Chapter 1

Deference: When the Court Must Yield to the Government’s Interpretation

§ 1:1 Introduction
   § 1:1.1 Legislative Regulations
§ 1:2 Chevron Deference
§ 1:3 Skidmore Deference
   § 1:3.1 Revenue Rulings
   § 1:3.2 Interpretive Regulations: Skidmore or Chevron?
§ 1:4 Auer Deference

§ 1:1 Introduction
In the past twenty-two years, the Supreme Court has significantly altered the principles of administrative law. In general, the alteration has resulted in a transfer of interpretive authority away from the courts and in favor administrative agencies. In the jargon of administrative law, courts are now required to give more deference to agency interpretations. Under the Supreme Court’s administrative law jurisprudence, there are now four different strands of deference. The courts are required to employ one of these four standards depending on the type of interpretation the agency invokes. The four strands are:

- the arbitrary-and-capricious standard, applicable to so-called legislative regulations;
- the Chevron standard, applicable to certain other types of agency interpretations;
• the Skidmore standard, applicable where the agency interpretation is subject to neither the arbitrary-and-capricious standard nor the Chevron standard; and

• the Auer standard, applicable where the agency’s interpretation, as distinguished from the statute, is ambiguous.

Each of these strands is considered in this chapter.

§ 1:1.1 Legislative Regulations

In the tax context, a regulation is deemed to be legislative in nature where it is promulgated under a specific grant of authority contained in the Code rather than under the general authority of section 7805.\(^1\) The courts are required to give such a regulation more deference than any other type of agency interpretation. As long as the agency has not been arbitrary or capricious or adopted an interpretation that is manifestly contrary to the underlying statute, the courts are required to sustain the regulation.\(^2\) Taxpayers therefore confront a very high standard when challenging such a regulation.\(^2.1\)

§ 1:2 Chevron Deference

Where the \textit{Chevron}\(^3\) standard is applicable, the courts are required to give controlling deference to an agency interpretation if the statute is ambiguous and the interpretation reasonably resolves the ambiguity.\(^4\) Thus, even if the court were inclined to read the statute differently, it must nonetheless defer to the agency’s interpretation where \textit{Chevron} applies and these two elements are satisfied.\(^4.1\) While the Supreme Court

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2. See, e.g., Krukowski \textit{v. Comm’r}, 279 F.3d 547, 551 (7th Cir. 2002) [upholding a regulation issued under a specific grant of authority contained in I.R.C. § 469 because not arbitrary, capricious or manifestly contrary to the statute]; see also United States \textit{v. Mead}, 533 U.S. 218, 227 (2001) [indicating that such a “regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute”].

2.1. It should be noted that it has been held that Circular 230 constitutes a legislative regulation. See \textit{Wright \textit{v. Everson}}, 543 F.3d 649 (11th Cir. 2008).


4. See id. at 842–43.

4.1. A regulation that fails to comply with the procedural requirements of the Administrative Procedure Act could be invalidated on that ground. In
articulates the *Chevron* standard differently from the standard it applies to legislative regulations, the two standards, as a matter of practical application, are probably equivalent.\(^5\) Once the statute is found to be ambiguous, in other words, an argument that the agency’s interpretation is invalid becomes exceedingly difficult under either standard.

In determining whether a statute is ambiguous, conflict in the lower courts could prove to be critical. In *Smiley v. Citibank*,\(^6\) the

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Intermountain Ins. Serv. of Vail LLC v. Comm’t, 134 T.C. No. 11 (2010), a concurring opinion by Judges Halpern and Holmes argued that a temporary regulation should be invalidated on the ground that it was issued without an opportunity for public comment. See also Kristin E. Hickman, “A Problem of Remedy: Responding to Treasury’s [Lack of] Compliance with Administrative Procedure Act Rulemaking Requirements,” 76 GEO. WASH. L. REV. 1153, 1201 (2008). Should the analysis in this concurring opinion become more widely adopted, most, if not all, temporary regulations would be vulnerable to this kind of challenge. It is, moreover, not clear whether *Chevron* applies in the case of a temporary regulation. See Burks v. United States, 633 F.3d 347 [5th Cir. 2011]; Beard v. Comm’t, 633 F.3d 616 [7th Cir. 2011]. For a discussion of deference in the context of temporary regulations, see Kristin Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465 (2013).

5. See Mayo Found. for Med. Educ. & Research v. United States, ___ U.S., ___ 131 S. Ct. 704 (2011) [intimating that the two formulations may not be different]; EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) [Scalia, J., concurring in part and concurring in the judgment] (suggesting that it is no longer useful to distinguish between the legislative-regulation standard and the *Chevron* standard); Boeing Co. v. United States, 258 F.3d 958 [9th Cir. 2001] (concluding that deciding whether the regulation was legislative or interpretive was unnecessary because it would be valid under either standard). But see Walton v. Comm’t, 115 T.C. 589, 597 (2000) (indicating that legislative regulations are entitled to more deference than interpretive regulations); Tiger’s Eye Trading, LLC, et al. v. Comm’t, 138 T.C. No. 6 (2012) (indicating that the regulation at issue was legislative in nature in upholding it and thus implying that such regulations receive greater deference). For an interesting application of the step-two analysis leading to a conclusion of invalidity based on *Chevron’s* step two, see Dominion Res., Inc. v. United States, 681 F.3d 1313 (2012) [finding that the regulation adopted an absurd interpretation and finding, separately, that the IRS was arbitrary and capricious in failing to provide a reasoned explanation for the position incorporated in the regulation]; see also Patrick J. Smith, *The APA’s Arbitrary and Capricious Standard and IRS Regulations, Tax Notes*, 136 TAX NOTES 271 (July 16, 2012) [discussing the need for a regulation to include in the preamble a reasoned explanation of the need for the change]; Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 VILL. L. REV. 515 (2014) [discussing the need for an agency to justify a change in position]. For a case where the court invalidated a regulation based on its conclusion that the statute was not ambiguous, see Finfrock v. United States, 860 F. Supp. 2d 651 (C.D. Ill. 2012).

Court, in making the threshold inquiry, emphasized that the different readings the statute had received in the Supreme Courts of New Jersey and California was in itself a strong indication of ambiguity.\(^7\) If this approach is generalized and applied at the federal level—and no apparent reason exists why disagreement in the federal courts should be treated differently—Chevron may transform the role of the Supreme Court itself. Inter-circuit conflict traditionally has been a basis for granting review of tax litigation in the Supreme Court, but such conflict may now argue in favor of deference to the Treasury’s construction. As a result, there may be less occasion for the Supreme Court to grant review in tax cases.\(^8\)

In *Estate of Hubert v. Commissioner*,\(^9\) without citing Chevron, a three-justice concurring opinion invited new regulations incorporating the very argument that the government had advanced unsuccessfully before the Court.\(^10\) Shortly after the Hubert decision, the Treasury accepted the invitation and overturned the Court’s decision by issuing regulations.\(^11\) Similarly, in *United Dominion Industries, Inc. v.*

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7. See id. at 739.
8. *But see* Gitlitz v. Comm’r, 531 U.S. 206, 217 n.7 (2001) [noting that a conflict in the circuit courts had developed on the issue, but concluding that the statute was unambiguous]. *Gitlitz* could be read as inconsistent with Smiley’s notion that lower-court conflict is suggestive of ambiguity, but a distinction may be made between these cases. In *Gitlitz*, unlike *Smiley*, the Court engaged in conventional statutory construction and, therefore, did not make a *Chevron* analysis. Although the Treasury had issued a proposed regulation addressing the question before the Court in *Gitlitz* [see Prop. Treas. Reg. § 1.1366-1(a)[2][viii], 63 Fed. Reg. 44,181 (1998)], the Court, not surprisingly, chose to omit the proposed regulation from its discussion and was therefore left to decide the case without the assistance of any administrative interpretation. See Boeing Co. v. United States, 537 U.S. 437, 455 n.13 (2003) [indicating that proposed regulations are of little consequence]. The Court was presumably anxious to find the statute unambiguous in order to avoid two points made by Justice Breyer in his dissent: that the Court’s analysis was inconsistent with the statute’s legislative history, and that an ambiguous Code section should be construed to avoid a loophole rather than to preserve it, which was the effect of the Court’s holding. See *Gitlitz*, 531 U.S. at 220–24 [Breyer, J., dissenting]. Perhaps, another way to read *Smiley*, in light of *Gitlitz*, is that although inter-circuit conflict presumptively leads to a finding of ambiguity, it does not necessarily do so in every case. Parenthetically, note that *Gitlitz* has been overruled by Congress. See Job Creation and Worker Assistance Act of 2002. See also I.R.C. § 108(d)[7].
10. See id. at 122.
United States,11.1 the Court again invited the IRS to amend its regulations to overturn the pro-taxpayer construction of the regulation adopted by the Court. From this vantage point, it would seem that the Court made an unwise commitment of resources in deciding to grant review in Hubert. And given the Supreme Court’s more recent endorsement of the notion that court decisions, including those from the Court itself, can be overturned by agency interpretation [which will be discussed below], it is unlikely that the Court will devote much of its resources to tax questions in the future.

