



## Pat Smith Quoted in Tax Notes Regarding Regulation Text

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### *Tax Notes*

June 27, 2016

Ivins attorney Pat Smith was quoted in a *Tax Notes* article on the issues presented when preambles to regulations contain material that is not included in the text of the regulations themselves. *News Analysis: When the Preamble and the Reg Text Don't Match.*

"I would not hesitate to argue that something in a preamble is something taxpayers can rely on," said Patrick J. Smith of Ivins, Phillips & Barker Chtd. When the IRS invites taxpayers to rely on information in a public release, they will have a valid complaint if the agency later takes a different position, he said.

Until recently, the IRM explicitly stated that it was unnecessary for preambles to justify the rules that are adopted in the regulations, Smith said. "But that's what preambles should do: They should say why [Treasury and the IRS have] adopted this rule," he said. The arbitrary and capricious standard of the Administrative Procedure Act puts additional pressure on preambles to explain the rationale behind the selection of the particular rules.

The legal effect of a statement in a preamble that is not also included in the text of the regulations likely depends on whether the statement is directly related to the subject covered by the regulation, Smith said. Statements that are related to the regulations would likely be analyzed under *Auer v. Robbins*, 519 U.S. 452 (1997), which provides that when an agency interprets its own regulations that have the force of law, the agency interpretation is given deference. "To the extent that a statement in the preamble clarifies something that might be unclear in the regulations, that kind of a statement would have a pretty great

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weight," Smith said. However, if a statement in a preamble is on a separate subject from what is covered in the text of the regulations, it would likely be analyzed under the framework in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and only given weight to the extent that it is persuasive, he said.

Statements that fall somewhere in between the poles of "directly related to the subject of the regulations" and "totally different subject" would probably not receive *Auer* deference.