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CONTENTS

- 182** Editorial
Margaret McKerchar, Michael Walpole and Binh Tran-Nam
- 184** Tax compliance costs for the small business sector in South Africa – establishing a baseline
Sharon Smulders, Madeleine Stiglingh, Riel Franzsen and Lizelle Fletcher
- 227** Australian business taxpayer rights to compensation for loss caused by tax official wrongs – a call for legislative clarification
John Bevacqua
- 250** Findings of tax compliance cost surveys in developing countries
Jacqueline Coolidge
- 288** Tax compliance costs for small and medium sized enterprises (SMEs): the case of the UK
Ann Hansford and John Hasseldine
- 304** FACTA and Schedule UTP: Are these unilateral US actions doomed unless accepted by other countries?
J. Richard (Dick) Harvey, Jr

CONTENTS CONTINUED

- 329 Navigating a transition in US tax administration
Kristin Hickman
- 345 Behavioural economics and the risks of tax administration
Simon James
- 364 Improving tax compliance strategies: can the theory of planned behavior predict business compliance?
Jo'Anne Langham, Neil Paulsen and Charmine E. J. Härtel
- 403 Intervening to reduce risk: identifying sanction thresholds among SME tax debtors
Elisabeth Poppelwell, Gail Kelly and Xin Wang
- 436 Developing risk management strategies in tax administration: the evolution of the Australian Tax Office's compliance model
Robert Whait
- 465 Tax return simplification: risk key engagement, a return to risk?
Jason Kerr
- 483 New dimensions in regulatory compliance – building the bridge to better compliance
Stuart Hamilton

Navigating a transition in U.S. tax administration

Kristin E. Hickman^{*}

1. INTRODUCTION

Judicial review is often an afterthought in many conversations about tax compliance and tax administration. To some extent, this lack of attention is entirely appropriate. Most taxpayers prefer to comply with rather than challenge the taxing authorities' interpretation of the law. Likewise, the goal of tax administrators is to encourage and facilitate voluntary tax compliance. For that matter, few enforcement matters lead to actual litigation. Hence, most tax professionals never see the inside of a courtroom.

Nevertheless, judicial review ought to be a consideration in evaluating tax risk. For one thing, despite best efforts by legislators and regulators, statutory and regulatory language is often ambiguous. Reasonable people will sometimes disagree over the proper application of the law to a particular set of facts. Taxpayers may believe they are complying with the law, only to find that tax administrators disagree. When these disputes arise, sometimes the government wins, and sometimes the taxpayer does.

But disagreements regarding the substantive meaning of the tax laws are only one part of the risk assessment equation. Most assessments of tax risk simply assume a fair degree of consistency both in how the government adopts regulations and other pronouncements interpreting the tax laws and also in how the courts evaluate disagreements between taxpayers and the government. For tax professionals in the United States, such consistency is now in question.

After years of ignoring changes in administrative law doctrine, judicial review of tax administration efforts in the United States is undergoing a period of transition as a result of three recent, high-profile cases. Early in 2011, in *Mayo Foundation for Medical Education and Research v. United States*¹ the United States Supreme Court held that general authority Treasury regulations promulgated using the public notice and comment procedures imposed by the Administrative Procedure Act (APA) are eligible for the highly deferential standard of judicial review articulated in *Chevron*

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¹ 131 S.Ct. 704 (2011).

U.S.A. Inc. v. Natural Resources Defense Council, Inc.² A few months later, in *Cohen v. United States*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), sitting en banc, reached a series of conclusions regarding the interaction of the Internal Revenue Code (IRC) and the APA that allowed a taxpayer challenge to the procedural validity of an IRS Notice to proceed on the merits irrespective of IRC limitations on the justiciability of taxpayer claims.³ Finally, the Supreme Court recently issued a decision in *United States v. Home Concrete & Supply, LLC*, invalidating a Treasury regulation on statutory grounds, but leaving untouched a budding disagreement among the lower courts regarding the procedures by which Treasury adopts many of its regulations.⁴

Collectively, these cases have tremendous potential to alter both judicial review of Department of Treasury (Treasury) and Internal Revenue Service (IRS) interpretations of the U.S. tax laws and also the procedures that Treasury and the IRS utilize in promulgating tax regulations and rulings. Indeed, the IRS has already modified Internal Revenue Manual provisions governing its employees in response to the *Mayo* decision. To a great extent, however, these questions raise as many or more questions as they answer, substantially complicating informed risk analysis. The purpose of this essay is to summarize the *Mayo*, *Cohen*, and *Home Concrete* cases and consider their implications for U.S. tax administration and for tax professionals seeking to assess tax risk in the midst of the questions these cases raise.

2. THREE KEY CASES

2.1 *Mayo Foundation for Medical Education and Research v. United States*

The Treasury Department promulgates regulations by exercising one of two types of delegated power from Congress. In various provisions of the Internal Revenue Code, Congress has authorized Treasury to adopt rules and regulations for the purpose of resolving specific issues.⁵ Separately, IRC § 7805(a) grants Treasury the general power to develop “all needful rules and regulations for the enforcement of” the IRC.⁶

The *Mayo* case concerned a Treasury Department interpretation of IRC § 3121(b), which defines “employment” for purposes of taxes assessed on wages under the Federal Insurance Contributions Act and specifically excludes services performed by

² 467 U.S. 837 (1984).

³ 650 F.3d 717 (D.C. Cir. 2011) (en banc).

⁴ 132 S.Ct. 1836 (2012).

⁵ See, e.g., IRC § 482 (giving Treasury the power to allocate income among businesses with common ownership as “necessary to prevent evasion of taxes or clearly reflect [their] income”); IRC § 1502 (authorizing the regulations that Treasury “deem[s] necessary” for affiliated corporate groups to prepare and file consolidated income tax returns “in such manner as clearly to reflect” their tax liabilities and “to prevent avoidance” of the same). The New York State Bar Association Tax Section a few years ago wrote a helpful report in which they claimed and categorized more than 550 specific delegations of rulemaking authority in the IRC. See N.Y. State Bar Ass’n Tax Section, Report on Legislative Grants of Regulatory Authority 2–6 (Nov. 3, 2006), available at <http://www.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1121Report.pdf>.

