
Essay

An Overlooked Dimension to OIRA Review of Tax Regulatory Actions

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Introduction	454
I. OIRA Review and the MOA.....	458
A. OIRA 101.....	458
B. Regulatory Impact Analysis.....	460
C. The MOA	462
II. Implications for APA Compliance	465
A. Reasoned Decisionmaking.....	468
B. Statutory Interpretation	470
C. APA Procedural Requirements	473
III. Still a Work in Progress	476
Conclusion.....	480

INTRODUCTION

The Office of Information and Regulatory Affairs (OIRA) is often labeled “the most important government office you’ve never heard of.”¹ Yet, for most federal government agencies, OIRA review is a

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1. See, e.g., Center for Regulatory Effectiveness in Legislation, *OIRA: The Most Important Government Office You’ve Never Heard Of*, INDEP. VOTER NEWS (Jan. 29, 2016), <https://ivn.us/2016/01/29/oira-important-government-office-youve-never-heard> [<https://perma.cc/7CQZ-VA8K>]; see also David Dayen, *Cass Sunstein’s OIRA: The Most Powerful Regulation-Smiting Agency You’ve Never Heard Of*, SHADOWPROOF (Nov. 29, 2011), <https://shadowproof.com/2011/11/29/cass-sunsteins-oira-the-most-powerful-regulation-smiting-agency-youve-never-heard-of> [<https://perma.cc/N2SC-3WT3>]; *OIRA 101: The Most Powerful Government Office You’ve Never Heard Of*, CTR. FOR PROGRESSIVE REFORM, <http://progressivereform.org/our-work/regulatory-policy/oira-101-most-powerful-government-agency-youve-never-heard> [<https://perma.cc/>]

critical part of the rulemaking process. In accordance with Executive Order (EO) 12866, agencies submit “significant” rules and regulations, along with analysis of their benefits and costs, to OIRA both before those actions are proposed and then again before they are finalized.² Submitting a regulatory action to OIRA kicks off a review process that has its supporters and its detractors.³

For most of OIRA’s history, tax rules and regulations have avoided OIRA review due to agreements between OIRA and the Treasury Department (Treasury) exempting them.⁴ In April 2018, consistent with EO 13789,⁵ the Treasury and OIRA signed a Memorandum of Agreement (MOA) providing that, for the first time in history, tax regulatory actions would be broadly reviewable by OIRA under EO 12866.⁶ After four years of OIRA review of tax regulatory actions, with the transition to the Biden administration, speculation is rampant over whether Treasury and OIRA will revisit or revoke entirely the MOA.⁷ Meanwhile, the recently-enacted American Rescue Plan Act⁸ includes a number of tax components, which means more tax rules and regulations that could be subject to OIRA review if the MOA remains in place.⁹

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2. See Exec. Order No. 12,866 § 6, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735, 51,740 (Oct. 4, 1993).

3. A robust academic literature considers various aspects of the OIRA review process. For just a few examples, see Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673 (2020); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059 (1986).

4. See *Treasury Docs Show Agreement Waiving OMB Review for IRS Rulings*, 2016 TAX NOTES TODAY 185-20 (Sept. 23, 2016) (publishing agreements from 1983 and 1993 between OMB and Treasury exempting most tax regulatory actions from OIRA review); see also Bridget C.E. Dooling, *OIRA’s Expanded Review of Tax Regulations and Its Surprising Implications*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 224, 226–27 (2019) (documenting this history).

5. Exec. Order No. 13,789, *Identifying and Reducing Tax Regulatory Burdens*, 82 Fed. Reg. 19,317 (Apr. 21, 2017).

6. See *Treasury, OMB Come to Agreement on Tax Reg Review*, 2018 TAX NOTES TODAY 72-45 (Apr. 11, 2018).

7. See, e.g., Jonathan Curry, *OMB’s Tax Reg Reviews Dodge Biden’s Regulatory Reckoning*, 170 TAX NOTES FED. 631 (Jan. 25, 2021); Martin A. Sullivan, *Should the Biden Administration Maintain OMB Review of Tax Regs?*, 169 TAX NOTES FED. 1725 (Dec. 14, 2020).

8. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

9. See, e.g., Alistair M. Nevius, *American Rescue Plan Act Passes with Many Tax*

For most tax advisers and their clients, OIRA is a black box. The MOA initially raised a variety of concerns among tax practitioners, including but not limited to the potential that tax rules and regulations would be politicized and suffer extended delays with no discernible upside.¹⁰ Some of those early skeptics later recognized those concerns as overblown.¹¹ Other critiques of OIRA review for tax regulatory actions have focused on the methodologies for and challenges of satisfying the requirement of EO 12866 that agencies assess and disclose the benefits and costs of regulatory proposals; those arguments continue.¹²

Substantially less attention has been paid to the more qualitative and legal doctrinal aspects of OIRA review with respect to transparency, accountability, and public participation in the regulatory process. Although OIRA neither possesses nor claims particular responsibility for ensuring agency compliance with the Administrative Procedure Act (APA), the OIRA review process has that effect. It forces the agency pursuing the rulemaking to identify where it has policy-making discretion, which in turn prompts the agency to do a better job of disclosing the regulatory alternatives that are available, soliciting public comments where they might be useful in deciding among those alternatives, and explaining the agency's choices—as required by the APA.

Components, J. OF ACCOUNTANCY (Mar. 10, 2021), <https://www.journalofaccountancy.com/news/2021/mar/tax-components-coronavirus-relief-bill.html> [<https://perma.cc/5U57-YSCH>].

10. See, e.g., *Timeliness Key to OMB Review of Tax Regs*, ABA Tax Section Says, 2018 TAX NOTES TODAY 82-12 (Apr. 26, 2018) (publishing letter from ABA Tax Section Chair Karen Hawkins to OMB and Treasury officials expressing concerns); Martin A. Sullivan, *Economic Analysis: OMB-Treasury Memo Creates Guidance Uncertainty and Delay*, 159 TAX NOTES 443 (Apr. 23, 2018); Jonathan Curry, *Lankford Steps Into Odd Role in Oversight of Tax Implementation*, 159 TAX NOTES 396 (Apr. 16, 2018) (quoting practitioner and former Treasury official Gregory Jenner raising concerns).

11. See, e.g., Jonathan Curry, *Spotlight on OIRA's Review Process Eases Politicization Concerns*, 162 TAX NOTES 1520 (Mar. 25, 2019) (quoting practitioner and former Treasury official Gregory Jenner, "If this continues on as it is, my concerns are unfounded, and I walk away a happy kid.").

12. See, e.g., Greg Leiserson, *Cost-benefit Analysis of U.S. Tax Regulations Has Failed: What Should Come Next?*, WASH. CTR. FOR EQUITABLE GROWTH (Sept. 30, 2020), <https://equitablegrowth.org/research-paper/cost-benefit-analysis-of-u-s-tax-regulations-has-failed-what-should-come-next> [<https://perma.cc/9SQN-CZ84>]; Greg Leiserson & Adam Looney, *A Framework for Economic Analysis of Tax Regulations*, ECON. STUD. AT BROOKINGS (Dec. 2018), https://www.brookings.edu/wp-content/uploads/2018/12/ES_20181220_Looney-OIRA-Tax-Regs.pdf [<https://perma.cc/UJ48-5EFD>]; David A. Weisbach, Daniel J. Hemel, & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507 (Sept. 10, 2018).

For agencies that have been submitting their regulatory actions to OIRA review for several decades, the connection between OIRA review and APA compliance may not be so apparent. Many contemporary administrative law requirements derive from case law interpreting the APA's rulemaking provisions in the late 1970s and early 1980s, around the same time that OIRA was first established. Thus, for most agencies, OIRA review and compliance with contemporary APA procedure and process requirements for agency rulemaking have developed in tandem with one another.

By contrast, in the tax context, where APA compliance has been spotty and OIRA review has been historically nonexistent, the qualitative and legal doctrinal aspects of OIRA review are more noticeable. At least until the Supreme Court's decision in *Mayo Foundation for Medical Education and Research v. United States* rejected tax exceptionalism from general administrative law requirements,¹³ Treasury and the IRS were guided by outmoded understandings of administrative law and statutory interpretation. The result was a poor track record of tax compliance with the APA procedure and process requirements. Although judicial review after *Mayo Foundation* has brought greater awareness of APA requirements to the tax community, old habits die hard, and Treasury and the IRS continue to cling to old ideas. OIRA review has been and is a better and more systematic vehicle for bringing tax regulatory actions into compliance with the APA.

