

JUST WHAT THE DOCTOR ORDERED?: HEALTH CARE REFORM, THE IRS, AND NEGOTIATED RULEMAKING

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TABLE OF CONTENTS

Introduction.....	200
I. Rulemaking Methods at the Internal Revenue Service (IRS) and Other Federal Agencies	202
A. Notice-and-Comment: Treasury Regulations	203
B. Revenue Rulings.....	205
C. Other Rulemaking Methods: Revenue Procedures, Private Letter Rulings, and Determination Letters.....	208
II. Negotiated Rulemaking	208
A. Background and Development	209
B. Potential Obstacles to Negotiated Rulemaking	211
III. The IRS and Health Care Reform.....	213
A. Doctrinal Issues: Complexity, Tax Exceptionalism, and APA Compliance	213
B. Intersection of Health Care Reform and Tax Regulatory Policy	217
C. Non-Tax Provisions of the ACA: A (Somewhat) Brief Explanation	218
D. Two Tax Provisions of the ACA and Their Regulatory Hazards.....	220
1. The Individual Mandate and Shared Responsibility	

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Payments.....	220
2. Stiffer Requirements for Tax-Exempt Nonprofit Hospitals—With Shared Hazards for Communities and Hospitals	224
IV. The Case for Negotiated Rulemaking at the IRS.....	228
A. Forming a Negotiated Rulemaking Committee at the IRS.....	228
B. Negotiated Rulemaking Could Aid the IRS in Drafting Regulations More Efficiently While Allowing Greater Taxpayer Participation.....	231
Conclusion.....	234

INTRODUCTION

In early 2009, after an election where health care reform was a central issue, President Obama threw down the gauntlet in an early address to a joint session of Congress.¹ The result was the Patient Protection and Affordable Care Act (ACA),² which made headlines when it survived a challenge in the Supreme Court.³ Five years later, the landscape of health care reform has changed dramatically. Despite numerous attempts in Congress to repeal the law, it has remained in place.⁴ A considerable proportion of the battles have taken place in the Internal Revenue Service (IRS), which has a central role in promulgating regulations to enforce the ACA.⁵ The ACA contains a number of additions to the tax code designed to fund the reforms and to ensure compliance.⁶ But the question remains

1. President Barack Obama, Address to Joint Session of Congress—As Prepared for Delivery (Feb. 24, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress>.

2. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of the U.S. Code).

3. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (upholding the constitutionality of the Patient Protection and Affordable Care Act's (ACA's) individual mandate under Congress's taxing power).

4. A variety of reasons, including the expenses associated with a full repeal of the law, make full repeal unlikely. *See, e.g.*, Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to John Boehner, Speaker of the House, U.S. House of Representatives (July 24, 2012). Nevertheless, more votes to repeal were on the table in 2013. *See* Joan McCarter, *House Committee Tees Up 38th Obamacare Repeal Vote*, DAILY KOS (July 10, 2013, 8:38 AM), <http://www.dailykos.com/story/2013/07/10/1220998/-House-Committee-tees-up-for-38th-obamacare-repeal-vote#>; Jonathan Weisman, *House Bill Links Health Care Law and Budget Plan*, N.Y. TIMES, Sept. 20, 2013, http://www.nytimes.com/2013/09/21/us/politics/house-spending-bill.html?_r=0.

5. I.R.S. Notice 2011-36, 2011-21 I.R.B. 792.

6. *See generally* ACA, 5 U.S.C. §§ 9001–9023.

whether the agency's rulemaking processes are up to the task of remaking the American health care market in the ACA's image.

This Comment argues that the Agency's rulemaking is not up to task for several reasons. First, although the IRS has always been involved in taxing health care entities and transactions, it may not have the expertise to deal with the potential impact of its own regulations on health care providers and patients.⁷ Second, the Agency's usual methods of rulemaking and adjudication entail uncertainty and are subject to varying standards of deference by the courts. Such qualities introduce confusion about the possible tax implications and interpretation of certain Internal Revenue Code (IRC) provisions across jurisdictions.⁸ Many of the key terms in the tax code have contentious definitions, and although the IRS currently uses the notice-and-comment process to settle definitions for purposes of the tax code, stakeholders have limited access to information that agencies use in rulemaking. This, in turn, limits participation and transparency in the regulatory process.⁹ The IRS has not always been consistent in following the requirements of the Administrative Procedure Act (APA) in promulgating its regulations, which has further diminished public participation and influence in the process.¹⁰

Although negotiated rulemaking may not be the best tool for the IRS to use in every case,¹¹ it has the potential to substantially improve outcomes

7. See Mary Crossley, *Tax-Exempt Hospitals, Community Health Needs and Addressing Disparities*, 55 HOW. L.J. 687, 701 (2012) ("For decades, the IRS has indirectly made health policy . . . without professing to bring to bear any particular expertise in the field of health policy.").

8. Compare *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, (2011) (holding that *Chevron* applies with "full force" to Treasury Regulations), with *In re Quality Stores, Inc.*, 693 F.3d 605, 619 (6th Cir. 2012), cert. granted sub nom. *United States v. Quality Stores, Inc.*, 134 S. Ct. 49 (2013) (Oct. 1, 2013) (No. 12-1408) (holding that IRS revenue rulings are *not* entitled to judicial deference because "Congress has not given them the force of law."). The Supreme Court has granted certiorari in *Quality Stores*, which may settle the question. *Id.*, cert. granted sub nom. *United States v. Quality Stores, Inc.*, 134 S. Ct. 49 (2013) (Oct. 1, 2013) (No. 12-1408).

9. See ANDREW F. POPPER & GWENDOLYN M. MCKEE, *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 64 (2d. ed. 2009) (noting that the Freedom of Information Act (FOIA) does not provide a right to discovery about evidence used in rulemaking).

10. See, e.g., 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, 1157-58 (2008) [hereinafter Hickman, *Responding*] (noting that the IRS claims that most of its interpretive regulations are exempt from notice-and-comment procedures); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 492-502 (2013) [hereinafter Hickman, *Unpacking*] (discussing concerns with the use of temporary regulations to collect tax revenue).

11. Nor were negotiated regulations (sometimes referred to as neg-reg) intended to be used in every case. See Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J.

for access and efficiency in the health care reform context. In the debate among patients, hospitals, physicians, insurers, and the government, a collaborative process could level the balance of power between stakeholders.¹² Other agencies have used negotiated rulemaking successfully, and the IRS has been criticized for not employing it in other areas.¹³ But the procedure is not without its limitations, and some have argued that it is more of a placebo than a cure for regulatory ills.¹⁴

Part I of this Comment discusses the IRS's main rulemaking methods, including Treasury Regulations and revenue rulings. Part II charts the development of negotiated rulemaking and the obstacles it faces. Part III examines the issues stemming from the IRS's role in health care reform and critiques how the IRS's current regulatory methods have led to results that fall short of the ACA's policy goals in key areas. Part IV describes how the IRS could implement negotiated rulemaking and responds to concerns about the cost of such implementation. In particular, use of e-rulemaking technology to enhance public input and access would benefit the IRS and optimize the process. Finally, this Comment concludes that whatever its potential shortcomings, negotiated rulemaking can provide stakeholders in health care reform with the opportunity to meaningfully participate in the rulemaking process while reducing the strain on public resources.

I. RULEMAKING METHODS AT THE INTERNAL REVENUE SERVICE (IRS) AND OTHER FEDERAL AGENCIES

Federal agency rulemaking is largely governed by the APA,¹⁵ which outlines several different schemes for agencies to administer laws. Rulemaking processes under the APA include (1) "informal" or notice-and-

1, 7 (1982) ("Negotiation undoubtedly will not work for all rules."); Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 987-88 (2008) (noting that Philip Harter, neg-reg's "founding father," did not consider it to be a "panacea").

12. See, e.g., Len M. Nichols, *Making Health Markets Work Better Through Targeted Doses of Competition, Regulation, and Collaboration*, 5 ST. LOUIS U. J. HEALTH L. & POL'Y 7, 8-10, 25 (2011) (suggesting a mixture of market forces, regulation, and collaboration to expand health care access and improve quality).

13. See, e.g., Carole C. Berry, *Sub S One Class of Stock Requirement: Rulemaking Gone Wrong*, 44 CATH. U.L. REV. 11, 54-58 (1994) (hypothesizing that negotiated rulemaking procedures would have better addressed the tax treatment of S corporations).

14. See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997) (claiming that negotiated rulemaking practices "subtly subvert the basic, underlying concepts of American administrative law").

15. Pub. L. No. 404, §§ 1-12, 60 Stat. 237 (1946).

comment rulemaking,¹⁶ (2) “guidance” or “policy statements,”¹⁷ and (3) formal administrative adjudications.¹⁸ At first glance, IRS rulemaking resembles the APA model. The Secretary of the Treasury is empowered to “prescribe all needful rules and regulations” for the enforcement of the tax code.¹⁹ The IRS issues several forms of administrative authority, including Treasury Regulations, revenue rulings, revenue procedures, private letter rulings, and determination letters.²⁰ Each is a tool adapted to a particular purpose, with its own strengths and weaknesses.

A. Notice-and-Comment: Treasury Regulations

Most agencies use “informal” rulemaking, or notice-and-comment rulemaking, instead of the formal rulemaking process.²¹ Under the notice-and-comment process, an agency develops a proposed rule and then publishes a Notice of Proposed Rulemaking in the Federal Register, inviting members of the public to comment over a specific period of time.²² Through various “e-rulemaking” processes, members of the public can submit comments to agencies through the Internet.²³ Treasury Regulations, the IRS’s primary regulatory tool, are issued according to the notice-and-comment method,²⁴ and have been subject to evolving standards of judicial deference. For decades, courts followed the standard the Supreme Court laid out in *National Muffler Dealers Ass’n, Inc. v. United*

16. Administrative Procedure Act (APA), 5 U.S.C. § 553 (2012). Notice-and-comment rulemaking involves a “Notice of Proposed Rulemaking” printed in the Federal Register, followed by a period of public comment. See generally POPPER & MCKEE, *supra* note 9, at 64.

17. *Id.* § 553(b)(A).

18. *Id.* § 554.

19. I.R.C. § 7805 (2006). To focus on presenting the specific tax issues at stake for the ACA, I have only included a (very) brief introduction to the complex issues of administrative law and procedure at play in the U.S. tax system. For a more thorough treatment, see generally WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION (15th ed. 2009).

20. See Steve Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and A Proposed Legislative Solution*, 77 TENN. L. REV. 563, 570–73 (2010) (defining and providing additional material on these and other agency tools).

21. See POPPER & MCKEE, *supra* note 9, at 64.

22. APA § 553(c). The notice must contain: (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. *Id.*

23. FREQUENTLY ASKED QUESTIONS, REGULATIONS.GOV, <http://www.regulations.gov/#!faqs> (last visited Jan. 31, 2014); see Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 447 (2011) (explaining the benefits and challenges to e-rulemaking).

24. APA § 553(b)–(c); Treas. Reg. § 601.601 (2012) (“The most important rules are issued as regulations and Treasury decisions prescribed by the Commissioner and approved by the Secretary or his delegate.”).

