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# Who's Afraid of the APA?

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# Who's Afraid of the APA?

By David J. Shakow

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The Supreme Court's decision in *Mayo* means that tax practitioners must be more sensitive to administrative law and judicial deference to administrative rules. This report reviews some of the important doctrines that apply.

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*Mayo*[1] has stirred concern among members of the tax bar. By daring to say that the IRS is just like any other federal agency, the Supreme Court has left the tax bar scrambling to accumulate the expertise it needs to navigate the rules of administrative law.

The initial focus of attention has been the application of *Chevron*,[2] the immediate subject of *Mayo*. Tax practitioners quickly learned that *Chevron* requires a two-step analysis: whether the words of the statute are clear and, if not, whether the administrator's action is reasonable. That test may seem pretty simple. But it turns out that in the administrative law community, the precise application of *Chevron* is unclear. Since 2007, the American Bar Association *Administrative Law Review* has published nine articles with *Chevron* in their title,[3] and about 43 articles have cited *Chevron* in that time.

But beyond *Chevron*, the tax bar recognizes that if IRS regulations are like any other agency's regulations, then they are governed by the same rules that govern other agency regulations and specifically are subject to the Administrative Procedure Act (APA).[4] Tax practitioners also will presumably need to

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[1]*Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), *Doc 2011-609*, *2011 TNT 8-10*.

[2]*Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[3]Randolph J. May, "Defining Deference Down, Again: Independent Agencies, *Chevron* Deference, and *Fox*," 62 *Admin. L. Rev*. 433 (2010); William S. Jordan III, "*Chevron* and Hearing Rights: An Unintended Combination," 61 *Admin. L. Rev*. 249 (2009); John S. Kane, "Refining *Chevron* — Restoring Judicial Review to Protect Religious Refugees," 60 *Admin. L. Rev*. 513 (2008); Abigail R. Moncrieff, "Reincarnating the 'Major Questions' Exception to *Chevron* Deference as a Doctrine of Noninterference (or Why *Massachusetts v. EPA* Got It Wrong)," 60 *Admin. L. Rev*. 593 (2008); Ann Graham, "Searching For *Chevron* in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations," 60 *Admin. L. Rev*. 229 (2008); Elizabeth V. Foote, "Statutory Interpretation or Public Administration: How *Chevron* Misconceives the Function of Agencies and Why It Matters," 59 *Admin. L. Rev*. 673 (2007); Linda Jellum, "*Chevron*'s Demise: A Survey of *Chevron* From Infancy to Senescence," 59 *Admin. L. Rev*. 725 (2007); Daniel J. Gifford, "The Emerging Outlines of a Revised *Chevron* Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy," 59 *Admin. L. Rev*. 783 (2007); David S. Rubenstein, "Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After *Chevron*," 59 *Admin. L. Rev*. 479 (2007). The titles of some of the articles suggest that all is not well (or at least clear).

[4]5 U.S.C. section 551ff.

become more expert in the APA, although the act's significance certainly has not been ignored by the tax community.[5]

In this report, I hope to identify some of the major issues in the judicial review of administrative actions, particularly as they apply to tax rules. If I am successful, the reader will have more questions after reading the report than before.

## I. Operation of the APA

Here is the barest outline of administrative practice as it pertains to the promulgation of agency rules: The APA requires agencies to publish a notice of proposed rulemaking in the *Federal Register*.[6] The notice containing the proposed rule should include a statement of the legal basis of the rule. The public must then be given the opportunity to comment on the proposed rule.[7] After considering those comments, the agency can promulgate the final rules with a statement of their basis and purpose.[8]

Those provisions mean that regulations published with notice and comment comply with the APA.[9] However, there are a number of important exceptions. The most important for our purposes is that interpretive rules are not subject to the notice and comment requirement.[10] Also, notice and comment are not required when the agency "for good cause finds" that they are "impracticable, unnecessary, or contrary to the public interest."[11] The agency must include its findings and the reasons behind them when it publishes the rule. Finally, notice and comment are not required for "rules of agency organization, procedure, or practice."[12]

The rule's effective date normally cannot be sooner than 30 days after publication unless the rule grants an exemption, the rule is an interpretive rule, or there is good cause for a different effective date (which must be published with the rule).[13]

[5]*See, e.g.*, Peter A. Lowy and Juan F. Vasquez, "How Revenue Rulings Are Made and the Implications of That Process for Judicial Deference," 101 *J. Tax'n* 230 (2004); Michael Asimow, "Public Participation in the Adoption of Temporary Tax Regulations," 44 *Tax Law*. 343 (1991).

[6]5 U.S.C. section 553(b).

[7]5 U.S.C. section 553(c).

[8]*Id*.

[9]*See infra* text accompanying notes 18-21 for the possibility that rules promulgated in other ways may get the same deference as those promulgated under notice and comment.

[10]5 U.S.C. section 553(b)(A).

[11]5 U.S.C. section 553(b)(B). The good cause exceptions are discussed in Part IX, below.

[12]5 U.S.C. section 553(b)(A).

[13]5 U.S.C. section 553(d).

## II. The Deference Standards

The issue highlighted in *Mayo* is the deference that is to be given to administrative rules. There are two main standards of deference given to administrative pronouncements. Some pronouncements — sometimes referred to as legislative regulations — get *Chevron* deference. Lesser pronouncements — sometimes called interpretive regulations — get only *Skidmore* deference.[14]

As mentioned before, *Chevron* deference involves a two-step analysis:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[15]

Essentially, Congress has allowed an agency to make a rule that will bind the courts. The agency's rule can be disregarded only if it is contrary to the statute on which it is purportedly based or is not a permissible construction of the statute. The court's view of whether the agency, in interpreting an ambiguous statute, has taken the best approach to the issue is of no consequence.

*Skidmore* deference is not as sweeping:

> We consider that the . . . interpretations . . . of the Administrator . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgments to which courts and litigants may properly resort for guidance. The weight of such a judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,

[14]323 U.S. 134 (1944). A separate aspect of deference is that the Court gives deference to an agency's *interpretation* of its own regulations. *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997). This is discussed in Part VIII, below.

[15]*Chevron*, 467 U.S. at 842-843.



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and all those factors which give power to persuade, if lacking power to control.[16]

When *Skidmore* applies, the issue is narrower. Courts should defer to agency rules because the agency has expertise in the area and deals with the full scope of the issues all the time. However, the court can still conclude that it is unpersuaded by the agency's reasoning and opt for a decision it prefers.

