2018

Centralized Review of Tax Regulations

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Centralized oversight of agency policymaking and spending by the President's Office of Management and Budget is a hallmark of the modern administrative state. But tax regulations have almost never been subject to centralized review. The Trump Administration recently proposed requiring centralized review of tax regulations, but it is unclear what regulations would be subject to such review or how it would be conducted.

This Article examines the normative desirability of the longstanding approach of exempting tax regulations from centralized review, and the alternative of imposing such review. Scholars and policymakers have provided various incomplete justifications for excepting tax policy from centralized review, including concerns about politicizing tax administration, analytical challenges, and ossification. I conclude that none of the reasons offered in the past for a default rule of no review are sufficient in light of the potential normative benefits of centralized review. The analysis here brings to the fore multiple functions of tax regulations, including shaping private behavior, raising revenue, and implementing precise congressional directives. I make the case that, for some tax regulations, centralized review can facilitate productive coordination with other parts of government, increase political accountability, and introduce analytical rigor through quantified analysis. This Article outlines the limitations of current centralized review conventions and proposes some specific adjustments. These adjustments include setting a threshold for review based on revenue estimates and producing both revenue estimates and distributional analysis as part of the regulation-drafting process.

The major tax legislation Congress enacted at the end of 2017 included numerous broad delegations. Thus, forthcoming tax regulations will reshape the tax system significantly, and the Trump Administration is poised to begin some version of centralized review of tax regulations, although many important issues remain unresolved. Recognizing the strengths and weaknesses of centralized review as applied to tax policy will help to establish consistent and productive oversight of the tax regulatory process.

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I. Introduction

When Congress enacted major tax legislation late in 2017,[1] reworking significant portions of the tax code, they did something unusual for tax legislation: they acted quickly. Whereas the legislative process that culminated in the major tax reform of 1986 played out over almost two years, the 2017 legislation was written and enacted in just four months.[2] Congress's haste has placed special pressure on the Department of the Treasury and the Internal Revenue Service (the IRS or the Service) to implement the new tax provisions. Often, in the past, when Congress has worked more ponderously, they have enacted highly detailed tax legislation that has delegated very little policymaking authority to the Executive Branch. But the 2017 Tax Act is different: Congress is relying on Treasury and the Service to develop regulations and guidance without which the new law simply will not work—and Treasury and the Service must deal with myriad issues that Congress did not have time to confront themselves and thus delegated in broad strokes.[3] The pressure is on for the Executive Branch, as many of the new provisions are effective immediately for tax year 2018.

Often when Congress delegates broad authority to an agency, they do so knowing that the President will have a substantial role in overseeing subsequent agency actions.[4] A key mechanism for this oversight is the "centralized review" process overseen by the Office of Management and Budget (OMB).[5] This centralized review often includes an interagency process whereby subject-matter experts from other departments and agencies

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1. The legislation, referred to throughout as the "2017 Tax Act," was enacted in December 2017 and is often referred to as the Tax Cuts and Jobs Act, although its official name—because of partisan wrangling in the U.S. Senate—is the "Act [t]o provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018." Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054.

2. The main part of the legislative process leading to the Tax Reform Act of 1986 took twenty-one months, beginning in early 1985 and extending through most of the year, as legislating Committees and Subcommittees in each house held hearings and markups. A Conference Committee spent a month reconciling the bills from each house, and staff from each house and the Joint Committee on Taxation worked for another month after that to draft the Conference Committee Report and the final legislation that Congress enacted. *See generally* Jeffrey H. Birnbaum & Alan S. Murray, Showdown at Gucci Gulch: Lawmakers, Lobbyists, and the Unlikely Triumph of Tax Reform (1988) (detailing the legislative process from start to finish).

3. One example is the pass-through deduction, 26 U.S.C. § 199A (West Supp. 2018), discussed *infra* notes 189–92 and accompanying text. *See also infra* note 128 (providing other examples).

4. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2331–32 (2001).

5. *See* Memorandum from OMB Director Leon E. Panetta for Heads of Executive Departments and Agencies, And Independent Regulatory Agencies, Guidance for Implementing E.O. 12866 (Oct. 12, 1993), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf (referring to OMB's oversight of regulatory actions as "centralized review"); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1260–61 (2006).

are given a chance to review a proposed regulatory action, and OMB often requires the rulemaking agency to prepare cost–benefit analysis, whereby the agency undertakes a quantitative and qualitative analysis of the effects of a proposed rule, following OIRA guidelines on how this analysis should proceed.[6]

But this OMB oversight has, dating back to the Reagan Administration, left out an essential piece of the federal government's regulatory and fiscal policy apparatus: the tax system. Indeed, there has been practically no centralized review of tax policy in the past. Since 2011, just one tax regulation has been subject to plenary centralized review.[7] This lack of review came even as Treasury has produced hundreds of regulations, including many that appear to meet the usual requirements for centralized review, as "significant" or "economically significant," meaning that they raise "novel" policy issues or will have an annual effect on the economy of $100 million or more.[8] Meanwhile, thousands of regulations produced by other departments and agencies were subject to centralized review.[9] Treasury has avoided such review by regularly asserting that its tax regulations are exempt.[10] OMB has accepted this assertion,[11] and has generally been content to view tax regulations as addressing "transfer payments," a category of

6. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003) [hereinafter CIRCULAR A-4]; OFFICE OF INFO. & REGULATORY AFFAIRS, REGULATORY IMPACT ANALYSIS: A PRIMER (2011) [hereinafter OIRA PRIMER].

7. The regulation sought to limit the U.S. tax benefits of corporate inversion transactions. T.D. 9790, 2016-45 I.R.B. 540; *see infra* Section II.B.2. The Obama Administration proposed the Regulation only after years of urging Congress to enact legislation to accomplish the same thing; as explained *infra*, the Obama Administration was exceedingly cautious in pushing this Regulation, but nonetheless, the White House's involvement in the tax regulatory process broke with various decades-old norms against direct White House involvement in Treasury's tax regulations. Another set of tax-related rules was subject to centralized review during the Obama Administration, but that Regulation did not address any substantive tax law and was promulgated under statutory authority outside of the tax code. *See infra* note 104 and accompanying text.

8. Exec. Order No. 12,866, § 3(f), 3 C.F.R. §§ 638, 641 (1993), *reprinted in* 5 U.S.C. § 601 (2012); *see infra* notes 48–51 and accompanying text.

9. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 18 (2016) [hereinafter GAO REPORT]. From 2011 to 2013, more than 350 regulations proposed across the Executive Branch were determined to be "economically significant" and were subject to centralized review as such; of those 350, just one was a tax-related regulation, and that one did not arise from the tax code. *Id.* OMB reviews in excess of 400 proposed and final regulations each year from other (non-tax) departments and agencies.

10. *E.g.*, *infra* note 22 (example of the exemption claim).

11. Under a long-standing agreement dating back to 1983, OMB generally does not review tax regulations, although this exemption did not include economically significant regulations. Memorandum of Agreement, Treasury and OMB Implementation of Executive Order 12291 (Apr. 29, 1983) [hereinafter 1983 Treasury–OMB Memorandum]. *See supra* note 9; *infra* notes 45, 97, 104 and accompanying text.

government action that OMB's oversight framework exempts from cost–benefit analysis.[12]

But now, centralized review of tax regulations is fast becoming a reality. The issue gained attention in political circles around 2016 when the Obama Administration subjected a tax regulation to centralized review.[13] In 2017, the Trump Administration began to formally reconsider the tax regulation exemption.[14] In early 2018, OMB and Treasury agreed to dispense with the exemption and gave themselves one year to set parameters for ongoing centralized review of certain tax regulations.[15]

This Article examines the normative desirability of the longstanding approach of exempting tax regulations from centralized review and the alternative of imposing such review. First, I chart as a descriptive matter how tax regulations are produced outside of the well-developed system of centralized review and challenge several justifications for this omission that have been offered by scholars and policymakers. I argue that none of the proffered reasons for distinct treatment of tax regulations is sufficient to justify categorically foregoing centralized review of tax regulations in light of the normative justifications for centralized review.

Rather, I make the case that centralized review can have salutary effects on some tax regulations, but realizing any benefits depends on the substance of each particular tax regulation.[16] First, more specifically, centralized review is appropriate and would be beneficial (with some modifications) in the development of tax regulations that have incentive effects that, in turn, affect private behavior—what I call the *private-allocation function* of tax regulations. On the other hand, I argue that centralized review can be used to elicit and make public useful information that Treasury is already capable of producing on tax regulations that primarily raise revenue—what I call the *public-allocation function* of tax regulations. That is, OMB should require Treasury to produce revenue estimates and distributional analysis when the public-allocation function features prominently. I argue that centralized review does not offer benefits for tax regulations that simply implement clear congressional directives—what I call the *imple-*

12. *See infra* notes 52, 196–99 and accompanying text.

13. *See supra* note 7 and accompanying text.

14. *See* Exec. Order No. 13,789, 82 Fed. Reg. 19,317 (Apr. 21, 2017) (directing Treasury and OMB to reconsider the exemption for tax regulations); GAO REPORT, *supra* note 9; *supra* notes 6–13 and accompany text; *infra* notes 15–33, 115–16, 120–22 and accompanying text; *infra* Section II.B.3.

15. *See* Memorandum of Agreement from the Dep't of the Treasury and the Office of Mgmt. & Budget on Review of Tax Regulations under Exec. Order 12866 (Apr. 11, 2018), https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf; Press Release, U.S. Dep't of the Treasury, Treasury, OMB Update Tax Regulatory Review Process (Apr. 12, 2018), https://home.treasury.gov/news/press-releases/sm0345.

16. *See infra* Part IV.

menting function. Thus, the standard practice of abstaining from centralized review is, indeed, justified on normative grounds for a broad swath of tax regulations that are highly prescribed by Congress.[17] Finally, I question the Trump Administration's proposal to use the same trigger for OMB review of tax regulations as it does for other types of regulations and to disregard transfer payments in determining whether a tax regulation warrants review.

Congress's broad delegations in the 2017 Tax Act mean more opportunities for Executive Branch tax policymaking—and the questions of who will determine that policy and how are important. In popular debates, centralized review is associated with presidential control, which has spurred some critical reactions in the current political environment. But absent centralized review, there are very few formal protections to insulate tax-regulation writing from political influence. I argue that systematic, as opposed to ad hoc, centralized review can be beneficial, especially when there are acute concerns about politicizing tax administration, because centralized review fosters transparency and analytical rigor.

The typical presidential tax-policy blind spot has led to the Executive Branch treating similar sorts of policy decisions in bizarrely different ways. This variation is particularly striking in the case of the private-allocation function. Consider one example[18]: regulatory policy addressing health care is largely devised and implemented by the Department of Health and Human Services (HHS). Thus, when HHS recently conceived of a regulation to promote tobacco-cessation incentives in health insurance policies, that regulation was subject to direct review by OMB, including an OMB-run interagency coordination process.[19] OMB required that HHS assess the costs and benefits of the proposal, and of alternative proposals, to maxim-

17. *See* Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 182 (2017). That article examines the institutions and practices in Congress that give rise to what I identify in this Article as the implementing function, making the case that Congress is uniquely able to enact detailed and precise tax statutes that leave little if any policymaking discretion to Treasury. *Id.* This process includes making use of the expertise of the staff of the Joint Committee on Taxation and producing voluminous "[s]pecific and illuminating legislative history." Comm'r v. Duberstein, 363 U.S. 278, 284 (1960). As such, in some instances, the substantive content of regulations is determined by Congress, leaving little policymaking discretion to the agency—i.e., the "merits of the regulation" may be "strongly determined by a statute." *See* John C. Coates IV, *Towards Better Cost-Benefit Analysis: An Essay on Regulatory Management*, 78(3) LAW & CONTEMP. PROBS. 1, 5 (2015). This Article focuses on centralized review of regulations that result from broader delegations, leading to regulations that carry out the private-allocation and public-allocation functions.

18. *See infra* notes 202–10 and accompanying text (describing this example in further detail).

19. Incentives for Nondiscriminatory Wellness Programs in Group Health Plans: Final Rule, 78 Fed. Reg. 33,158 (June 3, 2013) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2950, 45 C.F.R. pts. 146 & 147). Technically, this is a joint regulation issued under the Health Insurance Portability and Accountability Act of 1996 by HHS, DOL, and Treasury together. *Id.* Treasury claimed that its regulation (which duplicates the HHS and DOL regulations) was exempt from the requirements of Executive Order 12,866, but this exemption did not extend to HHS and DOL. So, the regulation went through those departments' standard review processes and was subject to centralized review.

ize net benefits, introducing rigorous analytical requirements to HHS's decision-making process.[20]

But HHS is not the only department that deals with smoking-cessation programs—surprisingly enough, Treasury's tax regulations have also addressed smoking-cessation incentives in employer health insurance policies.[21] In contrast to the HHS rule, when Treasury devised a *tax* regulation that dealt with tobacco cessation, that rule was not subject to OMB review of any sort. Rather, Treasury stated in the preamble to its proposed and final regulations that centralized review was not required, and no such review was carried out.[22] As a result, regulation-writers at Treasury were not subject to OMB oversight, and the proposed rule was not subject to any interagency review process, even though Treasury personnel were addressing an issue that appeared to be far outside of the realm of Treasury expertise. Further, with no cost–benefit analysis, the proposal was treated like other transfer payments that receive reduced OMB scrutiny as compared to other regulatory proposals[23]—even though the stated purpose of the provision is to disincentivize smoking, which is precisely the sort of behavior-changing policy that standard cost–benefit analysis can illuminate. Nonetheless, the final regulation was not a product of any cost–benefit analysis or explicit consideration of policy alternatives that OMB generally requires. In the end, the final Treasury Regulation was subject to less analytical rigor than the HHS Regulation, but not for any stated or apparently deliberate reason.

The varied treatment—centralized review or not—has oddly hinged on whether Congress has delegated authority to Treasury and the Service or to another department or agency. And these regulations on smoking-cessation incentives—and the distinct, and in some instances counterintuitive, treatment of tax regulations as compared to other regulations with similar policy objectives—are not an anomaly. Treasury produces reams of tax regulations and guidance documents prescribing how the tax system operates and how it carries out and affects a wide variety of social and economic policies. These regulations establish policies related to raising revenue to fund

20. *Id.* at 33,168, tbl.1 (summarizing analysis of quantitative and qualitative costs and benefits).

21. Minimum Essential Coverage and Other Rules Regarding Shared Responsibility Payment for Individuals, 79 Fed. Reg. 4302, 4306 (proposed Jan. 27, 2014) (to be codified at 26 C.F.R. pt. 1); *see infra* notes 202–10 and accompanying text.

22. The proposed regulation states: "It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to the proposed regulations." Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 7314, 7322 (proposed Feb. 1, 2013) (to be codified at 26 C.F.R. pt. 1).

23. *See* CIRCULAR A-4, *supra* note 6, at 38.

federal government operations, healthcare, education, labor, the environment, and other important policy areas, often shaping private behavior.

This Article proceeds as follows. Part II provides an overview of the mechanics and purposes of centralized review, including the roles of cost–benefit analysis and interagency review, and how that analysis and review is typically carried out. It also describes the process Treasury has used until recently to produce tax regulations, and reviews recent moves towards centralized review, initially by the Obama Administration and more formally by the Trump Administration. Part III analyzes the potential advantages, disadvantages, and challenges of centralized review of tax regulations: Political accountability must be balanced against the potential harms of politicization; quantified analysis is potentially illuminating but presents myriad practical obstacles; and the interagency review process can yield more thoughtful policy, but at the risk of ossification. Part IV seeks a way forward, proposing that different functions of tax regulations receive different treatment for centralized review purposes. This Part also responds to the Trump Administration framework. Part V concludes.

II. BACKGROUND

A. Centralized Review Outside of Tax

This Part provides an overview of the centralized review process and sets out the normative underpinnings of centralized review. Centralized review is generally—outside of the tax context—carried out in one of two ways. For regulatory activity, OMB's Office of Information and Regulatory Affairs (OIRA) supervises Executive Branch-agency[24] policy development. Agencies are required to disclose to OIRA any planned regulatory and guidance actions; OIRA then helps ensure that those actions are consistent with presidential priorities and are carefully considered—including shepherding the proposal through an interagency review process and quantifying costs and benefits.[25] For fiscal policy, personnel within OMB closely monitor each agency's ongoing spending and shape budget priorities for future spending within agencies as well as appropriations requests made to

24. Executive Branch agencies are distinguished from independent regulatory agencies, which produce regulations that are not necessarily subject to centralized review. *See, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600–01 (2010).

25. *See* Exec. Order No. 12,866, § 6, 3 C.F.R. §§ 638, 644–48 (1993), *reprinted in* 5 U.S.C. § 601 (2012) (describing "centralized review" of agency regulations).

Congress.[26] In other words, Congress receives spending requests only once they have been filtered through OMB, and the use of agency funds that have been appropriated by Congress but without precise earmarking is subject to review—and can be influenced—by OMB. Thus, OMB's role in overseeing and managing both regulatory policy and fiscal policy on behalf of the President is expansive.

The focus here is on the regulatory side (as opposed to spending).[27] OIRA is charged with overseeing all "regulatory actions" taken by any Executive Branch department or agency (but not independent agencies), and thus, OIRA can review all variety of agency guidance, including regulations that are finalized through the notice-and-comment process and subregulatory material, such as policy statements, that are not subject to notice and comment.[28]

Many scholars and policymakers view centralized review of proposed regulations—at least, nontax regulations—as an essential element of the federal rulemaking process for Executive Branch agencies.[29] This centralized review often relies on cost–benefit analysis carried out by the rulemaking agency, following OIRA guidelines on how this analysis should proceed.[30] OIRA also subjects draft regulations to an interagency review process whereby experts in parts of the government who did not draft the regulation can weigh in on the substance and analysis of a regulation.[31] Over the past thirty-plus years, centralized review has been embraced by Republican and Democratic Administrations alike, and cost–benefit analysis has proliferated in the development of a wide range of regulatory policies, including environmental regulation, public health regulation, and financial regulation, among other areas.

There are many potential benefits of centralized review. The process is thought to foster political accountability for agency action by way of the

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26. *See* 31 U.S.C. §§ 1101–26 (2012); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 10 (2016); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2186–88 (2016).

27. While the tax system is certainly central to fiscal policy, this Article is limited to considering how tax regulations might fit into the existing OMB architecture for oversight of regulatory policy. Like other departments and agencies, Treasury and the IRS carry out congressional mandates through regulations, so distinct treatment of tax regulations by OMB deserves scrutiny. Further consideration of OMB's tools for oversight of spending is necessary to determine whether such tools are relevant to other aspects of the tax system and tax administration.

28. *See infra* notes 45–47 and accompanying text.

29. Again, Executive Branch agencies are distinguished from independent agencies, which generally are not subject to OIRA oversight. *See supra* note 24; *infra* note 167 (describing the IRS's place in the Executive Branch as featuring some hallmarks of agency independence).

30. *See* CIRCULAR A-4, *supra* note 6.