States,²⁵ where the Court held that Treasury Regulations are entitled to deference as long as they “implement the congressional mandate in some reasonable manner.”²⁶ In 2011, the Supreme Court extended *Chevron* deference to all Treasury Regulations in *Mayo Foundation for Medical Education & Research v. United States*.²⁷

Although the notice-and-comment process does allow for some public input, it is far from perfect. To begin with, agencies using the notice-and-comment process are not required to publish “every alteration” to a rule in the Federal Register for public comment unless such alteration is not a “logical outgrowth” of the original proposal.²⁸ Courts must balance the needs of agencies such as the IRS—which promulgate regulations and must govern within their areas of statutory authority—with the public’s interest in transparency and open commenting. The IRS does not always abide by the APA’s strictures, however, and courts vary in how they respond to the IRS’s divergence from the APA’s requirements.²⁹

Additionally, although an agency’s final rule must “fairly apprise” parties of the “potential scope and substance of a substantially revised final rule,” and any substantial change must “relate in part to the comments received,” agencies do not need to actually follow *any* of the commenters’ recommendations.³⁰ Indeed, many of the comments often oppose such rules simply for political reasons, or take “extreme positions” without explanation or justification.³¹

Even when followed, the nature of the public comment process does not give interested parties the opportunity to discuss their views with fellow commenters or with the agency involved.³² Commenters are more likely to adopt extreme positions and may withhold information or give several different arguments without explaining their relative weight or importance.³³ Instead of focusing on finding a solution, commenters are

25. 440 U.S. 472 (1979).

26. *Id.* at 476 (quoting *United States v. Cartwright*, 411 U.S. 546, 550 (1973)).

27. 131 S. Ct. 704, 711–12 (2011) (applying *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (explaining that courts must follow Congressional intent if Congress has directly spoken to a question at issue, but must otherwise defer to the IRS’s rule, provided the IRS’s rule is based on a permissible interpretation of the statute that is not arbitrary or capricious).

28. *See First Am. Disc. Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000); *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951–52 (D.C. Cir. 2004).

29. *See infra* notes 122–138 and accompanying text.

30. *E.g.*, *Chocolate Mfrs. Ass’n of U.S. v. Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

31. *See Lubbers, supra* note 11, at 991.

32. *Id.* at 990–91.

33. *Id.* at 991.

incentivized to advocate for their own positions rather than exchange views with other commenters who support conflicting positions.³⁴ Finally, the notice-and-comment process presupposes the availability of information to some extent, in that commenters who lack expertise in certain fields may not give information in their comments that is either constructive or useful, and they also may misunderstand how or why the rules have developed.³⁵

B. Revenue Rulings

Another tool in the IRS's arsenal is revenue rulings, which are official interpretations of tax law issued by the IRS after an appeals process and published in the Internal Revenue Bulletin.³⁶ The usual way the IRS issues revenue rulings is by redacting personal information from a private letter ruling.³⁷ Revenue rulings are issued to provide "correct and uniform" guidance to taxpayers on issues "involving substantive tax law."³⁸ The IRS will not issue revenue rulings on issues: (1) "answered by statute, treaty, or regulations"; (2) "answered by rulings, opinions or court decisions"; (3) that the IRS deems not to be of adequate "importance or interest to warrant publication"; (4) that involve determinations of fact; or (5) that involve informers or rewards to informers.³⁹ Although the IRS issues revenue rulings "to provide precedents [for] other cases" at the IRS level and they "may be cited and relied upon for that purpose," they are limited to the facts at issue.⁴⁰ In fact, the IRS cautions its employees to consider the facts at issue in each particular case and avoid reaching the same conclusion as a revenue ruling unless the facts and circumstances involved are essentially the same.⁴¹

Revenue rulings are a strange hybrid. In one sense, revenue rulings function as guidance, as the IRS states in the Treasury Regulations.⁴² One of the hallmarks of guidance documents is that they serve the public's need for information on how to follow agency regulations, as well as explaining to agency staff how to carry out their public duties.⁴³ In a sense, revenue

34. *Id.*

35. See Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 373 (2004).

36. Treas. Reg. §§ 601.106, .201, .601 (2012).

37. See *infra* Part I-C for a discussion of private letter rulings.

38. Treas. Reg. § 601.601(d)(2)(iii).

39. *Id.*

40. *Id.* at §§ 601.601(d)(2)(v)(d)-(e).

41. Rev. Proc. 89-14, 1989-1 C.B. 814, § 7.01(6).

42. See Treas. Reg. § 601.601(d)(2)(iii).

43. JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 63-64 (5th ed. 2012).

rulings are the IRS's interpretation of the Treasury Regulations, without working a "substantive change."⁴⁴ As such, the revenue rulings have characteristics of interpretive, rather than legislative, rules, which are properly excluded from notice-and-comment procedures insofar as they function to advise the public about the IRS's construction of the tax code.⁴⁵

Revenue rulings are different from "pure" guidance documents or policy statements, in that although revenue rulings do contain statements of general IRS policy, revenue rulings are nonetheless binding applications of law to specific facts.⁴⁶ Thus, revenue rulings also function similarly to other agencies' adjudications, even though they lack the full "force and effect" of Treasury Regulations.⁴⁷ However, the process governing how the IRS issues revenue rulings is different from adjudication by other federal agencies. For example, revenue rulings do not guarantee the right to a hearing or the presentation of evidence.⁴⁸ Instead, individual IRS attorneys draft the rulings, which are reviewed at several levels before they are published in the Internal Revenue Bulletin.⁴⁹

Whatever their theoretical underpinnings, revenue rulings have proven confusing to the courts, which have been inconsistent with regard to what deference, if any, revenue rulings deserve. The Tax Court has noted in several cases that revenue rulings are merely the contention of one party (the government) in a controversy, and as such are not entitled to *Chevron* deference.⁵⁰ The court's rationale is that revenue rulings are essentially

44. See *id.* at 73 (discussing *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87 (1995)).

45. See LUBBERS, *supra* note 43, at 63–64. But see *id.* at 63 ("They are, however, not exempt from [§] 553's petition provision or, generally, from [§] 552's requirements for publication or public availability . . .").

46. See generally *id.* 63–76 (discussing the distinction between policy statements and legislative regulations); see also MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 3.03[1] (2d ed. 2013) ("While a revenue ruling does not have the legal effect of a regulation, it still has greater legal weight than a letter ruling . . . because revenue rulings are intended to be used as 'precedents' in the disposition of cases for all taxpayers . . .").

47. See generally LUBBERS, *supra* note 43, at 63–76 (discussing the distinction between policy statements and legislative regulations).

48. Compare APA, 5 U.S.C. § 554 (2012) (requiring agency hearings for administrative adjudications), with Rev. Proc. 89–14, 1989–1 C.B. 814 § 7 ("Revenue rulings arise from various sources, including rulings to taxpayers, technical advice to district offices, court decisions, suggestions from tax practitioner groups, publications, etc.").

49. MICHAEL I. SALTZMAN, *supra* note 46, ¶ 3.03[2][a]; Peter A. Lowy & Juan F. Vasquez, Jr., *How Revenue Rulings Are Made, and the Implications of that Process for Judicial Deference*, 101 J. TAX'N 230, 231 (2004).

50. Compare *Simon v. Comm'r*, 103 T.C. 247, 263 n.14 (1994) (noting that "neither proposed regulations nor revenue rulings are entitled to judicial deference"), and *PSB Holdings, Inc., v. Comm'r*, 129 T.C. 131, 142 (2007) (holding that revenue rulings only warrant deference commensurate with their "power to persuade"), with *Geisinger Health*

nothing more than the legal contentions of *one party*.⁵¹ In a recent case,⁵² the Sixth Circuit agreed with this position, finding that Congress did not give revenue rulings the force of law.⁵³ In contrast, the Second Circuit,⁵⁴ the Fifth Circuit,⁵⁵ and the Ninth Circuit⁵⁶ have all adopted a standard deferring to the IRS where revenue rulings are “reasonable and consistent” with the provisions of the Internal Revenue Code.⁵⁷ The Tenth Circuit accords deference to revenue rulings but has declined to state to what degree,⁵⁸ and the Federal Circuit has admittedly left the issue “undecided.”⁵⁹ The Supreme Court avoided settling the issue in *United States v. Mead Corp.*⁶⁰ and *Christensen v. Harris County*,⁶¹ despite the split in the circuits and Justice Scalia’s warning in his dissent to *Mead*.⁶² The Supreme Court may finally address the issue in 2014 in *United States v. Quality Stores, Inc.*⁶³

Plan v. Comm’r, 100 T.C. 394, 405 (1993) (holding that the Tax Court will give weight to a revenue ruling at issue on remand from the Court of Appeals if the primary issue on remand is the proper application of a ruling).

51. LAURENCE F. CASEY, FEDERAL TAX PRACTICE: A TREATISE OF THE LAWS AND PROCEDURES GOVERNING THE ASSESSMENT AND LITIGATION OF FEDERAL TAX LIABILITIES § 1.42 (2013) (emphasis added) (explaining that the circuit courts treat revenue rulings differently, varying in affording them deference).

52. *In re Quality Stores, Inc.*, 693 F.3d 605 (6th Cir. 2012), *cert. granted sub nom.* United States v. Quality Stores, Inc., 134 S. Ct. 49 (2013) (Oct. 1, 2013) (No. 12-1408).

53. *Id.* at 619.

54. *Amato v. W. Union Int’l Inc.*, 773 F.3d 1402, 1411 (2d Cir. 1985), *abrog’d on other grounds by* *Mead Corp. v. Tilley*, 490 U.S. 714 (1989).

55. *Foil v. Comm’r*, 920 F.2d 1196, 1201 (5th Cir. 1990).

56. *Walt Disney Inc. v. Comm’r*, 4 F.3d 735, 741 (9th Cir. 1993).

57. *See, e.g., Amato*, 773 F.3d at 1411 (holding that revenue rulings are entitled to “great deference” and have precedential effect unless they are “unreasonable or inconsistent”); *Foil*, 920 F.2d at 1201 (holding that revenue rulings are entitled to “respectful consideration” if they are reasonable and consistent); *Walt Disney Inc.*, 4 F.3d at 740 (holding that courts in the circuit will apply “great deference” to a reasonable and consistent revenue ruling).

58. *IHC Health Plans, Inc. v. Comm’r*, 325 F.3d 1188, 1194 n.11 (10th Cir. 2003).

59. *See, e.g., Fed. Nat’l Mortg. Ass’n v. United States*, 379 F.3d 1303, 1308 (Fed. Cir. 2004), *remanded to* 69 Fed. Cl. 89 (2005), *aff’d*, 469 F.3d 968 (Fed. Cir. 2006), *cert. denied*, 552 U.S. 1139 (2008).

60. 533 U.S. 218 (2001).

61. 529 U.S. 576 (2000).

62. *See* 533 U.S. at 246 (Scalia, J., dissenting).

63. *In re Quality Stores, Inc.*, 693 F.3d 605, 619 (6th Cir. 2012), *cert. granted sub nom.* United States v. Quality Stores, Inc., 134 S. Ct. 49 (2013) (Oct. 1, 2013) (No. 12-1408) (holding that IRS revenue rulings are *not* entitled to judicial deference because “Congress has not given them the force of law”). Oral argument took place on January 14, 2014, and it is not clear at the time of writing whether the opinion will be issued before or after publication.

