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OIRA's Expanded Review of Tax Regulations and Its Surprising Implications

*Bridget C.E. Dooling**

ABSTRACT

Executive Order 12866 describes U.S. policy on regulatory planning and review. It directs agencies to identify the nature and significance of the problem they are trying to solve with regulation, to identify alternative solutions, to assess the quantifiable and non-quantifiable costs and benefits of each alternative, and then to choose the option that maximizes net benefits to society, taking into account distributional effects and other considerations. That policy, which has governed U.S. regulation for several decades, is managed by the Office of Information and Regulatory Affairs (“OIRA”). It is also subject to several exemptions. In April 2018, the U.S. Department of Treasury and the Office of Management and Budget signed a historic memorandum of agreement narrowing one of those exemptions. The memorandum expands the number of Internal Revenue Service regulatory actions for which the Service must comply with Executive Order 12866. This action moved tax rules out of the “presidential tax-policy blind spot.” This article offers a close study of that memorandum of agreement and reveals six striking features that not only affect tax regulation, but also offer intriguing possibilities for (1) scholarly understanding of OIRA as an institution and (2) the future of regulatory review of independent regulatory agencies, which are currently exempt from OIRA review.

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I. INTRODUCTION

The afternoon panel of the *Business, Entrepreneurship & Tax Law Review* symposium in February 2019 focused on procedures to encourage “optimal regulation.” This theme was borrowed from University of Missouri School of Law Professor Thom Lambert’s book, *How to Regulate: A Guide for Policymakers*.¹ One of the best ways to improve regulatory decision-making is for more agencies to follow existing U.S. policy on regulatory planning and review, which is described in Executive Order (“EO”) 12866.² It directs agencies to identify the nature and significance of the problem they are trying to solve with regulation, to identify alternative solutions, to assess the quantifiable and non-quantifiable costs and benefits of each alternative, and then to choose the option that maximizes net benefits to society, taking into account distributional effects and other considerations.³

That policy, which has governed U.S. regulation for several decades, is managed by the Office of Information and Regulatory Affairs (“OIRA”).⁴ It is also subject to several exemptions.⁵ In April 2018, the U.S. Department of Treasury (“Treasury”) and the Office of Management and Budget (“OMB”) signed a historic memorandum of agreement (“MOA”) narrowing one of those exemptions.⁶ This MOA expands the number of Internal Revenue Service (“IRS”) regulatory actions for which IRS must comply with EO 12866.⁷ This action moved tax rules out of the “presidential tax-policy blind spot,”⁸ and was a meaningful step toward the optimal regulation described in Professor Lambert’s book.

Part II of this article provides some background on IRS exemptions from OIRA review. Part III reveals six striking features of the new MOA. Part IV considers the MOA’s implications for tax regulation and beyond. In particular, the MOA has surprisingly powerful potential to inform both scholarly understanding of OIRA as an institution as well as the future of OIRA’s regulatory review of independent agencies—the largest remaining exemption.

II. HISTORY OF OIRA REVIEW OF IRS REGULATIONS

Most of the U.S. government’s regulatory agencies are subject to EO 12866, which directs them to conduct certain analyses on their proposed regulatory

1. THOMAS A. LAMBERT, *HOW TO REGULATE: A GUIDE FOR POLICYMAKERS* (2017).

2. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Other executive actions have built on the EO 12866 framework. *See, e.g.*, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); U.S. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, REGULATORY ANALYSIS 1 (2003), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

3. Exec. Order No. 12,866 § 1(b), 58 Fed. Reg. at 51,735–36.

4. *See id.* § 2(b).

5. *See, e.g., id.* § 3(b) (defining “agency” to exclude independent regulatory agencies).

6. Memorandum of Agreement, The Dep’t of Treasury and Office of Mgmt. and Budget, Review of Tax Regulations under Executive Order 12866 3 (Apr. 11, 2018), <https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf>.

7. *See* Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 458–59 (2018).

