



Pat Smith Quoted in Tax Notes on New Policy Statement from Treasury and IRS on Tax Regulatory Guidance

PRACTICE AREAS

Tax

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IPB attorney Pat Smith was quoted in *Tax Notes* on a new policy statement issued by the Treasury and IRS regarding procedures that will be used in the future in issuing tax regulatory guidance. *Treasury Tightens Tax Reg Procedural Guidelines*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. said that the policy statement suggests a clear departure from past regulatory practices in several ways, all of which he said are "welcome changes."

"Temporary regs have been used very frequently by the IRS, particularly in the international area, and they've gotten some criticism for that," Smith said.

Smith said he reads the policy statement as saying that the IRS intends to use temporary regs less frequently, but that when it does use them, it will explain why they're necessary.

Smith observed that the IRS has been criticized for releasing detailed notices describing what will be in the proposed regs. Doing so effectively undercuts the notice and comment process "because it seems like they've already made up their mind about what the regulations will say," he said.

Smith said the change was a step in the right direction, adding that it seems to suggest that the IRS will issue fewer notices.

According to Smith, [another] change means that Treasury is effectively abandoning *Auer* deference, a reference to *Auer v. Robbins*, 519 U.S. 452 (1997). Although *Auer* deference isn't



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particularly common in the tax context, he explained, the change in policy might have been prompted by *Kisor v. Wilkie*, Sup. Ct. Dkt. No. 18-15, a pending Supreme Court case in which "the whole concept of *Auer* deference is being challenged." Oral arguments in the case are scheduled to begin this month.

Smith pointed out that Kristin Hickman, special assistant to OIRA Administrator Neomi Rao, has been a vocal critic of the procedural practices identified in the statement. "In her formalized role, she's certainly been expressing those views," he said.