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Fewer Regulations: Maybe Not So Good for Nonprofits

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With the new Administration, there are lots of big issues being tossed around for discussion and action; health care, immigration, taxes – just to name a few. While these topics make the headlines almost every day, there are other items flying so low under the radar that they may soon crash into the ground. Nevertheless, the latter may result in almost as much chaos and confusion as the big news stories.

In this category of small – comparatively silent – missiles of disruption are:

- The new "reducing regulation" executive order signed on Inauguration Day and an accompanying January 20 memorandum setting up regulation-review hurdles; and
- The expected demise of the "Chevron Deference" doctrine.

For the nonprofit community, these obscure items may mean a near-total shutdown of regulatory guidance from the federal government about how to maintain your tax-exempt status. They may also have a significant impact on the substantive focus of your organization; for example, an environmental-protection 501(c)(3) will notice disruption in that substantive area.

Merely by means of introduction and summary, here's a bit of basic information.

The Anti-Regulation Crusade

It's no deep, dark, secret that – for ages – the Republican Party has wanted to take all of the regulations in the federal government, haul them out to a giant bonfire, and burn them into oblivion. The GOP president has obliged; hence, the January 20th EO and related Memorandum. This Executive Order doesn't prohibit any and all new regulations; instead, it generally requires getting rid of two existing regulations when a new one is written.

This is a simplistic view of the meaning and purpose of a regulation. There's apparently a common misconception that a regulation is something that comes out of nowhere and is designed only to add layers of burden, cost, and bureaucratic aggravation.

To the contrary, a regulation is part of the process of creating workable laws. A legislature passes a statute on a particular topic. Unless each and every statute is going to be many pages long, the details of explaining the fairly general statutory language is left to an administrative agency with both the authority to implement that new law and the expertise to do it right. The process of writing a regulation is not done secretly; there are mandatory procedures that involve publishing proposed regulations and permitting public comment.

In a cogent article warning of the dangers of this anti-regulation slash-and-burn policy, tax law professor Sam Brunson recalls "the most salient example" from his experience:

> *[I]n December 2008, when the Bernie Madoff Ponzi scheme came out, investors wondered whether if it qualified as a theft loss and, if so, what they had to do to take a deduction and how much they could deduct.*
>
> *In March 2009, the IRS stepped in to resolve the questions. It issued Rev. Rul. 2009-9 and Rev. Proc. 2009-20, which clarified that (qualifying) Ponzi scheme losses were deductible theft losses, and provided a safe harbor allowing individuals to deduct 95% of their loss.*
>
> *Absent this guidance, taxpayers would have had to individually engage tax advisors to research and analyze and determine whether or not the Madoff losses were deductible. It would have been expensive, meaning only the wealthiest taxpayers could have taken the loss, and even then, taking that position would have been at least a little risky.*

Professor Brunson summarizes his point in writing "The (Near) Future of Treasury Regulations":

> *Whatever one thinks of the regulatory state, this lack of potential tax regulations and guidance is bad for taxpayers. Taxpayers have to comply with tax rules, even where Congress hasn't drafted them clearly, or didn't anticipate a particular set of events.*

Another example looms in the near future if the current (mirror-image) bills relating to the Johnson Amendment introduced in the House and Senate by Senator Lankford (R-Ok) and Rep. Scalise (R-LA) are enacted into law. They call for certain, limited exceptions to the politics ban, but the brief language will need extensive regulations to interpret and explain.

> ***Update***: *A presidential executive order purportedly dealing with the Johnson Amendment was issued on May 4, 2017. We'll publish a post soon on this development.*

(It should be noted that, even before the election, the Treasury Department decided for some reason that there would be limited written guidance for exempt organizations matters for the foreseeable future.)

The Attack on the Chevron Rule

In addition to the GOP's dislike of too many regulations, legislators of that party have a big problem with a related issue: The doctrine of *Chevron* deference.

This is important enough so that the House of Representatives in the new Congress quickly passed a bill – on January 11, 2017 – called the "Regulatory Accountability Act of 2017." If this House bill becomes law, it would change this doctrine.

So, what is this "Chevron" and what is the "deference" all about?

The United States Supreme Court, in 1984, established one of the most important principles in administrative law; that is, the law governing practice before an executive agency. The case was *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837:

> *The case raised the issue of how courts should treat agency interpretations of statutes that mandated that agency to take some action. The Supreme Court held that courts should defer to agency interpretations of such statutes unless they are unreasonable.*

It's a simple concept, but a really big deal. Neither party particularly likes having a law passed by a friendly Congress interpreted by an administrative agency under the direction of a White House of the other party – and the *Chevron* deference rule that says that the third branch of government – the courts – must generally accept the executive branch's interpretation.

It should not go by unnoticed that the defendant in the *Chevron* case is a nonprofit organization.

Conclusion

These changes have the capacity to create considerable upheaval in the interpretation and application of law in the United States.