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In this article, the authors examine IRS rules carrying the force of law that were issued without any notice and comment procedures. They also review court opinions addressing those rules and the Administrative Procedure Act and explain how taxpayers may use the opinions in future disputes.

The IRS and Treasury have long claimed that subregulatory published guidance is exempt from notice and comment requirements established by the Administrative Procedure Act. Two recent cases, *Mann Construction* in the Sixth Circuit[1] and *CIC Services* on remand from the Supreme Court,[2] however, rejected this claim in the context of two IRS notices, paving the way for taxpayers to wage similar successful attacks.

The APA allows and invites the governed to participate in the federal administrative rulemaking process. Before a rule may take effect, a federal agency must notify the public of its intent to adopt the rule, provide the public with an opportunity to comment, consider any comments received, and address any significant comments before finalizing the rule.[3] The notice and comment process is designed to ensure that "an agency's decisions are both informed and responsive" and to eliminate "the dangers of arbitrariness and irrationality in the formulation of rules."[4]

Over the past decade, the APA has come into focus as a way to challenge IRS rules, and with the Supreme Court and Sixth Circuit's decisions in *CIC Services*[5] and *Mann Construction*, respectively, we anticipate this trend to accelerate. In this article, we explore why the IRS issues substantive notices without following APA notice and comment procedures; whether the IRS and practitioners should expect the reasoning of the *Mann Construction* case to apply beyond the transaction at issue; and what are some of the implications of the APA on existing IRS notices, revenue rulings, and revenue procedures.

This article focuses on IRS rules carrying the force of law that were issued without any notice and comment procedures. This article does not delve into the adequacy of IRS rules that are published under formal *Federal Register* notice and comment procedures.[6] We limit our discussion on where the line is drawn between a legislative rule, subject to the APA, and interpretive guidance, like that found in IRS publications, that is not subject

[1] *Mann Construction Inc. v. United States*, Docket No. 21-1500 (6th Cir. Mar. 3, 2022).

[2] *CIC Services v. Internal Revenue Service*, No. 3:17-cv-110 (E.D. Tenn. Mar. 21, 2022).

[3] *See* 5 U.S.C. section 553, which generally requires agencies to follow notice and comment procedures before issuing final rules.

[4] *American Business Association v. United States*, 627 F.2d 525 (D.C. Cir. 1980).

[5] *CIC Services v. Internal Revenue Service*, 141 S. Ct. 1582 (2021).

[6] *See Altera Corp. v. Commissioner*, 926 F.3d. 1061 (2019), *cert. denied* (finding adequate APA notice and comment). *Compare Oakbrook Land Holdings LLC v. Commissioner*, No. 20-2117 (6th Cir. Mar. 14, 2022), *with Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021).

to the APA.[7] Nor do we consider whether IRS administrative practices and litigating positions can be attacked as rules subject to the APA.[8] Lastly, we do not address other process limitations imposed on the IRS such as the Paperwork Reduction Act and the Privacy Act.

I. IRS Challenges

Congress has broad taxing authority, and Treasury has great flexibility in interpreting the tax laws.[9] The IRS has expansive authority to collect the revenue that sustains the government. The combined exercise of these authorities produces a regular stream of new challenges for taxpayers — challenges to understand the substance of new laws and regulations and challenges to understand the procedural steps required to comply with the laws.

Congress is typically only too willing to set out its legislative purposes in broad strokes, leaving it to Treasury and the IRS to define more precisely the desired outcomes across the full range of contexts. Given the general willingness of Congress to delegate the details, the IRS often finds itself under pressure to quickly interpret and apply new provisions. Quick interpretations are required so that forms, instructions, and return processing software can be developed in time to meet a provision's effective date. Some of those decisions are mundane and administrative, while others can result in a taxpayer burden or obligation not specified by the underlying law. This latter type of decision does not often implicate the APA, but the recent uptick in APA-related challenges raises the potential for increased challenges to more forms of guidance.