Prior to Chevron, agency interpretations also received deference.12 In essence, however, Chevron made two important changes. First, it increased the level of deference.13 Previously, the courts were required to examine a variety of factors in determining whether or not in any given case the interpretation was persuasive and, therefore, entitled to deference.14 Now, as suggested, Chevron requires courts to give controlling deference to an interpretation if its two elements are satisfied without regard to whether the court finds it to be the best or most persuasive reading of the statute.15


14. See Skidmore, 323 U.S. at 140 [demonstrating whether the courts are required to defer to an agency interpretation depends upon, inter alia, the thoroughness of the agency’s analysis, the soundness of the analysis, and its consistency with earlier interpretations]; Nat’l Muffler Dealers Ass’n v. United States, 440 U.S. 472, 477 [1979] [indicating that courts should review tax regulations based on a variety of factors, including the consistency of the Treasury’s position; whether the government issued regulations contemporaneously with the enactment of the statute; how the regulation evolved; the length of time the regulation has remained in effect; the degree of taxpayer reliance; and the level of scrutiny the regulation received from Congress during the consideration of any reenacting legislation]. See also E.I. du Pont de Nemours & Co. v. Comm’r, 102 T.C. 1, 13, aff’d, 41 F.3d 130 (3d Cir. 1994), aff’d sub nom. Conoco, Inc. v. Comm’r, 42 F.3d 972 (5th Cir. 1995) [applying Nat’l Muffler, a pre-Chevron formulation, the court intimated that if the regulation under inquiry had been made in order to gain a litigating advantage, its validity might have been questionable]; Comm’r v. Sternberger’s Estate, 348 U.S. 187, 199 [1955] [showing that long-standing regulations are entitled to special weight].

15. See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 [2005] [upholding an interpretation under Chevron even if the court were to conclude that the agency’s reading of the statute is not the best reading].
Second, *Chevron* began to justify deference in a new way. No longer focusing exclusively on agency expertise as a justification, the Court began to emphasize political accountability. As a part of the executive branch, agencies are more politically accountable than courts and are therefore a more suitable repository for interpretive responsibility. The connection between political accountability and interpretive responsibility flows from the growing realization that law construction is often the equivalent of lawmaking. Law construction entails the making of policy, a function better served, under the Court’s new theory, by the politically accountable agencies rather than by the politically insulated courts. Thus, under *Chevron*, deference no longer rests solely on agency expertise for its justification but rather, as the Court stressed, on an agency’s political accountability as well.

This shift in theory translates into important practical consequences. For, under a theory of political accountability, agencies should have more discretion to change their position about the meaning of a statute: Since the administration must pay a political price if it allows an unpopular interpretation to stand, it should have the latitude to change position as circumstances warrant. Thus, not surprisingly, *Chevron* itself contemplates that agencies be given more flexibility to change their interpretations over time. Whereas, prior to *Chevron*,

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16. *See Chevron*, 467 U.S. at 865–66 [setting forth the political accountability theory, but also acknowledging the limited expertise of judges as compared to the agencies].
19. While *Chevron* deference has also been justified as a matter of separation of powers, [*see, e.g., Mead*, 533 U.S. at 241–42 (Scalia, J., dissenting)], the predominant view is that it derives from a delegation by Congress. *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GA. L.J. 833, 836 (2001). Indeed, in making *Chevron’s* applicability turn on whether Congress intended the agency to have the authority to invoke it, United States v. Mead, 533 U.S. 218 (2001), makes clear that Congress could constitutionally eliminate the *Chevron* standard.
20. Although one might read *Chevron* as deemphasizing the significance of expertise as a justificatory theory for deference, the Court has made clear that expertise remains an important justificatory component. *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 651–52 (1990) [*stating that “practical agency expertise is one of the principal justifications behind Chevron deference”*. *See also* Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088–90 (1990).
21. *See Chevron*, 467 U.S. at 863–64 [*“The fact that the agency has from time to time changed its interpretation of the term ‘source’ does not, as respondents argue, lead us to conclude that no deference should be
a change in agency position would weaken its claim of deference,\textsuperscript{22} such inconsistency is largely irrelevant under \textit{Chevron}.\textsuperscript{23} For example, in \textit{Central Laborers’ Pension Fund v. Heinz},\textsuperscript{24} the Supreme Court upheld the validity of a regulation even though the IRS had maintained a long-standing contrary position.\textsuperscript{25} In \textit{Mayo Foundation for Medical Educ. \& Research v. United States},\textsuperscript{25.1} the Court, in upholding an interpretive tax regulation, found such inconsistency to be irrelevant. \textit{Chevron} similarly makes the contemporaneousness of a regulation irrelevant. Indeed, given \textit{Chevron}’s political-accountability underpinnings, agency-administered statutes may no longer have a fixed meaning.\textsuperscript{26} In \textit{Smiley v. Citibank},\textsuperscript{27} a regulation was promulgated approximately one hundred years after the enactment of the underlying statute.\textsuperscript{28} After acknowledging the traditional view that a regulation issued contemporaneously with the enactment of the statute ordinarily receives deference on that account, the Court in \textit{Smiley} concluded that the delay was of no consequence.\textsuperscript{29} The Court reasoned that because Congress intended for ambiguities to be resolved by the politically accountable agencies, the validity of a regulation is not undermined by a lapse in time.\textsuperscript{30}

In short, with delay irrelevant and consistency not essential, agency-administered statutes containing ambiguities become mutable—or, to

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\item[23.] See Nat’l Cable & Telecommns. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 1001 n.4 (2005) (indicating that a lack of consistency does not undermine an agency’s deference claim under \textit{Chevron} as long as it has offered some reasoned explanation for changing position).
\item[25.] See id. at 748.
\item[27.] Smiley v. Citibank, 517 U.S. 735 (1996).
\item[28.] See id. at 740.
\item[29.] See id.
\item[30.] See id. at 740–41. Although under Smiley a regulation need not be long-standing in nature in order to be valid, such a regulation does gain
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borrow from the constitutional lexicon, “living documents”—no longer having the meaning fixed by Congress at the time of their enactment.

In *National Cable and Telecommunications Ass’n v. Brand X Internet Services*, the Supreme Court confirmed that agencies acting under *Chevron* have the authority to overrule court decisions. In doing so, the Court further expanded the interpretive authority of the agencies under *Chevron*. In *National Cable*, the Ninth Circuit had first construed the statute. Subsequently, the FCC, acting under its authority to issue interpretations under *Chevron*, adopted a construction of the statute that was contrary to the Ninth Circuit’s construction. When a case raising the validity of the FCC’s interpretation reached the Ninth Circuit, the court held that it was bound by its earlier decision as a matter of stare decisis. It therefore concluded that the FCC’s interpretation was invalid.

The Supreme Court reversed. It held that, since the earlier decision did not hold that the statute was unambiguous, the FCC was permitted to adopt a different interpretation and thereby in effect overturn the court’s decision. Citing its decision in *Smiley*, the Court emphasized that *Chevron* contemplates that the discretion to

legitimacy on this account. See Carlebach v. Comm’r, 139 T.C. No. 1 (2012) [quoting from *Smiley* for this proposition].

31. See Silberman, supra note 26, at 822 [suggesting that some might find it surprising that judges who subscribe to originalism in constitutional adjudication can at the same time argue for *Chevron’s* implicit commitment to viewing statutes as plastic].

32. While *Chevron*, at first blush, appears rather radical in its willingness to allow the current administration to employ a policy analysis based on considerations at the time the interpretation is promulgated when the statute was enacted years earlier, courts use a similar approach when doing conventional statutory construction. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 345–62 (1990) [indicating that courts interpret statutory language through the prism of post-enactment values]. For an example where the Supreme Court explicitly acknowledged the role of post-enactment change in constitutional values affecting the interpretation of a statute, see Circuit City, Inc. v. Adams, 532 U.S. 105 (2001) [holding, in effect, that the reach of a statute can expand over time where the Supreme Court’s jurisprudence on the contours of the commerce clause have changed since enactment].


34.1. As indicated in the text, the Supreme Court in *National Cable* contemplates that agencies will be foreclosed from trumping a court decision only where
the decision holds that the statute is unambiguous. See 545 U.S. at 982. This would appear to suggest that, if the court were to observe in mere dicta that the statute was unambiguous, the agency would remain free to adopt a regulation overturning the decision. Given Chevron, this approach makes sense. After all, unless the courts definitively conclude that the statute is unambiguous, the agencies should, under Chevron, retain the flexibility to adopt regulations that flesh out the meaning of a statute that the agency determines is ambiguous. Yet, in Home Concrete & Supply, LLC v. United States, 634 F.3d 249, 2011 WL 361495 (4th Cir. 2011), the court, seemingly oblivious to this distinction, invalidates a regulation based on dicta in a prior Supreme Court decision to the effect that the statute was unambiguous. In United States v. U.S. Home Concrete & Supply, LLC, 132 S. Ct. 1836 (2012), the Supreme Court applied its decision in National Cable to its pre-Chevron decision in Colony, Inc. v. Comm'r, 357 U.S. 28 (1958). In Colony, the Court had concluded that the Code provision at issue was not unambiguous. It then considered a number of factors, including legislative history, in determining Congress's intent. Based on this determination, it rejected the IRS's argument. The question in Home Concrete was whether a regulation designed to overrule the decision in Colony [insofar as it remained relevant under a reenacted version of the section] was valid. As Justice Scalia points out in his separate opinion in Home Concrete, one would have thought, given National Cable, that the Court's conclusion in Colony that the statute was not unambiguous would be dispositive. After all, in National Cable, the Court held that a regulation can overturn a court decision unless the court had held that the statute was unambiguous.

