From the Editor:

Treasury Argues Its Guidance Isn't 'Significant'

By Jeremy Scott — jscott@tax.org

Treasury regulations and guidance affect all taxpayers. The outcome of a regulatory project can affect millions, if not billions, of dollars in transactions. The creation of safe harbors, filing deadlines, and lists of prohibited transactions can greatly alter how business is conducted. Given all of that, it might surprise some to learn that virtually every piece of Treasury guidance is prefaced by a declaration that the contained rules are not "significant."

The reason for that declaration is an executive order issued by President Clinton that requires significant guidance to be reviewed by the Office of Management and Budget. If an agency releases guidance that has a measurable economic effect, it is subject to OMB review. According to Jeremiah Coder, Treasury does not consider its guidance as significant because it simply implements the will of Congress. Taxes cannot be considered a significant economic effect, Coder writes. He criticizes Treasury's broad disclaimer of OMB oversight, but does agree that effective tax administration might be undermined by an OMB review process that can be somewhat political. In his analysis of Treasury's position and the support for it within the executive branch, Coder concludes that Treasury and the IRS would probably be better served by voluntarily collaborating with stakeholders in the creation of important guidance projects. (For his article, see p. 867.)

Treasury's ability to sidestep administrative rules might be coming to an end. Although Clinton's executive order cannot be the basis for taxpayer challenges of regulations, Coder points out that the APA is becoming far more significant to tax administration. Treasury's practice of avoiding notice and comment periods and failing to justify its rulemaking procedures makes many pieces of guidance vulnerable to challenges under the APA, particularly those alleging arbitrariness. The Supreme Court's decision in *Mayo* might be viewed as a government win, but it could have far-reaching implications for the guidance process, particularly given Treasury's and the IRS's past claims of exceptionalism regarding many administrative rules.

Commentary

Corporations sometimes distribute rights to acquire stock to shareholders. These are called subscriptions and are usually used to raise capital as part of a reorganization. They can also be used as poison pills and to preserve NOLs. In his special report, Afshin Beyzaee describes the basic rules regarding the basis of subscriptions and discusses how the rules governing them lack a provision specifying the proper allocation of basis when a shareholder disposes of his existing shares, but keeps his subscription rights (p. 915). He argues that the lack of clear rules opens the door to potential abuses. He proposes two possible solutions: a reallocation of basis or treating the rights the same as shares. Treasury should solve this problem soon, he concludes.

The filing of FBARs has become a major issue of focus at the IRS in the wake of the UBS scandal. Many taxpayers who did not even realize they were required to file the forms are now scrambling to bring themselves into compliance. An area that was once neglected by the enforcement wing of the Service has spawned several voluntary disclosure programs. New Form 8938, which must sometimes be attached to an FBAR and sometimes filed individually, has complicated this area for many taxpayers. Charles Bruce and Stéphane Lagonico describe the differences between the FBAR and Form 8938, along with the situations in which each is required (p. 923). Many taxpayers were required to file their first Forms 8938 on June 30. The authors point out that taxpayers and return preparers must carefully compare the workings of the two forms to see how they fit together.

The IRS's new return preparer registration regime is designed to regulate virtually all professionals who handle returns or advise taxpayers on their taxes. Many practitioners, particularly enrolled agents, welcomed the new regime as a means of driving out unscrupulous preparers who operated in the shadows. But others fear that the creation of the Return Preparer Office will undermine the independence of OPR and lead to IRS abuse of disciplinary procedures. Kip Dellinger advises the latter group to take a deep breath (p. 931). In his article, he points out that many of the functions of the RPO are necessary for creating an efficient tax system and that the IRS has not really reduced the independence of OPR. He compares fears of the RPO's disciplinary power to concerns over covered

opinion rules, section 7216, and tax accrual workpapers and UTP disclosures. He points out that the nightmare scenarios posited by practitioners in those cases did not come to pass, and he is confident that the creation of the RPO should be considered a welcome development.

The Supreme Court's decision to uphold the healthcare reform law and the individual mandate has caused many to reevaluate Chief Justice John Roberts, who was long seen as a reliable member of the Court's conservative bloc. Roberts has been vilified by many on the right for betraying his principles, while he has been praised by many on the left for helping to depoliticize the Court. George White compares Roberts's decision in *NFIB* to a 1937 decision by a conservative Court to allow elements of the New Deal to proceed (p. 935). White concludes that how Roberts's legacy holds up will largely be determined by the success or failure of the healthcare law.

Section 269 allows the IRS to disregard acquisitions if the principal purpose was tax avoidance. Unfortunately, the Service seldom has much success in this area. Robert Wood looks at the Tax Court decision in *Love*, the latest failure of the IRS to successfully assert section 269 (p. 939). Wood writes that there are usually enough nontax reasons for an acquisition to satisfy courts. In *Love*, the taxpayers were found to be engaged in aggressive tax planning when they acquired stock in a restaurant company, but the court still did not find that tax avoidance was the principal purpose. Tax consequences are always on people's minds, but they rarely want to admit that they did something primarily to avoid paying taxes, Wood observes. The lack of an admission is usually good enough for courts.

Wage and income taxes create disincentives to work. Economists largely agree on this point, but disagree about the relative effect. A common misperception is that work disincentives largely depend on the statutory tax rate, according to Alan Viard. In this week's On the Margin, he writes that marginal effective tax rates are far more important (p. 943). The tax treatment of consumption and savings also has significant effects on the incentive to work, he adds. He uses a hypothetical economy to illustrate how tax rates and the treatment of consumption and savings can affect the decision to work.

In the third part of his series on the OECD's discussion draft on transfer pricing reform, Michael Durst explores the understanding of risk under the arm's-length principle (p. 959). He writes that under an arm's-length method, controlled taxpayers should be required to bear the risks of their own economic activities, unless those risks are truly transferred to another party in a manner that could occur in the open marketplace. He finds that the two recent OECD drafts take a sensible approach to risk sharing and can hopefully pave the way to simplified transfer pricing practices.

In a Shelf Project article, Calvin Johnson proposes replacing the employee-independent contractor test with a bright-line rule under which withholding would be required of any employer with more than two full-time workers (p. 949). Johnson would also require households expecting to pay more than $2,000 a month for one employee to withhold. He argues that the proposal is necessary because current law is both unworkably vague and arbitrary. He wants to prevent the tort standard of control from influencing the tax treatment of employees and independent contractors.

In an important article published in 2005, Edward Kleinbard, a former JCT chief of staff, proposed the business enterprise income tax (p. 901). Klelinbard's BEIT proposal generated a great deal of discussion and debate and would have significantly changed how the income tax applied to business enterprises. According to Kleinbard, the BEIT was motivated by the fact that in the quest for a perfect tax system, the United States had created a very poor regime. ■