UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

R.J. REYNOLDS TOBACCO CO. *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE *et al.*,

Defendants.

Civil Action No. 1:14-cv-01388 (KBJ)

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants the United States Department of Agriculture, the Farm Service Agency, the Commodity Credit Corporation, Tom Vilsack, in his official capacity as the Secretary of the United States Department of Agriculture, and Val Dolcini,[1] in his official capacity as the Administrator of the Farm Service Agency and Executive Vice President for the Commodity Credit Corporation, move to dismiss plaintiffs' complaint, ECF No. 1, for failure to state a claim upon which relief can be granted. Points and authorities in support of defendants' motion are presented in the attached Memorandum in Support.

December 2, 2014

Respectfully Submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General,
U.S. Department of Justice, Civil Division

JOHN R. GRIFFITHS
Director, Federal Programs Branch

[1] In this official-capacity action, Val Dolcini, as the successor in office to Juan M. Garcia as the Administrator of the Farm Service Agency and Executive Vice President for the Commodity Credit Corporation, is automatically substituted as a defendant. *See* Fed. R. Civ. P. 25(d).

/s/ *Peter J. Phipps*
PETER J. PHIPPS (DC Bar #502904)
Senior Trial Counsel
U.S. Department of Justice, Civil Division
Federal Programs Branch
Tel: (202) 616-8482
Fax: (202) 616-8470
Email: peter.phipps@usdoj.gov

Mailing Address:
P.O. Box 883 Ben Franklin Station
Washington, DC 20044

Courier Address:
20 Massachusetts Ave., NW
Washington, DC 20001

Attorneys for Defendants

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Acting Assistant Attorney General
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JOHN R. GRIFFITHS
Director, Federal Programs Branch

PETER J. PHIPPS
Senior Trial Counsel
Federal Programs Branch
20 Massachusetts Ave., NW
Washington, DC 20001
Tel: (202) 616-8482
Fax: (202) 616-8470
Email: peter.phipps@usdoj.gov

Attorneys for Defendants

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INTRODUCTION

At 52 pages and 209 paragraphs, plaintiffs' complaint is certainly not a short and plain statement of a claim. *Compare* Compl., ECF No. 1 (Aug. 14, 2014), *with* Fed. R. Civ. P. 8(a). Despite the length of their pleading, plaintiffs' grievance may be condensed into a single-sentence contention: the United States Department of Agriculture ("USDA"), in calculating plaintiffs' assessments under the Fair and Equitable Tobacco Reform Act ("FETRA"), should have given weight to plaintiffs' commissioned study of illicitly traded tobacco products. According to plaintiffs, their retained consultant identified quantities of illicitly traded cigarettes that would have led to the reduction of plaintiffs' FETRA assessments. At the administrative hearing, USDA did not give plaintiffs' figures weight and instead relied upon only the data contained in official U.S. government documents, either excise tax returns or customs forms. Displeased with USDA's response, plaintiffs have sued under two statutory causes of action – the assessment dispute provisions of FETRA, 7 U.S.C. § 518d(j), and the prohibition of arbitrary, capricious, or unlawful agency action in the Administrative Procedures Act (the "APA"), *see* 5 U.S.C. § 706(2)(A). Plaintiffs fail to state a claim for relief under either legal theory, and their complaint should be dismissed.

The central issue in this litigation is a pure question of law: is USDA, an agency without any investigatory or law enforcement authority with respect to illicitly traded tobacco products, required to give weight to plaintiffs' uncorroborated study regarding the amount of illicitly traded tobacco products? The answer to that question is no. Problems related to smuggled tobacco products have long vexed numerous law enforcement agencies at the federal, state, and local levels, and in enacting FETRA, there is no indication whatsoever that Congress intended to empower USDA to solve those problems. Rather, through FETRA, USDA was to implement the Tobacco Transition Payment Program by replacing price supports and quotas for tobacco

producers with funding received from a ten-year temporary transitional program that imposed an annual average of $1 billion in assessments on manufacturers and importers of tobacco products. In calculating the assessments on manufacturers and importers under FETRA, USDA relies on data contained in official governmental records, specifically forms and returns submitted to the Department of Treasury and the Department of Homeland Security. *See* 7 C.F.R. § 1463.7(b). Put simply, unaided by any congressionally delegated investigatory or enforcement powers, USDA does not independently evaluate or verify illicitly traded tobacco products in the process of calculating FETRA assessments. In adjudicating plaintiffs' claims, therefore, USDA acted reasonably and prudently because it lacks law enforcement and investigatory authority regarding illicitly traded cigarettes and it acted in conformity with its regulation (which plaintiffs have not challenged).

