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REVIVING *NATIONAL MUFFLER*: ANALYZING THE EFFECT OF *MAYO FOUNDATION* ON JUDICIAL DEFERENCE AS APPLIED TO GENERAL AUTHORITY TAX GUIDANCE

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INTRODUCTION

The topic of judicial deference arises each time a court reviews the legitimacy of an opinion or regulation by an administrative agency to which Congress has delegated some rulemaking authority. Determining the appropriate deference standard is important because it sets limits on an agency's quasi-legislative power and informs taxpayers and practitioners on the likelihood of challenging seemingly invalid administrative rulings. Noting the importance of the deference issue, Professor Kristin E. Hickman,[1] one of the foremost authorities on administrative law in the federal income tax context, wrote that "[d]rawing fine distinctions among deference standards may seem a purely academic exercise . . . [but] deference standards matter."[2]

For thirty-five years, the 1944 case of *Skidmore v. Swift & Co.* presented the primary method for judicial review of administrative guidance created under Congress's general grant of rulemaking authority.[3] In 1979, a new standard was created in what became known as the tax-specific deference standard of *National Muffler Dealers Association v. United States*.[4] Five years later, the Supreme Court held in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* that a separate and much more deferential standard should apply to final regulations drafted pursuant to a

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[1] Kristin E. Hickman is a Professor of Law at University of Minnesota Law School. Professor Hickman has published over a dozen articles on the subject of judicial deference as it relates to tax law and other areas of the law; several are cited throughout this Essay. Her work has been cited several times in various U.S. Supreme Court briefs, nine times by various federal courts of appeals, and once by the U.S. Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001) (link), which is heavily examined in this Essay. Finally, Professor Hickman has been a key participant in dozens of Faculty Research Workshops, Symposia, Conferences, and Bar presentations.

[2] Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1250 (2007) (link).

[3] 323 U.S. 134 (1944) (link).

[4] 440 U.S. 472 (1979) (link).

general grant of authority.[5] The *Chevron* decision cast doubt upon the viability of both *Skidmore* and *National Muffler* since it was unclear whether the decision applied to all regulations promulgated pursuant to general grants of authority and whether it applied to tax-related guidance. This confusion persisted until the Court decided two cases in 2000 and 2001 that distinguished between *Skidmore* and *Chevron* deference.[6] Unfortunately, the Court's distinction did not provide specific or uniform direction for the treatment of all general authority guidance and to this day the Court has failed to give clearer instruction.

In early 2011, the Court took a step closer to addressing the treatment of non-regulation general authority guidance by considering final regulations in the tax context. In *Mayo Foundation for Medical Education and Research v. United States*,[7] the Court conclusively answered the question concerning which standard (*Chevron* or *National Muffler*) applies to final Treasury regulations promulgated pursuant to the general grant of authority.[8] The Court concluded—without attempting to overturn or replace *National Muffler*—that all final regulations should be reviewed under *Chevron*. However, the court failed to address the still unsettled question of which standard to apply to guidance other than final regulations, which can come in many forms and accounts for the vast majority of guidance available to taxpayers. Presently, the default review standard is *Skidmore*, but *National Muffler* provides a more balanced approach that can be applied to all forms of general authority regulations rather than just non-regulation guidance.

This Essay explores the various standards of deference the Supreme Court has applied to general authority guidance over the past sixty-eight years and concludes that the Court should revive *National Muffler* as the dominant standard in the tax context. Part I discusses the role that deference plays in deciding tax-related issues in court, specifically presenting the current application of final Treasury regulations for background.[9] Part II

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[5] 467 U.S. 837 (1984) (link).

[6] *See* United States v. Mead Corp., 533 U.S. 218 (2001) (holding that interpretations based on general authority are typically not afforded the same *Chevron* deference as specific grants of authority, but such deference is possible based on the specific facts and circumstances surrounding the language and the process through which the interpretation was created); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (holding that interpretations such as those in opinion letters—"interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law"—do not warrant deference under *Chevron*) (link)

[7] 131 S. Ct. 704 (2011) (link).

[8] The general grant of authority to make rules and regulations necessary for applying and administering the laws of Congress is made under § 7805(a) of the Internal Revenue Code (the "Code"). I.R.C. § 7805(a) (2006) (link).

[9] Throughout this Essay, the terms "Treasury," referring to the United States Department of the Treasury, and "Service," referring to the Internal Revenue Service bureau within the Treasury, are used interchangeably. Within the executive branch of government are several administrative agencies, which include the United States Department of the Treasury. The Treasury is run by the Secretary of the

examines the path the Supreme Court followed in establishing and applying judicial deference from *Skidmore* through *Mayo*. Part III discusses the necessity of the *Mayo* decision, analyzes its holding, addresses the weaknesses of the existing standard for general authority guidance, and proposes a broad application of the former tax-specific standard from *National Muffler*. Part IV offers concluding remarks.

I. The Role of Judicial Deference

In order to properly discuss the distinctions between different deference standards, it is essential to understand the function of judicial deference and the source and development of the administrative authority.[10]

A. Function of Judicial Deference

Since the earliest days of Congress, there have been delegations of quasi-legislative power to executive branch agencies in the form of particularized rulemaking and interpretations for the purpose of enforcing and administering the law.[11] Likewise, there is a long history of judicial challenges to the administrative rules derived from these delegations. When a rule is challenged, a court must determine how much weight to give to the agency's interpretation of the law drafted by Congress. Courts should defer to agency regulations because Congress has delegated power to the agency

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Treasury. Beneath the Secretary are several bureaus, which constitute 98% of the Treasury's work force and who are each led by a Commissioner. The Internal Revenue Service is the bureau charged with determining, assessing, and collecting internal revenue. Additionally, the Internal Revenue Service issues guidance to taxpayers and uses its expertise to assist the Treasury in creating Internal Revenue Code regulations. *See generally About Bureaus* U.S. DEPARTMENT OF THE TREASURY, http://www.treasury.gov/about/organizational-structure/bureaus/Pages/default.aspx (last visited Aug. 2, 2012) (describing and listing the roles of Treasury Bureaus) (link). *See also* 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, 1729 n.6 (2007) (noting that, while the Treasury is delegated the authority to draft regulations, it is usually the Service that creates the initial drafts of public guidance) (link).

