



B-330376

November 30, 2018

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate

Subject: *Internal Revenue Service: Applicability of the Congressional Review Act to Revenue Procedure 2018-38*

This responds to your request for our legal opinion on whether Revenue Procedure 2018-38, *Returns by exempt organizations and returns by certain non-exempt organizations*, issued by the Internal Revenue Service (IRS), is a rule for purposes of the Congressional Review Act (CRA). IRS submitted the revenue procedure to GAO on July 24, 2018, and to both Houses of Congress on July 26, 2018. At issue here is the protection of Congress's review and oversight authorities when an agency has submitted a rule to Congress pursuant to CRA and the rule has been transmitted to the committees of jurisdiction. The purpose of CRA is to strengthen congressional oversight of agency rulemaking. We conclude that in these circumstances, because IRS submitted the revenue procedure as a rule, Congress is able to fully exercise its review and oversight authorities under CRA. We, therefore, take no position on whether the revenue procedure is a rule otherwise.

BACKGROUND

On July 16, 2018, IRS announced Revenue Procedure 2018-38, which modifies the information certain tax-exempt entities are required to report to IRS on their annual returns. CRA requires that before a rule can take effect, the agency promulgating the rule must submit to both Houses of Congress and GAO a report containing a copy of the rule, a concise general statement of the rule, including whether it is a major rule, and the proposed effective date of the rule. 5 U.S.C. § 801(a)(1)(A). Pursuant to that requirement, IRS submitted the revenue procedure to GAO on July 24, 2018, and to both Houses of Congress on July 26, 2018. 164 Cong. Rec. H7734 (July 31, 2018); 164 Cong. Rec. S5453 (July 30, 2018). Upon receipt of the rule, the Senate and House Parliamentarians transmitted it to the committees of jurisdiction, the Senate Committee on Finance and the House Committee on Ways and Means, respectively.

IRS's submission of the revenue procedure triggered several CRA statutory provisions. Under CRA, any joint resolution disapproving of the revenue procedure must be introduced within 60 days of the July 26, 2018 submission. 5 U.S.C.

§ 802(a). Further, in the Senate, if the committee to which a joint resolution has been referred has not reported on the resolution within 20 calendar days of the agency's submission, the committee may be discharged from further consideration of the joint resolution upon a petition of 30 members of the Senate after which the joint resolution is to be placed on the Senate calendar. 5 U.S.C. § 802(c). However, this rule and other rules limiting debate in the Senate only apply during the 60 session days following submission. 5 U.S.C. § 802(e)(1). In the case of Revenue Procedure 2018-38, a joint resolution of disapproval was introduced on September 24, 2018, and placed on the Senate calendar on October 12, 2018.

We received your request concerning Revenue Procedure 2018-38 on September 7, 2018. Letter from Chairman, Senate Committee on Finance, to Comptroller General (Sept. 7, 2018). 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. We contacted the Acting Chief Counsel of IRS to obtain the agency's views. Letter from Managing Associate General Counsel, GAO, to Acting Chief Counsel, IRS (Sept. 18, 2018). We received a response on October 9, 2018. Letter from Acting Chief Counsel, IRS, to Managing Associate General Counsel, GAO (Oct. 9, 2018) (IRS Letter).

DISCUSSION

Prior GAO opinions related to the CRA only have concerned agency actions that had not been submitted to Congress. In those cases where the agency action was a rule, CRA's purpose of providing Congress with an opportunity for review before a rule can take effect was frustrated by the agency's failure to submit the rule. Agency submission of a rule is the triggering event for Congress's review and oversight powers under CRA. 5 U.S.C. §§ 802(a), (c), (e). Failure to submit a rule could have deprived Congress of the ability to exercise these powers. However, Congress has opted to treat the receipt of a GAO opinion concluding that an agency action is a rule as triggering the statutory provisions that otherwise would have been triggered by the agency's submission. Thus, Congress has used GAO opinions to cure the impediment created by the agency's failure to submit the rule, protecting its review and oversight authorities.

By requiring that agencies submit all actions that meet the CRA's definition of a rule to Congress before they can take effect, CRA gives agencies the primary responsibility for determining which agency actions meet CRA's definition of a rule. 5 U.S.C. §§ 801(a)(1)(A), 804(3). In this case, IRS submitted the revenue procedure to Congress as a rule pursuant to CRA. IRS's submission triggered Congress's review and oversight powers under CRA, starting with the transmittal of the rule to the committees of jurisdiction. When an agency submits a rule under CRA, as IRS did here, Congress suffers no deprivation. There is no impediment to Congress's exercise of those powers that could be cured by an opinion from GAO. The purpose

that a GAO opinion might serve otherwise was superseded by IRS's submission of the revenue procedure as a rule under CRA.

In its response to our Office, IRS stated that it believes Revenue Procedure 2018-38 is exempt from the CRA but that it generally submits revenue procedures to Congress pursuant to CRA "out of an abundance of caution" to (1) allow Congress to decide whether it is a rule by consulting GAO and (2) protect IRS in case something it thinks is not a rule is later determined to be a rule. IRS Letter, at 1. However, as the Court of Appeals for the Second Circuit held in *NRDC v. Abraham*, agencies "cannot have it both ways." 355 F.3d 179, 205 (2d Cir. 2004). In that case, the court addressed a Department of Energy position that the rule in question was a substantive rule for purposes of one issue in contention and a procedural rule when analyzing whether the notice-and-comment requirements of the Administrative Procedure Act (APA) applied. *Id.* The court held that the agency could not benefit from simultaneously arguing that the rule in question was both substantive and procedural. *Id.* Similarly, IRS here cannot claim both the benefit of protection from the consequences of failure to submit a rule while also shielding the rule from congressional review and oversight under CRA by arguing that it should not have submitted the rule in the first place.

Further, the description of IRS policy as described in the IRS Letter is inconsistent with IRS policy as set forth in the Internal Revenue Manual (IRM) and IRS's observed practice. IRM states that IRS determines whether each revenue procedure it issues is or is not a rule under CRA on a case-by-case basis and documents that determination in the legal file. IRM § 32.2.8.2(5). Consistent with IRM, the *Congressional Record* shows that IRS submits some revenue procedures to Congress pursuant to CRA, but not all. Of the over 50 revenue procedures issued by IRS between January and October of 2018, 13, or approximately 25 percent, were not submitted to Congress. IRS's policy and practice are inconsistent with its position that it submits all revenue procedures to Congress pursuant to CRA.

CONCLUSION

For the forgoing reasons, we conclude that IRS's submission of Revenue Procedure 2018-38 to Congress pursuant to CRA obviates the need for a GAO opinion. In these circumstances, unlike when an agency has failed to submit a rule, an opinion by GAO would not further the purposes of CRA by protecting Congress's CRA review and oversight authorities. As Congress is not deprived of exercising its powers under CRA, there is no impediment to those powers that a GAO opinion might cure. We, therefore, take no position on whether the revenue procedure is a rule otherwise.

If you have any questions about this opinion, please contact Julie Matta, Managing Associate General Counsel at (202) 512-4023 or Shirley Jones, Assistant General Counsel at (202) 512-8156.

Sincerely,

A handwritten signature in black ink that reads "Thomas H. Armstrong". The signature is written in a cursive style with a long horizontal line extending from the top of the "A".

Thomas H. Armstrong
General Counsel