The principal goal of this Essay is to unpack a few of the ways in which the MOA and OIRA review of tax regulatory actions have prodded Treasury and the IRS into greater awareness of and adherence to APA procedure and process requirements.¹⁴ Relatedly, the tax

13. 562 U.S. 44, 55 (2011) (“[W]e are not inclined to carve out an approach to administrative review good for tax law only.”).

14. For purposes of this Essay, I will leave aside the potential of OIRA review as a solution for complaints that Treasury and the IRS have failed to live up to their obligations under the Paperwork Reduction Act and the Regulatory Flexibility Act. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-381, PAPERWORK REDUCTION ACT: AGENCIES COULD BETTER LEVERAGE REVIEW PROCESSES AND PUBLIC OUTREACH TO IMPROVE BURDEN ESTIMATES (2018) (raising concerns about IRS Paperwork Reduction Act analysis and disclosure); U.S. GOV'T ACCOUNTABILITY OFF., GAO/T-GGD-95-112, REGULATORY FLEXIBILITY ACT: STATUS OF AGENCIES' COMPLIANCE (Mar. 8, 1995) (reporting to Congress that the Small Business Administration, which monitors compliance with the Regulatory Flexibility Act, viewed the IRS as “repeatedly . . . failing to comply with the act”); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1605–07 (2006) (documenting a history of congressional dissatisfaction with IRS compliance with the Regulatory Flexibility Act). Although valid, those concerns are worthy of deeper consideration than this Essay allows. I will simply note that a cursory review of more recent regulatory preambles suggests that OIRA review has yielded greater compliance with these statutes as well. *See, e.g.*, Final

experience highlights a symbiotic relationship between OIRA review under EO 12866 and APA compliance that may be less obvious in other agency contexts. To some extent, this account is based on my own service as Special Adviser to the OIRA Administrator, helping to implement the MOA, from April 2018 to April 2019. Nevertheless, many of my observations are supported by government documents and secondary sources in addition to my own experience.

With that qualifier, this Essay proceeds in three parts. In Part I, for the benefit of those still getting to know OIRA and the MOA, I offer a brief introduction to the agency and the history leading up to the MOA. In Part II, I offer specific examples of Treasury and IRS regulatory practices that are problematic from an administrative law perspective, and describe how OIRA review helps to mitigate those tendencies. In Part III, I analyze a policy statement issued by Treasury roughly a year after the MOA was signed in which Treasury commits to several amendments of its rulemaking practices. In some ways, this document reflects greater awareness of Treasury and IRS obligations under the APA. In other ways, however, it reflects a stubborn refusal on the part of Treasury to accept that its practices will have to change.

I. OIRA REVIEW AND THE MOA

What OIRA does is obscure for most people, even outside the tax context. Likewise, most tax lawyers know very little about OIRA review, although they are learning. To understand the MOA and its implications, just a little background regarding the OIRA review process and the tax system's relationship with it may be useful.

A. OIRA 101

OIRA was established by the Paperwork Reduction Act of 1980 to administer government information collection efforts and ensure agency compliance with that statute's mandates—a role that OIRA continues to perform.¹⁵ Very quickly, however, OIRA's responsibilities expanded dramatically beyond mere Paperwork Reduction Act compliance.

regulations and removal of final and temporary regulations, Section 199A Rules for Cooperatives and Their Patrons (T.D. 9947), 86 Fed. Reg. 5544, 5565–68 (2021) (offering more extensive Paperwork Reduction Act and Regulatory Flexibility Act analysis than commonly was seen in Treasury regulation preambles prior to the MOA).

15. 44 U.S.C. §§ 3503–04; see also Susan E. Dudley, *The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States*, REG. AND GOVERNANCE 1, 5 (2020), <https://doi.org/10.1111/rego.12337> (documenting OIRA's history).

In particular, first President Ronald Reagan's EO 12291, and later President Bill Clinton's EO 12866, required agencies to submit "significant" regulatory actions to OIRA, including an assessment of their benefits and costs as well as the benefits and costs of potential alternatives.¹⁶ OIRA was then tasked with confirming compliance with the EO and applicable law, as well as ensuring that the rules in question did not conflict with those of other agencies or with presidential priorities.¹⁷ As defined by EO 12866, regulatory actions are significant when they have an annual economic effect of \$100 million or more, are inconsistent with the actions of other agencies, "materially alter the budgetary impact of entitlements," or "raise novel legal or policy issues."¹⁸

OIRA is a subordinate agency within the Office of Management and Budget (OMB), which in turn is part of the Executive Office of the President of the United States (EOP). Thus, apart from (or sometimes in conjunction with) debating the analysis of benefits and costs that is a key aspect of OIRA review, scholars have recognized OIRA's role as an instrument of presidential oversight of executive branch regulatory actions and policy.¹⁹ Critics of OIRA review complain that, at the behest of the President and his advisers, OIRA demands changes in regulations and delays the publication of agency regulations and sub-regulatory guidance for political reasons.²⁰ In this regard, what critics see as a bug (*e.g.*, for politicizing rulemaking better left to comparatively neutral agency experts), defenders may see as a feature (*i.e.*, for providing greater accountability for rules adopted by unelected agency administrators).

Regardless, Cass Sunstein, who served as OIRA Administrator during President Barack Obama's administration, has responded to this complaint with the observation that, "while the President is

16. Exec. Order No. 12,866 § 6(a)(3)(B), (C), 58 Fed. Reg. at 51,741; Exec. Order No. 12,291 § 3, *Federal Regulation*, 46 Fed. Reg. 13,193 (Feb. 19, 1981); Dudley, *supra* note 15, at 5–7. EO 12291 called for OIRA review of "major rules" rather than "significant regulatory actions," but the definitions and regulatory impact analysis requirements for the two are very similar.

17. Exec. Order No. 12,866 § 6(b), 58 Fed. Reg. at 51,742; Exec. Order No. 12,291 §§ 3(e)(1), 6(a), 46 Fed. Reg. at 13,193.

18. Exec. Order No. 12,866 § 3(f), 58 Fed. Reg. at 51,738; *see also* Exec. Order No. 12,291 § 1(b), 46 Fed. Reg. at 13,193 (defining "major rule" similarly).

19. *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 732–37 (2007); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247–51 (2001).

20. *See, e.g.*, Sidney A. Shapiro, *OMB and the Politicization of Risk Assessment*, 37 ENV'T L. 1083 (2007).

ultimately in charge, the White House itself is a 'they,' not an 'it.'"²¹ As Sunstein describes it, OIRA's role is better characterized as facilitating the evaluation of regulatory proposals across a broader group of interested governmental actors.²² OIRA circulates draft regulations among potentially-interested federal government offices and agencies, both inside the EOP and across the executive branch.²³ It then collects feedback for the issuing agency and, where necessary, coordinates intragovernmental discussion and negotiation of regulatory terms.²⁴ Although OIRA sometimes asserts its own views, OIRA typically seeks "to identify and convey interagency views and to seek a reasonable consensus."²⁵ Delays in the publication of agency regulatory actions are more properly attributed to unaddressed concerns that OIRA has identified in consultation with other agencies and EOP personnel—concerns that may be highly technical and require "continuing substantive discussion."²⁶ "Much of the time, the problem is not that OIRA, or anyone else, has a fundamental objection to the rule and the agency's approach. It is that the technical questions need good answers."²⁷

B. REGULATORY IMPACT ANALYSIS

For many observers, the defining feature of OIRA review is the comparison of the anticipated benefits and costs of a regulatory action and its potential alternatives. EO 12291 used the term "regulatory impact analysis" for this comparison, and OIRA personnel tend to use that term as well, whereas EO 12866 captures the same concept but speaks merely of analyzing the benefits and costs of regulatory actions.²⁸ The point of this Essay is not to delve deeply into the requirements and methodologies of regulatory impact analysis. Nevertheless, a few observations regarding regulatory impact analysis under EO 12866 are relevant to this Essay.

The regulatory impact analysis that EO 12866 envisions is not limited only to economic considerations.²⁹ EO 12866 defines the

21. Sunstein, *supra* note 3, at 1840.

22. *Id.* at 1854–57.