The current state of the law is, as described above, to give the lesser *Skidmore* deference to interpretive regulations under the Supreme Court's decision in *Christensen v. Harris County*.[17]

The Court in *United States v. Mead Corp.*[18] indicated that it is prepared to extend *Chevron* deference to some pronouncements that are not legislative regulations. The exact boundaries of the *Mead* rule are unclear.[19] No Supreme Court decision has relied on *Mead* to give *Chevron* deference to a rule that was not promulgated with notice and comment procedures. Any deviation from the notice and comment requirement would be most important in the tax area if the IRS wanted the courts to grant *Chevron* deference to revenue rulings. There has been serious discussion regarding whether IRS pronouncements other than regulations, such as revenue rulings, might be subject to *Chevron* deference.[20] However, the Justice Department has indicated that it will not argue for *Chevron* deference for revenue rulings and revenue procedures.[21]

The description above makes it seem that there are reasonably clear lines separating types of deference and the circumstances under which they are appropriately applied. Studies of Supreme Court decisions have raised serious questions about that conclusion, pointing to many cases when justices applied different rules of deference, or no clear rule at all.[22] That helps explain the flood of academic literature questioning the actual effects of *Chevron* in the courts.

### III. Legislative vs. Interpretive Regulations

Before *Mayo*, it was not clear that the Supreme Court applied the normal *Chevron* rules of deference in tax cases. As the Court recognized in *Mayo*, its prior decisions sometimes allowed courts to use a lesser form of deference based on the test in *National Muffler*.[23] Also, before *Mayo*, tax practitioners distinguished legislative regulations from interpretive regulations based on whether the IRS was specifically authorized to issue the regulations (for example, the consolidated return regulations authorized by section 1502).[24] At the time, the significance of making the distinction seemed limited. A practitioner might have wanted to assert that a regulation was legislative if the IRS had failed to comply strictly with the rules of the APA in connection with legislative regulations.[25]

The Supreme Court in *Mayo* rejected the application of *National Muffler* rather than *Chevron* to tax cases.[26] Moreover, on the question of which tax regulations should be viewed as legislative regulations to which *Chevron* would apply, the opinion states: "Our inquiry in that regard does not turn on whether Congress's delegation of authority was general or specific."[27] And, as the Court recognizes, the regulation in *Mayo* was issued "pursuant to the explicit authorization to 'prescribe all needful rules and regulations for the enforcement' of the Internal Revenue Code.' 26 U.S.C. section 7805(a)."[28] In other words, the explicit authorization of the IRS in

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[16]*Skidmore*, 323 U.S. at 140; *see* the discussion of *Skidmore* deference, below, Part VI.

[17]529 U.S. 576 (2000).

[18]533 U.S. 218 (2001); *see also Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (dicta indicates that the Court would grant *Chevron* deference to a rule announced through "less formal" means than notice and comment); *Edelman v. Lynchburg College*, 535 U.S. 106 (2002) (*Chevron* deference "does not necessarily require an agency's exercise of express notice-and-comment rulemaking power").

[19]*See* Lisa S. Bressman, "How *Mead* Has Muddled Judicial Review of Agency Action," 58 *Vand. L. Rev*. 1443 (2005).

[20]*See generally* Kristin E. Hickman, "IRS Guidance: The No Man's Land of Tax Code Interpretation," 2009 *Mich. St. L. Rev*. 239 (2009).

[21]Marie Sapirie, "DOJ Won't Argue for *Chevron* Deference for Revenue Rulings and Procedures, Official Says," *Tax Notes*, May 16, 2011, p. 674, *Doc 2011-9936*, *2011 TNT 90-7*. This issue is discussed further in Part VII, below.

[22]*E.g.*, Cano N. Raso and William N. Eskridge Jr., "*Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases," 110 *Columb. L. Rev*. 1727 (2010).

[23]440 U.S. 472 (1979); *see Mayo*, 131 S. Ct. at 712.

[24]*See* American Bar Association Section of Taxation, "Report of the Task Force on Judicial Deference," 57 *Tax Law*. 717, 728 (2004); Coverdale, "Court Review of Tax Regulations and Revenue Rulings in the *Chevron* Era," 64 *Geo. Wash. L. Rev*. 35, 49-50 (1995) (criticizing the distinction); Hickman, "Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements," 82 *Notre Dame L. Rev*. 1727, 1761 (2007). That purported distinction was occasionally accepted by the courts. *E.g.*, *Abbott Laboratories v. United States*, 84 Fed. Cl. 96, 110 (Ct. Fed. Cl. 2008). The Court in *Mayo* admitted that it, too, had sometimes drawn that distinction. *Mayo*, 131 S.Ct. at 713.

[25]*See, e.g.*, Hickman, "A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements," 76 *Geo. Wash. L. Rev*. 1153 (2008).

[26]*Mayo*, 131 S. Ct. at 713.

[27]*Id.* at 713-714.

[28]*Id.* at 713.



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this case was its general authority to promulgate regulations in section 7805. Thus, most IRS regulations will be subject to *Chevron* deference.

There is an important caveat to the conclusion that IRS legislative regulations are worthy of *Chevron* deference. As reflected in *Mayo*, to merit *Chevron* deference, it is important that the IRS use notice and comment procedures that the APA mandates[29]:

> The Department issued the full-time employee rule only after notice-and-comment procedures . . . again a consideration identified in our precedents as a ''significant'' sign that a rule merits *Chevron* deference. *Mead*, *supra* at 230-231; see, *e.g.*, *Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158, 173-174 (2007).

The classification of most IRS regulations as legislative for APA purposes may raise more problems for the IRS than it wishes to acknowledge. A study of 232 IRS regulations projects for which Treasury published final regulations (T.D.s) or notices of proposed rulemaking (NPRMs) between 2003 and 2005 revealed that the IRS followed the traditional APA process (NPRM followed by final regulations) less than 60 percent of the time.[30] About 90 percent of the projects in which APA procedures were not followed resulted from the IRS's issuance of temporary regulations without notice and comment.[31] Indeed, in more than 90 percent of the projects, whether APA procedures were followed or not, the IRS determined that APA section 553(b) did not apply to the regulation in question.[32] After *Mayo*, that is no longer the case.[33]

## IV. *Chevron*'s Step 1: Statute Compliance

Section 706 of the APA provides that ''the reviewing court shall decide all relevant questions of law.'' That reflects the rather basic pronouncement in *Marbury v. Madison*[34]: ''It is emphatically the province and duty of the Judicial department to say what the law is.'' Thus, a regulation cannot pass muster unless the court first finds that the regulation is consistent with the language of the statute. It is not necessary that the statute have only one meaning, but the regulation must comport with a possible meaning of the statute.

A short discussion of the substance of *Chevron*'s two-step analysis is impossible. The courts have applied the decision in myriad cases, and there is no easy summary of how they approach its application. Accordingly, the *Chevron* approach does not lead to uniform, predictable results. A careful empirical study of post-*Chevron* cases concludes that even after *Chevron*, judges' decisions are significantly influenced by their own personal beliefs — conservative judges continue to rule conservatively and liberal judges continue to rule liberally.[35]

An example of a step-one *Chevron* case is *INS v. Cardoza-Fonseca*.[36] Until 1980, an alien was eligible for asylum only if ''it is more likely than not that the alien would be subject to persecution.'' A 1980 amendment authorizes asylum if an alien has a ''well-founded fear of persecution.'' The Immigration and Naturalization Service said that was essentially the same test, but the Court held that that was not the case. The first test is objective; the second has subjective elements. Moreover, the fact that Congress changed the language is an indication that the tests are not the same.

