

# TAX AS PART OF A BROKEN BUDGET: GOOD TAXES ARE GOOD CAUSE ENOUGH

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## ABSTRACT

*The federal budget is a myth. Despite being a myth, Congress uses the budget to limit its choices by linking its revenue-raising and spending powers under a federal debt ceiling. Through its self-imposed limits, Congress puts tremendous pressure on how it calculates its budget, and that calculation generally assumes any tax provisions will raise revenue when the law becomes effective. However, many tax provisions require additional direction to ensure they operate as the budgetary process expects. That task falls to the Treasury Department and the Internal Revenue Service (IRS) as a bureau of the Department. Consequently, limiting the production of tax rules that implement, interpret, and sometimes limit possible interpretations of tax statutes is problematic because their projected revenue is used to balance the budget. Nevertheless, these Treasury Department rules are under attack on the grounds that their issuance fails to comply with the Administrative Procedure Act (APA). The APA generally requires notice and comment for the promulgation of rules, a costly process in terms of time and agency resources. This Article argues that there should be a wider acceptance of the good cause exception for the speedier issuance of tax regulations and other IRS-level implementing materials in order to satisfy Congress's revenue expectations.*

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INTRODUCTION

With the passage of a multi-hundred-page Tax Cuts and Jobs Act of 2017,<sup>1</sup> which changes tax rates, entitlement to deductions and credits, and many operating rules of the Internal Revenue Code (Code), the Treasury Department and the IRS, as a bureau of the Department, must create guidance to implement the new law before taxpayers can file their tax returns. Because not all taxpayers are calendar-year taxpayers, the time to create this guidance may be less than a calendar year. These changes not only extended tax breaks to taxpayers, which might justify expecting taxpayers to pay a tax advisor to understand the new law, but some changes increased taxpayers’ burden. That increase was necessary to control the cost of the new legislation.<sup>2</sup>

Cost is important because any annual deficit when Congress fails to balance the budget adds to the national debt as Congress borrows to fund its excess spending.<sup>3</sup> As of May 31, 2017, the U.S. government’s publicly held debt had reached almost \$15 trillion or about 75% of the

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1. See generally Pub. L. No. 115-97, 131 Stat. 2054 (2017).

2. See S. Con. Res. 25, 115th Cong. (2017).

3. The U.S. has only run budget surpluses in four of the past forty years. Nevertheless, the country has had several periods when the national debt as a percentage of GDP was reduced because of growth in the economy. Office of Mgmt. & Budget, *Historical Tables*, WHITE HOUSE (2018), <https://www.whitehouse.gov/omb/historical-tables/> [https://perma.cc/FK88-FYQP] (Tables 1.1 and 1.7).

nation's annual gross domestic product (GDP).<sup>4</sup> According to the CIA's World Factbook, this ratio ranks the U.S. as the 34th most debt-loaded country in the world.<sup>5</sup> This amount excludes the \$5.5 trillion intragovernmental debt (such as that held by the Social Security Trust Fund) and the quickly growing \$5.8 trillion state and local debt.<sup>6</sup> Combined, the total federal debt in 2017 (still excluding state and local debt) was \$20.5 trillion or over 104% of GDP.<sup>7</sup>

Congress has chosen to bind itself to reducing the size of national deficits and, consequently, reducing growth in the federal debt. Although these limits are not constitutional, they affect congressional decision-making and the public's perception of those decisions.<sup>8</sup> "[T]he cost of a proposal is critical, and the revenue estimate of the cost is necessary for every proposal at the front end of the consideration of that proposal."<sup>9</sup> Current law generally requires that the fiscal system balance over a ten-year projection period even though Congress is allowed to, and does, override this restriction.<sup>10</sup> In other words, Congress generally looks at, and is many times limited by, the effects of projected taxing and spending over ten years as it decides current tax policy.

Although the determination of the deficit is based on estimates of revenue and spending that can only be verified after year-end, Congress creates tax provisions with an expectation that they will

4. For a breakdown of the federal debt, see Fed. Reserve Bank of St. Louis, *Federal Debt: Total Public Debt*, ECON. RES., <https://fred.stlouisfed.org/series/GFDEBTN> [<https://perma.cc/46WX-K24C>] (last visited Oct. 8, 2018).

5. CIA, *Country Comparison: Public Debt*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2186rank.html> [<https://perma.cc/NKN4-S4C9>] (last visited Oct. 8, 2018). Foreign investors hold approximately 30% of public debt, although estimates of who holds debt and how much they hold is hard to verify because investors often hold securities through intermediaries. Fed. Reserve Bank of St. Louis, *Fiscal Service, Federal Debt Held by Foreign and International Investors*, ECONOMIC RESEARCH, <https://fred.stlouisfed.org/series/FDHBFIN> [<https://perma.cc/6MRA-V39R>] (last visited Oct. 8, 2018).

6. *Intragovernmental Holdings and Debt Held by the Public*, TREASURY DIRECT, [https://www.treasurydirect.gov/govt/charts/principal/principal\\_govpub.htm](https://www.treasurydirect.gov/govt/charts/principal/principal_govpub.htm) [<https://perma.cc/8HFR-JUPU>] (last visited Oct. 8, 2018).

7. For a breakdown of the federal debt, see Fed. Reserve Bank of St. Louis, *supra* note 4.

8. See *infra* Part I for more on the budget process.

9. Bernard M. (Bob) Shapiro, *The Last 50 Years: The Evolving Role of the Joint Committee Staff in the Tax Legislative Process*, U.S. CAPITOL HIST. SOC. (2016), <https://uschs.org/wp-content/uploads/2016/02/USCHS-History-Role-Joint-Committee-Taxation-Shapiro.pdf> [<https://perma.cc/DDX2-E5HS>].

10. See 2 U.S.C. § 632 (2012). The joint budget resolution sets the budget window. See *id.*

operate immediately upon their designated effective dates to raise revenue.<sup>11</sup> Revenue shortfalls, either because of errors in congressional assumptions or because provisions prove hard to enforce, upset the already precarious balance of the government's budget. In some instances, despite budgetary projections, the law requires additional action. For some tax provisions, Congress explicitly, and other times implicitly, demands the Treasury Department adopt regulations to implement the law.<sup>12</sup> Thus, when Congress leaves the law to be "determined under regulations prescribed by the Secretary" of the Treasury Department, additional rules are expected.<sup>13</sup> For example, the new § 199A, permitting taxpayers to take a deduction for certain business investments, has four such references.<sup>14</sup>

To the end of making tax law operational, the Treasury Department issues rules that operationalize new revenue-raising laws because, although the law may apply on its face, taxpayers may interpret ambiguity in their own favor.<sup>15</sup> Thus, although Congress makes the decision as to what should be taxed and at what rate, the Treasury Department often makes the system work. Its rules facilitate tax planning, tax filing, and the review of taxpayer activities by auditors. To the extent that this guidance has the force of law, it has a substantial effect on taxpayers' obligations, but its timing is also critical for the system to raise the revenue Congress expects.

Because the federal budget assumes that tax provisions generate revenue immediately, the Treasury Department is under pressure to issue guidance quickly. However, the Treasury Department has a limited budget, and its speedier procedures for creating rules are subject to debate. Many contemporary attacks on the Treasury Department's process for issuing tax guidance claim that the process fails to comply with the Administrative Procedure Act (APA).<sup>16</sup> The

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11. See *infra* Section I.A for more on estimates.

12. Ellen P. Aprill, *The Impact of Agency Procedures and Judicial Review on Tax Reform*, 65 NAT'L TAX J. 917, 917 (2012) (foretelling the need for the IRS to be able to quickly issue guidance).

13. *E.g.*, Tax Cuts and Jobs Act of 2017, Pub L. No. 115-97, § 11011, 131 Stat. 2054, 2068 (2017) (to be codified at 26 U.S.C. § 199A).

14. See *id.* § 11011, 131 Stat. at 2065, 2068, 2069, 2070.

15. See 26 U.S.C. § 7805(b) (2012).

16. See Ellen Aprill, *supra* note 12; Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 466 (2013); Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. 89, 92-93 (2010); Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1178-86 (2008); Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1543 (2006); Steven R. Johnson, *Preserving Fairness in Tax Administration in the*

APA requires agencies that create rules to follow a procedure, popularly referred to as notice and comment, unless the rules are specifically carved out.<sup>17</sup> This means agencies must provide the public with notice of proposed rules and consider the public's comments after a reasonable comment period.

Courts are currently deciding how rigorously to apply notice and comment to tax guidance. A recent judicial trend, although a relatively short one, has been to strike down tax guidance as inadequate.<sup>18</sup> Courts are increasingly interpreting the Treasury Department's policies as insufficient as a matter of law. These decisions have been rendered without considering Congress's often unstated demand for implementing rules' speedy issuance.

These decisions come at a time when the president actively discourages the production of tax regulations.<sup>19</sup> A President Trump Executive Order demands agencies eliminate two rules every time they create a new one.<sup>20</sup> In the world of a complex tax statute, this raises the political cost of creating guidance that interprets the law. On the other hand, the Tax Court has sided with the taxpayer "for mistakes of law in a complicated subject area that lacks clear guidance."<sup>21</sup> Thus, the need for guidance grows even as the government may be reluctant to produce it.<sup>22</sup>

In this political and judicial environment, the threat that tax regulations may be judicially invalidated on procedural grounds will likely significantly impact the federal deficit and the federal debt. Regulations may be overturned, and the Treasury Department may delay issuing rules because of fear of invalidation. In either event, in

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*Mayo Era*, 32 VA. TAX REV. 269, 280 (2012); Leandra Lederman, *The Fight Over 'Fighting Regs' and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 649-50 (2012); Toni Robinson, *Retroactivity: The Case for Better Regulation of Federal Tax Regulators*, 48 OHIO ST. L.J. 773, 775 (1987); Shannon Weeks McCormack, *Tax Abuse According to Whom?*, 15 FLA. TAX REV. 1, 52 (2013); Kristin E. Hickman, *Goodbye Tax Exceptionalism*, 12 ENGAGE 6 (2011), <http://www.fed-soc.org/publications/detail/goodbye-tax-exceptionalism> [<https://perma.cc/YGP7-9V77>]. See generally Administrative Procedure Act, 5 U.S.C. § 551 (2012).

17. See 5 U.S.C. § 553 (2012).

18. See *infra* Section I.C.

19. See Second Report to the President on Identifying and Reducing Tax Regulatory Burdens, 82 Fed. Reg. 48,013, 48,014 (Oct. 16, 2017) (to be codified at 26 C.F.R. pts. 1 & 301).

20. See Reducing Regulation and Controlling Regulatory Costs, 82 Fed. Reg. 9,339, 9,339 (Feb. 3, 2017).

21. *Simonsen v. Comm'r*, No. 29698-14, 2018 WL 1320362, at \*10 (T.C. Mar. 14, 2018).

22. See Second Report to the President on Identifying and Reducing Tax Regulatory Burdens, 82 Fed. Reg. at 40,014.

many instances the law as enacted will not produce the revenue it is estimated to produce. This puts pressure on the federal budget, which assumes the implementation of the law.

To improve the revenue-raising side of the budget, this Article argues that there is good cause to except most, if not all, tax rules from the notice-and-comment procedure.<sup>23</sup> Although Congress rarely explicitly enacts deadlines for when tax regulations must be issued, Congress builds into tax legislation an expectation that the system will affect taxpayers immediately, often demanding many detailed and complex regulations. The compounding effect of numerous new tax statutes and changes to existing tax provisions renders impossible strict compliance with the APA while maintaining a workable revenue-raising regime as envisioned by Congress. Even though budgeting assumptions are fallible, the Treasury Department should operationalize the law that is enacted, enabling policymakers to make budget choices better understanding the consequences of those choices.

This Article proceeds in four parts. In Part I, this Article examines the budgeting process and how Congress fits tax provisions into its budget. Regulations and other tax guidance materials help make the tax system operational and, as such, play an integral part in the congressional budgetary plan.<sup>24</sup> As shown in the estimates used in the budget process to reconcile spending with revenue, Congress generally expects tax statutes to raise revenue as it spends that money in the same legislative cycle. Failure of the tax system to fulfill its budgetary role can result in negative effects, such as automatic reduction in spending.<sup>25</sup>

Part II examines the Treasury Department's process for promulgating regulations. Additionally, Part II analyzes the financial penalties taxpayers face if they fail to follow tax regulations. Currently these penalties apply even if regulations have not gone through notice and comment.<sup>26</sup> These issues have been the subject of many recent cases discussed in Part II.<sup>27</sup> In particular, this Part examines the tension with the APA created by temporary tax regulations.

Part III analyzes the APA's good cause exception from notice and comment as well as a good cause exception from the thirty-day waiting period for regulations to become effective following

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23. *But see* Jonathan Olsen, Note, *The Unique Case of Treasury Regulations Issued to Prevent Abuse*, 4 COLUM. J. TAX L. 174, 179-80 (2013).

24. *See infra* Section I.A.

25. *See infra* Section I.B.

26. *See infra* Subsection II.B.2.

27. *See infra* Part II.

publication.<sup>28</sup> Although the good cause exception is generally interpreted narrowly, it has a role to play when agencies need to enact revenue-raising rules.<sup>29</sup> This reliance on exceptions from notice and comment is not unusual. All federal agencies, not merely the Treasury Department, are increasingly relying on exceptions in order to issue regulations to the public because of the costs of notice and comment.<sup>30</sup>

The Article concludes that thwarting Congress's expectations by delaying the issuance of regulations threatens the nation's ability to raise revenue to pay its bills. That need provides good cause for the prompt issuance of regulations, which may already be delayed by the political process. Because regulations help ensure statutes reflect Congress's expected cost of activities, limiting regulations risks sending the wrong signals to taxpayers as they plan their activities and to IRS personnel when they audit those activities. Therefore, courts should accept the Treasury Department's claim of good cause for the issuance of tax regulations, particularly when the regulations implement revenue-raising provisions.<sup>31</sup>

The approach advocated in this Article is consistent with the current jurisprudence on the good cause exception. Nevertheless, this use of the exception is likely to be seen as broadening current jurisprudence. Ideally, Congress could legislate a tax-specific exception to notice and comment to nullify the debate. This would not be unprecedented as Congress has legislated an exemption for tax from most pre-enforcement litigation.<sup>32</sup> However, in the current political environment, it is unlikely that Congress will do so. Without

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28. See *infra* Part III; see also 5 U.S.C. § 553(b)(3), (d) (2012); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (analyzing the differences between the good cause exception to the thirty-day waiting requirement and the good cause exception to notice and comment).

29. See *infra* Part II.

30. See *id.* The Government Accountability Office found approximately 35% of major rules and 44% of nonmajor rules were issued without notice and comment between 2003 and 2010. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-21, *FEDERAL RULEMAKING: AGENCIES COULD TAKE ADDITIONAL STEPS TO RESPOND TO PUBLIC COMMENTS* (2012); see also Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695, 695 (2007); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1123 (2009).

31. If Congress changes its budgeting process not to expect current application of tax statutes, this argument would no longer hold true.

32. The Anti-Injunction Act, now in § 7421 of the Code, denies injunctive relief by generally prohibiting "suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such taxes was assessed." 26 U.S.C. § 7421(a) (2012). The Declaratory Judgment Act contains a broader tax exception that prevents courts from providing declaratory relief for controversies "with respect to Federal taxes." § 2201(a) (2012).

that action, this proposal provides the second-best approach: a strong litigation strategy justifying the prompt issuance of tax rules implementing congressionally crafted laws as a much-needed backstop for the American budget in the face of complicated congressional politics.

## I. TAX AS PART OF BUDGETING

Every year the federal government enacts many tax provisions of varying sizes and political import. For example, between 1986 and 2005, Congress enacted almost 15,000 changes to the Code or more than two per day.<sup>33</sup> Some of these changes were part of major pieces of legislation. Others were technical revisions correcting prior typographical errors.<sup>34</sup> All enacted legislation follows a similar path but with different amounts of congressional and popular attention. Demand for a balanced budget drives many of the bigger changes, and a lack of deficit may even be required in the budgeting process.<sup>35</sup> Therefore, the revenue impact of tax law changes is often critical to their form and justification.

### A. Creating the Federal Budget

The enactment of tax legislation requires a complex interplay between the executive and legislative branches of government because tax legislation is part of the federal budget process.<sup>36</sup> However, that interplay usually focuses on the federal budget generally, rather than on tax alone.<sup>37</sup> Even when tax legislation is considered in isolation, particular revenue effects drive the process: revenue neutrality, the need to raise revenue, or the need to grant a certain amount of tax reduction.<sup>38</sup> Therefore, tax legislation is often seen as a tool for raising a given amount of money and, even when also viewed as a means to

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33. PRESIDENT'S ADVISORY PANEL ON FEDERAL TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM (2005).

34. *See id.*

35. *See* 31 U.S.C. § 1103 (2012).

36. The federal government's fiscal year begins on October 1. *See* 31 U.S.C. § 1102 (2012).

37. Existing budgeting procedures recognize policymakers' inability to simultaneously compare all factors affecting the economy and society. *See* Elizabeth Garrett, *Rethinking the Structure of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 397 (1998). However, other processes might be no simpler. *See id.* at 444-45.

38. *See id.* at 398.



accomplish social or fiscal objectives, the estimated revenue impact is critical to congressional and presidential approval.<sup>39</sup>

### 1. *Enacting Tax Legislation as Part of the Budget*

Although the president often starts the dialogue over tax legislation with a proposed budget, the Constitution requires that all tax legislation originate in the House of Representatives and be approved by both houses of Congress.<sup>40</sup> As between the branches of government and within Congress, political compromise over tax legislation is often difficult. Rarely does either political party have control over both houses of Congress and the presidency and, even when one does, the party may not be cohesive.<sup>41</sup> Nevertheless, tax legislation is often required in order to satisfy requirements of the national budget that is required by federal law for each fiscal year.<sup>42</sup> The creation of a budget, of which tax revenue is one part, is long and labor intensive. Budget volumes reach eight to twelve feet high when printed.<sup>43</sup> Within this process, Congress often finds it easier to spend money than to raise it, with the result that Congress has tied its hands procedurally to increase the likelihood that sufficient tax revenue is raised to fund its spending.

The Budget Control Act of 1974 requires that the House of Representatives and Senate pass resolutions that contain budget targets for the budget window period, currently ten years.<sup>44</sup> Congress passed the Budget Control Act to respond to the president's greater influence as the instigator of budgets.<sup>45</sup> These congressional resolutions are to permit Congress to recapture the process by coordinating its budget-related legislation.<sup>46</sup> However, although

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39. See *id.* at 409.

40. U.S. CONST. art. I, § 7. Pursuant to federal law, the president must submit a budget to Congress before the first Monday of each February. See 31 U.S.C. § 1105(a) (2012).

41. Negotiating budgets has grown more contentious. See Joseph Bafumi, *The Senate Budget Committee: The Impact of Polarization on Institutional Design*, 34 PS: POL. SCI. & POL. 161, 166 (2012).

42. See 31 U.S. § 1105(a).

43. DANIEL BERMAN & VICTORIA HANEMAN, *MAKING TAX LAW* 7 (2014).

44. See 2 U.S.C. § 632 (2012). The budget resolution must cover at least five fiscal years but has covered up to eleven years. *Id.*

45. See *id.* § 621.

46. See ALLEN SCHICK, *THE FEDERAL BUDGET PROCESS: POLITICS, POLICY, PROCESS* 119-20 (2007). Congress can change the procedures of the budget resolution by majority vote, reducing any stability in the budgeting process when it relies on these resolutions. House rules are readopted every year and can be changed by a simple majority; in the Senate, rules continue until amended and are subject to a filibuster except, perhaps oddly, budget-related rules through the budget resolution.

budget resolutions cannot be filibustered, they are generally only passed if one party has a 50% majority in both houses. If passed, these resolutions have no legal effect but are a framework for deciding revenue, spending, and other financial decisions.<sup>47</sup>

Budget resolutions often demand a certain amount of revenue be “saved” by designated committees.<sup>48</sup> Within the House, primary responsibility for tax legislation has been delegated to the House Committee on Ways and Means.<sup>49</sup> Once the House agrees on a draft bill, the bill goes to the Senate for the Senate’s consideration. The Senate’s committee comparable to Ways and Means is the Senate Committee on Finance.<sup>50</sup> Under a budget resolution, these committees are to report the amount they reduce spending, but the rules of regular budget resolutions do not force compliance by the committees, and committees are free to determine how the savings will be accomplished.<sup>51</sup> Notwithstanding these demands, few of the savings sought by budget resolutions are ever enacted.<sup>52</sup>

Thus, although in the strongest sense budget committees direct how much revenue tax committees should raise, the substance of tax legislation remains framed by the Ways and Means and Finance Committees.<sup>53</sup> Unlike with other legislation, tax committees and the

See Adopting Rules for the One Hundred Fifteenth Congress, H.R. Res. 5, 115th Cong. (2017); Standing Rules of the Senate, S. Res. 285, 113th Cong. (2013).

47. Adjustments to increase revenue are generally made through the tax code; changes to spending are generally for other committees but focus on mandatory, as opposed to discretionary, spending. See Molly Reynolds, *Picking the Pivot: Use and Consequence of the Budget Reconciliation Procedures in the United States Senate*, ASPA 2013 ANN. MEETING PAPER 7 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2300328](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2300328) [<https://perma.cc/36TL-UPQN>].

48. See H.R. Comm. Jurisdiction—Ways and Means, <https://waysandmeans.house.gov/committee-jurisdiction/> [<https://perma.cc/6S5B-SPZY>] (last visited Oct. 8, 2018).

49. See *id.* (indicating that drafting varies depending upon the issue); see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 575-76 (2002) (following interviews of staff of the Judicial Committee).

50. See S. Comm. on Fin., *Jurisdiction*, SENATE.GOV, <https://www.finance.senate.gov/about/jurisdiction> [<https://perma.cc/XND2-3A72>] (last visited Oct. 8, 2018).

