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The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation

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Courts typically accord some level of deference to agency interpretations of statutes. Should that change for a "fighting" regulation that an agency has issued during the course of related litigation? The Treasury Department has done that many times, as highlighted by the 2011 U.S. Supreme Court decision

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in Mayo Foundation for Medical Education and Research v. United States *and a series of recent courts of appeals cases that led to a grant of certiorari in* Home Concrete & Supply, LLC v. United States.

To answer the question of how "fighting regs" and other litigation-oriented tax guidance should be treated, this Article first analyzes the law on judicial deference to tax authorities generally, making sense of the confused tax-specific historical approach. It then considers the context of rulings issued during pending litigation. The Article explains that, following the 2011 decision in Mayo*, deference under the famous* Chevron *case applies to all Treasury regulations issued in accordance with the requirements of the Administrative Procedure Act. It further argues that Revenue Rulings – formal guidance issued by the Internal Revenue Service – should receive deference under* Skidmore v. Swift & Co.*, in accordance with* United States v. Mead Corp. *and* Mayo*. The Article proposes that regulations and rulings issued during related litigation receive the applicable level of deference (*Chevron *or* Skidmore*) but that the deference inquiry take into account the retroactivity and surprise issues raised by the timing of the guidance.*

INTRODUCTION

Imagine a corporation that sells its own stock at a time when the applicable Treasury regulation provides that such sales are tax-free, yet the government claims in litigation that the sale should be taxable. The Treasury Department amends the regulation during the litigation to state that such sales are taxable, retroactive to the year of the taxpayer's transaction. That is essentially what happened in *Helvering v. R.J. Reynolds Tobacco Co.*,[1] and resembles the facts of a number of very recent cases.[2] Should courts defer to the regulation in such a context?

The question of how much deference courts should accord agency interpretations of statutes is an important issue that cuts across distinct areas of substantive law, including banking law,[3] communications law,[4] environmental

[1] 306 U.S. 110 (1939).

[2] *See infra* Part III.B (discussing recent courts of appeals cases and the grant of certiorari in Home Concrete & Supply, LLC v. United States, 132 S. Ct. 71 (2011)). Regulations issued during related litigation are sometimes called "fighting regulations." *See* Indianapolis Life Ins. Co. v. United States, 940 F. Supp. 1370, 1388 (S.D. Ind. 1996) ("Indianapolis Life characterizes [the regulation] as a 'fighting regulation' issued for the purpose of bolstering the government's litigation position.").

[3] *See, e.g.*, Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2715 (2009) (applying deference pursuant to Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), to the interpretation of the term "visitorial powers" in the National Bank Act by the Office of the Comptroller of the Currency (Comptroller)); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739 (1996) (applying *Chevron* deference to the Comptroller's interpretation of the word "interest" in the National Bank Act).

[4] *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967,

law,[5] labor law,[6] and tax law.[7] The level of judicial deference matters because greater deference increases the likelihood that an agency regulation or ruling will be upheld, which in turn provides agencies with greater discretion in their rulemaking.[8]

As is well known, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[9] is the leading judicial deference case, setting forth a famously deferential two-step test.[10] As the U.S. Supreme Court explained in a footnote in *Chevron*, "The court need not conclude that the agency construction was the

986 (2005) (applying *Chevron* deference to the Federal Communication Commission's (FCC's) classification of broadband cable modem service as "telecommunications service"); Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 591-92 (2010) (discussing deference to the FCC).

[5] *See, e.g.*, *Chevron U.S.A. Inc.*, 467 U.S. at 842-43 (addressing whether the Environmental Protection Agency's interpretation of a term in the Clean Air Act was permissible); Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the* Chevron *Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 768-69 (2008).

[6] *See, e.g.*, Christensen v. Harris Cnty., 529 U.S. 576, 586-88 (2000) (discussing the appropriate level of deference to give to a Department of Labor opinion letter on a provision of the Fair Labor Standards Act of 1938); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2079-85 (2009) (suggesting that review of National Labor Relations Board (NLRB) actions and judicial deference to the agency become more consistent with review of and deference to all federal agency decisions).

[7] *See, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711-15 (2011) (applying *Chevron* to a Treasury regulation issued under the general-authority provision of the Internal Revenue Code); Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1539 (2006) ("Settling the question of deference toward Treasury regulations carries significant implications for both tax jurisprudence and tax policy.").

[8] *See* David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 332 (2000) ("[O]ne effect of *Chevron*'s replacement of the variable judicial deference that had been applied to agencies' legislative rules with a blanket rule of deference to reasonable agency interpretations of ambiguous or silent statutes has been to grant agencies vastly greater discretion in resolving statutory ambiguity.").

[9] 467 U.S. 837 (1984).

[10] The Court stated,

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43 (footnotes omitted).

only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[11] Thus, *Chevron* extended substantial deference to agency guidance.

Despite its prominence, *Chevron* did not necessarily displace agency-specific precedents.[12] In tax cases, courts sometimes applied *National Muffler Dealers Ass'n v. United States*[13] – an earlier, tax-specific precedent – instead of *Chevron*. Which standard to apply in tax cases remained a source of confusion until 2011, when the Supreme Court decided *Mayo Foundation for Medical Education & Research v. United States*.[14] In that case, the Court emphasized the importance of consistency between tax and other areas of law, holding that *Chevron*, not *National Muffler*, applies to tax regulations.[15]

Adding to the confusion regarding judicial deference, decades prior to *Chevron*, the Supreme Court decided *Skidmore v. Swift & Co.*,[16] under which some agency rulings are merely persuasive.[17] In *Skidmore*, the Court explained that the respect accorded a ruling "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[18] *Skidmore* therefore provides significantly less deference than *Chevron* does.

The Supreme Court has applied *Skidmore* even in post-*Chevron* cases. For example, in its 2001 decision in *United States v. Mead Corp.*,[19] which involved a "tariff classification" issued by the United States Customs Service, the Supreme Court held that the guidance did not qualify for *Chevron* deference

[11] *Id.* at 843 n.11.

[12] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1107-08 (2008) ("In forty-nine post-*Chevron* cases, the Court invoked *Beth Israel* [*Hosp. v. NLRB*, 437 U.S. 483 (1978)] deference and refrained from mentioning *Chevron*, any of the post-*Chevron* cases, or the famous two-step formula. . . . [T]he application of *Beth Israel* deference is found not only in labor law . . . but also in immigration, treaty interpretation, sentencing, education, and regulated industries." (footnotes omitted)); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 524-25 (2011) (discussing some courts' application of *Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472 (1979), instead of the *Chevron*/*Skidmore* general administrative law framework).

[13] 440 U.S. 472 (1979).

[14] 131 S. Ct. 704 (2011).

[15] *Id.* at 712-13.

[16] 323 U.S. 134 (1944); *see also* Hasen, *supra* note 8, at 334 ("Prior to *Chevron*, *Skidmore v. Swift & Co.* and its progeny controlled federal courts' review of agency rulemaking.").

[17] *Skidmore*, 323 U.S. at 140.

[18] *Id.*

[19] 533 U.S. 218 (2001).

because it was not promulgated in the exercise of authority to make rules with the force of law.[20] In the absence of such a delegation, the *Mead* Court determined that the tariff classification was entitled to respect under *Skidmore* "according to its persuasiveness."[21] Although *Mead* was not a tax case, a number of courts and commentators have found its reasoning applicable to Revenue Rulings,[22] which are official published guidance providing the IRS's interpretation of how the tax law applies to a particular set of facts.[23]

One reason deference questions have traditionally been so complicated in tax cases is that the Internal Revenue Service (IRS) and the Department of the Treasury, of which the IRS is a part, issue several forms of guidance. Treasury regulations, which interpret the Internal Revenue Code (Code), are published in the Code of Federal Regulations and "are by far the most prominent and carry the greatest legal weight."[24] These regulations may be final, temporary, or proposed, and they may be issued under the general authority provision in Code section 7805 or under specific authority provided in a particular Code section.[25] The IRS also issues several forms of guidance, including the Revenue Rulings referred to above.

Not only has the level of judicial deference accorded to these types of guidance often been unclear, but the deference question in any particular case also can be complicated by the timing of the guidance. Although many cases

[20] *Id.* at 231-33.

[21] *Id.* at 221. The Court remanded for consideration of the amount of respect the ruling needed to be accorded. *See id.* at 227, 234-35. Not everyone sees *Chevron* and *Skidmore* as distinct standards. The view that they are similar standards is often associated with Supreme Court Justice Breyer. *See, e.g.*, Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1248 (2007) ("Justice Breyer has long adopted the view that *Chevron* and *Skidmor*e are functionally similar, with *Chevron*'s emphasis on delegation representing merely another factor for a reviewing court to evaluate in deciding whether to defer to an administrative interpretation."); Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1138 (2001) (arguing that in his dissent in *Christensen v. Harris County*, 529 U.S. 576 (2000), Justice Breyer "hints, and implicitly endorses, that *Skidmore* can be understood within the architecture of *Chevron* deference, not as an alternative to *Chevron* deference"); Kathryn A. Watts, *Adapting to Administrative Law's* Erie *Doctrine*, 101 NW. U. L. REV. 997, 1007 n.56 (2007) ("Justice Breyer appears to view *Chevron* as a special type of *Skidmore* deference.").

[22] *See infra* text accompanying notes 137-142.

[23] *See* Treas. Reg. § 601.601(d)(2)(i)(a) (2010) ("A 'Revenue Ruling' is an official interpretation by the Service that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned."); *see also* Rev. Proc. 89-14, 1989-1 C.B. 814 § 3.01 (providing a similar definition).

[24] Hickman, *supra* note 7, at 1538.

[25] *See infra* text accompanying notes 70-71.

involve a disagreement about how longstanding guidance applies to the taxpayer's situation, the government has the unique opportunity to issue guidance during a pending controversy.

While it is never easy to determine motivation, particularly that of an entity such as the IRS or the Treasury Department, the facts of a particular case in litigation may suggest that the case prompted the guidance. Moreover, regardless of the government's motivation, the timing of guidance may raise questions of retroactivity with respect to a completed transaction and/or surprise the taxpayer late in litigation. Should courts consider these factors in connection with the deference inquiry?

This Article addresses that question. In order to develop a framework for the analysis, the Article examines the state of the law on deference in tax cases. It then considers whether the deference accorded to a Treasury regulation or Revenue Ruling should be reduced if the guidance was a "fighting" regulation or ruling – one issued during the controversy between the IRS and the taxpayer.

Part I of the Article reviews the development of deference law applicable to tax cases, focusing on where deference precedents in tax cases deviated from general administrative law precedents. In that regard, Part I considers the administrative law distinction between two main types of rulemaking – legislative and interpretative – and discusses how that distinction has been mapped onto tax rulemaking, including Treasury regulations.

Next, Part II of the Article considers what level of deference should apply to Treasury regulations and Revenue Rulings as a general matter. After examining the state of current law, it argues that the generally accepted approach of applying *Chevron* to Treasury regulations and *Skidmore* to Revenue Rulings makes sense. It further argues that it would be unproductive to adopt Mitchell Gans's proposal[26] to provide Treasury regulations deference under *Skidmore* and no deference at all to Revenue Rulings.[27]

In Part III, the Article sets up a typology of advocacy-oriented rulings and examines the history and state of the law on the treatment of regulations and Revenue Rulings issued during litigation. This Part then proposes that the timing of the rule in relation to the litigation and the potential unfairness of applying it to that litigation be taken into account under *Chevron* or *Skidmore*, whichever is applicable. The Article concludes that it is under these authorities that courts should consider timing and retroactivity issues. This approach has the advantage of benefitting from existing jurisprudence and of treating tax

[26] Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 792-95 (2002).

[27] In a pre-*Mead* article, Professor Linda Galler also argued that no deference should be accorded Revenue Rulings. *See* Linda Galler, *Emerging Standards for Judicial Review of IRS Revenue Rulings*, 72 B.U. L. REV. 841, 891 (1992). The Gans proposal is discussed *infra* at text accompanying notes 148-152.

cases as much like other cases as possible, as the Supreme Court counseled in *Mayo*.

I. THE CONFUSED HISTORY OF DEFERENCE TO TAX GUIDANCE

For years, the case law was murky regarding exactly how much deference to give Treasury regulations. Part of the confusion arose because, as discussed below, administrative law recognizes two categories of rules – legislative and interpretative – that receive different levels of deference, and it was unclear for a long time how those categories were defined with respect to tax regulations. This Part discusses deference standards for regulations generally and then for tax regulations in particular. In so doing, it considers the historical development of the distinction between legislative and interpretative regulations.

A. *The Legislative/Interpretative Distinction Generally*

Under current law, the Administrative Procedure Act of 1946 (APA)[28] is the principal source of the legislative/interpretative distinction.[29] It generally requires agencies engaging in "informal" rulemaking[30] to give the public notice and an opportunity to comment on proposed rules,[31] but it excepts from

[28] Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

[29] There are additional reasons the distinction matters: (1) "an agency has the power to issue binding legislative rules only if and to the extent Congress has authorized it to do so," and (2) "a legislative rule can impose distinct obligations on members of the public in addition to those imposed by statute, as long as the rule is within the scope of rulemaking authority conferred on the agency by statute." 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6:3, at 234 (3d ed. 1994).

[30] Professor David Franklin explains,

> The first [rulemaking] technique [under the APA], so-called "formal" rulemaking, involves onerous trial-type hearings and is rarely required unless a specific statute calls for rules to be "made on the record after opportunity for an agency hearing." Far more common is the second technique, variously known as "informal," "notice-and-comment," or "section 553" rulemaking.

David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 282 (2010) (footnote omitted) (quoting 5 U.S.C. §§ 553(c), 556, 557).

[31] The statute provides,

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 553(b) (2006).

the notice-and-comment requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."[32]

Rules that are subject to the notice-and-comment requirement are not given a name in the APA. They are, however, typically referred to as "legislative rules"[33] because they have essentially the force of a statute.[34] The APA thus refers to "rules" and "rule making," not regulations. Regulations are one type of "rule" in that they are a form of agency guidance.[35]

The interpretative/legislative distinction predates the APA.[36] In the years leading up to the enactment of the APA, commentators understood that some regulations were issued under authority granted to the agency to make rules with the force of law, while others were not. For example, the Attorney General's Report on Administrative Procedure, published in 1941, stated, "In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so."[37] Professor Kenneth Davis explained, "A legislative rule is the product of an exercise of delegated legislative power to make law through rules. An interpretative rule is any rule an agency issues without exercising delegated legislative power to make law through rules."[38]

In a pre-APA article, Stanley Surrey, then Assistant Legislative Counsel at the Treasury Department,[39] argued that interpretative regulations generally

[32] *Id.* § 553(b)(A). There is also a "good cause" exception. *Id.* § 553(b)(B).

[33] *See* Hickman, *supra* note 7, at 1543 n.23 ("The APA itself does not use the legislative term to describe rules subject to the notice and comment requirements. However, explanations of APA provisions and both pre- and post-APA literature and jurisprudence use the term in distinguishing such rules from interpretative rules.").

[34] *See* 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7:8-7:9, at 36, 46-47 (2d ed. 1979); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 476-77 (2002) ("Legislative rules are those that have the force and effect of law. From the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute.").

[35] *See* Treas. Reg. § 601.601(a)(1)-(2) (2010) ("The most important rules are issued as regulations and Treasury decisions . . . . Where required by 5 U.S.C. 553 [the Administrative Procedure Act] and in such other instances as may be desirable, the Commissioner publishes in the Federal Register general notice of proposed rules . . . .").

[36] *See* Hickman, *supra* note 7, at 1566-67.

[37] U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT ON ADMINISTRATIVE PROCEDURE 99 (1941), *available at* http://www.law.fsu.edu/library/admin/pdfdownload/apa1941.pdf.

[38] DAVIS, *supra* note 34, at § 7:8, at 36.

[39] Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 556 n.† (1940). Surrey later became Assistant Secretary of the Treasury (Tax Policy). *See* 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, 1796 (2007).

failed to warrant any deference at all: "The interpretative regulations considered in their own right enjoy, as respects taxpayers, no greater authority as to the meaning of the statutory language interpreted than is possessed by the discussions in the tax services or legal periodicals."[40] At that time, however, an important exception to this general rule was that, under the legislative "reenactment doctrine,"[41] reenactment of the statute interpreted by the regulation could result in the regulation obtaining force-of-law status[42] or, as Surrey phrased it, being "alchemized into a statutory command."[43] Surrey explained the legislative reenactment doctrine as follows: "[B]y virtue of such reenactment, 'under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law.'" [44]

The legislative reenactment doctrine was well-accepted at the time.[45] However, the doctrine reflected the fact that, until 1939, whenever Congress amended the tax laws, which it did fairly often, it recodified the entire statute, rather than simply leaving untouched sections that were not amended.[46] Erwin Griswold explained that "reenactment of the entire statute, including the unamended portions as well as those which have been changed[,] . . . was done simply as a matter of convenience."[47] In 1939, Congress stopped that practice when it adopted the Internal Revenue Code.[48]

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[40] Surrey, *supra* note 39, at 558; *see also* Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 261 (1940) ("The Treasury's construction of the statute, as set forth in interpretative regulations, is binding as a matter of law (it is too often *not* binding as a matter of practice) upon the Treasury's officers and agents; but it is not binding upon taxpayers."). With respect to judicial review of interpretative regulations, Alvord wrote,

> [W]here an interpretative regulation is involved, the ultimate question before the courts is: What does the statute mean? . . . If the statutory meaning is clear, neither legislative nor executive constructions to the contrary will have any force. However, if the statute is ambiguous, the regulations, as contemporaneous constructions of the statute by those charged with executing it, are and properly should be given weight by the courts, just as committee reports and other legislative interpretations will be consulted. Such aids to interpretation are often helpful, but never controlling.