For years the government, taxpayers, and advisers have debated how best to increase both the amount of formal guidance and the speed at which it is provided. Understandably, taxpayers and their advisers typically want to be able to rely on published guidance — regulations and rulings. At the same time, they want guidance delivered quickly. Not all guidance needs to be formal. In a policy statement, Treasury notes that "sound tax administration necessitates less formal guidance to efficiently advise the public about the meaning of the tax laws. . . . . Such guidance often provides taxpayers much-needed clarity and certainty concerning the legal interpretation that the IRS intends to apply, and taxpayers thus regularly request such guidance."[10]

Invoking APA notice and comment procedures does not make it easier to increase either the amount or the timeliness of guidance. In fact, the APA process can be expected to add to the time required to produce guidance. Recognizing this reality and the practical limits to Treasury and IRS bandwidth, some have urged the government to supplement the formal process with a more robust system of informal guidance, including FAQs. Recently the IRS announced a process by which some types of FAQs will be issued in a way that will increase taxpayer ability to rely on the guidance to avoid penalty exposure.

Increased APA challenges to existing IRS guidance comes at a difficult time for the agency. IRS resource and workload challenges have been well documented. Sustained budget reductions absorbed in the face of an expanding mission has left the IRS in a position in which the demands of its mission exceed its capabilities. This is exemplified by unprecedented return processing backlogs, huge taxpayer assistance inventories, and all-time low telephone service levels. The IRS struggles to rationalize its enforcement priorities — large corporate compliance, Bipartisan Budget Act partnerships, high-net-worth individuals, transfer pricing, etc. And every filing season seems to bring new legislation that requires quick implementation.

If ever there was a time when the IRS does not need any more balls in the air, it is now. As an example, the prospects of APA challenges to the collection of notices that comprise the reportable transaction regime could effectively dismantle an

[7] *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Ct. Cl. 1978) ("It is hornbook law that informal publications all the way up to Revenue Rulings are simply guides to taxpayers, and a taxpayer relies on them to his peril."); *Zimmerman v. Commissioner*, 71 T.C. 367, 371 (1991) ("The authoritative sources of Federal tax law are in the statutes, regulations, and judicial decisions, and not in such informal publications.").

[8] *See, e.g.*, *Petition in Alternative Therapies Group Inc. v. Commissioner*, T.C. Docket No. 266-22 (Jan. 7, 2022). We note, however, that the federal government, just like any litigant, can take positions supported by a reasonable basis in court.

[9] *E.g.*, IRC section 7805.

[10] Treasury, "Policy Statement on the Tax Regulatory Process" (Mar. 5, 2019).

important piece of an enforcement infrastructure that the IRS and others view as effectively addressing many of the most significant compliance risks.

There is no question that some disruption will occur if the government chooses or is required to expand the use of the APA across all its legislative rulemaking efforts. Despite short-term disruption, however, additional use of APA protocols could fundamentally improve the quality of guidance. To the extent a notice and comment process creates more transparency on important issues, the resulting guidance is apt to be better understood and accepted. Better understanding leads to more certainty, which promotes voluntary compliance. Increased voluntary compliance enables the government to expend its limited enforcement resources on truly significant compliance risks.

II. The Administrative Procedure Act

Under the APA, a court shall hold as unlawful and set aside a final agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law."[11] As a matter of long-standing policy and practice, however, the IRS and Treasury take the position that subregulatory published guidance is not subject to the APA's notice and comment procedures.[12] For years academics, most notably Kristin Hickman and Andy Grewal, puzzled over why tax practitioners (including those inside the government) generally paid little heed to the APA's procedural requirements.[13] The two most-often cited reasons, at least in a pre-enforcement context, were the standing and ripeness doctrines and the Anti-Injunction Act.

Standing and Ripeness

Courts will not hear a plaintiff unless and until the plaintiff has suffered a concrete and particularized harm that can be redressed.[14] That concept is captured in the standing and ripeness doctrines. Typically, taxpayers cannot establish standing based on anticipated tax consequences.[15] In general, a taxpayer must face real exposure to unfavorable tax assessments or collections before a court will hear that taxpayer-plaintiff. The role of the ripeness doctrine, as applied to judicial review of administrative action, is to "prevent the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[16]

The Anti-Injunction Act

The AIA prohibits suits that seek to "restrain [] the assessment or collection of any tax." An oversimplified summary of the AIA would say that federal litigation about taxes must always be channeled into Tax Court deficiency proceedings or refund litigation. And for the most part, that is how the statute worked for decades. For instance, in *Bob Jones University v. Simon*,[17] the Supreme Court held that a suit for an injunction to stop the IRS from revoking a university's tax-exempt status was barred by the AIA because any

[11] 5 U.S.C. section 706(2)(A), (D). Query whether Congress intended the APA's remedies to include nationwide or universal injunctions setting aside agency actions that violate the law. As Chief Judge Jeffrey S. Sutton notes in his concurring opinion in *Arizona v. Biden*, Case No. 22-3272 (6th Cir. 2022), "the question is whether Congress meant to upset the bedrock practice of case-by-case judgment with respect to the parties in each case or create a new and far-reaching power." Judge Sutton and others reason that nationwide injunctions encroach on the rules governing class actions and create practical issues by incentivizing forum shopping and short-circuiting decision-making benefits of different courts weighing in on questions.