51. See ALLEN SCHICK, RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS 6 (1981).

52. See *id.*

53. However, tax expenditures, or subsidies delivered through the tax system rather than as direct spending, are not directly included in the budget and totaled more than \$1.2 trillion in 2016, or more than all discretionary spending that year. See JOINT COMM. ON TAX’N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020, JCX-3-17 (2017).

full houses of Congress do not always use proposed statutory language as the basis of their discussion of tax bills.<sup>54</sup> Instead of statutory language, debate over most tax legislation proceeds from narrative descriptions that focus on the concepts. These descriptions of legislative proposals are written by the Joint Committee on Taxation (JCT).<sup>55</sup> The staff of the JCT, acting in the same way as outside attorneys to a client, translate technical jargon and legal concepts to the lay members of Congress, who vote based on these descriptions.<sup>56</sup> These JCT-produced conceptual descriptions might be the best method for assuring that members of Congress understand the content of the legislation before they vote.<sup>57</sup> Nevertheless, the bill's final language may be intentionally ambiguous or unintentionally vague because of a lack of sufficient time to clarify the language.<sup>58</sup>

This committee-powered approach has weakened in recent years with the rise of political partisanship.<sup>59</sup> Today, political parties are more ideological and cohesive than in prior decades, giving their leaders tremendous power.<sup>60</sup> As party leaders gained power over the shape of legislation, the House's Ways and Means Committee's role declined.<sup>61</sup> This has resulted in new members working in the committee and it having less influence over tax legislation in the full House.<sup>62</sup> This is also evidenced by the committee's limited role in developing recent tax legislation.<sup>63</sup>

The power of the tax committees also responds to other political constraints. The House Committee on Rules has tremendous power over the fate of tax legislation because it sets the parameters of debate

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54. See BERMAN & HANEMAN, *supra* note 43, at 264; JOINT COMM. ON TAX'N, ABOUT THE JOINT COMM. ON TAXATION 5-7, <https://www.jct.gov/publications.html?func=startdown&id=1174> [<https://perma.cc/4GTR-KA7D>] (last visited Oct 8, 2018).

55. See George K. Yin, *The Role of Nonpartisan Staff in the Legislative Process*, 139 TAX NOTES 1415, 1417-19 (2013); Shapiro, *supra* note 9.

56. See Shapiro, *supra* note 9.

57. See *id.*

58. See Victoria F. Nourse & Jane S. Schacter, *supra* note 49, at 594-97.

59. See Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702, 706-07 (2000).

60. See BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 166-67 (5th ed. 2017).

61. See George Yin, *Crafting Structural Tax Legislation in a Highly Polarized Congress*, 81 L. & CONTEMP. PROBS. 1, 250 (2018).

62. See BERMAN & HANEMAN, *supra* note 43, at 18-21, 51-53, 151; Yin, *supra* note 61, at 241, 242, 244, 250.

63. See generally H.R. Con. Res. 1, 115th Cong. (2018).

in the full House.<sup>64</sup> The Rules Committee can either set a closed rule, so the bill must be accepted or rejected in its entirety, or a modified closed rule, permitting specific amendments and limiting the hours of debate.<sup>65</sup> Therefore, the Rules Committee determines whether Representatives can delay a vote in the House.<sup>66</sup> For example, in the Tax Cuts and Jobs Act of 2017, the House's Rules Committee limited debate to four hours, divided equally between the parties with all points of order or intervening motions waived.<sup>67</sup>

When the Senate's Finance Committee considers tax legislation, it has less support from its Rules Committee because the Senate's Rules Committee is not as powerful as its House counterpart.<sup>68</sup> A vote for cloture is normally required to end debate and call a measure to vote in the Senate, which can end a filibuster.<sup>69</sup> Cloture requires a three-fifths vote of the Senate (or sixty Senators) and, if passed, cloture allows for thirty hours of additional debate followed by a vote on the bill.<sup>70</sup>

Because of political disagreements and without a strong Rules Committee in the Senate, tax legislation risks filibuster in that house, in which a group of Senators can talk on the floor of Congress to delay or defer a vote on legislation.<sup>71</sup> Because neither political party may have sufficient votes for cloture, Congress created a mechanism to get budget legislation to a vote, called the reconciliation process, in the Budget Control Act of 1974.<sup>72</sup> In addition to the regular budget resolution, reconciliation requires that the House and Senate agree on a budget resolution that includes "reconciliation directives" for specific committees.<sup>73</sup> This also means that reconciliation is only

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64. See H.R. Comm. on Rules, *About the Committee on Rules - History and Processes*, HOUSE.GOV, <https://rules.house.gov/about> [<https://perma.cc/QLQ9-RE69>] (last visited Oct. 8, 2018).

65. See *id.*

66. See H.R. Res. 619, 115th Cong. (2017).

67. See *id.*

68. See Christopher M. Davis, *Invoking Cloture in the Senate*, CONG. RES. SERV. 98-425 (2007), <https://www.senate.gov/CRSPubs/be873e40-a966-4feb-9d72-cf23a93cbe46.pdf> [<https://perma.cc/QTX3-SRC6>].

69. See *id.*

70. See *id.*

71. For a discussion of the history of cloture, see Bill Dauster, *The Monster that Ate the United States Senate*, 18 PUB. BUDGETING & FIN. 87, 88-90 (1998).

72. See 2 U.S.C. § 641 (2012). For more on the history of reconciliation, see Richard Doyle, *Congress, the Deficit, and Budget Reconciliation*, PUB. BUDGETING & FIN. 59 (1996). See also generally Anita S. Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget Train Wreck*, 35 HARV. J. ON LEGIS. 589 (1998).

73. David Reich & Richard Kogan, *Introduction to Budget "Reconciliation"*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (Nov. 9, 2016),

possible if a budget resolution can be passed because of sufficient control over both houses of Congress.

The reconciliation process eliminates the risk of a filibuster because it frames committees' agendas, reduces the necessary vote for passing a bill to 50% of the Senate, and limits debate to twenty hours in the Senate and to ten hours for conference compromises.<sup>74</sup> Although similar rules apply in the House of Representatives, its Rules Committee often imposes even more limiting restrictions.<sup>75</sup> Therefore, reconciliation helps ensure budgeting legislation makes it out of the Senate quickly and without a super-majority vote.

Reconciliation requires the committees designated in the budget resolution to prepare and report legislation by a certain date.<sup>76</sup> In the first year reconciliation was used, 1980, twenty committees participated and, in 1981, thirty committees did.<sup>77</sup> Committees are told to either (1) increase or decrease spending, (2) increase or decrease revenue, or (3) raise or lower the public debt limit.<sup>78</sup> This language limiting actions to three groups of activities has been interpreted to mean that there can only be three bills per budget resolution, and if a bill covers more than one subject the number of permissible bills is reduced.<sup>79</sup> Additionally, reconciliation is not to be used to change the law in ways that do not affect the budget unless the change is necessary for a budget-altering provision.<sup>80</sup>

With the concurrent resolution calling for reconciliation, the Committee on the Budget (which includes, among others, members of the Committees on Ways and Means, Appropriations, and Rules)

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<https://www.cbpp.org/sites/default/files/atoms/files/1-22-15bud.pdf>  
[<https://perma.cc/3Z2X-B88X>].

74. See *id.* at 3. When the House of Representatives and Senate do not agree on the same version of a tax bill but pass a bill of the same number, a conference is formed of Representatives and Senators from the Committees on Ways and Means and Finance. See Elizabeth Rybicki, *Resolving Legislative Differences in Congress: Conference Committees and Amendments Between the Houses*, CONG. RESEARCH SERV. 98-696, 11 (2018). The conference is only to consider disputed parts of the bill. See H. Rule XXII; S. Rule XXVIII. Drafting by conference may be particularly problematic because of pressures in time. See Nourse & Schacter, *supra* note 49, at 593, 599. If the conference reaches a compromise, the compromise bill then goes to each house for a vote. See U.S. CONST. art I, § 7. If approved by each house of Congress, the approved bill goes to the president for the president's signature. See *id.*

75. See Reich & Kogan, *supra* note 73, at 4.

76. See Megan S. Lynch, *The Budget Reconciliation Process: Timing of Legislative Action*, CONG. RES. SERV. RL30458, 5 (2016) (providing more on reconciliation).

77. See SCHICK, *supra* note 51, at 2.

78. See *id.* at 4.

79. See *id.*

80. See *id.*

establishes the aggregate amount of revenue to be raised as part of the reconciliation process.<sup>81</sup> The Ways and Means Committee must raise at least that much tax revenue. The tax committees are able to structure the tax laws to raise that revenue as they like—subject only to getting the final provisions through the full houses and signed by the president.<sup>82</sup> By setting the target, however, the reconciliation process limits the tax committees' freedom to enact or revise tax legislation if proposals are not within their respective committees' revenue targets.<sup>83</sup> It also means that members of Congress may be less concerned about the specifics of proposals than their cumulative effects.<sup>84</sup>

The reconciliation process has proven popular. After first being used in 1980, twenty reconciliation bills were enacted before 2016.<sup>85</sup> Four others were approved by Congress but vetoed by the president.<sup>86</sup> Despite its popularity, the process has been critiqued for preventing fundamental reform by producing fragile and narrow legislative changes rather than well-thought-out substantive change.<sup>87</sup>

This process is also powerful. Although reconciliation was created at a time when the focus was on deficits, by 1996, Republicans argued that it could be used to increase the deficit.<sup>88</sup> Over its life, reconciliation has been used to decrease and increase deficits—the former is illustrated with the Reagan budget in 1980 and the latter with the Bush tax cuts.<sup>89</sup> In 2007, Congress adopted rules to prohibit its use to increase deficits, but the limit was eliminated in the House in 2011

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81. *See id.* at 3.

82. *See id.* at 21.

83. *See* Beth C. Fuchs & John F. Hoadley, *Reflections from Inside the Beltway: How Congress and the President Grapple with Health Policy*, 20 PS: POL. SCI. & POL. 212, 217 (1987). This is a simplified description of reconciliation; the process is more complicated because of the interplay between taxing and spending programs in a budget bill.

84. *See id.* at 213.

85. *See id.*; Lynch, *supra* note 76, at 5.

86. *See* Reich & Kogan, *supra* note 73, at 1.

87. *See* Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2124 (2013).

88. *See id.*

89. *See generally* Jobs and Growth Tax Relief Reconciliation Act of 2003, 26 U.S.C. § 6429, 42 U.S.C. § 801 (2012); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.); Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599.

and in the Senate in 2016.<sup>90</sup> Reconciliation was again used to increase deficits with the 2017 Tax Cuts and Jobs Act.<sup>91</sup>

However, even when reconciliation does not prevent a deficit, it limits the size of the deficit. For example, in 2017, the Senate Budget Committee Chairman called for the Finance Committee to produce a revenue bill that would “increase the deficit by no more than \$1.5 trillion” over ten years.<sup>92</sup> Thus, tax cuts were the call for the day, but they were not to be unlimited. Even when Congress feels free to spend revenue, in the budgeting process Congress recognizes that this spending power is not unlimited.

The Senate supplemented reconciliation with the Byrd Rule, codified in 1985.<sup>93</sup> The Byrd Rule establishes a point of order, or parliamentary objection, against Senators amending a reconciliation bill with unrelated provisions, including any amendment to the bill that does not involve revenue matters or that decreases federal revenue after the ten-year period begun by the concurrent resolution starting the reconciliation process.<sup>94</sup> A successful point of order strikes the extraneous provision but retains the rest of the bill.<sup>95</sup> For example, in 2017 the Senate parliamentarian blocked repeal of the Johnson amendment that would have allowed 501(c)(3)’s, including churches, to endorse candidates as not having a budgetary impact.<sup>96</sup> A supermajority vote of Senators is required to retain the offending provision.<sup>97</sup> The Byrd Rule applies only in the Senate, but the House’s Rules Committee can set equivalent rules in its discretion.

This Article is not in support of the use of budget resolutions or the reconciliation process; that discussion is beyond the scope of this work. Regardless of its value, the fate of much tax legislation hangs on the Byrd Rule’s limit on amendments and the permissive majority vote of reconciliation. Without these rules, much tax legislation would fail. For example, the Tax Cuts and Jobs Act of 2017 would not have

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90. See Reich & Kogan, *supra* note 73, at 4.

91. See generally Tax Cuts and Jobs Act of 2017, Pub L. No. 115-97, 131 Stat. 2054 (2017).

92. See H.R. Con. Res. 71, 115th Cong. (2017).

93. See generally 2 U.S.C. § 644 (2012). After years as a Senate Rule, the Byrd Rule was codified. See *id.*; see also *id.* §§ 636, 641.

94. See § 20001, 100 Stat. at 390-91.

95. See *id.*; § 644.

96. See Sally Persons, *Johnson Amendment, Measure to Allow Churches to Endorse Candidates, Removed From Tax Plan*, WASH. TIMES (Dec. 15, 2017), <https://www.washingtontimes.com/news/2017/dec/15/johnson-amendment-measure-to-allow-churches-to-end/> [<https://perma.cc/UUJ4-N2MU>].

97. See § 20001, 100 Stat. at 390-91.

passed if a supermajority were required.<sup>98</sup> Tax policy is, therefore, greatly impacted by the budgeting process and its dependence upon raising revenue or framing tax cuts.

A side effect is that, although the Ways and Means and Finance Committees are delegated the responsibility for drafting tax legislation, they do not have free reign to do so. Even when cutting taxes, the process for creating new tax legislation is bound by structural limits to contain the size of the federal budget deficit. These processes link taxing and spending and force tax legislation that raises targeted amounts of revenue. To a real extent, Congress depends upon descriptions of tax legislation in their debates over proposed changes and of those changes' revenue effects to decide on the best choice of tax legislation.

## *2. Estimates of Revenue Are a Necessary Evil*

The budgeting process depends upon estimates of revenue and spending. These estimates of how much money Congress spends and how much revenue it raises under current law and with proposed tax changes dictate whether the budget is considered to be balanced.<sup>99</sup> These estimates are necessarily imprecise because the real-world results depend upon the public's responses to the law and to other variables; thus, flawed sources are a cornerstone of Congress's decision-making process.<sup>100</sup> Even if the estimated revenue effects prove inaccurate, Congress uses them to choose among many different programs and tax possibilities.<sup>101</sup> "Those estimates often play a critical role in congressional deliberations and public discussion."<sup>102</sup> If the estimates were known to be incorrect at the time, it might change the law Congress enacts.

The difficult task of estimating the revenue effects of current and proposed legislation is delegated to the JCT or the Congressional

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98. See generally Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017). The law passed in the House by 227-203 (52.8%) and in the Senate by 51-49 (51.0%). *All Information (Except Text) for H.R.1 - An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018*, CONGRESS.GOV <https://www.congress.gov/bill/115th-congress/house-bill/1/all-info?r=1> [<https://perma.cc/6EZF-VUG7>] (last visited Oct. 8, 2018).

99. See Cheryl D. Block, *Budget Gimmicks*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 4 (2007).

100. See *id.* at 5.

101. Douglas W. Elmendorf, "Dynamic Scoring": *Why and How to Include Macroeconomic Effects in Budget Estimates for Legislative Proposals*, BROOKINGS PAPERS ON ECON. ACTIVITY 91, 91 (2015).

102. *Id.*



Budget Office (CBO). The JCT is the older organization, formed in 1926, and is the principal adviser to congressional tax-writing committees.<sup>103</sup> The JCT's power has diminished in recent decades because of the proliferation of other sources of information, namely committee staffs and lobbyists.<sup>104</sup> The CBO was created in 1974 by the same Budget Control Act that created the budget resolution and reconciliation processes.<sup>105</sup> The CBO serves congressional budget committees rather than tax committees.<sup>106</sup> Focusing on the budget, the CBO analyzes overall spending and revenue rather than the specific tax provisions the JCT analyzes. These committees' reputations are as relatively objective and nonpartisan institutions that try to predict how much revenue will be raised or lost and from which group of taxpayers will the money come or go.

Upon request from members of Congress of both political parties and in both houses, these two organizations create tables that provide a revenue number for each proposal.<sup>107</sup> That revenue number is coupled with information regarding the revenue and distributional consequences of legislative proposals. Despite the effort put in the creation of these estimates, no estimate is perfect and no method infallible. These advisors cannot precisely predict the effects of policies on the distribution of income and wealth. Nevertheless, despite their imperfections, these estimates are scientific, and the specialists who create budget estimates are highly trained in taxation and economics.

To begin the estimation process, the CBO and JCT create a baseline of forecasted expenditures and revenue based on current policy as they define it and, against that baseline, the agencies score proposed changes.<sup>108</sup> Therefore, scoring is what determines the cost and benefit of proposals, but that scoring depends upon the baseline, so it is important that old estimates be accurate. Baselines are generally not updated, opening estimates to critique, but the resulting consistency arguably permits a better comparison of numbers over

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103. See George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 795 (2013).

104. See *id.* at 788.

105. See generally Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified in scattered sections of 2 U.S.C.).

106. See *id.* § 301. For more on the CBO, see generally CONG. BUDGET OFFICE, AN INTRODUCTION TO THE CONGRESSIONAL BUDGET OFFICE (2016), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/2016-IntroToCBO.pdf> [<https://perma.cc/AZ23-653W>].

107. See Elmendorf, *supra* note 101, at 94.

108. See *id.*

time.<sup>109</sup> For purposes of proposed tax changes required by budget resolutions, the CBO provides the baseline, and the JCT completes the scoring.<sup>110</sup> Most legislation is scored for the ten-year budget period.<sup>111</sup> Thus, the federal budget is measured over ten years, and not on an annual basis, in recognition of the ebbs and flows of the economy.

Not everything is scored using the same process. Proposed tax expenditures, taken as part of the baseline once enacted, are scored based on a five-year window by the JCT in conjunction with the Treasury Department's Office of Tax Analysis (OTA).<sup>112</sup> Although required as part of the budget process, the Tax Expenditure Budget of existing tax expenditures is informational and is not a constraint on congressional spending.<sup>113</sup> Therefore, funding for tax expenditures continues indefinitely until Congress modifies or repeals the provision.

To create estimates incorporating potential changes in taxpayer behavior, agencies create economic models based on assumptions about how people respond to changes in their personal economic situations, and those assumptions can be challenged and revised.<sup>114</sup> Both the CBO and JCT have a range of predicted behavioral responses that they determine based on formal statistical analyses and anecdotal evidence.<sup>115</sup> Starting in 2003, the process incorporated macroeconomic data and, as of 2015, requires dynamic scoring in certain circumstances.<sup>116</sup>

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109. See generally David Kamin & Rebecca Kysar, *Temporary Tax Laws and the Budget Baseline*, 157 TAX NOTES 125 (2017); Jared Shirck & Francis Shen, *The Role of Estimation in Budget Procedures: Baseline* (2005), [http://www.law.harvard.edu/faculty/hjackson/Baselines\\_4.pdf](http://www.law.harvard.edu/faculty/hjackson/Baselines_4.pdf) [<https://perma.cc/TA5J-JTVP>] (last visited Oct. 8, 2018).

110. See Alan Auerbach, *Dynamic Scoring: An Introduction to the Issues*, 95 AM. ECON. REV. 421, 421 (May 4, 2005). For tax and spending bills the committees work together to create estimates. See Elmendorf, *supra* note 101, at 94.

111. This time frame can change. In 1981, when reconciliation was first used, the window was three fiscal years, extended to five years in 1990, and then to ten years in 2002. See Dylan Moroses & Stephen Cooper, *Questions Raised on Budget Window Extension for Tax Reform*, 155 TAX NOTES 893, 893 (2017).

112. See JOINT COMM. ON TAX'N, *supra* note 53, at 1.

113. See *id.* at 22.

114. See Elmendorf, *supra* note 101, at 98.

115. See *id.* at 95.

116. See S. Con. Res. 11, 114th Cong. (2015); H. Res. 5, 108th Cong. (2003); Elmendorf, *supra* note 101, at 92. For more on dynamic scoring, see DOUGLAS HOLTZ-EAKIN & MICHAEL MANDEL, DYNAMIC SCORING AND INFRASTRUCTURE SPENDING 4 (2015); Paul Van de Water & Chye-Ching Huang, *Budget and Tax Plans Should Not Rely on "Dynamic Scoring,"* CTR. ON BUDGET & POL'Y PRIORITIES 1, 4 (2014); see also Auerbach, *supra* note 110, at 421.

Today, the CBO and JCT use dynamic scoring as an economic forecasting model that evaluates the impact a proposal would have on the aggregate economy, including secondary positive or negative effects.<sup>117</sup> These effects include such things as increases in labor supply or investment. Before dynamic scoring, only the immediate effects of tax cuts, tax hikes, or tax benefits were considered. Dynamic scoring is hoped to present a more complete estimation of a bill's effects; however, one proponent of dynamic scoring warned of the difficulty of preparing this type of estimate: "[e]ven if using rules of thumb to estimate macroeconomic effects could improve the accuracy of budget estimates on average, doing so would endanger the credibility of the estimating process."<sup>118</sup>

The executive branch has its own creators of budget estimates: the OTA and the Office of Management and Budget (OMB).<sup>119</sup> The OTA is the executive branch's counterpart to the JCT, and it houses economists and legal advisors to the Secretary of the Treasury who handle most of the executive branch's tax and tax-related planning.<sup>120</sup> The OMB is the executive branch's counterpart to the CBO, but it rarely deals directly with tax matters.<sup>121</sup>

Notwithstanding agencies' best efforts, they are notorious for not interpreting proposals' effects in similar ways. For example, the JCT expected President George Bush's proposed reduction of capital gain rates to lose \$11.4 billion in federal revenue over five years, but the OTA expected it to increase revenue by \$12.5 billion.<sup>122</sup> These two very different predictions resulted from different assumptions regarding how people would respond to changed rates.<sup>123</sup> Because of the human factor in the economy, there is some amount of subjectivity in agencies' analysis. Nonetheless, the validity of these estimates is critical to the budget process.<sup>124</sup>

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117. See Auerbach, *supra* note 110, at 421.

118. Elmendorf, *supra* note 101, at 111.

119. See Office of Mgmt. & Budget, *Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, [https://obamawhitehouse.archives.gov/omb/organization\\_mission/](https://obamawhitehouse.archives.gov/omb/organization_mission/) [<https://perma.cc/3M3F-SE3Q>] (last visited Oct. 8, 2018).

120. See *Tax Analysis*, U.S. DEP'T. OF TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Tax-Analysis.aspx> [<https://perma.cc/23UE-2WGB>] (last visited Oct. 8, 2018).

121. See Office of Mgmt. & Budget, *supra* note 119.

122. JOINT COMM. ON TAX'N, JCX-5-90, ESTIMATE OF ADMINISTRATION PROPOSAL FOR A REDUCTION IN TAXES ON CAPITAL GAINS OF INDIVIDUALS (1990); CONG. BUDGET OFFICE, THE DISTRIBUTION OF BENEFITS FROM A REDUCTION IN THE TAX RATE ON CAPITAL GAINS (1989).