[10] While this Essay primarily discusses the difference between specific authority and general authority Treasury regulations, other forms of general authority guidance include—but are by no means limited to—Revenue Rulings, Revenue Procedures, Technical Advice memoranda, and Private Letter Rulings.

[11] *See, e.g.*, Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790) (creating a quasi-legislative power in the executive branch through congressional delegation by requiring that those subject to the statute observe all rules and regulations created by the President or his appointees) (link). The Trade and Intercourse Act of 1790, which regulated trade with Indian Tribes, held that all persons must observe all "rules and regulations as the President shall prescribe" or as prescribed by the "superintendent of the department, or of such other person as the President of the United States shall appoint . . . ." *Id. See also* Act of July 22, 1813, ch. 16, § 4, 3 Stat. 22, 26 (prescribing that "the Secretary of the Treasury shall establish regulations suitable and necessary for carrying [the Act for the assessment and collection of direct taxes and internal duties] into effect; which regulations shall be binding . . . and also frame instructions for the said assessors . . . .") (link).

to interpret and enforce the laws.[12] Except for laws necessitating greater judicial scrutiny—like those that curtail civil rights—it is a constitutional norm that a court generally may not strike down a law passed by Congress unless it is unconstitutional, vague, unclear, or arbitrary. It follows that where Congress has delegated some of its power to an administrative agency, a court should not arbitrarily disregard the agency's conclusion. Rather, the court should consider the value of the agency's interpretation before ignoring it. In fact, the Supreme Court requires full deference to some agency rules so long as the rule is reasonable and the statute being interpreted is ambiguous.[13]

How much weight an interpretation should receive is not always clear. Nor is it always clear which deference standard a court applied when it reviewed an agency interpretation. This makes it difficult for other courts to determine the proper standard to apply to a particular set of facts. Historically, the standard was often dependent on the form of the delegation made by Congress and the form and content of the agency pronouncement itself. The task of determining how much deference a court should give to a particular regulation or rule comprises a significant portion of a larger body of law—administrative law—that spans multiple areas of substantive law.

Deference is important because it has a direct impact on the likelihood that an agency regulation will be upheld in court. Moreover, knowing how much weight a court will give an agency's interpretation may result in more or less freedom for a particular agency in crafting its regulations.[14] If an agency's regulations tend to receive a great amount of deference, then the people drafting the regulations may take a more controversial position among the other reasonable interpretations available when addressing an ambiguous or silent Code section.

B. Deference to the Treasury

For decades, the scope of the Treasury's regulatory authority has been controversial as courts have failed to agree on a particular deference standard or set of standards. Administrative law, as a whole, traditionally distinguishes between rules with the same force and effect as congressional statutes and non-binding rules that are simply intended to provide guidance

[12] Another reason for deferring to agency interpretations is the institutional competence of agencies. Where most courts hear cases from all areas of the law, agencies develop specialized knowledge in their particular area. For a list of cases highlighting courts' reliance on agency expertise, see *infra* note 95.

[13] For a discussion of where a court is required to show controlling deference to an agency interpretation, see *infra* notes 60–73 and accompanying text.

[14] *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1539 (2006) ("Settling the question of deference toward Treasury regulations carries significant implications for both tax jurisprudence and tax policy.") (link).

and explanation.[15] The former type of rule is known as a legislative rule and the latter as an interpretative rule. In tax law, legislative rules (also referred to as specific or direct authority) are those where Congress made an express delegation among the provisions of a specific Code section.[16] The majority of administrative rules are interpretative rules issued pursuant to the general mandate of Code § 7805(a), which permits the Treasury to prescribe rules and regulations necessary to effectively administer the law.[17] These general authority rules and interpretations—sometimes called interpretative authority or indirect authority—are the main subject of this Essay.

Over time, deference to Treasury regulations has departed from general administrative law principles and aided the creation of what is often referred to as "tax exceptionalism."[18] Tax exceptionalism signifies the notion that the treatment of tax-related matters under administrative law is different from other bodies of law because of inconsistency and blurred lines between specific and general authority guidance; administrative law dictates that legislative rules are binding while interpretative rules are non-binding guidance.[19] However, in tax law over the past twenty-five years,

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[15] *See* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 4:11 (3d ed. 2011) (quoting FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 99 (1941)) ("In addition to the power to enact legally binding regulations conferred upon many agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws."); Hickman, *supra* note 14, at 1571 ("[T]he common understanding was that general authority Treasury regulations were interpretative and nonbinding . . . ."); Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 650–51 (2012) (referring to a law review article from 1941 on the influence of regulations, Lederman notes that, prior to the Administrative Procedure Act, interpretative regulations were binding as a matter of law on Treasury officers and agents but not upon taxpayers) (link).

[16] *See* GAIL LEVIN RICHMOND, FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES 160 (8th ed. 2010) (introducing the concept of interpretative and legislative regulations).

[17] *See id.* Because interpretative rules are issued pursuant to a general mandate, they are sometimes called "general authority" regulations whereas legislative rules are sometimes called "specific authority" regulations. *Id.* at 160–61. Section 7805(a) states "the Secretary shall prescribe all needful rules and regulations for enforcement of [the Internal Revenue Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." I.R.C. § 7805(a) (2006). This same Code section also authorizes, subject to certain constraints, retroactive applications of regulations. *See* I.R.C. § 7805(b) (2006) (identifying limits and appropriate uses of retroactive regulations) (link).

[18] *See, e.g.*, Hickman, *supra* note 14, at 1540 (explaining the sources of tax exceptionalism). There is a "belief that the tax area has its own, unique deference tradition . . . ." *Id.* "[T]he emphasis of the existing scholarship on the uniqueness of the tax field—and the resulting complexity that this focus has added to what otherwise should be a fairly simple analysis—are emblematic of a perception of tax exceptionalism that intrudes upon much contemporary tax scholarship and jurisprudence." *Id.* at 1541. *See also* Kristin E. Hickman, *Agency Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. 89 (2011) [hereinafter Hickman, *Agency Specific Precedents*] (detailing possible reasons for the emergence of tax exceptionalism and explaining why courts and practitioners allow this condition to persist) (link).