31. *See FAQ, Regulations and the Rulemaking Process*, REGINFO.GOV, https://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Sept. 30, 2018).

President;[32] it can stave off overregulation;[33] and it can help prevent interest-group capture.[34] Scholars also credit centralized review as a mechanism for interagency coordination, which results in more effective and consistent regulatory policies.[35] Recently, scholars have recognized that OMB's role in the budget process provides similar benefits in terms of aligning spending with presidential priorities.[36] Likewise, many scholars laud cost–benefit analysis as an indispensable tool for comparing alternative regulatory options.[37] This consideration allows policymakers to maximize the extent to which the benefits of each regulation exceed total costs (direct and indirect, private and social) with the goal of improving social welfare.[38] Early skep-

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32. Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 882–83 (1988); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986); Kagan, *supra* note 4, at 2331–32; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3–4 (1995).

33. Bagley & Revesz, *supra* note 5, at 1262; *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 175–79 (2008).

34. *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 178 (1990); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340–41 (2013); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1150 (1990) (noting that capture is less likely when an entity reviews a wide range of issues); Susan Webb Yackee, *Reconsidering Agency Capture During Regulatory Policymaking*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 320, 323 (Daniel Carpenter & David A. Moss eds., 2014) [hereinafter PREVENTING REGULATORY CAPTURE].

35. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31 (2010); Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES IN L. 369, 374–75 (2016); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1184, 1209–10 (2012) ("Coordination tools can help agencies to manage overlapping agency functions or related jurisdictional assignments in ways that improve both cumulative expertise and the quality of the final agency decision."); Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1847–48 (2013).

36. *See* Pasachoff, *supra* note 26, at 2188; Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1720–21 (2017).

37. *E.g.*, Coats, *supra* note 17, at 5 (stating that cost–benefit analysis is "the best available overarching conceptual framework for organizing and communicating the pros and cons of a proposed regulation"); *accord* Ryan Bubb, Comment, *The OIRA Model for Institutionalizing CBA of Financial Regulation*, 78(3) LAW & CONTEMP. PROBS. 47, 47–48 (2015) (responding to Coates's declaration with "[a]men to that").

38. *E.g.*, Jean Drèze & Nicholas Stern, *The Theory of Cost-Benefit Analysis*, *in* 2 HANDBOOK OF PUB. ECON. 909 (Alan J. Auerbach & Martin Feldstein eds., 1987). Widespread use of cost–benefit analysis of proposed regulations across a broad range of policies (i.e., across many different proposed regulations) helps to ensure that the "estimated social benefits of all rules exceed the estimated social costs." Richard J. Pierce, Jr., *The Regulatory Budget Debate*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 249, 250 (2016); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1638 (2016) ("[T]he whole point of cost-benefit analysis is to provide information about the effects on social welfare . . . ."). The Trump Administration has attempted to reframe the popular debate and use the term "regulatory budget" to focus solely on the estimated costs of regulations and disregard anticipated bene-

ticism from public-interest-oriented scholars about reliance on centralized review and cost–benefit analysis—in particular, because costs were perceived to be more readily quantifiable than benefits, potentially creating a bias against regulation—has largely given way to debates about how to conduct centralized review and cost–benefit analysis,[39] not whether to do so.[40]

Centralized review, including in some cases cost–benefit analysis, is overseen by OIRA.[41] OIRA has a broad mandate to oversee the development of rules, interpretations of law, policy determinations, and other guidance produced by Executive Branch departments and agencies. For each regulatory proposal, each agency is required to identify for OIRA "the problem that it intends to address" and to "assess the significance of that problem."[42] The agency is instructed to "tailor its regulations to impose the least burden on society . . . consistent with obtaining the regulatory objectives."[43] OIRA, in turn, reviews each proposal (to varying degrees), and in some instances, oversees an interagency review and coordination process.[44]

The wellspring of OIRA's authority is Executive Order 12,866.[45] It calls for centralized review of any "regulatory action," defined as any "sub-

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fits. *See* OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 5–33 (2016) [hereinafter 2016 OIRA Draft Report] (showing the overall increases in estimated benefits and costs over a ten-year period); Glenn Kessler, *Fact Checker: The White House Claim that Obama-era Regulations Have Cost $890 Billion*, WASH. POST (Feb. 21, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/02/21/the-white-house-claim-that-obama-era-regulations-have-cost-890-billion/?utm_term=.6772bfbf2141. *See generally* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006) (describing the "traditional" view of cost–benefit analysis, and describing theoretical challenges with measuring changes in welfare); John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008).

39. This is a heated debated in itself, and has made "centralized review" something of a moving target—its reach and form are continually shifting. *See* Sunstein, *supra* note 35, at 1847–48.

40. *But see* Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 214–15 (2012). *See generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY (1991).

41. The paragraphs that follow summarize the centralized review process carried out by OIRA. For a more-detailed description that includes helpful commentary on the sorts of issues and considerations that OIRA regularly confronts during the process, and OIRA's internal procedures and practices during the course of the review, see Sunstein, *supra* note 35, at 1844–63.

42. Exec. Order No. 12,866, § 1(b)(1), 3 C.F.R. § 639 (1993), *reprinted in* 5 U.S.C. § 601 (2012).

43. *Id*. (directing OIRA to provide "meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, [and] the President's priorities").

44. *Id*.

45. Exec. Order No. 12,866, § 1, 3 C.F.R. §§ 638–40; Exec. Order No. 13,563, 3 C.F.R. § 215 (2011), *reprinted in* 5 U.S.C. § 601 (2012). This followed and updated Exec. Order No. 12,866, 3 C.F.R. § 638, and Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), *reprinted in* 5 U.S.C. § 601 (2012).

stantive action" related to the eventual promulgation of a final rule, whether or not the action is published in the Federal Register, by Executive Branch departments, agencies, and other parts of the federal government.[46] In practice, this allows OIRA to oversee all variety of agency guidance, including sub-regulatory material, such as policy statements, that are not subject to notice and comment.[47] Centralized review under Executive Order 12,866 does not apply to certain specified independent agencies and "agencies specifically exempted by the Administrator of OIRA."[48]

In accordance with the Executive Order, agencies must regularly disclose to OIRA any planned regulatory actions and must designate any actions that it believes to be significant or economically significant.[49] A significant regulatory action includes any action that might be in conflict with an action taken by another agency, any action that might "[m]aterially alter the budgetary impact of entitlements" or certain other government fiscal programs, or that might "[r]aise [a] novel legal or policy issue."[50] An economically significant regulatory action is an action that would have "an annual effect on the economy of $100 million or more," as well as any other regulation that is expected to "adversely affect in a material way" some aspect of "the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."[51] The $100 million threshold includes

46. *See* Exec. Order No. 12,866, § 3(e), 3 C.F.R. § 640.

47. Centralized review could also apply to sub-regulatory guidance. In a 2007 bulletin, OMB established a threshold for centralized review of guidance documents similar to the economically significant designation used for regulations, but OMB and subsequent Treasury guidance exempted the IRS from the requirements in the Bulletin. Treas. Dir. 28-04 (July 10, 2015), https://www.treasury.gov/about/role-of-treasury-orders-directives/Pages/td28-04.aspx; GAO REPORT, *supra* note 9, at 28. Nonetheless, it is clear that some sub-regulatory tax guidance documents fall within the standards provided in the OMB Bulletin, and so excluding these documents from centralized review raises issues similar to the exclusion of regulations that is the central focus here. For example, in 2016, the IRS issued a new "no-ruling" policy indicating that it would no longer offer advanced approval of certain spin-off transactions. Rev. Proc. 2016-1, 2016-1 I.R.B. 1 (addressing the "active trade or business" requirement under section 355). The immediate (and predictable) effect of this guidance was that Yahoo's planned $10 billion spinoff of its Alibaba stock holdings was abandoned—this transaction alone would seem to exceed the $100 million threshold. *See infra* note 51 and accompanying text (describing "economically significant" regulatory actions, which have an economic effect of $100 million or more, as subject to centralized review under the applicable Executive Orders).

48. Exec. Order No. 12,866, § 6, 3 C.F.R. §§ 644–48; *see supra* note 24.

49. *Id.* § 6(a)(3)(A), 3 C.F.R. § 645.

50. *Id.* § 3(f)(4), 3 C.F.R. § 642.

51. *Id.* § 3(f), 3 C.F.R. §§ 641–42. Previously, Executive Order 12,291 established a category of "major" rules that invoked the same $100 million threshold, applying to rules with an "annual effect on the economy of $100 million or more." Exec. Order No. 12,291, § 1(b), 3 C.F.R. §§ 127–28 (1981). Similarly, the Congressional Review Act defines "major" rules, which can be revoked through the legislative process, as rules that the OIRA administrator determines has had or will likely have an annual effect on the economy of $100 million or more; will likely result in a "major" increase in prices for

amounts of any "transfer" payments.[52] If the agency fails to identify a regulation as significant or economically significant, OIRA can make such a designation.[53] Any draft rule that is not designated as significant is not subject to OIRA review beyond the agency providing notification to OIRA that it has determined a planned action will not be significant.

For each significant regulatory action, the agency must provide OIRA with an advance draft of the proposed action as well as some analysis of the proposal.[54] The draft must be accompanied by a statement of need explaining why the action is necessary and how and why the action will achieve the desired results.[55] Additionally, the agency must explain how the proposal fulfills any statutory mandate and how it addresses or is consistent with the President's priorities.[56] And the agency must identify "potential

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individuals or for particular groups, industries, or regions; or will have "significant adverse effects on competition, employment, investment, productivity, [or] innovation." 5 U.S.C. § 804(2) (2012).

52. This point is not explicit in the Executive Order, but in recent years, OIRA has reported that many "economically significant" regulations are categorized as such because they carry out a transfer, in most cases a transfer from the government (for example, in the form of a subsidy payment). *See, e.g.*, OIRA DRAFT 2016 REPORT 8 n.15, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/legislative_reports/draft_2016_cost_benefit_report_12_14_2016_2.pdf; Sunstein, *supra* note 35, at 1868–69 (describing OIRA practices for providing oversight of transfer payments in excess of $100 million, which does not include cost–benefit analysis). This $100 million transfer standard is not currently applied to trigger OIRA review of tax regulations. *See infra* Part III.

53. OIRA has ten days to review the designation and can make a determination that a proposed rule is significant or request more information from the agency; otherwise, the rule is not subject to further OIRA review. Exec. Order No. 12,866, § 6(a)(3)(A), 3 C.F.R. § 645.

54. *Id.* § 6(a)(3)(B)(i), 3 C.F.R. § 645.

55. *Id.* The statement of need explains the problem that the regulation is intended to address and lays out the authority for the agency to address it via regulation, as well as detailing the "extent of discretion" Congress has granted to the agency. OIRA PRIMER, *supra* note 6, at 2. Executive Order 12,866 directs that a regulation should only be pursued if it is "required by law, [is] necessary to interpret the law, or [is] made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people." Exec. Order No. 12,866, § 1(a), 3 C.F.R. § 638. The statement can be as simple as a single sentence citing a statutory mandate, *e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, RIN: 0910-AG57, Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments (2013), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=0910-AG57 (requiring nutrition labeling in chain restaurants as mandated by section 4205 of the Patient Protection and Affordable Care Act), or the statement can provide a comprehensive explanation of the role of the proposal in a broader regulatory or statutory scheme and how it connects to broader policy initiatives, *e.g.*, OFFICE OF INFO. & REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, RIN: 2060-AS47, Model Trading Rules for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014 (2016), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=2060-AS47 (providing a broad explanation of the EPA's notice of final rulemaking for model rules in greenhouse-gas-emission guidelines, as part of a President Obama's Climate Action Plan). OIRA suggests some categories of reasons for action, including market failures (for example, externalities or asymmetric information in the market) and "[o]ther [s]ocial [p]urposes," such as preventing discrimination, protecting privacy, and promoting "other democratic aspirations." CIRCULAR A-4, *supra* note 6, at 5.

56. Exec. Order No. 12,866, § 6(a)(3)(B)(ii), 3 C.F.R. § 645.

costs and benefits" of the action[57] and "avoid[] undue interference" with nonfederal government bodies.[58]

For any economically significant action, the drafting agency must go a step further. In addition to the information and analysis required for significant actions, as described in the preceding paragraphs, the agency must also undertake a "Regulatory Impact Analysis"—i.e., qualitative cost–benefit analysis, quantitative cost–benefit analysis, or both—and provide that analysis to OIRA.[59] The agency is directed to select the regulatory approach that will "maximize net benefits" and will "impose the least burden on society, consistent with obtaining regulatory objectives."[60] The purpose of the analysis is to "learn if the benefits of an action are likely to justify the costs" or to "discover which of various possible alternatives would be the most cost-effective."[61] There are several audiences for this analysis: OIRA and the executive office of the President, other agencies, and the public—ideally all should be informed and given an opportunity to react to the analysis.[62]

The analysis should also include identification and analysis of alternatives to the agency's preferred regulatory approach.[63] For example, the agency might consider regulation at the state or local level, as well as voluntary action or the alternative of not regulating at all.[64] The agency should also consider particular design alternatives, such as different default rules, different types of communication plans, or other alternative mechanisms that might affect the efficacy and impact of the regulation.[65] OIRA advises that agencies should use this requirement to "specify performance objectives" rather than locking into a specific action or "manner of compliance that regulated entities must adopt."[66] That is, agency personnel should think creatively about what they are trying to accomplish and how to accomplish it.

OIRA provides direction on the types of costs and benefits that agencies should take into account and on the best methods for quantifying and

57. *Id.* This assessment of costs and benefits is not necessarily quantified. For these non-economically significant regulations, the agency is not required to compare costs and benefits to potential alternative policy options; thus, this mandate results in only rudimentary consideration of costs and benefits.

58. *Id.*

59. *See* OIRA PRIMER, *supra* note 6, at 2.

60. Exec. Order No. 13,563, 3 C.F.R. § 215 (2011), *reprinted in* 5 U.S.C. § 601 (2012).

61. CIRCULAR A-4, *supra* note 6, at 2.

62. *See id.*

63. *Id.*

64. OIRA PRIMER, *supra* note 6, at 2.

65. *Id.*

66. *Id.* at 3.

monetizing these costs and benefits.[67] The basic analysis calls for agencies to define a baseline that identifies "what the world would be like absent" the proposed regulatory action.[68] Agencies are directed to "use the best reasonably obtainable scientific, technical, economic, and other information to quantify the likely benefits and costs of each regulatory alternative."[69] OIRA provides direction on the types of costs and benefits agencies should take into account—for example, "[p]rivate-sector compliance costs" and "[g]ains or losses in consumers' or producers' surpluses."[70] Agencies are directed to distinguish between those costs and benefits that can be monetized, those that can be quantified but not monetized, and those that cannot be quantified and to identify the timing of each category of costs and benefits.[71] And OIRA provides guidance on how agencies should quantify and monetize the effects of a rule, including relying on empirical studies of individual "willingness to pay" or "willingness to accept" a regulatory alternative and discounting of future benefits and costs.[72]

OIRA's guidance also calls for agencies to "provide a separate description of distributional effects . . . so that decision makers can properly consider them *along with* the effects on economic efficiency."[73] That is, distributional analysis is not to be included as part of the cost–benefit analysis, but such analysis is encouraged as an addendum to the proposed regulation. OIRA does provide that "[w]here distributive effects are thought to be important, the effects of various regulatory alternatives should be described quantitatively to the extent possible, including the magnitude, likelihood, and severity of impacts on particular groups."[74] And it provides examples of some distributional effects that could be quantified—for example, "[r]eductions in well-being for some consumers that are matched by increases for others."[75] But the directive to include distributional analysis is very often disregarded, and scholars and policymakers have lamented the scant attention paid to distribution in regulatory analysis.[76]

67. *Id.* (listing nine steps for agencies to undertake in preparing a "[r]egulatory impact analysis").

68. *Id.* at 4.

69. *Id.* at 9.

70. *Id.* at 10.

71. *Id.* at 7.

72. *Id.* at 9, 11.

73. *Id.* at 7 (emphasis added).

74. *Id.*

75. *Id.* at 8.

76. *See* Bagley & Revesz, *supra* note 5, at 1324–29 (arguing that analysis of distributional consequences should be central to regulatory policymaking).

Once the drafting agency submits the requisite information to OIRA, OIRA personnel generally have ninety days to conduct a review.[77] The review can result in OIRA accepting the regulatory action "as is" or returning the action to the drafting agency for "further consideration," in which case OIRA prepares a written explanation of particular issues the agency should address in a subsequent draft.[78] OIRA engages with the substance of the proposal to ensure that it is consistent with "the President's priorities."[79]

This review includes assessing whether the proposal conflicts with any policies or actions undertaken by another agency, which is accomplished through an interagency review process that OIRA convenes.[80] In that process, OIRA personnel seek to "identify and convey interagency views and to seek a reasonable consensus."[81] The Obama Administration's addendum to Executive Order 12,866 emphasized the importance of interagency review.[82]

Agencies other than the drafting agency may have an interest in the regulatory action at issue or may have jurisdiction over some aspect of the issue.[83] Often, the nature of this interagency review is "highly technical," calling on experts from different departments and agencies to provide information that informs policy decisions made by other departments and agencies.[84] A former head of OIRA, Cass Sunstein, explained:

> OIRA may seek, for example, to ensure careful consideration of the views of the Department of Justice on a legal issue, or the views of the United States Trade Representative on an issue that involves international trade, or the views of the Department of Homeland Security and the National Security Council on an issue with national security implications, or the views of the Department of Energy on the effects of a rule on the energy supply. In such cases, career officials with technical expertise are frequently the central actors.[85]

Additionally, the interagency review process has put particular emphasis on procedural issues: "OIRA also engages lawyers throughout the executive branch to help resolve questions of law, including questions of administrative procedure. As noted, OIRA considers itself a guardian of appropriate

77. Exec. Order No. 12,866, § 6(b)(2)(B), 3 C.F.R. § 647 (1993), *reprinted in* 5 U.S.C. § 601 (2012).

78. *Id.* § 6(b)(3), 3 C.F.R. § 647.

79. *Id.* § 6(b), 3 C.F.R. §§ 646–48.

80. Sunstein, *supra* note 35, at 1841; *see generally* Freeman & Rossi, *supra* note 35, at 1174–80.

81. Sunstein, *supra* note 35, at 1841.

82. *See generally* Exec. Order No. 13,563, 3 C.F.R. § 215 (2011).

83. Freeman & Rossi, *supra* note 35, at 1179.

84. Sunstein, *supra* note 35, at 1842.

85. *Id.* at 1843.

procedure, and much of its role is associated with that guardianship (including the promotion of public comments)."[86]

B. The Process for Drafting Tax Regulations

This Subpart describes the process for formulating tax regulations, starting with the process as it has generally been carried out before 2018 (a process which does not involve centralized review). It then describes one regulation that was subject to centralized review toward the conclusion of the Obama Administration. Finally, it details the Trump Administration's plans to impose some form of centralized review following the enactment of the 2017 Tax Act.

