

## COMPETING NARRATIVES ON OIRA REVIEW OF TAX REGULATIONS

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### I. INTRODUCTION

In June 2023, the Biden Administration executed an interagency memorandum of agreement (the 2023 MOA)<sup>3</sup> that pulled the plug on Office of Information and Regulatory Affairs (OIRA) review, including an OIRA-facilitated interagency review process and compliance with Executive Order (EO) 12866, for tax regulatory actions.<sup>4</sup> Contrary to some assertions, the 2023 MOA goes further than any of its predecessor agreements by exempting not merely some or most but rather all tax regulatory actions from OIRA review.<sup>5</sup> The move also ended a short-lived effort, memorialized in a 2018 memorandum (the 2018 MOA), that required OIRA review more often in the tax context than had been the case in the past.<sup>6</sup>

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<sup>3</sup> Memorandum of Agreement, The Department of the Treasury and the Office of Management and Budget Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/06/Treasury-OMB-MOA.pdf> [hereinafter 2023 MOA].

<sup>4</sup> See 58 Fed. Reg. 51735 (Oct. 4, 1993); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1854–63 (2013) (describing the general process of OIRA review).

<sup>5</sup> In his first public statement about the 2023 MOA, OIRA Administrator Richard Revesz contended that the new MOA merely reverts to the pre-Trump status quo. See Marie Sapirie, *A Finale for OIRA Tax Review*, 180 TAX NOTES FEDERAL 349 (July 17, 2023) (quoting Revesz); Admin. Conf. of the U.S., *79th Plenary Session of the Administrative Conference of the United States*, YOUTUBE (June 15, 2023), [https://www.youtube.com/watch?v=8pFBBY6WgHU&list=PLziY\\_gwGrJeajF1zQieETRZXXV\\_L0PtXLJ&index=7&t=2948s](https://www.youtube.com/watch?v=8pFBBY6WgHU&list=PLziY_gwGrJeajF1zQieETRZXXV_L0PtXLJ&index=7&t=2948s) (capturing Revesz's response to question from Kristin Hickman at 49:10). As discussed below, this characterization is not correct.

<sup>6</sup> See *Treasury, OMB Come to Agreement on Tax Reg Review*, 2018 TAX NOTES TODAY 72-45 (Apr. 11, 2018) (publishing the 2018 MOA); Memorandum of Agreement, The Department of Treasury and Office of Management and Budget, Review of Tax Regulations under Executive Order 12866 (Apr. 11, 2018), <https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf> [hereinafter 2018 MOA].

The 2018 MOA was one of several indicators that “tax exceptionalism”—the idea that the uniqueness of tax justifies various departures from the legal and procedural requirements and expectations that we have for other government agencies—was on the retreat.<sup>7</sup> The courts continue to pursue their own rejection of tax exceptionalism in regulatory practice.<sup>8</sup> With the 2023 MOA, the executive branch is sending the opposite signal.

It is tempting in these cynical times to describe either or both of the 2018 MOA and the 2023 MOA in terms of partisan power grabs or bureaucratic turf battles.<sup>9</sup> Amid all of the dramatic back-and-forth over OIRA review of tax regulatory actions, however, we observe instead two competing narratives more oriented toward different conceptions of the public interest. The substantial and important nature of both the federal tax system and tax regulations grounds both narratives, but that might be where the agreement ends. One narrative is that OIRA review brings worthwhile, salutary benefits to the public and the regulatory process in the form of interagency coordination, accountability, analytical rigor, and transparency about agency decision-making. The other narrative is that OIRA review is meddlesome in multiple ways, dismissive of agencies’ subject matter expertise, and its analytical methods are not worth the effort they impose. The first narrative sees tax regulatory actions as highly interconnected with the social welfare and regulatory goals of other executive branch agencies, making robust analysis and interagency coordination especially important in the tax context. The other narrative acknowledges the tax system’s role in achieving social welfare and regulatory goals other than revenue raising but remains focused principally on the tax system’s traditional revenue raising mission and the associated needs of some taxpayers for regulatory certainty to support transaction planning and tax filing deadlines.

To some extent, the claims underlying and advanced by the two competing narratives can be evaluated empirically. In a separate study of several

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<sup>7</sup> For background on tax exceptionalism, see, e.g., Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014); Patrick J. Smith, *The APA’s Arbitrary and Capricious Standard and IRS Regulations*, 136 TAX NOTES 271 (2012); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack Of) Compliance with Administrative Procedure Act Rule-making Requirements*, 82 NOTRE DAME L. REV. 1727 (2007).

<sup>8</sup> See, e.g., *CIC Services, LLC v. IRS*, 141 S. Ct. 1582, 1594 (2021) (allowing pre-enforcement APA challenge against IRS notice to proceed); *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44, 55 (2011) (rejecting “an approach to administrative review good for tax law only”); see also Kristin E. Hickman, *The Federal Tax System’s Administrative Law Woes Grow*, 41 ABA TAX TIMES Win.-Spr. (2022) (documenting several circuit court cases and trends).

<sup>9</sup> An extensive academic literature exists discussing these and related motivations for bureaucratic behavior. See, e.g., RACHEL AUGUSTINE POTTER, *BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY* 54–84 (2019); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* [ch. 10] (1989); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L., ECON. & ORG. 243, 273–74 (1987); Terry Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235–71 (John E. Chubb & Paul E. Peterson, eds., 1985).

years' worth of tax regulation preambles, we aim to resolve at least some issues of contested fact.<sup>10</sup> That study is not designed, however, to address the disagreements about priorities and values—e.g., specialized expertise and efficiency versus accountability and transparency—that the two narratives reflect. In other work, we both have advanced arguments in favor of OIRA review, in the tax context and otherwise.<sup>11</sup> Given space limitations, we will not comprehensively reiterate that case here. Instead, in this essay, we engage these normative considerations by evaluating the primary justifications offered for the sea-change reflected in the 2023 MOA's wholesale rejection of OIRA review for tax regulatory actions. Our assessment of those justifications will, in turn, both note when they merely echo more universal objections to OIRA review and also reflect a more pro-OIRA perspective.

## II. NOT QUITE THE STATUS QUO ANTE

First, however, let us address claims that the 2023 MOA merely returns tax administration to the status quo prior to the 2018 MOA. In his first public statement about the 2023 MOA, OIRA Administrator Richard Revesz described the new agreement in such terms: “In some ways, we don’t see this as a big move; we see this as a return to what had been the status quo under administrations of both parties for about a 40-year period.”<sup>12</sup> Mark Mazur, formerly Assistant Secretary of the Treasury in both the Obama and Biden Administrations, suggested similarly: “This is largely a return to the environment that had been in place from the Reagan administration to the Obama administration.”<sup>13</sup> Although OIRA review of tax regulatory actions was not a common occurrence before the 2018 MOA, this characterization of the 2023 MOA and the history of OIRA review in the tax context is inaccurate in important respects.

To go back to the beginning, EO 12291 formalized both regulatory impact analysis and OIRA review for executive branch regulations.<sup>14</sup> Temporary agreements between the Treasury Department (Treasury) and OIRA in 1981 and 1982, followed by a more enduring agreement in 1983, exempted

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<sup>10</sup> See generally Bridget C.E. Dooling & Kristin E. Hickman, *Pre-Analysis Research Plan for OIRA Review of Treasury Regulations Project*, (Minn. Legal Stud. Rsch. Paper Series, Paper No. 24-1, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4419190](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4419190); Bridget C.E. Dooling & Kristin E. Hickman, *Applying the Regulatory Report Card to Tax Regulations*, J. BENEFIT-COST ANALYSIS (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4321211](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4321211).

<sup>11</sup> See Kristin E. Hickman, *An Overlooked Dimension to OIRA Review of Tax Regulatory Actions*, 105 MINN. L. REV. HEADNOTES 454, 465–75 (2021); Bridget C.E. Dooling, *Bespoke Regulatory Review*, 81 OHIO ST. L.J. 673, 694–95 (2020).

<sup>12</sup> See Sapirie, *supra* note 5, at 349; Admin. Conf. of the U.S., *supra* note 5, at 49:10.

<sup>13</sup> See Alexander Rifaat, *Biden Drops OIRA From Tax Reg Review Process*, 179 TAX NOTES FED. 2068 (June 19, 2023) (quoting Mazur).

<sup>14</sup> Exec. Order No. 12291 (Feb. 17, 1981), 46 Fed. Reg. 13193.

tax regulatory actions from these requirements under certain circumstances.<sup>15</sup> Treasury and OIRA subsequently ratified the 1983 agreement in 1993, after EO 12866 replaced EO 12291.

