The Tax Law Center NYU LAW

February 9, 2024

Improving Categorical Non-Enforcement in the Tax System.[1]

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Introduction and Executive Summary

Within the past year or so, Treasury and the IRS have announced several decisions to delay the implementation of new tax rules beyond statutory deadlines or to not strictly enforce certain statutory provisions on a "categorical" basis (for broad-based swaths of filers or defined situations). These include (as described in more detail in the **Appendix**):

- non-enforcement of taxes on and reporting of certain state payments in 2022;
- delay in the implementation of changes to section 1099-K reporting requirements, which the statute generally required for transactions in 2022;
- delay in implementation of the requirement that brokers report on digital assets, which the statute generally required for transactions in 2023;[2] and
- delay of the requirement that plan sponsors designate certain catch-up contributions as Roth contributions, which has a statutory effective date of January 1, 2024.

Categorical non-enforcement decisions are not unprecedented, and this report does not claim that there has been an increase or expansion of this approach in tax (nor is it obvious how that could be measured).[3] Indeed, it is appropriate and important for Treasury and the IRS to have broad flexibility to determine how to implement and enforce the tax law, and there is authority for categorical non-enforcement in many circumstances.

Recent decisions, however, have drawn scrutiny for several reasons. In announcing these decisions, Treasury and the IRS often failed to cite specific authority and to explain why they believed the decisions came under that authority, and did not transparently set out the process and considerations that they use when they decide whether and how to exercise that authority. The decisions were also often late-breaking, effectively penalizing filers who had incurred costs when making good-faith attempts to come into compliance with new law, while rewarding those who had deliberately delayed and created confusion in the hope of undermining implementation. Estimates suggest that the recent decisions have cost some $8 billion[4] which is small relative to

[1] Thalia Spinrad, Tax Law and Policy Fellow, provided excellent and extensive research support. Thank you to Professor Daniel Hemel, Professor Leigh Osofsky, and others generous reviewers for helpful feedback. All positions and errors in this report are solely attributable to the Tax Law Center.

[2] More recently, the reporting of transactions involving more than $10,000 in digital assets received in a trade or business was delayed until regulations are published. *See* Transitional Guidance Under Section 6050I with Respect to the Reporting of Information on the Receipt of Digital Assets, Announcement 2024-04 (Jan. 16, 2024).

[3] Categorical non-enforcement is certainly not a new phenomenon. *See, e.g.*, Mark J. Mazur, Assistant Secretary for Tax Policy, Letter to the Honorable Fred Upton, Chairman, U.S. House of Representatives Committee on Energy and Commerce, at 2 (July 9, 2013); IRS Criminal Investigation Voluntary Disclosure Practice; Treatment of Amounts Paid to Section 170(c) Organizations Under Employer Leave-Based Donation Programs to Aid Victims of the Hawaii Wildfires that Began on August 8, 2023, Notice 2023-69, at 1 (Sept. 28, 2023) (invoking previous instance of similar relief).

[4] *See* Part II and note 45 for discussion of this figure.

the scale of the federal tax system, but, absent a set of limiting principles and a transparent process, raises the risk of decisions of larger fiscal magnitude in the future.

Lawmakers in both houses of Congress and of both parties have expressed concerns about Treasury's and the IRS's authority to make several of these non-enforcement decisions.[5] For example, Senator Mike Crapo noted that the Administration "has resorted to unilaterally walking back and diluting" some of the Inflation Reduction Act's "key provisions" and that the IRS has "simply disregarded statutory deadlines" for implementing provisions including "enhanced information reporting and EV tax credits."[6] Senator Elizabeth Warren and six other senators wrote that they were "alarmed by the self-inflicted two-year delay" for the implementation of reporting requirements for crypto brokers and called for an earlier effective date that would not delay implementation of the statute by two years.[7] Most recently, twenty-five members of Congress called upon Commissioner Danny Werfel to testify about the "rule of law violations" related to the IRS's "refusal to implement" the IRA's $600 1099-K reporting threshold.[8]

More broadly, Senator Crapo asked Chief Counsel nominee Marjorie Rollinson how she would "approach a situation where the statute is clear, but the administration seeks a different outcome, whether based on claims of administrative complexity or political expediency[.]"[9]

While there are potential sources of authority and rationales for Treasury and the IRS's enforcement discretion, they should more explicitly address issues raised by their recent uses of non-enforcement authority. This report identifies some sources of authority for categorical non-enforcement decisions. This report does not attempt to completely describe the boundaries of that authority – nor does this report argue that any of the recent decisions by Treasury and the IRS fall beyond those boundaries, but this report offers some observations that could form the basis for a more considered delineation. This report also explores what factors should be considered when determining whether and how to use this authority well.

Summary of the three parts of this report:

Part I: What is the source of Treasury and the IRS's authority for categorical non-enforcement of tax laws, and what are the limits of that authority?

Part I explains that it is important for Treasury and the IRS to be able to delay or not strictly enforce certain tax provisions against entire broad-based categories of filers, but that there must also be limits on that power. While there is no singular, bright-line test for the breadth of non-enforcement authority, a key question is whether the non-enforcement is inappropriately frustrating Congress's purposes in enacting the particular provision, in delegating authority to the Secretary of the Treasury to administer the tax code, and in funding the IRS to enforce it.

There are a number of circumstances that would tend to meet this test. For instance, non-enforcement may be appropriate when enforcement resources are constrained given Congress's

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[5] For reporting on lawmakers' concerns, *see* Erin Slowey & Samantha Handler, *IRS 'Testing' of Statutory Boundaries Prompts Ire of Lawmakers*, Bloomberg Law (Oct. 30, 2023); Richard Rubin, *IRS Delays Tax Deadlines Set by Congress. It Could Cost $8 Billion*, Wall Street Journal (Nov. 24, 2023).

[6] Senator Mike Crapo, *Statement at IRS Chief Counsel and Social Security and Medicare Trustees Nomination Hearing*, at 2, Senate Finance Committee (Sept. 28, 2023).

[7] Senator Elizabeth Warren et al., Letter to the Treasury & IRS on Crypto Broker Reporting Rule (Oct. 10, 2023).

[8] Representative Jason Smith et al., Letter to the Honorable Daniel Werfel, at 1-2 (Dec. 21, 2023).

[9] *See* Senator Mike Crapo, *Hearing to Consider the Nomination of Marjorie A. Rollinson to be Chief Counsel for the Internal Revenue Service*, Senate Finance Committee (Sept. 29, 2023) (Video, at 00:48:20).

funding decisions and Treasury chooses not to enforce in a specific area because it would be resource intensive and do little to change tax liabilities relative to other enforcement areas. Another example would be when it is impossible for large swaths of filers making good faith efforts to comply by the statutory deadline, or when Treasury is practically unable to implement a complex set of rules by a particular deadline. Proactively announcing non-enforcement among broad classes of filers can provide more certainty, consistency, accountability, and efficiency in tax administration than not enforcing provisions on an ad hoc case-by-case basis.[10] For reasons such as these, categorical exemptions, including implementation delays, transition relief, and safe harbors, can be a practical way to administer tax law.

