Department of the Treasury Internal Revenue Service Office of Chief Counsel

# Notice

CC-2019-006

## September 17, 2019

	Policy Statement on the Tax		Upon incorporation into
Subject:	Regulatory Process	Cancel Date:	the CCDM

### Purpose

This Notice advises Chief Counsel attorneys about the Policy Statement on the Tax Regulatory Process issued by the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) on March 5, 2019.

## Background

The policy statement addresses certain rulemaking requirements under the Administrative Procedure Act and the issuance of subregulatory guidance. The full text of the policy statement can be found here. In the policy statement, Treasury and the IRS clarify and affirm their commitment to sound regulatory practices. First, the policy statement provides that Treasury and the IRS will continue to adhere to their longstanding practice of using the notice-and-comment process for interpretative tax rules published in the Code of Federal Regulations. Second, the policy statement provides that future temporary regulations under the Internal Revenue Code will include a statement of good cause in the preamble, will expire within three years of issuance, and will be issued simultaneously with proposed regulations. Third, the policy statement affirms that subregulatory<sup>1</sup> guidance does not have the force and effect of law and provides that Treasury and the IRS will not argue in the United States Tax Court for 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. Fourth, the policy statement provides that each future notice of intent to issue proposed tax regulations will state that if no proposed regulations or other guidance is released within 18 months after publication of such notice, taxpayers may continue to rely on the notice but, until additional guidance is issued, Treasury and the IRS will not assert a position adverse to the taxpayer based on the notice.

<sup>&</sup>lt;sup>1</sup> Subregulatory guidance includes publications in the Internal Revenue Bulletin such as Revenue Rulings, Revenue Procedures, Announcements, and Notices.

Distribute to:	Tax Litigation staff		Tax Litigation staff & Support personnel	
	X All Personnel	Х	Electronic Reading Room	
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#### Discussion

As set forth in section III of the policy statement, Chief Counsel attorneys representing the IRS before the U.S. Tax Court will not argue for deference under *Auer* or *Chevron* to positions taken only in subregulatory guidance. Arguments regarding the weight to be accorded by a court to IRS positions taken only in subregulatory guidance may continue to be made under other case authority, such as *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (weight given to agency's interpretation proportional to power to persuade); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (longstanding interpretation entitled to considerable weight); and *Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 562 (1991) (generally known administrative interpretation of statute ratified when Congress re-enacts the statute without change).

As set out in section IV of the policy statement, every notice of intent to issue regulations must include the following statement:

"If no proposed regulations or other guidance is released within 18 months after the date this notice is published in the Internal Revenue Bulletin, taxpayers may continue to rely on this notice but, until additional guidance is issued, the Treasury Department and the IRS will not assert a position adverse to a taxpayer based in whole or in part on this notice."

Any matter implicating any aspect of the policy statement must be coordinated with the Office of the Associate Chief Counsel (Procedure & Administration). Additionally, Chief Counsel Directives Manual Exhibits 31.1.1-1 and 35.11.1-1 require review by Procedure & Administration of any matter involving the Administrative Procedure Act or the validity of a regulation, temporary regulation, revenue ruling, revenue procedure, or other published guidance item, or any deference issues.

If you have any questions regarding the policy statement or the Administrative Procedure Act in general, please contact Emily M. Lesniak or Jennifer Auchterlonie at 202-317-3400 in the Office of the Associate Chief Counsel (Procedure & Administration).

/s/

Kathryn A. Zuba Associate Chief Counsel (Procedure & Administration)