8. *Id.* at 460.

changes and to submit those materials to OIRA for review prior to publication.⁹ Scholars have studied OIRA and its regulatory review process extensively,¹⁰ but less so with respect to tax.¹¹

Although the roots of centralized regulatory review run deeper,¹² EO 12291, signed by President Reagan in 1981, formalized an early version of OIRA's regulatory review.¹³ It applied to "any authority of the United States that is an 'agency' under 44 U.S.C. § 3502(1)."¹⁴ That cross-reference is and was a broad definition of "agency" from the Paperwork Reduction Act that included Treasury and its component agencies and bureaus.¹⁵ The EO excluded "independent regulatory agencies"¹⁶ and gave the OMB Director authority to "exempt any class or category of regulations from any or all requirements of this Order."¹⁷

Two years after EO 12291 was signed, OIRA Administrator Christopher DeMuth and Treasury General Counsel Peter J. Wallison signed an MOA that describes Treasury-specific procedures for the implementation of EO 12291.¹⁸ This 1983 MOA exempted rules issued by certain Treasury components, including those from IRS, unless they were both "major"¹⁹ and "legislative."²⁰ When EO

9. Exec. Order No. 12,866 § 6, 58 Fed. Reg. at 51,740–43.

10. As Professor Cass R. Sunstein, former OIRA Administrator, has explained, "[t]he literature is voluminous." Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1838 n.1 (2013). Professor Eloise Pasachoff summarizes the range of OIRA scholarship in her recent article on the OMB budget process. Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2185 n.2 (2016) (offering examples of literature with critical and favorable views of OIRA and its regulatory review process).

11. Scholars noted the absence of OIRA review from tax regulations, but did not dwell on it. Wallace, *supra* note 7, at 483 n.150 (citing, e.g., Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961, 1016 n.320 (2006); Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J. F. 263, 268 n.25 (2015)). One article stands out for its focus on OIRA review of tax regulations. Wallace, *supra* note 7, at 457–58. In it, Professor Clint Wallace opines that "systematic . . . centralized review can be beneficial, especially when there are acute concerns about politicizing tax administration, because centralized review fosters transparency and analytical rigor." *Id.* at 460.

Some recent reports focus on the mechanics of cost-benefit analysis as applied to tax rules. See David A. Weisbach, Daniel J. Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507 (Sept. 10, 2018); Greg Leiserson & Adam Looney, *A Framework for Economic Analysis of Tax Regulations*, BROOKINGS 5 (Dec. 2018), https://www.brookings.edu/wp-content/uploads/2018/12/ES_20181220_Looney-OIRA-Tax-Regs.pdf.

12. A special edition of the Administrative Law Review collected essays on the history of OIRA and centralized regulatory review. See generally Susan E. Dudley, *Observations on OIRA Thirtieth Anniversary Conference*, 63 ADMIN L. REV. 113, 115 (2011).

13. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

14. *Id.* § 1(d) (defining "agency").

15. Paperwork Reduction Act of 1980, Pub. L. No. 96-511 (codified as amended at 44 U.S.C. 3502(1)); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (referring to the same cross-reference).

16. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981) (referencing the Paperwork Reduction Act definition of "independent regulatory agency" at 44 U.S.C. § 3502(10)).

17. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

18. Memorandum of Agreement, Treasury and OMB, Implementation of Executive Order 12291 (Apr. 29, 1983), <https://www.treasury.gov/FOIA/Documents/OMB%20MOA%2083-93.pdf>.

19. *Id.* § II(a)(1). "Major" was defined in EO 12291 and served as a proxy for the likely economic significance of a rule. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981). Major rules were those:

likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment,

12291 was replaced by EO 12866 in the Clinton Administration,²¹ OIRA Administrator Sally Katzen largely affirmed the 1983 MOA.²² As such, this article refers to the 1983 MOA and its 1993 affirmation as the 1983-1993 MOA.

Over time, IRS exemptions raised concerns as those outside the executive branch noticed different treatment of IRS regulations. For example, some attempted to use IRS non-compliance with EO 12866 as part of their litigation strategy. In *BLAK Investments v. Commissioner*,²³ the U.S. Tax Court held in 2009 that “petitioner has no right to challenge compliance with Executive Order 12866” because of limiting language in the order itself.²⁴ Others raised their concerns to OIRA, IRS, and Congress.²⁵ Senator Orrin Hatch wrote to OMB on multiple occasions to press for public release of the 1983-1993 MOA and information about its implementation.²⁶

In response to an inquiry from Senator Hatch and others, the Government Accountability Office (“GAO”) issued a report in 2016 on this topic.²⁷ GAO found that OMB’s review of IRS rules was very limited because “IRS generally concludes that tax rules are [not] legislative” but, rather, are interpretive.²⁸ The 1983-

productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Id. at § 1(b). Under EO 12291, major rules were required to have a regulatory impact analysis (RIA). *Id.* § 3(a). An RIA needed to include information about the potential benefits and costs of the rule, potential net benefits of the rule, and regulatory alternatives. *Id.* § (d). Excluding non-major rules, therefore, excluded smaller rules from OIRA review. With tax rules, many would be expected to be major, because of the magnitude of the U.S. tax system. Even small changes in tax rules can have big economic effects.

