Insight

OMB and IRS Set New Parameters for Review

DAN BOSCH | APRIL 12, 2018

After months of anticipation (in the regulatory process world, at least), the Office of Management and Budget (OMB) and the Department of the Treasury released a Memorandum of Agreement (MOA) today that outlines which Internal Revenue Service (IRS) regulations will undergo review by the Office of Information and Regulatory Affairs (OIRA).

For about 35 years, IRS rules have been largely exempted from OIRA review based on a previous agreement between the two agencies. Among executive agencies, IRS was the exception rather than the rule. Other executive agencies have significant regulations reviewed by OIRA before they can be proposed or promulgated to ensure that regulations are justified and align with administration priorities.

In 1983, Treasury and OMB agreed on parameters of review for IRS actions. The key phrase in that agreement was that OIRA review did not apply to "major legislative regulations," that is, regulations required by Congress. This phrasing is peculiar, given that all regulations technically are rooted in congressional authorization. Regardless, IRS avoided review of a substantial number of regulations under the argument that its actions merely implemented mandates from Congress.

In recent years, some have called for OIRA to take a more active role in reviewing IRS actions. Proponents of increased review argue that IRS regulations are no different than other regulations and these regulations have clear, direct compliance impacts on affected individuals and entities. Further, OIRA review helps ensure that agencies comply with major administrative procedural requirements, including the Regulatory Flexibility Act. Opponents of increased review argue that the revenue raising aspect of virtually every IRS action would rise to the level of significance required to trigger a review, dramatically slowing implementation of tax laws, and that OIRA lacks the resources needed to review all these

actions.

FEATURES OF THE NEW MEMORANDUM

Today's memo reaches a compromise on many of these points. OIRA will review actions that create inconsistencies with other actions by other agencies, raise novel legal or policy issues, or have an annual *non-revenue* effect on the economy of $100 million or more (measured against a no-action baseline).

This last caveat is critical to understanding the impact of the MOA. As mentioned earlier, one of the key arguments against OIRA review of IRS actions was that nearly all IRS regulations have an impact of $100 million or more. However, much of this impact is from the revenue, or tax received, from the regulation. By carefully phrasing the economic impact as non-revenue, it ensures that OIRA will review only the actions with impact created by the IRS compliance burden and not the revenue sought by Congress through law.

The MOA also outlines how long OIRA has to review IRS actions. For other executive agencies, OIRA is supposed to review rules within 90 days. The MOA sets a target of 45 days. To address concerns about implementing the Tax Cuts and Jobs Act, passed in December, Treasury and OIRA can agree to an expedited review of just 10 business days.

These compromises should help address the issue of a lack of resources at OIRA by limiting the scope of what is reviewed and for how long. To help further, recent reports indicate that OIRA is seeking to add tax expertise to its staff.

POTENTIAL IMPACTS

We can determine a general sense of what OIRA would review under the MOA by considering the term "non-revenue impact." As mentioned earlier, this generally means compliance burden. The compliance burden associated with IRS regulations is typically manifested almost entirely in its paperwork burden. Fortunately, under the Paperwork Reduction Act, estimates of the hourly burden of IRS information collection requests (ICRs) are publicly available. Though not a perfect corollary to rules, we can use the burden-hour estimates from ICRs and apply an hourly cost to figure out the number of collections that impose $100 million or more of compliance cost.

As we have in previous estimates of tax compliance cost, we take the estimate of compliance cost from the IRS ICR submission where available. For those ICRs that do not have such an estimate, we use the hourly rate of a compliance officer from the Bureau of Labor Statistics (currently $34.39). The total number of active ICRs that reach $100 million based on these criteria is 66. This is about 9 percent of all active IRS ICRs. Using this calculation, and the

inherent nature of IRS compliance burden consisting of paperwork, roughly the same percentage of rules would be reviewed by OIRA because they are economically significant. For context, roughly 8 percent of rules that undergo OIRA review across all executive agencies are “economically significant” or cost $100 million or more, according to historical data from reginfo.gov. Therefore, the effect of the MOA is basically the same as that of other executive agencies.

CONCLUSION

The MOA appears to strike an appropriate balance between what should be and what can be reviewed by OIRA. If our estimate holds, less than two IRS rules per month will need to be analyzed by OIRA, hardly an overly burdensome amount. Because the rules that will be reviewed are the most burdensome to comply with, it is worth OIRA’s effort to review these to ensure they are justified and adhere to regulatory procedure.