123. See JOINT COMM. ON TAX'N, *supra* note 122.

124. See Elmendorf, *supra* note 101, at 106.

Some inaccuracies cannot be mitigated because they result from later changes in the law. For example, in January 2001, the CBO projected a \$5.6 trillion budget surplus between 2002 and 2011 that turned into a \$6.1 trillion deficit. However, 25% of the swing was the result of enacted tax reductions, 35% was increased spending, and an estimated 38% was an undefined “economic and technical” change that served as a catchall for things non-legislative.<sup>125</sup> Thus, changing law and changing conditions impact the estimates’ accuracy.

With estimates complexity and inherent fallibility, members of Congress may not fully understand the assumptions upon which estimates are based or their limits.<sup>126</sup> Professor Michael Graetz complains that policymakers frequently do not understand the differences between various estimates or what information each one lacks.<sup>127</sup> The differences are fundamental, starting from different baselines and with different economic premises, including different predicted reactions. For example, baselines may, or may not, assume that expiring tax provisions will be extended and may develop different definitions of income.<sup>128</sup> Similarly, tables may include people who are not tax return filers or be limited to people who pay income tax.<sup>129</sup>

Regardless of Congress’s full comprehension of these estimates, estimates are the basis of tax legislation and are critical to the budgetary process. Congress makes choices based on this imperfect source. In particular, tax provisions are enacted with an expectation that they will raise a certain amount of money and spending is then tied to those revenue estimates. These estimates are the backbone of a budgeting system that creates targets for revenue and expenditures.

## B. Problems if the Budget Fails

Under today’s budgeting procedures, Congress does not have to balance the budget as there is no federal constitutional requirement for a balanced budget. Nevertheless, Congress sets targets for how large the deficit will be. Rhetorically, deficits are hard to sell to an American

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125. CONG. BUDGET OFFICE, CHANGE IN CBO’S BASELINE PROJECTIONS SINCE JANUARY 2001 (2012).

126. The reliance on estimates encourages budgetary gimmicks; members of Congress enact artificial or distortionary changes to alter budgetary numbers. *See Testimony Before the Subcommittee on Select Revenue Measures of the Committee on Ways and Means*, 112th Cong. 3-4 (June 8, 2012) (statement of Donald Marron).

127. Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 626 (1995).

128. *See id.* at 676.

129. *See id.* at 642-43.

public that consistently calls for deficit reduction.<sup>130</sup> Economically, deficits must be funded with borrowing, and the cost in diverted investments and interest payments takes a toll on the nation's economic health.<sup>131</sup> Thus, political demands and the debt limit are the primary constraints on unlimited spending or tax cuts.

Congress has tried other means to bind itself to a more-or-less balanced budget. Congress has enacted federal legislation and rules in each house requiring balanced budgets, but all requirements permit exceptions with a sufficiently large majority vote.<sup>132</sup> In the end, only the need to finance the deficit ensures Congress controls its own excesses. The structural and political need to balance the budget is counterbalanced by the political difficulty of doing so.<sup>133</sup>

Although budget resolutions were introduced in 1974, it was not until 1985 that Congress tried to force itself to balance the budget.<sup>134</sup> With the passage of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as Gramm-Rudman-Hollings, Congress imposed punishments for failing to reduce deficits.<sup>135</sup> Under Gramm-Rudman-Hollings, if deficit targets were not met, automatic across-the-board spending cuts took effect.<sup>136</sup> This sequestration of funds proved unpopular and resulted in more gimmicks than deficit reduction.

Congress changed its approach in 1990 with the Budget Enforcement Act in which Congress set caps on spending and implemented a pay-as-you-go (PAYGO) backstop that demanded any increase in spending be currently offset with increases in revenue or

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130. See Andrew Kohut, *Debt and Deficit: A Public Opinion Dilemma*, PEW RES. CTR. (June 14, 2012), <http://www.people-press.org/2012/06/14/debt-and-deficit-a-public-opinion-dilemma/> [<https://perma.cc/G977-B5MZ>]; *Federal Budget Deficit*, GALLUP, <http://news.gallup.com/poll/147626/federal-budget-deficit.aspx> [<https://perma.cc/8SJJ-DRUA>] (last visited Oct. 8, 2018).

131. See William G. Gale & Peter R. Orszag, *Economic Effects of Sustained Budget Deficits*, 56 NAT. TAX J., 463, 463-64 (2003).

132. As recently as 1995, a balanced budget amendment to the Constitution failed in the Senate by only one vote. See Richard Doyle, *Congress, the Deficit, and Budget Reconciliation*, PUB. BUDGETING & FIN. 59, 60 (1996).

133. Not all legislation has a significant enough impact to affect the budget. For example, technical corrections have little revenue impact. In the first instance, the correction must not necessitate a tax policy discussion. Moreover, it must not affect the revenue estimate provided for the legislation. If the estimate created for the legislation would change if the economists had the corrected language, it is not a technical amendment. See BERMAN & HANEMAN, *supra* note 43, at 134.

134. See 2 U.S.C. §§ 900-907d, 922 (1988).

135. See generally *id.* § 901.

136. See *id.* at 1063-65.

spending reductions.<sup>137</sup> Although no penalties applied for failure to comply, sequestration was ordered if costs were not fully offset.<sup>138</sup> The Budget Enforcement Act was extended several times and made permanent in 2010.<sup>139</sup> However, PAYGO has limited power. PAYGO does not apply to discretionary spending, which is controlled by appropriations in the annual budget resolution.<sup>140</sup> Additionally, the automatic across-the-board cut in selected mandatory programs is very narrow as many programs are carved out of this process.<sup>141</sup>

The budget rules and PAYGO are statutory, not constitutional, requirements that have been allowed to lapse and can always be statutorily altered.<sup>142</sup> For example, Congress was able to avoid sequestration in the early 2000s, despite deficit spending, by requiring the OMB to reset the PAYGO scorecard.<sup>143</sup> By setting it to \$0, instead of carrying forward balances largely attributable to the 2001 capital gain tax cuts, Congress permitted spending it would otherwise have been unable to undertake under its own rules.

PAYGO did not permit deficit spending and neither does subsequent legislation, although Congress often skirts their limitations. The Budget Control Act of 2011, followed by the Bipartisan Budget Act of 2013, instituted a “super committee” to plan deficit reduction; however, the committee failed to put forward legislation.<sup>144</sup> Nevertheless, these attempts to make the budget revenue neutral generally required that the estimated budget effects of any new

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137. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13001, 104 Stat. 1388, 1388 (1990) (codified in scattered sections of 2 U.S.C.).

138. See *id.*

139. See generally 2 U.S.C. § 931 (2012); Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (codified in scattered sections of 47 U.S.C.); Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (codified as scattered sections of 7 U.S.C.).

140. For a description of the process, see Office of Mgmt. & Budget, *The Statutory Pay-As-You Go Act of 2010: A Description*, WHITE HOUSE, [https://obamawhitehouse.archives.gov/omb/paygo\\_description/](https://obamawhitehouse.archives.gov/omb/paygo_description/) [<https://perma.cc/6BGF-D84M>] (last visited Oct. 8, 2018).

141. See *id.* at 3.

142. For more on PAYGO, see Rachel Perkins, *Breaking the Spell of Tax Budget Magic*, 6 COLUM. J. TAX L. 1, 10 (2014).

143. See Cheryl Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 897-98 (2002); Karen C. Burke, *Estate Tax Repeal and the Budget Process*, 104 TAX NOTES 1049, 1050 (2004).

144. See Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 111, 127 Stat. 1165, 1170 (2013); Budget Control Act of 2011, Pub. L. No. 112-25, § 401, 125 Stat. 240, 259; see also Jeb Hensarling & Patty Murray, *Statement of Co-Chairs of the Joint Select Committee on Deficit Reduction*, DEFICITREDUCTION.GOV, <http://www.deficitreduction.gov/public/index.cfm/pressreleases?ID=fa0e02f6-2cc2-4aa6-b32a-3c7f6155806d> [<https://perma.cc/8Y6H-SC7J>] (last visited Oct. 8, 2018).

or augmented spending program or tax expenditure be offset with revenue cuts or tax increases. Thus, as the budget system currently operates, enacted legislation projected to increase the deficit in the relevant budget window results in cuts in selected mandatory programs, and the government spends less in appropriations than it otherwise might.

Additionally, the House and Senate have internal versions of PAYGO that do not have the force of law.<sup>145</sup> They provide a procedure for members of Congress to raise points of order objecting to violations of the PAYGO concept.<sup>146</sup> In the Senate, it requires three-fifths of all members to waive a point of order; in the House, there is no exception so a simple majority of the Rules Committee waives a point of order.<sup>147</sup> The Senate point of order creates an opportunity to object if legislation is projected to fail the Senate's budgetary limits.<sup>148</sup> However, that objection is not automatic.

These procedural tools trade spending and taxes, but the trading is difficult because different committees control elements of each, permitting multiple groups to claim credit or blame.<sup>149</sup> Trade-offs and political maneuvers make the budgeting process opaque for members of Congress and the public. By blurring information about how much money is being raised and spent, it is hard to know whether the budget is balanced. Given political incentives, an obscured budget is likely to lead to greater deficit spending. Deficit spending, unless coupled with economic growth, raises questions of equity for future generations and the federal government's long-term ability to fund its desired projects.<sup>150</sup>

Of course, not all deficits are dangerous. Since 1960, the federal government has run an on-budget deficit every year except for fiscal years 1999 and 2000 and total federal deficits in every year but fiscal

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145. See H.R. Res. 5, 115th Cong. (2017); H.R. Res. 21, 114th Cong. (2015); S. Con. Res. 11, 114th Cong., § 3201 (2015); S. Con. Res. 21, 110th Cong., §201 (2007).

146. See Ed Kleinbard, *Tax Expenditure Framework Legislation*, 63 NAT'L TAX J. 353, 361-63 (2010).

147. See U.S. SENATE COMM. ON THE BUDGET, BUDGET POINTS OF ORDER, <https://www.budget.senate.gov/imo/media/doc/Budget-Points-Of-Order.pdf> [<https://perma.cc/FQ3V-JR JW>] (last visited Oct. 8, 2018).

148. James V. Saturno, *Points of Order in the Congressional Budget Process*, CONG. RES. SERV. 1 (Oct. 20, 2015), <https://www.senate.gov/CRSpubs/814bf855-39fc-4626-9356-4235537a6f89.pdf> [<https://perma.cc/T3SF-MD6U>].

149. See Paul Posner, *Budget Process Reform: Waiting for Godot*, 69 PUB. ADMIN. REV. 233, 238-39 (2009).

150. See Gale & Orszag, *supra* note 131, at 470; Thomas Laubach, *New Evidence on the Interest Rate Effects of Budget Deficits and Debt* 5 (Fin. & Econ. Discussion Series, Working Paper No. 2003-12, 2003).

year 1969 and 1998 through 2001.<sup>151</sup> The CBO expects growing deficits in the 2017 to 2026 period.<sup>152</sup> Under current law, economic growth is expected to be insufficient to cover Congress's increased spending, increasing future deficits. The baseline for 2017 is a \$559 billion deficit or 2.9% of GDP.<sup>153</sup>

To fund the deficit, the government incurs debt. Although the Constitution gives Congress the power to borrow money, the ability to borrow requires that someone is willing to lend.<sup>154</sup> U.S. borrowing is made to two groups: the public and to other government agencies. The first is marketable securities, and the rest are non-marketable in that they cannot be sold. Their interest rate is determined by competitive bidding.<sup>155</sup> For 2017, the federal government spent almost 7% of its total budget on interest on federal debt.<sup>156</sup> This spending is required and must be paid in regular intervals because of prior government borrowing. In 2016, these payments were approximately \$432.6 billion and are expected to grow as a percentage of the budget.<sup>157</sup>

In addition to the need for lenders, the debt ceiling, a political device created in 1917, caps the amount the Treasury Department can borrow from the public or intragovernmentally.<sup>158</sup> However, the debt ceiling is also a statutory limitation and not a constitutional requirement.<sup>159</sup> When it operates, the debt ceiling denies the Treasury Department the authority to pay expenditures after the limit is reached, even if the expenditures are congressionally approved.<sup>160</sup> The Treasury

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151. See Office of Mgmt. & Budget, *Historical Tables*, WHITE HOUSE (2018), <https://www.whitehouse.gov/omb/budget/Historicals> [<https://perma.cc/4TSA-M6FL>] (Table 1.1).

152. See CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: 2017 TO 2027*, 2-3 (2017).

153. See *id.* at 3. The difference between 2016 and 2017 is primarily the result of the timing of income and expenses because the 2017 fiscal year began on a weekend.

154. See U.S. CONST. art. I, § 8, cl. 2.

155. For more on the auction process, see *How Treasury Auctions Work*, TREASURYDIRECT, <https://www.treasurydirect.gov/instit/auctfund/work/work.htm> [<https://perma.cc/T77V-EMDX>] (last visited Oct. 8, 2018).

156. See CONG. BUDGET OFFICE, *supra* note 152, at 94.

157. See *Interest Expense on the Debt Outstanding*, TREASURYDIRECT, [https://www.treasurydirect.gov/govt/reports/ir/ir\\_expense.htm](https://www.treasurydirect.gov/govt/reports/ir/ir_expense.htm) [<https://perma.cc/D5CR-75KQ>] (last visited Oct. 8, 2018).

158. See Second Liberty Bond Act of 1917, Pub. L. No. 65-43, § 1, 40 Stat. 288, 288. The debt ceiling has no direct effect on deficits. See *id.* at 290-91.

159. See *id.* at 288.

160. See No Budget, No Pay Act of 2013, Pub. L. No. 113-3, § 2, 127 Stat. 51, 51 (2013); Budget Control Act of 2011, Pub. L. No. 112-25, § 1, 125 Stat. 240, 240.



Department only has limited, extraordinary powers once the ceiling is reached.<sup>161</sup> These measures would not cover government operations for an extended period.<sup>162</sup>

In the last half decade, Congress has repeatedly risked hitting the debt ceiling and has suspended the debt ceiling for periods, for example between October 30, 2015 and March 15, 2017.<sup>163</sup> In 2011, there was a near default on public debt; the delay in raising the ceiling resulted in the first downgrade of the U.S.'s credit rating, a sharp drop in the stock market, and an increase in borrowing costs.<sup>164</sup> Another debt ceiling crisis arose in 2013, resulting in a brief suspension of the ceiling after a partial government shutdown and the Treasury Department being forced to take extraordinary measures.<sup>165</sup> With another debt ceiling crisis looming in early September 2017, Congress again raised the ceiling, partly justified to aid victims of Hurricane Irma. One day before the higher ceiling expired, Congress voted another increase until the end of December 2017.<sup>166</sup> By late December, the Treasury Department was raiding federal pension funds and using incoming tax receipts to keep from borrowing.<sup>167</sup> With another shut down looming, Congress suspended the debt ceiling until March 1, 2019 with spending caps and a continuing resolution for appropriations.<sup>168</sup>

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161. Grant Driessen & Joseph Hughes, “*Extraordinary Measures*” and the *Debt Ceiling*, CRS INSIGHT, Feb. 21, 2018.

162. Sage Belz & David Wessel, *The Hutchings Center Explains: The Debt Limit*, BROOKINGS (Aug. 3, 2017), <https://www.brookings.edu/blog/up-front/2017/08/03/the-hutchins-center-explains-the-debt-limit/> [<https://perma.cc/4JM6-8ZNH>].

163. See Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 901, 129 Stat. 584, 620 (2015).

164. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-701, ANALYSIS OF 2011-2012 ACTIONS TAKEN AND EFFECT OF DELAYED INCREASE ON BORROWING COSTS (2012).

165. See Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/congress-budget-debate.html> [<https://perma.cc/DZX4-4UJN>].

166. See Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-56, § 1, 131 Stat. 1129, 1129 (2017); Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, § 1, 131 Stat. 1280, 1280 (2017).

167. See Kimberly Amadeo, *U.S. Debt Ceiling and Its Current Status*, BALANCE (Aug. 1, 2018), <https://www.thebalance.com/u-s-debt-ceiling-why-it-matters-past-crises-3305868> [<https://perma.cc/A4Z6-GUE5>]. For a description of how the Treasury Department responded, see DEP'T OF THE TREASURY, DESCRIPTION OF EXTRAORDINARY MEASURES (2017).

168. See Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. § 30301 (2018).

Because of spending caps, when the government hits the debt ceiling, discretionary spending—comprising less than 40% of the federal government’s total spending—is singled out for greatest reduction.<sup>169</sup> As opposed to mandatory spending that is set by its own statutes, for instance how the Social Security Act determines the amount owed in Social Security, discretionary spending is set through the annual appropriations process. Under the budget acts, discretionary spending is expected to be reduced by \$1.5 trillion from fiscal year 2012 to 2021, whereas mandatory spending is projected to be reduced by less than \$0.2 trillion.<sup>170</sup>

A question without an answer is how much government debt is permissible.<sup>171</sup> Debt as the tool to fund government spending diverts the nation’s savings from being invested in productive capital goods such as factories and computers.<sup>172</sup> However, deficits could be counterbalanced by budget surpluses in growth periods so that long-term budgets are balanced. Alternatively, a balanced budget may not be necessary as long as the nation’s GDP increases. If the government pays only the interest on its debt and leaves the debt outstanding, the debt amount itself remains constant. If GDP increases, the accumulated debt becomes a smaller percentage of GDP. Without more information on future events, we cannot know if continued growth in debt is sustainable. In other words, if national debt is significantly greater than national GDP, it is possible that the government could not pay off the interest owed plus the debt itself.<sup>173</sup>

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169. GRANT DRIESSEN & MARC LABONTE, CONG. RESEARCH SERV., R42506, THE BUDGET CONTROL ACT OF 2011 AS AMENDED: BUDGETARY EFFECTS 2-3 (2015); GRANT DRIESSEN, CONG. RESEARCH SERV., R45202, THE FEDERAL BUDGET: OVERVIEW AND ISSUES FOR FY2019 AND BEYOND 7 (2018).

170. DRIESSEN & LABONTE, *supra* note 169, at 2-3.

171. Government borrowing may make particular sense when its interest rates are low. For example, in July 2016, the Treasury Department obtained a negative real interest rate on government debt because the inflation rate was greater than the interest rate owed on U.S. securities. See Craig Anthony, *Can Real Interest Rates Be Negative?*, INVESTOPEDIA (Jul. 26, 2016); John Hilsenrath, *Summers: U.S. Should Gradually Shift to More Short-Term Debt*, WALL ST. J. (Sept. 30, 2014), <https://blogs.wsj.com/economics/2014/09/30/summers-u-s-should-gradually-shift-to-more-short-term-debt/?ns=prod/accounts-wsj> [<https://perma.cc/SZ5B-XX24>].

172. See, e.g., Carmen Reinhart & Kenneth Rogoff, *Growth in a Time of Debt*, 100 AM. ECON. REV. 573, 574 (2010); Paul Krugman, *Debt and Growth: The State of the Debate*, N.Y. TIMES (May 31, 2013), <https://krugman.blogs.nytimes.com/2013/05/31/debt-and-growth-the-state-of-the-debate/> [<https://perma.cc/4VLV-JREC>]; Alexandru Minea & Antoine Parent, *Is High Public Debt Always Harmful to Economic Growth?* 4 (CERDI, Working Paper No. 18, 2012).

173. The International Monetary Fund’s study of market-access economies provides that a country’s debt level warrants higher scrutiny if current or projected

## II. CREATING THE MATERIALS THAT IMPLEMENT THE TAX LAW

The Treasury Department does not regulate in the same way as other agencies. Other agencies may prohibit the public from engaging in particular activities or from making particular choices. The Treasury Department calculates the tax treatment of the choices that taxpayers are free to make. In that light, the materials created by the Treasury Department and IRS are intended to tell taxpayers how much choices will cost.<sup>174</sup> Even without this guidance, the tax would make some activities more or less expensive. For taxpayers, the choice among activities is properly a post-tax determination, and the value of this information is to make the post-tax price more apparent.

### A. Current Procedures

The Treasury Department and IRS issue a tremendous amount of materials, from regulations to public notices, to assist taxpayers in their tax compliance and IRS agents in their audits of taxpayers' returns. These agencies do not have unlimited time or funding to issue this material. Instead, they make calculated decisions regarding its value. Part of that decision-making calculus is the cost of complying with government-mandated rules for issuing and revising materials that instruct the public on how the law applies.

#### 1. Tax's Procedures

Section 7805(a) gives the Secretary of the Treasury the authority to "prescribe all needful rules and regulations for the enforcement" of the Code. Although the underlying legislation is subject to the limitations of balanced budgeting rules, tax guidance is not. Implementing rules are presumed issued when the law is enacted. Therefore, "[t]here is, by definition, no revenue effect for a regulation because any and all effects should have already been taken into account in the revenue estimate prepared for the underlying legislation."<sup>175</sup> All of the economics is based on the legislation itself, whether or not the law is self-executing. Nevertheless, regulations and

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public debt exceeds 50-60% of GDP or if current or projected public gross financing needs exceed 10-15% of GDP. These thresholds are higher than for low-income countries because market-access countries can generally sustain higher levels of debt than emerging markets. INT'L MONETARY FUND, MODERNIZING THE FRAMEWORK FOR FISCAL POLICY AND PUBLIC DEBT SUSTAINABILITY ANALYSIS 13 (Aug. 5, 2011).

174. Taxes' cost may make some behavior prohibitively expensive, but that is a consequence of Congress's choice to tax.

175. BERMAN & HANEMAN, *supra* note 43, at 196.

other materials help make the tax system produce the revenue Congress estimates.

The IRS's mission is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all."<sup>176</sup> Before the IRS can do so, the Treasury Department must interpret the Internal Revenue Code to determine what it requires, particularly when faced with statutory ambiguity in hastily drafted provisions. Armed with its understanding, the Treasury Department's guidance to taxpayers and IRS personnel facilitates tax filings and the implementation of congressional initiatives. These two groups use these materials differently: Taxpayers need rules and interpretations to plan their activities and accurately file their tax returns while IRS personnel need it to ensure departmental consistency in the application of the law.

