

# Congress of the United States

## U.S. House of Representatives

### Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6515

December 14, 2017

The Honorable David J. Kautter  
Acting Commissioner  
Internal Revenue Service  
U.S. Department of the Treasury  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Dear Acting Commissioner Kautter:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Committee on Small Business is conducting oversight over the Internal Revenue Service (IRS). As part of this oversight, the Committee requests information about IRS enforcement of the Affordable Care Act (ACA) employer mandate.

While ACA required IRS to issue rules and to begin enforcement of the employer mandate in 2014, the IRS failed to enforce this provision of the law during the Obama Administration. In November 2017, shortly before your predecessor, Mr. Koskinen, vacated his position, IRS published guidance online that indicated it would begin the process of notifying applicable large employers (ALE) that IRS determined to owe an employer shared responsibility payment for previous years.<sup>1</sup> According to *The New York Times*, IRS has already begun notifying employers with 100 or more employees who did not offer the employees qualifying health insurance in 2015 that they are in violation of the law and subject to fines.<sup>2</sup>

While the IRS, like other federal agencies, is obligated to enforce the laws under its jurisdiction, this sudden change has caught and will catch many employers by surprise. While ACA exempted businesses with 50 or fewer employees from the employer mandate, businesses with 51 or more employees who work 30 or more hours per week were classified as ALEs and are subject to inflation adjusted shared responsibility payments of \$2,080 to \$3,390 per employee if not offered ACA qualified health insurance.<sup>3</sup> In 2015, the Congressional Budget Office

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<sup>1</sup> *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, Internal Revenue Serv., <https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act> (last updated Nov. 30, 2017). See also, The Editorial Board, *Koskinen's Parting Gift From the IRS*, THE WALL STREET JOURNAL (Nov. 7, 2017).

<sup>2</sup> Stacy Cowley, *I.R.S. Fines Employers Under A.C.A.*, THE N.Y. TIMES, Nov. 17, 2017.

<sup>3</sup> An ALE with at least 50 but fewer than 100 full-time employees during 2014 received transition relief from employer shared responsibility payments in 2015, provided that certain conditions were met. See EMPLOYER SHARED RESPONSIBILITY PROVISION TRANSITION RELIEF FOR 2015 PLAN YEARS, Internal Revenue Service, available at <https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provision-transition-relief-for-2015-plan-years>.

estimated that ALEs would owe shared responsibility payments of \$9 billion in FY2016 and \$13 billion in FY2017.<sup>4</sup>

Many small businesses followed the law's paperwork submission requirements to comply with ACA's employer mandate provision, but received no information from IRS about submitting the shared responsibility payments they owed. After the Obama-era IRS failed to enforce the law for several years, these small businesses are now subject to random and abrupt collection of these payments by the IRS. This sudden action will be disproportionately burdensome for businesses that ACA considers large, but the rest of the federal government, including the Small Business Administration (SBA),<sup>5</sup> considers small. SBA assesses 509 different industries and only one—less than one percent—has a 50 or fewer employee threshold to determine business eligibility for government programs or exempt from regulations. For most industries, SBA uses a 500 or fewer employee threshold, and businesses with up to 1,500 employees can be determined "small" depending on the industry.<sup>6</sup> Additionally, IRS did not perform Regulatory Flexibility Act analysis of the impact of the rulemaking on small businesses<sup>7</sup> even after the independent SBA Office of Advocacy requested that IRS do so.<sup>8</sup>

In light of these concerns, the Committee requests the following information as soon as possible, but no later than noon on Thursday, December 28, 2017:

1. As of December 1, 2017, the total number of ALEs that IRS has notified of employer shared responsibility payments for 2015.

Please also provide the number of ALEs that IRS has notified that correspond to each of the following size categories:

- a. Fewer than 100 employees
- b. 100-150 employees
- c. 151-200 employees
- d. 201-250 employees
- e. 251-500 employees
- f. 501-750 employees
- g. 751-1000 employees
- h. 1001-1250 employees
- i. 1251-1500 employees

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<sup>4</sup> CONGRESSIONAL BUDGET OFFICE, BUDGETARY AND ECONOMIC EFFECTS OF REPEALING THE AFFORDABLE CARE ACT (June 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50252-effectsofacarepeal.pdf>.

<sup>5</sup> *Small Business Size Regulations*, Small Bus. Admin., <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/small-business-size-regulations> (last visited Dec. 13, 2017).

<sup>6</sup> See also, Sofie E. Miller, *IRS and SBA Office of Advocacy Spar over Affordable Care Act Implementation*, REGULATORY STUDIES CTR., THE GEORGE WASHINGTON UNIV. (Feb. 18, 2014).

<sup>7</sup> Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8543 (Feb. 12, 2014) to be codified at 26 C.F.R. 1, 26 C.F.R. 301, 26 C.F.R.54).

<sup>8</sup> Letter from Winslow Sargeant, Chief Counsel for Advocacy, U. S. Small Bus. Admin., to William J. Wilkins, Chief Counsel, Internal Revenue Serv. (Feb. 21, 2013), available at [https://www.sba.gov/sites/default/files/files/IRS\\_Employer\\_Mandate\\_Letter\\_2\\_21\\_2013.pdf](https://www.sba.gov/sites/default/files/files/IRS_Employer_Mandate_Letter_2_21_2013.pdf).

2. As of December 1, 2017, the total number of ALEs that IRS plans to notify of employer shared responsibility payments for 2015.

Please also provide the number of ALEs that IRS plans to notify that correspond to each of the following size categories:

- a. Fewer than 100 employees
  - b. 100-150 employees
  - c. 151-200 employees
  - d. 201-250 employees
  - e. 251-500 employees
  - f. 501-750 employees
  - g. 751-1000 employees
  - h. 1001-1250 employees
  - i. 1251-1500 employees
3. Which factors did IRS use to prioritize the order in which ALEs were notified of employer shared responsibility payments for 2015?
  4. Does IRS intend to enforce the ACA employer mandate for years 2016 and 2017? If so, when will the enforcement actions begin?
  5. Prior to guidance being posted on the IRS website in November 2017, did IRS notify any small businesses or small business trade associations that the enforcement actions were beginning?

The Committee also requests IRS provide a briefing about IRS enforcement of ACA's employer mandate.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2361 of the Rayburn House Office Building and the Minority Staff in Room 2069 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Sharon Utz of the Majority Staff at (202) 225-5821. Thank you for your attention to this matter.

Sincerely,



Steve Chabot  
Chairman