Specifically, the 1983 agreement between Treasury and OIRA contemplated regulatory review for “legislative regulations that are ‘major’ as defined in” EO 12291.<sup>16</sup> Although other tax regulations were exempted from OIRA review, Treasury agreed to alert OIRA to major regulations for which OIRA review was waived and non-major regulations “that reasonably could be expected to have a significant economic impact.”<sup>17</sup> Finally, Treasury agreed not to publish any regulation in the *Federal Register* without first explaining to OIRA its reasons for concluding that the regulation was either not major or an interpretative rule.<sup>18</sup>

Treasury and the IRS (collectively Treasury/IRS) have maintained for decades that the vast majority of tax regulations are interpretative rules rather than legislative ones, as those terms are understood under the Administrative Procedure Act.<sup>19</sup> It is a position that may have made sense given jurisprudence in the 1970s and before but that courts have since rejected.<sup>20</sup> Presumably as a result of applying that same characterization in interpreting the 1983 agreement between Treasury and OIRA, as a matter of practice, most tax regulatory actions did not undergo OIRA review. Yet, OIRA and tax administration were not complete strangers.

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<sup>15</sup> See *id.*; *Treasury Docs Show Agreement Waiving OMB Review for IRS Rulings*, 2016 TAX NOTES TODAY 185-20 (Sept. 23, 2016) (publishing agreements from 1983 and 1993); see also Paige A. Foster & Marie Sapirie, *News Analysis: A Historical Perspective of OMB’s Review of Tax Rules*, 158 TAX NOTES 1752 (Mar. 26, 2018) (documenting this history).

<sup>16</sup> Memorandum of Agreement, Treasury and OMB, Implementation of Executive Order 12291 (Apr. 29, 1983), <https://perma.cc/C92M-CRG2> [hereinafter 1983-1993 MOA]. EO 12291 calls for OIRA review of “major rules,” whereas EO 12866 calls for OIRA review of “significant regulatory actions,” but the definitions and regulatory impact analysis required for the two are very similar.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See I.R.S., IRM 32.1.1.2.6 (Sept. 23, 2011); see also Michael Saltzman & Leslie Book, *IRS Practice and Procedure* ¶ 3.02[2][b] (2024) (discussing the legislative versus interpretative character of Treasury regulations); Hickman, *supra* note 7 at 1760–73 (documenting Treasury’s assertions and analyzing its claims under evolving jurisprudence). Interpretative rules are also exempt from Administrative Procedure Act notice-and-comment rulemaking procedures. 5 U.S.C. § 553(b).

<sup>20</sup> At least, the U.S. Tax Court has rejected such claims several times. On appeal in these cases, the government has not pressed the argument in some time, perhaps to avoid the sort of sweeping and unequivocal holdings that the Tax Court has reached on this issue. See, e.g., *Oakbrook Land Holdings, LLC v. Comm’r*, 154 T.C. 180, 189–90 (2020), *aff’d* 28 F.4th 700, 722 (6th Cir. 2022); *SIH Partners LLLP v. Comm’r*, 150 T.C. 28, 40–41 (2018), *aff’d* 923 F.3d 296, 308 (3d Cir. 2019); *Altera Corp. & Subs. v. Comm’r*, 145 T.C. 91, 115–17 (2015), *rev’d on other grounds*, 926 F.3d 1061, 1082 (9th Cir. 2019). *Cf. Mayo Found. for Med. Educ. & Res.*, 562 U.S. at 57 (holding that both specific and general authority Treasury regulations carry the force of law, albeit for *Chevron* deference purposes). Since *Mayo Foundation*, no court has held that any Treasury regulation is an interpretative rule.

According to [reginfo.gov](http://reginfo.gov), between OIRA's inception in 1981 and the 2018 MOA, Treasury/IRS submitted 56 regulations to OIRA for review.<sup>21</sup> Of those, the vast majority (44 submissions, or 78%) occurred prior to 1998, and most of those (32 submissions, or 57%) occurred between the 1986 Tax Reform Act and the Clinton administration's 1993 affirmation of the exemption for most tax regulatory actions.<sup>22</sup> Although Treasury/IRS submitted no regulations at all to OIRA for review between 1998 and 2010, it submitted 12 regulations in the near-decade preceding the 2018 MOA.<sup>23</sup> Many of these regulations imposed user fees or standards governing practice before the IRS upon attorneys, certified public accountants, and others.<sup>24</sup> Others were more substantive.<sup>25</sup>

In its 2011 decision in *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court rejected “an approach to administrative review good for tax law only” and declared that both specific authority and general authority Treasury regulations “carry the force of law.”<sup>26</sup> Since that decision, courts generally have rejected claims that tax regulatory actions—Treasury regulations<sup>27</sup> and even some subregulatory IRS notices<sup>28</sup>—are interpretative rules for Administrative Procedure Act purposes.<sup>29</sup> One consequence of these decisions, at least in theory, was to increase the number of Treasury regulations that might be subject to OIRA review under the terms of the 1983 agreement. Again, the terms of that 1983 agreement called for review of “legislative regulations that are ‘major.’”<sup>30</sup>

<sup>21</sup> Analysis using data from [reginfo.gov](http://reginfo.gov) (on file with authors).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., T.D. 9781, Preparer Tax Identification Number (PTIN) User Fee Update, 81 Fed. Reg. 52766, 2016-35 I.R.B. 274 (2016) (discussing the regulations' significance); T.D. 9668, Regulations Governing Practice Before the Internal Revenue Service, 79 Fed. Reg. 33685, 2014-27 I.R.B. 1 (2014) (designated as “a ‘significant regulatory action,’ but not economically significant”); T.D. 9527, Regulations Governing Practice Before the Internal Revenue Service, 76 Fed. Reg. 32286, 2011-27 I.R.B. 1 (2011) (designated as “a ‘significant regulatory action’ . . . inasmuch as it may adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs”).

<sup>25</sup> See, e.g., T.D. 9826, Mortality Tables for Determining Present Value Under Defined Benefit Pension Plans, 82 Fed. Reg. 46388-411 (2017) (“It has been determined that these regulations constitute a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563.”); T.D. 9790, Treatment of Certain Interests in Corporations as Stock or Indebtedness, 81 Fed. Reg. 72858, 2016-45 I.R.B. 540 (2016) (“This rule has been designated as a ‘significant regulatory action’ under section 3(f) of Executive Order 12866 and designated as economically significant.”).

<sup>26</sup> *Mayo Found. for Med. Educ. & Res.*, 562 U.S. at 55-58.

<sup>27</sup> See *Oakbrook Land Holdings, LLC*, 28 F.4th at 722; *SIH Partners LLLP*, 150 T.C. at 40-41, *aff'd* 923 F.3d at 306; *Altera Corp. & Subs.*, 145 T.C. at 115-17, *rev'd on other grounds*, 926 F.3d at 1080-82.

<sup>28</sup> See, e.g., *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1143-45 (6th Cir. 2022); *Green Rock, LLC v. IRS*, 654 F. Supp. 3d 1249, 1253 (N.D. Ala. 2023); *CIC Servs., LLC v. IRS*, 592 F.Supp.3d 677, 683 (E.D. Tenn. 2022); *GBX Assoc., LLC v. United States*, 2022 WL 16923886, at \*43-44 (N.D. Ohio Nov. 14, 2022); *Green Valley Investors, LLC v. Comm'r*, 159 T.C. 80, 95 (Nov. 9, 2022).

<sup>29</sup> See Hickman, *supra* note 7, at 1761-73 (citing sources).

<sup>30</sup> See 1983-1993 MOA, *supra* note 16.

In 2017, EO 13789 directed Treasury and OIRA to review and reconsider their earlier agreements regarding OIRA review and EO 12866 compliance for tax regulatory actions.<sup>31</sup> That executive order followed calls from members of Congress,<sup>32</sup> the Government Accountability Office,<sup>33</sup> and a bipartisan duo of former OIRA administrators<sup>34</sup> to bring the IRS into the OIRA fold. The result was the 2018 MOA, in which Treasury agreed more systematically to conduct regulatory impact analysis under EO 12866 for many of its draft regulatory actions and to send them to OIRA for review before publication.<sup>35</sup>

In summary, OIRA has always played at least some role in tax administration, and arguably could have played a greater role even under the 1983 agreement after the Supreme Court's *Mayo Foundation* decision. By comparison, the 2023 MOA is clear, unequivocal, and comprehensive in exempting any and all tax regulatory actions from EO 12866 compliance and OIRA review. After ratifying that other regulatory actions taken by Treasury generally will be subject to OIRA review and EO 12866 compliance, the 2023 MOA lists several types of regulatory actions that "will not be subject to such review process."<sup>36</sup> The first item on that list is "[t]ax regulatory actions, defined as a regulatory action (as defined by Executive Order 12866) issued by the Internal Revenue Service whether pursuant to Title 26 of the United States Code or with respect to any other United States Federal income, excise, estate, gift, or employment tax."<sup>37</sup> This means that, for the first time ever, all tax regulatory pronouncements would fall within the exclusion.

### III. JUSTIFICATIONS AND RESPONSES

Why should tax regulatory actions be exempt from the requirements of EO 12866 and OIRA review that other executive branch agencies must follow? Biden administration officials and tax experts have offered several

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<sup>31</sup> Exec. Order No. 13789 § 2(c), 82 Fed. Reg. 19317 (Apr. 26, 2017) (Identifying and Reducing Tax Regulatory Burdens).