[12] *Compare* CCDM (IRM) 32.1.2.3.3, *Chief Counsel Regulation Handbook* (implicitly acknowledging APA notice and comment procedures for legislative regulation projects) and Treasury policy statement, *supra* note 10, *with* CCDM (IRM) 32.2, *Chief Counsel Publication Handbook* (no reference to notice and comment procedures).

[13] *See* Andy Grewal, "Substance Over Form? Phantom Regulations and the Internal Revenue Code," 7 *Hous. Bus. & Tax L.J.* (2006); Kristin E. Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," 82 *Notre Dame L. Rev.* 1727 (2007); Hickman, "A Problem of Remedy: Responding to Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements," 76 *Geo. Wash. L. Rev.* 1153 (2008); Hickman and Mark Thomson, "Open Minds and Harmless Errors: Judicial Review of Postpromulgation Notice and Comment," 101 *Cornell L. Rev.* 261 (2016).

[14] *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016).

[15] *E.g., Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1975).

[16] *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967).

[17] 416 U.S. 725 (1974).

injunction would necessarily preclude the collection of taxes.

But three Supreme Court cases in recent years have shaken that traditional assumption. First, in *National Federation of Independent Business v. Sebelius*, the Obamacare case, the Court held that the Affordable Care Act's "shared responsibility payment" imposed by IRC section 5000g was a penalty, not a tax, for AIA purposes. The majority then held that that same payment was a tax for constitutional purposes. The *NFIB* case is one of those Supreme Court cases that has little bearing on everyday technical tax practice, but it certainly shook confidence in the power of the AIA to bar preemptive attacks on tax laws.

Next, in *Direct Marketing Association*,[18] the Court subjected the Tax Injunction Act to a close reading. The TIA is the federal statutory cousin to the AIA: It bars collateral or preemptive challenges to state tax laws. The Court held that Colorado's rules requiring retailers to file information returns were subject to pre-enforcement challenge, despite the TIA, because notice and reporting requirements are too attenuated from assessment and collection.

Most recently, in *CIC Services*,[19] the Supreme Court held that an IRS reporting requirement is not a tax, and a tax adviser is not barred under the AIA from challenging an IRS notice and associated penalty under the APA. In that case, a group of material advisers challenged the validity of Notice 2016-66, which identifies certain microcaptive insurance transactions as transactions of interest reportable on Forms 8886 and 8918. A transaction of interest is one that the IRS has identified as a potential tax avoidance transaction, usually in a notice. CIC Services argued that Notice 2016-66 was unlawfully issued without following notice and comment rulemaking and requested a declaratory judgment that the notice was invalid. The district court initially denied CIC Services' motion for lack of subject matter jurisdiction under the AIA. CIC Services appealed to the Sixth Circuit, and then to the Supreme Court, which ultimately ruled that the AIA did not preclude a pre-enforcement challenge of Notice 2016-66.

In reversing and remanding the Sixth Circuit's ruling, the Supreme Court sided with CIC Services for three reasons. First, the notice's affirmative reporting obligations inflicted costs separate and apart from the noncompliance penalty. Second, failure to comply with the reporting obligation does not automatically trigger the tax penalty — the penalty is imposed only after the IRS investigates, confirms there was a violation, and decides to impose the tax penalty. Accordingly, reporting requirements and any potential penalty assessment are too attenuated from each other. Third, the potential criminal penalty for nonreporting in compliance with the notice goes too far — regulated persons should not have to risk criminal sanctions as a cost of challenging an agency rule. After CIC Services won its case before the Supreme Court on procedural grounds, the case was remanded to the Eastern District of Tennessee to review the APA challenge on the merits; that is, whether Notice 2016-66 is invalid under the APA.

The Court's holding in *CIC Services* was a big win, and significant development, for taxpayers and material advisers. The Court scaled back its once-expansive reading of the AIA, and the *NFIB*, *Direct Marketing Association*, and *CIC Services* cases help provide taxpayers with a roadmap to challenging the government's reliance on the AIA to block pre-enforcement challenges to some IRS enforcement actions, especially challenges grounded in the APA.