Id. at 261-62 (footnotes omitted).

[41] Hickman, *supra* note 7, at 1570-71.

[42] Surrey, *supra* note 39, at 559; *see also* Hickman, *supra* note 7, at 1571 (footnote omitted) ("Although the common understanding was that general authority Treasury regulations were interpretative and nonbinding, the Court's adherence to a strong form of the reenactment doctrine through the 1930s meant that an entire generation of general authority regulations was given virtually automatic legislative characterization, and consequently the force and effect of law, on reenactment doctrine grounds.").

[43] Surrey, *supra* note 39, at 559.

[44] *Id.* (quoting Helvering v. R.J. Reynolds Tobacco, 306 U.S. 110, 115 (1939)).

[45] *Id.*; *see also* Hickman, *supra* note 7, at 1570-71.

[46] Hickman, *supra* note 7, at 1571.

[47] Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398,

Helvering v. R.J. Reynolds Tobacco Co.,[49] the case mentioned in the Introduction,[50] was decided in 1939 and was "probably the high-water mark"[51] of the legislative reenactment doctrine. Later the same year, the Supreme Court pulled back a bit in *Helvering v. Wilshire Oil Co.*,[52] stating that the doctrine "does not mean that a regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rule-making powers."[53] And, by 1941, the Court was calling the legislative reenactment doctrine "no more than an aid in statutory construction."[54]

At least in the 1940s, there was some argument that legislative regulations had to be enacted pursuant to a specific grant of power,[55] but that view may not

402 (1941).

[48] *See* Alvord, *supra* note 40, at 263 ("It should be noted that the adoption of the Internal Revenue Code by Congress at the last session has greatly narrowed the scope of legislative approval. Henceforth, amendments of the revenue laws will probably be made by amending specific sections of the Code, and the practice of reenacting the basic statute may be abandoned." (footnotes omitted)); Griswold, *supra* note 47, at 402. Stanley Surrey questioned the assumption underlying the legislative reenactment doctrine, noting that Congress often does not consider all of the sections it reenacts. Surrey, *supra* note 39, at 563.

[49] 306 U.S. 110 (1939).

[50] *See supra* text accompanying note 1. The *R.J. Reynolds* case is discussed further below. *See infra* text accompanying notes 185-194.

[51] Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 529 (1945).

[52] 308 U.S. 90 (1939).

[53] *Id.* at 100. The Court stated that the regulation in question was promulgated under a specific delegation of authority in Code section 23, rather than the general delegation in section 62. *See id.* at 102. Contemporaneous commentators expressed uncertainty as to whether the case involved a legislative regulation. Kenneth Culp Davis, *Administrative Rules – Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 956 (1948) ("[T]he Court seemingly assumed, perhaps erroneously, that the regulation was legislative . . . ."); Surrey, *supra* note 39, at 572 ("If Section 23(1) did extend to Section 114(b)(3), as the Court apparently decided, . . . it had before it a legislative regulation. . . . But if Section 23(1) did not extend to Section 114(b)(3) – and the Court seems not too sure of their relationship [–] . . . only an interpretative regulation is involved . . . ."). Another commentator "convincingly demonstrates that another section was the subject of interpretation and that the rule was interpretative rather than legislative." Davis, *supra*, at 956 n.185; *see also* Alvord, *supra* note 40, at 256-57.

[54] Helvering v. Reynolds, 313 U.S. 428, 432 (1941).

[55] *See* Hickman, *supra* note 7, at 1567 ("A general rulemaking grant that authorized binding regulations carrying the force and effect of law would be inconsistent with the nondelegation doctrine and thus constitutionally invalid."); *see also* Alvord, *supra* note 40, at 260-61; Surrey, *supra* note 39, at 557-58. Under the nondelegation doctrine, it was thought that Congress could not delegate its power. *See* United States v. Shreveport Grain

have been widely accepted. Citing two tax articles, Kenneth Davis stated in 1948, "[A]ssertions have been made that authority to make legislative rules must be specifically delegated . . . ."[56] He disagreed: "[B]oth legislative and interpretative rules may clearly rest upon statutory authority which is either express or implied."[57]

Thomas Merrill and Kathryn Watts have an interesting explanation for how courts and agencies at the time determined which rules were legislative ones. They argue that "from the second decade of the twentieth century through the enactment of the APA,"[58] there was a drafting convention that Congress followed:

> If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction – for example, a civil or criminal penalty; loss of a permit, license, or benefits; or other adverse legal consequences – then the grant conferred power to make rules with the force of law. Conversely, if Congress made no provision for

& Elevator Co., 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear."). "[T]he nondelegation doctrine died gradually, and the rise of legislative rules came during its dying period." DAVIS, *supra* note 34, § 7:9, at 44. Both of the 1940 articles cited by Hickman focused on Treasury regulations and argued that general authority regulations are necessarily interpretative. Alvord states,

> [S]ection [62] contains no Congressional standard or guide of any kind, nor does the income tax title of the Code anywhere set forth a standard for administrative action to which Section 62 might be related. If this section were to be construed as conferring on the Commissioner an unlimited power to make rules having the force and effect of law, it would be a plainly unconstitutional delegation of power. Accordingly, the courts have uniformly regarded the general Treasury regulations as merely stating the Treasury's construction of the statute.

Alvord, *supra* note 40, at 260 (footnotes omitted). Surrey states,

> While Section 62 of the Internal Revenue Code, like its counterpart in prior Revenue Acts, provides that "The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this chapter," this provision does not invest interpretative regulations with the force of law. The standard of "needful . . . for the enforcement" of a revenue act would hardly seem adequate in this regard to support a delegation of legislative power. The issuance of interpretative regulations would be equally valid without such a section and they gain nothing by it.

Surrey, *supra* note 39, at 557-58 (footnote omitted) (quoting I.R.C. § 62 (1939)).

[56] Davis, *supra* note 53, at 929 (citing Alvord, *supra* note 40, at 259); *see* Robert C. Brown, *Regulations, Reenactment, and the Revenue Acts*, 54 HARV. L. REV. 377, 384-85 (1941).

[57] Davis, *supra* note 53, at 929. Davis further explained that "[a]lthough the power to issue interpretative regulations is commonly inherent or implied, it may be expressly conferred," and he pointed to the general authority statute in the Internal Revenue Code as an example of such an express delegation of authority. *Id.* at 930.

[58] Merrill & Watts, *supra* note 34, at 472.

> sanctions for rule violations, the grant authorized only procedural or interpretive rules.[59]

Merrill and Watts acknowledge that "modern administrative lawyers are not aware of" the existence of this convention[60] and argue that that is because "during the time the convention was developed and followed by Congress, no appellate court rendered a decision that required it to determine whether Congress had conferred authority on an agency to make rules with the force of law."[61]

Modern appellate courts "have held that two conditions must be satisfied: 'Congress has delegated legislative power to the agency and . . . the agency intended to exercise that power in promulgating the rule.'"[62] However, "[i]n practice, the decisions that apply this two-part test focus almost exclusively on the second part – whether the agency intended to make a rule that has the force and effect of law. . . ."[63]

Thus, there is a distinction between legislative and interpretative rules that has both historical significance and continuing importance under the APA. The next section discusses how Treasury regulations have traditionally been characterized, as well as the current understanding of their status under the APA.

B. *Categorizing Treasury Regulations*

As indicated above, Treasury regulations come in three varieties: proposed, final, and temporary. Treasury regulations usually are issued in proposed form before being finalized.[64] This provides the government with an opportunity for

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[59] *Id.*; *cf.* Frederic P. Lee, *Legislative and Interpretive Regulations*, 29 GEO. L.J. 1, 3 (1940) ("If the statute provides that nonconformance to the regulation is to result in the imposition of legal sanctions specified by Congress, then the regulation is legislative."). Merrill and Watts argue,

> The implications of Lee's *Georgetown* article are considerable. His comments about how one identifies a grant of legislative, as opposed to interpretive, rulemaking authority exactly track the convention we have described. This understanding almost certainly reflects his extensive tenure as an attorney in the House and Senate Offices of Legislative Counsel – a tenure that coincided with the period during which Congress routinely observed the convention.

Merrill & Watts, *supra* note 34, at 522.

[60] Merrill & Watts, *supra* note 34, at 472.

[61] *Id.*

[62] *Id.* at 478 (quoting Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993)).

[63] *Id.*

[64] *See* Hickman, *supra* note 39, at 1748 ("With most of its regulatory efforts, Treasury at some point does publish an NPRM [Notice of Proposed Rulemaking] in the Federal Register, request and consider public comments, and issue its final regulations with a detailed explanatory preamble.").

feedback from affected parties before promulgating final regulations.[65] Sometimes Treasury will postpone finalizing regulations in response to comments.[66]

Some regulations are issued in temporary form. The Code currently provides that temporary regulations expire in three years[67] and that "any temporary regulation issued by the Secretary shall also be issued as a proposed regulation."[68] The IRS has instructed its attorneys to follow temporary regulations, even if the government has subsequently issued proposed regulations that would resolve an issue in the government's favor.[69]

Another distinction among Treasury regulations is whether they were issued under the authority of a specific Code section or under the general delegation of authority in Code section 7805, which provides,

> Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.[70]

Many regulations are issued under section 7805, but others are issued under the authority of specific provisions. For example, Code section 6103, on the confidentiality of tax returns and return information, provides, "The Secretary is authorized to prescribe such other regulations as are necessary to carry out

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[65] *See id.* Some regulations receive substantial comments. *See, e.g.*, *Reporting of Gross Proceeds Payments to Attorneys*, T.D. 9270, 2006-2 C.B. 237, at 238 (2006), *reprinted in Reporting of Gross Proceeds Payments to Attorneys*, TAX NOTES TODAY, July 12, 2006, LEXIS, 2006 TNT 134-6 ("The IRS received written comments on the 1999 proposed regulations, and held a public hearing on September 22, 1999. After considering those comments and the testimony at the public hearing, the IRS and the Treasury Department decided to amend and repropose regulations under sections 6041 and 6045(f). . . . A number of written comments were received in connection with the reproposed regulations. . . . In addition to written comments, a number of telephone calls were received with questions and comments regarding the reproposed regulations.").

[66] *See, e.g.*, I.R.S. Notice 2001-7, 2001-1 C.B. 374, *available at* http://www.irs.gov/pub/irs-drop/n-01-7.pdf ("Because the [Internal Revenue] Service is continuing to study the many comments regarding the NPRM under § 6045(f), the Service intends to further delay the effective date of § 1.6045-5.").

[67] I.R.C. § 7805(e)(2) (2006).

[68] *Id.* § 7805(e)(1). Code section 7805(e) is effective with respect to regulations issued after November 20, 1988. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, Title VI, § 6232(b), 102 Stat. 3342, 3735.

[69] I.R.S. Chief Counsel Notice CC-2003-014 (May 8, 2003), *available at* LEXIS, 2003 TNT 93-7 (providing as an example, "if the application of the proposed regulations would have an adverse effect on the taxpayer . . . , then the proposed regulations should not be applied in that situation").

[70] I.R.C. § 7805(a).

the provisions of this section."[71] Treasury usually, but not always, follows notice-and-comment procedures with respect to general-authority regulations.[72] It also sometimes cites both section 7805 and a specific Code section to support a single regulation.[73]

Prior to the APA, there was an understanding specific to tax law that general-authority regulations were interpretative and that specific-authority regulations were legislative. For example, in a 1940 article, Stanley Surrey considered the question of what level of deference courts should accord the regulation that was at issue in *R.J. Reynolds*,[74] which the Treasury had amended during the *R.J. Reynolds* litigation and sought to apply retroactively to tax the corporate taxpayer's sale of its own stock.[75] The regulation had been issued under the Code's general authority provision, which was then section 62.[76] Before addressing the deference question, Surrey drew the legislative/interpretative distinction:

> The preponderant majority of the Regulations are what may be termed "interpretative regulations". Such Regulations constitute the Department's interpretations of the Revenue Act and serve to guide the personnel of the Bureau and the taxpaying public in the application of the law. . . . [T]hese guides are of some assistance to taxpayers. But they still remain no more than the Department's construction of the Revenue Act.[77]

Surrey then considered the regulations in question, making a statutory argument that regulations promulgated under the general authority provision of the Code were necessarily interpretative. His argument generally was that "[r]egulations . . . specifically authorized must obviously be taken to possess

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[71] *Id.* § 6103(q). For a section 6103 regulation, see Treas. Reg. § 301.6103(k)(9)-1 (2011).

[72] *See* Hickman, *supra* note 39, at 1748-49 (finding that, from January 1, 2003, through December 31, 2005, the IRS omitted notice and comment with respect to 11 of 232 rulemaking projects, and in 84 others it issued temporary regulations at the same time as its notice of proposed rulemaking).

[73] *See id.* at 1752. In the regulations Professor Hickman studied,

> Treasury only cited specific as well as general authority in 1 of the 11 projects in which it skipped pre-promulgation notice and comment altogether. Yet Treasury relied upon specific as well as general rulemaking authority in 36.5% of projects and general authority only in 63.5% of projects in which it followed the traditional process of issuing the NPRM, taking comments, and then issuing final regulations.

Id.

[74] Helvering v. R.J. Reynolds, 306 U.S. 110 (1939).

[75] Surrey, *supra* note 39, at 556-57; *see also supra* text accompanying note 1. *R.J. Reynolds* is also discussed in further detail below. *See infra* text accompanying notes 185-194.

[76] *See* Surrey, *supra* note 39, at 557.

[77] *Id.* at 557.

different attributes than those issued under Section 62 [the general authority provision], for otherwise the careful particularization of Congress in these other sections would be without meaning."[78] He argued that only the regulations issued under the authority of a specific section were "legislative regulations."[79]

Surrey was not alone in arguing that tax regulations issued under the general authority of section 62 were interpretative regulations. Another commentator, Ellsworth Alvord, also writing in 1940, argued that it would be unconstitutional for the general-authority provision, which "contains no Congressional standard or guide of any kind," to "confer[] on the Commissioner an unlimited power to make rules having the force and effect of law."[80]

In their 2002 article, Merrill and Watts argued that the general-authority/specific-authority distinction tax scholars drew is consistent with the original drafting convention, because initially Congress did not attach statutory sanctions to violations of regulations promulgated under the general-authority provision.[81] They also argued that the general/specific distinction by tax commentators reflected an imperfect understanding of the basis of the legislative/interpretative paradigm:

> Surrey had worked in the Treasury Department and was undoubtedly familiar with the received understanding that section 7805(a) authorizes only interpretive rules. He sought an explanation for this assumption that fit the facts of the tax world, and came up with the general/specific distinction. Since there was no judicial opinion or other written source that contradicted this explanation, and Surrey's arguments were at least superficially plausible, his explanation became the conventional wisdom of the tax world.[82]

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[78] *Id.* at 558; *see also* Alvord, *supra* note 40, at 257 ("Obviously, some difference was intended by Congress, or it would not have been necessary to grant a specific regulatory power in Section 23(1) in addition to the general power contained in Section 62. It is submitted that this difference is that Congress intended to confer a *legislative* power in Section 23(1), to prescribe the details of a reasonable depletion allowance, and an *interpretative* power in Section 62, to assist in the execution of the statute by administrative officials.").

[79] Surrey, *supra* note 39, at 558.

[80] Alvord, *supra* note 40, at 260.

[81] Merrill & Watts, *supra* note 34, at 571-73. For example, a 1940 article by Frederic Lee – who had been "an attorney in the House and Senate Offices of Legislative Counsel" – argued that legislative regulations were ones in which "the statute provides that nonconformance to the regulation is to result in the imposition of legal sanctions specified by Congress." *Id.* at 522. Lee stated that "where taxes are directed to be computed on the basis of such regulations," they are legislative. Lee, *supra* note 59, at 20.

[82] Merrill & Watts, *supra* note 34, at 575.

The categorization of specific-authority Treasury regulations as "legislative" and general-authority regulations as "interpretative" survived the APA. For example, Professor Davis stated in 1948,

> A leading example of interpretative regulations is the huge bulk of tax regulations issued by the Treasury Department, most of which now rest upon [the general delegation section] . . . of the Internal Revenue Code . . . . But many provisions of the tax regulations (one commentator counted 56 in the income tax law in 1940) are legislative rules, because they spring from grants of power to create new law.[83]

In two cases decided in the early 1980s, *Rowan Cos. v. United States*[84] and *United States v. Vogel Fertilizer Co.*,[85] even the Supreme Court adopted that approach.[86] After decades of silence on the issue, however, the Supreme Court rejected that distinction in its 2011 *Mayo* decision[87]:

> Since *Rowan* and *Vogel* were decided . . . the administrative landscape has changed significantly. We have held that *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." . . . Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific.[88]

The persistence of tax exceptionalism in this area for several decades is probably an example of the "silo effect" that can result from attorney specialization.[89] Ultimately, however, the Supreme Court aligned the approach

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[83] Davis, *supra* note 53, at 930 (footnotes omitted) (citing Alvord, *supra* note 40, at 258).

[84] 452 U.S. 247 (1981).

[85] 455 U.S. 16 (1982).

[86] Professors Merrill and Watts explain,

> [I]n *Rowan Cos. v. United States*, the Court noted that "the Commissioner interpreted Congress' definition [of the word 'wages'] only under his general authority to 'prescribe all needful rules.' 26 U.S.C. 7805(a)." Because the regulation was merely interpretive, the Court held that it deserved "less deference than a regulation issued under a specific grant of authority." Similarly, in *United States v. Vogel Fertilizer Co.*, the Court considered a regulation, issued by the Commissioner under section 7805(a), which interpreted the statutory term "brother-sister controlled group." The Court again observed that because the Commissioner had issued the regulation under his general rulemaking grant, the interpretation was entitled to "less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."