<sup>32</sup> See, e.g., Senators Ask OIRA to Review Deal Exempting IRS Regs from Review, 2018 TAX NOTES TODAY 32-24 (Feb. 15, 2018); Hatch Requests Private Treasury memo on Federal Tax Regulations, 2016 TAX NOTES TODAY 85-30 (May 3, 2016).

<sup>33</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-720, Report to Congressional Requesters, Regulatory Guidance Processes: Treasury and OMB Need to Reevaluate Long-standing Exemptions of Tax Regulations and Guidance 35 (Sept. 6, 2016).

<sup>34</sup> See generally Susan E. Dudley & Sally Katzen, *The Story Behind the IRS's Exemption From Oversight*, WALL ST. J. (Feb. 22, 2018, 6:24 PM), <https://www.wsj.com/articles/the-story-behind-the-irss-exemption-from-oversight-1519341868>.

<sup>35</sup> See 2018 MOA, *supra* note 6; see also Bridget C.E. Dooling, *OIRA's Expanded Review of Tax Regulations and Its Surprising Implications*, 3 BUS. ENTREP. & TAX L. REV. 224, 225 (2019).

<sup>36</sup> See 2023 MOA, *supra* note 3.

<sup>37</sup> *Id.*

reasons. Some reflect common complaints about OIRA review generally, although sometimes with a unique tax twist. Others are more explicitly rooted in tax exceptionalism.

#### A. *Delay*

One of the most common complaints about OIRA review of tax regulatory actions has been that the OIRA process slows down or delays the release of necessary tax guidance.<sup>38</sup> The 2018 MOA was announced shortly after the enactment of the Tax Cuts and Jobs Act, which tasked the IRS with a huge volume of rulemaking.<sup>39</sup> At the time, many worried that the new MOA would inhibit the timely release of IRS regulations.<sup>40</sup> The question of delay was portrayed as particularly concerning in the tax context, as taxpayers planning transactions, making quarterly estimated tax payments, and filing annual tax returns need the legal certainty that timely guidance provides.

Delay concerns are not unique to the tax context, as OIRA's critics perennially complain that OIRA review slows down the release of important and beneficial regulations.<sup>41</sup> The question, of course, is whether the additional time it takes for OIRA review is "worth it." Framing the issue as one of "delay" implies that a good rule is otherwise being held up by extra, unhelpful process.<sup>42</sup> If, however, OIRA review uncovers and enables agency officials to resolve problems with a regulation before it is issued—including (though not limited to) those that might jeopardize the regulation in subsequent litigation—then characterizing the additional time spent as a "delay" seems less

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<sup>38</sup> See, e.g., Naomi Jagoda, *Tax Rules Exempt from White House Review Under New Pact*, BLOOMBERG TAX (June 12, 2023, 1:11 PM), <https://news.bloombergtax.com/daily-tax-report/tax-regulations-exempt-from-white-house-review-under-new-pact> (quoting David Kautter, Assistant Secretary of the Treasury for Tax Policy).

<sup>39</sup> See generally Pub. L. No. 115-97, 131 Stat. 2054 (2017).

<sup>40</sup> See, e.g., *Timeliness Key to OMB Review of Tax Regs*, ABA Tax Section Says, 2018 TAX NOTES TODAY 82-12 (Apr. 26, 2018); Martin A. Sullivan, *Economic Analysis: OMB-Treasury Memo Creates Guidance Uncertainty and Delay*, 159 TAX NOTES TODAY 443 (Apr. 23, 2018); see also Roger W. Dorsey & Mark Funk, *OIRA Review of Tax Regulations and the Continuing Demise of 'Tax Exceptionalism' In Administrative Law*, 101 Prac. Tax Strategies 8, 8 (2018) (acknowledging concerns about delay in reaction to the 2018 MOA).

<sup>41</sup> See, e.g., Peter Ketcham-Colwill, *Presidential Influence Over Agency Rulemaking Through Regulatory Review*, 82 GEO. WASH. L. REV. 1622, 1626-29 (2014); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1065 (1986); see also CURTIS W. COPELAND, LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2013), <https://www.acus.gov/report/oira-review-report> (documenting complaints and statistics regarding the timeliness of OIRA reviews over time).

<sup>42</sup> See, e.g., Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645, 1653 (2023) (arguing that increased procedures merely delay IRS's response to important issues).

apt.<sup>43</sup> Internal reviews by, for example, the promulgating agency’s general counsel staff or political appointees are more likely to be seen as just part of “the process,” and therefore not to be described in this manner.<sup>44</sup>

Somewhat ironically, the time allotted by the 2018 MOA for OIRA review was demonstrably less in the tax context. For most agencies, the time designated for OIRA review of most regulatory actions is 90 days.<sup>45</sup> For tax regulatory actions, the 2018 MOA shortened that time period to 45 days and further offered a mechanism for seeking “expedited release” that limited OIRA review to “no more than 10 business days.”<sup>46</sup> When OIRA reviews a regulatory action under EO 12866, it discloses the review start and conclusion dates. While our main study will provide more comprehensive data, the average OIRA review time for tax regulations while the 2018 MOA was in effect was approximately 33 days—with some longer but many shorter—showing that the 2018 MOA timeframes generally were honored in practice.<sup>47</sup>

Timely regulations and guidance are important in many regulatory fields. For example, higher education regulations related to student aid are guided by a “master calendar” designed to recognize the importance of implementing changes in time for the school year.<sup>48</sup> The Medicare program runs on annual rulemakings that adjust payment policy for providers that participate in the program; without timely rules, health care providers do not get paid updated amounts.<sup>49</sup> These regulations come through OIRA for review.<sup>50</sup> For that matter, EO 12866 is quite explicit that even regulations promulgated

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<sup>43</sup> See, e.g., THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 118 (1991) (describing several “virtues” of EO 12866-style regulatory analysis and OIRA review, including “[s]ecuring successful judicial review”); Hickman, *supra* note 11, at 465–75 (describing in which EO 12866 and OIRA review help Treasury/IRS comply with Administrative Procedure Act requirements).

<sup>44</sup> See, e.g., I.R.S., Internal Revenue Manual § 32.2.6.4 (Nov. 12, 2019) (including circulation of drafts to various personnel, including Treasury officials, among procedural steps for published guidance); § 32.2.7.8 (Oct. 21, 2011) (including final Treasury clearance among procedural steps for published guidance).

<sup>45</sup> See Exec. Order No. 12866 § 6(b)(2)(B). Review times can be longer or shorter than 90 days. In our study of several years’ worth of tax regulation preambles, we will include an assessment of OIRA review times for tax and other regulations. See Dooling & Hickman, *Pre-Analysis*, *supra* note 10.

<sup>46</sup> See 2018 MOA, *supra* note 6, at § 4(a).

<sup>47</sup> Analysis using data from [reginfo.gov](http://reginfo.gov) (on file with authors).

<sup>48</sup> See 20 U.S.C. § 1089.

<sup>49</sup> See CONG. RSCH. SERV., RL30526, *MEDICARE PAYMENT POLICIES 1–2* (Sept. 24, 2010) (describing the system of annual Medicare payment rules).

<sup>50</sup> See, e.g., OFF. OF INFO. REG. AFF., OIRA Conclusion of EO 12866 Review (Sept. 16, 2013), <https://www.reginfo.gov/public/do/eoDetails?rrid=123408> (documenting OIRA’s review of a U.S. Department of Education Federal Family of Education Loans regulation); OFF. OF INFO. REG. AFF., OIRA Conclusion of EO 12866 Review, <https://www.reginfo.gov/public/do/eoDetails?rrid=307861> (Mar. 21, 2023) (documenting OIRA’s review of a U.S. Department of Health and Human Services Medicare Part D regulation).



in emergency circumstances are subject to OIRA review,<sup>51</sup> notwithstanding that the Administrative Procedure Act's good cause exception otherwise might exempt such rules from notice-and-comment rulemaking procedures.<sup>52</sup> So while the annual cycle of tax-related reporting is certainly important to consider, the tax context is not entirely unique.

One interesting aspect of tax, though, is just which taxpayers have the greatest need or desire for more rapid regulatory guidance. Individual taxpayers whose income comes principally from wages subject to third-party withholding<sup>53</sup> and who claim the standard deduction rather than itemizing<sup>54</sup> have little room to engage in the sort of tax planning supported by the rapid issuance of regulations. Larger firms and high net worth individuals (and their professional tax advisers) are more likely to place value on quicker regulatory guidance from Treasury/IRS to facilitate planning.<sup>55</sup> A key normative question is the extent to which the planning needs of the latter subset of taxpayers should be accommodated at the expense of those of other taxpayers or other good government values such as the interagency coordination and transparent and rigorous decision-making facilitated by OIRA review and EO 12866 compliance.

