
In Major Change, Regulatory Reform Comes to Tax Regulation

By William J. Walsh, Kenneth von Schaumburg, Karen C. Bennett, Jane C. Luxton / Apr 16, 2018

For decades, tax regulations have been viewed as exempt from required regulatory review under [Executive Order 12866](#) of October 4, 1993, on *Regulatory Planning and Review*. That Executive Order (“EO”) directs federal agencies to submit all new regulations that have an annual effect on the economy of \$100 million or more, or other significant impacts, to the Office of Information and Regulatory Affairs (“OIRA”) at the Office of Management and Budget (OMB) for review of the need for the rule and its costs and benefits. Under the terms of what Senate Finance Committee Chairman Orrin Hatch characterized in an October 11, 2016 [letter](#) as a “long-secret Memorandum of Agreement” (“MOA”) between OMB and the Department of the Treasury, tax regulations were placed in a special status, not subject to normal interagency review. In a striking example of the broad changes that are occurring under the banner of regulatory reform, that status was abruptly revoked and the prior MOA superseded on April 11, 2018, with the signing of a new [MOA](#) between OIRA and the Treasury Department, which provides for OIRA review of significant new tax regulations. This change in policy creates new opportunities for regulated parties to raise concerns about the need for and cost justification of proposed new tax rules.

The MOA bars the Treasury Department from publishing or publicly releasing significant new tax rules until OIRA has completed or waived its review. To avoid delay, OIRA is limited to a 45-day review, with provisions for extensions and expedited reviews. In the event of a policy disagreement, OIRA will facilitate a principals meeting and, if necessary, elevate the issue to the President. The agreement allows for a 12-month period for Treasury to develop resources adequate to perform required cost benefit analyses.

The MOA implements regulatory reform objectives outlined in [EO 13789](#) of April 21, 2017 on *Identifying and Reducing Tax Regulatory Burdens*, and is part of a wide-ranging initiative that is ushering in changes throughout the federal government. Where there are changes of this type, regulated parties can act on new opportunities to engage on issues of concern. Clark Hill is experienced in developing and implementing informed regulatory reform strategies and in complex regulatory matters at all stages of the process, from initial advocacy to appellate challenges. For more information, see, see Clark Hill’s resources on this issue at <http://www.clarkhill.com/contents/regulatory-reform> or contact Karen C. Bennett, Jane C. Luxton, Kenneth von Schaumburg, William J. Walsh, or another member of Clark Hill’s Administrative Law Practice Group.