In distinguishing permissible versus non-permissible non-enforcement, it is important not to rely on pragmatism alone since that is not legal authority and Congress may or may not agree with the executive branch on what is good policy. Thus, even administrative decisions that represent wise policy must be grounded in the law. There must be some boundary between granting appropriate administrative relief to whole categories of taxpayers through non-enforcement and impermissibly rewriting the tax law and in a way that actually frustrates Congress's purposes in writing the law and delegating significant but limited tax administration authority. There is obviously no general ability for an administration to, say, decline to enforce a hypothetical statute increasing the corporate tax rate to 35 percent, and to opt to instead only enforce the pre-increase 21 percent rate, simply because the executive would prefer lower tax rates. While such extreme hypotheticals make it clear that a boundary must exist, it is important to attempt to identify at least the broad contours of the boundary, short of those extremes. Poorly-articulated and poorly-bounded categorical enforcement discretion could invite administrations to move toward those extremes or even intentionally circumvent laws that they have a duty to administer and enforce.

Part I outlines potential sources of authority – and their limits – for categorical non-enforcement of tax laws. These include constitutional and administrative law, general provisions of the tax code, and specific authorities and duties embodied by specific provisions of the relevant tax law.

These sources of authority do not draw a clear bright line between permissible non-enforcement discretion and impermissible disregard of the law, and this report does not attempt to fully delineate that boundary. However, the authorities and case law do establish that the authority for categorical non-enforcement is not limitless. These authorities suggest that agencies should carefully consider factors including resource constraints and the specific statutory text and legislative intent of the law that the agency is considering not enforcing to determine when non-enforcement is authorized. The courts have made clear that this inquiry, far from being austerely textualist, requires interrogating and giving due consideration and weight to the purposes of the provision of law that may or may not be enforced, and the degree to which the actions are frustrating rather than effectuating Congress's purposes.

It is also clear that limits to non-enforcement authority exist even when courts decline to review agency non-enforcement decisions. The judiciary can decline to review agency non-enforcement decisions when the Executive Branch is the institution most competent to identify and weigh the

[10] *See generally* Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 Tax L. Rev. 73, 75-76, 124, 132 (2015). One way transparent categorical non-enforcement decisions promote accountability is through communicating to lawmakers that the agency faces resource constraints or has adopted a particular policy position. *See id.* at 75-76, 124, 132. Lawmakers can then respond by providing more resources, modifying the scope of the statute or the agency's discretion, or using accountability mechanisms. *See id.*

administrative considerations surrounding non-enforcement and its limits. In other cases, there may be no plaintiff with "standing" – the ability to ask the court to review a non-enforcement decision. When Treasury and the IRS make decisions that are arguably outside of authority and that reduce tax revenues, this fact alone does not allow taxpayers to challenge those decisions in the courts, absent other more specific harms. The lack of potential judicial review of certain non-enforcement decisions does not mean that there are no limits to non-enforcement authority, but instead places the onus more squarely on agencies, rather than the courts, to carefully identify the bounds of authority. (There may also in fact be potential litigants who can challenge the bounds of recent non-enforcement decisions, as Part I discusses briefly.)

The often-asymmetric pressures that Treasury and the IRS face to take categorical non-enforcement relief makes it even more vital for Treasury and the IRS to have a firm grasp on the sources and scope of their authority, and to work to help current and future tax system participants understand those boundaries.[11] Treasury and the IRS have faced intense industry pressure and sometimes congressional pressure to offer relief from strict enforcement of the law. For instance, they cited "feedback from taxpayers, tax professionals, and payment processors" when delaying full implementation of 1099-K reporting.[12] Treasury and the IRS can also be assured of legal challenges to their decisions in cases where they arguably increase taxes or compliance burdens on filers outside of their authority. These are good reasons for Treasury and the IRS to be careful and explicit about understanding and articulating the bounds of their authority to take categorical non-enforcement decisions.[13]

This report does not argue that any specific recent non-enforcement decision lacks authority. However, it is understandable that Treasury and the IRS are facing questions about whether they may be running up against the boundaries of their non-enforcement authority, given that, when issuing recent decisions, they have not clearly stated the sources (and limits) of the authority relied upon to decline to enforce tax laws, or explained why those decisions fit within such authority in the face of explicit statutory requirements including effective dates.

Transparent and explicit reasoning about authority and its boundaries can help ensure that Treasury and the IRS in fact take decisions within authority, help secure public confidence in Treasury's and the IRS's commitment to the law, and guard against potential future abuses of authority.

Part II: When and how is it sound for Treasury and the IRS to exercise their discretion to issue categorical non-enforcement relief?

Part II clarifies that even where authority for discretionary non-enforcement exists, Treasury and the IRS should strive to ensure that they use it only when doing so would produce sound results, based on thorough consideration of relevant tax administration and statutory interests.

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[11] *See, e.g.*, Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. Rev. 1645 (2023) (describing the tax system's "tilt" against revenue and toward inaction); Glen Staszewski, *The Federal Inaction Commission*, 59 Emory L.J. 369, 370-71 (2009); Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 Texas L. Rev. 625, 628 (2015) (citing Leandra Lederman & Stephen W. Mazza, Tax Controversies: Practice and Procedure 8 (3d ed. 2009)); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. Rev. 1657, 1691-93 (2004).

[12] IRS Announces Delay in Form 1099-K Reporting Threshold for Third Party Platform Payments in 2023; Plans for a Threshold of $5,000 for 2024 to Phase in Implementation, IR-2023-221 (Nov. 21, 2023).

[13] *See*, *e.g.*, Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 Harv. Envt'l L. Rev. 313, 325-26 (2013).

In announcing some of their recent non-enforcement decisions, Treasury and the IRS have made broad statements that the decisions are good for "sound tax administration," but have not offered specific reasons for that conclusion beyond, in some cases, pointing to stakeholder input. Some taxpayers and filers – including well-resourced industry groups at the forefront of pushing for some of the granted relief – naturally welcomed these decisions. But the same decisions disadvantaged others, including filers who incurred costs making good-faith efforts to comply with the law. The decisions also had significant costs for tax administration, including reduced certainty and predictability in how and when future new tax provisions would be implemented.

These decisions by their nature also raised the specter of some harm to the purposes and intent of the tax law provisions that Treasury and the IRS temporarily declined to enforce, including reducing the tax gap and improving tax compliance, raising revenue, and advancing other legislative goals.

Additionally, in many recent decisions, hurriedly reversing other guidance or making last-minute non-enforcement decisions close to important deadlines led to disruption, uncertainty, and inequity between filers that a clear and timely decision could have avoided.

For instance, setting aside questions of authority, Treasury and the IRS's decisions delaying full implementation of statutory 1099-K reporting thresholds were of questionable wisdom, as it was unclear that significant downsides for tax compliance, administration, certainty, and revenue were considered alongside the stated upsides. And even when setting aside the wisdom of these decisions, repeatedly waiting until the verge of filing season to announce them had its own costs.

Part III: How can Treasury and the IRS ensure that exercise of non-enforcement discretion is transparent and consistent?

Part III recommends that Treasury and the IRS state clearly what they believe is the source and boundary of their non-enforcement authority and why they believe any non-enforcement decision sits within that authority. They should further state what factors they consider when exercising their non-enforcement authority, and clarify the processes governing how they will exercise it.

Even if Treasury and the IRS ultimately take a different approach to the substance of these issues than this report suggests, transparency could have independent value. Transparency can help place appropriate boundaries on Treasury and the IRS's non-enforcement authority by requiring justification for non-enforcement actions and then allowing stakeholders to assess whether Treasury and the IRS have acted consistently with their own stated approach across decisions. Transparency may also make it easier for filers to anticipate and plan for how tax laws (especially new laws) will be implemented.

I. WHAT IS THE SOURCE OF TREASURY AND THE IRS'S AUTHORITY FOR CATEGORICAL NON-ENFORCEMENT OF TAX LAWS, AND WHAT ARE THE LIMITS OF THAT AUTHORITY?

