



**INTERPRETATIONS BY TREASURY AND THE IRS:
AUTHORITATIVE WEIGHT, JUDICIAL DEFERENCE, AND THE
SEPARATION OF POWERS**

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INTRODUCTION

Since the Supreme Court's decision in *Mayo Foundation*, tax has no longer been subject to special treatment. Rather, the worlds of tax law and administrative law have effectively been merged, adding complexity to an already extremely complex tax system. This article examines the doctrine of judicial deference to administrative agency action in the tax context as well as the criticisms of judicial deference as being a violation of separation of powers. The article also discusses the rise of judicial abdication theory and its effect on the reinvigoration of the judicial power and how that could impact the administration of the tax laws.

Part I of this article discusses the structure of the federal government and the struggle to harmonize administrative agencies with principles of separation of powers, checks and balances, and judicial review. Part I

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also discusses the doctrine of judicial deference and, in particular, its role in the relationship between the judicial branch and administrative agencies and the effect of changes in the degree of judicial oversight on the power that administrative agencies have. This relationship is examined with a particular focus on the role of the New Deal in the shift to expert based administration and how this paved the way for the declining role of the judiciary in the administrative state through the end of the twentieth century and into the twenty-first century.

Part II discusses the standards of judicial deference to administrative agency rules, including *Chevron*, *Skidmore*, and *Auer*, as well as the difficult question presented by *Brand X* as to whether the doctrine of stare decisis is trumped by an agency's later interpretation. Part II also discusses recent criticisms of *Auer* deference as raising separation of powers concerns and the Court's attempt in *Kisor* to restore the balance of power by substantially limiting *Auer* deference while strengthening the role of the judiciary in interpreting regulations. Part III analyzes various types of advice issued by Treasury and the IRS, including regulations, revenue rulings, revenue procedures, notices, letter rulings, Chief Counsel Advice, Technical Advice Memoranda, information letters, as well as many other types of guidance. Part III also examines the procedures involved in issuing each type of advice and the authoritative weight and degree of judicial deference accorded to each type of guidance.

Part IV explores recent trends in re-examining the doctrine of judicial deference, including criticisms that judicial deference to administrative agencies under *Chevron* violates the separation of powers. Part IV also examines the rise of judicial abdication theory and the recent efforts by the Supreme Court to reinvigorate the judicial power by narrowing the reach of *Chevron*. Finally, Part IV addresses the potential impact of changes in *Chevron* deference on tax complexity, uniformity in the tax system, and the administration of the tax laws.

I. THE RISE OF JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCY ACTION

A. *Separation of Powers and the Principle of Judicial Review*

The separation of powers and the system of checks and balances are fundamental concepts that are central to the framework of the U.S. Constitution.¹ The structure of the federal government was carefully

1. See David S. Rubenstein et al., *The Proposed Separation of Powers Restoration Act of 2016*, 41 ADMIN. & REG. L. NEWS 4, 5 (2016) (“[O]ne of the central precepts undergirding the Constitution is the notion that the preservation of liberty depends on the separation of powers among branches capable of checking the excesses of each other.”); Niki

designed to protect against tyranny by, inter alia, preventing the concentration of power.² The Framers sought to protect the liberties of the people from governmental overreaching by diffusing the power of the federal government.³ This protection was accomplished by separating the three main powers of the U.S. Government—the legislative power, the executive power and the judicial power—into the three branches that were created by Articles I, II and III of the U.S. Constitution.⁴ Article I vests all legislative Powers in Congress, Article II vests the executive power in the President, and Article III vests the judicial power in the Supreme Court and inferior courts created pursuant to Article III.⁵

Nonetheless, although the three branches were intended to be separate, they were not envisioned to operate with absolute independence.⁶ Rather, the U.S. Constitution contemplates a workable government, whose branches, although separate, are also

Ford, *Tax Reform in a “World Without Chevron”: Will Tax Regulations Withstand the Review of Justice Gorsuch?*, 71 TAX LAW. 975, 978 (2018) (“Separation of powers, and, correlatively, the checks and balances that each branch of government exerts over the others, is arguably the fundamental tenet of American government.”).

2. THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”); see also CHARLES DALLISON, THE ROYALIST’S DEFENCE 80 (1648) (“[W]ilst the *Supremacy*, the *Power to Judge the Law*, and *Authority to make new Lawes*, are kept in *severall hands*, the known Law is *preserved*, but *united*, it is *vanished*, instantly thereupon, and *Arbitrary* and *Tyrannicall* power is introduced.”). This concept of separation of powers articulated in the Royalist’s Defence was subscribed to by John Locke and Baron de Montesquieu, both of whom endorsed a system of checks and balances. See *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 117 (2015) (“[P]ower should be a check to power lest the legislature arrogate to itself what authority it pleased . . . [and] soon destroy all the other powers.”) (internal quotation marks omitted) (citing CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. 6, at 150–57 (O. Piest ed., Thomas Nugent transl., Hafner Press 1949) (1748)). The Founders combined these two concepts—separation of powers and checks and balances—in the framework of the U.S. Constitution. See *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 117–18 (2015).

3. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“[T]he founders considered the separation of powers a vital guard against governmental encroachment on the people’s liberties A government of diffused powers, they knew, is a government less capable of invading the liberties of the people.”) (citing THE FEDERALIST NO. 47 (James Madison)).

4. *Perez*, 575 U.S. at 117.

5. See U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art. III, § 1; see also Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 757 (1991).

6. See *United States v. Nixon*, 418 U.S. 683, 707 (1974) (“In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.”).

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interdependent.⁷ The Framers knew that a system of checks and balances would buttress the separation of powers.⁸ Some of the checks and balances created by the Framers and embodied in the U.S. Constitution include: the President's power to veto legislation enacted by Congress,⁹ Congress' power to override a Presidential veto by a supermajority vote,¹⁰ the Senate's power to give advice and consent to the President's appointment of Officers of the United States,¹¹ and the life tenure appointments of federal judges, of Article III courts, whose pay cannot be diminished.¹²

Another vital element of the system of checks and balances is judicial review.¹³ The principle of judicial review was enunciated in *Marbury v. Madison*.¹⁴ In *Marbury*, Chief Justice John Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁵ In so doing, the Court established the doctrine of judicial review of legislation and the supremacy of the judicial branch in interpreting the U.S. Constitution.¹⁶ Thus, while judicial review is

7. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

8. *Perez*, 575 U.S. at 117–18 ("[E]xperience has taught us a distrust of the separation of powers alone as a sufficient security to each [branch] [against] encroachments of the others [I]t is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper.") (internal citations and quotation marks omitted) (quoting James Madison, *Remarks at the Federal Convention of 1787*, in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., Yale University Press 1911)).

9. See U.S. CONST. art. I, § 7, cl. 2-3; see also *Buckley v. Valeo*, 424 U.S. 1, 285 (1976) ("[T]he veto power was to provide a defense against the legislative department's intrusion on the rights and powers of other departments; without such power, 'the legislative and executive powers might speedily come to be blended in the same hands.'") (quoting THE FEDERALIST NO. 73 (Alexander Hamilton)).

10. See U.S. CONST. art. I, § 7, cl. 2–3.

11. See U.S. CONST. art. II, § 2, cl. 2.

12. See U.S. CONST. art. III, § 1; *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938 (2015) (stating that "life tenure and pay that cannot be diminished" are protections that "help to ensure the integrity and independence of the judiciary").

13. See Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 811 (2005) ("[J]udicial review is viewed as an essential component of checks and balances . . . [and is] one of the most potent checks on legislative power, rivaling, and at times even surpassing, the presidential veto as a restraint on Congress.").

14. *Marbury v. Madison*, 5 U.S. 137 (1803).

15. *Id.* at 177.

16. See Charles Grove Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816, 822 (1936).

viewed as a component of the system of checks and balances, it is also grounded in separation of powers.¹⁷

B. Judicial Deference to Expert Based Administration

Administrative agencies have been an important component of the federal government for well over 200 years. Although during the administration of our first President there were only three administrative departments, during the nineteenth century, the number of administrative agencies gradually increased.¹⁸ And during the early part of the twentieth century, the number and size of administrative agencies grew at a faster pace.¹⁹ However, judicial review of the actions of these agencies during that period had generally confined their power.²⁰ But with the advent of the New Deal, the federal government experienced an explosive growth in the number of administrative agencies as well as an increase in their regulatory power.²¹ The New Deal has been described as the “birthplace” or the “coming of age of the administrative state.”²² It has also been described as the period during which its “defining features were famously defended and cemented.”²³

During the New Deal, the Supreme Court also had a significant role in expanding the regulatory power of administrative agencies.²⁴ This expansion, in turn, was directly related to the rapid increase in the number of such agencies.²⁵ This grant of power to agencies by the Supreme Court occurred on many fronts.²⁶ First, the Supreme Court decided *West Coast Hotel v. Parrish*,²⁷ which is widely viewed as signaling

17. See, e.g., Sylvia Snowiss, *The Marbury of 1803 and the Modern Marbury*, 20 CONST. COMMENT. 231, 236 (2003) (“Judicial authority to expound what the law is, is the authority to provide finality. It was grounded in conventional separation of powers.”); Reinstein & Rahdert, *supra*, note 13, at 731 (“The conventional wisdom, therefore, is that *Marbury* is first and foremost a separation of powers decision.”).

18. See Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 294 (2001).

19. *Id.* at 295 (citing MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 78 (1993)).

20. Shuren, *supra* note 18, at 295.

21. See D. A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 64 (2017); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1562 (2017).

22. Candeub, *supra* note 21.

23. See David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J. L. & PUB. POL’Y 267, 298 n.157 (2015).

24. See Candeub, *supra* note 21.

25. See *id.*

26. See generally *id.* at 64–68.

27. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage law for women).

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the downfall of the *Lochner* era.²⁸ In *Lochner*, the Supreme Court prohibited the government from regulating hours of labor in the workplace because such regulation interfered with an employer and employee's freedom of contract that was protected by substantive due process.²⁹ Some commentators have suggested that the decline of substantive due process review by the Supreme Court in the New Deal paved the way for the rise of judicial deference to administrative agency action.³⁰

Second, the Supreme Court expanded federal regulatory jurisdiction under the Commerce Clause.³¹ In 1937, the Supreme Court in *NLRB v. Jones & Laughlin Steel Corp.*, upheld the constitutionality of the National Labor Relations Act as a valid exercise of Congress to regulate commerce.³² Later, in 1942, the Court in *Wickard v. Filburn*³³ held that Congress could regulate private consumption of wheat on a farm on which wheat is produced because private consumption of wheat competes with wheat in commerce and affects the price of wheat in the market and therefore affects Congress' ability to regulate commerce.³⁴ The scope of the federal government's Commerce Power was expanded even more after the New Deal in *Heart of Atlanta Motel v. United States*³⁵ and *Katzenbach v. McClung*.³⁶ In both cases, the Court upheld the Civil Rights Act of 1964 as a constitutional exercise by Congress of its Commerce power.³⁷ But in 1995, in *United States v. Lopez*, the Supreme Court seemingly placed limits on Congress' power under the Commerce Clause.³⁸

28. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 876 (1987); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 54 (2003).

29. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) ("[T]he freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.").

30. See Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 432 (2007).

31. See Candeub, *supra* note 21, at 67.

32. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

33. *Wickard v. Filburn*, 317 U.S. 111 (1942).

34. *Id.* at 128. This expanded scope of federal regulatory power has been criticized as being inconsistent with the concept that the federal government has only enumerated powers, because under *Wickard*, the federal government can essentially regulate anything that indirectly affects commerce. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1396 (1987).

35. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964).

36. See *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964).

37. Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 606 (2001).

38. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that the Gun-Free School Zones Act, which makes it a federal offense to knowingly possess a firearm near a school zone, exceeded Congress' Commerce Clause authority because possession of a gun in

Third, the Supreme Court retreated from the nondelegation doctrine.³⁹ “The nondelegation doctrine is rooted in the principle of separation of powers,”⁴⁰ and its theory can be traced back to John Locke.⁴¹ The basic theory of that doctrine is that the U.S. Constitution vests the legislative powers of the federal government in Congress,⁴² and that in order to protect the integrity of the system of government mandated by the Constitution, Congress is generally prohibited from delegating its legislative powers to the Executive branch.⁴³ But in 1928, the Supreme Court held in *J.W. Hampton, Jr., & Co. v. United States* that the under the nondelegation doctrine, Congress can delegate legislative power to the Executive if Congress also provides the Executive with an intelligible principle with which the Executive is directed to conform.⁴⁴ Although during the New Deal the Supreme Court used the non-delegation doctrine to limit the power of the Executive in two high-profile cases in 1935,⁴⁵ the Court’s use of that doctrine was short lived and by 1936, the Court had retreated from relying on the non-delegation doctrine.⁴⁶

Another factor that led to the vast increase in the number, as well as the power, of administrative agencies during the New Deal was the Great

a local school zone was not an economic activity and did not have a substantial impact on interstate commerce); *see also* *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact civil remedy provision of the Violence Against Women Act because that provision does not regulate activity that substantially affects interstate commerce).

39. Candeub, *supra* note 21, at 65.

40. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

41. *See* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 4 (1982–83); *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 380–81 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1960) (“The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others. . . . And when the People have said, We [sic] will submit to rules, and be govern’d by *Laws* made by such Men, and in such Forms, no Body else can say other Men shall make *Laws* for them; nor can the people be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorised to make *Laws* for them. The power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making laws, and place it in other hands.”).

42. *See* U.S. CONST. art. I, § 1.

43. *See Mistretta*, 488 U.S. at 371–72 (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

44. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

45. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

46. *See* Candeub, *supra* note 21, at 65–66 (The Court’s decision in *Carter v. Carter Coal* was the last case in which the Court relied upon the nondelegation doctrine, and since then, “almost any statutory mandate is sufficient to provide an intelligible principle.”).

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Depression.⁴⁷ Many policymakers during the New Deal viewed the Great Depression as a failure of laissez-faire capitalism and that some degree of centralized planning by the government was needed in the regulation of the economy.⁴⁸ New Deal policymakers saw that the solution to the Great Depression could be found by way of expert-based administration.⁴⁹ Expert administrators were thought to be better equipped to identify the best way to solve a particular social problem and implement the appropriate policy.⁵⁰

Although the New Dealers were enthusiastic about the emergence of administrative agencies, opponents of the New Deal sought procedural and judicial checks on those agencies.⁵¹ On one hand, the New Dealers favored a form of government where expert based administrators would influence the economy.⁵² On the other hand, New Deal opponents viewed the rise of administrative agencies as a form of “dictatorial central planning.”⁵³ Administrative agencies, by their nature, concentrate, rather than disperse power,⁵⁴ which is in tension with the concept of separation of powers.⁵⁵ Although the debate regarding the legitimacy of administrative agencies had been ongoing for about forty years, it culminated in the New Deal.⁵⁶

The shift to regulatory agency power was legitimized in 1946 with the passage of the Administrative Procedure Act⁵⁷ (The “APA”).⁵⁸ The APA evinces a hard-fought compromise between supporters and opponents of the New Deal and embodies the nation’s decision to permit extensive government regulation but to avoid dictatorship and central planning.⁵⁹ The APA created procedures for agencies to follow when promulgating rules.⁶⁰ For notice and comment rule making,⁶¹ which is

47. See Schiller, *supra* note 30, at 413–14.

48. See *id.* at 414.

49. See *id.* at 406, 415.

50. See *id.* at 406; Ford, *supra* note 1, at 980 (“During the New Deal era, it was first emphasized that administrative agencies were the experts in the field they represented. This concept has persisted into the twenty-first century.”).

51. See Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 466 (2015).

52. Schiller, *supra* note 30, at 415.

53. Shepherd, *supra* note 21, at 1559.

54. See Ford, *supra* note 1, at 978, 981.

55. See *id.* at 978 n.12.

56. See Jeremy K. Kessler, *Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 722–23 (2016).

57. 5 U.S.C. §§ 551–559 (2018).

58. See Candeub, *supra* note 21, at 67.

59. Shepherd, *supra* note 21, at 1559–60.

60. 5 U.S.C. § 553 (2018).

61. *Id.*

the most dominant form of rulemaking,⁶² to be procedurally valid, an agency must follow the requirements of the APA.⁶³ Unless an exception applies,⁶⁴ the agency must publish, at least thirty days⁶⁵ before the rule's effective date, a notice of proposed rulemaking,⁶⁶ and receive and consider comments from the public before promulgating the final rule.⁶⁷ Finally, the agency must provide a reasonable explanation for adopting the regulation.⁶⁸

The New Dealers also believed that the federal judiciary did not possess the requisite expertise or specialized knowledge to second-guess expert administrators and that judicial review of administrative agency actions undermined expert-based administration.⁶⁹ This line of thought can be seen in the Court's retreat in 1936 from the *Ben Avon*⁷⁰ doctrine, which had entitled public utilities, on due process grounds, to de novo review of agency rate-making.⁷¹ In addition, the Supreme Court Justices appointed by President Roosevelt significantly diminished the role of the judiciary in the administrative process by changing the doctrine of judicial review of administrative action to insulate the administrative process from judicial review.⁷² This era of judicial passivity paved the way for the model of judicial deference that continued to be developed throughout the twentieth century.⁷³ In the decades that followed the New Deal, the Supreme Court established, through a line of cases, three main

62. Candeub, *supra* note 21, at 67–68.

63. See 5 U.S.C. § 553 (2018) (outlining procedures for government agencies).

64. See *id.* § 553(b) (listing exceptions).

65. *Id.* § 553(d).

66. *Id.* § 553(b).

67. *Id.* § 553(c) (stating that “[a]fter notice . . . the agency shall give interested persons an opportunity to participate in the rule making”).

68. See *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (stating that “the agency must examine the relevant data and articulate a satisfactory explanation for its action”).

69. See Schiller, *supra* note 30, at 406, 419–20, 430.

70. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920).

71. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (courts are not empowered to make truly independent determinations and instead must be guided by a “strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing”) (citing *Darnell v. Edwards*, 244 U.S. 564, 569 (1917)); see also Leslie A. Glick, *Independent Judicial Review of Administrative Rate-Making: The Rise and Demise of the Ben Avon Doctrine*, 40 *FORDHAM L. REV.* 305, 307 (1971).

72. See, e.g., *R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 584 (1940) (“It is not for the federal courts to supplant the Commission’s judgment even in the face of convincing proof that a different result would have been better.”); see also Schiller, *supra* note 30, at 399, 430–31.

73. Schiller, *supra* note 30, at 399.

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standards of judicial deference to agency action: *Chevron* deference, *Skidmore* deference, and *Auer* deference.

II. STANDARDS OF JUDICIAL DEFERENCE TO ADMINISTRATIVE AGENCY INTERPRETATIONS

A. *Chevron Deference*

The framework for determining which standard for judicial deference applies is complex. The initial step, commonly referred to as *Chevron* Step Zero, inquires whether *Chevron* analysis applies at all.⁷⁴ Under this step, “administrative implementation of a particular statutory provision qualifies for *Chevron* deference 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.”⁷⁵ Such delegation could be shown in a variety of ways, including the agency’s use of congressionally delegated power to engage in notice and comment rulemaking.⁷⁶ However, the absence of the notice and comment procedure does not by itself bar *Chevron* deference.⁷⁷ Thus, the result of the analysis under Step Zero is that if the agency has promulgated an interpretation in the exercise of congressionally delegated authority to make rules carrying the force of law, then the analysis continues under *Chevron*’s two prong framework.⁷⁸ But even if the interpretation does not qualify for analysis under

74. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

75. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). In *City of Arlington v. FCC*, the Court indicated that a congressional grant of specific rulemaking authority is not required for the analysis under *Mead*. 569 U.S. 290, 306–07 (2013). But rather, a congressional grant of general rulemaking authority to an agency is sufficient. *Id.*

76. *See Mead*, 533 U.S. at 227 (“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.”); Thomas W. Merrill, *Step Zero After City of Arlington*, 83 FORDHAM L. REV. 753, 762, 780 (2014).

77. *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002) (“[T]he fact that the Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due . . . [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation”) (internal citations omitted); *see Mead*, 533 U.S. at 231 (“[T]he want of [notice and comment] 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.”) (citations omitted).

78. *See Sunstein, supra* note 74, at 190–91.

Chevron, it could still be entitled to some degree of deference⁷⁹ under *Skidmore v. Swift & Co.*⁸⁰

If the analysis is under the *Chevron* standard, the court is confronted with a two-step analysis.⁸¹ Under *Chevron* Step One, the court inquires “whether Congress has directly spoken to the precise question at issue.”⁸² “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.”⁸³ The second part of the analysis, *Chevron* Step Two, applies if the statute is silent or ambiguous with respect to the specific issue and inquires “whether the agency’s answer is based on a permissible construction of the statute.”⁸⁴ The Court in *Chevron* seemed to provide two alternative standards to be applied in *Chevron* Step Two. If there is an express delegation of authority to the agency with respect to a specific issue, then the agency’s interpretation is given controlling weight unless such interpretation is “arbitrary, capricious, or manifestly

79. *Mead*, 533 U.S. at 234 (“*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires . . .”) (internal citations omitted).