⁶ 26 U.S.C. § 7805(a).

students who work for the academic institutions in which they are enrolled.⁷ In 2004, Treasury exercised its general rulemaking authority under IRC § 7805(a) to adopt a regulation declaring that medical residents are not students, reversing a longstanding IRS interpretation and rejecting federal circuit court precedent reaching the opposite conclusion.⁸ Institutions that withheld and paid the taxes unsuccessfully sought refunds and then promptly sued the government, challenging the validity of the regulation.

The standard of judicial review for most agency regulations derives from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*⁹ The Chevron standard instructs a reviewing court to ask first whether the statute being interpreted is clear, “for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰ In evaluating statutory clarity, reviewing courts employ “traditional tools of statutory construction” as they have always done.¹¹ But where traditional interpretive methods fail to yield a conclusive sense of congressional intent, and the statute is susceptible of more than one reasonable construction, the Chevron standard recognizes the choice between competing alternatives to be a matter of policy preference instead of mere interpretation.¹² In such circumstances, expert agencies to which Congress has delegated administrative power are better situated to make policy choices than generalist courts.¹³ Accordingly, under Chevron, if the reviewing court finds a statute to be ambiguous, then “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹⁴ More recently, in *United States v. Mead Corp.*, the Supreme Court limited the scope of Chevron’s applicability to agency actions that carry “the force of law.”¹⁵

For years prior to *Mayo*, the courts and the tax community had debated whether or not the Chevron standard applied in evaluating general authority Treasury regulations.¹⁶ Many tax lawyers, the United States Tax Court, and some federal circuit courts maintained that an arguably less deferential standard articulated prior to Chevron in the tax-specific case of *National Muffler Dealers Ass’n, Inc. v. United*

⁷ 26 U.S.C. § 3121(b)(10).

⁸ See Treas. Reg. § 31.3121(b)(10)-2(d), (e) (Example 4); T.D. 9167, 69 Fed. Reg. 76404 (Dec. 21, 2004); see also, e.g., *Minnesota v. Apfel*, 151 F.3d 742, 743 (8th Cir. 1998) (holding that medical resident stipends were exempt under identical language concerning Social Security taxes); Internal Revenue Service, Treasury, *Notice of Proposed Rulemaking and Notice of Public Hearing; Student FICA Exception*, 69 Fed. Reg. 8604 (Feb. 25, 2004) (proposing regulatory language and acknowledging contrary decision in *Minnesota v. Apfel*).

⁹ 467 U.S. 837 (1984).

¹⁰ *Id.* at 842-43.

¹¹ *Id.* at 843, n.9.

¹² See *id.* at 843.

¹³ See *id.* at 865-66; see also *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001) (holding that Chevron only applies when Congress delegates the power to act with the force of law and the agency exercises that delegated power).

¹⁴ *Chevron*, 467 U.S. at 843.

¹⁵ 533 U.S. at 226-27.

¹⁶ See, e.g., Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537, 1556-59 (2006) (summarizing the disagreement among courts and legal scholars).

States,¹⁷ applied instead.¹⁸ Other circuits expressly adopted Chevron rather than National Muffler as the standard of review for general authority Treasury regulations.¹⁹ Still other federal circuit courts wondered whether the Chevron and National Muffler standards were meaningfully different.²⁰ The Supreme Court's previous discussions of the issue were muddled and contradictory.²¹ Finally, the Mayo case brought the issue squarely before the Supreme Court. The National Muffler standard expressly called for considering, among other factors, an interpretation's consistency and longevity—factors that weighted against Treasury's new regulation—while Chevron expressly recognizes the need to allow agencies to change their interpretive positions. Also, unlike in prior cases before the Court, briefing in Mayo by the parties and by dueling amici clearly raised and thoroughly addressed the question of Chevron versus National Muffler review.²²

In upholding the regulation, an undivided Court unequivocally chose Chevron and rejected National Muffler as the standard of review for general authority Treasury regulations.²³ In reaching that decision, the Court offered several observations and conclusions, including that the Chevron and National Muffler standards “call for different analyses of an ambiguous statute”;²⁴ that National Muffler factors such as an agency's inconsistency or an interpretation's longevity or contemporaneity (or lack thereof) are not reasons for denying Chevron deference to a Treasury regulation;²⁵ that “[t]he principles underlying our decision in Chevron apply with full force in the tax context”;²⁶ and, finally, that “Chevron and Mead, rather than National Muffler ..., provide the appropriate framework for evaluating” the Treasury regulation at issue.²⁷ Furthermore, in considering the regulation at issue under the Chevron framework, and drawing further from earlier jurisprudence applying that standard, the Court rejected as irrelevant that Treasury had promulgated its regulation in response to litigation and in the face of a contrary lower court precedent.²⁸

¹⁷ 440 U.S. 472, 477 (1979).

¹⁸ See, e.g., *St. Jude Med., Inc. v. Comm'r*, 34 F.3d 1394, 1400, 1402 (8th Cir. 1994); *Snowa v. Comm'r*, 123 F.3d 190, 197 (4th Cir. 1997); *Snap-Drape Inc. v. Comm'r*, 98 F.3d 134, 197 (5th Cir. 1996); see also Irving Salem et al., *ABA Section on Taxation: Report of the Task Force on Judicial Deference*, 57 Tax Law. 717 (2004).

¹⁹ See, e.g., *Swallows Holding, Ltd. v. Comm'r*, 515 F.3d 162 (3d Cir. 2008); *McNamee v. Dep't of Treasury*, 488 F.3d 100, 105 (2d Cir. 2007); *Peoples Fed. Sav. & Loan Ass'n of Sindy v. Comm'r*, 948 F.2d 289, 299, 304 (6th Cir. 1991).

²⁰ See, e.g., *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978-83 (7th Cir. 1998).

²¹ See Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy*, 89 Texas L. Rev. See Also 89, 107-08 (2011) (analyzing Supreme Court tax deference precedents).

²² See Brief for Petitioners, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S.Ct. 704 (2011) (No. 09-837); Brief of Amicus Curiae Professor Kristin E. Hickman in Support of Respondent, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S.Ct. 704 (2011) (No. 09-837); Brief of Tax Professor Carlton M. Smith as Amicus Curiae in Support of the Petitioners, *Mayo Found. for Med. Educ. & Research v. United States*, 131 S.Ct. 704 (2011) (No. 09-837).