[19] *See* KOCH, *supra* note 15 (discussing the traditional view that there are legislative rules which are binding and non-legislative rules which are interpretative and non-binding); *see also* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L.

both types of rules were often afforded equal deference treatment as applied to final Treasury regulations.[20] Professor Hickman asserts that "[t]his terminological dissonance has generated tremendous confusion" relating to the proper creation and review of interpretative rules.[21] Much of the lingering confusion, however, has been settled by the recent *Mayo* decision. As discussed in Part II, with its holding in *Chevron* that specific and general authority regulations should be treated the same,[22] the Supreme Court largely eliminated the issue of distinguishing between final Treasury regulations derived from specific and general authority. Unfortunately, *Chevron* did not settle the question of how much weight to apply to other forms of guidance and did not address its potential or intended impact on the tax-specific, *National Muffler* standard. Far from a tax case, *Chevron* involved a regulation regarding air quality standards set by the Environmental Protection Agency under the Clean Air Act.[23] Thus, it is not difficult to see why courts—including even the Supreme Court—were unsure which standard to apply in the face of *National Muffler* and tax exceptionalism. As a result, post-*Chevron* decisions on administrative rulings seemed to follow one of two different paths of review.[24]

REV. 467, 476–77 (2002) ("Legislative rules are those that have the force and effect of law. From the perspective of agency personnel, regulated parties, and courts, these rules have a status akin to that of a statute.").

[20] *See* Hickman, *Agency Specific Precedents*, *supra* note 18, at 92 (noting that the tax community and judiciary have a "longstanding habit of labeling general authority Treasury regulations as interpretative rules, even though the regulations are legally binding and thus clearly legislative in general administrative law parlance."). As discussed throughout this Essay, non-regulation guidance issued pursuant to general authority has not been directly dealt with in recent Supreme Court decisions relating to judicial deference. In fact, these cases leave room for one to argue that either *Skidmore* or *Chevron* is applicable to a particular piece of guidance given the proper factual circumstances. Thus, there is a need for the court to clarify which standard should be applied to this other body of administrative guidance.

[21] *See id.* at 92–93. (commenting on the variances between how courts review regulations of different administrative agencies, such as the Treasury, when administrative law is intended to be applied evenly across all agencies); *id.* at 98 ("[T]he tax community's habit of labeling specific authority Treasury regulations as legislative rules and general authority Treasury regulations as interpretative rules represents an instance of general administrative law shifting direction while agency-specific understandings maintain course. The consequences of this split have been substantial.").

[22] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency."). For a discussion of the lingering confusion regarding deference toward final Treasury regulations after *Chevron*, see *infra* Part II and accompanying notes.

[23] *See Chevron*, 467 U.S. at 840–41 (discussing the facts of the case).

[24] *See* Hickman, *Agency Specific Precedents*, *supra* note 18, at 106–07 ("[S]ome courts cited both *Chevron* and *National Muffler* as supporting deference to reasonable Treasury regulations, even as they seemingly applied one standard or the other."). Courts tended to apply either *Chevron* or the tax-specific case of *National Muffler*.

One path is the two-step test developed in *Chevron*, which takes a fairly objective approach to the deference question.[25] First, a court must ask whether Congress has directly spoken to the precise question at issue in a clear and unambiguous manner. If yes, then the statute applies. If no, step two is to ask whether the agency's interpretation is based on a permissible construction of the statute that is neither arbitrary nor capricious. If the construction is reasonable, the regulation controls and the court must defer to the agency interpretation in deciding the case.

The other path is the *National Muffler* standard, which takes a more subjective approach that considers a list of factors for a court to review. [26] These factors include the length of time the regulation has been in effect, the purpose of the statute and regulation, reliance placed upon the regulation, and the consistency of the regulation's application by the Service.[27]

In January 2011, twenty-six years after *Chevron*, the Supreme Court finally addressed the lingering question of whether tax-related cases should apply *Chevron* or *National Muffler* analysis. The *Mayo* decision held that final Treasury regulations created under general authority should receive *Chevron* treatment the same as non-tax matters created under general authority.[28] While the Court's decision has an important impact on final Treasury regulations, the decision was silent on the issue of other administrative guidance, which has received relatively little judicial scrutiny when one takes into account the vast quantity of such authority issued by the Treasury. Other administrative authority issued pursuant to Congress's general grant of authority is typically subject to a lesser level of review and therefore is often referred to as secondary administrative authority.[29]

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[25] *See Chevron*, 467 U.S. at 842–43 (explaining the two-part test for reviewing an agency's construction of the statute which it administers).

[26] *See* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (describing relevant considerations to be considered in determining whether a regulation should have force).

[27] An even more subjective approach—arguably too subjective—is to follow the *Skidmore* standard. *Skidmore* instructs courts to show deference to the extent an interpretation holds the power to persuade. Power to persuade relates to the formality with which the guidance was created and the expertise of the drafting agency. *Skidmore* is rarely applied to cases involving regulations. Under current law, it appears to apply only to non-regulation guidance. For a discussion of *Skidmore* deference, see *infra* Parts II(B) and III(D)(2), and accompanying footnotes.

[28] *See* Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713–14 (2011) ("Our inquiry . . . does not turn on whether Congress's delegation of authority was general or specific."). The Court notes that, while it previously distinguished between specific and general authority regulations, "the administrative landscape has changed significantly" and an equivalent level of deference is "appropriate when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." *Id.* at 713 (internal quotation marks omitted). The Court further noted that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context." *Id.*

[29] Although most Treasury regulations are issued pursuant to a general grant of authority rather than specific, these regulations are typically not considered secondary authority.

Secondary administrative authority constitutes the majority of guidance issued by the Treasury. One author has identified as many as twenty-five different methods by which the Treasury can issue interpretations or other guidance to taxpayers.[30] The courts have dealt little with the weight that should be given to these pronouncements. However, determining the proper level of deference toward secondary authority is very important because it gives taxpayers and the Service a measure of which Treasury pronouncements are truly binding in a judicial setting. This in turn aids the drafting of future guidance.