In applying step one of *Chevron*, the Court has indicated that it will use ''traditional tools of statutory construction.''[37] What those tools are[38] and whether their use is appropriate are subjects of considerable controversy. Unfortunately, different judges may rely on the same tool and come to

[29]*Id.* at 714. As noted *supra*, text accompanying notes 18-21, the Court in *Mead* left open the possibility that *Chevron* deference would be given to rules not promulgated with a notice and comment procedure.

[30]Hickman, *supra* note 25.

[31]The DOJ will continue to argue that temporary regulations deserve *Chevron* deference, apparently relying on the rule in 5 U.S.C. section 553(b)(B) that notice and comment procedures need not be used if doing so would be ''impracticable, unnecessary, or contrary to the public interest,'' but won't argue for *Chevron* deference for proposed regulations. *See* Sapirie, *supra* note 21. Section 7805(e)(1) now requires the IRS to issue proposed regulations whenever it issues temporary regulations. However, it does not follow that the temporary regulations will necessarily merit *Chevron* deference if accompanied by proposed regulations.

[32]Hickman, *supra* note 25, at 1749. Apparently, that followed from instructions in the IRS Manual. *Id.* at 1749 n.91. Hickman asserts that it shouldn't matter if the IRS disclaims the need for compliance with the APA procedures if it follows them anyway.

[33]Whether the issuance of temporary and proposed regulations is in compliance with the APA's good cause exception is discussed in Part IX, below.

[34]5 U.S. (1 Cranch.) 137, 177 (1803).

[35]Thomas Miles and Cass Sunstein, ''Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*,'' 73 *U. Chi. L. Rev.* 823 (2006). In the years immediately after *Chevron* was decided, that seems not to have been the case, and how *Chevron* would be applied was more predictable. *See* Peter H. Schuck and E. Donald Elliot, ''To the *Chevron* Station: An Empirical Study of Federal Administrative Law,'' 1990 *Duke L.J.* 984; Richard L. Revesz, ''Environmental Regulation, Ideology, and the D.C. Circuit,'' 83 *Va. L. Rev.* 1717 (1997).

[36]480 U.S. 421 (1987).

[37]*Chevron*, 467 U.S. at 843 n.9.

[38]Possible tools include congressional purpose, canons of construction, legislative history, and the plain meaning of the statute.



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opposite conclusions.[39] Prof. Richard Pierce, in the leading administrative law textbook, argues that allowing courts to use the full gamut of tools of statutory construction would virtually eliminate the deference courts should be paying to administrative action.[40] He advocates limiting the tools to plain meaning (limited to any definition in a reputable dictionary) and the constitutional avoidance canon (strike down an administrative construction of ambiguous language that raises a serious constitutional question). He is particularly wary of allowing the courts, rather than the administrative agencies, to use legislative history.

Tax lawyers have experienced the problem of deciding whether a statute is clear on its face in the section 6501(e) controversy. The section 6501(a) question that courts have confronted recently is whether the statute of limitations governing a tax liability resulting from the disallowance of inflated basis is six years because the inflation results in a substantial understatement of income. The Seventh Circuit in *Beard v. Commissioner*[41] held that the taxpayer loses under the first *Chevron* step — the statute's language clearly supports the government's position. On the other hand, the Fourth Circuit, in *Home Concrete & Supply LLC v. United States*,[42] relying in part on a Supreme Court decision,[43] held that the statute unambiguously favors the taxpayer. That controversy will presumably be settled by the Supreme Court, which accepted certiorari and has heard arguments in *Home Concrete*.[44]

## V. *Chevron*'s Step 2: Approved Interpretation?

Many cases that require a *Chevron* analysis reach step two. But the test appears to be a difficult one to apply. Pierce says[45]:

> It seems apparent that step two of *Chevron* is *State Farm* [*Motor Vehicle Manufactures Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983)]. The Court has never explicitly so held, but it has applied *Chevron* step two in that manner in many cases, including *Chevron* and *Smiley* [*v. Citibank*, 517 U.S. 735 (1996)]. . . . Thus, a court's task in applying *Chevron* step two is to determine: (1) whether the agency adequately discussed plausible alternatives, (2) whether the agency adequately discussed the relationship between the interpretation and pursuit of the goals of the statute, (3) whether the agency adequately discussed the relationship between the interpretation and the structure of the statute, including the context in which the language appears in the statute, and (4) whether the agency adequately discussed the relationship between the interpretation and any data available with respect to the factual predicates for the interpretation.

That description clearly focuses on the reasons given by the administrative agency in considering and finalizing its regulations. Without notice and comment, it is not easy to satisfy those requirements.

In a recent decision, the Supreme Court considered a Board of Immigration Appeals policy for deciding when an alien can apply to the attorney general for relief from deportation. The Court evaluated the policy based on whether it was arbitrary or capricious under APA section 706(2)(A). Although acknowledging that the scope of its review was narrow, in light of the expertise of the agency, the Court asserted that its role was to ensure that the agency "engaged in reasoned decisionmaking." The government argued that the Court should apply *Chevron*'s step two. The Court's response was twofold. First, citing *Mayo*, the Court said its analysis would be the same as its section 706(2)(A) analysis, because *Mayo* characterized *Chevron*'s step two as asking whether the agency interpretation was "arbitrary or capricious in substance."[46] More interestingly, the

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[39]*E.g.*, *K-Mart Corp. v. Cartier Corp.*, 486 U.S. 281 (1988) (two opinions reach opposite conclusions relying on congressional intent); *Rust v. Sullivan*, 500 U.S. 173 (1991) (majority and dissent construe statute to avoid grave doubts about constitutionality, and reach opposite conclusions). In other cases, the justices rely on different canons and reach opposite conclusions. *E.g.*, *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989) (majority relies on legislative history; dissent relies on plain meaning). For useful discussions of particular canons, see Stephen Breyer, "On the Uses of Legislative History in Interpreting Statutes," 65 *U.S.C. L. Rev*. 845 (1992); Michael Herz, "Judicial Textualism Meets Congressional Micromanagement; A Potential Collision in Clean Air Act Interpretation," 16 *Harv. Env. L. Rev*. 175 (1992).

[40]Richard J. Pierce Jr., *Administrative Law Treatise* 238-240 (2010). For a general discussion, see Adrian Vermeule, "Interpretive Choice," 75 *N.Y.U. L. Rev*. 74 (2000). On the use of plain meaning, see Frederick Schauer, "Statutory Construction and the Coordinating Function of Plain Meaning," 1991 Sup. Ct. Rev. 231.

[41]633 F.3d 616 (2011), *Doc 2011-1764*, *2011 TNT 18-10*.

[42]634 F.3d 249 (2011), *Doc 2011-2674*, *2011 TNT 26-7*.