²³ See *Mayo*, 131 S. Ct. at 712-14.

²⁴ *Id.* at 712.

²⁵ *Id.* at 712-13.

²⁶ *Id.* at 713.

²⁷ *Id.* at 714.

²⁸ See *id.* at 712-13.

In the midst of this analysis, the Court also offered a short discussion of the relationship between tax administration and administrative law doctrine with potential implications beyond the standard of review question. First, the Court stated explicitly, “[W]e are not inclined to carve out an approach to administrative review good for tax law only. To the contrary, we have expressly ‘[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.’”²⁹ In making this statement, the Court quoted *Dickinson v. Zurko*, a non-tax (patent) case with an extensive discussion regarding Congress’s intent that the Administrative Procedure Act bring uniformity to the otherwise disparate field of federal administrative action.³⁰ The Court also cited *Skinner v. Mid-America Pipeline Co.*³¹ for “declining to apply ‘a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power.’”³² Other turns of phrase within the *Mayo* Court’s analysis reflect a similar orientation toward reconciling the tax and non-tax contexts.

2.2 *Cohen v. United States*³³

The D.C. Circuit’s subsequent en banc decision in *Cohen* was less immediately consequential but, consistent with the Supreme Court’s policy in *Mayo* of administrative law uniformity, represents a further shift in favor of bringing tax administration back in line with administrative law norms. The case grew from several challenges against an old telephone excise tax made defunct by changes in telephone technology and long-distance billing practices.³⁴ After several federal circuit courts rejected the IRS’s arguments in favor of the continued vitality of the tax,³⁵ the IRS adopted special refund procedures for the tax by issuing informal guidance, Notice 2006-50.³⁶

The APA generally requires agency rules carrying the force and effect of law to be adopted through using procedures including public notice and opportunity for comment.³⁷ Consistent with its standard practice for informal guidance documents, in issuing Notice 2006-50, the IRS did not utilize APA notice-and-comment rulemaking procedures. Taxpayers who consider the IRS’s special refund procedures for the telephone excise tax to be fundamentally flawed challenged Notice 2006-50 on APA

²⁹ *Id.* at 713.

³⁰ 527 U.S. 150, 154 (1999).

³¹ 490 U.S. 212, 222-23 (1989).

³² *Mayo*, 131 S. Ct. at 713.

³³ 650 F.3d 717 (D.C. Cir. 2011) (en banc).

³⁴ *See id.* at 719-20 (summarizing the history of the tax); *see also* 26 U.S.C. §§ 4251-54 (imposing the tax).

³⁵ *See, e.g.,* *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005); *Office Max, Inc. v. United States*, 428 F.3d 583 (6th Cir. 2005); *Nat’l R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005).

³⁶ *See* IRS Notice 2006-50, 2006-1 C.B. 1141.

³⁷ *See* 5 U.S.C. § 553(b)-(c); *see also* *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979) (using “force and effect of law” language to describe agency rules subject to APA notice-and-comment rulemaking procedures).

procedural grounds, seeking notice and comment as the appropriate forum for requiring the IRS to address the alleged inadequacies.

The Supreme Court has interpreted the APA as establishing a presumption in favor of judicial review of final agency action.³⁸ Separately, IRC § 7421, also known as the Anti-Injunction Act, generally prohibits any lawsuit “for the purpose of restraining the assessment or collection of any tax” until either the IRS issues a notice of deficiency to a taxpayer or denies a taxpayer-requested refund.³⁹ Correspondingly, the Declaratory Judgment Act prevents courts from providing declaratory relief for controversies “with respect to Federal taxes.”⁴⁰ In a series of cases in the 1960s and 1970s, the Supreme Court interpreted these provisions as precluding judicial review of virtually all tax cases except for statutory deficiency or refund actions.⁴¹ Although the Court has never interpreted the Anti-Injunction Act or the Declaratory Judgment Act as limiting judicial review of APA procedural challenges against Treasury regulations and IRS rulings to statutory deficiency or refund actions, a few lower courts interpreted the Court’s precedents as requiring that conclusion.⁴²

In *Cohen*, however, after the district court dismissed the case for lack of jurisdiction, a divided three-judge panel of the D.C. Circuit reversed and remanded the case for consideration of the merits of the taxpayers’ APA procedural claims, holding that Notice 2006-50 was reviewable under the APA as final agency action.⁴³ Several months later, that court granted the government’s petition for review by the full court sitting en banc and requested briefing on several questions pertinent to interpreting the Anti-Injunction Act and the Declaratory Judgment Act as potential limitations on judicial review of the *Cohen* taxpayers’ case.⁴⁴ In summer 2011, a divided en banc court issued its decision, also in favor of the taxpayers, reaching several conclusions regarding the courts’ jurisdiction to consider APA procedural claims in the tax context.⁴⁵

First, the court held that APA § 702 waives sovereign immunity for APA procedural challenges in the tax context, just as it does in other regulatory areas; there is no tax

³⁸ See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

³⁹ See 26 U.S.C. § 7421(a).

⁴⁰ 28 U.S.C. § 2201(a).

⁴¹ See, e.g., *United States v. Am. Friends Serv. Comm.*, 419 U.S. 7, 8, 12 (1974) (per curiam); *Alexander v. “Ams. United” Inc.*, 416 U.S. 752, 756-57, 763 (1974); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 727, 735-36 (1974); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 5-6 (1962).

⁴² See, e.g., *Stephenson v. Brady*, 927 F.3d 596, 1991 WL 22835, at *2, *4-5 (4th Cir. 1991) (per curiam) (unpublished table decision); *Reimer v. United States*, 919 F.2d 145, 1990 WL 186825, at *1-3 (9th Cir. 1990) (unpublished table decision); cf. *Inv. Annuity, Inc. v. Blumenthal*, 609 F.2d 1, 8-9 (D.C. Cir. 1979) (reading the Anti-Injunction Act and the Declaratory Judgment Act as statutory limitations on pre-enforcement judicial review in the tax context, notwithstanding the APA presumption in favor thereof). But see *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1285-86 (D.C. Cir. 1974), vacated on other grounds, 426 U.S. 26 (1976) (concluding before vacatur that the Anti-Injunction Act, the Declaratory Judgment Act, and the APA do not operate to preclude judicial review of all pre-enforcement tax claims).