What largely distinguishes regulations from other interpretations is the level of formality with which they are promulgated. The Administrative Procedure Act of 1946 (APA)[31] mandates a notice-and-comment process. Compliance with the APA is required for final and temporary Treasury regulations and gives such regulations greater weight than guidance issued through a less rigorous process. Most of the guidance promulgated by the Treasury and Service is not "formal" like the regulations codified in the Code of Federal Regulations.[32] Despite not being subject to the APA, the Service treats much of its secondary authority, such as revenue rulings and revenue procedures, as binding to taxpayers with the same set of facts addressed in the guidance. That is to say, examiners at the Service largely base their reviews on guidance published by the Treasury rather than judicial interpretations of the Code. Determining the level of deference that courts should show to these informal pronouncements will provide more

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[30] *See* Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View from Within*, 46 DUQ. L. REV. 323 (2008) (examining both the reliance on and the retroactive applicability of several forms of Service guidance) (link). The forms of guidance offered include Revenue Rulings, Revenue Procedures, Announcements and Notices, Letter Rulings, various Agreements, Technical Advice Memoranda, Chief Counsel Notices and Advice, Field Legal Advice, Litigation Guideline Memoranda, Acquiescence and Actions on Decision, News Releases and Fact Sheets, Coordinated Issue Papers, Appeals Settlement Guidelines, Audit Guides, Directives, and Oral Communications. *See id.* at 323–24. (listing forms of Service guidance available).

[31] Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.) (link).

[32] *See* Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 44 (2006) (referring to the vast amount of non-regulatory guidance and labeling guidance that has not gone through the APA's notice and comment procedure as "informal" rather than "formal") (link). Pietruszkiewicz elaborates:

> The focus of discussion has been the degree to which formal agency guidance carrying the force of law should be given deference. Nevertheless, informal agency guidance accounts for an overwhelming percentage of the guidance issued by administrative agencies. It is, therefore, appropriate to consider the impact of informal guidance and to utilize a standard that recognizes the expertise of those that Congress charges with implementation of a statutory scheme.

Id.

information and greater transparency to taxpayers while increasing consistency in enforcing the Code.

The APA dictates several procedural requirements for drafting agency regulations, which the APA refers to as rules. Chief among these requirements is the need to provide "general notice of proposed rule making [by publishing the proposed rule] in the Federal Register" and to allow the public to have an opportunity to "participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation."[33] To the extent practicable, given the aim and policy constraints of each regulation, the drafters are charged with incorporating the comments and suggestions from the public in forming the final version of the rule. Failure to follow the requirements could result in a court invalidating the regulation.[34] By subjecting the regulations to public notice and comment, the APA is viewed to improve the quality of agency rulemaking and ensure fairness to affected parties while providing a "well-developed record that enhances the quality of judicial review."[35]

The APA includes an exception from the notice-and-comment requirement for interpretative rules.[36] Administrative law regards interpretative rules as those promulgated under the general authority of Code § 7805(a). The Service maintains that "most IRS/Treasury regulations are interpretative, and therefore not subject to the notice-and-comment provisions of the APA."[37] Nevertheless, "the Service usually solicits public comment when it promulgates a rule."[38] However, following *Mayo*, the distinction between types of regulations is essentially moot because the Court held that legislative and interpretative regulations should receive the same treatment. A key issue today is not whether a regulation is legislative or interpretive for the purposes of complying with the APA, but whether other forms of guidance should be considered interpretative or legislative and subject to the APA's requirements. Similarly, there is uncertainty how non-regulation guidance might be treated if it were issued after public notice and comment.

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[33] 5 U.S.C. § 553(b)–(c) (2006) (link). Additionally, upon issuing final regulations, the APA requires that the agency include a "concise statement of their basis and purpose." 5 U.S.C. § 553(c) (link). As noted by Professor Hickman, these "concise" statements, which often appear as the preambles to final regulations, tend to be more comprehensive than concise due to the close attention courts pay to them upon judicial review. *See* Hickman, *supra* note 9, at 1733 (mentioning effect of judicial expectations on final regulation preambles).

[34] *See, e.g.*, Sprint Corp. v. FCC, 315 F.3d 369, 373, 377 (D.C. Cir. 2003) (invalidating a rule because the FCC failed to issue proper notice after amending the proposed rule) (link); MCI Telecomm. Corp. v. FCC, 57 F.3d 1136, 1142–43 (D.C. Cir. 1995) (striking down a rule for failing to provide adequate notice) (link).

[35] *Sprint*, 315 F.3d at 373 (internal quotations and citations omitted).

[36] *See* 5 U.S.C. § 553(b), (d) (2006) (link).

[37] INTERNAL REVENUE MANUAL § 32.1.5.4.7.5.1 (2011) (link).

[38] *See id.*

II. THE LONG MARCH TO *MAYO*: DEVELOPMENT OF SUPREME COURT DEFERENCE JURISPRUDENCE

Leading up to *Mayo*, one could identify four standards of deference that may be applied by a court reviewing a rule or decision by the Treasury or Service. At one end of the spectrum, a court may give no deference to the agency determination and impart its own independent judgment. At the other end is *Chevron* deference, which grants great deference to agency determinations. In between lies the intermediate "*Skidmore* standard"[39] and the "*National Muffler* standard"; both of which are considered to offer a sliding-scale approach, with *National Muffler* less subjective and tax-specific.