Cass Sunstein contends that so-called delays attributed to OIRA usually arise because of concerns raised by other agencies in the OIRA-facilitated interagency review process, sometimes even when the promulgating agency has already consulted other agencies regarding a rule's content.<sup>56</sup> Resolving such disagreements before a rule is issued, rather than discovering them after the fact, would seem to improve rather than detract from the regulation quality.<sup>57</sup>

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<sup>51</sup> See Exec. Order No. 12866 § 6(a)(3)(D), 58 Fed. Reg. 51735 (Oct. 4, 1993); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 728 (1999).

<sup>52</sup> See 5 U.S.C. § 553(b)(B).

<sup>53</sup> According to a Tax Foundation study, “[f]or most tax filers in the U.S., the largest income number on their own Form 1040 appears on the line where they report wages, salaries, tips, and other compensation for their work,” estimated at 66% of total income. Erica York & Michael Hartt, *Sources of Personal Income, Tax Year 2020*, TAX FOUND. (June 28, 2023), <https://taxfoundation.org/data/all/federal/personal-income-tax-returns-pi-data>.

<sup>54</sup> According to the IRS, more than 87% of individual taxpayers claim the standard deduction. See INTERNAL REVENUE SERV., SOI Tax Stats—Tax Stats-at-a-Glance, <https://www.irs.gov/statistics/soi-tax-stats-tax-stats-at-a-glance>.

<sup>55</sup> See, e.g., OECD, *Study into the Role of Tax Intermediaries* 6, 13–16 (2008), <https://www.oecd.org/tax/administration/39882938.pdf> (identifying the most common participants in aggressive tax planning activities and their interest in timely tax guidance).

<sup>56</sup> Sunstein, *supra* note 4, at 1842.

<sup>57</sup> For more on OIRA's role as a coordinator and various other forms of interagency coordination and their implications, see Jim Rossi & Jody Freeman, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1197–1203 (2012).

In the tax context, some argue that interagency coordination happens without OIRA review.<sup>58</sup> While this is surely true to some extent, two important questions come to mind.

First, are an appropriate range of agencies being consulted, and at an appropriate level within the agency? OIRA sits within the Executive Office of the President, from which vantage point it might be aware of agencies with an interest in draft tax regulations that might not be immediately apparent to Treasury/IRS. Many contemporary tax regulations serve regulatory and social welfare goals beyond mere revenue raising, and OIRA-coordinated interagency review ensures that critical perspectives within the executive branch are taken into account.<sup>59</sup> OIRA review can also create a repeat-player scenario in which agencies more regularly interact with each other in both formal and informal ways, perhaps creating opportunities to avoid issues in the future.

Second, when disputes between Treasury/IRS and other agencies arise, how are they handled? OIRA review creates a structure in which interagency disagreements can be considered and resolved. If it is only Treasury's call whether to take interagency concerns seriously, one wonders if the other agencies consistently get a fair hearing for their concerns, especially if they come from a source with relatively less leverage within the executive branch than Treasury.

## B. *Politicization*

Another common complaint is that OIRA review increases the politicization of the tax regulatory process. The politicization concern is not unique to the tax context.<sup>60</sup> On the other hand, tax administrators have always been sensitive to accusations of political bias.

Mostly, concerns about politicization in the tax context relate to tax collection and enforcement—e.g., leaking private tax return information or initiating tax audits to harass and harm political opponents—rather than

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<sup>58</sup> See, e.g., Chye-Ching Huang, *Modernizing Tax Regulatory Review*, YALE J. ON REG. NOTICE & COMMENT BLOG (June 29, 2023), <https://www.yalejreg.com/nc/modernizing-tax-regulatory-review-by-chye-ching-huang/>; Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 3:06 PM), <https://twitter.com/rebeccakysar/status/1668334063541977094>.

<sup>59</sup> See Blaine G. Saito, *Tax Coordination*, 38 GEORGIA ST. U. L. REV. 735, 794–96 (2022) (discussing OIRA's role as one element of improved tax coordination).

<sup>60</sup> See, e.g., Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 517–18 (2015); Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENV'T L. REV. 325 (2014).

regulation drafting.<sup>61</sup> Still, critics assert that OIRA review of tax regulatory actions gives lobbyists and political actors more opportunity to influence the content of tax regulations, instead of relying on the views and subject matter expertise of Treasury/IRS career personnel.<sup>62</sup> Making this point in defending the 2023 MOA, former Assistant Secretary for Tax Policy Mark Mazur seemed to suggest further that the IRS's lack of political appointees—"only two [the Commissioner and the Chief Counsel] . . . in an agency of over 80,000 employees"—results in a comparatively depoliticized regulatory process.<sup>63</sup>

Of course, most of the IRS's 80,000 employees are involved in routine compliance and administrative functions, not rulemaking.<sup>64</sup> Yet, Mazur omits the Office of Tax Policy at Treasury, which is quite political. That office is led by an Assistant Secretary appointed by the President and confirmed by the Senate, and also includes several political Deputies appointed by the Secretary, for the purpose of carrying forth presidential priorities in tax policy, including direct involvement in regulation drafting and approval.<sup>65</sup> By comparison, OIRA has fewer political appointees than Treasury—one Administrator with a couple of political deputies—and, like the IRS, is staffed primarily with career civil servants.<sup>66</sup> There is no indication that OIRA's political appointees and career civil servants are any more susceptible to lobbying than the political appointees and career civil servants at Treasury/IRS.

Regardless, the notion that executive branch tax policy is somehow insulated from political influence is puzzling.<sup>67</sup> Although some tax regulatory

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<sup>61</sup> See, e.g., Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 483–86 (2018) (discussing concerns about politicization of tax administration and acknowledging the distinction).

<sup>62</sup> See, e.g., Jonathan Curry, *Lankford Steps into Odd Role in Oversight of Tax Implementation*, 2018 TAX NOTES TODAY 71-4 (Apr. 12, 2018) (quoting former deputy assistant secretary for tax policy Greg Jenner making this point).

<sup>63</sup> See Rifaat, *Biden Drops OIRA*, *supra* note 13 (quoting Mazur).

<sup>64</sup> See Saltzman & Book, *supra* note 19, at ¶¶ 1.02 & 3.02 (describing the IRS's several offices and divisions and what they do, as well as the personnel involved in the regulatory process); see also *IRS Budget & Workforce*, IRS (last accessed March 5, 2024), <https://www.irs.gov/statistics/irs-budget-and-workforce>.

<sup>65</sup> 31 U.S.C. § 301(e); U.S. DEP'T OF TREAS., Treasury Order 101-06 (Sept. 20, 2022), <https://home.treasury.gov/about/general-information/orders-and-directives/treasury-order-101-06>; see also OFF. OF TAX POL'Y, U.S. DEP'T OF TREAS., <https://home.treasury.gov/about/offices/tax-policy>; see generally Daniel Bunn, *Personnel is Policy: Biden International Tax Team Edition*, TAX FOUND. (Feb. 4, 2021), <https://taxfoundation.org/blog/biden-international-tax-team-treasury/>.

<sup>66</sup> *Frequently Asked Questions*, OFF. OF MGMT. & BUDGET, <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp#oira> (last visited Mar. 25, 2024).

<sup>67</sup> See, e.g., Jasper L. Cummings, Jr., *Why They Won't Talk*, 160 TAX NOTES 673 (July 30, 2018) (documenting lobbying and political interference in executive branch tax policymaking apart from OIRA review).

actions are sufficiently minor or technical as to avoid much scrutiny,<sup>68</sup> others inevitably will be politically charged because of the significance of the issues they involve, irrespective of whether OIRA plays a role. Wholly apart from OIRA review, examples abound of Treasury/IRS changing course on pending tax regulations as a result of political pressure from Congress, the President, and presumably outside parties as well.

Regulations adopted in 2016 to curb corporate inversion transactions that expatriated or “stripped” earnings from U.S. taxation offer one such example. For many years, Treasury and many other tax experts considered inversions abusive, but Treasury/IRS maintained that they lacked the statutory authority to prevent inversions through regulations and called upon Congress to act instead.<sup>69</sup> Under pressure from the Obama White House and members of Congress,<sup>70</sup> and supported by academic analysis suggesting possible alternative interpretations of relevant statutory provisions,<sup>71</sup> Treasury /IRS issued first a pair of IRS notices,<sup>72</sup> then temporary regulations,<sup>73</sup> followed by final regulations to curtail inversions.<sup>74</sup> Treasury’s change of heart, and the resulting inversion regulations, were the product of enormous political pressure notwithstanding a lack of OIRA involvement.

More recently, guidance implementing Inflation Reduction Act changes to the tax credit for electric vehicle purchases provides another clear example

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<sup>68</sup> In fact, many proposed Treasury regulations receive no or only a few public comments. Hickman, *Coloring Outside the Lines*, *supra* note 7, at 1758 (documenting that just under a quarter of Treasury regulation projects from 2003 through 2005 received no comments from the public). Also, OIRA often determined that Treasury regulations were not significant or waived review. *See, e.g.*, Jonathan Curry, *A Look Ahead: Treasury, OIRA to Chart New Territory as Final Regs Flood In*, 161 TAX NOTES 1493 (Dec. 17, 2018) (noting waiver possibility). Our main study will update and further analyze both of these data points. *See* Dooling & Hickman, *Pre-Analysis*, *supra* note 10.

