

# CAUSE of ACTION

## INSTITUTE

Pursuing Freedom & Opportunity through Justice & Accountability<sup>SM</sup>

February 8, 2018

### VIA EMAIL

United States Senate  
Committee on Finance  
Dirksen Senate Office Building, SD-219  
Washington, DC 20510-6200

### **Re: Nomination of Charles Rettig to be IRS Commissioner**

Dear Chairman Hatch and Ranking Member Wyden,

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.<sup>1</sup> In carrying out its mission, CoA Institute uses legal and investigative tools to educate the public about the importance of government transparency and accountability. Recent news reports indicate that President Donald Trump has nominated Charles “Chuck” Rettig to be the next commissioner of the Internal Revenue Service (“IRS”).<sup>2</sup>

Although there are numerous important issues the next IRS commissioner will need to address, I urge you to press Mr. Rettig to publicly commit to reform the IRS practice of skirting oversight of its rulemakings. CoA Institute recently issued an investigative report titled *Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact*.<sup>3</sup> The report details how the IRS created and expanded a series of self-bestowed exemptions from three important regulatory oversight mechanisms. The IRS created these exemptions by claiming that the economic effects of its rules flow from the underlying statute and not its regulatory choices.

This IRS practice denies Congress information about IRS major rules that should be reported to the Government Accountability Office under the Congressional Review Act. It also hinders the White House’s ability to fulfill its constitutional obligation to supervise the Executive Branch by conducting oversight of IRS regulations pursuant to Executive Order 12,866. And it impacts the public’s

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<sup>1</sup> See CAUSE OF ACTION INST., *About*, [www.causeofaction.org/about](http://www.causeofaction.org/about).

<sup>2</sup> See Toby Eckert & Aaron Lorenzo, *Trump nominates tax lawyer to head IRS*, POLITICO, Feb. 8, 2018, <http://politi.co/2FYxDvC>.

<sup>3</sup> CAUSE OF ACTION INST., *EVADING OVERSIGHT: THE ORIGINS AND IMPLICATIONS OF THE IRS CLAIM THAT ITS RULES DO NOT HAVE AN ECONOMIC IMPACT* (Jan. 2018), *available at* <http://coainst.org/2mgpYAu>.

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right to learn about and comment on the economic impact of IRS rules that are subject to the Regulatory Flexibility Act.

I urge you to review and consider the executive summary and findings of *Evading Oversight*, which are attached to this letter. The full report is available on CoA Institute's website.<sup>4</sup> In order to hold the IRS accountable, I also urge you to press Mr. Rettig to end this practice during your face-to-face meetings and at a public hearing, as I recently recommended in the *Wall Street Journal*.<sup>5</sup>

If you have any questions or concerns, please contact me by telephone at (202) 499-4232 or by e-mail at james.valvo@causeofaction.org. Thank you for your attention to this matter.



R. JAMES VALVO, III

COUNSEL & SENIOR POLICY ADVISOR

CC:

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SENATOR BOB CASEY  
SENATOR MARK WARNER  
SENATOR CLAIRE MCCASKILL  
SENATOR SHELDON WHITEHOUSE

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

<sup>5</sup> John Vecchione and James Valvo, *The IRS Evades Accountability—and Its Excuse Is Ridiculous*, WALL ST. J., Jan. 9, 2018, available at <http://on.wsj.com/2rDf8KH>.

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### **EVADING OVERSIGHT:**

*The Origins and Implications of the IRS  
Claim That Its Rules Do Not Have an  
Economic Impact*

James Valvo

January 2018

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## Executive Summary

A tension exists in federal administrative law. Agencies are tasked by statute with executing delegated functions, and the president is assigned by the Constitution to head the Executive Branch and take care that laws are faithfully executed. This creates tension because agencies can make controversial, burdensome, unwise, or unaccountable decisions that may conflict with statutory mandates or the president's chosen governing course. This tension has heightened over the past one hundred years as the size and scope of the administrative state has dramatically increased. Disputes over how to control administrative agencies and the validity of their actions have also sharpened during the same period.

In an attempt to alleviate these tensions, Congress and the president have installed various regulatory-oversight mechanisms. The mechanisms, embodied in statutes and executive orders, seek to mitigate the worst agency abuses, while also reinjecting constitutional actors into the agency decision-making process. When agencies act to subvert these oversight mechanisms, they undermine legitimate checks on their power and raise concerns about the propriety of their decisions, thereby exacerbating concerns about lack of control over the administrative state.

The Internal Revenue Service ("IRS") is one such agency. It has systematically constructed a series of exemptions from certain aspects of three important oversight mechanisms: the Regulatory Flexibility Act, White House review pursuant to Executive Order 12,866, and the Congressional Review Act. The IRS purports to base these self-made exemptions on the claim that any economic impact of the rules that it issues flows from the underlying statute and is not attributable to its regulatory actions, for the purpose of triggering economic-impact analyses and information sharing under these three oversight mechanisms. The IRS, however, has not provided any detailed, public explanation to justify its position. Further, the IRS position, if correct, would apply to any regulation promulgated by any agency, as hopefully all regulations are based on a statute.

All three oversight mechanisms are designed to: (1) increase information sharing between agencies and the constitutional actors that oversee their actions, and (2) disclose to the public the economic significance of agency decisions. By claiming an exemption from these mechanisms, the IRS is denying Congress, the president, and the public important information about how IRS rules impact the economy and how different administrative choices could alleviate that impact.

## **Findings**

**Finding #1:** *In the three sections of the Internal Revenue Manual that govern the IRS approach to compliance with three important regulatory oversight mechanisms, the agency claims that its regulations have no economic impact because any such impact is attributable only to the underlying statute.*

**Finding #2:** *The IRS asserts that its regulations have no economic impact to claim self-bestowed exemptions that allow it to avoid economic impact analyses and the sharing of information with the White House, Congress, and the public. The IRS has provided no detailed, public explanation to justify its position.*

**Finding #3:** *The IRS first claimed that its regulations have no economic impact to evade a congressional amendment to the Regulatory Flexibility Act that was explicitly designed to cover IRS regulations.*

**Finding #4:** *Over time, the IRS has expanded its self-bestowed exemption to avoid a greater number of regulatory-oversight mechanisms. The exemption first applied only to the “revenue impacts” of IRS regulations but is now claimed for all “effects.” In addition to avoiding the requirement of the Regulatory Flexibility Act, the IRS also applies its exemption in the context of White House Office of Information and Regulatory Affairs review and the Congressional Review Act. The IRS has provided no detailed, public explanation to justify these expansions.*

**Finding #5:** *The combination of the IRS assertion that its rules do not create an economic impact and a 1983 memorandum of understanding between the White House and the Department of the Treasury has created a moral hazard that allows the IRS to determine which rules it sends to the White House for pre-publication review, as required under Executive Order 12,866 and its progeny.*