1. Historically: No Centralized Review

In some ways, the process for drafting tax regulations has been similar to the process that OIRA oversees for regulations produced by other departments and agencies, as described in the prior Subpart. The major distinction is that that there is almost never substantive OIRA review of draft tax regulations and, thus, no cost–benefit analysis and no interagency process for most tax regulations.[87]

The regulation-drafting process is carried out by both IRS and Treasury personnel and is overseen by political appointees at both the IRS and Treasury—thus, the lines of authority are more blurred than in the more typical single-agency-head structure.[88] Regulations are produced by the IRS Chief Counsel's office in coordination with Treasury's Office of Tax Policy. Some regulations are drafted solely by attorneys in the Chief Counsel's office and submitted for review by the attorneys in the Office of Tax Policy; for some regulations, the Office of Tax Policy is involved throughout the drafting process. Once drafted, prior to publication in the Federal Register, regulations are subject to review and approval by the IRS Chief Counsel, the IRS Commissioner, the Assistant Secretary of the Treasury for Tax Policy, and Treasury's General Counsel.[89]

86. *Id.* at 1842–43.

87. *See supra* note 47 and accompanying text.

88. The six Senate-confirmed posts with responsibility for tax administration and policy are the Secretary of the Treasury, the Assistant Secretary of the Treasury for Tax Policy, the General Counsel of the Department of the Treasury, the Inspector General for Tax Administration, the IRS Chief Counsel, and the Commissioner of the IRS (who serves a five-year term). *See* CHRISTOPHER M. DAVIS & MICHAEL GREENE, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 23–24 (2017).

89. In order to be published in the Federal Register, proposed or final regulations must carry the signature of both the IRS Deputy Commissioner for Services and Enforcement and the Assistant Secre-

There is a long-standing understanding among Treasury's Tax Policy personnel and the IRS Chief Counsel's office that, unlike regulations produced by other departments and agencies that are subject to centralized review, most tax regulations do not carry the force of law, but this position is congruous with the practice of not seeking OMB review.[90] Until 2011, there was wide agreement among Treasury attorneys, IRS personnel, and the tax-practitioner community that "general authority" regulations were "interpretive" regulations. This category included all regulations promulgated under authority provided in Code section 7805(a), which provides general authority for Treasury to "prescribe all needful rules and regulations."[91] On the other hand, only a small handful of regulations are issued under "specific" delegations from Congress, and these delegations give express direction to issue regulations. These regulations were understood to be the only potentially "legislative" regulations.[92] Thus, there is a statutory justification for this position, but it does not hold up under scrutiny.

Under nontax precedent, an "interpretive" regulation does not carry the force of law and is not subject to the same stringent requirements for deference as "legislative" regulations, which do carry the force of law. However, while the distinction between interpretive and legislative is familiar outside of the tax context, the basis for making this distinction among tax regulations is not. Under *Mead*, whether regulations are interpretive or legislative is based on the content of the regulation and the nature of the delegation made by Congress.[93] But tax jurisprudence never made these sorts of distinctions until very recently—the Supreme Court's 2011 opinion in *Mayo Foundation* made clear for the first time that the *Mead* framework applies to tax regulations,[94] and the Tax Court has subsequently followed this lead.[95] Nonetheless, the Internal Revenue Manual, which prescribes the tax regulation drafting process, still directs that

tary of the Treasury for Tax Policy. INTERNAL REVENUE SERV., PINK SIGNATURE PACKAGE IRM § 32.1.6.8 (2018), https://www.irs.gov/irm/part32/irm_32-001-006#idm139647525701984. In contrast, sub-regulatory guidance is produced by the IRS Chief Counsel's office and approved by the IRS Chief Counsel. INTERNAL REVENUE SERV., REVIEW AND APPROVAL, IRM § 32.1.1.4.6 (2011), https://www.irs.gov/irm/part32/irm_32-001-001#idm139647505234736.

90. *See generally* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006).

91. 26 U.S.C. § 7805(a) (2012).

92. *See* Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, TAXES: THE TAX MAGAZINE, Aug. 2009, at 21, 22–23 (the authors are former Chief Counsels of the Internal Revenue Service). Some scholars, however, have long pointed out that this reasoning is problematic. *See, e.g.*, Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1762–63 (2007).

93. United States v. Mead Corp., 533 U.S. 218, 227–31 (2001).

94. Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 57 (2011).

95. Altera Corp. v. Comm'r, 145 T.C. 91, 114–15 (2015).

> most IRS/Treasury regulations merely implement a statute. The underlying statute provides adequate legal authority to impose or collect a tax, or issue a payment to a taxpayer. IRS/Treasury regulations provide a mechanism for the tax to be satisfied or collected, or payment to be issued to the taxpayer. The effect from a rule in most IRS/Treasury regulations is almost always a result of the underlying statute, rather than the regulation itself.[96]

A 1983 Memorandum of Agreement between Treasury and OMB suggested that this justification held currency at the dawn of the centralized-review era.[97] The memorandum provided that, under the predecessor to Executive Orders 12,866 and 13,563,[98] the "review procedures of the Executive order are waived with respect to all regulations [issued by the Service and Treasury] except legislative regulations that are 'major' as defined in the Executive order."[99] Treasury and Service officials seem to have combined this directive with their understanding that most tax regulations are "interpretive" to conclude that essentially no tax regulations are subject to centralized review. OMB has rarely questioned Treasury's determinations.[100]

Senator Orrin Hatch, the Chairman of the Senate Finance Committee, and a few other members of Congress prompted the Government Accountability Office (GAO) to examine the issue.[101] GAO recommended that Treasury and OMB "reevaluate their long-standing agreement,"[102] and it highlighted the rarity of centralized review of tax regulations: from 2011 until midway through 2016, just two of Treasury's tax-related regulations were determined to be significant or economically significant. (One of those two is discussed below;[103] the other is disregarded in this discussion because it is not at all a typical tax regulation—it arose under statutory authority outside of the tax code and had nothing to do with substantive tax law.[104]) Those same regulations were the only ones issued solely by Treas-

96. INTERNAL REVENUE SERV., EXECUTIVE ORDER 12,866, SUPPLEMENTED BY EXECUTIVE ORDER 13,563, IRM § 32.1.5.4.7.5.3 (2018), https://www.irs.gov/irm/part32/irm_32-001-005#idm140712272190672.

97. 1983 Treasury–OMB Memorandum, *supra* note 10. The memorandum of agreement (MOA) was made public for the first time in 2016. *See* Alison Bennett, *New Tax Rule Challenges May Follow Memorandum Release*, BNA: DAILY TAX REPORT (Sept. 27, 2016), https://www.bna.com/new-tax-rule-n57982077591/.

98. *See supra* note 45 and accompanying text.

99. 1983 Treasury–OMB Memorandum, *supra* note 10, at 1.

100. The one recent exception to this is described *infra* note 104.

101. Letter from Orrin G. Hatch, Chairman, Senate Fin. Comm., to Jacob Lew, Sec'y, Dep't of the Treasury (Oct. 11, 2016) (following up after GAO released the 1983 memorandum).

102. GAO REPORT, *supra* note 9.

103. *See infra* Section II.B.2.

104. GAO REPORT, *supra* note 9, at 18. Those two regulations were actually two takes at the same set of rules, which provided for the nationwide regulation of tax return preparers, covering any

ury that were identified as "major" tax regulations for purposes of the Congressional Review Act.[105]

Yet, a high-level review shows that dozens of tax regulations from this period appear to be significant or economically significant, especially given OIRA's general standard of considering transfers as part of the economic effect for purposes of the $100 million threshold. Based on titles and summaries of proposed tax regulations over the last several years, dozens of tax regulations appear to meet the $100 million threshold, while just one was so designated.[106] Frequently, Treasury's designations of not-significant have defied logic: a recent regulation issued under the Affordable Care Act was designated as significant (but not economically significant) by the Department of Labor and HHS,[107] but when Treasury promulgated the regulation, it stated that

> [n]otwithstanding the determinations of the Department of Labor and Department of Health and Human Services, for purposes of the Department of the Treasury, it has been determined that this Treasury decision is not a significant regulatory action for purposes of Executive Order 12866. Therefore, a regulatory assessment is not required.[108]

GAO found that from 2013 to 2015 Treasury issued fifteen joint regulations that were *not* designated as significant or economically significant

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person who prepares any tax return or refund request. T.D. 9527, 2011-27 I.R.B. 1, 7. This Regulation was not at all a typical Treasury–IRS tax regulation in that it did not arise from the tax code. *Id.*; *see* 31 U.S.C. § 330(a)(1) (2012). The rules required every preparer to pass a competency exam, register with and pay an annual fee to the IRS, and complete continuing education each year. T.D. 9527, 2011-27 I.R.B. at 7. It was designated as economically significant (initially, in 2011 by OIRA; Treasury did not designate it as such) and subject to centralized review. GAO REPORT, *supra* note 9, at 18. But the rules were ultimately struck down by the D.C. Circuit as exceeding Treasury's statutory authority. Loving v. Internal Revenue Serv., 742 F.3d 1013, 1021–22 (D.C. Cir. 2014).

105. 5 U.S.C. § 801(a)(1)(A) (2012); GAO REPORT, *supra* note 9, at 18–19; *see supra* note 51.

106. For example, in 2016 and 2017 there were fifteen proposed, finalized, or temporary regulations that potentially could have triggered OIRA review as "economically significant," and just one—discussed below, *see infra* Section II.B.2—that was designated as such. GAO REPORT, *supra* note 9, at 20. These regulations addressed topics ranging from the exemption from the ACA's employer mandate for contraceptive coverage for private employers who object to such coverage based on their religious beliefs, T.D. 9827, 2017-44 I.R.B. 382, and withholding requirements for gambling winnings from bingo and slot machine games, T.D. 9807, 2017-5 I.R.B. 573, to reporting requirements for charitable contributions, a measure which was withdrawn but was expected to have a significant effect on claimed charitable deductions (though the total revenue effect was undetermined—there was no quantitative analysis undertaken in connection with the rule). *Substantiation Requirements for Certain Contributions; Withdrawal*, 81 Fed. Reg. 882 (Jan. 8, 2016).

107. *See* Treas. Reg. § 54.9815-2713T (as amended by T.D. 9541, 2011-39 I.R.B. 438); *see also* 29 C.F.R. § 2590.715-2713(a)(1)(iv) (2018) (containing amending language from Treasury Decision 9541); 45 C.F.R. § 147.130(a)(1)(iv) (2018) (containing language identical to the language amended by the final tax regulation in Treasury Decision 9541).

108. T.D. 9541, 2011-39 I.R.B. 438.

by Treasury, but which were so designated by one or both of the other drafting agencies.[109]

2. A Recent Exception: The Earnings Stripping Rule

The only recent Treasury Regulation that was designated as economically significant and subject to OIRA review was a highly politicized Obama Administration rule to limit the tax benefits of corporate inversions.[110] Inversions are tax-driven transactions that involve a U.S.-headquartered corporation merging with a foreign corporation, causing the foreign corporation to become the parent of the entire corporate structure. This inverted structure allows the corporation then to use various mechanisms to prevent some income from being subject to U.S. taxation, reducing the corporation's effective tax rates. The 2016 Regulation seeks to stem one of the mechanisms used by inverted corporations, reducing the extent to which a foreign parent corporation can issue debt to its U.S. subsidiary.[111]

President Obama repeatedly urged Congress to act to address the problem of tax inversions.[112] Only after Congress stalled for nearly two years did Treasury draft and propose regulations.[113] Although the President did not issue a directive to Treasury to act, it appeared that the rules were prompted by President Obama's publicly expressed concerns.[114] Nonethe-

109. GAO REPORT, *supra* note 9, at 20.

110. *See supra* note 106. *See generally* Daniel J. Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633, 635 (2017).

111. Before the enactment of the 2017 tax legislation, this sort of debt allowed the U.S. subsidiary to make deductible interest payments that reduced U.S. tax liability and that often flowed into low-tax jurisdictions, thus reducing U.S. income, reducing the corporation's tax liability, and reducing revenue collected by corporate income tax. *See* Treatment of Certain Interests in Corporations as Stock or Indebtedness, 81 Fed. Reg. 20,912 (proposed Apr. 8, 2016) (to be codified in 26 C.F.R. pt. 1).

112. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2017 REVENUE PROPOSALS 27–28 (2016) (proposing legislation to limit inversions); DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 37–38 (2015) (same); DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2015 REVENUE PROPOSALS 64–65 (2014) (same); *see* David Jackson, *Obama: Congress Should End 'Tax Inversions,'* USA TODAY (Aug. 6, 2014, 10:13 PM), https://www.usatoday.com/story/money/business/2014/08/06/obama-tax-inversions/13697661/.

113. Despite failing to act legislatively, members of Congress were engaged in the rulemaking process, although the effects of this engagement are unclear. *See* Naomi Jagoda, *Treasury Officials to Meet with Lawmakers on Inversion Rules*, THE HILL (June 29, 2016, 4:59 PM), http://thehill.com/policy/finance /286033-treasury-officials-to-meet-with-lawmakers-on-inversion-rules (describing a meeting among presidential appointees and staff from Treasury, staff of the Joint Committee on Taxation, and members of the House and Senate tax Committees to discuss the proposed rule).

114. The President's statements on Treasury's actions to combat inversions are conspicuously deferential, indicating that President Obama supports Treasury but has not initiated or directed Treasury's work. *See, e.g.*, Press Release, Office of the Press Sec'y, The White House, Statement by the President (Sep. 22, 2014) ("[M]y Administration will act wherever we can to protect the progress the

less, President Obama went to significant lengths to peg the proposed regulation as the independent work of Treasury and the Service, even as that seemed far-fetched.[115]

Perhaps because the policy seemed to originate from the White House and was especially politically salient, the rule was subject to centralized review as economically significant. But that review appeared rudimentary. Treasury conducted a cost–benefit analysis of the rule, but this analysis only compared the anticipated revenue the rule would raise ($843 million over 10 years) with the anticipated costs to taxpayers of complying with the rules ($13 million over 10 years).[116] In accordance with Circular A-4, anticipated revenue was not accounted for as a cost to taxpayers.[117] The analysis also did not attempt to estimate any potential benefits flowing from government expenditure of the money collected. Despite OIRA's general instruction that distributional considerations should be addressed qualitatively, Treasury provided no indication of the incidence of the $843 million in revenue, nor did Treasury otherwise address, even in broad strokes, how it might affect distribution. And, in spite of Circular A-4, the analysis involved no contemplation of potential behavioral effects of the proposed policy, let alone quantification of those effects. As such, the regulatory impact analysis bears little resemblance to the robust quantified analysis prescribed by Circular A-4.[118]

Other aspects of centralized review were incomplete as well. For example, the statement of need submitted to OMB along with the draft regulation cast the proposal as a technical response to a technical problem.[119] But some alternative rationales were provided during the public relations effort surrounding the legislative effort that preceded the regulation and in the administrative public commentary on the proposed and final regulation. Both President Obama and Secretary of the Treasury Jacob Lew suggested

American people have worked so hard to bring about. As part of this effort, Secretary Lew briefed me today on the first steps the Treasury Department is taking to discourage companies from taking advantage of corporate inversions . . . . I'm glad that Secretary Lew is exploring additional actions to help reverse this trend.").

115. President Barack Obama, Remarks on Tax Code Reform and an Exchange with Reporters (Apr. 5, 2016) ("So I am very pleased that the Treasury Department has taken new action to prevent more corporations from taking advantage of one of the most insidious tax loopholes out there and fleeing the country just to get out of paying their taxes. This got some attention in the business press yesterday, but I wanted to make sure that we highlighted the importance of Treasury's action and why it did what it did.").

116. OFFICE OF MGMT. & BUDGET, E.O. 13563 AND 12866 REGULATORY IMPACT ANALYSIS (2016) [hereinafter EARNINGS STRIPPING RIA], http://www.regulations.gov/document?D=IRS-2016-0014-001 (follow "View Document").

117. CIRCULAR A-4, *supra* note 6.

118. *See supra* notes 6–33 and accompanying text.

119. EARNINGS STRIPPING RIA, *supra* note 116.

that the policy was motivated by a desire to protect the fisc from lost revenue.[120] They also underscored concerns about fairness because large multinational corporations were using inversion transactions and earnings stripping in a way that was perceived to allow them to avoid paying taxes that they *should* owe—maneuvers that were not available to wholly domestic corporations or to individuals.[121] The statement of need did not address these concerns directly, although it did include a citation to a 2007 Treasury report that estimated that earnings stripping cost Treasury more than $700 million of revenue in 2002 and 2003.[122] By focusing on the technical issue, Treasury appeared not entirely forthcoming in its formal justification for the rule.

This omission shaped the regulatory analysis that followed. The regulatory impact analysis did not specify what, if any, alternative policies Treasury considered. For example, one part of the rule applied only to corporations with more than $50 million of outstanding related-party debt; another part applied only to corporations with more than $100 million of assets or $50 million of revenue.[123] Presumably, Treasury could have considered alternatives that made the rule apply either more broadly or more narrowly. And other parts of the rule could have been altered to create a menu of different options that would cover different types of debt arrangements in varying quantities and applying to different types of taxpayers. But it is unclear whether the rule as adopted was shaped in consideration of the revenue effects, fairness implications, or only based on more technical considerations, so it is not clear what sort of alternatives Treasury might have wanted to consider.

This incomplete version of centralized review of the anti-inversion rule was perhaps the first sign that centralized review of tax regulations would soon garner increased interest.

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120. Press Release, Dep't of the Treasury, Remarks by Treasury Secretary Jacob J. Lew on a Press Conference Call Regarding Announcement of Earnings Stripping (Oct. 13, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0577.aspx ("Earnings stripping is . . . a contributing factor to the erosion of the U.S. corporate tax base.").

121. Press Release, Office of the Press Sec'y, The White House, Remarks by President Obama on the Economy (Apr. 5, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/05/remarks-president-economy-0 (discussing the proposed regulations and describing inversion transactions as allowing "big corporations" to "get out of paying their fair share of taxes here at home").

122. DEPARTMENT OF THE TREASURY, REPORT TO THE CONGRESS ON EARNINGS STRIPPING, TRANSFER PRICING AND U.S. INCOME TAX TREATIES 26 (2007).