Finally, plaintiffs' claim under the APA in Count Two must be dismissed as a matter of law because the APA does not apply where another statute provides an adequate remedy. As demonstrated by plaintiffs' own claim under FETRA, that statute provides a remedy for over-assessments, and in light of the adequacy of that remedy, the APA does not provide a cause of action here.

STATUTORY AND REGULATORY BACKGROUND

For a period of time dating back to the 1930s, USDA administered subsidy programs for tobacco growers through tobacco marketing quotas and tobacco price supports. *See generally* 7 U.S.C. § 1311 *et seq*. (repealed 2004); *id.* §§ 1445, 1445-1, 1445-2 (repealed 2004). In 2004, however, with the enactment of FETRA, Congress abolished the quota and price support programs and replaced them with the Tobacco Transition Payment Program (the "TTPP"). *See* Pub. L. No. 108-357 §§ 601-43, 118 Stat. 1418, 1522-36 (Oct. 22, 2004) (codified in part as amended at 7 U.S.C. §§ 518-19a). Under the TTPP, tobacco growers subject to the repealed subsidy

programs were eligible for TTPP payments for a period of ten years (from fiscal year 2005 through fiscal year 2014, *i.e.*, September 30, 2014). *See* 7 U.S.C. § 518d(b)(1)-(2); *id.* § 518d(k).

In addition to phasing out subsidies for tobacco growers, FETRA also reallocated financial responsibility so that the public fisc no longer subsidized tobacco growers. Instead, manufacturers and importers of tobacco products became responsible for paying assessments to cover the TTPP payments. *See* 7 U.S.C. § 518d(b)(1)-(2). Under the regulatory system established in accordance with FETRA, USDA, through the Commodity Credit Corporation (the "CCC"), collects assessments from manufacturers and importers of tobacco products on a quarterly basis, in the amount of approximately $1 billion a year, and deposits those assessments into the Tobacco Trust Fund. *See id.* § 518d(b)(1), (3); *see also id.* § 518f (limiting the Tobacco Trust Fund's expenditures to $10.14 billion over the ten-year period); 7 C.F.R. § 1463.8. The CCC then distributes those funds to eligible tobacco quota holders and growers. *See* 7 U.S.C. § 518a (providing for payments for tobacco quota holders), *id.* § 518b (providing for payments for producers of quota tobacco).

The determination of the amount of each manufacturer or importer's FETRA assessment involves several calculations. *See generally Determination of the Administrator of the Farm Service Agency and Executive Vice President of the Commodity Credit Corporation Regarding the Current "Step A" and "Step B" Assessment Methods in the Tobacco Transition Payment Program*, Nov. 16, 2011 (hereafter "the Final Administrative Determination").[2] USDA first determines the amount of the national assessment needed to make payments to tobacco growers, and then USDA uses a two-step process to allocate liability for that national assessment among the tobacco manufacturers and importers. *See* 7 U.S.C. § 518d(b)(2); 7 C.F.R. § 1463.4; *see*

[2] Available at http://www.fsa.usda.gov/Internet/FSA_File/tobacco_determ_11162011.pdf.

generally Prime Time Int'l Co. v. USDA, 753 F.3d 1339, 1340 (D.C. Cir. 2014); *Philip Morris USA, Inc. v. Vilsack*, 736 F.3d 284, 285-86 (4th Cir. 2013). In Step A, liability for the national assessment is allocated among the six classes of tobacco products: cigarettes, cigars, snuff, roll-your-own tobacco, chewing tobacco, and pipe tobacco. *See* 7 U.S.C. § 518d(c)(1); 7 C.F.R. §§ 1463.3, 1463.5; *see also Prime Time*, 753 F.3d at 1340; *Philip Morris*, 736 F.3d at 286. FETRA specifies that the cigarette class be initially responsible for 96.331% of the national assessment with adjustments subsequently to be made by USDA. *See* 7 U.S.C. § 518d(c)(1)-(2); 7 C.F.R. 1463.5(c) (specifying that the national assessment be adjusted annually); *see also Philip Morris*, 736 F.3d at 286. After the liability for each class has been determined, USDA engages in the Step B process to allocate the class liability on a pro rata basis among the manufacturers and importers within that class. *See* 7 U.S.C. § 518d(e)(1). That assignment is done by multiplying the manufacturer or importer's "market share" for a class by the total assessment for the class of tobacco products. *See id.* § 518d(f). The term "market share," is derived from the manufacturer or importer's overall gross domestic volume, and it is calculated by each manufacturer or importer's share of the "volume of domestic sales" for the class of tobacco products. *See id.* § 518d(a)(3) (defining "market share").

