

**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>

April 5, 2018

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

Dear Mr. Kautter:

As the Internal Revenue Service and the Department of the Treasury escalate enforcement of the Patient Protection and Affordable Care Act's employer mandate, questions have arisen related to the IRS's capacity to evaluate compliance and assess penalties. To address those concerns, we are writing to request documents and information that will shed light on how the IRS is approaching enforcement of the employer mandate.

The Patient Protection and Affordable Care Act (ACA) instituted the Employer Shared Responsibility Provision (ESRP) to compel applicable large employers (ALEs) to provide health insurance to full-time equivalent (FTE) employees or else pay a penalty.<sup>1</sup> Originally set to take effect in January 2014, companies with 50 employees or more that do not offer "affordable" coverage that provides "minimum value" to FTEs and their dependents would be subject to a per-employee penalty.<sup>2</sup> The penalty is calculated based on coverage being unavailable, unaffordable, or insufficient, in addition to whether the employees receive subsidized coverage through an exchange.<sup>3</sup> ACA exchanges—whether state-based or through the federally-facilitated marketplace (FFM)—enable individuals and small businesses to shop for health insurance coverage.<sup>4</sup> The penalty was intended to coerce companies to continue offering coverage once the exchanges began operating in 2014, in addition to offsetting the cost to the federal government for providing insurance subsidies to employees gaining coverage through the ACA marketplace.

The threat of this penalty has caused smaller companies to revert to a part-time workforce. For example, a 49-employee company that does not provide coverage and elects to hire its 50th employee—the "killer" employee—is now potentially subject to a penalty of

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<sup>1</sup> 26 U.S.C. § 4980H.

<sup>2</sup> 26 U.S.C. § 4980H(a); *see also* § 4980H(b) (describing the two types of payments under the provision).

<sup>3</sup> *Id.*

<sup>4</sup> Pub. L. No. 111-148 (2010).

\$40,000 per year (\$2,000 per employee above the first 30 employees).<sup>5</sup> The company can avoid the penalty by converting its staff to part-time employees, thereby decreasing their overall wages. A study released shortly after the law's enactment estimated this mandate will cost the workforce \$6.4 billion and risk 3.2 million jobs.<sup>6</sup> In 2016, the Congressional Budget Office estimated businesses would owe nearly \$169 billion in penalties through 2024.<sup>7</sup>

The reporting requirements associated with the mandate are exorbitant. The mandate requires employers provide the IRS names and social security numbers of employees and their dependents who they offer coverage, what the insurance covers, and the cost to the employee for the lowest-cost plan offering.<sup>8</sup> Businesses must file two forms with the IRS which uses the information to identify employers that may be subject to the employer mandate and to calculate the penalty amount.<sup>9</sup> The employer mandate is nearly impossible to enforce without also enforcing the reporting requirements.

The complicated and cumbersome reporting system delayed implementation and enforcement by the legislated deadline. The employer mandate was scheduled to take effect January 1, 2014, but in July 2013, the Obama Administration delayed the deadline for compliance to January 1, 2015, and only for employers with 100 or more full-time equivalent employees.<sup>10</sup> Then in February 2014, the Administration applied another delay to January 1, 2016, giving employers with fewer than 100 employees another reprieve to comply with the mandate.<sup>11</sup>

On April 7, 2017, the Treasury Inspector General for Tax Administration (TIGTA) found “some of [IRS’s] processes did not function as intended, which resulted in the IRS not having accurate and complete data for use in its compliance strategy to identify noncompliant employers

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<sup>5</sup> *Assessing Alternatives to the ACA's Individual Mandate: Hearing Before the Subcomm. on Health of the H. Comm. on Ways and Means*, 114th Cong. 22-23 (2015) (statement of Douglas Holtz-Eakin, President, American Action Forum), <http://docs.house.gov/meetings/WM/WM02/20150414/103311/HHRG-114-WM02-Wstate-Holtz-EakinD-20150414.pdf>.

<sup>6</sup> Diana Furchtgott-Roth & Amlan Banerjee, *The Effects of the Patient Protection and Affordable Care Act on the Franchise Industry*, Hudson Institute (Sept. 2011), [http://www.edfoxphd.com/The\\_Effects\\_of\\_PPACA\\_on\\_Franchising\\_Final\\_copy.pdf](http://www.edfoxphd.com/The_Effects_of_PPACA_on_Franchising_Final_copy.pdf).

<sup>7</sup> CONGRESSIONAL BUDGET OFFICE, *OPTIONS FOR REDUCING THE DEFICIT 2017-2026, REPEAL ALL INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT* (Dec. 8, 2016), <https://www.cbo.gov/budget-options/2016/52231>.

