



B-329916

May 17, 2018

The Honorable Mark Meadows  
House of Representatives

Subject: *Internal Revenue Service: Applicability of the Congressional Review Act to the IRS Statement on Health Care Reporting Requirements*

Dear Mr. Meadows:

This is in response to your request<sup>1</sup> for our opinion whether an Internal Revenue Service (IRS) Statement regarding electronically filed tax returns where the taxpayer does not address the health coverage reporting requirements of the Patient Protection and Affordable Care Act (ACA) is a rule for purposes of the Congressional Review Act (CRA).<sup>2</sup> In that Statement, IRS announced that for the 2018 tax filing season it would not accept electronically filed individual income tax returns where the taxpayer does not meet ACA reporting requirements, specifically to report full-year health coverage, claim a coverage exemption, or report a shared responsibility payment (known as “silent returns”). As explained below, we conclude that the Statement falls within a statutory exception to CRA because it is a rule of agency procedure or practice that does not substantially affect taxpayers’ rights or obligations.<sup>3</sup>

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<sup>1</sup> Letter from Chairman of the Subcommittee on Government Operations, House of Representatives, to Comptroller General (Feb. 16, 2018).

<sup>2</sup> CRA was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996. Pub. L. No. 104-121, title II, subtitle E, 110 Stat. 857, 868 (Mar. 28, 1996) (*codified at* 5 U.S.C. §§ 801-808).

<sup>3</sup> Our practice when rendering opinions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP). We contacted the Chief Counsel of IRS to obtain the agency’s views. Letter from Assistant General Counsel, GAO, to Acting Chief Counsel, IRS (Mar. 29, 2018). We received a response on April 12, 2018. Letter from Acting Chief Counsel, IRS, to Assistant General Counsel, GAO (Apr. 12, 2018) (IRS Letter).

## BACKGROUND

### The IRS Statement

IRS is charged with ensuring and monitoring compliance with the internal revenue laws<sup>4</sup> and with establishing procedures to accomplish these purposes.<sup>5</sup> The law requires taxpayers to file a complete tax return.<sup>6</sup> Additionally, IRS has a specific statutory responsibility to implement certain provisions of ACA.<sup>7</sup> Among these provisions that IRS ensures compliance with is the requirement that, beginning tax year 2014, a taxpayer must (1) have health coverage that meets minimum requirements, (2) qualify for a health coverage exemption, or (3) report a shared responsibility payment (SRP) with their federal income tax return for the months without coverage or an exemption (“ACA reporting requirements”).<sup>8</sup>

In carrying out this responsibility for tax years 2014 through 2016, IRS accepted individual income tax returns where the taxpayer did not comply with ACA reporting requirements. Specifically, IRS processed all silent returns submitted, whether filed on paper or electronically. IRS did not verify a taxpayer’s compliance with these requirements until after the taxpayer had filed a return and paid taxes due or received a refund, which IRS refers to as post-processing compliance. IRS told us that in 2017, post-processing compliance procedures included sending a letter to taxpayers who filed silent returns directing them to file an amended return to comply with ACA reporting requirements.<sup>9</sup>

IRS changed its approach for the 2018 filing season. According to IRS, it received feedback from the National Taxpayer Advocate after tax year 2016 that not accepting an electronically filed silent return or contacting the taxpayer during the

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<sup>4</sup> 26 U.S.C. § 7803(a)(2).

<sup>5</sup> 26 U.S.C. § 7805(a).

<sup>6</sup> 26 U.S.C. § 6011(a).

<sup>7</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Pub. L. No. 111-152, 124 Stat. 1029 (2010).

<sup>8</sup> Pub. L. No. 111-148, §§ 1501, 10106, *amended by* Pub. L. No. 111-152, §§ 1002, 1004 (*codified as amended at* 26 U.S.C. § 5000A). The SRP is also known as the individual mandate penalty. In December 2017, a law repealing the SRP was enacted, effective beginning tax year 2019. See Pub. L. No. 115-97, § 11081 (2017).