Thus, although Congress creates tax law, the Treasury Department develops the law in regulations, and its bureau, the IRS, administers the developed law.<sup>177</sup> However, there may be concern that "the regulatory process has been far less transparent" than the legislative process.<sup>178</sup> Tax guidance is currently created through exchanges between the agency and the public, although the Treasury Department often relies on exceptions to the APA's preferred notice-and-comment process for the issuance of tax guidance.<sup>179</sup> Instead of

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176. *The Agency, its Mission and Statutory Authority*, IRS, <https://www.irs.gov/uac/the-agency-its-mission-and-statutory-authority> [<http://perma.cc/8JBP-KWHG>] (last updated June 27, 2018).

177. Scholars debate whether judges should respect politics as influencing the creation of guidance or whether political influence should be grounds for overturning guidance as arbitrary and capricious. Compare Nina A. Mendelson, *Disclosing a "Political" Oversight of Agency Decision-Making*, 108 MICH. L. REV. 1127, 1130 (2010) (stating that Professor Nina Mendelson argues that agencies' public disclosure of presidential or executive influences on decisions would improve transparency and accountability), and Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8-9 (2009) (noting that Professor Kathryn Watts has argued for greater deference when agency decisions are influenced by political factors as long as they are not "raw politics or partisan politics unconnected in any way to the statutory scheme being implemented"), with Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 ADMIN. L. REV. 573, 576 (2010); and Stephen M. Johnson, *Disclosing the President's Role in Rulemaking: A Critique of the Reform Proposals*, 60 CATH. U. L. REV. 1003, 1004 (2011), and Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 WASH. L. REV. 419, 422-23 (2009), for a discussion on how politicization might reduce the amount of guidance produced, reduce agency independence and fairness, facilitate partisan judging, and erode consistency.

178. BERMAN & HANEMAN, *supra* note 43, at 181.

179. Treasury spokesman Andrew DeSouza took issue with Professor Hickman's conclusion that the Treasury Department does not comply with the APA.

notice and comment, the Treasury Department utilizes other procedures for the issuance of regulations and supplemental materials.

The Treasury Department uses those procedures to produce a tremendous amount of information for the public. One study found that the Department issued 203 Treasury Decisions and 163 Notices of Proposed Rulemaking in 2003 through 2005.<sup>180</sup> The amount spent to produce guidance is rarely even a feature of the Treasury Department's budget. Recently, while using fewer employee hours, the Department has managed to publish more guidance, but this growth in efficiency may not be sustainable.<sup>181</sup>

To make the process of producing regulations and other materials more transparent, the IRS incorporates public input in choosing which projects are chosen for development.<sup>182</sup> To create the resulting Priority Guidance Plan, which lists current and upcoming projects, the IRS annually solicits taxpayer input.<sup>183</sup> However, the process by which the Assistant Secretary of Tax Policy puts proposals into semiannual agenda is not publicly disclosed, and new legislation or events might change listed priorities without notice. There is a downside to public involvement in this process in that it permits measurement of fiscal year-end accomplishment of the listed tasks.<sup>184</sup> Projects expected to take longer than the twelve-month reporting

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Jeremiah Coder, *Study Finds Treasury Isn't Complying with Procedure Act*, 116 TAX NOTES 636, 636 (2007). DeSouza stated, "Treasury and the IRS take the Administrative Procedure Act very seriously and fully comply with it and all other procedural requirements when issuing regulations and other published guidance." *Id.* at 637.

180. See Kristin Hickman, *Coloring Outside the Lines: Examining the Treasury's (Lack of) Compliance with the Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1741 (2007).

181. See *Tax Administration: Letting Practitioners Help Write Guidance Poses No More Risk of Influence, TIGTA Says*, DAILY TAX REP. (BNA) 17 (Mar. 12, 2008).

182. See *Priority Guidance Plan*, IRS, <https://www.irs.gov/privacy-disclosure/priority-guidance-plan> [<https://perma.cc/UNF5-M3NE>] (last updated Aug. 27, 2018).

183. Michael J. Desmond, *Roundtable Discussion on Taxpayer Guidance: How to Address the Growing Problem of Inadequate Guidance From the IRS on Complying With the Tax Code*, in 2011 TNT 142-100 (2011) [hereinafter *Transcript*]; *Tax Administration: Letting Practitioners Help Write Guidance Poses No More Risk of Influence, TIGTA Says*, *supra* note 181, at 17. In the 1950s, the Assistant Secretary to Treasury explained then current procedures. See Laurens Williams, *Preparation and Promulgation of Treasury Department Regulations Under Internal Revenue Code of 1954*, 8 U.S.C. L. SCH. TAX INST. 733, 748-50 (1956).

184. The IRS website states the plan is "to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance." *Priority Guidance Plan*, *supra* note 182.

period tend to be deferred because they will adversely affect those measurements.<sup>185</sup>

Projects initiated from the agenda are assigned to the Office of the Chief Counsel of the IRS, effectively the IRS's internal law firm, to begin the drafting process.<sup>186</sup> The public may be alerted to the agency's interpretation of an issue at different times in the drafting process. Either with an Advance Notice of Proposed Rulemaking or a Notice of Proposed Rulemaking, the Treasury Department describes when the agency is considering or is issuing guidance, describing the anticipated approach and seeking public feedback on that approach.<sup>187</sup> The Treasury Department may also warn that the future regulations will have retroactive effect.

For example, Notice 98-5 on the Foreign Tax Credit Abuse was issued in 1997 and warned multi-national corporations against entering or considering abusive tax-motivated transactions to acquire foreign tax credits to shelter low-taxed foreign source income.<sup>188</sup> The targeted transactions occur when either tax benefits are duplicated in the U.S. and the foreign country or if a corporation purchases an income stream with a nonrecourse loan so tax credits are effectively purchased. The notice requested public comments before the issuance of regulations. However, regulations on this issue have never been issued, and the notice was withdrawn in 2004 when the IRS admitted it did not intend to issue these regulations.<sup>189</sup>

Regardless of whether earlier notice has been provided, the Treasury Department must issue a Notice of Proposed Rulemaking announcing proposed regulations, published in the Code of Federal Regulations, and include draft language.<sup>190</sup> In addition to this disclosure for regulations, other tax materials are made public through the Freedom of Information Act (FOIA). FOIA was extended to the IRS in 1996, making less formal guidance publicly available.<sup>191</sup>

The IRS's Internal Revenue Manual describes the method for drafting proposed regulatory language.<sup>192</sup> The IRS holds the pen in

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185. BERMAN & HANEMAN, *supra* note 43, at 181.

186. Treas. Reg. § 601.601(a)(1) (as amended in 1987).

187. IRS, INTERNAL REVENUE MANUAL 32.1.1.2.1 (Aug. 1, 2018).

188. IRS, INTERNAL REVENUE BULLETIN 1998-3 50, 51 (1998).

189. See IRS, INTERNAL REVENUE CUMULATIVE BULLETIN 2004-1 JANUARY-JUNE 1 (noting the lack of intent to create regulations).

190. See IRS, *supra* note 187, at 32.1.1.2.2 (Aug. 11, 2004).

191. See 5 U.S.C. § 552 (2012); see also Treas. Reg. § 601.702.

192. See IRS, *supra* note 187, at 32.1.1; see also MICHAEL SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE 3.02[2] (2002); Michael Asimov, *Public Participation*, 44 TAX L. 343, 366-68 (1991); Phillip Gall, *Phantom Tax Regulations: The Curse of Spurned Delegations*, 56 TAX L. 413, 416 (2003); Monte

drafting regulations but receives guidance from the Treasury's Office of Tax Policy (OTP) because the OTP makes executive policy decisions and analysis.<sup>193</sup> Members of the IRS Office of Chief Counsel and an attorney from the OTP work together on language and these, plus others if the need arises, jointly identify issues, informally exchange drafts of regulations, and hold guidance briefings as needed.<sup>194</sup>

Before being proposed to the public, draft language is submitted to various constituents within the Treasury Department in order to have widespread internal acceptance of its content.<sup>195</sup> Only when the language reaches the highest level of internal review is input received from outside the Department. This external review includes the executive's OMB, a new requirement as the OMB has increased its power over the shape of tax regulations.<sup>196</sup> If the Assistant Secretary for Tax Policy signs off on the proposed language, it becomes a proposed regulation to be published. This first internal step takes anywhere from months to years.<sup>197</sup>

Once initially published, the group of drafters solicits public comments on the proposed regulations, and this is when the Treasury Department officially receives feedback from taxpayers or their representatives.<sup>198</sup> Although many hearings are scheduled, most are canceled because no one in the public accepts the invitation to

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A. Jackel, *Is There Anything Wrong with the Guidance Process?*, 132 TAX NOTES 935, 935 (2011); Williams, *supra* note 183, at 748-50.

193. BERMAN & HANEMAN, *supra* note 43, at 178.

194. *See id.*

195. *Transcript*, *supra* note 183 (citing remarks from Mike Desmond).

196. *See* Nancy Cook & Aaron Lorenzo, *Tax Law Ignites White House Power Struggle*, POLITICO (Feb. 23, 2018, 6:44 PM), <https://www.politico.com/story/2018/02/23/tax-law-white-house-power-struggle-364885> [<https://perma.cc/HYK2-T6Q3>]; Pat Ralph, *Top Trump Administration Officials Are Locked in a Power Struggle Over New Tax Law*, BUS. INSIDER (Apr. 6, 2018, 12:32 PM), <https://www.businessinsider.nl/treasury-omb-tax-law-2018-4/> [<https://perma.cc/KW6K-FHGS>]; *see also* Clint Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. (forthcoming 2018).

197. *See* Cook & Lorenzo, *supra* note 196.

198. *See* IRS, *supra* note 187, at 32.1.7.2 (Aug. 1, 2018). There are other, less participatory means of rulemaking, not used in the tax area. Direct final rulemaking permits the agency to publish a rule and then solicit public feedback; if objections are received the rule is normally withdrawn and submitted for notice and comment. *See* Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 ADMIN. L. REV. 757, 758 (1999); *see also* Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995). *But see* Lars Noah, *Doubts About Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 402 (1999) (stating that agencies can now promulgate final rules without first publishing a notice of proposed rulemaking or allowing for the submission of comments).

participate.<sup>199</sup> Notwithstanding this formal process, many scholars argue that the majority of comments received on tax regulations are informal and delivered over the phone.<sup>200</sup> After the public comment period has lapsed and assuming that no major changes are required in response to comments, the group prepares final regulations and drafts issues memoranda.<sup>201</sup> The Commissioner (or Deputy Commissioner) of the IRS and an Assistant Secretary (or Deputy Assistant) for Tax Policy then sign the final regulations.<sup>202</sup> However, if major changes are required, the process may begin again with another notice-and-comment period.

After tax regulations are signed, they may not automatically become effective. Congress provides a standard thirty-day waiting period to provide people “reasonable time to prepare” for complying with the rules.<sup>203</sup> However, there is an exception to the standard thirty-day waiting period for tax regulations, but the current exception is less lenient than it once was. Before 1996, the default was that all tax regulations applied retroactively.<sup>204</sup> In 1996, Congress amended the rule so that no type of tax regulation for any statute enacted after 1996 can have an effective date before the earlier of (1) the date the final regulation is published in the *Federal Register*, (2) the date any notice substantially describing the proposed, temporary, or final regulation is published, or (3) in case of a final regulation, the date the proposed or temporary regulation to which it relates is published, and earlier in the case of abusive transactions.<sup>205</sup> Thus, today’s exceptions permit retroactive effective dates for tax regulations when they are issued relatively quickly after enactment of the statute.

## 2. APA Procedures

Critics complain that the Treasury Department’s process is inappropriate because it fails to comply with notice and comment.<sup>206</sup> They argue that “changes in administrative law doctrine . . . have not

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199. See BERMAN & HANEMAN, *supra* note 43, at 181-82.

200. Asimow, *supra* note 192, at 366 n.104; Hickman, *A Problem of Remedy, supra* note 16, at 1205. See also Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1381-83 (2010).

201. See IRS, *supra* note 187, at 32.1.8.6.

202. See *id.*

203. § 553(d); U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) [hereinafter *Attorney General Manual*] (quoting congressional reports).

204. See 26 U.S.C. § 7805(b) (1994).

205. See 26 U.S.C. § 7805(b) (2000).

206. See *supra* note 16.



penetrated fully into IRS practice or judicial precedents concerning IRS rules and regulations.<sup>207</sup> This is part of a wave of attacks against Treasury Department procedures that are seen not to comply with the APA. Since 2011, when the Supreme Court warned in the *Chevron* context for judicial deference that the IRS will not be granted a special exemption from administrative law,<sup>208</sup> what compliance with the APA requires and the extent to which that compliance is necessary to ensure the quality of tax regulations have been hot topics.<sup>209</sup>

Section 553 of the APA requires federal agencies to provide the public with notice of proposed rules as well as an opportunity to comment on those rules.<sup>210</sup> For this purpose, the term “rule” is defined broadly enough to encompass virtually any agency statement about what regulated parties must or should do.<sup>211</sup> Therefore, if an agency is going to dictate some aspect of the public’s behavior, the agency must first tell the public of the proposed requirements and give them the chance to comment on those requirements. These procedures are to ensure that the public has a voice in the rules that govern them.<sup>212</sup>

However, the notice-and-comment procedures may inadvertently make it harder for agencies to move closer to the ideal by increasing the cost of issuing any form of guidance to the public.<sup>213</sup> Thus, exceptions from these procedures exist but are limited in order to maintain a robust dialogue between agencies and the public.<sup>214</sup> The exceptions exist to guarantee that other public interests are not sacrificed in the quest for public participation.<sup>215</sup>

Put most basically, the notice-and-comment process requires that the public be given notice of all federal agencies’ proposed rules

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207. Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 520 (2011).

208. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53, 55 (2011).

209. For example, there have been several conferences on anti-tax exceptionalism. *See, e.g.*, ATPI’s *Tax Law and Administrative Law: The Implications of May Foundation v. U.S.* (2016); Duke Law School’s *Taking Administrative Law to Tax* (2014); Tax Policy Center’s *American Corporate Tax Exceptionalism* (2009).

210. *See* 5 U.S.C. § 553(b) (2012).

211. *See* 5 U.S.C. § 551(4) (2012).

212. The APA’s broadly applicable procedures for creating rules aim to promote public deliberation, reasoned agency decision-making with fewer errors, and agency accountability to the public and to Congress. *See* Attorney General Manual, *supra* note 203, at 26. *See also* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1028-31 (D.C. Cir. 1978); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

213. *See* Stephanie Hunter McMahon, *The Perfect Process is the Enemy of the Good Tax: Tax’s Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 583 (2016).

214. For the exceptions, *see* § 553(d).

215. *See* McMahon, *supra* note 213, at 581.

unless Congress explicitly legislates otherwise.<sup>216</sup> For example, notice must provide sufficient factual details and rationales to permit the public a “fair chance” to comment meaningfully.<sup>217</sup> Courts have required notice to include critical data so that people commenting on proposed language can make meaningful submissions responding to the agency’s evidence.<sup>218</sup> Before the rule is finalized, the agency must consider the public’s submission of written data, views, or arguments after a reasonable comment period.<sup>219</sup>

Finally, the resulting rule must be published at least thirty days before it takes effect unless there is good cause for an earlier effective date.<sup>220</sup> Despite the Supreme Court’s efforts to limit lower courts from adding requirements to this statutorily defined process, lower courts have interpreted the statutory requirements expansively, developing a common-law life beyond these strict statutory prescriptions.<sup>221</sup>

A critical component of the process is that final regulations must be submitted to the *Federal Register* with a “concise general statement of their basis and purpose.”<sup>222</sup> Courts have effectively eliminated “concise” from this APA requirement.<sup>223</sup> In *Citizens to Preserve Overton Park, Inc. v. Volpe*, the Supreme Court urged lower courts to engage in a “searching and careful” review of agency actions.<sup>224</sup> To facilitate that review, agencies must provide courts a contemporaneous administrative record of their decision-making that permits this “hard look” review.<sup>225</sup> Consequently, the statement must contain the agency’s findings and reasoning so that any reviewing court is able “to see what major issues of policy were ventilated by the

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216. See § 553(d).

217. See § 553(b); *Glob. Van Lines, Inc. v. Interstate Commerce Comm’n*, 714 F.2d 1290, 1298 (5th Cir. 1983) (holding that the Interstate Commerce Commission’s failure to articulate the legal basis for a rule “effectively deprived the petitioners of any opportunity to present comments.”) (emphasis in original); H.R. REP. NO. 79-1980, at 24 (1946); S. REP. NO. 79-752, at 14 (1945).

218. See *Chamber of Commerce v. SEC*, 443 F.3d 890, 906 (D.C. Cir. 2006); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); *Penobscot Indian Nation v. U.S. Dep’t Hous. & Urban Dev.*, 539 F. Supp. 40, 50 (D.D.C. 2008).

219. See § 553(b)-(c).

220. See § 553(d).

221. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 524 (1978).

222. § 553(c).

223. See *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

224. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

225. See *id.* at 420.

informal proceedings[,] [] why the agency reacted to them as it did[,]” and that the agency considered public comments.<sup>226</sup>

The process is time consuming. Not only does it often take years to get a rule ready for public notice,<sup>227</sup> but the comment period is typically sixty days.<sup>228</sup> Following the comment period, the agency must consider “the relevant matter presented” in the comments.<sup>229</sup> Although required to consider and incorporate comments in the final regulation, the agency cannot change the rule substantially in response to comments without starting the notice-and-comment process over again.<sup>230</sup> Only those changes that are a “logical outgrowth” of the proposed rule may be made without restarting the process for fear that the public did not have adequate notice or the opportunity to comment on the revised language.<sup>231</sup>

### 3. Types of Regulations

Although a number of tax regulations proceed through the notice-and-comment process to become final regulations, many do not.<sup>232</sup> Final regulations are the most authoritative and the only regulations to have completed all internal and external review.<sup>233</sup> The Treasury Department often modifies notice and comment by issuing temporary and proposed regulations simultaneously.<sup>234</sup> Proposed regulations have completed internal review but have not yet completed the public’s review.<sup>235</sup> Temporary tax regulations have the same authority as final regulations despite rarely being submitted to notice

226. *Auto. Parts & Accessories Ass’n*, 407 F.2d at 338. See also *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252-53 (2d Cir. 1977).

227. *Transcript*, *supra* note 183 (citing remarks by Mike Desmond).

228. JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 251-52, 272-74 (5th ed. 2012). Agencies may accept late comments at their discretion. See *id.*

229. 5 U.S.C. § 553(c) (2012).

230. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

231. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 160 (2007); *Nat. Res. Def. Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002); *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 547.

232. Hickman, *supra* note 180, at 1748-51.

233. IRS, *supra* note 187, at 32.1.1.2.2 (Aug. 2, 2018).

234. See Hickman, *supra* note 180, at 1743.

235. Taxpayers cannot rely on proposed regulations to support a tax position or for planning purposes unless the IRS clearly states otherwise, and proposed regulations are not binding on the IRS, even though the IRS’s policy is to follow them. See IRS, *supra* note 187, at 32.1.1.2.2 (Aug. 2, 2018).; Notice from the Office of the Chief Counsel of the Internal Revenue Serv. 2 (May 8, 2003) [hereinafter *Chief Couns. Mem.*].

and comment.<sup>236</sup> Thus, with the simultaneous issuance of proposed and temporary regulations, the comment period occurs after publication of guidance that is binding on the public.<sup>237</sup>

It is temporary regulations' combination of speedy publication and lack of public review that raises objections but makes them popular with the Treasury Department.<sup>238</sup> Some complain that temporary regulations' lack of procedure "obliterate[s] the APA's notice-and-comment procedures."<sup>239</sup> Temporary tax regulations are pervasive. The Treasury Department has issued a significant number of them since the number of statutes enacted in the 1980s created a backlog of needed regulations.<sup>240</sup> In a study of 232 regulatory projects, from January 1, 2003 through December 31, 2005, more than one-third were issued with only post-promulgation notice and comment.<sup>241</sup>

Starting in 1988, temporary regulations are only effective for three years, requiring the Treasury Department to finalize regulations.<sup>242</sup> However, a question remains whether temporary regulations need the same process of ex ante public comment as final regulations. The Treasury Department has argued, largely unsuccessfully, that Congress provided the short period of effectiveness and required the simultaneous issuance of proposed regulations as a political trade off permitting the continued, shorter-term use of temporary regulations without notice and comment.<sup>243</sup> It is plausible, but unproven, that when Congress enacted the limiting

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236. Chief Couns. Mem, *supra* note 235.

237. Section 7805(e) of the Code requires the Treasury Department to issue proposed regulations when it issues temporary regulations, and proposed regulations presumably are subject to notice and comment. See 26 U.S.C. § 7805(e) (2012); IRS, *supra* note 187 at 32.1.1.2.2 (Aug. 2, 2018).

238. Asimow, *supra* note 192, at 364; Kristin E. Hickman & Mark Thomson, *Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment*, 101 CORNELL L. REV. 261, 263 (2016); Hickman, *Unpacking the Force of Law*, *supra* note 16, at 496 n.168; Steve R. Johnson, *Intermountain and the Importance of Administrative Law in Tax Law*, 128 TAX NOTES 837, 850 (2010); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidation*, 3 HOUS. BUS. & TAX L.J. 248, 253 (2003). One can think of temporary regulations as either (1) a prelude to a final regulation or (2) as permitting the parties to see potential problems, debate solutions, and mitigate the problems.

239. Vasquez & Lowy, *supra* note 238, at 253.

240. Asimow, *supra* note 192, at 343; Hickman, *Unpacking the Force of Law*, *supra* note 16, at 498.

241. Hickman, *supra* note 180, at 1748-51.

242. 26 U.S.C. § 7805(e)(2) (2012); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232, 102 Stat. 3342, 3734-35.