<sup>69</sup> Steven Russolillo, *In Opposing Tax Inversions, Treasury’s Lew Calls for “Economic Patriotism”*, WALL ST. J. (July 16, 2014).

<sup>70</sup> *See, e.g.*, Lindsey McPherson, *White House Eyes Administrative Options on Inversions*, 144 TAX NOTES 660 (Aug. 11, 2014); U.S. Democratic Senators Urge Executive Action to Stop Inversions, 2014 WTD 151-20 (Aug. 5, 2014), <https://www.taxnotes.com/tax-notes-today-international/legislation-and-lawmaking/us-democratic-senators-urge-executive-action-stop-inversions/2014/08/06/gvq8>; Oliver Dugan, *Barack Obama Attacks ‘Corporate Deserters’ in Tax Inversion Takeovers*, TELEGRAPH (July 25, 2014), <http://www.telegraph.co.uk/finance/10990994/Barack-Obama-attacks-corporate-deserters-in-tax-inversion-takeovers.html>.

<sup>71</sup> *See, e.g.*, Steven M. Rosenthal, *Professor Shay Got It Right: Treasury Can Slow Inversions*, 144 TAX NOTES 1445 (Sept. 22, 2014); Stephen E. Shay, *Mr. Secretary, Take the Tax Juice Out of Corporate Expatriations*, 144 TAX NOTES 473 (July 28, 2014).

<sup>72</sup> *See* Notice 2015-79, 2015-49 I.R.B. 775 (Nov. 19, 2015); Notice 2014-52, 2014 I.R.B. 712 (Sept. 22, 2014). The Internal Revenue Code authorizes Treasury to backdate its regulations to the date of an IRS notice “substantially describing the expected contents of” such regulations. 26 U.S.C. § 7805(b)(1)(C).

<sup>73</sup> *See* T.D. 9761, *Inversions and Related Transactions*, 81 Fed. Reg. 20858 (Apr. 8, 2016), 2016-20 I.R.B. 743 (May 16, 2016).

<sup>74</sup> *See* T.D. 9812, *Guidance for Determining Stock Ownership; Rules Regarding Inversions and Related Transactions*, 82 Fed. Reg. 5388 (Jan. 18, 2017).

of a politicized tax rulemaking process with little OIRA involvement. In 2022, that legislation changed which cars would be eligible for the credit, for example by requiring critical minerals used in the batteries to be extracted in North America or a country with which the U.S. has a free trade agreement, and requiring both a percentage of battery assembly as well as final vehicle assembly to occur in North America.<sup>75</sup> The IRS immediately issued FAQs and other subregulatory guidance to explain to the public which cars would fall within these requirements (and, critically, which would not).<sup>76</sup> Foreign countries complained,<sup>77</sup> and members of Congress lobbied Treasury/IRS to be more flexible in their interpretation of the statute.<sup>78</sup> Responding to the political pressure, the IRS changed its subregulatory guidance and foreshadowed Treasury/IRS intentions to broaden eligibility for the credit in proposed regulations.<sup>79</sup> More lobbying ensued,<sup>80</sup> followed by more adjustments.<sup>81</sup> Proposed regulations issued in April 2023<sup>82</sup> along with updated subregulatory guidance<sup>83</sup> did not end the politicking.<sup>84</sup> Treasury has since issued two

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<sup>75</sup> See IRC § 30D(d)(1)(G), (e)(1)-(2).

<sup>76</sup> See, e.g., *FAQ Outlines Changes to Electric Vehicle Tax Credit*, 2022 TAX NOTES TODAY FEDERAL 159-22 (Aug. 16, 2022); Mary Katherine Browne & Chandra Wallace, *IRS Issues Immediate Guidance as EV Credit Changes Are Enacted*, 176 TAX NOTES FED. 1294 (Aug. 22, 2022).

<sup>77</sup> See, e.g., Marie Sapirie, *Supercharging EV Guidance, Maybe*, 177 TAX NOTES FEDERAL 1500 (Dec. 12, 2022); Mary Katherine Browne, *EV Credits Raise Concerns About Foreign Industry Discrimination*, 177 TAX NOTES FEDERAL 748 (Oct. 31, 2022); Alexander Rifaat, *Biden Administration Downplays EV Tax Credit Fears*, 177 TAX NOTES FEDERAL 455 (Oct. 17, 2022).

<sup>78</sup> See, e.g., *Manchin Asks Treasury to Limit Clean Vehicle Tax Credit Use*, 2022 TAX NOTES TODAY FEDERAL 239-23 (Dec. 12, 2022); *Warnock Calls for More Electric Vehicle Tax Credit Flexibility*, 2022 TAX NOTES TODAY FEDERAL 186-9 (Sept. 23, 2022).

<sup>79</sup> See, e.g., *Anticipated Direction of Forthcoming Proposed Guidance on Critical Mineral and Battery Component Value Calculations for the New Clean Vehicle Credit* (Dec. 29, 2022), <https://www.taxnotes.com/research/federal/other-documents/treasury-news-releases/treasury-outlines-new-clean-vehicle-credit-battery-requirements/7fhzw>; *Fact Sheet Addresses Clean Vehicle Credit FAQs*, 2022 TAX NOTES TODAY INT'L 250-18 (Dec. 29, 2022); Alexander Rifaat & Lauren Loricchio, *White House Offers EU Potential Reprieve on EV Tax Credits*, 178 TAX NOTES FEDERAL 134 (Jan. 2, 2023); Lauren Loricchio, *EV Credit Guidance Buys Time for Automakers on Battery Rules*, 178 TAX NOTES FEDERAL 132 (Jan. 2, 2023).

<sup>80</sup> See, e.g., *Lawmakers Ask Treasury Not to Delay Electric Vehicle Credits*, 2023 TAX NOTES TODAY FEDERAL 9-13 (Jan. 11, 2023); Amanda Athanasiou, *Europe Flags Continuing Discrimination in EV Credit Scheme*, 178 TAX NOTES FEDERAL 279 (Jan. 9, 2023).

<sup>81</sup> See, e.g., *IRS Modifies Classification Standards for Clean Vehicle Credit*, 2023 TAX NOTES TODAY FEDERAL 24-23 (Feb. 3, 2023); *Fact Sheet Supersedes FAQs on Clean Vehicle Credits*, 2023 TAX NOTES FEDERAL 24-38 (Feb. 3, 2023); Alexander Rifaat, *Treasury Revises Classifications for Clean Vehicle Tax Credit*, 178 TAX NOTES FEDERAL 1043 (Feb. 13, 2023); Joseph Disciullo, *IRS Guidance Addresses New Clean Vehicle Credits*, 178 TAX NOTES FEDERAL 1021 (Feb. 13, 2023).

<sup>82</sup> See Notice of Proposed Rulemaking, 88 Fed. Reg. 23370 (Apr. 17, 2023).

<sup>83</sup> See, e.g., *Updated Fact Sheet Accompanies Proposed Regs on Clean Vehicle Credit*, TAX NOTES (Apr. 10, 2023), <https://www.taxnotes.com/taxpractice/credits/updated-fact-sheet-accompanies-proposed-regs-clean-vehicle-credit/2023/04/10/7g91b?>

<sup>84</sup> See, e.g., Alexander Rifaat, *White House Rejects Manchin EV Tax Credit Criticism*, 1982 TAX NOTES FEDERAL 177 (Jan. 1, 2024); Alexander Rifaat, *Manchin seeks to Overturn EV Tax Credit Regs*,

additional notices of proposed rulemaking to “supplement” the first<sup>85</sup> and called for a public hearing on the proposed regulations.<sup>86</sup> The IRS continues to “update” its subregulatory guidance.<sup>87</sup> Within statutory limitations, Treasury/IRS willingness to make adjustments to their policies in response to feedback from a variety of sources is laudable. But there can be no doubt that the rulemaking process for implementing changes to the tax credit for electric vehicles has been political from day one, and continues to be so, with at most minimal OIRA involvement.<sup>88</sup>

Meanwhile, much of the media reporting on OIRA review of tax regulations under the 2018 MOA observed that the biggest impact on tax regulations from that process came in the form of increased preamble disclosure and analysis—i.e., transparency, and perhaps better policymaking as a result of additional analysis—rather than substantive changes to the regulations themselves.<sup>89</sup> One can debate whether greater transparency and more analysis are worth the effort, but this pattern is not consistent with the narrative that OIRA review politicizes an otherwise relatively neutral and technocratic regulatory process.