FETRA provides that the "volume of domestic sales" be calculated "based on information provided by the manufacturers and importers pursuant to subsection (h), as well as any other relevant information provided to or obtained by the Secretary." 7 U.S.C. § 518d(g)(1). The information referenced in subsection (h) consists of returns and forms "that are required to be filed with a Federal agency," *see* 7 U.S.C. § 518d(h)(1), that relate to "the removal of tobacco products into domestic commerce" and the payment of taxes under cha[p]ter 52 of Title 26," which relates to tobacco excise taxes, *see id.* § 518d(h)(2). By regulation, USDA has specifically limited the

data sources for measuring volume of domestic sales to only reports filed with the Department of Treasury and the Department of Homeland Security:

> For purposes of determining the volume of domestic sales of each class of tobacco products and for each entity, such sales shall be based upon the reports filed by domestic manufacturers and importers of tobacco with the Department of Treasury and the Department of Homeland Security and shall correspond to the quantity of the tobacco product that is removed by each such entity:
>
> (1) For cigarettes and cigars, on the number of cigarettes and cigars *reported on such reports* . . . .

7 C.F.R. § 1463.7(b) (emphasis added).

If a manufacturer or importer disputes the amount of its assessment, FETRA and the implementing regulations provide an administrative mechanism to challenge an assessment. Within 30 days of receiving notice of the assessment, a manufacturer or importer may submit a written statement to the CCC that sets forth the basis for the challenge. *See* 7 U.S.C. § 518d(i)(1); 7 C.F.R. § 1463.11(a). FETRA specifies that "[i]n challenging the assessment, the manufacturer or importer may use any information that is available, including third party data on industry or individual company sales volumes." 7 U.S.C. § 518d(i)(1). Following the written submission, an informal hearing takes place wherein a hearing officer will develop an administrative record through oral and written evidence sufficient to render a final determination on the disputed matter. *See* 7 C.F.R. § 1463.11(b). After the hearing, the CCC will then issue a final administrative decision. *See id.* § 1463.11(c). If the manufacturer or importer wishes to challenge the CCC's administrative decision, it may seek review of the determination in federal district court to restrain the collection of the excessive portion of the assessment. *See* 7 U.S.C. § 518d(j)(1), (3); 7 C.F.R. § 1463.11(d). The administrative and judicial review procedures do not relieve manufacturers or importers from paying FETRA assessments, but they may place the disputed portion of the assessment in an interest-bearing escrow account. *See* 7 U.S.C. § 518d(i)(5); 7 C.F.R. § 1463.9(e).

FACTUAL BACKGROUND

Plaintiffs R.J. Reynolds Tobacco Company and Santa Fe Natural Tobacco Company, Inc. are cigarette manufacturers that pay FETRA assessments. *See* Compl. ¶¶ 22-23. According to the allegations in the complaint, plaintiffs retained GlobalSource LLC, a business investigations firm, to investigate the illicit cigarette trade. *See id.* ¶ 76, *see also id.* ¶¶ 129-39, 141-53, 155-66, 168-73. Based on GlobalSource's findings, plaintiffs initiated an administrative appeal with USDA to challenge the amount of two of their quarterly assessments (for September 2013 and December 2013), claiming that USDA wrongfully excluded illicitly traded cigarettes from its calculation of plaintiffs' FETRA assessments. *See id.* ¶¶ 7-9, 82-86, 101-05. At that hearing, plaintiffs provided GlobalSource's figures to argue that USDA was not accounting for a significant amount of illicitly traded cigarettes when calculating plaintiffs' FETRA assessments. *See id.* ¶¶ 8-10, 129-39. According to plaintiffs, they were overcharged by at least $119,004 (for RJRT) and $6,543 (for Santa Fe) during the September 2013 quarter, and by at least $257,148 (for RJRT) and $15,836 (for Santa Fe) during the December 2013 quarter. *See id.* ¶¶ 12, 99, 118. In submitting their FETRA assessments, plaintiffs requested that those disputed amounts be placed in escrow. *See id.* ¶¶ 85, 104.