243. *Intermountain Ins. Serv. of Vail, L.L.C., v. Comm'r*, 134 T.C. 211, 245-46 (T.C. 2010), *rev'd, on other grounds*, 650 F.3d 691 (D.C. Cir. 2011).

period it was aware of the backlog of tax law changes and taxpayers' desire for guidance and expected the Treasury Department to continue issuing temporary regulations but with post-promulgation notice and comment. If that was the case, Congress did not say so, although it has in other contexts. For example, Congress explicitly permitted regulations with post-promulgation comments with respect to the Health Care Portability and Accountability Act of 1996.<sup>244</sup>

One argument the Treasury Department uses to support this procedure is that most of its regulations are interpretative and therefore do not require any notice and comment.<sup>245</sup> The Treasury Department persists in using an expansive definition of interpretive regulations based on the origin of the authority to issue regulations. Regulations can be initiated for any provision of the Internal Revenue Code, but a catchall provision, § 7805(a), grants the Treasury Department significant power to issue rules.<sup>246</sup> The Treasury Department interprets this broad power as the source of interpretive regulations. Therefore, all regulations that are sourced to § 7805(a) are, according to the Department, interpretive. Under this interpretation, only legislative regulations originating from specific authority in a particular provision require notice and comment.<sup>247</sup> In one studied period, the Treasury Department claimed that more than 90% of temporary regulations were interpretive and that public comment was not required.<sup>248</sup>

This distinction between interpretive and legislative regulations may be invalid under administrative law. Most other agencies recognize regulations as legislative.<sup>249</sup> Focusing on the potential penalties taxpayers face if they fail to follow interpretive tax regulations, Professor Kristin Hickman argues that the distinction reflects a historical understanding no longer consistent with changes in administrative law doctrine.<sup>250</sup> According to this argument, all tax regulations except those issued under the good cause exception would need pre-promulgation notice-and-comment review.

Although the Treasury Department may lack justification for its preferred procedure, Congress is aware that the Treasury Department retains this distinction between legislative and interpretive

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244. See 26 U.S.C. § 9833 (2012); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 401, 110 Stat. 1936, 2073.

245. See IRS, *supra* note 187 32.1.1.2.8 (Aug. 2, 2018).

246. See § 7805(a).

247. See *id.*

248. Hickman, *supra* note 180, at 1752.

249. See Asimow, *supra* note 192, at 373; Johnson, *supra* note 238, at 837.

250. See Levy & Glicksman, *supra* note 207, at 520 n.117 (citing Professor Hickman's argument).

regulations. Pursuant to the Regulatory Flexibility Analysis Act, agencies must analyze the impact of proposed rules on small businesses. The requirement generally applies only to rules that go through notice and comment, which the Treasury Department contends is only specific-authority regulations.<sup>251</sup> Recognizing this distinction, Congress added a special requirement applicable only to tax to include interpretive rules as well as legislative ones.<sup>252</sup> In the limited context of the Regulatory Flexibility Analysis Act, Congress chose to override the Treasury Department's distinction without eliminating it generally.

## B. The Impact of These Agency-Created Materials

The existence of materials explaining and applying the tax law, in particular tax regulations, is critical to taxpayer compliance and government consistency. These materials facilitate compliance by providing inquisitive taxpayers information and facilitate national uniformity by binding IRS employees. Although taxpayers are not always required to follow agency interpretations of the law, if taxpayers are audited, the government must generally comply with its own rules.

### 1. *Guidance for Taxpayers and IRS Agents*

Official interpretations of tax laws help internal and external audiences. Taxpayers need to know how the law is being interpreted in order to properly plan their affairs. But no less important is the information for IRS employees to know how to consistently enforce the law. Facing hundreds of issues, the agency needs to create a coherent policy for its almost 78,000 employees (and more than 116,000 in 1992).<sup>253</sup> Without that policy, individual IRS agents cannot fairly enforce the law. The agency's interpretation of the law, made public through publication or FOIA, also shines public light on Treasury Department and IRS operations. Practitioners and politicians can see how the law is being applied and use that knowledge to challenge interpretations they dislike. Thus, Congress can learn of the

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251. See 5 U.S.C. § 603(a) (2012).

252. See *id.* (applying the requirement to a general notice of proposed rulemaking or a "notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States").

253. IRS, IRS DATA BOOK 2016 66 (2017), <https://www.irs.gov/pub/irs-soi/16databk.pdf> [<https://perma.cc/2GK4-DU7H>] [hereinafter IRS DATA BOOK].

public's disagreements with the IRS through reactions to tax guidance and can make adjustments as Congress sees fit.

This assistance and the opportunity for differing interpretations of law to otherwise develop is particularly great in tax because much of tax law is created through amendments to the Internal Revenue Code. Statutory changes are often fragments, adding clauses and isolated sentences to existing provisions that are not set forth in the bill.<sup>254</sup> Moreover, the interrelation of many different provisions, such as those governing international taxation, should create a workable whole, but the unifying theory is not explicitly laid out in the statute itself. Therefore, the interpretation of the words added in a particular statute must be consistent with the underlying intent of the law, even when the words themselves could have multiple meanings.

Although the materials that the Treasury Department and IRS produce are imperfect, most tax practitioners are relatively happy with them.<sup>255</sup> One critic of the Treasury Department's procedures for adopting tax guidance noted, "[m]ost members of the tax community believe that Treasury does a decent job in drafting regulations and instead focus their grumbling on issues where guidance is lacking."<sup>256</sup> One Wharton School professor noted: "[I]f a regime is designed to give bureaucrats flexibility and hold them accountable for their results—a management technique taught in many business schools . . . —then Treasury's administrative model might seem to be an exemplar rather than a problem."<sup>257</sup> The materials provide information to taxpayers, who complain when it is not provided, and increase IRS personnel's transparency and consistency.

Despite its evident value, not all of these materials have the same authority to bind taxpayers. Since *Mayo* held that tax regulations are to be given *Chevron* deference, there is a risk that regulations with lesser procedural protections may be given too much deference,

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254. Bradford L. Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 807 (1989).

255. I have spoken with many practitioners who prefer the creation of guidance, in part because it equalizes the business field with aggressive attorneys.

256. Hickman, *supra* note 180, at 1800. Professor Hickman argues the reason for the failure to complain is not rational ignorance of administrative law or love of the guidance itself, but procedural limitations as to what a taxpayer may gain from such a challenge. *See id.*

257. David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 241 (2010). Linda Stiff, Managing Director with PricewaterhouseCoopers and former Acting Commissioner of the IRS, stated, "I personally believe that the process is neither fundamentally or inherently bad or failed or completely ineffective as I've heard some say." *Transcript, supra* note 183.

however that is defined.<sup>258</sup> Although in *Mayo*, the Court noted adherence to notice and comment as “good indicators of a rule meriting *Chevron* deference,” the inverse may also exist, meaning that rules created without notice and comment might bind taxpayers’ choices without public participation.<sup>259</sup> The level of deference courts give to guidance is a matter of judicial interpretation of the APA, over which the Treasury Department has no power. Therefore, the Treasury Department does not have the option of choosing less deference in exchange for less process.<sup>260</sup>

It is unclear how much the level of judicial deference matters in practice but for the pressure the distinction adds to procedural questions. In *Swallows Holding, Ltd v. Commissioner*, a Barbados corporation dealing in real property in the U.S. sought to claim deductions related to its real estate holdings.<sup>261</sup> At issue was the filing deadline because, according to the regulations, the corporation filed too late to claim deductions.<sup>262</sup> The Tax Court ruled for the taxpayer, invalidating the regulation, and held that the same result would occur whether the court applied *Chevron* or a lesser deference standard.<sup>263</sup> The Circuit Court overturned the decision on the ground that the regulation was a reasonable interpretation of an ambiguous statute.<sup>264</sup> The Circuit Court said *Chevron* definitely applied and was willing to give *Chevron* deference to interpretive regulations, although that

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258. *Mayo Found. for Educ. and Research v. United States*, 562 U.S. 44, 55-56 (2011). In an era of political hostility and claims of political manipulations, agencies may need deference to ensure their directives are met. James O’Reilly, *Losing Deference in the FDA’s Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 940 (2008).

259. *Mayo Found. for Educ. and Research*, 562 U.S. at 46.

260. *Chevron* deference has not always resulted in victory for the government. For example, in 2012, the Supreme Court reviewed final regulations extending the statute of limitations. *United States v. Home Concrete & Supply, L.L.C.*, 556 U.S. 478, 480-81 (2012). The Court found there was no statutory ambiguity and therefore no need to defer to the Treasury Department. *See id.* at 486. Congress has since changed the statute to overturn *Home Concrete*. *See* Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, Pub. L. No. 114-41, § 2005, 129 Stat. 443, 456-57 (2015). Courts may also side step the issue despite admitting the application of *Chevron*. In 2014 in *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015), the Court refused to defer to Treasury Department regulations interpreting provisions of the Patient Protection and Affordable Care Act. Despite finding the language ambiguous, the Court concluded that, if Congress wanted to assign such power over the new healthcare system to the agency, Congress “surely would have done so expressly.” *Id.* at 2489.

261. 515 F.3d 162, 165 (3d Cir. 2008).

262. *See id.*

263. *See id.* at 166.

264. *See id.* at 165.



deference was possibly tied to the regulations having completed notice and comment.<sup>265</sup>

Thus, procedure might increase the weight given to the government's interpretation of the law and, in the process, might increase the agency's legitimacy. "Agencies which listen and respond to public comment enhance their legitimacy and accountability, both of critical importance when decision-making is delegated to a nonrepresentative, politically insulated body."<sup>266</sup> However, one can question whether responding to public comments in a formalized process would enhance the IRS's or its guidance's legitimacy in an era when some politicians want to shut down the IRS.<sup>267</sup> Moreover, although the IRS is staffed with career employees, the IRS as an entity is far from politically insulated. The public is aware through the press of the agency's actions on salient issues or through their advisors if the issue applies to them. For issues that are neither salient nor personally applicable, notice and comment is unlikely to make the public more aware than it is now.

If these materials, whether regulations or other guidance, are found not to comply with required procedures, they may be nullified. Courts can vacate a rule, which invalidates the rule and requires the agency begin the rulemaking process anew, or remand it, which keeps the rule in effect but requires the agency to remedy the problem and readopt the rule.<sup>268</sup> Most courts accept that they have discretion as to the choice of approach and tend to consider potential damage to the public interest from setting aside a rule.<sup>269</sup> Some judges, however, believe that the APA requires vacating a rule because § 706(2)(A) provides that a reviewing court confronted with a procedurally invalid rule "shall . . . hold [it] unlawful and set [it] aside."<sup>270</sup>

The court's choice affects the agency's ability to move forward with its official interpretation. If the interpretation is vacated, it

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265. See *id.* at 169.

266. Ellen R. Jordan, *The Administrative Procedure Act's "Good Cause" Exemption*, 36 ADMIN. L. REV. 113, 116-17 (1984).

267. See Susan Cornwell, *Conservatives in Congress Urge Shutdown of IRS*, REUTERS (May 2, 2016, 7:06 AM), <https://www.reuters.com/article/us-usa-taxes-congress/conservatives-in-congress-urge-shutdown-of-irs-idUSKCN0XT0TF> [<https://perma.cc/2BB8-4TGL>]; see also Mike Allen, *Cantor Plans Anti-IRS Push*, POLITICO (July 9, 2013, 9:29 AM), <https://www.politico.com/story/2013/07/eric-cantor-irs-093878> [<https://perma.cc/7WJR-45HX>].

268. See 5 U.S.C. § 706 (2012).

269. See *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002); see also *Int'l Union, United Mine Workers v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966-67 (D.C. Cir. 1990).

270. *Checkosky v. SEC.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., dissenting).

eliminates penalties and the public's corresponding incentive for compliance.<sup>271</sup> Moreover, it reduces available guidance for those who would otherwise choose to rely upon it. However, if the case is remanded, one study of D.C. Circuit cases found that the agency was able to reinstate the same or similar rule in 80% of the cases with an average delay of less than two years.<sup>272</sup> Therefore, at least with remand, the failure to follow procedures merely cost time and uncertainty but did not prevent the agency from adopting what it thought was the best rule. Remand does not, however, guarantee anything else.

Additionally, increasing the cost of issuing these types of materials risks less being produced.<sup>273</sup> The procedures' cost plus the length of time required for their issuance will almost certainly reduce the amount of information provided internally to IRS employees and to taxpayers.<sup>274</sup> This information is necessary to ensure consistent audits so that taxpayers can plan their affairs and be treated fairly.

## 2. Penalties When Taxpayers Fail to Follow Them

As the tax system currently operates, the threat of significant civil penalties encourages compliance with tax regulations and other forms of government-issued guidance, even those that fail to go through notice and comment. Focusing on regulations, if a taxpayer fails to pay the proper amount of tax and, in the process, disregards published regulations, financial penalties may be imposed in addition to the tax itself and interest on the tax due.<sup>275</sup> Penalties apply to temporary and final regulations and whether they are interpretive or legislative. However, there are exceptions to the penalty for a taxpayer's good-faith disagreement over the regulations.<sup>276</sup> Thus,

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271. See generally § 706.

272. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability To Achieve Regulatory Goals Through Informal Rulemaking?*, 94 Nw. U. L. REV. 393, 440 n.277 (2000).

273. McMahan, *supra* note 213, at 593.

274. See *id.*

275. See generally 26 U.S.C. §§ 6662-6664 (2012). Failure to follow other tax guidance might also give rise to penalties but only if there is no "realistic possibility of being sustained on its merits." Treas. Reg. § 1.6662-3(b)(2) (2016). According to an ABA task force, this "may fall short of a sanction rising to the force of law." Irving Salem et al., *ABA Section of Taxation: Report of the Tax Force on Judicial Deference*, 57 TAX L. 717, 727 (2004). The taxpayer has the burden of overcoming the presumption that the IRS's determination of negligence is greater than unreasonable reliance on advice, although the IRS's determination must be supported by some evidence. See *Barlow v. Comm'r*, 301 F.3d 714, 724 (6th Cir. 2002).

276. See Treas. Reg. § 1.6664-4 (2016).

taxpayers can ignore any regulation if they reasonably think that the regulation is incorrect but not if they just do not like the regulation or did not bother to read it.

Financial penalties can be significant. Penalties of 20% of the underpayment are imposed for “[n]egligence or disregard of rules and regulations.”<sup>277</sup> This means that penalties may be imposed for the careless, reckless, or intentional disregard of temporary or final regulations and most other published tax guidance.<sup>278</sup> However, civil penalties generally cannot be imposed when the taxpayer believes the regulations are an incorrect interpretation of the statute. If a taxpayer takes a position contrary to a regulation and that contrary position has a realistic possibility—meaning a greater than one-third likelihood—of being sustained on the merits, the taxpayer is not susceptible to a penalty for disregarding the regulations.<sup>279</sup>

Additionally, taxpayers can typically avoid penalties by disclosing that the tax return takes a position contrary to a regulation.<sup>280</sup> Disclosure represents a good faith challenge to a regulation’s validity unless the taxpayer fails to keep adequate records to properly substantiate the items or there is no reasonable basis for the challenge.<sup>281</sup> Having no reasonable basis for a different interpretation of the statute is a lower threshold, permitting taxpayers to prevail with only a 5% or 10% chance of being sustained in court.<sup>282</sup>

Regardless of any ability to avoid penalties, it may be unfair to hold taxpayers responsible for following regulations that have not completed notice and comment.<sup>283</sup> For such rules, taxpayers have not had the opportunity to publicly comment on the rules they are bound to follow. Additionally, it may be problematic to impose financial penalties for the failure to obey rules that are the Treasury Department’s interpretation of the law, as courts are the final arbiter of legal interpretation.

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277. § 6662(a), (b)(1).

278. See *id.* § 6662(c); see also § 1.6662-3(b)(2).

279. See § 1.662-3(b)(2); see also Treas. Reg. § 1.6694-2(b) (2016); ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 85-352 (1985); Dennis J. Ventry, Jr., *Lowering the Bar: ABA Formal Opinion 85-352*, 112 TAX NOTES 69, 69, 76, 77 (2006).

280. See Ventry, *supra* note 279, at 69, 76, 77.

281. See *id.*

282. See § 1.6662-3(b)(3)-(d); see also ABA Comm’n on Prof’l Ethics & Grievances, Formal Op. 314 (1965).

283. See Hickman, *Unpacking the Force of Law*, *supra* note 16, at 505-06, 526-28. See generally Michael Asimow, *Civil Penalties for Inaccurate and Delinquent Tax Returns*, 23 UCLA L. REV. 637 (1976); Arnold Hoffman, *Intentional Disregard of Rules and Regulations*, 28 TAXES 111 (1950); Donald Arthur Winslow, *Tax Penalties—“They Shoot Dogs, Don’t They?”*, 43 FLA. L. REV. 811 (1991).

There is also debate over the usefulness of penalties in the tax context and whether penalties increase or decrease tax compliance.<sup>284</sup> With a 0.6% personal audit rate in a tax system with over 244 million tax returns, penalties may be viewed as necessary to minimize the likelihood of tax evasion.<sup>285</sup> However, people who fail to read these rules and regulations may also be unaware of penalties. If that occurs, penalties are a post-hoc tool for punishing abuse and compensation to the government for detecting it. A proper evaluation of penalties' effectiveness is beyond the scope of this Article. Any move to eliminate financial penalties from the system for failure to comply with the Treasury Department and IRS's published materials needs a comprehensive evaluation of the impact of doing so.

Despite penalties for failing to follow published guidance potentially being costly, this failure cannot result in incarceration. Although there are criminal penalties imposed under the Internal Revenue Code, disregard of regulations or other published materials is not grounds for criminal prosecution.<sup>286</sup> Criminal tax evasion is defined as the willful attempt to evade or defeat the income tax.<sup>287</sup> Therefore, tax crimes require an affirmative act constituting evasion and willfulness, neither of which exists because of a disagreement over the content of a regulation or even failing to read the regulation.<sup>288</sup> Even if a jury was not instructed that a "bad purpose" or "evil purpose" is necessary for criminal evasion,<sup>289</sup> a good faith misunderstanding of tax law is a defense, and the Supreme Court has held that this

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284. See generally Reuven S. Avi-Yonah, *Corporations, Society and The State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193 (2004); Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (2009); Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law is Uncertain*, 27 VA. TAX REV. 241 (2007); Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431 (2008); Eric M. Zolt, *Deterrence via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343 (1989); James R. Hines, Jr., *Taxed Avoidance: American Participation in Unsanctioned International Boycotts* (Nat'l Bureau of Econ. Research, Working Paper No. 6116, 1997).

285. IRS DATA BOOK, *supra* note 253, at 2.

286. See 26 U.S.C. §§ 7201-7217 (2012).

287. See § 7201; *Sansone v. United States*, 380 U.S. 343, 344 (1965); *United States v. Koskerides*, 877 F.2d 1129, 1137 (2d Cir. 1989); *United States v. Stone*, 770 F.2d 842, 844 (9th Cir. 1985).

288. See *United States v. Pomponio*, 429 U.S. 10, 12-13 (1976).

289. See *United States v. Kelley*, 539 F.2d 1199, 1204 (9th Cir. 1976), *cert. denied*, 429 U.S. 969 (1976); *United States v. Malinowki*, 472 F.2d 850, 853 (3rd Cir. 1973), *cert. denied*, 411 U.S. 970 (1973); *United States v. Bishop*, 412 U.S. 346, 360-61 (1973).

understanding need not even be objectively reasonable.<sup>290</sup> Negligence, even gross negligence, does not establish criminal willfulness.<sup>291</sup>

### C. Recent Judicial Challenges to Tax Materials

Agencies know that their published materials are subject to judicial review. However, even agency rules that complete the notice-and-comment process are not free from judicial invalidation. One study found that courts reject 30% of rules that go through notice and comment because the agency did not adequately respond to one or more submitted comments.<sup>292</sup> Invalidation is increasingly likely in the tax context as courts hear cases applying the APA in ways that are new in this area of law. As discussed below, many recent tax cases have been decided on arguments regarding procedure, most of which have struck down Treasury Department regulations.

#### 1. *Judicial Review of Notice and Comment in Tax Cases*

The APA incentivizes litigation over agency compliance with notice-and-comment procedures.<sup>293</sup> Judicial review is to proceed with a hard look at agency action, and it imposes close substantive judicial review of agency guidance.<sup>294</sup> Although the meaning of hard-look review is subject to debate, it is clear that courts are to intervene in cases of procedural inadequacies.<sup>295</sup> If the court becomes aware that an agency has not really taken a “hard look” at problems identified by the public or has not genuinely engaged in reasoned decision-making, regulations must be invalidated.<sup>296</sup> As part of this review, courts can

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290. *United States v. Montgomery*, 747 F.3d 303, 309-10 (5th Cir. 2014). *See* *Cheek v. United States*, 498 U.S. 192, 192 (1991); *United States v. Flitcraft*, 803 F.2d 184, 186 (5th Cir. 1986).

291. *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992); *United States v. Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987); *United States v. Goichman*, 407 F. Supp. 980, 986 (E.D. Pa. 1976), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

292. Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 10 (2014). Lawyers of interested parties critical of the proposed rules have learned to submit voluminous comments. *Id.* at 9-10.

293. *See* *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *see also* *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

294. *See* *Wagner*, *supra* note 200, at 1352.

295. RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 447-50 (4th ed. 2002); Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 116-18 (2003); *Wagner*, *supra* note 200, at 1357.

296. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

take a hard look to ensure that an agency has adequately considered all comments and that the agency has adequately supported its contested assumptions.<sup>297</sup>

Even though courts often do not use the term “hard-look review” and the depth of review varies over time, the threat of invalidation remains a concern for agencies as they draft guidance.<sup>298</sup> One difficulty with hard-look review is that the doctrine imposes no rules regarding the size, number, detail, or technicality of the issues that can be raised in the comment period or how the courts will assess the validity and importance of those comments.<sup>299</sup> Professor Jerry Mashaw argues that courts function as “robbed roulette wheels” when reviewing agency guidance.<sup>300</sup> Therefore, it is impossible to know the appropriate specificity to use for a rebuttal. Agencies may rationally devote excessive or inadequate resources to this process.

Because of the general uncertainty regarding hard-look review, an overarching issue is the extent to which the APA’s notice-and-comment requirement applies to tax regulations and tax guidance more generally. Since 2011, when *Mead* was decided,<sup>301</sup> courts have heard a number of cases in which the APA was used to strike down tax guidance. Few of these cases have explicitly reached a conclusion on whether guidance should be vacated or remanded, although the likely result is that the guidance is vacated and the statute left without implementing rules.

In one such case, *Altera Corp. v. Commissioner*, the taxpayer sued over international tax regulations governing agreements between subsidiaries of multinational corporations.<sup>302</sup> The regulations at issue were issued under § 482, governing the tax treatment of cost-sharing arrangements among related parties. This arrangement is part of transfer pricing, which allocates expenses among subsidiaries in

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297. Whether the Supreme Court has truly adopted hard-look review is open to debate. Compare Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 183-84 (1983), with Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 312 (2004).