20. 1983 Memorandum of Agreement, *supra* note 18, § II(a).

21. Exec. Order No. 12, 866, 58 Fed. Reg. 51735 (Sept. 30, 1993).

22. Letter from Sally Katzen, Administrator, Office of Information and Regulatory Affairs, to Jean E. Hanson, General Counsel, U.S. Department of Treasury (Dec. 22, 1993), <https://www.treasury.gov/FOIA/Documents/OMB%20MOA%2083-93.pdf>. Administrator Sally Katzen included a caveat with respect to how advance notices of proposed rulemaking were treated under EO 12866. *Id.*

23. *Blak Investments v. C.I.R.*, 133 T.C. 431, 447 (2009).

24. *Id.* (“Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.” (citing Exec. Order No. 12,866, 3 C.F.R. § 10 (1994))).

25. *E.g.*, Letter from Cleta Mitchell et al. to Howard Shelanski, Administrator, Office of Info. & Regulatory Affairs (Dec. 19, 2014), <https://www.irs.org/wp-content/uploads/2014/12/Letter-re-IRS-501c4-rulemaking.pdf>; Letter from Randel K. Johnson, Senior Vice President, and Katie Mahoney, Exec. Dir., Health Policy, U.S. Chamber of Commerce, to Internal Revenue Serv. (Nov. 2, 2015), <https://www.regulations.gov/contentStreamer?documentId=IRS-2015-0040-0018&attachmentNumber=1&contentType=pdf>; *see also* Wallace, *supra* note 7, at 478–79 (citing other examples).

26. *E.g.*, Letter from Senator Orrin G. Hatch, Chairman, U.S. Senate Comm. on Fin., to Jacob Lew, Sec’y, U.S. Dep’t of Treasury (Oct. 11, 2016), <https://www.finance.senate.gov/imo/media/doc/Hatch%20Demands%20Treasury%20Clarify%20Use%20of%20Secret%20Memo%20Regarding%20Section%20385%20Debt-Equity%20Regulations.pdf>.

27. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS TO TAX REGULATIONS AND GUIDANCE 1–2, 37 (2016).

28. *Id.* at 25; *see also* Wallace, *supra* note 7, at 473 (“Treasury and Service officials seem to have combined [the 1983-1993 MOA] with their understanding that most tax regulations are ‘interpretive’ to conclude that essentially no tax regulations are subject to centralized review. OMB has rarely questioned Treasury’s determinations.”).

1993 MOA, however, applied OIRA review only to legislative rules.²⁹ The line between legislative and interpretive rules can be hazy in practice.³⁰ The distinction between these two categories has particular salience in tax because “tax lawyers and administrators have a longstanding habit of labeling general authority regulations . . . as ‘interpretative rules,’ even though such regulations are legally binding and thus ‘legislative’ in general administrative-law parlance.”³¹ The GAO Report explained that both Treasury and IRS viewed tax rules as “interpretative because the underlying Tax Code being implemented by the regulation contains the necessary legal authority for the action taken, and any effect of the regulation flows directly from the code.”³² As a result of this position, many tax regulations were outside the scope of OIRA review. The choice to view tax rules as interpretive, rather than legislative, was at odds with “nontax precedent,”³³ and is one element of a larger theory of “tax exceptionalism.”³⁴ Among other findings and recommendations, GAO recommended that OMB and Treasury “[e]xamine the relevance of the long-standing agreement that exempts certain IRS regulations from executive order requirements and OIRA oversight; and if relevant, make publicly available any reaffirmation of the agreement and the reasons for it.”³⁵

With this backdrop, in April 2017, EO 13789 directed Treasury and OMB to “review and, if appropriate, reconsider the scope and implementation of the existing exemption for certain tax regulations from the review process set forth in Executive Order 12866 and any successor order.”³⁶ In February 2018, Senator Ron Johnson, Chairman of the U.S. Senate Committee on Homeland Security and Governmental Affairs (which oversees federal regulatory policy) and Senator James Lankford, Chairman of the Subcommittee on Regulatory Affairs and Federal Management, wrote to OIRA Administrator Neomi Rao, urging her to revisit the 1983-1993 agreement “with a critical eye as to why this agreement is necessary.”³⁷ The chairmen also signaled that the subcommittee would plan to hold an oversight hearing in “the very near future” and that “[t]he issues outlined in this

29. 1983 Memorandum of Agreement, *supra* note 18, § II(a).