80. *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

81. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

82. *Id.* at 842; *see* *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (in determining the intent of Congress, a court begins “with the language of the statute”). If the statutory language is ambiguous, the court first resorts to canons of statutory construction and then to the legislative history. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007); *see also* *Cal. Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 400 (D.C. Cir. 2004) (applying the canon of statutory construction *nosctur a sociis*, meaning “a word is known by the company it keeps,” in order to provide context to a word that is capable of many meanings, and ultimately finding the statute unambiguous); *Brown v. Gardner*, 513 U.S. 115, 120 (1994) (“[T]he text and reasonable inferences from it give a clear answer . . . and that . . . is the end of the matter.”) (emphasis added) (internal quotation marks omitted). *But see* *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005) (possibly implying that a reviewing court, in *Chevron* Step One, can only resort to interpreting the plain meaning of the text of the statute and cannot resort to canons of statutory construction nor to legislative history).

83. *Chevron*, 467 U.S. at 842–43; *see* *Pennsylvania Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (asserting that when a statute can be applied in situations not anticipated it is not an indication of ambiguity, but rather it evinces breadth); *see also* *Nat. Res. Def. Council v. E.P.A.*, 489 F.3d 1364, 1373 (D.C. Cir. 2007) (“[T]he absence of a statutory definition does not render a word ambiguous.”); *Goldstein v. S.E.C.*, 451 F.3d 873, 878 (D.C. Cir. 2006) (“The lack of a statutory definition of a word does not necessarily render the meaning of a word ambiguous, just as the presence of a definition does not necessarily make the meaning clear.”). If a statutory term is not defined, courts typically give the term its ordinary meaning. *See* *FCC v. AT&T, Inc.*, 562 U.S. 397, 403 (2011).

84. *Chevron*, 467 U.S. at 843. An agency’s construction of a statute may be permissible notwithstanding that such a construction is not the only permissible construction the court could have adopted. *Id.* at 843 n.11.

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contrary to the statute.”⁸⁵ But if the delegation of authority is implicit, the court must defer to the agency interpretation if the interpretation is reasonable.⁸⁶

An important question naturally follows from *Chevron* in a situation where a prior judicial interpretation conflicts with a subsequent agency interpretation of the same statute. In other words, does the doctrine of stare decisis trump *Chevron* deference? The Supreme Court tackled this issue in *National Cable & Telecommunications Association v. Brand X Internet Services*, where it held that “[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.”⁸⁷ Thus, in effect, the *Brand X* Court held that an agency interpretation of an ambiguous statute can trump stare decisis,⁸⁸ and this decision has been described as an extremely generous grant of power from the courts to administrative agencies.⁸⁹ The *Brand X* decision leaves open the possibility that an agency interpretation can displace a United States Supreme Court interpretation of the same statute.⁹⁰

85. *Id.* at 843–44.

86. *Id.* at 844.

87. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). For an example of the Court upholding a prior Supreme Court interpretation of an unambiguous statute over a subsequent agency interpretation of the same statute, see *United States v. Home Concrete & Supply LLC*, 566 U.S. 489–90 (2012).

88. See Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 *FORDHAM L. REV.* 607, 610 (“[*Brand X*] effectively liberates agencies from *stare decisis* for their own interpretations in many cases and even allows agency interpretations of ambiguous statutes to displace judicial precedents on those same questions.”).

89. See *id.* at 625 (“*Brand X* is arguably the capstone of the Court’s *Chevron* evolution: it works a wholesale transfer of statutory interpretation authority from federal courts to agencies. Not since . . . *Erie R.R. Co. v. Tompkins*, [304 U.S. 64 (1938)] have we seen the Court giv[e] away so much of its power to a different institutional legal actor.”). But see Doug Geyser, *Courts Still “Say What the Law Is”: Explaining the Functions of the Judiciary and Agencies after Brand X*, 106 *COLUM. L. REV.* 2129 (2006) (arguing that even after *Brand X*, courts have not abandoned their duty to say what the law is, but in fact fulfill that duty by determining the boundaries within which agencies act).

90. See *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1248 (10th Cir. 2008) (“[T]he holding of *Brand X* applies whether the judicial precedent at issue is that of a lower court or the Supreme Court.”). But see *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005) (Stevens, J., concurring) (suggesting that an agency interpretation of an ambiguous statute would not displace a Supreme Court interpretation of the same statute).

B. Skidmore Deference

If the agency interpretation does not survive *Chevron* Step Zero, the interpretation may still be eligible for deference under the *Skidmore* standard,⁹¹ which states that the weight given by the court to an administrative pronouncement depends on “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.”⁹² The *Skidmore* standard can be best described as a sliding scale of optional deference, where the deference the court accords to an agency’s interpretation depends on the extent to which the court is persuaded by such interpretation.⁹³

During the first four decades after *Skidmore* was decided in 1944, the *Skidmore* standard was generally viewed as the Court’s best expression of its judicial deference policy with respect to agency interpretations.⁹⁴ However, the Court’s decision in *Chevron* appeared to cast some doubt on *Skidmore* as a viable judicial deference standard.⁹⁵ But some commentators have suggested that the Court, because of its decisions in *Christensen v. Harris County* and *United States v. Mead Corp.*, has resurrected *Skidmore* by clarifying that the scope of *Chevron* is limited and that many agency interpretations that do not qualify for *Chevron* deference may still be entitled to deference under *Skidmore*.⁹⁶

C. Auer Deference

Yet a third standard of deference is applied to an agency’s interpretation of its own regulation. Generally, an administrative agency’s interpretation of its own regulation is entitled to *Seminole Rock* deference whereby the agency’s interpretation would have “controlling weight unless it is plainly erroneous or inconsistent with the regulation.”⁹⁷ In *Auer v. Robbins*, the Court expanded upon the *Seminole Rock* standard by holding that the agency’s “interpretation is not

91. For a modern application of the *Skidmore* standard, see *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).

92. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

93. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1255 (2007).

94. *Id.* at 1236.

95. *Id.* at 1237.

96. See, e.g., *id.* (citing *Christensen v. Harris Cty.*, 529 U.S. at 587; *United States v. Mead Corp.*, 533 U.S. 218, 230–33 (2001)).

97. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

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rendered unworthy of deference by the fact that it is set forth in an amicus brief.”⁹⁸ The *Auer* Court reasoned that the agency’s position “is in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack”⁹⁹ and “[t]here is no reason to suspect that it does not reflect the Secretary’s fair and considered judgment.”¹⁰⁰

In *Christensen v. Harris County*, the Court limited the domain of *Auer* deference to agency interpretations of ambiguous regulations.¹⁰¹ In *Gonzales v. Oregon*, the Court clarified that in order for *Auer* deference to apply, the agency’s interpretation must not run counter to the agency’s intent at the time of the promulgation of the regulation,¹⁰² and that the regulation being interpreted must not merely paraphrase the statutory language.¹⁰³ The Court further limited *Auer* deference in *Christopher v. SmithKline Beecham Corporation*, where it held that deference would not apply when the agency interpretation causes unfair surprise.¹⁰⁴

Even though the Court had made efforts to constrain the realm of *Auer* deference, the doctrine still faced significant criticism and its constitutionality was put into question, including by Members of the

98. *Auer v. Robbins*, 519 U.S. 452, 453 (1997); *see also* *Cathedral Candle Co. v. United States Int’l Trade Comm’n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005) (“That generous degree of deference is due to an agency interpretation of its own regulations even when that interpretation is offered in the very litigation in which the argument in favor of deference is made.”).

99. 519 U.S. at 462 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988)).

100. *Id.* The deference doctrine established by the Court in *Seminole Rock* and later expanded upon by the *Auer* Court is hereinafter referred to as *Auer* deference.

101. *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (“*Auer* deference is warranted only when the language of the regulation is ambiguous . . . [to do otherwise] would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.”).

102. *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

103. *Id.* at 257 (“An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”).

104. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012) (holding *Auer* deference inapplicable to an agency’s interpretation of ambiguous regulations which would have imposed a substantial liability for conduct that had occurred before the interpretation was announced and stating that “[t]o defer to the agency’s interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires’”) (citing *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)) (Scalia, J.); *see also* Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO J.L. & PUB. POL’Y 103, 107 (2018).

Court.¹⁰⁵ For example, in *Talk America, Inc. v. Michigan Bell Telephone Co.*, Justice Scalia raised separation of powers concerns about *Auer* deference.¹⁰⁶ His arguments were twofold. First, deferring to an agency's interpretation of its own rule is inconsistent with separation of powers because it allows the same entity that promulgates the law to also interpret it.¹⁰⁷ Second, deferring to an agency's interpretation of its own regulation creates an incentive for the agency to draft vague regulations.¹⁰⁸ The concern is that the agency would have an incentive to draft vague regulations only to interpret the regulations later however it pleases, yet such interpretation could still merit deference under *Auer*.¹⁰⁹ This consequence would frustrate "the notice and predictability purposes of rulemaking, and promote arbitrary government."¹¹⁰

105. See *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1296 n.8 (10th Cir. 2011) ("'*Auer* deference' has been criticized as creating serious separation of powers concerns . . .") (citing *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 66–68 (2011) (Scalia, J., concurring)); Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL'Y 87, 87–88 (2018); Aneil Kovvali, *Seminole Rock and the Separation of Powers*, 36 HARV. J.L. & PUB. POL'Y 849, 849 (2013).

106. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring).

107. *Id.* at 68.

108. *Id.* at 68–69.

109. See Walker, *supra* note 104, at 106.

110. *Talk Am.*, 564 U.S. at 69. In *Perez v. Mortgage Bankers Ass'n*, Justice Scalia elaborated on his concern regarding *Auer* which he had stated in *Talk Am.* See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 108–12 (2015) (Scalia, J., concurring). He stated that by deferring to an agency's interpretation of its own regulation, the agency has an incentive to promulgate vague substantive regulations with gaps that the agency can fill in later using interpretations that do not require notice and comments procedures. *Id.* at 110–12. This approach essentially would give agencies the power to "control the extent of [their] notice-and-comment-free domain." *Id.* at 111. Justice Thomas's concurrence in *Perez* also included a comprehensive analysis of why and how *Auer* deference raises serious separation of powers concerns. *Id.* at 112–33 (Thomas, J., concurring). Justice Thomas had two concerns with respect to *Auer* deference. *Id.* at 119. His first concern was that the doctrine "represents a transfer of judicial power to the Executive Branch . . ." *Id.* He explained that the Framers intended the judiciary to exercise independent judgement. *Id.* at 120–22. In order to preserve the judiciary's independence, the Framers added structural protections to protect judges from political pressures, including life tenures with undiminished pay. See *id.* at 120–21. *Auer* deference prevents the judiciary from exercising its independent interpretation of agency regulations and transfers the exercise of interpretive judgement to the agency. *Id.* at 123–24. However, because the agency does not possess the same structural protections for independent judgement as the judiciary (that is, life tenure and undiminished pay), such a transfer of interpretive judgment to the agency raises serious separation of powers concerns. *Id.* at 124. Justice Thomas's second concern with *Auer* is that it "undermines the judicial 'check' on the political branches." *Id.* at 124. His argument was mainly grounded in judicial abdication theory. See *id.* at 125–26. Simply put, the judiciary, by deferring to administrative agencies, declines to exercise the judicial check with respect to those agencies. *Id.* at 126. And in doing so, the judiciary gives the agency's interpretation of its own regulation the force and effect of law while simultaneously

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The Court directly addressed the viability of the *Auer* doctrine in *Kisor v. Wilkie*.¹¹¹ In *Kisor*, the specific question before the Court was whether *Auer* and *Seminole Rock* should be overruled.¹¹² Grounding its decision in principles of stare decisis, the Court declined to overrule *Auer* and *Seminole Rock* despite the harsh criticism that the *Auer* doctrine had faced.¹¹³ Instead, the Court clarified and expanded upon the limits inherent in the doctrine, and in doing so, further limited its scope.¹¹⁴ The *Kisor* Court laid out a framework which courts must use before deciding that *Auer* deference applies.¹¹⁵

First, *Auer* deference only applies if the regulation is genuinely ambiguous.¹¹⁶ Before making a determination “that a [regulation] is genuinely ambiguous, a court must exhaust all ‘traditional tools’ of construction.”¹¹⁷ The Court’s focus on the importance of the condition that *Auer* deference does not even apply until the reviewing court determines that the statute is genuinely ambiguous shows a striking resemblance to Justice Kennedy’s concurrence in *Pereira v. Sessions*,¹¹⁸ where, as a means of curbing abdication of the judiciary’s role in interpreting statutes, he made a call to judges to end the practice of reflexive deference (the practice by judges of performing a cursory analysis) at *Chevron* Step One.¹¹⁹ Second, even if a regulation is genuinely ambiguous, the agency’s interpretation of that regulation must be reasonable.¹²⁰ The Court was emphatic in clarifying that the reasonableness requirement is a real requirement that an agency can definitely fail.¹²¹ Third, in order for *Auer* deference to apply, the interpretation must be the agency’s authoritative

permitting the agency to change its interpretation without advance notice to affected parties. *See id.* Thus, the abandonment by the judiciary of the judicial check on agencies results in the “accumulation of governmental powers that the Framers warned against.” *Id.* (citing THE FEDERALIST NO. 47, at 302 (James Madison)).

111. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

112. *Id.*

113. *See id.* at 2422–23.

114. *See id.* at 2414–17; *see also* Lee A. Shepard, *Making the World Safe for Treasury Interpretations*, 164 TAX NOTES FED. 9, 11 (2019) (“The Supreme Court tried to preserve *Auer* as precedent while rewriting its doctrine . . . into line with more recent constrictions of agency power.”).

115. *See* Stephanie Cumings, *Chevron May Lack Teeth in a Post-Kisor World*, 164 TAX NOTES FED. 409, 409 (2019).

116. *Kisor*, 139 S. Ct. at 2415. This step is hereinafter referred to as *Auer* Step One.

117. *Id.*

118. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018).

119. *See infra* Part IV.B.1.

120. *Kisor*, 139 S. Ct. at 2415. This step is hereinafter referred to as *Auer* Step Two.

121. *See id.* at 2416 (“And let there be no mistake: That is a requirement an agency can fail.”).

or official position,¹²² must in some way implicate the agency's substantive expertise, and must reflect fair and considered judgment and not be merely a convenient litigating position or an interpretation that causes regulated parties unfair surprise.¹²³

While a less potent version of the substantive expertise requirement was previously mentioned in *Gonzales v. Oregon*, the revamped version articulated in *Kisor* seems to show some resemblance to the Court's focus in *King v. Burwell*¹²⁴ on whether, in the context of determining whether *Chevron* deference analysis applied at all, the agency in question had the requisite expertise.¹²⁵ Furthermore, the official position and substantive expertise requirements as expressed in *Kisor* appear to operate before *Auer* Step One or *Auer* Step Two¹²⁶ because if either the official position or substantive expertise requirements are not satisfied, under *Kisor*, *Auer* deference would not apply and, ostensibly, the analysis would not proceed to *Auer* Step One or *Auer* Step Two.¹²⁷ If the agency does not have the requisite expertise or if the interpretation is not an official position of the agency, then it should not matter whether the regulation in question was ambiguous or whether the agency's interpretation was reasonable.¹²⁸ Ultimately, the application of the official position and the substantive expertise requirements at *Auer* Step Zero has the effect of reallocating power from agencies to the judiciary.¹²⁹

122. See *id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 n.6, 257–59 (2001) (Scalia, J., dissenting)).

123. See *id.* at 2417–18.

124. *King v. Burwell*, 135 S. Ct. 2480 (2015). But see Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, NOTICE & COMMENT (Jun. 26, 2019), <https://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/> (suggesting that the substantive expertise requirement is an incorporation of the *Skidmore* doctrine, whereby a court defers to an agency interpretation based on its power to persuade).

125. See *infra* Part IV.B.3 for a discussion of how the Court's focus on the substantive expertise requirement amounts to an expansion by the Court of *Chevron* Step Zero and is in effect an enhanced form of boundary maintenance between the judiciary and agencies. See *supra* Part I.B for a discussion of the relationship between expert-based administration and judicial deference.

126. This step is hereinafter referred to as *Auer* Step Zero.

127. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019).

128. See *id.* In other words, the official position and substantive expertise requirements appear to serve a gatekeeping function with respect to *Auer*, similar to how *Mead* and *King* serve a gatekeeping function with respect to *Chevron*. See *supra* notes 74–78 and accompanying text for a discussion of how *Mead* serves a gatekeeping function at *Chevron* Step Zero; see *infra* Part IV.B.3 for a discussion of how *King* serves a gatekeeping function at *Chevron* Step Zero.

129. *Kisor*, 139 S. Ct. at 2417 (“Generally, agencies have a nuanced understanding of the regulations they administer.’ . . . Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge’s bailiwick When the agency has no

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The fair and considered judgment requirement, although mentioned in *Auer v. Robbins*,¹³⁰ was stated there in the negative. In other words, in *Auer*, the Court stated that the agency interpretation in question was not unworthy of deference where there was “no reason to suspect that interpretation does not reflect the agency’s fair and considered judgment.”¹³¹ In *Kisor*, however, the fair and considered judgment requirement was stated in the positive; moreover, it was stated there as a condition precedent that must be satisfied in order for an agency interpretation to receive *Auer* deference.¹³² This strengthening of the fair and considered judgment requirement also resembles, to a certain extent, what the Court did in *Michigan v. EPA* and *Encino Motorcars, LLC v. Navarro*, where the Court incorporated *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*¹³³ into *Chevron* Step Two in determining whether the agency’s interpretation was reasonable.¹³⁴ Similarly, the Court in *Kisor* seems to have bolstered the reasonableness requirement by incorporating the fair and considered judgment requirement at *Auer* Step Two, and in doing so, has made *Auer* Step Two a formidable hurdle for agencies to overcome, thereby further restricting the realm of *Auer* deference.¹³⁵

comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.”) (quoting Brief for Respondent at 33, *Kisor*, 139 S. Ct. 2400 (No. 18-15)). This reallocation of power by the *Kisor* Court from agencies to the judiciary resembles, at least with respect to judicial review of regulations, what Chief Justice John Marshall did in *Marbury v. Madison* when he established the doctrine of judicial review of legislation and the supremacy of the judicial branch in interpreting the U.S. Constitution. See *supra* text accompanying notes 14–16.

130. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

131. *Id.*; see also *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (“[D]eference is . . . *unwarranted* when there is reason to suspect that the agency’s interpretation does *not* reflect the agency’s fair and considered judgment on the matter in question.”) (emphasis added) (internal quotation marks omitted) (citing *Auer*, 519 U.S. at 462).

132. *Kisor*, 139 S. Ct. at 2417.

133. See *infra* Part IV.B.2 for a discussion of how the Court has been incorporating *State Farm* into *Chevron* Step Two as a means of restoring the balance of power between agencies and the judiciary and bolstering judicial review of administrative agency action.

134. See *generally* *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016).

135. *Kisor*, 139 S. Ct. at 2417. The Court in *Kisor*, before mentioning the fair and considered judgment requirement, stated that “not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference.” *Id.* at 2416. This analysis presupposes that *Auer* Step Zero and *Auer* Step One have already been satisfied and, ostensibly, this fair and considered judgment requirement would be analyzed at *Auer* Step Two. *Id.* at 2417.

Kisor thus seems to have Chevronized *Auer*, which appears to have survived as a miniature version of *Chevron*.¹³⁶ The substantive expertise and official position requirements serve a gatekeeping function analogous to *Chevron* Step Zero.¹³⁷ The genuinely ambiguous and reasonableness requirements are akin to *Chevron* Step One and *Chevron* Step Two, respectively. Additionally, the fair and considered judgment requirement functions as a fortification of the reasonableness requirement, comparable to how *State Farm* has been applied at *Chevron* Step Two. Post-*Kisor*, the *Auer* standard operates with respect to regulations in a manner that is analogous to how the *Chevron* standard operates with respect to statutes.¹³⁸ What has emerged is a new and modified *Auer* doctrine “not quite so tame as some might hope, but not nearly so menacing as they might fear,”¹³⁹ and which not only provides agencies with significant leeway in interpreting their own ambiguous regulations,¹⁴⁰ but also amplifies the role of the judiciary in interpreting regulations.¹⁴¹

III. JUDICIAL DEFERENCE TO TREASURY REGULATIONS AND OTHER TAX GUIDANCE

Administrative agency action in the area of taxation comes in many forms with varying degrees of authority, ranging from regulations on one end of the authority spectrum to oral statements by revenue agents on the opposite end. This part examines some of these administrative pronouncements, the degree of deliberation involved in issuing such pronouncements—as well as their authoritative weight, and the degree of judicial deference they are generally accorded.

136. Kristin E. Hickman & Mark R. Thomson, Essay, *The Chevronization of Auer*, 103 MINN. L. REV. HEADNOTES 103, 107 (2019) (arguing that the *Auer* doctrine shows some resemblance to the *Chevron* doctrine in that the each started out as a simple and straightforward legal standard, but with time, each doctrine has become complex and riddled with qualifications and exceptions); Shepard, *supra* note 114, at 11; *see also* Walker, *supra* note 124 (noting similarities between the official position requirement and *Chevron* Step Zero, between the genuinely ambiguous requirement and *Chevron* Step One, and between the reasonableness requirement and *Chevron* Step Two).

137. *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); King v. Burwell, 135 S. Ct. 2480, 2489 (2015).

138. *See* Shepard, *supra* note 114 (“[T]he *Auer* presumption for a regulation is now supposed to operate just like *Chevron* does for a statute.”).

139. *Kisor*, 139 S. Ct. at 2418.