298. See LUBBERS, *supra* note 228, at 434-38; see also Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1190 (1988); Hertz, *supra* note 297, at 308-18; Sunstein, *supra* note 297, at 181-84; see also Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 233-34 (1996).

299. PIERCE, *supra* note 295, at 447-50; Rubin, *supra* note 295, at 116-18; Wagner, *supra* note 200, at 1352.

300. Wagner, *supra* note 200, at 1360 n.151 (citing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 181 (1999)).

301. *United States v. Mead Corp.*, 533 U.S. 218, 231 (2000).

302. See *Altera Corp. v. Comm’r*, 145 T.C. 91, 134 (T.C. 2015).

different countries.<sup>303</sup> Therefore, the taxpayers affected by the regulations tended to be educated on tax law. The regulations had gone through notice and comment and the issue was well known and hotly debated long before the *Altera* case.<sup>304</sup>

According to the Tax Court, the Treasury Department's six-page preamble to the regulations was not an adequate statement responding to the thirteen submitted comments and four participants in the hearings.<sup>305</sup> At the time the final rule was issued, the Treasury Department's files did not contain expert opinions, empirical data, or articles that supported its position.<sup>306</sup> Consequently, in *Altera* a unanimous Tax Court invalidated the regulations. By adopting a hard-look review of the regulatory process, the court found that the agency must examine the relevant data and articulate a satisfactory explanation for its action.<sup>307</sup> While the court accepted that "[i]mproving administrability can be a reasonable basis for agency action," the Treasury Department did not make this claim in its preamble (although even if it did, it does not appear the court would have accepted this claim without more significant fact-finding).<sup>308</sup> From *Altera*, it appears that the Tax Court, which hears 95% of all tax litigation, believes that all tax regulations are subject to notice and comment.<sup>309</sup>

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303. See *id.* at 95-96.

304. The issue was raised in prior litigation and also in the notice of proposed rulemaking and public hearings. See generally *Xilinx Inc. v. Comm'r*, 125 T.C. 4 (T.C. 2005); *Compensatory Stock Options Under Section 482*, 67 Fed. Reg. 48997 (proposed Jul. 29, 2002).

305. See *Altera Corp.*, 145 T.C., at 130.

306. See *id.* at 107. The Treasury Department attempted to address comments by stating it "do[es] not agree" with them despite acknowledging contrary "data may not be available." *Id.* at 108. The Department asserted that the evidence provided by the commentators "do not share enough characteristics" with the issues raised by the regulations to be conclusive. *Id.* at 127.

307. See *id.* at 133.

308. See *id.* at 126. Compare this outcome to *Schwabach v. Commissioner*, regarding the passive activity loss regulations, which the Tax Court held complied with the APA. 111 T.C. 215, 216 (T.C. 1998). In its discussion, the court focused on the interaction between the agency and the public in two rounds of comments rather than evaluating the agency's wording. See *id.* at 224. In *Schwabach*, the proposed regulation had not reached shareholders of C corporations, but this relationship was governed by the final regulations. See *id.* at 224-25. The court concluded that a permissive logical outgrowth analysis did not invalidate the notice and comment process, a position inconsistent with modern hard-look review. See *id.* at 226. See also *Am. Med. Ass'n v. United States*, 887 F.2d 760 (7th Cir. 1989); *Griffin Indus., Inc. v. United States*, 27 Fed. Cl. 183, 196 (1992); *Dow Corning Corp. v. United States*, 22 Cl. Ct. 184, 192 (Cl. Ct. 1990); *Wing v. Comm'r*, 81 T.C. 17, 32 (T.C. 1983).

309. See *Altera Corp.*, 145 T.C. at 112.

In late 2017, the *Altera* appeal was argued before the Ninth Circuit.<sup>310</sup> According to the government, the regulations did not rest on empirical conclusions, so the APA rules were not implicated.<sup>311</sup> According to Professor Kristin Hickman, it is possible that the appellate court was troubled having the Tax Court adjudicate APA litigation.<sup>312</sup> This case has since been subject to rehearing with the panel's focus in oral arguments on the substantive reasonableness of the regulations, with only some discussion of the Treasury Department's compliance with the APA.<sup>313</sup>

On the other hand, although a case not focusing on the procedure used to promulgate a regulation, in *Balestra v. United States*, the Court of Appeals for the Federal Circuit may have signaled that it has backtracked from hard-look review.<sup>314</sup> In *Balestra*, a husband and wife who filed a joint tax return brought a refund suit for employment taxes on deferred compensation that was vested but that the husband would never receive because his employer went bankrupt.<sup>315</sup> The issue was the regulatory definition of deferred compensation for purposes of payroll taxes.

Not noting that the regulations had gone through notice and comment, the court focused on the fact that the regulation complied with the scant legislative history available.<sup>316</sup> Although purporting to apply hard-look review, the court cursorily repeated the notice of proposed and final rulemaking. That “the regulation in this case does not conflict with the statute” permitted the court to uphold the regulation.<sup>317</sup> In doing so, the court found that the Treasury Department did not act arbitrarily or capriciously but that, instead, it sought simple, workable, and flexible rules; the “path” used to create the regulations was “reasonably discernable.”<sup>318</sup>

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310. See Oral Argument, *Altera Corp. v. Comm’r*, Nos. 16-70496, 16-70497, 2018 WL 343989 (9th Cir. July, 24, 2018), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000012327](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012327) [<https://perma.cc/YJ3Q-KLM6>].

311. See *id.*

312. See Paul Caron, *Hickman: Altera Meets Chamber of Commerce*, TAXPROF BLOG (Oct. 17, 2017), [http://taxprof.typepad.com/taxprof\\_blog/2017/10/hickman-altera-meets-chamber-of-commerce.html](http://taxprof.typepad.com/taxprof_blog/2017/10/hickman-altera-meets-chamber-of-commerce.html) [<https://perma.cc/RYPH-856N>].

313. See Oral Argument, *Altera Corp. v. Comm’r*, Nos. 16-70496, (9th Cir. Oct. 16, 2018), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000014449](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014449) [<https://perma.cc/RD5L-4PWB>].

314. See generally 803 F.3d 1363 (Fed. Cir. 2015).

315. See *id.* at 1365.

316. See *id.* at 1366.

317. *Id.* at 1373.

318. See *id.* at 1374.



## 2. Temporary Regulations and Timing

As discussed in Subsection II.A.3, the Treasury Department's temporary regulations are subject to challenge when the Department does not use notice and comment for their issuance. The Treasury Department generally relies on Congress's three-year limitation to issue them, often concurrently with proposed regulations proceeding through notice and comment.<sup>319</sup> Taxpayers are challenging this assumption, and some courts that have heard the issue have sided with taxpayers over the government. Taxpayers generally want to litigate these matters before regulations or other guidance apply. On the other hand, Congress decided in 1867 that pre-enforcement litigation would stifle the government's ability to raise revenue.<sup>320</sup> Congress limited taxpayers' ability to engage in pre-enforcement litigation in the tax context.<sup>321</sup> However, much as taxpayers are winning with respect to temporary regulations, they are winning earlier in the process.

The issue of temporary regulations came before the Tax Court in *Intermountain Insurance Service of Vail, LLC v. Commissioner*.<sup>322</sup> In response to a widely sold tax shelter, Son of BOSS, the Treasury Department issued temporary regulations providing that inflated tax basis would trigger the extended period of limitation for substantial understatements of income.<sup>323</sup> According to the agency's interpretation, Congress authorized a tax-specific exception to notice and comment for temporary regulations for three years.<sup>324</sup> The Tax Court refused to accept the temporary regulations not because of their procedure but on the grounds that an earlier Supreme Court decision precluded the Treasury Department's interpretation.<sup>325</sup> A concurring opinion by Judges James Halpern and Mark Holmes discussed in

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319. See Hickman, *supra* note 180, at 1748-51.

320. See Stephanie Hunter McMahon, *Pre-enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1343-1344 (2017).

321. The Anti-Injunction Act, in 26 U.S.C. § 7421, denies injunctive relief by generally disallowing "suit for the purpose of restraining the assessment or collection of any tax [to] be maintained in any court by any person, whether or not such person is the person against whom such taxes was assessed." 26 U.S.C. § 7421 (2012). The Declaratory Judgment Act contains a broader tax exception that prevents courts from providing declaratory relief for controversies "with respect to Federal taxes." 28 U.S.C. § 2201(a) (2000).

322. See 134 T.C. 211, 245-46 (T.C. 2010), *rev'd on other grounds*, 650 F.3d 691 (D.C. Cir. 2011).

323. See *id.* at 211.

324. Judges Halpern and Holmes of the Tax Court rejected this interpretation. See *id.* at 245-46 (Halpern, J., concurring).

325. See *id.* at 213 (quoting *Bakersfield Energy Partners, LP v. Comm'r*, 128 T.C. 207, 215 (T.C. 2007)).

detail their objection to the Treasury Department's claim to a political trade off of the short-term life of temporary regulations for forgoing notice and comment.<sup>326</sup>

More recently, in *Chamber of Commerce v. IRS*, a federal district court vacated regulations after finding that the Anti-Injunction Act did not prevent pre-enforcement review of procedural challenges under the APA.<sup>327</sup> The Anti-Injunction Act is normally interpreted as requiring a delay in tax litigation until after the law is enforced against a particular taxpayer.<sup>328</sup> However, in *Chamber of Commerce*, the court allowed the litigation.<sup>329</sup> Ruling that the Anti-Injunction Act did not preclude review of this pre-enforcement activity, the court also rejected the claim that temporary regulations could be issued without notice and comment simply because of the limitation in § 7805(e) that they are valid for only three years.<sup>330</sup> The court did not question the Treasury Department's authority to issue the regulations with proper procedure.<sup>331</sup>

The regulations in *Chamber of Commerce* were politically sensitive, involving rules to reduce corporations' tax advantage from relocating their headquarters to other countries.<sup>332</sup> Popularly called corporate inversions, this relocation of headquarters seeks to remove much of a corporation's foreign-source income from the U.S.'s worldwide tax reach.<sup>333</sup> The regulations responded to a statutory provision permitting the Treasury Department to modify the application of a statute to "prevent the avoidance of [its] purposes" but were issued in 2016 as temporary regulations without notice and comment.<sup>334</sup>

The regulations made it more likely a corporate inversion would run afoul of a 2004 statute.<sup>335</sup> In 2004, Congress enacted legislation

326. See *id.* at 238-48; see also, Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 683-84 (2012).

327. *Chamber of Commerce of United States v. Internal Revenue Serv.*, No. 1:16-CV-944-LY, 2017 WL 4682050, at \*3-4 (W.D. Tex. Oct. 6, 2017).

328. See Stephanie Hunter McMahon, *Pre-Enforcement Litigation Needed for Taxing Procedures*, 92 WASH. L. REV. 1317, 1343-44 (2017).

329. See *Chamber of Commerce*, 2017 WL 4682050, at \*6.

330. See *id.* at \*7.

331. Andy Grewal, *Loss in Anti-Inversion Case Strikes Potentially Major Blow on IRS's Rulemaking Authority*, YALE J. REG., NOTICE AND COMMENT (Sept. 30, 2017), <http://yalejreg.com/nc/loss-in-anti-inversion-case-strikes-potentially-major-blow-to-irss-rulemaking-authority> [<https://perma.cc/ZYD2-3RDA>].

332. Treas. Reg. §1.7874-8T.

333. STEPHANIE HUNTER MCMAHON, PRINCIPLES OF TAX POLICY 354 (2d ed. 2018). See *id.* for more on U.S. international taxation.

334. 26 U.S.C. § 7874(g) (2012); see also § 7874(e)(6).

335. See § 7874.

that limited a U.S. corporation's ability to merge into a foreign company to limit the income subject to U.S. taxation.<sup>336</sup> The 2004 rules ignore merger inversions, meaning the corporation will continue to be taxed as a U.S. taxpayer, if U.S. shareholders retain a substantial stake, defined as 80% of the voting and value, in the new foreign parent corporation. Limitations on favorable tax elements may apply if U.S. shareholders hold less than 80% but more than 60% of the new entity.<sup>337</sup> In face of the rule, corporations must plan more in order to invert overseas. In 2014, Pfizer, Walgreen, and Medtronic each proposed high-profile inversions. Although the press questioned whether transactions were unpatriotic, Congress failed to act.<sup>338</sup> Instead, the Treasury Department issued these temporary regulations that added a three-year lookback rule to ensure the foreign company did not increase its size to avoid the statutory inversion threshold.<sup>339</sup> These rules make it less likely that a U.S.-based company will be recognized as inverting if it merges into a smaller foreign company.

Despite taxpayer resistance, in the short term, the Treasury Department's strategy was successful. The Pfizer deal was called off, with the company stating that the decision "was driven by the actions announced by the U.S. Department of Treasury."<sup>340</sup> However, since then, the regulations have suffered judicial defeat and have continued a string of cases that strictly apply the APA in the tax context.

One judicial means of permitting pre-enforcement litigation is for courts to interpret the Anti-Injunction Act's subject matter in a limited way. For example, in *Chamber of Commerce*, the court limited the Anti-Injunction Act to lawsuits over taxes determined to be owed.<sup>341</sup> Therefore, the Anti-Injunction Act does not cover the situation in which the "[p]laintiffs challenge the validity of the Rule so that a reasoned decision can be made about whether to engage in a

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336. American Jobs Creation Act of 2004, Pub. L. 108-357, §7874, 118 Stat. 1418.

337. See *id.*

338. See generally Robert J. Samuelson, *Making Corporate Tax Dodgers Patriotic*, WASH. POST, Jul. 23, 2014; Jeanne Sahadi, *When U.S. Companies Dodge Taxes, Is It Unpatriotic?*, CNN.MONEY, Jul. 25, 2014

339. See generally IRS, INTERNAL REVENUE BULLETIN 2016-45 540 (2016).

340. Press Release, Pfizer Inc., Pfizer Announces Termination of Proposed Combination with Allergan (Apr. 6, 2016), [https://www.pfizer.com/news/press-release/press-release-detail/pfizer\\_announces\\_termination\\_of\\_proposed\\_combination\\_with\\_allergan](https://www.pfizer.com/news/press-release/press-release-detail/pfizer_announces_termination_of_proposed_combination_with_allergan) [<https://perma.cc/7ZFE-3ZDK>].

341. *Chamber of Commerce of United States v. Internal Revenue Serv.*, 2017 WL 4682050, at \*3-4 (W.D. Tex. Oct. 6, 2017).

potential future transaction that would subject them to taxation under the Rule.”<sup>342</sup>

This *Chamber of Commerce* interpretation is consistent with the Supreme Court’s 2015 ruling in *Direct Marketing Association v. Brohl*, which narrowly read the Tax Injunction Act, a law similar to the Anti-Injunction Act but one that prohibits federal district courts from hearing challenges to state taxes.<sup>343</sup> At issue in *Direct Marketing*, a Colorado law required retailers to notify Colorado customers of potential use tax liability and required retailers to report tax-related information to state tax authorities.<sup>344</sup> Thus, the law imposed notice and reporting obligations but no tax. The taxpayer successfully limited the activities for the “assessment and collection of tax” that cannot be challenged prior to enforcement, and so the Tax Injunction Act did not apply.<sup>345</sup>

The analysis of *Direct Marketing*, if applied to the Anti-Injunction Act, would greatly expand the number of cases that could be heard prior to enforcement because of the federal tax system’s copious information gathering. Although assessment “might also be understood more broadly to encompass the process by which [the] amount [of tax liability] is calculated,” the Court chose to interpret it as the official action taken based on information already reported.<sup>346</sup> In the Court’s opinion in *Direct Marketing*, collection occurs only “after a formal assessment” and is part of the enforcement process.<sup>347</sup> In this narrow reading of assessment, any guidance regarding anything that occurs prior to a tax return being filed is open to pre-enforcement litigation.

However, later in 2015, the D.C. Circuit Court of Appeals dismissed pre-enforcement litigation over the Treasury Department’s compliance with the APA.<sup>348</sup> The case involved Treasury Department-

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342. *Id.* For more on the extremely narrow reading of the Anti-Injunction Act, see Bryan Camp, *More on the Successful Challenge to the Anti-Inversion Regulations*, PROCEDURALLY TAXING (Oct. 2, 2017), <http://procedurallytaxing.com/more-on-the-successful-challenge-to-the-anti-inversion-regulations> [<https://perma.cc/NV4Q-X8U8>].

343. 135 S. Ct. 1124, 1129 (2015). The Tax Injunction Act is not exactly like the Anti-Injunction Act, but the Court “assume[d] that words used in both Acts [were] generally used in the same way.” *Id.*

344. *See id.* at 1128.

345. *Id.* at 1133.

346. *Id.* at 1130.

347. *See id.*

348. *See Fla. Bankers Ass’n v. U.S. Dep’t of Treasury*, 799 F.3d 1065, 1072 (D.C. Cir. 2015). *But see Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011), *cert. denied*, 135 S. Ct. 946 (2015) (vacating refund procedures issued in Notice 2006-50 without notice and comment).

issued regulations governing banks' reporting requirements for the interest income earned by non-U.S. taxpayers who were from certain treaty countries.<sup>349</sup> The interest is not taxable in the U.S., but, according to the Treasury Department, the information is necessary to comply with information-sharing agreements with other countries.<sup>350</sup> The bankers' association argued that the Treasury Department acted arbitrarily and capriciously by failing to consider that some people would withdraw funds from U.S. banks in response to the reporting requirement.

In *Florida Bankers Association v. Department of the Treasury*, the court held that the Anti-Injunction Act prevents this review of procedural matters.<sup>351</sup> The Circuit Court held it was not permissible to circumvent the Anti-Injunction Act and Declaratory Judgment Act by challenging only the regulatory aspect of a regulatory tax.<sup>352</sup> Earlier, the District Court had been unwilling to rely on the Anti-Injunction Act and Declaratory Judgment Act because the regulations did not restrain the assessment or collection of taxes but only imposed a reporting requirement.<sup>353</sup> Although seemingly at variance with *Direct Marketing*, rehearing en banc was denied, as was certiorari.<sup>354</sup> Nevertheless, this case may be inconsistent with the new narrower reading of these statutes.<sup>355</sup>

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349. See *Fla. Bankers*, 799 F.3d at 1068.

350. See *id.* at 1068.

351. See *id.* at 1067; see also 26 U.S.C. § 7421(a) (2012).

352. See *Fla. Bankers*, 799 F.3d at 1070.

353. See *Fla. Bankers Ass'n v. U.S. Dep't of Treasury*, 19 F. Supp. 3d 111, 121 (D.D.C. 2014). Although the court ultimately sided with the government, it lessened the government's protection from pre-enforcement procedural litigation. *Id.* at 120-21. Banks do not owe tax on the reported income even though a penalty, defined in the Code to be a tax, attached if a bank fails to meet its reporting requirements. The penalty is in Chapter 68, Subchapter B, Section 6721. Section 6671(a) defines penalties imposed by Title 26, including Chapter 68, Subchapter B, as taxes unless otherwise provided. This differs from *Foodservice & Lodging Inst., Inc. v. Regan*, in which plaintiffs were allowed to challenge only the regulation providing "data useful for assessing tip compliance" but no tax attached for the failure to comply. 809 F.2d 842, 846 (D.C. Cir. 1987). The other regulations involved the assessment of tax and the employer could "refuse to comply, pay the statutory fine, and sue for a refund of the fine." *Id.* at 843-45. *But see California v. Regan*, 641 F.2d 721, 722 (9th Cir. 1981) (subjecting California's reporting requirement pursuant to ERISA to the Declaratory Judgment Act).

354. See *Fla. Bankers Ass'n v. Dep't of Treasury*, 136 S. Ct. 2429, 2429 (2016).

355. See generally Patrick J. Smith, *D.C. Circuit in Florida Bankers Misapplies Anti-Injunction Act*, 149 TAX NOTES 1493 (Dec. 21, 2015).

## III. USE OF GOOD CAUSE EXCEPTION

Congress never expected that all agency materials would go through notice and comment. At the time that Congress created the procedure, it included exceptions. Although agencies often use these statutory exceptions, courts interpret them narrowly.<sup>356</sup> As discussed below, courts interpret these exceptions so that notice and comment is the default but not required if other public goals of sufficient merit conflict with the process. One such exception is the good cause exception that permits agencies to skip notice and comment in limited circumstances.<sup>357</sup> The Treasury Department often relies on good cause but fails to justify its reliance in a way that would create a strong argument for mitigating notice and comment.

## A. General Exception from Notice and Comment

Agencies often chafe against the restraints of notice and comment.<sup>358</sup> They argue that the procedures have become onerous and reduce the amount of rules and guidance that are produced because the production is costly in terms of agency time and resources.<sup>359</sup> Perhaps anticipating this result, Congress enacted the good cause exception as one of several exceptions from notice and comment.<sup>360</sup> At its heart, this exception works to balance “conflicting values,” and that balancing will always be fraught with political and social discontent.<sup>361</sup> Although

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356. Hickman, *Unpacking the Force of Law*, *supra* note 16, at 493-94.

357. See 5 U.S.C. § 553(b)(B) (2012).

358. Stephanie Hunter McMahon, *The Perfect Process is the Enemy of the Good Tax: Tax's Exceptional Regulatory Process*, 35 VA. TAX REV. 553, 577-85 (2016).

359. For more on ossification, see *infra* text at note 567.

360. See 5 U.S.C. § 553(b)(B) (2012). Other exceptions are specific subject-matter exceptions for national priority circumstances—military or foreign affairs—or for internal agency or government business. See § 553(a). Another exception is for interpretive or procedural rules and general statements of public policy. See § 553(b)(A). These latter forms of guidance are not supposed to have the force and effect of law or, alternatively, do not govern substantive rights. Instead, they offer guidance as to the agency’s interpretation of the law. The ability to issue interpretive regulations has come into question and any distinction that remains between the types of rules—interpretive or legislative—is difficult for agencies to make. See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001); *Reno v. Koray*, 515 U.S. 50, 61 (1995); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-58 (1991). See also Lubbers, *supra* note 228, at 64-77; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17. See generally *Christensen v. Harris Cty.*, 529 U.S. 576 (2000); Johnson, *supra* note 238. For this reason, interpretive guidance is left for other scholars to debate.