But the four-justice plurality opinion in Home Concrete, sensitive to the concern that in pre-Chevron cases the Court could not have appreciated the importance of ambiguity under the Chevron framework, concluded that it was appropriate to consult traditional tools of statutory construction, like legislative history, in determining whether the earlier decision found Congress had intended to speak to the issue in question. Pointing to the legislative history, among other factors, the four-justice plurality concluded that the Court in Colony had found that Congress had in fact formed an intent on the issue. As a result, the four-justice plurality held that the regulation overturning the decision in Colony was invalid. Thus, given Home Concrete, it would seem that National Cable must be applied in a somewhat less rigorous fashion when a pre-Chevron decision is at issue. Whether this less rigorous approach will be utilized in the case of lower-court decisions, as well as Supreme Court decisions, remains to be seen. See comments of IRS Chief Counsel, William J. Wilkins, at the ABA Tax Section on May 12, 2012 [discussing the possibility that National Cable will be applied differently depending on whether the earlier decision was rendered by the Supreme Court or a lower court]; Lipton, __ J. TAX’N (July 2012) [discussing Wilkins’ comments about Home Concrete].

What is perhaps more important than this reworking of National Cable by the four-justice plurality is an observation made by the four-justice dissent: that the Court has not yet decided whether National Cable applies to a Supreme Court precedent. Thus, at least four justices are of the view that National Cable did not definitively establish that an agency has the authority to overrule a Supreme Court precedent even where the Court found the statute to be ambiguous. And given Justice Scalia’s
resolve questions of statutory ambiguity reside in the agency having jurisdiction over the statute rather than the courts. Significantly, the same analysis would apply even in the case of a Supreme Court decision. So, for example, if the Supreme Court were to construe a statute, the decision would not preclude the agency from adopting a regulation that in effect overruled the decision as long as the Court did not hold that its construction was unambiguously required by the statute.  

Perhaps recognizing the significant shift in power away from the courts and in favor of the government that the combination of *Chevron* and *National Cable* has the potential to effect, the Tax Court resisted the notion that an interpretive tax regulation can overturn judicial precedent (that is, that a regulation issued under the general authority of section 7805, rather than under a specific section of the Code, can have this effect). In *Swallows Holding v. Commissioner*, 36 which has now been reversed by the Third Circuit, the Tax Court, over

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35. In Estate of Hubert v. Comm'r, 520 U.S. 93 (1997), the three-justice plurality opinion suggested that Treasury promulgate a new regulation incorporating the approach that the Court rejected. The Court’s holding in *National Cable* goes much further. Whereas in *Hubert*, the Court was required to decide merely the meaning of an unclear regulation, the meaning of the statute itself was at issue in *National Cable*.

36. *Swallows Holding v. Commissioner*, 126 T.C. No. 6 (2006), vacated, 515 F.3d 162 (3d Cir. 2008). In reversing, the Third Circuit concluded that, because the prior cases had not held that the Code section was unambiguous, the regulation permissibly overturned the cases and was therefore valid under *Chevron*.

In *Intermountain Ins. Serv. of Vail LLC v. Comm’r*, 134 T.C. No. 11 (2010), the court explored the relevance of legislative history under the *National Cable* framework. The majority invalidated a regulation that was designed to overturn the Supreme Court’s decision in *Colony, Inc. v. Comm’r*, 357 U.S. 28. Although the Supreme Court had found that the text of the statute was ambiguous, it was nonetheless able to conclude that the statute unambiguously called for the result it reached by examining the legislative history. The majority in *Intermountain*, unlike the concurring opinion, reasoned that the Supreme Court’s conclusion in *Colony* that the statute was unambiguous, even though based on the legislative history, is sufficient to foreclose a contrary regulation. Given the many Supreme Court decisions that have rested at least in part on legislative history, the issue in *Intermountain* is an important one. After the Tax Court’s decision in *Intermountain*, the IRS issued regulations finalizing the temporary regulations that were at issue in *Intermountain*. See T.D. 9511. For the Supreme Court’s later decision on this issue, see the discussion in note 34.1 of *United States v. U.S. Home Concrete & Supply, LLC*, 132 S. Ct. 1836 (2012). Note also that, in *Home Concrete*, the Court indicated that
dissenting opinions, refused to apply the framework that the Supreme Court adopted in *National Cable*. In essence, the court offered two rationales for rejecting the framework. First, in *National Cable*, the FCC interpretation overturning the Ninth Circuit decision was entitled to deference under the *Chevron* standard. In contrast, according to the Tax Court in *Swallows Holding*, it was not clear whether interpretive tax regulations qualify for the *Chevron* standard.

Second, the FCC had not been a party to the earlier litigation in the Ninth Circuit. In the perception of the Tax Court, had it been a party, the Supreme Court would have reached the opposite conclusion: not permitting the FCC’s interpretation to overturn the decision. Thus, according to the Tax Court, in tax litigation, where the government is necessarily a party, the *National Cable* framework is unavailable. While there is no hint of a suggestion in the Supreme Court’s decision in *National Cable* that it is to be read in this limited fashion, the Tax Court has been unwilling to change its position. \(^{36.1}\)

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36.1. Note, however, that in *Estate of Gerson v. Comm’r*, 127 T.C. No. 11 (2006), aff’d, 507 F.3d 345 [6th Cir. 2007], the majority sustained a GST regulation designed to overturn circuit court precedent. Without acknowledging its shift, the majority deviated from its decision in *Swallows Holding*. It concluded that, under the *National Cable* framework, where, as in *Gerson*, the courts are in conflict about the meaning of a Code section, an interpretive regulation can resolve the conflict. Thus, unlike *Swallows Holding*, *Gerson* contemplates that *National Cable* can apply to interpretive tax regulations. Unfortunately, however, *Gerson* fails to recognize that only a *Chevron*-type interpretation can overturn a court decision. *See National Cable*, 545 U.S. at 983 (indicating that “the court’s prior ruling remains binding law” in the case of an “agency interpretation to which *Chevron* is inapplicable”). Thus, given the majority’s failure to embrace *Chevron*—in both *Swallows Holding* and *Gerson*—its conclusion that an interpretive tax regulation can overturn court precedent cannot be reconciled with *National Cable*. *Gerson* is problematic on a second ground: the regulation seeks to overturn an Eighth Circuit decision finding the statute unambiguous. *See Simpson v. United States*, 183 F.3d 812 [8th Cir. 1999]; *see also* Bachler v. United States, 281 F.3d 1078 [9th Cir. 2002] (following *Simpson* but, unlike *Simpson*, not indicating that the statute is unambiguous). Contrary to the majority’s intimation that the regulation supersedes the prior cases, the Eighth Circuit should not yield. For, as indicated, under *National Cable*, not even a *Chevron*-type regulation can overturn a court’s conclusion that the statute is unambiguous. This is not to suggest, however, that the Tax Court should have viewed itself as bound by the Eighth Circuit’s decision in *Simpson*. It was certainly permissible for the Tax Court to find, unlike the Eighth Circuit, ambiguity in the statute and then to conclude that the regulation appropriately resolves the ambiguity. Indeed, in affirming the Tax Court in *Gerson*, the Sixth Circuit
With the 2011 Supreme Court decision in *Mayo Foundation for Medical Educ. & Research v. United States*, however, the Tax Court is likely to yield. As will be discussed, in *Mayo* the Court held that the validity of interpretive regulations is to be determined under the *Chevron* standard. As a result, the *National Cable* framework is now applicable in the case of interpretive tax regulations, and the Tax Court will presumably acquiesce. *Chevron*’s implications, as embellished by *National Cable*, may presage the end of a traditional aspect of tax litigation. In the past, the government’s defeat in a circuit court would likely lead to further review in other circuits, or perhaps in the Supreme Court on the ground that there is inter-circuit conflict. Now, the government can instead simply write a new regulation announcing the result it failed to secure in court. As indicated, rather than becoming a predicate for Supreme Court review, inter-circuit conflict becomes evidence of statutory ambiguity, making the Treasury, not the Supreme Court, the ultimate interpretive authority. If the tax bar at one time viewed the Treasury as a mere adversary, that view no longer accurately reflects the more dynamic role the Treasury now enjoys. In short, given its enhanced quasi-legislative function under *Chevron*, the government is no ordinary adversary in that it can rewrite the rules in many cases rather than litigate the meaning of the rules as originally written.

Is this a salutary alteration? The answer is not clear. On the one hand, allowing the Treasury more influence is valuable because of its enormous expertise—an expertise understandably lacking in many judges sitting on tax cases. Unlike the courts, the Treasury is able to bring this expertise to bear on an entire area of law at one time, facilitating an appreciation of the various ways in which the rules it promulgates interface. Also, Congress may not be able to respond as quickly as the Treasury to resolve issues not contemplated at the time

also concluded that the statute is ambiguous and therefore sustained the regulation without exhaustively analyzing the Tax Court’s treatment of *National Cable*. See 507 F.3d at 440 n.2. But, unless the Eighth Circuit overturns its decision in *Simpson* and now concludes that the statute is ambiguous, the regulation can have no effect in that circuit. For a discussion of the deference issues with regard to the GST regulation sustained by the court in *Gerson*, see Mitchell M. Gans, *Deference and the End of Tax Practice*, 36 REAL PROP. PROB. & TR. J. 731 (2002).