[43]*Colony Inc. v. Commissioner*, 357 U.S. 28, 37 (1958).

[44]The order granting certiorari is *available at* http://www.supremecourt.gov/orders/courtorders/092711zr.pdf. A transcript of the oral argument, which was held on January 17, can be found at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-139.pdf. The justices in the oral argument seemed concerned with trying to determine when a statute is "ambiguous."

**(Footnote continued in next column.)**

[45]Pierce, *supra* note 40, at 219.

[46]*Judulang v. Holder*, 181 L. Ed. 2d 449 (2011) (slip op. at 9 n.7), citing *Mayo*, 131 S. Ct. at 711 (quoting *Household Services Inc. v. Pfennig*, 541 U.S. 232, 242 (2004)).

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Court held that *Chevron* did not apply because there was no statute to interpret. The statute gave the administrator the authority to allow an alien into the country even if the alien had run afoul of enumerated grounds for exclusion. The agency, as a matter of equity, extended that discretion to cases of deportation.[47] Because the statute did not discuss deportation, the Court fell back on its usual standard of whether the agency's actions were arbitrary or capricious, without reference to *Chevron* precedents.

If that has any broader significance, it may allow courts more latitude in evaluating agency actions that are not clearly tied to particular statutory language. Take, for example, the controversy over whether an innocent spouse is subject to a two-year deadline to ask for equitable relief under section 6015(f).[48] As the Third Circuit said in upholding the IRS's position imposing the two-year limit:

> Section 6015 tells us nothing about when claims may be brought under subsection (f) as the section does not address this point.[49]

The court then went on to analyze the validity of the IRS position using a *Chevron* analysis. In light of *Judulang*, it is possible that a court would grant the IRS's position less deference if a similar case came up once it concluded that the statute did not address the issue.[50] Based on *Judulang*, a conclusion that the statute did not address the issue would mean that *Chevron* was not applicable.

In any event, when *Chevron* step-two analysis is appropriate and there is no procedural impediment to the agency's issuing its rule, courts likely will uphold the agency rule in most cases. A study published in 1998 found that courts upheld the agency rule in 89 percent of cases in which a *Chevron* step-two analysis was conducted.[51]

## VI. Interpretive Regulations — *Skidmore*

As explained above, it would seem to follow from *Mayo* that substantive IRS regulations are legislative in nature, because they generally are issued under the authority of a particular code provision or section 7805. I also note that the DOJ does not intend to argue that other IRS pronouncements, such as revenue rulings, warrant *Chevron* deference.[52] Accordingly, they should warrant *Skidmore* deference — the courts should consider their persuasive power in light of the agency's expertise.

What factors are taken into account in applying *Skidmore* deference? One long-recognized factor is whether the guidance is contemporaneous with the statute; another is whether it is long standing.[53] Certainly, if those two factors are present, the guidance gains additional significance, although it does not mean courts will necessarily accept an administrative position that has both factors.[54]

One example of a court applying *Skidmore* is *General Electric Co. v. Gilbert*.[55] In that case, the company's disability plan excluded benefits for pregnancy. An Equal Employment Opportunity Commission (EEOC) guideline required disability benefits to be applied to disability related to pregnancy under the Civil Rights Act's prohibition of discrimination because of sex. The Court rejected the EEOC guideline using the *Skidmore* standard, arguing that it was not contemporaneous with the statute, contradicted an earlier interpretation of the EEOC, and went against the general tenor of the legislative history.

Exactly what constitutes the *Skidmore* standard is ultimately a subject of debate. A study of cases decided between 2001 and 2006 that purported to use *Skidmore* deference identified two forms of deference.[56] In one, a court exercises independent judgment in evaluating an agency rule, which boils

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[47]*Judulang*, 181 L. Ed. 2d 449, slip op. at 16-17 (and n.11): "Section 212(c) simply has nothing to do with deportation. . . . Rather, section 212(c) refers solely to exclusion decisions; its extension to deportation cases arose from the agency's extra-textual view that some similar relief should be available in that context to avoid unreasonable distinctions."

[48]This controversy was laid to rest administratively by CC-2011-017, *Doc 2011-16174*, *2011 TNT 143-23*.

[49]*Manella v. Commissioner*, 631 F.3d 115 (3d Cir. 2011).

[50]Of course, once *Judulang* is on the books, a court might consider the language of the statute more carefully before asserting that it did not address the issue.

[51]Orin S. Kerr, "Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Courts of Appeal," 15 *Yale J. on Reg*. 1, 30-31 (1998).

[52]*See* Sapirie, *supra* note 21.

[53]*E.g.*, *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.) (contemporaneous guidance left intact — this factor was recognized as early as *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827)); *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956) (position long standing).

[54]*See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 213 (1954); *Zuber v. Allen*, 396 U.S. 168 (1969) (presence of both factors does not result in deference). Congressional reenactments that occur after an administrative position has been promulgated may also be treated as supporting the administrative position. The Court took that position in *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 53 (1955). However, it is probably wise not to put too much reliance on this factor. For a more balanced statement of the significance of reenactment, see *Mass. Trustees of Easter Gas & Fuel Assoc. v. United States*, 377 U.S. 235, 241 (1964). The idea of relying on reenactment is criticized in William N. Eskridge, "Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale L.J.* 331 (1991). Indeed, the Court itself has recognized that it has treated reenactment inconsistently. *Helvering v. Griffiths*, 318 U.S. 371, 396 n.47 (1943).

[55]429 U.S. 125 (1976).

[56]Hickman and Krueger, "In Search of the Modern *Skidmore* Standard," 107 *Columb. L. Rev*. 1235 (2007).



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down to virtually no deference at all.[57] The other form has been termed ''sliding scale deference,'' in which the court uses a set of factors to determine how much deference it will give the agency rule. The factors considered are: ''thoroughness of consideration, agency expertise, validity of the reasoning, consistency of application, longevity of the interpretation, and formality of format — in evaluating the administrative interpretation.''[58] The study found that in about 75 percent of the cases, the more deferential sliding scale was used, while less than 20 percent used the independent judgment model.[59] Not surprisingly, the courts using the sliding scale approach were more likely to approve of the agency rule (in about 60 percent of the cases) than those using the independent judgment approach (50 percent).[60]

What seems clear is that *Skidmore* deference is less influential in practice than *Chevron* deference, under which 89 percent of cases reaching step two are decided for the agency.[61] *Skidmore*'s exact contours, however, are less clear than *Chevron*'s and more subject to each court's particular approach.

## VII. IRS Positions Other Than Regulations

The DOJ has indicated that it will not argue for *Chevron* deference for revenue rulings.[62] It is helpful to examine a possible basis for that decision to evaluate how likely it is to remain in effect.

