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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

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February 13, 2018

The Honorable David Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Mr. Kautter:

The Committee on Homeland Security and Governmental Affairs is examining the extent to which federal agencies conduct transparent and thorough rulemaking in compliance with federal law. According to a recent report, the Internal Revenue Service (IRS) has attempted to exempt itself from statutory requirements by declining to issue economic impact analyses of its rules.¹ We write to request information about the IRS's justification for not producing economic analyses during its rulemaking process, and urge the agency to reconsider its policy.

Federal agencies must follow rulemaking procedures pursuant to administrative statutes.² Federal law requires agencies to conduct an economic analysis of any proposed rule that is likely to have a significant economic impact on small entities.³ Federal agencies include this information when publishing the regulation in the *Federal Register*.⁴ These requirements are intended to increase transparency in the federal government and provide clarity to stakeholders affected by the regulation.

According to a recent report by the Cause of Action Institute, the IRS has not conducted economic analyses of its regulations.⁵ The report found that the IRS "takes the position that its rules have no economic effect because any impact is attributable to the underlying law that authorized the rule, not the agency's decision to issue or alter the rule."⁶ The IRS's position

¹ James Valvo, *Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact*, Cause of Action Institute, Jan. 2018.

² 5 U.S.C. §601-612; 5 U.S.C. §801-808.

³ See 5 U.S.C. §§ 603(a), 801(a)(2)(A), 804(2). The Regulatory Flexibility Act does not define "significant economic impact"; however, the Congressional Review Act defines a "major rule" as any rule that "has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets." *Id.* § 804(2).

⁴ *Id.*

⁵ Valvo *supra* note 1.

⁶ John Vecchione and James Valvo, *The IRS Evades Accountability—and Its Excuse Is Ridiculous*, WALL ST. J., Jan. 9, 2018, available at https://www.wsj.com/article_email/the-irs-evades-accountabilityand-its-excuse-is-ridiculous-1515544992-1MyQjAxMTA4ODAyOTIwNDkxWj/.

apparently dates back nearly 20 years, when the IRS Office of Chief Counsel issued a notice taking this position.⁷ The report notes that while the IRS initially limited its economic analysis exemption to only “interpretative regulations and revenue impacts[,] both limitations fell away over time.”⁸

Regulatory actions from the IRS can often have significant economic consequences for American taxpayers. With that in mind, we strongly urge you to reconsider the IRS’s decision to exempt itself from assessing the economic impact of its regulations. To assist the Committee’s oversight, we ask that you provide the following information and materials:

1. Please explain whether the IRS has conducted any retrospective economic impact analyses of regulations that did not receive an initial economic impact analysis.
2. In 2016, the Small Business Administration’s Office of Advocacy wrote to the IRS disputing the agency’s assertion that the IRS’s regulations are not subject to the requirement to conduct economic impact analyses.⁹
 - a. Did the IRS respond to the Office of Advocacy? If so, please provide that response.
 - b. Has the IRS received guidance or feedback from other federal agencies regarding the IRS’s decision to not conduct economic analyses of its regulations? If so, please provide those documents as well as any response the IRS may have sent to those agencies on this matter.
3. Please explain the process by which a determination is made as to whether the agency will or will not conduct an economic impact analysis on a proposed regulation.

Please provide a response as soon as possible but no later than 5:00 p.m. on February 28, 2018, so that the Committee may begin to receive responsive information. When delivering production sets, please produce to Majority staff in room 340 of the Dirksen Senate Office Building and to Minority staff in room 442 of the Hart Senate Office Building. For purposes of this request, please refer to the definitions and instructions in the enclosure.

The Committee on Homeland Security and Governmental Affairs is authorized by Rule XXV of the Standing Rules of the Senate to investigate “the efficiency, economy, and

⁷ Valvo *supra* note 1, at 9. See Office of Chief Counsel, Internal Revenue Service, Notice, Regulatory Flexibility Act, Mar. 3, 1998, at 3, available at <https://causeofaction.org/wp-content/uploads/2017/11/IRS00849-1070.pdf>, (“With respect to interpretative regulations, any possible revenue impact of the regulations is inherently part of the revenue impact of the underlying statute, and thus is not considered in measuring any economic impact attributable to the regulations.”).

⁸ Valvo, *supra* note 1, at 10. The Internal Revenue Manual states, “Most IRS/Treasury regulations are not significant regulatory actions. . . . The effect from a rule in most IRS/Treasury regulations is almost always a result of the underlying statute, rather than the regulation itself.” See Internal Revenue Serv., Internal Revenue Manual §32.1.5.4.7.5.3 (2015).

⁹ Letter from Darryl L. DePriest, Chief Counsel, Office of Advocacy, Small Bus. Admin., *et al.*, to William J. Wilkins, Chief Counsel, Internal Revenue Serv., Nov. 1, 2016 at 5, available at <http://coainst.org/2wuQ31Q>; Valvo, *supra* note 1, at 5.

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effectiveness of all agencies and departments of the Government.”¹⁰ Additionally, S. Res. 62 (115th Congress) authorizes the Committee to examine “the efficiency and economy of all branches and functions of the Government with particular references to the operations and management of Federal regulatory policies and programs.”¹¹

If you have any questions regarding this letter, please contact Scott Wittmann or Josh McLeod of Chairman Johnson’s staff at (202) 224-4751 or James Mann of Chairman Lankford’s staff at (202) 224-3823. Thank you for your attention to this matter.

Sincerely,



Ron Johnson
Chairman
Committee on Homeland Security
and Governmental Affairs



James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management

cc: The Honorable Claire McCaskill
Ranking Minority Member

The Honorable Heidi Heitkamp
Ranking Minority Member
Subcommittee on Regulatory Affairs
and Federal Management

The Honorable Mick Mulvaney
Director
Office of Management and Budget

The Honorable Steven Mnuchin
Secretary
Department of Treasury

Enclosure

¹⁰ S. Rule XXV(k); *see also* S. Res. 445, 108th Cong. (2004).

¹¹ S. Res. 62 § 12(e)(1)(G), 115th Cong. (2017).