C. *Other Rulemaking Methods: Revenue Procedures, Private Letter Rulings, and Determination Letters*

In addition to Treasury Regulations and revenue rulings, the IRS also issues other administrative decisions.⁶⁴ The Treasury defines revenue procedures, one such document, as “statement[s] of procedure that affect[] the rights or duties of taxpayers or other members of the public under the [Internal Revenue] Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.”⁶⁵ Revenue procedures generally deal with matters internal to the IRS, but they can also be useful guidance for taxpayers and practitioners.⁶⁶

The IRS also issues private letter rulings and determination letters.⁶⁷ Private letter rulings are written statements prepared for taxpayers by the IRS National Office.⁶⁸ These rulings apply the law to specific facts of a case, much like revenue rulings,⁶⁹ but are much more limited in that they only bind the taxpayer to whom they are issued for the particular transaction at issue.⁷⁰ Furthermore, the IRS may revoke or modify them “at any time in the wise administration of the taxing statutes.”⁷¹ District directors of local IRS offices write determination letters,⁷² which involve completed transactions, and are particularly important in qualifying organizations for tax exemption under the IRC.⁷³

II. NEGOTIATED RULEMAKING

Unlike notice-and-comment rulemaking, negotiated rulemaking invites stakeholders to directly participate in creating rules, rather than just give suggestions.⁷⁴ Negotiated rulemaking aims to be less expensive and time-consuming than the usual rulemaking process. Additionally, other federal

64. Treas. Reg. §§ 601.201, 601.601 (2012) (describing rulings, determination letters, and revenue procedures issued by the IRS).

65. § 601.601(d)(2)(i)(b).

66. § 601.601(d)(2)(vi).

67. § 601.201(a)(2)–(3).

68. § 601.201(a)(1)–(2).

69. Compare § 601.601(d)(2)(v)(a) (“Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated . . .”), with § 601.201(a)(2) (“A *ruling* is a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts.”).

70. §§ 601.201(l)(1), (6).

71. § 601.201(l)(1).

72. § 601.201(c)(1).

73. § 601.201(c)(5).

74. APA, 5 U.S.C. § 561 (2012); Harter, *supra* note 11, at 28.

and state agencies, including the Department of Health and Human Services (HHS), have used it.⁷⁵ Compared with administrative adjudication, the process incentivizes collaboration over litigation and is less adversarial or formal.⁷⁶ Congress officially enacted the Negotiated Rulemaking Act in 1990,⁷⁷ and in 1993, President Clinton issued Executive Order 12,866,⁷⁸ which, among other mandates, directed federal agencies to “explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.”⁷⁹

A. Background and Development

The genesis of using negotiation rather than an adversarial process to enact regulations is found in a seminal article by Philip J. Harter on the subject, which was based on a report Harter prepared for the Administrative Conference of the United States (ACUS).⁸⁰ Harter argued that administrative law, and rulemaking in particular, suffered from a “malaise”—a lack of agreement over the proper degree of discretion to allow agencies—and from procedural tensions between formal procedural requirements and agencies’ desire for broader flexibility.⁸¹

Harter acknowledged several benefits of the adversarial process—such as the openness of parties’ positions to critiquing arguments—which provides a strong incentive for stakeholders to present their best possible arguments. He also found many flaws in the adversarial rulemaking process.⁸² For one,

75. *E.g.*, ACA, Pub. L. No. 111-148, § 5602(a)(1), 124 Stat. 119, 677–78 (2010) (directing the Department of Health and Human Services (HHS) to use negotiated rulemaking to establish “comprehensive methodology and criteria” for designation of critically underserved areas); *see also* Jane Hudson et al., *Negotiated Rulemaking: A Better Alternative*, 44 CLEARINGHOUSE REV. 526, 528–30 (2011) (describing negotiated rulemaking used by the Maryland state legislature to establish procedures for student restraint and seclusion procedures).

76. Administrative Conference of the United States (ACUS), Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 50 Fed. Reg. 52,893, 52,895–96 (Dec. 27, 1985) (codified at 1 C.F.R. § 305.85-5).

77. Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified as amended at 5 U.S.C. §§ 561-570a (2012)).

78. 58 Fed. Reg. 51,735 (Oct. 4, 1993).

79. *Id.* at 51,740.

80. Harter, *supra* note 11, at 1. Harter’s report was the background for the ACUS Recommendation 82-4. Procedures for Negotiating Proposed Regulations, 47 Fed. Reg. 30,701, 30,708 (July 15, 1982).

81. Harter, *supra* note 11, at 2. This language was borrowed from an earlier case in which the D.C. Circuit referred to difficulties in the regulatory process as a “malaise.” *See* Am. Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 630 (D.C. Cir. 1966).

82. Harter, *supra* note 11, at 18–19 (comparing the benefits and drawbacks of the adversarial process).

Harter pointed out that parties at adversarial proceedings—including public agencies—tend to take positions more extreme than those they actually expect to adopt, anticipating that they will be “drawn toward the middle.”⁸³ Additionally, those who participate in the adversarial rulemaking process are usually not the stakeholders themselves, but intermediaries—attorneys and others who specialize in the procedure itself—who benefit from protracted conflicts.⁸⁴

Harter proposed reimagining the power structure of administrative law. Specifically, he recommended treating agencies and private stakeholders not as commanders and subjects, but as *equal participants* in the rulemaking process.⁸⁵ This seemingly unorthodox idea was accompanied by a tempered observation that agencies themselves, like private parties, are subject to countervailing power: namely Congress, which can limit agencies’ discretion to act, and the courts, which can overturn agency determinations.⁸⁶ Additionally, Harter proposed that agencies would benefit from conserved resources as direct negotiations could lead to sharing the task of conducting research.⁸⁷ Finally, Harter pointed out that agencies could reduce some of the costs of political infighting, with the potential to reach a desirable result in a shorter period of time.⁸⁸ Adopting Harter’s proposals, ACUS recommended that agencies adopt negotiated rulemaking to better “identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests.”⁸⁹

At the federal level, Congress formally adopted ACUS’s

83. *Id.* at 19 (“Participants that oppose any regulation or that hope to obtain a minimally intrusive regulation may argue that no regulation is needed or that at most a weak one is required . . .”).

84. *Id.* at 21–22 (comparing attorneys in administrative practice to “modern knights who joust with each other at the behest of the actual parties in interest and supply their principals with intelligence about the others’ actions”).

85. *Id.* at 57–58. Harter admits that it is difficult to determine what an agency’s exact “interest” is, on the argument that the agency would seek to “further its perception of the ‘public interest’” under the authorizing statute involved rather than simply further its own interests. *Id.* at 57 n.316.

86. *Id.* at 58–59 (“Because the outcome of judicial review is rarely predictable, the agency cannot be confident that its views, as embodied in the regulation, will prevail.”).

87. *Id.* at 59 (hypothesizing that “in face to face negotiations the parties may be more willing to furnish relevant data which often is inaccessible to the agency, if the donor can control its use”).

88. *Id.* at 59–60 (“Much of the time involved [in adversarial rulemaking] surely must be attributable to the wrangling and disputes among the parties . . .”).

89. ACUS, Recommendation 82-4, Procedures for Negotiating Regulations, 47 Fed. Reg. 30,701, 30,708 (July 15, 1982) (codified as amended at 1 C.F.R. § 305.82-4).

recommendations by passing the Negotiated Rulemaking Act of 1990.⁹⁰ The preamble to the Act repeats Harter's assertion that adversarial forms of rulemaking could discourage the affected parties from meeting and communicating, and proposes negotiated rulemaking as a solution.⁹¹ The Negotiated Rulemaking Act was originally set to run a term of six years but became permanent in 1996.⁹²

Compared with notice-and-comment rulemaking, negotiation offers stakeholders more direct participation in the rulemaking process.⁹³ And because a rule developed through negotiation is publicized for comment as a proposed regulation anyway, it presents the same opportunity for comment by the general public at large, with the opportunity for enhanced participation by stakeholders who are selected to participate in the negotiating committee.⁹⁴ Compared with adjudication, negotiated rulemaking is less adversarial and reduces the risk that parties will adopt extreme positions.⁹⁵

B. Potential Obstacles to Negotiated Rulemaking

Negotiated rulemaking is not without its problems, however. One obstacle is that because the rules resulting from negotiation are *proposed* regulations, not final ones—and so must be submitted to the notice-and-comment process—some negotiated rules may actually take longer to promulgate than through regular notice-and-comment.⁹⁶ In addition, forming rulemaking committees necessarily exclude many interested parties from the negotiating process.⁹⁷ After all, the Internet can support far more

90. Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561–570a (2012)).

91. *Id.* § 2(2)–(3).

92. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) (codified as amended at 5 U.S.C. §§ 571–584 (2012)).

93. *See infra* Part II-A.

94. APA, 5 U.S.C. § 568 (2012); *see also* Berry, *supra* note 13, at 14 (arguing that the notice-and-comment process is a kind of “sequential negotiation”). Unlike the notice-and-comment process, however, negotiated rulemaking allows various parties to interact directly.

95. *See* Harter, *supra* note 11, at 19.

96. *See* Funk, *supra* note 14, at 1368 (suggesting that rather than decreasing the amount of time and resources spent on administrative rulemaking, negotiation adds an additional step that *increases* the length and expense of rulemaking); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 446 (2001) (“Making consensus a precondition for policymaking will only likely exacerbate problems such as ambiguity, lowest common denominator results, and an undue emphasis on tractability.”).

97. *See* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1323 (1997) (noting that “the exclusion of groups from

commenters than there are seats at a negotiating table.⁹⁸ A further concern is that the Negotiated Rulemaking Act does not create a remedy for negotiations conducted in bad faith.⁹⁹ Finally, some scholars argue that the negotiation process encourages agencies to incentivize consensus over the public interest, to the potential detriment of both.¹⁰⁰

Despite these potential obstacles, negotiated rulemaking shows considerable promise as a method of breaking deadlocks between agencies and affected stakeholders.¹⁰¹ A civil atmosphere can enhance understanding of opposing positions, which can both aid in formulating an effective negotiating strategy and make it easier to reach a consensus.¹⁰² Furthermore, many of the arguments listed above do not provide any guidance on what makes a negotiation successful or unsuccessful. Successful negotiation involves communication of interests, issues, perceptions, and expectations.¹⁰³ Furthermore, the presence of an agency representative who is “authorized to fully represent the agency”¹⁰⁴ acts as a final safeguard against negotiations that are unfair or conducted in bad faith.¹⁰⁵

Whereas an adversarial setting revolves around arguing for the correct position, a negotiation setting focuses on generating workable options by

membership on the committees adds a source of discontentment not otherwise present in notice-and-comment rulemaking,” and that “a select committee whose representatives will develop a draft rule apparently attracts even closer scrutiny by organizations not represented at the negotiating table”).

98. SEE HOW DO I SUBMIT A COMMENT ON REGULATIONS.GOV?, FREQUENTLY ASKED QUESTIONS, REGULATIONS.GOV, <http://www.regulations.gov/#!faqs> (last visited Jan. 31, 2014); see Farina et al., *supra* note 23, at 395.

99. See USA Grp. Loan Servs., Inc. v. Riley, 82 F.3d 708, 714–15 (7th Cir. 1996) (noting that the Negotiated Rulemaking Act does not render promises made by agencies during negotiations enforceable).

