

## The Politics of Drafting Regulations

by Monte A. Jackel



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In this article, Jackel discusses the roles of the Office of Chief Counsel and the

Treasury Office of Tax Policy in the drafting of tax regulations and other public guidance, and he questions whether the drafting process is being conducted properly.

The views expressed here are solely the author's and do not necessarily represent those of any other person, firm, or organization.

### Introduction

Ordinarily, we think that the decisions made by both the IRS Office of Chief Counsel (OCC) and the Treasury Office of Tax Policy (OTP) on issues that are part of a tax regulation project are based on the technical and tax policy merits of the issue, with both the OCC and OTP acting as equal partners in the process. Heading that effort is the assistant secretary for tax policy and the chief counsel of the IRS.

### Background

Section 7701(a)(11) defines "Secretary of the Treasury" as the Treasury secretary personally. The same statute defines the term "Secretary" as either the Treasury secretary personally or his delegate. Section 7701(a)(12)(A)(i), in turn, defines "or his delegate" for this purpose as any officer, employee, or agency of Treasury duly authorized

by the Treasury secretary, directly or indirectly, by one or more redelegations of authority to perform the function mentioned or described in the context.

It is common practice for grants of regulatory authority in the Internal Revenue Code to grant the power to write regulations to the "Secretary," which, as described earlier, means the secretary or his delegate.

According to Treasury's website:

The Assistant Secretary (Tax Policy) is the senior advisor to the Secretary of the Treasury for analyzing, developing, and implementing Federal tax policies and programs.

Treasury Order 101-05<sup>1</sup> directs that the assistant secretary (tax policy) shall report, through the deputy Treasury secretary, to the Treasury secretary and shall exercise supervision over the officials and employees in the OTP. And then Treasury Order 111-01<sup>2</sup> states, in pertinent part, that the assistant secretary for tax policy:

is *exclusively authorized* to make the final determination of the Treasury Department's position with respect to issues of tax policy arising in connection with regulations, published Revenue Rulings and Revenue Procedures, and tax return forms and to determine the time, form and manner for the public communication of such position. [Emphasis added.]

<sup>1</sup>Dec. 17, 2015.

<sup>2</sup>Mar. 16, 1981. See also 31 U.S.C. section 301(e) (the assistant secretary for tax policy is to carry out the duties and powers prescribed by the Treasury secretary); section 301(f)(2) (authorizes the position of IRS chief counsel who is to be the chief law officer for the IRS and shall carry out the duties and powers prescribed by the Treasury secretary); and section 321(b)(2) (the Treasury secretary may delegate the duties and powers of the secretary to another officer or employee of Treasury).

The latter Treasury order further states that, in exercising the authority so delegated, the assistant secretary for tax policy:

shall act in his own capacity and under his own title, should be responsible for referring to the Secretary any matter on which actions should appropriately be taken by the Secretary, and shall solicit and give due regard to the views of the Commissioner of Internal Revenue respecting the operational and enforcement consequences of any such determination and to the views of the General Counsel (including the Chief Counsel of the Internal Revenue Service) as to the legal aspects of any issue.

Internal Revenue Manual section 32.1.1.3.1 states that the OTP is responsible for establishing policy criteria reflected in regulations and rulings and, together with the IRS and the OCC, preparing regulations and rulings. IRM section 31.1.1.2.1 states:

The Associate Chief Counsel is responsible for the development and issuance of all published guidance. In the course of drafting published guidance, the Associate Chief Counsel is charged with building a consensus among all interested parties within the Department of the Treasury, including other offices within Counsel, the operating divisions and other components of the Service, and the Office of Tax Policy, and with elevating significant, unresolved issues to the appropriate official for determination. To the extent necessary, the Associate Chief Counsel is also responsible for coordinating with other Federal agencies, such as the Department of Justice.

Regarding review by OTP attorney-advisers of tax regulations, IRM section 32.1.6.4.3 states:

Depending on the complexity and significance of the issues, the OTP attorneys may begin participation or review early in the drafting stage. If not already involved, during the period of Associate Chief Counsel front office

review of regulation drafts, one or more OTP attorneys may review drafts.

However, it is also clear that the initial drafting team for a tax regulation generally only consists of an OCC docket attorney and a reviewer. IRM section 32.1.3.2:

Once the decision has been made to issue guidance on an issue, the Associate assigns the project to a drafting team consisting, at a minimum, of a branch attorney and reviewer. The drafting team is responsible for complying with the requirements for processing and publishing a regulation and the requirements imposed by Federal administrative law.