Taxpayers also raise APA claims in response to enforcement efforts supported by IRS rules and regulations. In *Mann Construction*,[20] the Sixth Circuit concluded "the IRS's process for issuing Notice 2007-83 did not satisfy the notice-and-comment procedures for promulgating legislative rules under the APA," and therefore "we must set it aside." For the plaintiffs in *Mann Construction*, the setting aside of Notice 2007-83, which treated some trust arrangements using cash-value life insurance policies as listed transactions, meant that the taxpayer was entitled to refunds for listed transaction penalties it paid.

[18] *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015).

[19] 141 S. Ct. 1582 (2021).

[20] *Mann Construction*, No. 21-1500.

III. Taxpayers Press the Issue

What will be the effect on other taxpayers affected by IRS notices identifying reportable transactions or by other IRS guidance issued without notice and comment? The *CIC Services* case, on remand from the Supreme Court, gives us our first clue. Shortly after the Sixth Circuit's opinion invalidating Notice 2007-83 in *Mann Construction*, CIC Services and the government submitted briefs addressing the effect of that opinion on CIC Services' lawsuit. The government argued that the Sixth Circuit's conclusion that the failure to follow notice and comment rulemaking meant that Notice 2007-83 "must" be set aside was dicta and was not binding precedent as to Notice 2016-66. The government argued that because Mann Construction had abandoned its claim for declaratory relief, the issue of remedies was not an issue the Sixth Circuit had to decide. The government maintained that the district court should instead follow the D.C. Circuit's statement in *Allied Signal v. U.S. Nuclear Regulatory Commission*,[21] that "an inadequately supported rule . . . need not necessarily be vacated" and urged the court to permit a remand to the IRS to allow it to cure any potential deficiencies in Notice 2016-66.

The district court was not persuaded by the government's argument. The court held that the Sixth Circuit's APA analysis in *Mann Construction* was binding precedent and that the circuit court's reasoning applied with equal force to Notice 2016-66. Thus, the district court concluded it was appropriate to vacate Notice 2016-66 in its entirety, declining to limit the vacatur to only CIC Services. The court further ordered the IRS to return all documents and information it collected from all taxpayers and their material advisers in accordance with Notice 2016-66 — not just those from the plaintiff.

On the heels of *CIC Services* and *Mann Construction*, other suits against the IRS are already afoot. For example, real estate firm GBX Associates is challenging the validity of Notice 2017-10, which treats some syndicated conservation easement transactions as listed transactions.[22] In its complaint, GBX challenges the validity of Notice 2017-10 on the basis that the IRS did not comply with the APA's notice and comment procedures. Like the notices at issue in *CIC Services* and *Mann Construction*, the consequences of noncompliance with the notice include both civil penalties and criminal prosecution.

In *Liberty Global* a federal district court held that temporary regulations issued under section 245A were invalid because they were not promulgated in compliance with the APA's notice and comment procedures. The court rejected the government's good-cause argument that compliance with the APA's 30-day notice and comment period was "impracticable, unnecessary, or contrary to the public interest." In siding with the taxpayer, which cited *Mann Construction*, the court noted that the government had ample time to issue temporary regulations in a manner that would satisfy the APA's notice and comment requirements.[23]

It remains to be seen whether the government will further litigate *Mann Construction* or *CIC Services*. Both opinions clearly portend more challenges for the government in defending IRS notices and other guidance issued without notice and comment. Presumably the Sixth Circuit's reasoning behind invalidating Notice 2007-83 in *Mann Construction* would apply not just to Notice 2016-66 but to other notices treating transactions as listed or reportable transactions when the IRS failed to follow notice and comment procedures. If other courts follow the broad relief granted by the district court in *CIC Services*, the stakes will remain high for both the government and taxpayers.

IV. Reactions and Implications

In the context of regulations, the IRS and Treasury have been reacting to APA developments for years, taking great care to respond to comments. In 2019 Treasury issued a policy statement on the tax regulatory process

[21] 988 F.2d 146 (D.C. Cir. 1993).

[22] *GBX Associates LLC v. United States*, Docket No. 1:2022cv00401 (N.D. Ohio Mar. 11, 2022).