<sup>9</sup> IRS Letter, at 2.

processing of the return was less burdensome to taxpayers than notifying them and potentially taking a compliance action after the return was filed, taxes paid, and any refunds received.<sup>10</sup> IRS told us that identifying omissions and requiring taxpayers to provide health coverage information at the point of electronic filing makes it easier for the taxpayer to successfully file a tax return and minimizes potential related refund delays.

Therefore, IRS announced that it would not accept electronically filed tax returns if the taxpayer does not report full-year coverage, claim a coverage exemption, or report a shared responsibility payment on the tax return.<sup>11</sup> IRS decided to verify compliance with ACA requirements at the time of filing by requiring that the taxpayer provide health coverage information when filing rather than accepting the return and directing the taxpayer to file an amended return to report ACA compliance. IRS noted in its letter to us that it will continue to accept silent returns filed on paper and correspond with the taxpayer to address omissions.

### Congressional Review Act

CRA was enacted in 1996 to strengthen congressional oversight of agency rulemaking. The statute requires all federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect.<sup>12</sup> In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process.<sup>13</sup> CRA also provides for expedited procedures under which Congress may pass a joint resolution of disapproval for a rule subject to the Act that, if enacted into law, overturns the rule.<sup>14</sup>

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<sup>10</sup> IRS Letter, at 2. The National Taxpayer Advocate is an independent organization within the IRS that helps people resolve tax problems with the IRS and recommends changes to prevent problems.

<sup>11</sup> IRS, Individual Shared Responsibility Provision, [www.irs.gov/affordable-care-act/individuals-and-families/individual-shared-responsibility-provision](http://www.irs.gov/affordable-care-act/individuals-and-families/individual-shared-responsibility-provision). IRS also updated the section of its website for tax professionals to include this information. See IRS, ACA Information Center for Tax Professionals, [www.irs.gov/tax-professionals/aca-information-center-for-tax-professionals](http://www.irs.gov/tax-professionals/aca-information-center-for-tax-professionals).

<sup>12</sup> 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id.*

<sup>13</sup> *Id.* § 801(a)(1)(B).

<sup>14</sup> *Id.* §§ 801-802.

CRA adopts the definition of rule under the Administrative Procedure Act (APA) which states in relevant part that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”<sup>15</sup> CRA excludes three categories of rules from coverage: (a) rules of particular applicability; (b) rules relating to agency management or personnel; and (c) rules of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.<sup>16</sup>

IRS did not send a report on its Statement regarding silent returns for the 2018 tax filing season to Congress or the Comptroller General because, in IRS’s opinion, the Statement is an agency procedure that does not affect taxpayer rights or obligations and is therefore not subject to review under CRA.

## ANALYSIS

To determine whether the IRS Statement is a rule subject to review under CRA, we first address whether the Statement meets the APA definition of a rule and then, if it does, whether any of the CRA exceptions apply. A summary description of the Statement shows clearly that it meets the definition of a rule. It is an agency statement because it publicly articulates the agency’s plans regarding acceptance of electronically filed silent returns for the 2018 tax filing season. The Statement is of general applicability as it applies to all taxpayers who file tax returns electronically. It is of future effect since it describes IRS intentions, with respect to silent returns, about the timing of its efforts to monitor compliance with ACA requirements during the 2018 filing season.

Because the Statement meets the APA definition of a rule, we next consider whether it meets one of the exceptions enumerated in CRA. In this case, two of the exceptions do not apply since the Statement is a rule of general and not particular applicability and is not a rule relating to agency management or personnel. Therefore, only one exception—for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties—is relevant here.<sup>17</sup>

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<sup>15</sup> *Id.* § 804(3) (*citing* 5 U.S.C. § 551).

<sup>16</sup> *Id.* § 804(3). The statute provides for certain other exceptions that are not relevant here. *Id.* §§ 804, 807, 808.

<sup>17</sup> See 5 U.S.C. § 804(3).