But where is the dividing line between “analyzing, developing and implementing Federal tax policies and programs,” which is the exclusive province of OTP, and the development, interpretation, and administration of the federal tax law, which is the exclusive province of the OCC and the IRS?

Almost anything other than purely administrative tasks can be determined to be tax policy. Even determining what entries or questions should be included on a tax return can be determined to be, at least in part, tax policy. The term “policy” is defined in *Merriam-Webster*<sup>3</sup> as “a definite course or method of action selected from among alternatives and in light of current conditions to guide and determine present and future decisions.” From the generally understood meaning of the term “policy” or “tax policy,”<sup>4</sup> we have OTP, which clearly does more in terms of regulation drafting than the term “tax policy” would seem to reasonably imply.

### Analysis

Given the directive of Treasury Order 111-01 to vest “exclusive authority” to make regulatory decisions concerning tax policy to the assistant secretary for tax policy and, in turn, to the OTP as a whole, it appears that the Treasury secretary

<sup>3</sup> *Merriam-Webster's Collegiate Dictionary* (11th ed. 2009).

<sup>4</sup> See AICPA, “Tax Policy Concept Statement 1, Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals, 2017.”

should not be making decisions on the merits of issues regarding tax policy on a periodic, regular, or even semi-regular basis.<sup>5</sup> In extraordinary cases, yes. In other cases, clearly no. Yet, that is what I have heard is in fact happening at Treasury these days.<sup>6</sup>

I have heard, which I cannot confirm, that at times, the OTP attorney-adviser or higher OTP official working on a regulation project with OCC attorneys tells the chief counsel attorneys that the Treasury secretary has been briefed on an issue and, without any involvement whatsoever by the OCC in that briefing, the Treasury secretary has determined that an issue must be decided a specific way — no debate or input from the OCC; only a fiat indirectly communicated to the OCC by the OTP. In this process, as I understand it, the assistant secretary for tax policy apparently does not exercise his “exclusive authority” over tax regulations and no one from OTP consults with the chief counsel or the OCC generally on the issue that, it is said, is being briefed to the Treasury secretary until it has already been decided by the Treasury secretary. That does not seem to be treating the chief counsel and the OCC as a direct and equal partner in the guidance process.

Although it may arguably be legal for the Treasury secretary to do this, is it any way to run a railroad, as the expression goes? Historically, the OTP and the OCC have served as a check and balance on each other in the regulatory drafting process. But that would no longer happen if the Treasury secretary personally makes the call. And, can the Treasury secretary exercise the power to make decisions on questions of tax policy that he has personally delegated to the assistant secretary for tax policy exclusively? Presumably, “exclusive” in this context means to the exclusion of all others, including the secretary personally.

## Conclusion

In my experience, OTP attorneys are more experienced and expert tax lawyers compared with their counterparts in OCC. Also, OTP attorneys usually function, more or less, in a leadership role in developing regulations compared with the attorneys in the OCC who have gravitated, more or less, to a subservient role in the overall development and implementation of a regulation project. In some cases, I must say, the OCC lawyers seem to function more as scribes to the OTP attorneys, who function as the “conductors of the orchestra.”

The tax lawyers in both OTP and OCC generally do an excellent job in drafting published guidance with limited time and resources. It is a difficult job, and they all should be commended. But this article is meant to point out that the roles of both organizations seem to have morphed into something that does not fit the literal job description of either organization; meaning, more than tax policy is being done at the OTP and less of tax implementation, interpretation, and administration is being done by the OCC and the IRS.

When did this usurpation of the role and authority of OCC begin, and should it continue? Is this just the function of the current administration? Was this state of affairs the intent of the OTP when first founded and whose first assistant secretary, Stanley S. Surrey, was a truly outstanding academic and tax legal scholar as well as a leader in the tax community?

Whatever the true intent was then, it seems abundantly clear that today the OTP is the predominant player in the tax guidance process and the OCC is subordinate. Not powerless for sure; but just not as powerful as the OTP. I think that it is time to bring more balance to the tax system by restoring the checks and balances of each organization as originally intended. We would all benefit. ■

<sup>5</sup> *Black's Law Dictionary* (11th ed. 2019), defines “exclusive” as limited to a particular person, entity, or thing. It is different from the term “share,” which the same source defines as to divide something into portions or to enjoy or partake of a power or right.

<sup>6</sup> I cannot personally confirm if or when this happened. I am only referencing what I have “heard on the street.” Anything that I may have learned in the course of my recent government employment cannot be disclosed in any event because of post-employment restrictions. So, this assertion is hearsay in the true meaning of the term until confirmed, if ever.