37. Of course, Treasury expertise as a justification for *Chevron* deference is not entirely convincing, as much litigation occurs in the specialized Tax Court. However, taxpayers can seek to exploit the lack of expertise in other courts by choosing to litigate elsewhere.
Moreover, Congress may be completely disabled from acting because nonpolicy-based concerns trump any legitimate policy objective. And, as some commentators have suggested, increased deference tends to create more uniform application of the law by reducing the potential for disagreement among the circuit courts.

38. See Mead, 533 U.S. at 247 [Scalia, J., dissenting] (arguing that “ossification” of the law would occur if the agencies did not receive Chevron deference); Sunstein, supra note 20, at 2088 [indicating that agencies are better situated than Congress to respond to changed circumstances and new developments].

39. See Daniel Shaviro, When Rules Changes: An Economic and Political Analysis of Transition Relief and Retroactivity, 86–88 (2001) [arguing that the public choice critique of legislation is particularly compelling in the tax context]. See also The Federalist No. 10, at 56 [James Madison] [Legal Classics Library ed., 1983] (“The apportionment of taxes on the various descriptions of property, is an act which seems to require the most exact impartiality, yet there is perhaps no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice.”). Note also that, in Mayo Foundation for Medical Educ. and Research v. United States, 562 U.S. __, 131 S. Ct. 704 [2011], the Court upheld a regulation that was amended to create a pro-government outcome after the government had been defeated in court based on an earlier iteration of the regulation.

40. See Silberman, supra note 26, at 824; see also Colin Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 585–92 [1985] (granting deference to agencies will make policy more coherent and will unify the law by locating decision-making authority in the agencies rather than in the various courts of appeals). Moreover, at least in the tax area, some sentiment favors minimizing inter-circuit conflict. See Popov v. Comm’r, 246 F.3d 1190, 1195 [9th Cir. 2001] (stressing the importance of uniformity in the tax area and the need to maintain consistency among the circuits). On the other hand, uniformity creates another concern: the lost opportunity for the courts to experiment with different approaches and to reflect on alternative ways of addressing the problem. Note that, in Carpenter Family Invs., LLC v. Comm’r, 136 T.C. No. 17 [2011], the court adhered to its decision in Intermountain, invalidating the final regulation.

The Tax Court’s approach in Intermountain and Carpenter has received mixed results in the circuit courts. In Grapevine Imports, Ltd. v. United States, 636 F.3d 1368 [Fed. Cir. 2011], the court upheld the regulation, which had not been issued until after the trial court’s decision favoring the taxpayer. The court reversed—and indeed overruled one of its own precedents in doing so—based on the new regulation. Citing Chevron, Mayo and Smiley, the court indicated that there is nothing inherently problematic in terms of the Chevron framework for an agency to issue a regulation in the “heat of litigation.” The court applied the regulation retroactively based on the pre-1996 version of section 7805 [i.e., retroactivity is generally impermissible under the 1996 amendment, but this amendment does not apply to regulations issued under a Code section enacted prior to 1996]. The court concluded that the retroactive application of the regulation did not constitute an abuse of discretion. See also
On the other hand, there is the question of the Treasury's bias. Where the government is defeated, it would be surprising if its perspective were unaffected. Indeed, the Treasury's very position as the taxpayer's adversary in tax litigation will tend to produce bias. Just as criminal prosecutors are not given the quasi-legislative responsibility of defining the elements of the crimes they prosecute, so too, one might argue, more skepticism would be appropriate regarding the scope of the Treasury's lawmaking function. Although judges are certainly not free of bias, at least they do not suffer the bias one acquires as an adversary. Thus, if disinterested, unbiased analysis is the objective, one can make a fairly compelling argument that Chevron's shift of power from the courts to the agencies is not entirely desirable.

One might also take a negative view of this alteration because of the resulting diminution in the courts' authority to limit the abusive

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Salman Ranch, Ltd. v. Comm'r of Internal Revenue, 647 F.3d 929 (10th Cir. 2011) [same]; Beard v. Comm'r of Internal Revenue, 633 F.3d 616 (7th Cir. 2011) [rejecting the taxpayer's argument based on the court's reading of the statute]. On the other hand, in Burks v. United States, 633 F.3d 347 (5th Cir. 2011), the court found the temporary regulation to be invalid based on its conclusion that the statute is unambiguous given the Supreme Court's decision in Colony. See also Home Concrete & Supply, LLC v. United States, 634 F.3d 249 (4th Cir. 2011) [same].


42. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (indicating that the Court gives considerable and, in some cases, decisive weight to tax regulations, provided that the regulation is "not of adversary origin").

43. To the extent that one perceives the government as acting unfairly, the willingness of taxpayers to comply voluntarily will be affected adversely. See Eric A. Posner, Law and Social Norms: The Case of Tax Compliance, 86 VA. L. REV. 1781, 1812 (2000) [suggesting that when the Service acts unfairly, it sends a signal to taxpayers that will undermine voluntary compliance].

44. Prior to Chevron, the Court was reluctant to review regulations deferentially when issued in order to gain adversarial advantage. See Skidmore, 323 U.S. at 140. Under Chevron, however, a regulation is entitled to controlling deference even if adopted for the purpose of influencing pending litigation. See Smiley v. Citibank, 517 U.S. 735 (1996) [granting Chevron deference even though the interpretation was issued during the litigation]. The government's ability to influence a pending tax litigation by issuing a regulation has been constrained by the 1996 amendment to I.R.C. § 7805(b)[1] which prohibits, as a general matter, retroactive regulations. See Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 1101(a), 110 Stat. 1452, 1468 (1996). On the other hand, Smiley does contemplate that a regulation issued after a transaction has been consummated can be relevant even when the agency does not have the authority to issue regulations on a retroactive basis. See Smiley, 517 U.S. at 744 n.3.
exercise of power by another branch of government. The Service has recently been perceived as an unresponsive bureaucracy. To the extent that a disinterested judge might be able to restrain bureaucratic power, *Chevron* can be seen as bureaucracy-entrenching. This is somewhat ironic. As the perception of the Service has grown more negative, a corresponding popular impulse to curtail its authority has arisen. Oddly, at the very time this impulse took root, the courts enhanced the government’s authority through *Chevron* in the name of political accountability. In other words, the Supreme Court has, in effect, enhanced the power of an unpopular agency in the name of sensitivity to popular will.

**§ 1:3 Skidmore Deference**

In *United States v. Mead*, the Supreme Court clarified *Chevron*’s scope as well as the kind of deference non-*Chevron* interpretations are entitled to receive. In terms of *Chevron*’s scope, the Court indicated that two conditions must be satisfied for *Chevron* to apply: (i) Congress must have intended to confer the authority on the agency to issue interpretations having force-of-law effect (that is, the authority to invoke the *Chevron* standard), and (ii) the particular interpretation must be issued in the type of format that Congress contemplated would be eligible for the *Chevron* standard. If it is assumed Congress did intend to confer such authority on Treasury—an issue that will be considered shortly—the question whether it could be invoked through the issuance of guidance less formal than a regulation would remain. The consensus view is that revenue rulings do not qualify for *Chevron* treatment,

45. *See* Thomas W. Merrill, *Judicial Deference to Executive President*, 101 YALE L.J. 969, 996–97 (1992) (emphasizing the weakness of presidential oversight and the need for judicial review to limit the potential for agency abuse of power).


48. For a contrary view, see Merrill & Hickman, *supra* note 19.


50. *See id.* at 226–27.

51. *See, e.g.*, Aeroquip-Vickers, Inc. v. Comm’r, 347 F.3d 173, 181 (6th Cir. 2003) [stating “When promulgating revenue rulings, the IRS does not invoke its authority to make rules with the force of law.”]; *In re Quality Stores, Inc.*, 693 F.3d 605 (6th Cir. 2012) [indicating that revenue rulings do not receive *Chevron* deference and then finding the revenue ruling
thus leaving only regulations as a possible candidate for such treatment.\footnote{51}{\textsuperscript{1}}

In \textit{Mead}, the Court held that any interpretation not eligible for the \textit{Chevron} standard is to be analyzed under \textit{Skidmore v. Swift \& Co.}\footnote{52}{\textsuperscript{2}}. Under the \textit{Skidmore} standard, the court must determine whether the interpretation is persuasive.\footnote{53}{\textsuperscript{3}} In making this judgment, the court must consider a number of factors: whether the agency has consistently maintained its position;\footnote{53.1}{\textsuperscript{4}} how thoroughly the agency considered its interpretation is persuasive.

\footnote{51.1}{\textsuperscript{5}}The Department of Justice has indicated that it will not seek \textit{Chevron} deference for revenue rulings or revenue procedures. See Marie Sapirie, \textit{DOJ Won’t Argue for Chevron Deference for Revenue Rulings and Procedures, Official Says}, TAX NOTES TODAY, www.taxanalysts.com as Doc 2011 TNT 90-7 [May 10, 2011]. See also Exxon Mobil Corp. \& Affiliated Cos. v. Comm’t, __F.3d__, 2012 WL 3194293 [2012] (rejecting \textit{Chevron} deference in the case of a revenue procedure). In addition, the Tax Court has indicated that it will not grant \textit{Chevron} deference to an IRS Notice. See Hellweg v. Comm’t, T.C. Memo 2011-58 [indicating that a Notice is not entitled to \textit{Chevron} deference but may be entitled to \textit{Skidmore} deference]; Morehouse v. Comm’t, 140 T.C. No. 16 [2013] (granting what appears to be \textit{Skidmore} deference to a Notice), rev’d, 769 F.3d 616 [8th Cir. 2014] (concluding that the Notice, which was accompanied by a proposed revenue ruling that was never formally adopted and that was contrary to a longstanding revenue ruling, was entitled to no deference and that the Tax Court had erred in giving it deference); Sutardja v. United States, 109 Fed. Cl. 358 (Cl. Ct. 2013) [granting \textit{Skidmore} deference to a Notice].