<sup>8</sup> 26 U.S.C. § 6056.

<sup>9</sup> Internal Revenue Serv., Form 1094-C, <https://www.irs.gov/pub/irs-pdf/f1094c.pdf>, *see also* Internal Revenue Serv., Form 1095-C, <https://www.irs.gov/pub/irs-pdf/f1095c.pdf>.

<sup>10</sup> Internal Revenue Serv., Notice 2013-45, <https://www.irs.gov/pub/irs-drop/n-13-45.PDF>

<sup>11</sup> 79 Fed. Reg. 8,543 (2014) <https://www.federalregister.gov/documents/2014/02/12/2014-03082/shared-responsibility-for-employers-regarding-health-coverage>, *see also* U.S. Dep't of Treasury, Treasury Notes, Continuing to Implement the ACA in a Careful, Thoughtful Manner (July 2, 2013), <https://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>, <https://obamawhitehouse.archives.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law>.

potentially subject to the [ESRP].”<sup>12</sup> TIGTA discovered numerous problems with the processing of information, such as system and validation errors and a failure to implement key processes to identify non-compliant filers.<sup>13</sup> For example, TIGTA “found that the most basic processes were not functioning as intended, such as the ability to transfer scanned paper information returns.”<sup>14</sup> As a result, “some of the information returns data was not accurate and complete for use in its compliance strategy to identify noncompliant [ALEs] that are potentially subject to the [ESRP].”<sup>15</sup> It is unclear if the systems in place now are reliable and whether the IRS has the capability to enforce employer penalties.<sup>16</sup>

Shortly before your predecessor John Koskinen vacated his position as Commissioner, IRS sent letters to companies with at least 100 FTEs, claiming to certify these companies as potentially liable to employer mandate penalties in 2015, with some recipients receiving proposed assessments of more than \$10 million.<sup>17</sup> But it was only earlier that month, on November 2, 2017, that IRS updated its Employer Mandate Questions and Answers webpage to notify stakeholders the agency was finally instituting prospective ESRP penalties.<sup>18</sup> IRS added a new section titled, “Making an Employer Shared Responsibility Payment,” including guidance on how to respond to a notification letter.<sup>19</sup>

On March 8, 2017, the Committee held a hearing titled, *Examining IRS Customer Service Challenges*.<sup>20</sup> On October 25, 2017, the Committee held a hearing titled, *Ongoing Management Challenges at IRS*.<sup>21</sup> The Committee remains committed to conducting oversight of the IRS to ensure the agency maintains a balance between taxpayer service and tax enforcement and administers the tax code with fairness and integrity. In doing so, the Committee is conducting oversight of IRS’s implementation and enforcement of the employer mandate and the accelerated timeline for enforcement. To assist the Committee, provide the following documents and information:

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<sup>12</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., Reference No. 2017-43-027, AFFORDABLE CARE ACT: ASSESSMENT OF EFFORTS TO IMPLEMENT THE EMPLOYER SHARED RESPONSIBILITY PROVISION, (April 7, 2017), <https://www.treasury.gov/tigta/auditreports/2017reports/201743027fr.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Memorandum from Mary Beth Murphy, Comm’r, Small Business/Self Employed Div., U.S. Dep’t of Treasury, to Michael E. McKenney, Deputy Inspector Gen. for Audit, Treasury Inspector Gen. for Tax Admin. (May 10, 2017), <https://www.treasury.gov/tigta/auditreports/2017reports/201743027fr.pdf>.

<sup>17</sup> Stephen Miller, *IRS Starts to Send ACA Penalty Letters*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, Nov. 15, 2017; Stacy Cowley, *I.R.S. Starts to Enforce Health Law’s Rule That Employers Offer Insurance*, N.Y. TIMES, Nov. 16, 2017; The Editorial Board, *Koskinen’s Parting Gift From the IRS*, WALL STREET JOURNAL, Nov. 7, 2017

<sup>18</sup> *Internal revenue Service, Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act: Making an Employer Shared Responsibility Payment*, <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Making> (last visited Mar. 28, 2018).

<sup>19</sup> *Id.*

<sup>20</sup> *Examining IRS Customer Service Challenges: Hearing before the H. Committee on Oversight Gov’t Reform*, 115<sup>th</sup> Cong. (Mar. 8, 2017).

<sup>21</sup> *Ongoing Management Challenges at the IRS: Hearing before the H. Committee on Oversight Gov’t Reform*, 115<sup>th</sup> Cong. (Oct. 25, 2017).

