

Section of Taxation

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April 26, 2018

The Honorable Brent J. McIntosh
General Counsel
Office of General Counsel
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

The Honorable Neomi J. Rao
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Bldg.
1650 Pennsylvania Ave., NW
Washington, DC 20503

Re: Memorandum of Agreement dated April 11, 2018
Review of Tax Regulations Under Executive Order 12866

Dear Mr. McIntosh and Ms. Rao:

On behalf of the American Bar Association Section of Taxation, we write regarding the new Memorandum of Agreement dated April 11, 2018 (the "MOA") between the Department of the Treasury ("Treasury") and the Office of Management and Budget ("OMB") regarding review of tax regulations by the Office of Information and Regulatory Affairs ("OIRA"). The views expressed herein are presented on behalf of the Section of Taxation. These comments have not been approved by the Board of Governors or House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Tax regulations are needed for the interpretation and application of our tax laws, and consequently the process of issuing regulatory guidance is of great importance. We write today to encourage Treasury and OIRA to continue to work together to effectuate a successful implementation of the new MOA. A key element to success of the MOA will be ensuring that the agencies implement the MOA in a manner that produces timely guidance, particularly regarding the recently enacted legislation.

In 1981, President Reagan issued Executive Order ("EO") 12291 that directed federal agencies to undertake procedures designed to reduce the burden of federal rulemaking on the public. On April 29, 1983, in response to EO 12291, Treasury and OMB entered into a "Memorandum of Agreement" that exempted from OMB review all Internal Revenue Service ("IRS") regulations "except legislative regulations that are 'major' as defined in [EO 12291]." The Memorandum of Agreement also excluded IRS revenue rulings and IRS revenue procedures from OMB review.

On September 30, 1993, President Clinton issued EO 12866 that set forth a comprehensive set of rules that federal agencies were to follow with respect to undertaking regulatory action. In addition, EO 12866 revoked EO 12291. On November 4, 1993, in response to EO 12866, Treasury requested that OIRA confirm that EO 12866 did not change the review process that had previously been agreed to by Treasury and OMB in the 1983

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Memorandum of Agreement. On December 22, 1993, in response to Treasury's request, OIRA confirmed that nothing had changed, except that certain "advanced notices of proposed rules" would now be subject to OIRA review. It is our understanding that few tax regulations have been reviewed by OMB/OIRA since implementation of the Memorandum of Agreement in 1983.

In EO 13789 (April 21, 2017), President Trump directed "the Secretary and the Director of the Office of Management and Budget [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 [EO] 12866." In accordance with the directive set forth in EO 13789, the MOA sets forth the revised procedures for OIRA review of regulations.

After public announcement of the MOA negotiations, a concern was expressed that OIRA review could slow down the guidance process. The MOA provides that OIRA will, subject to extensions, conclude its review within 45 days after receiving certain information required under EO 12866. With the approval of Treasury Secretary (or Deputy Secretary) and the OIRA Administrator, regulatory actions related to the new tax law will be reviewed within 10 business days (instead of 45 days). Thus, the MOA is sensitive to the concern about timeliness and provides for expedited review of guidance regarding the new tax law.

The MOA does not establish a hard deadline for completing the OIRA process. We are confident that Treasury and OIRA will be responsive to each other's inquiries, but the MOA leaves open the possibility that regulatory review could stretch out over a significant period of time while information is being exchanged and analysis is being done. The need for timely administrative guidance exists whenever the tax laws are significantly changed. The new tax law raises important unresolved issues and taxpayers, their advisors and the IRS need certainty for planning, reporting and administration. Moreover, because of the breadth of the recently enacted tax law, we are concerned that its intended benefits may be diminished if there is delay in addressing important issues. We thank Treasury and OIRA for reaching an agreement, and we urge Treasury and OMB to implement the MOA in a manner that will permit the issuance of much needed guidance as soon as possible.

Thank you for your consideration.

Sincerely,



Karen L. Hawkins
Chair, Section of Taxation

cc: Hon. Mick Mulvany, Director, Office of Management and Budget
Hon. Steven Mnuchin, Secretary, Department of the Treasury
Hon. David Kautter, Assistant Secretary for Tax Policy, Department of the Treasury
David Kautter, Acting Commissioner, Internal Revenue Service
William M. Paul, Acting Chief Counsel, Internal Revenue Service