123. EARNINGS STRIPPING RIA, *supra* note 116, at 2.

3. Trump Administration: Aspiring to Centralized Review

The Trump Administration, from the outset, adopted a more heavy-handed approach to directing tax regulatory actions, with OMB including tax regulations in its early anti-regulatory directives.[124] President Trump used an executive order to instruct the Secretary of Treasury to "review" all significant tax regulations issued in the final year of the Obama Administration to determine if any of those regulations "impose(d) . . . financial burden(s) on United States taxpayers."[125] In April 2017, President Trump directed the Secretary of Treasury and the Director of the OMB to "review and, if appropriate, reconsider" the exemption of tax regulations from centralized review.[126] Still, the Trump Administration's regulatory agenda for tax regulations, released publicly in summer 2017, did not designate any tax regulations as "economically significant," consistent with past practices.[127]

With the passage of the 2017 Tax Act, focus on centralized review began to sharpen, particularly as policymakers and the tax community digested the unusually broad delegations to the Executive Branch that were included in the new legislation.[128] A conservative nonprofit issued a report

124. President Trump issued an Executive Order that called for two regulations to be revoked for every one new regulation finalized, and his Chief of Staff issued a directive to department heads that halts publication of new regulations and "guidance documents." Exec. Order 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017); Reince Priebus, Memorandum from Reince Priebus, Assistant to the President & Chief of Staff, for Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review (Jan. 20, 2017), https://www.whitehouse.gov/presidential-actions/memorandum-heads-executive-departments-agencies/. The IRS interpreted this to mean that it should cease publication of all but the most routine guidance (such as updating interest rates). Andrew Velarde & Emily L. Foster, *No Substantive IRS Guidance Coming for a While, Official Says*, TAX NOTES, (Feb. 27, 2017), www.taxnotes.com/editors-pick/no-substantive-irs-guidance-coming-while-official-says.

125. Exec. Order 13,789, § 2(a), 82 Fed. Reg. 19,317 (Apr. 21, 2017) (being titled "Identifying and Reducing Tax Regulatory Burdens"; directing that "earlier determinations of whether a regulation is significant pursuant to Executive Order 12866 of September 30, 1993, as amended (Regulatory Planning and Review), shall not be controlling").

126. *Id.* § 2(c).

127. Stephanie Cummings & Andrew Velarde, *Regulatory Agenda Doesn't Deem Any Tax Regs Significant*, TAX NOTES: TAX NOTES TODAY (July 21, 2017), https://www.taxnotes.com/tax-notes-today/tax-system-administration/regulatory-agenda-doesnt-deem-any-tax-regs-significant/2017/07/21/1vx32.

128. Congress made some very broad express delegations of authority in the 2017 Tax Act. Examples include the pass-through provision, described *infra* notes 189–92 and accompanying text; a provision that directs Treasury to determine who qualifies for a new special tax break on beer, 26 U.S.C.A § 5051(a)(1) (West Supp. 2018); and a delegation of rulemaking authority to address how private equity partnerships can qualify for the long-term capital gains rate, 26 U.S.C.A. § 4061 (West Supp. 2018). Congress also left significant gaps that demand that Treasury exercise policymaking discretion. *See, e.g.*, Stephen E. Shay, *Treasury Can Close a Potential Loophole in the Treatment of Deferred Foreign Income in the Tax Cuts and Jobs Act: Will It Act?* (unpublished manuscript) (Dec. 26, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093379 (follow "Open PDF in Browser") (describing how a new provision imposing a tax on the deemed repatriation of deferred foreign income

criticizing the fact that tax regulations are not subject to centralized review.[129] Various congressional Republicans and conservative interest groups pushed the issue as well.[130]

In April 2018, the Trump Administration issued a "new framework" providing for centralized review of tax regulations in the near future.[131] The framework has three major components. First, it requires Treasury to keep OIRA abreast of its agenda by submitting quarterly "notices" of all "planned tax regulatory actions."[132] Second, it provides that OIRA will review any regulatory actions that "create a serious inconsistency or otherwise interfere with an action taken or planned by another agency," or that "raise novel legal or policy issues, such as by prescribing a rule of conduct backed by an assessable payment."[133] The treatment of this category of tax regulatory actions corresponds with the treatment of "significant" rules under Executive Order 12,866—these rulemaking projects are subject to centralized review, but the drafting agency is not required to prepare a regulatory impact analysis.[134] Third, the framework requires that actions that have "an annual non-revenue effect on the economy of $100 million or more," be subject to plenary review as is required for "economically significant" regulations under Executive Order 12,866.[135] This review calls for Treasury to produce quantified cost–benefit analysis of the proposed regulation and alternatives.[136]

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is unclear as to how certain distributions from foreign income are to be accounted for, creating the possibility that multinational corporations could use such distributions to reduce tax liability, potentially by billions of dollars for a corporate taxpayer like Apple).

129. James Valvo, *Evading Oversight: The Origins and Implications of the IRS Claim That Its Rules Do Not Have an Economic Impact*, CAUSE OF ACTION INSTITUTE (2018), https://causeofaction.org/evading-oversight-origins-implications-irs-claim-rules-not-economic-impact/; *see supra* note 14.

130. Letter from Ron Johnson, Chairman, Senate Comm. on Homeland Sec. & Gov't Affairs, and James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to Neomi Rao, Adm'r, Office of Info. & Regulatory Affairs (Feb. 1, 2018); Letter from Ron Johnson, Chairman, Senate Comm. on Homeland Sec. & Gov't Affairs, and James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt., to David Kautter, Comm'r, Internal Revenue Serv. (Feb. 13, 2018); Press Release, Cause of Action Inst., 17 Groups Urge Trump Administration to End Unlawful IRS Practice of Dodging Oversight (Feb. 27, 2018).

131. Memorandum of Agreement Between the Dep't of the Treasury and the Office of Mgmt. & Budget, Review of Tax Regulations under Executive Order 12866 (Apr. 11, 2018) [hereinafter 2018 Treasury–OMB MOA], https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf.

132. *Id.* at 1.

133. *Id.*

134. *Id.*; Exec. Order No. 12,866, § 6(a)(3)(B), 3 C.F.R. § 645 (1993), *reprinted in* 5 U.S.C. § 601 (2012); *see supra* notes 48, 54–58 and accompanying text.

135. 2018 Treasury–OMB MOA, *supra* note 131, at 1.

136. *See* Exec. Order No. 12,866, § 6(a)(3)(C), 3 C.F.R. §§ 645–46; *supra* notes 53–68 and accompanying text (describing review of economically significant regulations under Executive Order 12,866).

Notably, the framework provides the agencies with up to a year from the date of the agreement (i.e., until April 12, 2019) to commence the full review that requires Treasury to produce quantified cost–benefit analysis (as part of the regulatory impact analysis). The expressed purpose of this delay is to allow Treasury and OIRA to "obtain[] reasonably sufficient resources . . . to perform the required analyses."[137]

Parts of the framework are novel and parts are not.[138] The regulatory agenda requirement does not mark a significant change from current Treasury and Service practices. Treasury and the Service already produce an annual "Priority Guidance Plan," which is a list of planned regulatory actions, and it already updates that plan three times throughout the year (i.e., it releases an updated priority list each quarter).[139] The Priority Guidance Plan and agenda-setting process for tax regulations are already particularly robust and useful versions of the sort of regulatory agenda-setting prescribed under Executive Order 12,866: Treasury is vigilant about soliciting public input on agenda items, makes fairly accurate predictions of its capacity, and follows through on the items it places on the agenda. In addition, regular quarterly updates provide transparency as to how the projects are proceeding.[140] Thus, the new framework adds little substantively, but rather simply mandates that Treasury should provide the (already publicly available) agenda and updates directly to OIRA. The framework does not specify that the agenda should be provided to OIRA in advance of being made public. It specifies that, "[a]t the election of the OIRA Administrator, Treasury will engage in substantive consultation with OIRA regarding any" regulatory action that appears on the agenda.[141] It is not clear from the memorandum what such engagement might consist of; regardless, such engagement was not prohibited previously.

The other two elements of the framework, mandating review of all regulations and requiring cost–benefit analysis of certain significant regula-

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137. 2018 Treasury–OMB MOA, *supra* note 131, at 3.

138. In addition to the points described above, the framework provides OIRA with forty-five days to review each rule (as compared to ninety days provided for under Executive Order 12,866), with additional time provided as necessary, and allows Treasury to request an "expedited" ten-business-day review. *Id.* at 1–2.

139. *See Priority Guidance Plans*, INTERNAL REVENUE SERV., https://www.irs.gov/privacy-disclosure/priority-guidance-plan (last visited Oct. 4, 2018) (listing priority guidance plans dating back to 2000). Prior to 2011, the plan was updated twice a year, and prior to 2009 it was released annually with no mid-year updates. *See id.*

140. *Compare* INTERNAL REVENUE SERV., 2016–2017 PRIORITY GUIDANCE PLAN, https://www.irs.gov/pub/irs-utl/2016-2017_pgp_initial.pdf (last visited Oct. 1, 2018), *with* INTERNAL REVENUE SERV., 2015–2016 PRIORITY GUIDANCE PLAN, https://www.irs.gov/pub/irs-utl/2015-2016_pgp_initial.pdf (last visited Oct. 1, 2018) (detailing progress made since the prior year, with updates on the status of specific regulatory projects).

141. 2018 Treasury–OMB MOA, *supra* note 131, at 1.

tions, potentially mark a sea-change in the process for producing tax regulations. However, many important details—which could impact the effectiveness and significance of centralized review—remain to be determined.

The first category of tax regulations that OIRA plans to review is ill-defined, although in broad strokes it appears reasonable: review is triggered if the drafted rule is inconsistent with or interferes with other policy, or raises a novel issue. A tax regulation could certainly produce policy results that are inconsistent with substantive policy overseen by other agencies.[142] However, the framework states that OIRA review applies if a proposed regulation presents a "serious inconsistency"; it is unclear how OIRA will distinguish between serious and minor potential inconsistencies. The second definitional prong is similarly vague: a "novel legal or policy issue[]" appears straightforward, but is then exemplified as a "rule of conduct backed by an assessable payment."[143] In tax administration, such a rule is not novel; it is a tax or a penalty. It is unclear whether OIRA intends to (or believes it is authorized by the framework to require) review of any rule that can affect the amount of tax or penalty owed, or if this is more limited. It is also unclear whether this category only applies to rules that *create* such an assessment, or if it applies to rules that *implement* an assessment established by Congress by statute. This play in the joints—serious versus minor, and what constitutes a novel tax rule—means that OIRA could conceivably use the new framework to impose centralized review on almost any tax regulation, or on almost none.

The second category of tax regulations subject to review, those that have a $100 million effect on the economy, sounds familiar (because the number is drawn from Executive Order 12,866) but is perhaps even more undetermined. That category applies to rules that "have an annual non-revenue effect on the economy of $100 million or more, measured against a no-action baseline."[144] The primary uncertainty here is how OIRA and Treasury define the "no action" baseline. Does that refer to a state of the world where Congress has not enacted a provision that requires regulatory action, or one where Congress has acted but Treasury provides no further guidance? If it is the latter, then the baseline will often be defined by partial compliance with a law as enacted.[145] On the other hand, a baseline that as-

142. *See, e.g.*, *infra* notes 202–10 and accompanying text.

143. 2018 Treasury–OMB MOA, *supra* note 131, at 1.

144. *Id.*

145. For an example, see the discussion of the forthcoming pass-through deduction regulations, *infra* notes 189–94 and accompanying text. Congress enacted a detailed statute that leaves many questions unanswered. If, hypothetically, Treasury abstained from issuing regulations, some taxpayers would use the statute as authority to claim the deduction, but likely not nearly as many as would do so if Treasury issued regulations that made clear who qualifies.

sumes the former—no action by Congress—presents strange counterfactual assumptions that will overestimate the effect that each tax regulatory action will have on the economy.

Further confounding the question of what OIRA will review under this prong, OIRA and Treasury have entirely deferred the issue of how the "non-revenue effect on the economy of $100 million or more" will be calculated.[146] The first descriptor, "non-revenue effect," makes clear that revenue estimates are not relevant.[147] Presumably, this means that Treasury will be focused on the costs and benefits of compliance and behavioral changes, and not on the amount of tax revenue collected. If Treasury relies on its existing compliance cost estimates, this requirement will simply weight review towards regulations that affect more taxpayers. Treasury calculates compliance costs by estimating time required and assigning varied values to different people, as well as to types of professionals who assist with tax return preparation (e.g., accountants versus lawyers).[148] A few extra minutes spent on Form 1040 will easily cost more than $100 million, whereas a provision like the earnings stripping regulation—which is immensely complicated, but affects only corporations that already have the capacity to comply—may not.[149] Quantifying and monetizing behavioral changes presents its own set of challenges—discussed at length in Parts III and IV—that go far beyond simply ensuring that Treasury has enough time to hire the right people.

In summary, the Trump Administration plans to start imposing centralized review, but as of now, it is not clear to which regulations that review will apply; whether it will be imposed categorically or in an ad hoc manner; how the review will be conducted; or, as a result of these points of uncertainty, what potential effects centralized review might have on tax regulations, procedurally and substantively. These issues are explored in greater detail in the Parts that follow.

III. TRADE-OFFS IN CENTRALIZED REVIEW

Why is it that tax regulations have not been subject to centralized review, and how should such review proceed? The omission of tax regulations from OMB review is surprising, because the tax system is an essential element of each of the two components of the federal bureaucracy that OMB oversees: tax policy is an important tool for implementing regulatory

146. 2018 Treasury–OMB MOA, *supra* note 131, at 1.

147. *See id.*

148. Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279, 295 (2015).

149. *See supra* notes 111–16 and accompanying text. Treasury estimated compliance costs for that regulation of $13 million. EARNINGS STRIPPING RIA, *supra* note 116.

policy, and raising revenue is central to the fiscal system. Although the lack of centralized review was occasionally acknowledged by scholars[150] and is now at least purportedly in the process of being reshaped,[151] the normative foundations for reviewing or not reviewing have not received close scrutiny.

This Part explores the potential advantages and disadvantages of imposing centralized review on tax regulations by reference to forthcoming rules addressing the new pass-through deduction[152] and the recently finalized smoking-cessation rule, each described below.[153]

A. Politicization vs. Political Accountability

The conventional explanation for why tax regulations are most often produced in a manner that diverges from standard administrative procedures relates to politicization. This term invokes negative connotations that make it distinct from the normative goal of political accountability, but as discussed below, politicization and political accountability are very much connected. Politicization of tax collection has long been a concern, whereas political accountability for regulatory tax policymaking may be desirable. Are tax regulations in the tax administration and enforcement domain where lessons from history about the perils of politicization are instructive? Or are tax regulations a form of policymaking that really should be politicized so as to make the President accountable for policy decisions?

The prospect of political accountability may actually keep presidents (and their closest political appointees) away from the tax policymaking process. From this view, perhaps the reason tax regulations have not previously been subject to centralized review is simply because presidential administrations prefer to stay separated from the unpopular work of raising revenue. Centralized review is credited with facilitating presidential "ownership" of regulatory policy and marking resultant policy with presidential approval.[154] But when policies are unpopular, as is the case with at least

150. *E.g.*, Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961, 1016 n.320 ("The IRS does not typically engage in the cost-benefit analysis required of some other agencies under Executive Order 12,866, typically taking the position that the rulemaking is not a 'significant regulatory action,' meaning, among other things, that it will not have an annual economic effect of $100 million or more."); Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J. F. 263, 268 n.25 (2015) ("There is a longstanding exemption, based on practice rather than the text of any relevant Executive Order, for rules from the Internal Revenue Service.").

151. *See supra* Section II.B.3.

152. *See infra* notes 189–92 and accompanying text.

153. *See infra* notes 202–10 and accompanying text.

154. Sunstein, *supra* note 150, at 269–70 (considering presidential oversight in financial regulations, many of which are promulgated by independent agencies and thus are exempt from OIRA over-

some tax regulations that raise revenue, presidents do not want this sort of ownership and appearance of approval. A similar theory has been offered for why presidents have not imposed centralized review of financial regulations.[155] Recent Administrations have rarely used presidential directives and public actions to proactively support revenue-raising regulations in any manner, let alone through centralized review.[156] Presidential avoidance of tax administration is poignantly illustrated by the fact that President Kennedy was the last and only President ever to visit the IRS in person.[157]

Various institutional arrangements and norms developed over the course of the twentieth century that were intended to keep politics out of tax administration. In the early decades of the income tax, the system was administered and taxes were collected by regional "Collectors of Internal Revenue," positions that were patronage appointments made by the President.[158] In the 1920s, congressional investigators asserted that tax administrators had too much autonomy and that the Bureau of Internal Revenue should depoliticize tax collection by "promulgat[ing] and publish[ing] the principles and practices to be followed in determining tax liability."[159] But nonetheless, the patronage system persisted until the 1950s, when a series of corruption scandals among the collectors resulted in purging hundreds of government employees involved in tax collection.[160] After the scandal

sight; stating that "some Presidents might be cautious about subjecting financial regulation to the OIRA process, because that step would force the Executive Office of the President, and the President personally, to 'own' the decisions of financial regulators. If, for example, the SEC were subject to the OIRA process, the President would be blamed for its decisions, which might be an unwelcome complication. It might be better, from the standpoint of the President himself, to be able to maintain a degree of distance from financial regulators' decisions. Such distance could serve as a kind of 'enabling constraint' in which the President's authority is, in an important respect, increased if and because the decisions of financial regulators cannot be directly attributed to him. Of course there is a countervailing point, which is that without the OIRA process or some surrogate for it, the President cannot control such decisions, even if he believes them to be misdirected or wrong").

155. *Id.*

156. *See* Hemel, *supra* note 110, at 651–52 ("It does not appear that the President has *ever* issued a memorandum directing the Treasury or the IRS to take regulatory action on a tax-specific issue."). The Obama-era earnings-stripping regulation is the single significant counterexample. *See supra* Section II.B.2. Even the Clinton Administration, reputed for liberal use of presidential memoranda to direct agencies to take particular actions, *see* Kagan, *supra* note 4, made no such tax-related directives. *See Papers of Bill Clinton*, THE AM. PRESIDENCY PROJECT, http://goo.gl/7k9u23 (last visited Oct. 1, 2018).

157. President Kennedy visited the IRS in April of 1961 at the invitation of IRS Commissioner Mortimer Caplin. Colby Itkowitz, *This 100-year-old Public Servant Is from a Time When Americans Still Believed in Government*, WASH. POST (July 8, 2016), https://www.washingtonpost.com/news/inspired-life/wp/2016/07/08/this-100-year-old-public-servant-is-from-a-time-when-americans-still-believed-in-government/?utm_term=.3d16c539fcd0.

158. *See* Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 751, 756 (2001) (citing S. REP. NO. 69-27, at 229 (1926)); George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 842–48 (2013).

159. *See* Thorndike, *supra* note 158, at 751.

160. *Id.* at 757–59.

broke, organizational reforms limited Treasury's role in IRS affairs, creating a "generally independent structure."[161] At the same time, the congressional committee investigating the scandals determined that greater transparency in tax administration, and specifically greater reliance on ostensibly apolitical published guidance interpreting the tax laws, would be an important reform of tax administration.[162] This gave rise to the modern-day system of tax regulations and a variety of regularly published guidance.[163]

Politicization of tax administration once again gained public attention when Richard Nixon's attempts to use the IRS for political ends was exposed during impeachment proceedings. Nixon sought direct audits of his political enemies and sought information from their tax returns.[164] As a direct result, in the Tax Reform Act of 1976,[165] Congress imposed strict limits on the availability of tax returns and the disclosure of tax return information to prevent the White House from directing IRS activities for untoward purposes.[166]

The combination of investigations and institutional reforms in the 1920s and 1950s and significant privacy protections enacted in the 1970s created an environment in which tax administration has—for the last four decades or so—been treated with particular sensitivity by Presidents and political appointees in the Executive Office of the President. In the late 1990s, Congress remained notably focused on ensuring that the IRS remained "insulated from political interference."[167]

Today, the structure of the tax policymaking apparatus, and presidential appointment power for the key roles in that apparatus, mixes the hallmarks of agency independence and presidential control. The Commissioner of the IRS is removable by the President at-will, as are the IRS Chief

161. NAT'L COMM'N ON RESTRUCTURING THE INTERNAL REVENUE SERV., A VISION FOR A NEW IRS 12 (1997) [hereinafter A VISION FOR A NEW IRS].