23. *Id.*; *see also* Dudley, *supra* note 15, at 11 (documenting the same process).

24. Sunstein, *supra* note 3, at 1854–57; Dudley, *supra* note 15, at 11.

25. Sunstein, *supra* note 3, at 1841.

26. *Id.* at 1842.

27. *Id.* at 1843.

28. *Compare* Exec. Order No. 12,866 § 6(a)(3), 58 Fed. Reg. at 51,741, *with* Exec. Order No. 12,291 § 3, 46 Fed. Reg. at 13,193.

29. *See* Dudley, *supra* note 15, at 13 (observing distinction between regulatory

benefits to be considered as including, “but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias,” irrespective of whether those benefits are quantifiable.³⁰ Correspondingly, the costs to be assessed in the analysis include not only “the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation,” but also “any adverse effects on the efficient functioning of the economy, private markets . . . , health, safety, and the natural environment,” again whether or not those costs can be quantified.³¹ In other words, regulatory impact analysis under EO 12866 is qualitative as well as quantitative, reflecting not only the most direct, obvious, and quantifiable costs and benefits but also hard-to-quantify goals and values.

In addition, EO 12866 requires agencies to assess and include with their regulatory impact analysis the “costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.”³² Given the qualitative as well as quantitative aspects of contemporary regulatory impact analysis, the goal is not necessarily to pursue the least costly alternative approach, but rather to provide a framework for reasoned decisionmaking.³³ Meanwhile, the expectation that agencies will identify and evaluate regulatory alternatives has the effect of teasing out where agencies have policymaking discretion, as opposed to where their actions are dictated by statutory requirements.

Finally, reviewing all of this analysis of benefits, costs, and regulatory alternatives is not limited to the issuing agency and OIRA personnel. Consistent with the intragovernmental review process described above, the regulatory impact analysis that agencies transmit to OIRA is then circulated to other offices in the EOP and relevant

impact analysis and economic benefit-cost analysis).

30. Exec. Order No. 12,866 § 6(a)(3)(C)(i), 58 Fed. Reg. at 51,741 (specifying that benefits should be quantified “to the extent feasible”).

31. *Id.* § 6(a)(3)(C)(ii), 58 Fed. Reg. at 51,741.

32. *Id.* § 6(a)(3)(C)(iii), 58 Fed. Reg. at 51,741.

33. Although EO 12291 required agencies to provide legal reasons why lower-cost alternatives could not be adopted, EO 12866 does not contain that requirement. *Compare* Exec. Order No. 12,866 § 6(a)(3)(C), 58 Fed. Reg. at 51,741, *with* Exec. Order No. 12,291 § 3(d)(4), 46 Fed. Reg. at 13,193.

executive branch agencies for their consideration. Ultimately, it is also disclosed to the public.³⁴

C. THE MOA

Shortly after OIRA was created and EO 12291 began requiring OIRA review of significant regulatory actions, in April 1983, OIRA Administrator Christopher DeMuth and Treasury General Counsel Peter Wallison signed a Memorandum of Understanding (MOU) that, in practice, functioned to exclude virtually all tax regulatory actions from OIRA review.³⁵ The 1983 MOU did not attempt to justify its terms, but the reasons for it are not difficult to discern. OIRA was tasked with enforcing the Paperwork Reduction Act, which carried a certain anti-IRS flavor, which arguably counseled against the 1983 MOU. Yet, President Reagan came to office concerned about the economic effects of traditional, 1930s-style economic regulation of selected industries as well as the growing burden of agency regulations in the environmental and consumer protection areas.³⁶ Although the Reagan administration pursued tax simplification and lower tax rates, the regulatory and social welfare functions that the tax system now performs were much less robust in the early 1980s.³⁷ Meanwhile, prominent tax practitioners and even some members of Congress objected to OIRA review of tax regulatory actions, thus supporting Treasury's desire for the 1983 MOU.³⁸ For an OIRA that was just getting started and focusing on other

34. See, e.g., Final Regulations (T.D. 9944), 86 Fed. Reg. 4,728, 4,752–56 (Jan. 15, 2021) (disclosing regulatory impact analysis); Notice of proposed rulemaking, 84 Fed. Reg. 69,124, 69,140–44 (Dec. 17, 2019) (same).

35. See *Treasury Docs Show Agreement Waiving OMB Review for IRS Rulings*, 2016 TAX NOTES TODAY 185–20 (Sept. 23, 2016) (publishing the 1983 MOU); see also Dooling, *supra* note 4, at 226–27 (documenting this history).

36. See, e.g., Jefferson Decker, *Deregulation, Reagan-Style*, REG. REV. (Mar. 13, 2019), <https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style> [<https://perma.cc/CE6X-CGQR>].

37. See, e.g., Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 69–71 (2013) (documenting the dramatic transformation of the Internal Revenue Code as a vehicle for policymaking unrelated to revenue raising since the early 1980s).

38. See, e.g., *NYSBA Opposes OMB Review of Tax Regulations and Rulings*, 2018 TAX NOTES TODAY 48–24 (Mar. 12, 2018) (publishing an August 25, 1983 report submitted to Treasury by the New York State Bar Association); *Former IRS Commissioner Scolds Continued OMB Review of Treasury Regs*, 2018 TAX NOTES TODAY 48–27 (Mar. 12, 2018) (publishing a letter dated May 21, 1983 from Sheldon S. Cohen to Peter J. Wallison); Cynthia S. Chegwiddden, *Justice and OMB Agree on Paperwork Reduction Rules; Treasury's Comments Reflect 'Tempered' Concern*, 17 TAX NOTES 563 (Nov. 15, 1982); see also Marie Sapirie, *News Analysis: A Historical Perspective of OMB's Review of Tax Rules*, 158 TAX NOTES 1752 (Mar. 26, 2018) (reviewing additional communications from the early

priorities, signing the MOU with Treasury would have been an easy call.³⁹

During the Clinton administration, in 1993, Administrator Sally Katzen and Treasury Department General Counsel Jean Hanson exchanged letters reaffirming the basic premises of the original 1983 MOU. Critics of OIRA review within the Democratic party were pushing Clinton officials to curtail or even eliminate it, so expanding OIRA review to new agencies was not politically viable.⁴⁰ Meanwhile, OIRA officials were concerned about their own lack of tax expertise and the resulting potential for unintended consequences given the complexity of the tax laws; and they also were convinced by Treasury officials that Congress made most of the policy decisions in the tax context, leaving the agency little discretion.⁴¹ Katzen also has expressed her understanding that the 1983 MOU only exempted “technical rules interpreting discrete provisions of the tax code—such as whether an otherwise unspecified reference to ‘days’ means calendar days or business days”—and suggested that what was intended to be a narrow exemption over time had become a more substantial “loophole” for avoiding OIRA review.⁴²

By the time that OIRA Administrator Neomi Rao and Treasury Department General Counsel Brent McIntosh signed the MOA on April 11, 2018, perceptions about tax exceptionalism had changed substantially. Congressional use of the tax system to implement and administer regulatory and social welfare programs had grown substantially, to the point where tax regulatory actions for such purposes represented a sizeable plurality of the rules and regulations that Treasury and the IRS issued.⁴³ The Supreme Court’s decision in *Mayo*

1980s).

39. This account of the 1983 MOU comes partly from a conversation between the author and Christopher DeMuth at a luncheon hosted by the C. Boyden Gray Center for the Study of the Administrative State on September 13, 2019, as confirmed by subsequent emails.

40. This account of the 1993 decision to extend the 1983 MOU comes from a panel presentation by Sally Katzen at the Society for Benefit-Cost Analysis Annual Conference on March 19, 2021, as confirmed by a subsequent conversation.

41. *Id.*

42. Susan E. Dudley & Sally Katzen, *The Story Behind the IRS’s Exemption from Oversight*, WALL ST. J. (Feb. 22, 2018), <https://www.wsj.com/articles/the-story-behind-the-irss-exemption-from-oversight-1519341868> [<https://perma.cc/QRC4-JL7P>].