Examples of how recent guidance describes the authority or rationale for non-enforcement are included in the Appendix. Again, to be clear, this report does not argue that any specific decision lacks authority.

Why is it appropriate for Treasury and the IRS to have categorical non-enforcement authority – and why is that authority bounded?

To effectively implement the tax laws enacted by Congress, it is appropriate that Treasury and the IRS have broad flexibility to make tax administration decisions, which may include sometimes delaying implementation of new provisions beyond statutory deadlines or offering other types of broad-based administrative relief. Lawmakers may enact provisions that are impossible to implement, enforce, fully interpret, or comply with within statutory deadlines given the resources that filers and the IRS have available, or that would require the IRS to divert too many resources away from enforcing other laws. Broad-based administrative relief can bring certainty and clarity to affected taxpayers and the IRS, helping to facilitate tax filing. It can help the IRS prioritize its work and navigate resource constraints, including in emergencies. Categorical non-enforcement decisions may also be preferable to non-enforcing on a case-by-case basis or "systematically" deprioritizing enforcement because, in addition to being less arbitrary, categorical non-enforcement is more predictable and tends to receive greater public scrutiny.[14] Indeed, it is routine for the IRS to offer transition relief or safe harbors, delay implementation of certain new laws, or offer other categorical non-enforcement relief.

But however pragmatic, the use of categorical non-enforcement discretion must also be rooted in legal authority. Recent Treasury and IRS decisions often did not cite the specific authority that they relied on or explain why they believed the decision fell within the relevant authority. The concern is not only about the formalities of missing boilerplate citations, but, rather, is a substantive concern about whether Treasury and the IRS can reach and set out a solid and consistent understanding of the sources and boundaries of their non-enforcement authority for tax system stakeholders to understand.

Authority for categorical non-enforcement cannot be unbounded, and a place to start—and a key question even as there is not a single bright-line rule—is whether the action taken is furthering or instead frustrating Congress's purposes in enacting the relevant provision, delegating authority to the Secretary to administer the laws, and funding the IRS to enforce them. Suppose lawmakers enacted a statute raising the corporate tax rate. There would clearly be no authority for the administration to grant "relief" from the new rate, and instead only enforce the old corporate rate, whether temporarily or on a permanent basis, simply because the Executive preferred lower taxes. Such a hypothetical would correctly be considered extreme because it is so clearly inconsistent with the basic rationales for enforcement discretion, as articulated by the Supreme Court in a seminal non-enforcement case, *Heckler v. Chaney* (discussed more below).[15]

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[14] Osofsky, *supra* note 10, at 103.
[15] 470 U.S. 831-33 & n.4 (1985).

Lowering the statutory corporate tax rate by announcing a non-enforcement policy would clearly, in *Chaney's* terms, be a "consciously and expressly adopted" general policy that disregards legislative direction—frustrating Congress's purposes.[16] There is no gap in the statute that leaves room for agency interpretation and implementation decisions. Moreover, enforcing only the lower rate would be contrary to the IRS's fundamental purpose of collecting revenue according to the tax law. Even if a hypothetical administration tried to pursue and justify such an approach on the basis of lacking enforcement resources, such a justification should fail given that the difference in resources needed to enforce a higher corporate tax rate is minimal, or at least minimal in comparison with presumed revenue effects.[17]

While such extreme hypotheticals make it clear that a boundary on categorical non-enforcement authority exists, it is also important to attempt to identify at least the broad contours of the boundary, short of those extremes. Transparent and explicit reasoning about authority and its boundaries can help ensure that Treasury and the IRS in fact take decisions within authority, help secure public confidence in Treasury's and the IRS's commitment to the law, and guard against potential future abuses of authority.

Sources of authority and boundaries on categorical non-enforcement

Authority for – and boundaries on – categorical non-enforcement lies in sources including general constitutional and administrative law, general provisions of the tax code, and the specific authorities and duties embodied in the specific provisions of the relevant tax law.

The Take Care clause of the Constitution states the President "shall take Care that the Laws be faithfully executed"[18] and empowers executive discretion over enforcement decisions while at the same time requiring the executive to comply with and execute clear statutory directives.[19] The dual purposes of the Take Care clause are mirrored in general tax code provisions that establish both obligations and powers for the Secretary of Treasury and other members of the Executive Branch to enforce and administer the Code.[20] The Administrative Procedure Act

[16] *Id.* at 833 n.4.
[17] *Id.* at 831-32.
[18] U.S. Constitution, Art. II, § 3.
[19] *See* Todd Garvey, Congressional Research Service, The Take Care Clause and Executive Discretion in the Enforcement of Law, at 3 (2014); *see also Chaney*, 470 U.S. at 832. The Article II Vesting Clause, Art. II, § 1, has also been understood to contribute to executive enforcement discretion. *See* Garvey, at 4.
[20] Section 7801(a) provides that "[e]xcept as otherwise expressly provided by law, the administration and enforcement of [Title 26] shall be performed by or under the supervision of the Secretary of the Treasury." Section 7805(a) specifies that except where Title 26 provides otherwise, "the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." When Treasury and the IRS delayed the effective date of the ACA's employer mandate in 2013, they stated it was "an exercise of the Treasury Department's longstanding administrative authority to grant transition relief when implementing new legislation" under section 7805(a). Mazur, *supra* note 3; Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions), Notice 2013-45, 2013-31 I.R.B. Section 7803(a)(2)(A) provides the IRS Commission broad authority to administer application of the code. *See* Rubin, *supra* note 5 (noting that the IRS cited the authority in section 7803(a)(2)(A) in a statement justifying recent decisions). And the Code specifically empowers the Chief Counsel, subject to delegation by the Commissioner, "to determine which civil actions should be litigated under the laws relating to the Internal Revenue Service[.]" Section 7803(b)(2)(E).

("APA") provides a framework for assessing unreasonable delay of agency action,[21] and procedural requirements for notice-and-comment rulemaking when a non-enforcement policy is a "legislative rule."[22]

These sources of authority and case law do not give bright-line boundaries to non-enforcement discretion and leave much unclear. They do establish, however, some fundamental points:

- **There are boundaries to proper use of categorical non-enforcement.** Establishing where these boundaries lie can require balancing factors. Congress has a number of different goals in enacting particular provisions, delegating administrative authority to the Secretary, and funding the IRS to enforce the laws. As the *Chaney* court explained, most agency non-enforcement decisions are committed to agency discretion because agencies are best-positioned to balance complicated factors including assessing when there has been a violation, assessing when there are sufficient resources to pursue enforcement, prioritizing use of agency resources, determining when enforcement is feasible, and considering non-enforcement decisions in the context of "the agency's overall policies[.]"[23] But that authority does not extend to situations where Congress has limited agency discretion by statute and so expressed its view clearly of the balance of factors at play or where an agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities"[24] – effectively working to frustrate Congress's aims.
- **Resource constraints** are a key set of factors that are proper for an agency to consider on the administrative flexibility side of the equation. Congress after all sets the budget constraint on the agency, and that naturally creates trade-offs in enforcement. So, it then falls into the purview of the agency to determine whether or not the agency has enough resources to undertake the action, and the best use of scarce resources.[25] Among other things, this can help justify an agency temporarily non-enforcing on a category of taxpayers where they are unable to comply with the law in a certain timeframe despite good faith efforts – the agency can reasonably weigh the effect of enforcement on that category of taxpayer versus deploying those efforts elsewhere.
- **The specific statutory text and legislative intent** can limit the extent of non-enforcement discretion. Of course, some inconsistency with the letter of the law is a hallmark of exercises of categorical non-enforcement discretion.[26] But judicial decisions indicate that the clearer and more explicit the relevant statutory law is with respect to enforcement of statutory requirements then the less leeway – if any – the executive has to not enforce those

[21] *See* 5 U.S.C. § 706(1); *Telecommunications Research and Action Center (TRAC) v. FCC*, 750 F.2d 70, 79-80 (D.C. Cir. 1984); Todd Garvey, Congressional Research Service, A Primer on the Reviewability of Agency Delay and Enforcement Discretion, at 2-3 (2014). By contrast, most other agency non-enforcement decisions are "committed to agency discretion" under 5 U.S.C. § 701(a)(2). *See Chaney*, 470 U.S. at 828. *But see* 5 U.S.C. § 706(2). Still, case law suggests that Congress can limit an agency's discretion "either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." Chaney, 470 U.S. at 833.

