Regulations – Relevance of Replace 2 to Issue 1, GAO and Congressional Concerns

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Agenda

Relevance of topic

Review – Where does the tax law come from?

Types of Guidance

What is "Guidance"

How Treasury/IRS Decide What to Issue

Regulations Process and the Many Laws Involved

Executive Orders – Past and Present

Issues with the Guidance Process

Legislative Proposals to Change the Regulatory Process

Looking Forward

Review – Where does the tax law come from?

Three branches of government all play a role

1. Legislative
   - Writes the statute.
   - Role in regulations too:
     - Created the Administrative Procedures Act and other laws governing the reg process.
     - Created the Congressional Review Act – All new final rules must be submitted to House nd Senate. Congress can review and possibly reject new regulations by vote (more later).
2. Administrative
   - Lots of processes to follow.
3. Judicial
   - Can review to see if reg permissible and within underlying statute.
   - What is the deference process? (more later)

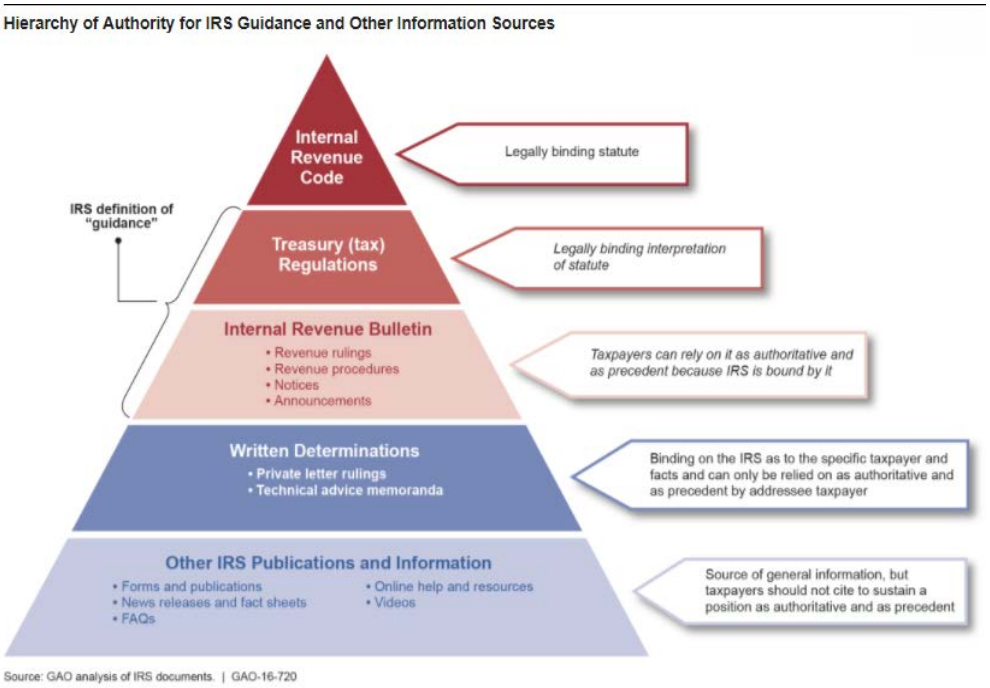
Relevance of Topic

Three Executive Orders by President Trump in 2017 on regulatory process.

We need binding guidance.

Efforts exist to control or restrict the guidance process by President and Congress.

Types of Guidance



https://www.gao.gov/products/GAO-16-720

What is "Guidance"

	Can you rely on it? (published in IRB)?	"Authority" per 1.6662-4?	Governed by
Regulations	Yes	Yes	Many laws (see later slides)
Revenue Ruling Revenue Procedure Notice Announcement	Yes	Yes	Reg. 601.601
Private letter rulings and Technical Advice Memorandum	No	Yes	First and second revenue procedure of the year
Chief Counsel Advice	No	No	
Information Letters	No	No	
FAQs on website, publications	No	No	

https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer
https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance

IRS Caution

PLEASE NOTE. *Rulings and procedures reported in the IRB do not have the force and effect of Treasury tax regulations, but they may be used as precedents. In contrast, any documents not published in the IRB cannot be relied on, used, or cited as precedents in the disposition of other cases.*

In applying rulings and procedures published in the IRB, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered. In addition, all parties are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance

Also see Reg. 601.601(d)(2)(ii)(a).

How Do Treasury & IRS Decide What to Issue?

Reasons:

- Congress changes or enacts changes to the IRC.
- Responding to statutory provisions calling upon Secretary to proscribe rules.
- IRS determines guidance is needed or process created (such as accounting method change).