Merrill & Watts, *supra* note 34, at 573 (quoting *Vogel Fertilizer Co.*, 455 U.S. at 24 (1982); *Rowan Cos.*, 452 U.S. at 253) (footnotes omitted).

[87] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

[88] *Id.* at 713-14 (quoting United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

[89] *See* Levy & Glicksman, *supra* note 12, at 501 (referring to "a phrase commonly used in the literature concerning the operation of large organizations to describe the tendency of subdivisions within organizations to develop their own bureaucratic imperatives that create

to tax cases to administrative law's approach to other cases.[90] Moreover, the result in tax cases is not necessarily inconsistent with Merrill and Watts's analysis. Kristin Hickman has pointed out that if we were to follow the convention Merrill and Watts espouse, the result in tax cases today would likely be to find all Treasury regulations legislative because the Code imposes a penalty on "[n]egligence or disregard of rules or regulations"[91] without any distinction between types of regulations.[92]

II. WHAT LEVEL OF DEFERENCE DO TAX AUTHORITIES GENERALLY WARRANT?

A. *Treasury Regulations*

Until recently, the case law was unclear as to whether *Chevron*[93] applies in tax cases. In *Chevron*, as discussed above, the Supreme Court set forth a famously deferential two-step test.[94] Prior to deciding *Chevron*, however, the Court had applied a somewhat different standard in a tax-specific case, *National Muffler*,[95] and the Court continued citing *National Muffler* in post-*Chevron* cases.[96] The reason for this once again may be the perpetuation of

obstacles to information sharing and other forms of cooperation"); *see also* Eskridge & Baer, *supra* note 12, at 1108-09.

[90] *See infra* text accompanying notes 93-98.

[91] I.R.C. § 6662(a), (b)(1) (2006).

[92] Hickman, *supra* note 7, at 1604-05. Hickman remarks,

> It may or may not be fair to presume that Congress appreciated the potential consequences to judicial deference of using the "rules and regulations" terminology in the penalty provision. It is notable, however, that Congress used the same "rules and regulations" language in both I.R.C. § 6662 and I.R.C. § 7805(a); and Treasury's regulations interpreting § 6662 do not distinguish between specific authority and general authority Treasury regulations in prescribing § 6662's applicability.

Id. at 1605.

[93] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[94] *Id.* at 842-43; *see supra* note 10 and accompanying text.

[95] Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979). In *National Muffler*, the Court stated,

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.

Id. at 477.

[96] *See, e.g.*, United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 219 (2001);

specialized precedents, particularly in tax law.[97] However, the Supreme Court recently abandoned *National Muffler*, stating in *Mayo* that "[i]n the absence of . . . justification, we are not inclined to carve out an approach to administrative review good for tax law only."[98]

After *Chevron* but before *Mayo*, the Supreme Court added a layer of analysis in *United States v. Mead Corp.*[99] In *Mead*, the Court stated that *Chevron* applies

> when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.[100]

Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560-61 (1991).

This approach is not unique to tax cases. *See* Eskridge & Baer, *supra* note 12, at 1106 ("Prior to *Chevron*, the Court had articulated numerous agency-specific deference regimes that in form and substance foreshadowed the *Chevron* test. Invocation of these cases, which resemble and presage *Chevron*'s reasonability review of agency interpretations when statutes are ambiguous, has continued during the *Chevron* era."). Eskridge and Baer cite *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978), as an example. *See* Eskridge & Baer, *supra* note 12, at 1106-07.

[97] Professors Eskridge and Baer explain,

> [S]pecialized practices . . . prefer their particular deference precedents and continue to cite them, often leading the Court to follow suit. The best example of this phenomenon is tax (always a special case, concededly). There is a long-standing consensus among the tax bar that the Internal Revenue Code's general delegation of authority to the Internal Revenue Service (section 7805) is *not* a general lawmaking delegation, in contrast to the many particular delegations. Hence, the Court rarely applies *Chevron* to IRS interpretations. If a deference regime is applied, it is usually the pre-*Chevron* regime associated with *National Muffler Dealers v. United States.*

Eskridge & Baer, *supra* note 12, at 1108-09 (footnotes omitted).

[98] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011).

[99] 533 U.S. 218 (2001).

[100] *Id.* at 226-27. One scholar has argued that *Mead* has made a mess of "the question [of] when an agency is entitled to *Chevron* deference for procedures other than notice-and-comment rulemaking or formal adjudication." Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1445 (2005). Another scholar has argued that *Mead* actually did not change the Supreme Court's practice of when to apply *Chevron*:

> Even after *Mead*, the Supreme Court continues to apply *Chevron* deference only in contexts that fall within the scope of *Chevron*'s original consensus. Under the pretext of reconstructing Congress's intent, the Court has granted *Chevron* deference where agency decision-making processes satisfy five core factors: (1) congressionally delegated authority, (2) agency expertise, (3) political responsiveness and accountability, (4) deliberative rationality, and (5) national uniformity. Contrary to

This suggests that all tax regulations issued by the Treasury Department, whether under general or specific authority, are entitled to *Chevron* deference, at least if they were promulgated with notice and comment.[101] It is well accepted[102] that the Treasury Department has the power "to make rules carrying the force of law"[103] and that rules promulgated using the notice-and-comment procedure are "promulgated in the exercise of that authority."[104] *Mayo* confirmed that:

> conventional wisdom, none of these overlapping rationales can be properly considered redundant; since the Court decided *Mead*, it has consistently withheld *Chevron* deference when any one of these core rationales is not satisfied. Thus, the Supreme Court continues to honor *Chevron*'s consensus under the veil of *Mead*'s delegation fiction.

Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1275 (2008) (footnote omitted). *But see* Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 275 (2011) (stating that "[b]y treating constitutional justifications and policy considerations on an equal footing, this understanding forfeits any potential to explain how the factors that bear on this question should fit together in resolving it," and arguing that "the foundation for the *Chevron* doctrine is anchored in the separation of powers as manifested by the structure of the Constitution and Article III's assignment of the judicial powers").

Treasury regulations appear to satisfy Professor Criddle's five factors, given the express delegations in the Code to the Treasury, Treasury's expertise, the fact that it has no less accountability than other agencies, the deliberative process Treasury regulations go through, and the national uniformity of Treasury rulemaking. Professor Seidenfeld argued that his Article III-based "foundation for *Chevron* justifies factors akin to those used in *Mead* more than does the legislative intent foundation on which that case relied." Seidenfeld, *supra*, at 301. His analysis would reach different results from *Mead* in some cases. *Id.* at 302.

[101] *Cf.* Criddle, *supra* note 100, at 1299 ("Justice Stevens's singular achievement in *Chevron* was to construct a consensus in favor of flexible agency administration in contexts where agencies use notice-and-comment rulemaking procedures to interpret ambiguous statutory provisions.").

[102] *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1158-59 (2008) ("Congress, Treasury, and taxpayers all operate with the understanding that Treasury regulations, whether temporary or final, are legally binding on both taxpayers and the government.").

[103] *Mead*, 533 U.S. 218, 226-27 (2001). *Mead* further stated, "We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed." *Id.* at 229.

[104] *Id.* at 227; *see also id.* at 230 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. . . . Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." (citation omitted)).

> The Department issued the . . . rule pursuant to the explicit authorization to "prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code. We have found such "express congressional authorizations to engage in the process of rulemaking" to be "a very good indicator of delegation meriting *Chevron* treatment." . . . The Department issued the . . . rule only after notice-and-comment procedures, . . . again a consideration identified in our precedents as a "significant" sign that a rule merits *Chevron* deference.[105]

The *Mead* Court did recognize the possibility that a rule issued without notice and comment, at least where "no such administrative formality was required,"[106] could still be subject to *Chevron* deference[107] but did not find *Chevron* deference applicable to the Customs ruling at issue.[108] Thus, the statement in *Mead* was dicta, but *Mead* expressly did not overturn cases finding *Chevron* deference without notice and comment. In addition, the *Mead* Court stated, "The authorization for classification rulings, and Customs's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."[109]

Thus, it appears that, in cases involving informal rulemaking rather than formal rulemaking or formal adjudication, notice and comment and *Chevron* deference are largely, though not entirely, coterminous.[110] In fact, in the

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[105] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 714 (2011) (quoting I.R.C. § 7805(a) (2006)); United States v. Mead Corp., 533 U.S. 218, 229-231).

[106] *Mead*, 533 U.S. at 231.

[107] *See id.* at 230-31 ("[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded, *see, e.g.*, *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 . . . (1995). The fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*." (footnote omitted)).

[108] *See id.* at 231 ("No matter which angle we choose for viewing the Customs ruling letter in this case, it fails to qualify under *Chevron*.").

[109] *Id.*; *see also* Criddle, *supra* note 100, at 1305-06 ("Unlike the notice-and-comment procedures in *Chevron*, the Customs Service's decision-making procedures were not conducive to open public deliberation, lacked precedential authority, and did not require the Superintendent's contemporaneous approval.").

[110] *See* Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 HOUS. BUS. & TAX L.J. 248, 276-77 (2003) ("The Supreme Court . . . did note that 'the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation.' . . . But, when coupled with the emphasis the Court places on the notice-and-comment process, a strong argument can be made that the Court was referring only to 'an agency interpretation contained in a

passage from *Mayo* quoted above, the Supreme Court cited *Mead* for the proposition that "notice-and-comment procedures . . . [are] a consideration identified in our precedents as a 'significant' sign that a rule merits *Chevron* deference."[111]

Mayo involved a final regulation, so the Court did not face or determine the level of deference to be accorded temporary regulations. Temporary regulations are similar to final regulations, but they typically are issued without prior notice and comment.[112] Comments after temporary regulations have been promulgated may not be the same or have the same impact as comments on proposed regulations, because temporary regulations have already taken effect.[113]

In 2004, the ABA Task Force on Judicial Deference advocated treating temporary regulations the same as final regulations "provided that the promulgation of such regulations meets the good cause standards as specified in the Administrative Procedure Act for promulgating regulations without notice and comment."[114] The APA's "good cause" exception applies when the agency finds and states "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[115] Some scholars have argued that the Treasury over-relies on this exception.[116]

regulation' that also completes the notice-and-comment process." (quoting Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000)).

[111] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 714 (2011) (quoting *Mead*, 533 U.S. at 230-231).

[112] *See* Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 728 (2004) ("Temporary regulations, whether legislative or interpretive, are issued without notice and comment.").

[113] *See* Michael Asimow, *Public Participation in the Adoption of Temporary Regulations*, 44 TAX LAW 343, 366-67 (1991) ("Once an agency has decided on a definitive rule and the rule has gone into effect, the staff may be less willing to make substantial alterations in the rule (and retrain enforcement personnel) in response to comments that suggest drastic changes in the rule. . . . Indeed, a post-effective comment period is little more than a petition for modification of a rule – a right that all persons have whether the agency asks for post-effective comments or not." (footnote omitted)).

[114] Salem et al., *supra* note 112, at 719.

[115] 5 U.S.C. § 553(b)(B) (2006).

[116] *See* Asimow, *supra* note 113, at 348 (citing cases invalidating temporary rules promulgated under the "good cause" exception). "[M]any of the Treasury's claims under the good cause exception are unlikely to be sustained. Numerous judicial decisions, well supported by the legislative history, establish that the good cause provision is narrowly construed." *Id.*; *see* Hickman, *supra* note 39, at 1731 ("Treasury may on occasion have a reasonable basis for claiming good cause; but Treasury's reliance on the good cause exception is typically poorly justified and often misplaced in light of jurisprudential trends."). Professor Michael Asimow explains,

> Certainly some tax regulations meet the good cause test. For example, temporary regulations may be needed to prevent serious economic dislocations, forestall massive tax avoidance, or to carry out Congressional intent for immediate implementation. It is

Although, as a general matter, failing to follow the notice-and-comment procedures of the APA raises the possibility that a regulation will be invalidated,[117] the ABA Task Force on Judicial Deference contemplated the possibility that courts could find that notice and comment is not a requirement for temporary tax regulations.[118] Accordingly, the Task Force advocated applying *Skidmore* to temporary regulations in which the IRS cannot justify the absence of notice and comment, "since the deliberative process rises at least to the level of a revenue ruling."[119]

Of course, *Mayo* made clear that although notice and comment is "significant," it is not a prerequisite for *Chevron* deference. Recently, in *Beard v. Commissioner*,[120] the Court of Appeals for the Seventh Circuit stated in dicta that it would have applied *Chevron* deference to temporary regulations.[121] The court noted that the absence of notice and comment is not an absolute bar to the application of *Chevron*, although, instead of *Mayo*, it cited a 2002 Supreme Court case involving Social Security Administration regulations.[122] The issue of the deference to be accorded temporary regulations remains to be decided, but, under *Mayo*, and as recommended by the ABA Task Force on Judicial Deference, courts should be reluctant to apply *Chevron* to regulations that did not benefit from notice and comment or a similar process.[123]

B. *Revenue Rulings*

As mentioned above, the IRS issues official, published guidance in the form of Revenue Rulings.[124] Revenue Rulings are issued under different procedures than are Treasury Regulations. Most notably, they "typically are not presented

> unlikely, however, that the good cause exemption applies in the case of . . . numerous . . . situations in which the Treasury waited several years to adopt temporary regulations and made only generalized claims that temporary regulations were justified by a need for immediate guidance.

Asimow, *supra* note 113, at 349-50 (footnotes omitted).

[117] *See* Asimow, *supra* note 113, at 349 n.34 (citing cases invalidating temporary rules promulgated under the "good cause" exception).

[118] *See* Salem et al., *supra* note 112, at 742 (stating that, with regard to temporary regulations, "[i]f . . . this Report's position that all IRS regulations are legislative rules within the meaning of the APA is rejected, courts may have a difficult time enforcing the 'good cause' requirement of the APA").

[119] *Id.*

[120] 633 F.3d 616 (7th Cir. 2011), *petition for cert. pending*, No. 10-1553 (filed June 23, 2011).

[121] *Id.* at 623 ("[W]e need not reach this issue. However, we would have been inclined to grant the temporary regulation *Chevron* deference . . . .").

[122] *Id.* (citing Barnhart v. Walton, 535 U.S. 212, 222 (2002)).

[123] The questions presented to the Supreme Court in *United States v. Home Concrete & Supply, LLC* do not directly raise this issue, though the Supreme Court could address it. *See infra* note 284 and accompanying text.

[124] *See supra* notes 22-23 and accompanying text.

for any form of public comment."[125] Revenue Rulings provide the IRS's interpretation of how the tax law applies to a particular set of facts.[126] In its procedural regulations, the IRS provided the following context for Revenue Rulings:

> The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers.[127]

Taxpayers generally may rely on Revenue Rulings as guidance regarding the application of the tax law to "substantially the same" facts.[128]

As discussed below, the IRS not only has the authority under the Code to apply Revenue Rulings retroactively, but by statute, Revenue Rulings are retroactive unless the IRS specifies otherwise.[129] The IRS has explained, however, that it generally will not apply Revenue Rulings retroactively where to do so would be harmful to taxpayers: "When revenue rulings revoke or modify rulings previously published in the Bulletin, the authority of section 7805(b) ordinarily is invoked to provide that the *new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers*."[130]

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[125] *U.S. Federal Tax Research*, Tax Mgmt. Portfolio (BNA) No. 100, at A-27 (2005) [hereinafter BNA Tax Mgmt. Portfolio]; *see also* Kornman & Assocs. v. United States, 527 F.3d 443, 453 (5th Cir. 2008) ("The Government acknowledges that revenue rulings are not promulgated pursuant to the notice-and-comment procedures of the Administrative Procedures [sic] Act."); John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the* Chevron *Era*, 64 GEO. WASH. L. REV. 35, 79 (1995) ("The IRS does not ordinarily employ notice-and-comment procedures in the publication of Revenue Rulings, although occasionally it requests comments on proposed Revenue Rulings." (footnotes omitted)).

[126] *See* Treas. Reg. § 601.601(d)(2)(i)(a) (2010); Rev. Proc. 89-14, 1989-1 C.B. 814 § 3.01.

[127] Treas. Reg. § 601.601(d)(2)(iii).

[128] *Id.* § 601.601(d)(2)(v)(e).

[129] *See* I.R.C. § 7805(b)(7) (2006). The IRS has described this authority as follows:

> Section 7805(b) provides that the Secretary of the Treasury may prescribe the extent to which any ruling is to be applied without retroactive effect. That authority has been delegated to the Commissioner and has been redelegated to the Associate Chief Counsel (Technical), the Associate Chief Counsel (International), and the Assistant Commissioner (Employee Plans and Exempt Organizations) and to each of their deputies. The exercise of this authority requires an affirmative action.

Rev. Proc. 89-14, 1989-1 C.B. 814 § 7.01(3).

[130] Rev. Proc. 89-14, 1989-1 C.B. 814 § 7.01(3) (emphasis added).

How much deference courts accord Revenue Rulings is not entirely clear.[131] The Department of Justice had argued in appellate litigation that Revenue Rulings should receive *Chevron* deference, but it has abandoned that view after *Mayo*.[132] By contrast, the Tax Court had stated that "[a]bsent exceptional circumstances, revenue rulings are viewed as 'merely an opinion of a lawyer in the agency', they are not considered to have the effect of law, and they are not binding on the Commissioner or the courts."[133] That statement predates both *Mead*[134] and an IRS notice that provides that the IRS will follow its own published guidance, including Revenue Rulings.[135] More recently, the Tax Court has applied *Skidmore* deference in light of *Mead*.[136]

Mead's approach does suggest that *Skidmore* deference is appropriate for Revenue Rulings:

> In *Mead*, the Supreme Court concluded that tariff classification rulings do not qualify for *Chevron*-style deference, but that *Skidmore* factors should be applied to determine if some lower level of deference is due. Although

[131] *See* BNA Tax Mgmt. Portfolio, *supra* note 125, No. 100, at A-28 ("It is not entirely clear . . . the extent to which revenue rulings may be persuasive authority; in other words, it is not clear whether and to what extent courts will defer to the Service's interpretation of the law as stated in a revenue ruling.").

