

# Treasury and the IRS Issue Joint Policy Statement on Deference and the Tax Regulatory Process

Tax Alert  
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Yesterday, Treasury and the IRS issued a [joint policy statement](#) announcing important changes to the tax regulatory process and clarifying their views on their less-formal "subregulatory" guidance (*e.g.*, revenue rulings, revenue procedures, notices, and announcements). This new policy is aimed at reaffirming their commitment to a tax regulatory process that "encourages public participation, fosters transparency, affords fair notice, and ensures adherence to the rule of law." In many respects, the new policy embraces established principles of administrative law and the Administrative Procedure Act (APA) that Treasury and the IRS have not historically applied to tax regulations.

## Treasury and IRS Pledge to Not Seek Judicial Deference for Subregulatory Guidance

The most notable element of the policy statement is its commitment that the IRS will not "seek judicial deference under *Auer* [citation omitted] or *Chevron* [citation omitted] to interpretations set forth only in subregulatory guidance." Those cases provide for deference to interpretations of the law by administrative agencies (whether through regulations or other guidance), with *Chevron* providing a well-known two-step analysis for evaluating the validity of an agency's regulation and *Auer* providing for broad deference to agency interpretations where its own regulation is ambiguous. And although the *Chevron* deference is generally not afforded to subregulatory guidance that lacks the force and effect of law, the pledge to refrain from seeking *Auer* deference is noteworthy.

The policy statement is timely. Both *Chevron* and *Auer* have been under siege of late. Just this week, Supreme Court Justice Neil Gorsuch (a long-time critic of *Chevron* deference) went after *Chevron* in his dissent in [BNSF Railway Co. v. Loos](#), writing that ceding to *Chevron* deference in that case would have amounted to the Court "throwing up our hands and letting an interested party—the federal government's executive branch, no less—dictate an inferior interpretation of the law that may be more the product of politics than a scrupulous reading of the statute." And as covered in our Tax Appellate Blog [here](#), the continuing vitality *Auer* deference is squarely at issue before the Supreme Court.

Since deference favors only the government, the policy statement is welcome news for taxpayers fighting agency interpretations of the law. But there are a couple of caveats that should accompany this welcome news:

- The pledge in the policy statement applies only to subregulatory guidance, which means that the IRS could still theoretically argue for deference to interpretations it takes on brief under *Auer* (although that tactic would face strong headwinds in this judicial climate).
- The policy statement provides that Treasury and the IRS will not seek deference for subregulatory guidance only "[i]n litigation before the U.S. Tax Court." It thus provides no assurance that the Department of Justice will refrain from arguing for deference to subregulatory guidance in refund forums.

## Other Clarifications Regarding "Subregulatory" Guidance

The policy statement encourages taxpayers to rely on subregulatory guidance, stating that "[t]axpayers can have confidence [] that the IRS will not take positions inconsistent with its subregulatory guidance when such guidance is in effect." It also describes the factors considered by Treasury and the IRS when deciding whether to issue guidance in the form of regulations or as subregulatory

guidance:

- the intended effect on taxpayers' rights or duties,
- the need for public comments,
- the form and content of prior positions,
- the significance of the issues,
- the statutory framework, and
- whether the interpretation or position is of short-term or long-term value.

Treasury and the IRS favor subregulatory guidance for interpretations of existing law applied to a limited set of facts, statutorily prescribed forms of relief, statements of agency procedure or practice, announcements of the intent to issue proposed regulations, or an announcement that has only immediate or short-term value.

The policy statement specifically addresses confusion surrounding IRS notices that announce an intent to issue proposed regulations. The policy statement acknowledged that the "[f]ailure to promulgate regulations previewed in notices on a timely basis can cause confusion and uncertainty for taxpayers." To address this uncertainty, the policy statement provides that future IRS notices will include a statement of intent to issue proposed regulations. And the statement will provide that "if no proposed regulations or other guidance is released within 18 months after the date the notice is published, taxpayers may continue to rely on the notice." Until additional guidance is issued, Treasury and the IRS will not assert a position adverse to the taxpayer based in whole or in part on the notice.

## **Notice and Comment to Apply to Both "Legislative" and "Interpretive" Regulations**

The policy statement describes the APA's notice-and-comment rule making process as a "best practice" and reaffirms a commitment to notice and comment when issuing both "legislative" and "interpretive" rules. According to the IRS, "legislative" rules arise "when Congress simply provided an end result, without any guidance as to how to achieve the desired result or when a statutory provision does not provide adequate authority for the regulatory action taken." IRM 32.1.1.2.7 (Aug. 2, 2018). "Interpretive" rules include those issued to advise the public of the agency's construction of the statutes it administers. IRM 32.1.1.2.6 (Sept. 23, 2011). Although the policy statement notes that an agency's interpretive rules are exempt from the notice-and-comment process under the APA, Treasury and the IRS intend to apply notice and comment "as a matter of sound regulatory policy" to rules they consider to be interpretive.

## **Statements of "Good Cause" for Temporary Regulations Issued with Immediate Effect**

The policy statement likewise cites "sound regulatory policy" as the rationale for why Treasury and the IRS will provide a statement of "good cause" when enacting temporary regulations with immediate effect that do not go through notice-and-comment procedures. Although the APA has long required "good cause" for issuing regulations without notice and comment, Treasury and the IRS have historically interpreted section 7805(e) as eliminating the APA's notice-and-comment requirement or the need to provide a "good cause" statement for temporary tax regulations. But this legal interpretation is now in question after the district court's decision in *Chamber of Commerce of U.S. v. IRS*, 120 AFTR 2d 2017-5967 (W.D. Tex. 2017). In that case, the court rejected the government's interpretation of section 7805(e) and invalidated a temporary Treasury regulation because it had not gone through notice and comment. The policy statement thus pledges (except under "exceptional circumstances") to meet the APA's requirements when promulgating temporary tax regulations (consistent with the court's reasoning in *Chamber of Commerce*). Notably, however, the policy statement does not concede that Treasury and the IRS are legally required to do so.

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