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Reliance on Treasury Department and IRS Tax Guidance

The Department of the Treasury (Treasury) and Internal Revenue Service (IRS) use several forms of guidance to help taxpayers understand the Internal Revenue Code (IRC) and to inform taxpayers of Treasury and the IRS's position on particular tax issues. For the most part, this tax guidance can be split into three categories: (1) *Treasury regulations*, (2) sub-regulatory guidance published in the *Internal Revenue Bulletin* (IRB), and (3) *unpublished* sub-regulatory guidance (i.e., sub-regulatory guidance not published in the *Federal Register* or the IRB). Former heads of the IRS's Office of Chief Counsel have remarked that the type of guidance issued reflects a balance between taxpayers' need for certainty and the need of Treasury and the IRS for latitude in administering tax laws.

In a tax dispute, taxpayers generally may rely on Treasury regulations and sub-regulatory guidance published in the IRB (e.g., revenue rulings, revenue procedures, notices, and announcements) to support their tax position, as long as the guidance is not contrary to or inconsistent with the law and subsequent guidance does not render it moot. Taxpayers are generally unable to rely on unpublished sub-regulatory guidance (e.g., forms, instructions, and publications) in tax disputes. Given that Treasury and the IRS often issue unpublished sub-regulatory guidance in response to time-sensitive issues, taxpayers may exercise caution when the need for clarity and certainty is at its greatest, and might wait for Congress to potentially enact clarifying legislation or for courts to address the legal issue in litigation.

This In Focus analyzes the ability of taxpayers to rely on valid Treasury regulations and the more common types of published sub-regulatory tax guidance.

Common Types of Published Treasury and IRS Tax Guidance

Treasury Regulations

Treasury regulations are the most important type of tax guidance issued by Treasury and the IRS. Treasury regulations can provide guidance on newly enacted legislation and tax issues that arise with respect to preexisting laws. Taxpayers may rely on *final* and *temporary Treasury regulations*, but may not rely on *proposed Treasury regulations* unless they contain an express statement permitting reliance.

Generally, proposed Treasury regulations are published in the *Federal Register* as a Notice of Proposed Rulemaking, which invites the public to review and comment on the proposed regulation. Treasury and the IRS may modify or withdraw a proposed Treasury regulation based on the comments they receive. After considering the public's comments, Treasury and the IRS may issue a final

regulation and publish it in the *Federal Register* as a *Treasury Decision*.

Treasury and the IRS issue temporary Treasury regulations when they conclude that the public requires immediate guidance before the publication of final Treasury regulations. Temporary Treasury regulations are also published in the *Federal Register* as Treasury Decisions, but expire after three years. When Treasury and the IRS issue a temporary Treasury regulation, they simultaneously issue a corresponding proposed Treasury regulation.

Signaling a significant change in procedure, a memorandum of agreement between Treasury and the Office of Management and Budget (OMB) dated June 9, 2023, superseded an earlier memorandum dated April 11, 2018, so that tax regulations no longer undergo the standard centralized review process under Section 6 of Executive Order 12866 conducted by the OMB's Office of Information and Regulatory Affairs (OIRA).

Revenue Rulings

Revenue rulings are the IRS's official interpretation of tax laws, related statutes, tax treaties, and regulations as applied to a specific set of facts. They are published in the IRB. Taxpayers may rely on revenue rulings when the taxpayer's facts are substantially the same as the facts addressed in the revenue ruling. Revenue rulings foster uniformity and enable taxpayers to make informed decisions about their tax obligations. Revenue rulings do not carry the same level of authority as Treasury regulations.

Revenue Procedures

The IRS announces administrative practices and procedures through revenue procedures published in the IRB. A revenue procedure can provide information on filing a return or other instruction to enable a taxpayer to reach a particular result. Revenue procedures cover diverse topics, such as the adoption of accounting methods, the computation of certain expenses, the current value of inflation-adjusted items in the tax code, and how to request a waiver for electronic filing. Taxpayers may rely on revenue procedures when their facts are substantially the same as those described in the revenue procedure. Like revenue rulings, revenue procedures do not have the same level of authority as Treasury regulations.

Announcements and Notices

The IRS makes time-sensitive public pronouncements through announcements and notices. Announcements have immediate or short-term value. They can summarize laws and regulations without making substantive interpretations, explain forthcoming regulations, and notify taxpayers of approaching deadlines. Notices may contain substantive interpretations of the IRC or other laws. The IRS has used notices to inform taxpayers of the types of transactions that

they are **scrutinizing**. Treasury and the IRS can publish announcements and notices in the IRB. Typically, taxpayers can **rely** on announcements and notices published in the IRB, but they **do not have** the same level of authority as Treasury regulations.