[132] *See* Marie Sapirie, *DOJ Won't Argue for Chevron Deference for Revenue Rulings and Procedures, Official Says*, TAX NOTES TODAY, May 16, 2011, LEXIS, 2011 TNT 90-7 ("The Department of Justice will no longer argue for *Chevron* deference for revenue rulings and revenue procedures, said Gilbert Rothenberg, appellate section chief in the DOJ's Tax Division.").

[133] Estate of McLendon v. Comm'r, 72 T.C.M. (CCH) 42, 45 (1996) (quoting Stubbs, Overbeck & Assocs. v. United States, 445 F.2d 1142, 1146-47 (5th Cir. 1971)).

[134] *Mead* was decided in 2001. *See* United States v. Mead Corp., 533 U.S. 218, 218 (2001). Professor Ellen Aprill explained, "*Mead*'s invocation of *Skidmore* for tariff rulings . . . seems to undermine the Tax Court's attitude toward revenue rulings, and *Mead* has in fact begun to influence the Tax Court's attitude toward revenue rulings." Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2109 (2005).

[135] *See* I.R.S. Chief Counsel Notice CC-2003-014 (May 8, 2003), *available at* LEXIS, 2003 TNT 93-7 (stating that, in Tax Court and in "defense or suit letters sent to the Department of Justice . . . [,] Chief Counsel attorneys may not argue contrary to final guidance," including Revenue Rulings). The Chief Counsel Notice further states, "Chief Counsel attorneys may not rely on case law to take a position that is less favorable to the taxpayer in a particular case than the position set forth in published guidance." *Id.* (underline omitted).

[136] *See* Taproot Admin. Servs. v. Comm'r, 133 T.C. 202, 208-09 (2009) (stating that "[w]e are not bound by revenue rulings" and that *Skidmore* deference is the appropriate standard); PSB Holdings, Inc. v. Comm'r, 129 T.C. 131, 144 (2007) (discussing *Mead* and stating, "We conclude that we must evaluate the revenue ruling at hand under the 'power to persuade' standard set forth in *Skidmore*."); Bogue v. Comm'r, 102 T.C.M. (CCH) 41 (2011) ("We are not bound by revenue rulings, and we evaluate them based on the 'power to persuade' standard articulated by the Supreme Court in Skidmore v. Swift & Co. . . .").

> the case involved tariff classification rulings, the Court defined the issue before it more generically: "to consider the limits of *Chevron* deference owed to administrative practice in applying a statute." In addition, tariff classification rulings are in many respects analogous to Revenue Rulings. Accordingly, the Court's analytical framework may apply in determining the level of deference, if any, that revenue rulings deserve.[137]

In line with this approach, the Court of Appeals for the Ninth Circuit sensibly stated, "*Mead* involved a Customs Service tariff ruling, which is closely akin to an IRS revenue ruling. Given that the two types of agency rulings are analogous, we are required to apply *Mead*'s standard of review to an IRS revenue ruling."[138] *Mayo* reinforces that approach because it applied *Mead* in the tax context.[139]

Commentators generally support the application of *Skidmore* to Revenue Rulings.[140] In 2004, the *ABA Section of Taxation Report of the Task Force on Judicial Deference* advocated applying *Skidmore* to Revenue Rulings, in light of *Mead*.[141] Professor Kristin Hickman explained, "Since the Court's decision in *Mead*, most courts and commentators have assumed or concluded that *Skidmore* provides the appropriate evaluative standard for revenue rulings and, to a lesser extent, other . . . guidance as well, although not everyone agrees."[142]

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[137] BNA Tax Mgmt. Portfolio, *supra* note 125, No. 100, at A-29 (footnotes omitted) (quoting United States v. Mead Corp., 533 U.S. 218, 226 (2001)).

[138] Omohundro v. United States, 300 F.3d 1065, 1068 (9th Cir. 2002) (per curiam). Similarly, the Sixth Circuit cited *Mead* and *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000), in applying *Skidmore* deference to a Revenue Ruling. *See* Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 180-81 (6th Cir. 2003).

[139] Patrick J. Smith, *Life After* Mayo*: Silver Linings*, 131 TAX NOTES 1251, 1260 n.62 (2011).

[140] *See, e.g.*, *id.* ("[T]he *Mead* test leads to the result that revenue rulings and procedures do not receive *Chevron* deference. Those forms of guidance are therefore evaluated under the *Skidmore* test instead."); *see also* Aprill, *supra* note 134, at 2108-18, 2123 ("[A] consensus is emerging that revenue rulings are entitled to *Skidmore* deference . . . ."); John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 89 (2003) ("*Mead* teaches that '*Chevron* left *Skidmore* intact and applicable where statutory circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked . . . .' Although penalties attach for careless, reckless or intentional disregard of a revenue ruling, the Treasury, in promulgating revenue rulings, does not invoke its authority to make rules with the force of law. . . . Revenue rulings, therefore, should not be considered candidates for *Chevron* deference." (footnotes omitted)); Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference*, 7 FLA. TAX REV. 569, 595 (2006) ("Although the Supreme Court has not yet clarified whether *Chevron* or *Skidmore* applies to revenue rulings, it is very likely that the courts will apply *Skidmore* rather than *Chevron* in this context.").

[141] Salem et al., *supra* note 112, at 744.

[142] Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*,

Applying *Skidmore* to Revenue Rulings makes sense because, "[w]hen promulgating revenue rulings, the IRS does not invoke its authority to make rules with the force of law. Specifically, the IRS does not claim for revenue rulings 'the force and effect of Treasury Department regulations.'"[143] The relevant Revenue Procedure states,

> Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No published ruling or decision will be relied on, used, or cited, by any officer or employee of the Service as a precedent in the disposition of other cases.[144]

The IRS also acts consistently with this view in that it typically does not follow notice-and-comment procedures for Revenue Rulings.[145] Since Revenue Rulings appear to lack the force of law,[146] *Skidmore*, not *Chevron*, is the appropriate deference standard under *Mead*.[147]

C. *The Gans Proposal*

In a pre-*Mayo* article, Mitchell Gans proposed – partly because of "the government's direct interest in the outcome of tax litigation and the adversarial bias thereby engendered"[148] – that tax regulations should receive deference only under *Skidmore* and Revenue Rulings should receive no deference.[149] Gans argued that this approach is supported by the Tax Court's expertise: "[T]o the extent that deference is driven by the concern that courts might otherwise undermine the agencies' expertise-based decisions, deference cannot be justified in areas of law when specialized courts are in place."[150]

2009 MICH. ST. L. REV. 239, 260 (footnotes omitted). Hickman cites *Tualatin Valley Builders Supply, Inc. v. Comm'r*, 522 F.3d 937, 945-47 (9th Cir. 2008) (O'Scannlain, J., concurring), regarding an argument in favor of applying *Chevron* deference to a Revenue Procedure, and Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 43-44 (2006), as advocating *National Muffler* deference for Revenue Rulings, Revenue Procedures, and IRS Notices. *Id.* at 260 n.127.

[143] *Aeroquip-Vickers*, 347 F.3d at 181 (citing Rev. Proc. 89-14, 1989-1 C.B. 814).

[144] Rev. Proc. 89-14, 1989-1 C.B. 814.

[145] *See* BNA Tax Mgmt. Portfolio, *supra* note 125, No. 100, at A-27.

[146] *See* Franklin, *supra* note 30, at 324 ("Agencies may issue nonlegislative rules so long as they do not intend their rules to have legal effect, or so long as they do not bind themselves or others, or so long as they are merely interpreting existing legal obligations rather than creating new ones.").

[147] *See* Smith, *supra* note 139, at 1260-61.

[148] Gans, *supra* note 26, at 795.

[149] *Id.* at 792-95.

[150] *Id.* at 789.

Gans accompanies this observation with an argument for a single trial-level federal tax court, arguing that it would have the "salutary by-product" of reducing forum shopping.[151] He considers both the prospect of a specialized court of tax appeals and the approach of having the courts of appeals continue to hear all of the appeals in tax cases, arguing with respect to the latter,

> [L]imiting the scope of appellate review would be appropriate (otherwise, the disparity in expertise produced under current law would continue). *Such a limitation on the scope of review could be achieved by requiring that the lower court's decision receive deference on questions of law as well as fact, making reversal on legal questions appropriate only where the ruling is unreasonable*.[152]

Gans does not cite the unpopular and ill-fated[153] *Dobson v. Commissioner*[154] for this proposition,[155] but the standard is very similar. In *Dobson*, the Supreme Court stated,

> Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; *when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand*. . . . In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible.[156]

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[151] *See id.* at 789-90.

[152] *Id.* at 790 (emphasis added).

[153] *See* David F. Shores, *Deferential Review of Tax Court Decisions:* Dobson *Revisited*, 49 TAX LAW. 629, 631 (1996) ("History has not been kind to the *Dobson* decision. It was legislatively modified, or, depending on one's point of view, overruled in 1948 when Congress adopted the predecessor to section 7482(a), amending the statute to provide that Tax Court decisions shall be reviewed in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." (footnote omitted)).

[154] 320 U.S. 489 (1943).

[155] *See* Gans, *supra* note 26, at 790 n.303. Gans states,

> This limitation appears somewhat novel, but Congress adopted the limitation in the context of habeas corpus. *See* Williams v. Taylor, 529 U.S. 362, 399 (2000) (interpreting the new criminal statutes' requirement that relief only be granted if the decision invalidated "an unreasonable application of clearly established Federal law . . .").

Id.

[156] *Dobson*, 320 U.S. at 501-02 (emphasis added).

At the time of the *Dobson* decision, the Tax Court was still an administrative agency; it did not become an Article I court until 1969.[157] It nonetheless had only judicial functions. Contemporary critique of the *Dobson* rule reflected the difficulty in imposing "the administrative functions apparently contemplated by the *Dobson* decision" on a judicial body.[158]

Dobson not only was criticized by contemporary commentators,[159] but it also was unpopular with appellate courts, which generally preferred to retain a larger scope of review.[160] A return to the *Dobson* regime would also treat tax cases differently from other cases. As the Supreme Court recently observed, there is virtue in treating tax cases like other cases.[161] Doing so benefits from advancements in other areas of law, which is a more efficient approach to law development. As Paul Caron argued,

> A symbiotic relationship between tax and nontax law will deepen our tax understanding while providing a fertile area in which to test and refine nontax principles. . . . By replacing their narrow tax lens with a panoramic perspective of the legal landscape, the tax debate will be invigorated with nontax learning while the special talents of tax lawyers and professors will generate insights useful to their nontax counterparts.[162]

For all of these reasons, privileging the Tax Court's expertise and providing little or no deference to Treasury and IRS rules would be going too far. The IRS, not the Tax Court, is the expert agency. The Tax Court is a judicial body

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[157] *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730; *see also* I.R.C. § 7441 (2006).

[158] Eisenstein, *supra* note 51, at 541-42 ("[T]he Tax Court, like other judicial bodies, may make a bad condition worse. . . . It is completely saturated with the weaknesses and vagaries of the judicial process.").

[159] *See* Steve R. Johnson, *The Phoenix and the Perils of the Second Best: Why Heightened Appellate Deference to Tax Court Decisions Is Undesirable*, 77 OR. L. REV. 235, 249 (1998) ("*Dobson* quickly proved unpopular. Many circuit court of appeals decisions applied *Dobson*, but unenthusiastically, and leading commentators criticized it." (footnote omitted)); *see also* Eisenstein, *supra* note 51, at 540 ("The *Dobson* decision is essentially a reaction against the failure of administration by the Treasury, which could have narrowed the area of judicial intervention. Nevertheless, the *Dobson* case is not the answer to the Supreme Court's prayer.").

[160] Johnson, *supra* note 159, at 273.

[161] *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) ("In the absence of . . . justification, we are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999))).

[162] Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 590 (1994).

with only judicial functions.[163] Treasury regulations and published IRS rulings therefore should continue to receive deference from courts. The question is what level of deference is appropriate.

Moreover, consistency with other areas of law is beneficial both for tax law and for other areas of law that might learn from developments in the tax context. *Chevron* deference should therefore be the appropriate standard for legislative rules, and *Skidmore* for interpretative rules. Under *Mayo*, Treasury regulations that are valid under the APA should receive *Chevron* deference, regardless of whether they were promulgated under section 7805 or another Code provision.[164] Revenue Rulings, by contrast, should receive consideration under *Skidmore* in accordance with *Mead* and *Mayo*.[165]

III. "FIGHTING" TAX RULINGS

The discussion above focused on the general context of prospective guidance by the federal government. The government, however, is also a party to every federal tax case, whether it arises as a tax deficiency or tax refund matter.[166] Should the deference standard differ if the Treasury Department or IRS issues government-favorable guidance on an issue in litigation? This Part examines that question.

A. *A Typology of Advocacy-Oriented Rulings*

There are several ways in which the Treasury Department can use its rulings power to try to influence litigation. One way is that, after losing one or more

[163] As a court, the Tax Court lacks the policymaking power and presidential control agencies have. Presidential control is one justification for *Chevron* deference. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1764 (2007) ("Administrative law reflects the presidential control model by increasing judicial deference to agency decisions. The most prominent example is *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* In that case, the Court held that agencies are entitled to judicial deference for interpretations of ambiguous statutory provisions in large part because they are subject to presidential control . . . ." (footnote omitted)); *see also* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1727-28 (2011) ("[A]gencies are answerable to the elected President, giving them a heightened claim of discretionary authority when it comes to policymaking.").

[164] *See Mayo*, 131 S. Ct. at 714.

[165] *See supra* text accompanying notes 140-142.

[166] In the Tax Court, IRS attorneys represent the government, whereas in the Article III courts, Department of Justice Tax Division attorneys do so. *See* I.R.C. § 7452 (2006) ("The Secretary shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate in the same manner before the Tax Court as he has heretofore been represented in proceedings before such Court."); 28 U.S.C. § 516 (2006) ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

cases, it can try to position itself for a different outcome in the future by issuing a ruling in its favor.[167] In this way, Treasury may be able to "reverse" even the Supreme Court.[168] The Court stated in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[169]

The government may also attempt to use its rulemaking power to influence the outcome of pending litigation, which is the primary focus of this Part of the Article. One way the government can do that is by trying to convince the Supreme Court not to grant certiorari in a case, so as to leave a court of appeals decision undisturbed. The government took that approach in *William L. Rudkin Testamentary Trust v. Commissioner*[170]:

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[167] *See* Gans, *supra* note 26, at 791 ("[S]ubject to the proviso that the Treasury make any new regulation prospective, it remains free in many instances to rewrite the outcome of a decision it loses, as it did in the aftermath of defeat in *Simpson* [*v. United States*, 183 F.3d 812 (8th Cir. 1999)] and [*Estate of*] *Hubert* [*v. Comm'r*, 520 U.S. 93 (1997)].").

[168] *See id.* at 752-53 ("Although permitting an agency to replace the Court's interpretation of a statute with its own contrary interpretation is novel and inconsistent with the traditional role of the judiciary, *Chevron*'s preference for agency resolution of statutory ambiguity does lead in this direction." (footnote omitted)); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 188 (2004) (observing, prior to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), that "[i]t has been increasingly common for the Treasury to attempt to 'fix' a Supreme Court interpretation that, for various reasons, the Treasury finds problematic."). *But cf. Brand X*, 545 U.S. at 1003 (Stevens, J., concurring) (arguing that the *Brand X* principle "would not necessarily be applicable to a decision by this Court that would presumably remove any pre-existing ambiguity"); *id.* at 1017 (Scalia, J., dissenting) (arguing that agency adoption of a rule inconsistent with the Supreme Court's view on the best interpretation of a statute is "not only bizarre. It is probably unconstitutional."). In the oral argument in *Home Concrete*, Chief Justice Roberts pointed out, "We've never said an agency can change what we've said the law means." Transcript of Oral Argument at 55, United States v. Home Concrete & Supply, LLC, No. 11-139 (U.S. Jan. 17, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-139.pdf.

[169] *Brand X*, 545 U.S. at 982; *see also Mayo*, 131 S. Ct. at 712-13 ("[W]e have found it immaterial to our analysis that a 'regulation was prompted by litigation.' Indeed, in *United Dominion Industries, Inc.* v. *United States*, 532 U.S. 822, 838 . . . (2001), we expressly invited the Treasury Department to 'amend its regulations' if troubled by the consequences of our resolution of the case." (citation omitted)).

[170] 467 F.3d 149 (2d Cir. 2006), *aff'd sub nom.*, Knight v. Comm'r, 552 U.S. 181 (2008). One commentator described the government's approach in this case as follows: "[T]he Justice Department took the remarkable position that the Court should deny a taxpayer's petition for certiorari on the basis of a regulation that the Treasury Department had not yet promulgated or even proposed." Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of* National Cable, Swallows Holding, *and Other Developments*,

> [The] conflict [in the circuits] . . . does not require resolution by this Court because it is likely to be resolved by new regulations interpreting Section 67(e)(1). . . .
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> . . . .
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> A regulation interpreting Section 67(e)(1) would resolve the conflict among the courts of appeals without the need for this Court's intervention. . . . Under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), a court would be required to defer to the agency's reasonable interpretation.[171]

Despite the government's argument, the Court did grant certiorari in that case.[172] The Treasury also went ahead and issued the regulation.[173] The Supreme Court rejected the government's argument to follow the regulation[174]: "The Government did not advance this argument before the Court of Appeals. In fact, the notice of proposed rulemaking appears to be the first time the Government has ever taken this position, and we are the first Court to which the argument has been made in a brief."[175]

A more obvious way the Treasury or IRS can try to influence pending litigation – or even a case under audit – is by issuing a regulation or other rule addressing the substantive issue in litigation and claiming that the rule resolves the issue. That is what happened in the *R.J. Reynolds* case.[176] Cases such as *R.J. Reynolds* generally involve retroactivity, since the underlying transaction will have occurred years before the matter reached the court.[177]

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61 TAX LAW. 481, 482 (2008).