162. Thorndike, *supra* note 158, at 759 (citing SUBCOMM. ON ADMIN. OF THE INTERNAL REVENUE LAWS, 82ND CONG., REPORT ON INTERNAL REVENUE INVESTIGATION 30 (Subcomm. Print 1952)).

163. *Id.*

164. Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 278–79 (2011) (summarizing the Nixon Administration's attempts to use the IRS and taxpayer information for political purposes); David J. Herzig, *Justice for All: Reimagining the Internal Revenue Service*, 33 VA. TAX REV. 1, 25–26 (2013).

165. Pub. L. No. 94-455, 90 Stat. 1520.

166. Blank, *supra* note 164, at 279–80; STAFF OF J. COMM. ON TAXATION, 94TH CONG., CONF. COMPARISON ON H.R. 10612: TAX REFORM ACT OF 1976, at 55–59 (Comparitive Comm. Print 1976).

167. A VISION FOR A NEW IRS, *supra* note 161, at 12–13. A report issued in the late 1990s by a congressionally appointed commission proposed various reforms to the IRS, including a five-year term for the IRS Commissioner. *See id.* Congress adopted this proposal, continuing the trend of insulating tax administration from the White House. 26 U.S.C. § 7803(a)(1) (2012).

Counsel and the Assistant Secretary of the Treasury for Tax Policy.[168] The Chief Counsel plays an important role within the IRS, which includes overseeing litigation; providing legal advice and interpretations of tax law to the Commissioner, to IRS field staff, and to taxpayers; and drafting regulations and legislative proposals.[169] The Chief Counsel generally reports to the Commissioner, but as part of congressional attempts to separate administration from policymaking (and from politicization), is directed by Congress to report exclusively to the General Counsel for the Department of the Treasury on matters related to tax policy.[170] The Commissioner is removable by the President, and the Commissioner has statutory authority to recommend the removal of the Chief Counsel to the President.[171] In short, the lines of authority from the President are blurred. Treasury has attempted to "retain[] its rightful place as the developer of tax policy for the executive branch" while deliberately staying "removed from tax administration."[172]

From the Nixon White House until 2016, norms developed—and remained intact across administrations and without regard to party—that limit White House engagement with all aspects of tax administration, including oversight and enforcement, and regulatory policymaking. For example, the National Economic Council (NEC), within the Executive Office of the President, often takes the lead in prompting and crafting regulatory initiatives that are top presidential priorities.[173] But the NEC has avoided engaging with tax regulations in this manner.[174] Instead, tax regulations are produced solely within the Department of the Treasury (except in instances when tax regulations are jointly issued by Treasury and another agency or department). The IRS procedures for producing tax regulations specify that the drafting team at the IRS and Treasury should not disclose the draft rule or information about it outside of Treasury Department until it is published as a proposed rule for public comment.[175] The procedures provide an ex-

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168. A VISION FOR A NEW IRS, *supra* note 161, at 12–13; *see* CHRISTOPHER M. DAVIS & MICHAEL GREEN, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 24 (2017).

169. *See* INTERNAL REVENUE SERV., CHIEF COUNSEL OF THE INTERNAL REVENUE SERVICE, IRM § 1.1.6.1 (2015).

170. 26 U.S.C. § 7803(b)(3) (2012) (providing that, for tax litigation issues and "legal advice or interpretation of the tax law not relating solely to tax policy," the Chief Counsel reports to both the Commissioner and the General Counsel).

171. 26 U.S.C. § 7803(a)(2).

172. A VISION FOR A NEW IRS, *supra* note 161, at 12.

173. Since the Clinton Administration, the NEC has been charged with coordinating economic policy. *National Economic Council*, FEDERAL REGISTER, https://www.federalregister.gov/agencies/national-economic-council (last visited Oct. 2, 2018).

174. This was relayed to this author orally by a former NEC official.

175. *See* INTERNAL REVENUE SERV., CONFIDENTIALITY, IRM § 32.1.1.5 (generally disallowing dissemination of draft regulations outside of the Department of the Treasury prior to publication in the Federal Register).

ception for "routine coordination necessary with other government agencies (e.g., Department of Labor and Pension Benefit Guaranty Corporation on pension regulations)," which suggests that the procedure allows for intra-government sharing only with jointly issued regulations.[176]

Towards the end of the Obama Administration, OIRA staff expressed that their sensitivity about politicizing tax administration extended to centralized review of tax regulations, remaining consistent with Administrations not wanting to appear to be involved in regulatory tax policymaking.[177] And former Treasury and Service officials have claimed that submitting tax regulations for OIRA review would inevitably politicize the rulemaking process in a way that would be harmful for the substance of tax regulations, although the specific concern here with regard to tax regulations is not exactly clear.[178] In contrast, over the last forty years, oversight of the other areas of the administrative state by political appointees in or near the White House has notably increased, a move that has been justified normatively by scholars and policymakers.[179]

The optimistic justification for politicization is that having political personnel involved in policy decisions establishes political accountability. The basic claim to political accountability in the Executive Branch is that presidential imprimatur creates a "link" between the electorate and the policy decisions that emerge from the Executive Branch.[180] Proponents of centralized review argue that it can strengthen this link by inserting OMB political personnel who are close to the White House—physically and also in terms of familiarity and commitment to the President's policy goals—into the regulation-drafting process.[181]

In addition to establishing processes to ensure that policies reflect the priorities of the elected president, political accountability in the regulatory process is fostered by transparency. Transparency includes making clear

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176. *Id.*

177. *See* GAO REPORT, *supra* note 9, at 26 (expressing that abstaining from centralized review of tax regulations was intended "to insulate the Executive Office of the President from the charge that it might use OMB's review of IRS for political purposes").

178. Jeremiah Coder, *Why Treasury Tax Regulations Are Rarely 'Significant,'* TAX NOTES: TAX NOTES TODAY, at 872, Aug. 20, 2012; *see also* GAO REPORT, *supra* note 9, at 26 ("[O]ne historic rationale for the agreement was to insulate the Executive Office of the President from the charge that it might use OMB's review of IRS for political purposes.").

179. *See, e.g.*, JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS 326–28 (7th ed. 2014) (providing a concise overview of the development of White House regulatory oversight from the Nixon Administration through the Obama Administration, with emphasis on establishing presidential control); *see supra* Subpart II.A.

180. Kagan, *supra* note 4, at 2331–32; Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1411–12 (2013).

181. *E.g.*, DeMuth & Ginsburg, *supra* note 32, at 1081; Pildes & Sunstein, *supra* note 32, at 3–4.

the tradeoffs inherent in policy decisions.[182] This is especially lacking currently in tax regulations; with no publicly available revenue estimates, it is oftentimes totally unclear how a particular tax regulation will affect the fiscal position of the U.S. government. The need for a broad perspective on the implications of any given policy is a longstanding justification for centralized review.[183] It seems particularly important in the tax-regulation context; the revenue effects of alternative versions of the regulation have implications for government spending and borrowing in the future.

Political accountability may be an antidote to a potential concern with tax regulations: capture of the regulatory process. Agency "capture" describes the concern than an agency can be controlled or unduly influenced by the interests it is intended to regulate, at the expense of the public interest.[184] In the tax regulation context, capture can consist of seeking to shape regulations to avoid increased tax liability or increased private costs. This could be accomplished by blocking a regulation that would increase tax liability or by shaping a regulation to carve out an industry or set of taxpayers who would otherwise face increased tax liability. Whatever the particular manifestation, capture in the tax contexts looks very similar to capture in other contexts: well-organized interest groups can take advantage of superior information (for example, technical understanding of the subject matter that regulations are focused on) and procedural protections built into the regulatory process to shape outcomes, often at the expense of the diffuse and unorganized public.[185]

The extent to which the tax regulatory process is susceptible to capture is subject to debate. Because the tax system affects essentially every person and every industry in the country, Treasury and the Service are not prone to the sort of single-industry-focused pressures that arise with more narrowly focused regulators.[186] On the other hand, the participants in the notice-and-comment process for tax regulations are highly skewed towards organized

182. *See generally* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 149 (2012).

183. Presidential Review of Agency Rulemaking, 1 C.F.R. § 305.88-9 (1989) ("An effective mechanism is needed to coordinate agency decisions with the judgments of officials having a broader perspective, such as the President and Congress.").

184. *See generally* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 19–25 (2008); Michael A. Livermore & Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 34, at 292, 296–98; Yackee, *supra* note 34, at 420, 426.

185. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1326 (2010).

186. *Cf.* Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1178 (1993) (describing tax committees in Congress as having "numerous and diverse constituencies" as compared to the "fewer and more homogeneous pressures" of more specialized committees).

interests, with very few public interest participants.[187] And tax regulation writing is largely a "closed process" with little transparency (even when Treasury uses notice and comment), which makes it highly susceptible to capture, which may not be outwardly apparent.[188] The potential for capture may skew tax regulation to favor taxpayers with greater resources.

The forthcoming pass-through regulations are useful to expose the potential pros and cons of politicizing regulatory tax policy. The 2017 Tax Act provides, in a new section 199A, that certain income from businesses that are taxed as pass-throughs—meaning that the income of the business appears on the tax return of the individual owner or owners—will be eligible for a special 20% deduction.[189] In some respects, Congress acted in typical fashion, consistent with how it has produced tax legislation in the past: it created an exceedingly complicated statutory scheme that limits the amount of the deduction for certain businesses based on how much a pass-through business spends on a combination of payroll expenses and capital investments. The deduction is capped at either 50% of W-2 wage expenses, or 25% of W-2 wage expenses plus 2.5% of the original cost of "qualified property."[190]

But Congress left various critically important issues in section 199A for the Executive Branch to sort out on its own. Perhaps most challenging, section 199A establishes differential rates as between distinct types of services, but it does not establish which services qualify for the low rate and which do not. The deduction is expressly disallowed for high-earning lawyers and doctors, and expressly *not* disallowed for engineers and architects.[191] At the same time, the qualifying services cannot include "any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees."[192] Treasury's regulations must specify which specific service businesses qualify for the deduction—do architecture firms built on the reputation of employees qualify or not? Should they be treated differently than general contracting businesses built on the reputation of employees? What about firms providing support ser-

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187. Wallace, *supra* note 17, at 219–24.

188. Zelinsky, *supra* note 186, at 1173 ("[R]elatively closed processes, less visible to some groups or to the general public than to other groups, are more easily captured by the interests that can readily monitor those processes and therefore intelligently punish and reward such processes' decisionmakers.").

189. 26 U.S.C.A. § 199A (West Supp. 2018); Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11011(a), 131 Stat. 2054, 2063; H.R. REP. NO. 115-466, at 10–19 (2017) (Conf. Rep.).

190. 26 U.S.C.A. § 199A(b)(2)(B) (West Supp.).

191. *Id.* at § 199A(d)(2)(A) (citing 26 U.S.C. § 1202(e)(3)(A) (2012) (defining specified services by reference to a list that includes lawyers, doctors, engineers, and architects)) (directing that the engineers and architects should be omitted from the list).

192. 26 U.S.C. § 1202(e)(3)(A).

vices to reputation-based firms? For example, if office support for a reputation-based service is a qualifying business, can a reputation-based service spin off its support functions into a separate entity and receive a partial deduction?[193]

The regulation that will define "reputation or skill" creates huge opportunities for political favoritism not grounded in any defensible policy rationale. Perhaps reality television stars should be exempt—i.e., should qualify for the deduction—because the genre has friends in high places? And perhaps it is better for the White House to make the final decision and to be known to be the decision-maker. Congress gave no hint as to how these sorts of questions should be resolved, and there is little additional explanation of the meaning or purpose of the provisions from the Joint Committee on Taxation. Indeed, there are not any clear underlying purposes to the provisions that might offer some semblance of consistency as to who should and who should not be able to take advantage of the deduction.[194] The end result is that Treasury must act—through regulations and other forms of guidance—to clarify how the rules should work, who is permitted to take the deduction, and who is not so permitted. But these regulations will necessarily involve significant policy decisions that affect distribution between owners and workers, between industries, within industries, and between current and future taxpayers, all of which seem like political issues, for which public accountability would be desirable.

In short, the line drawing between services seems inherently political and appropriate for politically accountable decision-makers. In contrast, the earnings stripping regulation exhibits the absurdity of trying to depoliticize inherently political tax policy: centralized review conducted for that regulation was hindered because the Administration obfuscated the purposes, shrouding behavioral effects, revenue concerns, and distributional goals in technical tax-policy-implementing sort of language. Greater transparency as to political decision-making could increase accountability and limit negative politicization. But the lines can be blurry between political involvement that promotes accountability and politicization that potentially taints tax administration.

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193. David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV (forthcoming 2018) (manuscript at 21–22), https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=3089423.

194. *See id.* at 16–18; Daniel Shaviro, *Evaluating the New US Pass-Through Rules*, BRIT. TAX REV., no. 1, 2018, at 49, 51, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141521.

B. Systematizing Analysis

This Subpart considers how qualitative and quantitative analysis could be part of the centralized review process and how such analysis might be conducted as applied to tax regulations. Circular A-4 expressly excludes transfer payments from consideration in cost–benefit analysis,[195] and OIRA's annual report on the costs and benefits of federal regulations has, in recent years, included a very brief statement distinguishing transfer regulations from typical regulations: "Budgetary transfer rules are rules that primarily cause income transfers usually from taxpayers to program beneficiaries. Agencies typically do not estimate possible resulting distortionary effects on the economy."[196]

Thus, analysis of transfers—tax or otherwise—is generally relegated to budget tables. The budget is a measure of the government's "fiscal position," employed in the legislative process as a tool for making "trade-offs between different uses of resources."[197] But the practice of analyzing tax policy strictly through budgetary tools belies ambiguity about whether tax policy is distinct from other types of regulatory policy. Dan Shaviro illustrated this point: "[O]ne might think of minimum wage laws either as workplace regulation, involving the organization of a mandatory cartel among low-wage workers, or as equivalent to an off-budget tax on the employers of such workers accompanied by an off-budget transfer to those same workers."[198] Of course, a minimum wage could also be accomplished by way of an on-budget tax on employers and a transfer back to workers, managed by the government and reflected in the federal budget. Shaviro concludes that the "rationale for distinguishing between the fiscal system

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195. *See* CIRCULAR A-4, *supra* note 6, at 38.

196. OIRA 2016 DRAFT REPORT, *supra* note 38, at 8 n.15. And later: "[F]or budgetary transfer rules, benefits and costs are generally not estimated because agencies typically estimate budgetary impacts instead." *Id.* at 63 n.134. This language echoes similar language in reports from previous years. *See OIRA Reports to Congress*, OFFICE OF MGMT. & BUDGET, https://obamawhitehouse.archives.gov/omb/inforeg_regpol_reports_congress/ (last visited Oct. 3, 2018).

197. David Kamin, *Risky Returns: Accounting for Risk in the Federal Budget*, 88 IND. L.J. 723, 727 (2013). The many rules and practices related to enacting taxing and spending policies within budget constraints, as well as measuring budget effects of legislation, all contribute to the basic purpose of reflecting the government's fiscal position and requiring trade-offs between on-budget expenditures. In arguing that the federal budget should not account for certain risks that have no fiscal effect, Kamin comments, "[P]olicymaking should, to the extent possible, take into account the full costs and benefits of policies; that is how resource allocation should be done. . . . However, budgeting is a different exercise than cost-benefit analysis." *Id.* at 728.

198. Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 190 (2004).

and everything else the government does is simply ease of measurement."[199]

Therein lies an enormous challenge for centralized review of tax regulations, and for analysis of tax policy more generally: revenue estimates are challenging enough to produce but nonetheless provide incomplete information about the effects of tax policy. While budget analysis facilitates some trade-offs in policymaking—i.e., what level of resources are available for public spending—it does not attempt to manage or to engage directly with the "social costs" of such trade-offs, nor with the benefits of policy alternatives.[200] This means that analyzing tax policy strictly through budgets leaves out important considerations in tax policymaking.[201] Although distributional analysis sometimes accompanies revenue estimates, this analysis is generally limited. And none of these tools are regularly applied to the tax regulatory process and made available for public consumption during that process.

Centralized review outside of tax often includes cost–benefit analysis, and proponents and critics of centralized review have explored the possibility of integrating distributional analysis into that review. This Subpart considers each—cost–benefit analysis and distributional analysis—in turn, as applied to tax regulations. Together, these modes of analysis have the potential to illuminate a diversity of trade-offs necessary in formulating tax regulations.

A recently finalized tax regulation, issued as part of Treasury's efforts to implement the Affordable Care Act's "individual mandate," illustrates how useful this sort of analysis could be.[202] The individual mandate was intended to prompt individuals to acquire health insurance coverage that

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199. *Id.* David Bradford and Shaviro illustrated this point most absurdly, imagining the possibility of replacing all weapons procurement spending carried out by the Department of Defense with a tax credit for weapons production, offered to the same manufacturers for the same amounts as would have been paid directly. *Id.* at 197 (citing David F. Bradford, *Reforming Budgetary Language*, *in* PUBLIC FINANCE AND PUBLIC POLICY IN THE NEW CENTURY 93–116 (Sijbren Cnossen & Hans-Werner Sinn eds., 2003)).

200. Kamin, *supra* note 197, at 737 (arguing that the federal budget should not be used for such purposes).

201. This critique may also apply to spending, but congressional appropriations are enacted annually and are generally subject to significant scrutiny. This does raise an oddity in tax policymaking that has been recognized only partially in the literature: tax expenditures are widely viewed as not receiving sufficient oversight, but nonetheless, when tax expenditures are shaped by Treasury through regulations, these regulations are not subject to centralized review or cost–benefit analysis. Scholars have widely criticized the distinction between fiscal functions and other functions as too blurred to justify treating tax policy differently than other types of policy, focusing on the legislative process for so-called tax expenditures. *See, e.g.*, Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U. L. REV. 1 (2010).

202. *See* Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, 79 Fed. Reg. 70,464 (Nov. 26, 2014) (to be codified at 26 C.F.R. pt. 1).

meets particular specifications.[203] It is implemented through a detailed statutory and regulatory scheme, and the focus here is on one particular regulatory provision: a rule establishing tobacco-related "wellness program incentives."[204] The final regulation included a rule that is apparently designed to discourage smoking, but the rule was adopted without close consideration of the trade-offs involved. It seems at least possible that the rule results in costs that exceed benefits, and that these costs will largely be borne by low-income people. None of these issues were subject to quantitative analysis.