A. Intermediate Standard – Deference Under Skidmore

In *Skidmore*, several firefighters sought overtime pay for the time spent in the fire hall beyond their typical hours.[40] They challenged an informal conclusion of the Administrator of the Department of Labor's Wage and Hour Division who determined in a Bulletin that employees are not entitled to additional compensation during times when they are not actually working.[41]

The Supreme Court noted that such rulings are not binding on the courts, but that the Court "has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury."[42] According to the Court, administrative regulations, rulings, interpretations, and opinions are subject to some deference because they are created by an agency in accordance with the agency's official duty and based upon more specialized experience and broader investigations than information that is likely available to a judge. The Court held that deference "will depend upon the thoroughness evident in its consideration" and "its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[43]

The intermediate level of deference created in *Skidmore* allows a reviewing court flexibility in deciding whether to follow the conclusion or interpretation of an administrative agency or draw its own conclusion. The Court made no distinction between sources of the authority granting agencies the power to interpret laws. In fact, it stated that an agency's ruling or interpretation will not be "controlling upon the courts by reason of their

[39] The *Skidmore* standard comes from the Supreme Court case of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[40] *Skidmore*, 323 U.S. at 135 (1944).

[41] *Id.* at 139.

[42] *Id.* at 140.

[43] *Id.*

authority."[44] The Court's holding has typically been applied to only general authority rulings; specific authority rulings are automatically granted greater deference. Under *Skidmore*, a court will only adopt an agency's interpretation based on general authority where factors can be identified that warrant giving special weight to the agency's views.

Following the *Chevron* decision, which effectively expanded the strong form of deference to general authority rules, the viability of *Skidmore* was unclear and the holding went dormant. Then in 2000 and 2001, the Supreme Court revisited *Skidmore*, and confirmed its holding, in *Christensen v. Harris County* and *United States v. Mead Corp*.[45] In each case, the Court considered the applicability of *Chevron* to non-regulation guidance issued pursuant to a general grant of authority.

In *Christensen*, the court considered whether *Chevron*'s high level of deference should be conferred to a non-binding Department of Labor opinion letter.[46] Specifically rejecting *Chevron*, the Court noted that "we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."[47] The Court continued by pulling language from *Skidmore* to express that informal interpretations are "entitled to respect under our decision in [*Skidmore*], but only to the extent that those interpretations have the power to persuade."[48] Through its decision, the Court pronounced that *Skidmore* is the principal method for interpreting the vast array of informal rulemaking by administrative agencies.

The following year, the Court again turned to *Skidmore* after refusing to apply *Chevron* deference to a letter ruling.[49] The ruling letter from the U.S. Customs Service stated that day planners imported by the petitioner should be considered "bound" diaries rather than "unbound" diaries as argued by the petitioner.[50] The Court noted in its holding that *Chevron* deference is generally applicable in formal administrative rulemaking where Congress contemplates administrative action with the effect of law. While the use of notice-and-comment procedures is "significant," the lack of that procedure "does not decide the case."[51] A key reason for rejecting *Chevron* was that the Court found no indication that Congress meant to delegate

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[44] *Id.*

[45] *See* United States v. Mead Corp., 533 U.S. 218, 230–33 (2001); Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (both cases clarifying that *Chevron* is not limitless and that *Skidmore* governs a wide range of administrative interpretations that do not carry congressionally authorized legal force).

[46] *See Christensen*, 529 U.S. at 581 (discussing conclusion of the opinion letter issued by the Department of Labor's Wage and Hour Division).

[47] *Id.* at 587.

[48] *Id.* (internal quotations and citations omitted).

[49] *See Mead*, 533 U.S. at 230–31 (refusing to apply *Chevron* due to the informal nature of the rule at issue).

[50] *See id.* at 224–25 (noting that unbound diaries fell into a tax-free subcategory of the statute).

[51] *Id*. at 230–31.

authority to the U.S. Customers Service to issue clarification rulings with the force of law.[52] In rejecting *Chevron* deference on this issue, the Court stated that there is "room at least to raise a *Skidmore* claim here" because the matter of the classification is one where the expertise of Customs may be of use and "therefore at least seek a respect proportional to its power to persuade."[53]

Hence, after *Chevron* raised questions about *Skidmore*'s influence, *Christensen* and *Mead* confirmed that *Skidmore* is still alive and serves as the applicable deference standard for most administrative pronouncements other than regulations. These cases effectively limited the scope of *Chevron*'s broad power by stating that not all general authority guidance is entitled to *Chevron*'s strong deference. While these cases reduce the reach of *Chevron* by excluding general authority guidance that Congress would not reasonably expect to be binding, the language in *Mead* also gives way to the possibility that some non-regulation guidance may be deemed to qualify for *Chevron* deference under the proper circumstances. Though not necessary, this outcome would be especially likely if the agency were to adopt the ruling under a more formal process, such as issuing the rule for notice and comment or holding an adjudicative hearing.

In *Mead*, the Court observed that it does not matter whether Congress expressly delegated rule making authority if it is:

> [A]pparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to particular result.[54]

Although the long-time consensus was that non-regulation guidance "was nonbinding and merely advisory in nature," the interplay between *Skidmore*, *Chevron*, and *Mead*, has placed such guidance "squarely in the gray area of the force of law concept."[55]

B. Tax-Specific Standard: Deference under National Muffler

In *National Muffler*, the Supreme Court established a more detailed test for final Treasury regulations issued pursuant to the Treasury's general

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[52] *See id.* at 231–32 (highlighting the major factor in the Court's decision).

[53] *Id.* at 325 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[54] *Id.* at 229 (internal quotations omitted).

[55] Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239, 258 (link). Professor Hickman claims that proper deference probably falls under either *Chevron* or the less deferential standard of *Skidmore*. *See id.* at 256.

grant of authority. The deference issue in *National Muffler* was simply how much weight the Court should give to the regulation in question. The regulation contained a definition of "business league," an ambiguous term from the statute being interpreted.[56] In making its decision, the Court began by considering whether it should defer to the general authority regulation.[57] As a preliminary matter, the Court decided that deference should be shown where statutory language is ambiguous and the proper agency, pursuant to congressional delegation, exercised its mandate to provide all needful rules and regulations for enforcement of the law. Following this determination, the Court said to:

> [L]ook to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[58]

Ultimately, the Court decided the regulation was subject to deference and left the Service's definition undisturbed.[59]

This holding effectively created an additional standard of judicial deference that most courts interpreted as applying primarily to tax matters due to the context of the decision. Because the test considers multiple factors in making a deference determination, a range of outcomes is possible, thus resembling a sliding scale. Depending on how closely a regulation matches the factors, a court could grant no deference, serious deference, or anything in between.