30. See generally Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 168 (2019); Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* 23 (Oct. 12, 2017), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>.

31. Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1718–19 (2014).

32. GAO Report, *supra* note 27, at 21; see also Wallace, *supra* note 7, at 471–73. There is some indication that the Treasury and IRS position is shifting. See Policy Statement on the Tax Regulatory Process, DEP’T OF TREASURY (Mar. 5, 2019), <https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf>.

33. Wallace, *supra* note 8, at 472.

34. Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1541 (2006). Tax exceptionalism is “the perception that tax law is so different from the rest of the regulatory state that general administrative law doctrines and principles do not apply.” Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014).

35. GAO Report, *supra* note 27, at 35.

36. Exec. Order No. 13,789 § 2(c), 82 Fed. Reg. 19,317 (Apr. 26, 2017) (identifying and reducing tax regulatory burdens).

37. Letter from Senator Ron Johnson, Chairman, U.S. Senate Comm. on Homeland Sec. & Governmental Affairs and Senator James Lankford, Chairman, Subcomm. on Regulatory Affairs & Fed. Mgmt. to Neomi Rao, Adm’r, Office of Info. and Regulatory Affairs (Feb. 1, 2018), <https://www.hsgac.senate.gov/imo/media/doc/2018-02-01-RHJ-Lankford-to-Rao-OIRA-DOT-Agreement.pdf>.

letter will likely constitute a major part of this hearing.”³⁸ That same month, a bipartisan team of two former OIRA administrators described the 1983-1993 MOA as “crafted to apply only to technical rules” over which IRS had little discretion but functioning instead like a much broader “loophole” in practice, allowing IRS “to evade the good-government requirements that generally apply to federal regulators.”³⁹ Just over one month later, the revised MOA was issued, expanding the set of IRS regulatory actions subject to OIRA review.⁴⁰

III. FEATURES OF THE NEW OMB-TREASURY MOA

The most recent OMB-Treasury MOA, which this article will refer to below as the 2018 MOA, has several features that deserve attention. First, it has a short preamble that quotes EO 13789 to explain that the parties were negotiating because they were directed to by the president.⁴¹ This signals the importance of this issue to the president. It also suggests OIRA’s limited power to roll back this exemption on its own.

Second, the preamble affirms that “Treasury and OMB share a commitment to reducing regulatory burdens and providing timely guidance to taxpayers.”⁴² The 2018 MOA was signed shortly after enactment of the Tax Cuts and Jobs Act (“TCJA”),⁴³ which contained dozens of provisions that applied to the 2018 tax year, requiring IRS to implement it rapidly by writing rules, issuing guidance, and changing forms, among other actions.⁴⁴ In response, IRS “produced more than 500 new or revised tax forms, publications, and instructions to implement the law,” working at unprecedented speeds.⁴⁵ In addition to TCJA implementation concerns, those skeptical of the value of OIRA’s review express concern that the review is not worth the “delay” it imposes on IRS output.⁴⁶ Together, this may explain why the 2018 MOA preamble, which is only one paragraph, nevertheless emphasizes the importance of “timely” guidance.⁴⁷

38. *Id.*

39. 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>.

40. 2018 Memorandum of Agreement, *supra* note 6.

41. *Id.* at 1.

42. *Id.*

43. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

44. William Hoffman, *TCJA Reg Writers Earn Tax Notes' 2018 Person of the Year*, TAX NOTES (Jan. 2, 2019), <https://www.taxnotes.com/tax-reform/tcja-reg-writers-earn-tax-notes-2018-person-year>; see also Wallace, *supra* note 7, at 457.