The processing of silent returns, including acceptance of a return, is an agency procedure. When it issued the Statement, IRS exercised its statutory authority to establish procedures to ensure and monitor compliance with the internal revenue laws, including the requirement that the taxpayer file a complete return and meet ACA reporting requirements.<sup>18</sup> The question is whether, when IRS changed its procedure regarding the acceptance of silent returns, that change substantially affected taxpayers' rights or obligations.

The CRA exception for rules of agency practice or procedure that do not substantially affect non-agency parties' rights or obligations was modeled on the APA, which excludes "rules of agency organization, procedure, or practice" from the notice-and-comment rulemaking requirement.<sup>19</sup> Courts have applied the APA exception by inquiring whether a rule will have a "substantial impact" on those regulated,<sup>20</sup> and this feature was expressly included in the CRA exception for procedural rules.<sup>21</sup> Thus we can look to APA case law to guide us in determining whether an agency statement has a substantial effect on non-agency parties.

The courts have addressed whether changes to procedures substantially affect the rights and obligations of non-agency parties.<sup>22</sup> In *JEM Broadcasting Co. v. FCC*, the U.S. Court of Appeals for the D.C. Circuit rejected a claim that the Federal Communications Commission (FCC) violated APA by changing its broadcasting license application process without opportunity for notice and comment.<sup>23</sup> FCC

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<sup>18</sup> 26 U.S.C. § 7803(a)(2).

<sup>19</sup> 5 U.S.C. § 553(b)(A). See also B-238859, Oct. 23, 2017, at 12 ("The CRA legislative history discussion of this exception is limited, but states that it was modeled on the APA").

<sup>20</sup> *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979).

<sup>21</sup> See B-275178, July 3, 1997, at 7.

<sup>22</sup> See, e.g., *James v. Hurson Assocs. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (an agency's elimination of face-to-face meetings to review food labeling was a procedural rule because it did not change the substantive criteria of the review); *Pub. Citizen, Inc. v. Dep't of State*, 100 F.Supp. 2d 10 (D.D.C. 2000) (an agency's use of a date-of-request cut-off for Freedom of Information Act (FOIA) requests was a procedural rule because it did not alter the rights of FOIA requesters but merely guided the agency's response to FOIA requests); *Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256, 262 (D.C. Cir. 2000) (an agency's standard for assessing requests for deadline extensions was procedural because it "merely altered a standard for the enforcement of filing deadlines; it did not purport to regulate or limit [filers'] substantive rights").

<sup>23</sup> 22 F.3d 320 (D.C. Cir. 1994).

changed its rules for processing license applications by establishing a fixed filing period, or window, for all applications requesting use of a particular channel. Applications filed within the window were evaluated for “substantial completeness”; those meeting the standard were accepted and placed on a publicly released list. Following release of the list, applicants were allowed 30 days to amend their applications. Applications that did not meet the “substantial completeness” standard by the close of the window were rejected without opportunity for amendment. FCC argued that the rules were procedural and “simply ‘shifted to the beginning of the process some of the application checks previously made later in the process.’”<sup>24</sup>

In its ruling, the court noted that “the ‘critical feature’ of the procedural exception ‘is that it covers agency actions that do not themselves alter the rights or interests of parties.’”<sup>25</sup> In finding that the change to FCC’s rules did not have a substantial impact on regulated entities, the court emphasized that FCC’s new rules did not change the substantive standards by which the agency evaluated license applications.<sup>26</sup> The court highlighted that FCC “always has required applications to be complete in all critical respects by *some* date or suffer dismissal.”<sup>27</sup>

Like FCC’s change to its license application processing, the IRS Statement shifts the timing of a step in the agency’s process: verification of the taxpayer’s compliance with ACA reporting requirements occurs at the time of tax filing rather than after a taxpayer’s silent return has been accepted. Intended to enable the IRS to fulfill its responsibility to ensure compliance with those requirements, the Statement has no effect on the taxpayer’s rights or obligations. Just as FCC’s new rules did not change the substantive standards for evaluating license applications, the Statement does not change the substance of what the IRS evaluates for compliance—that is, whether the taxpayer has filed a complete return, including ACA reporting information.