⁴³ See *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009), vacated in part, 599 F.3d 652 (D.C. Cir. 2010).

⁴⁴ See *Cohen v. United States*, 599 F.3d 652 (D.C. Cir. 2010).

⁴⁵ See *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011) (en banc).

exception from the APA.⁴⁶ Picking up the Supreme Court's admonition in *Mayo* in favor of administrative law uniformity, quoted elsewhere in the majority opinion, the court concluded that "[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA."⁴⁷

Next, the court held that the Anti-Injunction Act and the Declaratory Judgment Act do not bar judicial review of the taxpayers' APA procedural claim.⁴⁸ Citing and quoting extensively from *Hibbs v. Winn*, in which the Supreme Court interpreted a similar provision governing state taxation,⁴⁹ the court adopted a narrow, textualist interpretation of the Anti-Injunction Act's limitation on judicial review. According to the court, the Anti-Injunction Act's prohibition against suits to restrain "the assessment or collection of any tax" does not refer to a "'single mechanism' that ultimately determines the amount of revenue the Treasury retains" and is not "synonymous with the entire plan of taxation."⁵⁰ Instead, "assessment" and "collection" are defined terms in the IRC: assessment represents "the trigger for levy and collection efforts," and collection is "the actual imposition of tax against a plaintiff."⁵¹ The Cohen appellants' APA procedural claim did not concern the assessment or collection of taxes because "[t]he IRS previously assessed and collected the excise tax at issue"; rather, their suit was merely about the procedures under which the IRS will refund taxes that it has already collected.⁵² Although the text of the Declaratory Judgment Act is arguably broader in its prohibition of declaratory relief in tax cases, the Cohen court held that the Declaratory Judgment Act is to be interpreted coterminously with the Anti-Injunction Act and not as a separate limitation on judicial review.⁵³

While the government argued that interpreting the Anti-Injunction Act and the Declaratory Judgment Act in this way would open the floodgates for APA challenges against Treasury and IRS actions, those provisions are not the only potential limitations on judicial review of agency action, whether in the tax context or otherwise. In fact, the majority and dissenting opinions in *Cohen* considered several. Particularly where (as in the case of the Internal Revenue Code) a specific statute provides its own legal mechanisms for seeking judicial review, APA §§ 703 and 704 limit the availability of judicial review under the APA to cases in which the challenging parties otherwise lack an adequate legal remedy.⁵⁴ The dissenting judges in *Cohen* contended that statutory refund actions authorized by IRC § 7422 offered the appellants just such legal remedy.⁵⁵ The majority disagreed on the ground that the taxpayers' APA procedural challenge sought equitable relief rather than a tax refund

⁴⁶ See *id.* at 723.

⁴⁷ *Id.*

⁴⁸ See *id.* at 724-27.

⁴⁹ See *Hibbs v. Winn*, 542 U.S. 88, 99-108 (2004) (interpreting 28 U.S.C. § 1341).

⁵⁰ *Id.* at 726.

⁵¹ *Id.*

⁵² *Id.* at 725-26.

⁵³ See *id.* at 727-31.

⁵⁴ See 5 U.S.C. § 703 (providing form and venue for judicial review of agency action where "no special statutory review proceeding" is otherwise available); 5 U.S.C. § 704 (authorizing judicial review of final agency action "for which there is no other adequate remedy in a court").

⁵⁵ See *Cohen*, 650 F.3d at 738-41 (Kavanaugh, J. dissenting).

(even if a refund was their ultimate goal), and IRC § 7422 does not offer that remedy.⁵⁶ Both opinions additionally discuss the doctrines of ripeness and exhaustion at some length, while standing and finality limitations make brief appearances as well. In analyzing these different barriers to judicial review, the Cohen majority construed its conclusions very narrowly. Indeed, the court labeled the case before it as “*sui generis*” and either assumed or stated outright that judicial review of many if not most APA procedural challenges to Treasury and IRS actions will be limited by one or more of these obstacles.⁵⁷ Hence, while the taxpayers’ APA claim may not be the only one eligible for judicial review outside of the statutory mechanisms provided by the IRC, just how many others will be able to run this gauntlet of limitations is unclear. Regardless, the Cohen court’s insistence upon treating the taxpayers’ APA challenge as such, and its interpretation of the Anti-Injunction Act and the Declaratory Judgment Act as interacting with rather than wholly displacing the APA, represent bold statements about tax as part of and not separate from administrative law more generally.

One final point of interest from Cohen concerns the court’s statement regarding the finality of Notice 2006-50. The initial panel decision in the case determined that Notice 2006-50 represents final agency action because it determines taxpayer rights and obligations and binds the IRS.⁵⁸ In discussing other issues concerning the justiciability of the taxpayers’ APA claim, the en banc court reiterated that holding.⁵⁹ The IRS typically does not employ APA notice-and-comment rulemaking procedures in issuing notices (or other informal guidance documents, like revenue rulings or revenue procedures). The APA contains exceptions from its public notice and comment procedures for “interpretative rules” and “general statements of policy.”⁶⁰ As it did in Cohen, the IRS generally takes the position that guidance documents like Notice 2006-50 are either interpretative rules or policy statements and thus exempt from APA notice-and-comment rulemaking procedures.⁶¹ Of course, since the Cohen taxpayers’ principal claim is that the IRS should have subjected the rules contained in Notice 2006-50 to notice-and-comment rulemaking and failed to do so, the merits of their case now turns on the eligibility of Notice 2006-50 for these exceptions.

General administrative law doctrine surrounding the interpretative rule and policy statement exemptions from notice-and-comment rulemaking is notoriously

⁵⁶ See *id.* at 731-32.

⁵⁷ *Id.* at 733.

⁵⁸ See *Cohen v. United States*, 578 F.3d 1, 7-10 (D.C. Cir. 2009), *vacated in part*, 599 F.3d 652 (D.C. Cir. 2010).

⁵⁹ See *Cohen*, 650 F.3d at 723.

⁶⁰ 5 U.S.C. § 553(b)(A).

