KPMG

TaxNewsFlash

United States

No. 2019-094
March 6, 2019

Treasury policy statement on tax regulatory process

The U.S. Treasury Department and IRS have released a policy statement on the tax regulatory process, the use of notice-and-comment rulemaking, the limited use of temporary regulations, and limitations on notices announcing an intent to propose regulations.

The policy statement also addresses "subregulatory" guidance—such as revenue rulings, revenue procedures, IRS notices, and IRS announcements.

The **policy statement** [PDF 72 KB] indicates that the Treasury and IRS:

- Will continue to adhere to their "longstanding practice" of using the notice-and-comment rulemaking process for interpretative rules published in the Code of Federal Regulations

- Commit to including a statement of "good cause" when issuing any future temporary regulations under the Internal Revenue Code in addition to continuing to adhere to other limitations in the Code that mandate that temporary regulations must expire within three years of issuance and that proposed regulations must be issued simultaneously with any temporary regulations

The policy statement further indicates that subregulatory guidance "is not intended to affect taxpayer rights or obligations independent from underlying statutes and regulation" and that taxpayers "can have confidence that the IRS will not take positions inconsistent with its subregulatory guidance when such guidance is in effect." In addition, the policy statement states that:

> *[Subregulatory] guidance cannot and should not . . . be used to modify existing legislative rules or create new legislative rules. The Treasury Department and the IRS will adhere to these limits and will not argue that subregulatory guidance has the force and effect of law. In litigation before the U.S. Tax Court, as a matter of policy, the IRS will not seek judicial deference under* Auer v. Robbins*, 519 U.S. 452 (1997) or* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to interpretations set forth only in subregulatory guidance.*

With respect to notices announcing the intention of Treasury and the IRS to issue proposed regulations, the policy statement indicates that future such notices will include a statement 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 but, until additional guidance is issued, the

Treasury Department and the IRS will not assert a position adverse to the taxpayer based in whole or in part on the notice." In other words, the policy statement indicates that if proposed regulations are not issued within 18 months, taxpayers may rely on the IRS notice but that the IRS won't use the notice to the taxpayer's detriment.

Importantly, the policy statement explicitly states that it is not intended to, and does not, create any enforceable substantive or procedural right or benefit against the United States, any of its departments or agencies, or any other person.

KPMG observation

The policy statement—which does not expressly reference but may be related to an April 2018 memorandum of agreement between the Treasury Department and the Office of Management and Budget—primarily reiterates existing policy and practice while emphasizing a couple of key principles. Notwithstanding its reaffirmation that most tax regulations are interpretive, the policy statement commits Treasury to the notice-and-comment convention of the Administrative Procedures Act as well as to the inclusion of a "good cause" statement in the preamble of temporary regulations. The policy statement also captures Treasury's view on the appropriate scope and impact of sub-regulatory guidance, including the judicial deference afforded to interpretations set forth in such guidance.