Any consequences a taxpayer may face for failure to file a complete return and comply with ACA reporting requirements stem from the taxpayer’s independent legal obligation to comply with the tax laws and ACA—not the Statement itself.<sup>28</sup> That noncompliance may be identified during tax filing—rather than after—does not affect

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<sup>24</sup> *Id.* at 327 (citing *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19,936, 19,945 (May 13, 1985)).

<sup>25</sup> *Id.* at 326 (citing *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

<sup>26</sup> *Id.* at 327.

<sup>27</sup> *Id.* (emphasis in original).

<sup>28</sup> See also *United States Dep’t of Labor v. Kast Metals Corp.*, 744 F.2d 1145, 1155 (5th Cir. 1984) (holding that an agency’s plan for selecting employers for inspection was procedural and noting that “the rights and obligations of an employer within [the  
(continued...)

the underlying rights or obligations of the taxpayer.<sup>29</sup> Moreover, any penalties that may be assessed for failure to file a complete tax return derive from the separate legal obligation to do so and not from the IRS Statement.

Here, the Statement does not impose or confer new burdens, penalties, or rights on taxpayers.<sup>30</sup> This is in marked contrast to the types of agency statements we previously held did have substantial effects on the rights or obligations of non-agency parties. Examples of such agency statements include interim guidance that clearly altered existing regulations and gave recipients of government assistance significant rights that they did not previously possess,<sup>31</sup> and a national forest plan amendment that changed permissible activities in designated land use areas.<sup>32</sup>

IRS's letter to our office focused on the statutory exception for rules of agency practice or procedure that do not substantially affect the rights or obligations of non-agency parties.<sup>33</sup> IRS emphasized that the processing of silent returns is an agency procedure regarding compliance activities and does not affect taxpayer rights or obligations. IRS asserted that when it changed the policy regarding the processing of silent returns, it merely implemented a new internal procedure to ensure taxpayers complied with their existing statutory obligation. We agree.

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agency's] jurisdiction exist independently of a plan whose sole purpose is the funneling of agency inspection resources”).

<sup>29</sup> That the Statement could change the manner or timing of taxpayers' interaction or correspondence with IRS but nevertheless not substantially affect taxpayers' rights or obligations is consistent with our prior observation that agency statements “may alter the manner in which the parties present themselves to the agency” but still fit the exception because they “do not themselves alter the rights or interests of the parties.” B-281575, Jan. 20, 1999, at 5 (*citing Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)).

<sup>30</sup> See *also* B-291906, Feb. 28, 2003, in which we concluded that a Department of Veterans Affairs (VA) memorandum instructing area directors to stop engaging in marketing activities to enroll new veterans did not substantially affect the rights or obligations of veterans. We found it dispositive that no veterans were being denied the right to enroll in the VA system, nor were enrolled veterans being dropped from the program, which we considered the substantive rights that the memorandum would need to affect to fall outside of the exception.

<sup>31</sup> B-281575, Jan. 20, 1999.

<sup>32</sup> B-238859, Oct. 23, 2017.

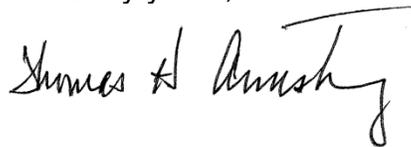
<sup>33</sup> See IRS Letter, at 2-3.

## CONCLUSION

The IRS Statement is not subject to review under CRA because it falls under the exception for rules of agency practice or procedure that do not substantially affect the rights or obligations of taxpayers. The Statement changes the timing of IRS compliance measures, but it does not change IRS's basis for assessing taxpayers' compliance with existing law—namely, the requirement to file a complete tax return and to meet ACA reporting requirements. Any consequences taxpayers may face for failing to comply stem from those requirements, not the IRS Statement.

If you have any questions about this opinion, please contact Robert J. Cramer, Managing Associate General Counsel, at (202) 512-7227 or Shirley Jones, Assistant General Counsel, at (202) 512-8156.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first few letters.

Thomas H. Armstrong  
General Counsel