[171] Brief for the Respondent in Opposition at 5-6, Knight v. Comm'r, 552 U.S. 181 (2008) (No. 06-1286), 2007 WL 1520971 at *5-6, *available at* LEXIS, 2007 TNT 120-22.

[172] Knight v. Comm'r, 551 U.S. 1144 (2007).

[173] *Knight*, 552 U.S. at 187 n.3.

[174] *Id.* at 187-88 ("In applying the statute, the Court of Appeals below asked whether the cost at issue *could* have been incurred by an individual. This approach flies in the face of the statutory language." (footnote omitted)).

[175] *Id.* at 187 n.3 (citation omitted).

[176] Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110 (1939).

[177] Tax returns are typically due months after the close of the tax year in question. *See* I.R.C. § 6072(a) (2006) (stating that for individuals, "returns made on the basis of the calendar year shall be filed on or before the 15th day of April following the close of the calendar year"); *id.* § 6072(b) ("Returns of corporations under section 6012 made on the basis of the calendar year shall be filed on or before the 15th day of March following the close of the calendar year."). Audits generally occur after the tax year has closed. *See* Treas. Reg. § 601.103(b) (2010) ("After the returns are filed and processed in internal revenue service centers, some returns are selected for examination."). The government typically has three years from when the return was filed to notify the taxpayer of a deficiency. *See* I.R.C. § 6501(a). The IRS can issue other forms of guidance, such as Announcements, Notices, and Chief Counsel Advice, but those forms of guidance generally do not carry as much weight as regulations or Revenue Rulings. *See* Hickman, *supra* note

Until 1996, all Treasury regulations had a presumption of retroactivity; section 7805 read, "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."[178] The current version of the statute[179] provides that the Treasury generally has the power to make regulations retroactive essentially only to the date the Treasury first notified the public about the expected contents of the regulation,[180] unless the regulation is issued within eighteen months of the enactment of the statute.[181]

With respect to Revenue Rulings, current law provides, "The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect."[182] Thus, the statute retains a presumption of retroactivity for Revenue Rulings.

The government can also issue a procedural ruling that is not retroactive but nonetheless affects the outcome of the case by changing the playing field in some way. An example of this is an attempt to extend the statute of limitations, such as in the line of cases that includes *Home Concrete & Supply, LLC v. United States*,[183] discussed below,[184] although the issue in those cases also involves an element of retroactivity because of the content of that regulation's effective date provision.

B. *Courts' Treatments of Fighting Regulations and Rulings*

There are quite a number of litigated tax cases involving fighting regulations and rulings. The cases take differing approaches and adopt diverse rationales.

142, at 240-41; *cf.* I.R.C. 6110(b)(1)(A), (k)(3).

[178] *See* I.R.C. § 7805(b), *amended by* Pub. L. No. 104-168, § 1101, 110 Stat. 1452, 1468-69 (1996).

[179] I.R.C. § 7805(b). The effective date provision states that it applies "with respect to regulations which relate to statutory provisions enacted on or after the date of the enactment of this Act." *Id.* § 7805 note. Taxpayer's counsel in *United States v. Home Concrete & Supply* recently argued to the Supreme Court that "enacted" modifies "regulations." Transcript of Oral Argument at 51, United States v. Home Concrete & Supply, LLC, No. 11-139 (U.S. Jan. 17, 2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-139.pdf ("[W]e think, in context, it must modify 'regulation' because there's two types of IRS regulations: regulations relating to statutes and regulations relating to internal IRS practices."); *see also* Brief of American College of Tax Counsel as Amicus Curiae in Support of Respondents, United States v. Home Concrete & Supply, LLC, No. 11-139, at 13 (U.S. Dec. 22, 2011), *available at* LEXIS, 2011 TNT 248-17 (arguing that the language of the effective date provision is ambiguous as to whether "enacted" modifies "regulations" or "statutory provisions.").

[180] *See* I.R.C. § 7805(b)(1).

[181] *Id.* § 7805(b)(2).

[182] *Id.* § 7805(b)(8).

[183] 634 F.3d 249 (4th Cir. 2011), *cert. granted*, 132 S. Ct. 71 (2011).

[184] *See infra* Part III.B.2.

This section first discusses cases involving Treasury regulations – final and temporary – then cases involving Revenue Rulings.

1. Final Treasury Regulations

The "fighting regs" cases generally reflect a trend moving from concern about regulations promulgated during litigation to deference to them after *Chevron*. *Helvering v. R.J. Reynolds Tobacco Co.* is an early pre-*Chevron* decision in which the Court manifested serious discomfort with regulations promulgated during related litigation. In that case, the corporate taxpayer periodically purchased its own stock and resold it.[185] During litigation on other issues in the Board of Tax Appeals relating to the taxpayer's 1929 taxable year, the IRS filed an amended answer asserting that the taxpayer needed to report gain on the sale of the stock.[186] In 1929, the relevant Treasury regulation had provided in part, "'A corporation realizes no gain or loss from the purchase or sale of its own stock.'"[187] On May 2, 1934, however, while the taxpayer's case was pending before the Board of Tax Appeals,[188] the government amended the regulation to state, "'[W]here a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another.'"[189] The IRS relied on the amended regulation, which was promulgated under the general authority provision of the Code.[190] Stanley Surrey described this case as "suggest[ing] the dream-like details of a law school examination problem."[191]

In *R.J. Reynolds*, the Supreme Court held that the taxpayer's "tax liability for the year 1929 is to be determined in conformity to the regulation then in force."[192] The Court reasoned that Congress had implicitly sanctioned the regulations that existed at the time of the taxpayer's transaction through its reenactment of the statute defining gross income.[193] The Court did not decide whether the reenactment of that section in 1936 and 1938 – after the regulation

[185] Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110, 112 (1939).

[186] *Id.*

[187] *Id.* at 113 (quoting Treas. Reg. 74, Art. 66 (1928)).

[188] Surrey, *supra* note 39, at 556-57.

[189] *R.J. Reynolds*, 306 U.S. at 112-13 (quoting T.D. 4430, 13-1 C.B. 36 (1934)).

[190] *See id.* at 113 ("Section 62 directs the Commissioner, 'with the approval of the Secretary' of the Treasury, to 'prescribe and publish all needful rules and regulations for the enforcement of this title.'"); *cf.* Surrey, *supra* note 39, at 558 ("That the interpretative Regulations issued under Section 62 do not possess the vital current of legislative power is evidenced by the fact that in other selected sections of the various acts the Commissioner is given specific authority to issue rules and regulations . . . .").

[191] Surrey, *supra* note 39, at 556.

[192] *R.J. Reynolds*, 306 U.S. at 116.

[193] *Id.*

was amended – permitted the Treasury to apply the amended regulation, stating,

> [W]e have no occasion to decide this question since we are of opinion that the reenactment of the section, without more, does not amount to sanction of retroactive enforcement of the amendment, in the teeth of the former regulation which received Congressional approval, by the passage of successive Revenue Acts including that of 1928.[194]

Thus, the Court found that the legislative reenactment doctrine prohibited the Treasury from amending its regulation retroactively to impose tax liability on the taxpayer. The Court, however, minimized the importance of the doctrine shortly after the *R.J. Reynolds* decision.[195] Still, *R.J. Reynolds* reflects judicial discomfort with retroactive application of a regulation amended during litigation.[196]

More recently, but prior to *Chevron*, the Court of Appeals for the Second Circuit considered whether a regulation finalized in 1968 but retroactive to 1954 applied to a 1962 transaction.[197] Applying the then-current version of Code section 7805(b), the Second Circuit stated, "We recognize that subject to certain limitations the Commissioner is empowered to prescribe the extent, if any, to which his regulations shall be given retroactive effect."[198] The court stated that "the Commissioner may not take advantage of his power to promulgate retroactive regulations during the course of a litigation for the purpose of providing himself with a defense based on the presumption of validity accorded to such regulations."[199] It concluded, however, that even under the regulation that existed at the time of the taxpayer's transaction, the IRS had the better argument,[200] rendering its statement dictum.

The year before *Chevron* was decided, the Supreme Court mentioned in a footnote in the famous case of *Commissioner v. Tufts* that the applicable regulation had been promulgated while the case was on appeal but found that it "merely formalized the Commissioner's prior interpretation." [201] Accordingly,

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[194] *Id.* at 117.

[195] *See supra* text accompanying notes 51-54.

[196] The regulation at issue in *R.J. Reynolds* was amended partly in response to a court of appeals decision finding sales of a corporation's own shares taxable. Surrey, *supra* note 39, at 556 (citing Comm'r v. S.A. Woods Machine Co., 57 F.2d 635 (1st Cir. 1932)).

[197] *See* Chock Full O' Nuts Corp. v. United States, 453 F.2d 300 (2d Cir. 1971).

[198] *Id.* at 302.

[199] *Id.* at 303; *see also id.* at 302 n.6 ("[C]ourts have declined to give retroactive effect to regulations or rulings of the Commissioner . . . when litigation involving the area clarified by the regulation had already been begun, Commissioner of Internal Revenue v. Goodwyn Crockery Co., 315 F.2d 110, 113 (6th Cir. 1963) . . . .").

[200] *Id.*

[201] Comm'r v. Tufts, 461 U.S. 300, 310 n.9 (1983). The author thanks Deborah Geier for pointing this out.

the Court found that the IRS's approach "implement[ed] the statutory mandate in a reasonable manner" under *National Muffler*.[202]

The Court's approach in *Tufts* suggests that a regulation promulgated even late in litigation deserves the same deference it would otherwise receive, at least if it does not reflect an about-face, as in *R.J. Reynolds*. And more recent Supreme Court decisions have not contained even that caveat.

After *Chevron*, but before the recent decision in *Mayo*,[203] the leading case on the effect of issuing a regulation in response to litigation was a 1996 Supreme Court case, *Smiley v. Citibank*[204] – a non-tax case involving a regulation issued with notice and comment by the Comptroller of the Currency. The issue in *Smiley* was whether *Chevron* deference should apply.[205] The Court said that it did; that the regulation was issued 100 years after the statute was enacted and that the litigation disclosed the need for the regulation were irrelevant.[206] The plaintiff also argued that the regulation was inconsistent with previous positions taken by the Comptroller.[207] The Court disagreed on the facts but also stated,

> Sudden and unexplained change, . . . or change that does not take account of legitimate reliance on prior interpretation, . . . may be "arbitrary, capricious [or] an abuse of discretion," 5 U.S.C. § 706(2)(A). But if these pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.[208]

In *Mayo*, which involved a regulation promulgated after the government lost a previous case against the same party,[209] the Court cited *Smiley* with approval, stating in part, "[W]e have found it immaterial to our analysis that a 'regulation

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[202] *Id.* at 317.

[203] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 (2011).

[204] 517 U.S. 735 (1996).

[205] *See id.* at 740.

[206] *Id.* at 740-41; *see also* Barnhart v. Walton, 535 U.S. 212, 221 (2002) ("Walton also asks us to disregard the [Social Security] Agency's interpretation of its formal regulations on the ground that the Agency only recently enacted those regulations, perhaps in response to this litigation. We have previously rejected similar arguments." (citing Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 741 (1996))). In *Smiley*, the agency that had promulgated the regulation was not a party to the litigation. *See Smiley*, 517 U.S. at 737; *id.* at 740 (referencing "this and similar litigation in which the Comptroller has participated as *amicus curiae* on the side of the banks."). In *Barnhart*, however, the suit was against Jo Anne Barnhart, Commissioner of Social Security, the agency that had promulgated the regulation. *See Barnhart*, 535 U.S. at 212.

[207] *See Smiley*, 517 U.S. at 742.

[208] *Id.*

[209] Mayo Found. v. United States, 503 F. Supp. 2d 1164, 1167, 1167 n.1 (D. Minn. 2007), *rev'd*, 568 F.3d 675 (8th Cir. 2009), *aff'd*, 131 S. Ct. 704 (2011) (citing United States v. Mayo Found. for Med. Educ. & Research, 282 F. Supp. 2d 997 (D. Minn. 2003)).

was prompted by litigation.'"[210] Thus, the balance seems to have shifted after *Chevron* toward deferring to regulations even if they were issued during related litigation.

2. The Controversy over Temporary Regulations

In most cases in which a regulation benefits from *Chevron* deference, the agency will have followed the notice-and-comment procedures under the APA, as the agencies did in both *Smiley* and *Mayo*.[211] But the notice-and-comment process takes time. Treasury could issue *proposed* regulations, but they may not have the force of law[212] and thus should not benefit from *Chevron* deference.[213]

The Treasury has a way around this problem, however. It often issues temporary regulations simultaneously with proposed regulations. Temporary regulations generally have similar legal force to final regulations – until they expire.[214] Accordingly, by issuing temporary regulations, instead of a Revenue

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[210] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712 (2011) (quoting *Smiley*, 517 U.S. at 740).

[211] As discussed above in notes 99-111 and accompanying text, *Mead* stated,

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.

United States v. Mead Corp., 533 U.S. 218, 230 (2001) (footnote omitted) (citation omitted). *Mead* left open the possibility that a rule could have the force of law without notice and comment: "[A]s significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Id.* at 230-31 (citations omitted).

[212] *See* I.R.S. Chief Counsel Notice CC-2003-014 (May 8, 2003), *available at* LEXIS, 2003 TNT 93-7 ("Proposed regulations have no legal effect unless and until they are adopted."). In 1997, the Tax Court stated, "proposed regulations and revenue rulings are generally not afforded any more weight than that of a position advanced by the Commissioner on brief. That is especially true here, where respondent [the Commissioner] did not publish her position prior to this controversy." Gen. Dynamics Corp. & Subsidiaries v. Comm'r, 108 T.C. 107, 120-21 (1997) (citations omitted).

[213] *See* Tax & Accounting Software Corp. v. United States, 301 F.3d 1254, 1260 (10th Cir. 2002) (applying *Skidmore* deference under *Christensen v. Harris County*, 529 U.S. 576 (2000), because "the government's interpretation . . . had not been incorporated into a final regulation that had gone through the notice-and-comment rulemaking process"); *see also* Sapirie, *supra* note 132 ("Speaking at the Low-Income Taxpayer session of the American Bar Association Section of Taxation meeting in Washington on May 7, [Gilbert] Rothenberg said the [Department of Justice] was prepared to argue that temporary regulations are entitled to *Chevron* deference, but that it wouldn't argue that proposed regulations should also be accorded deference.").

[214] *See* Hickman, *supra* note 102, at 1158-59 ("Congress, Treasury, and taxpayers all

Ruling or another type of guidance, the temporary regulations might obtain *Chevron* deference.[215] There currently is no definitive authority on whether post-promulgation comment is sufficient, and if it is not, whether that would invalidate the final regulations, too.[216]

A recent line of cases that includes *Home Concrete & Supply, LLC v. United States*,[217] in which the Supreme Court has granted certiorari, illustrates the IRS strategy.[218] These cases arise out of the "Son of BOSS" tax shelter[219] and involve a procedural issue: the statute of limitations on assessment of tax.

Although the general limitations period is three years,[220] Code section 6501(e) provides for a special six-year limitation period where "the taxpayer omits from gross income an amount properly includible therein and . . . such amount is in excess of 25 percent of the amount of gross income stated in the return."[221] The rationale for this provision, as articulated by the Supreme Court in 1958 in *Colony, Inc. v. Commissioner*,[222] is that "where, because of a

operate with the understanding that Treasury regulations, whether temporary or final, are legally binding on both taxpayers and the government."); Salem et al., *supra* note 112, at 735 ("Unlike proposed regulations, temporary regulations are effective when they initially appear in the Federal Register, thus providing immediate and binding guidance to taxpayers.").

[215] *See* Hickman, *supra* note 7, at 1558. Hickman explains,

> *Robinson* [*v. Comm'r*, 119 T.C. 44, 66-67 (2002)] actually called into question the validity of certain temporary Treasury regulations promulgated pursuant to the general authority of I.R.C. § 7805(a) (2000) but without the benefit of public notice and comment. Whether temporary regulations so issued are generally entitled to *Chevron* deference remains an open question. Regardless, for purposes of its evaluation, the Tax Court in *Robinson* expressly equated temporary regulations with other interpretative regulations adopted pursuant to § 7805(a). *See Robinson*, 119 T.C. at 67.

Id. at 1558 n.98 (citations omitted).

[216] *See* Hickman, *supra* note 102, at 1191-92 (discussing an array of approaches to this issue in non-tax cases); *see also* Asimow, *supra* note 113, at 369 ("[F]inal rules that supersede temporary regulations are . . . jeopardized because courts might treat the notice and comment procedure provided after adoption of a temporary regulation as insufficient.").

[217] 634 F.3d 249 (4th Cir. 2011), *cert. granted*, 132 S. Ct. 71 (2011).

[218] *See id.* at 255-56.