⁶¹ See Final Brief for the Appellee, *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2009), 2009 WL 857437 (arguing that Notice 2006-50 was not reviewable as final agency action because it was a policy statement lacking the force of law); see also *generally* Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1987) (stating that such guidance documents “do not have the force and effect of Treasury Department regulations”).

murky,⁶² but overlaps substantially with finality doctrine. A conclusion that Notice 2006-50 represents a justiciable final agency action does not automatically compel a decision that the IRS should have used notice and comment in that pronouncement's development, but a contrary holding is difficult to justify. On remand, the district court recognized as much, drawing a straight line between the D.C. Circuit's finding that "Notice 2006-50 binds the IRS" and its own conclusion that the IRS "was required to abide by the APA's notice-and-comment requirements or to, alternatively, provide good cause for not doing so."⁶³

2.3 United States v. Home Concrete & Supply LLC⁶⁴

Most recently, the Supreme Court issued its much-anticipated opinion in *Home Concrete*. Like the *Mayo* case before it, first and foremost, *Home Concrete* concerned the meaning of the statute. IRC § 6501(a) generally requires the IRS to assess a tax deficiency within three years after a taxpayer files its return.⁶⁵ IRC § 6501(e)(1)(A) in turn extends that limitations period from three to six years "[i]f the taxpayer omits from gross income an amount properly includible therein" and certain other requirements are met.⁶⁶ The statutory question at issue in *Home Concrete* was whether an overstatement of asset basis, and the corresponding understatement of gain on the disposition of that asset, represents an omission of an amount from gross income that extends the limitations period for assessing a deficiency from three to six years. Nevertheless, as in *Mayo*, however, the case raised several other issues concerning the circumstances surrounding Treasury's adoption of the temporary and final regulations interpreting § 6501(e)(1)(A).

In 1958, in *Colony Inc. v. Commissioner*, the Supreme Court concluded that virtually identical predecessor language from the Internal Revenue Code of 1938 did not encompass basis overstatements.⁶⁷ After two federal circuit courts relied on *Colony* to reject a contrary IRS interpretation of IRC § 6501(e)(1)(A),⁶⁸ Treasury issued temporary and proposed regulations in 2009⁶⁹ and final regulations in 2010⁷⁰ providing that basis overstatements constitute omissions from gross income under IRC § 6501(e)(1)(A).⁷¹ In light of the Supreme Court's holding in the *Mayo* case that Treasury regulations are eligible for judicial deference under the Chevron standard of review, the government claimed Chevron deference first for its temporary

⁶² See, e.g., Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 547-48 (2000) (citing cases describing the distinction between legislative and interpretative rules as "'fuzzy,' 'tenuous,' 'blurred,' 'baffling,' and 'shrouded in considerable smog'").

⁶³ In re Long-Distance Telephone Service Federal Excise Tax Refund Litigation, __ F.Supp.2d __, 2012 WL 1179063, at *4 (D.D.C. Apr. 10, 2012).

⁶⁴ 132 S.Ct. 1836 (2012).

⁶⁵ IRC § 6501(a).

⁶⁶ IRC § 6501(e)(1)(A).

⁶⁷ 357 U.S. 28 (1958).

⁶⁸ See *Salman Ranch Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009); *Bakersfield Energy Partners LP v. Comm'r*, 568 F.3d 767 (9th Cir. 2009).

⁶⁹ T.D. 9466, 74 Fed. Reg. 49321 (Sept. 28, 2009).

⁷⁰ T.D. 9511, 75 Fed. Reg. 78897 (Dec. 17, 2010).

⁷¹ See Treas. Reg. § 301.6501(e)-1(a)(1)(iii).

regulations and then for its final ones in several cases. In 2010, in *Intermountain Insurance Service of Vail LLC v. Commissioner*, the United States Tax Court invalidated Treasury's 2009 temporary regulation on the ground that Colony controlled the interpretation of § 6501(e)(1)(A).⁷²

The Tax Court's decision in *Intermountain* represented a big loss for the government. Because the temporary regulation in question concerned the limitations period for assessing a deficiency, the case impacted numerous other pending cases, including many concerning deficiencies assessed against taxpayers who had participated in the notorious Son-of-BOSS tax shelter.⁷³ These cases allowed the government to appeal the Tax Court's *Intermountain* decision to several federal circuits in short order, during which time Treasury also finalized the temporary and proposed regulations invalidated by the Tax Court.⁷⁴ The federal circuit courts disagreed sharply over the meaning of § 6501(e)(1)(A), the significance of Colony in interpreting that provision, and the eligibility of Treasury regulations for Chevron deference,⁷⁵ leading both taxpayers and the government to request Supreme Court review.

In many respects, *Home Concrete* seems very similar to *Mayo*: in response to court decisions it did not like, Treasury promulgated regulations adopting its preferred interpretation and now asks the Court to defer under Chevron. Yet, minor contextual differences between *Mayo* and *Home Concrete* made the latter a substantially more difficult case as a matter of legal doctrine.

For example, in *National Cable and Telecommunications Association v. Brand X Internet Services*, the Supreme Court held that a federal circuit court decision construing ambiguous statutory language would not preclude an administering agency from claiming Chevron deference for a contrary interpretation later adopted using APA notice-and-comment rulemaking procedures.⁷⁶ In *Mayo*, Treasury promulgated the regulation at issue in reaction to a decision by the United States Court of Appeals for the Eighth Circuit;⁷⁷ later, in the *Mayo* litigation itself, the Eighth Circuit opined

⁷² 134 T.C. 211, 222-24 (2010).

⁷³ Roughly six months after the Tax Court's *Intermountain* decision, one blog reported a Department of Justice assertion that there were then "35-50 cases pending in the federal courts raising the same issue, with approximately \$1 billion at stake." *Son-of-BOSS Statute of Limitations Issue Inundates the Courts of Appeals*, <http://appellatetax.com/2010/11/30/son-of-boss-statute-of-limitations-issue-inundates-the-courts-of-appeals/> (Nov. 30, 2010).

⁷⁴ Two cases during this period, including the *Home Concrete* case itself, were appealed from federal district courts but had not yet been decided when the Tax Court issued its decision in *Intermountain*. See *Home Concrete & Supply, LLC, United States*, 599 F.Supp.2d 678 (E.D.N.C. 2008), appeal docketed, No. 09-2353 (4th Cir. Dec. 9, 2009); *Burks v. United States*, 108 A.F.T.R.2d 2011-6665 (N.D. Tex. June 13, 2008), appeal docketed, No. 09-11061 (5th Cir. Oct. 26, 2009).