1. Documents sufficient to show the total number of companies that meet the definition for an ALE for each tax year since 2015, including but not limited to a distinction between those that did not offer coverage and those that offered coverage that did not provide “affordable” and “minimum value” coverage for each benefit year since 2015 and the number of employees for each ALE;<sup>22</sup>
2. An aggregate of all 226J letters IRS sent to ALEs for the 2015 tax year;
3. An aggregate of responses or appeals from the recipient ALEs;
4. All documents referring or relating to implementation of the employer mandate produced or circulated at the Department of the Treasury since December 2013, including but not limited to documents referring or relating to:
  - a. Decisions to forego the collection of penalties;
  - b. Analyses calculating the likelihood of compliance and incurred costs by the federal government should companies shift employees onto the exchanges;
  - c. Processes for determining an ALE’s compliance with the employer mandate; and
  - d. Procedures for submitting the payment, which must be available prior to issuing letters to ALEs for the 2015 tax year;
5. Documents sufficient to identify the names, titles, and dates of employment of IRS employees charged with implementing or enforcing the employer mandate, including but not limited to Small Business/Self-Employed Division employees;<sup>23</sup> and
6. All calendar entries for meetings or calls of employees identified in the previous request referring or relating to implementation of penalties for the employer mandate, including but not limited to expected and actual attendees and shared documents in preparation for and as follow-up to those meetings or calls.

Provide the requested documents and information as soon as possible, but no later than 5:00 p.m. on April 19, 2018. In addition, please contact the Committee no later than April 10, 2018, to arrange a briefing as soon as possible, but by April 13, 2018. An attachment to this letter provides additional instructions for responding to the Committee’s request.

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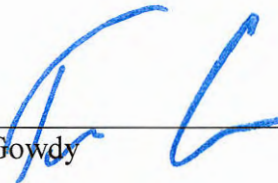
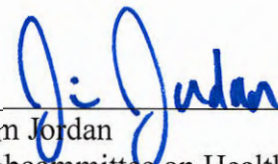
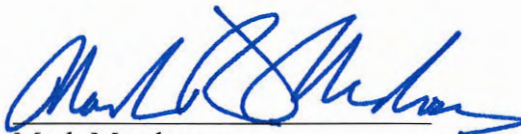
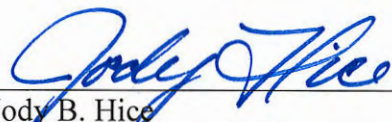
<sup>22</sup> In lieu of the documents identified in this item of the schedule, the Committee will accept a list that includes the elements requested.

<sup>23</sup> In lieu of the documents identified in this item of the schedule, the Committee will accept a list that includes the elements requested.

The Honorable David J. Kautter  
April 5, 2018  
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Please contact Michael Koren of the Majority staff at (202) 225-5074 or Michael.Koren@mail.house.gov with any questions about this request. Thank you for your attention to this matter.

Sincerely,

  
\_\_\_\_\_  
Trey Gowdy  
\_\_\_\_\_  
Jim Jordan  
Subcommittee on Healthcare, Benefits,  
and Administrative Rules  
\_\_\_\_\_  
Mark Meadows  
Subcommittee on Government Operations  
\_\_\_\_\_  
Jody B. Hice  
Subcommittee on Government Operations  
\_\_\_\_\_  
Rod Blum

Enclosure

cc: The Honorable Elijah E. Cummings

## 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.

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
U.S. HOUSE OF REPRESENTATIVES  
115<sup>TH</sup> CONGRESS**

**NOTICE OF APPEARANCE OF COUNSEL**

**Counsel submitting:** \_\_\_\_\_

**Bar number:** \_\_\_\_\_ **State/District of admission:** \_\_\_\_\_

**Attorney for:** \_\_\_\_\_

**Address:** \_\_\_\_\_

**Telephone:** ( \_\_\_\_\_ ) \_\_\_\_\_ - \_\_\_\_\_

**Pursuant to Rule 16 of the Committee Rules, notice is hereby given of the entry of the undersigned as counsel for \_\_\_\_\_ in (select one):**

**All matters before the Committee**

**The following matters (describe the scope of representation):**

\_\_\_\_\_  
\_\_\_\_\_

**All further notice and copies of papers and other material relevant to this action should be directed to and served upon:**

**Attorney's name:** \_\_\_\_\_

**Attorney's email address:** \_\_\_\_\_

**Firm name (where applicable):** \_\_\_\_\_

**Complete Mailing Address:** \_\_\_\_\_  
\_\_\_\_\_

**I agree to notify the Committee within 1 business day of any change in representation.**

\_\_\_\_\_  
**Signature of Attorney**

\_\_\_\_\_  
**Date**