[22] *See* 5 U.S.C. § 553; *see also* Peter Richman & Taylor Cranor, *Legislative and Interpretive Tax Rules and Rulemaking*, Tax Notes (Mar. 8, 2023) (discussing different approaches to determine when a rule is "legislative").

[23] *Chaney*, 470 U.S. at 831-32.

[24] *Id.* at 832-33 & n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)).

[25] See *id.* at 831-32; *TRAC*, 750 F.2d at 80.

[26] *See Chaney*, 470 U.S. at 831-32.

provisions.[27] Additionally, it appears proper and sometimes required[28] for the agency, when establishing whether it has categorical non-enforcement authority, to consider the legislative intent of the provision with respect to the interests that it seeks to secure. Understanding the interests that the particular provision of law seeks to secure requires interrogating the purposes and intent of that provision. That is, far from representing an unduly textualist approach to interpretation and enforcement discretion, the authorities and case law suggest that it is important to give due weight to the purposes of the provision of law that an agency is considering not enforcing, as well as the broader purposes of delegating authority to the Secretary to administer the system and funding the IRS to enforce it.

- **Courts are more apt to *review* the agency's decision to exercise non-enforcement authority in certain circumstances – but that does not mean that authority is unbounded when the courts do not review.** The courts more readily review categorical non-enforcement decisions than case-by-case non-enforcement,[29] and are more apt to review cases of delayed implementation of statutory mandates. In cases of delay, courts will explicitly engage in identifying and balancing factors on either side of the tension between administrative flexibility and the law subject to a non-enforcement decision (*TRAC*).[30] Longer delays beyond statutory deadlines are subject to more scrutiny than shorter delays.[31] Other non-enforcement decisions not involving delay are not generally reviewable, but there are various exceptions to that general rule (*Chaney*).[32]

  When the courts decline to review an agency's non-enforcement decision, this does not mean that the Executive's authority is boundless; it simply means that the courts recognize that in many circumstances, the Executive is the most competent institution to identify and assess the factors that determine when non-enforcement is appropriate. Similarly, the courts may also decline to review non-enforcement decisions when there is no plaintiff who has been sufficiently injured[33] – a dynamic that is acute in tax given the general lack of standing to challenge tax guidance that *lowers* administrative burdens or taxes.[34]

  The limited prospects for judicial review add gravity to the duty and responsibility of Treasury and the IRS to identify and explain the boundaries of their authority. It increases the need to establish limits in a way that forestalls abuse of that authority by any future administrations that may wish to try to decline to enforce tax laws simply because they do not like them.

  Moreover, although doctrines limit judicial review, Treasury and the IRS may not be immune from all challenges to non-enforcement decisions. Some recent cases suggest various routes

[27] *See id.* at 833 & n.4; Garvey, *supra* note 21, at 4-8. *See also, e.g.*, Impoundment Control Act, Pub. L. 93-344, 88 Stat. 297-339 (1974); *Train v. City of New York*, 420 U.S. 35, 44 (1975) (finding statutory limitation on discretion to impound funds predating more general limitation created by the 1974 Act).

[28] See below as to jurisprudence requiring balancing of such factors in the case of delay.

[29] *See* Garvey, *supra* note 19, at 24 (citing *Crowley Caribbean Transportation v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994); *Nader v. Saxbe*, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974)).

[30] *TRAC*, 750 F.2d at 79-80; Garvey, *supra* note 21, at 2-3.

[31] *See TRAC*, 750 2d. at 79-80 (interpreting 5 U.S.C. § 706(1)).

[32] *Chaney*, 470 U.S. at 828-35 & n.4; Osofsky, *supra* note 10, at 108-11; Garvey, *supra* note 21, at 3-8.

[33] Garvey, *supra* note 19, at 16 n.115; *see also* Osofsky, *supra* note 10, 108-111, 129.

[34] *See* Daniel J. Hemel & David Kamin, *The False Promise of Presidential Indexation*, 36 Yale J. on Reg. 693, 720-32 (2019); Osofsky, *supra* note 10, at 108-111, 129; Galle & Shay, *supra* note 11.

for challenges to overly generous agency actions.[35] With respect to Treasury and the IRS's recent non-enforcement decisions, there are potential parties who may have specific grounds for standing.[36]

- **There is a difference between non-enforcement and interpretation**. A categorical non-enforcement decision is a decision to not enforce statutory provisions against broad-based swaths of filers or in defined situations *even though* the filers or situations are clearly within the scope of the provision. By contrast, a decision not to enforce a statute against certain filers or in situations because they are not within the scope of the statute can be a question of interpretation, which has different implications for the boundaries of agency authority. Whether Treasury and the IRS are interpreting or not enforcing a statute may sometimes be difficult to tell in practice, especially when Treasury and the IRS are working through the proper interpretation of a statute; where there is uncertainty about the scope of a statute, questions around the margins could often be framed either as interpretation or as non-enforcement. This makes it more, not less, important that Treasury and the IRS approach these difficult cases with a clear framework and explain the authority for their decision. As an example, in issuing an announcement and later a notice regarding the excludability of certain state payments, Treasury and the IRS were not clear whether they believed they were issuing substantive guidance or not enforcing the statute.[37] This led to confusion about whether specific state payments were or were not excludable,[38] and to a decision that Colorado Taxpayer's Bill of Rights ("TABOR") refunds were excludable in 2023, even though their connection to exclusions for general welfare payments, disaster relief payments, or any other exclusion referenced in the notice is questionable.[39]
- **Agency delay or non-enforcement of regulations has fewer implications for separation of powers** but still has some boundaries and may be reviewable in some circumstances.[40] The power delegated by Congress to agencies creates a zone of enforcement discretion within which agencies have more flexibility to make adjustments for administrability, resource constraints, and other considerations. However, when an agency revises its regulations in response to statutory changes, the non-enforcement or delay of these revised regulations may amount to failing to enforce or delaying the revised statute. Delay or non-enforcement decisions in such cases may have implications for separation of powers. Even so, as with direct non-enforcement or delay of a statute, an agency may nonetheless have authority to not

[35] *See* Hemel & Kamin, *supra* note 34; *see also CIC Services, LLC v. Internal Revenue Service*, 593 U.S. 209, 216 (2021).
[36] For example, taxpayers may have suffered harm if they would have received 1099-Ks from third-party settlement organizations if the $600 threshold were fully implemented, or if they would have received statements under section 6045 but for the delay of the digital asset broker reporting requirements. While one purpose of third-party information reporting requirements is raising revenue, another purpose is lowering compliance burdens for taxpayers seeking to accurately report their taxable income.
[37] *See* IRS Issues Guidance on State Tax Payments to Help Taxpayers, IR-2023-23 (Feb. 10, 2023); Federal Income Tax Consequences of Certain State Payments, Notice 2023-56 (Aug. 30, 2023).
[38] *See* Appendix and *infra* note 69.
[39] *See* Emily Hollingsworth, *Colorado DOR Confirms IRS Won't Tax 2023 TABOR Refunds*, Tax Notes (Jan. 16, 2024).
[40] *See generally, e.g.*, *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95 (2d Cir. 2018).

enforce or to delay revised regulations under certain circumstances or for a certain length of time.