43. See, e.g., Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1746–53 (2014) (documenting that a large plurality of Treasury regulation projects from 2008 through 2012 concerned social welfare and regulatory programs embedded in the Internal Revenue Code, rather than the IRS’s traditional revenue raising function); Pamela F. Olson, *Woodworth Memorial Lecture: And Then Cnut Told*

*Foundation*⁴⁴ and subsequent court cases raised awareness of tax as just another field of government regulation.⁴⁵ Members of Congress and industry representatives wrote letters to OIRA and the IRS raising concerns about whether tax regulatory practices complied with statutory requirements and wondering why tax regulatory actions were exempt from OIRA review.⁴⁶ In 2016, the Government Accountability Office published a study of Treasury and IRS regulatory practices that raised several concerns, highlighted the increasing use of the tax code as a social welfare and regulatory tool, and recommended specifically that OMB and Treasury reconsider their longstanding agreement exempting tax regulatory actions from OIRA review.⁴⁷ In April 2017, President Trump expressly ordered Treasury and OIRA to reconsider their longstanding agreement exempting tax regulatory actions from OIRA review.⁴⁸

The MOA provides for OIRA review of tax regulatory actions under EO 12866, but with several modifications.⁴⁹ First, the MOA provides its own list of conditions leading to OIRA review, including benefit-cost analysis, that is similar to but not precisely the same as the significance definition contained in EO 12866. Like EO 12866, the

Reagan . . . Lessons From the Tax Reform Act of 1986, 38 OHIO N.U. L. REV. 1, 12–13 (2011) (observing that tax administration now covers “policies aimed at the environment, conservation, green energy, manufacturing, innovation, education, saving, retirement, health care, child care, welfare, corporate governance, export promotion, charitable giving, governance of tax exempt organizations, and economic development, to name a few”); Edward D. Kleinbard, *Woodworth Memorial Lecture: The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1, 3 (2010) (observing that tax expenditures are now “the dominant instruments for implementing new discretionary spending policies”).

44. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011) (rejecting exceptionalism in judicial review of tax regulatory actions).

45. See, e.g., *Altera Corp. & Subs. v. Comm’r*, 145 T.C. 91 (2015), *rev’d* 926 F.3d 1061 (9th Cir. 2019); *Good Fortune Shipping SA v. Comm’r*, 897 F.3d 256 (D.C. Cir. 2018); *Chamber of Commerce v. Internal Revenue Service*, No. 1:16-CV-944-LY, 2017 WL 4682050 (W.D. Tex. Oct. 6, 2017).

46. See, e.g., *Senators Ask OIRA to Review Deal Exempting IRS Regs from Review*, 2018 TAX NOTES TODAY 32–24 (Feb. 15, 2018); *Hatch Requests Private Treasury Memo on Federal Tax Regulations*, 2016 TAX NOTES TODAY 85–30 (May 3, 2016); see also Dooling, *supra* note 4, at 226–27 (documenting this history).

47. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-720, REPORT TO CONGRESSIONAL REQUESTERS, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 35 (2016).

48. Exec. Order No. 13,789 § 2(c), *Identifying and Reducing Tax Regulatory Burdens*, 82 Fed. Reg. 19,317, 19,317 (Apr. 26, 2017).

49. See *Treasury, OMB Come to Agreement on Tax Reg Review*, 2018 TAX NOTES TODAY 72–45 (Apr. 13, 2018) [hereinafter *Memorandum of Agreement*] (publishing the MOA).

MOA specifies that tax regulatory actions will be subject to OIRA review if they are inconsistent with the actions of other agencies, “raise novel legal or policy issues,” or are economically significant.⁵⁰ But in a nod to the tax system’s revenue-raising role, the MOA defines economic significance as “hav[ing] an annual *non-revenue* effect on the economy of \$100 million or more, measured against a no-action baseline.”⁵¹ Taxpayers commonly perceive taxes paid as a cost, while the government typically perceives taxes collected—i.e., revenue—as a benefit. Again, however, from OIRA’s perspective, the primary goals of regulatory impact analysis are to identify where the agency has policymaking discretion and to disclose the relative consequences of the available choices. Taking revenue effects out of the equation is more illuminating than obfuscating in this regard.

Another difference between the MOA and EO 12866 concerns the timing of OIRA review. The ordinary time frame for OIRA review under EO 12866 is 90 days.⁵² As a concession to concerns about the desirability or need for releasing tax rules and regulations more quickly, the MOA cuts the time for OIRA review of tax regulatory actions to 45 days.⁵³ In a nod to concerns about delays particularly with respect to the Tax Cuts and Jobs Act of 2017, which was enacted just a few months before the MOA was signed, the MOA additionally specifies that Treasury may request an expedited 10-day review for tax regulatory actions implementing that legislation.⁵⁴ Since the MOA was signed, OIRA has added personnel with tax expertise.

II. IMPLICATIONS FOR APA COMPLIANCE

For many years, the tax community generally perceived tax regulatory actions as falling outside of, and as exempt from, general administrative law requirements, doctrines, and norms. It is impossible to determine fully how or why that perception came to be. A natural silo effect that evolves when attorneys specialize probably contributed, as busy government officials and tax practitioners quite sensibly focused their attention on the tax laws instead of changes in administrative law doctrine.⁵⁵ Also, a reorganization of the IRS Chief Counsel’s Office

50. *Id.* at § 1. Although § 1 does not use the term “significant,” other provisions of the MOA refer to economic significance in obvious reference to § 1(c).

51. *Id.* at § 1(c).

52. Exec. Order No. 12,866 § 6(b)(2)(B), 58 Fed. Reg. at 51,742.

53. *Memorandum of Agreement*, *supra* note 49, at § 4(a).

54. *Id.* at § 4(a)–(b).

55. See Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 558–59 (2011) (positing a similar theory for why judicial decisions in tax

in the 1980s eliminated the division of that office with the most administrative law expertise and dispersed the responsibility for regulation drafting across several new divisions organized along subject-matter lines.⁵⁶ The result was a decline in the attentiveness to administrative law among tax regulation drafters at a time when Treasury was struggling with a backlog of regulatory projects.⁵⁷ In other words, Treasury and IRS noncompliance with the APA may have evolved over time as an unanticipated and unintended consequence of well-intentioned and otherwise successful organizational changes.

Regardless, the Internal Revenue Manual has acknowledged for many years that tax regulatory actions are subject to the APA and other general regulatory statutes like the Paperwork Reduction Act and the Regulatory Flexibility Act.⁵⁸ Yet, tax administrators have consistently interpreted those statutes and framed tax regulatory actions to claim simultaneously that their actions are exempt from most of the requirements those statutes impose and that they voluntarily comply with those same requirements anyway.⁵⁹ Even before, but certainly after, the Supreme Court's *Mayo Foundation* decision, tax scholars and practitioners questioned these assertions and observed that Treasury and IRS rules and regulations were not precisely APA-compliant.⁶⁰

and other highly specialized legal fields sometimes deviate from general administrative law requirements).

56. See Fed. Bar Ass'n, *Interview with Donald L. Korb, Chief Counsel, IRS*, 2005-FALL FED. B.A. SEC. TAX'N REP. 1, 9 (2005).

57. See Kristin E. Hickman, *Coloring Outside the Lines*, 82 NOTRE DAME L. REV. 1727, 1796-99 (2007) [hereinafter Hickman, *Coloring Outside the Lines*] (documenting this history based on interviews with former IRS officials).

58. See, e.g., IRS, IRM 32.1.2.3 (2010), 2010 WL 5770264. Individual manual provisions are updated periodically without notice and without being archived, and this and other provisions summarizing Treasury and IRS obligations under the APA and other administrative law statutes were last updated in 2018 and 2019. Old versions of the Internal Revenue Manual are available on Westlaw on an annualized basis. In discussing IRS understandings and policies prior to the Supreme Court's opinion in *Mayo Foundation*, I chose the 2010 version as the most recent version that predates that decision. Citations to current Internal Revenue Manual provisions include a full date in the citation.

59. For example, the Internal Revenue Manual instructs Treasury regulation drafters that most Treasury regulations are interpretative and also that interpretative regulations are not subject to the Regulatory Flexibility Act. See IRS, IRM 32.1.2.3(3) (Aug. 16, 2018), https://www.irs.gov/irm/part32/irm_32-001-002#idm140208784533232 [<https://perma.cc/F59X-KTUJ>]; *id.* at 32.1.5.4.7.4.5.3 (Nov. 18, 2019), https://www.irs.gov/irm/part32/irm_32-001-005 [<https://perma.cc/HF8Z-9BLX>].