USDA denied plaintiffs' appeals on the grounds that the information that plaintiffs provided regarding illicitly traded cigarettes was not substantiated by official government documents. *See* Compl. ¶¶ 14, 182, 187. As USDA explained:

> CCC relies upon the tax information and forms described in subsection 518d(h)(2) to measure the volume of a manufacturer's or importer's domestic sales when determining quarterly assessments. The information and evidence presented by [plaintiffs] must be substantiated by the U.S. Department of Treasury, the U.S. Department of Homeland Security, or the U.S. Department of Justice (Bureau of Alcohol, Tobacco, and Firearms) as appropriate, before the Secretary can rely upon it when determining individual assessments pursuant to Section 625 of FETRA. Such substantiation is also key to ensuring that CCC complies with the requirement of FETRA subsection 625(e)(2) (7 U.S.C. 518d(e)(2)), that no manufacturer or

> importer pays an assessment based on an amount that is in excess of its share of domestic volume.

Adjudicatory Decision at 5 (Mar. 26, 2014) (copy attached at Ex. 1); *see also* Compl. ¶¶ 179, 185. USDA also explained that plaintiffs' evidence and testimony were "largely based on estimates, approximations, and assumptions," and for that reason USDA could not "reliably, much less accurately, determine amounts and timing of the tobacco placed into commerce so as to correctly adjust [plaintiffs'] TTPP assessment levels." Adjudicatory Decision at 5; *see also* Compl. ¶ 183. USDA then referred plaintiffs' allegations of illicitly traded cigarettes to the Department of Treasury and the Department of Justice. *See* Adjudicatory Decision at 5. In addition, USDA informed plaintiffs that "[a]ny determinations of quantifiable removals and timing of removals by an enforcement agency have been consistently considered during the annual 'true-up' reconciliation process and result in a recalculation and reconciliation of TTPP assessments for all tobacco companies within that class of tobacco (retroactively if necessary)." Adjudicatory Decision at 5; *see also* Compl. ¶ 187.

Following USDA's determination, plaintiffs commenced this action.

ARGUMENT

This motion under Rule 12(b)(6) seeks dismissal of plaintiffs' complaint for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint's factual allegations, and "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 129 (D.C. Cir. 2012). In evaluating the sufficiency of the factual allegations in a complaint, a Court may consider only limited categories of information: the facts alleged in the complaint; any documents either attached to or incorporated in the complaint; matters of judicial notice; and

public records, such as adjudicatory decisions by federal agencies. *See E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997); *Schmidt v. Shah*, 696 F. Supp. 2d 44, 49 n.3 (D.D.C. 2010); *Williams v. Chu*, 641 F. Supp. 2d 31, 34 (D.D.C. 2009).

Under those standards, plaintiffs' complaint fails in several respects. Most fundamentally, this case presents a direct legal question: in calculating FETRA assessments, is USDA obligated to credit plaintiffs' own estimates and approximations of illicitly traded cigarettes? That question has a straightforward answer because it is reasonable and lawful for USDA – an agency without law enforcement or investigatory capabilities regarding tobacco products – to refuse to give weight to reports of illicitly traded cigarettes that are not corroborated by a federal agency with either law enforcement or investigatory powers. Moreover, USDA has already determined through a regulation that FETRA assessments will be determined based on the data reported on federal excise tax returns and customs forms. *See* 7 C.F.R. § 1463.7(b). Finally, plaintiffs cannot proceed with a claim under the APA when FETRA provides an adequate remedy for challenging alleged over-assessments. For these reasons, as elaborated below, plaintiffs' claims should be dismissed under Rule 12(b)(6).

I. USDA'S EXCLUSION OF PLAINTIFFS' FIGURES IS JUSTIFIED.

Plaintiffs' claims should be dismissed because USDA's determination is rational in light of USDA's lack of investigatory and law enforcement powers regarding illicitly traded tobacco products. The problem of smuggled tobacco products remains unsolved despite the efforts of numerous law enforcement agencies. For reference, the United States General Accountability Office (the "GAO"), conducted a study in 2004 – the same year as FETRA's enactment – which determined that "[b]ecause of its clandestine nature, the extent of cigarette smuggling into the United States is impossible to measure with any certainty." Report to the Chairman and Ranking Minority Member, Committee on Government Reform, House of Representatives, Cigarette