⁷⁵ See *Intermountain Ins. Serv. Of Vail LLC v. Comm'r*, 650 F.3d 691 (D.C. Cir. 2011); *Salman Ranch Ltd. v. Comm'r*, 647 F.3d 929 (10th Cir. 2011); *Grapevine Imports Ltd. v. United States*, 636 F.3d 1368 (Fed. Cir. 2011); *Home Concrete & Supply, LLC*, 634 F.3d 249 (4th Cir. 2011); *Burks v. United States*, 633 F.3d 347 (5th Cir. 2011); *Beard v. Comm'r*, 633 F.3d 616 (7th Cir. 2011).

⁷⁶ 545 U.S. 967 (2005).

⁷⁷ See Internal Revenue Service, Treasury, *Notice of Proposed Rulemaking and Notice of Public Hearing; Student FICA Exception*, 69 Fed. Reg. 8604 (Feb. 25, 2004) (proposing regulatory language and acknowledging contrary decision in *Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998)).

that the relevant statutory language was ambiguous,⁷⁸ and the Supreme Court agreed, thus opening the door for Chevron deference in light the Court's holding in *Brand X*.⁷⁹ By contrast, *Colony* was a Supreme Court decision. The Court had never addressed whether its reasoning in *Brand X* allowing agencies to reject federal circuit court outcomes through notice-and-comment rulemaking extends to its own opinions.

The procedures that Treasury used in promulgating the *Home Concrete* regulations were also potentially problematic. The APA contemplates a particular procedural sequence for agencies adopting regulations that carry the force and effect of law like those at issue in both *Mayo* and *Home Concrete*. Specifically, APA § 553(b) requires an agency to provide public notice of its proposed rules through publication in the *Federal Register*.⁸⁰ Next, APA § 553(c) commands the agency pursuing the rulemaking to offer interested persons an opportunity to participate through the submission of written comments.⁸¹ Only "after consideration of the relevant matter presented" through the comments may the agency issue the final, legally binding regulations along with a "concise general statement of their basis and purpose."⁸² In other words, the APA anticipates that regulated parties will receive notice of proposed agency rules and have the opportunity to submit comments before finding themselves legally bound by those rules.

In adopting the regulation at issue in *Mayo*, Treasury followed the procedural sequence contemplated by the APA.⁸³ And in extending Chevron deference to that regulation, the Court particularly acknowledged Treasury's use of notice-and-comment rulemaking.⁸⁴ In promulgating the regulation at bar in *Home Concrete*, however, Treasury employed an alternative procedural sequence known most commonly by courts and administrative law scholars as interim-final rulemaking. Specifically, as noted above, Treasury issued legally-binding temporary regulations simultaneously with its notice of proposed rulemaking requesting comments. In other words, Treasury inverted the procedural sequence contemplated by the APA, providing the public with the opportunity to comment only after they were already legally bound. The government has acknowledged that the final regulation, issued several months later, "track[ed] the temporary regulation in virtually every respect."⁸⁵

The general legal consensus holds that interim-final rulemaking violates the APA unless the agency can validly claim an exception from the procedural requirements of

⁷⁸ See *Mayo Foundation for Medical Educ. & Research v. United States*, 568 F.3d 675, 679 (8th Cir. 2009). Four other circuits found the statute unambiguously supportive of the taxpayers' interpretation, *see id.* (citing cases), but the Supreme Court in *Mayo* agreed with the Eighth Circuit's conclusion that the meaning of IRC § 3121(b)(10) was ambiguous.

⁷⁹ See *Mayo*, 131 S. Ct. at 712-13.

⁸⁰ See 5 U.S.C. § 553(b).

⁸¹ See 5 U.S.C. § 553(c) (calling for opportunity to comment "after notice").

⁸² *Id.*

⁸³ See T.D. 9167, 69 Fed. Reg. 76404 (Dec. 21, 2004) (documenting the regulation's procedural background).

⁸⁴ See *Mayo*, 131 S.Ct. at 714.

⁸⁵ Brief for the United States, *United States v. Home Concrete & Supply, LLC*, No. 11-139 (Nov. 15, 2011).

APA § 553.⁸⁶ Although the government has asserted a couple of exceptions from APA § 553 in the course of the Home Concrete litigation,⁸⁷ those claims are legally questionable.⁸⁸ Yet, the fact remains that Treasury did accept public comments in the course of finalizing the challenged regulations. Even as they disapprove of post-promulgation notice and comment, the federal circuit courts have disagreed over whether invalidating the regulation ought to be the appropriate remedy for under these circumstances.⁸⁹ Meanwhile, the Supreme Court has never addressed the legality of or the remedy for interim-final rulemaking. Nor has the Court considered whether it ought to extend Chevron deference to otherwise legally binding regulations adopted through questionable procedures.

The lower courts have divided over the implications of Treasury's procedures in adopting its regulations interpreting § 6501(e). While Tax Court's majority in Intermountain cited Colony in invalidating the regulations, Judges Halpern and Holmes writing in concurrence concluded unequivocally that temporary Treasury regulations violate the APA.⁹⁰ By contrast, the Seventh Circuit in *Beard v. Comm'r*, while resolving the case for the government on other grounds, indicated in dicta its inclination to extend Chevron deference to temporary Treasury regulations.⁹¹ The Fifth Circuit in the *Burks v. United States* relied on Colony in siding with the taxpayer, but chastised Treasury for issuing temporary regulations and suggested that the final regulations might be ineligible for Chevron deference as a result.⁹² The *Burks* court explicitly rejected the adequacy of post-promulgation notice and comment to satisfy APA requirements.⁹³ Meanwhile, the Federal Circuit in *Grapevine Imports, Ltd. v. United States* and the D.C. Circuit on appeal in the Intermountain case both decided that § 6501 was ambiguous and extended Chevron deference to Treasury's interpretation, concluding that Treasury's consideration of public comments in

⁸⁶ See, e.g., Administrative Conference of the United States, *Notice; Adoption of Recommendations*, 60 Fed. Reg. 43108, 43111-12 (Aug. 18, 1995) ("Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified."); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 717, 725-26 (1999) (observing that, without a statutory exception from notice-and-comment rulemaking, "a rule adopted with post- rather than pre-adoption notice and comment is procedurally invalid").