100. Funk, *supra* note 14, at 1386.

101. Cf. Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of A Regional Air Quality Rule*, 35 ENVTL. L. 415, 462 (2005) (describing a negotiated rulemaking regarding the metal finishing industry in California in which “the process attained the goal of civility and resulted in enhanced cooperation among the parties”). Selmi notes that although the outcome was only partially successful in that the agreement left other issues to be fleshed out, the negotiating process enhanced the level of trust between the parties, who quickly dealt with miscalculations that could have otherwise derailed or delayed the rulemaking process. *Id.* at 464–65.

102. *Id.* at 463.

103. G. RICHARD SHELL, BARGAINING FOR ADVANTAGE 139 (1999).

104. APA, 5 U.S.C. § 566(b) (2012).

105. William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 191–96 (2009). Professor Funk notes, however, that this may have the side effect of agencies publishing rules that are “at odds with the President’s or Congress’s political agendas.” *Id.* at 196.

identifying the root problems at stake, analyzing symptoms and causes, and developing approaches and strategies that lead to real-world solutions.¹⁰⁶ Stakeholders are able to represent their own interests, untainted by the influence of intermediaries who benefit from protracted litigation.¹⁰⁷ Furthermore, even in situations where negotiations do not lead to a consensus, the negotiation process can nonetheless be useful by “narrowing the issues in dispute, identifying information necessary to resolve issues, [and] ranking priorities. . . .”¹⁰⁸ The unique challenges posed by the complex regulatory environment of the health care market provide a strong incentive to use negotiation as a rulemaking strategy.

III. THE IRS AND HEALTH CARE REFORM

The IRS’s dizzyingly complicated regulatory procedures have led to administrative problems inside and outside the health care arena. Some of the problems involved result from the structure of tax law itself and its relation to other areas of law. Other problems stem from how the IRS actually exercises its regulatory authority.

A. Doctrinal Issues: Complexity, Tax Exceptionalism, and APA Compliance

First, the complexity of the tax code causes problems for taxpayers trying to determine the value of their property to calculate the amount of taxes they owe on the income it generates.¹⁰⁹ Also, although tax lawyers use opinion letters to estimate potential outcomes of litigation,¹¹⁰ applying the same substantive tax doctrines may produce widely different outcomes in

106. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 69 (1981) (charting the process of generating options).

107. See Harter, *supra* note 11, at 21–22.

108. Lubbers, *supra* note 11, at 994.

109. See generally Richard J. Kovach, *New Rulemaking Approaches to Improve Federal Tax Administration Through Use of Precisional Substitutions that Avoid Valuation Uncertainties*, 6 HOUS. BUS. & TAX L.J. 79, 80 (2005) (noting that “[T]axpayers spend untold time and treasure attempting to work out the revenue consequences of various rules that require valuations for properties having no readily ascertainable market values.”).

110. See Treas. Dep’t Circular No. 230 (Rev. 8-2011), § 10.35 (June 3, 2011). Tax opinion letters are meant to assess risk, but can subject taxpayers to additional risk if they are coupled with practices that result in questionable accuracy. See, e.g., *Canal Corp. & Subsidiaries v. Comm’r*, 135 T.C. 199, 219 (2010) (describing an opinion letter that was “littered with typographical errors, disorganized and incomplete,” while also “riddled with questionable conclusions and unreasonable assumptions”). When asked how a tax lawyer could issue an opinion with no authority on point, the tax lawyer simply responded that “it was what [the client] requested.” *Id.* Needless to say, the client did not prevail on the issue. *Id.* at 220.

two factual situations that differ only slightly.¹¹¹

Another problem is what some scholars have called “tax exceptionalism”—a belief that tax law is somehow “fundamentally different” from other areas of the law—which has kept the tax world hidden behind a curtain of complicated structural and doctrinal inflexibility.¹¹² As a result, regulatory efforts to bridge the divide are complicated by a lack of understanding of tax law by non-tax regulators, and vice versa.¹¹³ These problems are keenly felt when the IRS ventures to regulate other areas of the law through the tax code.¹¹⁴

A third problem is that the IRS’s conformity with the APA’s standards has been inconsistent.¹¹⁵ Some scholars have argued that the IRS’s characterization of its regulations as “interpretive” rules, exempt from notice-and-comment, deters taxpayers from pursuing claims, particularly when those rules still apply to taxpayers filling out their returns.¹¹⁶ The rationale behind exempting interpretive rules from notice-and-comment requirements is explained by a moniker: agencies can *interpret* terms that are ambiguous without the procedural baggage of a long notice-and-comment process.¹¹⁷ But, ostensibly following this logic, the IRS could issue legally binding regulations without public input that impose penalties for noncompliance on taxpayers because taxpayers, their advisers, and tax return preparers are still subject to legal penalties for noncompliance.¹¹⁸ Under the Supreme Court’s decision in *Mayo Foundation for Medical Education*, these regulations would be entitled to *Chevron* deference regardless of

111. *E.g.*, Charles A. Rose, Note, *The Tax Lawyer’s Dilemma: Recent Developments Heighten Tax Lawyer Responsibilities and Liabilities*, 2011 COLUM. BUS. L. REV. 258, 287–90 (2011) (noting the ambiguity in civil standards for tax practitioner liability and the problems that it poses for tax lawyers); *see also* I.R.C. § 7701(o) (2006).

112. *See generally* Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994). Caron advocates replacing this view with a more holistic view informed by “an appreciation of the symbiotic relationship between tax and nontax law” in order to facilitate the ultimate resolution of many tax issues by nontax learning. *Id.* at 519.

113. *Id.*

114. *See, e.g.*, Crossley, *supra* note 7, at 701 (criticizing the IRS’s lack of health policy expertise); John D. Colombo, *The Failure of Community Benefit*, 15 HEALTH MATRIX 29, 59 (2005) (describing the IRS as “unwitting (and often uninformed) major players in health care policy”).

115. APA, 5 U.S.C. § 553(b) (2012).

116. *See, e.g.*, Hickman, *Responding*, *supra* note 10, at 1157–58. While Professor Hickman admits that the distinction between “interpretive” and “legislative” rules is blurred, she argues that the IRS’s position that most of its regulations are “interpretive” makes little sense under modern doctrine. *Id.* at 1158.

117. *See* LUBBERS, *supra* note 43, at 63–64.

118. Hickman, *Unpacking*, *supra* note 10, at 492–93.

whether they are temporary or final, legislative or interpretive.¹¹⁹

Additionally, as Professor Hickman has pointed out, the IRS's use of temporary regulations to enforce the IRC has wrought confusion among the circuit courts.¹²⁰ One side of the divide, led by the Sixth Circuit, holds that temporary Treasury Regulations are entitled to deference regardless of whether the Treasury used the notice-and-comment process.¹²¹ The other side, exemplified by the Fifth Circuit's approach, holds that failure to follow notice-and-comment procedures may render temporary Treasury Regulations ineligible for *Chevron* deference.¹²²

Administrative and judicial doctrines exacerbate the problem of the IRS's APA compliance by treating the IRS differently than other administrative agencies.¹²³ The APA provides a cause of action for private parties to challenge administrative agencies' final actions where they would result in legal wrongs or adverse effects before they are enforced.¹²⁴ Tax cases, on the other hand, take place after the IRS has begun enforcement proceedings, because otherwise the courts lack jurisdiction to hear the case.¹²⁵

Additionally, the IRS has sometimes issued final regulations without a notice-and-comment period without even referring to the exceptions to the

119. Hickman, *Responding, supra* note 10, at 1158–59; Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711–12 (2011). *But see* Carpenter Family Invs., LLC v. Comm'r, 136 T.C. 373, 384 (2011) (“Amidst conflicting signals of legislative intent, *Chevron* and its progeny certainly require deference to the administering agency’s interpretation of the resulting statutory language. However, we know of no authority . . . that requires us to defer to the Commissioner’s determination of the applicability of Supreme Court precedent.”).

120. *See* Hickman, *Unpacking, supra* note 10, at 501–02.

121. *Hosp. Corp. of Am. v. Comm'r*, 348 F.3d 136, 144–45, 145 n.3 (6th Cir. 2003); *see also* *Beard v. Comm'r*, 633 F.3d 616, 623 (7th Cir. 2011).

122. *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (noting that in *Mayo*, the Supreme Court had not dealt with regulations that were submitted to notice-and-comment).

123. Hickman, *Responding, supra* note 10, at 1164. Litigation against the IRS only begins after enforcement has already begun. *Id.*

124. APA 5 U.S.C. §§ 702, 704 (2012), *see also* Hickman, *Responding, supra* note 10, at 1162–63.

125. *See* I.R.C. §§ 6213, 6214, 7428, 7429, 7430, 7442, 7476, 7478 (2006) (giving the Tax Court limited jurisdiction over certain types of cases); *Id.* § 7421(a) (“no 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 tax was assessed.”); *see also* Hickman, *Responding, supra* note 10, at 1164 (“Taxpayer-initiated tax litigation generally falls into one of two categories which . . . I will term ‘enforcement-based’: refund litigation, where the taxpayer has paid taxes or penalties allegedly owed and seeks to recover those funds; and deficiency litigation, where the IRS has examined the taxpayer’s tax filings and concluded that taxes or penalties are due.”).

notice-and-comment requirement in the APA at all.¹²⁶ Professor Hickman conducted an empirical study of 232 IRS regulatory projects between 2003 and 2005, and the results were troubling.¹²⁷ In 36.2% of the cases studied, the IRS issued temporary regulations simultaneously with the beginning of the notice-and-comment period, such that the temporary regulations were treated as legally binding pending the promulgation of final regulations.¹²⁸ In 4.7% of the cases studied, the IRS simply issued final regulations without proposing regulations first or providing any period for public comment.¹²⁹ And even if taxpayers challenge temporary Treasury Regulations in the courts, the IRS has the authority to make final regulations retroactively applicable to the date of the temporary regulation.¹³⁰ Thus, taxpayers may simply conclude that such challenges are not worth the time or expense of pursuing them.¹³¹

Finally, Professor Hickman's study indicated that in over 90% of the instances in which the IRS diverged from the APA's required procedures, the IRS was cryptic or nonresponsive as to why the APA did not apply to its regulations, either stating briefly that the provisions under § 553 did not apply or being silent as to its reasons altogether.¹³² The IRS's current rulemaking processes cause this lack of consistency and transparency, which is precisely what negotiated rulemaking is designed to counteract by requiring active public participation in developing proposed regulations.

The IRS has never used negotiated rulemaking, and some practitioners who considered the idea in the past concluded that Treasury Regulations affect too broad a range of interests to make negotiation effective.¹³³ Nevertheless, others have concluded that even if it is not perfect for general use at the IRS, it could be effective in some areas.¹³⁴ In 1995, Carole C.

126. See Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1806 (2007) [hereinafter Hickman, *Coloring Outside the Lines*] (alluding to the IRS's inconsistent compliance with APA requirements).

127. *Id.* at 1730.

128. *Id.* at 1749.

129. *Id.*; see also Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 344 (1991) (recommending that the Treasury "sharply limit" the use of temporary regulations in exercises of "specific legislative delegations of rulemaking power").

130. I.R.C. § 7805(b) (2006).

131. Hickman, *Responding*, *supra* note 10, at 1193.

132. See Hickman, *Coloring Outside the Lines*, *supra* note 126, at 1750. The chart in the article indicates that the IRS only gave a conclusive statement in 81.55% of the regulatory projects studied and was silent 8.58% of the time. *Id.*

133. See Collette C. Goodman, *Are There Better Ways To Resolve Tax Disputes?*, FED. B. ASS'N SEC. TAX'N REP., WINTER 1993, at 1, 7.