\footnote{52}{\textsuperscript{6}}\textit{Skidmore v. Swift \& Co.}, 323 U.S. 134 [1944].

\footnote{53}{\textsuperscript{7}}\textit{See Mead}, 533 U.S. at 228.

\footnote{53.1}{\textsuperscript{8}}In Taproot v. Comm’t, 679 F.3d 1109 [9th Cir. 2012], the court upheld a pro-government revenue ruling, pointing out that the IRS had consistently
position; whether the agency’s reasoning is valid; and whether other factors make the interpretation persuasive.\footnote{See Mead, 533 U.S. at 228.} To illustrate the very significant difference between the \textit{Chevron} and \textit{Skidmore} standards, consider again the Court’s decision in \textit{Smiley}.\footnote{Smiley v. Citibank, 517 U.S. 735 (1996).} In \textit{Smiley}, the Court upheld an interpretation even though it was issued one hundred years after the enactment of the underlying statute, the agency had been inconsistent and it was issued after litigation had already broken out about the meaning of the statute. Applying \textit{Chevron}, the Court did not permit any of these considerations to undermine the validity of the interpretation. Under the \textit{Skidmore} standard, in contrast, the interpretation would have presumably been invalidated. Indeed, the cumulative effect of the cited considerations aside, any one of them would have likely led to such a conclusion.

\section*{§ 1:3.1 Revenue Rulings}

With revenue rulings seemingly ineligible for the \textit{Chevron} standard, they necessarily become subject to \textit{Skidmore}.\footnote{For authorities applying \textit{Skidmore} to revenue rulings, see note 51, supra.} This raises the question whether pro-government and pro-taxpayer revenue rulings should be treated alike. In a series of cases, the Tax Court has begun to give more binding effect to pro-taxpayer revenue rulings.\footnote{Note that, prior to \textit{Mead}, some courts had given \textit{Chevron}-like deference to pro-government revenue rulings. See Salomon, Inc. v. Comm’r, 976 F.2d 837 (2d Cir. 1992). In the aftermath of \textit{Mead}, courts will presumably retreat from granting this much deference and will instead apply the \textit{Skidmore} methodology. On the other hand, where Congress reenacts a section of the Code after a pro-government revenue ruling has been issued, \textit{Skidmore} will not apply. Instead, the reenactment may be viewed as a ratification of the ruling, thus rendering it invulnerable to taxpayer challenge. See, e.g., Davis v. United States, 495 U.S. 472, 482 (1990). On the other hand, in the case of reenactment, the government is not necessarily precluded from revoking the ruling and adopting a new, post-reenactment interpretation. See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005) [permitting agencies to adopt a different interpretation despite reenactment unless Congress unambiguously indicated its intent to freeze the interpretation in place].} In other words, while applying \textit{Skidmore} to pro-government

\begin{itemize}
\item followed the revenue ruling in private letter rulings—a somewhat surprising conclusion given the non-precedential nature of such rulings under section 6110 of the Code. See also Hall v. United States, ___ U.S. __, 132 S. Ct. 1882, 2012 WL 1658486 [2012] (citing a chief counsel advisory, also non-precedential under section 6110 of the Code, as well as the \textit{Internal Revenue Manual}, in reaching a pro-government position).
\end{itemize}
revenue rulings—inquiring whether they are persuasive based on Skidmore’s relevant considerations—it has refused to permit the

should be noted that the court emphasized in these cases that the Service had consistently followed the taxpayer-friendly ruling in private letter rulings. Whether the outcome might be different in the case of a revenue ruling never cited by the Service is an interesting question. For a Tax Court decision where the court did not follow Rauenhorst, see Gluckman v. Comm’r, T.C. Memo 2012-329 (refusing to follow a taxpayer-friendly revenue ruling without citing Rauenhorst or the other Tax Court decisions embracing it). For a case where the court embraces a taxpayer-friendly interpretation in a Chief Counsel Memorandum, see Park v. Comm’r of Internal Revenue Serv., __ F.3d __, 2013 WL 3388414 [D.C. Cir. 2013]. See also Dixon v. Comm’r, 141 T.C. No. 3 [2013] [citing Rauenhorst for the proposition that the court is obligated to follow taxpayer-friendly revenue rulings]. In a letter dated October 17, 2002, the Office of Chief Counsel announced that it would not take a position in litigation contrary to an outstanding revenue ruling. See also Chief Counsel Advice 201501010 [citing Rauenhorst and stating, “The Commissioner must follow his own relevant revenue rulings in Tax Court proceedings”].

What if the ruling is not revoked after the Code is amended? In Pilgrim’s Pride Corp. v. Comm’r, 141 T.C. No. 17 [2013], the IRS maintained a position that was contrary to an outstanding revenue ruling [Rev. Rul. 93-80, 1993-2 C.B. 239]. Without citing Rauenhorst, the court agreed with the IRS on the substantive issue on the ground that the ruling was issued before an amendment to the Code that, in the court’s view, effected a change in the law. The court stated that the IRS is not required “to assert a particular position as soon as the statute authorizes such an interpretation,” citing, inter alia, Dickman v. Comm’r, 465 U.S. 330, 343 (1984); see also Farrell v. United States, 313 F.3d 1214 [9th Cir. 2002] [refusing to apply a taxpayer-friendly regulation that had not been revoked on the ground that it was in effect invalidated by a later amendment to the Code], Young v. Comm’r, T.C. Memo 2009-24 [same]. It is surprising that the court failed to cite a post-amendment revenue ruling that adhered to the position taken by the IRS in the earlier ruling [Rev. Rul. 2004-58, 2004-1 C.B. 1043]. It is also somewhat troubling that the IRS could allow a taxpayer-friendly ruling to remain “on the books” for many years after an amendment to the Code without giving notice to taxpayers that it intends to argue the ruling is no longer viable in light of the amendment until the IRS takes the position in court. Cf. E. Norman Peterson Marital Trust v. Comm’r, 78 F.3d 795 [2nd Cir. 1996] [suggesting that it would make sense to hold the IRS’s failure to clarify its position in a regulation against the IRS]; Applied Research Assocs., Inc. & Affiliate v. Comm’r, 143 T.C. No. 17 [2014] [refusing to construe a regulation in favor of the IRS where the IRS had not amended the regulation to incorporate its litigating position]; Cosentino v. Comm’r, T.C. Memo 2014-186 [indicating that taxpayers may rely on taxpayer-friendly revenue rulings]. Compare Morehouse v. Comm’r, 769 F.3d 616 [8th Cir. 2014] [deferring to a revenue ruling on the ground that it was longstanding without addressing the question whether, as a taxpayer-friendly ruling, it was binding on the IRS].
Service to disavow pro-taxpayer revenue rulings without regard to their persuasiveness.  

The principle established in these cases is subject to two qualifications. First, as the Supreme Court has indicated, where a Code provision is unambiguous, the Service cannot rewrite it by making a taxpayer-friendly concession in a revenue ruling. Thus, if the Service were to able convince the court that the Code unambiguously calls for result contrary to the one set forth in the revenue ruling, the court would be required to apply the Code without regard to the ruling. This qualification is driven by constitutional concerns: While the executive branch may have interpretive discretion under *Chevron* or *Skidmore*,

58. It remains to be seen whether other courts will follow the Tax Court’s approach. For cases where the court appeared to be willing to permit the Service to disavow a taxpayer-friendly ruling, see Black & Decker Corp. v. United States, 436 F.3d 431 (4th Cir. 2006); Ford v. United States, 2012 WL 6579598 (6th Cir. 2012) [not officially reported] [refusing to hold the IRS bound by a revenue procedure]; Vons Cos. v. United States, 55 Fed. Cl. 709, 718 (2003); Omohundro v. United States, 300 F.3d 1065 (9th Cir. 2002) [applying *Skidmore* in upholding a taxpayer-friendly revenue ruling without acknowledging that in Estate of Rapp v. Comm’r, 140 F.3d 1211 (9th Cir. 1998), an earlier Ninth Circuit panel had indicated in dicta that taxpayers may use a taxpayer-friendly revenue ruling as a shield]. On the other hand, under the Fifth Circuit’s approach, which the Tax Court cited, the Service is deemed bound by taxpayer-friendly revenue rulings. See Estate of McLendon v. Comm’r, 135 F.3d 1017, 1024 n.15 (5th Cir. 1998). The Second Circuit’s approach is similar to the Fifth Circuit’s. See *Weisbart* v. U.S. Dep’t of Treasury, 222 F.3d 93, 98 (2d Cir. 2000). The Second Circuit has, however, called into question the continuing viability of *Weisbart*, intimating that all revenue rulings are to be analyzed under *Skidmore*. See *Reimels* v. Comm’r, 436 F.3d 344, 347 n.2 (2d Cir. 2006). In AmBase Corp. v. United States, 731 F.3d 109, 121 n.12 (2d Cir. 2013), the court ruled for the taxpayer based on an approach outlined in a revenue ruling and a general counsel memorandum. The court indicates that it previously stated in dicta that a general counsel memorandum, like a revenue ruling, is entitled to deference under the *Skidmore* standard. It then concludes that there is no need to reexamine the issue because, in this case, the same approach is contained in a revenue ruling. The court then takes the view that the revenue ruling is valid under *Skidmore* and therefore determinative. In reaching its conclusion, the court does not make a distinction between a taxpayer-friendly ruling, as here, and an IRS-friendly ruling. Whereas the validity of an IRS-friendly ruling depends on its persuasiveness [as *Skidmore* requires], the validity of a taxpayer-friendly ruling should not, as a general matter, be questioned by the IRS. See *Rauenhorst* v. Comm’r, 119 T.C. 157 (2002). *But see* Comm’r v. Schleier, 515 U.S. 323, 335 n.8 (1995) [indicating that a taxpayer-friendly ruling is invalid if contrary to the unambiguous terms of the Code].