Additionally, while we agree it is normatively correct to guard against the potential for political intrusion into IRS adjudicatory decisions (e.g., in the context of tax collection and enforcement), administrative law considerations of due process have long distinguished between adjudicative and legislative decision-making in the executive branch and afforded each with different levels of protection from different forms of influence.<sup>90</sup> Flattening this

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182 TAX NOTES FEDERAL 182 (Jan. 1, 2024); Amanda Athanasiou, *Canada Consults on Tax Credit Domestic Content Requirements*, 112 TAX NOTES INT’L 410 (Oct. 16, 2023).

<sup>85</sup> See Notice of Proposed Rulemaking, 88 Fed. Reg. 70310 (Oct. 10, 2023); Notice of Proposed Rulemaking, 88 Fed. Reg. 84098 (Dec. 4, 2023).

<sup>86</sup> See Notice of Proposed Rulemaking; Notice of Public Hearing, 89 Fed. Reg. 1858 (Jan. 11, 2024).

<sup>87</sup> See, e.g., *IRS Updates Clean Vehicle Credit FAQs*, TAX NOTES (Jan. 1, 2024), <https://www.taxnotes.com/taxpractice/credits/irs-updates-clean-vehicle-credit-faqs/2024/01/01/7hq9z?>; *Fact Sheet Adds, Updates FAQs on Clean Vehicle Credit*, 2023 TAX NOTES TODAY FEDERAL 193-25 (Oct. 6, 2023); *Jason Smith Urges Action to Keep EV Credits Away from Adversaries*, 2023 TAX NOTES TODAY INT’L 180-22 (Sept. 19, 2023); Alexander Rifaat, *Sunak Cautions Biden Against ‘Subsidy Races’*, 179 TAX NOTES FED. 1881 (June 12, 2023); *Lawmakers Say EV Credit Guidance May Aid China*, 2023 TAX NOTES TODAY FED. 63-18 (Mar. 31, 2023).

<sup>88</sup> According to the preamble to April 2023 notice of proposed rulemaking, OIRA designated the proposed regulations as significant and thus subject to OIRA review. Notice of Proposed Rulemaking, 88 Fed. Reg. 23370 (Apr. 17, 2023). By that date, however, OIRA review was nominal at best given the impending 2023 MOA, and now has been removed from the process entirely. See 2023 MOA, *supra* note 3.

<sup>89</sup> See, e.g., Andrew Velarde & Eric Yauch, *New OIRA Drafts Reveal Tweaks to TCJA Guidance*, 2019 TAX NOTES TODAY INTERNATIONAL 131-1 (July 9, 2019).

<sup>90</sup> See, e.g., *Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970) (describing the test for decision-maker disqualification in an adjudicatory context); *Assoc. of National Advertisers, Inc. v. Federal Trade Commission*, 627 F.2d 1151, 1170 (D.C. Cir. 1979) (describing the test for decision-maker disqualification in the rulemaking context).

distinction for tax is yet another manifestation of tax exceptionalism without corresponding justification.

### C. *Cost-Benefit Analysis & Tax*

Under EO 12866, agencies are expected to analyze the costs and benefits of their proposals and to make that analysis available to the public during the comment period of notice-and-comment rulemaking.<sup>91</sup> The application of this cost-benefit analysis (CBA) requirement to tax regulations has been controversial since the 2018 MOA was issued.<sup>92</sup> Critics of OIRA review of tax regulations insist that CBA is inappropriate for the tax context for reasons including (but not necessarily limited to) its failure to take into account either the revenue effects or the distributional effects of tax regulations.<sup>93</sup>

As a threshold matter, some—including the IRS—continue to believe that tax regulations merely implement congressional decisions reflected in tax statutes and do not have independent consequences meriting this kind of analysis.<sup>94</sup> While this may have been true at some point in the distant past, it makes little sense today. The modern Internal Revenue Code includes hundreds of authorizations for Treasury, with IRS’s assistance, to adopt rules and regulations to elaborate statutory requirements, fill statutory gaps, and decide how best to achieve congressional goals. In 2006, a New York State Bar Association study identified 550 sections of the Internal Revenue Code specifically authorizing rules and regulations in addition to the general authority to adopt regulations “as needful” contained in IRC § 7805(a).<sup>95</sup> It seems unlikely that Treasury’s rulemaking power has diminished since then. The fact that taxpayers must pay taxes and file tax returns even in the absence of regulatory guidance does not negate the reality of the extensive regulatory discretion these provisions give Treasury. In exercising that rulemaking power, Treasury/IRS make their own policy choices that narrow or expand eligibility for deductions and credits, incentivize or discourage private party behavior, and impose or alleviate tax regulatory burdens, in addition to increasing or

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<sup>91</sup> See Exec. Order No. 12866, 58 Fed. Reg. 51735 § 6(a)(3)(C) & (E)(i) (Oct. 4, 1993).

<sup>92</sup> See Hickman, *supra* note 11, at 456.

<sup>93</sup> See, e.g., Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 3:06 PM), <https://twitter.com/rebeccakysar/status/1668334059158929408> & <https://twitter.com/rebeccakysar/status/1668334060580802560>.

<sup>94</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-720, REGULATORY GUIDANCE PROCESS: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 21 (Sept. 2016) (discussing Treasury and IRS policies that “any effect of the regulation flows directly from the [Internal Revenue Code]”).

<sup>95</sup> N.Y. State Bar Ass’n Tax Section, *Report on Legislative Grants of Regulatory Authority 2* (2006), <https://nysba.org/app/uploads/2020/03/1121-Report.pdf> (documenting 550 sections of the Internal Revenue Code containing specific authorizations of rulemaking power to Treasury, in addition to the general authority in IRC § 7805(a) to adopt regulations as it deems them “needful”).

reducing tax liabilities.<sup>96</sup> Tax regulations, and the policy choices they reflect, have real-world consequences far beyond who pays a few dollars more (or less) in taxes.

The issue of regulatory discretion is at the heart of another complaint about CBA because to conduct such an analysis one must articulate the ex ante conditions, called the baseline, to compare against the proposed rule.<sup>97</sup> If tax statutes “self-execute” in the manner the IRS and others suggest,<sup>98</sup> with Treasury exercising little or no discretion through regulation, then the issue of selecting an analytical baseline will be simple. No daylight exists between what the statute requires and what the regulation requires, so the regulation offers no costs or benefits to analyze. If a Treasury regulation contains a series of discretionary choices—as we suggest very many Treasury regulations do—then it is these choices that the agency can analyze.

Apart from the fundamental issue of the presence or absence of discretion, some take exception to the idea that CBA treats tax revenue collections as “transfers” instead of “benefits” while administrative and compliance costs count as “costs.”<sup>99</sup> As we have written elsewhere, this is to ensure that “both sides of the conceptual ledger” in CBA are appropriately considered, as revenue received by the government is funding that taxpayers must pay.<sup>100</sup> CBA functionally “nets out” revenue effects in this manner by calling them transfers, but this is not due to a value judgment about the clearly essential and beneficial role of taxes for promoting the public good. Although the 2018 MOA expressly excluded revenue effects from the determination of “significance,” and thus eligibility for OIRA review in the first instance, it said nothing about how to treat revenue effects for purposes of CBA or other analysis under EO 12866.<sup>101</sup> Perhaps as a result of this misunderstanding, a 2020 Addendum to the 2018 MOA provided expressly that “[r]egulatory impact analyses of tax regulatory actions . . . shall account for transfers (including revenue effects) of tax regulatory actions to the same extent as required under this

<sup>96</sup> See Dooling & Hickman, *Applying the Regulatory Report Card*, *supra* note 10.

<sup>97</sup> OFF. OF MGMT. & BUDGET, OMB CIRCULAR A-4, REGULATORY ANALYSIS 10–14 (2023) (describing the concept of a baseline in CBA); GREG LEISERSON & ADAM LOONEY, A FRAMEWORK FOR ECONOMIC ANALYSIS OF TAX REGULATIONS 7–9 (2018), [https://www.brookings.edu/wp-content/uploads/2018/12/ES\\_20181220\\_Looney-OIRA-Tax-Regs.pdf](https://www.brookings.edu/wp-content/uploads/2018/12/ES_20181220_Looney-OIRA-Tax-Regs.pdf).

<sup>98</sup> See, e.g., Leiserson & Looney, *supra* note 97, at 7.

<sup>99</sup> See, e.g., Chye-Ching Huang, *Modernizing Tax Regulatory Review*, YALE J. ON REG.: NOTICE & COMMENT BLOG (June 29, 2023), <https://www.yalejreg.com/nc/modernizing-tax-regulatory-review-by-chye-ching-huang/>; Reuven S. Avi-Yonah & Yosef M. Edrey, *Putting the Public Benefit in Cost Benefit Analysis of Tax Regulations: A Response to Hemel, Nou and Weisbach* (U. of Mich. Pub. L. and Legal Rsch. Paper No. 618, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3228379](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228379); Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 3:06 PM), <https://twitter.com/rebeccakysar/status/1668334060580802560>; *but see* Daniel J. Hemel & David A. Weisbach, *The Behavioral Elasticity of Tax Revenue*, 13 J. LEGAL ANALYSIS 381, 422–30 (2021) (arguing that increases in tax revenues from behavioral changes should count as societal benefits).