140. *Id.*

141. *See id.* at 2418, 2423 (“[The] Court has cabined *Auer*’s scope in varied and critical ways—and in exactly the same measure, has maintained a strong judicial role in interpreting rules . . . [W]e have taken care today to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules.”).

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As discussed in Part I.B., since the New Deal, expert-based administration has had a strong role as a form regulation in the United States.¹⁴² One example of expert-based administration can be seen in the U.S. tax system. The U.S. tax laws are extremely complex.¹⁴³ One cause of such complexity is that the income tax system is used as the primary instrument of fiscal policy.¹⁴⁴ Exacerbating that complexity is that the United States is a large country with a sophisticated society and a complex economy.¹⁴⁵

The income tax system is designed to apply to every person and to every conceivable transaction.¹⁴⁶ This application, by necessity, creates complexity because a tax system with such broad coverage must provide rules addressing what the tax base will be, the entities or persons that will be taxed, and the tax rate that will apply.¹⁴⁷ Even something ostensibly simple as the tax rate becomes very complicated in our tax system because we chose to have progressive tax rates¹⁴⁸ as well as a preferential rate for capital gains.¹⁴⁹ Another cause of complexity in the tax system is the use of the tax law to achieve goals that are not related to raising revenue.¹⁵⁰ For example, the tax system is used to achieve a system of employer-provided healthcare.¹⁵¹

Complexity is also generated by the interrelation between Treasury and Congress. Members of Congress are generalists and not technical experts in the tax law.¹⁵² They draft legislation hastily and do not fully appreciate all the technical implications of the provisions drafted by them or the practicality of how Treasury is going to be able draft regulations that implement the generally drafted statute.¹⁵³ Treasury and the IRS are then tasked with administering and enforcing the tax laws and use

142. See *supra* Part I.B.

143. See Sidney I. Roberts et al., *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 327 (1972).

144. James S. Eustice, Essay, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7, 11 (1989).

145. *Id.* at 12.

146. See *id.* at 11.

147. See *id.* at 11–12.

148. See I.R.C. § 1 (2018).

149. See *id.* § 1(h).

150. See Roberts et al., *supra* note 143, at 345.

151. See I.R.C. § 106 (2018).

152. Eustice, *supra* note 144, at 13.

153. See *id.* at 13–14.

regulations as a principal means of giving taxpayers guidance on interpreting the Internal Revenue Code.¹⁵⁴

1. General Versus Specific Authority Regulations and the “Force of Law”

Treasury regulations carry the most authoritative weight for determining the meaning of the Internal Revenue Code.¹⁵⁵ There are two broad categories of Treasury regulations.¹⁵⁶ The first category is regulations issued pursuant to a specific statutory authority in certain sections of the Code.¹⁵⁷ The second category consists of regulations issued pursuant to the general authority of Code section 7805(a).¹⁵⁸ Before 2011, one important distinction between specific authority and general authority regulations was that general authority regulations were generally entitled to less deference than specific authority regulations.¹⁵⁹ After the *Chevron* decision was handed down by the Supreme Court, uncertainty existed as to which deference standard—*Chevron* or the less deferential *National Muffler* standard—applied to interpretive Treasury regulations.¹⁶⁰ However, in 2011, the Supreme Court held in *Mayo*

154. See I.R.C. §§ 7801, 7803 (2018); Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323, 324 (2008).

155. See Rogovin & Korb, *supra* note 154, at 330.

156. *Id.* at 326.

157. See, e.g., I.R.C. §§ 1502, 1061(f), 1400Z-2(e)(4) (2018); see also Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1042 (1995).

158. I.R.C. § 7805(a) (2018) (granting the Secretary of the Treasury with general authority to prescribe all needful rules and regulations for enforcement of the Internal Revenue Code).

159. See *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981); *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982) (“Accordingly, ‘we owe the interpretation 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.’” (quoting *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981)); *Nat’l Muffler Dealers Ass’n, Inc. v. United States*, 440 U.S. 472, 477 (1979) (applying a multi-factored analysis whereby a court should defer to an agency’s interpretative regulation as long as it implements the congressional mandate in some reasonable manner and “harmonizes with the plain language of the statute, its origin and purpose.”) Factors to be considered include whether the regulation “is a substantially contemporaneous construction of a statute by those presumed to have been aware of congressional intent Other relevant considerations are the length of time the regulation has been in effect, the reliance placed upon it, the consistency of [administrative] interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.” *Nat’l Muffler Dealers Ass’n*, 440 U.S. at 477.

160. See Patricia Brandstetter, *Supreme Court Strengthens Power of Interpretive Treasury Regs.*, TAX ADVISER (May 1, 2011), <https://www.thetaxadviser.com/issues/2011/may/clinic-may2011-story-07.html>.

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Foundation that the determination of whether an agency interpretation, promulgated under a delegation of authority from Congress to make rules carrying the force of law, is entitled to *Chevron* deference “does not turn on whether Congress’ delegation of authority was general or specific.”¹⁶¹ Thus, under *Mayo Foundation*, both general and specific grants of authority are considered explicit grants of authority from Congress.¹⁶²

On the one hand, regulations promulgated under a general grant of congressional authority, as well as regulations promulgated under a specific grant of Congressional authority, would both be analyzed under the *Chevron* framework, provided such regulations carry the force of law.¹⁶³ On the other hand, regulations not carrying the force of law, although not eligible for *Chevron* deference, would be analyzed under *Skidmore*.¹⁶⁴ Even though the precise meaning of the term “force of law” within the context of *Chevron* deference is not entirely clear,¹⁶⁵ notice and comment rulemaking along with formal adjudication have been recognized by the Court as proof that an agency intended to act with the legal force sufficient for *Chevron* deference.¹⁶⁶ Adding, somewhat, to the uncertainty, however, is the Court’s position that notice and comment rulemaking is not a prerequisite for *Chevron* deference.¹⁶⁷

161. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 57 (2011).

162. *See id.* at 59; Matthew A. Melone, *Light on the Mayo: Recent Developments May Diminish the Impact of Mayo Foundation on Judicial Deference to Tax Regulations*, 13 HASTINGS BUS. L.J. 149, 168 (2017).

163. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference 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.”).

164. *See id.* at 234 (“*Chevron* did nothing to eliminate *Skidmore*’s holding that an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency”); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (notwithstanding that a reasonable agency interpretation is not entitled to *Chevron* deference, such interpretation still carries “at least some added persuasive force”); Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 467 (2013).

165. *See, e.g.*, Hickman, *supra* note 164, at 485 (“Having pronounced the force of law as the touchstone for *Chevron* deference, however, the Court has again declined to specify precisely what it means by that concept.”).

166. *See Mead*, 533 U.S. at 230; Hickman, *supra* note 164, at 489.

167. *See Mead*, 533 U.S. at 203–31 (“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. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure . . . does not decide the case”); Hickman,

An important consequence of the *Mayo Foundation* decision is that it has further melded the worlds of administrative law and tax law and made tax regulations on *pari-passu* with other administrative regulations by generally subjecting each type of regulation to deference analysis under the same framework.¹⁶⁸ Moreover, that administrative law and tax law intersect is not a new phenomenon. Under the Administrative Procedure Act, legislative rules promulgated by an agency must satisfy the APA's notice and comments requirements, or satisfy an exception from those requirements, in order to be procedurally valid.¹⁶⁹ The notice and comment procedures are not required if the regulations are interpretive, as opposed to legislative.¹⁷⁰

2. Legislative Versus Interpretive Regulations

A threshold issue when evaluating procedural validity of administrative rules under the APA is whether the rule is legislative or interpretive.¹⁷¹ Legislative rules, also referred to as substantive rules, are "issued by an agency pursuant to statutory authority and which implement the statute."¹⁷² These rules have the force of law.¹⁷³ Interpretive rules, on the other hand, are rules or statements issued by an agency to "advise the public of the agency's construction of the statutes and the rules which it administers."¹⁷⁴ This threshold determination is important because interpretive rules are not subject to the APA's notice and comment procedures but legislative rules must comply with such

supra note 164, at 490 ("The Supreme Court's refusal to limit *Chevron* deference to notice-and-comment regulations and its simultaneous failure to elaborate the circumstances where other agency rules might be *Chevron* eligible have perplexed lower courts forced to evaluate agency rules that lack notice and comment procedures.").

168. See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011) ("[W]e 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.'").

169. 5 U.S.C. § 553 (2018).

170. See *generally id.* § 553(b)(A) (providing an exception from notice and comment procedures for, inter alia, interpretive rules).

171. This distinction has been described as "enshrouded in considerable smog," "fuzzy," "tenuous," "blurred" and "baffling." See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108–09 (D.C. Cir. 1993).

172. *Id.* at 1109 (citing U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL TO THE ADMINISTRATIVE PROCEDURE ACT (1947)).

173. *Id.*; *Chrysler Corp. v. Brown*, 441 U.S. 281, 295–96 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' This doctrine is so well established that agency regulations . . . have been held to pre-empt state law under the Supremacy Clause.").

174. *Am. Mining Cong.*, 995 F.2d at 1109 (citing UNITED STATES DEPT OF JUSTICE, ATTORNEY GENERAL'S MANUAL TO THE ADMINISTRATIVE PROCEDURE ACT (1947)).

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procedures, unless such procedures would be impracticable, unnecessary, or contrary to the public interest.¹⁷⁵

3. Retroactive Regulations Versus Regulations Having Prospective Effect

The extent of Treasury's ability to give retroactive effect to a regulation generally varies depending on when the underlying statute, to which the regulation relates, was enacted.¹⁷⁶ Regulations which relate to statutory provisions enacted before July 30, 1996 are subject to the prior version of I.R.C. § 7805(b), which generally presumed that all regulations have retroactive effect unless the Secretary of the Treasury prescribes otherwise.¹⁷⁷ With respect to such regulations, Treasury would have near plenary authority to apply them with retroactive effect.¹⁷⁸ The traditional justifications for the retroactivity authorized by the pre-1996 amendment version of I.R.C. § 7805(b) were grounded in the declaratory theory of jurisprudence articulated by Sir William Blackstone.¹⁷⁹ Under that theory, judges are not viewed as making law, but as finding the law, declaring it to the litigants and applying it retroactively since it is the correct law.¹⁸⁰ Applying the declaratory theory to Treasury regulations, Treasury is not viewed as creating the law, since the statute is the law, but rather as "declaring what a specific provision of the Code had always meant."¹⁸¹

In 1996, I.R.C. § 7805(b) was amended¹⁸² and the presumption of retroactivity of regulations was replaced by a presumption of prospective application.¹⁸³ As a result, regulations which relate to statutory provisions enacted on or after July 30, 1996 are subject to I.R.C. § 7805(b)(1) which generally restricts retroactivity of any temporary, proposed or final regulation to the taxable period ending before the

175. 5 U.S.C. § 553(b)(B) (commonly referred to as the good cause exception); see *Am. Mining Cong.*, 995 F.2d at 1109; Hickman, *supra* note 164, at 467.

176. Andrew Pruitt, Essay, *Judicial Deference to Retroactive Interpretive Regulations*, 79 GEO. WASH. L. REV. 1558, 1569–70 (2011).

177. See *id.* at 1569 (preceding the 1996 amendment to I.R.C. § 7805(b), "the Code granted the Secretary of the Treasury near-plenary authority to issue retroactive regulations. In fact, all Treasury regulations were presumed to have retroactive effect unless otherwise specified.").

178. See *id.* at 1570.

179. See David W. Ball, *Retroactive Application of Treasury Rules and Regulations*, 17 N.M. L. REV. 139, 142 (1987).

180. *Id.*

181. See Pruitt, *supra* note 176, at 1569.

182. See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101(a), 110 Stat. 1452, 1468–69 (1996).

183. Pruitt, *supra* note 176, at 1569.

earlier of the date in which the regulation (or in the case of a final regulation, the related temporary or proposed regulation) was published in the Federal Register,¹⁸⁴ or the issuance date of a notice which substantially describes the expected contents of any temporary, proposed or final regulation.¹⁸⁵ Exceptions from I.R.C. § 7805(b)(1) exist, including exceptions for regulations issued within eighteen months of the enactment of a statutory provision to which the regulation relates,¹⁸⁶ regulations that take effect retroactively to prevent abuse,¹⁸⁷ and regulations that correct procedural defects in the previously issued regulations.¹⁸⁸

While the 1996 amendment, on its face, appears to seriously restrict Treasury's ability to promulgate retroactive regulations, as compared to status quo ante before the 1996 amendment, the limitations in the amendment only apply with respect to regulations that relate to statutory provisions enacted on or after July 30, 1996.¹⁸⁹ The corollary to that is that regulations that relate to statutory provisions enacted before July 30, 1996 are pregnant with the pre-1996 presumption of retroactive effect, even if the regulations are promulgated on or after July 30, 1996.¹⁹⁰ Since most of the current tax laws come from or antedate the Internal Revenue Code of 1986, it follows that Treasury has effectively retained almost all, or a substantially all, of its plenary authority to give retroactive effect to regulations, the 1996 amendment to I.R.C. § 7805(b) notwithstanding.¹⁹¹

4. Final Regulations

Treasury "[r]egulations receive the greatest degree of deliberation by Treasury and the IRS."¹⁹² This process consists of multiple levels of review, including review by high level personnel, as well as consideration of public input via the notice and comment process.¹⁹³ The approval process of regulations is also extensive. Treasury regulations are approved by the Commissioner of Internal Revenue as well as the

184. I.R.C. § 7805(b)(1)(A)-(B) (2018).

185. *Id.* § 7805(b)(1)(C).

186. *Id.* § 7805(b)(2).

187. *Id.* § 7805(b)(3).

188. *Id.* § 7805(b)(4).

189. *See* Pruitt, *supra* note 176, at 1570.

190. *See id.*

191. *See id.*

192. Irving Salem, Ellen P. Aprill & Linda Galler, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX L. 717, 733 (2004) [hereinafter ABA Task Force].

193. *See id.*

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Assistant Treasury Secretary for Tax Policy or by their deputies.¹⁹⁴ Although the IRS takes the position that most Treasury regulations are interpretive and are therefore not subject to the APA's notice and comment requirement,¹⁹⁵ the IRS customarily follows notice and comment procedures for both legislative and interpretive regulations.¹⁹⁶

Treasury regulations are the most authoritative guidance issued by Treasury and the IRS.¹⁹⁷ Such regulations, whether they are promulgated under general or specific authority, are generally analyzed for judicial deference under the *Chevron* two step framework.¹⁹⁸ Moreover, Treasury regulations, especially those that have been subjected to notice and comment procedures, and which provide a reasonable¹⁹⁹ interpretation of an ambiguous statute, are, under current jurisprudence, generally afforded *Chevron* deference.²⁰⁰

194. See Treas. Reg. § 601.601(a)(1) (as amended in 1987). It is important to note here that the procedural rules issued under Part 601 of Subchapter H of the Code of Federal Regulations, also referred to as "the Statement of Procedural Rules," differ significantly from Treasury regulations. See *Boulez v. Comm'r*, 810 F.2d 209, 215 (D.C. Cir 1987). These procedural rules are issued by the Commissioner of Internal Revenue without approval from the Secretary of the Treasury and are "directory, not mandatory in nature." See *Boulez*, 810 F.2d at 215.

195. See IRM 32.1.1.2.6 (Sept. 23, 2011) ("The Administrative Procedure Act (APA) exempts interpretive rules from the APA's notice and comment requirements . . . Most IRS/Treasury Regulations are considered interpretive because the underlying statute implemented by the regulation contains the necessary legal authority for the action taken and any effect of the regulation flows directly from that statute."); Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX. REV. 51, 57 (1996).

196. See Aprill, *supra* note 195; ABA Task Force, *supra* note 192, at 734; IRM 32.1.5.4.7.4.1 (3), (9) (Aug. 21, 2018) ("IRS/Treasury regulations have the force and effect of law even though they are interpretive regulations Although most IRS/Treasury regulations are interpretive, and therefore not subject to the notice-and-comment provisions of the APA, the Service usually solicits public comment when it promulgates a rule."). *But see* Ford, *supra* note 1, at 983 ("Treasury, although one of the oldest and most rule-heavy administrative bodies in the federal government, is one of the most lax when it comes to following the APA.").

197. See Rogovin & Korb, *supra* note 154, at 330.

198. See *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 56–57 (2011); *see also*, *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 487 (2012).

199. See *supra* text accompanying notes 84–86 for a discussion of the Court's apparent bifurcation of the permissibility of a construction into two alternative standards: the "arbitrary, capricious, or manifestly contrary to the statute" standard and the a "reasonable interpretation" standard. Note that in *Mayo*, the Court applied the "reasonable interpretation" standard in step two of the *Chevron* analysis. See *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 58.

200. See *SIH Partners LLLP v. Comm'r*, 150 T.C. No. 3, 12, 15 (2018) (granting *Chevron* deference to Treas. Reg. §§ 1.956-2(c)(1), 1.956-1(e)(2)); *United States v. Hendrick*, No. 16-1006, 2018 WL 1795425, at *1, *3 (W.D. Pa. Apr. 18, 2018) (according *Chevron* deference to Treas. Reg. § 301.6330-1(g)(1)); *Our Country Home Enters., Inc. v. Comm'r*, 855 F.3d 773, 784 (7th Cir. 2017) (providing *Chevron* deference to Treas. Reg. § 301.6330-

5. Temporary and Proposed Regulations

Proposed Treasury regulations are generally not binding on the taxpayer or the government.²⁰¹ Taxpayers could, however, in certain circumstances, rely on proposed regulations if there is an express statement in the proposed regulations notifying taxpayers that they can rely on them.²⁰² Although a proposed regulation is generally not binding, if it is eventually adopted, the final regulation can have retroactive effect from the date that is the earlier of the date on which the proposed regulation was published in the Federal Register or the issuance date of a notice that substantially described the expected contents of the proposed regulation.²⁰³ “Proposed regulations are generally not afforded any more weight” than a position of the IRS advanced on brief and some courts have held that proposed regulations should be entitled to little or no deference.²⁰⁴ Recently, however, the trend seems to be changing such that proposed regulations that have the power to persuade merit *Skidmore* deference.²⁰⁵

1(e)(3)); *Keller Tank Servs. II, Inc. v. Comm’r*, 854 F.3d 1178, 1197–98 (10th Cir. 2017); *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 55–56; see also *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984); Ford, *supra* note 1, at 994–95. *But see infra* Part IV.A for a discussion of recent criticisms of *Chevron* deference as violating the separation of powers.

201. See *Garvey, Inc. v. United States*, 1 Cl. Ct. 108, 118 (1983) (“[P]roposed [regulations] are merely preliminary proposals.”), *aff’d*, 726 F.2d 1569 (Fed. Cir. 1984); *LeCroy Research Sys. Corp. v. Comm’r*, 751 F.2d 123, 127 (2d Cir. 1985) (“Proposed regulations are suggestions made for comment; they modify nothing.”).

202. See IRM 32.1.1.2.2(2) (Aug. 2, 2018). Proposed regulations can also be relied on by taxpayers as authority for purposes of determining whether substantial authority exists for the tax treatment of an item. See Treas Reg. § 1.6662-4(d)(3)(iii) (2019).

203. See I.R.C. § 7805(b)(1)(B)-(C)(2018).

204. *Robinson v. Comm’r*, 119 T.C. 44, 153 n.4 (2002) (Vasquez, J., dissenting); *Gen. Dynamics Corp. v. Comm’r*, 108 T.C. 107, 120 (1997); *Laglia v. Comm’r*, 88 T.C. 894, 897 (1987) (citing *Freese v. Comm’r*, 84 T.C. 920, 939 (1985); *Zinniel v. Comm’r*, 89 T.C. 357, 369 (1987) (quoting *Woolworth v. Comm’r*, 54 T.C. 1233, 1265–66 (1970); *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, 287 (2003) (first citing *Robinson v. Comm’r*, 119 T.C. 44, 155 n.4 (2002) then citing *Laglia v. Comm’r*, 88 T.C. 894, 897 (1987); *Zinniel v. Comm’r*, 89 T.C. 357, 369 (1987); ABA Task Force, *supra* note 192, at 743.

205. See, e.g., *Yang You Lee v. Lynch*, 791 F.3d 1261, 1265 (10th Cir. 2015) (“Under *Skidmore*, a proposed regulation is ‘entitled to respect’ if it has the ‘power to persuade.’”) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Hulett Coffey v. Comm’r*, 150 T.C. 60, 84 n.20 (2018) (“Proposed regulations are entitled to deference under *Skidmore v. Swift & Co.*, which means we defer to them if they persuade us.”) (citation omitted).

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Temporary regulations have historically been issued by Treasury and the IRS without being subjected to notice and comment procedures.²⁰⁶ Since 1996, however, temporary regulations must also be published in the Federal Register as proposed regulations,²⁰⁷ for which comments are invited, and must be finalized within three years from the date they are issued as proposed regulations.²⁰⁸ However, the three year limitation of I.R.C. § 7805(e) only applies prospectively to temporary regulations issued after November 20, 1988.²⁰⁹ Therefore, temporary regulations issued on or before November 20, 1988 would technically never expire.²¹⁰ Such regulations have been referred to as “grandfathered temporary regulations” or even “permanently temporary.”²¹¹

One issue that has created substantial academic debate is that temporary regulations are immediately binding upon publication and are not subjected to the pre-promulgation notice and comment procedures that are generally required by the APA.²¹² Although temporary regulations have, since 1996, been required to be published as proposed regulations, the comment period occurs post-promulgation, meaning that the comment period occurs after the effective date of the temporary regulation.²¹³ Unless Treasury satisfies the good cause exception of 5 U.S.C. § 553(b)(B), or unless the temporary regulations are interpretive, as specified in 5 U.S.C. § 553(b)(A), such temporary regulations issued with only post-promulgation notice and comment violate the APA and would therefore be procedurally deficient.²¹⁴ Nevertheless, Treasury does

206. See Hickman, *supra* note 164, at 492; Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44(2) TAX LAW. 343, 343 (1991).