[219] *See* Burks v. United States, 633 F.3d 347, 353-54 (5th Cir. 2011) ("Our holding is consistent with other courts' analysis regarding the applicability of *Colony* in the context of Son of BOSS tax shelters." (citing *Intermountain* and other cases)). *Burks* explained,

> In a Son of BOSS scheme, partners engage in various long and short sale transactions and transfer the resulting obligations to the partnership thereby improperly inflating the basis in the partnership assets. . . . When basis is overstated, "gross income is affected to the same degree as when a gross-receipt item of the same amount is completely omitted from a tax return."

Id. at 349 (citations omitted) (quoting Colony, Inc. v. Comm'r, 357 U.S. 28, 32 (1958)).

[220] I.R.C. § 6501(a) (West 2011).

[221] *Id.* § 6501(e)(1)(A).

[222] 357 U.S. 28 (1958).

taxpayer's omission to report some taxable item, the Commissioner is at a special disadvantage in detecting errors[,] . . . the return on its face provides no clue to the existence of the omitted item."[223] *Colony* involved an overstatement of tax basis in subdivided lots,[224] about which the Court stated, "[W]hen, as here, the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage."[225] Accordingly it found that the extended statutory period did not apply.[226]

The transaction in *Colony* predated section 6501(e),[227] but that section had been enacted before the case reached the Court. The Court noted in dicta, "[W]e observe that the conclusion we reach is in harmony with the unambiguous language of § 6501(e)(1)(A)."[228] Section 6501(e)(1)(A) states in part,

> In the case of a trade or business, the term 'gross income' means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services . . . .[229]

The IRS has interpreted that language to mean that in cases not involving the goods or services of a trade or business, "gross income is determined after reducing sales proceeds by basis,"[230] which results in an omission from gross income where a business sold non-trade or business property with an inflated basis.

Prior to promulgating new regulations, the IRS pressed that argument but lost in two courts of appeals, which applied *Colony*.[231] In *Salman Ranch Ltd. v. United States*, the Court of Appeals for the Federal Circuit reasoned in part,

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[223] *Id.* at 36.

[224] *Id.* at 30.

[225] *Id.* at 36. This interpretation of the statute is supported by the definition in section 6501 of the amount omitted; it provides an exception for disclosed items. *See* I.R.C. § 6501(e)(1)(B)(ii); *see also* Leandra Lederman & Stephen W. Mazza, *Limitation by Regulation: Heads the Service Wins, Tails Taxpayer Loses?*, 30 ABA SEC. OF TAX'N NEWSQUARTERLY 7, 7-8 (2010).

[226] *Colony*, 357 U.S. at 38.

[227] *See id.* at 37.

[228] *Id.*

[229] I.R.C. § 6501(e)(1)(A)(i) (West 2011).

[230] I.R.S. Chief Counsel Memo. 200537029 (Sept. 16, 2005), *available at* LEXIS, 2005 TNT 180-36.

[231] Salman Ranch Ltd. v. United States, 573 F.3d 1362, 1372 (Fed. Cir. 2009); Bakersfield Energy Partners v. Comm'r, 568 F.3d 767, 768 (9th Cir. 2009); *cf.* Beard v. Comm'r, 633 F.3d 616, 621-22 (7th Cir. 2011) (not applying *Colony* but stating, "[A]pplying standard rules of statutory construction to give equal weight to each term and avoid rendering parts of the language superfluous, we find that a plain reading of Section 6501(e)(1)(A) would include an inflation of basis as an omission of gross income in non-

> We acknowledge that Congress did not have before it *Colony*, a 1958 decision, when it enacted § 6501(e)(1)(A) in 1954. Nevertheless, the fact remains that *Colony* represents an interpretation of the very same language that is now found in § 6501(e)(1)(A), and in the years since *Colony*, Congress has not indicated that the Court's interpretation of the language of § 275(c) should not apply to § 6501(e)(1)(A).[232]

In *Bakersfield Energy Partners*, the Court of Appeals for the Ninth Circuit similarly concluded, "However sensible the IRS's argument may be that a taxpayer can 'omit . . . an amount' of gain by overstating its basis, this argument is foreclosed by *Colony*." [233] Thus, the Ninth Circuit found *Colony* binding precedent. [234] The court also stated, however, that, under the *Brand X* case, "[t]he IRS may have the authority to promulgate a reasonable reinterpretation of an ambiguous provision of the tax code, even if its interpretation runs contrary to the Supreme Court's 'opinion as to the best reading' of the provision." [235]

Perhaps accepting the Ninth Circuit's invitation to promulgate a new interpretation of section 6501(e), on September 24, 2009, the Treasury Department issued proposed and temporary regulations, maintaining the government's position both with respect to the general six-year period and with respect to partnership items,[236] which has an analogue to section 6501(e) in section 6229(c)(2).[237] The regulations provided in part that in the non-trade or

trade or business situations." (citations omitted)).

[232] *Salman Ranch*, 573 F.3d at 1373.

[233] *Bakersfield Energy Partners*, 568 F.3d at 778.

[234] *Id.* ("The IRS may have the authority to promulgate a reasonable reinterpretation of an ambiguous provision of the tax code, even if its interpretation runs contrary to the Supreme Court's 'opinion as to the best reading' of the provision. . . . We do not." (citations omitted) (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-83 (2005))).

[235] *Id.* (quoting *Brand X*, 545 U.S. at 982-83).

[236] Temp. Treas. Reg. § 301.6229(c)(2)-1T (Sept. 28, 2009); Temp. Treas. Reg. § 301.6501(e)-1T (Sept. 28, 2009); Prop. Treas. Reg. § 301.6229(c)(2)-1, 74 Fed. Reg. 49,354, 49,355 (Sept. 28, 2009); Prop. Treas. Reg. § 301.6501(e)-1, 74 Fed. Reg. 49,354, 49,355 (Sept. 28, 2009); T.D. 9511, 75 Fed. Reg. 78897-01 (Dec. 17, 2010) (to be codified at 26 C.F.R. Pt. 301) (enacting proposed regulations and removing temporary regulations); *see also* Mark Allison, *The New Battle in an Old War: Omissions from Gross Income*, 2010 TAX NOTES TODAY 45-4, 1227, 1239 (Mar. 9, 2010) ("[A]ccording to Treasury, the new regulations merely clarify the government's long-standing interpretation of section 6501(e)(1)(A)(i) – which Treasury believes was interpreted by the courts as ambiguous – and limit the holding in *Colony* to the trade or business context."); *IRS Publishes Proposed Regs on Definition of Omission from Gross Income*, 2009 TAX NOTES TODAY 184-11 (Sept. 25, 2009); *IRS Pubilshes [sic] Temporary Regs on Definition of Omission from Gross Income*, 2009 TAX NOTES TODAY 184-9 (Sept. 25, 2009).

[237] Section 6229(c) is not identical to section 6501(e), however. Section 6229(c) provides, "If any partnership omits from gross income an amount properly includible therein

business context, "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income."[238]

In *Intermountain Insurance Service of Vail, LLC v. Commissioner*,[239] the Tax Court had its first opportunity to consider the temporary regulations promulgated under section 6229. The Tax Court had previously found in that case, following its decision in *Bakersfield Energy Partners*, that a three-year period applied to inflated basis issues.[240] After the regulations were promulgated, the IRS moved for reconsideration of the *Intermountain* case,[241] which the court granted.[242]

Intermountain involved a partnership return filed on September 15, 2000 and a partnership administrative adjustment (FPAA) sent on September 14, 2006.[243] In its second opinion in the case, the Tax Court considered how to apply the regulations' effective date, which provides that they apply to "taxable years with respect to which the applicable period for assessing tax did not expire before September 24, 2009."[244] The IRS argued, "'The temporary regulations apply to petitioner's 1999 tax year, because the period of limitations under sections 6229(c)(2) and 6501(e)(1)(A), as interpretated [sic] in the regulations, remains open with respect to that year.'"[245] The IRS thus tried to use the regulations themselves to assert their applicability to a case in which the statute arguably would otherwise have expired.

The Tax Court called this "a notably convoluted interpretation of the effective/applicability date provisions" and rejected the IRS's argument.[246] It

and such amount is described in clause (i) or (ii) of section 6501(e)(1)(A), subsection (a) shall be applied by substituting '6 years' for '3 years'." I.R.C. § 6229(c)(2) (West 2011). It does not explicitly refer to section 6501(e)(1)(B), which provides special rules for determining gross income for purposes of section 6501(e)(1)(A). I.R.C. § 6501(e)(1)(B).

[238] Temp. Treas. Reg. § 301.6501(e)-1T; Temp. Treas. Reg. § 301.6229(c)(2)-1T.

[239] 134 T.C. 211 (2010) (reviewed by the court), *rev'd*, 2011 U.S. App. LEXIS 12476 (D.C. Cir. June 21, 2011).

[240] Bakersfield Energy Partners v. Comm'r, 128 T.C. 207, 215-16 (2007), *aff'd*, 568 F.3d 767 (9th Cir. 2009).

[241] *See Intermountain*, 134 T.C. at 211-212.

[242] The government's motion was late but the Tax Court granted it anyway. *Id.* at 215. In addition, "following the issuance of the regulations, Justice moved for the Federal Circuit to reconsider its decision in *Salman Ranch* based on the new guidance, confirming the obvious goal of the regulations. (The motion was denied, and the reconsideration period in *Bakersfield Energy* had already closed.)" Allison, *supra* note 236, at 1239.

[243] *Intermountain*, 134 T.C. at 212.

[244] Temp. Treas. Reg. § 301.6229(c)(2)-1T(a)(2)(b) (Sept. 28, 2009); *see also* Temp. Treas. Reg. § 301.6501(e)-1T(a)(2)(b) (Sept. 28, 2009).

[245] *Intermountain*, 134 T.C. at 219 (quoting Respondent's Brief in Support of Motion to Vacate Order and Decision at 6, Intermountain Ins. Serv. of Vail, LLC v. Comm'r, 134 T.C. 211 (2010) (No. 25868-06)).

[246] *Id.* at 218.

explained that to accept the IRS's argument, it would have to depart from its holding in *Bakersfield Energy Partners*, which had been affirmed by the Court of Appeals for the Ninth Circuit.[247] Thus, it refused to accord deference to the IRS's interpretation of the regulations:

> Ordinarily, an agency's interpretation of its own regulation is controlling unless it is "plainly erroneous or inconsistent with the regulation." Auer v. Robbins, 519 U.S. 452, 461 (1997) . . . . Here, however, the Court concludes that respondent's interpretation of the temporary regulations' effective/applicability date provisions is erroneous and inconsistent with the regulations. Specifically, we find the interpretation to be irreparably marred by circular, result-driven logic and the wishful notion that the temporary regulations should apply to this case because Intermountain was involved in what he believes was an abusive tax transaction.[248]

The court found instead that "[t]he plain meaning of the temporary regulations' effective/applicability date provisions indicates that the temporary regulations do not apply to this case because the applicable period of limitations expired before September 24, 2009."[249]

In *Intermountain*, the Tax Court majority also considered whether the regulations would be entitled to deference if they were applicable.[250] The court did not, however, determine what level of deference to apply. Instead, it applied *Brand X*, which precludes an agency from interpreting a statute differently from a prior court decision if the decision held "that its construction follows from the unambiguous terms of the statute."[251] According to the Tax Court, the Supreme Court's opinion in *Colony*, which found that the extended limitations period would only apply "'where a taxpayer actually omitted some income receipt or accrual in his computation of gross income, and not more generally to errors in that computation arising from other causes,'"[252] "'unambiguously foreclose[d] the agency's interpretation' of sections 6229(c)(2) and 6501(e)(1)(A) and displaces respondent's temporary regulations."[253]

Judges Halpern and Holmes concurred in the result, arguing that before considering the substantive validity of the regulations, they would "consider first the logically prior question of the procedural validity of the temporary regulations," and concluded that the taxpayer "has the better argument."[254] On

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[247] *Intermountain*, 134 T.C. at 218-19.

[248] *Id.* at 219 (footnote omitted).

[249] *Id.* at 220.

[250] *See id.*

[251] *Id.* at 221 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).

[252] *Id.* at 224 (quoting Colony, Inc. v. Comm'r, 357 U.S. 28, 33 (1958)).

[253] *Id.* (quoting *Brand X*, 545 U.S. at 983).

[254] *Id.* at 227 (Halpern, J., concurring).

that issue, the Halpern-Holmes concurrence explained, "Giving the public the opportunity to participate through notice and comment is important in giving regulations legitimacy. Giving the public a chance to comment only after making the regulations effective does not comply with the APA."[255]

On appeal, however, the Court of Appeals for the D.C. Circuit reversed the Tax Court's decision in *Intermountain*, deferring to the regulations under *Chevron*.[256] It gave no weight to the taxpayer's argument that the government had issued retroactive regulations during the course of the litigation, finding that fact irrelevant under *Smiley* and *Mayo*.[257] It also found that the regulations were validly promulgated under the APA, despite having been released simultaneously in proposed and temporary form.[258]

After the Tax Court's decision in *Intermountain*, several other courts of appeals faced the issue, starting with the Court of Appeals for the Seventh Circuit in *Beard v. Commissioner*.[259] In *Beard*, the court interpreted the plain language of the statute and found *Colony* inapplicable.[260] Because it did not apply *Colony*, it did not reach the issue of what deference to accord the temporary regulations.[261] In dicta, however, the court stated,

> [W]e would have been inclined to grant the temporary regulation *Chevron* deference . . . . We have previously given deference to interpretive Treasury regulations issued with notice-and-comment procedures, *see Kikalos v. Commissioner of Internal Revenue*, 190 F.3d 791, 795 (7th Cir. 1999); *Bankers Life and Casualty Co. v. United States*, 142 F.3d 973, 979-84 (7th Cir. 1998), and the Supreme Court has stated that the absence of notice-and-comment procedures is not dispositive to the finding of Chevron deference. *Barnhart v. Walton*, 535 U.S. 212, 222 . . . (2002).[262]

Thus, the Seventh Circuit would have applied *Chevron* deference to the temporary regulations, despite the lack of prior notice and comment and without citing *Mayo*, which was decided two weeks earlier.[263]

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[255] *Id.* at 246-47 (citations omitted). The concurrence also stated, "Since the majority has chosen to address the effective date of the temporary regulations and their substantive validity, we feel compelled to comment. We are persuaded by neither of the majority's analyses . . . ." *Id.* at 227.

[256] Intermountain Ins. Servs. of Vail, LLC v. Comm'r, 2011 U.S. App. LEXIS 12476, at *21 (D.C. Cir. June 21, 2011).

[257] *Id.* at *37-38.

[258] *Id.* at *47-48.

[259] 633 F.3d 616, 621-22 (7th Cir. 2011), *petition for cert. pending*, No. 10-1553 (filed June 23, 2011).

[260] *Id.* at 621.

[261] *Id.* at 623.

[262] *Id.*

[263] *Mayo* was decided on January 11, 2011. *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 704 (2011). *Beard* was decided on January 26, 2011. *See Beard*, 633 F.3d at 616.

Shortly after *Beard*, the Fourth Circuit addressed the issue, in *Home Concrete & Supply, LLC v. United States*.[264] Unlike the Seventh Circuit, the Fourth Circuit found that *Colony* controlled and foreclosed the argument that overstatement of basis constituted an omission from gross income.[265] The temporary regulation under section 6501 had become final while the appeal was pending,[266] but the Fourth Circuit found that it did not apply to the years in question because the assessment period would have ended, even under the six-year period of limitations, in 2006, prior to the effective date of the regulation.[267] The court rejected the IRS's argument, stated in the preamble to the final regulation, that the statute "remain[ed] open for 'all taxable years . . . that are the subject of any case pending before any court of competent jurisdiction . . . in which a decision had not become final (within the meaning of [26 U.S.C. §] 7481)'" as of September 24, 2009,[268] finding that argument inconsistent with the language of section 6501.[269] The Fourth Circuit also held, citing *Mayo*, that even if the regulation applied, *Chevron* deference is only owed when the statute it is interpreting is ambiguous.[270] According to the court, *Colony* had found the language of the statute unambiguous.[271]

The Court of Appeals for the Fifth Circuit similarly found *Colony* controlling, in *Burks v. United States*.[272] It therefore did not need to reach the issue of the level of deference due the temporary regulations in order to find for the taxpayer.[273] It also cited to the final regulations, rather than the temporary ones, because "any difference[s] between the Temporary and final Regulations are not material to our review."[274] The court found it unclear, however, whether the regulations would be entitled to *Chevron* deference under *Mayo*[275]:

> In *Mayo*, the Court held that the principles underlying its decision in *Chevron* "apply with full force in the tax context" and applied *Chevron* to treasury regulations issued pursuant to 26 U.S.C. § 7805(a). [*Mayo*, 131 S. Ct.] at 707. Significantly, in *Mayo* the Supreme Court was not faced with a situation where, during the pendency of the suit, the treasury

[264] 634 F.3d 249 (4th Cir. 2011), *cert. granted*, 132 S. Ct. 71 (2011).

[265] *Id.* at 251.

[266] *Id.* at 255.

[267] *Id.* at 256.

[268] *Id.* (quoting T.D. 9511, 2011-1 C.B. 455).

[269] *Id.* at 256-57.

[270] *Id.* at 257.

[271] *Id.* The Supreme Court has granted certiorari in *Home Concrete*. *See* Grant of Certiorari in 11-139, United States v. Home Concrete & Supply, 132 S. Ct. 71 (2011), *available at* http://www.supremecourt.gov/qp/11-00139qp.pdf.

[272] 633 F.3d 347, 360 (5th Cir. 2011).

[273] *Id.*

[274] *Id.* at 359 n.8.

[275] *Id.* at 360 n.9.

