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## IRS Issues Guidance on Deference for Subregulatory Guidance

The IRS issued Chief Counsel Notice 2019-006 (<https://www.irs.gov/pub/irs-ccdm/cc-2019-006.pdf>), which sets forth the level of deference it will ask the courts to give to subregulatory guidance. Subregulatory guidance is guidance published in the Internal Revenue Bulletin (i.e., revenue rulings, revenue procedures, notices and announcements). The Chief Counsel Notice provides that subregulatory guidance should not be used to modify existing legislative rules or create new legislative rules. Further, the IRS will not argue that subregulatory guidance has the force and effect of law. In litigation before the Tax Court, as a matter of policy, the IRS will not seek judicial deference under Auer or Chevron to interpretations set forth only in subregulatory guidance. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* ([https://scholar.google.com/scholar\\_case?case=14437597860792759765&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=14437597860792759765&hl=en&as_sdt=6&as_vis=1&oi=scholar)), the Supreme Court set out a two-step analysis for a court to apply in reviewing an agency's construction of a statute that it administers:

- a. if the intent of Congress is clear, the IRS and the courts must give effect to the unambiguously expressed intent of Congress;
- b. if the statute is silent or ambiguous as to a specific issue, the question for a court is whether the agency's answer is based on a permissible construction of the statute. An agency's regulations are given controlling weight unless they are "arbitrary, capricious, and manifestly contrary to the statute."

Such interpretation, regardless of the formality of the procedures used to formulate it, is "controlling unless 'plainly erroneous or inconsistent with the regulation,'" according to *Auer v. Robbins* ([https://scholar.google.com/scholar\\_case?case=10703230932343258283&hl=en&as\\_sdt=6&as\\_vis=1&oi=scholar](https://scholar.google.com/scholar_case?case=10703230932343258283&hl=en&as_sdt=6&as_vis=1&oi=scholar)).

## IRS Finalizes Safe Harbor for Treating Rental Real Estate 199A Trade or Business

The IRS issued Revenue Procedure 2019-38, 2019-42 IRB (<https://www.irs.gov/pub/irs-drop/rp-19-38.pdf>) and accompanying News Release (IR 2019-158 (<https://www.irs.gov/newsroom/irs-finalizes-safe-harbor-to-allow-rental-real-estate-to-qualify-as-a-business-for-qualified-business-income-deduction>)) relating to a safe harbor under which a rental real estate enterprise will be treated as a trade or business solely for the purposes of the Section 199A qualified business income deduction. (Section references are to the Internal Revenue Code of 1986, as amended.)

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