Smuggling, Federal Law Enforcement Efforts and Seizures Increasing, GAO-04-641 at 2 (May 2004).[3] GAO further found that law enforcement agencies "do not have estimates of the quantity of cigarettes smuggled into the country," nor was GAO "able to find studies conducted by other organizations regarding the extent of the cigarette smuggling problem." *Id.* at 6. More recently, in a report to Congress on smuggled tobacco products, the Department of Treasury, which oversees excise taxes on tobacco products, explained that "[a]ccurately measuring the amount of federal tax receipts lost as a result of tobacco diversion and smuggling is difficult because these activities are, by definition, clandestine in nature." Department of the Treasury Report to Congress on Federal Tobacco Receipts Lost Due To Illicit Trade and Recommendations for Increased Enforcement at 1 (Feb. 4, 2010).[4] For that reason, the Treasury Department concluded that "any estimate of the extent of the illicit tobacco trade will have a wide window of uncertainty around it." *Id.* at 1. Against that backdrop, two shortcomings of plaintiffs' argument become readily apparent.

First, although plaintiffs claim to have solved the accounting problem for illicitly traded cigarettes by retaining the GlobalSource consulting firm, USDA rationally concluded that the firm's figures were imprecise and could not be relied upon. *See* Adjudicatory Decision at 5. For perspective, GAO's report and the Treasury letter leave little doubt that something more than a study performed by a consulting firm is needed for an accurate accounting of the quantities of illicitly traded cigarettes. Indeed, in 2004 GAO learned from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that "cigarette investigations take 12 to 24 months, and the investigations are extensive and complex . . . ." *Id.* at 20. But even if plaintiffs' one study does

[3] Available at http://www.gao.gov/new.items/d04641.pdf.

[4] Available at http://www.ttb.gov/pdf/tobacco-receipts.pdf.

shed a little light on the amounts of illicitly traded cigarettes, USDA concluded that its findings were based on assumptions, estimates, and approximations. *See* Adjudicatory Decision at 5. And consistent with USDA's determination, the complaint does not profess that GlobalSource's figures are exact. Accordingly, it was not unreasonable or unlawful for USDA to conclude that plaintiffs' figures were not sufficiently reliable or precise enough for calculating FETRA assessments, and for USDA to rely on official governmental documents instead.

Second, plaintiffs' complaint implicitly imputes responsibility to USDA that Congress never intended. Specifically, to remedy plaintiffs' grievance would require USDA to verify accounting data for illicitly traded cigarettes. But as GAO concluded, even the federal law enforcement agencies responsible for identifying and pursuing illegal traffickers have found it difficult to account for smuggled tobacco products. As a result, "there are no reliable estimates of the overall amount of revenue that the federal and state governments are losing because of cigarettes being smuggled into the United States." GAO-04-641 at 7-8; *see also id.* at 6. USDA is not a law enforcement agency, and FETRA provides USDA with no specific law enforcement or investigatory powers, much less with the ability to issue subpoenas or compel testimony in connection with its FETRA calculation process. Without any law enforcement or investigatory powers, USDA cannot meaningfully and reliably account for illicitly traded cigarettes, much less verify the accuracy of plaintiffs' approximations and estimations. In light of the scope of its delegated powers under FETRA, therefore, it is lawful and reasonable for USDA to calculate FETRA assessments based solely on data reported on official governmental documents.

In sum, FETRA charges USDA with administering a subsidy program, not with solving the accounting problems related to illicitly traded tobacco products. USDA properly recognized the limits of its authority and its capabilities, and the Court should uphold its determination.

II. USDA'S DECISION TO AFFORD NO WEIGHT TO PLAINTIFFS' REPORT IS LAWFUL AGENCY ACTION CONSISTENT WITH USDA'S UNCHALLENGED REGULATIONS.