The Affordable Care Act and prior legislation allows employer-provided health insurance plans to include monetary incentives for certain healthy behavior, such as regularly exercising or abstaining from tobacco use. For example, a health insurance plan might have a total annual cost of $6,000 per covered individual, of which $4,500 is paid by the employer, and $1,500 is paid by the employee. Under the wellness program incentive rules, a plan could include a $500 discount off the employee portion, if the employee joins a gym and regularly makes use of it, and an additional $1,000 discount for abstaining from smoking or seeking help to stop smoking. With these incentives in place, any regular gym-goers who are also non-smokers would end up paying $0 for the coverage, while smokers who did not workout at a gym would pay the full $1,500.[205]

Section 5000A requires that individuals have health insurance, but provides an exemption such that the penalty is *not* imposed if a person did not have sufficient income to afford the plan made available to the person through her employer.[206] (In 2019, the penalty amount will be $0, effective-

203. The individual mandate was effectively repealed as part of the 2017 Tax Act, but curiously, Congress's approach to repeal was simply to reduce the penalty for failure to meet the insurance requirement to $0 (from around $700 or more per person), starting in 2019. Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092. That means that the regulations remain fully in force for 2018, and after that, the requirements will remain on the books, as will the regulations implementing the requirement and facilitating the process for exemptions from the mandate.

204. Treas. Reg. § 1.5000A-3(e)(3)(ii)(F) (as amended in 2016). I have not attempted to estimate whether the tobacco-cessation rule might trigger the $100 million threshold under Executive Order 12,866. *See supra* note 51. If 150,000 people were subject to the penalty because of the rule, it would have resulted in approximately $100 million of penalty revenue for the government, although those revenues are transfers that could potentially trigger centralized review as economically significant on that basis alone. *See supra* note 52 and accompanying text. It seems almost certain that the entire set of proposed rules under 26 U.S.C. § 5000A would have done so—for example, another piece of the rule provided that a person is deemed to have coverage for the entire month for purposes of determining penalty liability if they have coverage for a single day during the month. Treas. Reg. § 1.5000A-1 (as amended in 2016). If this rule affected penalty payments or insurance coverage decisions for just a fraction of the 28.5 million uninsured people, it would surely amount to over $100 million.

205. *See, e.g.*, Treas. Reg. § 54.9802-1(f)(5)(ii) (as amended in 2014) (describing, in Example 2, the operation of incentives for tobacco-cessation programs as part of wellness programs permitted under the Public Health Service Act as amended by the Affordable Care Act).

206. 26 U.S.C. § 5000A(e)(1) (2012) (exempting "[i]ndividuals who cannot afford coverage").

ly repealing the individual mandate absent further action by Congress.[207]) Congress provided that a plan is unaffordable for purposes of the individual mandate if the employee's required contribution is more than 8% of the employee's household income.[208] Congress defined household income and delegated to Treasury the task of determining exactly how to calculate the required contribution.

The regulation is performing classic gap-filling: although Congress did not expressly direct Treasury and the IRS to issue regulations to deal with this particular issue within Code section 5000A, it is unenforceable and impossible to administer consistently without fleshing out numerous details, including how to calculate the "required contribution" amount and how to account for incentives provided in wellness programs when calculating affordability.

The final regulation that Treasury produced provided that the 8% calculation will not count tobacco-cessation benefits as actual costs to the employee.[209] That is, the employee cannot account for failure to qualify for the tobacco-cessation benefit as part of the cost of the insurance. Thus, in calculating affordability, the example plan described above would automatically be treated as costing an individual employee $500 out of pocket: the $1,500 sticker price minus the $1,000 tobacco wellness benefit, regardless of whether the employee qualifies for that benefit. However, the plan only truly costs $500 for employees who actually qualify for the smoking-cessation benefit.

Counting or not counting a tobacco wellness benefit can make a big difference in determining whether health coverage is affordable. For example, an employee who had household income of $7,000 per month would not qualify for an affordability exemption because the deemed $500 employee contribution is 7.1% of household income. But if the employee was not eligible for the smoking-cessation benefit (that is, the employee is a smoker and does not participate in an antismoking program), then the actual cost to the employee could be as much as $1,500 per month, which is 21.4% of household income. Nonetheless, even with $1,500 of out-of-pocket costs per month, the regulation provides that the employee would not qualify for exemption from the penalty because only the $500 part of

207. The provision is not actually being excised from the tax code, and the Regulation will apparently remain on the books. *See supra* note 203.

208. 26 U.S.C. § 5000A(c)(4)(B) (2012) (defining household income by reference to other provisions of the Tax Code).

209. Treas. Reg. § 1.5000A-3(e)(3)(ii)(F) (as amended in 2016); Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, 79 Fed. Reg. 70,464, 70,467 (Nov. 26, 2014) (to be codified at 26 C.F.R. pt. 1).

the cost of the insurance (deemed the "unearned" benefit in the language of the regulation) counts for purposes of calculating the exemption.

The preamble to the final regulation as published (without centralized review) explains that the rationale for the ultimately adopted rule was connected to the ACA's healthcare goals: the rule is justified as "consistent with policies related to tobacco use reflected in the Affordable Care Act, such as allowing issuers to charge higher premiums based on tobacco use."[210] Treating all employees as qualifying for the smoking-cessation program regardless of the reality extends the individual mandate penalty to a group of low-income people who would otherwise be exempt from it. In so doing, it potentially creates incentives for those low-income people to accept and pay for health insurance, and then further to participate in the smoking-cessation program offered under their plan; otherwise, they either will be subject to the penalty or take on health insurance that may be truly unaffordable. But on the other hand, it may result in the affected population paying the penalty, since the insurance (without the smoking-cessation benefit) may cost more than the penalty, so they might feel they have no choice.

When this provision was proposed, it was not subjected to centralized review by OIRA, and Treasury did not undertake regulatory impact analysis, nor did it develop a statement of need for the proposed action or explore possible alternatives.[211] But what if the rule had gone through centralized review as an economically significant rule?

1. Cost–Benefit Analysis

For (nontax) "economically significant" regulations,[212] OIRA instructs that the drafting agency must evaluate the costs and benefits of the proposal and the leading alternative approaches, and thus, the agency must determine which options should be treated as the top alternatives. This analysis is very much focused on the effects of various alternative rules on private behavior. With the smoking-cessation regulation described above, there was no public discussion of these alternative manifestations of the rule before it was finalized.

If this approach were applied to consider alternatives with regard to how to treat smoking-cessation programs, there are six possibilities that could have been discussed:

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210. Minimum Essential Coverage and Other Rules Regarding the Shared Responsibility Payment for Individuals, 79 Fed. Reg. at 70,467.

211. *See supra* note 55 and accompanying text.

212. *See supra* notes 51–52.

1. The rule as proposed, counting such programs as "earned," while counting other wellness incentives as unearned;
2. Counting other wellness incentives as earned but counting smoking-cessation programs as unearned;
3. Counting all wellness incentives as earned;
4. Counting all wellness incentives as unearned;
5. Establishing some process to allow calculations to reflect the wellness incentives that a taxpayer actually qualified for, thus actually establishing whether a taxpayer's costs exceed the congressionally mandated affordability threshold; or
6. Considering whether there was some alternative regulatory or non-regulatory approach to further the goal of discouraging tobacco use, as encouraged by OIRA guidance (e.g., could some other anti-tobacco intervention be packaged with the communications related to compliance with the individual mandate?).[213]

To carry out cost–benefit analysis of the proposal and alternatives, Treasury would first identify a baseline against which to measure costs and benefits. One approach—although there are alternatives—would be to assume a world in which there were a cost-free, perfect measurement of each employee's actual cost of healthcare coverage. Then, alternative proposals could be compared based on (1) expected degree of replication of the perfect measurement and (2) administrative and compliance costs.

Next, Treasury would outline the anticipated costs and benefits of each alternative. These might include the following:

- ❖ Compliance costs for taxpayers and their employers, for calculating whether coverage is affordable;
- ❖ Enforcement and error costs for the Service, for confirming whether taxpayers have accurately determined that they are exempt from the individual-mandate penalty;
- ❖ Costs or benefits resulting from changes in behavior, including whether deeming coverage affordable changes healthcare plan consumption or uptake of smoking-cessation programs resulting from including or not including the benefit in the affordability calculation; and
- ❖ Costs or benefits arising from whether and how the smoking-cessation programs affect smoking behavior.

213. OIRA suggests considering different forms of communication, different default rules, and various other outside-the-box alternatives to the proposed regulation. *See supra* notes 64–66. Given the broader health care policy context, Treasury might have ruled out option 2 as running counter to Congress's desired policy to discourage smoking (by instead undermining the incentive effect of smoking-cessation programs). Similarly, option 3 would seem to undermine the congressional goal of affordability by making plans appear to be less expensive than they actually are for many employees. That would have left the regulation as adopted, along with alternatives 4, 5, and 6.

Additional consideration might be given to collection of the individual-mandate penalty.

With potential costs and benefits identified, Treasury would attempt to quantify and then monetize each consequence of each alternative regulation. This would require Treasury to determine the number of taxpayers whose behavior would potentially be affected by the regulation. This would not include taxpayers for whom health care coverage was expected to easily fall below the 8% affordability threshold whether or not wellness incentives are included (presumably higher income taxpayers), nor taxpayers whose coverage would not be affordable regardless of whether marginal incentives were included (presumably more low-income taxpayers or taxpayers with especially high employer health care costs). From the remaining universe of potentially affected taxpayers, Treasury would then estimate the number who might have an available wellness incentive, smoking-cessation incentive, or both; and then the number who were actually smokers. This would provide an idea of the universes of taxpayers who (a) could be affected in any way by how wellness-program incentives are included in the affordability calculation and (b) might have a smoking-cessation benefit available, but who might not actually receive available smoking-cessation incentives and thus would be affected by a rule that treated the benefit as earned.

The analysis would then turn to quantifying the behavioral effects of the alternative rules—would one rule actually encourage greater participation in smoking-cessation programs, and what would be the anticipated effects of such participation? What would be the compliance costs of alternative rules, and how would compliance costs affect behavior? What alternative antismoking intervention might Treasury carry out in connection with administering the individual mandate, and would that be more effective (in terms of costs and/or behavior)?

Policymakers have devoted significant attention to quantifying behavioral responses and trade-offs applicable in other areas of regulatory policy.[214] But this quantification is lacking with tax policy: tax scholars and economists working on optimal income taxation are grappling with these

214. *See* OIRA PRIMER, *supra* note 6, at 9 (suggesting that existing "revealed preference studies" are a useful source of information for quantifying the trade-offs involved in regulatory alternatives).

issues,[215] and the behavioral trade-offs in response to tax rules remain subject to significant academic debates.[216]

Indeed, tax rules present particularly vexing analytical challenges for economists.[217] Raising revenue generally distorts behavior in undesired ways, and greater taxation generally results in exponentially greater distortionary costs, causing changes in behavior that "move the market away from the competitive equilibrium, thereby reducing social efficiency."[218] The relevant point of analysis for modeling behavioral responses is the taxpayers' marginal tax rates, which vary widely.[219] Among individuals, marginal rates vary based on family status, location (e.g., state and local income tax), type of income, and so on. For the corporate income tax, the basic distortions are of returns to labor (i.e., employee compensation), capital (i.e., investor returns), or in prices.[220] Among business entities, marginal rates vary across lines of business, types of business investments, and location of investments, among other factors.[221]

Problematically, these responses are not well understood in the real world.[222] Prior work on designing tax instruments has required making significant assumptions about these key questions of behavioral responses.[223] To take one example, scholars continue to rely on a study from 1985 that found between \$0.17 and \$0.56 of deadweight loss for each marginal dollar of revenue raised.[224] The study concluded that "a public project must pro-

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215. *See* JOEL SLEMROD & CHRISTIAN GILLITZER, TAX SYSTEMS 182–83 (2014) (summarizing the empirical challenges involved in measuring behavioral effects of different tax instruments, and evaluating behavioral responses along multiple margins, e.g., work/leisure, avoidance, evasion, career choice, and so on); Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 CORNELL L. REV. 523, 528–35 (2013) (summarizing some recent progress in empirical work on behavioral responses to taxation and emphasizing the need for more of this research).

216. SLEMROD & GILLITZER, *supra* note 215, at 79.

217. Raskolnikov, *supra* note 215, at 526, 533–37 (detailing the particular challenges that tax law raises for economic analysis, describing "immense complexity, uncertainty, and value dependence" in theoretical tax models, and emphasizing, under the header "*Why What's Good for Environmental Law Isn't Good for Tax*," the challenge of inherent inefficiency in (most) taxation and the further complication of responses, including substitution, evasion, and avoidance).

218. JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 589 (4th ed. 2013).

219. *See id.* at 608–11. And, actually, the best, although even more challenging, data point is probably each individual's perceived marginal tax rate.

220. *Id.* at 715–16.

221. SLEMROD & GILLITZER, *supra* note 215, at 182.

222. *See* Raskolnikov, *supra* note 215, at 533–37, 540–46.

223. *See, e.g.*, Lily L. Batchelder et al., *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 27 n.16 (2006) (arguing that tax incentives should be designed assuming "underlying price elasticities and behavior do not vary systematically across the income distribution" in the absence of evidence to the contrary).

224. Charles L. Ballard et al., *General Equilibrium Computations of the Marginal Welfare Costs of Taxes in the United States*, 75 AM. ECON. REV. 128, 128 (1985). *See* Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905, 1925 n.85 (1987); Gary S. Becker & Casey B. Mulligan, *Deadweight Costs and the Size of*

duce marginal benefits of more than $1.17 per dollar of cost if it is to be welfare improving."[225] But this is an enormous range, and the study relied on significant assumptions that ought to be tested before moving to the real world. This is just one example, but it is a key piece of information for tax policy analysis—the uncertainty and lack of data would impair effective cost–benefit analysis.

Thus, the size and even the direction of some tax-induced distortions remains unclear, and even if empirical work provides greater insights on taxpayer elasticities, the analysis remains complex and dynamic.[226] Policymakers have developed various methods for addressing some of these issues for purposes of revenue estimates.[227] But revenue-estimate models are far less complex than models that attempt to integrate efficiency costs: revenue estimates involve determining the extent to which taxpayers will engage in the taxed behavior; whether those who are not taxed are able to do so through illegal evasion or legal avoidance does not matter to revenue estimators, nor does the cost of evasion or avoidance activities. But to estimate the social costs more broadly for purposes of cost–benefit analysis and to model behavioral responses accurately, much more information about the types of responses and costs of responses is necessary.

Cost–benefit analysis thus offers alluring possibilities for integrating the social costs and benefits of tax policy changes into the regulatory process: as a proven analytical method, cost–benefit analysis could provide insights on private allocative effects of tax regulations. But cost–benefit analysis is not plug-and-play, so realizing benefits from cost–benefit analysis will in many instances further empirical research to quantify and monetize how tax policies affect behavior. This research may have been started in other contexts and can build on the tools used for revenue estimates, but this leaves significant work to be done before cost–benefit analysis can play a reliable role in developing tax regulations.

Government, 46 J.L. & ECON. 293, 317 n.56, 329 n.86 (2003); Brian Galle, *Carrots, Sticks, and Salience*, 67 TAX L. REV. 53, 72 n.102 (2013); Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2482 (2014) (describing the Ballard et al. study as "[t]he most-cited economics article estimating the efficiency costs of taxation").

225. Ballard et al., *supra* note 224, at 128.

226. SLEMROD & GILLITZER, *supra* note 215, at 88–91.

227. The Department of the Treasury, the Joint Committee on Taxation, and various thinktanks have developed microsimulation models based on actual tax returns that capture behavioral responses at least as to tax return positions. *See, e.g.*, *The Tax Policy Center Microsimulation Model*, URBAN INSTITUTE, https://www.urban.org/research/data-methods/data-analysis/quantitative-data-analysis/microsimulation/tax-policy-center-microsimulation-model (last visited Oct. 3, 2018).

2. Distributional Analysis

OMB has generally neglected distributional consequences of regulations,[228] but scholars have been skeptical of this blind spot in regulatory analysis: OIRA is seen as "disclaim[ing] any responsibility for developing protocols that agencies could use to determine the distributional impacts of a particular regulation," which "sends a clear message that consideration of distributional consequences is a peripheral concern at best. Regulatory agencies have gotten that message and, in general, pay little attention to distribution."[229] OIRA seems especially keen on ignoring distributional effects of taxes in that it directs agencies to disregard transfer payments in analysis of the effects of regulations.[230]

Still, some scholars have argued that distributional analysis has an important role to play in the regulatory process even outside of tax.[231] Other scholars argue that distributional analysis is unfeasible.[232] Steve Croley's volume defending the administrative state and regulatory processes as generally up to the task of producing "socially beneficial regulation" is instructive on the challenges involved in confronting distributional issues.[233] He notes that from "purely a distributive point of view, reallocation of social resources may be desirable even if a regulatory initiative's benefits are outweighed by its cost."[234] The desirability of alternative distributional outcomes, he argues, hinges on establishing a desired distribution against which the expected distributional outcomes of competing policy alternatives can be measured.[235] But even if policymakers could agree on the baseline for the argument, there are measurement problems: how can you determine what distribution is desirable and whether it has been achieved?[236] In other policymaking contexts aside from tax, disregarding distribution is justified by the belief that it is appropriate to rely on the tax

228. *See supra* notes 73–76 and accompanying text.

229. Bagley & Revesz, *supra* note 5, at 1326.

230. *See* OIRA PRIMER, *supra* note 6, at 8 (explaining that OIRA's guidance to agencies includes a stylized example of a Pigouvian tax, specifying that "taxes paid . . . by [a] firm to the government are a transfer and have no effect on the net benefits of the regulation"); *supra* note 196 and accompanying text.

231. *E.g.*, Bagley & Revesz, *supra* note 5, at 1324–29.

232. *See id.* at 1325 n.391, 1326–27; David A. Weisbach, *Distributionally Weighted Cost–Benefit Analysis: Welfare Economics Meets Organizational Design*, 7 J. LEGAL ANALYSIS 151, 154–58 (2015).

233. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 254 (2008).

234. *Id.*

235. *Id.* (describing the need for a "normative distributive baseline").

236. *See* Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1380 (2014) (explaining that Executive Order 13,563 recognizes that some benefits and burdens are "difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts").

system to deal with redistribution—most notably, Louis Kaplow and Steven Shavell advocate that policymakers could avoid dealing with the distributive effects of nontax policies because any such effects should be corrected through the income tax.[237] But that justification does not work for tax-policy analysis and the distributional function of tax regulations.[238]

Because distributional effects are so central to tax policy, it is desirable to consider those effects in regulatory tax policy. If we were to treat the tax system as the tool for redistribution, it is all the more important that analysis of tax regulations includes consideration of distributional effects. There is already institutional competence and capacity for such analysis in the Executive Branch (and also in the Legislative Branch). Distributional analysis of the tax system and of changes and proposed changes to the tax code are produced by the Service's Statistics of Income division,[239] Treasury's Office of Tax Analysis,[240] the Joint Committee on Taxation,[241] and the Congressional Budget Office.[242] Each organization uses microsimulation models based on previously filed tax returns (provided each year by the Service), and each carries out distributional analysis slightly differently (there are ongoing debates about which of several alternative approaches to key issues are preferable). The results are similar: distribution is analyzed by reference to some measure of pretax income, dividing individual taxpayers into income-band ranges (e.g., less than $10,000, $10,000–$20,000,

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237. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994 n.64 (2001) ("[T]here may be no need separately to identify the redistributive effects of legal rules, especially of particular rules, because general data on the distribution of income and measures of the standard of living will tend to capture the aggregate of distributive effects from all sources.").

