

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074
MINORITY (202) 225-5051

<http://oversight.house.gov>

February 20, 2018

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Dear Mr. Kautter:

On March 31, 2015, the Committee sent a bipartisan request to the Government Accountability Office (GAO) to study the Internal Revenue Service (IRS) rulemaking process.¹ The Committee highlighted IRS's unusual approach to regulatory processes, namely self-exempting IRS regulations from the Administrative Procedure Act (APA) notice and comment process and the avoidance of oversight by the Office of Management and Budget (OMB). The GAO issued a report responsive to the request in September 2016, which shed some light on regulatory practices at IRS, but also raised more questions.²

GAO found the IRS has escaped substantive review of the vast majority of regulations and other regulatory guidance for 35 years under a long forgotten agreement between the Department of the Treasury and OMB. The 1983 memorandum of agreement³ established an exemption from regulatory review as required under Executive Order 12,866 by exempting all non-major legislative regulations, which has in practice operated to shield the vast majority of IRS rules and guidance from the critical eye of the Office of Information and Regulatory Affairs

¹ Letter from Representatives Chaffetz, Meadows, Connolly, Jordan, and Cartwright, and Senators Hatch, Johnson, Lankford, and Heitkamp to the Honorable Gene L. Dodaro, Comptroller General of the United States (Mar. 31, 2015) (on file with the Committee).

² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONGSTANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE (2016).

³ OMB, Internal Memorandum, *Memorandum of Agreement, Treasury and OMB Implementation of Executive Order 12291* (Apr. 29, 1983).

(OIRA).⁴ The agreement was last reviewed more than 20 years ago. GAO reported, “The original intent behind the agreement, and whether that intent remains valid, are not known.”⁵

Despite the intended and intuitive effects of IRS regulations, GAO found IRS rarely categorized regulations as significant, and even less frequently identified regulations as economically significant. In the course of their review for their 2016 report, GAO found only one of more than 200 tax regulations issued between 2013 and 2015 was determined by the IRS to be significant.⁶ During this same period, GAO identified 15 instances of rules being issued jointly by IRS and other agencies where those other agencies classified the rules as significant while IRS clung to the position the rules were neither significant nor economically significant.⁷

Similarly, IRS policies and procedures state APA notice and comment procedures do not apply because the regulations are interpretive, meaning they do not have the force and effect of law.⁸ IRS has asserted its regulations are interpretive because the authority to issue the regulation comes directly from the underlying Tax Code, thus, “any effect of the regulation flows directly from the code.”⁹ The same position was used to explain away obligations to analyze economic impacts, conduct regulatory flexibility analyses, and comply with the Congressional Review Act.¹⁰

As GAO’s report demonstrates, IRS’s interpretation of the effect of a regulation flowing directly from the law authorizing the agency to issue such regulation, rather than the decisions the agency makes in developing the regulation, effectively exempts IRS from every law and administrative policy requiring regulatory accountability and transparency. GAO recommended Treasury and OMB reexamine the 1983 memorandum and the other processes allowing IRS regulations to escape scrutiny.

In April 2017, the President issued Executive Order 13,789 “Identifying and Reducing Tax Regulatory Burdens,” which requires Treasury and OMB to revisit the 1983 memorandum of agreement and reconsider the significance determination of previously issued regulations.¹¹ A recent report shows increased involvement from OMB has helped Treasury identify at least eight

⁴ A legislative rule is, “An agency action that purports to impose legally binding obligations or prohibitions on regulated parties – and that would be the basis for an enforcement action for violations of those obligations or requirements. . . .” *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). A significant rule is one which has an annual effect on the economy of \$100 million or has a material adverse effect on the economy, creates an inconsistency with or interferes with the regulations of another agency, materially alters the budgetary impact of certain programs, or raises novel legal or policy issues. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51738 (Oct. 4, 1993).

⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2, at 26.

⁶ *Id.* at 18.

⁷ *Id.* at 20.

⁸ *Id.* at 21; *See* *Perez v. Mortg. Bankers Ass’n*, 135 S.Ct. 1199, 1204 (2015) (“The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issue legislative rules. But that convenience comes at a price: Interpretative rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’”) (internal citation omitted).

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2, at 21.

¹⁰ *Id.* at 18-25.

¹¹ Exec. Order No. 13,789, 82 Fed. Reg. 19,317 (Apr. 26, 2017).

regulations that are both significant and appropriate for revocation or modification.¹² However, there is little evidence Treasury and OMB have begun to reconsider the 1983 memorandum.

The Committee is conducting oversight of the IRS's exemption from OMB regulatory review. To assist the Committee, please provide the following documents and information:

1. All documents and communications referring or relating to any legal analysis used to justify or explain IRS's exemption from any administrative law or categorization of any regulation or guidance documents since March 2015.
2. All documents and communications referring or relating to the 1983 memorandum from March 2015 to the present.

Provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on March 6, 2018. An attachment to this letter provides additional instructions for responding to the Committee's request. Please contact James Lesinski of the Majority staff at (202) 225-5074 or James.Lesinski@mail.house.gov with any questions about this request. Thank you for your attention to this matter.



Trey Gowdy

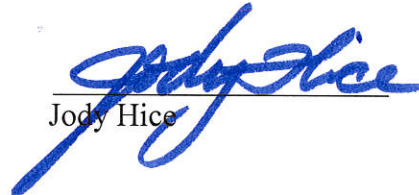
Sincerely,



Jim Jordan



Mark Meadows



Jody Hice



Rod Blum

Enclosure

cc: The Honorable Elijah E. Cummings

¹² Executive Order 13789-Second Report to the President on Identifying and Reducing Tax Regulatory Burdens, 82 Fed. Reg. 48013 (Oct. 16, 2017).

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term “document” means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term “communication” means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.