C. Chevron *Standard*

Five years after *National Muffler*, the Supreme Court decided *Chevron.* The *Chevron* decision was a landmark case in administrative law. It is

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[56] Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 476 (1979).

[57] *See id.* at 476–77 (describing how to determine "whether a particular regulation carries out the congressional mandate in a proper manner").

[58] *Id.* at 477.

[59] *See id.* at 484, 488 (concluding that "the Commissioner's view . . . merits serious deference" and that "the Association has not shown that either the regulation or the Commissioner's interpretation of it fails to implement the congressional mandate in some reasonable manner").

important for two main reasons. First, it established the famous two-part test for evaluating administrative interpretations of the law. Second, it expanded applicability of the strong deference due to specific authority guidance to include interpretations based on general authority. However, the broad reach of *Chevron* was trimmed back several years later by *Mead*.

The Court described the test for evaluating agency interpretations as follows:

> [W]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . . If, however, the court determines Congress has not directly addressed the precise question at issue, . . . [and] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[60]

The Court went on to state that "controlling weight" must be given to administrative interpretations where Congress has "explicitly left a gap for the agency to fill."[61] Where there is a specific delegation or a specific grant of authority, the reviewing court must follow any non-arbitrary agency interpretation. The Court then added that "[s]ometimes legislative delegation to an agency on a particular question is implicit rather than explicit."[62] Thus, *Chevron* makes the case for giving complete deference to interpretations based on the Treasury's general rulemaking authority only where Congress has made a specific delegation among the provisions of a statute.

In 2005, the Supreme Court handed down a decision that strengthened the power of agency interpretations, but without expanding the scope of *Chevron.* In *National Cable & Telecommunications Association v. Brand X Internet Services* (*Brand X*)[63] the Court considered the validity of an interpretation by the Federal Communications Commission (FCC) that appeared contrary to the language of the Communications Act of 1934.[64] The Ninth Circuit, relying on its own precedent rather than *Chevron*, rejected the FCC's interpretation.[65] The Supreme Court reversed,[66] reasoning that a "court's prior judicial construction of a statute trumps an

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[60] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[61] *Id.* at 843–44.

[62] *Id.* at 844.

[63] 545 U.S. 967 (2005) (link).

[64] *See id.* at 975, 977–79.

[65] *See id.* at 979–80 (relying on AT&T Corp. v. Portland, 216 F.3d 871 (9th Cir. 2000) (link)).

[66] *See id.* at 1003 ("The Commission is in a far better position to address these questions than we are.").

agency construction otherwise entitled to *Chevron* deference *only if* the prior court decision holds that its construction follows from the unambiguous terms of the statute and leaves no room for agency discretion."[67] Thus, the *Brand X* Court made a strong statement about agency supremacy and called for a strict textual reading of a statute to evaluate an agency ruling.

Though quite powerful, the reach of *Chevron* remains limited to rules and regulations where it appears Congress intended, explicitly or implicitly, for an agency to fill gaps. In determining whether an implicit delegation was made, the *Chevron* Court considered whether there appeared to be any congressional intent to enlarge or confine the scope of an agency's power. If there was congressional intent to enlarge the scope, then a general authority regulation would be viewed under *Chevron*. However, the Court never discussed what factors should be considered in determining whether Congress intended a general grant of authority to produce an administrative interpretation that would be legally binding. In *Mead*, the Supreme Court indicated that the level of formality with which an interpretation is created gives some indication as to the intent of Congress, but this alone "does not decide the case."[68]

III. *MAYO*: WHAT THE COURT SAID, DIDN'T SAY, AND SHOULD HAVE SAID ABOUT GENERAL AUTHORITY GUIDANCE

A. The Need for Mayo

Leading up to the *Mayo* decision, courts were split on whether *Chevron* or *National Muffler* was the proper standard for the review of Treasury pronouncements. In some circuits, courts applied *Chevron* for most regulations, but applied *Skidmore* for some general authority regulations—promulgated without prior public notice and comment—as well as all other forms of administrative guidance. In other circuits, courts applied *National Muffler* when the issue concerned a tax matter, regardless of whether there was general or specific authority.[69] Still others presented the two standards as indistinguishable by applying them both to support the

[67] *Id*. at 982 (emphasis added).

[68] United States v. Mead Corp., 533 U.S. 218, 231 (2001). The Court further stated that "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id*. at 230.

[69] For instance, the Third and Sixth Circuit Courts of Appeal declared that *Chevron* provided the appropriate standard for evaluating general authority Treasury regulations. *See, e.g.*, Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162 (3d Cir. 2008) (link); Estate of Gerson v. Comm'r, 127 T.C. 139 (2006), *aff'd*, 507 F.3d 435, 438 (6th Cir. 2007) (link); Peoples Fed. Sav. & Loan Ass'n of Sidney v. Comm'r, 948 F.2d 289, 304–05 (6th Cir. 1991) (link). Conversely, the Eighth Circuit concluded that *National Muffler* was the proper standard. *See, e.g.*, St. Jude Med., Inc. v. Comm'r, 34 F.3d 1394, 1400 n.11 (8th Cir. 1994) (link).

same conclusion.[70] Even the Supreme Court went back and forth on the issue.[71] Finally, in early 2011, the Court seized an opportunity to provide further guidance and delivered *Mayo*, specifically addressing the *Chevron–National Muffler* issue.

B. What Mayo *Said*

In *Mayo*, the Supreme Court addressed the legitimacy of a Treasury regulation interpreting the statutory exemption in the Federal Insurance Contributions Act (FICA) from the duty to pay social security taxes. Under FICA, "employees" are exempt from paying social security tax for services "performed by a student who is enrolled and regularly attending classes" at a school, college, or university.[72] In December 2004, after public notice and comment, the Service amended a regulation, providing that employment is "incident" to a student's studies only if the educational aspect of the individual's relationship with his or her employer predominates over the service aspect.[73] Medical residents spend most of their time, "anywhere from 50 to 80 hours per week," caring for patients and participating in a structured educational program.[74] The Mayo Foundation (the "Foundation") filed suit to obtain a refund of taxes it had withheld on stipends paid to its medical residents, arguing that the Treasury regulation was invalid. Although the district court agreed with the Foundation, the Court of Appeals reversed. Seeing an opportunity to address the *Chevron–National Muffler* quandary, the Supreme Court granted certiorari.