361. Jordan, *supra* note 266, at 116.

currently not widely accepted by courts, the good cause exception permits agencies to issue immediately binding guidance that has the force of law.<sup>362</sup> This exception only applies to the extent that compliance with the notice-and-comment procedure is “impracticable, unnecessary, or contrary to the public interest.”<sup>363</sup> There is an additional good cause exception to the standard thirty-day waiting period following rules’ publication before they become effective.<sup>364</sup> At times, these exceptions are a large “legal grey hole” through which agencies avoid judicial review of their procedure in making law.<sup>365</sup>

Because of the good cause exception’s power to create law through a less public process than required by notice and comment, Congress and the courts limit its application.<sup>366</sup> The goal is often to maintain a robust dialogue between agencies and the public except when the dialogue is not a net benefit to society. Thus, the good cause exception is not intended to be an escape clause but, instead, is conditioned upon a “true and supported or supportable finding of necessity or emergency . . . made and published.”<sup>367</sup> The good cause test is only to apply “when ‘delay would do real harm’” to the public.<sup>368</sup> The difficulty, however, is that the terms “emergency” and “harm” are not defined.<sup>369</sup> Parties may interpret them differently in the face of different facts.

Good cause is defined in the APA as entailing one or more of three criteria: when compliance with notice and comment is impracticable, unnecessary, or contrary to the public interest.<sup>370</sup> Each

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362. For more on the government’s interpretation of the good cause exception, see generally JARED P. COLE, CONG. RES. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION (2016).

363. *Id.* at 1.

364. § 553(d). See *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (discussing conceptual differences between good cause exception to notice and comment and good cause exception to thirty-day requirement).

365. See Adrian Vermeule, *supra* note 30, at 1130.

366. See *id.* at 1123.

367. S. REP. NO. 79-752, at 14. In the brief discussion on the congressional floor regarding the good cause exception when the APA was enacted, the presenting Representative commented that the good cause exception “may be made operative only where facts and interests are such that notice and proceedings are impossible or manifestly unnecessary.” 92 CONG. REC. 5650 (1946) (statement of Rep. Walter).

368. *San Diego Navy Broadway Complex Coal. v. U.S. Coast Guard*, No. 10cv2565-IEG(RBB), 2011 WL 1212888, at \*3 (S.D. Cal. Mar. 30, 2011) (quoting *Hawaii Helicopter Operators Ass’n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995)) (accepting as good cause the depletion of Coast Guard resources).

369. See S. REP. NO. 79-752, at App. A.

370. See § 553(b)(B). There is also a good cause exception from the 30-day waiting period between a rule’s publication and effective date. See § 553(d)(3).

category of reasoning for the good cause exception has a long and complicated judicial history in part because of courts' perceptions that agencies exploit the exception in order to shorten the regulatory process.<sup>371</sup> To win under courts' narrow interpretation, agencies must "incorporate[] the finding and a brief statement of reasons therefor."<sup>372</sup> Thus, agencies must explain their reasoning contemporaneously. They need not explicitly invoke the exception, but the record must "manifest plainly the agency's reliance on the exception."<sup>373</sup> Judges may deny the exception's application if the agency's reasoning is insufficiently developed.<sup>374</sup> Yet courts have been inconsistent in their enforcement of this requirement to explain the underlying rationale for the claim.<sup>375</sup>

First, the "unnecessary" prong of the good cause exception only applies if the rule is noncontroversial and "the public is not particularly interested" in it, such as a minor technical amendment.<sup>376</sup> If the new rule or rule change would be of consequence to members of the public, this prong should not apply. For example, when the Environmental Protection Agency (EPA) erroneously did a "search and replace" in drafting a rule, an error resulted that was of great consequence to the public (the difference being fifty parts per million or ten parts per million), so notice and comment was necessary to remove the error.<sup>377</sup> However, in limited circumstances, courts have interpreted "unnecessary" expansively, producing some confusion as to the appropriate standard.<sup>378</sup>

Some agencies take a liberal reading of "unnecessary" when the public is given the opportunity to trigger notice and comment. With direct final rules, an agency publishes a notice claiming the exception

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371. See, e.g., *Mid-Tex Elec. Coop. v. Fed. Energy Regulatory Comm'n*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) The "inquiry should be a close one" but not to be automatically dismissed because the inquiry is "inevitably fact- or context-dependent." *Id.*

372. § 553(b)(B).

373. *N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 768 (4th Cir. 2012) (quoting *Nat'l Customs Brokers & Forwarders Ass'n v. United States*, 59 F.3d 1219, 1224 (Fed. Cir. 1995)).

374. See *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 15-16 (D.D.C. 2009).

375. See Juan Lavilla, *The Good Cause Exception to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 399-403 (1989).

376. See Attorney General Manual, *supra* note 203, at 31. A study conducted in the 1980s found that almost 25% of rules adopted pursuant to the good cause exception were grounded on the claim they were unnecessary as minor or technical. See also Lavilla, *supra* note 375, at 342 n.92.

377. See *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 752 (D.C. Cir. 2001).

378. See *Chlorine Inst., Inc. v. OSHA*, 613 F.2d 120, 124 (5th Cir. 1980).



and the proposed adoption of a rule without public participation.<sup>379</sup> If no member of the public submits an adverse comment within the period provided, often thirty days, the rule is adopted without notice and comment; however, if an adverse comment is received, the agency withdraws the rule and proceeds with notice and comment.<sup>380</sup> Although supported by the Administrative Conference of the United States, a nonpartisan independent agency, the validity of this procedure is debated.<sup>381</sup> In the event that notice and comment is truly unnecessary, direct final rulemaking is more than the APA requires; if notice and comment applies, direct final rulemaking may be insufficient because it fails to strictly comply with the APA. Courts have not yet ruled on this issue.

Second, the “impracticable” prong of the good cause exception applies if the use of notice and comment would thwart the agency’s “due and timely execution of its functions.”<sup>382</sup> This expressly prioritizes the agency’s enabling act when the agency is unable to “follow section 553 and execute its statutory duties.”<sup>383</sup> The Attorney General’s Manual, published in 1947 and interpreting the then newly enacted APA, illustrates impracticability as when an agency tasked with saving lives learned from the investigation of an airline incident that a rule should be revised immediately in order to save lives.<sup>384</sup> In that case, notice and comment was impracticable because of the overriding need to ensure air safety.<sup>385</sup>

What is sufficient evidence of impracticability is unclear. A statutory deadline for the completion of regulations does not, by itself, make the notice-and-comment procedure impracticable but may be evidence of it.<sup>386</sup> Courts “are duty bound to analyze the entire set of circumstances” to determine whether there is sufficient time to permit

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379. For a discussion of direct final rulemaking, see Lars Noah, *Doubts about Direct Final Rulemaking*, 51 ADMIN. L. REV. 401, 406-07 (1999); Ronald M. Levin, *More on Direct Final Rulemaking*, 51 ADMIN. L. REV. 757, 758-63 (1999); Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 1 (1995).

380. See Levin, *supra* note 379, at 1.

381. See generally Administrative Conference of the U.S. Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43110 (Aug. 18, 1995).

382. Attorney General Manual, *supra* note 203, at 30.

383. *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983).

384. See Attorney General Manual, *supra* note 203, at 30-31.

385. See *id.*

386. See *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1236-37 (D.C. Cir. 1994); *Sepulveda v. Block*, 782 F.2d 363, 366 (2d Cir. 1986); *Petry v. Block*, 737 F.2d 1193, 1201-03 (D.C. Cir. 1984); *Levesque*, 723 F.2d at 184; *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 213 (5th Cir. 1979); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 287 (7th Cir. 1979).

notice and comment, including the resources the agency has available to create those regulations.<sup>387</sup> The agency's time pressure must result from a congressionally mandated deadline and not from the agency's delay.<sup>388</sup> This limitation is true even if the agency adopts the regulation after prolonged agency consideration that included a hearing and the submission of extensive pre- and post-hearing comments.<sup>389</sup>

As with many things in the law, the content of the good cause exception when deadlines apply is unclear. In *Consumers Union of the U.S., Inc. v. Sawhill*, the court found one month and two days sufficient to hold notice and comment on the Federal Energy Administration's interim price regulation for unleaded gasoline, in part on the grounds that the agency could have shortened the comment period from the traditional thirty days.<sup>390</sup> On the other hand, in *Philadelphia Citizens in Action v. Schweiker*, a forty-nine-day window before a law was effective was sufficiently short to allow waiver of notice and comment on a regulation governing a reduction in Aid to Families with Dependent Children (a precursor to Temporary Assistance for Needy Families, or TANF).<sup>391</sup> Deadlines do not always have to be explicit as long as the "congressional intent is stated" or even "otherwise revealed that implementation of the statute should be speedy."<sup>392</sup>

The legislation's complexity and severity of results are important factors in determining whether Congress has made notice and comment impracticable. When the Secretary "faced the daunting task of preparing regulations to implement a complete and radical overhaul of the Medicare reimbursement system," the court found

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387. See *Petry*, 737 F.2d at 1202-03.

388. See, e.g., *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006); see also *NRDC v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004); *Am. Fed'n of Gov't Emps. v. Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981); *Council of S. Mountains, Inc.*, 653 F.2d 573, 581-82 (D.C. Cir. 1981); *New Jersey v. EPA*, 626 F.2d 1038, 1047 (D.C. Cir. 1980); *N. Mariana Islands v. United States*, 686 F. Supp. 2d, 7, 15-16 (D.D.C. 2009).

389. See *Mid Continent Nail Corp. v. United States*, 999 F. Supp. 2d 1307, 1322 (Ct. Int'l Trade 2014).

390. See *Consumers Union of U.S., Inc. v. Sawhill*, 393 F. Supp. 639, 641 (D.C. Cir. 1975). Some courts object to shorter periods. For example, in *Energy Reserves Grp. v. FEA*, the court held a fifteen-day comment period was too short. 447 F. Supp. 1135, 1139, 1151 (D. Kan. 1978).

391. See *Phila. Citizens in Action v. Schweiker*, 669 F.2d 877, 885 (3d Cir. 1982). See generally *Omnibus Budget Reconciliation Act of 1981*, Pub. L. No. 97-35, 95 Stat. 357.

392. See *Lavilla*, *supra* note 375, at 357. See also *Phila. Citizens in Action*, 669 F.2d at 885; *Coal. of Mich. Nursing Homes, Inc. v. Dempsey*, 537 F. Supp. 451, 456 (E.D. Mich. 1982).

good cause to not apply notice and comment.<sup>393</sup> A district court also upheld the Department of Homeland Security and Department of Labor's use of the good cause exception for regulations, without which temporary non-agricultural workers could not be granted visas.<sup>394</sup> Thus, a deadline required by the statute or exigent circumstances, coupled with other factors, make it more likely courts will accept a claim for the good cause exception.

However, courts may be reluctant to recognize federal financial considerations as justifying a good cause exception even when in conjunction with short timeframes. For example, in *Levesque v. Block*, the First Circuit would not uphold an interim rule despite proof of a significant financial consequence.<sup>395</sup> The Department of Agriculture published interim rules governing food stamp regulations on September 4, 1981, to be implemented by the states by October 1, 1981, the beginning of the new fiscal year. The comment period opened on September 4 for 120 days and final rules were promulgated on November 19, 1982, more than a year after states were to comply.<sup>396</sup>

In *Levesque*, the Department argued that it had good cause to defer notice and comment largely on the basis that the regulations, by operationalizing the Omnibus Budget Reconciliation Act of 1981, would save \$1 billion.<sup>397</sup> The agency estimated the notice-and-comment procedure would have taken three months, which would have pushed the regulations beyond the start of the new fiscal year and delayed the cost savings by the year. Moreover, the budget for the food stamp program had assumed these savings so that benefits for everyone would have to be cut if the savings were not achieved.<sup>398</sup> In the Act, Congress had granted the Secretary the power to implement the new rules wholly according to the Secretary's discretion, only taking into account the need for "orderly implementation."<sup>399</sup> The First Circuit interpreted "orderly" as not requiring "immediate implementation" or speedy action.<sup>400</sup>

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393. *Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994).

394. *See Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1272 (N.D. Fla. 2016); *see also Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 613 (D.C. Cir. 1982).

395. *See Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983). Food stamp regulations are required to be issued in accordance with notice and comment despite being a benefit program. *See also* 7 U.S.C. § 2013(c) (1982); 5 U.S.C. § 553 (1982).

396. *See Levesque*, 723 F.2d at 178.

397. *See id.*

398. *See id.*

399. *See* 7 U.S.C. § 2012 (1982).

400. *See Levesque*, 723 F.2d at 185.

More recently, in *Sorenson Communications Inc. v. FCC*, the D.C. Circuit Court would not accept the possibility of the agency's potential budget shortage as providing good cause.<sup>401</sup> The Federal Communications Commissioner promulgated rules imposing certification requirements on hearing-impaired individuals receiving telephones with captioning capability. The rules were adopted because the plaintiff distributed free captioning-enabled phones, which greatly increased demand for captioned services subsidized by a government-organized fund.<sup>402</sup> The concern was that the pre-regulation pace of spending would deplete the fund before the end of the year. Although the D.C. Circuit would "not exclude the possibility that a fiscal calamity could conceivably justify bypassing the notice-and-comment requirement," it found the record was "simply too scant to establish a fiscal emergency."<sup>403</sup>

Thus, courts have held that deadlines can make notice and comment impracticable for the creation of necessary guidance; however, many courts are reluctant to accept short time frames alone as such a justification. Reluctance is particularly strong if there is the perception that the agency created the time pressure. Other factors often need to strengthen the justification, and financial considerations are unlikely to qualify as a factor. Financial considerations are disfavored as the purpose of the APA is to protect rights.<sup>404</sup>

The final, and most opaquely defined, prong of the good cause exception applies when notice and comment is "contrary to the public interest," meaning that the procedure would defeat the public's interests, however that is defined.<sup>405</sup> Often used in conjunction with the impracticability prong, courts generally require some form of emergency, such as a threat to public health or safety.<sup>406</sup> Courts have used this prong to permit rules providing for the automatic suspension of pilot licenses upon notification that the pilot is a security risk or for hunting regulations where the season had begun and the herds could dwindle to extinction.<sup>407</sup> In the case of the pilots, the court permitted the regulations because the agency "deemed such regulations

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401. *Sorenson Commc'ns. Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014); *see also* *Wash. All. of Tech. Workers v. Dep't of Homeland Sec.*, 156 F. Supp. 3d 123 (D.D.C. 2015) (failing to prove that high-tech employers needed to retain skilled technical workers to forestall a "fiscal emergency").

402. *See Sorenson*, 755 F.3d at 705.

403. *See id.* at 707.

404. *See* H.R. REP. NO. 79-1980, at 250; S. REP. NO. 79-752, at 193.

405. U.S. DEP'T OF JUSTICE, *supra* note 203, at 30.

406. *See Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004)

407. *See id.* at 1179-80; *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987).

necessary” to minimize a threat, bestowing significant power on the agency.<sup>408</sup> This was not surprising as the case arose shortly after 9/11.

An emergency for this purpose does not have to be life or death. For example, in *Mid-Tex Electric Cooperative, Inc. v. FERC*, the court permitted the use of the good cause exception.<sup>409</sup> The Federal Energy Regulatory Commission issued a rule allowing electric utilities to include in their rate base a portion of the construction costs for ongoing projects, citing three factors: First, the rule was temporary and limited in scope; second, the public had a lengthy opportunity to comment on virtually the same rule in a prior rule; third, there was a concern that the lack of the rule would cause “regulatory confusion” and “irremedia[ble] financial consequences” because of reliance.<sup>410</sup> Combining those factors, the court found the rule to be in the public interest.<sup>411</sup>

Financial considerations play a part in public-interest cases, often because of the concern that the prior announcement of regulations has a negative economic effect but only if the effect is adequately proven.<sup>412</sup> For example, a court upheld an executive order preventing the increase of professional football season ticket prices despite the order not having gone through notice and comment because of a concern that prior notice would lead to anticipatory price increases.<sup>413</sup> However, the agency must be prepared to demonstrate to a reviewing court the substantiality of its fear that regulated parties would undermine the contemplated regulation while the regulation is pending.<sup>414</sup> For example, in *Tennessee Gas Pipeline Company v. FERC*, the D.C. Circuit refused to apply the good cause exception to a rule requiring advanced notice of the construction of natural gas pipeline facilities because the court was not persuaded that businesses would rapidly build facilities to avoid an unknown rule.<sup>415</sup> Therefore,

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408. *Jifry*, 370 F.3d at 1179.

409. *See* *Mid-Tex Elec. Coop., Inc. v. Fed. Energy Regulatory Comm’n*, 822 F.2d 1123, 1130 (D.C. Cir. 1987).

410. *Id.* at 1132-34.

411. *See id.* at 1132.

412. *See* *Nader v. Sawhill*, 514 F.2d 1064, 1068-69 (Temp. Emer. Ct. App. 1975).

413. *See* *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1325-26 (Temp. Emer. Ct. App. 1974), *cert. denied*, 419 U.S. 896 (1974); *see also* *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992); *Nader*, 514 F.2d at 1068; *Reeves v. Simon*, 507 F.2d 455, 458 (Temp. Emer. Ct. App. 1974), *cert. denied*, 420 U.S. 991 (1975).

414. *See* *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992).

415. *See id.*

the court was unable to determine whether the agency's prediction was reasonable and so it vacated the regulations.<sup>416</sup>

The claim to the public interest is contentious, as seen in the Circuit Court split over non-tax regulations issued under the Sex Offender Registration and Notification Act of 2006.<sup>417</sup> The regulations require sex offenders traveling interstate to register in the various states.<sup>418</sup> These regulations apply retroactively to those convicted as a sex offender before the Act was signed.<sup>419</sup> They were issued without notice and comment on the grounds that they were necessary to eliminate uncertainty and to prevent delay in registration by those who would evade registration during notice and comment, commit additional sexual assaults, and be harder to apprehend.<sup>420</sup> The Fourth,<sup>421</sup> Fifth,<sup>422</sup> and Eleventh<sup>423</sup> Circuits have upheld the regulations; the Third,<sup>424</sup> Sixth,<sup>425</sup> Eighth,<sup>426</sup> and Ninth Circuits<sup>427</sup> have vacated the regulations on the grounds that they are procedurally invalid.

Arguing impracticability or that notice and comment is contrary to the public interest, agencies sometimes adopt rules as interim-final rules for which the public is invited to submit comments after the rule becomes effective.<sup>428</sup> This procedure makes the rule final and proposed at the same time, although in a different process than issuing both temporary and proposed regulations.<sup>429</sup> With interim-final rules, the agency commits itself to consider any submitted comments and

416. *See id.* at 1146.

417. *See* 18 U.S.C. § 2250(a) (2006); The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,030 (July 2, 2008); Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81,849, 81,850 (Dec. 29, 2010) (to be codified at 28 C.F.R. pt. 72). The law had been in effect seven months before the interim rules were issued, time for some notice and comment, especially because the post-effect comment period was only thirty days, and finalization of the rule did not occur until January 28, 2011. For more on this line of litigation, see Nathanael Paynter, Note, *Flexibility and Public Participation: Refining the Administrative Procedure Act's Good Cause Exception*, 2011 U. CHI. LEGAL FORUM 397, 397 (2011).

418. *See* § 2250(a).

419. *See* Paynter, *supra* note 417, at 397.

420. *See id.*

421. *See* United States v. Gould, 568 F.3d 459, 481 (4th Cir. 2009).

422. *See* United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011).

423. *See* United States v. Dean, 604 F.3d 1275, 1281 (11th Cir. 2010).

424. *See* United States v. Reynolds, 710 F.3d 498, 524 (3d Cir. 2013).

425. *See* United States v. Utesch, 596 F.3d 302, 310 (6th Cir. 2010); *see also* United States v. Cain, 583 F.3d 408, 422 (6th Cir. 2009).

426. *See* United States v. Brewer, 766 F.3d 884, 892 (8th Cir. 2014).

427. *See* United States v. Valverde, 629 F.3d 1159, 1166 (9th Cir. 2011).

428. For more on interim-final rules, see Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 711 (1999).

429. *See id.* at 704.

modify the rule if warranted. The agency's open-mindedness in that consideration is a relevant factor in determining whether good cause existed in the first place.<sup>430</sup> This process is valid under the APA if there is a good cause justification, in which case the subsequent comment period is good practice but statutorily unnecessary.

Because of the uncertainty over the meaning of "unnecessary," "impracticable," and "contrary to the public interest," Congress has considered a number of amendments to the phrasing of the good cause exception since the APA's enactment in 1946.<sup>431</sup> None have been enacted. Many proposals would restrict the exception's use to issues of public health, safety, or welfare, although most maintain an "important public interest" or "legislative policies" components.<sup>432</sup> Proposed changes would generally limit the exception's availability or increase the cost of relying on the exception.<sup>433</sup> For example, a bill introduced in the 114th Congress would expand the subsequent comment period and provide for hearings when rules are excepted because notice and comment is impracticable or contrary to the public interest.<sup>434</sup> When the Administrative Conference of the United States made a similar proposal, it noted that the reasonableness of the comment period should take "into account the nature and number of comments and *the agency's other responsibilities*."<sup>435</sup> Exactly how this would affect the issuance of guidance remains unknown.

## B. Use of the Good Cause Exception in Tax

As discussed in Part II, tax is an essential part of the federal budget. The budgeting system generally assumes that tax provisions' estimated revenue is raised despite any need for agency action to implement the law or to limit statutory ambiguities to preserve that revenue. This link between the revenue raised and revenue spent evidences the Treasury Department's need to speedily adopt operating rules and justifies a good cause exception from notice and comment. Because of the assumption that most tax provisions are immediately effective and their revenue is built into the budgeting process, Congress implicitly demands quick (generally before the end of the fiscal year) issuance of implementing rules.

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430. *See id.*

431. *See* Lavilla, *supra* note 375, at 324.

432. *See id.* at 324-26 (quoting H.R. 1776, 98th Cong., (1983)).

433. *See id.*

434. *See* Regulatory Accountability Act of 2015, S. 2006 (Introduced Aug. 6, 2015).

435. 1 C.F.R. § 305.83-2, Part 305—Recommendations of the Administrative Conference of the United States (1992) (emphasis added).

Fundamental to this justification is the recognition that tax revenue is necessary for the government to fund all other federal projects and is a unique part of the political bargain creating those projects. Congress decides as between projects based, in part, on the amount of revenue available to fund them, often with projects reduced in scope to fit within revenue estimates. Therefore, delay in the operation of the tax law frustrates congressional objectives and destroys the political bargain implicit in the budgeting process with a spillover effect on the financial basis of other federal projects<sup>436</sup> Even with older provisions, current year budgetary consequences demand implementation of a workable regime. The budget is built on a baseline of historical legislation, and subsequent changes presuppose the effectiveness of earlier tax legislation.<sup>437</sup>

This pressure imposed by revenue expectations exists even when Congress does not specifically call for agency action or explicitly provide *when* tax regulations or IRS materials must be issued. Instead, Congress builds into tax legislation an expectation that the system will operate on taxpayers by an effective date, often the following tax year.