60. See Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 491-509 (2013) [hereinafter Hickman, *Unpacking the Force of Law*]; Hickman, *Coloring Outside the Lines*, *supra* note 57, at 1759-86; Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271, 274-75 (2012); Michael

Although the courts post-*Mayo Foundation* have occasionally invalidated tax regulatory actions for failing to follow APA requirements, the courts are not an especially effective vehicle for enforcing APA compliance in the tax context. Most agency actions will never be challenged in court, for example because litigation costs would exceed compliance costs, or because affected parties want to stay on the good side of agencies before which they must appear on a regular basis.⁶¹ Challenging tax regulatory actions is complicated by unique limitations, including but not limited to an Anti-Injunction Act provision that limits the scope of pre-enforcement judicial review in many cases.⁶²

By comparison, OIRA review entails regular and sustained engagement between OIRA personnel and Treasury and IRS administrators regarding all of the most significant tax regulatory actions. OIRA review thus offers a more systematic way to prod Treasury and the IRS to reform their regulatory practices toward greater compliance with the APA. To some extent, these contributions are a consequence of the OIRA-facilitated interagency review and a general instruction in EO 12866 that the OIRA Administrator “provide meaningful guidance and oversight so that each agency’s regulatory actions are consistent with applicable law.”⁶³ But really, OIRA’s contributions in this regard may be more incidental than deliberate.

OIRA as an agency does not claim specialized expertise with respect to the APA, but many OIRA personnel have developed a good understanding of administrative law requirements, doctrines, and norms. APA rulemaking requirements and OIRA review under EO 12866 share common goals—*e.g.*, achieving reasoned decisionmaking

Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 TAX L. 343, 347 (1991).

61. See, *e.g.*, Nicholas R. Parrillo, *Federal Agency Guidance and The Power to Bind: An Empirical Study of Agencies*, 36 YALE J. ON REG. 165, 171 (2019); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 806 (2001).

62. See, *e.g.*, Kristin E. Hickman, *A Problem of Remedy*, 76 GEO. WASH. L. REV. 1153, 1162–80 (2008) (documenting justiciability limitations on pre-enforcement challenges to tax regulatory actions). Although the Supreme Court recently narrowed the scope of the Anti-Injunction Act as a limitation on pre-enforcement judicial review of tax rules and regulations, see *CIC Services, LLC v. Internal Revenue Service*, No. 19-930 (May 17, 2021), the reach and implications of that decision are presently unclear. See Kristin E. Hickman, *CIC Services, LLC v. IRS: Another Blow to Tax Exceptionalism*, YALE J. ON REGUL. NOTICE & COMMENT (May 20, 2021), <https://www.yalejreg.com/nc/cic-services-llc-v-irs-another-blow-to-tax-exceptionalism> [<https://perma.cc/4YP8-TUMA>].

63. Exec. Order No. 12,866 § 6(b), 58 Fed. Reg. at 51,742.

via thorough vetting of agency regulatory proposals, and enhancing transparency by requiring the rulemaking agency to disclose to the public the alternatives it considered and the reasons for its regulatory choices.⁶⁴ Additionally, OIRA review often entails lawyers from the Department of Justice, the OMB General Counsel's office, or the White House Counsel's office who have expertise in administrative law evaluating whether particular regulatory actions satisfy APA requirements. Thus, by pursuing the objectives of EO 12866, OIRA review indirectly leads to better compliance with the APA, especially for agencies like Treasury and the IRS that have demonstrated a lack of familiarity with the APA's terms.

The ways in which OIRA review promotes better APA compliance can be broken down into the three categories of private party challenges to agency regulatory actions more generally. The most obvious are process challenges, where Treasury and the IRS concede that they have discretion and OIRA (and eventually judicial) review focuses on the agencies' justifications for their regulatory and interpretive choices. Perhaps less obvious are substantive challenges, based on Treasury and IRS interpretations of statutory terms and requirements, and procedural challenges, which claim that Treasury and the IRS have failed to follow notice-and-comment rulemaking requirements properly.

A. REASONED DECISIONMAKING

The clearest way that OIRA review promotes APA compliance relates to judicial interpretations of the APA requiring agencies to demonstrate reasoned decisionmaking contemporaneously with their actions. No one seriously questions that Treasury and IRS officials put great care into drafting tax regulatory actions. But Treasury and IRS officials are not omniscient when it comes to identifying potential objections to or problems with their regulatory proposals, and they

64. A common critique of the OIRA review process is its own lack of transparency. See, e.g., Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections On the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL L. REV. 325, 334-40 (2014). Irrespective of whether one accepts that narrative of OIRA review, EO 12866 § 6(a)(3)(C)(iii) clearly enhances transparency by requiring the rulemaking agency to disclose and provide benefit-cost analysis for the regulatory alternatives it has considered. In the tax context, Tax Notes has obtained and published redline comparisons of regulations before and after OIRA review, providing some transparency regarding the OIRA review process itself. See, e.g., *Before and After OIRA Review Versions Provided for Proposed FTC Regs*, 2019 TAX NOTES TODAY INT'L 244-16 (Dec. 18, 2019); *Before and After OIRA Review Versions Provided for Final BEAT Regs*, 2019 TAX NOTES TODAY INT'L 242-24 (Dec. 16, 2019).

frequently could do a better job of explaining the reasons for their decisions.

Section 706(2)(A) of the APA requires reviewing courts to set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or contrary to law.”⁶⁵ Under the *State Farm* line of jurisprudence, whenever an agency possesses policymaking discretion, the APA requires it to justify its choices contemporaneously and in writing to ensure, for example, that the agency has not “entirely failed to consider an important aspect of the problem” or otherwise “[made] a clear error of judgment.”⁶⁶

The requirements of APA § 706(2)(A) and *State Farm* represent an area of extensive litigation exposure for Treasury and the IRS. For many years, the Internal Revenue Manual expressly advised drafters of tax regulations that they should not attempt in their regulatory preambles “to justify the rules that are being proposed or adopted or alternatives that were considered.”⁶⁷ As a consequence, many preambles to Treasury regulations explain how Treasury regulations work but not why Treasury and the IRS made the choices they did.⁶⁸ Post-*Mayo Foundation*, Treasury regulations have been challenged on these grounds, sometimes successfully.

In *Altera Corp. and Subsidiaries v. Commissioner*, for example, the United States Tax Court decided that Treasury had failed to “examine the relevant data” and “failed to articulate a ‘rational connection between the facts found and the choice made’” when it failed to engage in or disclose its own fact finding and disregarded significant evidence submitted by taxpayers.⁶⁹ After making clear that all Treasury regulations must satisfy the requirements of APA § 706(2)(A) and *State Farm*, the Tax Court invalidated the regulations based on Treasury’s failure to demonstrate reasoned decisionmaking.⁷⁰ Although a divided Ninth Circuit Court of Appeals reversed that decision, it did so by concluding that the regulations in question satisfied the *State Farm* standard, not that the *State Farm* standard did not apply to tax regulatory

65. 5 U.S.C. § 706(2)(A).

66. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (interpreting APA § 706(2)(A)).

67. IRS, IRM 32.1.5.4.7.3(1) (2010), 2010 WL 5770356. This sentence was later replaced by IRS, IRM 32.1.5.4.7.3(1) (2014), 2014 WL 8057034. *See also* Smith, *supra* note 60, at 274 (noting this history).

68. *See* Smith, *supra* note 60, at 274–78 (documenting the shortcomings of tax regulatory actions in this regard).

69. 145 T.C. 91, 122–27 (2015).

70. *See id.*

actions.⁷¹ Notably, even as the litigation was pending before the Ninth Circuit, the Chief of the Department of Justice Tax Division Appellate Section insisted that “[f]or tax lawyers . . . *State Farm* is irrelevant.”⁷²

In another case, *Good Fortune Shipping v. Commissioner*, the D.C. Circuit rejected a set of Treasury regulations that treated bearer stock and registered stock differently for purposes of claiming an exemption from a tax on U.S.-source gross transportation income of nonresident alien individuals and foreign corporations for a lack of “[a] sufficiently reasoned analysis.”⁷³ The court was concerned that Treasury had changed its interpretation from earlier pronouncements without adequately explaining the change.⁷⁴ Although the court did not cite *State Farm* by name, it relied on other cases in that line of jurisprudence as requiring an agency to both acknowledge and explain the reasons for interpretive policy changes.⁷⁵

As noted above, EO 12866 requires that agencies identify and analyze “potentially effective and reasonably feasible” regulatory alternatives. That requirement dovetails neatly with the APA expectation that agencies justify their regulatory choices. Although OIRA’s primary focus is on the regulatory impact analysis requirement of EO 12866 rather than the reasoned decisionmaking requirement of APA § 706(2)(A) and *State Farm*, the two are so closely intertwined that ensuring compliance with the former goes a long way toward accomplishing the latter.