45. Hoffman, *supra* note 44.

46. E.g., Eileen J. O'Connor, *Excessive review of IRS regulation delays needed government revenue*, THE HILL (Apr. 12, 2018), <https://thehill.com/opinion/finance/382725-excessive-review-of-irs-laws-delays-needed-government-revenue>; Adam Looney, *How OIRA and Treasury Can Work Together to Improve Tax Regulation*, UP FRONT (Apr. 11, 2018), <https://www.brookings.edu/blog/up-front/2018/04/11/how-oira-and-treasury-can-work-together-to-improve-tax-regulation/>; Leonard E. Burman, *OMB Review Of Tax Regulations: A 'Dispassionate Second Opinion' Or Needless Sand In The Gears?*, TAX VOX (Sept. 17, 2018), <https://www.taxpolicycenter.org/taxvox/omb-review-tax-regulations-dispassionate-second-opinion-or-needless-sand-gears>; Greg Leiserson & Adam Looney, *A Framework for Economic Analysis of Tax Regulations*, BROOKINGS 1 (Dec. 2018), https://www.brookings.edu/wp-content/uploads/2018/12/ES_20181220_Looney-OIRA-Tax-Regs.pdf; see also Wallace, *supra* note 7, at 503–04 (discussing trade-off between speed and interagency deliberation).

47. 2018 Memorandum of Agreement, *supra* note 6, at 1.

Third, the 2018 MOA closes the “legislative rule” loophole by superseding the 1983-1993 MOA and redefining what is subject to OIRA review.⁴⁸ It does so, however, using a test tailor-made for tax regulatory actions that will be subject to OIRA review.⁴⁹ This is a departure from EO 12866, which has a four-prong test for “significant” actions subject to OIRA review:

‘Significant regulatory action’ means any regulatory action that is likely to result in a rule that may:

- (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.⁵⁰

Under the 2018 MOA, a tax regulatory action is subject to OIRA review if it may:

- (a) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (b) raise novel legal or policy issues, *such as by prescribing a rule of conduct backed by an assessable payment*; or
- (c) have an annual *non-revenue* effect on the economy of \$100 million or more, *measured against a no-action baseline*.⁵¹

Only the interagency conflict prong uses the same language as EO 12866. The others are deleted or edited to adapt them to the tax setting. This language is striking, in general, because OIRA had not previously tailored its significance test like this for any particular agency. In particular, the meaningfulness of these changes is somewhat unclear. Subsection (b) adds an example of a novel legal or policy issue.⁵² The analogous provision in EO 12866 is one that “OIRA makes liberal use

48. *Id.* at 2.

49. Bridget C.E. Dooling, *Bespoke Regulatory Review* (working paper) (on file with author).

50. Exec. Order No. 12,866 § 3(f), 58 Fed. Reg. 51,735.

51. 2018 Memorandum of Agreement, *supra* note 6, at 1 (emphasis added to show changes from EO 12866); *see also* Wallace, *supra* note 7, at 480–82 (discussing differences).

52. 2018 Memorandum of Agreement, *supra* note 6, at 1.

of . . . to bring rules in for review.”⁵³ It is unclear whether the addition of an example broadens, narrows, or merely explains the scope of this prong of the test.

Subsection (c) limits the types of effects that count towards the \$100 million threshold to those that are “non-revenue.”⁵⁴ In the tax context, “tax revenues are neither benefits nor costs – they are transfers from citizens to the government.”⁵⁵ So, in contrast to subsection (b), it is clear that subsection (c) is a significant departure from EO 12866, which includes transfers in its \$100 million threshold calculation.⁵⁶ This means that revenue effects of provisions that raise or lower taxes are not part of the calculation, leaving only the results of other behavior changes that result from a regulatory change, *e.g.*, choices to invest in a home due to favorable tax treatment of mortgage interest or choices not to purchase tobacco products due an associated tax.⁵⁷ With annual U.S. tax receipts of over \$3 trillion,⁵⁸ it would not take a big proposed change to trip the \$100 million threshold if revenue effects were included. While this appears to be a workable limitation, its implementation deserves further analysis.

Subsection (c) also includes language about the “no action” baseline to be used to determine significance, *i.e.*, to determine whether OIRA will review the regulatory action.⁵⁹ This stands in contrast to EO 12866, however, which does not specify which baseline agencies should use to determine significance.⁶⁰ Rather, OMB’s Circular A-4 is the document that directs agencies to use certain baselines for regulatory analysis.⁶¹ Although the 2018 MOA does not explain or acknowledge this distinction, one can infer that the “no action” baseline in the 2018 MOA applies only to the significance determination process and that its silence about the baseline for regulatory analysis means that Circular A-4 applies.