Per Chief Counsel Regulation Handbook

Attorneys must consider the appropriate form of guidance and document the decision to use that form of guidance in the legal file. Factors to consider when determining the appropriate form of guidance may include, but are not limited to, the following:

The purpose for the guidance and possible guidance alternatives

The scope of the guidance's application

The effect on taxpayer's rights

The effect on taxpayer's duties

The degree of deference needed for the guidance

Whether the guidance will be controversial

Whether public comments are necessary or helpful

Whether the guidance is of short-term or long-term value

Whether the guidance should include the application of law to a factual scenario

Advantages of the type of guidance selected

https://www.irs.gov/irm/part32/irm_32-001-001

Purpose of Revenue Rulings and Procedures

IRM 1.2.16.1.10 (01-28-1977) Policy Statement 7-82 (Formerly P-11-68)

Publication Standards

The purpose of publishing Revenue Rulings and Revenue Procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, and regulations, and statements of Service procedures affecting the rights and duties of taxpayers. Therefore, issues and answers involving substantive tax law under the jurisdiction of the Internal Revenue Service will be published in the Internal Revenue Bulletin, except those involving:

a. issues answered by statute, treaty, or regulations;
b. issues answered by rulings, opinions, or court decisions previously published in the Bulletin;
c. issues that are of insufficient importance or interest to warrant publication;
d. determinations of fact rather than interpretations of law;
e. informers and informers' rewards; or
f. disclosure of secret formulas, processes, business practices, and similar information.

Procedures affecting taxpayers' rights or duties that relate to matters under the jurisdiction of the Service will be published in the Bulletin.

https://www.irs.gov/irm/part1/irm_01-002-016

What do they want t/p to do with the guidance?

IRM 1.2.16.1.12 (04-16-1968)

Policy Statement 7-84 (Formerly P-11-70)

Reliance by taxpayers on Revenue Rulings; exceptions provided

Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the applicability of the tax law to their own transactions and need not obtain ruling letters provided (a) the facts and circumstances in their cases are substantially the same, and (b) the positions stated in the Revenue Rulings are still determinative when considered in the light of subsequent legislation, regulations, court decisions, and Revenue Rulings.

https://www.irs.gov/irm/part1/irm_01-002-016

Regulations Process and the Many Laws Involved

IRC §7805

Anti-Injunction Act – Section 7421

Administrative Procedures Act (APA)– 5 USC 551-559

Paperwork Reduction Act (PRA) – 44 USC 3501-3520

Regulatory Flexibility Act (RFA) – 5 USC 601-608

Congressional Review Act (CRA) – 5 USC 801-808

Also, a few Executive Orders and IRS guidelines in IRM

Typical reg preamble statement:

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6) please refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

IRC Section 7805, Regulations and Rules

Gives Secretary of the Treasury authority to promulgate tax regulations

(a) AUTHORIZATION Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

IRC Section 7805(b)

Limitations on retroactivity:

- Effective date may not be earlier than the earliest of the date of filing with Federal Register of the regulation in final or proposed form, or on which a notice "substantially describing the expected contents"
- Exceptions:
  - Regs issued within 18 months of enactment of statutory provisions .
  - For prevention of abuse.
  - To correct a procedural defect in issuance of any prior regulation.
  - Congress provides date.
  - To allow taxpayer to elect retroactive application.
  - Judicial ruling or any non-regulation administrative determination.

Contrast - Retroactivity of Revenue Rulings

IRM 1.2.16.1.14 (10-22-1968)

Policy Statement 7-86 (Formerly P-11-73)

Effective date of published rulings

A Revenue Ruling published in the Internal Revenue Bulletin applies retroactively unless the Revenue Ruling includes a specific statement indicating the extent to which it is to be applied without retroactive effect.

https://www.irs.gov/irm/part1/irm_01-002-016

IRC Section 7805(e)

TEMPORARY REGULATIONS

(1) ISSUANCE Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation.

(2) 3-YEAR DURATION Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.

IRC Section 7805(f)

(f) REVIEW OF IMPACT OF REGULATIONS ON SMALL BUSINESS

Proposed and temp regs go to Chief Counsel for Advocacy of Small Business Administration for comment on impact on small business. SBA has 4 weeks to provide comments.

In final reg, Treasury must discuss SBA comments in preamble.

Same for promulgation of any final reg that does not replace a proposed reg but must submit to SBA 4 weeks before promulgation and include comments in preamble.

Anti-Injunction Act

I.R.C. §7421

- No 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.

Interpreted broadly to include facial challenges to regulations, with narrow exceptions.

Administrative Procedures Act (APA)

- Federal agencies, including IRS/Treasury, must comply with procedural requirements, such as publishing advance notice and providing opportunity for comment on proposed rules.
- 5 U.S.C. §706(2)(A) - Agency action cannot be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law."
  - Did the agency engage in "reasoned decision making"? – *State Farm* test
    - Agency cannot rely on "factors which Congress has not intended it to consider," fail to "consider an important aspect of the problem," or offer "an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"
  - Is the agency's interpretation valid? - *Chevron* test
    - Agency interpretation cannot be contrary to the "unambiguously expressed intent of Congress"
    - If the statute is silent or ambiguous, is the agency interpretation "based on a permissible construction of the statute"?

32.1.2.3 (09-23-2011)
Overview of Relevant Federal Administrative Law

IRM on APA

"The Administrative Procedure Act (APA) requires agencies to publish Notices of Proposed Rulemaking (NPRMs) in the Federal Register and permit the public to submit comments. The APA also requires that regulations be published at least 30 days prior to their effective date. Interpretative regulations are generally not subject to the APA provisions on rulemaking, including its notice and comment requirements. Although most IRS/Treasury regulations are interpretative, the IRS usually publishes its NPRMs in the Federal Register and solicits public comments. See CCDM 32.1.5.4.7.5.1, Administrative Procedure Act, for further discussion of the APA."

