

A Study To Evaluate OIRA Review of Treasury Regulations

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In brief...

In a new study, we aim to learn more about the effect of Office of Information and Regulatory Affairs (OIRA) review of Treasury Department regulations interpreting the Internal Revenue Code. What contributions does OIRA review offer the tax regulatory process? What are its limitations?

For most federal agencies, centralized review by Office of Information and Regulatory Affairs (OIRA) and regulatory impact analysis have been a routine part of the regulatory process for more than 40 years.¹ Not so in the tax context. When OIRA was in its infancy, OIRA Administrator Christopher DeMuth and Treasury Department General Counsel Peter Wallison signed a [memorandum of agreement](#) that exempted most Treasury and IRS tax regulations from OIRA review. More than a decade later, [that memorandum of agreement was ratified](#) by OIRA Administrator Sally Katzen and Treasury Department General Counsel Jean Hanson. Katzen has indicated since then that her understanding was that the exempted rules were [minor and technical rather than sweeping and substantive](#). As a result of these agreements, however, very few Treasury regulations were ever submitted for OIRA review.

That changed in April 2018, when OIRA Administrator Neomi Rao and Treasury Department General Counsel Brent McIntosh signed a [new memorandum of agreement](#) (MOA) that would pull more Treasury and IRS tax regulations in for OIRA review, albeit with some adjustments to the Executive Order (EO) 12866 process. This policy change came on the heels of [expressions of concern](#) from [legislators](#) and a [Government Accountability Office report](#) suggesting the exemption of tax regulations from OIRA review be reconsidered. The change was met with a mix of reactions. Some were very concerned that OIRA review would [bog down](#) the time-sensitive [regulatory process for tax](#), especially in light of major implementation challenges presented by the then-recently enacted Tax Cuts and Jobs Act. Others argued

¹ Exec. Order. No. 12,866 § 6, [Regulatory Planning and Review](#), 58 Fed. Reg. 51,735, 51,740 (Dec. 4, 1993); *see also* Exec. Order No. 12,291 § 3, [Federal Regulation](#), 46 Fed. Reg. 13,193 (Feb. 19, 1981) (originating OIRA review of agency rules, subsequently replaced by EO 12866); Susan E. Dudley, [The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States](#), REG. & GOVERNANCE 1, 5-7 (2020). EO 12291 called for OIRA review of “major rules” rather than “significant regulatory actions,” but the definitions of and analysis required for the two are very similar.

that aspects of the Circular A-4 framework OIRA uses to review regulations [were fatally flawed](#) as [applied to tax](#). Still others applauded that this long-time analytical and centralized review [loophole was closed](#).

Now that the MOA is almost four years old, these differing reactions encourage us to investigate how OIRA review has influenced the content of Treasury regulations implementing and interpreting the tax laws. We are not alone in trying to understand this issue. To date, two post-MOA empirical studies have briefly addressed aspects of OIRA review in the tax context.² These studies offer glimpses of what we hope to capture more comprehensively: to what extent are Treasury tax regulations different pre- and post-MOA, and what do those changes mean?

For our study, we are compiling regulatory documents published in the *Federal Register* and *Internal Revenue Bulletin* documents between January 1, 2016, and December 31, 2021. This period covers a portion of the Obama administration, all of the Trump administration, and the beginning of the Biden administration. We estimate that we will review close to 500 individual regulatory documents reflecting approximately 200 Treasury tax regulation projects, roughly a third of which were completed before the MOA was signed. One particular timeframe of interest is the 12-month period following the MOA's effective date. In this window, the MOA gave Treasury flexibility to do less economic analysis than is required by EO 12866, to allow time for capacity-building in the midst of implementing the Tax Cuts and Jobs Act. The mix of regulations in our study also will include, pre- and post-MOA, rules that OIRA deemed to be significant and therefore subject to OIRA review, rules that were significant but for which OIRA waived review, and non-significant rules exempt from OIRA review.

We are also in the process of generating a series of criteria for assessing these documents. Some are items that we will evaluate qualitatively. For example, to what extent do the regulatory preambles discuss policy alternatives and the respective benefits, costs, and transfers associated with those alternatives? To what extent do notices of proposed rulemaking seek public comment on specific issues rather than merely more generally? Treasury possesses a unique statutory authority to backdate tax regulations under certain circumstances. Do Treasury's backdating practices change after the MOA, and, if so, how? Does Treasury rely on subregulatory guidance documents in conjunction with regulation projects in the same manner over time? What can we tell about how interagency concerns factor into regulation? We are also exploring how to use text analysis tools to determine word counts of various sections of regulatory documents, such as the entire preamble, as well as the economic analysis and other analytical sections concerning the Regulatory Flexibility Act or Paperwork Reduction Act, to see whether OIRA review influences the length of these sections. We will also gather information from existing administrative data, such as the number of comments that Treasury tax regulation projects receive during public comment periods, the amount of time between proposed and final rules, and the number of days of OIRA review.

² Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A*, 69 EMORY L.J. 209 (2019) (evaluating the role of public comments submitted through notice-and-comment rulemaking as well as public meetings with OIRA about one high-profile Treasury regulation); Clinton G. Wallace & Jeffrey M. Blaylock, *Administering Taxes Democratically?*, 94 TEMPLE L. REV. 49 (2021) (comparing Treasury regulations and IRS subregulatory guidance documents issued to implement three separate major pieces of tax legislation—enacted in 1986, 2001, and 2017, respectively—to evaluate whether tax regulatory practices in the wake of the decline of tax exceptionalism (including but not limited to OIRA review) “have reflected ... normative commitments to democratic legitimacy”).

This project builds on our individual, earlier writing about the MOA.³ We will also draw upon Hickman’s expertise in tax and administrative law, her prior empirical work, and her personal experience working in OIRA to implement the MOA, as well as Dooling’s regulatory and administrative law expertise arising out of 10 years of experience as an OIRA analyst applying EO 12866 and Circular A-4 to a wide range of draft regulations. We are also grateful for the support and technical expertise of the analysts and scholars at the GW Regulatory Studies Center.

As individuals who tend to think that OIRA review produces positive results, we recognize that our empirical work needs to stand up to scrutiny. Our goal is to produce a study that people on all sides of the issue of OIRA’s review of tax regulations can have confidence in and find useful. To that end, in the coming months we plan to share more about our methodology. We will welcome comments on those proposed plans, particularly those which help bolster the objectivity of and evidentiary basis for our work. In the meantime, please do reach out if you would like to engage with us about this project, as we are still in the early stages and will surely benefit from your thoughts and advice.

³ Kristin E. Hickman, [An Overlooked Dimension to OIRA Review of Tax Regulatory Actions](#), 105 MINN. L. REV. HEADNOTES 454 (2021); Bridget C.E. Dooling, [Bespoke Regulatory Review](#), 81 OHIO ST. L.J. 673 (2020); Bridget C.E. Dooling, [OIRA’s Expanded Review of Tax Regulations and Its Surprising Implications](#), 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 224 (2019).