As indicated above, legislative regulations get *Chevron* deference, while interpretive regulations get the lesser *Skidmore* deference. The other side of the coin is that legislative regulations must satisfy APA requirements — generally, they must be published with notice and comment procedures. That means that if a legislative regulation tries to masquerade as an interpretive regulation, it won't simply get *Skidmore* deference. Instead, it will be treated as an invalid legislative regulation.[63]

It would be comforting to have clear Supreme Court precedent distinguishing legislative from interpretive rules, but we do not: the precedent comes from circuit courts. It is difficult to extract a single test from the case law.

The clearest explanation may be in *American Mining Congress v. Mine Safety & Health Administration*.[64] If an agency intends to issue a legislative rule, it can. And if it uses the notice and comment procedure, then the rule will be a valid legislative rule (subject, presumably, to the *Chevron* tests). If the agency says that it intends to issue an interpretive rule, the court will be warier, since the agency may characterize a rule as interpretive in order to avoid APA procedures. Despite the agency's assertions, the rule will be treated as legislative if it has the force of law, and then it will be subject to APA procedures.

What factors determine that the rule is legislative? If the rule is essential to support agency enforcement, it is legislative. A simple example would be the consolidated return regulations — without the regulations, there is no guidance about how consolidated returns should be prepared. Also, a rule is legislative when the agency ''explicitly invoke[s] its general legislative authority.''[65] And finally, a rule that amends or contradicts a legislative rule must itself be legislative.[66]

*American Mining Congress* adds an important gloss to the last criterion. If an agency issues a vague and open-ended legislative rule, it cannot clarify that rule with an interpretative rule — the clarification itself will be legislative, and hence subject to notice and comment. The opinion gives as an example the Park Service's indication, in a legislative rule, that specific conditions would apply to a particular class of permits it issued.[67] The

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[57]*See* Colin S. Diver, ''Statutory Interpretation in the Administrative State,'' 133 *U. Pa. L. Rev*. 549, 565 (1985).

[58]Hickman and Krueger, *supra* note 56, at 1267-1268.

[59]*Id*. at 1271. The remaining cases were indeterminate.

[60]*Id*. at 1276.

[61]Kerr, *supra* note 51.

[62]*See* Sapirie, *supra* note 21.

[63]Pierce, *supra* note 40, at 447. Saltzman asserts that a procedurally defective legislative regulation has the force of an interpretive regulation. Michael I. Saltzman, *IRS Practice and Procedure* para. 3.02[3][c] (''Interpretive, or more accurately, 'non-legislative' rules include interpretive rules, policy statements, and procedurally defective legislative rules''). Saltzman's source for his assertion is the concurrence of Judges Halpern and Holmes in *Intermountain Insurance Service of Vail LLC v. Commissioner*, 134 T.C. 211, 226 (2010), *Doc 2010-10163*, *2010 TNT 88-12*, which states that a court ''should not entirely ignore invalidated regulations — but we cannot give them

**(Footnote continued in next column.)**

binding force.'' In a note, the concurring judges add: ''If respondent had successfully promulgated interpretive rules, we would reach this same point.'' However, the opinion then cites, among other sources, Hickman, ''A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements,'' 76 *Geo. Wash. L. Rev*. 1153, 1197 n.199 (2008) (suggesting invalidated regulations may be similar in force to proposed regulations, which set forth the agency's views but do not bind courts). Hickman cites *Butka v. Commissioner*, 91 T.C. 110, 130 (1988), for the proposition that a proposed regulation is ''not a complete nullity.'' However, it is not of the same legal status as an interpretive regulation, which is given *Skidmore* deference.

[64]995 F.2d 1106 (D.C. Cir. 1993).

[65]The court in *American Mining Congress* also viewed as significant whether the rule was published in the Code of Federal Regulations. However, that criterion was later called just a ''snippet of evidence.'' *See Health Ins. Ass'n of Am. Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

[66]995 F.2d at 1110-1111.

[67]*United States v. Piccotto*, 875 F.2d 345 (D.C. Cir. 1989).



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rule indicated that a permit could contain ''additional reasonable conditions.'' Later, in a purported interpretative rule, it added a specific ''mandatory condition.'' The court said that would be treated as a legislative rule, requiring compliance with the APA. Essentially, courts view a vague legislative rule followed by a detailed ''interpretative'' rule as an end run around the APA, which they will not permit.[68] The Supreme Court has expressed its concern about a specific manifestation of that administrative ploy in an ''anti-parroting'' canon: If the legislative regulation simply parrots the language of the statute, a court will not grant deference to an ''interpretative'' rule that interprets that legislative rule.[69] Pierce approves of the *American Mining Congress* test, which has been followed in at least seven other circuits.[70]

As Pierce points out, however, there is another standard, which was articulated by the D.C. Circuit. In *Paralyzed Veterans of America v. D.C. Arena*,[71] the D.C. Circuit stated that a rule is legislative if it amends a prior interpretation of a legislative rule. In other words, the rule can be legislative if it amends an interpretative rule. Later cases in the D.C. Circuit have followed that view,[72] as has the Fifth Circuit.[73] The Third Circuit has a case following *Paralyzed Veterans* to go with its decision following *American Mining Congress*.[74]

If a court strictly followed *Paralyzed Veterans*, the IRS would be in a terrible bind. Assuming revenue rulings are interpretative, any change in position taken in one would be legislative. The result? The revenue ruling would have to be issued under the APA's notice and comment procedures.

## VIII. Agency's Interpretation of Its Own Rules

A different standard of deference, *Auer*[75] deference, applies when an agency interprets its own rules. In that situation, the interpretation will be controlling unless ''plainly erroneous or inconsistent with the regulation.''[76]

The agency interpretation can come in a variety of forms, even in a brief in the litigation. The court simply must be convinced that the agency interpretation reflects its ''fair and considered judgment on the matter in question.''[77] What won't pass muster is an agency's ''post-*hoc* rationalization'' of action that is under judicial review.[78]

This strong deference to administrative action has two important qualifications. First, in *Gonzales v. Oregon*,[79] the Supreme Court refused to give deference to an agency interpretation of a regulation that simply parroted the statute. The logic of that refusal is that deference is given to regulations that have the benefit of notice and comment. If the regulation simply parrots the statute, there is little gained from the regulation, and the agency is just interpreting the statute, not its own regulation.

Second, *Auer* deference is not given to an interpretation of a regulation that will lead to a penalty, whether civil or criminal. Due process considerations limit the ability of an agency to clarify rules that can result in a penalty imposed on someone who acted before the clarification was available.[80]

We can ask whether the same logic should apply to limit *Chevron* deference in a penalty context. Moreover, if there is reason to give less than *Chevron* deference when violation of a regulation leads to a penalty, or less than *Auer* deference where an agency interprets its own regulation regarding a penalty, should that lesser deference apply to IRS regulations that affect a tax liability, not something denominated a penalty? In other words, can increased taxes be viewed as a penalty in that context? This question is particularly pointed when the IRS is simply running a nontax program through the code. An example to consider would be an IRS determination that a pension plan is nonqualified

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[68]*See, e.g.*, *Mission Group Kansas v. Riley*, 146 F.3d 775 (10th Cir. 1998).