⁸⁷ See Brief for the United States, *United States v. Home Concrete & Supply, LLC*, No. 11-139 (Nov. 15, 2011).

⁸⁸ See Brief of Amicus Curiae Professor Kristin E. Hickman In Support of Respondents, *United States v. Home Concrete & Supply, LLC*, No. 11-139 (Dec. 22, 2011) (challenging the government's claims).

⁸⁹ Compare, e.g., *Air Transp. Ass'n of Am. V. Dep't of Transp.*, 900 F.2d 369, 379-80 (D.C. Cir. 1990), vacated without opinion and remanded, 498 U.S. 1023 (1991), vacated as moot, 933 F.2d 1043 (D.C. Cir. 1991), and *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979), with *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994), and *Levesque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983).

⁹⁰ See *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 134 T.C. 211, 238-48 (2010) (Halpern & Holmes, J.J., concurring).

⁹¹ See *Beard v. Comm'r*, 633 F.3d 616, 623 (7th Cir. 2011).

⁹² See *Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011).

⁹³ See *id.*

finalizing its regulations resolved any procedural flaws in the temporary regulations and rendered the taxpayer's APA procedural challenge moot.⁹⁴

In the end, in a 5-4 decision, with Justice Breyer writing for the majority, the Supreme Court rejected Treasury's interpretation of IRC § 6501(e)(1)(A), holding that the Court's earlier decision in *Colony* "determines the outcome of this case"⁹⁵ and that language in IRC § 6501(e)(1)(A) extending the limitations period for IRS deficiency assessments "does not apply to an overstatement of basis."⁹⁶ The dissent, written by Justice Kennedy, contended that *Colony* did not consider 1954 congressional amendments to IRC § 6501(e), that *Colony* thus did not control the outcome in *Home Concrete*, and that "there was room for the Treasury Department to interpret the new provision in" the manner that it did.⁹⁷ In short, the majority and dissenting opinions offer relatively straight-forward presentations of two competing interpretations of § 6501(e), with the majority siding with the taxpayer.

From there, however, the Court split three ways. Justice Breyer, joined by Chief Justice Roberts and Justices Thomas and Alito, spoke at some length regarding the *Brand X* question.⁹⁸ For this plurality of the Court, *Brand X* only authorized an agency to adopt regulations contrary to a judicial decision when a statute's silence or ambiguity represents a congressional delegation of gap-filling authority to the agency. But Congress's intent with § 6501(e) was clear at the time of *Colony* and continues to be clear now, at least in the *Chevron* sense of what it means for Congress's intent to be clear. As a result, there was no need to resolve whether the Court ought to extend *Brand X* to Supreme Court decisions, although the plurality opinion seemed open to the idea. Likewise the four dissenters: By concluding that *Colony* did not apply at all, the dissenters were able to find § 6501(e) ambiguous and defer to Treasury's interpretation without actually deciding whether *Brand X* extends to Supreme Court decisions.⁹⁹ Nevertheless, the dissenting opinion speaks of a "continuing dialogue among the three branches of Government on questions of statutory interpretation and application," thus suggesting the theoretical possibility of extending *Brand X*.¹⁰⁰ Finally, Justice Scalia, writing in concurrence continued his outright rejection of the "ugly and improbable structure" created by the Court's decisions in *United States v. Mead Corp.* as well as in *Brand X*.¹⁰¹ In short, while the Court offered plenty of rhetoric for administrative law aficionados to chew on, the Court went no further toward actually resolving the applicability of *Brand X* to its own opinions.

⁹⁴ See *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 650 F.3d 691, 709-10 (D.C. Cir. 2011); *Grapevine Imports, Ltd. v. United States*, 636 F.3d 1368, 1380 (Fed. Cir. 2011).

⁹⁵ 132 S.Ct. 1836, 1841 (2012).

⁹⁶ *Id.* at 1839.

⁹⁷ *Id.* at 1851 (Kennedy, J. dissenting).

⁹⁸ See *id.* at 1842-44.

⁹⁹ See *id.* at 1851-52 (Kennedy, J. dissenting).

¹⁰⁰ *Id.* at 1852 (Kennedy, J. dissenting).

¹⁰¹ *Id.* at 1847 (Scalia, J. concurring in part and concurring in the judgment). Justice Scalia dissented vehemently and at length from the approach to *Chevron* deference advanced by the Court in both *Mead* and *Brand X*. See *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1014-20 (2005) (Scalia, J. dissenting); *United States v. Mead Corp.*, 533 U.S. 218, 239-61 (2001) (Scalia, J. dissenting).

Meanwhile, none of the opinions issued in the *Home Concrete* case said a word about the procedural question raised by the case: whether Treasury regulations issued initially in temporary form with only post-promulgation notice and comment violate APA procedural requirements or are eligible for Chevron deference. The Court thus left standing the existing disagreement among the lower courts regarding this issue.

3. OPEN QUESTIONS

The Mayo Court's emphasis on administrative law uniformity has certainly captured the attention of the U.S. tax community. Thus, with the heightened awareness of the relevance of administrative law doctrine for tax practice comes tremendous uncertainty, leaving U.S. tax professionals scrambling to assess tax risk in a changing environment.

Tax professionals, including those in government and on the bench, have largely ignored developments in administrative law doctrine for years.¹⁰² Yet, as the Court observed in the Mayo case, "the administrative landscape has changed significantly" in recent decades.¹⁰³ As a result of the neglect, contemporary tax administrative practices do not always quite match up with the typical administrative law expectations.

Deviations from general administrative law norms are not unique to tax. Every area of federal government administration is at least a little different from the others, sometimes because provisions and requirements of organic statutes vary, but just as often simply because each agency develops its own habits and norms in administering the statutes within its jurisdiction. Also, lawyers in many practice areas tend to over-rely on precedents specific to the agencies with which they frequently interact, leading to deviations from general administrative law principles in many areas of regulatory law.¹⁰⁴ Regardless, as the *Cohen* and *Home Concrete* cases demonstrate, many now-routine practices in contemporary tax administration raise significant administrative law questions for which no clear answers exist.