Paperwork Reduction Act (PRA)

"The Paperwork Reduction Act (PRA) requires Federal agencies to obtain OMB approval before enforcing any "collection of information" requirement. Generally, the term "collection of information" includes reporting, recordkeeping, or disclosure requirements imposed on ten or more persons. A collection of information in a regulation is presumed to involve 10 or more persons. *See* CCDM 32.1.2.5 for further discussion of the PRA."

32.1.2.3 (09-23-2011)
Overview of Relevant Federal Administrative Law

IRM on Regulatory Flexibility Act (RFA)

"Congress enacted the Regulatory Flexibility Act (RFA) to ensure that agency regulations and collection of information requirements are appropriate in scope for the businesses, organizations, and governmental jurisdiction regulated. RFA applies to interpretative regulations containing a collection of information requirements and to all legislative regulations. If the regulation is subject to RFA, the drafting team must prepare a regulatory flexibility analysis to determine whether the collection of information requirement (or, in the case of a legislative regulation, the rule itself) will have a "significant economic effect" on a substantial number of small entities. If the collection of information requirement/rule will not impose this adverse effect, an agency may certify that a regulatory flexibility analysis is not required. The drafting attorney must include a RFA checklist in the signature package. See CCDM 32.1.5.4.7.5.4 for further discussion of the RFA."

Unified Agenda

"**Regulatory Flexibility Act requires** that agencies publish semiannual "regulatory flexibility agendas" describing regulatory actions they are developing that will have significant effects on small businesses and other small entities (5 U.S.C. 602). The Unified Agenda helps agencies fulfill all of these requirements. All federal regulatory agencies have chosen to publish their regulatory agendas as part of this publication. The fall editions of the Unified Agenda include the agency regulatory plans required by EO 12866, which identify regulatory priorities and provide additional detail about the most important significant regulatory actions that agencies expect to take in the coming year.

The Unified Agenda can be found online at http://www.reginfo.gov/public/do/eAgendaMain"

https://www.gsa.gov/policy-regulations/policy/federal-regulation-policy/unified-agenda-of-federal-regulatory-and-deregulatory-actions

IRM on Congressional Review Act (CRA)

Congressional Review Act/Small Business Regulatory Enforcement Fairness Act

"The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) added the Congressional Review Act (CRA). The CRA provides that temporary and final rules cannot become effective until the issuing agency submits a report to the House of Representatives, the Senate, and the Comptroller General of the General Accountability Office. The IRS meets this requirement by submitting a Congressional Review Act form (or CRA form), the regulation, the plain language summary, and other supporting documents. Note that, unlike other requirements, the preamble to the regulations does not discuss compliance with CRA/SBREFA. The CRA also mandates that no "major" rule can become effective until 60 days after the rules is delivered to the House. See CCDM 32.1.6.11.2.5 , Congressional Review Act Forms, for further discussion of the Congressional Review Act."

IRM – Handbooks for Chief Counsel

https://www.irs.gov/irm/part32

Part 32. Published Guidance and Other Guidance to Taxpayers

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Executive Orders – Past and Present

EO 12866 (10/4/93)
- Reaffirmed by EO 13563 (2011)

EO 13771 (1/30/17) – Reducing Regulation and Controlling Regulatory Costs.

EO 13777 (2/24/17) – Enforcing the Regulatory Reform Agenda.

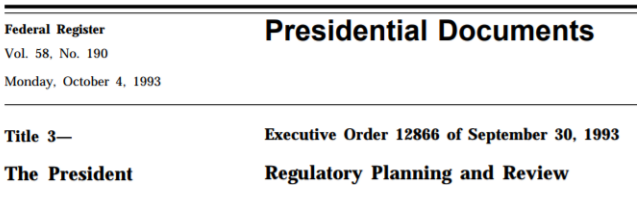
EO 13789 (4/21/17) – Identifying and Reducing Tax Regulatory Burdens.

IRM on EO 12866 and EO 13563

"Executive Order 12866 (E.O. 12866) requires agencies to notify OMB of all planned regulatory actions by preparing the 7-Point memorandum. Executive Order 12866 also requires a regulatory assessment of all regulations characterized as "significant." A regulatory assessment requires preparation of a cost-benefit analysis that must be submitted to the Office of Information and Regulatory Affairs at OMB. Generally, IRS/Treasury regulations are not "significant" as defined in the executive order. See CCDM 32.1.5.4.7.5.3 for further discussion of E.O. 12866 and treatment of significant regulations.

Executive Order 12866 also requires agencies to provide the public with meaningful participation in the regulatory process. Before publishing an NPRM, the views of those who are intended to be affected by the regulation should be sought. After the publication of an NPRM, the public should generally be afforded a period of at least 60 days to comment on the proposed regulation. Executive Order 12866 was supplemented by E.O. 13563 (January 18, 2011). Executive Order 13563 reinforces the notion that regulations should be adopted through an open exchange of information and a process that involves public participation. Both E.O. 12866 and E.O. 13563 also provide broad principles of regulation for agencies to follow. See CCDM 32.1.5.4.7.5.3 (12) and (13) for further discussion.

EO 12866



Federal Register
Vol. 58, No. 190
Monday, October 4, 1993

Presidential Documents

Title 3—
The President

Executive Order 12866 of September 30, 1993
Regulatory Planning and Review

Spells out philosophy, principles and procedures for all agencies issuing regulations.

