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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

February 1, 2018

The Honorable Neomi Rao  
Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Dear Ms. Rao:

The Committee on Homeland Security and Governmental Affairs Committee and the Subcommittee on Regulatory Affairs and Federal Management are conducting oversight of the federal regulatory process to ensure that regulations are promulgated in a lawful manner. We write regarding a longstanding agreement between the Office of Information and Regulatory Affairs (OIRA) and the Department of the Treasury to exempt regulations issued by the Internal Revenue Service (IRS) from the requirements contained in Executive Order 12866.

In 1983, after President Reagan issued Executive Order (EO) 12291, OIRA executed an agreement with the Treasury Department to exempt certain regulations issued by the IRS from OIRA review.<sup>1</sup> In 1993, the Clinton Administration revisited the agreement after the issuance of EO 12866—which requires, among other things, subjecting agency regulations to centralized review by OIRA, conducting a benefit-cost analysis, and consideration of alternatives to regulation<sup>2</sup>—but made no discernable changes to the agreement.<sup>3</sup> The agreement has remained in effect without review since then.

In September 2016, the Government Accountability Office (GAO) issued a report finding deficiencies in the IRS's regulatory processes.<sup>4</sup> GAO noted how the IRS rarely determined whether its regulations were significant under EO 12866, major under the Congressional Review Act, or had a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act.<sup>5</sup> In addition, the IRS has avoided conducting regulatory analyses by claiming its regulations are not legislative, but merely interpretive of the underlying statute.<sup>6</sup>

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<sup>1</sup> Office of Info. and Reg. Aff. and Dept. of the Treasury, *Memorandum of Agreement: Treasury and OMB Implementation of Executive Order 12291* (Apr. 29, 1983).

<sup>2</sup> Exec. Order No. 12866, 58 Fed. Reg. 190 (Sep. 30, 1993).

<sup>3</sup> Letter from Sally Katzen to Jean E. Hanson (Dec. 22, 1993) ([T]he new Executive Order does not apply to the substantive categories of regulatory actions of the Department of the Treasury that were not subject to review under Executive Order 12291 or the Treasury/OMB Memorandum of Agreement implementing that Order.”).

<sup>4</sup> U.S. Gov't Accountability Office, GAO-16-720, *Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-Standing Exemptions of Tax Regulations and Guidance* (2016).

<sup>5</sup> *Id.*


<sup>6</sup> 26 U.S.C. § 1 et seq.

This rationale, if applied across government, would effectively nullify the Administrative Procedure Act's notice and comment requirements<sup>7</sup> and the balancing goals of the Regulatory Flexibility Act.<sup>8</sup>

OIRA holds the unique and vitally important position as the “central authority for the review of Executive Branch regulations,”<sup>9</sup> ensuring regulations issued by federal agencies follow both statutory requirements and Executive Order directives. All such regulations, including IRS regulations, should be subject to notice and comment procedures, OIRA review, and the Congressional Review Act. In its report, GAO recommended that OIRA develop a process to ensure it has all necessary information to determine if IRS rules are “major” under the Congressional Review Act or “significant” under EO 12866.<sup>10</sup>

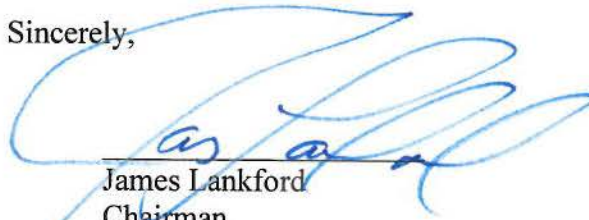
We strongly urge you to revisit the regulatory agreement between OIRA and Treasury, as directed by President Trump's EO 13789,<sup>11</sup> with a critical eye as to why this agreement is necessary. We also encourage OIRA to implement all the recommendations in GAO's September 2016 report and provide a full explanation to the Committee and Subcommittee in the event that OIRA declines to implement any of GAO's recommendations. Finally, for your awareness, the Subcommittee intends to hold an oversight hearing in the very near future regarding OIRA activities. The issues outlined in this letter will likely constitute a major part of this hearing.

We appreciate your attention to these matters. If you or your staff has any questions, please contact Satya Thallam of Chairman Johnson's staff at (202) 224-4751 or James Mann of Chairman Lankford's staff at (202) 224-3823.



Ron Johnson  
Chairman

Sincerely,



James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management

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<sup>7</sup> 5 U.S.C. § 553.

<sup>8</sup> 5 U.S.C. § 601 et seq.

<sup>9</sup> Office of Management and Budget, INFORMATION AND REGULATORY AFFAIRS, <https://www.whitehouse.gov/omb/information-regulatory-affairs/> (last visited Jan. 25, 2018).

<sup>10</sup> GAO, *supra* note 4, at 35.

<sup>11</sup> Exec. Order No. 13789, 82 Fed. Reg. 19317 (Apr. 21, 2017) (“To ensure that future tax regulations adhere to the policy described in section 1 of this order, the Secretary and the Director of the Office of Management and Budget shall review and, if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations from the review process set forth in Executive Order 12866 and any successor order.”).

The Honorable Neomi Rao

February 1, 2018

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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

The Honorable David Kautter  
Acting Commissioner  
Internal Revenue Service