238. *See* Richard Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. __ (forthcoming 2018).

239. *See SOI Tax Stats - Individual Statistical Tables by Size of Adjusted Gross Income*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-size-of-adjusted-gross-income (last visited Oct. 3, 2018).

240. JULIE-ANNE CRONIN, OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, OTA PAPER 85, U.S. TREASURY DISTRIBUTIONAL ANALYSIS METHODOLOGY (1999), https://www.treasury.gov/resource-center/tax-analysis/Documents/WP-85.pdf; OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, TREASURY'S DISTRIBUTION METHODOLOGY AND RESULTS (2015), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Summary-of-Treasurys-Distribution-Analysis.pdf.

241. STAFF OF J. COMM. ON TAXATION, 103D CONG., METHODOLOGY AND ISSUES IN MEASURING CHANGES IN THE DISTRIBUTION OF TAX BURDENS (J. Comm. Print 1993) [hereinafter JCT METHODOLOGY], https://www.jct.gov/publications.html?func=startdown&id=4471. The same microsimulation models that are used—by the government and thinktanks—for revenue estimates can produce distributional estimates, setting aside social costs. *See supra* note 227.

242. *E.g.*, CONG. BUDGET OFFICE, 115TH CONG., THE DISTRIBUTION OF HOUSEHOLD INCOME, 2014 (2018) [hereinafter DISTRIBUTION OF HOUSEHOLD INCOME], https://www.cbo.gov/system/files?file=115th-congress-2017-2018/reports/53597-distribution-household-income-2014.pdf.

and so on),[243] or into equal-sized groups (e.g., deciles[244] or quintiles[245]). This sort of analysis is useful—it reveals how income is spread across the population, how the tax burden is spread across the population, and how specific proposals alter that distribution.

But there are significant limitations to this analysis currently. The standard distributional analysis does not involve more nuanced distinctions based on characteristics other than income (for example, race, gender, health status, or education level).[246] For example, although the Service collects data on industries from corporate taxpayers and partnership filers, it has not used previously this data for cross-sector distributional comparisons of individual taxpayers.[247]

Distributional analysis of the pass-through rule might show that different alternative formulations make the rule significantly more or less regressive. Because Congress mandated that the deduction must phase out for certain types of businesses, the way that those businesses are defined can mean that many more (or fewer) high-income people will be able to make use of the deduction. This seems like a very important consideration in formulating the regulations. Similarly, distributional analysis of the smoking-cessation rule might have revealed that the rule was either beneficial or harmful for low-income people—it is hard to know without attempting the analysis, but either way, the information would have been a relevant consideration to balance against the potential benefits of discouraging smoking. On the other hand, assessing the distributional effects of the smoking-cessation rule primarily has to do with how the rule shapes private behavior—does it make less people buy health insurance, or does it make more people actually take part in smoking-cessation programs? Answering this question seems beyond the existing competencies developed to analyze distributional effects of collecting revenue.

For rules like the pass-through regulation, the existing models could potentially be useful, particularly if used along with other data that revealed

243. JCT METHODOLOGY, *supra* note 241, at 17.

244. *See, e.g.*, OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, DISTRIBUTION OF FAMILIES, CASH INCOME, AND FEDERAL TAXES UNDER 2019 CURRENT LAW (2018), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Distribution-of-Tax-Burd en-Current-Law-2019.pdf.

245. *E.g.*, DISTRIBUTION OF HOUSEHOLD INCOME, *supra* note 242, at 19.

246. The IRS can append some additional background information to the tax return data that is used to analyze distribution, including age and "other demographic and economic data." CRONIN, *supra* note 240, at 13.

247. *See SOI Tax Stats - Corporation Data by Sector or Industry*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-corporation-data-by-sector-or-industry (last visited Oct. 3, 2018); *SOI Tax Stats - Partnership Statistics by Sector or Industry*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-partnership-statistics-by-sector-or-industry (last visited Oct. 3, 2018).

income characteristics of the affected population—although all of this begs further work by economists.

C. Ossification vs. Interagency Deliberation

A common concern regarding centralized review in general and centralized review of tax regulations specifically is ossification.[248] There are several manifestations of ossification: when each proposed rule requires more time and energy, it leads to delays in commencing regulatory projects, delays in completing projects, failure to take up projects, failure to review and amend existing regulations, and in attempts to make up for these delays and failures, redirecting of agency resources to regulation-writing instead of other priorities.[249] This concern is a pointed one in the tax context, where there is a significant backlog of regulations to-be-proposed[250] and where there is wide recognition of the need for additional and faster guidance in order to facilitate tax compliance.[251]

For economically significant regulations, the regulatory impact analysis prepared by the drafting agency is provided to OIRA and fed into an interagency review process.[252] This process allows experts from across different departments to weigh in on a proposed regulation and to help calibrate the regulation with the President's priorities based on their close understandings of technical issues. Cass Sunstein, the recent former head of OIRA, portrayed OIRA as a "conveyer and a convener," acting as the central hub in the interagency review process, its primary and most important function.[253] Scholars have commended interagency review as a means of applying appropriate expertise to policy challenges, eliciting useful information from within the government, and coordinating agency functions that might otherwise coincide or conflict.[254] Additionally, the interagency process al-

248. Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 4–5 (2014). A common reaction from tax practitioners and policy analysts to the prospect of OMB review of tax regulations has been concern about delays (ossification). *See, e.g.*, Naomi Jagoda, *Conservatives Push for New Check on IRS Rules*, THE HILL (Mar. 6, 2018, 6:00 AM), http://thehill.com/regulation/finance/376852-conservatives-push-for-new-check-on-irs-rules (quoting one tax practitioner asking, "Why would you slow the process down?").

249. Pierce, *supra* note 248, at 4–5.

250. *See generally* DEP'T OF THE TREASURY, 2017–2018 PRIORITY GUIDANCE PLAN (2017), https://www.irs.gov/pub/irs-utl/2017-2018_pgp_initial.pdf (listing, before the enactment of the 2017 Tax Act, dozens of incomplete and unstarted regulatory projects).

251. Coder, *supra* note 178, at 868–69, 872.

252. *See supra* notes 80–86 (describing the interagency review process).

253. Sunstein, *supra* note 35, at 1841.

254. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1184 (2012). Freeman and Rossi's assessment is that the President (and by extension

lows an Administration to coordinate policies across departments and agencies.[255]

Despite these sorts of potential benefits, could centralized review on its own nonetheless cause unacceptable ossification, particularly if producing quantified cost–benefit analysis of tax regulations is challenging? This is not simply a question of slow versus fast—there are potential benefits flowing from the slower process. Ryan Bubb has credited the "creative tension" between staff and OIRA for producing "more and better information and analysis for regulatory decisionmaking."[256] Would a similar dynamic emerge in tax policymaking? And what is there to do in the short- to medium-term when we expect that data will continue to be lacking?

For example, the interagency process could have been enormously valuable for the smoking-cessation regulation. OIRA would have circulated the proposed regulation and accompanying analysis to other relevant agencies, including perhaps HHS, the Department of Labor, and the Food and Drug Administration. Each might weigh in with suggestions on the rule or refinements on the analysis. Most obviously, experts in these other agencies have greater experience and familiarity than Treasury with empirical studies on antismoking interventions. Invoking empirical work could have informed quantitative cost–benefit analysis of the proposed rule, allowing Treasury to use its own expertise in estimating costs of compliance in comparison with the anticipated benefits of the rule (if any), including the potentiality that the rule would have unexpected effects, such as reducing access to healthcare. In an ideal version of interagency review, the shared information might inform an alternative plan to realize some further benefits in smoking-cessation programs with lower costs.

One challenge is that OIRA has not traditionally had any tax expertise, and overseeing tax regulations would require hiring new staff or redirecting existing staff to take responsibility for tax.[257] This concern has historic valence as well—the 1983 memorandum was motivated in part by a desire on the part of OIRA personnel to avoid being overwhelmed by tax regulations, with which no one was particularly interested in dealing.[258] In such a small

OIRA) is "uniquely positioned and motivated to manage the problems of shared regulatory space and that coordination tools afford him the chance to put his stamp on policy." *Id.* at 1210.

255. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 31 (2010).

256. Bubb, *supra* note 37, at 51 (citing Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEGAL STUD. 95, 128 (2014)).

257. *See* GAO REPORT, *supra* note 9, at 26 ("[Current OIRA staff] said that historically OMB had lacked staff expertise on tax policy.").

258. This was relayed to this author orally by a former OIRA official, and echoes the concerns of current staff as reported to the GAO, *id.*, and as relayed to this author in informal conversations. *See id.* ("[H]istorically OMB had lacked staff expertise on tax policy.").

office (OIRA has just fifty full-time staff members),[259] the sheer volume of tax regulations presents a significant burden that would detract from oversight of regulations in other important policy areas. In contrast, the IRS Chief Counsel "supervises approximately 1,400 attorneys."[260] Recent news reports have indicated that, following the enactment of the 2017 Tax Act, OIRA has sought to hire tax experts,[261] including hiring a leading tax and administrative law scholar as an advisor.[262]

Tax regulations have generally been shielded from one of the primary culprits of ossification that arises in other contexts: Pre-enforcement judicial review of proposed rules. Such review can make the regulatory process move very slowly, but—in accordance with the Tax Anti-Injunction Act[263] and the Declaratory Judgment Act[264]—pre-enforcement review of tax regulations is off limits.[265] Some scholars have pressed the argument that courts should accept that pre-enforcement review of tax regulations is permissible under the Tax Anti-Injunction Act.[266] Others have suggested that judicial review and centralized review should be complementary.[267] Under that analysis, increased OIRA review is justified, in part, because parties have less access to judicial review.[268] Conveniently, this either/or approach would obviate some of the concerns regarding ossification: while tax rule-

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259. *Frequently Asked Questions*, *OIRA*, OFF. OF INFO. & REG. AFFAIRS, OFF. OF MGMT. & BUDGET, https://www.reginfo.gov/public/jsp/Utilities/faq.jsp (last visited Oct. 3, 2018).

260. *Chief Counsel, Internal Revenue Service*, U.S. DEP'T OF THE TREASURY (Mar. 8, 2011, 9:56 AM), https://www.treasury.gov/about/organizational-structure/offices/General-Counsel/Pages/irs.aspx.

261. Cheryl Bolen & Allyson Versprille, *OMB Hires Tax Experts as It Negotiates Rules Review With Treasury*, BLOOMBERG DAILY TAX REPORT (Mar. 30, 2018), https://www.bna.com/omb-hires-tax-n57982090700/.

262. *Prof. Hickman Named Special Advisor to OIRA*, UNIV. OF MINN. LAW SCHOOL (Apr. 18, 2018), https://www.law.umn.edu/news/2018-04-18-prof-hickman-named-special-adviser-oira.

263. 26 U.S.C. § 7421(a) (2012) ("[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.").

264. 28 U.S.C. § 2201(a) (2012) (providing declaratory relief except expressly disallowing such relief "with respect to Federal taxes").

265. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1181 (2008) (questioning limitations on pre-enforcement judicial review of tax regulations). A few recent cases have suggested that this protection may be weakening. *See* Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124, 1133 (2015) (addressing the Tax Injunction Act, 28 U.S.C. § 1341, which applies to state tax provisions, and interpreting the provision more narrowly than courts have interpreted the Tax Anti-Injunction Act).

266. *See generally* Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 VA. L. REV. 1683 (2017).

267. Catherine M. Sharkey, *State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1620–23, 1623 n.143 (2014) (proposing more lenient judicial review for rules that have been subjected to greater executive oversight, including through OIRA review and cost–benefit analysis, and less deference for rules that are not).

268. *Id.* at 1622–23.

making may be slowed down marginally by centralized review, it remains (for now) insulated from expansive pre-enforcement judicial review.

IV. ASSESSING THE COMPETING CONSIDERATIONS

This Part evaluates the competing normative considerations involved in imposing centralized review on tax regulations. The preceding discussion highlighted one challenge of analyzing tax regulations: as a group, tax regulations have multiple and widely varying purposes and effects, which cut across public finance and regulation of private behavior. This Part seeks to focus the analysis of whether and how tax regulations might benefit from centralized review by offering a taxonomy of three distinct functions of tax regulations, drawing on public finance scholarship. This Part then analyzes the advantages, disadvantages, and challenges of centralized review in light of these varying functions.

A. Three Functions of Tax Regulations

As the preceding discussion of the smoking-cessation rule and the pass-through regulations revealed, tax regulations have varied purposes. To particularize the analysis of how centralized review of tax regulations might be undertaken, this Subpart distinguishes between three functions performed by tax regulations: (1) private allocation, (2) public allocation, and (3) implementation. Each is described below.

First, some tax regulations result in allocating private resources to different private uses through incentives, intentional and unintentional; this is the *private-allocation* function. Second, some elements of regulatory tax policy involve allocating private resources to public uses by collecting tax revenue; this is the *public-allocation* function. As discussed further below, the private- and public-allocation functions can each have distributional affects, as changing tax policy redistributes resources among different groups.[269] These first two functions are an extension of the distinction

269. Tax regulations affect distribution when the regulations determine which taxpayers or which groups of taxpayers have what amount of the total resources in society, for example, by offering credits—or, most intuitively, refundable credits—to certain groups. Any time the government collects revenue, it has the potential to alter who gets how much of the total economic pie, depending on who pays the tax and who benefits from government expenditures. For context, the Gross Domestic Product was approximately $18.624 trillion in 2016. *GDP (current US$)*, THE WORLD BANK, https://data.worldbank .org/indicator/NY.GDP.MKTP.CD?locations=US (last visited Oct. 3, 2018). The individual income base was approximately $10 trillion (i.e., individual gross income totaled $10 trillion; taxable income was approximately $7 trillion), and total federal tax collections were $3.3 trillion. JOHN A. KOSKINEN ET AL., 2016 INTERNAL REVENUE SERVICE DATA BOOK: OCTOBER 1, 2015 TO SEPTEMBER 30, 2016, at 1 (2017); MICHAEL PARISI, INTERNAL REVENUE SERV., STATISTICS OF INCOME BULLETIN: INDIVIDUAL INCOME TAX RETURNS, PRELIMINARY DATA, 2016 (2018).

drawn by the Musgraves between allocative fiscal policies and distributional fiscal policies.[270] As Shaviro summarizes, "[a]llocation affects the amount, use, and character of all assets in society, while distribution affects who has what."[271] Through this lens, tax revenue that is deployed on public goods—for example, police protection—serves an allocative function because policymakers are allocating funds that individuals would spend or save to an alternative use.[272]

The final function is the implementing function. Some tax regulations implement allocative and distributional decisions made by Congress; Treasury is given very little policymaking discretion and simply follows directives to promulgate substantive rules prescribed by statute. The implementing function is consistent with the category of so-called interpretive rules that are familiar in other agency rulemaking contexts.[273]

These three functions of tax regulations are not mutually exclusive—any given regulation might have elements of each. For example, many tax provisions are focused on public allocation in that they raise revenue for the government to spend (in ways that are different from how the funds would have been deployed if left in private hands). These same revenue-raising regulations may also affect private allocation because imposing taxes will affect private behavior. And both the public-allocation function and the private-allocation function could have distributional effects, since the manner in which the funds are raised and in which the benefits of government spending accrue alters the relative wealth or income of different groups of taxpayers. The purpose of this taxonomy is not to definitively categorize regulatory projects that have multiple purposes; rather the point in the remainder of this Subpart is to illuminate that there are different analytical frameworks and expectations appropriate for different elements of tax regulations.

Recognizing the varied functions of tax regulations brings to the fore a key point of confusion regarding how best to develop and analyze tax regulations: tax regulations that affect private behavior are, in that respect, very much like other types of regulatory activity currently overseen by OMB (albeit, with varying degrees of efficacy). At the same time, other tax regulations present issues that OMB disregards in its regulatory oversight, re-

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270. *See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 6–11 (5th ed. 1989).

271. Shaviro, *supra* note 198, at 188.

272. *Id.*

273. *See supra* notes 90–92 and accompanying text; Hickman, *supra* note 92, at 1764–65 (observing that "the courts have had little opportunity to apply contemporary administrative law principles for distinguishing legislative from interpretative rules in the tax context").

gardless of the source of the regulations: OMB has not concerned itself with distributional analysis or with analysis of transfer payments.[274]

Consider again the pass-through rules and the smoking-cessation rules. A regulation applying to a pass-through entity that provides services that are built on the reputation and skill of its employees will call upon each of the three functions: private allocation, public allocation, and implementation. The differential tax rates that the provision will create—and the way that lines are drawn in regulations to distinguish "winners" who are permitted to take the deduction from "losers" who are not—will also have public-allocation effects and private-allocation effects.[275] The deduction will affect the amount of revenue taken in by the government, which will affect government spending, and the lower tax rates in particular industries may move investment and work effort from one industry to another. Each of these functions will affect distribution, both between industries and within industries, with varying consequences (and varying degrees of regressivity) for different income levels in different industries.

Further, while Congress has given Treasury significant policymaking discretion to decide who can benefit from the pass-through deduction, it has also established a core set of rules about how the deduction should operate in some respects, which gives rise to the implementing function in the forthcoming regulations. For example, for certain industries, the deduction is limited for people with incomes above congressionally mandated income levels. These rules will require regulations to implement but nonetheless are largely predetermined. For example, the definition of "qualified property"[276] that Congress enacted leaves open some questions as to what property might be included—relatively straightforward gap-filling which leaves Treasury without significant discretion.[277] These regulations will be simply implementing—that is, the regulations will fit within—policy decisions Congress has already made. All three functions are present, but as dis-

274. *See supra* Section III.B.2.

275. At the 37% top marginal tax rate—which applies to married joint filers making over $600,000 or single filers making over $500,000—the 20% deduction increases after-tax income by 7.4%. The increase is lower in lower tax brackets, on account of lower marginal rates. For example, it is 7% in the 35% bracket, which ranges from $400,000 to $600,000 for married joint filers in 2018. Scott Greenberg & Nicole Kaeding, *Reforming the Pass-Through Deduction*, TAX FOUNDATION 1, 7 (2018), https://files.taxfoundation.org/20180621095652/Tax-Foundation-FF593.pdf; *see supra* note 189 and accompanying text.

276. The new provision in section 199A incorporates a somewhat vague, though longstanding, definition from 26 U.S.C. § 167. *See* 26 U.S.C.A. § 199A(b)(6) (West Supp. 2018).