<sup>100</sup> Dooling & Hickman, *Applying the Regulatory Report Card*, *supra* note 10.

<sup>101</sup> See 2018 MOA, *supra* note 6, at §§ 1(c) & 2.



Agreement for non-revenue effects, consistent with section 6(a)(3) of Executive Order 12866.”<sup>102</sup>

Others have expressed concern that CBA ignores distributional effects,<sup>103</sup> which is true at least of traditional economic CBA alone. This critique fails to land with force in the context of OIRA review and EO 12866 for two reasons. First, it misapprehends and artificially limits the full scope and purpose of the analysis that EO 12866 requires. Second, it disregards the reality on the ground, both of other agencies that have been including distributional effects in their EO 12866 analysis, as well as Biden administration moves to expand those efforts.

Reflecting the first of these observations, EO 12866 explicitly contemplates consideration of distributional effects by calling upon agencies, “in choosing among alternative regulatory approaches,” to “maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”<sup>104</sup> Hence, since the George W. Bush administration, the Office of Management and Budget’s Circular A-4 has described the analysis agencies should provide in addressing regulatory alternatives as including “a separate description of distributional effects (i.e., how both benefits and costs are distributed among sub-populations of particular concern), so that decisionmakers can properly consider them along with the effects on economic efficiency.”<sup>105</sup>

Further, when EO 12866 speaks in terms of analyzing the costs and benefits of regulatory actions, it defines those terms broadly. In describing the costs to be considered, EO 12866 lists not only administrative and compliance costs but also “any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment.”<sup>106</sup> Correspondingly, in speaking of benefits, EO 12866 counsels including not only “promotion of the efficient functioning of the economy and private markets,” but also “the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias.”<sup>107</sup> In neither case

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<sup>102</sup> Addendum to the Memorandum of Agreement, The Department of the Treasury and the Office of Management and Budget, Review of Tax Regulations under Executive Order 12866 (Dec. 11, 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/12/Addendum-to-MOA-12.11.2020.pdf>.

<sup>103</sup> Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 3:06 PM), <https://twitter.com/rebeccakysar/status/1668334060580802560>; Naomi Jagoda, *Tax Rules Exempt from White House Review Under New Pact*, BLOOMBERG LAW NEWS 2023-06-12T13:11:02000-04:00 (June 12, 2023) (quoting Chye-Ching Huang).

<sup>104</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 § 1(a) (Oct. 4, 1993).

<sup>105</sup> OMB CIRCULAR A-4, *supra* note 100, at 14.

<sup>106</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 § 6(a)(3)(C)(ii) (Oct. 4, 1993).

<sup>107</sup> *Id.* § 6(a)(3)(C)(i).

does EO 12866 limit the analysis to the listed examples.<sup>108</sup> Certainly, nothing in the discussion of costs and benefits contained in EO 12866 so constrains the required analysis as to preclude consideration of distributional effects. The point of the analysis is not merely to add up the quantifiable economic costs and benefits, narrowly construed, and adopt only those regulations where the latter exceed the former. Indeed, for both costs and benefits, EO 12866 takes care to acknowledge that quantification of some costs and benefits may not even be “feasible.”<sup>109</sup> Rather, the analysis is meant to be comparative, assessing relative costs and benefits of regulatory alternatives, broadly conceived, and explaining why the discretionary choices that a particular regulation reflects are better than the other possibilities.<sup>110</sup> In other words, the goal is to facilitate transparency and reasoned decision-making, not (in the case of tax regulations) to “tilt[] in favor of revenue-losing regulations.”<sup>111</sup>

Turning to reality on the ground, and demonstrating this broader understanding of regulatory costs and benefits, Caroline Cecot and Robert Hahn have documented empirically that other agencies have been including distributional effects in their EO 12866 analysis, although not as often nor as thoroughly as Cecot and Hahn (and others) might like.<sup>112</sup> Analyzing 189 rule-makings of several different agencies across four presidential administrations from October 2003 to January 2021, Cecot and Hahn found that distributional analysis was “rarely conducted” but present: 21% quantified “at least some benefits for a particular group”; 20% quantified “at least some costs for a particular group”; and “2% calculated net benefits for a particular group.”<sup>113</sup> Another study by Jerry Ellig of 130 Obama administration preambles found that 20% included a “reasonably thorough” assessment of the distribution (incidence) of benefits and 31% offered a “reasonably thorough” discussion of the distribution (incidence) of costs.<sup>114</sup> In short, including an analysis of distributional effects of agency regulations has not been routine, but it has been done, and with at least sufficient regularity to suggest the absence of any barrier on the part of OIRA and EO 12866 to Treasury/IRS including it as often as they liked.<sup>115</sup>

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<sup>108</sup> *Id.* §§ 6(a)(3)(C)(i)–(ii).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* § 6(a)(3)(C)(iii).

<sup>111</sup> Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 3:06 PM), <https://twitter.com/rebeccakysar/status/1668334059158929408>.

<sup>112</sup> Caroline Cecot & Robert W. Hahn, *Incorporating equity and justice concerns in regulation*, 18 REGUL. & GOVERNANCE 99 (2024).

<sup>113</sup> *Id.* at 105–06.

<sup>114</sup> Jerry Ellig, *Evaluating the Quality and Use of Regulatory Impact Analysis: The Mercatus Center's Regulatory Report Card, 2008-2013* 23–24 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3191415](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191415).

<sup>115</sup> See also Richard L. Revesz & Samantha P. Li, *Distributional Consequences and Regulatory Analysis*, 52 ENV'T L. 53 (2022).

One irony of the 2023 MOA is that it works at cross-purposes with efforts to improve distributional analysis as a part of agency decision-making process. As part of an initiative to modernize regulatory review, the Biden administration has taken steps do just that with changes to Circular A-4 and otherwise.<sup>116</sup> Considered collectively, tax regulations surely are among the most redistributive regulations issued by the federal government. By exempting tax regulatory actions from EO 12866 compliance and OIRA review, the 2023 MOA makes the Biden administration's emphasis on distributional analysis look like "an empty gesture."<sup>117</sup> It also effectively carves tax policy, as well as IRS-administered regulatory and social welfare policy, out of the interagency analytical discussions within which the federal government will forge these new methodological approaches.<sup>118</sup> Treasury/IRS are also contemplating ways to consider distributional effects in their own regulatory efforts.<sup>119</sup> Perhaps Treasury and IRS officials are reaching out to and consulting with other agencies in these efforts, as former Biden administration officials claim is the case.<sup>120</sup> Nevertheless, the exceptionalist perspective reflected in the 2023 MOA may instead merely exacerbate Treasury/IRS isolation.<sup>121</sup>

#### D. *Tax Regulations Are Just Different*

It is a common refrain among tax experts that tax administration ought to be exempt from the requirements and expectations of other agencies because tax is just different from other areas of government regulation. How or why tax is so different may vary depending upon the requirement or expectation in question. In the context of OIRA review, two particular claims stand out.

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<sup>116</sup> OMB CIRCULAR A-4, *supra* note 97, at 61–67 (including more robust guidance the inclusion of distributional effects as part of EO 12866 analysis as well as overall emphasis of distributional effects); Presidential Memorandum, Modernizing Regulatory Review, 86 Fed. Reg. 7223, 7223 (Jan. 26, 2021) (directing OMB to "propose procedures that take into account the distributional consequences of regulations").

<sup>117</sup> Daniel J. Hemel, *Tax Regulations and The New Cost-Benefit Analysis*, 181 TAX NOTES FEDERAL 1977, 1981 (Dec. 11, 2023). Hemel analogizes this move to exempting the Environmental Protection Agency and the Department of Energy from a hypothetical requirement to analyze climate consequences of agency regulations. *Id.*

<sup>118</sup> See Dooling, *supra* note 11, at 695, 698–99 (discussing the value of interagency coordination for innovations in analytical standards and methodologies).

<sup>119</sup> See, e.g., Julie-Anne Cronin, Portia DeFilippes & Robin Fisher, *Tax Expenditures by Race and Hispanic Ethnicity: An Application of the U.S. Treasury Department's Race and Hispanic Ethnicity Imputation* (Office of Tax Analysis, Working Paper No. 122, 2023), <https://home.treasury.gov/system/files/131/WP-122.pdf>.

<sup>120</sup> See, e.g., Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 3:06 PM), <https://twitter.com/rebeccakysar/status/1668334063541977094>.

<sup>121</sup> Dooling, *supra* note 11, at 698 (discussing the Securities and Exchange Commission's efforts to build internal analytical capability, on its own, after a series of adverse DC Circuit decisions).

One is that tax regulations are different from those of other agencies because the Internal Revenue Code is self-executing, meaning that its provisions go into effect and taxpayers are required to comply even if Treasury has not issued regulations.<sup>122</sup> A contrasting example is the Clean Air Act, which authorizes the Environmental Protection Agency to adopt air quality standards without specifying except in broad terms what those standards might be.<sup>123</sup> The implication of this assertion is that other regulatory statutes are not self-executing, or that the Internal Revenue Code always is. Either claim is distinctly odd.