207. This requirement may also be satisfied if Treasury and the IRS issue the proposed regulations as cross-references to temporary regulations. See H.R. REP. NO. 100-1104, at 218 (1988) (“The IRS may continue its present practice of issuing proposed regulations by cross-reference at the time temporary regulations are issued.”).

208. I.R.C. § 7805(e)(1)-(2) (2018); see also Hickman, *supra* note 164, at 492.

209. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647 § 6232(b), 102 Stat. 3342 (1988).

210. See Eleanor D. Wood, *Rejecting Tax Exceptionalism: Bringing Temporary Treasury Regulations Back in Line with the APA*, 100 MINN. L. REV. 839, 843 (2015).

211. *Id.*; Vasquez & Lowy, *supra* note 204, at 254.

212. IRM 32.1.1.2.3.1(1) (Aug. 2, 2018) (“Temporary regulations are issued to provide immediate guidance to the public and IRS and Counsel employees prior to publishing final regulations. Temporary regulations are effective when published by the Office of the Federal Register.”); ABA Task Force, *supra* note 192, at 728.

213. See Hickman, *supra* note 164, at 493 (“Treasury frequently begins its rulemaking with the legal equivalent of a final rule rather than with merely a nonbinding proposal.”).

214. See *id.*; Michael Asimow, *Interim Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 717 (1999) (“In order to dispense with pre-adoption public participation, an agency must qualify under an APA rulemaking exception. Absent such an exception, a rule adopted with post- rather than pre-adoption notice and comment is procedurally invalid.”); Kristen E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of)*

not regularly resort to claiming the good cause exception when promulgating temporary regulations.²¹⁵ When it does claim the good cause exception, however, Treasury usually justifies its position by explaining the necessity of immediate guidance.²¹⁶ Treasury's main defense regarding the procedural validity of temporary regulations under the APA is that most Treasury regulations are interpretive rules and therefore are not subject to the notice and comment procedures of the APA.²¹⁷ Temporary regulations generally carry the same authoritative weight as final tax regulations.²¹⁸ Although temporary regulations are issued without pre-promulgation notice and comment procedures, Treasury's lack of compliance with such procedures does not necessarily bar temporary regulations from being eligible for *Chevron* deference.²¹⁹

Compliance with Administrative Procedure Act Rulemaking Requirements, 82 NOTRE DAME L. REV. 1727, 1730 (2007) (observing that some scholars have noted "certain aspects of Treasury's practices as potentially inconsistent with APA requirements . . ."); Vasquez & Lowy, *supra* note 204, at 252–54 (arguing that Treasury's reliance of the good cause and interpretive rule exceptions "has all but obliterated the APA's notice-and-comment procedures" with respect to Temporary regulations and Treasury's repeated invocation of the good cause exception in effect equates to "an abuse of discretion").

215. See Hickman, *supra* note 164, at 494.

216. See *id.* at 495; IRM 32.1.5.4.7.4.1(8) (Aug. 21, 2018) ("Treasury temporary regulations are generally issued when there is a need to provide taxpayers with immediate guidance."). *But see* Mobil Oil Corp. v. Dep't of Energy, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (citation omitted) ("[A] desire to provide immediate guidance, without more, does not suffice for good cause [I]f the conclusory statement that normal procedures were not followed because of the need to provide immediate guidance and information . . . constitutes 'good cause', then an exception to the notice requirement would be created that would swallow the rule.").

217. See IRM 1.1.2.6 (Sept. 23, 2011); Hickman, *supra* note 164, at 495–96.

218. *E. Norman Peterson Marital Tr. v. Comm'r*, 78 F.3d 795, 798 (2d Cir. 1996) ("The fact that the regulation at issue is a temporary regulation does not change our analysis. Until the passage of final regulations, temporary regulations are entitled to the same weight we accord to final regulations.") (citing *Truck & Equip. Corp. of Harrisonburg v. Comm'r*, 98 T.C. 141, 149, 1992 WL 18381 (1992)). *Cf.* *LeCroy Research Sys. Corp. v. Comm'r*, 751 F.2d 123, 127 (2d Cir. 1984) (noting that temporary regulations, unlike proposed regulations, are binding). The Code imposes a 20 percent accuracy-related penalty on underpayments attributable to disregarded of rules and regulations. I.R.C. § 6662 (a), (b)(1) (2018). The term "rules or regulations" is defined to include temporary Treasury regulations. Treas. Reg. § 1.6662-3(b)(2) (as amended in 2003). Temporary regulations can also be relied on by taxpayers as authority for purposes of determining whether substantial authority exists for the tax treatment of an item. See Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

219. See, e.g., *Union Ban Cal Corp. v. Comm'r*, 305 F.3d 976, 985 (9th Cir. 2002) (upholding a temporary Treasury regulation that was issued without notice and comment); *Hosp. Corp. of Am. v. Comm'r*, 348 F.3d 136, 144 (6th Cir. 2003) ("The fact that the temporary regulation was not subject to notice and comment does not . . . require us to eschew *Chevron* deference"); *Freightliner of Grand Rapids, Inc. v. United States*, 351 F. Supp. 2d 718, 721 (W.D. Mich. 2004) ("The fact that the regulations at issue are temporary does not affect the analysis. Temporary regulations receive the same *Chevron*

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6. Regulations Promulgated in Response to Pending Litigation

Regulations can create thorny issues when they are issued in connection with pending litigation. These regulations have been referred to as “fighting regulations.”²²⁰ The concern arises when Treasury attempts to issue regulations in an attempt to influence the outcome of the pending litigation. Although the Supreme Court had historically showed general discomfort with the concept of such regulations being issued during related litigation,²²¹ the Court’s stance on this point seemed to change²²² in 1996 with its decision in *Smiley v. Citibank*, where

deference as do permanent regulations.”); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) (“[T]he want of notice and comment “does not decide the case, for we have sometimes found reasons for *Chevron* deference even when such administrative formality was required and none was afforded.”); *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (“[T]he fact that the Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due.”); ABA Task Force, *supra* note 192, at 742 (“[It is] appropriate for a court to give *Chevron* deference to temporary regulations only if the IRS in promulgating them can justify the absence of notice and comment under criteria like that required under the APA.”). *But see* *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (holding that the statute in question was unambiguous and its meaning controlled by a prior Supreme Court precedent, but noting that even if the statute was ambiguous and the prior Supreme Court precedent was not applicable, “it is unclear whether the Regulations would be entitled to *Chevron* deference under *Mayo Foundation for Medical Research v. United States* Here, the government issued the Temporary Regulations without subjecting them to notice and comment procedures That the government allowed for notice and comment after the final Regulations were enacted is not an acceptable substitute for pre-promulgation notice and comment.”) (internal citations omitted); *In re Canada*, 574 B.R. 620, 636 n.16 (N.D. Tex. 2017) (noting that the “Fifth Circuit [in *Burks*] has expressed hesitancy at the thought of affording *Chevron* deference to a temporary Treasury regulation issued without pre-promulgation notice and comment”); Jeffrey N. Starkey & Thomas A. Cullinan, *Is the IRS Always Right? Judicial Deference to Treasury Regulations and Other IRS Positions*, 14 J. TAX PRAC. & PROC. 31, 32 (2012) (noting that “there is a substantial question as to whether temporary Treasury regulations will (or should) be afforded *Chevron* deference” because temporary regulations “are immediately binding on taxpayers [but are promulgated] without following notice-and-comment procedures.”).

220. Leandra Lederman, *The Fight over Fighting Regs and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 644, n.2 (2012).

221. *See, e.g.*, *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110, 115–16 (1939) (refusing to give retroactive effect to a regulation amended during litigation); *Chock Full O’ Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971) (“[T]he 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.”).

222. *See* ABA Task Force, *supra* note 192, at 743 n.71 (“[W]hile earlier tax cases may suggest that a litigating regulation could be invalidated as an abuse of discretion, such as *Chock Full O’ Nuts Corp. v. United States*, 453 F.2d 300 (2d Cir. 1971), or *Caterpillar*

the Court stated that the fact that the need for the regulations arose out of the litigation, was irrelevant.²²³ Further, in *Mayo Foundation* the Court cited *Smiley* with approval and specifically stated that “it [is] immaterial to our analysis that a ‘regulation was prompted by litigation.’”²²⁴

In the tax context, one possible justification for the somewhat recent acceptance of Treasury Regulations issued in relation to litigation is that since Treasury is interested in all tax cases, requiring a court to disregard litigating regulations would, the argument goes, require the courts to disregard all Treasury regulations, since it is likely that most tax issues are litigated at some point in time.²²⁵ Therefore, fighting regulations, should generally be eligible for *Chevron* deference as if they were not issued in connection with litigation,²²⁶ and the *Chevron* analysis would be the same as that performed for final and temporary regulations.²²⁷ However, one question that remains unanswered after the Supreme Court’s decisions in *Brand X*,²²⁸ *Mayo*,²²⁹ and *Home Concrete*,²³⁰ is whether *Chevron* deference applies to a retroactive regulation issued by Treasury, during the pendency of litigation to which it is a party, where the regulation conflicts with a prior judicial precedent on the same legal issue but where the prior court found that the statute was ambiguous and left a gap to be filled.²³¹

Tractor Co. v. United States, 589 F.2d 1040 (Ct. Cl. 1978), these cases may have been superseded by developments in Supreme Court precedent.”)

223. *Smiley v. Citibank*, (S.D.), N.A., 517 U.S. 735, 741 (1996) (“Nor does it matter that the regulation was prompted by litigation, including this very suit . . . That it was litigation which disclosed the need for regulation is irrelevant.”).

224. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 712 (2011) (citation omitted); see also Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731, 734–35 (2002) (explaining that a regulation designed to influence the outcome of pending litigation would likely be binding on the courts assuming it otherwise satisfied the requirements for *Chevron* deference).

225. See *Indianapolis Life Ins. Co. v. United States*, 115 F.3d 430, 436 (7th Cir. 1997) (“[The argument that the Treasury Regulation] should be thrown out because it is just a crutch one litigant uses to support its position, and that it was issued in anticipation of litigation . . . prove too much: they would require courts to disregard all federal tax regulations, because the Treasury is vitally interested in every tax case, and most tax questions sooner or later come to litigation.”).

226. See ABA Task Force, *supra* note 192, at 759.

227. See *supra* Parts III.A.4 and III.A.5 for a discussion of *Chevron* deference to final and temporary regulations.

228. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

229. *Mayo Found. for Med. Educ. & Research*, 562 U.S. at 44.

230. *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012).

231. See *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011) (“[I]n *Mayo* the Supreme Court was not faced with a situation where, during the pendency of the suit, the treasury promulgated determinative, retroactive regulations following prior adverse

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1. Revenue Rulings

Revenue rulings are official interpretations issued by the National Office of the IRS and are published in the Internal Revenue Bulletin.²³² They reflect conclusions as to how the law would apply to a specific set of hypothetical facts.²³³ Revenue rulings are considered interpretive rules under the APA and are therefore generally exempt from the notice and comment procedures.²³⁴ While revenue rulings are official interpretations by the IRS, they do not generally receive the same degree of consideration and review as do regulations,²³⁵ and they carry less authoritative weight than regulations.²³⁶ Although revenue rulings are not as authoritative as regulations, taxpayers can generally rely on them, provided the facts and circumstances in their own transactions are substantially the same as those in the revenue rulings.²³⁷ Failure to follow revenue rulings, however, may result in accuracy-related penalties for disregard of rules or regulations.²³⁸ Revenue rulings are generally not

judicial decisions on the identical legal issue.”); Starkey & Cullinan, *supra* note 219, at 33 (stating that *Home Concrete* left many unanswered questions, including “[c]an the Treasury Department ‘overrule’ a Supreme Court case in which . . . the Court did not identify a clear Congressional intent underlying the relevant statutory provision? And can Treasury promulgate a regulation to ‘overturn’ an adverse lower court decision while an appeal is pending, and apply the regulation retroactively?”).

232. Treas. Reg. §§ 601.201(a)(6) (1967); 601.601(d)(2)(i)(a) (as amended in 1987).

233. See Treas. Reg. § 601.601(d)(2)(v)(a) (as amended in 1987) (“[C]onclusions expressed in revenue rulings will be directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling.”); Galler, *supra* note 157, at 1044–45.

234. See, e.g., *Wing v. Comm’r*, 81 T.C. 17, 27 (1983) (“[R]evenue rulings, which merely represent opinions by [the Service], have been held to be the classic example of an interpretive ruling and exempt from the notice and comment provisions of APA section 553.”); see also Galler, *supra* note 157, at 1045.

235. See ABA Task Force, *supra* note 192, at 736, 744 (“After written approval of a proposed ruling by the Chief Counsel, it is reviewed in the Office of the Commissioner and in the Treasury’s Office of Tax Policy. Revenue Rulings are published . . . without prior notice to the public, and the Service does not ordinarily solicit public comments before issuing them. Revenue rulings are not formally signed by the Commissioner or the Assistant Secretary for Tax Policy. Revenue rulings . . . simply list the staff lawyer in Office of Chief Counsel who is the principal author, and give that person’s phone number for further information.”).

236. See Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1987) (“Revenue rulings published in the [Internal Revenue] Bulletin do not have the force and effect of Treasury Department Regulations . . . 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.”); ABA Task Force, *supra* note 192, at 735–36; Galler, *supra* note 157, at 1041.

237. See Treas. Reg. § 601.601(d)(2)(v)(e) (as amended in 1987).

238. See I.R.C. § 6662(a), (b)(1) (2018); Treas. Reg. § 1.6662-3(b)(2) (as amended in 2003) (defining rules or regulations to include revenue rulings issued by the IRS and

entitled to *Chevron* deference.²³⁹ Rather, revenue rulings are generally analyzed for deference under the standard established in *Skidmore v. Swift & Co.*²⁴⁰

2. Revenue Procedures

Revenue procedures are generally promulgated to outline procedures²⁴¹ and not substantive rules.²⁴² They typically follow an internal review process similar to revenue rulings and are generally issued without notice and comment procedures.²⁴³ Revenue procedures are generally not binding on the government and do not carry the force and effect of law.²⁴⁴ Although the government has argued, at least on one occasion that revenue procedures should be entitled to less weight than revenue rulings,²⁴⁵ not all revenue procedures are procedural, and in fact,

published in the Internal Revenue Bulletin). Revenue rulings can also be relied on by taxpayers as authority for purposes of determining whether substantial authority exists for the tax treatment of an item. See Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

239. See *In re WorldCom, Inc.*, 723 F.3d 346, 357 (2d Cir. 2013) (“We now hold, consistent with every other circuit to have addressed the issue since *Mead*, that revenue rulings are not entitled to *Chevron* deference.”); see also Marie Sapirie, *DOJ Won’t Argue for Chevron Deference for Revenue Rulings and Procedures, Official Says*, TAX ANALYSTS (May 12, 2011), <http://www.taxhistory.org/www/features.nsf/Articles/2EC3B72AF2B851808525788E0056818B?OpenDocument> (“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.”).

240. 323 U.S. 134, 140 (1944); see, e.g., *Grecian Magnesite Mining, Indus. & Shipping Co., SA v. Comm’r*, 926 F.3d 819, 823–24 (D.C. Cir. 2019) (analyzing a revenue ruling for deference under *Skidmore*); *Seaview Trading, LLC v. Comm’r*, 858 F.3d 1281, 1284–85 (9th Cir. 2017) (same); (*Estate of Schaefer v. Comm’r*, 145 T.C. 134, 144 (2015) (same); *Webber v. Comm’r*, 144 T.C. 324, 352–53 (2015) (same); *Validus Reinsurance, Ltd. v. United States*, 19 F. Supp. 3d 225, 230, n.4 (D.D.C. 2014) (“In this Circuit, courts accord [revenue] rulings with *Skidmore* deference—that is, they are ‘entitled to respect to the extent they ‘have the power to persuade.’ But courts will not defer when a ruling contrasts with clear statutory language.”) (alteration in original) (citations omitted); *PSB Holdings, Inc. v. Comm’r*, 129 T.C. 131, 142–45 (2007) (performing deference analysis for a revenue ruling under the *Skidmore* framework).

241. See Treas. Reg. § 601.601(d)(2)(i)(b) (as amended in 1987) (“A ‘Revenue Procedure’ is an official 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.”).

242. See ABA Task Force, *supra* note 192, at 730.

243. *Id.* at 746.

244. See *United States v. Toyota of Visilia*, 772 F. Supp. 481, 486 (E.D. Cal. 1991) (Revenue Procedures “do not have the force and effect of law and thus [are] not binding on the I.R.S.”), *aff’d*, 988 F.2d 126 (9th Cir. 1993).

245. See *United States v. Metro Constr. Co.*, 602 F.2d 879, 882 (9th Cir. 1979).

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some may have substantive content.²⁴⁶ This fact has led some to suggest that a revenue procedure that ventures beyond the realm of procedure into the world of substance should arguably be treated more like a revenue ruling.²⁴⁷ Moreover, although the government is generally not bound by revenue procedures, the government may be bound by revenue procedures which are substantive in nature.²⁴⁸ Like revenue rulings, revenue procedures are also generally not entitled to *Chevron* deference.²⁴⁹ Nevertheless, some courts have analyzed revenue procedures for deference under *Skidmore*.²⁵⁰

3. Notices

Frequently, the IRS issues notices, which are public pronouncements that may contain a substantive interpretation of the Code or other provisions of the law.²⁵¹ The IRS often uses notices when there is a need for expedient guidance,²⁵² especially in circumstances where revenue rulings or revenue procedures may “not be appropriate.”²⁵³ While some notices may have substantive content, the IRS sometimes uses notices in order to solicit public comment on non-regulatory guidance, such as revenue procedures.²⁵⁴ Other times, the IRS uses notices to inform the

246. See, e.g., *id.* (stating that even if it is true that revenue procedures are promulgated to outline procedures, taxpayers have a right to rely on their substantive content when the Code and regulations are ambiguous).

247. See, e.g., ABA Task Force, *supra* note 192, at 771. Strengthening this argument is that fact that revenue procedures are subjected to the same degree of deliberation as revenue rulings. See *id.* at 736.

248. See *Estate of Shapiro v. Comm’r*, 111 F.3d 1010, 1017 (2d Cir. 1997) (“[I]f a Revenue Procedure ‘is properly characterized as a substantive statement rather than a procedural directive,’ the IRS may be required to follow it in every case But the instances in which the IRS can be bound by its own Revenue Procedures appear to be quite rare.”) (citation omitted) (quoting *Eli Lilly & Co. v. Comm’r*, 856 F.2d 855, 865 (7th Cir. 1988)). Nonetheless, revenue procedures can be relied on by taxpayers as authority for purposes of determining whether substantial authority exists for the tax treatment of an item. See *Treas. Reg. § 1.6662-4(d)(3)(iii)* (as in amended in 2003).

249. See *Stauffer v. Internal Revenue Serv.*, 285 F. Supp. 3d 474, 490 (D. Mass. 2017) (“With respect to IRS revenue procedures, courts generally have tended to treat them as non-binding and not entitled to *Chevron* deference.”); see also *Sapirie*, *supra* note 239.

250. See, e.g., *Tualatin Valley Builders Supply, Inc. v. United States*, 522 F.3d 937, 938 (9th Cir. 2008) (applying *Skidmore* deference analysis to revenue procedure). *But see Marandola v. United States*, 76 Fed. Cl. 237, 246 n.14 (Fed. Cl. 2007) (stating that revenue procedures “can, where they set out a persuasive rationale, be entitled to *limited Skidmore* deference”) (emphasis added).

251. See *IRM 32.2.2.3.3(1)* (Aug. 11, 2004).

252. See *Rogovin & Korb*, *supra* note 154, at 339.

253. See *IRM 32.2.2.3.3(1)* (Aug. 11, 2004).

254. See *id.* For an example of such a notice, see, e.g., I.R.S. Notice 18-64, 2018-35 I.R.B. 347 (containing a proposed revenue procedure that provides guidance on methods for

public about the content of future regulations in cases where such regulation may not be published in the immediate future.²⁵⁵ Like revenue procedures, notices are subjected to internal review processes akin to revenue rulings and are not issued with prior notice and comment procedures.²⁵⁶ Notices can generally be relied upon by taxpayers as authority for purposes of determining whether substantial authority exists for the tax treatment of an item.²⁵⁷ Failure to follow a notice may result in an accuracy-related penalty for disregard of rules or regulations.²⁵⁸ Many courts that have analyzed whether notices merit deference have generally done so under the *Skidmore* standard.²⁵⁹

calculating W-2 wages for purposes of I.R.C. § 199A and Prop. Treas. Reg. §§ 199A-1 through 199A-6 and requesting public comment on the proposed revenue procedure contained in the notice).