Administrative Procedure Act Procedural Challenges to the Validity of Treasury and IRS Tax Guidance

Section 553 of the Administrative Procedure Act (APA) generally requires federal agencies to follow **notice-and-comment** rulemaking procedures before issuing, amending, or repealing **legislative rules** (i.e., rules that carry the force of law). The APA **does not require** federal agencies to apply these same procedures to **interpretive rules**. The IRS contends, in Internal Revenue Manual 32.1.1.2.6, that most Treasury regulations are interpretive rules.

Contemporary case law suggests that some of the tax guidance that the IRS designates as interpretive rules are, in fact, legislative rules subject to APA notice-and-comment rulemaking procedures. In *Chamber of Commerce of United States v. Internal Revenue Service*, No. 1:16-CV-944-LY 2017 WL 4682050 (W.D. Tex. Oct. 6, 2017), a district court determined that a temporary Treasury regulation that adjusted the computation for determining whether a corporation should be treated as a surrogate foreign corporation was a substantive rule, not an interpretive rule. The court **explained** that the adjustments were “not mere interpretations of the statute, but substantive modifications to the application of the statute.” The court **relied** on the Supreme Court’s decision in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979), which **describes** legislative rules as substantive rules that “affect[] individual rights and obligations.”

Courts **have** also relied on the absence of APA notice-and-comment procedures to invalidate sub-regulatory tax guidance. The Sixth Circuit in *Mann Construction, Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022), and the Eleventh Circuit in *Green Rock LLC v. IRS*, 104 F.4th 220 (11th Cir. 2024), have held that two different IRS notices designating specific types of transactions as **listed transactions** under IRC Section 6707A(c) were legislative rules subject to the APA’s notice-and-comment rulemaking procedures. The U.S. Courts of Appeals for the **Sixth** and **Eleventh Circuits** concluded that the notices were legislative rules because failure to comply with the notices’ reporting requirements came with the risk of statutory penalties and criminal sanctions. In *Bullock v. United States*, 401 F. Supp. 3d 1144 (D. Mont. 2019), a Montana district court held that a revenue procedure was a legislative rule subject to the APA’s notice-and-comment requirement **because** it effectively amended a prior legislative rule—a Treasury regulation promulgated after a public notice-and-comment period.

Provisions in the **Paperwork Reduction Act**, the **Regulatory Flexibility Act**, and the **Congressional Review Act** also can render tax guidance invalid.

Judicial Review of Treasury and IRS Guidance Interpreting Tax Laws

In *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44 (2011), the Supreme Court explained it was “**not inclined**,” absent justification, to

carve out an approach for judicial review of federal agency action that only applied in the tax context. It **emphasized** the importance of maintaining a uniform approach for reviewing administrative actions. As a result, the Court **applied** the judicial deference **framework** established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to evaluate agency actions instead of the less deferential multifactor analysis used to review Treasury regulations established in *National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472 (1979). The Court has since overruled *Chevron*’s judicial deference framework in a **pair of cases**, *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, 144 S. Ct. 2244 (2024) (collectively *Loper Bright*). In *Loper Bright*, the Court held that *Chevron*’s judicial deference framework **contravened** Section 706 of the APA, which requires courts to “decide all relevant questions of law” and “interpret . . . statutory provisions.”

The **majority’s** opinion in *Loper Bright* has **renewed** courts’ **inquiries** into the APA’s role in challenges to Treasury and IRS guidance interpreting tax statutes. The majority **recognized** Congress has often enacted statutes that expressly delegate authority to an agency to give meaning to a statutory term, prescribe rules to fill in the details of a statutory scheme, or regulate subject to limits. It **expressed**

[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations . . . and ensuring the agency has engaged in “‘reasoned decisionmaking’” within those boundaries.

In the tax context, Congress has expressly provided Treasury and the IRS with a general grant of authority under IRC Section 7805(a) to issue “all needful rules and regulations” to enforce the IRC. Tax commentators have also estimated that there might be anywhere from **hundreds** to over **1,000** specific statutory grants of authority in the IRC. Despite a general grant of authority under IRC Section 7805(a) and a specific grant of authority under IRC Section 245A, the Tax Court held in *Varian Medical Systems, Inc. and Subsidiaries v. Commissioner*, 163 T.C. No. 4 (2024), that Treasury and the IRS **did not have authority** to issue a regulation modifying IRC Section 78’s effective date because the regulation fell outside the “**boundaries of any authority** that Congress may have delegated under 245A or 7805.” It **reasoned** Treasury and the IRS could not “contradict the clear effective date provided for in the statutory text” of IRC Section 78 even though the **mismatch** with IRC Section 245A’s effective date from the same **legislation** could **produce** a **windfall** for certain taxpayers. Additional opinions applying *Loper Bright* may be necessary to determine *Loper Bright*’s full effects, but the latter case may inhibit Treasury and the IRS’s ability to use tax guidance to administer tax statutory schemes.

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