Philosophy includes: "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that 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."

10 pages https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf

+ Final Bulletin for Agency Good Guidance Practices

https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices

EO 12866 (10/4/93)

"Significant regulatory action" must be reviewed by OMB's Office of Information and Regulatory Affairs (OIRA)

> "(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
>
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order."

Materials related to OIRA review must be made public

Predecessor: EO 12291 (1981) – defining "major" regulations

1983 OMB Memorandum

In 1983, OMB issued a Memorandum regarding "Treasury and OMB Implementation of Executive Order 12291"

Waived all review procedures of tax regulations

- Rationale: tax regulations merely interpret the Code, so the cost of such regulations is really attributable to the underlying statute

Confirmed in 1993 correspondence between OMB and Treasury with respect to Executive Order 12866 (see more later on concerns)

Bottom line: tax regulations are not subject to OMB review no matter how "major" or "significant"

Recent EOs

EO 13771 (1/30/17) – Reducing Regulation and Controlling Regulatory Costs

"for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process."

Focuses on costs of regs in determining if the 1 for 2 substitute is appropriate. OMB Director required to issue guidance to heads of agencies on implementation.

- Memo was issued 4/5/17 (**M-17-21**), which includes definitions, references to other regulatory guidance, and 39 Q&As. Supplements interim guidance that was released 2/2/17. Per M-17-21, these two memos are mostly consistent, but if there is any conflict, the 4/5/17 memo (M-17-21) supersedes the earlier guidance (per the Introduction to M-17-21).

Memorandum: Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs" **M-17-21**

"In general, executive departments or agencies ("agencies") may comply with those requirements by issuing two EO 13771 deregulatory actions (described below) for each EO 13771 regulatory action (described below). The incremental costs associated with EO 13771 regulatory actions must be fully offset by the savings of EO 13771 deregulatory actions."

https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation

Q2. What is an "EO 13771 regulatory action"?

A: An "EO 13771 regulatory action" is:

1.A significant regulatory action as defined in Section 3(f) of EO 12866 that has been finalized and that imposes total costs greater than zero; or

2.A significant guidance document *(e.g.,* significant interpretive guidance) reviewed by OIRA under the procedures of EO 12866 that has been finalized and that imposes total costs greater than zero.

For example, EO 13771 regulatory actions include negotiated rulemakings that are significant as defined in Section 3(f) of EO 12866, that have been finalized, and that impose total costs greater than zero.

Q4. What is an "EO 13771 deregulatory action"?

A: An "EO 13771 deregulatory action" is an action that has been finalized and has total costs less than zero. An EO 13771 deregulatory action qualifies as both: (1) one of the actions used to satisfy the provision to repeal or revise at least two existing regulations for each regulation issued, and (2) a cost savings for purposes of the total incremental cost allowance. EO 13771 deregulatory actions are not limited to those defined as significant under EO 12866 or OMB's *Final Bulletin on Good Guidance Practices*.*

*https://www.federalregister.gov/documents/2007/01/25/E7-1066/final-bulletin-for-agency-good-guidance-practices

EO 13777 (2/24/17) – Enforcing the Regulatory Reform Agenda

Calls upon agencies to oversee certain regulatory reform initiatives and policies by 4/25/17.

Such actions include forming a task force to review regulations that harm job creation, are outdated or ineffective, where costs exceed benefits, or that are inconsistent with other initiatives.

Relevance to **tax** regulations?

Every spring, IRS and Treasury issue a notice calling for suggestions for their Priority Guidance Plan.

2017, call was about a month later than usual (Notice 2017-28 (4/21/17); the call in 2016 via Notice 2016-26 was released 3/18/16).

Notice 2017-28 included a new criterion that commentators should consider in providing input to IRS on next version of the Plan:

"Whether the recommended guidance would be in accordance with Executive Order 13771, Executive Order 13777 (82 FR 12285), or other executive orders."

EO 13771 and EO 13777 – What's Happened?

https://www.reginfo.gov/public/do/eAgendaMain

Current Unified Agenda of Regulatory and Deregulatory Actions

The Trump Administration's Unified Agenda of Regulatory and Deregulatory Actions provides an updated report on the actions administrative agencies plan to issue in the near and long term. Released by the Office of Information and Regulatory Affairs, this Agenda represents the beginning of fundamental regulatory reform and a reorientation toward reducing unnecessary regulatory burden on the American people.

By amending and eliminating regulations that are ineffective, duplicative, and obsolete, the Administration can promote economic growth and innovation and protect individual liberty.

Fulfilling longstanding principles to review and assess existing regulations, the Agenda includes the withdrawal and reconsideration of numerous regulatory actions. Agencies have committed to careful assessment of the costs and benefits of each regulatory and deregulatory action, and to prioritizing the maximization of net benefits of regulations. The Agenda recognizes that reform will take time and require rigorous analysis, public input, and careful consideration of a variety of important legal and social values. To this end, the Agenda provides greater information and transparency about regulatory actions proposed by agencies.

Executive Orders 13771 and 13777 require agencies to reduce unnecessary regulatory burden and to enforce regulatory reform initiatives. As a step in the right direction, the first five months of this Administration produced quantifiable annualized cost savings estimated at $22 million, compared to $6.8 billion in annualized costs due to rules finalized during last five months of fiscal year 2016.