134. See Berry, *supra* note 13, at 49; see also Goodman, *supra* note 133, at 6–7 (describing

Berry published an article arguing that the IRS could have used negotiated rulemaking successfully in dealing with Subchapter S corporations.¹³⁵ In particular, Berry opined that the IRS's proposed regulations regarding "one class of stock" for S corporations were so restrictive as to potentially eliminate S corporation status for many small businesses, inconsistent with congressional intent.¹³⁶ Berry argued that negotiated rulemaking could have effectively addressed most, if not all, of these problems.¹³⁷

Berry pointed out that the negotiation process could have ameliorated several of the difficulties experienced during the regulatory process, and would have benefited from the factors surrounding the regulation: equality of participants, a finite number of people who can effectively represent taxpayer concerns, a matter ripe for decision, and urgency for a resolution.¹³⁸ All of these factors are also present when addressing health care reform.

B. Intersection of Health Care Reform and Tax Regulatory Policy

Tax policy and health care policy share many common goals. Health care regulation involves a coordinated blend of public and private activity across federal and state levels, often with several different agencies pooling their efforts.¹³⁹ The rationale behind regulating health care in general involves correcting market-based inequities while protecting public health and safety.¹⁴⁰ But the tax code is ill-suited to micromanaging taxpayers' health care decisions. And without sufficient expertise or the involvement of private actors, regulatory failures can be as grave as market failures when they impose burdens in excess of their benefits and discourage innovation.¹⁴¹ Maximizing public benefit requires balancing several factors, including economic realities, public health and safety, individual social and economic liberties, and societal values.¹⁴²

the National Geographic Society's then-Associate General Counsel Suzanne McDowell's proposal that the IRS use negotiated rulemaking for regulations on corporate sponsorship of activities by exempt organizations).

135. See Berry, *supra* note 13, at 49. See generally I.R.C. §§ 1361–78.

136. See Berry, *supra* note 13, at 53.

137. *Id.*

138. *Id.* at 54–57; see also Harter, *supra* note 11, at 45–50.

139. See Peter D. Jacobson, *Regulating the U.S. Health Care System: Adam Smith and the Limits of Law*, 32 *HAMLIN J. PUB. L. & POL'Y* 333, 339–40 (2011); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 *HARV. L. REV.* 1131, 1134 (2012) (noting that "Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies").

140. Jacobson, *supra* note 139, at 340.

141. *Id.* at 340–41.

142. See *id.* at 335–36.

It is neither new nor unusual for health care policy to involve tax considerations, and the IRS has long recognized health promotion as a goal of tax policy.¹⁴³ The U.S. health care system involves many complex societal values and spheres of policy, but it is undeniably a market—a system where providers and patients function as suppliers and consumers.¹⁴⁴ As tax policy creates incentives and penalties for market behaviors, it makes sense to see the health care and tax regimes as structurally intertwined.

The IRS implements health care policy through a complex system of tax credits, exclusions, and deductions to patients and employers. Employers may deduct the cost of health insurance purchased for employees, which is also excluded from employees' gross income.¹⁴⁵ Uncompensated medical expenses are deductible, including prescription drugs and insulin.¹⁴⁶ Health insurance benefits received as a result of physical injury or sickness beyond an employer-financed insurance plan or pensions and annuities are excluded from patients' gross income.¹⁴⁷ The IRS might have taken advantage of this tax system effectively to stimulate certain behaviors and curtail others to effectuate policy goals of the ACA. But the IRS's rulemaking structure often frustrates these policy goals and excludes taxpayers from participating, even where allowing them to do so might improve both the efficiency of the IRS's efforts and the outcomes for affected groups with common interests.

C. *Non-Tax Provisions of the ACA: A (Somewhat) Brief Explanation*

Congress enacted the ACA on March 23, 2010.¹⁴⁸ It was amended by the Health Care Education Reconciliation Act on March 30 of the same year,¹⁴⁹ largely as a result of a compromise in the Senate after the Democratic Party lost its supermajority in 2010.¹⁵⁰ The political furor over

143. See Rev. Rul. 69-545, 1969-2 C.B. 118 (noting that the promotion of health is an independent basis for classifying a hospital as a charitable entity eligible for tax exemption). See generally Bobby A. Courtney, Note, *Hospital Tax-Exemption and the Community Benefit Standard: Considerations for Future Policymaking*, 8 IND. HEALTH L. REV. 365 (2011) (discussing charity care and community benefit doctrine as it relates to tax exemption for hospitals).

144. See Joseph White, *Markets and Medical Care: The United States, 1993-2005*, 85 MILBANK Q. 395, 400-02 (2007).

145. I.R.C. § 106(a) (2006).

146. See *id.* § 213 (allowing a deduction for uncompensated medical costs above 7.5% of gross income).

147. *Id.* § 104(a)(3). This includes military pensions received out of injuries resulting from active military or public health service. *Id.* § 104(a)(4).

148. Pub. L. No. 111-148, 124 Stat. 119 (2010).

149. Pub. L. No. 111-152, 124 Stat. 1029 (2010).

150. See Maximilian Held, Note, *Go Forth and Sin [Tax] No More: Important Tax Provisions*,

the individual mandate continued up to and after the Supreme Court decision upholding the ACA as constitutional,¹⁵¹ and was a goldmine for opinion columnists.¹⁵² The media attention colored public opinion about the debate, which galvanized supporters and detractors of the law as some pundits likely hoped.¹⁵³ But all the press attention nonetheless failed to capture the import of other areas of the law that bore mentioning both in and out of the tax code that could have prompted more discussion and debate of provisions with significant impact on society.

The ACA defines ten “essential health benefits” that each health insurance plan must cover: ambulatory and emergency services, hospitalization, maternity care, mental health and substance-use disorder services, prescription drug coverage, rehabilitative services and devices, laboratory services, preventative care and wellness, and pediatric care.¹⁵⁴ Insurance companies may no longer deny coverage because of pre-existing conditions.¹⁵⁵ The law further divides insurance plans into tiers, based on actuarial measurements, which measure the total average covered benefits of each policy.¹⁵⁶

The ACA radically overhauls the structure of the health care system in

and their Hazards, in the Patient Protection and Affordable Care Act, 46 GONZ. L. REV. 717, 719–20 (2011).

151. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

152. Politically charged news editorials about the ACA’s constitutionality and consequences dominated the press and the airwaves. See, e.g., Bill Keller, *Five Obamacare Myths*, N.Y. TIMES, July 15, 2012, http://www.nytimes.com/2012/07/16/opinion/keller-five-obamacare-myths.html?_r=0 (attributing fears about possible job losses resulting from the ACA to Republicans’ “years of trying out various alarmist falsehoods”); Betsey McCaughey, *Beware: ObamaCare’s Now Reality*, N.Y. POST, Nov. 13, 2012, <http://nypost.com/2012/11/13/beware-obamacares-now-reality/> (characterizing the ACA and health care regulation in general as “bureaucrats telling doctors and patients what to do”).

153. See Adam Liptak & Allison Kopicki, *Public’s Opinion of Supreme Court Drops After Health Care Law Decision*, N.Y. TIMES, July 18, 2012, <http://www.nytimes.com/2012/07/19/us/politics/publics-opinion-of-court-drops-after-health-care-law-decision.html> (summarizing a poll which indicated that more than 50% of Americans believed that the Supreme Court’s decision upholding the ACA was based on the Justices’ personal or political views, while only 30% believed that the decision was based on legal analysis).

154. Pub. L. No. 111-148, § 1302, 124 Stat. 163–64 (2010) (codified at 42 U.S.C. § 18022 (2010)).

155. 42 U.S.C. § 300gg-1; 29 C.F.R. §§ 2590.715-2704 (2012).

156. A “bronze” plan covers at least 60% of all health care costs, a “silver” plan covers at least 70%, a “gold plan” at least 80%, and a “platinum” plan at least 90%. 42 U.S.C. § 18022(d)(1). “Actuarial measurements” are estimates of the percentage of total average costs for covered benefits that a plan will cover. GLOSSARY: ACTUARIAL VALUE, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/actuarial-value/> (last visited Jan. 31, 2014).

the United States, which had long been plagued with systematically inflated costs and social inequities, to maximize access to quality health care.¹⁵⁷ But implementing the ACA requires massive regulatory action, blurring the lines not only between tax and health care policy, but also between public agencies, private markets, and the government—each bringing its own shortcomings.¹⁵⁸ The IRS’s administrative structure exacerbates the situation by denying taxpaying patients, hospitals, and physicians enough access to the regulatory process to contribute meaningfully.

D. Two Tax Provisions of the ACA and Their Regulatory Hazards

Much of the ACA’s substance is accomplished through the tax code. The IRS has yet to implement a number of the tax provisions in the ACA that will become effective in coming years.¹⁵⁹ The provisions that have been the subject of proposed rules provide insight into the hazards that the current rulemaking structure poses to the patients and providers who are also taxpayers. Two provisions of the ACA in particular—regulations on shared responsibility payments and requirements for nonprofit hospitals—illustrate the missed opportunities that negotiated rulemaking could have provided as well as the benefits it could offer in the future.

1. The Individual Mandate and Shared Responsibility Payments

The individual mandate is effectuated in the tax code through something called a “shared responsibility payment.”¹⁶⁰ Anyone who fails to maintain “minimum essential coverage,” as defined in § 5000A of the IRC, is liable

157. See Timothy Stoltzfus Jost, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*, 5 ST. LOUIS U. J. HEALTH L. & POL’Y 27, 28 (2011) (opining that the ACA was designed for “revolutionizing the underwriting practices of health insurers, stimulating competition in the health insurance industry, and protecting health insurance consumers”).

158. See Stephen Utz, *The Affordable Care Act and Tax Policy*, 44 CONN. L. REV. 1213, 1216 (2012) (“Because the Act tries to work through the private sector to provide a public good, it runs directly into the perennial problems of markets’ mis-measurement of utility, non-measurement of opportunity, and utter insensitivity to the mesh of utility and opportunity, which, collectively, are the most plausible measure of well-being.”); see also Barbara Rylko-Bauer & Paul Farmer, *Managed Care or Managed Inequality? A Call for Critiques of Market-Based Medicine*, 16 MED. ANTHROPOLOGICAL Q. 476, 477 (2002) (arguing that “health care as a right is not compatible with health care as commodity” because market-based incentives are grounded in profit motives rather than principles of justice and social good).

159. See, e.g., HHS, KEY FEATURES OF THE AFFORDABLE CARE ACT BY YEAR, <http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html> (last visited Jan. 31, 2014) (demonstrating that the ACA’s provisions will gradually go into effect through 2015).