[23] *Liberty Global Inc. v. United States*, Docket No. 1:20-cv-03501 (D. Colo. Apr. 4, 2022).

that generally endorsed notice and comment procedures as a best practice if not required under the APA. That same policy statement tried to erect a firebreak between regulatory and subregulatory guidance. Treasury drew a distinction between the two: "Subregulatory guidance is not intended to affect taxpayer rights or obligations independent from underlying statutes or regulations. Unlike statutes and regulations, subregulatory guidance does not generally have the force and effect of law," and Treasury has said that it will no longer seek *Chevron* deference for this guidance.[24] As we have seen, however, the *Mann Construction* and *CIC Services* courts categorically rejected that distinction for IRS notices issued without notice and comment procedures.

Moreover, in some circumstances subregulatory guidance can constitute a final agency action that so deeply affects taxpayer rights that it becomes reviewable under the APA. For instance, in *Cohen* the IRS published a deeply flawed notice that created a bevy of procedural obstacles for taxpayers seeking refunds of an illegally collected excise tax. The D.C. Circuit held that those barriers went beyond mere statements of agency policy, and in practice was actually a final agency action that stood between taxpayers and their rights. [25] Likewise, Treasury regulations define revenue rulings and notices as rules and regulations for purposes of the accuracy-related penalty, and therefore taxpayers who ignore this subregulatory guidance are at risk of incurring accuracy-related penalties.[26] Scholars have long suggested that this formulation elevates this subregulatory guidance into legislative rules; under the rationale of *Mann Construction*, those scholars appear to be correct. In sum, at least some subregulatory guidance may be vulnerable to APA challenge.

It is a good thing for the IRS and Treasury to issue timely and detailed guidance. But as a former IRS chief counsel said: "A taxpayer and its counsel who are trying to win a case really don't care about policy and tax administration issues as long as they can find a winning argument, so a lot of APA and other creative arguments are being tested all the time."[27] More importantly, as the *Mann Construction* court noted, exceptions to the APA must come explicitly from Congress. Even noble goals and compelling policy reasons do not create extratextual exceptions to the APA's notice and comment requirement.

At this point, all notices regarding listed transactions and transactions of interest seem vulnerable. By design, none of these were issued using notice and comment. The government has yet to articulate a limiting principle in the reasoning of the *CIC Services* and *Mann Construction* opinions that would save these notices from their APA shortcomings. It is tempting to think that the IRS and Treasury could cure these vulnerabilities by running all existing listed transaction and transaction of interest notices through a notice and comment process to try to save them, at least in the future.[28] But that approach would require the IRS and Treasury to engage with the comments of many interested stakeholders, many of whom are highly motivated. The rulemaking process would need to be especially punctilious in its consideration of comments, since under the APA the agency cannot go through notice and comment as a mere formality in pursuit of a predetermined outcome. At this point — absent congressional action — one approach might be for the IRS to waive its claims to reportable transaction penalties in favor of other tools for encouraging voluntary compliance.[29] The IRS has developed a largely successful litigation record around its listed transactions. It could transform the 36 listed transactions into the "Dirty Three Dozen," pointing to judicial precedent as authority for its litigating positions rather than its listing notices,

[24] Treasury policy statement, *supra* note 10.

[25] *Cohen v. United States*, 578 F.3d 1, 11-12 (D.C. Cir 2009).

[26] Reg. section 1.6662-3(b)(2). *See* IRC section 6662(b)(1).

[27] Prepared Remarks of William J. Wilkins, IRS Chief Counsel, NYU 8th annual Tax Controversy Forum (June 24, 2016).

[28] Lee A. Sheppard, "What Is Arbitrary and Capricious?" *Tax Notes Federal*, Mar. 28, 2022, p. 1803.

[29] This waiver would probably have to follow APA notice and comment procedures. Refund claims for reportable transaction penalties paid by taxpayers and material advisers are a separate matter, and they could be substantial. *See generally* Caplin & Drysdale, "Obtaining Refunds of Section 6707A and Section 6707 Penalties Paid for Not Properly Reporting Listed Transactions or Transactions of Interest (Including Notice 2007-83 and Notice 2016-66)" (Mar. 22, 2022).

as the IRS does with its Dirty Dozen list of frivolous tax arguments.