The Agenda represents ongoing progress toward the goals of more effective and less burdensome regulation and includes the following developments:

- Agencies withdrew 469 actions proposed in the Fall 2016 Agenda;
- Agencies reconsidered 391 active actions by reclassifying them as long-term (282) and inactive (109), allowing for further careful review;
- Economically significant regulations fell to 58, or about 50 percent less than Fall 2016;
- For the first time, agencies will post and make public their list of "inactive" rules-providing notice to the public of regulations still being reviewed or considered.

EO 13789 (4/21/17) – Identifying and Reducing Tax Regulatory Burdens

"The Federal tax system should be simple, fair, efficient, and progrowth. The purposes of tax regulations should be to bring clarity to the already complex Internal Revenue Code (title 26, United States Code) and to provide useful guidance to taxpayers. Contrary to these purposes, numerous tax regulations issued over the last several years have effectively increased tax burdens, impeded economic growth, and saddled American businesses with onerous fines, complicated forms, and frustration. Immediate action is necessary to reduce the burden existing tax regulations impose on American taxpayers and thereby to provide tax relief and useful, simplified tax guidance."

The Treasury Department "shall immediately review all significant tax regulations issued … on or after January 1, 2016, and, … identify in an interim report to the President all such regulations that:

(i) impose an undue financial burden on United States taxpayers;

(ii) add undue complexity to the Federal tax laws; or

(iii) exceed the statutory authority of the Internal Revenue Service."

EO 13789 (4/21/17) – What happened?

Notice 2017-38
- IRS notes 8 possible regs
- Sought comments by 8/7/17

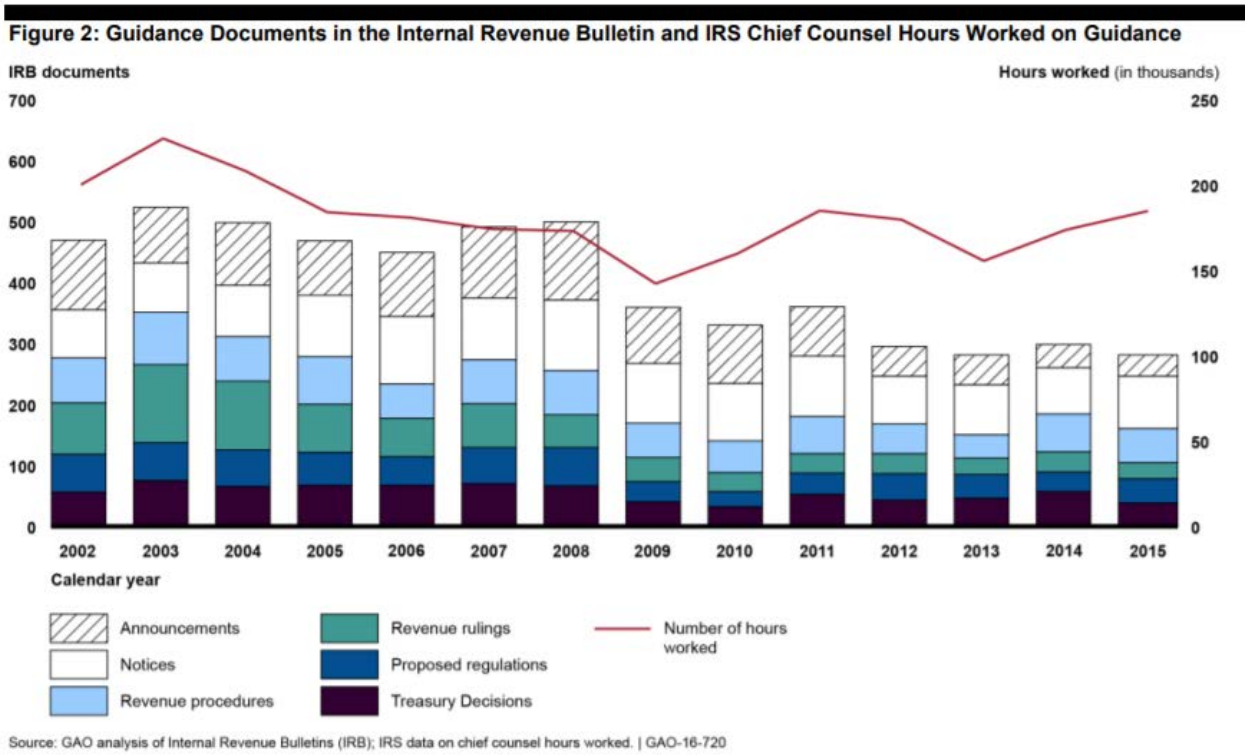
Final Report issued in September 2017
- 8 regs identified
- Also found "over 200 regulations for potential revocation, most of which have been outstanding for many years"
  - Expect to start revoking in 4th quarter 2017

https://www.treasury.gov/press-center/press-releases/Documents/2018-03004_Tax_EO_report.pdf

Issues with the Guidance Process - 1

Lots of non-binding guidance issued each year.
- Some of it represents new interpretations
  - Example – CCA 201504011 – interaction of Sections 280E and 263A
    - https://www.irs.gov/pub/irs-wd/201504011.pdf
  - Information letter 2014-0018 – property tax need not be ad valorum; contrary to Rev Rul 80-121
    - https://www.irs.gov/pub/irs-wd/12-0018.pdf
  - OVDI Rules