255. See IRM 32.2.2.3.3(1) (Aug. 11, 2004). For example, I.R.C. § 1061, enacted on December 22, 2017, and effective for tax years beginning after December 31, 2017, increases the holding period for long term capital gain treatment from one to three years for Applicable Partnership Interests. A potential loophole in § 1061 would have allowed taxpayers to circumvent § 1061 through the use of Subchapter S corporations by claiming that the exception in § 1061(c)(4)(A) for Applicable Partnership Interests held through corporations, applies to Applicable Partnership Interests held through Subchapter S corporations. See I.R.S. Notice 18-18, 2018-12 I.R.B. 443. In response, Treasury and the IRS announced in Notice 2018-18 that they intend to issue regulations that will apply retroactively to tax years beginning after December 31, 2017 to close this potential loophole and that such regulations “will provide that the term ‘corporation’ in section 1061(c)(4)(A) does not include an S corporation.” *Id.* Notably, Treasury has specific authority from Congress under I.R.C. § 1061(f) to “issue such regulations or other guidance as is necessary or appropriate to carry out the purpose of [§ 1061].” I.R.C. § 1061(f) (2018).

256. See ABA Task Force, *supra* note 192, at 746.

257. See Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003); Rev. Rul. 90-91, 1990-2 C.B. 262; Rogovin & Korb, *supra* note 154, at 341.

258. See I.R.C. § 6662(a), (b)(1) (2018); Treas. Reg. § 1.6662-3(b)(2) (as amended in 2003) (defining rules or regulations to include notices, other than notices of proposed rulemaking, issued by the IRS and published in the Internal Revenue Bulletin).

259. See, e.g., *Esden v. Bank of Boston*, 229 F.3d 154, 169, n.19 (2d Cir. 2000) (holding that an IRS notice, interpreting a Treasury regulation, merits deference under *Auer*, but noting that even if the notice was not entitled to deference under that standard, it would have been entitled to respect under *Skidmore*); *WestRock Va. Corp. v. United States*, 136 Fed. Cl. 267, 281 (Fed. Cl. 2018) (analyzing notice for deference under *Skidmore*); *Sunoco, Inc. v. United States*, 128 Fed. Cl. 345 (Fed. Cl. 2016) (same); *In re Wyly*, 552 B.R. 338, 558, n.1187 (Bankr. N.D. Tex. 2016) (same); *Sutardja v. United States*, 109 Fed. Cl. 358 (Fed. Cl. 2013) (same); *W.E. Partners II, LLC v. United States*, 119 Fed. Cl. 684, 691–92 (Fed. Cl. 2015) (applying both *Chevron* analysis and *Skidmore* analysis to an IRS notice, but concluding that the notice, although not afforded *Chevron* deference, merits deference under *Skidmore*); *Morehouse v. Comm’r*, 769 F.3d 616, 624 (8th Cir. 2014) (Gruender, J., dissenting) (“[An] IRS notice can be ‘entitled to respect’ because it constitutes ‘a body of experience and informed judgment’ . . . [but] that level of deference depends upon, among other factors, ‘consistency with earlier and later pronouncements’ . . . [and] under *Skidmore*, deference can range from ‘great respect at one end to near indifference at the other.’”).

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4. Interpretations of Ambiguous Regulations

Not all regulations are unambiguous. Some regulations promulgated by Treasury and the IRS are ambiguous and are in need of clarification. In such circumstances, the IRS sometimes clarifies such ambiguity using published guidance, including revenue rulings and notices. Courts reviewing such agency interpretations generally perform the deference analysis under the *Auer* standard, irrespective of whether the interpretation is in the form of a revenue ruling,²⁶⁰ notice,²⁶¹ letter ruling,²⁶² or even in a legal brief.²⁶³ *Auer* has not, however, been limited to interpretations of ambiguous Treasury regulations. Rather, *Auer* deference has also been applied to an IRS interpretation of an ambiguous revenue procedure.²⁶⁴

260. See *Mellow Partners v. Comm’r*, 890 F.3d 1070 (D.C. Cir. 2018) (analyzing a revenue ruling, that interpreted an ambiguous Treasury regulation, for deference under both *Auer* and *Skidmore*); see also *Blue Mountain Energy, Inc. v. United States*, No. 2:14-cv-418-DN, 2016 WL 4179366, at *1 (D. Utah 2016) (analyzing revenue ruling, interpreting Treasury regulation, for deference under *Auer*).

261. See *Esden*, 229 F.3d at 169, n.19 (reviewing IRS notice, interpreting Treasury regulation, for deference under *Auer*).

262. See *PBBM-Rose Hill, Ltd. v. Comm’r*, 900 F.3d 193, 206–07 (5th Cir. 2018) (analyzing letter ruling, interpreting Treasury regulation, for deference under *Auer*). This case however, was decided before *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). After *Kisor*, it is unclear whether an IRS interpretation stated in a letter ruling would survive the official position requirement at *Auer Step Zero*, in which case, *Auer* would not apply at all. See also I.R.C. § 6110(k)(3) (2018) (“[A] written determination may not be used or cited as precedent.”); I.R.C. § 6110(b)(1)(A) (2018) (defining the term written determination to include a letter ruling). For a discussion of *Kisor*’s official position requirement and its application at *Auer Step Zero*, see *supra* text accompanying notes 126–28.

263. Compare *Amazon v. Comm’r*, 934 F.3d 976, 991–93 (9th Cir. 2019) (illustrating, post-*Kisor*, one court’s refusal to grant *Auer* deference to an IRS interpretation of a Treasury regulation where the IRS’ first expression of such interpretation was in the IRS’ court brief in the pending litigation); with *Polm Family Found., Inc. v. United States*, 644 F.3d 406, 409 (D.C. Cir. 2011) (illustrating, pre-*Kisor*, a case where the court granted *Auer* deference to an IRS interpretation of a Treasury regulation, even if such interpretation appears for the first time in a court brief).

264. See *Am. Express Co. v. United States*, 262 F.3d 1376, 1381–83 (Fed. Cir. 2001) (applying *Auer* deference to General Counsel Memorandum interpreting revenue procedure). It remains to be seen, however, whether *Kisor* and its narrowing of *Auer* deference would permit the application of *Auer* to an interpretation of a revenue procedure as opposed to a regulation. Furthermore, whether a General Counsel Memorandum would survive the official position requirement at *Auer Step Zero* is questionable . . . ; see also I.R.C. § 6110(k)(3) (2018) (“[A] written determination may not be used or cited as precedent.”); I.R.C. § 6110(b)(1)(A) (2018) (defining the term written determination to include Chief Counsel advice); I.R.C. § 6110(i)(1)(A) (2018) (defining Chief Counsel advice as “written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel,” relating to a revenue provision, and issued to Service employees); Rogovin & Korb, *supra* note 154, at 362 (General Counsel

5. Announcements and News Releases

Announcements are public pronouncements that have only immediate or short-term value and provide guidance on substantive or procedural matters of general interest.²⁶⁵ Announcements are issued when guidance is needed quickly, for example, regarding effective dates of temporary regulations, clarification of rulings and form instructions.²⁶⁶ Announcements are also used to notify the general public of the IRS' revocation of its prior determinations that certain entities qualify as tax-exempt organizations.²⁶⁷ Announcements are approved by an Associate Chief Counsel²⁶⁸ and are published in the Internal Revenue Bulletin.²⁶⁹ Similar to notices, announcements can generally be relied upon by taxpayers, to the same extent as revenue rulings and revenue procedures, as authority for determining whether substantial authority exists for the tax treatment of an item.²⁷⁰

A news release is a non-technical publication that is issued when there is a significant need to alert the nonpractitioner public and the immediate release of the publication to the general news media may be beneficial.²⁷¹ A news release is generally drafted by the IRS' Media Relations Office in coordination with an Associate Chief Counsel.²⁷² Unlike an announcement, a news release is not published in the Internal Revenue Bulletin.²⁷³ The IRS does, however, make news releases available on the IRS website.²⁷⁴ Although a news release is generally not required to be reviewed by Chief Counsel personnel,²⁷⁵ the decision to disseminate information in the form of a news release must be approved at the Associate Chief Counsel level or higher.²⁷⁶ Because the content of

Memoranda are formal legal opinions by Chief Counsel components of the IRS national office).

265. See IRM 4.10.7.2.4.1(1)(a) (Jan. 1, 2006); IRM 32.2.2.3.4(1) (Aug. 11, 2004).

266. See IRM 4.10.7.2.4.1(1)(a) (Jan. 1, 2006); IRM 32.2.2.3.4(1) (Aug. 11, 2004). See I.R.S. Announcement 2012-36, 2012-46 I.R.B. 547 for an example of an announcement listing corrections and clarifications for items in Publication 1220.

267. See, e.g., I.R.S. Announcement 2018-07, 2018-16 I.R.B. 503.

268. See IRM 32.2.2.6.6(2) (Aug. 11, 2004).

269. See IRM 32.2.2.1(1) (Aug. 11, 2004).

270. See Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003); Rev. Rul. 90-91, 1990-2 C.B. 262; IRM 32.2.2.10(3) (Aug. 11, 2004); Rogovin & Korb, *supra* note 154, at 341.

271. See IRM 32.2.2.1(3) (Aug. 11, 2004); IRM 32.2.2.3.5(1) (Aug. 11, 2004).

272. See IRM 32.2.2.9.2(1) (Aug. 11, 2004); IRM 32.2.2.3.5(2) (Aug. 11, 2004).

273. See IRM 32.2.2.3.5(1) (Aug. 11, 2004).

274. Internal Revenue Serv., <https://www.irs.gov/newsroom/news-release-and-fact-sheet-archive> (last visited Feb. 23, 2020) (listing web version of IRS news releases from 2002 to the present); Rogovin & Korb, *supra* note 154, at 369, n.233.

275. IRM 32.2.2.3.5(2) (Aug. 11, 2004).

276. IRM 32.2.2.3.5(3) (Aug. 11, 2004).

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news releases is generally non-technical, many news releases do not lend themselves to reliance by taxpayers.²⁷⁷ But some news releases invite reliance by taxpayers by specifically clarifying that certain tax benefits are allowed in a given situation.²⁷⁸ Other news releases invite reliance by providing mechanical rules, such as due dates,²⁷⁹ or guidance on how to report and pay certain taxes.²⁸⁰

Similar to an announcement, a news release can be relied upon as authority in determining whether a taxpayer has substantial authority for the tax treatment of an item.²⁸¹ Case law regarding judicial deference to IRS announcements and news releases is sparse. However, depending on the circumstances, a court could ostensibly use the framework provided in *Skidmore* and defer to an announcement or news release only to the extent the court finds it persuasive.

C. *Written Determinations*

1. Letter Rulings

A letter ruling is a written statement issued to a taxpayer by the Associate Chief Counsel of a division of the IRS in response to a written

277. Rogovin & Korb, *supra* note 154, at 369.

278. See, e.g., I.R.S. News Release IR-2017-210 (Dec. 27, 2017). The Tax Cuts and Jobs Act, P.L. No. 115-97, which was signed into law on December 22, 2017, amended I.R.C. § 164(a) by adding a new paragraph (6) which generally limits, for tax years beginning on January 1, 2018, the federal deduction taken by individuals for certain state and local taxes to \$10,000. The Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054, 2085 (2017). Many individual taxpayers had questions as to whether they can pre-pay certain 2018 real estate taxes before December 31, 2017 in order to take the related deduction on their 2017 returns without being subjected to the \$10,000 limitation, which is not effective for the 2017 tax year. The IRS issued IR-2017-210 in which is stated that generally, the deduction would be allowed if the state or local taxing authority has assessed the 2018 tax on or before December 31, 2017 and the taxpayer pays such assessed tax on or before December 31, 2017. See I.R.S. News Release IR-2017-210 (Dec. 27, 2017).

279. Rogovin & Korb, *supra* note 154, at 369.

280. See, e.g., I.R.S. New Release IR-2018-53 (Mar. 13, 2018) (informing taxpayers that the IRS has released information in a question and answer format, relating to the then newly enacted I.R.C. § 965, which was added by the Tax Cuts and Jobs Act on December 22, 2017). Section 965, generally, may give rise to a 2017 tax liability (commonly referred to as the transition tax) for a United States Shareholder owning an interest in a specified foreign corporation. *Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> (last updated Jan. 28, 2020). IR-2018-53 and the related frequently asked questions provided much needed guidance, including how to report and pay the transition tax and it also provided information regarding certain elections available under § 965).

281. See Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

request from the taxpayer.²⁸² Letter rulings are issued with respect to prospective transactions or even transactions that have already occurred, but before the tax return for the period to which the transaction relates is filed.²⁸³ The IRS places restrictions on issuance of letter rulings. For example, the IRS does not typically issue so-called “comfort rulings,”²⁸⁴ or letter rulings that would not address the tax status, liability, or reporting obligations of the requester.²⁸⁵ Nor does the IRS ordinarily issue letter rulings if an identical issue exists in a tax return of the same taxpayer for a prior tax year which is under audit by the IRS.²⁸⁶ Similar to a revenue ruling, a letter ruling interprets and applies the tax laws to a specific set of facts.²⁸⁷ But unlike a revenue ruling, a letter ruling does not synthesize the specified decisions in the letter ruling into a rule or principle.²⁸⁸ Letter rulings go through a less extensive review process, for example, as compared to revenue rulings, and are generally approved by an Associate Chief Counsel Office.²⁸⁹ Letter rulings are made available for public inspection after identifying information about the taxpayer to whom the ruling is issued is deleted.²⁹⁰

The taxpayer to whom a letter ruling is issued may rely on the letter ruling for the specific transaction, even if future regulations are issued that hold a contrary position to that reflected in the letter ruling.²⁹¹ By

282. See Treas. Reg. § 601.201(a)(2) (1967). Letter rulings are also commonly referred to as private letter rulings. See, e.g., *Private Letter Rulings: Some Basic Concepts*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts> (last visited Feb. 23, 2020) (referring to a letter ruling as a private letter ruling).

283. See Treas. Reg. § 601.201(a)(1) (1967).

284. Rev. Proc. 2018-1, 2018-1 I.R.B. 1 (stating that generally, “a letter ruling will not be issued with respect to an issue that is clearly and adequately addressed by statute, regulations, decision of a court, revenue rulings, revenue procedures, notices, or other authority published in the Internal Revenue Bulletin”).

285. *Id.*

286. See Treas. Reg. § 601.201(b)(1) (1967).

287. *Id.* § 601.201(a)(2).

288. See Rogovin & Korb, *supra* note 154, at 332. (stating that, with respect to letter rulings, “no attempt is made to formulate specified decisions into a stated principle or rule”).

289. See IRM 32.3.2.1(1) (July 9, 2014) (describing authority of Associate Chief Counsel Offices to issue letter rulings); Rogovin & Korb, *supra* note 154, at 332 n.32 (noting that “[f]ew letter rulings are reviewed above the branch level of an Associate Chief Counsel Office in the Office of Chief Counsel.”); ABA Task Force, *supra* note 192, at 735–36 (comparing process for letter rulings to process for revenue rulings and noting that letter rulings “are issued by an Associate Chief Counsel”); see also ABA Task Force, *supra* note 192 for a summary of the steps involved in the review and approval process with respect to revenue rulings.

290. See I.R.C. § 6110(a), (c)(1) (2018).

291. See *Schering-Plough Corp. v. United States*, No. 05-2575 (KSH), 2007 WL 4264542, at *7 (D.N.J. Dec. 3, 2007) (noting a letter ruling is binding on the IRS with respect to the taxpayer to whom the letter ruling is issued); see also Rev. Proc. 2018-1, 2018-1 I.R.B.

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the same token, the IRS may use the letter ruling in an examination of that taxpayer's return.²⁹² Under I.R.C. § 6110(k)(3), letter rulings generally cannot be cited as precedent²⁹³ and the only taxpayer who can rely on a letter ruling is the taxpayer who requested that ruling.²⁹⁴ The justification for not allowing a taxpayer to rely on a letter ruling issued to another taxpayer is that if taxpayers can rely on all letter rulings, the IRS would need to subject letter rulings to a considerably greater level of review than under the existing procedures.²⁹⁵ This review, in turn would result in delays in the issuance of letter rulings and taxpayers would not be able to obtain timely guidance from the IRS, causing the letter ruling program to suffer.²⁹⁶

Although as a general matter, letter rulings formally cannot be cited as precedent, they should carry at least some authoritative value.²⁹⁷ Since letter rulings are issued by the National Office, they are generally

1 (stating that generally, except in unusual circumstances, the application of the letter ruling to the requester's transaction will not be affected by the later issuance of regulations or if it is later found that the ruling is in error); James P. Holden & Michael S. Novey, *Legitimate Uses of Letter Ruling Issued to other Taxpayers – A reply to Gerald Portney*, 37 TAX L. 337, 340 (1984) ("As a matter of 'general policy,' taxpayers receiving favorable rulings would be protected if the ruling was in error or the Service subsequently changed its position.") (quoting Rev. Rul. 54-172, 1954-1 C.B. 394).

292. See Rev. Proc. 2018-1, 2018-1 I.R.B. 1.

293. See I.R.C. § 6110(k)(3) (2018) ("Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent."); see also I.R.C. § 6110(b)(1)(A) (2018) (defining the term "written determination" to include a ruling).

294. See *Goodstein v. Comm'r*, 267 F.2d 127, 132 (1st Cir. 1959) ("[T]o hold that the Commissioner is bound by rulings specifically addressed to a taxpayer other than the one whose return is questioned would severely limit the usefulness of the long established practice of private administrative rulings."); Treas. Reg. § 1.6662-4(d)(3)(iv)(A) (as amended in 2003) (stating that substantial authority exists for the tax treatment of an item if the treatment is supported by conclusion of the letter ruling issued to the taxpayer.); Treas. Reg. § 601.201(l)(l) (1967) ("A taxpayer may not rely on an advance ruling issued to another taxpayer."); see also Rev. Proc. 2018-1, 2018-1 I.R.B. 1 ("A taxpayer may not rely on a letter ruling issued to another taxpayer."); Rogovin & Korb, *supra* note 154, at 348. *But see* Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003) (stating that a letter ruling issued after October 31, 1976 constitutes authority for other taxpayers for purposes of determining whether there is substantial authority for the tax treatment of an item). If a letter ruling becomes a basis for a revenue ruling, relying on a revenue ruling generally affords more protection than relying on a letter ruling issued to another taxpayer. However, the taxpayer to whom the letter ruling was issued is afforded more protection by relying on that letter ruling with respect to the referenced transaction than by relying on the revenue ruling. See Holden & Novey, *supra* note 291, at 340 n.21.

295. S. REP. NO. 94-938, at 311 (1976).

296. *Id.*

297. See Yehonatan Givati, *Resolving Legal Uncertainty: The Fulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 159–60 (2009) (stating that I.R.C. § 6110(k) notwithstanding, letter rulings have precedential value in practice).

of high quality²⁹⁸ and can serve as a manifestation of an administrative interpretation of the Code or regulations.²⁹⁹ Moreover, because they are disclosed to the public, once the public is aware of an IRS position on a specific transaction in a letter ruling, sound tax administration requires the public to have confidence that the IRS administers the tax laws in an even-handed manner.³⁰⁰ Some courts have even enforced the duty of consistency against the IRS and have required the IRS to allow a taxpayer to rely on a letter ruling issued to another similarly situated taxpayer.³⁰¹ But ultimately, a taxpayer who relies on a letter ruling issued to another taxpayer bears the risk that the IRS will not follow the ruling.

While letter rulings may not have precedential value, some courts that have recently analyzed letter rulings for deference, have done so under the *Skidmore* standard.³⁰² Other courts have deferred to letter rulings, without applying *Skidmore*,³⁰³ especially when the letter rulings

298. See Holden & Novey, *supra* note 291, at 349.

299. *Id.* at 340.

300. See S. REP. NO. 94-938, at 305–06 (1976) (stating that public access to letter rulings “will tend to increase the public’s confidence that the tax system operates fairly and in an even-handed manner with respect to all taxpayers”); James R. Atkinson, *Public Reliance Necessarily Follows from the Public Disclosure of Private Letter Rulings*, 10 U. TOL. L. REV. 985, 1007 (1979). *But see* Rogovin & Korb, *supra* note 154, at 348 (“Only in some unusual and very limited circumstances has a taxpayer been allowed to rely on letter rulings issued to another taxpayer.”).

301. See *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (“The Commissioner cannot tax one and not tax another without some rational basis for the difference.”); *Sirbo Holdings, Inc. v. Comm’r*, 476 F.2d 981, 987 (2d Cir. 1973) (“[T]he Commissioner has a duty of consistency toward similarly situated taxpayers”); *see also* Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent*, 40 TAX L. REV. 411 (1985) (arguing that the proclamation in I.R.C. § 6110(j)(3) [Author’s note: I.R.C. § 6110(j) was amended by the IRS Restructuring and Reform Act of 1998, P.L. 105-206, § 35019(b) which re-designated I.R.C. § 6110(j) as I.R.C. § 6110(k)] that letter rulings cannot be cited as precedent is not sufficient to exempt the IRS of its duty of consistency to taxpayers); Atkinson, *supra* note 300.