Consider, for example, the circumstances of the regulation at issue in *Home Concrete* case. Treasury's use of interim-final rulemaking—temporary regulations issued with only post-promulgation notice and comment—is hardly new. Treasury has been issuing temporary regulations for decades.¹⁰⁵ Consequently, hundreds of Treasury

¹⁰² See, e.g., Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 Va. Tax Rev. 517, 518 (1994) ("[T]ax law too often is mistakenly viewed by lawyers, judges, and law professors as a self-contained body of law . . . [T]his misperception has impaired the development of tax law by shielding it from other areas of law that should inform the tax debate.").

¹⁰³ *Mayo*, 131 S.Ct. 704, 713 (2011).

¹⁰⁴ See generally Richard Levy & Robert Glicksman, *Agency-Specific Precedents*, 89 Texas L. Rev. 499 ((2011) (describing several examples, including but not limited to the tax context).

¹⁰⁵ See Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 Tax Law. 343 (1991) (documenting Treasury's use of temporary regulations more than twenty years ago); Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727, 1797 (2007) (describing the evolution of Treasury's use of temporary regulations). In one relatively recent

regulations interpreting the tax laws are susceptible to the same arguments concerning their procedural validity as have been raised in the Home Concrete litigation. In light of the opinions the Fifth Circuit in *Burks* case and of Tax Court Judges Halpern and Holmes in *Intermountain*, taxpayers in at least some circuits may have a potentially winning procedural argument they can raise in challenging tax assessments based on regulations that Treasury initially issued in temporary form.¹⁰⁶ Given particularly the recent decisions of the Federal Circuit in *Grapevine Imports* and the D.C. Circuit in *Intermountain*, however, other taxpayers are faced with the prospect that such regulations will not only be considered procedurally valid but will be reviewed under the highly deferential *Chevron* standard.¹⁰⁷ Given the sheer number of Treasury regulations with temporary origins, what will happen to the tax system if one or two circuits begin regularly invalidating Treasury regulations on APA procedural grounds while other circuits do not?

Likewise, the pronouncement at issue in *Cohen*, Notice 2006-50, is by no means unique among IRS guidance documents. The IRS annually issues hundreds of revenue rulings, revenue procedures, and notices, many if not most of which contain substantive interpretations of the tax laws.¹⁰⁸ The IRS now considers itself bound by these pronouncements¹⁰⁹ and predicates many enforcement actions on the failure of taxpayers to comply with the interpretations advanced therein. But the IRS almost never seeks public comments in issuing IRB guidance; on the rare occasions when the IRS does seek public input,¹¹⁰ it does not purport to comply with APA notice-and-comment rulemaking procedures. Largely on the basis of this lack of public notice and comment, the federal circuit courts thus far have declined to extend *Chevron* deference to legal interpretations advanced in these formats.¹¹¹ Yet, the legal arguments and conclusions that led the courts to invalidate Notice 2006-50 in the *Cohen* litigation apply equally to many if not most other such guidance documents, leaving them susceptible to invalidation on APA procedural grounds.

One last aspect of particularly the *Mayo* and *Home Concrete* cases has U.S. tax professionals especially troubled when it comes to assessing risk. Both cases concern regulations promulgated by Treasury in the midst of ongoing litigation concerning the proper interpretation of the IRC. Long before *Mayo*, in *Smiley v. Citibank* (South Dakota), N.A., the Supreme Court explained that, where an agency adopted an interpretation using APA notice-and-comment rulemaking procedures, the fact that the

three-year period alone, Treasury issued temporary regulations in 84 of 232, or 36.2%, of regulation projects undertaken. See Hickman, *supra*, at 1748-49 (documenting study of Treasury regulation projects from 2003 through 2005).

¹⁰⁶ See discussion *supra* notes 91-94 and accompanying text.

¹⁰⁷ See *id.*

¹⁰⁸ See Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239, 242-52 (examining IRS use of revenue rulings, revenue procedures, and notices).

¹⁰⁹ See, e.g., Internal Revenue Manual § 32.2.2.10 (Aug. 11, 2004), available at <http://www.irs.gov/irm/part32/index.html> (requiring IRS attorneys to follow legal positions established in published revenue rulings, revenue procedures, and notices, even if case law would support a position less favorable to taxpayers).

¹¹⁰ See, e.g., IRS Notice 2008-80, 2008-40 I.R.B. 820 (seeking comments on proposed revenue procedure); IRS Notice 2007-59, 2007-30 I.R.B. 135 (same).

¹¹¹ See, e.g., *Kornman & Assoc., Inc. v. United States*, 527 F.3d 443, 452056 (5th Cir. 2008); *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 181 (6th Cir. 2003).

agency's action was prompted by litigation was irrelevant for purposes of Chevron analysis.¹¹² In *Mayo*, the Court relied on *Smiley* in rejecting the argument that Chevron deference was inappropriate because Treasury adopted the regulation in question in the midst of litigation.¹¹³ Also, as noted, the Supreme Court in both *Mayo* and in earlier cases extended Chevron deference to notice-and-comment regulations adopted in repudiation of contrary federal circuit court precedents.¹¹⁴ As the Court observed in *Smiley*,¹¹⁵ such regulations are susceptible to challenge under the APA as arbitrary and capricious for a lack of due deliberation.¹¹⁶ Nevertheless, particularly depending upon the outcome in *Home Concrete*, U.S. tax professionals wonder how to evaluate tax risk if Treasury can change the law after the transaction has been completed, and even after litigation has commenced.

4. CONCLUSION

U.S. tax administration is experiencing a transitional period triggered by the Supreme Court's decision in *Mayo* and furthered by subsequent decisions in *Cohen* and *Home Concrete*. The results may ultimately be quite positive, increasing Treasury and IRS transparency and accountability in the promulgation of legally binding tax rules. For that matter, as in *Home Concrete*, and hopefully in future cases to come, unique aspects of contemporary U.S. tax administrative practices will push at the boundaries of existing administrative law doctrine, perhaps requiring the Supreme Court to confront some of the more extreme potential implications of its past decisions particularly regarding the scope of the Chevron standard's applicability. Nevertheless, for now, U.S. tax professionals face an uncertain environment likely to complicate their efforts to assess tax risk for some time to come.

¹¹² 517 U.S. 735, 740-41 (1996).

¹¹³ See *Mayo*, 131 S.Ct. 704, 712 (2011).

¹¹⁴ See discussion *supra* notes 76-79 and accompanying text.

¹¹⁵ See *Smiley*, 517 U.S. at 740-42.

¹¹⁶ See 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 46-57 (1983).