In light of these principles, scrutiny of some recent non-enforcement decisions is reasonable. For instance, in delaying full implementation of the 1099-K information reporting provisions enacted in the American Rescue Plan ("ARP") Act of 2021, the IRS did not enforce the provision at all for transactions made in 2022 and 2023 and announced a $5,000 transitional threshold for third-party settlement organizations ("TPSOs") reporting on transactions made in 2024, which is neither the $600 threshold mandated by the ARP, nor the $20,000 threshold that preexisted the ARP. Instead, it is a threshold created by the IRS, in an announcement that did not explain why the IRS had the authority to create this threshold in the face of an explicit and specific statutory alternative and deadline.[41] Again, it is beyond the scope of this report to fully analyze or draw conclusions about any specific non-enforcement decision, but it is unsurprising that given some of these aspects of the statutory framework, Treasury and the IRS are being asked to share more of their reasoning. (As discussed further in Part II, it is also unclear that this decision furthered sound tax administration on net, and whether and how key statutory goals were weighed). There may be other factors that go to authority beyond those this report has raised here. If other factors are influencing Treasury and IRS decisions as to authority, they should explain what they are as well as their source in law.

II. WHEN AND HOW IS IT SOUND FOR TREASURY AND THE IRS TO EXERCISE THEIR DISCRETION TO ISSUE CATEGORICAL NON-ENFORCEMENT RELIEF?

Even where Treasury and the IRS have authority to make a categorical non-enforcement decision, they should ensure they are using that authority as wisely as possible. The following considerations could help inform that goal:

Sound tax administration means more than relieving certain groups of filers of compliance burdens.

In each of the recent non-enforcement decisions, Treasury and the IRS did not fully explain what factors they considered, but made broad statements that the decisions were good for "sound tax administration," and in some cases based on "stakeholder input." Sound tax administration, however, is not necessarily furthered simply because a non-enforcement decision reduces compliance burdens on some categories of filers, because those decisions may have other countervailing costs for tax administration. This justification alone also clearly sweeps too broadly. If reducing compliance burdens sufficed to justify non-enforcement, that could justify mass non-enforcement of the tax system and commensurate loss in revenue, which clearly is outside Treasury and the IRS's discretion and does not represent sound administration of the tax system.

[41] As is common across announced categorical non-enforcement decisions, Treasury and the IRS were clear and transparent about *when* they would enforce, which can help promote accountability and prevent arbitrariness. *See* Osofsky, *supra* note 10, at 75-76, 124, 132. They did not, however, explain the authority behind that decision.

In weighing how non-enforcement affects taxpayer compliance costs and behavior, it is important to consider the risks associated with non-enforcement.

It is appropriate and important that Treasury and the IRS consider impacts on filers and other stakeholders most directly affected when granting categorical administrative relief, including the extent to which it is even possible to comply with the law under statutory deadlines. But it should also recognize that this input is often inherently one-sided because other factors also important to tax administration and to the law do not tend to have loud and organized stakeholder constituencies. Treasury and the IRS should be careful to ensure – and clearly demonstrate – that they are not underweighting these other considerations when exercising non-enforcement discretion.

For instance, the recent announcement of 1099-K transition relief begins by stating that it is made "Following feedback from taxpayers, tax professionals, and payment processors."[42] Indeed, industry groups lobbied heavily and spread confusion among customers and encouraged them in turn to request delay.[43] Those groups naturally welcomed the non-enforcement decision.[44] But the decision also generated deleterious effects when it comes to how taxpayers interact with the tax system and its administrators. Some filers made good faith attempts to comply with the law before the non-enforcement announcement, meaning that they incurred compliance costs, while competitors who were subject to the same law and who did not make those efforts did not bear such costs. Even if all filers subject to the new requirements were ultimately happy with the relief, the lesson that they might take in the future is that there is no benefit to making good faith efforts to come into compliance with the law, despite statutory deadlines, because the IRS may fail to enforce anyway – and that joining those loudly failing to comply might increase the chances of relief. The decision also reduced certainty and predictability generally about how tax provisions will be implemented.

Non-enforcement decisions can undercut important legislative goals, intents, and purposes core to sound tax administration—including revenue, compliance, and equity between filers and industries.

Non-enforcement decisions can also harm the legislative intent and interests underlying the provision of law that Treasury and the IRS is declining to enforce. For recent non-enforcement decisions, these include: improving tax compliance and improving parity between different types of payment platform (e.g. 1099-K reporting); improving certainty, tax compliance and parity between different forms of economic income (e.g., cryptocurrency broker reporting); other policy goals; and revenue. In announcing their decisions, Treasury and the IRS have not explained which of these types of factors they considered.

As to revenue, Treasury and the IRS have not publicly issued estimates of the revenue cost of their recent non-enforcement decisions, but other estimates suggest that the recent delay and non-

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[42] IR-2023-221, *supra* note 12.

[43] *See* Erin Slowey & Samantha Handler, *Urgency Mounts to Avert 1099-K EBay, Paypal Tax Form Chaos*, Bloomberg Law (Nov. 20, 2023).

[44] *See* Coalition for 1099-K Fairness, The Coalition for 1099-K Fairness Praises IRS Announcement of One-Year Delay for 1099-K Reporting Threshold and Calls on Congress to Pass Permanent Relief for Taxpayers (Nov. 21, 2023).

enforcement decisions will, very roughly, add at least $8 billion to deficits.[45] For example, analysts estimate that excluding state tax payments from income reduced revenue by $3 billion to $4 billion in 2023.[46] Delay of the revised 1099-K reporting requirement may have cost around $1.2 billion over two years,[47] not accounting for costs of the "transitional" threshold for 2024 transactions, and the delay to implementing the crypto broker reporting requirement will likely cost about $1.5 billion in FY2024 and $2.9 billion in FY2025.[48] The two-year delay of the requirement that plan sponsors designate certain catch-up contributions as after-tax, Roth contributions will likely cost around $4 billion in upfront revenue.[49]

Late and confusing announcements.

Some of the recent Treasury and IRS decisions came within days or weeks of a statutory deadline or of a requirement going into effect, generating both inequities and confusion after some filers had already taken steps to comply. In addition to ensuring that any non-enforcement decisions are wise, Treasury and the IRS should improve when and how it announces them.

For example, the IRS announced the first delay in implementing the new 1099-K reporting threshold on December 23, 2022, just a month before the start of the filing season for tax year 2022.[50] The Tax Law Center noted that this would spark further confusion,[51] and other commentators predicted that some customers of TPSOs with between $600 and $20,000 of transactions would still receive forms, causing confusion both for the taxpayers and the IRS.[52] KPMG issued a report on the confusion that had in fact resulted for payors, payees, and state agencies.[53] The second delay, this time issued two months before the filing season for Tax Year

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[45] This figure includes only the costs of the non-enforcement decisions listed in the Executive Summary, not the other non-enforcement decisions listed at the end of the Appendix. The upfront cost of the delay of the mandatory Roth provision is not included.