B. STATUTORY INTERPRETATION

The Internal Revenue Code is a complicated statute. Tax regulatory actions routinely communicate Treasury and the IRS interpretations of the statute’s provisions. The statute contemplates as much when it authorizes Treasury to promulgate rules and regulations to effectuate its terms, both in specific substantive provisions⁷⁶ and also

71. *Altera Corp. & Subs. v. Comm’r*, 926 F.3d 1061, 1080–82 (9th Cir. 2019).

72. Andrew Velarde, *ABA Section of Taxation Meeting: Wilkins Predicts Temporary Regs Will Disappear From Rulemaking*, 163 TAX NOTES 1282 (May 20, 2019) (quoting Gilbert Rothenberg); see also Andrew Velarde, *ABA Meeting: DOJ Sticking to Its Guns in Defense of Temporary Regs’ Validity*, 92 TAX NOTES INT’L 343 (Oct. 15, 2018) (noting similar comments).

73. 897 F.3d 256, 263 (D.C. Cir. 2018).

74. See *id.* at 263–65.

75. See *id.* at 263 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) as requiring the IRS to “display awareness that it is changing position” and “show that there are good reasons for [its] new policy” as part of its “sufficiently reasoned analysis”) (emphasis omitted).

76. Two of the most prominent examples are I.R.C. § 482, concerning the

by granting Treasury the power to “prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”⁷⁷ Moreover, modern statutory interpretation theory recognizes that ambiguities abound in complex regulatory statutes like the Internal Revenue Code, and that such ambiguities represent grants of policymaking discretion to the administering agency.⁷⁸ It is for this reason that the government claims, and the Supreme Court extends, *Chevron* deference for Treasury regulations interpreting the Internal Revenue Code, whether adopted pursuant to specific or general rulemaking authority.⁷⁹ Treasury and the IRS are hardly shy about exercising their authority to adopt rules and regulations interpreting the Internal Revenue Code.

On the other hand, the IRS takes the position that most Treasury regulations merely implement the statute as written, and thus are not exercises of discretion. This idea is reflected in the Internal Revenue Manual, which says so, it seems, for the purpose of preserving claims that neither notice-and-comment rulemaking nor OIRA review apply, even if the IRS voluntarily chooses to pursue them.⁸⁰ For example, the Internal Revenue Manual asserts that most Treasury regulations are exempt from APA notice-and-comment rulemaking requirements as interpretative rules “because the underlying statute implemented by the regulation contains the necessary legal authority for the action taken and any effect of the regulation flows directly from that statute.”⁸¹ Likewise, in discussing the IRS’s obligations under EO 12866, the Internal Revenue Manual asserts that “IRS/Treasury regulations are rarely economically significant regulatory actions because the effect of the rule is usually due to the underlying statute, rather than to the regulation.”⁸²

allocation of income and deductions among affiliated entities (i.e., transfer pricing), and I.R.C. § 1502, governing the computation of the tax liability of affiliated groups making consolidated returns, but examples of specific delegations of rulemaking authority are littered throughout the Internal Revenue Code.

77. I.R.C. § 7805(a).

78. See, e.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1986).

79. See *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 56–57 (2011).

80. The same is true with respect to the applicability of the Regulatory Flexibility Act. See *supra* note 62.

81. IRS, IRM 32.1.1.2.6 (Sept. 23, 2011), https://www.irs.gov/irm/part32/irm_32-001-001 [<https://perma.cc/H5UV-BRXL>].

82. IRS, IRM 32.1.2.4 (3)(c) (Nov. 12, 2019), https://www.irs.gov/irm/part32/irm_32-001-002 [<https://perma.cc/WWN5-38FJ>].

Doctrinally, these two positions conflict, and Treasury and the IRS risk judicial invalidation of their rules and regulations by maintaining otherwise. The APA requires reviewing courts to set aside agency action found to be arbitrary and capricious—*i.e.*, not the product of reasoned decisionmaking.⁸³ Longstanding administrative law doctrine limits judicial review of agency action to the explanations offered by agency officials at the time the action is taken.⁸⁴ Applying these principles, courts often will reject an agency's regulations if the agency justifies them by claiming that the statutory interpretations they advance were required by the statute, and the court concludes instead that the statute is ambiguous and affords the agency discretion.⁸⁵

As described above, EO 12866 requires agencies to analyze the benefits and costs of not only their regulatory proposals but also feasible alternatives. Consequently, a key aspect of OIRA review involves identifying which aspects of an agency's regulatory proposals represent exercises of discretion that must be analyzed in this way. When an agency accurately believes that the statute truly only supports a single interpretation of a statute, and bases its regulatory proposal on that interpretation, then the agency lacks discretion, and there are no feasible alternatives to analyze. By contending that particular regulations lack economic significance because their effects are due to the statute rather than an exercise of regulatory discretion, then from the perspective of *Chevron* analysis and judicial review, Treasury is claiming that the meaning of the statute is clear. If pressed by OIRA personnel to commit in writing in the preamble that its regulations are

83. 5 U.S.C. § 706(2)(A).

84. *See* Sec. & Exch. Comm'n v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *see also* *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

85. *See, e.g.*, *Am. Lung Ass'n v. Env'tl. Prot. Agency*, 985 F.3d 914, 944 (D.C. Cir. 2021) (vacating agency regulations so that the agency could "interpret the statutory language anew" after concluding that the agency "failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law"); *PDK Labs, Inc. v. Drug Enf't Agency*, 362 F.3d 786 (D.C. Cir. 2004) (holding that "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly 'believes that interpretation is compelled by Congress'" (quoting *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002), and citing several other precedents for the same proposition); *cf. Negusie v. Holder*, 555 U.S. 511, 521 (2009) (rejecting an agency's interpretation of a statute because the agency "deemed its interpretation to be mandated by [case law], and that error prevented it from a full consideration of the statutory consideration here presented").

required by the statute, Treasury generally will concede that it has discretion. OIRA personnel will then ask Treasury to analyze the alternatives as part of its regulatory impact analysis and also to explain its choices as part of its notice of proposed rulemaking or final regulatory preamble.

Thus, irrespective of the Internal Revenue Manual's assertions regarding the statutory basis of most of its regulations, by reviewing Treasury's claims that its regulations lack economic significance as well as its regulatory impact analysis, OIRA is able to tease out of Treasury and the IRS their true assessments of policymaking discretion. OIRA can then ask Treasury to adjust its regulatory record to reflect those conclusions. The result is more transparency regarding the reasoning behind tax regulatory actions, which improves the ability of interested persons both within and outside the federal government to vet that reasoning and brings tax rules and regulations into better compliance with the requirements of APA and judicial review.

C. APA PROCEDURAL REQUIREMENTS

Because following notice-and-comment rulemaking procedures required by the APA is not discretionary, OIRA review might seem to be much less relevant in promoting compliance with those procedures. Nevertheless, my own experience included several occasions in which the OIRA review process included discussions and consultations with lawyers from the Department of Justice, the OMB General Counsel's office, or the White House Counsel's office, and then Treasury and IRS officials regarding whether particular tax regulatory actions raised procedural issues.

One such procedural question was whether a draft notice of proposed rulemaking provided sufficient explanation of Treasury and IRS intentions to avoid "logical outgrowth" problems. Courts have interpreted APA § 553(b) and (c) as requiring final regulations to be a logical outgrowth of the associated notice of proposed rulemaking.⁸⁶ To put the requirement another way, for a notice of proposed rulemaking to be adequate, it must "sufficiently foreshadow" the final regulations.⁸⁷ Otherwise, interested parties are denied a meaningful

86. See, e.g., *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1373–74 (Fed. Cir. 2017); *Council Tree Comm'ns, Inc. v. FCC*, 619 F.3d 235, 249–50 (3d Cir. 2010); *Shell Oil Co. v. Envtl. Prot. Agency*, 950 F.2d 741, 746–47 (D.C. Cir. 1991).

