Treasury Agrees to OMB Review of Tax Regulations

What are the possible impacts for subjecting tax regulations to OIRA review?

By Diana Hodges, David Levine, and Brigen Winters

Two members of President Trump's cabinet recently reached an agreement over the process for issuing tax regulations, potentially creating another significant hurdle that Treasury and IRS must clear before issuing regulations. On April 11, the Office of Management and Budget ("OMB") and the Treasury Department ("Treasury") published an updated Memorandum of Agreement ("MOA") that, for the first time, subjects Treasury and IRS regulations to review by OMB's Office of Information and Regulatory Affairs ("OIRA"). Prior to the new MOA, the majority of Treasury and IRS regulations had been carved out of OIRA review. The short-term impact will likely mean an even longer period before taxpayers see any meaningful regulations from Treasury and IRS — including rules implementing the Tax Cuts and Jobs Act and the recent Budget Act. The long-term effect might be even greater if Treasury and IRS are forced to engage in more robust economic analysis of their regulations.

A. New MOA

Under the new MOA, tax regulatory actions will be subject to OIRA review if they are likely to result in a rule that would:

1. create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
2. raise "novel" legal or policy issues, especially if the rule might subject taxpayers to fines or taxes; or
3. have an annual non-revenue effect on the economy of $100 million or more, measured against a baseline assumption of no action.

Treasury and IRS are prohibited from publicly releasing any rules that are subject to OIRA review prior to receiving notification that OIRA has waived or completed its review. Treasury must also submit a quarterly notice to OIRA of planned tax regulatory actions.

OIRA generally will be required to complete its review within 45 days of Treasury's submitting the rule. Certain rules implemented under the Tax Cuts and Jobs Act, however, can be designated for an expedited review of just 10 days.

B. Implications

The possible implications of the new MOA may be significant. At a minimum, the new MOA adds an additional level of review to tax regulations, prolonging the period before new rules can be released. It will likely also take longer for regulations to be drafted, given the new oversight and economic analysis required.

Because OIRA has not reviewed tax rules in the past, it is not currently appropriately staffed and will need to increase its ranks, with all of the resulting growing pains. Additionally, OIRA's usual approach to cost-benefit analysis may be a poor fit for most tax rules since taxes have generally been viewed as a transfer of money rather than a cost. This will mean that OIRA will need to develop new procedures and analytical tools.

It also remains unclear just how OMB will determine which rules raise "novel legal or policy issues." If OMB interprets the directive broadly, it could generate far more reviews than perhaps anticipated.

There is, of course, the chance that OIRA review will actually improve the tax regulatory process by placing a larger emphasis on economic review and analysis, and by adding another level of expert review. Proponents of OIRA review often argue that it generates superior rules because it gives agencies an additional incentive to analyze rules thoroughly. OIRA review also arguably makes agency rulemaking more responsive to stakeholder comments and helps to avoid unintended consequences.

In the short term, the new agreement may well mean that taxpayers have an even longer wait than anticipated for proposed rules. Whether such delays will persist in the long-term is yet to be seen.

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