[46] *See* Linda Qiu & Alan Rappeport, *I.R.S. Decision Not to Tax Certain Payments Carries Fiscal Cost*, The New York Times (Feb. 27, 2023).

[47] *See id.*; Estimated Revenue Effects of H.R. 1319, The "American Rescue Plan Act of 2021," As Amended by the Senate, Scheduled for Consideration by the House of Representatives (Mar. 9, 2021), JCX-14-21, at 2 (modifications of exceptions for reporting of third-party network transactions).

[48] Joint Committee on Taxation, Estimated Revenue Effects Of The Provisions In Division H Of An Amendment In The Nature Of A Substitute To H.R. 3684, Offered By Ms. Sinema, Mr. Portman, Mr. Manchin, Mr. Cassidy, Mrs. Shaheen, Ms. Collins, Mr. Tester, Ms. Murkowski, Mr. Warner And Mr. Romney, The "Infrastructure Investment And Jobs Act", JCX-33-21 (Aug. 2, 2021); *see also* Chye-Ching Huang, U.S. Will Likely Lose Billions Due to Unacceptably Long Delay for Digital Asset Reporting Requirements, Tax Law Center at NYU Law (Aug. 25, 2023)**Error! Bookmark not defined.**; Taylor Cranor & Mike Kaercher, *Treasury and the IRS Should Issue Digital Asset Broker Reporting Guidance Quickly*, Tax Law Center at NYU Law (Jun. 21, 2023).

[49] Joint Committee on Taxation, Estimated Revenue Effects of H.R. 2617, the "Consolidated Appropriations Act" as Passed by the Senate, JCX-21-22, at 4 (Dec. 22, 2022) ("elective deferrals generally limited to regular contribution limit"); *see also* Congressional Budget Office, S. 4808 Enhancing Retirement Now Act, at 12 (Sept. 23, 2022) (describing revenue effects of an earlier version of this provision). Because the difference between after-tax and pre-tax contributions is a matter of timing, the delayed implementation of this provision causes an upfront loss that is greater in magnitude than the long-term revenue effects of the delay.

[50] Naomi Jagoda, *Confusion Still Expected After Delay of Lower 1099-K Threshold*, Bloomberg Law (Jan. 19, 2023).

[51] Grace Henley et al., The Tax Law Center at NYU Law, *Undermining Information Reporting Requirements For "Gig" Companies and Other Online Platforms Would Hurt Honest Filers, Cost Revenue, and Reward Tax Evaders* (June 12, 2023).

[52] *Id.*

[53] KPMG, Form 1099-K Delayed Reporting Thresholds (Jan. 24, 2023).

2023, will likely create yet more confusion with its administratively-created phase-in that yields different thresholds for each of tax years 2023, 2024, and 2025.

Similarly, guidance regarding 2022 state tax payments was issued weeks after the filing season, with the lateness causing avoidable confusion. For example, California sent tax forms suggesting that the state's payments were taxable income before the IRS guidance determined that the payments from California did not need to be reported.[54]

III. ENSURING TRANSPARENT AND CONSISTENT CATEGORICAL NON-ENFORCEMENT DECISIONS

Treasury and the IRS have not been clear about the sources of their non-enforcement authority, why the actions taken are within its boundaries, and the considerations and processes they use to decide when to exercise that authority. They should be more transparent on these points. While Treasury and the IRS have offered some justification of their authority in response to questions that lawmakers and others have raised,[55] proactive explanation of reasoning would be preferable.

Transparency may have value independent of the content of the positions that Treasury and the IRS ultimately take (within reason). It can help promote consistency across a large agency. Stakeholders will be able to assess whether Treasury and the IRS are acting consistently with their own stated approach and across decisions. Predictability may be improved by making it easier for stakeholders to anticipate and plan for how laws may be implemented.[56] This report recommends that with respect to decisions to not enforce certain tax laws on a categorical basis, Treasury and the IRS seek to be explicit and transparent about:

Authority: Treasury and the IRS should clearly articulate the sources of authority relied upon when granting administrative relief and why the actions taken are within the bounds of that authority. Treasury and the IRS should also attempt to be as clear as possible about whether (and to what extent) they believe they are exercising authority to categorically non-enforce against filers statutory obligations that are clear, or, alternatively, using non-enforcement authority in addition to, or in anticipation of, exercising interpretive authority clarifying the underlying statutory obligations. This can help reduce the potential for later confusion among filers who may benefit from non-enforcement one year, but could then be surprised to later find that they have obligations.

Process: Treasury and the IRS should clearly articulate who will be involved and have decision-making authority for categorical non-enforcement of or delays in implementation of provisions of the Code or of implementing regulations. They will need to consider the role of the IRS,

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[54] Kate Dore, *IRS Says Many State Rebates Aren't Taxable at the Federal Level. Some May Face Filing Struggle, Tax Pros Warn*, CNBC (Feb. 10, 2023).

[55] *See* Rubin, *supra* note 5; Samantha Handler, *Republicans Demand Werfel Testify on Delay of 1099-K Change,* Bloomberg Law (Dec. 21, 2023).

[56] On the other hand, transparency about non-enforcement authorities and considerations may make it easier for well-resourced stakeholders to intensify pressure for relief that is narrowly beneficial to them but has larger costs for the tax system overall. But recent decisions seem likely to encourage such pressure anyway, and Treasury and the IRS will continue to be confronted with disasters, new laws, and other situations in which they must determine whether to grant categorical administrative relief.

Treasury, and the broader Executive Branch in making such determinations, and to develop internal procedures and guidance to avoid haphazard or late announcements of any such relief.

Factors to consider when deciding whether to exercise authority: Treasury and the IRS should state generally and prospectively factors they will consider when making categorical non-enforcement decisions under broad grants of authority. They should also clearly state the "sound tax administration" and other factors that went into any announced non-enforcement decision. These may include:[57]

- **Resource constraints in enforcement.** The administration should clarify what types of resource constraints might result in a non-enforcement decision. Resource considerations that may affect full implementation of a statute include: temporary constraints on funding or administrability (including external factors such as disasters or shutdowns); the resource intensity of fully implementing the provision; how easily resources can be shifted to make the provision easier to implement and enforce; and the costs of such resource shifts.
- **Considerations flowing from the text and legislative purpose of the relevant provision of tax law.** These considerations will depend on the tax provision at issue, embodied by the text of the law, sometimes supplemented by official legislative history. As noted in Part I, identifying the interests that the relevant law sought to advance will require an appropriately purposive approach to interpretation. For instance, some of the recently non-enforced provisions listed in the Appendix sought to improve tax compliance, increase equity between different tax filers and industries, and raise revenue. Non-enforcement may also be used to respond to drafting errors or oversights inconsistent with the purpose of a provision.[58]
- **Fiscal cost.** Revenue collection is a core function of the tax system and of tax administration, and often also of the relevant provision that Treasury and the IRS are deciding whether to enforce. Revenue costs should therefore be considered, either as an impact on "sound tax administration," a cost of non-enforcement with respect to legislative intent, or both.
- **Stakeholder impacts, input, and access.** It is important and appropriate for the IRS to consider the impact on directly-affected filers and other stakeholders. Requests for relief may be especially consistent with sound tax administration when factors out of filers' control, including emergencies and disasters, impose high compliance burdens, or make it impossible to comply under statutory deadlines. Treasury and the IRS should also be more inclined to offer relief when deadlines for implementation are inherently unreasonable even if the administration and filers had made good faith efforts to comply, as compared to when difficulties complying arise only because stakeholders failed to take reasonable and timely

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[57] As noted above, when delay or non-enforcement decisions are challenged in court, clear and transparent consideration of these factors by the agency in making these decisions may help the court find that the agency action was proper. Further, note that identification and weighing of factors and tradeoffs does not necessarily imply a requirement for any formal or quantified welfare or cost-benefit analysis. Indeed, as this report starts with the relevant sources of authority for categorical non-enforcement, this report focuses on factors most relevant to tax administration and the intent of relevant statutory provisions, which in some cases may be just a subset of factors included in a full welfare analysis.