Fourth, the 2018 MOA commits OIRA to reviewing IRS regulatory actions more quickly than EO 12866 requires. EO 12866 affords OIRA 90 days to review most regulatory actions.⁶² The 2018 MOA provides that OIRA will generally review tax actions in 45 days, with a special provision for certain TJCA-related actions, which can receive 10-business-day review.⁶³ The 1983-1993 MOA also offered expedited review, but it was for a much smaller set of actions.⁶⁴

Fifth, the 2018 MOA included a one-year phase-in, which allowed both IRS and OIRA time to adjust.⁶⁵ This could have been especially important to Treasury to allow it to stay focused on the TJCA implementation in 2018, rather than di-

53. RACHEL AUGUSTINE POTTER, BENDING THE RULES: PROCEDURAL POLITICKING IN THE BUREAUCRACY 35 (2019).

54. 2018 Memorandum of Agreement, *supra* note 6, at 1.

55. Jerry Ellig, *Economic Analysis of Tax Regulations: An Assessment of the First Year*, TAX NOTES 1570 (2019).

56. See Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51,735 (describing an economically significant rule as one which has \$100 million or more of annual effects on the economy, a concept which includes costs, benefits, and transfers).

57. See Ellig, *supra* note 55, at 1570.

58. Kate Davidson, *U.S. Tax Revenues Fall, Deficit Widens in Wake of New Tax Law*, WALL ST. J. (Feb. 13, 2019, 9:10 PM), <https://www.wsj.com/articles/u-s-tax-revenue-declined-0-4-in-2018-11550084426>.

59. 2018 Memorandum of Agreement, *supra* note 6, at 1.

60. See generally Exec. Order No. 12,866 § 3(f), 58 Fed. Reg. 51,735.

61. See, *e.g.*, CIRCULAR A-4, *supra* note 2, at 2, 15–16.

62. Exec. Order No. 12,866 § 6(b)(2)(B), 58 Fed. Reg. 51,735.

63. 2018 Memorandum of Agreement, *supra* note 6, at 1.

64. See 1983–1993 Memorandum of Agreement, *supra* note 18, at 1.

65. See 2018 Memorandum of Agreement, *supra* note 6, at 3.

verting resources to compliance with EO 12866. Although IRS and Treasury have numerous economists, the analysis called for by EO 12866 is specialized and requires some familiarity with OMB's cost-benefit analysis standards in Circular A-4.⁶⁶ The phase-in might also reflect concerns that OIRA lacked relevant experience or a deep bench of tax specialists.⁶⁷ OIRA staff comprises professionals with a breadth of general and specific expertise,⁶⁸ and it has moved to add additional staff with tax backgrounds.⁶⁹

Sixth, the 2018 MOA also articulated a dispute resolution process, seemingly replacing at least some provisions of the process described in EO 12866. The 2018 MOA says that “[i]n the rare event of a policy disagreement that could not be resolved during the review process, OIRA will facilitate a principals meeting to resolve any remaining issues and, if needed, elevate those issues to the President.”⁷⁰ Section seven of EO 12866 offers a more elaborate set of procedures:

To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

66. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735; see generally CIRCULAR A-4, *supra* note 2, at 18 (describing specifics of the cost-benefit analysis). Writing about the independent regulatory agencies, which are not subject to OIRA review, Professor Jerry Ellig explained that independent regulatory agencies, which are not subject to OIRA review, face “significant challenges in constructing the capacity” to improve economic analysis of their regulations. Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 28 CORNELL J. L. & PUB. POL’Y 2, 6 (2018). Although IRS is not an independent agency, the challenges it faces in building its capacity to conduct this analysis are analogous.

67. See, e.g., Looney, *supra* note 46.

68. Office of Info. & Regulatory Affairs, *Frequently Asked Questions*, How large is OIRA’s staff and what are their backgrounds?, REGINFO.GOV, <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp> (last visited Sep. 15, 2019).

69. Cheryl Bolen & Allyson Versprille, *OMB Hires Tax Experts as It Negotiates Rules Review With Treasury*, BLOOMBERG DAILY TAX REPORT (Apr. 02, 2018), https://www.bloomberglaw.com/product/tax/page/news_and_archives (click “Daily Tax Report 1994 to Current”; next locate “Daily Tax Report (BNA), DRT Issue No. 63 (04/02/2018)”; then locate News, “Tax Regulations: OMB Hires Tax Experts as It Negotiates Rules Review With Treasury (1)”).