See: http://www.sjsu.edu/people/annette.nellen/DCPaper_FAQ_3-24-12_Final.pdf



GAO (2016) - https://www.gao.gov/assets/680/679518.pdf

Regulation Tally – 2017 and last few years

2014 – 78 regs

2015 – 64

2016 – 103

2017 – 25 (through 10/29/17)

http://www.sjsu.edu/people/annette.nellen/website/2017regs.html

FAQs Are Not Legal Authority

IRS Memo to Field

- SBSE-04-0517-0030 (5/18/17)
- "to remind examiners that frequently asked questions (FAQs) and other items posted on IRS.gov that have not been published in the *Internal Revenue Bulletin* **are not legal authority**. The FAQs and other items should not be used to sustain a position unless the items (e.g., FAQs) explicitly indicate otherwise or the IRS indicates otherwise by press release or by notice or announcement published in the Bulletin."

https://www.irs.gov/pub/foia/ig/spder/sbse-04-0517-0030.pdf

FAQs – National Taxpayer Advocate

7/26/17 blog post

- "can be trap for the unwary"
- Criticizes OVDP FAQs
- Should only use for emergency guidance and then converted to published guidance quickly
- Let public know not bunding – should display disclaimer:
  - "Taxpayers may only rely on official guidance that is published in the Internal Revenue Bulletin. Various IRS functions try to provide unofficial guidance to taxpayers by posting Frequently Asked Questions (FAQs) and other information on IRS.gov. Unless otherwise indicated, however, this information is not binding, and taxpayers may not rely on it because it may not represent the IRS's official position."

https://taxpayeradvocate.irs.gov/news/irs-frequently-asked-questions-can-be-a-trap-for-the-unwary

Issues with the Guidance Process - 2

Challenges by the courts when procedures not followed.

Process problems under one or more laws

- Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44 (2011)
- Altera, 145 TC 91 (2015)
- Chamber of Commerce of the U.S. v. IRS, No. 1:16-CV-944-LY (WD TX, 9/29/17)

Chevron Deference and its Progeny

- Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).
- Auer v. Robbins, 519 U.S. 452 (1997)
- Dominion Resources, Inc., No. 2011-5087 (Fed. Cir. 2012)

Agency Deference

Chevron deference applies to rules issued by an agency with the force of law.

- Step one asks whether Congress has spoken directly on the issue or if the statute is ambiguous.
  - If the statute is ambiguous, step two asks whether the agency's interpretation is a "permissible construction of the statute."

Mayo Foundation clarified that the APA applies to the IRS and *Chevron* deference applies to Treasury regulations.

The Supreme Court's decision in *Mead* determines whether a rule was issued with the procedure and authority to receive *Chevron* deference.

- Did Congress delegate authority to the agency to make rules carrying the force of law?
- Was the agency's interpretation promulgated in the exercise of that authority?

If the agency did not issue the rule with the force of law, courts give the rule some deference under *Skidmore* based on the rule's power to persuade, the thoroughness of the agency's investigation, the validity of its reasoning, and the consistency of its interpretation over time. [Skidmore v. Swift & Co., 323 U.S. 134 (1944)]

Agency Deference for Its Own Regs

Auer deference: Agencies are entitled to deference on interpretations of their own ambiguous regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation."

- Agency "litigation position" insufficient for *Auer* deference
- The more long-standing and thorough the agency's interpretation is, the more likely a court will defer
- Cannot rely on *Auer* to rewrite an unambiguous regulation after the fact

Altera case

Xilinx transfer pricing litigation

- IRS alleges that stock based compensation costs should be included in costs that must be shared between parties in a cost sharing agreement.
- Tax Court rejects IRS argument as contrary to arm's length standard (2005).
- 9th Circuit ultimately affirms Tax Court (2010).

Treasury proposes Treas. Reg. § 1.482-7(d)(2), codifying the IRS's failed *Xilinx* argument

- Numerous substantive comments point out the lack of empirical evidence for Treasury's position.
- Treasury finalizes the rule anyway ignoring the comments and failing to give an explanation for its decision (2003).

Altera transfer pricing litigation

- IRS again alleges stock based compensation argument, relying on § 1.482-7(d)(2).
- Tax Court invalidates regulation for lack of "reasoned decision making" (2015).
- Government's appeal pending in 9th Circuit – decision likely in 2018.

Dominion Resources case

Dominion Resources (Fed. Cir. 2012)

- Challenge to avoided cost method regulations under IRC §263A(f)
- Statute held to be ambiguous, but regulation was not a reasonable interpretation under Chevron Step 2
- Also, Treasury did not provide a satisfactory rationale, violating *State Farm*

Chamber of Commerce case

Challenge to anti-inversion regulations issued as temporary regulations (Treas. Reg. 1.7874-8T)

- Regs were issued specifically to block pending Pfizer-Allergan merger

Chamber of Commerce filed injunction suit in W.D. Tex.