87. See, e.g., *Am. Mining Cong. v. Thomas*, 772 F.2d 617, 633 (10th Cir. 1985). The courts generally treat the logical outgrowth and sufficiently foreshadowed formulations as functionally equivalent. See, e.g., *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1267–68 (D.C. Cir. 1984) (using the terms interchangeably).

opportunity to comment on the proposed regulations and may be unfairly surprised by the final product of the rulemaking.⁸⁸ Teasing out areas of agency discretion and requiring agencies to disclose potential alternatives has the effect of highlighting where a notice of proposed rulemaking might set up an agency for an eventual logical outgrowth issue.

Correspondingly, another procedural issue sometimes highlighted by OIRA review is whether the preambles to Treasury Decisions adopting final regulations adequately address significant comments received from the public as part of the rulemaking process. APA § 553(c) requires agencies both to provide interested parties with “an opportunity to participate in the rulemaking” and to include with their final regulations a “concise general statement of their basis and purpose,” or explanatory preamble.⁸⁹ APA § 706(2)(A) in turn requires courts to set aside agency regulations that are found to be arbitrary and capricious.⁹⁰ To ensure both that the opportunity to participate is a meaningful one and that the rulemaking record is sufficiently detailed to facilitate meaningful judicial review, courts have interpreted APA § 553(c) as requiring agencies to address significant comments in the preambles to their final regulations.⁹¹ Comments and questions raised by EOP personnel and other agencies to which rulemaking documents are circulated often flag areas of potential discretion or regulatory alternatives not otherwise addressed in the EO 12866 regulatory impact analysis. In turn, regulatory impact analysis influences how rulemaking agencies respond to the comments received.

A final procedural issue that OIRA review may bring to the fore is whether the IRS is properly using subregulatory guidance—particularly revenue rulings, revenue procedures, notices, or FAQs. A perennial legal question for such documents is whether in substance they cross a line such that they must be categorized as legislative rules rather than as interpretative rules or policy statements.⁹² Legislative

88. See, e.g., *Council Tree Comm'ns*, 619 F.3d at 250 (quoting *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259–60 (D.C. Cir. 2005)); *Shell Oil*, 950 F.2d at 750–51.

89. 5 U.S.C. § 553(c).

90. 5 U.S.C. § 706(2)(A).

91. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.”).

92. See, e.g., Ronald M. Levin, *Rulemaking and The Guidance Exemption*, 70 ADMIN. L. REV. 263, 265 (2018) (describing this question as possibly “the single most frequently litigated and important issue of rulemaking procedure before the federal courts today”); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893

rules carry “the force and effect of law”; interpretative rules and policy statements do not.⁹³ Legally-binding agency regulations generally must satisfy APA notice-and-comment rulemaking procedures; non-binding interpretative rules and policy statements can but need not do so.⁹⁴

The IRS continues to maintain in the Internal Revenue Manual that most Treasury regulations are interpretative rules.⁹⁵ That position has been rejected implicitly by the Supreme Court in *Mayo Foundation*⁹⁶ and thoroughly by the United States Tax Court in *Altera*.⁹⁷ Whatever the IRS chooses to say in the Internal Revenue Manual, it appears that Treasury no longer asserts in its regulatory preambles that APA notice-and-comment rulemaking requirements do not apply, and the Department of Justice no longer argues in litigation that Treasury regulations are exempt from notice-and-comment rulemaking requirements as interpretative rules.

The status of subregulatory IRS guidance is more complicated. Whether a subregulatory guidance document is really a legislative rule that must go through notice-and-comment rulemaking turns on characteristics such as the adequacy of the statute or regulation it interprets as a basis for enforcement⁹⁸ and the bindingness of the language it uses.⁹⁹ The IRS is not alone among federal government

(2004) (“Among the many complexities that trouble administrative law, few rank with that of sorting valid from invalid uses of so-called ‘nonlegislative rules.’”).

93. See, e.g., *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979)).

94. See 5 U.S.C. § 553(b)(A) (exempting interpretative rules and policy statements from notice-and-comment rulemaking requirements); *Mortg. Bankers Ass’n*, 575 U.S. at 96–97.

95. See IRS, IRM 32.1.1.2.6 (Sept. 23, 2011), https://www.irs.gov/irm/part32/irm_32-001-001 [<https://perma.cc/EHV6-29WH>].

96. See *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 57–58 (2011) (holding that all Treasury regulations carry the force and effect of law for *Chevron* purposes, thus at least implying that they are legally-binding for APA procedural purposes as well); see also Hickman, *Unpacking the Force of Law*, *supra* note 60, at 491 (making this connection).

97. See *Altera Corp. & Subs. v. Comm’r*, 145 T.C. 91, 115–17 (2015), *rev’d on different grounds*, 926 F.3d 1061, 1080–82 (9th Cir. 2019).

98. See, e.g., *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (listing this among the factors to be considered in determining whether a pronouncement labeled an interpretative rule is, in fact, a legislative rule that carries legal force and must satisfy notice-and-comment rulemaking procedures).

99. See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946–47 (D.C. Cir. 1987) (characterizing an agency pronouncement as a legislative rule, rather than a policy statement, because language used in the document gave it present binding effect).

agencies in sometimes treading very close to the line with its subregulatory guidance.

Irrespective of its lack of legal bindingness, subregulatory guidance can be deemed significant for purposes of EO 12866, and thus subject to OIRA review. Invariably, the first question OIRA asks may be why the agency has chosen to make the pronouncement in question through subregulatory guidance rather than a Treasury regulation. Eventually, the result may be either a softening of the language of the guidance document to reduce its arguable bindingness or, alternatively, folding the more binding elements of the subregulatory guidance into a regulation subject to notice-and-comment requirements.

To be clear, the OIRA review process does not purport to enforce APA procedural requirements, and OIRA really cannot force Treasury and the IRS to comply with the APA. Nevertheless, bringing APA procedural questions to the attention of Treasury and IRS officials at least makes it more likely that APA procedures will be followed.

III. STILL A WORK IN PROGRESS

Although the MOA and OIRA review of tax regulatory actions contributes to better Treasury and IRS compliance with the APA in various ways, it would be a mistake to conclude that Treasury and the IRS are wholly on board with that program. Treasury entered into the MOA more or less voluntarily, so one might be tempted to think that it had recognized a need to bring its rulemaking practices more clearly in line with those of other agencies, and had turned to OIRA to assist with that endeavor. Such a view would be overly optimistic.

Almost a year after the MOA was signed, on March 5, 2019, Treasury issued a new policy statement that purported to announce and clarify how it and the IRS would approach certain procedural matters with respect to the issuance of tax rules and regulations.¹⁰⁰ In some respects, it seems to signal a greater awareness of and commitment to general administrative law requirements. A closer reading reflects some movement in this regard, but also illustrates that old attitudes die hard.

100. David J. Kautter & Brent J. McIntosh, *Policy Statement on the Tax Regulatory Process*, DEP'T OF THE TREASURY (Mar. 5, 2019), <https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf> [<https://perma.cc/JC3D-7V98>] [hereinafter *Policy Statement*]; see also Chief Counsel Notice CC-2019-006 (Sept. 17, 2019) (implementing the policy statement through instructions to IRS attorneys).

The policy statement addressed four key points. First, after expressing its “commitment to notice-and-comment rulemaking,” the policy statement offered the following paragraph:

The APA generally requires notice and comment for legislative rules. The APA exempts interpretative rules from notice-and-comment requirements. Nonetheless, as a matter of sound regulatory policy, the Treasury Department and the IRS will continue to adhere to their longstanding practice of using the notice-and-comment process for interpretive tax rules published in the Code of Federal Regulations.¹⁰¹

As noted above, Treasury and the IRS have asserted for many years that most Treasury regulations are exempt from APA notice and comment procedures as interpretative rules.¹⁰² Since the Supreme Court’s decision in *Mayo Foundation*, no court has agreed with that argument. The United States Tax Court has emphatically rejected it.¹⁰³ The Department of Justice no longer claims the interpretative rule exemption for Treasury regulations in actual litigation. Nevertheless, the Internal Revenue Manual continues to assert the exemption for most Treasury regulations,¹⁰⁴ and the phrasing in the above paragraph suggests that Treasury also persists in taking this position. Commenting on Treasury’s policy statement, Steve Johnson observed that the fact that Treasury continues to suggest that any of its regulations might be interpretative rules means that “the old view still has enough traction within the organization that they haven’t achieved a sufficient degree of consensus to turn the ship around.”¹⁰⁵

Second, the policy statement backed away from Treasury’s longstanding and procedurally-questionable habit of issuing temporary regulations without a contemporaneous assertion of good cause.¹⁰⁶

As a matter of sound regulatory policy, the Treasury Department and the IRS commit to include a statement of good cause when issuing any future temporary regulations under the Internal Revenue Code. . . . When sound tax

101. *Policy Statement*, *supra* note 100, at § I.