it does not have the authority to alter the meaning of an unambiguous statute that Congress has enacted.\(^\text{60}\)

The second qualification is that, in each of the cases in which the court held the Service bound by its concession, the ruling was still outstanding at the time of the litigation. In effect, the court would not permit the Service to argue against its own extant, published position. If, however, the Service were to revoke its ruling before the court issued its decision, these cases would presumably no longer be relevant. The question would rather become whether the revocation constituted an abuse of discretion. If, for example, the taxpayer consummated a transaction in reliance on the revenue ruling, could the Service revoke the ruling retroactively and then apply its new position to the taxpayer?\(^\text{61}\) As a practical matter, the Service tends to exercise its authority under section 7805 to revoke on a retroactive basis sparingly, typically providing that the revocation is to be given prospective effect. Practitioners may take some comfort from the Service’s unwillingness to use its authority too aggressively.

Nonetheless, the abuse-of-discretion question remains an important one. Given the extent to which Practitioners rely on taxpayer-friendly revenue rulings in structuring transactions, a change in the Service’s practice would radically affect the ability of Practitioners to give advice and the ability of taxpayers to engage in transactions with a sense of certainty about the tax consequences. If in fact the Service can retroactively revoke a taxpayer-friendly revenue ruling, might it not be


\(^{61}\) While, as a general matter, regulations can no longer be revoked retroactively (see I.R.C. § 7805[b][1]), revenue rulings may be revoked on this basis. See I.R.C. § 7805[b][8]. In Burleson v. Comm’r, T.C. Memo 1994-364, after the taxpayer and the Service had entered into a stipulation in the Tax Court, the Service revoked and clarified a relevant taxpayer-friendly revenue ruling. Emphasizing the fact that the revocation occurred after the stipulation had been executed, the court found that the revocation was an abuse of discretion and refused to permit the Service to disavow its earlier ruling. See also La. Rest. Ass’n Self Ins. Trust v. United States, 2014 WL 2600080 [E.D. La. Apr. 16, 2014] (finding a retroactive revocation of a private letter ruling on which the taxpayer had relied was an abuse of discretion).

\(^{62}\) I.R.C. § 7805[b][8] authorizes the Service to make any ruling, even including a judicial ruling, prospective. Thus, in Cent. Laborers’ Pension Fund v. Heinz, 541 U.S. 739, 748 n.4 (2004), the Court held that the Service could make the Court’s ruling prospective.
prudent for Practitioners to inform clients of this possibility where their advice is based on a taxpayer-friendly revenue ruling—just as a Practitioner who relies on private letter rulings will ordinarily inform the client that they are not entitled to precedential effect?

In Dixon v. United States,63 the Service revoked a ruling retroactively. Even though the taxpayer had acquired an investment in reliance on the ruling, the Court held that there was no abuse of discretion. Emphasizing the Service’s statutory authority to revoke a ruling retroactively and the statement in the controlling revenue procedure concerning revocation policy, the Court concluded that the taxpayer’s reliance was not justifiable and that the Service could therefore correct its mistake of law.64 Thus, the Service was not precluded from maintaining a position that was contrary to the revoked ruling.

Questions have, however, been raised about Dixon’s significance. In Estate of McLendon v. Commissioner,65 the court raised two such questions. First, the court suggested the possibility that the Supreme Court’s refusal to hold the Service bound by the revoked ruling was based on its conclusion that the ruling was contrary to a clear Code section and that the Service could not be permitted to rewrite such a section by concession (or otherwise).66 If this reading of Dixon is correct, then its import is rather limited. For in the vast majority of cases where the Service has issued a taxpayer-friendly revenue ruling, it will not be found to be inconsistent with unambiguous statutory language. Second, the McLendon court discerned a change in the Service’s revocation-policy language, reading the controlling revenue procedure as inviting more taxpayer reliance than the revenue procedure at issue in Dixon.67 Thus, were the Service to revoke a revenue ruling retroactively, a taxpayer seeking to establish justifiable reliance could perhaps point to this change in language (but if the ruling were contrary to a clear Code section, this argument would fail).68 In

64. See Dixon, 381 U.S. at 72–76.
65. Estate of McLendon v. Comm’r, 135 F.3d 1017 (5th Cir. 1998).
66. See id. at 1024 n.15. In Bobrow v. Comm’r, T.C. Memo. 2014-21, the IRS had taken a taxpayer-friendly position in one of its publications. Before the court, the IRS maintained a position contrary to the publication. Without citing or even mentioning the publication, the court agreed with the IRS on the substantive issue. The IRS, however, later announced that it would seek to apply its victory in Bobrow only on a prospective basis and that it would delete the taxpayer-friendly statement from the publication. See I.R.S. Ann. 2014-15.
67. See id.
short, while there is a trend in the direction of holding the Service bound by an unrevoked revenue ruling, questions do remain about its ability to revoke after the transaction is consummated but before the court rules on the issue.\textsuperscript{68.1}

\textbf{§ 1:3.2 Interpreive Regulations: Skidmore or Chevron?}

In the case of interpretive regulations (that is, those issued under the general authority of Code section 7805 rather than under a specific grant of authority), there were questions about the applicability of the \textit{Chevron} standard. Until the Supreme Court's decision in \textit{Mayo Foundation for Medical Educ. v. United States},\textsuperscript{69} some lower courts had suggested that a more taxpayer-friendly standard might apply. For example, the Tax Court, in \textit{Swallows Holding v. Commissioner},\textsuperscript{70} invalidated an interpretive regulation. In doing so, it refused to decide whether the \textit{Chevron} standard or the deference standard articulated by the Supreme Court in \textit{National Muffler v. Commissioner}\textsuperscript{71} applies to

\begin{enumerate}
\item IRS General Counsel Memoranda, unlike revenue rulings, are not intended to have precedential effect. See IRS INFO 2001-0199 ["they do not represent the position of the IRS"]. Nonetheless, at least one court has granted them \textit{Skidmore} deference. See Nathel v. Comm'tr, 615 F.3d 83, (2d Cir. 2010). As acknowledged by the U.S. Court of Appeals for the Second Circuit in Nathel, however, other courts have refused to grant any deference in this context. In AmBase Corp. v. United States, 731 F.3d 109, 121 n.12 (2d Cir. 2013), the court ruled for the taxpayer based on an approach outlined in a revenue ruling and a general counsel memorandum. The court indicates that it previously stated in dicta in Nathel that a general counsel memorandum, like a revenue ruling, is entitled to deference under the \textit{Skidmore} standard. It then concludes that there is no need to reexamine the issue because, in this case, the same approach is contained in a revenue ruling that is, according to the court, determinative under the \textit{Skidmore} framework.
\item Swallows Holding v. Comm'tr, 126 T.C. No. 6 (2006). In reversing, the Third Circuit applied \textit{Chevron}, indicating that the Tax Court erroneously applied factors that would be relevant under \textit{National Muffler} but not under \textit{Chevron}. For a critique of the Tax Court's decision in \textit{Swallows Holdings} on the same grounds, see Mitchell M. Gans & Jay A. Soled, \textit{A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference}, 7 FLA. TAX REV. 569 (2006). Note also that in PSB Holdings, Inc. v. Comm'tr, 129 T.C. No. 15 (2007), the Tax Court in dicta, without citing its decision in \textit{Swallows Holding}, suggests that \textit{Chevron} applies to interpretive regulations. On the other hand, the Tax Court has opted for applying \textit{Chevron} under the Golsen Doctrine (i.e., in those cases where an appeal would lie in a circuit court that applies \textit{Chevron}), suggesting there is continuing disagreement among the court's judges on the question. See Lantz v. Comm'tr, 132 T.C. No. 8 (2009).
\end{enumerate}
interpreive tax regulations.72 Under either standard, the court ruled the regulation was invalid.73 The Third Circuit reversed, applying *Chevron* and finding the regulation valid under this standard.

