

Fleshing Out Centralized Review of Tax Regulations

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Clinton Wallace, *Centralized Review of Tax Regulations*, 71 **Alabama L. Rev.** __ (forthcoming 2018), available at [SSRN](#).

In a new article, [Centralized Review of Tax Regulations](#), Clinton Wallace addresses the timely question of whether and how tax regulations should be subject to centralized review by the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget (“OMB”). While OMB review has become standard for “significant” or “economically significant” agency regulations, tax regulations have long avoided review even when they meet this standard, raising, yet again, the question of whether tax should be different than other areas of administrative law. In addition to helping us understand the historical lack of centralized review of tax regulations, Wallace’s paper does the important job of showing the inadequacy of the new framework for centralized review, and pushing us to recognize the complex questions that have to be answered to develop objective criteria for review.

Wallace first describes how the history of tax regulations not being subject to OIRA review is tied in with the long and much discussed (at least in tax circles) story of tax exceptionalism. Historically, Treasury and the IRS have taken the view that most of their regulations were merely interpretive and thus not subject to various requirements such as notice-and-comment or centralized review. This has resulted in the anomaly of tax regulations not being subject to the various stages of OIRA review even in cases in which other agencies, with joint drafting responsibility, have subjected that very same set of regulations to centralized review. Wallace also describes how the anti-inversion rule, the one tax regulation that has been subject to centralized review recently, was only reviewed in a relatively superficial way, lacking the type of rigorous analysis prescribed by OIRA’s own rules.

What could have just been a historical analysis has become a current event as a result of the Trump administration’s decision to reconsider exemption of tax regulations from centralized review and the passage of the Tax Cuts and Jobs Act (“TCJA”) at the end of 2017. The TCJA was drafted hastily, leaving Treasury and IRS with significant discretion to fill in gaps in the legislation. Whether or not OIRA weighs in on this process is thus poised to be a particularly important question. And the Trump administration has recently created a [“new framework”](#) for centralized review of tax regulations. As Wallace adeptly describes, exactly what this new framework means for centralized review of tax regulations is not entirely clear. Namely, the framework’s application of centralized review to “novel or legal policy issues, such as [those that prescribe] a rule of conduct backed by an assessable payment” could, in theory, apply only to a select few Treasury Regulations, or almost any. And the framework’s application of centralized review to rules that “have an annual non-revenue effect on the economy of \$100 million or more, measured against a no-action baseline” is particularly inscrutable and could be subject to any number of interpretations. As Wallace points out, the uncertainty around exactly when OIRA review will happen creates the undesirable prospect of lobbying and perceived unfairness.

In light of this concern, Wallace examines the arguments for and against centralized review of tax regulations. On the one hand, centralized review of tax regulations may be an important step in making tax part of a broader, rational government policy of spending and borrowing. It may reduce the possibility of capture, it may increase accountability and transparency into regulatory decisions that can oftentimes involve political decisions, and it may provide Treasury and IRS valuable input and

perspective regarding regulations that implicate many non-tax questions. On the other hand, centralized review may increase ossification as well as the perceived and/or actual politicization of the tax system, something that presidential administrations have tried to avoid since, and even before, Nixon's attempt to use the IRS to target political enemies. Moreover, there is deep uncertainty in tax scholarship about how to deploy some of the tools that one would expect from centralized review, such as cost-benefit analysis that takes into account the behavioral impacts of the regulation. And certain aspects of centralized review that have not been as developed because they have not been as relevant in other areas, including distributional analysis, seem key to tax analysis, necessitating some rethinking of what, exactly, centralized review entails.

In order to provide some guide through this maze of potential approaches to centralized review, Wallace suggests that tax regulations can have different functions: private allocation (incentive provisions), public allocation (revenue raising provisions), and implementation (interpretive rules that involve the exercise of very little discretion by Treasury). While Wallace acknowledges that tax regulations can often serve a combination of these functions, he nonetheless argues that certain types of centralized review can make more sense for some functions. For instance, he argues that robust inter-agency cost-effectiveness analysis would be beneficial for private incentives, Treasury and IRS-driven revenue estimates and distributional analysis would be beneficial for public allocation, and no centralized review should apply to mere Treasury and IRS implementation of congressional mandates.

Wallace recognizes some of the difficulties in distinguishing between these different functions and, in the end of the paper, turns to trying to improve the existing Trump administration framework thresholds for review. The distinctions Wallace tries to draw pose difficult line-drawing problems that present promising questions for further research. The perennial difficulty in distinguishing between legislative and interpretive rules, for instance, suggests that trying to distinguish between what he calls the implementation function and the other functions would be an incredibly difficult task. Wallace's contribution is to identify and explore the challenge posed by tax regulations doing all sorts of things, many of which have little relation to raising revenue.

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