[69]*Gonzales v. Oregon*, 546 U.S. 243 (2006). *See infra* note 79. The Court granted *Skidmore* deference to the rule in question. *Id.* at 263-264.

[70]Pierce, *supra* note 40, at 454, 456, citing *Warder v. Shalala*, 149 F.3d 73 (1st Cir. 1998); *New York City Employees' Retirement System v. SEC*, 45 F.3d 7 (2d Cir. 1995); *Appalachian States Low-Level Radioactive Waste Commission v. O'Leary*, 93 F.3d 103 (3d Cir. 1996); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995); *Hoctor v. Dep't of Agriculture*, 82 F.3d 165 (7th Cir. 1996); *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9th Cir. 2003) (Pierce mentions the Ninth Circuit in his text but does not provide case support); *Mission Group Kansas*, *supra* note 68. Two D.C. Circuit cases that follow *American Mining Congress* are *Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 156 (D.C. Cir. 1998) and *Aulenback v. Federal Highway Administration*, 103 F.3d 156 (D.C. Cir. 1997). Also following *American Mining Congress* is *National Organization of Veterans Advocates v. Secretary of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001). The concurrence by Judges Halpern and Holmes in *Intermountain*, *supra* note 63, noted the primacy of the *American Mining Congress* standard.

[71]117 F.3d 579 (D.C. Cir. 1997).

[72]*E.g.*, *Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005).

[73]*Shell Offshore v. Babbitt*, 238 F.3d 622 (5th Cir. 2001).

[74]*SBC v. FCC*, 414 F.3d 486 (3d Cir. 2005); *compare Appalachian States*, *supra* note 70.

[75]*Auer v. Robbins*, 519 U.S. 452 (1997).

[76]*Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), quoted in *Auer*, 519 U.S. at 461.

[77]*Talk Am. Inc. v. Mich. Bell Telephone Co.*, 131 S. Ct. 2254, 2263 (2011), citing *Auer*, *supra* note 75, at 462.

[78]*Talk Am.*, *supra* note 77, citing *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168-169 (1962).

[79]546 U.S. 243 (2006).

[80]*See generally* Pierce, *supra* note 40, at 543-553.



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because it violated the nondiscrimination rules. Failure to satisfy those rules results in a disallowance of amounts paid into the plan, leading to an additional tax liability that could be viewed as a penalty because it does not stem from any change in the real income recognized by the taxpayer-employer. There would seem to be an argument that the resulting tax is a penalty for the purpose of deciding what level of deference should be given to a regulation promulgated by the IRS that defines what constitutes nondiscrimination.

Justice Antonin Scalia has raised the specter of a further, drastic limitation on *Auer* deference. In *Talk America Inc. v. Michigan Bell Telephone Co.*, he suggests that *Auer* deference is misguided because it encourages agencies to draft unclear regulations rather than having a clear regulation subject to the scrutiny of notice and comment procedures. He said that deferring to an agency's interpretation of its own rule ''encourages an agency to draft vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.''[81]

## IX. The Good Cause Exception

Section 553(b)(B) of the APA allows an agency to dispense with notice and comment if it finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Section 553(d)(3) allows an agency to have a rule with an effective date less than 30 days after publication of the rule ''for good cause found.'' In both cases, the agency must give its reasons for deviating from the normal rule.

As indicated before, the IRS often publishes regulations, particularly temporary regulations, without complying fully with the notice and comment procedures, and those temporary regulations often have effective dates less than 30 days from publication.[82] With the likelihood that more attention will now be paid to the IRS's compliance with the APA, can that practice hold up to scrutiny?

Pierce gives two reasons why agencies invoke the good cause exception.[83] One is ''an urgent need to issue a rule to govern a particularly problematic area of conduct.'' For example, in *Jifry v. FAA*,[84] the Federal Aviation Administration issued a new rule without notice and comment requiring automatic suspension of a foreign national's pilot's certificate if the Transportation Security Administration notifies the FAA that the pilot poses a security threat. That rule was issued in the wake of the 9/11 attacks, and the court pointed to those attacks as a sign of the emergency situation that justified issuing the rule without notice and comment. On the other hand, when the Drug Enforcement Administration wanted to accelerate the effective date of a rule classifying a drug as having a high potential for abuse, the court said there was no good cause in the absence of a showing of an ''acute and immediate threat to public health.''[85]

A more likely basis for the IRS arguing good cause is the second reason identified by Pierce: An agency believes that prior notice will distort a pattern of transactions.[86] Pierce observes that this reason is often invoked in economic regulation. For example, giving notice of price freezing of season football tickets would lead to ''a massive rush to raise prices.''[87] The IRS's issuance of a rule to prevent use of a transaction it views as abusive would seem to be a natural basis for ignoring notice and comment.

Pierce observes that when agencies go that route they often characterize the regulation as temporary, with the simultaneous issuance of matching proposed regulations. That has certainly been a common practice for the IRS, and it is now required by statute.[88] Although Pierce urges courts to encourage that practice,[89] he cites no authority indicating that courts have required the simultaneous issuance of proposed regulations. Now that *Mayo* has put the IRS on notice that it is subject to the APA, courts probably will be asked to look more carefully at the IRS's procedures.

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[81]131 S. Ct. 2266. He refers the reader to a fuller discussion in John Manning, ''Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,'' 96 *Columb. L. Rev.* 512 (1996). Scalia dissented forcefully in *Gonzales*, *supra* note 69, arguing that there was no basis for the Court's ''anti-parroting'' position. It is not clear whether his concurrence in *Talk America* reflects a retreat from that position.

[82]Hickman, *supra* note 24, and text accompanying note 25.

[83]Pierce, *supra* note 40, at 672.

[84]370 F.3d 1174 (D.C. Cir. 2004).

[85]*United States v. Gavrilovic*, 551 F.2d 1099, 1105 (8th Cir. 1977).

[86]Pierce, *supra* note 40, section 7.10, p. 674.

[87]*DeRieux v. Five Smiths Inc.*, 499 F.2d 1321 (Temp. Emerg. Ct. App.), *cert. denied*, 419 U.S. 896 (1974).

[88]Section 7805(e)(1). It could be argued that the specific reference to temporary regulations in section 7805(e)(1) reflects congressional approval of the IRS issuing temporary regulations without compliance with the APA. This argument has been considered and rejected in the literature. *See* Michael Asimow, ''Public Participation in the Adoption of Temporary Tax Regulations,'' 44 *Tax Law.*, 343, 362, 364 (1991); Hickman, *supra* note 25, at 1739.

[89]Pierce, *supra* note 40, at 676.



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## X. Retroactive Rules

If administrative action is justified under *Chevron*'s step two, it means that a court has found that the agency's action ''is based on a permissible construction of the statute.'' That means there is more than one permissible construction, and the agency's actions reflect one of those constructions.