In *National Muffler*, decided before *Chevron*, the Court found this inquiry controlling in determining the validity of a regulation: whether it “harmonizes with the plain language of the statute, its origin and its purpose.”74 The Court indicated that various factors are to be considered in reaching a resolution: whether the regulation was adopted at the time the statute was enacted; whether the regulation is a long-standing one; whether taxpayers have relied on the regulation; whether the Service has consistently adhered to the position taken in the regulation; and whether Congress has considered the regulation in adopting subsequent legislation.75

The *National Muffler* standard is very similar, if not equivalent, to the *Skidmore* standard. Both set forth an ultimate question—whether the regulation is persuasive in the case of *Skidmore* and whether it harmonizes with the statute in the case of *National Muffler*—and both go on to require that the ultimate question be answered based on an examination of similar second-order considerations. Thus, at least in the Tax Court, the possibility remained that the *National Muffler* standard, a *Skidmore*-like standard, would govern where the validity of an interpretive regulation was at issue. Given the Supreme Court’s decision in *United States v. Mead*,75.1 however, the Tax Court’s conclusion that the *National Muffler* standard might continue to be viable was rather surprising. After all, *Mead* established a two-tier framework, under which agency interpretations are to be analyzed

72. It should be noted that the court’s deference analysis in *Swallows Holding* is largely, if not entirely, dicta. Once the court concluded that the Code section was unambiguous, there was no need to consider the level of deference to which the regulation was entitled. See Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) (indicating that there is no need to consider the deference question if the statute is determined to be unambiguous). For a further discussion of *Swallows Holding*, see Mitchell M. Gans & Jay A. Soled, *A New Model for Identifying Basis in Life Insurance Policies: Implementation and Deference*, 7 FLA. TAX REV. 569 (forthcoming).

73. See also Estate of Gerson v. Comm’r, 127 T.C. No. 11 (2006) (again refusing to decide whether *Chevron* or *National Muffler* applies, but concluding, unlike *Swallows Holding*, that the challenged regulation was valid).

In Mayo Found. for Med. Educ. & Research v. United States, 568 F.3d 675 (8th Cir. 2009), the court applied a mixture of *Chevron* and *National Muffler*. As indicated in the text, the Supreme Court held in *Mayo* that *Chevron* is the controlling standard.

74. See *id.* at 476–77.

75. See *id.*

under either the *Chevron* or the *Skidmore* standard. *Mead* certainly does not contemplate the possibility of a third standard. Thus, to the extent the Tax Court in *Swallows Holding* held open the possibility that the *National Muffler* standard might not have been supplanted, it was questionable.\textsuperscript{75.2}

Given the substantial difference between the *Skidmore* and *Chevron* standards, the question whether *National Muffler*, a *Skidmore*-like standard, remained viable was an important one. For under the *National Muffler* standard, taxpayers would bear a much easier burden when challenging the validity of interpretive regulations.\textsuperscript{75.3}


Speculation about the fate of *National Muffler* can be attributed to the Supreme Court’s tax cases. While the Court has cited to *Chevron* in some of its tax cases (see *Mead*, 533 U.S. at 230, indicating that it had applied *Chevron* to an interpretive tax regulation in Atl. Mut. Ins. Co. v. Comm’r, 523 U.S. 382 (1998); United States v. Haggar Apparel Co., 526 U.S. 380 (1999)), it has failed to do so in others. *See* Boeing Co. v. United States, 537 U.S. 437 (2003). *See also* United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) (citing *National Muffler*). In its most recent tax case, *Cent. Laborers’ Pension v. Heinz*, 541 U.S. 739 (2004), although it did not cite *Chevron*, it held in the context of an ERISA litigation that an interpretive tax regulation had force-of-law effect. Since the Court uses force-of-law nomenclature only when it invokes *Chevron* (see *Mead*, 533 U.S. at 221), any argument that it contemplates the continuing use of the *National Muffler* standard has become rather weak. Interestingly, however, the Tax Court in *Swallows Holding* apparently overlooked the Supreme Court’s decision in *Cent. Laborers’ Pension*, with neither the majority nor the dissenting opinions citing it. *See also* Scanlon White, Inc. v. Comm’n, 427 F.2d 1173 (10th Cir. 2006) (applying *National Muffler* without citing or acknowledging *Cent. Laborers’ Pension*); Stobie Creek Invs. v. United States, 82 Fed. Cl. 636 (2008) (applying *National Muffler*).

\section*{75.3} It should be noted that in *Barnhart v. Thomas*, 540 U.S. 20 (2003), the Court granted *Chevron* deference to agency interpretation issued without notice and comment. Given the fact that interpretive regulations are not issued without such formality, it would have been surprising if the Court had found...
In Mayo Foundation for Medical Educ. & Research v. United States, the Supreme Court resolved the question. It held that National Muffler had been supplanted by Chevron, overruling earlier cases holding that less deference was appropriate in the case of an interpretive regulation than one issued under a specific grant of authority. As a result, the validity of interpretive regulations is to be determined under Chevron, thus making National Muffler's second-order considerations irrelevant. For example, in Mayo, the Court upheld the regulation even though it was inconsistent with the position taken under a prior regulation. Whereas such inconsistency would cut against the validity of a regulation under National Muffler, it is irrelevant under Chevron. Mayo thus conclusively resolves the question of National Muffler's continuing viability and makes the task of taxpayers seeking to invalidate an interpretive regulation a much more difficult one.

Despite the Supreme Court's seemingly unequivocal embrace of Chevron in Mayo, a relatively obscure concurrence in 2014 by Justices Scalia and Thomas raises core questions about deference, perhaps signaling a fundamental reexamination of the concept in tax and other contexts.

In Whitman v. United States, 135 S. Ct. 352 (Mem.) (2014), the Supreme Court denied certiorari in a case involving a criminal conviction based on a violation of the securities law. The lower courts had upheld the conviction based on the SEC's interpretation of the statute. Justices Scalia and Thomas, while concurring in the decision to deny certiorari, suggest that there is a need for the Supreme Court to consider the appropriateness of granting Chevron deference to an interpretation of a statute that carries both civil and criminal implications. They point to the rule of lenity, under which ambiguity in a criminal statute must be resolved in favor of the defendant. They maintain that the rule serves two functions: to make sure that criminal defendants have fair warning as to the nature of the proscribed conduct and to effectuate the “norm” that only the legislature, not the executive branch, defines crime. They argue that the two Justices also make the point that a statute cannot have a dual meaning: it cannot have one meaning for civil purposes and a different one for criminal purposes. See also United States v. Thompson/Center Arms Co., 504 U.S. 505 (1992) (plurality opinion); Leocal v. Ashcroft, 543 U.S. 1, 11–12, n.8 [2004].

What does this suggest about the applicability of Chevron in the tax context and about the validity of Mayo? Whereas under Chevron/Mayo, ambiguous provisions in the Code can be resolved by regulation, ambiguity would be uniformly resolved in favor of the taxpayer under the principle of lenity. In effect, if the principle applies—on the rationale that the Code carries not just civil, but potentially criminal, sanctions—Chevron deference would no longer be appropriate in the tax context and Mayo would need to be overruled.
§ 1:4  

**Auer Deference**

Finally, an entirely different strand of deference has been applied by the Supreme Court where the agency’s interpretation, as distinguished from the statute, is ambiguous. In *Auer v. Robbins*, 76 a non-tax case, the Court held that an agency’s interpretation of an ambiguous regulation is entitled to controlling deference as long as it is not plainly inconsistent with the regulation or plainly erroneous. 77 The courts have begun applying *Auer* in tax cases 78 as well

As the two Justices acknowledge, there is authority to the effect that the principle should not apply in the civil context even if the statute also carries criminal sanctions—that, in other words, ambiguity should be resolved differently in the criminal and civil contexts. *See* *Babbitt v. Sweet Home Chapter, Cmtys. for Great Or.*, 515 U.S. 687 (1995). But, as indicated, the Justices cite to other decisions (*United States v. Thompson/Center Arms Co.*, *supra*; and *Leocal v. Ashcroft*, *supra*) that preclude statutes from having a dual meaning. What, in essence, the two Justices seek is a plenary review of the Court’s treatment of the issue in *Babbitt*.

Should the Court eventually decide to consider the issue, its decision in *United States v. Thompson Arms Co.*, *supra*, will be of importance. A tax case, it involved the construction of a Code provision dealing with firearms. The Court, in a plurality opinion, applied the principle of lenity in construing an ambiguous Code section even though the issue was civil, not criminal, in nature. In doing so, the plurality emphasized that the statute under consideration would carry a criminal sanction even if the defendant did not know that his conduct was illegal. The Court distinguished the typical tax case, where a criminal prosecution can only be maintained if the defendant knew that the position taken on the return was contrary to the Code (citing *Cheek v. United States*, 498 U.S. 192 (1991)).

The implication is that, in a typical case, the applicability of *Cheek* would somehow undercut the concern that animates the principle of lenity. Perhaps, the plurality tacitly reasoned that, given *Cheek*, a criminal prosecution could not be brought on the basis of an ambiguous Code provision—thus permitting courts to resolve ambiguity in the civil context without concern about the principle.

The difficulty with this reasoning from the Scalia/Thomas perspective is that it deals only with the question of notice and not with their suggested “norm” requiring that crime be defined by the legislature. In sum, if, as Scalia and Thomas maintain, it is not possible for statutes to have a dual meaning and if ambiguity cannot be resolved by the executive branch where criminal sanctions are possible, it seems that the fate of *Chevron/Mayo* may well be in doubt.