[58] *See* Leigh Osofsky, *Agency Legislative Fixes*, 105 Iowa L. Rev. 2107, 2151-52 (2020) (considering the benefits and drawbacks of using non-enforcement to fix drafting mistakes).

actions in the face of a clear statutory duty.[59] As part of this assessment, Treasury and the IRS should consider that non-enforcement can undermine certainty in how tax laws will be administered, adversely affect those who have planned for implementation, or create filer expectations for routine non-enforcement and implementation delays that can be undesirable in a tax system that relies on voluntary compliance.

Treasury and the IRS should be less inclined to offer delays and non-enforcement to allow for stakeholder input if there have already been prior opportunities for input, and Treasury and the IRS should carefully interrogate whether delays or non-enforcement would in fact improve the ability of stakeholders to give input. Indeed, some recent delays or non-enforcement decisions were combined with delays in issuing proposed regulations that would have *begun* the process of transparently collecting stakeholder comments.

In weighing stakeholder input, Treasury and the IRS should consider that compared to disadvantaged communities, well-resourced and sophisticated filers may be both better situated to implement new requirements – but also to request administrative relief. Treasury and the IRS should evaluate requests for relief understanding that disadvantaged communities may be less likely to have formal or informal input into guidance and regulatory processes, and should take care not to view volume and intensity of lobbying as a proxy for the potential benefits of administrative relief or for tax administration more broadly.[60]

- **Other relevant administrative frameworks.** There are several administration-wide Executive Orders that Treasury and the IRS are subject to in their administration of the tax law, including on racial equity, reducing administrative burden, and climate change.[61] Treasury and the IRS should review and consider how these orders and other executive-wide frameworks should influence determinations of non-enforcement relief in tax.

[59] The particular statutory framework may, of course, imply or explicitly require a higher standard than reasonable or good faith efforts, and, as discussed in Part I, that should be considered when determining whether there is authority for categorical non-enforcement, as well as when determining whether to exercise any such authority.
[60] *See* Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 Emory L.J. 209, 216, 259 (2019); Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 Tax L. Rev. 179, 217-21 (2017).
[61] *See, e.g.*, Executive Order No. 14091, Further Advancing Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 10825, 10832 (Feb. 22, 2023); Executive Order No. 14058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, 86 Fed. Reg. 71357, 71357 (Dec. 16, 2021); Executive Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619, 7620 (Feb. 1, 2021); Executive Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009, 7009 (Jan. 25, 2021). For further discussion of the role of different elements of the Executive in non-enforcement, *see generally* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031 (2013).

APPENDIX

Recent decisions by Treasury and the IRS to grant categorical administrative relief include:

- **Non-enforcement of taxability of state payments and special tax refunds**. In February 2023, the IRS announced after filing season had already begun that it would not challenge the non-reporting of, and exclusion of certain payments made by many states in 2022.[62] The reason offered was that this was "*in the best interest of sound tax administration*."[63] In August 2023, the IRS followed up with a notice laying out more guidance on how it will address these payments going forward.[64] The notice provides some additional reasoning as to why the IRS determined many of these 2022 state payments qualified as excludable disaster relief payments under section 139.[65] However, the IRS provided limited explanation or authority for its approach, and provided elaboration only several months after the initial non-enforcement decision. Moreover, although the portions of the notice related to the pandemic emergency declaration mentioned that the emergency ended in May 2023, the notice implied that the COVID-related state payment issue only pertained to the 2022 tax year.[66] This resulted in confusion about how the guidance would apply to certain state payments made in 2023.[67] Further, the IRS has reportedly confirmed that taxpayers would not need to report certain additional 2023 state refunds, even when these refunds do not clearly fall under either the general welfare exception or the exclusion for income for qualified disaster relief payments.[68]
- **Delay in the implementation of changes to section 1099-K reporting requirements (6050W).** For third-party settlement organizations—which include organizations such as Etsy, eBay, PayPal, Venmo, Uber, and DoorDash—the American Rescue Plan of 2021 lowered the threshold for sending a Form 1099-K to customers and to the IRS to $600.[69] By law, this new threshold generally applied for transactions made during 2022.[70] On December 23, 2022, the IRS announced a one-year delay in implementing the new $600 threshold.[71]

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[62] IR-2023-23, *supra* note 37.
[63] *Id.*
[64] Federal Income Tax Consequences of Certain State Payments, Notice 2023-56 (Aug. 30, 2023).
[65] *Id.* at 6-8.
[66] *Id.* at 2.
[67] Maine viewed certain state Winter Energy Relief payments as excludable from federal taxes, even though the IRS later determined that they would not qualify for the general welfare exception. Kirsten LC Figueroa, Letter to William M. Paul, Acting Chief Counsel (Dec. 12, 2023). After hearing from the state, the IRS Acting Chief Counsel concluded that these early 2023 payments could be excluded under the section 139(b)(4) exclusion for income for qualified disaster relief payments because of references to addressing the impact of the pandemic in the state legislation providing for these payments. *Id.*; William M. Paul, Acting Chief Counsel, Letter to Kirsten LC Figueroa (Dec. 15, 2023). Arizona has recently requested that certain 2023 state tax rebates be excluded from federal income under the general welfare exception. Kris Mayes, Letter to the Honorable Daniel Werfel (Jan. 25, 2024). Although the February 2023 announcement is less clear, the August 2023 notice and the Acting Chief Counsel's December 15 letter are framed as categorical *applications* of statutory exclusions rather than exercises of categorical non-enforcement. Along the same lines, Arizona's letter requests a determination that the 2023 Arizona state rebates fall under the general welfare exclusion rather than that the IRS not enforce the law. Mayes, supra.
[68] *See* Hollingsworth, *supra* note 39.
[69] American Rescue Plan Act of 2021, Pub. Law 117-2, § 9674(c), 135 Stat. 185 (Mar. 11, 2021); Grace Henley et al., *supra* note 51.
[70] *Id.*
[71] IRS Announces Delay for Implementation of $600 Reporting Threshold for Third-Party Payment Platforms' Forms 1099-K, IR-2022-226 (December 23, 2022).

