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Taxpayers Already Seeking to Hold Treasury and IRS to Policy Statement

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On March 5, 2019, the US Department of Treasury (Treasury) issued a [policy statement](#) on the tax regulatory process. We previously wrote an article on the policy statement, which can be accessed [here](#). In our article, we noted the disclaimer language in the policy statement that “is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or inequity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.” We further noted that this same limiting language can be found in Executive Orders issued by the President of the United States, and that courts have generally rejected attempts to rely on such orders containing this language, although it might be possible to analogize the positions in the policy statement to the Internal Revenue Service’s (IRS) statements in CC-2003-014, which instructs IRS employees not to take positions contrary to IRS published guidance.

Taxpayers are already seeking to hold Treasury and the IRS to statements in the policy statement. On March 12, 2019, the taxpayer in *CIC Services LLC v. Internal Revenue Service*, Case No. 18-5019, filed a notice of supplemental authority with the US Court of Appeals for the Sixth Circuit arguing that Notice 2016-66 is a legislative rule that should have been created through notice-and-comment rulemaking and the failure to engage in this process requires that “Notice 2016-66 must be enjoined; it fails [Treasury’s and the IRS’s] own rulemaking standards.”

In its March 19, 2019, response, the government filed a response countering the taxpayers’ position. That response states that “[t]he policy statement expressly denies creating any judicial rights or cause of action.” In addition to asserting that the taxpayer’s argument was irrelevant under the procedural posture of the case, the government further asserted that the Notice was part of a congressionally-sanctioned procedure and that the Internal Revenue Code, not the Notice, imposed the requirements set forth in the Notice.

Practice Point: It remains to be seen whether the Sixth Circuit will address the taxpayers’ argument. The case, which involves a pre-enforcement challenge to the validity of Notice 2016-66, was dismissed by the district court on the ground that the Anti-Injunction Act (AIA) barred the lawsuit because the taxpayers were improperly seeking to retain the IRS’s ability to assess and collect taxes. If the Sixth Circuit agrees with the District Court, it likely will not need to address the taxpayers’ argument on whether Treasury and the IRS can be held to statements made in the policy statement. We will continue to follow this case and provide any developments in this area. For our prior coverage on recent developments involving the AIA, see [here](#) and [here](#).

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