77. *See id.* at 461. In *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013), the Court indicates that, under *Auer*, an agency’s interpretation of its regulation is to be upheld even if it is not the best interpretation, as long as it is a reasonable one.
78. In *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), the Court gave what it called “substantial judicial deference” based on a long-standing revenue ruling that resolved an ambiguity in the regulation. *See id.* at 219. The Court’s emphasis on the long-standing nature of the ruling is difficult to understand: in *Auer*, it deferred to the agency’s
as in the interpretation of the Circular itself. Auer is similar to Chevron in that it also uses a two-step analysis: first inquiring whether the regulation is ambiguous (in Chevron, in the first step, inquiry is made as to whether the statute is ambiguous), and then inquiring whether the agency’s proffered resolution of the ambiguity in its regulation is abusive or clearly inappropriate (in Chevron, in the second step, inquiry is made as to whether the regulation reasonably resolves the ambiguity in the statute).

A problematic aspect of Auer deference is the retroactive effect that it creates. In general, regulations must be issued on a prospective basis, thus giving taxpayers an opportunity to understand the consequences of a transaction before undertaking it. Under Auer, in contrast, the Service could suggest in its brief how an ambiguous construction without inquiring whether it was a long-standing one. For lower court cases applying Auer in the tax context, see, e.g., Am. Express Co. v. United States, 262 F.3d 1376 (Fed. Cir. 2001) [applying Auer in the case of an ambiguous revenue procedure]; Cinema ’84 v. Comm’r, 294 F.3d 432, 439 (2d Cir. 2003) [applying substantial deference unless the interpretation is plainly erroneous]; Kurzet v. Comm’r, 222 F.3d 830 [10th Cir. 2000]; Focardi v. Comm’r, T.C. Memo 2006-56 [indicating that great deference is appropriate in this context]; Schott v. Comm’r, 319 F.3d 1203 [9th Cir. 2003] [indicating that the Service’s interpretation of an ambiguous regulation is to be respected unless it is an unreasonable one and then concluding, however, that the Service’s interpretation was unreasonable]; Palm Family Found., Inc. v. United States, 651 F.3d 118, [D.C. Cir. 2011]; Union Carbide Corp. and Subsidiaries v. C.I.R., 697 F.3d 104 [2d Cir. 2012] [citing Auer, the court upheld an interpretation of a regulation proffered in the government’s brief]; Mitchell v. Comm’r, __ F.3d __, 2015 WL 64927 [10th Cir. 2015] (applying Auer to a regulation even though the IRS did not seek such deference, indicating that it would be inappropriate to apply Auer if there were reason to suspect that the IRS did not reach a considered judgment on the issue). Some Tax Court judges are unwilling to apply Auer in the absence of published guidance that resolves the ambiguity in the regulation or some other indication that the Secretary of the Treasury is in agreement with the IRS position. See Pierre v. Comm’r, 133 T.C. No. 2, concurring opinion by Cohen, J. [2009] (adopting this position); but see Lantz v. Comm’r, 132 T.C. No. 8 [2009], n.10 [indicating that Auer can be invoked without discussing the preconditions suggested by Judge Cohen].


78.2. Note that Auer does not apply where the regulation merely parrots the language of the statute. See Hanah Metchis Volokh, The Anti-Parroting Canon, 6 N.Y.U. J. L. & LIBERTY 290 (2011) [discussing the Supreme Court decision in Gonzales v. Oregon].

79. See I.R.C. § 7805[b]. Note, however, that apparently, in the case of a Code section enacted before the 1996 amendment to section 7805, regulations can be issued on a retroactive basis. See Howard E. Clendenen, Inc. v. Comm’r, 207 F.3d 1071 [8th Cir. 2000]. Note also that the Code
regulation should be construed\textsuperscript{80} and thereby make its construction applicable to the very transaction at issue in the litigation, even though the transaction had occurred long before the Service proffered its construction.\textsuperscript{81} Perhaps out of concern about the retroactive effect of Auer, the Supreme Court has suggested, in a non-tax context, that it

\textsuperscript{80} In Keys v. Barnhart, 347 F.3d 990 [7th Cir. 2003], Judge Posner, in dicta, questioned whether it is appropriate to defer under Auer based on a brief written by an agency staff attorney. He went on to question whether Auer can be reconciled with Chevron, suggesting that Chevron's delegation-of-lawmaking rationale does not comfortably accommodate the grant of deference under Auer in the case of such a brief. See also Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 574 [7th Cir. 2001]; Eastman Kodak Co. v. STWB, Inc., 452 F.3d 215 [2d Cir. 2006] (citing Keys and raising the question whether Auer deference, rather than Skidmore deference, should be granted where an agency proffered a construction of its regulation in an amicus brief filed in the circuit court). But see Edsen v. Bank of Bos., 229 F.3d 154 [2d Cir. 2000] (granting Auer deference to a Notice resolving an ambiguity in a regulation). While, as Judge Posner suggests, there may be some tension between Chevron and Auer, the Supreme Court does appear to contemplate two different forms of deference: Chevron deference in the case of an ambiguous statute and Auer deference in the case of an ambiguous regulation. As distinct doctrines, with each having its own rationale, it is not surprising that each has its own, different contours. Indeed, in Auer itself, the Court granted deference based on an interpretation proffered in the agency’s Supreme Court brief (Judge Posner acknowledges this aspect of Auer in Keys, but suggests that Auer should not apply in the case of an interpretation proffered in a lower court brief). For a further discussion of Auer and its relationship to Chevron, see Coverdale, Chevron’s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead, 55 ADMIN. L. REV. 39 [2003]; Irving Salem et al., Report of the Task Force on Judicial Deference, 57 TAX LAW. 717 [2004].

\textsuperscript{81} To the extent that the agency has not been consistent in its interpretation of the ambiguity, it may not be entitled to any deference. See Comm'r v. Schleifer, 515 U.S. 323, 334 n.7 [1995]. See also U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137 [7th Cir. 2001] (refusing to grant deference where the agency had been inconsistent); Mitchell v. Comm'r, ___ F.3d ___ 2015 WL 64927 [10th Cir. 2015] (applying Auer but noting that it would be inappropriate to do so had the IRS been inconsistent); Green Forest Mfg. Inc. v. Comm'r, T.C. Memo 2003-75 (applying Skidmore-type analysis in determining whether court should defer to the Service’s interpretation). These cases raise an interesting question: whether a court must apply a Skidmore-type or Chevron-type analysis in the second step of inquiry.
may not continue to be receptive to such deference claims in the absence of some advanced notice by the agency of its new interpretation.\textsuperscript{82} Given \textit{Auer}, Practitioners should be cautious about giving advice whenever a regulation appears to be ambiguous. Prudent Practitioners will disclose to the client the possibility that the Service might proffer a resolution of the ambiguity at the time of litigation and that, under \textit{Auer}, the court would be required to defer if it is determined not to be plainly erroneous or plainly inconsistent with the regulation. In short, with tax advice so often based on the meaning of regulations, Practitioners must be sensitive to \textit{Auer} and its implications.\textsuperscript{83}

under \textit{Auer}. In other words, if the agency’s interpretation of its regulation is not plainly erroneous or plainly inconsistent with the regulation, must the court defer even if it concludes that the interpretation is not persuasive based on an analysis of the \textit{Skidmore} factors? For example, an interpretation issued while the litigation is pending would presumably receive little deference under \textit{Skidmore}. See Cottage Sav. Ass’n v. Comm’r, 499 U.S. 554, 563 n.7 (1991) (speculating that the Service might not have claimed deference for a revenue ruling because it was issued during the litigation). Thus, if the \textit{Skidmore} factors must be consulted in the second step of inquiry under \textit{Auer}, an interpretation proffered during the litigation would never be entitled to \textit{Auer} deference. Yet \textit{Auer} seems to contemplate that deference is appropriate in just these circumstances. Perhaps, given the Supreme Court’s decision in \textit{Schleier}, agency inconsistency is relevant under \textit{Auer}’s second step while the other \textit{Skidmore} factors, like the fact that the interpretation is issued during the litigation, are not. For a further discussion of this issue, see Irving Salem et al., \textit{Report of the Task Force on Judicial Deference}, 57 TAX LAW. 717 [2004]; see also Coverdale, Chevron’s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead, 55 ADMIN. L. REV. 39, 64 (2003).

\textsuperscript{82} In Christopher v. SmithKline Beecham Corp., 547 U.S. 63, 132 S. Ct. 2156 (2012), the Court emphasized that it would be inappropriate to impose “massive liability” on a party for conduct occurring before the government announced its interpretation. It can be expected that, in future cases, taxpayers will argue that, based on \textit{SmithKline}, an IRS failure to announce its interpretation prior to litigation will preclude it from seeking \textit{Auer} deference. Whether the Court will follow this approach in cases that do not involve the imposition of “massive liability” remains to be seen. In any event, note that the Court suggests that, even if an interpretation is not entitled to \textit{Auer} deference for this reason, it may nonetheless be entitled to \textit{Skidmore} deference. In Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326 (2013), several justices argue that a reexamination of \textit{Auer} is necessary. Justice Scalia, in dissent, argues that allowing an agency to interpret the rules it has written constitutes a constitutional violation of the separation of powers.

\textsuperscript{83} For a discussion of the Tax Court’s treatment of \textit{Auer}, see Steve R. Johnson, \textit{Auer/Seminole Rock Deference in the Tax Court}, 11 PITT. TAX REV. 1 [2013]; see also Shea Homes, Inc. v. Comm’r, 142 T.C. No. 3 (2014) (refusing to give \textit{Auer} deference to an IRS interpretation of a regulation, distinguishing between “fair and considered judgment on the issue” and “a post hoc rationalization for past agency action”).