For example, many tax provisions, such as the \$10,000 limit on the deduction for state and local taxes imposed by the Tax Cuts and Jobs Act, need explication to ensure taxpayers do not circumvent the law and frustrate its revenue-raising potential.<sup>438</sup> States responded to the enactment by adopting measures to allow their taxpayers to make deductible charitable contributions instead of paying non-deductible taxes.<sup>439</sup> Permitting this circumvention of the new limit would jeopardize some portion of the \$668.4 billion in revenue Congress expected this provision (along with changes to a host of other deductions) to raise.<sup>440</sup> The Treasury Department responded with a notice detailing plans to propose regulations that will be “informed by

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436. Alternatively, a delay in spending projects could result in a revenue surplus.

437. For more on the baseline, see Rebecca Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1030-32 (2011).

438. 26 U.S.C. § 164(b)(6) (2012); Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97 § 11042, 131 Stat. 2054, 2086 (2017).

439. See, e.g., *Governor Murphy Signs Legislation to Preserve Property Tax Deductibility for New Jersey Taxpayers*, STATE OF NEW JERSEY, [https://www.nj.gov/governor/news/news/562018/approved/20180504a\\_propertyTax.shtml](https://www.nj.gov/governor/news/news/562018/approved/20180504a_propertyTax.shtml) [<https://perma.cc/8CR5-PEDQ>]; see also *Governor Cuomo Signs Bill to Protect New York Taxpayers from Federal Tax Increases on Tax Day*, N.Y. STATE, <https://www.governor.ny.gov/news/governor-cuomo-signs-bill-protect-new-york-taxpayers-federal-tax-increases-tax-day> [<https://perma.cc/UP7G-UQ2H>].

440. See JOINT COMM. ON TAX'N, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R.1, JCX-67-17 (2017).



substance-over-form principles.”<sup>441</sup> The agency’s goal is likely to reduce this form of tax planning, but the notice itself does not provide the principles to distinguish programs; those principles will only come in the form of regulations. Drafted to survive scrutiny under notice and comment, it is unlikely any new regulations could be ready by the end of the tax-filing season.

When agencies do not explicate the law, it is harder for the government to win in court. Without interpretation, ambiguities may be interpreted in the taxpayer’s favor. In one 2018 case, the Tax Court sided with the taxpayer “for mistakes of law in a complicated subject area that lacks clear guidance.”<sup>442</sup> Although tax law does not default in favor of either the government or the taxpayer, the practical result may be judicial frustration with the lack of government action. Moreover, the government has the opportunity to craft a clearer meaning consistent with its revenue needs if the agency has the ability to issue regulations and other guidance.

It is tax’s core role in budgeting that makes retroactive guidance, permissible under the Internal Revenue Code in many instances, an insufficient fix.<sup>443</sup> Although Congress expressly grants the Treasury Department the ability to issue retroactive regulations in limited circumstances, doing so raises issues of fairness because guidance affects closed transactions, one reason this power is unusual.<sup>444</sup> Furthermore, retroactivity disturbs the desired certainty of the tax system. With retroactivity, taxpayers have no assurance which rules will apply when they file their tax returns. Instead, taxpayers must guess whether the rules will change.

This proof of congressional intent to create an operative, prospective tax system is at least as strong as previously used to find good cause. Good cause was found from a statutory effective date being “close” to the enactment date and from a “strong congressional intent to expedite . . . implementation” because enactment and effective dates were identical when a Senate report also showed dissatisfaction with the slow implementation of rules the year

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441. IRS, NOTICE 2018-54 2 (2018).

442. *Simonsen v. Comm’r*, No. 29698-14, 2018 WL 1320362, at \*10 (T.C. Mar. 14, 2018).

443. See Jonathan Olsen, Note, *The Unique Case of Treasury Regulations Issued to Prevent Abuse*, 4 COLUM. J. TAX L. 174, 178, 187 (2017). Olsen argues the superiority of retroactive regulations rather than reliance on the good cause exception. However, he assumes procedural arguments will not be made with retroactive regulations when there is no evidence of that critical fact.

444. See I.R.C. §7805(b).

before.<sup>445</sup> With tax's implicit deadline, requiring that guidance go through notice and comment is impracticable and contrary to the public's interest.

The claim to impracticability and public interest is strengthened because, like Medicare, tax law is complex.<sup>446</sup> With many revisions of the tax system occurring on an annual basis, some demanding significant agency attention, such as the rules in the Affordable Care Act or the Tax Cuts and Jobs Act, the Treasury Department cannot create timely guidance on all legislative changes through notice and comment. It is not that one piece of guidance must be created but that many are necessary. Their cumulative need is to create a reasonably operative budget system, without which "fiscal calamity" for the nation is all but certain.<sup>447</sup>

Although protecting the government's purse could be seen as insufficient to justify reducing procedural rights, the nation's economic health is sufficiently important to justify a good cause exception from notice and comment. Courts, which have dispensed with notice and comment because of a gasoline shortage, should recognize that the national budget and the federal government's long-term financial health are equally important.<sup>448</sup> Similarly, courts have permitted the use of the good cause exception to create rules to authorize the sale of homes because of the government's high cost of retaining unsuitable homes and to maintain the financial stability of federal employee health plan carriers, highway funding, and the efficient use of navigable airspace.<sup>449</sup> These concerns are no greater than the nation's budgetary health.

Therefore, the good cause exception from notice and comment should be available under its prongs of "impracticability" and "contrary to the public interest" any time Congress incorporates revenue estimates for tax legislation into the budget. Although many courts prefer Congress to explicitly state that notice and comment can be disregarded, Congress does not have to express its intent for the

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445. *Sepulveda v. Block*, 782 F.2d 363, 366 (2d Cir. 1986); *see also Williams v. Pierce*, 708 F.2d 57, 61 (2d Cir. 1983).

446. *See Methodist Hosp. of Sacramento v. Shalala*, 38 F.3d 1225, 1237 (D.C. Cir. 1994).

447. *See Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 707 (D.C. Cir. 2014).

448. *See Reeves v. Simon*, 507 F.2d 455, 458-59 (Temp. Emer. Ct. App. 1974).

449. *See Nat'l Fed'n of Fed. Emps. v. Devine*, 671 F.2d 607, 611-12 (D.C. Cir. 1982); *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981); *Valiant Steel & Equip., Inc. v. Goldschmidt*, 499 F. Supp. 410, 412 n.5 (D.D.C. 1980); *Arteaga v. Lyng*, 660 F. Supp. 1142, 1147 (M.D. Fla. 1987).

exception to be meritorious.<sup>450</sup> That a tension exists between the structural imperative Congress has created and courts' desire to limit the exception does not negate the need for the exception.

The sheer number of changes to the tax system enacted annually strengthens this Article's proposed argument. For example, in 2017, well over 100 tax provisions were adopted or revised, many of which have been recognized as complex or seemingly contradictory.<sup>451</sup> Those changes necessitate the speedy adoption of many, often detailed and complex regulations. Without the good cause exception to notice and comment, meeting Congress's revenue expectations is likely impossible because of the compounding effect of numerous new tax statutes and changes to existing tax provisions.

The justification is further strengthened by a consideration of all of the tasks assigned to the Treasury Department. When courts evaluate the practicability of a procedure, they do so not in a vacuum but after considering the totality of the agency's circumstance.<sup>452</sup> In its recent plea for funding, the Treasury Department illustrated the diversity of its tasks as ranging from helping developing nations reduce carbon pollution to curbing terrorist financing to cybersecurity.<sup>453</sup> The myriad tasks impose a financial constraint on how all tasks are accomplished because Congress does not prioritize them.

Although funding complaints are undoubtedly common throughout the government, this does not negate problems created by the lack of staffing and funding for those who draft and review regulations and other materials, the complaint often being that "being 'cheap' at the front end results in much more cost at the back end."<sup>454</sup> One study found that the issuance of guidance is "quite sensitive to the bureaucratic costs of adopting [it]."<sup>455</sup> The number of published revenue rulings declined between 1974 and 1984 by 70% because the IRS and Treasury Department recognized that the process is costly and needed to divert guidance personnel to higher urgency tasks and the review process created delays and bottlenecks.<sup>456</sup> Thus, the cost of

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450. See Sharon Steel Corp. v. EPA, 597 F.2d 377, 380 (6th Cir. 1980).

451. See generally, e.g., Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

452. See Block, 737 F.2d at 1202-03.

453. Fact Sheet, DEP'T TREAS. (2017), <https://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY17FactSheet.pdf> [<https://perma.cc/K79Y-8VYN>].

454. Jackel, *supra* note 192, at 935.

455. See Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 406 (1985).

456. *Id.* at 407.

issuing guidance is a constraint. For example, the IRS restricts the issuance of one type of private guidance, private letter rulings, in order to conserve agency resources.<sup>457</sup>

This cost is heightened by a current executive policy against the promulgation of regulations and other agency rules. In a desire to reduce regulation, President Donald Trump requires that executive agencies eliminate two rules every time they create a new one.<sup>458</sup> That limitation does not consider the type of regulation being made or eliminated. In the face of institutional opposition, the political cost of creating regulations and other guidance interpreting the law is increased. That increase is despite Congress failing to simplify the law or draft laws less in need of guidance.

In the face of its limited resources and diverse demands, to comply with notice and comment, the Treasury Department must divert resources to the creation of materials explicating the law (without increasing the amount of explication) from other, also congressionally mandated tasks. To the extent that courts are willing to consider the agency's workload and staffing problems when evaluating justification for good cause, the Department's diverse and pressing tasks should speak to how feasible the notice-and-comment process is for the myriad of tax provisions Congress enacts.<sup>459</sup>

Permitting the use of the good cause exception also restores to the agency the power to shape the implementation of the law and takes the power from courts. The Supreme Court has held that agencies, rather than courts, should determine the procedures that are best for making the substantive judgments Congress requires.<sup>460</sup> According to the Court, agencies' expertise puts them "in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved."<sup>461</sup> This is what would occur if courts recognize a good cause exception to notice and comment for tax guidance.

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457. See IRS, REV. PROC. 2013-32 1 (2013).

458. See *id.*

459. See *Petry v. Block*, 737 F.2d 1193, 1202-03 (D.C. Cir. 1984); see also Administrative Conference of the U.S., *supra* note 381.

460. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

461. *Id.* at 525 (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965)).

This argument differs from that proposed by the IRS in the Internal Revenue Manual. In a section last updated in 2011, the IRS concluded:

The following considerations may support the conclusion that good cause exists:

- The need to avoid confusion,
- The complexity of the regulatory frameworks addressed by the regulation,
- Congressional authorization for the issuance of the rule,
- The temporary or interim effect of the rule during which the agency devises a final rule incorporating notice and comment, and
- Agency diligence in seeking notice and comment and promulgating a final rule incorporating those comments in accordance with the APA.<sup>462</sup>

This list of considerations is overly broad even as it fails to mention the most valid reason for prompt issuance: to raise revenue for the federal government. As notice and comment necessarily slows the production of implementing guidance, it thwarts the agency's ability to comply with the government's budgeting expectations upon which congressional choices were based.

Courts reluctant to embrace this interpretation of the good cause exception could start by limiting its application to regulations that are clearly targeted to raising revenue. With this limitation, the good cause exception would not apply to the issuance of regulations addressing procedural issues or that facilitate federal revenue reduction. Regulations covering these topics would be required to complete notice and comment unless another exception applies. Moreover, the justification would not reduce the thirty-day notice before regulations become effective unless the legislation was enacted so late in the year that it is impossible to satisfy this requirement before the end of the taxable year for most taxpayers.

However, because tax preferences are not unlimited, the good cause exception should also apply to tax provisions that reduce government revenue. The Treasury Department needs to define provisions' limits, which justifies the prompt issuance of tax materials. For example, in 2017, Congress enacted a limited "qualified business income" deduction.<sup>463</sup> This deduction is extremely complex, limiting the percentage that can be deducted, by whom, and the types of income

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462. See IRS, *supra* note 187, at 32.1.5.4.7.5.1 (Aug. 21, 2018).

463. See Tax Cuts and Jobs Act of 2017, Pub L. No. 115-97, § 11011, 131 Stat. 2054, 2063 (2017) (to be codified at 26 U.S.C. § 199A).

that are qualified. Taxpayers' economic incentive to claim the deduction is great as it may reduce the tax rate on certain income from 37% to 29.6%.<sup>464</sup> Thus, the incentives for taxpayers to try to figure the deduction out for themselves is great, especially in a manner that is more taxpayer-friendly than Congress intended. However, not only is the law complicated, but the new law provides a 20% penalty if taxpayers make more than a 5% error in claiming this deduction.<sup>465</sup> This penalty and the government's need to contain the loss of revenue justify the prompt issuance of regulations and other materials.

The alternative to accepting this argument regarding the good cause exception is the general requirement of notice-and-comment procedures coupled with hard-look review, which may result in the ossification of tax rulemaking.<sup>466</sup> Ossification occurs because the procedural constraints imposed on federal agencies make the process so burdensome that agencies delay or defer issuing guidance.<sup>467</sup> In the seventy years since the APA was adopted, many agencies have learned that it may take years to process comments and that pre-notice rulemaking may take twice as long because of the risk of judicial invalidation if a final regulation is not in essentially the same form as the proposed rule.<sup>468</sup> There is no reason to think that the Treasury Department would be unusually fast in this process. Thus, without the exception, materials may simply not be published, or be significantly delayed, for internal or external consumption.

This delay in the production of regulations and other materials, condoned by the President and tacitly supported by those urging notice

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464. If 100% of income is reduced by 20%, only 80% is subject to the generally applicable tax rate; the highest general rate being 37%. As an equation:  $(100\% - 20\%) \times 37\% = 29.6\%$ . Therefore, taxpayers in lower top marginal brackets would have a lower effective rate.

465. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11012, 131 Stat. 2054, 2070-71 (2017) (to be codified at 26 U.S.C. § 6662(d)(1)(C)).

466. See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1424 (2012) (testing rulemaking at the Department of the Interior); see also Richard Pierce, Jr., *Rulemaking Ossification is Real*, 80 GEO. WASH. L. REV. 1493, 1495 (2012) (responding to Yackee & Yackee); Rubin, *supra* note 295. For the classic article diagnosing ossification, see generally Thomas McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

467. The American Journal for Administrative Law states that an administrative agency spends much of its time developing and enforcing regulations, conducting hearings, issuing licenses, and publishing advisory opinions. 2 AM. JUR. 2D ADMIN. LAW § 48 (2004).

468. See Pierce, *supra* note 292, at 12; see also Asimow, *supra* note 192, at 345.

and comment, exacerbate current regulatory deficiencies.<sup>469</sup> Not every tax provision that requires regulations has them issued, even with a congressional mandate to do so.<sup>470</sup> Time and resource allocations as well as political pressures mean some tax provisions are never made fully operative.<sup>471</sup> Projects may “linger or die” when Treasury Department personnel or the project’s politicization change.<sup>472</sup> This failure damages the reputation of the agency and enforcement of the law. Courts may compel the creation of regulations but, with limited agency resources, only so much can practically be done.<sup>473</sup>

In the form envisioned in this Article, the good cause exception is not expanded from broader APA jurisprudence and would not lead to a parade of horrors. The same limitations currently applied to the exception would continue to apply. Moreover, the tax system has built-in correctives that check abuse from continuing existing procedure. First, tax is a topic of rigorous public review.<sup>474</sup> Politicians are aware that they can win political points by pointing out IRS abuse of power, real or imagined. Additionally, Congress’s budgetary demands ensure that members of Congress keep an eye on tax—even if not with the results that tax professors or the public always prefer. This political control over the tax system provides an avenue for public input at least as effective as notice and comment as it empowers Congress vis-à-vis the executive agency.<sup>475</sup> Moreover, more than 95%

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469. See Michael Livermore & Richard Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340, 1341 (2013).

470. See *id.* at 1341. When Congress delegates specific authority to the Treasury Department to issue regulations but regulations are not forthcoming, courts may invoke phantom regulations as though some form of regulation had been issued in order to apply the law. *But see, e.g.*, *Temsco Helicopters, Inc. v. United States*, 409 Fed. Appx. 64, 67 (9th Cir. 2010); see also *Francisco v. Comm’r*, 119 T.C. 317, 322 (T.C. 2002), *aff’d*, 370 F.3d 1228 (D.C. Cir. 2005); *Hillman v. Comm’r*, 114 T.C. 103, 106, 114 (T.C. 2000), *rev.’d on other grounds*, 263 F.3d 338 (2001); *Estate of Neumann v. Comm’r*, 106 T.C. 216, 220 (T.C. 1996).

471. See Livermore & Revesz, *supra* note 470, at 1381.

472. Jackel, *supra* note 192, at 935.

473. See 5 U.S.C. § 706(1) (2012); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004). *But see* *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984).

474. This is evidenced by the attention given to the enactment of the Tax Cuts and Jobs Act 2017 and the position of several political and tax specific blogs. See, e.g., Leandra Lederman, *IRS Reform: Politics as Usual?*, 7 COLUM. J. TAX L. 36, 58 (2016).

475. Professor Lisa Bressman notes that courts have interpreted administrative law to assist Congress “in monitoring agency action” because agencies are subject to “two political principals,” Congress and the President, and Congress might lose control of the law because of presidential power over the agency. *Id.* at 1752-53. This concern is less valid in taxation because there is significant congressional oversight.

of U.S. federal trial-level tax litigation occurs in the U.S. Tax Court.<sup>476</sup> As a specialized court, the Tax Court is an expert in tax. Thus, watchdogs observe the government's actions to limit abusive rules.

Finally, there remain financial limits on the Treasury Department's actions and a review of the substance of tax agencies' materials. The cost of issuing any form of guidance as well as fear for its budget should deter the Treasury Department from unjustly altering rules simply because of a permissive process.<sup>477</sup> The likelihood of a legislative response and judicial review of materials' substance should minimize oscillation in policy and acts as a check on the final rule. These feedback loops already exist, ensuring that agency abuse in this area is unlikely. If abuse arises, Congress retains the power to threaten the agency's budget or to increase the process required for issuing future materials. Until Congress chooses to do the latter, the good cause exception should be read consistently with its purpose and political reality.

With these existing checks on agency power, permitting the Treasury Department and IRS to claim the good cause exception does not give undue power to the agencies but prioritizes the revenue needs set by Congress. When Congress speedily passes changes to tax laws, through reconciliation or other budgetary rules, Congress has established the statutory framework, and that speed must be carried over into the regulatory realm in order for the law, as enacted—even if imperfect—to work. Changes to this result should focus on Congress and how it passes laws, rather than using regulatory procedure to nullify the laws once enacted.<sup>478</sup> Using notice and comment to alter the law upsets the constitutional balance of power.<sup>479</sup>

## CONCLUSION

Drafting the federal budget, deficit spending, and adding to the national debt all follow rules that limit the government's ability to

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476. IRS, 2017 DATA BOOK 62 (2017).

477. For example, the National Labor Relations Board has faced criticism for unsettling Board doctrine through its rulemaking authority. Michael Harper, *Judicial Control of the National Labor Relations Board's Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 189-90 (2009).

478. Accepting this role for the good cause exception minimizes procedure's ability to ensure that taxpayers are treated as "persons" or to improve the quality of the resulting rule. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7 (1978).

479. Even if Congress acts as though "deliberation, fairness, bipartisanship, and debate are impediments to the larger goal of achieving political and policy success," does not mean courts or agencies should end run around Congress. THOMAS MANN & NORMAN ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK 170-71 (2006).



spend money without raising offsetting revenue. These rules exist because the American public is concerned about federal spending. Today, these rules risk being subordinated to the APA's procedural formalism in notice and comment. That subordination may be inadvertent and occur without a thoughtful discussion of the cost of this formalism. This is problematic because, although the federal budget generally assumes that tax statutes are operational when they are enacted, tax laws rarely operate well without some form of agency guidance.

When courts accept the good cause exception in the tax context, the federal budget's revenue becomes more secure and budgeting requirements can be met. Adding procedural delay to current political resistance to raise taxes threatens the budgeting system and makes it more likely that Congress creates a budget with faulty information about the law's effectiveness. Thus, ignoring the availability of the good cause exception risks increasing the national debt without Congress's or the public's awareness of tax law changes' impact on national debt until years after law is enacted. Accountability for these choices is maximized when agency guidance is quickly made available to the public.

Courts are not the only fix for this problem of administrative procedure trumping budgeting rules. Congress could legislate a tax exclusion to the APA or alter its taxing and spending choices. With the latter, Congress would change the financial dynamics of many proposals before it; and changing those dynamics could alter the fate of the proposals, even for proposals that are not directly tax-related. Consequently, both sides of the ledger, taxing and spending, may be affected by the failure to accept the need for speedy tax materials.

Despite Congress's power, courts need not wait for Congress to expressly alter APA rules. The good cause exception exists as a backstop to the APA. In this instance, the American budget coupled with complicated congressional politics demands use of the exception. This interpretation is consistent with the current jurisprudence on the exception.

Permitting this use of the good cause exception will not make all future tax materials perfect; however, it recognizes that strict adherence to the notice-and-comment process does not address most concerns about that materials' value. At one high-level roundtable talk, the complaint was not the lack of notice and comment in the making of tax rules, but instead the Treasury Department and IRS's fear of "getting it wrong" and therefore delaying guidance.<sup>480</sup> This

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480. Amy S. Elliott, *Roundtable Panelists Bemoan Tax Guidance Processes*, 132 TAX NOTES 473 (2011).

problem of a lack of guidance would be exacerbated if notice and comment were required in all instances. Without the freedom to issue clarifying materials in response to rapidly changing tax law, the nation will fail its budgetary obligations.<sup>481</sup>

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481. See Richard J. Pierce, Jr., *Which Institution Should Determine Whether an Agency's Explanation of a Tax Decision is Adequate?: A Response to Steve Johnson*, 64 DUKE L.J. ONLINE 1, 10 (2014) ("The nation simply cannot afford to allow courts to delay interminably the process of issuing tax rules . . .").