> promulgated determinative, retroactive regulations following prior adverse judicial decisions on the identical legal issue. "Deference to what appears to be nothing more than an agency's convenient litigating position" is "entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 . . . (1988). The Commissioner "may not take advantage of his power to promulgate retroactive regulations during the course of a litigation for the purpose of providing himself with a defense based on the presumption of validity accorded to such regulations." *Chock Full O' Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971).[276]

The Fifth Circuit also noted that the temporary regulations had not undergone pre-promulgation notice and comment, which might affect the level of deference due.[277]

Two months after *Mayo* was decided, the Court of Appeals for the Federal Circuit addressed the issue in *Grapevine Imps., Ltd. v. United States*.[278] It found that the regulations were intervening authority allowing it to depart from its holding in *Salman Ranch*.[279] Reversing the Court of Federal Claims, the court deferred to the final regulations under *Chevron*.[280] The court noted, "In its response brief, Grapevine also argues that the temporary Treasury regulations should not receive *Chevron* deference because of purported procedural shortcomings in their issuance. Now that the regulations have issued in final form, these arguments are moot."[281] Similarly, the Court of Appeals for the Tenth Circuit, which had subsequent tax years involving Salman Ranch before it in another post-*Mayo* case, applied *Chevron*[282]:

> Our analysis focuses on the final regulations, which, for our purposes, do not differ materially from the temporary regulations. We do not opine on what effect, if any, the temporary regulations would have had if they had not been superseded by the final regulations during the pendency of this appeal.[283]

Thus, the courts of appeals do not agree on an approach to temporary regulations issued without notice and comment. Some courts, at least, are willing to accord *Chevron* deference to such regulations once they have been finalized. The U.S. Supreme Court recently granted certiorari in *Home*

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[276] *Id.*

[277] *Id.*

[278] 636 F.3d 1368 (Fed. Cir. 2011).

[279] *Id.* at 1375-76, 1383-84.

[280] *Id.* at 1371.

[281] *Id.* at 1380.

[282] Salman Ranch, Ltd. v. Comm'r, 2011 U.S. App. LEXIS 10910, at *17 n.11, *29 (10th Cir. May 31, 2011).

[283] *Id.* at *17 n.11.

Concrete, but the questions presented to the Court do not explicitly raise this issue.[284]

3. Revenue Rulings

The courts have taken differing approaches to an IRS argument that a Revenue Ruling issued during the pendency of the litigation should apply to the case in issue. This may not be surprising given the lack of definitive guidance on the level of deference courts should accord Revenue Rulings generally.

Some of the cases emphasize the importance of consistency with previous administrative practice. For example, in a 1966 U.S. Supreme Court case,[285] the taxpayer, in advance of purchasing a ship, had obtained a letter ruling that allowed it to depreciate the ship over a three-year period, "subject to change if warranted by subsequent experience."[286] Egypt's seizure of the Suez Canal in 1956 unexpectedly caused the ship's value to increase significantly.[287] The taxpayer-corporation sold the ship in 1957, but it also liquidated in that year, which, under then-current law, allowed it to avoid capital gain on the sale.[288] The taxpayer also claimed virtually all of the third year's depreciation deduction.[289]

The IRS's position – stated in a Revenue Ruling published the day before trial[290] – was that "the deduction for depreciation in the year of sale of a depreciable asset is limited to the amount by which the adjusted basis of the asset at the beginning of the year exceeds the amount realized from the sale."[291]

In the opinion by Chief Justice Warren, who wrote for a six-Justice majority, the Court proved unsympathetic to the government's position:

> The Commissioner's position represents a sudden and unwarranted volte-face from a consistent administrative and judicial practice followed prior to 1962. The taxpayer has cited a wealth of litigated cases and several rulings in which the Commissioner unhesitatingly allowed depreciation in the year of favorable sale. Against this array of authority, the

[284] The deference question presented is framed as follows: "Whether a final regulation promulgated by the Department of the Treasury, which reflects the IRS's view that an understatement of gross income attributable to an overstatement of basis can trigger the extended six-year assessment period, is entitled to judicial deference." *See* Grant of Certiorari in 11-139, *supra* note 271. Accordingly, it does not refer to the level of deference due a temporary regulation.

[285] Fribourg Navigation Co. v. Comm'r, 383 U.S. 272 (1966).

[286] *Id.* at 274.

[287] *Id.*

[288] *See id.*

[289] *Id.* at 275.

[290] *Id.* at 275 & n.1 (citing Rev. Rul. 62-92, 1962-1 C.B. 29).

[291] *Id.* at 275-76.

> Commissioner contends that he did not "focus" on the issue in most of these instances. This is hardly a persuasive response . . . . Moreover, in several instances, the Commissioner did not merely consent to depreciation in the year of sale, but insisted over the taxpayer's objection that it be taken.[292]

Thus, the majority focused on the consistency of the IRS's position prior to the ruling promulgated during the litigation. The dissenters disputed this approach, countering that several of the cases and rulings cited in the majority opinion were not on point.[293]

Niles v. United States, a 1983 Ninth Circuit decision, took a similar approach.[294] In that case, the taxpayer was injured on a playground when he was eleven years old.[295] He received negligent medical care that rendered him quadriplegic.[296] He successfully sued, receiving over $4 million in a lump sum.[297] The California Court of Appeals affirmed the award.[298] During the appeal, in order to show that the award was not excessive, the taxpayer's attorney "presented a detailed, hypothetical itemization of the award, allocating $1,588,176 to future medical expenses."[299] The taxpayer excluded the award from his gross income in accordance with Code section 104(a)(2).[300]

The IRS challenged the taxpayer's deduction of medical expenses,[301] reasoning that if the taxpayer were "allowed to deduct amounts he received in

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[292] *Id.* at 279-80 (emphasis added) (footnotes omitted). The Court explained that in one case, "the taxpayers tried without success to forgo the depreciation deduction for the year of sale since the taxes payable on the resulting increase in ordinary income would have been less than the increased amount payable under the existing capital gain provision if depreciation were taken." *Id.* at 280 n.6 (citing Simons v. Comm'r, 19 B.T.A. 711 (1930)). In addition, "[i]n several other cases the Commissioner expressly required a year-of-sale depreciation deduction, thus increasing the gain on the sale." *Id.*

[293] *Id.* at 295-96 (White, J., dissenting). The dissent stated,

> Several of the cases and revenue rulings relied upon by the majority to establish past practice were concerned with tax years previous to 1922, when the first capital gain provision became applicable. I would not give precedential significance to positions taken during that time because the tax saving resulting from a depreciation deduction in the year of sale would have been exactly offset by the tax liability resulting from the correspondingly greater gain upon the sale of the asset due to the lower basis. The remaining revenue ruling and most of the remaining cases relied upon by the majority were concerned primarily with issues other than the one now before us.

Id. (footnotes omitted).

[294] 710 F.2d 1391, 1393 n.3 (9th Cir. 1983).

[295] *Id.* at 1392.

[296] *Id.*

[297] *Id.*

[298] *Id.*; *see* Niles v. City of San Rafael, 116 Cal. 733 (1974).

[299] *Niles*, 710 F.2d at 1392.

[300] *Id.*

[301] *Id.* (stating that "the IRS asserted income tax deficiencies against [the taxpayer] for

a personal injury award that were intended as compensation for future medical expenses, he would be getting an exclusion and a deduction for the same monies."[302] Furthermore, the IRS, adopting the hypothetical itemization of the award that the taxpayer presented in state court, determined that the taxpayer could not "deduct any future medical expenses until the aggregate amount of such expenses exceed[ed] $1,588,176."[303]

The district court granted summary judgment for the taxpayer.[304] In affirming, the court of appeals noted the absence of any authority supporting the IRS's decision to make an allocation.[305] The court therefore considered whether allocation was "unreasonable or plainly inconsistent with the . . . Code."[306]

The court noted, "Revenue Ruling 79-427, 1979-2 C.B. 120, specifically addresses the issue in this case and concludes that although the jury did not allocate a specific amount for future medical expenses, an allocable amount may be determined based on the best evidence available under the circumstances."[307] The court refused, however, to rely on the ruling: "We do not rely on or pass judgment on the propriety of [the Revenue Ruling] since it was promulgated during the audit, and was based on the facts of the instant case. As the district court noted, we cannot allow the IRS to take advantage of a self-serving ruling."[308]

The court also found that the 1979 ruling was inconsistent with previous administrative practice:

> In attempting to allocate a portion of [the taxpayer's] lump-sum jury award to future medical expenses, the Government is changing an administrative practice almost as old as the income tax itself. It was in 1922 that the Government declared it would not make allocation from lump-sum verdicts.
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> . . . .
>
> This court does not look favorably upon an administrative change in "a principle of taxation so firmly entrenched in our jurisprudence," *Commissioner v. Greenspun*, 670 F.2d 123, 126 (9th Cir. 1982), particularly when that change is sought by means of adjudication in a particular audit.[309]

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the years 1973 through 1976" but "[t]he only deficiency before this court is for medical expenses deducted in 1975").

[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] *Id.* at 1393.

[306] *Id.*

[307] *Id.* at 1393 n.3.

[308] *Id.*

[309] *Id.* at 1393-94.

The court stressed that "by refusing to allow the IRS to deviate from such a long-standing and well-understood administrative practice, we are presumptively supporting the will of Congress."[310]

A somewhat more recent Tax Court decision focused primarily on what it perceived as government opportunism in issuing the ruling. In that case, the taxpayer, a large publicly held corporation, had several lines of business.[311] During the fiscal year ending June 30, 1975, the taxpayer transferred two of its business operations to two new wholly owned corporations, Tandy Brands, Inc. and Tandycrafts, Inc, and received all of their stock in return.[312] The transferred assets included assets for which a credit had been taken under Code section 38.[313]

The issue before the Tax Court was whether Code section 47(a) required the taxpayer to recapture a portion of the credit that had been allowed in prior years, as a result of the reorganization.[314] Initially, there was no authority on point.[315] The court noted, however, that after the case had been tried and briefed, the IRS issued Revenue Ruling 89-18.[316] In the Revenue Ruling, the Commissioner "concluded on almost identical facts that recapture is appropriate in the year of the transfer of assets."[317] The court expressed its general approach to Revenue Rulings, as well as its specific concern about the timing of that Ruling:

> Revenue rulings do not ordinarily constitute authority in this Court, since "absent special circumstances, a revenue ruling merely represents the Commissioner's position with respect to a specific factual situation." We were well aware of respondent's [the IRS's] position on this issue before the issuance of Rev. Rul. 89-18; we think that the ruling is a thinly veiled attempt to influence this litigation, judging from the similarity of the facts and the timing of its issuance. This and other courts have routinely looked upon such bootstrapping revenue rulings with disfavor.[318]

The court also dismissed the content of the Revenue Ruling: "In any event, the ruling contains no cited authority to support the conclusion that recapture is required in year one vis-à-vis year two and [the revenue ruling] is

[310] *Id.* at 1395.

[311] Tandy Corp. v. Comm'r, 92 T.C. 1165, 1166 (1989).

[312] *Id.*

[313] *Id.*

[314] *See id.* at 1168.

[315] *Id.* at 1169.

[316] *Id.* at 1170.

[317] *Id.*

[318] *Id.* (citations omitted) (quoting Stark v. Comm'r, 86 T.C. 243, 250-51 (1986)) (citing Fribourg Navigation Co. v. Comm'r, 383 U.S. 272, 279 (1966); Busse v. Comm'r, 479 F.2d 1147, 1152 n.12 (7th Cir. 1973), *aff'g* 58 T.C. 389 (1972); Ludwig v. Comm'r, 68 T.C. 979, 986 n.4 (1977)).

unpersuasive."[319] After considering whether the step-transaction doctrine applied and concluding that it did not, the court resolved the issue in the taxpayer's favor.[320]

A 1999 decision of the Court of Appeals for the Federal Circuit, *AMP Inc. v. United States*,[321] followed *Tandy*'s approach, refusing to apply a Revenue Ruling issued during litigation. In *AMP*, the underlying issue was whether the corporate taxpayer was entitled to the foreign tax credit in the amount it claimed in an amended return.[322] During the 1981 and 1982 taxable years, the taxpayer had owned 100 percent of the stock in a Brazilian subsidiary, AMP Brasil, from which it had received dividends that it reported.[323] It also claimed a foreign tax credit for "deemed paid Brazilian taxes."[324]

> During the years at issue in this case, the Brazilian economy was operating under hyperinflationary conditions which decreased the purchasing power of the Brazilian cruzeiro. In November 1982, Brazil adopted Decree Law No. 1967, which established an indexing system for the payment of Brazilian income taxes. The index was based on the value of the Brazilian Readjustable National Treasury Bond (Obrigacoes Reajustaveis do Tesouro Nacional) (ORTN). The ORTN's nominal cruzeiro value was adjusted monthly as a function of the fluctuation in the purchasing power of the cruzeiro, in effect reflecting a devaluation of the cruzeiro resulting from inflation. . . . AMP's tax payments were required to be paid in cruzeiros; tax payments were not made in ORTNs.[325]

In 1986, the taxpayer filed amended returns for the tax years in question. In its amended returns, the taxpayer claimed a larger tax credit, computed by using the actual amount of cruzeiros it paid, not the ORTN amount.[326]

The Court of Federal Claims ruled for the government, finding persuasive Revenue Ruling 91-21, which stated that "for purposes of I.R.C. § 902, the ORTN tax liability is the foreign income tax."[327] On appeal, the Court of Appeals for the Federal Circuit explained that the "Brazilian Supreme Court in 1986 and 1987 specifically held that Brazil's national currency was the cruzeiro, not the ORTN."[328] The court then expressed its disagreement with the Court of Federal Claims on the weight accorded to Revenue Ruling 91-21:

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[319] *Id.*

[320] *See id.* at 1170-73.

[321] 185 F.3d 1333 (Fed. Cir. 1999).

[322] *See id.* at 1334.

[323] *Id.* at 1334-36.

[324] *Id.* at 1336.

[325] *Id.* at 1335.

[326] *Id.* at 1336.

[327] *Id.*

[328] *Id.* at 1338.

> Although the Court of Federal Claims placed considerable reliance on Revenue Ruling 91-21, we find it unpersuasive. This ruling was issued while AMP's refund claims were pending with the Internal Revenue Service (I.R.S.). *A revenue ruling issued at a time when the I.R.S. is preparing to litigate is often self-serving and not generally entitled to deference by the courts*. *See Tandy Corp. v. Commissioner*, 92 T.C. 1165, 1170 . . . (1989). This is especially true when the ruling cites no authority and is inconsistent with regulations and other pronouncements of the I.R.S. *See id.* at 1170-71.
>
> . . . Revenue Ruling 91-21 states, without supporting authority, that "for the purposes of section 902 of the Code, the ORTN tax liability is the foreign income tax." This statement, in light of the prospective litigation between AMP and the Commissioner, is self-serving.[329]

The court ultimately found that Congress had not addressed hyperinflationary economies until 1986 and then had done so only prospectively; under prior law, the cruzeiro was Brazil's functional currency, as the taxpayer had argued.[330]

By contrast, *First Chicago NBD Corp. v. Commissioner*,[331] a 1998 decision by the Court of Appeals for the Seventh Circuit, was more hospitable to the government, though still critical of the practice of relying on rulings issued during the litigation. In that case, five corporations that were wholly owned subsidiaries of First Chicago NBD Corporation (a bank holding company) held over ten percent of a Dutch bank's voting stock.[332] In an effort to take advantage of Code section 902(a), which provides tax benefits to "a domestic corporation which owns 10 percent or more of the voting stock of a foreign corporation from which it receives dividends," the taxpayers aggregated their individual stakes in the Dutch company.[333] The IRS disagreed that aggregation was permissible for this purpose, "formalizing its position in Rev. Rul. 85-3."[334] The IRS also issued a notice of deficiency to the taxpayer, which took the matter to Tax Court.[335]

The Tax Court held for the IRS.[336] In an opinion written by Judge Posner, the Court of Appeals for the Seventh Circuit addressed the aggregation question. It pointed out that the statute in question "refers to 'a' corporation,

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[329] *Id.* at 1338-39 (emphasis added) (quoting Rev. Rul. 91-21, 1991-1 C.B. 112).

[330] *Id.* at 1339.

[331] 135 F.3d 457 (7th Cir. 1998), *aff'g* 96 T.C. 421 (1991).

[332] *Id.* at 458.

[333] *Id.*

[334] *Id.* (citing Rev. Rul. 85-3, 1985-1 C.B. 222).

[335] *Id.*

[336] *Id.*

not a group of affiliated corporations."[337] It then considered the question of how much weight to accord Revenue Ruling 85-3:

> The IRS has decided to read the statute literally, and a threshold issue is how much deference to give its reading. The answer is that it is entitled to respectful consideration, but not to the deference that the *Chevron* doctrine requires in its domain. . . .
>
> There are plenty of gaps in the Internal Revenue Code. But the authorized mode of gap-filling is by Treasury Regulations, which are issued *after* notice and an opportunity for public comment, rather than by Revenue Rulings.[338]

The court was quick to add that the ruling was nonetheless entitled to some deference:

> The Internal Revenue Service knows more about the tax laws than the judges of the federal appellate courts do, and so it is natural for us to give some weight to its views about the meaning and application of those laws. And that is what we shall do. The fact that the IRS first decided to give section 902(a) the reading embodied in Rev. Rul. 85-3 in this very case is not to be held *too* strongly against the Service, although there is a definite flavor of its seeking opportunistically to bolster a litigating position. The aggregation issue apparently had not arisen before, even informally, so there would have been no occasion to issue a Revenue Ruling earlier. It would be anomalous to give weight to the Service's interpretation only in cases against taxpayers who come *afte*r the one who first decided to sail close to the wind. A treatise on international taxation, moreover, agrees (and no authority that we have found disagrees) with the IRS's reading of section 902.[339]

The court further stated that the government's interpretation of the statute "has the . . . virtue of simplifying the administration of the tax laws by avoiding inquiry into issues of indirect or de facto ownership."[340] Accordingly, the court of appeals affirmed the Tax Court's decision that Code section 902(a) does not permit aggregation under Revenue Ruling 85-3.[341]

Most recently, in a post-*Mayo* case, the Tax Court considered the level of deference to accord a Revenue Procedure,[342] a document akin to a Revenue Ruling but containing procedural guidance.[343] In *Exxon Mobil Corp. v.*

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[337] *Id.*

[338] *Id.* at 458-59.

