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# EFFECT OF THE APA ON IRS GUIDANCE

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## Where Things Stand Currently

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# Administrative Procedure Act Rulemaking Basics

- 5 U.S.C. § 553(b) & (c):
  - Notice of proposed rulemaking that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”
  - Opportunity for public participation through written submissions.
  - Final regulations to be accompanied by a “concise general statement of their basis and purpose” (also known as the “preamble”).
  - Exceptions for interpretative rules, policy statements, procedural rules, or “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

# Administrative Procedure Act Rulemaking Basics

- 5 U.S.C. § 706(2)(A):
  - Calls upon courts to “hold unlawful and set aside agency action ... found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - Requires agencies to explain and justify their discretionary choices contemporaneously.  
*See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

## APA Issues Raised By Treasury / IRS Practices

- Are Treasury regulations legislative rules subject to APA notice-and-comment rulemaking procedures or interpretative rules exempt from those procedures?
  - What about revenue rulings, revenue procedures, and IRS notices?
- If Treasury regulations are legislative rules, do they actually comply with APA notice-and-comment rulemaking procedures?
  - Does IRC 7805(e) exempt temporary Treasury regulations from pre-promulgation notice and comment?
  - Do preambles to final Treasury regulations adequately respond to significant comments?
  - Do preambles to final Treasury regulations adequately explain and justify Treasury's discretionary choices?

## Treasury Regulations Are Legislative Rules

- Treasury regulations are legislative rules, not interpretative rules, for APA purposes (meaning they are subject to notice and comment procedures).
  - *Oakbrook Land Holdings, LLC v. Comm'r*, 154 T.C. 180 (2020), *aff'd* 28 F.4th 700 (6th Cir. 2022).
  - *Altera Corp. & Subs. v. Comm'r*, 145 T.C. 91 (2015), *rev'd on other grounds*, 926 F.3d 1061 (9th Cir. 2019).
  - *SIH Partners LLLP v. Comm'r*, 150 T.C. 28 (2018), *aff'd* 923 F.3d 296 (3d Cir. 2019).
  - *Cf. Mayo Found. for Med. Educ. & Res. v. United States*, 562 U.S. 44 (2011) (holding that general as well as specific authority Treasury regulations carry “the force of law,” albeit for *Chevron* purposes).
  - **But note:** The Internal Revenue Manual continues to assert that most Treasury regulations are exempt interpretative rules.

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