Another untested area concerning subregulatory guidance is when the IRS attempts notice and comment through different channels than the APA requires. The APA's requirements are specific, treating all agency guidance equally. Under the APA, the notice of proposed rulemaking must be "published in the *Federal Register* unless persons subject thereto are named and either personally served or have actual notice in accordance with the law."[30] Notices, announcements, revenue procedures, and revenue rulings are generally published in the Internal Revenue Bulletin (and previously the Cumulative Bulletin), but generally are not cross-published to the *Federal Register*. Thus, there are instances in which the IRS has tried to follow the spirit of the notice and comment requirements for important subregulatory guidance projects,[31] but may still face technical APA challenges if the process completely sidestepped the *Federal Register*. Those sorts of challenges seem less likely to succeed, given the potential futility of requiring the IRS to repropose a long-standing rule that has been carefully considered and revised considering comments.

Often, as noted above, the IRS issues notices to offer quick interpretative guidance on new provisions enacted by Congress. The IRS and Treasury often "reg-ify" these notices after collecting feedback from affected stakeholders by issuing proposed and then final regulations. These sorts of notices do not raise the same type of force of law concerns as reportable transaction notices, mostly because taxpayers generally cannot be penalized for failing to follow proposed regulations, much less the preliminary notices that set out the IRS and Treasury's first tentative efforts on a regulation project.[32]

Another type of subregulatory guidance that seems fairly safe includes unilateral concessions and safe harbors set out by the IRS. Few taxpayers are likely to challenge this type of guidance.[33] For instance, ever since Congress enacted the predecessor of section 6323, the IRS refuses to assert the priority of the federal tax lien over purchase money mortgages in cases in which the notice of federal tax lien is recorded first.[34] This systemic concession by the IRS rests on the reasonable assumption that purchase money lenders would be less likely to lend to their customers — who are, after all, taxpayers — if a federal tax lien would automatically prime the mortgage. Further, the mortgaged property would not be the taxpayer's property but for the purchase money mortgage, so it makes sense for the IRS to step aside. Would anyone challenge this rule? And even if a disgruntled borrower wants to argue, for some reason, that an IRS lien takes priority over his mortgage lender, we query whether that borrower would have standing to make the argument.

V. Conclusion

As recent cases like *Mann Construction*, *CIC Services*, and *Liberty Global* show us, courts keep encouraging Treasury and the IRS to join the mainstream of administrative law principles. It is unclear how developments will evolve and to what extent other courts will follow suit. What is clear, however, is that momentum continues to build behind APA challenges, and the recent run of taxpayer wins suggests that the government's traditional defenses against these challenges are no longer tenable. We anticipate that more taxpayers will press APA claims, as is their right. The government has a lot of old guidance that

[30] 5 U.S.C. section 553(b).

[31] *E.g.*, Announcement 99-1, inviting comment on a revision of Rev. Proc. 65-17, on conforming a taxpayer's accounts to reflect a primary adjustment under section 482. The comments received and changes finally adopted were set out in Rev. Proc. 99-32.

[32] *See* reg. section 1.6662-3(b)(2) (excluding proposed regulations from the definition of rules and regulations). *See F.W. Woolworth Co. v. Commissioner*, 54 T.C. 1233, 1265-1266 (1970) (proposed regulations "carry no more weight than a position advanced on brief by the" IRS); and IRM 32.1.1.2.2 (Aug. 22, 2018).

[33] But some will. See, for instance, the litigation surrounding the validity of the generally taxpayer-favorable check-the-box entity rules. *Medical Practice Solutions LLC v. Commissioner*, 132 T.C. 125 (2009); *McNamee v. Treasury*, 488 F.3d 100 (2d Cir. 2007); *Littriello v. United States*, 484 F.3d 372 (6th Cir. 2007); *Kandi v. United States*, 97 AFTR 2d 721, 2006-1 USTC par. 50,231 (W.D. Wash. 2006), *aff'd*, 295 Fed. Appx. 873 (9th Cir. 2008); *Stearn and Co. LLC v. United States*, 499 F. Supp. 2d 899 (E.D. Mich. 2007).

[34] Rev. Rul. 68-57. The authority for the concession comes from a brief reference in the legislative history of the Federal Tax Lien Act of 1966, providing that "purchase money mortgages . . . are protected whenever they arise."

may be vulnerable. The situation is not sustainable from a tax policy perspective.[35] ■

[35] The foregoing information is not intended to be "written advice concerning one or more Federal tax matters" subject to the requirements of section 10.37(a)(2) of Treasury Department Circular 230. The information contained herein is of a general nature and based on authorities that are subject to change. Applicability of the information to specific situations should be determined through consultation with your tax adviser. This article represents the views of the author(s) only, and does not necessarily represent the views or professional advice of KPMG LLP.