USDA's adjudicatory decision is also in conformity with its regulations. The crux of plaintiffs' complaint is that USDA should have given weight to GlobalSource's estimates of illicitly traded cigarettes. In not crediting GlobalSource's findings, USDA acted in accordance with its regulations, which specify that in calculating FETRA assessments, USDA is to rely upon data reported on customs forms and excise tax forms. *See* 7 C.F.R. § 1463.7(b) (providing that the calculation of volume of domestic sales "shall be based upon the reports filed by domestic manufacturers and importers of tobacco with the Department of Treasury and the Department of Homeland Security"); *see also Single Stick, Inc. v. Johanns*, 601 F. Supp. 2d 307, 314-15 (D.D.C. 2009) (upholding the regulation excluding smuggled tobacco products from the FETRA assessment calculation), *reversed and remanded on other grounds sub nom. Prime Time Intl., Inc. v. Vilsack*, 599 F.3d 678 (D.C. Cir. 2010). Accordingly, USDA's actions were consistent with "a fundamental principle of administrative law that an agency is bound to adhere to its own regulations." *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008); *see generally United States v. Nixon*, 418 U.S. 683, 696 (1974) ("So long as [the special prosecutor] regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it."); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (noting that it is axiomatic that an agency must follow its own regulations); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) ("An agency is required to follow its own regulations."); *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . ."); *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 526 n.20 (D.C. Cir.

1978) ("Although it is within the power of the agency to amend or repeal its own regulations, the agency is not free to ignore or violate its regulations while they remain in effect.").

Notably, plaintiffs do not challenge USDA's regulation – only the result it brings. Yet adherence to an unchallenged regulation is neither illegal nor arbitrary nor capricious; rather it would have been problematic had USDA deviated from its regulation on the basis of the imprecise and unreliable figures presented by plaintiffs. *See Nat'l Envtl. Dev. Ass'n*, 752 F.3d at 1009 (explaining that an agency action may be set aside as arbitrary and capricious if the agency does not comply with its own regulations); *see also Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988) (explaining that "strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases").

III. THE SPECIFIC REMEDY PROVIDED BY FETRA PRECLUDES PLAINTIFFS' APA CLAIM.

In addition to suing under FETRA's cause of action to correct alleged over-assessments, plaintiffs also pursue a count under the APA. *See* Compl. ¶¶ 200-09. That count should be dismissed as a matter of law because the APA permits judicial review only when federal law provides for no other adequate relief.

The APA limits the scope of its claims to "[a]gency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* . . . ." 5 U.S.C. § 704 (emphasis added); *see also Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 531 n. 6 (D.C. Cir. 2006) ("The general rule is that injunctive relief will not issue when an adequate remedy at law exists."). As explained by the Supreme Court, "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *see also Cohen v. United States*, 650 F.3d 717, 738 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("A party cannot bring a freestanding APA suit when

Congress has specified a different judicial review procedure relevant to the subject matter, so long as that congressionally specified review procedure is adequate.").

In this instance, FETRA provides an adequate remedy to plaintiffs by enabling a reviewing court to "restrain collection of the excessive portion of any assessment or order a refund of excessive assessments already paid, along with interest . . . ." 7 U.S.C. § 518d(j)(3). Due to the availability of that remedy, plaintiffs cannot proceed under the APA to remedy an alleged FETRA over-assessment. Accordingly, plaintiffs' APA claim should be dismissed in favor of the adequacy of the cause of action provided by FETRA. *See, e.g., Garcia v. Vilsack*, 563 F.3d 519, 522-26 (D.C. Cir. 2009) (holding that no APA claim was available for a failure to investigate claim in light of the remedies available under the Equal Credit Opportunity Act); *Wescott v. McHugh*, -- F.Supp.2d --, 2014 WL 1491209, at *9 (D.D.C. Apr. 16, 2014) (holding that a plaintiff cannot bring an APA claim for violations of the Privacy Act due to the adequacy of the remedy provided by the Privacy Act); *Ray v. Fed. Bureau of Prisons*, 811 F. Supp. 2d 245, 250 (D.D.C. 2011) (holding that no APA claim for delayed production claims under the Freedom of Information Act due to the remedy provided by FOIA); *Kingman Park Civic Ass'n v. EPA*, 84 F. Supp. 2d 1, 9 (D.D.C. 1999) (holding that no APA claim existed for violations of the Clean Water Act due to the adequacy of remedies provided by the Clean Water Act).

CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed for failure to state a claim under Rule 12(b)(6).

December 2, 2014

Respectfully Submitted,

JOYCE R. BRANDA
Acting Assistant Attorney General
U.S. Department of Justice, Civil Division

JOHN R. GRIFFITHS
Director, Federal Programs Branch

/s/ *Peter J. Phipps*
PETER J. PHIPPS (DC Bar #502904)
Senior Trial Counsel
U.S. Department of Justice, Civil Division
Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Washington, DC 20044
Tel: (202) 616-8482
Fax: (202) 616-8470
Email: peter.phipps@usdoj.gov

Attorneys for Defendants