277. Critics of the legislative definition have pointed out that, based on the statutory language alone, there are some absurd possible inclusions in "qualified property." Kamin et al., *supra* note 193, at 18. But the confines of Treasury's task here is essentially a technocratic task, and certainly Treasury will issue regulations to flesh out this definition.

cussed below, it would not be productive to undertake the same type of centralized review for each of these elements of the regulatory project.

Along the same lines, the central purpose of the smoking-cessation regulations under the individual mandate provisions is a private-allocation function: the individual mandate generally promotes private spending on health coverage that meets specific requirements, thus diverting spending on other forms of consumption or on nonconforming health coverage. The smoking-cessation regulation addresses a particular type of health insurance incentive that is directly focused on shaping private behavior—it determines whether certain individuals are subject to a penalty (essentially an excise tax)[278] for failure to maintain acceptable coverage. The excise tax serves a public-allocation function: it raises revenue that is used to fund general government operations. And the rule is tied to income level and may well affect lower income people more than others, which means there is potential for a distributional effect as well. However, there is not a clear implementing function in this rule: the Executive Branch was essentially working from a clean slate because there was no indication that Congress directly contemplated the rule.

Other tax regulations might implicate different combinations of functions. Often, tax regulations consist of only the implementing function—Congress provides a clear directive, and the task for regulation writers is simply to implement the scheme without adopting or altering policy.[279] Regulations that affect private allocation and no other function also arise occasionally: the Service carries out, via regulation, various excise taxes

278. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 567 (2012).

279. *See, e.g.*, 26 U.S.C. §§ 6045, 6112 (2012); Treas. Reg. §§ 1.6049-10, 301.6708-1 (2016); Treas. Reg. § 1. 6045A-1 (as amended in 2016); Treas. Reg. § 1.6045-1 (as amended in 2017). Prior to Treasury drafting Treas. Reg. 301.6708-1, Congress enacted a tax provision requiring that any "material advisor" on certain types of transactions must maintain a list of clients who undertook such transactions along with "such other information as the Secretary may by regulations require." 26 U.S.C. § 6112(a)(2). The provision further requires that such advisors make the list available to the Secretary within twenty business days of a request and imposes a penalty of $10,000 per day for each day beyond twenty that such a list is not produced. *Id.* There is an exception if such delay is for reasonable cause. *Id.* The Service issued the Regulation, which explains how the twenty days will be calculated and provides examples of real-life scenarios that might constitute reasonable cause. Treas. Reg. § 301.6708-1. Prior to Treasury drafting Treas. Reg. § 1.6045-1, Congress enacted new Code section 6045, which requires securities brokers to track their customers' basis in securities and to report the basis to the Service (and to the customer) when a security is disposed of on behalf of a client. 26 U.S.C. § 6405. The statute defines the key terms and provides a detailed rule as to when the reporting requirement attaches. *Id.* The regulation elaborates on the definitions provided in the statute and other details, and provides for some exemptions from the requirement in situations where reporting makes no sense (e.g., for sellers who are not subject to U.S. tax). Treas. Reg. § 1.6045-1. The particulars of the Regulation do not involve any policymaking discretion, but nonetheless, these are important to help taxpayers understand how to comply with Congress's requirements.

that raise zero (or essentially zero) revenue.[280] Thus, these regulations act to regulate private behavior but have no public-allocation or other function. It is also possible, at least theoretically, that a regulation could implicate only the public-allocation function (raising revenue, but not affecting private behavior).

B. Recommendations

The Trump Administration has committed to conduct centralized review of some tax regulations,[281] but the criteria for determining what regulations will be subject to review remain largely undeveloped.[282] Further, it is unclear how or if Treasury plans to carry out quantified regulatory impact analysis as part of this centralized review. The Trump Administration framework calls for beginning to impose the most comprehensive version of centralized review by April 2019, providing Treasury and OMB some time to sort through these challenges. This Subpart proposes several guidelines for centralized review of tax regulations, identifies some specific challenges arising from the Trump Administration's approach, and suggests options to improve centralized review of tax regulations over time. The three functions identified above can be useful to that end—each warrants somewhat different considerations in the drafting process and thus for centralized review.

1. Private Allocation: Standard Centralized Review

Centralized review is appropriate and would often be beneficial in the development of the private-allocation function of tax regulations, although OMB's existing practices must be modified in some respects to work most effectively for tax regulations. Specifically, requiring quantified analysis of the private-allocation function is feasible, data permitting (this challenge is discussed below), but expectations must be moderated according to what insights on tax policy decisions the cost–benefit-analysis framework can

280. For an example, see Treas. Reg. §§ 56.4911-0 to 56.4911-10 (2018), which provides for a tax on "excess" lobbying expenditures made by 501(c)(3) organizations that make an election under section 501(h) (to be subject to a specific set of lobby expenditure limits). In 2014, just thirty organizations were subject to the tax, paying a total of $254,000. INTERNAL REVENUE SERV., TABLE 1: EXCISE TAXES REPORTED BY CHARITIES, PRIVATE FOUNDATIONS, AND SPLIT-INTEREST TRUSTS ON FORM 4720, CALENDAR YEAR 2014 (2015), https://www.irs.gov/pub/irs-soi/14pf00et.xls. But the rule that the tax enforces—limiting expenditures—is one that significantly affects and shapes actions of public charities. *See* Jill S. Manny, *Nonprofit Legislative Speech: Aligning Policy, Law, and Reality*, 62 CASE W. RES. L. REV. 757, 778–79 (2012).

281. The Trump Administration framework, like Executive Order 12,866, applies to regulatory actions generally, not only regulations. *See supra* notes 47–48.

282. *See supra* Section II.B.3.

produce. Relatedly, OMB should consider directing Treasury to make use of an alternative, simplified analytical framework to cost–benefit analysis: cost–effectiveness analysis.

Adding interagency review to the process for developing tax regulations with a private-allocation function offers significant promise, as tax regulations often touch on areas outside of Treasury's and the Services's expertise. For example, subjecting the pass-through rules to scrutiny from the Department of Commerce and the Small Business Administration could indeed be expected to produce better rules. This is especially promising given that, in the past, many tax regulations have been subject to little scrutiny (even though the proposed rules may go through the notice-and-comment process)—that is, tax regulations are often produced without publicly interested input.[283]

There are also significant potential benefits to subjecting the private-allocation function of tax regulations to cost–benefit analysis, although this raises some methodological issues.[284] The methods and conventions for analysis that are currently suggested by OIRA[285] can inform Treasury as to the potential behavioral response aspects of a tax regulation (consider the smoking-cessation rule). But at the same time, in the current centralized review process, cost–benefit analysis is used to attempt to maximize social benefits, with the expectation that a regulatory project will only go forward if the benefits exceed the costs. When the private-allocation function of tax regulations is mixed with the public-allocation function or the distribution function, however, the resulting rule often will not yield social benefits overall. This is because the primary benefits of the rule are not accounted for in cost–benefit analysis.[286] Rather, the inputs will be costs—compliance costs, administration costs, and gain or loss from behavioral changes. In some cases, where behavioral changes produce positive externalities, cost–benefit analysis could include benefits and could be considered, but even then it is likely that benefits will be overwhelmed by costs in many cases. The simplest solution to this is to use the cost-benefit-analysis toolset to produce cost–effectiveness analysis of tax rules that cannot produce net

283. *See* Wallace, *supra* note 17, at 219 (tallying participants in the notice and comment process for tax regulations and finding almost no commenters for most proposed regulations).

284. Whereas the interagency review process really requires a convener like OIRA, quantified analysis of regulatory proposals could be decoupled from the question of who should require, oversee, or do both with the analysis. That is, Treasury could self-impose cost–benefit analysis requirements on certain regulations without OMB oversight, or Congress could require it and shape it in some way other than what OIRA prescribes. I set aside the alternative possibilities for now.

285. *See supra* notes 67–72 and accompanying text.

286. *See* Raskolnikov, *supra* note 215, at 533–34. The question of how to account for the benefits of raising revenue requires further consideration, and will be especially important if cost–benefit analysis becomes a regular feature of the tax regulatory process.

benefits, with the goal of minimizing the costs of achieving specific policy goals, rather than maximizing benefits.[287]

One limitation to the feasibility of cost–benefit analysis or cost–effectiveness analysis is that quantifying and monetizing private-allocation effects may involve quantification that is not feasible based on currently available data. Treasury and OIRA should survey existing research and data to identify—and publicize—areas of need. Ideally, Treasury would support research in these areas. Even if financial support is not feasible, a public assessment of needs may help prompt researchers to pursue specific types of information, and Treasury might facilitate this by seeking to make tax data available to researchers whose proposals can provide useful inputs for quantified regulatory impact analysis.

One significant potential downside to centralized review of the private-allocation function is that welcoming a more complicated and more politicized tax regulatory process will create more footholds for well-organized interest groups to get what they want and will delay rules that need to be publicized quickly. It is reasonable to question whether this will create additional problems, but there is no reason to think that this concern should be any more pronounced than it is with other types of regulation where, of course, centralized review is mandated. Nonetheless, OIRA and Treasury should commit to transparency regarding participants in the various decision-making processes and at the numerous decision points created by the prospect of centralized review (e.g., Does a project appear on the regulatory agenda? Is a regulation subject to review? Should Treasury conduct a regulatory impact analysis? Should OIRA intervene on any of these points?).

2. Public Allocation: Revenue Estimates and Distributional Analysis

Centralized review could be beneficial but also should take on a different form as applied to tax rules that have a public-allocation function. Quantified analysis can improve transparency for the public-allocation function of tax regulations, but this quantified analysis should consist not of extensive cost–benefit or cost–effectiveness analysis, but rather of OMB requiring revenue estimates, similar to the current practice with non-tax transfers.[288] Treasury is well-equipped to provide this analysis, and in fact, in some instances it makes such revenue estimates internally (i.e., Treasury produces revenue estimates that are not released to the public but that in-

287. *See* Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067, 1068–69, 1076 (2003).

288. *See supra* note 6 and accompanying text.

form policymaking, both legislative proposals and regulatory policy). Mandating revenue estimates as part of the centralized review process would ensure that tax regulations conform to congressional design and that revenue cannot be disregarded at the whim of the executive branch, at least not without public disclosure. Deeper qualitative and quantitative analysis of the public-allocation function requires grappling with the very challenging philosophical question of how to account for government spending as a cost or benefit. But revenue estimates are a useful and currently available point of analysis.

Further, where feasible, analysis of public-allocation regulations should include distributional analysis. Treasury and the Service have the capacity to produce some distributional analysis, which means that tax regulations could be an area where OIRA could begin to fulfill the long-neglected mandate to consider distributional effects of regulatory policy. OMB should mandate that Treasury provide distributional analysis of tax regulations that trigger review, using the same methods and producing the same basic outputs (for now) that Treasury and the Service have honed for legislative tax proposals.[289] Even this somewhat limited analysis could help inform regulatory tax policy and create transparency as to the effects of different tax regulations on particular groups of taxpayers. OMB should consider Treasury's and the Service's analytical methods, which could be a model for distributional analysis of other types of regulations. Further, Treasury and the Service should consider whether and how to refine distributional analysis to account for private-allocation effects and to make more fine-grained distinctions between different groups of taxpayers.

Perversely, transparency could be a detriment for the public-allocation function in some respects: why would any president want to "own" tax increases carried out through regulations?[290] Indeed, it seems possible that revenue estimates could become a poison pill that prevents proposed tax regulations from moving forward. Despite this potential political downside, the normative benefits of well-analyzed proposed tax policies and well-informed regulation drafting remains appealing, especially when the tools already exist to make effective revenue estimates. The procedures already exist to subject those revenue estimates to interagency scrutiny, which could help improve the substance of proposed regulations. Thus, centralized review for provisions that raise revenue—the public-allocation function—can be beneficial, although the methods of analysis can be honed beyond simple revenue estimates.

289. *See supra* notes 228–31 and accompanying text.

290. Of course, President Obama did do this with the earnings stripping regulation. *See supra* Section II.B.2.

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Many tax regulations will have a private-allocation function along with the public-allocation function, because raising revenue will have some behavioral effects and will have differential effects on after-tax income across different groups. Taken together, requiring revenue estimates and distributional analysis where there is a public-allocation function, and imposing some form of cost–benefit analysis or cost–effectiveness analysis only where there is a private-allocation function, would result in significant quantified analysis of many tax regulations. Although the interagency review process may shed little light on the public-allocation aspect of tax regulations specifically,[291] it will be beneficial for the private-allocation function. OIRA can plan accordingly: where the public-allocation function features prominently, the onus will be on Treasury to prepare revenue estimates and distributional analysis before submitting the rule to OIRA for review. On the other hand, where private-allocation effects seem significant, OIRA and Treasury should plan for a robust interagency review process and should start to practice and refine versions of cost–benefit or cost–effectiveness analysis.

Recognizing those challenges and limitations, requiring Treasury to undertake some version of cost–benefit analysis and revenue estimates will allow the private- and public-allocation functions to help illuminate the effects and degree of significance of tax regulations. Moreover, introducing OMB's interagency review process to the formulation of regulations has great potential to improve tax regulations in substance and to allow for salutary coordination of tax regulations in promoting the Administration's priorities. The result could be a more responsive rulemaking apparatus, a better-informed public (and thus less opportunity for capture behind closed doors), as well as improved transparency.[292]

3. Implementing: No Centralized Review

Finally, as in other contexts, centralized review of interpretive regulations—the implementing function—serves little substantive purpose. Thus, the current practice of abstaining from centralized review is, indeed, justified on normative grounds for a broad swath of tax regulations that are highly prescribed by Congress.[293] Although Treasury and the IRS have, until recently, drawn too large a circle around the implementing function

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291. *See supra* note 281 and accompanying text.

292. Again, the extent to which this political-accountability benefit—attributing decisions of the bureaucracy to the President—is meaningful in the real world is subject to debate.

293. *See* Wallace, *supra* note 17, at 193–69, 194 n.71.

(i.e., claiming that almost all tax regulations are exempt from Executive Order 12,866 because they are interpretive), using it to effectuate a blanket exemption from centralized review, this history should not give rise to an overcorrection. Many tax regulations have very large effects on revenue and thus might trigger centralized review as economically significant based on the transfer amount alone, if not treated as exempt from such review (and if revenue effect is made to be relevant to trigger centralized review, a departure from the Trump Administration framework). But often these regulations are carrying out precise directives from Congress that involve little if any policymaking discretion at the regulation-writing stage.[294] The extent to which these sorts of narrow delegations continue to predominate is an open question—it depends on whether Congress's quick policy development and legislative drafting, as seen with the 2017 Tax Act, proves to be an aberration or the new normal.

4. The Threshold for Review

Regardless of the substantive contents of any tax regulation, centralized review should be structured to avoid counterproductive politicization.[295] This means that the categories of tax regulations subject to review should be clearly prescribed in advance by objective criteria. The alternative, which would be accomplished by the Trump Administration framework if no further criteria are specified, leaves the decision of whether or not OMB will impose centralized review to the discretion of the OIRA Administrator or lower-ranking OIRA personnel, and this approach creates the potential for lobbying efforts from interested parties (who might, depending on the circumstances, prefer or oppose centralized review) to be decisive. The Trump Administration framework presents the prospect of a significant lack of transparency as to which rules are subject to review and which are not. The OIRA Administrator should further specify substantive triggers for review.

The general idea of setting a threshold for more searching centralized review—embodied in OIRA's current standard of making "economically significant" regulations, which are those that have an annual economic impact of $100 million or more—makes as much sense with the private-

294. *See infra* Section IV.B.4 (discussing the challenge of setting a baseline for determining the revenue effect of a regulation and how the approach of assuming *no* legislation and attributing all costs and benefits of the legislation and regulation to the regulation would result in centralized review of many implementing regulations).

295. *See supra* Subpart III.A (contrasting two types of politicization: political influence that directs public policy to achieve private goals for a limited subset of affected parties and political accountability that flows from transparent decision-making by democratically accountable actors).

allocation function of tax regulations as for nontax regulations.[296] However, the Trump Administration's decision to exclude transfer payment amounts (i.e., to disregard the question of how much tax revenue is at stake) from the trigger is ill-conceived. It may make review of tax regulations more arbitrary because tiny costs imposed on a huge number of people—which is often an effect of tax regulations—may frequently trigger review.

Further it will create unnecessary complications for centralized review of tax regulations, particularly in the immediate future. Applying the economically-significant trigger to tax regulations means that the full review process will only come to bear on a small portion of proposed tax regulations. But determining which regulations are subject to such review requires quantifying the costs of many regulations. Especially given that the data and methods for evaluating costs imposed remain under development,[297] this standard will create murkiness as to what tax regulations should be subject to review.

One readily available alternative is to look only at the revenue effect. If a tax regulation will alter revenue collection by $100 million (plus or minus, and since that threshold is arbitrary, it could be adjusted), that alone could trigger centralized review. A revenue-based standard could make use of existing competencies—Treasury has revenue estimating models and procedures—and would provide the same sort of filter that the $100 million threshold seeks to accomplish for nontax regulations. A revenue-based threshold could also help with the baseline problem: Treasury and OIRA could decide that the threshold is in comparison to (1) a baseline starting with the legislation as enacted but assuming only limited compliance; or (2) a baseline that starts with the legislation as enacted and assumes compliance to the extent predicted in revenue estimates at the time of enactment (note: the revenue estimates make some assumptions about how the Service will implement and enforce).[298] These alternatives deserve further consideration; either of these two could potentially work and would allow for consistent imposition of centralized review. In theory, the same set of alternatives is available for a threshold based on behavioral and compliance costs, but the calculation of those costs will be less consistent, particularly

296. This is not to endorse or disclaim the "economically significant" standard. *See* Exec. Order No. 12,866, § 3(f), 3 C.F.R. §§ 641–42 (1993). There is an ongoing debate about the wisdom of that standard, and I see no reason to exclude tax regulations with a private-allocation function from that broader discussion. *See generally* Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J.L. & PUB. POL'Y 447 (2014).

297. *See supra* notes 222–26 and accompanying text.

298. A third alternative is assuming a baseline of no legislation and thus no compliance, whereby the comparison attributes all of the costs and benefits of policy changes caused by the underlying statute to the regulation. This would result in all implementing regulations being subject to review if the underlying statute has a significant revenue effect, which does not seem productive.

in the early going, as Treasury works to identify and generate data inputs and refines its regulatory-impact-analysis practices.

V. CONCLUSION

The procedures and practices that shape tax regulations are particularly relevant now as both the Obama and Trump Administrations have taken extraordinary steps to change federal tax policy unilaterally through administrative actions, and the Trump Administration has promised to impose some form of centralized review on tax regulations in the near future. Recognizing the strengths and weaknesses of centralized review as applied to tax policy—and particularly as applied to different sorts of regulatory tax policy described in the three-part taxonomy developed here—will help to establish consistent and productive oversight of the tax regulatory process, which furthers political accountability and can foster effective regulatory tax policies.