Court rejected Anti-Injunction Act defense and allowed facial challenge to reg

Court found IRS failed to follow the notice and comment procedures in the APA

- Reasoning would apply to almost any temporary regulation on the books

Not known if IRS will appeal to Fifth Circuit

Issues with the Guidance Process - 3

Treasury's Final Report on EO 13789 found 8 regulations issued in 2016 to early 2017 that:

- (i) impose an undue financial burden on U.S. taxpayers,
- (ii) add undue complexity to the Federal tax laws, or
- (iii) exceed the statutory authority of the Internal Revenue Service (IRS).

Questions:

How did this happen?

Are there other such regs outside of the EO 13789 window?

Issues with the Guidance Process - 4

Use of wrong type of guidance.

Example from SVTDG:

- Asked Treasury to look at other guidance in EO 13789 review
- Why? "Treasury has developed a practice over the past several years of issuing notices describing transactions of which Treasury disapproves and promising future proposed regulations that will address these transactions. These notices are troubling for many reasons, not the least of which is that they have immediate effective dates and do not comply with the notice and comment requirements in the Administrative Procedure Act. Moreover, in many cases, Treasury and the IRS fail to issue the proposed regulations described in the notice—no doubt because the notices achieved the in terrorem effect that Treasury desired. "
  - Examples: Notices 2016-73 and 2012-39

http://www.svtdg.org/docs/svtdg_comment_letter_on_recommendations_eo_13789_6-12-17.pdf

Issues with the Guidance Process - 5

REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE, GAO-16-720, 9/6/16

6 recommendations including:

" IRS communicate more clearly the limitations of information not published in the IRB, and that IRS develop procedures to better document the type of guidance it plans to issue and the key decisions made during the evaluations. GAO also recommends that Treasury and OMB reevaluate their long-standing agreement to exempt some tax guidance and regulations from OMB oversight. IRS and Treasury agreed with all of GAO's recommendations, and OMB neither agreed nor disagreed."

https://www.gao.gov/products/GAO-16-720

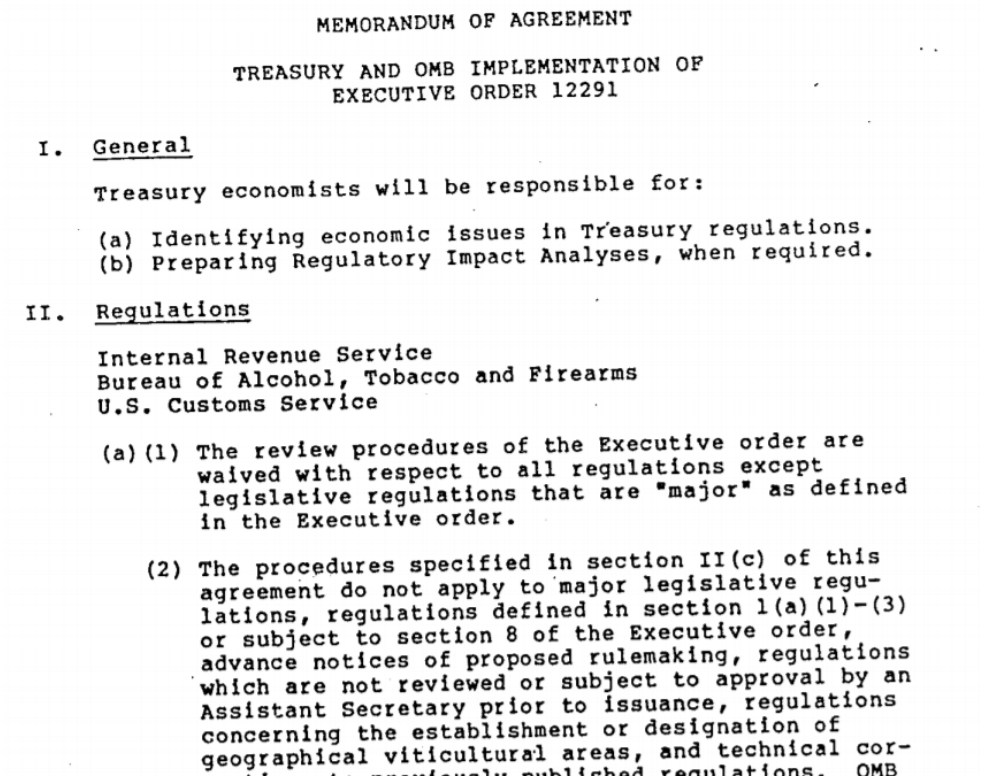
SENATOR HATCH (AND OTHERS) CONCERNS ON "SECRET" MEMO RELATED TO EO 12866

Letter to Treasury 10/11/16

"transparency and accountability requirements appear to have been thwarted for decades due to Treasury Department's long-secret MOA with OMB's Office of Information and Regulatory Affairs (OIRA). They have also appeared to have been thwarted due to Treasury's long-held view that Treasury regs are "interpretive" (meaning they merely interpret the language of IRC and thus do not by themselves give rise to regulatory costs) rather than "legislative" (meaning they are authorized under IRC and create operational rules, thus creating their own regulatory costs). After I requested that the Treasury Department release the MOA in April (which followed similar requests in 2013 and 2014), Committee staff independently obtained a copy of the document, and the Treasury Department later agreed to its release. I have attached it to this letter."

https://www.finance.senate.gov/chairmans-news/hatch-demands-treasury-clarify-use-of-secret-memo-regarding-section-385-debt-equity-regulations

The "Secret" MOU



MEMORANDUM OF AGREEMENT

TREASURY AND OMB IMPLEMENTATION OF EXECUTIVE ORDER 12291

I. General

Treasury economists will be responsible for:

(a) Identifying economic issues in Treasury regulations.
(b) Preparing Regulatory Impact Analyses, when required.