Many, or perhaps even most, regulatory statutes are self-executing, imposing prohibitions or requirements that are effective with or without implementing regulations, even as they simultaneously authorize an administering agency to adopt rules and regulations elaborating statutory terms. To consider just one example, the Food, Drug and Cosmetic Act prohibits several acts regarding adulterated or misbranded “food, drug, device, tobacco product, or cosmetic” items, including their manufacture and their delivery or receipt in interstate commerce.<sup>124</sup> Much like the Internal Revenue Code, that statute also includes dozens, if not hundreds, of specific grants of rulemaking power<sup>125</sup> and also broadly authorizes the Secretary of Health and Human Services to adopt rules and regulations as needed “for the efficient enforcement” of its provisions.<sup>126</sup>

Meanwhile, as Andy Grewal has documented, many Internal Revenue Code provisions are not obviously self-executing, instead delegating rulemaking authority to Treasury in terms suggesting that regulations may be required before the provisions become operative.<sup>127</sup> Taxpayers or the IRS may claim in litigation that these provisions are self-executing, and sometimes the Tax Court either agrees or, in the case of tax benefits, grants relief under principles of equity.<sup>128</sup> In short, declaring the Internal Revenue Code as uniformly self-executing and other regulatory statutes as not simply does not comport with a reality that is more complicated.

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<sup>122</sup> See, e.g., Rebecca Kysar (@rebeccakysar), TWITTER (June 12, 2023, 4:17 PM), <https://twitter.com/rebeccakysar/status/1668351854751645697>; see also Leiserson & Looney, *supra* note 97, at 7 (making this assertion, but in arguing principally for a post-statutory baseline rather than for exempting tax regulations from OIRA review entirely).

<sup>123</sup> See *id.* (offering this example).

<sup>124</sup> 21 U.S.C. § 331.

<sup>125</sup> See, e.g., 21 U.S.C. § 341 (authorizing the Secretary to adopt definitions and standards for food, with specific exceptions and considerations); *id.* § 360f (authorizing regulations to expressly ban devices found to “present[ ] substantial deception and an unreasonable or substantial risk of illness or injury for one or more uses”); *id.* § 360i (authorizing the Secretary to require manufacturers and importers to file reports to ensure compliance with statutory prohibition regarding devices).

<sup>126</sup> 21 U.S.C. § 371(a).

<sup>127</sup> Andy Grewal, *Substance Over Form? Phantom Regulations and the Internal Revenue Code*, 7 HOUS. BUS. & TAX L.J. 42, 43–44 (2006).

<sup>128</sup> *Id.* at 49–59 (summarizing cases).

Another way in which defenders of the 2023 MOA contend that tax regulations are different is rooted in the perceptions of regulated parties. In essence, the claim is that “the business community” welcomes tax regulations for the certainty they offer regarding the tax consequences of transactions and dislikes other regulations for the costs they impose.<sup>129</sup> According to Lawrence Axelrod, a former IRS special counsel,

[T]ax regulations are different from regulations promulgated by other agencies. The business community generally regards regulations as a burden because they often impose new requirements that can be costly. Although tax regulations sometimes shut down aggressive tax planning, and practitioners may not always agree with the regulatory analysis, tax regulations generate certainty. Law firms and accounting firms that are asked to draft opinions for clients on proposed transactions welcome regulations that clarify what the IRS will accept and what it will challenge.<sup>130</sup>

Some tax regulatory actions fit this description—for example, regulations governing transfer pricing, or the prices that affiliated enterprises charge one another for goods and services, especially across tax jurisdictional lines.<sup>131</sup> But however accurate this observation may be for some subset of both tax regulations and other regulations alike, it mistakes a small subset of regulations for the whole. It also disregards that regulatory certainty is valued in many regulatory domains, not just tax.

Many or even most tax regulatory actions serve purposes other than offering clarity in support of the sorts of business transactions described.<sup>132</sup> For several decades, Congress has relied increasingly on the tax system as a favorite vehicle for accomplishing social welfare and regulatory objectives through various tax credits, deductions, exclusions, deferrals, and preferences.<sup>133</sup> Recent tax regulation projects addressed policy questions concerning low-income housing,<sup>134</sup> carbon oxide sequestration,<sup>135</sup> semiconductor

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<sup>129</sup> Lawrence M. Axelrod, *Letter to the Editor: No OIRA Review Is Good for Tax Regs*, 179 TAX NOTES FEDERAL 2211 (June 26, 2023).

<sup>130</sup> *Id.*

<sup>131</sup> I.R.C. § 482 (authorizing Treasury to “distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among” affiliated enterprises as “necessary in order to prevent evasion of taxes or clearly to reflect the income” thereof).

<sup>132</sup> See, e.g., Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1746–53 (2014) (categorizing and quantifying Treasury regulations for one five-year period). Our main study will update this analysis. See Dooling & Hickman, *Pre-Analysis*, *supra* note 10.

<sup>133</sup> See, e.g., Pamela F. Olson, *Woodworth Memorial Lecture: And Then Cnut Told Reagan . . . Lessons from the Tax Reform Act of 1986*, 38 OHIO N.U. L. REV. 1, 12–13 (2011); Edward D. Kleinbard, *Woodworth Memorial Lecture: The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes* 36 OHIO N.U. L. REV. 1, 3 (2010).

<sup>134</sup> Section 42, Low-Income Housing Credit Average Income Test Regulations, 87 Fed. Reg. 61489 (Oct. 12, 2022).

<sup>135</sup> Section 45V Credit for Production of Clean Hydrogen; Section 48(a)(15) Election to Treat Clean Hydrogen Production Facilities as Energy Property, 88 Fed. Reg. 89220 (Dec. 26, 2023).

manufacturing,<sup>136</sup> and electric vehicle purchases,<sup>137</sup> to name a few. Treasury/IRS are heavily involved in regulating health care, health insurance, and retirement plans as a result of the Affordable Care Act, Employee Retirement Income Security Act, and other statutes.<sup>138</sup> Because of tax exemptions for nonprofit organizations and tax deductions for charitable contributions, tax administrators are deeply engaged in regulating the nonprofit sector. Indeed, one of the IRS's four administrative divisions is dedicated to nonprofit organizations and government entities that are largely or entirely exempt from income taxes.<sup>139</sup> Treasury/IRS are hardly the only subject matter experts in these topics. Indeed, in some of these areas, other federal government agencies arguably possess greater subject matter expertise than Treasury/IRS.

Lastly, and returning to the idea of competing narratives, even those with different views about the value of OIRA review and CBA will agree that the importance of tax regulation cannot be overstated. For those who support a role for OIRA, the impact of tax policy and tax administration on society is precisely what makes it important to analyze regulations in terms of their social impacts. If tax is different, that difference is one that deserves closer inspection and perhaps even more coordination, not less.

## CONCLUSION

Amid recent policy turbulence surrounding OIRA's long-time but sporadic review of tax regulations, two competing narratives emerge. Both emphasize the importance of tax regulations, but one emphasizes the uniqueness of tax regulations while the other emphasizes OIRA review's value to the public and the regulatory process. Existing literature has delved into tax exceptionalism as well as the value of OIRA's role and regulatory analysis, and we do not rehash those debates here. Instead, this essay builds upon that literature to assess the primary justifications for the 2023 MOA and its complete removal of the OIRA review process from tax regulation.

The 2023 MOA is not guaranteed to be the end of the story for OIRA and IRS. Congress could step in to impose OIRA review on tax regulations, or a future presidential administration could revisit whether to call tax regulations in for OIRA review.<sup>140</sup> As future policymakers consider whether and

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<sup>136</sup> Advanced Manufacturing Investment Credit, 88 Fed. Reg. 17451 (Mar. 23, 2023).

<sup>137</sup> Section 30D New Clean Vehicle Credit, 88 Fed. Reg. 23370 (Apr. 17, 2023); *see also supra* at pp. 284–285 and accompanying notes 75–88 (discussing the history of Treasury/IRS rulemaking efforts in this area).

<sup>138</sup> *See, e.g.*, Coverage of Certain Preventive Services Under the Affordable Care Act, 88 Fed. Reg. 7236 (Feb. 2, 2023); *see generally* King v. Burwell, 576 U.S. 473 (2015) (addressing a challenge to IRS regulations administering the Affordable Care Act).

<sup>139</sup> *At-a-Glance: IRS Divisions and Principal Offices*, IRS, <https://www.irs.gov/about-irs/at-a-glance-irs-divisions-and-principal-offices> (last updated Mar. 4, 2024).

<sup>140</sup> One such bill has been introduced already. IRS Accountability and Transparency Act, S. 2981, 118th Cong. (2023).

how to extend OIRA review again to tax regulatory actions, as well as to traditionally independent financial regulators, the value-laden arguments above are likely to surface again. When that time comes, we hope this essay sheds some light on the nature of the disagreement and how it might be resolved.