102. *See supra* notes 82–84 & accompanying text.

103. *See Altera Corp. & Subs. v. Comm’r*, 145 T.C. 91, 115–17 (2015), *rev’d on different grounds*, 926 F.3d 1061, 1080–82 (9th Cir. 2019).

104. *See* IRS, IRM 32.1.1.2.6 (Sept. 23, 2011), https://www.irs.gov/irm/part32/irm_32-001-001 [<https://perma.cc/EHV6-29WH>].

105. Jonathan Curry, *Treasury’s Regulatory Course Correction Confounds Observers*, 162 TAX NOTES 1366 (Mar. 18, 2019) (quoting Johnson also as indicating that Treasury’s assertion is “wrong, wrong, wrong”).

106. *See also* Hickman, *Unpacking the Force of Law*, *supra* note 60, at 492–502 (explaining the procedural questions stemming from Treasury’s continued reliance on this rulemaking practice post-*Mayo Foundation*); Hickman, *Coloring Outside the Lines*, *supra* note 57, at 1748–51 (documenting the large plurality of Treasury regulations adopted initially as temporary regulations without good cause claims).

administration does warrant temporary regulations, the Treasury Department and the IRS will make their reasons for issuing such immediately-effective regulations clear by including a statement of good cause in the preamble.¹⁰⁷

After Treasury issued the policy statement, former IRS Chief Counsel William Wilkins predicted that Treasury would no longer issue temporary regulations at all.¹⁰⁸ In fact, Treasury issued temporary regulations in June 2019 with an extensive good cause analysis to implement Internal Revenue Code § 245A, which was enacted by Congress as part of the Tax Cuts and Jobs Act of 2017.¹⁰⁹ Regardless, at least at one point, Treasury and IRS officials represented to OIRA personnel that they would not issue temporary regulations during the Trump administration. Whether Treasury in the Biden administration will retain this aspect of the policy statement remains to be seen.

Third, the policy statement addressed the “proper scope of subregulatory guidance documents,” specifically Revenue Rulings, Revenue Procedures, Notices, and Announcements. The policy statement asserted without discussion that “[u]nlike statutes and regulations, subregulatory guidance does not have the force and effect of law.”¹¹⁰ As described in Part II, because some IRS subregulatory guidance formats can lead to taxpayer penalties for noncompliance, whether this assertion is true in the tax context may be debatable. Regardless, the policy statement went on to list several factors Treasury and the IRS would consider in deciding whether to issue subregulatory guidance as opposed to regulations: “the intended effect on taxpayers’ rights or duties, the need for public comments, the form and content of prior positions, the significance of the issues, the statutory framework, and whether the interpretation or position is of short-term or long-term value.”¹¹¹ This statement was responsive to concerns expressed by the Government Accountability Office regarding the seemingly ad hoc nature of Treasury and IRS decisions regarding which formats to utilize in communicating substantive interpretations of the tax laws.¹¹² It is unclear at present, however, whether this broad list of factors will

107. *Policy Statement*, *supra* note 100, at § II.

108. *See Velarde*, *supra* note 72.

109. *See* T.D. 9865, 84 Fed. Reg. 28,398 (June 18, 2019); *see also* Kirstin E. Hickman, *245A and T.D. 9865: Two Steps Forward, One Step Back for Temporary Treasury Regulations?*, 11 COLUM. J. TAX L. TAX MATTERS (2020) (analyzing Treasury’s articulated reasons for claiming good cause).

110. *Policy Statement*, *supra* note 100, at § III.

111. *Id.*

112. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-720, REPORT TO CONGRESSIONAL REQUESTERS, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 16–17 (2016).

yield meaningful change in tax regulatory practices. Meanwhile, the policy statement made no mention of FAQs—a subregulatory guidance format that the IRS has been criticized for using more frequently in recent years.¹¹³

Finally, the policy statement described how Treasury and the IRS intend to approach Notices that announce an intention to propose regulations in the future, when said proposed regulations do not in fact materialize. Specifically, the policy statement provided,

Failure to promulgate regulations previewed in notices on a timely basis can cause confusion or uncertainty for taxpayers. To limit the uncertainty that these situations may create, the Treasury Department and the IRS will include a statement in each future notice of intent to issue proposed regulations stating that if no proposed regulations or other guidance is released within 18 months after the date the notice is published, taxpayers may continue to rely on the notice but, until additional guidance is issued, the Treasury Department and the IRS will not assert a position adverse to the taxpayer based in whole or in part on the notice.¹¹⁴

To the extent that Treasury and the IRS have issued Notices in the past that describe proposed regulations to come, and those Notices remain in effect years later, with no additional action taken, this statement may provide some clarity. A subsequent Chief Counsel Notice instructed IRS attorneys to include a statement in notices regarding the 18-month limitation.¹¹⁵ The policy statement failed to address, however, one of the key objections to such notices—*i.e.*, that the Internal Revenue Code authorizes Treasury to backdate the effective date of regulations to the date such a Notice is issued.¹¹⁶

In short, the policy statement was a mixed bag, encouraging in parts, but simultaneously reflecting a stubborn insistence upon past positions and practices that are inconsistent with the trend away from tax exceptionalism from general administrative law principles.¹¹⁷ IRS attorneys have been instructed to follow its pronouncements.¹¹⁸ Yet one senses, both from the document's format and from its terms, that its pronouncements lack permanence.

113. See, e.g., Marie Sapirie, *What Will Happen to FAQs?*, 169 TAX NOTES FED. 735 (Nov. 2, 2020); Nina Olson, *IRS FAQs Can Be A Trap For The Unwary*, TAX CONNECTIONS (July 28, 2017), <https://www.taxconnections.com/taxblog/irs-faqs-can-be-a-trap-for-the-unwary> [<https://perma.cc/4698-SWZ6>].

114. *Policy Statement*, *supra* note 100, at § IV.

115. Chief Counsel Notice CC-2019-006 (Sept. 17, 2019).

116. See I.R.C. § 7805(b).

117. See Curry, *supra* note 105 (documenting similar observations).

118. See IRS, IRM 32.1.1.1(5) (Nov. 13, 2019), https://www.irs.gov/irm/part32/irm_32-001-001 [<https://perma.cc/EHV6-29WH>]; Chief Counsel Notice CC-2019-006 (Sept. 17, 2019).

CONCLUSION

For the most part, OIRA's authority comes from "soft power." EO 12866 represents a command from the President to his subordinates in agencies like Treasury and the IRS, but that command is only enforceable to the extent that those subordinates are willing to adhere to it. EO 12866 itself calls for disputes between OIRA and rulemaking agencies to be resolved by appeal up the chain of command all the way to the President.¹¹⁹ But Presidents have more pressing matters to address than day-to-day disagreements over regulatory impact analysis and APA compliance, so those disagreements are resolved through negotiation and compromise.

OIRA review of tax regulatory actions could undoubtedly be improved, particularly as regards regulatory impact analysis. Nevertheless, Treasury and OIRA have managed over the past four years to reach many compromises regarding both the MOA's general implementation and its application to particular rules and regulations. If the MOA remains in force, further improvements seem likely. Treasury and the IRS undoubtedly dislike the intrusion of OIRA review into their space—most other agencies feel the same way. But Treasury regulations have not been substantially delayed during that time, nor have we seen widespread complaints about the quality of Treasury regulations declining.

Meanwhile, OIRA review has contributed to the APA compliance of tax regulatory actions. Although they may be disinclined to admit it, Treasury and the IRS needed—and still seem to need—the nudge of OIRA review to prod them into compliance with APA requirements. Much has been accomplished since the MOA was signed four years ago. Hopefully, the Biden administration will see the MOA's merits and avoid that step back to tax exceptionalism.

119. Exec. Order No. 12,866 § 7, 58 Fed. Reg. at 51,743.