

DECEMBER 14, 2023

EFFECT OF THE APA ON IRS GUIDANCE

PROF. KRISTIN E. HICKMAN, UNIVERSITY OF MINNESOTA LAW SCHOOL
PROF. CALVIN H. JOHNSON, UNIVERSITY OF TEXAS SCHOOL OF LAW
PROF. SUSAN C. MORSE, UNIVERSITY OF TEXAS SCHOOL OF LAW

1

Where Things Stand Currently

Kristin E. Hickman
University of Minnesota Law School

2

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.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Effect of the APA on IRS Guidance

Also available as part of the eCourse

[2023 Taxation eConference: Day 2 - Focus on Tax Controversy](#)

First appeared as part of the conference materials for the
71st Annual Taxation Conference: Day 2 - Focus on Tax Controversy session
"Effect of the APA on IRS Guidance"