It follows that an agency should be permitted to change the construction it gives a statute as long as it follows the proper procedures in promulgating its decision.[90] In making such a change, it must explain its actions, take into account legitimate reliance on the prior position, and may not be arbitrary, capricious, or abuse its discretion.[91] It may even take a position contrary to a prior court decision, as long as the court did not conclude that its interpretation satisfied *Chevron*'s step one and allowed for only one interpretation.[92]

Because *Mayo* recognized the IRS's power in promulgating regulations, tax practitioners may well find the agency being more aggressive in pushing its favored positions through regulations. The extent to which it can change its published positions must be clarified.

### A. The Statutory Structure — Section 7805

Before the Taxpayer Bill of Rights II,[93] Congress created a special rule that applied to the retroactivity of IRS regulations and rulings. Section 7805(b) said:

> The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

Thus, the default under the statute was that any ruling or regulation would apply retroactively.

That approach was turned on its head by the Taxpayer Bill of Rights II. Under current section 7805(b)(1), a regulation, whether final, temporary, or proposed, cannot normally have an effective date before the earlier of (i) the date the final regulation is published in the *Federal Register*, (ii) the date that any notice substantially describing the proposed, temporary, or final regulation is published, or (iii) in the case of a final regulation, the date the proposed or temporary regulation to which it relates is published. There are six exceptions:

1. regulations issued within 18 months of the enactment of the statute to which the regulation relates;
2. regulations issued to prevent abuse;
3. regulations that correct a procedural defect in a previously issued regulation;
4. regulations relating to internal practices or procedures;
5. regulations issued under a legislative grant to prescribe a different effective date; and
6. regulations to the extent taxpayers may elect to apply them retroactively.

Amended section 7805(b) continues to allow pronouncements other than regulations to be issued with retroactive effect.[94] The change in retroactive effect applies to regulations that relate to statutory provisions enacted on or after July 30, 1996. Note that this effective date is not based on the date the regulation was issued but on the date the statute was enacted. The IRS can continue to issue regulations with retroactive effect under the prior version of section 7805(b) for statutory provisions enacted before July 30, 1996. Congress's actions suggest that in drafting future legislation, it will take into account the more limited power it has given the IRS to issue retroactive regulations.

### B. The Judicial Gloss

The Supreme Court provided strong authority against retroactive application of regulations in *Bowen v. Georgetown University Hospital*.[95] However, that opinion is not of central importance in tax litigation[96] because it focused on whether the administrative agency had the power to promulgate retroactive rules. As discussed above, the code has long had explicit rules governing the IRS's power to promulgate retroactive rules.

Thus, the limits on retroactive rulemaking would appear to come from the APA and general principles of fairness. The APA discusses the scope of judicial review of administrative actions and states, in part[97]:

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[90]*Motor Vehicle Manufacturing Ass'n v. State Farm Automobile Insurance Co.*, 463 U.S. 29 (1983).

[91]*Smiley v. Citibank*, 517 U.S. 735, 742 (1996).

[92]*Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). The Supreme Court might elaborate on that in its *Home Concrete* decision. *See supra* text accompanying notes 41-44. In the oral argument of *Home Concrete*, Justice Breyer expressed concern with the fairness of the IRS's retroactive regulation. Chief Justice Roberts repeatedly asked whether *Brand X* has ever been applied to a Supreme Court decision (it has not).

[93]P.L. 104-168, section 1101(a).

[94]Section 7805(b)(8). However, rulings do not have the same status as regulations, with some courts taking the position that they are no more than a statement of the position of one of the parties. *See Butka v. Commissioner*, 91 T.C. 110, 130 (1988).

[95]488 U.S. 204 (1988).

[96]The Federal Circuit made that point in *Grapevine Imports Ltd. v. United States*, 636 F.3d 1368, 1382 (Fed. Cir. 2011), *Doc 2011-5233*, *2011 TNT 49-14*; *see also* Saltzman, *supra* note 63, at para. 3.02[4].

[97]5 U.S.C. section 706(e).



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The reviewing court shall —

> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > **(B)** contrary to constitutional right, power, privilege, or immunity;
> >
> > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

That provision is not novel. As explained in the 1947 Attorney General's Manual on the APA ("the Government's own most authoritative interpretation of the APA,"[98]), those criteria "restate the scope of the judicial function in reviewing final agency action."[99]

When an administrative agency attempts to apply a rule retroactively, courts apply a balancing test to determine whether retroactive application runs afoul of section 10(e). In *NLRB v. Guy F. Atkinson Co.*,[100] the National Labor Relations Board (NLRB) wished to enforce a new standard to declare the respondent guilty of an unfair labor practice. The court refused to apply the new rule retroactively, saying the iniquity of retroactive policymaking on an innocent party was "manifest." The court reasoned that the fact that an administrative agency may be favored in its interpretation of its own rules does not mean that it has any special authority to determine when its actions should be retroactive.[101]

In *NLRB v. Majestic Weaving Co.*,[102] the NLRB petitioned to enforce an order ruling that the respondent gave unlawful assistance to a union. The respondent's activities were permissible when they were done, but later became unlawful under a new NLRB rule. The court said:

> A decision branding as "unfair" conduct stamped "fair" at the time a party acted, raises judicial hackles. . . . And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.[103]

In *Retail, Wholesale and Department Store Union v. NLRB*,[104] the court set forth five considerations for determination that a rule should be made retroactive:

1. whether the case is one of first impression;
2. whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law;
3. the extent to which the party against whom the new rule is applied relied on the former rule;
4. the burden a retroactive order imposes on a party; and
5. the statutory interest in applying a new rule despite a party's reliance on the old standard.

The retroactivity doctrine has been applied in cases involving tax liabilities.[105] With the tax bar now required to focus more clearly on the possible application of administrative law authorities to tax litigation, the issue may get further scrutiny.

## XI. One Last Look at *Mayo*

It is highly unlikely that the Supreme Court will reconsider its position in *Mayo* when it considers *Home Concrete*. Still, it is worth noting that despite the Court's conclusion to the contrary in *Mayo*, there may well be reasons that *Chevron* should not be applied to decisions reached in the context of tax administration.

The Court in *Chevron* emphasized the greater political accountability of agencies as compared with courts.[106] Administrative law scholars recognize that not all agencies are equally independent. For example, Cass Sunstein has qualified a statement that administrators have electoral accountability, saying:

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[98]*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring).

[99]*See* the 1947 Attorney General's Manual, at 108-109, *available at* http://www.oalj.dol.gov/PUBLIC/APA/REFERENCES/REFERENCE_WORKS/AGTC.HTM.

[100]195 F.2d 141 (9th Cir. 1952).

[101]*Id.* at 149 (footnote omitted).

[102]355 F.2d 854 (2d Cir. 1966).

[103]*Id.* at 860.

[104]466 F.2d 380, 390 (D.C. Cir. 1972).