302. See, e.g., *Martinez–Gonzalez v. Catholic Schools of Archdioceses of San Juan Pension Plan*, 235 F. Supp. 3d 334, 346 (D.P.R. 2017) (stating that private letter rulings “are entitled to ‘respect’ under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) . . . but only to the extent that these interpretations have the power to persuade.”) (quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)); *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 918 n.3 (N.D. Cal. 2013) (stating that private letter rulings “are entitled to only *Skidmore* deference . . . such that the weight the Court must give to the letters depends on ‘the thoroughness evident in their consideration, the validity of their reasoning, their consistency with earlier and later pronouncements, and all those factors which give them power to persuade, if lacking power to control.’”) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

303. See, e.g., *Smith v. Reg’l Transit Auth.*, 827 F.3d 412, 423 n.3 (5th Cir. 2016) (“While IRS private letter rulings are not binding with respect to parties other than the taxpayer to whom they were issued, ‘such rulings do reveal the interpretation put upon the

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are consistent with the court's reading of the text of the statute,³⁰⁴ even when the IRS has changed its position from the position it had previously expressed in the letter ruling.³⁰⁵

2. Determination Letters

Somewhat similar to a letter ruling is a determination letter, which is a written statement issued in response to a taxpayer's written inquiry and which applies previously established precedents and principles to a specific set of facts.³⁰⁶ A determination letter is issued by a district director and only "when a determination can be made based on clearly established rules in a statute, a tax treaty, the regulations, a conclusion in a revenue ruling, or an opinion or court decision that represents the position of the [IRS]."³⁰⁷ Determination letters can be issued with respect to both completed transactions and certain prospective transactions.³⁰⁸ Determination letters issued regarding prospective transactions are generally limited to letters as to qualification of plans under I.R.C. § 401, the exempt status of related trusts under § 501, the exempt status of organizations under §§ 501 and 521, qualification of organizations for foundation status under §§ 509(a) and 4942(j)(3), and the replacement of certain involuntary converted property.³⁰⁹

Like letter rulings, determination letters are also required to be publicly disclosed after redacting confidential information.³¹⁰ Although generally not reviewed by an Associate Chief Counsel,³¹¹ a determination letter has the same effect as a letter ruling with respect to the taxpayer to whom it is issued.³¹² However, because determination letters receive a

statute by the agency charged with the responsibility of administering the revenue laws.") (quoting *Hanover Bank v. C.I.R.*, 369 U.S. 672, 686 (1962)).

304. See, e.g., *Overall v. Ascension*, 23 F. Supp. 3d 816, 827 (E.D. Mich. 2014) ("IRS private letter rulings, while not binding, are entitled to deference . . . This is particularly so where the IRS rulings, in the Court's view, are consistent with the text of the statute.")

305. See, e.g., *Hanover Bank v. Comm'r*, 369 U.S. 672, 686 (1962) ("[A]lthough the petitioners are not entitled to rely upon unpublished private rulings which were not issued specifically to them, such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws."); *Transco Expl. Co. v. Comm'r*, 949 F.2d 837, 840-41 (5th Cir. 1992) (deferring to a letter ruling under circumstances similar to those in *Hanover Bank*).

306. See Treas. Reg. § 601.201(a)(3) (1967).

307. See Rev. Proc. 2018-1, 2018-1 I.R.B. 1.

308. See Treas. Reg. § 601.201(c)(1), (5)-(6) (1967).

309. *Id.*

310. I.R.C. § 6610 (a), (c) (2018).

311. See Rev. Proc. 2018-1, 2018-1 I.R.B. 1.

312. See *id.*; see also Treas. Reg. § 1.6662-4(d)(3)(iv)(A) (as amended in 2003) (stating that a conclusion set forth in a determination letter or in a letter ruling constitutes

lesser degree of consideration by the Service than letter rulings,³¹³ it follows that determination letters should theoretically carry less authoritative value to other taxpayers than letter rulings.³¹⁴ At least one court has held that determination letters are entitled to some deference (albeit without resorting to *Skidmore*).³¹⁵ Other courts have generally been hesitant to defer to determination letters that are based on limited information provided by the applicant.³¹⁶ And some courts have accorded no deference to determination letters in situations where the letter is not the only guidance issued by the IRS on the matter or where the determination letter does not specifically address the issue being examined by the court.³¹⁷ Determination letters have also been afforded no deference where the letter in question did not provide reasoning to explain the basis for the statements made in the letter or where the letter was devoid of legal analysis.³¹⁸

3. Technical Advice Memoranda

A technical advice memorandum (“TAM”) is advice issued by any of the various Offices of the Associate Chief Counsel in response to a request by an IRS field office.³¹⁹ A TAM is issued in response to a question arising under any proceeding before the IRS and concerning the interpretation

substantial authority for the tax treatment of an item with respect to the taxpayer to whom the letter ruling of determination letter is issued).

313. See Rogovin & Korb, *supra* note 154, at 351.

314. See *supra* notes 297–300 and accompanying text for a discussion on the authoritative value of letter rulings; see also Rogovin & Korb, *supra* note 154, at 351 (“Of lesser impact than the ruling program in interpreting the Code is the determination letter program.”).

315. See *Amato v. Western Union Int’l, Inc.*, 773 F.2d 1402, 1412–13 (2d Cir. 1985) (“Although such written determination letters by the IRS . . . ‘may not be used or cited as precedent . . . they are entitled to some weight The force of letters of determination is enhanced by the limited circumstances in which the IRS issues them’”) (citing I.R.C. § 6110(j)(3) [Author’s note: I.R.C. § 6110(j) was amended by the IRS Restructuring and Reform Act of 1998, P.L. 105-206, § 35019(b) which re-designated I.R.C. § 6110(j) as I.R.C. § 6110(k)]). See generally *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994).

316. See *Shatto v. Evans Products Co.*, 728 F.2d 1224, 1228 n.2 (9th Cir. 1984).

317. See *Esden v. Bank of Bos.*, 229 F.3d 154, 175–76 (2d Cir. 2000); *Lyons v. Ga. Pac. Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1252 (11th Cir. 2000).

318. See *Hickey v. Chi. Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465, 469 (7th Cir. 1992) (“Given the informal nature of these letters . . . and the absence of any reasoning to explain the basis for the statements, we do not think that any implication in either of these letters . . . is entitled to deference.”); *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1172 (S.D. Tex. 1991) (“[T]he Court also finds that the IRS determination is due no deference because it evidences no investigation or legal analysis of the facts by the IRS.”).

319. See Rev. Proc. 2018-2, 2018-1 I.R.B. 106. A taxpayer, however, may request that a field office refer an issue to an Office of the Associate Chief Counsel for technical advice. See *id.* at § 5.02.

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and application of the Code, regulations, or other sources of authority, to facts pertaining to the tax treatment of an item in a period under examination or appeal.³²⁰ As compared to a letter ruling, which can be issued with respect to a prospective transaction, a TAM may generally only be issued for closed transactions.³²¹

Although a TAM is not requested by the taxpayer, the taxpayer named in the TAM can generally rely on the TAM as substantial authority for the tax treatment of an item if the treatment is supported by the conclusion of the TAM.³²² For other taxpayers, a TAM issued after October 31, 1976 constitutes authority for purposes of determining whether substantial authority exists for the tax treatment of an item.³²³ A TAM is generally subject to public inspection³²⁴ and cannot be used or cited as precedent.³²⁵ However, since a TAM can be binding on the IRS at least with respect to the taxpayer named in the TAM and since a TAM is issued by an Office of the Associate Chief Counsel and therefore receives a degree of deliberation similar to a letter ruling, a TAM should ostensibly carry some authoritative value³²⁶ to other taxpayers similar to that accorded in practice to letter rulings.³²⁷ Although a TAM, like a letter ruling, may not be cited for its precedential value, some courts have still deferred to TAMs and have done so without resorting to *Skidmore*.³²⁸

320. See Rev. Proc. 2018-2, 2018-1 I.R.B. 106.

321. See *id.*

322. Treas. Reg. § 1.6662-4(d)(3)(iv)(A) (as amended in 2003).

323. See *id.* § 1.6662-4(d)(3)(iii); Rogovin & Korb, *supra* note 154, at 355–56.

324. See I.R.C. § 6110(a), (b)(1)(A) (2018); Rogovin & Korb, *supra* note 154, at 355.

325. See I.R.C. § 6110(a), (b)(1)(A), (k)(3) (2018).

326. See Rogovin & Korb, *supra* note 154, at 354 (“The most authoritative form of legal advice, and the only one for which the Service publishes an annual revenue procedure is the Technical Advice Memorandum, or TAM.”).

327. See *supra* notes 297–300 and accompanying text for a discussion on the authoritative value of letter rulings.

328. See, e.g., *Wells Fargo & Co. and Subsidiaries v. Comm’r*, 224 F.3d 874, 886 (8th Cir. 2000) (“[Technical Advice Memoranda] . . . have no precedential value, but they do ‘reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws’ and may provide evidence of the proper construction of the statute.”) (quoting *Hanover Bank v. Comm’r*, 369 U.S. 672, 686 (1962)); *Hardy v. Comm’r*, T.C. Memo 2017-16, at 7 (2017) (“Although we recognize that a technical advice memorandum may not be cited for its precedential value, it does reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws and may provide evidence that such construction is compelled by the language of the statute.”) (internal citations omitted); *Woods Inv. Co. v. Comm’r*, 85 T.C. 274, 281, n.15 (1985) (same); see also *Stromme v. Comm’r*, 138 T.C. 213, 223 n.2 (2012) (Holmes, J., concurring) (“We don’t give Technical Advice Memoranda any more deference than we would a litigating position taken by the Commissioner.”); *Schuman Aviation Co. Ltd. v. United States*, 816 F. Supp. 2d 941, 954 n.7 (D. Haw. 2011) (refusing to consider Technical Advice Memoranda “because the Internal Revenue Code does not permit a Technical Advice Memorandum to be used or cited as precedent by a taxpayer

4. Chief Counsel Advice

Chief Counsel advice is written advice or instruction prepared by any national office component of the Office of Chief Counsel and issued to employees of the IRS or of the Office of Chief Counsel, that conveys a legal interpretation, IRS position or policy concerning a revenue provision.³²⁹ The term revenue provision is defined to include internal revenue law, revenue ruling, revenue procedure, other guidance, or tax treaty.³³⁰ Chief Counsel advice includes other types of advice issued by the Office of Chief Counsel, including Field Service Advice.³³¹ Similar to other written determinations, Chief Counsel advice is generally subject to public inspection³³² and cannot be used or cited as precedent.³³³ Chief Counsel advice is used to develop, settle, or resolve the cases for which the advice is requested,³³⁴ and although they could be helpful in shedding light on the legal analysis performed by the Office of Chief Counsel, Chief Counsel advice should not be relied upon as authority by taxpayers.³³⁵

The degree of deference accorded to Chief Counsel advice seems to be inconsistent among the courts. At least one court has analyzed Chief Counsel advice for *Skidmore* style deference.³³⁶ The court in *Voss v. Comm’r*, gave “limited weight” to Chief Counsel advice after stating that “the IRS’s Chief Counsel Advice is only entitled to the ‘measure of deference proportional to 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.’”³³⁷ Another court stopped short of deferring to Chief Counsel

other than the taxpayer to whom the memorandum was issued”) (citing I.R.C. § 6110(k)(3) (2018)).

329. See I.R.C. § 6110(i)(1)(A) (2018).

330. See I.R.C. § 6110(i)(1)(B) (2018).

331. See H.R. REP. NO. 105-599, at 300 (1998) (Conf. Rep.). The term Chief Counsel advice also includes service center advice, technical assistance to the field, litigation guideline memoranda, tax litigation bulletins, general litigation bulletins, and criminal tax bulletins. See *id.* The term Chief Counsel advice has been held to be broad enough to cover certain emails containing legal advice sent by lawyers in the Office of Chief Counsel to IRS field personnel. See *Tax Analysts v. I.R.S.*, 495 F.3d 676, 681 (D.C. Cir. 2007).

332. See I.R.C. § 6110(a), (b)(1)(A) (2018).

333. See I.R.C. § 6110(k)(3) (2018).

334. Rogovin & Korb, *supra* note 154, at 358.

335. *Id.* (“As there is no assurance that that the Service will apply the result in any given Chief Counsel Advice to matters other than those explicitly covered in the document, taxpayers and their advisers cannot rely on these documents in determining how to consummate transactions or take return positions.”).

336. *Voss v. Comm’r*, 796 F.3d 1051 (9th Cir. 2015).

337. *Id.* at 1066 (internal quotation marks omitted) (first quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012); then quoting *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)).

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advice and used it to analyze a revenue ruling for deference under *Skidmore*.³³⁸ Yet another court declined to even consider Chief Counsel advice, citing a statement in the advice that, pursuant to I.R.C. § 6110(k)(3), such document may not be cited as precedent.³³⁹

D. Other Agency Action by Treasury and the IRS

1. Advance Pricing Agreements

While written determinations are required to be available for public inspection, the IRS can enter with taxpayers into certain agreements which, under current law, are not required to be disclosed to the public. One type of such agreement is an advance pricing agreement.³⁴⁰ An advance pricing agreement is a binding agreement between the Service and the taxpayer.³⁴¹ Advance pricing agreements are used to resolve transfer pricing issues by means of an agreement between the taxpayer, the IRS and, often, a foreign taxing authority.³⁴² Advance pricing agreements generally apply prospectively.³⁴³

The only taxpayer who can rely on the advance pricing agreement is the taxpayer to whom the advance pricing agreement specifically relates, and even that tax taxpayer can only rely on the advance pricing agreement for the specific transactions and the specific taxable years subject to the advance pricing agreement.³⁴⁴ Advance pricing agreements are issued by the Advance Pricing and Mutual Agreement program, which is “a constituent office of the U.S. competent authority, within the office of the Deputy Commissioner International, Large Business & International Division.”³⁴⁵ The non-disclosure of advance pricing agreements to the public has spurred debate among scholars as to whether the IRS should be required to publicly disclose advance pricing agreements.³⁴⁶ Nevertheless, the fact that advance pricing agreements

338. See *Seaview Trading, LLC v. Comm’r*, 858 F.3d 1281, 1286 n.3 (9th Cir. 2017) (“Under 26 U.S.C. § 6110(k)(3), Chief Counsel Advice is not precedential. It may, however, be relevant to the panel’s *Skidmore* review of the consistency and logic of the agency’s position.”).

339. *In re Lewis*, 557 B.R. 233, 239 (M.D. Ala. 2016).

340. See I.R.C. §§ 6110(b)(1)(B), 6103(b)(2)(C) (2018).

341. Rev. Proc. 2015-41, 2015-35 I.R.B. 263.

342. GERALYN M. FALLON, *Advance Pricing Agreements*, 75 TAXES 304, 304 (1997).

343. Rev. Proc. 2015-41, 2015-35 I.R.B. 263 (“APAs are intended to apply primarily to prospective [tax] years . . .”); Rogovin & Korb, *supra* note 154, at 350.

344. See Rev. Proc. 2015-41, 2015-35 I.R.B. 263.

345. See *id.*

346. Compare Kristin E. Hickman, *Should Advance Pricing Agreements Be Published?*, 19 NW. J. INT’L L. & BUS. 171, 189–94 (1998) (arguing that as a matter of policy, advance pricing agreements should not be published because publication could hinder the

remain undisclosed to the public tends to increase the public's perception that the IRS is creating a secret body of law,³⁴⁷ and making "secret deals."³⁴⁸ Further, because advance pricing agreements are not disclosed to the public, they are not typically the subject of judicial deference analysis by the courts.³⁴⁹

2. Closing Agreements

A closing agreement is a written agreement entered into by the IRS and a taxpayer with respect to that taxpayer's tax liability for a specific taxable period.³⁵⁰ The purpose of a closing agreement is to assist the government and the taxpayer to settle a controversy surrounding a taxpayer's tax liability in a complete and final manner.³⁵¹ While most closing agreements resolve issues that arise during an examination, some resolve issues with respect to prospective transactions or completed transactions before the filing of the related tax return.³⁵² A taxpayer who is looking for a greater degree of finality might request a closing agreement instead of a letter ruling.³⁵³ Sometimes, however, the IRS will condition the issuance of a letter ruling on the signing of a closing agreement.³⁵⁴

Once a closing agreement is approved, it can only be set aside "upon a showing of fraud or malfeasance, or misrepresentation of a material fact."³⁵⁵ However, a closing agreement with respect to a taxable period that has not ended as of the date of the agreement is subject to changes

IRS' ability to negotiate multilateral and bilateral pricing agreements with other taxing authorities), with Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 517, 527–28 (2017) (arguing that "the curtain of tax privacy on Advance Pricing Agreements should be lifted" and that the public disclosure of advance pricing agreements, with redacted confidential information, would increase accountability of the IRS to the public "without interfering with the agency's ability to deter and detect avoidance and abuse").

347. See Fallon, *supra* note 342, at 308.

348. See Blank, *supra* note 346, at 518.

349. See Rev. Proc. 2015-41, 2015-35 I.R.B. 263 (stating generally that "an [advance pricing agreement] will have no legal effect except with respect to the taxpayer, taxable years, and issues to which the [advance pricing agreement] specifically relates . . . the IRS and the taxpayer may not introduce the [advance pricing agreement] or non-factual oral and written representations made in conjunction with the [advance pricing agreement] request as evidence in any judicial or administrative proceeding regarding any tax year, issue, or person not covered by the [advance pricing agreement].").

350. I.R.C. § 7121(a) (2018).

351. *Bankers' Reserve Life Co. v. United States*, 43 F.2d 313, 315 (Ct. Cl. 1930).

352. Rogovin & Korb, *supra* note 154, at 349–50.

353. *Id.* at 350.

354. *Id.*

355. Treas. Reg. § 301.7121-1(c) (as amended in 1960).

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in the law enacted subsequent to that date and applicable to that taxable period.³⁵⁶ A closing agreement can effectively shorten the period of the statute of limitations.³⁵⁷ On one hand, the taxpayer is protected from the subsequent reopening of the case prior to the expiration of the statute of limitations.³⁵⁸ On the other hand, the government is protected from subsequent refund claims by the taxpayer.³⁵⁹

Similar to an advance pricing agreement, a closing agreement is not disclosed to the public.³⁶⁰ Closing agreements that cover taxable periods prior to the date of the closing agreements are generally handled by Operating Division officials and other field officials.³⁶¹ Closing agreements that cover prospective transactions are handled by the National Office.³⁶² As is the case with advance pricing agreements, the question of whether closing agreements should be publicly disclosed remains subject to academic debate.³⁶³ Moreover, judicial deference issues generally do not arise in the context of closing agreements because closing agreement are not publicly disclosed and they are generally more akin to contracts than to agency interpretations.³⁶⁴

3. Actions on Decisions

An action on decision (“AOD”) is a formal memorandum issued by the IRS that announces to IRS personnel as well as to the public, in an

356. *Id.*

357. Robert J. Terry, *The Scope of Closing Agreements*, 59 A.B.A. J. 428, 428 (1973).

358. *Bankers’ Reserve Life Co. v. United States*, 43 F.2d 313, 315–16 (Ct. Cl. 1930).

359. *Id.* at 316.

360. See I.R.C. §§ 6110(b)(1)(B), 6103(b)(2)(D) (2018).

361. See IRM 8.13.1.2.4.1(4) (May 25, 2018).

362. See IRM 8.13.1.9(2) (May 25, 2018).

363. Compare Blank, *supra* note 346, at 455 (arguing that ex-post enforcement actions, including closing agreements that result from an audit, should not be disclosed to the public, “in order to preserve effective tax enforcement”), with Reuven S. Avi-Yonah & Ariel Siman, *The 1 Percent Solution: Corporate Tax Returns Should Be Public (and How to Get There)*, 73 TAX NOTES INT’L 627, 627–28 (2014) (arguing that corporate tax return information should be disclosed because “sunshine is indeed the best disinfectant [and the] threat of revealing corporate tax information could be a very effective tool in curbing corporate tax shelters and other abusive arrangements designed to eliminate corporate tax”), and Joseph J. Thorndike, *Show Us the Money*, 123 TAX NOTES 148, 148 (2009) (arguing for public access to individual taxpayers’ tax return information because “[p]ublicity reveals the actual, rather than the theoretical, functioning of the tax system”); see also Blank, *supra* note 346, at 455 (noting that complete tax returns include information regarding any settlement agreements entered into with the IRS).

364. See *Davis v. United States*, 811 F.3d 335, 339 (9th Cir. 2016) (“Closing agreements are contracts . . . governed by federal common law.”) (citations omitted); Rogovin & Korb, *supra* note 154, at 350 (“Because closing agreements are not generally released to the public, the issue of reliance by an unrelated taxpayer on the terms of a closing agreement rarely arises.”).

expedient manner, the litigating position of the Office of Chief Counsel.³⁶⁵ An AOD is issued by the Associate Chief Counsel office and contains a recommendation as to whether the IRS will follow a significant court opinion that was adverse to the IRS.³⁶⁶ An AOD can convey one of three types of recommendations: acquiescence, acquiescence in the result, and non-acquiescence.³⁶⁷ An acquiescence simply means that the IRS accepts the court's holding and will follow it in other cases which have the same controlling facts.³⁶⁸ An acquiescence, however, conveys neither approval nor disapproval of the court's reasoning supporting its conclusions.³⁶⁹ One policy reason that the IRS sometimes provides for its acquiescence to a court decision that is adverse to the government is the interest of sound tax administration.³⁷⁰ This reasoning makes sense from a policy perspective: if the IRS does not intend to continue litigating a certain position, disclosure of this information to the public is an important step toward attaining finality and repose in addition to establishing well settled principles that can be consistently applied to similarly situated taxpayers.

