



# Pat Smith quoted in Tax Notes on whether an S Corporation is a Corporation

## PRACTICE AREAS

Tax

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Ivins attorney Pat Smith was quoted in a *Tax Notes* article on whether the IRS and Treasury have the authority to issue a regulation providing that an S corporation is not a corporation for purposes of the carried interest provisions, particularly in light of a possible violation of the Administrative Procedure Act's notice-and-comment rulemaking requirements. *How to Decide Whether an S Corp Is a Corporation.*

Treasury may also run into problems with its anticipated guidance because of how it approached Notice 2018-18. The notice summarily states that "the regulations will provide that the term corporation' in section 1061(c)(4)(A) does not include an S corporation." Issuing a notice that declares what the guidance will say and then issuing regulations that say exactly that may make the regulations particularly vulnerable to challenge under the Administrative Procedure Act's (APA) notice and comment rules, said Patrick J. Smith of Ivins, Phillips & Barker Chtd. One possibility for making announcements about regulatory plans less vulnerable to APA challenges based on the notice and comment requirements is to include several genuine alternatives that are under consideration in notices, he said.

Another potential APA problem for Notice 2018-18 is that it contains no explanation of why Treasury thinks this approach is appropriate, although Smith said the regulations would likely provide an explanation that should satisfy the arbitrary and capricious standard as reflected in *Altera Corp. v. Commissioner*, 145 T.C. 91 (2015). Smith said the IRS and Treasury have recently begun adhering more closely to the APA in issuing notices, but that Notice 2018-18 didn't benefit from that renewed interest.