The explanation for the last-minute delay by then Acting IRS Commissioner Doug O'Donnell was: "The IRS and Treasury heard a number of concerns regarding the *timeline* of implementation of these changes. . . . To help *smooth the transition* and *ensure clarity* for taxpayers, tax professionals and industry, the IRS will delay implementation of the 1099-K changes. The additional time will help *reduce confusion* during the upcoming 2023 tax filing season and provide more time for taxpayers to prepare and understand the new reporting requirements."[72] On November 21, 2023, the IRS announced an additional delay "[f]ollowing feedback from taxpayers, tax professionals, and payment processors and to reduce taxpayer confusion[.]"[73] In doing so, the IRS not only kept the pre-ARP $20,000 threshold in place for transactions made during 2023; it also announced a threshold of $5,000 for transactions made during 2024, with the statutorily-mandated threshold of $600 only fulling phasing in for transactions made in 2025.[74]

- **Delay in implementation of the requirement that brokers report on digital assets (6045).** The Infrastructure Investment and Jobs Act imposed a new reporting requirement on crypto brokers.[75] The law generally required reporting beginning on January 1, 2024, for transactions occurring in 2023.[76] However, by December 23, 2022, Treasury and the IRS had announced only that they intended to issue a notice of proposed rulemaking for regulations to implement this section of the Code.[77] They explained that the notice and comment process would "allow the Treasury Department and the IRS to accept comments from affected taxpayers, industries, and other interested parties and enable the public to *meaningfully participate in the regulatory process***.**"[78] In the months following this announcement, stakeholders expressed increasing doubts that Treasury and the IRS could finalize regulations under section 6045 before January 1, 2024.[79] The IRS ultimately released the proposed

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[72] *Id.* (emphasis added). For further exploration of the questions raised by this first delay, *see* Daniel Hemel & Steven M. Rosenthal, *The IRS's Christmas Gift to Airbnb and PayPal Is a Loss for Law-Abiding Taxpayers*, Tax Policy Center (Jan. 11, 2023).
[73] IR-2023-221, *supra* note 12; Revised Timeline Regarding Implementation of Amended Section 6050W(e), Notice 2023-74 (Nov. 21, 2023).
[74] *Id.* A GAO report published shortly before the delay recommended that the IRS "work to determine the most appropriate thresholds for payment information reporting, including Form 1099-K." GAO, Tax Enforcement: IRS Can Improve Use of Information Returns to Enhance Compliance, GAO-24-107095 (Nov. 15, 2023). However, some commentators questioned Treasury and the IRS's authority to rewrite a threshold written into the statute. *See* Jonathan Curry & Cady Stanton, *Relief, Cheers Greet IRS's Further Delay of New 1099-K Regime*, Tax Notes (Nov. 22, 2023); Representative Smith et al., *supra* note 8; National Federation of Independent Business, *IRS Delays $600 Reporting Threshold for Payment Platform Transactions* (Dec. 6, 2023).
[75] Infrastructure Investment and Jobs Act, Pub. L. 117-58, § 80603, 135 Stat. 1339-41 (2021).
[76] *Id.* § 80603(c); Joint Committee on Taxation, Estimated Revenue Effects of the Provisions in Division H of an Amendment in the Nature of a Substitute to H.R. 3684, JCX-33-21, at 2 (Aug. 2, 2021).
[77] Transitional Guidance Under Sections 6045 and 6045A With Respect to the Reporting of Information on Digital Assets by Brokers, Announcement 2023-2 (Dec. 23, 2022).
[78] *Id.* at 4 (emphasis added).
[79] *See, e.g.*, Senator Elizabeth Warren et al., Letter to Treasury and IRS re Crypto Reporting Requirements (Aug. 1, 2023).

regulations on August 25, 2023.[80] The proposed regulations delay the implementation of this reporting requirement by two years to 2026, for sales and exchanges made in 2025.[81]

- **Delay of changes to designation of certain catch-up contributions (414(v)).** Under the SECURE 2.0 Act, catch-up contributions to tax-qualified retirement plans by individuals earning over $145,000 must be designated as after-tax Roth contributions, not pre-tax contributions.[82] The Act required plan sponsors to implement this change by January 1, 2024.[83] However, after having "been made aware of taxpayer concerns" with timely implementing the changes,[84] on August 25, 2023, the IRS announced a two-year "administrative transition period" to "help taxpayers transition smoothly" to the new requirement, and to "facilitate an orderly transition[.]"[85]

Other potential examples of categorical administrative relief since late 2022 include:

- Transitional Guidance Under Section 6050I with Respect to the Reporting of Information on the Receipt of Digital Assets, Announcement 2024-4 (Jan. 16, 2024); Treasury and the IRS Announce That Businesses Do Not Have to Report Certain Transactions Involving Digital Assets Until Regulations Are Issued, IR-2024-12 (Jan. 16, 2024)[86];
- Anticipated Direction of Forthcoming Proposed Guidance on Critical Mineral and Battery Component Value Calculations for the New Clean Vehicle Credit (Dec. 29, 2022);
- Temporary Relief Under Sections 901 and 903 of the Internal Revenue Code, Notice 2023-55, at 5 (July 21, 2023); Guidance Regarding the Foreign Tax Credit and Dual Consolidated Losses in Relation to the GloBE Model Rules, and Modification of Temporary Relief in Notice 2023-55, Notice 2023-80, at 26 (Dec. 11, 2023);
- Additional Time for Partnerships to Provide Complete Forms 8308 for Section 751(a) Exchanges Occurring in Calendar Year 2023, Notice 2024-19 (Jan. 11, 2024);
- Relief from Additions to Tax for Certain Taxpayers' Failure to Timely Pay Income Tax for Taxable Years 2020 and 2021, Notice 2024-7 (Dec. 19, 2023);
- Treatment of Amounts Paid to Section 170(c) Organizations Under Employer Leave-Based Donation Programs to Aid Victims of the Hawaii Wildfires that Began on August 7, 2023 (2023 Hawaii Wildfires), Notice 2023-69 (Sept. 28, 2023);
- Employee Retention Credit Voluntary Disclosure Program, Announcement 2024-23 (Dec. 21, 2023);

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[80] U.S. Dep't of Treasury, IRS Release Proposed Regulations on Sales and Exchanges of Digital Assets by Brokers (Aug. 25, 2023); Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, REG-122793-19, 88 Fed. Reg. 59576-59659 (Aug. 29, 2023); *see* also Huang, *supra* note 48. Treasury and the IRS subsequently prolonged this process by extending the comment period through November 13, 2023. Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, REG-122793-19, 88 Fed. Reg. 73300-01 (Oct. 25, 2023).

[81] Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, 88 Fed. Reg. 59596, *supra* note 80; *see also* Tax Law Center, Recommendations for Guidance Regarding Broker Reporting of Digital Asset Transactions, REG-122793-19 (Nov. 13, 2023).

[82] Consolidated Appropriations Act of 2022, Pub. L. 117-328, § 603, 136 Stat. 5391-92 (Dec. 29, 2022).

[83] *Id.* § 603(c), 136 Stat. 5392.

[84] Guidance on Section 603 of the Secure 2.0 Act with Respect to Catch-Up Contributions, Notice 2023-62, 2023-37 I.R.B. 817 (Aug. 25, 2023).

[85] IRS Announces Administrative Transition Period for New Roth Catch Up Requirement; Catch-Up Contributions Still Permitted After 2023, IR-2023-155 (Aug. 25, 2023).

[86] *See* note 2.

- Transition Relief and Guidance Relating to Certain Required Minimum Distributions, Notice 2023-54 (July 14, 2023);
- Transitional Guidance With Respect to Stock Repurchase Excise Tax, Announcement 2023-18 (June 29, 2023);
- Relief from Certain Additions to Tax for Corporation's Underpayment of Estimated Income Tax Under Section 6655, Notice 2023-42 (June 7, 2023);
- Extension of Temporary Relief Related to the Penalty for Failure to Deposit Superfund Chemical Taxes, Notice 2023-28 (June 29, 2023);
- Lookback Periods for Claims for Credit or Refund for Returns with Due Dates Postponed by Notice 2020-23 or Notice 2021-21, Notice 2023-21 (Apr. 20, 2023); and
- Foreign Financial Institution Temporary U.S. Taxpayer Identification Relief, Notice 2023-11 (Apr. 10, 2023).