IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*, *Plaintiffs*, *v.* KATHLEEN SEBELIUS, *et al.*, *Defendants.*	Civ. No. 13-623 (PLF) **NOTICE OF SUPPLEMENTAL AUTHORITY**

PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY
IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

On November 27, 2013, after the completion of briefing on the parties' cross-motions for summary judgment, the U.S. Court of Appeals for the Sixth Circuit issued a decision bearing on the applicability of *Chevron* deference to the IRS regulation at issue in this case. *See Carter v. Welles-Bowen Realty, Inc.*, No. 10-3922, 2013 WL 6183851 (6th Cir. Nov. 27, 2013) (attached).

Plaintiffs have explained that *Chevron* deference is inapplicable here for several reasons, including because, even if there were any ambiguity in 26 U.S.C. § 36B about the availability of tax-credit subsidies on federal Exchanges, the canon governing construction of tax credits would resolve that ambiguity in favor of protecting the federal Treasury. (*See* Dkt. No. 57, at 30-33.)

In *Carter*, Judge Sutton not only delivered the unanimous panel opinion, but also added a concurrence discussing at length why such canons trump *Chevron* deference. "Deference comes into play only if a statutory ambiguity lingers after deployment of all pertinent interpretive principles." 2013 WL 6183851, at *8 (slip op. 13). Accordingly, "[i]f an interpretive principle resolves a statutory doubt in one direction, an agency may not reasonably resolve it in the

opposite direction." *Id.* The *Carter* case implicated the rule of lenity, but Judge Sutton observed that "[a]ll manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views." *Id.* (slip op. 14). As examples, he cited presumptions against preemption, retroactivity, and implied causes of action; the canon directing that deportation laws be construed in favor of immigrants; the clear-statement rule in favor of preserving traditional state powers; and the principle of constitutional avoidance. *Id.* (citing *Wyeth v. Levine*, 555 U.S. 555 (2009); *INS v. St. Cyr*, 533 U.S. 289 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)).

The venerable canon in favor of construing tax credits to protect the federal Treasury is no different than any of the examples catalogued by Judge Sutton. That canon "resolves a[ny] statutory doubt in one direction," and so the IRS "may not reasonably resolve it in the opposite direction." 2013 WL 6183851, at *8 (slip op. 13). Judge Sutton's opinion also exposes the irrelevance of the Government's retort that the tax-credit canon is not a "clear statement rule." (Dkt. No. 62, at 24.) As the opinion correctly notes, "[a]ll manner of presumptions, substantive canons and clear-statement rules" trump deference. *Id.* (slip op. 14).

December 6, 2013

Respectfully submitted,

/s/ Michael A. Carvin
Michael A. Carvin (D.C. Bar No. 366784)
Jacob M. Roth (D.C. Bar No. 995090)
Jonathan Berry (D.C. Bar No. 1016352)
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
Phone: (202) 879-3939

Attorneys for Plaintiffs