



## Federal Tax ADVISORY ■

**MAY 1, 2018**

### Regulation Confusion

The Office of Management and Budget (OMB) has recently asserted jurisdiction over Treasury regulations, and a new arrangement will give the OMB added review powers over proposed regulations. The ABA Tax Section quickly weighed in to encourage the OMB not to slow down needed regulations. But slowing down the regulation process may be the least of taxpayers' worries.

There are indications that the OMB may discard the traditional distinction between legislative and interpretive regulations. The Administrative Procedure Act recognizes that distinction. It relieves interpretive regulations from the notice and comment requirement. That also should relieve interpretive regulations from the strict requirement imposed by the Tax Court in the *Altera* decision that Section 482 regulations (which clearly are legislative) be fully explained in their preamble to avoid being labeled arbitrary.

Unfortunately, IRS and Department of Justice litigators have tended to assert that all regulations issued with notice and comment are entitled to *Chevron* deference, which is limited to legislative regulations, even if notice and comment was not required.

The result of these crosscurrents is that the notion has arisen that any and all IRS published guidance is effectively a legislative regulation if the IRS can assert a penalty for its violation. Of course, the IRS can assert a penalty for ignoring interpretive regulations and Revenue Rulings because they just say what the law says.

So if the OMB treats interpretive regulations as legislative, it may require extensive preambles explaining why the interpretation is the one, best correct meaning of the statute. Or it may reject interpretive regulations that did not have notice and comment, including temporary regulations. Or it may complain about inadequate response to comments. These responses not only would slow down the already slow regulatory process but introduce complications from which interpretive tax regulations have been spared forever.

The issue is most acute with the vast array of regulations needed to implement the business provision of the Tax Cuts and Jobs Act of 2017. Taxpayers should carefully watch the review process for these regulations.

For more information, please contact [Jack Cummings](#) at 919.862.2302.

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