The Court held that Treasury regulations, like the rules of other administrative agencies, should be reviewed by courts under the *Chevron* standard. The Court considered it necessary to maintain "a uniform approach to judicial review of agency action" and viewed the deferential approach of *Chevron* as appropriate given treatment among other agencies and the expertise of agencies in making complex policy choices.[75] Applying

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[70] *See, e.g.*, Redlark v. Comm'r, 141 F.3d 936, 941 (9th Cir. 1998) (link); Snowa v. Comm'r, 123 F.3d 190, 197 (4th Cir. 1997) (link); RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1464 (11th Cir. 1992) (link); Dresser Indus., Inc. v. Comm'r, 911 F.2d 1128, 1137–38 (5th Cir. 1990) (link).

[71] In *United States v. Boyle*, the Court held that *Chevron* should apply to the challenge of a general authority Treasury regulation. 469 U.S. 241, 246 n.4 (1985) (link). The Court then held in *Cottage Savings Ass'n v. Commissioner* that the *National Muffler* factors should be considered in evaluating a general authority Treasury regulation. 499 U.S. 554, 560–62 (1991) (link). Years later, the Supreme Court again applied *Chevron* and *National Muffler* while reviewing two separate challenges to general authority regulations. *See* Boeing Co. v. United States, 537 U.S. 437 (2003) (link); Atlantic Mutual Ins. Co. v. Comm'r, 523 U.S. 382 (1998) (link).

[72] *See* I.R.C. § 3121(b)(10) (2006) (link).

[73] *See* Treas. Reg. § 31.3121(b)(10)-2(d)(3) (2005) (link). The regulation also provided that the student social security tax exception does not apply to any individuals normally scheduled to work as an employee for forty or more hours per week, and it included as an example an individual employed by a university as a medical resident. *See* Treas. Reg. §§ 31.3121(b)(10)-2(d)(3), 2(e) (2005).

[74] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 708–09 (2011).

[75] *Id.* at 713.

Chevron, the Court found that the statutory provision excepting students from FICA taxes was ambiguous, thus passing the first step of the two-part test. Under the second step, the Court concluded that the regulation excluding medical residents from the carve-out was a reasonable interpretation of the statute. Therefore, the regulation was upheld. The Court noted that regulations, like legislation, require some line-drawing and the Service therefore was justified in adopting the more administrable categorical exemption rather than the more resource-intensive case-by-case approach advocated by the Foundation.

In its analysis, the Court expressly rejected the multi-factor *National Muffler* test for evaluating final Treasury regulations in the face of an ambiguous statute and firmly established that *Chevron* provides the appropriate deference standard for such regulations.[76] As support for its conclusion, the Court relied on *Mead*'s declaration that "*Chevron* deference is appropriate [for general authority pronouncements] where it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[77] The *Mayo* Court also stated that "[o]ur inquiry . . . does not turn on whether Congress's delegation of authority was general or specific."[78] Interestingly, the Court's acceptance of *Mead*'s deference analysis, which essentially applies the second step of *Chevron*, appears contradictory to its plain statement that the inquiry should not depend on whether authority was general or specific. It is difficult to reconcile the *Mayo* Court's decision to adopt *Mead*—which reduced the reach of *Chevron* by saying not all types of general authority regulations should receive controlling weight—while at the same time holding that the review of a regulation does not turn on the type of regulation.[79]

The Supreme Court highlighted *Brand X*[80] as an occasion where it applied *Chevron* deference to a general authority regulation promulgated after public notice and comment. In *Brand X*, the Court held that the FCC was delegated "the authority to promulgate binding legal rules" under statutes that gave the Commission "the authority to execute and enforce, and to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Communications Act of 1934."[81] This language is nearly identical to the delegation of general

[76] *See id.* at 714 ("We believe *Chevron* and *Mead*, rather than *National Muffler* . . . provide the appropriate framework for evaluating the full-time employee rule.").

[77] *Id.* at 713–14 (citing United States v. Mead Corp., 533 U.S. 218, 226–27 (2001)).

[78] *Id.* at 714.

[79] Recall that *Mead* constricted *Chevron*'s reach by stating that not all general authority regulations are afforded *Chevron* deference. For a discussion of *Mead*'s holding, see *supra* notes 49–53 and accompanying text.

[80] 545 U.S. 967 (2005).

[81] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 714 (2011) (quoting *Brand X*, 545 U.S. at 980–81) (internal quotations omitted).

authority to the Treasury under Code § 7805(a).[82] In *Brand X*, as in *Mead*, the Court indicated that a rule promulgated pursuant to general authority may be granted *Chevron* deference where the rule is not inconsistent with the statute being interpreted and Congress may have reasonably expected for the rule to be binding. Also as in *Mead*, the Court did not distinguish between the various forms of rulemaking that find their origin in general authority regulations, such as revenue rulings and procedures. Therefore, it is possible for the Service to argue that the broad guidelines of *Mead*, combined with the strong deference language in *Mayo*, should result in greater judicial deference toward some informal agency rulemaking.

C. What Mayo *Didn't Say and the Potential Implications of Its Omission*

In *Mayo*, the Supreme Court settled the debate over whether *Chevron* deference applies equally to finalized general authority regulations issued by the Treasury as it does to the general authority regulations of other administrative agencies. It does apply equally. In so holding, the Court relied on *Mead* and *Brand X*, which provide broad guidelines for when a general authority regulation may be reviewed under the *Chevron* standard.[83] *Mead* noted that specific authority regulations are automatically reviewed under the *Chevron* standard, but general authority regulations may not always be reviewed under this standard. However, in neither of these cases did the Court specifically address whether or how the broad guidance provided should be applied to the judicial review of general authority guidance other than Treasury regulations.