160. I.R.C. § 5000A (Supp. 2011).

for this payment.¹⁶¹ The amount of the shared responsibility payment is the lesser of (1) monthly penalty amounts determined under § 5000(c)(2), or (2) the national average premium for qualified health plans with a “bronze” level of coverage.¹⁶²

Several groups are exempt from liability for these payments, including prisoners (other than those awaiting disposition of charges) and undocumented persons.¹⁶³ Members of American Indian tribes and individuals who cannot afford health care coverage because premium costs would exceed 8% of their household income, or who are below the income tax filing threshold are also excluded.¹⁶⁴ The tax code also grants two exemptions based on religious affiliation for people with general religious objections to receiving public assistance and for members of a new brand of spiritually-minded private health care organizations called “health care sharing ministries.”¹⁶⁵ While health care sharing ministries can spread costs to some degree, they may refuse to cover certain treatments on religious grounds and are largely unregulated, such that they may not have reserves to cover large expenses and are not required to carry such reserves.¹⁶⁶

The shared responsibility payment also applies to employers with fifty or more employees.¹⁶⁷ Employers who fail to provide their employees with the opportunity to enroll in minimum essential insurance coverage face a penalty of \$250 for each full-time employee each month.¹⁶⁸ Although this provision aims to incentivize providing health coverage to employees, some commenters argue that the penalty perversely incentivizes employers not to hire low and moderate-income taxpayers or to shift such employees to part-

161. *Id.*

162. *Id.* § 5000A(c). Monthly penalty amounts are equal to one-twelfth of the greater of a “flat dollar amount” (the lesser of 300% of the applicable dollar amount (\$95 for 2014 and \$325 for 2015) or the sum of the applicable dollar amount for each individual who failed to maintain coverage during a given month), or a percentage of the taxpayer’s gross income for the taxable year (1% for 2014, 2% for 2015, and 2.5% for 2016 onward). *Id.* While there are several other calculations involved in estimating the penalty, this information is spelled out here to give readers an idea of how complicated the new rules can be for taxpayers.

163. *Id.* § 5000A(d)(3)–(4).

164. *Id.* § 5000A(e).

165. *Id.* § 5000A(d). A Health Care Sharing Ministry is a nonprofit religious organization whose members mutually agree to share health care costs. *See generally* Samuel T. Grover, Note, *Religious Exemptions to the PPACA’s Health Insurance Mandate*, 37 AM. J.L. & MED. 624, 645–47 (2011) (describing Health Care Sharing Ministries and their similar function to “reciprocal insurance exchanges”).

166. CCH, 2010 TAX LEGISLATION: PATIENT PROTECTION AND AFFORDABLE CARE; HEALTH CARE RECONCILIATION; HIRE AND OTHER RECENT TAX ACTS 64–65 (2010).

167. I.R.C. §§ 4980H(a), (c).

168. *Id.* Curiously, this amount is written in the Code as “1/12 of \$3,000.” *Id.*

time status.¹⁶⁹

There were several rounds of notice-and-comment rulemaking pertaining to shared responsibility payments under § 4980H, beginning on May 3, 2011 with a Notice of Proposed Rulemaking.¹⁷⁰ Additional notices were published on October 3, 2011,¹⁷¹ February 27, 2012,¹⁷² and October 9, 2012.¹⁷³

On January 2, 2013, the IRS published another Notice of Proposed Rulemaking pertaining to the shared responsibility payment.¹⁷⁴ The IRS rejected earlier commenters' suggestions that the IRS adopt the Fair Labor Standards Act's definition of "employer" in favor of the common law definition.¹⁷⁵ The IRS also rejected commenters' recommendations to exempt new employers from § 4980H requirements to give them time to come into compliance.¹⁷⁶

Not everything about the proposed regulations suggested that the IRS had failed to address commenters' concerns. Many commenters had discussed feasibility and privacy issues regarding the so-called "affordability safe harbor," a provision requiring employers to base calculations of affordability on a threshold of 9.5% of employees' "household income" rather than their W-2 wages.¹⁷⁷ The IRS published Notice 2011-73, which

169. See generally David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669 (2012), for a thorough quantitative discussion of the economic incentives tempting employers to modify their employment strategies in order to avoid the penalty.

170. I.R.S. Notice 2011-36, 2011-21 I.R.B. 792.

171. I.R.S. Notice 2011-73, 2011-40 I.R.B. 474.

172. I.R.S. Notice 2012-17, 2012-9 I.R.B. 430.

173. I.R.S. Notice 2012-58, 2012-41 I.R.B. 436.

174. Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 218 (proposed Jan. 2, 2013).

175. *Id.* at 221. Compare 29 U.S.C. § 203 (2006) (defining an employer under the Fair Labor Standards Act as a person or organization "acting directly or indirectly in the interest of an employer in relation to an employee," but not including labor organizations or their agents), with Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. at 221 (defining an employer as a person for whom services are performed and who has the right to control and direct the employee, "not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished").

176. Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. at 222.

177. I.R.C. § 36B (Supp. 2011); see, e.g., Letter from Angelo I. Amador, Vice President, Labor & Workforce Policy, & Michelle Reinke Neblett, Dir., Labor & Workforce Policy, Nat'l Restaurant Ass'n, to HHS & IRS (Oct. 31, 2011), <http://www.regulations.gov/#!documentDetail;D=HHS-OS-2011-0024-0186> ("Employers do not know their employees' household income, nor do we want to know this information for privacy reasons.").

addressed this and even proposed adopting the taxpayers' ideas.¹⁷⁸

But for other stakeholders, the new proposed regulations, if adopted, would lead to new problems. The ACA exempts "seasonal employees" from consideration of an employer's size for determining liability for shared responsibility payments as long as the employer had more than fifty total employees for 120 or fewer days.¹⁷⁹ Although the new proposed regulations used the Department of Labor's definition of "seasonal employee,"¹⁸⁰ the regulations only required employers to use a "reasonable method" for crediting hours to certain employees whose work schedules and compensation did not fit the traditional "hours of service" framework.¹⁸¹

Adjunct faculty at universities were particularly concerned by this, as educational institutions generally compensate adjunct faculty on the basis of credit hours taught, rather than tracking the hours they work.¹⁸² Some adjuncts feared that the new regulations would present "an additional opportunity for the educational institutions to abuse their adjunct faculty by crediting adjuncts with less labor than the employer actually receives."¹⁸³ Additionally, this kind of rulemaking bears an uncomfortable resemblance to the pernicious use of temporary regulations that legal scholars have accused the IRS of employing in the past.¹⁸⁴ Eventually, on April 24, 2013, the IRS held a full hearing in Washington, D.C., which twenty stakeholders attended.¹⁸⁵ On July 2, 2013, in response to these and other complaints and concerns by stakeholders, the IRS delayed the employer responsibility payments from going into effect until 2015.¹⁸⁶ On August 30, 2013, the

178. I.R.S. Notice 2011-73, 2011-40 I.R.B. 474.

179. I.R.C. § 4980H(c)(2)(B).

180. Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. at 222 ("After consultation with the [Department of Labor], the Treasury Department and the IRS have determined that the term seasonal worker, as incorporated in section 4980H, is not limited to agricultural or retail workers.").

181. *Id.* at 225. See also John C. Duncan, Jr., *The Indentured Servants of Academia: The Adjunct Faculty Dilemma and Their Limited Legal Remedies*, 74 IND. L. J. 513, 528-29 (1999) (discussing semester pay and other adjunct faculty compensation schemes).

182. Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. at 225.

183. Kenneth H. Ryesky, Esq., *Comments on Proposed Treasury Regulations Regarding Shared Responsibility for Employers Regarding Health Coverage* (Jan. 28, 2013), available at <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0023>.

184. See Hickman, *Coloring Outside the Lines*, *supra* note 126, at 1748-49.

185. *IRS and Treasury Public Hearing Proposed Regulations: Shared Responsibility for Employers Regarding Health Coverage*, HIGHROADS.COM (Apr. 23, 2013), <http://www.highroads.com/newsroom/irs-and-treasury-public-hearing-proposed-regulations-shared-responsibility-for-employers-regarding-health-coverage/>.

186. Mark J. Mazur, *Continuing to Implement the ACA in a Thoughtful, Careful Manner*, TREASURY NOTES (July 2, 2013), <http://www.treasury.gov/connect/blog/pages/continuing>

IRS issued final rules regarding liability, administration, and calculation of the shared responsibility payments.¹⁸⁷

2. *Stiffer Requirements for Tax-Exempt Nonprofit Hospitals—With Shared Hazards for Communities and Hospitals*

Nonprofit hospitals are not necessarily tax-exempt unless they are organized and operated exclusively for charitable purposes.¹⁸⁸ The IRS's standard for tax exemption for hospitals under § 501(c)(3) is predicated primarily on two interrelated doctrines—community benefit and private inurement.¹⁸⁹ The doctrine of community benefit guides this metric and involves several considerations, including whether an organization is

organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals.¹⁹⁰

The private inurement doctrine holds that tax exemption must serve a public interest, not a private one.¹⁹¹ In other words, if an organization's

-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx.

187. Shared Responsibility Payment for Not Maintaining Minimum Essential Coverage, 78 Fed. Reg. 53,646 (to be codified at Treas Reg. §§ 1.5000A-1–A-5).

188. Rev. Rul. 69-545, 1969-2 C.B. 117.

189. *Id.* (ruling that to qualify for tax-exempt status, hospitals must: (1) operate an emergency room open to all persons regardless of ability to pay; (2) provide care to all persons able to pay directly or through insurance; (3) serve a public interest; (4) maintain an open medical staff; and (5) use surplus revenues to improve the quality of care, facilities, medical training, education, and research).

190. I.R.C. § 501(c)(3) (2006).

191. *Id.* (requiring that “no part of the net earnings of [a tax-exempt entity] inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office”); see also *Ginsburg v. Comm’r*, 46 T.C. 47, 56 (1966) (holding that there is no justification for tax exemption if an organization uses its funds primarily to foster private interests and the benefit, if any, to the general public is only incidental); Rev. Rul. 76-206, 1976-1 C.B. 154–55 (stating that nonprofit organizations organized to promote classical music must serve “a public rather than a private interest”). In very basic terms, “private inurement” occurs whenever a private stakeholder in a non-profit hospital receives benefits that are “disproportionate” to their contributions. See Treas. Reg. § 1.501(a)-1(c) (2012) (defining private shareholders as persons having a “personal and private interest in the activities of the organization”). The analysis of what actually is disproportionate involves a variety of considerations, including excessive compensation, exchanges of property for less than fair market value, unsecured loans, and a variety of other considerations beyond the

primary purpose is to benefit certain individuals rather than the public—to “inure” a benefit to private parties—then it cannot be tax-exempt, even though the organization may also do charitable work.¹⁹² Conversely, the fact that an organization benefits private individuals may not defeat tax exemption if those benefits are merely incidental to the organization’s purpose, and the organization otherwise qualifies for exemption.¹⁹³

The charity care standard for hospitals under § 501(c)(3) has changed considerably since it was first articulated—but not necessarily in the right direction. Under Revenue Ruling 56-185, non-profit hospitals may charge patients, but only to the extent of their “financial ability,” and hospitals must provide charity care.¹⁹⁴ But under this ruling, a low percentage of charity care was “not conclusive that a hospital is not operated for charitable purposes.”¹⁹⁵ Furthermore, the community benefit doctrine has been undermined by other doctrines dealing with tax exemption, including the “integral part” doctrine,¹⁹⁶ which states that a Health Maintenance Organization that provides no significant health benefits to non-subscribers is not entitled to tax-exempt status under § 501(c)(3).¹⁹⁷ But, such an organization can still qualify for tax exemption as long as it is *related* to one that does provide such benefits.¹⁹⁸

According to a report by the Congressional Budget Office, nonprofit hospitals across the United States enjoyed \$12.6 billion in exemptions from federal and state corporate income taxes in 2002.¹⁹⁹ Hospitals wishing to claim tax exemption must report their financial assistance policies on Form

scope of this Comment. For a more thorough analysis, see generally Jeremy J. Schirra, Note, *A Veil of Tax Exemption?: A Proposal for the Continuation of Federal Tax-Exempt Status for “Nonprofit” Hospitals*, 21 HEALTH MATRIX 231, 245–46 (2011); John D. Colombo, *Health Care Reform and Federal Tax Exemption: Rethinking the Issues*, 29 WAKE FOREST L. REV. 215, 221–23, 253–58 (1994) (arguing that the complexity of the private inurement doctrine stems partly from its dependence on an idea of “private benefit” that defies easy definition and that the complexity increases as health providers integrate). For a discussion of state law issues relating to community benefit reporting since the ACA’s passage, see generally Sara Rosenbaum, et al., *Hospital Tax-Exempt Policy: A Comparison of Schedule H and State Community Benefit Systems*, 2 FRONTIERS IN PUB. HEALTH SERVS. & SYS. RESEARCH, No. 1, Article 3, (2013), available at <http://uknowledge.uky.edu/frontiersinphssr/vol2/iss1/3>.

