

Regs, notices, announcements: What's the difference and why it's important

In our world—let's generously call it tax world—there are regulations, or regs, (temporary, proposed and final) and then there's everything else (notices, announcements, revenue procedures and revenue rulings). For us, all of these guidance documents were sort of interchangeable. You can rely on them, unless the IRS says otherwise. And reliance is key in tax world and in payroll, too.

Apparently, that may not be the case. The IRS unexpectedly shed light on its rulemaking processes. And this may influence how and when they come out with guidance on which you can rely.

Temporary regs

You can always rely on final regs; that's the point. Unless the IRS says otherwise, you can't rely on proposed regulations.

And then there are temporary regulations.

The IRS can do things most other federal agencies can't. It can, for example, issue temporary regs without soliciting comments from the public. And those temporary regs have the same force as final regs.

Take the cafeteria plan regs. The IRS first proposed temporary regs for cafeteria plans in 1984. Those regs never become final and in 2007 it re-proposed them again. It's been 12 years and we're still waiting.

The IRS isn't swearing off temporary regs. But it does say that when temporary regs are warranted, it will tell you exactly why it couldn't go through the normal notice and comment procedure.

Subregulatory guidance

The IRS publishes notices, announcements, revenue procedures and revenue rulings every week in its Internal Revenue Bulletin. Since they're not regulations, they're called subregulatory guidance. It's a feast for those who like picking through tax minutiae.

So, can you rely on these documents? We always thought the answer was Yes. But the real answer appears to be Maybe.

IRS: Although subregulatory guidance doesn't have the force of law, the IRS won't argue against the position it takes in a notice or revenue ruling. **BIG BUT:** The IRS also says that the effect of subsequent legislation, court decisions, rulings and procedures must be considered.

Well not arguing against a position is at least something.

Regs or something else

Regulations take time; publishing in the IRB is a relative snap. So it's tempting to just skip the regulatory process altogether and go right to issuing a notice. That happened when the Tax Cuts and Jobs Act wiped out corporate tax deductions for the cost of employer-provided parking.

The IRS issued Notice 2018-99, which explained how the deduction disallowance worked. Within the notice, it also said that it would propose regulations.

Well, the first corporate tax filing season has come and gone for the most part and there are no regs.

The IRS now says that if it issues a notice that says it's going to publish proposed regs, and it doesn't within 18 months, you can rely on the notice until proposed regs are published.

The stickier issue is what would happen if regulations were proposed to become effective retroactively and they took a different position than the notice.

No one has the answer to that one.