[339] *Id.* at 459-60 (citation omitted). As authority for according the Revenue Ruling some weight, the court cited Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1077-82 (1995).

[340] *Id.* at 460.

[341] *Id.* at 461-62.

[342] Exxon Mobil Corp. v. Comm'r, 136 T.C. 99, 117 (2011).

[343] *See* Treas. Reg. § 601.601(d)(2)(i)(b) (1987) (defining a Revenue Procedure as a

Commissioner, the taxpayer sought netting of overpayment and underpayment interest for 1979 and 1980,[344] a period during which overpayment interest bore a higher interest rate than underpayment interest.[345] Such netting was authorized by statute in 1998, both prospectively and retroactively, subject to a special rule that read, "Subject to any applicable statute of limitation not having expired with regard to either a tax underpayment or a tax overpayment."[346]

In *Exxon Mobil*, the parties stipulated that the period of limitation had not run "for filing suit for payment of additional overpayment interest for 1979 and 1980."[347] In a 1999 Revenue Procedure, however, the IRS had interpreted the special rule to require that both the underpayment *and* overpayment limitations periods had to be open in order for netting to apply for earlier periods.[348] The IRS argued in *Exxon Mobil* that the Revenue Procedure was entitled to *Skidmore* deference.[349]

Departing from an earlier Court of Appeals for the Federal Circuit decision that had considered the same Revenue Procedure,[350] the Tax Court refused to

"statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge").

[344] *Exxon Mobil*, 136 T.C. at 103-04.

[345] *Id.*

[346] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3301(c)(2), 112 Stat. 741, *amended by* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 4002(d), 112 Stat. 2681-906 (1998) (cited in *Exxon Mobil*, 136 T.C. at 99).

[347] *Exxon Mobil*, 136 T.C. at 116.

[348] Rev. Proc. 99-43, 1999-2 C.B. 579, 580.

[349] *Exxon Mobil*, 136 T.C. at 117.

[350] FNMA v. United States, 379 F.3d 1303, 1308-09 (Fed. Cir. 2004). *Exxon Mobil* explained:

> In FNMA I a three-judge panel of the Court of Appeals for the Federal Circuit held that although Rev. Proc. 99-43 . . . does not provide a basis to decide the case, the special rule constitutes a waiver of sovereign immunity because it "discriminates between those claims for overpaid interest Congress has authorized and those it has not." [*FNMA*, 379 F.3d at] 1310. . . . The Court of Appeals went on to hold that the waiver was expressly conditioned by the introductory language "Subject to any applicable statute of limitation not having expired". Thus, the Court concluded that the term of consent in the special rule limit a court's jurisdiction to entertain a suit, that the principle of strict construction had to be applied, and that the principle assumed "primacy over any other tools or principles of statutory construction". *Id.* at 1311 n.8. Therefore, the principle of strict construction required an interpretation of the special rule in favor of the Government. The Court of Appeals remanded the case to the Court of Federal Claims to determine whether the limitations period for the underpayment year was closed on July 22, 1998. On remand, the Court of Federal Claims granted summary judgment to the Government. See FNMA v. United States, 69 Fed. Cl. 89 (2005), affd. 469 F.3d 968 (Fed. Cir. 2006). In affirming the Court of Federal Claims, the Court of Appeals reaffirmed its position in FNMA I.

defer to the Revenue Procedure, calling it a "litigation position" of the IRS (although it had not been released in connection with the case in question):

> The revenue procedure was promulgated 16 months after the special rule's enactment and states that the special rule requires that "both periods of limitation applicable to the tax underpayment and to the tax overpayment[. . .] must have been open on July 22, 1998". The pronouncement in the revenue procedure is not supported by any analysis of text or legislative history or any other relevant guidance. It is not an interpretation but a litigation position.[351]

The court then applied *Skidmore*, finding that because the Revenue Procedure's interpretation of the statutory special rule lacked any supporting rationale, it was not entitled to deference.[352] The court did not cite *Mayo*.

As these cases demonstrate, a number of courts have expressed concern about Revenue Rulings issued during litigation. The courts generally have been less willing to defer to them than they have to Treasury regulations. This reluctance is not surprising given the greater deference accorded regulations more generally, consistent with their "force of law" status under *Mead* and *Mayo*.

C. *Rulemaking During Litigation: A Deference Proposal*

Should "fighting regs" and rulings receive less deference? The application of a new agency rule to a pending controversy – at the audit stage or later in the process – raises concerns about retroactivity and procedural fairness, as courts have recognized.[353] Yet, courts have also recognized that the Treasury Department and the IRS have special expertise and that they may not be aware of an issue until the first case arises.[354] Both sides of this equation contain

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> With all due respect to the Court of Appeals for the Federal Circuit, 6621(d), as modified by the special rule, is a remedial statute that must be interpreted to achieve the remedial purpose Congress intended; i.e., taxpayer relief from disparate interest rates. And such an interpretation is appropriate regardless of whether the special rule constitutes a waiver of sovereign immunity.

Exxon Mobil, 136 T.C. at 117-18.

[351] *Exxon Mobil*, 136 T.C. at 117 (citation omitted) (citing *FNMA*, 379 F.3d 1303).

[352] *Id.* (citation omitted)).

[353] *See, e.g.*, Fribourg Navigation Co. v. Comm'r, 383 U.S. 272, 279 (1966); Helvering v. R.J. Reynolds Tobacco, 306 U.S. 110, 117 (1939); Niles v. United States, 710 F.2d 1391, 1393 n.3 (9th Cir. 1983); Intermountain Insurance Serv. of Vail, LLC v. Comm'r, 134 T.C. 211 (2010) (reviewed by the court), *rev'd*, 2011 U.S. App. LEXIS 12476 (D.C. Cir. June 21, 2011).

[354] *See* First Chicago NBD Corp. v. Comm'r, 135 F.3d 457, 459 (7th Cir. 1998) ("The fact that the IRS first decided to give section 902(a) the reading embodied in Rev. Rul. 85-3 in this very case is not to be held *too* strongly against the Service, although there is a definite flavor of its seeking opportunistically to bolster a litigating position. The aggregation issue apparently had not arisen before, even informally, so there would have

factual questions. That is, the timing of a particular ruling may or may not prejudice the taxpayer in litigation, and a pending controversy may or may not reflect the first real opportunity the IRS had to apply its expertise to the issue.

Fortunately, these are issues that can be considered under the existing *Chevron* and *Skidmore* regimes. Thus, this Article proposes not to apply a lower standard of deference to rules issued during the pendency of a related controversy, but rather to consider under the applicable deference standard the facts surrounding the issuance of the rule. That is, courts should consider in the *Chevron* or *Skidmore* deference analysis the extent of any burden or litigating prejudice to the taxpayer resulting from the agency's unilateral ability to issue guidance that bolsters the law arguably applicable to the case.[355]

This approach is particularly clear under *Skidmore* – and thus with respect to Revenue Rulings. Recall that *Skidmore* stated, "The weight of . . . a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[356] In considering "the thoroughness evident in . . . [the] consideration" of a Revenue Ruling and "all those factors which give it power to persuade," a court can take into account whether the ruling was issued precipitously. "[C]onsistency with earlier and later pronouncements" is also sometimes an issue for rulings issued in conjunction with pending litigation, as several of the cases discussed above suggest.[357]

Skidmore thus works well for litigation-oriented Revenue Rulings. Revenue Rulings may be faster to produce than regulations because of the lack of a notice-and-comment requirement under the APA. They can therefore more readily be issued during the pendency of related litigation, but they will have been less vetted. *Skidmore*, with its lower level of deference than *Chevron*, allows room for a court to ignore a Revenue Ruling.

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been no occasion to issue a Revenue Ruling earlier."); *see also* Smiley v. Citibank, 517 U.S. 735, 742 (1996) (stating that if pitfalls of "[s]udden and unexplained change, . . . or change that does not take account of legitimate reliance on prior interpretation, . . . are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"); *cf.* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712 (2011) ("[W]e have found it immaterial to our analysis that a regulation was prompted by litigation." (internal quotation marks omitted)).

[355] An analogy for this type of inquiry is the burden of proof rule in Tax Court. The Tax Court's rules provide that the burden of proof is generally on the taxpayer but is on the IRS with respect to "new matter, increases in deficiency, and affirmative defenses, pleaded in his answer." TAX CT. R. PRAC. & PROC. 142(a). The IRS, however, is barred from raising a new issue so late as to cause surprise and prejudice. *See* LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE 339-40 (3rd ed. 2009).

[356] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (emphasis added).

[357] *See, e.g.*, *Fribourg*, 383 U.S. at 279; AMP, Inc. v. United States, 185 F.3d 1333, 1339 (Fed. Cir. 1999); *Niles*, 710 F.2d at 1393.

Of course, Treasury can avoid *Skidmore* by issuing a regulation. As discussed above, Treasury regulations warrant *Chevron* deference.[358] *Chevron* provides a high level of deference, but it does contain exceptions: at step two, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[359] Thus, a regulation that is not "manifestly contrary to the statute" still does not warrant deference if it is arbitrary or capricious.[360] This is a high standard, but one that is not necessarily insurmountable,[361] particularly in a context where the Treasury regulation changes the law retroactively.

No cases are directly on point, but a few cases in the regulations context evidence courts' distaste for retroactivity. As discussed above, in *R.J. Reynolds*,[362] the Supreme Court refused to allow a regulation to be applied retroactively, though that case predated *Chevron* and relied on the legislative reenactment doctrine. Some of the recent Son-of-BOSS statute-of-limitations cases also reflect a concern about retroactivity. In *Intermountain*,[363] the Tax Court applied *Brand X* to invalidate a regulation that had an effective date provision that would have resulted in retroactive application of a longer limitations period, though *Intermountain* was reversed on appeal.[364] The Fifth Circuit did not reach the issue in *Burks v. United States*,[365] as it decided the case in the taxpayer's favor,[366] but it expressed concern in dicta.[367] In those

[358] *See supra* text accompanying note 15.

[359] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[360] *Cf.* Smiley v. Citibank, 517 U.S. 735, 742 (1996) ("Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] an abuse of discretion,' 5 U.S.C. § 706(2)(A)." (citations omitted)); Seidenfeld, *supra* note 100, at 312 (explaining that under his argument that *Chevron* is founded in separation of powers doctrine, it is the "judicial responsibility to ensure that agencies fulfill the promise stemming from their superior expertise and accountability justifies courts taking an active oversight role over agency interpretations of statutes").

[361] *Cf.* Judulang v. Holder, 132 S. Ct. 476, 479 (2011) (finding "the Board of Immigration Appeals' . . . policy for deciding when resident aliens may apply to the Attorney General for relief from deportation under a now-repealed provision of the immigration laws . . . arbitrary and capricious" under the APA).

[362] Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110, 117 (1939).

[363] Intermountain Ins. Serv. of Vail, LLC v. Comm'r, 134 T.C. 211 (2010) (reviewed by the court), *rev'd*, 2011 U.S. App. LEXIS 12476 (D.C. Cir. June 21, 2011).

[364] Intermountain Ins. Serv. of Vail, LLC v. Comm'r, 2011 U.S. App. LEXIS 12476 (D.C. Cir. June 21, 2011).

[365] 633 F.3d 347, 360 (5th Cir. 2011).

[366] *See id.*

[367] *Id.* at 360 n.9. In *Home Concrete*, the Fourth Circuit also declined to apply the regulation retroactively, conducting an analysis of when retroactivity is appropriate. *See* Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 256-58 (4th Cir. 2011), *cert. granted*, 132 S. Ct. 71 (2011).

cases, courts did not apply *Chevron*, but, in future cases, courts could find a regulation arbitrary or capricious under *Chevron*, particularly if it prejudices the taxpayer and its timing appears to reflect opportunism rather than careful application of the agency's expertise.

This proposal generally is consistent with the approach of the ABA Task Force on Judicial Deference, in that it would apply *Chevron* to valid Treasury regulations. The Task Force's Report argued, "Regulations issued in response to pending litigation should be entitled to *Chevron* deference. Generally, the period a regulation is outstanding is not relevant, even where a regulation is issued in connection with pending litigation. This is one issue as to which the case law is clear."[368] The Task Force's Report also stated, however, "Although *National Muffler* does emphasize the timing and manner in which a regulation evolved, the Task Force does not believe that timing should prevent the IRS from changing its view if appropriate notice-and-comment issuance procedures are followed."[369] Although this Article does not argue that *National Muffler* should apply, it does argue that the timing of the regulation is an issue a court should be able to consider under the applicable deference standard (*Chevron* or *Skidmore*).

This proposal offers the benefit of application of existing standards that have well-developed bodies of precedent. It also avoids creating an exception for tax cases, which the Court in *Mayo* was loath to do in a related context. It does mean that "fighting regs" are likely to be upheld, since *Chevron* is a difficult hurdle to overcome, but that consequence follows from *Smiley* and *Mayo*.

The good news in this regard is that Treasury's issuance of a regulation benefitting from *Chevron* deference generally requires the notice-and-comment procedures under the APA to be followed,[370] which takes time and results in feedback to the agency. The bad news is that the Treasury has found a short cut. It often issues temporary regulations in conjunction with proposed regulations, as it did in the *Home Concrete* line of cases.[371] By issuing temporary regulations rather than merely proposed regulations, Treasury can attempt to increase the deference accorded its position,[372] and by issuing them

[368] Salem et al., *supra* note 112, at 742-43 (citing Smiley v. Citibank, 517 U.S. 735 (1996)); Indianapolis Life Ins. Co. v. United States, 115 F.3d 430 (7th Cir. 1998); Barnhart v. Wilson, 535 U.S. 212 (2002)). *See also* Indianapolis Life Ins. Co. v. United States, 940 F. Supp. 1370, 1389 (S.D. Ind. 1996) (applying *Chevron* to a Treasury regulation and stating that "[e]ven if the Treasury Department drafted Regulation § 1.809-9 with the litigation in mind, it had the authority to do so as long as it used proper procedures and the end result was consistent with the statute's language and purpose").

[369] Salem et al., *supra* note 112, at 743.

[370] *See supra* text accompanying notes 30-35.

[371] *See supra* text accompanying notes 214-216.

[372] Proposed regulations are not intended to have the force of law, *see supra* note 212 and accompanying text, and this should not benefit from *Chevron* deference, *see supra* text accompanying note 213.

at the same time as the proposed regulations, Treasury can avoid waiting. The availability of this approach increases the importance of proper procedure; regulations issued with the force of law should be held to the requirements of the APA. The temporary regulations at issue in the *Intermountain-Home Concrete* line of cases, for example, did not undergo notice and comment, and thus warrant further examination of their validity.

Although both *Mayo* and *Mead* state that notice and comment is not an absolute prerequisite to *Chevron* deference, they also make clear that it is an extremely important factor.[373] Post-promulgation comments simply are not the same, so they should not be considered a substitute for comments that are considered before the regulation is finalized.[374]

If courts lean hard on the Treasury with respect to regulations that did not receive the benefit of notice and comment before being finalized, that should encourage the Treasury to use more sparingly the technique of simultaneously issuing temporary and proposed regulations. That approach should be limited to situations that fall within the "good cause" exception of the APA.[375]

The practical effect of the proposed deference approach would be to require the Treasury to take more time and engage in greater deliberation before issuing a regulation prompted by pending litigation, unless the regulation fits within the APA's "good cause" exception. If the Treasury follows proper procedure, the regulation will receive substantial deference, but the regulation that receives that deference may very well not contain the same substantive content as one that was issued more quickly and without public input. This approach thus entails little change in current substantive law, but it emphasizes the importance of deliberative procedure.

CONCLUSION

The level of deference courts should accord administrative pronouncements is a thorny but important issue that becomes even more complicated when the guidance is issued during the course of a related controversy. Conceptually, the level of deference that courts should accord such litigation-oriented regulations and rulings depends on (1) what deference is accorded those authorities outside this specialized context and (2) what adjustment, if any, should be made for the timing of the rule in question.

This Article has argued that all Treasury regulations should be subject to *Chevron* deference, as *Mayo* provides, rather than deference under the tax-specific *National Muffler* decision or an even lower level of deference, such as *Skidmore*, as Mitchell Gans argued. It has further argued in favor of the well-accepted approach that, following *Mead*, Revenue Rulings should be given deference under *Skidmore*.

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[373] *See supra* text accompanying notes 101-105.

[374] *See supra* text accompanying note 113.

[375] *See supra* text accompanying notes 114-119.

With respect to the specific context of litigation-oriented rulemaking, the Article has argued that the timing of the issuance of the rule and, if applicable, its retroactivity, should be taken into account under the otherwise applicable deference standard (*Chevron* or *Skidmore*). That would leave substantial room for courts to disregard Revenue Rulings they find abusive. Regulations would be harder to invalidate but could be found arbitrary or capricious in some cases.

The government could try to rely on temporary regulations, as it did in the Son-of-BOSS cases, but temporary regulations, since they are designed to have the force of law, risk being invalidated if they did not go through the notice and comment process. Requiring that process as a prerequisite for *Chevron* deference would both increase the vetting of the regulation and slow down the rulemaking process, reducing the government's incentive to issue "fighting regs."