192. Treas. Reg. §§ 1.501(c)(3)-1(d)(1)(ii) (2012).

193. THOMAS K. HYATT & BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT HEALTHCARE ORGANIZATIONS* 65 (3d ed. 2008).

194. Rev. Rul. 56-185, 1956-1 C.B. 202–03.

195. *Id.*

196. *E.g.*, *Geisinger Health Plan v. Comm’r*, 985 F.2d 1210, 1220 (3d Cir. 1993).

197. *Id.*

198. *Id.*

199. CONG. BUDGET OFFICE, PUB. NO. 2707, *NONPROFIT HOSPITALS AND THE PROVISION OF COMMUNITY BENEFITS* 5 (2006).

990, Schedule H, and must include a number of details, including what percentage of Federal Poverty Guidelines were used to qualify patients, the uniform application of financial assistance policies, as well as documented expenditures on community building activities and bad medical debt.²⁰⁰

At the same time, although some states have enacted mandatory percentages for hospitals providing charity care, little evidence exists to suggest that this does a good job meeting the needs of the communities served by such hospitals, particularly in rural or economically distressed regions.²⁰¹ Attempts to impose standardization on communities and health care systems across the country are further complicated by the lack of any consistently applied formula to assess hospitals' community benefit activities.²⁰² Thus, the IRS's current system does not tax some hospitals whose behavior might otherwise have been classified as profit-seeking while increasing the difficulty of providing health care services for needy communities.

The ACA imposes additional reporting requirements on tax-exempt nonprofit hospitals.²⁰³ In particular, hospital organizations are subject to new Community Health Needs Assessment (CHNA) requirements, which mandate that hospitals conduct assessments of the needs of the communities they serve at least every three years.²⁰⁴ Hospital organizations must document the assessment and provide information to the IRS describing: (1) the community that the hospital serves; (2) the process used to conduct the assessment, including sources of data, analytical methods, information gaps, and any organizations with which the hospital cooperated in conducting the assessment; (3) how the hospital took input from community representatives into account; (4) a description of a community's specific health needs organized in order of priority; and (5) existing health care facilities and other resources within the community.²⁰⁵

Hospital organizations must also develop a financial assistance policy and, if a patient lacks relevant information, use "reasonable efforts" to determine eligibility for financial assistance before commencing collection

200. IRS, DEP'T. OF THE TREASURY, SCHEDULE H (FORM 990) (2012).

201. For example, hospitals in such areas may face risk of closure where there are already not enough paying patients to subsidize the larger numbers of indigent patients they would be required to serve. See Courtney, *supra* note 143, at 379–80.

202. *Id.* at 380; DEPT. OF THE TREASURY, IRS EXEMPT ORGANIZATIONS (TE/GE) HOSPITAL COMPLIANCE PROJECT FINAL REPORT 1 (2009).

203. Pub. L. No. 111-148, § 9007, 124 Stat. 855–57 (2010) (codified at I.R.C. § 501(r) (Supp. 2011)).

204. *Id.* § 501(r)(3).

205. I.R.S. Notice 2011-52, 2011-30 I.R.B. 60.

proceedings against patients.²⁰⁶ Under IRS policy pursuant to the ACA, the hospital seeking to claim tax exemption must document: (1) eligibility criteria for financial assistance, including free or discounted care; (2) how to calculate what the hospital charges patients; (3) how to apply for financial assistance; (4) actions resulting from nonpayment; and (5) publication of the financial assistance plan.²⁰⁷ To this end, the IRS published a Notice and Request for Comments Regarding the Community Health Needs Assessment Requirements for Tax-Exempt Hospitals on July 8, 2011,²⁰⁸ and issued proposed regulations nearly a year later on June 26, 2012.²⁰⁹

The proposed regulations ran counter to many commenters' concerns. First, they failed to specify any minimum eligibility criteria for financial assistance plans, despite commenters' requests that they do so.²¹⁰ Additionally, although the regulations provided a definition of "reasonable efforts" with respect to eligibility determinations for financial assistance, the definition the IRS provided was formidably detailed and complicated.²¹¹ The standardized general requirements impose a "notification period" of 120 days, during which a hospital providing care must notify an individual about the hospital's financial assistance plan before making and documenting a determination about whether the individual is eligible.²¹² The regulations also impose a longer "application period" of 240 days.²¹³

Unsurprisingly, comments showed mixed reactions to the proposed rules. Many community health advocates welcomed the new requirements as a means to ensure adequate access to health care, particularly in economically distressed areas.²¹⁴ But, hospital administrators argued that the proposed regulations required too narrow a definition of "reasonable efforts," which hospitals contended would force them to dedicate considerable staff time and resources to determining the financial status of patients while precluding them from using effective practices already in

206. I.R.C. § 501(r)(6).

207. *Id.* § 501(r)(4)(A).

208. I.R.S. Notice 2011-52, 2011-30 I.R.B. 60.

209. Additional Requirements for Tax-Exempt Hospitals, 77 Fed. Reg. 38,148 (June 26, 2012) (to be codified at Treas. Reg. pt. 1).

210. *Id.* at 38,151.

211. *Id.* at 38,156–59.

212. *Id.* at 38,156.

213. *Id.* In the event of an incomplete application being submitted, the hospital is obligated to provide the individual with information relevant to completing it. *Id.*

214. See, e.g., Health Law Advocates of Louisiana, *HLA's Hospital Accountability Project*, HEALTH L. ADVOC. OF LA. NEWSL. No. 4, Aug. 2011, available at <http://hlalouisiana.org/wp-content/uploads/2013/08/Health-Law-Advocates-of-Louisiana-August-2011-Newsletter.pdf>.

place.²¹⁵ Others expressed concerns that compliance would be enforced before meaningful guidance had been issued by the IRS, as the proposed regulations provided neither a transition period for hospitals to operationalize the final rule's requirements or to cure noncompliance, nor any "intermediate sanctions" less than losing tax-exempt status.²¹⁶ Although the IRS's new requirements could improve patient access, they could be detrimental to the quality of care hospitals provide if such facilities spend resources on compliance that would otherwise have gone to providing care and services. Negotiated rulemaking could have allowed a more equitable outcome more efficiently.²¹⁷

IV. THE CASE FOR NEGOTIATED RULEMAKING AT THE IRS

Although it may not solve problems in every instance, negotiated rulemaking could at least improve the quality of public input into the tax regulatory process while improving its efficiency.²¹⁸ The IRS's failure to address taxpayer commenters' concerns only adds fuel to the fire for those who feel that they have been, and sometimes are, directly and personally harmed by various tax policies, while also left out of the decisionmaking process.²¹⁹ Implementing negotiated rulemaking at the IRS could drastically reduce costs associated with litigation and improve the IRS's record for public input and transparency.

A. *Forming a Negotiated Rulemaking Committee at the IRS*

The Negotiated Rulemaking Act provides the process all agencies use to form negotiated rulemaking committees, and would thus govern any such committee formed by the IRS.²²⁰ The IRS would begin the process by examining several factors. First, the agency would determine the need for a rule in the first place.²²¹ Second, the IRS would examine whether a limited

215. See, e.g., John D. Baumgartner, Senior Vice President & Controller, Methodist Health Sys., *Comments on Proposed Additional Requirements for Charitable Hospitals* (Sept. 20, 2012), <http://www.regulations.gov/#!documentDetail;D=IRS-2012-0036-0179>.

216. Melinda Reid Hatton, Senior Vice President & Gen. Counsel, Am. Hosp. Ass'n, *Comments on Proposed Additional Requirements for Charitable Hospitals*, at 3 (Sept. 24, 2012), <http://www.regulations.gov/#!documentDetail;D=IRS-2012-0036-0100>.

217. See *infra* Part IV.

218. Harter, *supra* note 11, at 106.

219. See, e.g., COMMENT ON FR DOC # 2012-31269, REGULATIONS.GOV, <http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0034> (last visited Jan. 31, 2014) (detailing one anonymous commenter's son's difficulties running small businesses).

220. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-570a (2012)).

221. APA, 5 U.S.C. § 563.

number of identifiable interests exists that the rule would significantly affect.²²² The health care reform environment meets both of these requirements. Although the ACA did not specifically require the IRS to create a negotiated rulemaking committee, it did mandate that the Health Resources and Service Administration create a negotiated rulemaking committee to develop criteria for designating medically underserved populations and health profession shortage areas.²²³ This committee of twenty-eight members—which includes a representative from the Health Resources and Services Administration, as well as technical experts, representatives of other federal programs, provider groups, and other stakeholders—published a long series of recommendations, replete with analysis and discussion.²²⁴

Third, the IRS would look for a reasonable likelihood of balanced representation and consensus.²²⁵ There certainly are obstacles to overcome in achieving balanced representation on rulemaking committees, and opponents of negotiated rulemaking such as William Funk have argued that negotiated rulemaking is simply the subversion of public choice to powerful interests.²²⁶ And even without abuse of the negotiation process, it may be difficult to forge a consensus among a large number of competing interests, given the broad application of the IRS's regulatory authority.²²⁷ But, appointing the proper representatives could provide effective leverage against abuse or co-optation by powerful interest groups or by the government.²²⁸ Even the face-to-face format itself can provide substantial

222. *Id.*

223. Pub. L. No. 111-148, § 5602, 124 Stat. 119, 677–79 (2010).

224. *See generally* HHS, NEGOTIATED RULEMAKING COMM. ON THE DESIGNATION OF MED. UNDERSERVED POPULATIONS AND HEALTH PROFESSIONAL SHORTAGE AREAS, FINAL REPORT TO THE SECRETARY (2011).

225. APA, 5 U.S.C. § 563.

226. *See* Funk, *supra* note 14, at 1386 (opining that negotiating regulations results in a subtle transformation of public law into private law relationships). *But see* Lubbers, *supra* note 11, at 1003 (noting that Funk's concerns may be "largely theoretical," and that "if the convening stage is done correctly, the right stakeholders and the agency representatives are all around the table").