[105]*E.g.*, *Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939) (Court also influenced by reenactment of statute); *Elkins v. Commissioner*, 81 T.C. 669, 681 (1983) ("It would constitute an abuse of discretion for [the commissioner] first to state a concise rule through the medium of an official pronouncement and then belatedly to alter that rule to the substantial disadvantage of a taxpayer who had meanwhile acted in reliance on the most reasonable interpretation of it"); *LeCroy Res. System Corp. v. Commissioner*, 751 F.2d 123 (2d Cir. 1984); *see also Chock Full O'Nuts Corp. v. United States*, 453 F.2d 300 (2d Cir. 1971) (promulgation of retroactive regulation during the course of litigation is "questionable").

[106]467 U.S. at 865-866.



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> Of course, "independent" agencies — those whose heads are appointed for fixed terms and are not subject to plenary removal power — are to a degree insulated from presidential policy making. . . . Moreover, shifts in the judiciary are a predictable consequence of shifts in the administration, and in this sense courts are not wholly independent. Finally, agencies are sometimes subject to narrow or parochial pressures. Their decisions can hardly be said to track the public will in all cases. These qualifications do not, however, undermine the basic claim that the democratic pedigree of the agency is usually superior to that of the court.[107]

That might suggest that *Chevron* deference could operate differently when applied to the pronouncements of different agencies, depending on how much electoral accountability they have. I have not found anyone who makes that suggestion, however, perhaps because, even in independent agencies, political shifts that affect enforcement are quite significant, although their effect is perhaps not quite as immediate as for other agencies.[108]

The problem with applying that analysis to the IRS is that it is much more insulated from political changes than other agencies for two reasons. First, from a political science standpoint, the IRS has "observable outputs and outcomes" that make it "more responsive to statutory mandates than to fluctuations in the political preferences."[109] A study of IRS audits concluded that "political influence is not too strong" in IRS operations.[110] However, the IRS is not unique in that regard.

The second reason to conclude that the IRS is insulated from the political process relates to its history. In the early 1950s, a major investigation of the Bureau of Internal Revenue (predecessor of the IRS) uncovered significant corruption in the administration of the tax laws.[111] As a result of the investigation, the Commissioner of Internal Revenue between 1944 and 1947 was indicted for income tax evasion, the assistant AG in charge of the tax division was removed from office by the president, the chief counsel of the Bureau resigned his office, and nine of the 64 collectors of internal revenue (the predecessors of district directors) were removed from office or forced to resign. Among the consequences of that investigation, all IRS positions, except for the commissioner and the chief counsel, became civil service appointments.[112] Accordingly, the IRS is not intended to be subject to political changes the same way other administrative agencies are. Since then, the IRS has had a tradition of being fiercely protective of its independent status.[113] And, with only two political appointees (and their assistants) coming in with any new administration, there is not much ability to make substantive changes in IRS positions. That has been strengthened in recent years because commissioners often have been chosen for their ability to run a large operation rather than for their substantive tax expertise.[114] While it remains true that the IRS has

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[107]Sunstein, "Law and Administration After *Chevron*," 90 *Columb. L. Rev*. 2071, 2087 at n. 80 (1990).

[108]*See, e.g.*, Michael Harper, "Judicial Control of the National Labor Relations Board's Lawmaking in the Age of *Chevron* and *Brand X*," 89 *B. U. L. Rev*. 189, 189-191 (2009); James O'Reilly, "Losing Deference in the FDA's Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise," 93 *Cornell L. Rev*. 939 (2008).

[109]The generalizations come from James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (Basic Books 1989), as summarized in Mehriye Mete, "Bureaucratic Behavior in Strategic Environments: Politicians, Taxpayers and the IRS," 64 *J. Pol*. 384, 401 (2002). For a general review of the interactions between political science theories and rules of deference, see Bradley Lipton, "Accountability, Deference, and the *Skidmore* Doctrine," 119 *Yale L.J*. 2096 (2010).

[110]Mehriye Mete, "Bureaucratic Behavior in Strategic Environments: Politicians, Taxpayers and the IRS," 64 *J. Pol*. 384, 401 (2002).

[111]House Ways and Means Committee, King Committee Report. A detailed description of the results of the investigation can be found in Appendix B. Allusions to the problems that were uncovered in that investigation can be found in President Truman's message accompanying Reorganization Plan No. 1 of 1952. (H. Doc. 327), U.S. G.C.A.N. 931, 82d Cong. 2d Sess. (1952).

[112]Reorg. Plan No. 1 of 1952, 17 *Fed. Reg.* 2.243, 66 Stat. 823.

[113]Probably the best known example is the refusal by Commissioner Donald Alexander (himself a political appointee) to act on President Nixon's "enemies list." *See, e.g.*, Michael Joe, "Former IRS Commissioner Donald Alexander Dies at 87," *Tax Notes*, Feb. 9, 2009, p. 703, *Doc 2009-2239*, or *2009 TNT 21-4*. My own experience at Treasury's Office of Tax Legislative Counsel suggests the power of the nonpolitical bureaucrats at the IRS. As the line attorney at Treasury in charge of farmers' cooperatives, I received regular visits from the head of one of the nation's biggest farmer cooperatives, which was based in Georgia, President Carter's home state. He was asking for a change in the treatment of cooperatives, which we agreed internally should be made. However, the head of the IRS group that had to sign off on the change was deeply suspicious of co-operatives and was greatly concerned that they would use any change to elude the corporate tax. After many meetings with IRS personnel, and many tentative agreements, I left Treasury without any change having been made. When I had been out of Treasury for a few years, the chief counsel called me into his office to review the co-operative situation. After reviewing it with me, he agreed to one approach we had proposed and said he would make the change. The change was never made administratively — it required a statutory amendment.

[114]That distinction between the IRS and other agencies is reduced to the extent the Treasury assistant secretary for tax policy must sign off on regulations before the IRS can publish them. Reg. section 301.7805-1(a). Still the premise on which *Chevron* deference is based may be misdirected when applied to

**(Footnote continued on next page.)**



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technical expertise have, there are few aspects of political accountability to support deference to IRS decisions.

Moreover, the IRS's technical tax expertise (although perhaps not its sensitivity to administrative concerns) is shared by the Tax Court, whose members come to the court after years of tax practice. Yet appellate courts do not grant the Tax Court anything like the deference they would grant to the IRS under *Chevron* or *Skidmore*. Indeed, there is no suggestion that the Tax Court believes that it can exercise any lesser deference in reviewing IRS pronouncements than other courts do. One can at least wonder whether a mechanical application of *Chevron* to IRS pronouncements is totally justified.

## XII. Conclusion

The discussion above does little more than scratch the surface of the issues that tax practitioners will have to deal with as they adapt to the *Mayo* decision. Unlike the tax rules, the law of judicial deference to administrative agencies' rulemaking involves little statutory guidance but very substantial, if confusing, judicial authority. It is not easy to predict how the courts will deal with the intersection of administrative law and tax law.

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the IRS. While that may not be a basis for totally ignoring *Chevron* in tax cases, it may suggest some moderation in the application of the doctrine.

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