70. 2018 Memorandum of Agreement, *supra* note 6, at 2.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.⁷¹

There are several notable differences: EO 12866 gives the vice president a significant role in conflict resolution; allows the OMB Director, the rulemaking agency's head, or the head of an agency affected by the rule to initiate dispute resolution; sets a timeframe for conflict resolution; and requires communication from outside parties to be in writing and included in the public docket.⁷² In contrast, the 2018 MOA does not articulate a role for the vice president, lacks specific timing provisions, seems to direct only OIRA to facilitate dispute resolution, and is silent on how to handle communications from outside parties.⁷³

On the one hand, these differences might not be important. The 2018 MOA dispute resolution language, for example, could merely reflect the reality that dispute resolution in policymaking is not always a rigid process. The officials involved in any given policy issue dispute resolution might differ, so details like who raises disputes and how they raise them may reasonably differ, too, and the 2018 MOA offers needed flexibility. In addition, the lack of language on outside communications could merely reflect that EO 12866's other disclosure provisions⁷⁴ adequately cover the materials from outside parties, and so no additional language is needed in the 2018 MOA. The 2018 MOA also uses the modern parlance of "principals meeting"⁷⁵ and could be seen as merely updated language without much, if any, intended or practical difference in meaning from the status quo.

On the other hand, it is not clear whether this provision of the 2018 MOA replaced all or only some of § 7 in EO 12866. Elsewhere the 2018 MOA says that

71. Exec. Order No. 12,866 §7, 58 Fed. Reg. 51,735.

72. *Id.*

73. See 2018 Memorandum of Agreement, *supra* note 6, at 2.

74. See Exec. Order No. 12,866 §6(b)(4), 58 Fed. Reg. 51,735.

75. John P. Burke, *The Contemporary Presidency: The Trump Transition, Early Presidency, and National Security Organization*, 47 PRESIDENTIAL STUDIES QUARTERLY 574, 579 (2017) ("One of the historic challenges of national security decision making since the inception of the NSC in 1947 has been interagency coordination and policy deliberation below the level of the Council itself. Beginning in the G. H. W. Bush administration, a "principals" group was established (by presidential order, not statutorily) as a body to provide an organized forum for input, discussion, and analysis prior to consideration of matters at formal meetings of the NSC."); see Martha Joynt Kumar, *The 2008 National Security Council Transition: Providing Continuity in a Bipartisan Environment*, 43 PRESIDENTIAL STUDIES QUARTERLY 490 (2013) (describing principals process in depth). This approach, which began on the national security side of the White House, has spread to other areas of policymaking.

“[t]he provisions of Executive Order 12866 not explicitly modified in this MOA will apply...” but the effect of this language is ambiguous with respect to omitted language.⁷⁶ Does the 2018 MOA remove the 60-day review conflict resolution timeframe? Can only OIRA initiate dispute resolution, or can other agencies still do it too? How does disclosure of outside communications work? These questions highlight one of the risks of making incremental, agency-specific changes to an existing policy.

IV. THE MOA'S MEANING FOR TAX & BEYOND

The prior section set out six notable features of the 2018 MOA in comparison to EO 12866, which would otherwise govern OIRA-agency interactions during centralized regulatory review.⁷⁷ Together, these provisions reinvigorate OIRA review of IRS regulations. In the press release announcing the agreement between OMB and Treasury, Treasury Secretary Steven T. Mnuchin said that the 2018 MOA “will increase scrutiny of regulations most likely to impose new costs, while preserving Treasury’s ability to ensure taxpayers receive timely, clear rules and guidance on how to comply with our tax code.”⁷⁸ An important area of study will be how and whether the 2018 MOA delivers on the goal of improved regulatory analysis and decision-making, especially now that the one-year phase-in has passed.⁷⁹

The 2018 MOA also provokes several other intriguing questions. First, why did OIRA exempt IRS initially in 1983, and then again in 1993?⁸⁰ Was it merely one of several actions taken to insulate IRS from political interference following the presidency of Richard Nixon?⁸¹ Were tax regulations used differently then, such that their focus on raising revenue was less like the regulatory activity that OIRA was designed to review?⁸² Was this a frank acknowledgement of the limits of OIRA expertise,⁸³ or simply a less-studied outcome of tax exceptionalism?⁸⁴ How does the Supreme Court’s unanimous holding in *Mayo Foundation for Medical Education & Research v. United States*,⁸⁵ which upended tax exceptionalism in 2011, fit in?