227. *See, e.g.,* Goodman, *supra* note 133, at 7 (recounting the view of the Federal Bar Association's Working Group on Regulations that "IRS regulations did not generally lend themselves to negotiated rulemaking due to their broad application"). *But see id.* ("Nevertheless, the group also recognized that there are some situations in which a finite group of interests are affected by a regulation, and felt it would be worthwhile to try negotiated rulemaking in carefully selected cases. Public interest groups and bar associations could be invited to participate, along with a knowledgeable neutral party.").

228. *See* Harter, *supra* note 11, at 54 (explaining that an effective representative must have "sufficient stature with the constituency he represents to adapt to changing situations in the negotiations . . . while retaining the confidence of his constituency").

benefits to the process.²²⁹

Fourth, the IRS would need to determine whether negotiated rulemaking would unreasonably delay notice and issuance of the proposed rule.²³⁰ Opponents have argued that this problem is inherent in the negotiated rulemaking process, and point to instances where agencies abandoned negotiations in the middle of the process, or where the negotiation process dragged on longer than the notice-and-comment process presumably would have.²³¹ Agencies' own internal processes can also exacerbate delays when they minimize the flexibility or adaptability the negotiating process needs to be successful.²³²

But these problems are not necessarily inherent to the negotiated rulemaking process itself. Even strong proponents of negotiated rulemaking have generally not argued that it is a magical cure-all to use in every regulatory process, but recommend negotiated rulemaking where it could potentially *enhance* cost-effectiveness and speed.²³³ Additionally, some state governments have implemented negotiated rulemaking at agencies in cases when doing so is feasible, giving interested parties and their advocates new opportunities to present and discuss information that may be relevant.²³⁴ This speaks to the confidence governments are showing in the public to provide meaningful input and influence during the regulatory process.

Once the government decides to move forward with negotiation, it

229. SHELL, *supra* note 103, at 113 (noting that negotiators at a power disadvantage can gain leverage by "showing passionate commitment rather than cool indifference"); *see also* Lubbers, *supra* note 11, at 1004 (arguing that one of the benefits of negotiated rulemaking is the investment participants have in the outcome, which is difficult to measure empirically).

230. APA, § 563.

231. *See* Coglianesi, *supra* note 97, at 1274–77 (pointing out that between 1983 and 1996, the Department of the Interior, the Environmental Protection Agency (EPA), Federal Communications Commission, Federal Trade Commission, and Nuclear Regulatory Commission (NRC) all abandoned at least one negotiation process mid-stream before reaching consensus, and that over the same time period, out of 47,603 final promulgated rules, only thirty-five were reached through negotiation).

232. *See, e.g.*, Lubbers, *supra* note 11, at 1000–01 (detailing the role of the EPA's rule clearance process in delaying a proposed rule on inquiries into previous land ownership and use for liability purposes, despite the fact that the negotiated rulemaking committee had already reached consensus on the preferred approach).

233. *See* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 41 n.40 (2000) (admitting that negotiated rulemaking "is typically used only for rules that are quite difficult and controversial," rather than "a process for all rules regardless of complexity or controversy").

234. *E.g.*, Richard Seamon & Joan Callahan, *Achieving Regulatory Reform by Encouraging Consensus*, ADVOC. No. 56(2) 27 (Feb. 2013) (describing a recent amendment to Idaho's version of the APA, requiring Idaho agencies to use negotiated rulemaking "whenever it is feasible to do so"). The Idaho statute also provides for legislative and executive review in cases where agencies choose not to pursue negotiated rulemaking. *Id.* at 29.

publishes a notice in the Federal Register announcing the formation of a negotiated rulemaking committee and soliciting applications for membership.²³⁵ Anyone who would be “significantly affected by a proposed rule and who believe that their interests will not be adequately represented by any person specified in a notice” may apply for membership or nominate a third party representative.²³⁶ The application period will coincide with a thirty-day period allowing public comment on the proposal to establish the committee and the proposed membership.²³⁷ Afterward, the agency must review the comments before the final decision to establish a committee.²³⁸

Membership on the negotiated rulemaking committee would—and should—reflect the fact that taxpaying health care providers and patients have a variety of diverse interests. However, the health care and tax contexts intersect in an area where common interests are possible to identify in discrete groups, similar to other areas that practitioners have considered in the past. Some of the same industry and public interest groups that have posted comments could be invited to help draft the regulations, as well as professional associations such as the American Bar Association and the American Institute of Certified Public Accountants.²³⁹ Doing so could allow knowledgeable tax professionals to discuss the implications of the proposed regulations with the groups representing the health care professionals and patients who would be affected, as well as with the IRS.

B. Negotiated Rulemaking Could Aid the IRS in Drafting Regulations More Efficiently While Allowing Greater Taxpayer Participation

Despite the problems with the current system and the solutions that negotiation could offer, the IRS might still have reasons to decide that it need not negotiate with taxpayers at all. In the context of alternative dispute resolution, each party to a negotiation usually develops a concept

235. APA, § 564. The committee is limited to twenty-five members. *Id.* § 565. In addition, it must additionally conform to Federal Advisory Committee Act standards. Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. 2).

236. APA, § 564(b). Applications must include: (1) the applicant or nominee’s name and a description of his or her interests; (2) evidence of authorization to represent parties related to those interests; (3) a written commitment to actively participate in good faith; and (4) reasons why the persons specified in the notice under subsection (a)(4) do not adequately represent the interests of the person submitting the application or nomination. *Id.*

237. *Id.* § 564(c).

238. *Id.* § 565.

239. *Id.* § 563; *see also* Berry, *supra* note 13, at 55–56.

known as the best alternative to a negotiated agreement, or BATNA.²⁴⁰ Essentially, the BATNA is what a party expects to be able to gain in the event that negotiations fail or are foregone altogether.²⁴¹

By its design, negotiated rulemaking operates in a similar conceptual framework. The IRS is, after all, empowered to impose and enforce taxes with or without taxpayers' cooperation, and its regulations are subject to deferential review by the courts.²⁴² In light of this, the IRS might seem to better serve its function in collecting revenue by issuing commands under the current regime than by negotiating with taxpayers.

However, there are several reasons why this is not the case. First, negotiated rulemaking could lower enforcement expenses and increase efficiency by reducing the chance that courts would overturn the negotiated rules.²⁴³ For 2013, the IRS requested over \$5.7 billion for enforcement costs, including \$688,296,000 for investigations, \$4,846,749,000 for examinations and collections, and \$166,625,000 for regulatory costs.²⁴⁴ Additionally, in litigating, the IRS runs the risk of paying victorious taxpayers' attorneys' fees if the agency loses in the courts or at the agency.²⁴⁵

Although the initial cost associated with the negotiated rulemaking process might be higher than the notice-and-comment process alone, this cost might be offset by the savings each year from avoiding implementation expenses related to the ACA, which are estimated to approach \$100 million annually.²⁴⁶ Furthermore, technology can improve stakeholder access to the bargaining process while cutting costs. Prime among the ways in which to accomplish this is the use of the Internet, which could facilitate meetings

240. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 102 (3d ed. 2011).

241. *Id.*

242. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, (2011) (deferring to the Treasury's regulation because it was a "permissible construction" of Congressional intent).

243. *See, e.g.,* Ctr. for Law & Educ. v. U. S. Dep't of Educ., 315 F. Supp. 2d 15, 30 (D.D.C. 2004), *aff'd on other grounds*, 396 F.3d 1152 (D.C. Cir. 2005) (holding that courts are barred from overturning a negotiated rule based on an "alleged defect in the establishment of a negotiated rulemaking committee"); *see also* Lubbers, *supra* note 11, at 1004 (illustrating how "courts have not been receptive to challenges to the reg-neg procedure itself").

244. IRS, FY2013 BUDGET IN BRIEF 1 (2012).

245. I.R.C. § 7430 (Supp. 2011). *See generally* Harris L. Bonnette, Jr., *The IRS Will Absolutely, Positively Not Pay Your Attorneys' Fees (Or Will They?)*, 84 FLA. B.J. 28 (2010) for a discussion of how this works in practice.

246. *Compare* Lubbers, *supra* note 11, at 997 (citing DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 274 (2d ed. 1995)) (estimating costs for each rulemaking proceeding undertaken by the EPA at \$128,000 in 2008 dollars), *with* IRS, *supra* note 244, at 6 (budgeting \$85.4 million for implementing changes related to the ACA).

and communication without requiring participants in the negotiation process to share a space or a *per diem* hotel bill.²⁴⁷ Collaborative meetings to draft and submit comments have already taken place online through services such as the Cornell e-Rulemaking Initiative's Regulation Room website.²⁴⁸ Such technology could very easily be adapted to facilitate real-time negotiations through social networking sites or video conferencing.²⁴⁹

Adapting this technology to regulatory negotiations seems a logical next step, and could broaden the playing field across distances, allowing taxpayers to speak their minds directly to officials at the bargaining table. For example, the IRS could follow the Nuclear Regulatory Commission's lead and improve efficiency by dividing different electronic forums based on the topics they discuss.²⁵⁰ The agency could appoint facilitators to guide the discussions, and participants could have the freedom to log in and out as they please.²⁵¹

Additionally, the IRS *already* negotiates at the individual level. At the appeals office, the IRS seeks to resolve tax disputes on a fair and impartial basis, pre-empting the need for litigation.²⁵² Given that the IRS holds conferences and settlements with taxpayers already, simply completing the negotiations ahead of time could save both the taxpaying public and the IRS considerable time, money, and resources. Whatever the risks of negotiation, the current process makes clear that commenting on a proposed regulation is simply not the same thing as directly participating in crafting the rule.

247. The idea of using Internet technology in conjunction with negotiated rulemaking is not new. See, e.g., Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 321–24 (1998) (describing the NRC's use of "chat group rulemaking" via electronic chat rooms and discussion lists to reach a consensus).

248. CORNELL E-RULEMAKING INITIATIVE, REG. ROOM, <http://regulationroom.org/> (last visited Jan. 31, 2014); see also Farina et al., *supra* note 23, at 395–96 (discussing e-rulemaking in general and its potential to improve government transparency).

249. See generally Cynthia R. Farina et al., *Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking*, 31 PACE L. REV. 382 (2011) (propounding the use of social networking to facilitate immediacy and civic participation in the regulatory process); Tawnya Plumb, *Video Conferencing: Changing the Way Courts Do Business*, 34 WYO. LAW. 56 (2011) (explaining courts' use of video conferencing technology to conduct plea hearings, conferencing for juvenile cases, interviews, and administrative trainings).

250. See Johnson, *supra* note 247, at 322 (describing the NRC's creation of multiple electronic "town meetings" to discuss major topics).

251. See *id.* (describing how facilitators assisted in the NRC's regulation process by leading discussions, summarizing comments and periodically asking participants to vote on positions); see also APA, 5 U.S.C. § 566 (2012).

252. IRS, *Accomplishing the Appeals Mission*, IRM 8.1.1.1 (Feb. 10, 2012).

CONCLUSION

Negotiated rulemaking is not a panacea for all regulatory ills. In the context of health care reform, however, negotiated rulemaking could give taxpayers a say at the IRS while both providing experience and viewpoints the IRS may not have considered and also reducing strain on its resources. Allowing interested parties to have a direct say in how tax regulations would be crafted could give taxpayers, health insurers, health care providers, and the IRS the ability to make the dream of quality health care with a manageable tax burden a reality—with less of a headache.