An acquiescence in the result, like an acquiescence, also means that the IRS accepts the court's holding and will follow it in other cases which have the same controlling facts.³⁷¹ But unlike an acquiescence, an acquiescence in the result expresses concern or disagreement with at least part of the court's reasoning supporting its conclusions.³⁷² A non-acquiescence, on the other hand, indicates that the IRS disagrees with the holding of the court and will generally not follow that decision in cases involving other taxpayers.³⁷³ If the non-acquiescence is with respect to a circuit court of appeals, it generally means that although the IRS will generally follow that decision in the deciding circuit, it will not follow the decision in other federal circuits.³⁷⁴ In rare instances, however, the IRS might continue to litigate the same issue in the deciding circuit, notwithstanding the fact that the circuit's prior decision on that issue

365. See *Actions on Decisions*, INTERNAL REVENUE SERV., <https://apps.irs.gov/app/picklist/list/actionsOnDecisions.html> (last visited Feb. 3, 2020); IRM 36.3.1.1(1) (Mar. 14, 2013).

366. See IRM 36.3.1.1(1) (Mar. 14, 2013).

367. See I.R.S. Action on Decision 17-07, 2017-42 I.R.B. 311; IRM 36.3.1.4(2) (Mar. 14, 2013); Rogovin & Korb, *supra* note 154, at 366.

368. See IRM 36.3.1.4(2)(a) (Mar. 14, 2013).

369. See *id.*

370. See, e.g., I.R.S. Action on Decision 00-9, 2000-48 I.R.B. 515.

371. See IRM 36.3.1.4(2)(b) (Mar. 14, 2013).

372. See, e.g., *id.*; I.R.S. Action on Decision 17-4, 2017-15 I.R.B. 1072.

373. See IRM 36.3.1.4(2)(c) (Mar. 14, 2013).

374. See Rogovin & Korb, *supra* note 154, at 366-67.

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was adverse to the government.³⁷⁵ This result could happen where, for example, the prior case could be limited to its unique facts.³⁷⁶

Although AODs are published in the Internal Revenue Bulletin, they generally contain a statement that they are not to be relied upon or otherwise cited as precedent by taxpayers.³⁷⁷ In addition, the preface to recent AODs contains a statement that “unlike a Treasury Regulation or a Revenue Ruling, an Action on Decision is not an affirmative statement of Service position. It is not intended to serve as public guidance and may not be cited as precedent.”³⁷⁸ The ability of the IRS to retroactively withdraw its acquiescence or change it to a non-acquiescence substantially diminishes the reliance value that can be placed by taxpayers on AODs.³⁷⁹ Moreover, even if the IRS does acquiesce, that does not necessarily forbid the IRS from taking a position that is contrary to that to which it had previously acquiesced.³⁸⁰ AODs issued after March 12, 1981 constitute authority for purposes of determining whether there is substantial authority for the tax treatment of an item.³⁸¹

Although AODs have generally not been the subject of tax litigation involving judicial deference specifically to AODs, they seem to fit within the category of a litigating position of the IRS.³⁸² Under *Bowen v. Georgetown University Hospital*, agency litigating positions are generally owed no deference to the extent they are “wholly unsupported by regulations, rulings, or administrative practice.”³⁸³ The Court in *United States v. Mead Corp.*, cited *Bowen* as standing for the proposition that the level of deference owed by courts to agency litigating positions is

375. See *id.* For an example of an AOD where the IRS continued to litigate the same issue in the same circuit after receiving an adverse opinion from that circuit, see I.R.S. Action on Decision 07-4, 2007-40 I.R.B. 720.

376. See IRM 36.3.1.4(4) (Mar. 14, 2013).

377. See, e.g., I.R.S. Action on Decision 17-7, 2017-42 I.R.B. 311.

378. See, e.g., *id.*

379. See *Dixon v. United States*, 381 U.S. 68, 80 (1965) (holding that the IRS clearly has the power under I.R.C. § 7805(b) to retroactively withdraw an acquiescence even after a taxpayer has detrimentally relied on the IRS' acquiescence prior to its withdrawal).

380. See *Quinn v. Comm'r*, 524 F.2d 617, 623 (7th Cir. 1975) (holding that “an outstanding acquiescence in a case does not bar the [IRS] from collecting tax in contravention of the rule stated in the case as to which there had been acquiescence,” but noting that the better administrative practice would be a formal withdrawal of the acquiescence when a rule has been determined to be incorrect).

381. See Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 2003).

382. See *supra* note 365 and accompanying text.

383. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). The *Bowen* Court also stated that “we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that ‘Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.’” *Id.* (citing *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)).

“near indifference . . . [to an] interpretation advanced for the first time in a litigation brief.”³⁸⁴ This proposition however, ostensibly, should not foreclose a court from giving a measure of deference to an AOD, under *Skidmore*, that is proportional to the IRS’ “thoroughness . . . in its consideration, the validity of its reasoning” and the consistency of the analysis in such AOD with earlier and later pronouncements issued by the Treasury and the IRS.³⁸⁵ It is less likely that an AOD, even an acquiescence or an acquiescence in the result, that includes an interpretation of an ambiguous regulation would be eligible for *Auer* deference.³⁸⁶

4. Information Letters and Oral Advice

An information letter is issued by the IRS or by an Office of the Associate Chief Counsel and is in the form of a statement of an established interpretation or principle of tax law.³⁸⁷ Unlike a revenue ruling or a letter ruling, however, an information letter does not apply the interpretation or principle of tax law to a specific set of facts.³⁸⁸ The circumstances under which a determination letter is issued are typically when a taxpayer’s inquiry is in the nature of a request for general information or if the taxpayer’s inquiry does not meet the requirements for issuing a determination letter or a letter ruling and the IRS determines that general information may be helpful to the taxpayer.³⁸⁹ Information letters are merely advisory and are not binding on the IRS.³⁹⁰ Although information letters are not written determinations and are therefore not subject to public inspection under I.R.C. § 6110, the IRS generally makes them available under the Freedom of Information Act after redacting confidential information.³⁹¹ Many courts that have examined the level of deference that should be accorded to information

384. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citation omitted).

385. *See id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

386. In *Kisor v. Wilkie*, the Supreme Court limited *Auer* deference to interpretations expressed in official agency positions. 139 S. Ct. 2400, 2416–17 (2019). Given that AODs generally contain a statement that they are not to be relied on by taxpayers, it remains to be seen whether an AOD can survive *Auer* Step Zero after *Kisor*. *See supra* notes 126–28, 377–78 and accompanying text.

387. *See* Rev. Proc. 2019-1, 2019-1 I.R.B. 1.

388. *See id.*; IRM 32.3.3.1(1) (Aug. 11, 2004); Rogovin & Korb, *supra* note 154, at 352.

389. *See* Rogovin & Korb, *supra* note 154, at 352–53; Rev. Proc. 2019-1, 2019-1 I.R.B. 1; IRM 32.3.3.5(1) (Aug. 11, 2004).

390. *See* Rev. Proc. 2019-1, 2019-1 I.R.B. 1.

391. *See id.*; IRM 32.3.3.4(2) (Aug. 11, 2004).

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letters have done so under *Skidmore*³⁹² as refined by the Court in *Christensen*.³⁹³

Finally, oral advice is an available medium through which the IRS can transmit information to taxpayers.³⁹⁴ Similar to information letters, oral advice by IRS employees is advisory only.³⁹⁵ Although IRS employees are permitted to discuss substantive matters with taxpayers, oral advice given by IRS employees is not binding on the IRS, and should generally not be relied upon by taxpayers for purposes of return preparation or transaction planning.³⁹⁶ Statements that are made by IRS agents but that are not reduced to written form, should generally not be entitled to any deference.³⁹⁷

IV. REINVIGORATING JUDICIAL POWER IN THE ADMINISTRATIVE STATE

A. *Criticisms of Chevron Deference as Violating Separation of Powers*

As the doctrine of judicial deference to agency interpretations has been steadily developing, many academicians have performed empirical

392. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

393. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in . . . *Skidmore* . . . but only to the extent that those interpretations have the ‘power to persuade.’” (quoting *Skidmore*, 323 U.S. at 140)); *see, e.g.*, *F.D.I.C. v. Cashion*, 720 F.3d 169, 179 (4th Cir. 2013) (“Although the IRS’ interpretation is expressed in an information letter rather than a regulation or ruling, and thus is not subject to *Chevron*-style deference, it is nonetheless ‘entitled to respect . . . to the extent that [its] interpretations have the power to persuade.’” (quoting *Christensen*, 529 U.S. at 587)); *Kaff v. Nationwide Credit, Inc.*, No. 13-CV-5413, 2015 WL 12660327, at *5 (E.D.N.Y. Mar. 31, 2015) (finding an IRS information letter to be persuasive and adding that the “‘rulings, interpretations and opinions of [an administrative agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,’ depending on ‘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.’” (quoting *Skidmore*, 323 U.S. at 140)); *Mennes v. Capital One, N.A.*, No. 13-CV-822-bbc, 2014 WL 1767079, at *5–6 (W.D. Wis. May 5, 2014); *see also* *Gugger v. USAA Fed. Sav. Bank*, No. 17-CV-1518-AJB-AGS, 2017 WL 5552254, at *4 (S.D. Cal. Nov. 17, 2017) (finding IRS information letters to be persuasive); *In re Lukaszka*, No. 17-00242, 2017 WL 3381815, at *3 (N.D. Iowa Aug. 4, 2017) (deferring to interpretation in IRS information letter but distinguishing it from case at hand which had additional facts not factored into the analysis in the information letter).

394. *Rogovin & Korb*, *supra* note 154, at 373.

395. *See* Rev. Proc. 2019-1, 2019-1 I.R.B. 1.

396. *Id.*; *Rogovin & Korb*, *supra* note 154, at 373.

397. *Cf. McGinley v. United States.*, No. 12-5471 (JAP), 2013 WL 5466634, at *8 (D.N.J. Sept. 30, 2013) (citing various cases supporting the proposition “that oral representations can never estop the government, regardless of the circumstances . . .”).

studies to study the impact of *Chevron*³⁹⁸ and its progeny on the courts as well as agencies.³⁹⁹ One notable observation is that at the Supreme Court level, when the Court has applied *Chevron*, agencies prevailed between 67% and 76.2% of the time, which was very similar to the agencies' success rate (73.5%) if the Court applied *Skidmore*.⁴⁰⁰ Another notable observation is that at the circuit court level, if an agency interpretation survived *Chevron Step Zero*⁴⁰¹ (that is, the step where the court determines whether *Chevron* applies at all), it was 70% likely to survive *Chevron Step One*⁴⁰² (that is, the step that determines whether the statute being interpreted is ambiguous).⁴⁰³ Further, agencies that do survive Step One in the circuit courts are 93.8% likely to survive Step Two⁴⁰⁴ (that is, the step where the court determines if the agency's interpretation is reasonable).⁴⁰⁵ This result has led some commentators to question whether the standard in Step Two has any teeth.⁴⁰⁶ This result has also led to recent criticisms of the doctrine of *Chevron* deference and has raised questions as to whether *Chevron* and its progeny, especially *Brand X*, give too much power to agencies, at the expense of courts, and whether the doctrine still comports with separation of powers principles.⁴⁰⁷

As discussed in Part I.A, *supra*, separation of powers is based on the idea that liberty is secured by having a government of dispersed powers.⁴⁰⁸ Although the three branches of the federal government were not designed to have absolute independence from each other, but were

398. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

399. See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 4 (2017).

400. See *id.* at 4–6 n.11 (citing 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, 1142 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 849 (2006)).

401. See *supra* notes 74–80 and accompanying text.

402. See Barnett & Walker, *supra* note 399, at 6.

403. See *id.*

404. See *id.*

405. See *id.*

406. See, e.g., Ford, *supra* note 1, at 1002 (“[C]ourts are exceedingly reluctant to invalidate a regulation under the current rubric of *Chevron* step two The standard—whether the agency’s action is ‘permissible’—is hardly a standard at all.”).

407. See, e.g., *id.* at 1003 (quoting *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring)).

408. See *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) (“[T]he founders considered the separation of powers a vital guard against governmental encroachment on the people’s liberties A government of diffused powers, they knew, is a government less capable of invading the liberties of the people.”) (citing THE FEDERALIST NO. 47 (James Madison)).

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instead designed to be separate but interdependent in order to function as a workable government,⁴⁰⁹ administrative agencies, by their very nature, tend to concentrate, rather than diffuse power.⁴¹⁰ They essentially combine the three branches into one and are thus inherently in tension with the idea of having a government of diffused powers.⁴¹¹ *Chevron* deference has recently been criticized as violating the separation of powers.⁴¹²

In *Michigan v. EPA*,⁴¹³ Justice Thomas expressed doubt about whether deference to agency statutory interpretations was constitutional.⁴¹⁴ His concern was essentially that *Chevron* deference, especially, as enhanced by the Court in *National Cable & Telecommunications Association v. Brand X Internet Services*,⁴¹⁵ is in conflict with Article III courts' interpretive power as declared by Chief Justice John Marshall in *Marbury v. Madison*.⁴¹⁶ Justice Thomas stated:

Chevron deference raises serious separation-of-powers questions. . . . “[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.” Interpreting federal statutes—including ambiguous ones administered by an agency—“calls for that exercise of independent judgment.” *Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is “the best reading of an ambiguous statute” in favor of an agency’s construction. It thus wrests from courts the ultimate

409. See *supra* notes 6–7 and accompanying text.

410. See *supra* note 54 and accompanying text.

411. See Ford, *supra* note 1, at 978, 981 (“[B]y their very nature, administrative agencies tend to muddle the traditional form of government by combining rather than separating powers . . . [A]gencies effectively merge the three branches of government that the Constitution intended to be separate. Agencies generally fall within the ambit of the executive branch; however, they function as legislatures when they enact regulations that are binding upon citizens and function as courts when they adjudicate or impose sanctions or penalties upon citizens who violate such regulations . . . [A]n administrative agency inherently possesses the power of each governmental branch . . .”).

412. See *id.* at 976.

413. *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

414. See also Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL’Y 103, 104 (2018).

415. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (holding that “[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.”).

416. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

interpretative authority to “say what the law is,” and hands it over to the Executive. Such a transfer is in tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.⁴¹⁷

Justice Thomas’s comments have been recognized by some judges as calling into question the constitutionality of *Chevron* deference. For example, in *Green v. United States*,⁴¹⁸ the Tenth Circuit stated that it recognized “that some Justices have questioned the constitutionality of *Chevron* deference,” refused to apply the *Chevron* framework, and instead upheld an IRS interpretation since it was the most reasonable interpretation of the statute in question.⁴¹⁹

In *Gutierrez-Brizuela v. Lynch*, then-Judge Gorsuch also heavily criticized *Chevron*, as well as *Brand X*, as being inconsistent with the separation of powers.⁴²⁰ He noted that after *Brand X*, a judicial interpretation of the law is not authoritative but is essentially subject to revision by an administrative agency, and that this revision is in direct conflict with the Framers’ intended design: that judicial interpretations should not be overturned by an elected branch of government.⁴²¹ His main concern seems to be that under the current framework *Chevron* enables an agency to change its interpretation as the political winds change, and when such agency interpretations are challenged in court, the agencies will still prevail.⁴²² Instead, the Framers intended the

417. *Michigan*, 135 S. Ct. at 2712 (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1217, 1219 (2015); *Brand X*, 545 U.S. at 983; *Marbury*, 5 U.S. at 177) (citing U.S. CONST. art. III, § 1).

418. *Green v. United States*, 880 F.3d 519 (10th Cir. 2018).

419. *Id.* at 527–28 n.3.

420. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1154–55 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design Even under the most relaxed . . . view of our separated powers some concern has to arise, too, when so much power is concentrated in the hands of a single branch of government After all, *Chevron* invests the power to decide the meaning of the law . . . in the very entity charged with enforcing the law Under any conception of our separation of powers, I would have thought powerful and centralized authorities like today’s administrative agencies would have warranted less deference from other branches, not more It’s an arrangement, too, that seems pretty hard to square with the Constitution of the founders’ design *Chevron* . . . appears instead to qualify as a violation of the separation of powers.”).

421. *See id.* at 1150.

422. *See id.* at 1152; Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2361 (2018).

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interpretation of the law to be “charged [to] individuals insulated from political pressures.”⁴²³

Then-Judge Gorsuch also described *Chevron* Step Two as an abdication by a court of its judicial duties and that *Chevron* has essentially marginalized the role of judges to determine whether statutory text is ambiguous in Step One.⁴²⁴ He stated:

Yet, rather than completing the task expressly assigned to us, rather than “interpret[ing] . . . statutory provisions,” declaring what the law is, and overturning inconsistent agency action, *Chevron* step two tells us we must allow an executive agency to resolve the meaning of any ambiguous statutory provision. In this way, *Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty. Of course, some role remains for judges even under *Chevron*. At *Chevron* step one, judges decide whether the statute is “ambiguous,” and at step two they decide whether the agency’s view is “reasonable.” But where in all this does a court *interpret* the law and say what it *is*? When does a court independently decide what the statute means and whether it has or has not vested a legal right in a person? Where *Chevron* applies that job seems to have gone extinct.⁴²⁵

His comments were also recognized by many judges, including in the Sixth Circuit in *Arangure v. Whitaker*, where that court stated that courts must do their best to determine the statute’s meaning before finding a statute ambiguous and deferring to an agency.⁴²⁶ The court also referred to the 70% rate of success that agencies enjoy at Step One and described it as “abdication by ambiguity” which is “impermissibly expand[ing] an already questionable *Chevron* doctrine.”⁴²⁷ The court also noted that “[m]any members of the Supreme Court have called *Chevron* into question.”⁴²⁸

In *Chamber of Commerce of United States v. United States Department of Labor*, the Fifth Circuit held that the statute in question was unambiguous, but held that even assuming the statute were ambiguous, the agency interpretation failed *Chevron* Step Two as well as

423. See *Gutierrez-Brizuela*, 834 F.3d at 1149.

424. *Id.* at 1151–52.

425. *Id.*

426. *Arangure v. Whitaker*, 911 F.3d 333, 338 (6th Cir. 2018).

427. *Id.*; see also *supra* text accompanying notes 401–03.

428. *Arangure*, 911 F.3d at 338 n.3 (citing then-Judge Gorsuch’s concurrence in *Gutierrez-Brizuela*).

5 U.S.C. § 706(2)(A), (C).⁴²⁹ The court cited then-Judge Gorsuch's concurrence in *Gutierrez-Brizuela* and Justice Thomas's concurrence in *Michigan v. EPA* and noted that the *Chevron* doctrine "has been questioned on substantial grounds, including that it represents an abdication of the judiciary's duty under Article III 'to say what the law is,' and thus turns over judicial power to politically unaccountable employees of the Executive Department."⁴³⁰

What *Chamber of Commerce*, *Arangure*, and *Green* seem to suggest is that the comments, made by Justice Thomas in *Michigan v. EPA* and then-Judge Gorsuch in *Gutierrez-Brizuela* regarding separation of powers concerns with *Chevron*, have acted as an impetus to the judiciary to re-examine its role in the current administrative state. Moreover, in 2016, the Separation of Powers Restoration Act ("SOPRA") was introduced by members of Congress as an amendment 5 U.S.C § 706.⁴³¹ SOPRA was also reintroduced by members of Congress in 2017.⁴³² If passed, SOPRA would require courts to perform de novo review of all agency interpretations of statutes and rules.⁴³³ At least one commentator has suggested that the introduction of SOPRA was prompted by the increase in criticism of the doctrine of judicial deference to agency interpretation.⁴³⁴ SOPRA is quite broad, and in addition to targeting *Chevron* deference, aims to debunk *Auer* deference as well.⁴³⁵

429. *Chamber of Commerce v. Dep't of Labor*, 885 F.3d 360, 379–80, 388 (5th Cir. 2018).

430. *Id.* at 379 n.14. (internal quotation marks omitted).

431. Separation of Powers Restoration Act, H.R. 4768, 114th Cong. § 2 (2016); Separation of Powers Restoration Act, S. 2724, 114th Cong. § 2 (2016); *see also* Walker, *supra* note 414, at 104.

432. *See* Separation of Powers Restoration Act, H.R. 76, 115th Cong. § 2 (2017); Separation of Powers Restoration Act, S. 1577, 115th Cong. § 2 (2017); Regulatory Accountability Restoration Act of 2017, H.R. 5, 115th Cong. § 202 (2017) (adding to SOPRA's de novo review proposal a provision that a reviewing court "shall not interpret . . . [a] gap or ambiguity [in a statutory or regulatory provision] as an implicit delegation to the agency of legislative rule making authority . . . and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law."); MacDonald A. Norman, *Senate Attempts to Repeal Chevron Deference*, NAT'L. L. REV. (July 31, 2017), <https://www.natlawreview.com/article/senate-attempts-to-repeal-chevron-deference>.

433. Walker, *supra* note 414, at 104.

434. *See id.* (citing Christopher J. Walker, *Courts Regulating the Regulators*, REG. REV. (Apr. 25, 2016), <https://www.theregreview.org/2016/04/25/walker-courts-regulating-the-regulators>).

435. *See* Rubenstein et al., *supra* note 1, at 6.

