

# 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 20, 2018

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

Dear Mr. Kautter:

On February 20, 2018, the Committee wrote to you about unusual regulatory process practices related to regulations issued by the Internal Revenue Service (IRS). The Committee inquired into the basis for deviating from the common legal interpretations and regulatory process requirements and requested documents reflecting the legal analysis used to justify or explain such practices.<sup>1</sup> The Committee understands Department staff is assembling responsive information and we look forward to receiving those documents. However, recent events show the Department of the Treasury and the IRS may have abandoned the practice of interpreting rules out of standard regulatory process requirements.

On April 11, 2018, Treasury and the Office of Management and Budget (OMB) entered into a new Memorandum of Agreement (2018 MOA) which rescinds the 1983 Memorandum of Agreement (1983 MOA), and describes practices the IRS is supposed to engage in when issuing certain rules.<sup>2</sup> While the revised agreement is a step toward normalizing the rulemaking practices at the IRS, the practical effects of the 2018 MOA will depend upon its implementation.

Under the prior administration, the IRS regularly avoided generally applicable rulemaking requirements like the Administrative Procedure Act (APA) and the Regulatory Flexibility Act (RFA).<sup>3</sup> Specifically, the IRS claimed, “the underlying Tax Code being implemented by the regulation contains the necessary legal authority for the action taken, and any effect of the regulation flows directly from the code.”<sup>4</sup> This allowed the IRS to assert the rulemaking was an interpretive rule or guidance, not subject to various requirements. It effectively exempted the IRS from administrative laws and policies requiring regulatory accountability and transparency.<sup>5</sup> If the IRS continues to use this legal interpretation in evaluating whether legal requirements or policies apply to new rulemakings, the recently signed 2018 MOA may be without effect.

---

<sup>1</sup> Letter from Trey Gowdy et al., Chairman, House Committee on Oversight and Government Reform, to David Kautter, Assistant Secretary for Tax Policy, Department of the Treasury (Feb. 20, 2018).

<sup>2</sup> OMB, Internal Memorandum, *Memorandum of Agreement, The Department of Treasury and Office of Management and Budget Review of Tax Regulations under Executive Order 12866* (Apr. 11, 2018).

<sup>3</sup> See 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* 18-25 (2016).

<sup>4</sup> *Id.* at 21.

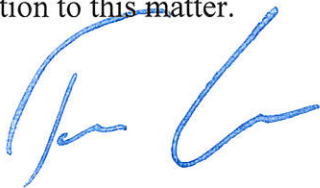
<sup>5</sup> See *id.* at 18-25; Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury (Lack Of) Compliance With Administrative Procedure Act Requirements*, 82 NOTRE DAME L. REV. 1727, 1759 (2007).

Recent testimony by you and Treasury General Counsel Brent McIntosh indicated there may be reason to believe the IRS could be abandoning—or at least curtailing—the unique legal analysis allowing for the avoidance of key regulatory process requirements. In testimony before the Senate on April 12, 2018, McIntosh stated, “We clearly believe there are a set of rules that have not gone through OIRA review that ought to.”<sup>6</sup> At a hearing before two of this Committee’s subcommittees on April 17, 2018, Subcommittee Chairman Jim Jordan questioned whether the intent of the IRS’s classification of rules was to evade the 2018 MOA and other rulemaking requirements, to which you responded, “No sir, that is not our intent.”<sup>7</sup>

Insight into the IRS’s implementation of the 2018 MOA and other updated regulatory process will be valuable for the Committee’s work. To assist the Committee, please provide the Committee with a briefing on the Department’s plan for implementing the recently signed 2018 MOA and documents sufficient to show:

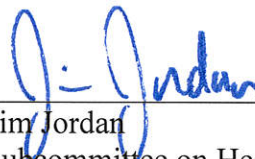
1. The process by which the IRS and Treasury Department evaluate and determine whether a potential tax regulation is legislative or interpretative in nature; and
2. The process by which the IRS and Treasury Department evaluate and determine whether a prospective tax regulation has an economic impact and the scope of the impact.

Please contact James Lesinski of the Majority staff at (202) 225-5074 no later than April 30, 2018, to schedule the briefing or with any questions about this request. Thank you for your attention to this matter.



Trey Gowdy

Sincerely,



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

<sup>6</sup> *Reviewing the Office of Information and Regulatory Affairs: Hearing Before the Subcomm. on Regulatory Affairs & Federal Management of the S. Comm. on Homeland Sec. & Governmental Affairs*, 115<sup>th</sup> Cong. (2018).

<sup>7</sup> *Continued Oversight Over the Internal Revenue Service: Hearing Before the Subcomms. on Government Operations and Healthcare, Benefits, and Administrative Rules of the H. Comm. on Oversight & Gov’t Reform*, 115<sup>th</sup> Cong. (2018).

## **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**