II. Regulations

Internal Revenue Service
Bureau of Alcohol, Tobacco and Firearms
U.S. Customs Service

(a)(1) The review procedures of the Executive order are waived with respect to all regulations except legislative regulations that are "major" as defined in the Executive order.

(2) The procedures specified in section II(c) of this agreement do not apply to major legislative regulations, regulations defined in section 1(a)(1)-(3) or subject to section 8 of the Executive order, advance notices of proposed rulemaking, regulations which are not reviewed or subject to approval by an Assistant Secretary prior to issuance, regulations concerning the establishment or designation of geographical viticultural areas, and technical cor-

https://www.treasury.gov/FOIA/Documents/OMB%20MOA%2083-93.pdf

Legislative Proposals to Change the Regulatory Process - 1

Repeal Chevron –

- S. 1577 (115th Congress), Separation of Powers Restoration Act
  - Senator Hatch press release 7/19/17
- H.R. 76 (115th Congress), Separation of Powers Restoration Act
- H.R. 4768 (114th Congress), Separation of Powers Restoration Act
  - House Rpt. 114-622 (6/14/16)
  - 7/12/16 – passed in House
  - H.Res. 796 – passed in the house on 7/5/16 to consider HR 4768
- S. 2724 (114th Congress), Separation of Powers Restoration Act

Rationale S. 1577

Per Senator Grassley –

"For too long, unelected bureaucrats have relied on *Chevron* to expand their own authority beyond what Congress ever intended. This has weakened our system of checks and balances and created a recipe for regulatory overreach. The Constitution's separation of powers makes clear that it is the responsibility of Congress, as the People's representative, to make the law. And it's the job of the courts – not the bureaucracy – to interpret the law. This bill helps to reassert those clear lines between the branches. By doing so, it makes the government more accountable to the People and takes a strong step toward reining in the regulators."

https://www.hatch.senate.gov/public/index.cfm/2017/7/senate-leaders-introduce-bill-to-restore-regulatory-accountability

Legislative Proposals to Change the Regulatory Process - 2

H.R. 5, Regulatory Accountability Act of 2017

- 1/11/17 – passed in House
- Includes Separation of Powers Restoration Act and Small Business Regulatory Flexibility Improvements Act among other provisions
- S. 2724 (114th Congress), Separation of Powers Restoration Act

S. 584 (115th Congress), Small Business Regulatory Flexibility Improvements Act

H.R. 33 (115th Congress), Small Business Regulatory Flexibility Improvements Act

Looking Forward

What will happen to 8 regs and others?

Will binding guidance on tax reform be delayed?

Will Congress pass any legislation restricting *Chevron* deference or any aspect of the regulatory process?

Will IRS implement GAO recommendations in the 2016 report?

Want more?

Read the Executive orders (recent and prior)

OIRA FAQs on definitions, process and more

https://www.reginfo.gov/public/jsp/Utilities/faq.jsp

Guide to the rulemaking process

https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf

GAO report of October 2016

http://www.gao.gov/products/GAO-16-720

CRS, Chevron Deference: A Primer

https://fas.org/sgp/crs/misc/R44954.pdf

Federal Tax Regulations Issued in 2017

The table below lists tax regulations issued by the Treasury Department and IRS in 2017 in chronological order. The links will take you to the text of the regulations (usually in the Federal Register) and other helpful information

- For more information on the regulations including comments submitted on proposed regulations, visit http://www.regulations.gov.
- Search Code of Federal Regulations (go to Title 26) - http://www.ecfr.gov/
- Federal Register - https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR
- IRS website - https://www.irs.gov/Tax-Professionals/Tax-Code,-Regulations-and-Official-Guidance
- IRS website on Affordable Care Act provisions and links to regulations and other guidance - https://www.irs.gov/Affordable-Care-Act/Affordable-Care-Act-Tax-Provisions

List of regulations issued in: 2016 2015 2014 2013 2012 2011

California Franchise Tax Board (FTB) Regulations – see the Interested Parties meetings website of the FTB.

See information following the table about executive orders issued by President Trump that affect the issuance of regulations.

Title of Regulation [Health care regs noted with "ACA"]	Status	Citation	IRC Sections	Additional Information
Regulations Regarding Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, Information Reporting and Backup Withholding on Payments Made to Certain U.S. Persons, and Portfolio Interest Treatment	Removal of temp regs Final and Temp and Prop	TD 9808 (1/6/17) REG-134247-16	871 1441 1461 6041	"This document contains final and temporary regulations regarding withholding of tax on certain U.S. source income paid to foreign persons, information reporting and backup withholding with respect to payments made to certain U.S. persons, and portfolio interest paid to nonresident alien individuals and foreign corporations. This document finalizes (with minor changes) certain

http://www.sjsu.edu/people/annette.nellen/website/2017regs.html

Lists for 2011 through 2017
2017 list includes EO i13789 details at end.