2020] *INTERPRETATIONS BY TREASURY AND THE IRS* 339*B. Scaling Back Chevron as a Step Toward Restoring the Balance of Power*

With all these calls to reconsider the doctrine of judicial deference, the Supreme Court has begun to take action to reinvigorate judicial power, starting with re-examining *Chevron* deference. Recently the Supreme Court seems to be making significant changes to the *Chevron* doctrine to narrow its scope. At Step Zero, the Court has narrowed the reach of *Chevron* in *King v. Burwell*⁴³⁶ with the expansion of the major questions doctrine.⁴³⁷ That doctrine generally states that, with respect to questions of “deep economic and political significance” which are central to the statutory scheme, absent an express delegation from Congress courts should not presume that Congress intended to assign that question to an agency.⁴³⁸ In *Pereira v. Sessions*, Justice Kennedy emphasized that judges should end the practice of “reflexive deference” and must perform more thorough statutory interpretation, both at Step One, in determining whether a statute is ambiguous, and at Step Two, in analyzing whether the agency interpretation is reasonable.⁴³⁹ Additionally, at Step Two, the Court, possibly in response to the fact that Step Two practically equates to no hurdle at all for agencies,⁴⁴⁰ seems to have, in *Michigan v. EPA*⁴⁴¹ as well as in *Encino Motorcars, LLC v. Navarro*,⁴⁴² incorporated *State Farm*⁴⁴³ into determining whether the agency’s interpretation is reasonable. In doing so, the Court ostensibly would seem to give teeth to an otherwise very forgiving Step Two. All these measures appear to be efforts to reinvigorate judicial power by narrowing *Chevron* deference.

1. Curbing Judicial Abdication by Ending Reflexive Deference

The judicial abdication theory articulated by then-Judge Gorsuch in *Gutierrez-Brizuela v. Lynch*⁴⁴⁴ was specifically noted by Justice Kennedy

436. *King v. Burwell*, 135 S. Ct. 2480 (2015).

437. *See id.*

438. *See id.* at 2488–89; *see also* Jonas J. Monast, *Major Questions about the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 449–53 (2016).

439. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

440. *See Ford*, *supra* note 1, at 1002.

441. *Michigan v. EPA*, 135 S. Ct. 2699, 2706–07 (2015).

442. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

443. *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

444. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

in *Pereira v. Sessions*.⁴⁴⁵ In *Pereira*, the Court refused to grant *Chevron* deference to a regulation promulgated by the Board of Immigration Appeals because the statute in question was unambiguous.⁴⁴⁶ Justice Kennedy joined the majority opinion but also added a concurring opinion in which he highlighted his concern about what he called “reflexive deference.”⁴⁴⁷ He explained that reflexive deference is essentially a flaw in the way some courts apply *Chevron* by performing merely a cursory analysis at *Chevron* Step One in determining whether the statute is ambiguous and then deeming, in a conclusory fashion, the agency interpretation reasonable in Step Two.⁴⁴⁸ In doing so, judges are abdicating their proper role in interpreting federal statutes.⁴⁴⁹ He added that this practice is especially troubling when the agency interpretation is with respect to a statutory provision concerning the scope of the agency’s own authority.⁴⁵⁰ He also stated that:

Given the concerns raised by some Members of this Court *see, e.g.,* [*City of Arlington v. FCC*, 569 U.S. 290, 312-28 (2013) (Roberts, C.J., dissenting)]; *Michigan v. EPA*, 576 U.S. —, —, 135 S.Ct. 2699, 2712–2714, 192 L.Ed.2d 674 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–1158 (C.A.10 2016) (Gorsuch, J., concurring), it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.⁴⁵¹

Thus, one response from the Supreme Court to the judicial abdication theory has been a call to the judiciary to more fully exercise its independent interpretative power such that judicial review continues to function as a check on administrative agencies in a manner that comports with separation of powers principles.

445. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

446. *Id.* at 2113.

447. *Id.* at 2120 (Kennedy, J., concurring).

448. *See id.*

449. *See id.*

450. *See id.* at 2120–21 (citing *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (“We do not leave it to the agency to decide when it is in charge.”)).

451. *See id.* at 2121 (citation omitted).

2020] *INTERPRETATIONS BY TREASURY AND THE IRS* 3412. Strengthening Step Two with *State Farm*

In *Michigan v. EPA*, the Court invalidated an EPA rule that limited certain hazardous emissions by power plants.⁴⁵² The EPA had promulgated the rule in question without considering costs.⁴⁵³ The federal statute in question directed the EPA to regulate power plants' emissions of hazardous air pollutants if it "finds such regulation is appropriate and necessary."⁴⁵⁴ The Court reviewed the EPA's interpretation under *Chevron*, but it seemed to modify Step Two by merging the traditional Step Two (that is, whether the agency interpretation is reasonable) with consideration of relevant factors analysis from *State Farm*.⁴⁵⁵ The *Michigan* Court stated that "agencies are required to engage in 'reasoned decisionmaking' . . . [n]ot only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."⁴⁵⁶ It follows that agency action is lawful only if it rests "on a consideration of the relevant factors."⁴⁵⁷

In *Encino Motorcars, LLC v. Navarro*, the Court denied *Chevron* deference to the Department of Labor's ("DOL") interpretation of an overtime provision of the Fair Labor Standards Act ("FLSA").⁴⁵⁸ The DOL's interpretation, which was promulgated in 2011 through notice and comment rulemaking, was a reversal of the DOL's prior interpretation of the same provision and excluded a service advisor from the statutory exemption from the overtime pay requirement under the FLSA.⁴⁵⁹ The Court performed *Chevron* deference analysis, but again used the modified version of Step Two, which incorporated *State Farm*.⁴⁶⁰ In applying Step Two, the Court stated:

But *Chevron* deference is not warranted where the regulation is "procedurally defective" . . . [o]ne of the basic procedural

452. See *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015). The Court also remanded the case. *Id.*

453. *Id.* at 2705.

454. *Id.* at 2706.

455. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). See Sharkey, *supra* note 422, at 2422 ("*Michigan* demonstrates that the Court might in fact have adopted something akin to the *Chevron-State Farm* conceptual framework in the context of evaluating the EPA's choice to disregard costs in deciding whether it was 'appropriate' to regulate.>").

456. *Michigan*, 135 S. Ct. at 2706.

457. *Id.* (citing *State Farm*, 463 U.S. at 43).

458. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016).

459. *Id.* at 2123–24.

460. *Id.* at 2125 (citing *State Farm*, 463 U.S. at 43).

requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency “must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” . . . Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change. It follows that an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.”⁴⁶¹

In denying *Chevron* deference to the DOL’s interpretation, the Court seemed to place particular emphasis on the DOL’s lack of justification, in the form of a reasoned explanation during the promulgation process, for its change in position.⁴⁶² The Court’s apparent endorsement of this fortified version of Step Two in *Encino Motorcars* is consistent with the Court’s use of the same modified Step Two in *Michigan*.⁴⁶³ Thus, the Court appears to be actively turning Step Two into a more formidable hurdle, which could mitigate some of the concerns of the critics of *Chevron*.⁴⁶⁴ Put simply, incorporating *State Farm* into Step Two ostensibly makes the *Chevron* deference standard less deferential, at least as compared to Step Two in *Chevron* proper. In doing so, the Court is, to a certain extent, restoring the Constitutional balance of power by bolstering judicial review as a check on the regulatory power of administrative agencies.

3. Sidestepping *Chevron*: Expanding the Major Questions Exception

The Court has also seemingly scaled back the scope of *Chevron* by incorporating yet another hurdle. This time, however, the hurdle occurs before even applying *Chevron*. That is, it occurs at Step Zero. In *King v. Burwell*, the Court declined to give *Chevron* deference to an IRS interpretation of a provision of the Patient Protection and Affordable Care Act (“ACA”).⁴⁶⁵ Section 1401 of the ACA added § 36B to the Internal

461. *Id.* at 2125–26 (citations omitted).

462. *See id.* at 2126–27.

463. *See Sharkey, supra* note 422, at 2425 (noting that *Encino Motorcars* is consistent with a reading of *Michigan* as “signaling the arrival of a new *Chevron-State Farm* conceptual framework”).

464. *See Ford, supra* note 1, at 1002 (“[O]ne way of alleviating the concerns of *Chevron* detractors is to make the second prong of *Chevron* a true hurdle for agencies to overcome.”).

465. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

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Revenue Code.⁴⁶⁶ I.R.C. § 36B authorizes tax credits for individuals enrolled in coverage through “an Exchange established by the State under section 1311” of the ACA.”⁴⁶⁷ Treasury and the IRS promulgated a regulation, through notice and comment rulemaking, which interpreted I.R.C. § 36B, as authorizing the IRS to make the tax credits available for coverage obtained on State and Federal Exchanges.⁴⁶⁸ In declining to perform *Chevron* deference analysis with respect to the interpretation by Treasury and the IRS, the Court explained that:

[*The Chevron* Two Step framework] is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation. This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep economic and political significance that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.⁴⁶⁹

Thus, it appears that the Court might be aggressively pursuing, at Step Zero, a form of enhanced “boundary maintenance” to confine the scope of agency interpretive authority.⁴⁷⁰ This approach is consistent with Justice Kennedy’s concurrence in *Pereira v. Sessions*,⁴⁷¹ where he emphasized that a court should not leave it to the agency to decide when

466. Sharkey, *supra* note 422, at 2413–14.

467. *King*, 135 S. Ct. at 2487.

468. *Id.*

469. *Id.* at 2488–89 (citations omitted).

470. See Merrill, *supra* note 76, at 757 (“The dissenters in *City of Arlington*, led by Chief Justice Roberts, protested that giving *Chevron* deference to agencies’ views about the scope of their own authority was completely at odds with what I have called the boundary maintenance function of the courts. As he put it, ‘[a]n agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.’”).

471. *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring).

the agency is in charge.⁴⁷² The Court in *King* also seemed to expand the scope of the major questions exception to judicial deference at Step Zero by stating that the agency that interpreted the statute is not the appropriate agency for the task.⁴⁷³ Instead, the *King* Court declared that it was the Court's duty to determine the correct interpretation of the statute.⁴⁷⁴ Thus, by expanding the realm where the Court can sidestep *Chevron* altogether at Step Zero, the Court has another means of effectively scaling back *Chevron* where necessary in order to harmonize *Chevron* with the Court's emphatic duty to "say what the law is."⁴⁷⁵

C. Effect on the Administration of the Tax Laws

As discussed in Part IV.B, the recent wave of criticism of the *Chevron* doctrine as a violation of separation of powers has led to a trend by the judiciary to reinvigorate judicial power in the modern administrative state.⁴⁷⁶ There appear to be three main judicial strategies that have recently surfaced in an effort to harmonize *Chevron* deference with separation of powers principles.

The first strategy is ending reflexive deference, such that a reviewing court more thoroughly exercises its interpretive powers at Step One, in determining whether the statute in question is ambiguous, as well as at Step Two, in determining if the agency interpretation is reasonable. This strategy is a key step in the *Chevron* framework, because once an agency, under *Chevron* proper, survives Step One, empirical studies show that an agency is generally very likely to survive Step Two.⁴⁷⁷ By fully exercising its interpretive power at Step One, the judiciary has more control over whether agencies can succeed to Step Two. The second strategy is making Step Two more of an actual hurdle for agencies by fortifying Step Two with the *State Farm* requirements, that is, that the agency must show that it engaged in reasoned decision-making⁴⁷⁸ by considering all the relevant factors⁴⁷⁹ and giving adequate reasons for its decisions, examining the relevant data and articulating a satisfactory

472. *Id.* at 2121 (citing *Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting)).

473. *See King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015); Sharkey, *supra* note 422, at 2413.

474. *See King*, 135 S. Ct. at 2489.

475. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

476. *See supra* Part IV.B.

477. *See Barnett & Walker, supra* note 399, at 6.

478. *See Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 350, 374 (1998)).

479. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

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explanation for its action including a rational connection between the facts found and the choice made.⁴⁸⁰ The third strategy is the expansion of the major questions exception to judicial deference at Step Zero.⁴⁸¹

This section of the article explores the possible impact these three strategies could have on the administration of the tax laws. As discussed in Part III.A, *Chevron* deference analysis has generally been applied to final Treasury regulations.⁴⁸² More rigorous review by the judiciary at Step One and at Step Two could invite more litigation challenging tax regulations. If taxpayers believe that a reviewing court is less likely to defer to a Treasury regulation because the court is now more likely to find a specific provision of the Internal Revenue Code to be unambiguous or an interpretation by Treasury and the IRS of an unambiguous Internal Revenue Code provision to be unreasonable, litigation involving Treasury regulations could increase. In turn, this litigation could also lead to increased uncertainty in the tax system and cause delays.

In addition, uniformity in the application of the tax laws would be negatively impacted. For example, if a tax regulation is challenged by two different taxpayers in district courts that are in different circuits, on appeal, if both circuit courts decide that the regulation fails *Chevron* Step One, each circuit could have a different interpretation of the provision of the Internal Revenue Code. Although, in general, circuit courts give consideration to the importance of uniformity in application of the laws, especially in tax matters,⁴⁸³ circuit courts are not legally bound by decisions of other circuits, even in tax matters.⁴⁸⁴ And even if the conflict in question is resolved among the circuits by the Supreme Court, the tax

480. See *id.* at 43.

481. See *supra* Part IV.B.3.

482. See *supra* Part III.A.4.

483. See *Wash. Energy Co. v. United States*, 94 F.3d 1557, 1561 n.5 (Fed. Cir. 1996) (“[A]s the courts of appeals have long recognized, the need for uniformity of decision applies with special force in tax matters. In recognition of the principle that ‘uniformity among the circuits is particularly desirable in tax cases to ensure equal application of the tax system to our citizenry,’ we have held that we should not ‘reach a result in conflict’ with a sister circuit ‘unless the statute [at issue] or precedent of this court gives us, in our view, no alternative.’”) (citing *Gibraltar Fin. Corp. v. United States*, 825 F.2d 1568, 1572 (Fed. Cir. 1987); *N. Am. Life & Cas. Co. v. Comm’r*, 533 F.2d 1046, 1051 (8th Cir. 1976) (“[D]ecisions of other courts of appeals in the area of taxation should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them.”); *Fed. Life Ins. Co. v. United States*, 527 F.2d 1096, 1098–99 (7th Cir. 1975) (“Respect for the decisions of other circuits is especially important in tax cases because of the importance of uniformity, and the decision of the Court of Appeals of another circuit should be followed unless it is shown to be incorrect.”)).

484. See *Grimland v. United States*, 206 F.2d 599, 601 (10th Cir. 1953) (“Of course, we are not bound by the decisions of other courts of appeals but they are persuasive and entitled to great weight, particularly in tax matters.”).

treatment of the item in question would have been uncertain throughout the duration of the litigation, which may encompass many years.

Compare this approach with *Chevron* proper. Under the traditional approach to *Chevron*, uniformity in the tax system would generally more likely be preserved. Since it is more likely that a court would defer to Treasury regulations under *Chevron* proper, it is more likely that Treasury's interpretation of a provision of the tax law be the only interpretation and would be applied uniformly to all taxpayers. Thus, more rigorous judicial review at Step One and Step Two could have a negative impact on the administration of the tax laws in the form of increased uncertainty and delays and lack of uniformity in the application of the tax laws.

The second judicial strategy, incorporating *State Farm* into Step Two, could, on the other hand, contribute positively to the sound administration of the tax laws. Under this modified version of Step Two, Treasury and the IRS would need to show a reasoned explanation for adopting a regulation⁴⁸⁵ and a rational connection between the facts they find and the choices they make in promulgating the regulation.⁴⁸⁶ While this strategy could increase challenges to Treasury regulations and could also cause some delays for Treasury and the IRS in promulgating Treasury regulations because it would add more procedural hurdles for Treasury and the IRS, the added explanation for the rationale behind the regulation could contribute to reducing tax complexity while increasing taxpayer confidence. Empirical studies suggest that rule drafters are more likely to be aggressive in their interpretive efforts if they are confident that their interpretations will receive *Chevron* deference.⁴⁸⁷ Treasury and the IRS would be less likely to promulgate unnecessary regulations if they knew that *State Farm* created a more formidable hurdle in Step Two. Fewer unnecessary regulations, in turn, would promote tax simplicity. Moreover, regulations that are necessary would include a thorough explanation for their rationale. This approach would shed more light on the meaning of the regulation and clarify the purpose of the regulation as well as situations in which it applies. This added clarity would increase tax transparency and government accountability and would have a positive effect on the confidence that taxpayers have in the tax system.

485. See *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1319 (Fed. Cir. 2012).

486. See *id.* (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

487. See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 83 *FORDHAM L. REV.* 703, 706 (2014).

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The third judicial strategy, expanding the major questions exception to judicial deference, can increase uncertainty in the tax system. As previously mentioned in Part III.A, one cause of complexity in the tax system is the use of the tax law to achieve goals that are not related to raising revenue.⁴⁸⁸ The Internal Revenue Code includes a vast number of provisions that were enacted to achieve non-revenue raising purposes such as conserving energy, education, child care, charitable contributions, economic development, and corporate governance.⁴⁸⁹ Under *King v. Burwell*, *Chevron* deference may not be available for Treasury regulations interpreting such statutory provisions where the question rises to the level of a “deep economic and political significance.”⁴⁹⁰ Further, *Chevron* deference may also not be available if Treasury and the IRS lack the requisite expertise in the non-revenue related subject matter covered by the statute in question.⁴⁹¹

King thus provides taxpayers with two arguments with which to challenge a Treasury regulation’s entitlement to *Chevron* deference: the extraordinary importance of the matter and the lack of expertise of Treasury or the IRS.⁴⁹² Further, if *Chevron* does not apply, then the court could generally review the matter de novo, independent of the interpretation in the Treasury regulation.⁴⁹³ Thus, the major questions doctrine increases uncertainty and delays in the tax system by inviting challenges to Treasury regulations that interpret statutory provisions addressing social, economic or politically significant issues.⁴⁹⁴ Further, de novo review by the court of the Internal Revenue Code could negatively impact uniformity in application of the tax provision in question as the matter is litigated in the trial courts and various circuits.

CONCLUSION

Treasury and the IRS issue a large variety of guidance to taxpayers, ranging from authoritative guidance, such as Treasury regulations, to guidance that is non-binding and merely advisory, such as information

488. See *supra* note 150 and accompanying text.

489. See Alix Valenti & Vanessa Johnson, *The Impact of King v. Burwell on Judicial Review of Administrative Action: An Exception to Chevron, a Move from Textualism, or Something Else*, 18 HOUS. BUS. & TAX L.J. 78, 115 (2018).

490. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

491. See *supra* notes 469, 473 and accompanying text; Melone, *supra* note 162, at 182–83.

492. Melone, *supra* note 162, at 205.

493. See *King*, 135 S. Ct. 2480, 2489; Valenti & Johnson, *supra* note 489, at 81, 109, 117.

494. See Valenti & Johnson, *supra* note 489, at 118.

letters. Since the Supreme Court's decision in *Mayo Foundation*, the disciplines of tax law and administrative law have, to a certain degree, become intertwined. As taxpayers rely on the different types of guidance issued by Treasury and the IRS, it is important to analyze such guidance, not only under a lens of tax law, but also under one of administrative law. This analysis adds complexity to an already complex tax system. If a change occurs in an administrative law doctrine, its ripple effect is felt in tax. This result is especially true if the constitutionality of that administrative law doctrine is questioned.

The New Deal had a significant role in shaping the current relationship between administrative agencies and the judiciary. The rise in expert-based administration inevitably led to a more passive role for the judiciary throughout the second half of the twentieth century and into the twenty-first century. This passive role of judges paved the way for the development of the doctrine of judicial deference to administrative agency action. Three main judicial deference standards have emerged: *Chevron*, *Auer*, and *Skidmore*. As the *Chevron* doctrine developed over time, questions have surfaced as to the proper scope of the interpretive authority of agencies, especially in light of the judiciary's power of judicial review, as declared in *Marbury v. Madison*. This scrutiny has led some, including current Members of the Supreme Court, to question the constitutionality of *Chevron*. A review of recent Court decisions suggests that, instead of overruling *Chevron*, the Court might instead potentially modify the *Chevron* doctrine in order to comport with constitutional separation of powers principles.

Treasury regulations have generally been analyzed for deference under the *Chevron* standard. More rigorous review by the judiciary at *Chevron* Step One and at *Chevron* Step Two could have a negative impact on the administration of the tax laws by inviting more litigation challenging tax regulations which could lead to increased uncertainty in the tax system, cause delays, and negatively affect uniformity in the application of the tax laws. Similarly, expanding the major questions exception to judicial deference would increase uncertainty and cause delays in the tax system by inviting challenges to Treasury regulations that interpret statutory provisions addressing social, economic or politically significant issues. Further, by allowing courts to sidestep *Chevron* altogether, a broader major questions exception at *Chevron* Step Zero could increase de novo review of such provisions of the Internal Revenue Code and thus negatively impact uniformity in application of the tax provision in question as the matter is litigated in the trial courts and various circuits. Finally, incorporating *State Farm* in *Chevron* Step Two, while having the potential of increasing challenges to Treasury regulations, could reduce tax complexity by reducing the promulgation of

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unnecessary regulations and could also increase taxpayer confidence by improving tax transparency and government accountability.

Ultimately, this revamped version of *Chevron* reallocates power from administrative agencies to the judiciary and effectively reins in the power of administrative agencies, which has been increasing at a dramatic pace since the New Deal. *Chevron*, as modified, strikes a constitutional balance. On one hand, administrative agencies will still have substantial flexibility in interpreting ambiguous statutory provisions. On the other hand, judicial power in the administrative state is reinvigorated—better enabling the judiciary to fulfill its duty to say what the law is.