76. 2018 Memorandum of Agreement, *supra* note 6, at 2.

77. See generally Exec. Order No. 12,866, 58 Fed. Reg. 51,735.

78. Press Releases, Treasury, *OMB Update Tax Regulatory Review Process*, U.S. DEP’T OF THE TREASURY (Apr. 12, 2018), <https://home.treasury.gov/news/press-releases/sm0345>.

79. Susan E. Dudley, *Closing the Tax Man’s Loophole*, FORBES (Apr. 11, 2019), <https://www.forbes.com/sites/susandudley/2019/04/11/closing-the-tax-mans-loophole>; Ellig, *supra* note 55, at 1569.

80. Bridget C.E. Dooling, *Overcoming the OIRA Caricature* (Jan. 2020) (working paper) (on file with author).

81. Wallace, *supra* note 7, at 483–90 (tracing the history of post-Nixon political insulation of the IRS).

82. See Susannah Camic Tahk, *Everything Is Tax: Evaluating the Structural Transformation of U.S. Policymaking*, 50 HARV. J. ON LEGIS. 67, 70–71 (2013) (“For the past twenty-five years, Congress has been relying increasingly on the tax code to accomplish goals beyond raising revenue.”).

83. See *Paperwork and Regulatory Improvements Act of 2003: Hearing on H.R. 2432 Before the H. Comm. on Gov’t Reform*, 108th Cong. (2003) (statement of John D. Graham, Administrator, Office of Information and Regulatory Affairs), https://georgewbush-whitehouse.archives.gov/omb/legislative/testimony/graham/030722_graham.html.

84. See *supra* note 34.

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

Second, why did OIRA negotiate with IRS in 2018? The short answer may be that the president directed them to negotiate, and because members of Congress were pressing for a change to the status quo. But OIRA's public reputation is of an "obscure but powerful" entity that draws its power, in part, from its position within the Executive Office of the President.⁸⁶ What do the choices to negotiate and to use an MOA to resolve the issue reveal about OIRA and its influence in the executive branch?⁸⁷ Does the agreement to tailor the terms of EO 12866 to IRS undermine the effectiveness of OIRA's regulatory review or simply tweak the process in sensible ways?⁸⁸

Third, what does the 2018 MOA imply, if anything, for other exemptions from EO 12866? The biggest remaining exemption is for independent regulatory agencies.⁸⁹ Others have suggested that independent regulatory agencies have valid reasons to invite OIRA to review their draft regulations.⁹⁰ Does bilateral negotiation offer a path forward for OIRA review of independent regulatory agency regulations?⁹¹ If so, which provisions of EO 12866 should be amended, and which are best left alone?⁹²

V. CONCLUSION

By rolling back the long-standing exemption for IRS tax regulations, OMB took a significant step to move towards a U.S. regulatory system that better aligns with the principles of EO 12866. This is one of the best ways to pursue optimal regulation, a theme of both the Symposium and Professor Lambert's book. The mechanism for that policy change, the 2018 MOA, departs in several ways from the general framework of EO 12866, which applies to most other U.S. regulators. A close read of the 2018 MOA offers intriguing glimpses into how changes to regulatory review are negotiated at the highest levels of the executive branch and poses questions about OIRA and the future of regulatory review.

86. Donald R. Arbuckle, *Obscure but Powerful: Who are Those Guys?*, 63 ADMIN. L. REV. 131, 131 (2011).

87. Dooling, *supra* note 80.

88. *Id.*

89. See Exec. Order No. 12,866 § 3(b), 58 Fed. Reg. 51,735 (defining "agency" to exclude independent regulatory agencies).

90. *E.g.*, Catherine M. Sharkey, *State Farm 'With Teeth': Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1633–34 (2014); Jerry Ellig, *Why and How Independent Agencies Should Conduct Regulatory Impact Analysis*, 28 CORNELL J. L. & PUB. POL'Y 2, 31–32 (2018).

91. Dooling, *supra* note 49.

92. *Id.*