The *Mayo* decision flatly stated that general authority regulations are subject to *Chevron* deference like specific authority regulations. By default, all other rulemaking is subject to *Skidmore* deference. In actuality, the Court was stating that general authority regulations meeting the description in *Mead* should be reviewed under the same standard as specific authority regulations because these regulations were created with the intent that they carry the force of law. This holding ignores any guidance other than final Treasury regulations and provides little help in deciding when a general authority regulation is intended to carry the force of law. The Court's failure to distinguish between Treasury regulations and other forms of

[82] *Compare* Communications Act of 1934, 47 U.S.C. § 201(b) (2006) (link) (stating the Commission may "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of" the communications Act of 1934), *with* I.R.C. § 7805(a) (stating that the Secretary of the Treasury may "prescribe all needful rules and regulations for the enforcement").

[83] *See* Hickman, *supra* note 14, at 1601. While *Mead* clearly attempts to add structure to the question of *Chevron*'s scope, *Mead*'s holding nevertheless contains its own analytical holes. At a minimum, the framework articulated in *Mead* leaves open for further consideration two major questions: How should the courts determine whether Congress has delegated to an agency the requisite administrative authority, and—even if the requisite delegation exists—which interpretive processes represent exercises of such congressionally delegated authority? Both questions turn on the vague "force of law" concept, for which the Court has provided only minimal guidance. *Id.*

guidance issued pursuant to the same general grant of authority creates the potential for unfair treatment to taxpayers who are bound by rulemaking that is not subject to the higher procedural standards of most Treasury regulations. The Court's silence on the matter of *Chevron*'s applicability to non-regulation guidance and the relatively loose standards set in *Mead* for determining whether *Chevron* deference is general authority rulemaking leaves the doorway open for the Treasury to issue traditionally non-binding guidance and argue that it should be subject to *Chevron* deference.

Mayo's holding enhances the executive branch's quasi-legislative authority at the expense of the taxpayer by cutting away at the taxpayer's ability to effectively challenge such rules in court. Multiple practitioners interviewed following the release of the decision noted that the Treasury's legislative authority has never before been greater.[84] The *Mayo* decision acknowledges that regulations may include drawing lines to improve administration and enforcement of the law. This emphasis on ease of administration at the expense of fairness may ultimately undercut a court's assessment of a rule's reasonableness. As Chief Counsel William J. Wilkins noted for the Service regarding the *Mayo* decision:

> [W]e recognize that this is a moment to consider for ourselves the implication of the famous quote about great power bringing with it equally great responsibility. The thesis behind *Chevron* deference is based on agency competence and integrity. The relevant opinions focus on the agency's knowledge of the subject matter, the agency's ability to consider secondary and tertiary effects on stakeholders and the regulatory system writ large, and the agency's ability to consult at length with affected internal and external parties. We recognize that all of this implies the need to make choices based on wise public policy.[85]

By noting the significance of the APA's notice-and-comment procedures, the *Mayo* decision draws attention to the fact that Treasury regulations issued pursuant to general authority, which are deemed interpretative rules for APA purposes and not subject to its procedural

[84] *See* Alison Bennet, *'Mayo' Ruling Raises Bar for Challenges to Tax Regulations, Practitioners Say*, 43 DAILY REP. EXEC. (BNA), at K-3 (Feb. 14, 2011) (reporting on the Service's expanded authority). One practitioner notes that *Mayo* is "giving the IRS more leeway in legislating than in administering the law" and that this is "arguably more authority than [the Service has] had in the past." *Id.* Another practitioner believes the ruling "puts a pretty heavy burden on those who are now going to argue that regulations are invalid." *Id.* A third expressed concern that the decision "hasn't left any room to challenge regulations." *Id.*

[85] 2011 TAX NOTES TODAY 22–15 (Feb. 2, 2011).

requirements, have been issued without public notice and comment.[86] This creates some concern. On one hand, the Supreme Court in *Mayo* says that a court's inquiry should not turn on whether a regulation was issued pursuant to specific or general authority. Yet, on the other hand, compliance with notice-and-comment rulemaking procedures has repeatedly been referenced by the Supreme Court as a significant indication that a regulation should be given *Chevron* deference. This apparent conflict widens the path for further administrative rulemaking—issued as binding authority—to be reviewed under the *Chevron* standard, regardless of whether there was a formal public notice and comment procedure.

D. What Mayo *Should Have Said*

Mayo should have developed a clearer standard that covers the treatment of regulations and non-regulations since both are created pursuant to § 7805(a). A better solution would have been for the Court to hold that *National Muffler* governs all general authority regulations, as was previously the law for tax matters. First, by enforcing *National Muffler*, a court would no longer need to determine whether a regulation issued pursuant to § 7805(a) was intended to carry the force of law before engaging in *Chevron* analysis. Second, *National Muffler* is a more appropriate test for determining the proper weight of non-regulation guidance. Finally, the *Mayo* decision left open the possibility that *National Muffler* may still be applicable in certain situations.

1. Eliminating Need to Engage in Multiple Analyses

A confusing aspect of the *Mayo* holding is the Court's statement that it has "expressly recognized the importance of maintaining a uniform approach to judicial review of administrative action" due to its apparent conflict with earlier precedent.[87] This statement is confusing because the essence of *Mead*'s holding is that not all general authority regulations are alike; some carry the force of law while others do not, and each is subject to a different deference standard. Under *Mead*, if it turns out the regulation was intended to carry the force of law, then a court would have to apply *Chevron*. If it appears the regulation was not intended to be treated as legally binding, then a court must apply *Skidmore*. Thus, the *Mead* analysis functions as a "step zero" to be applied before the two-step *Chevron* test or *Skidmore* analysis. In comparison, applying *National Muffler* would eliminate the need to perform multiple tests. Under *National Muffler*, all guidance issued pursuant to § 7805(a) would be analyzed under the same set of factors: harmony with the plain language of the statute, its origin, and its purpose; whether it is substantially contemporaneous with the statute;

[86] *See* Hickman, *supra* note 9, at 1730 (noting that Treasury has often failed to adhere to the APA rulemaking requirements in issuing regulations deemed to be interpretative rather than legislative).

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

reliance on the guidance; consistency of interpretation; and degree of scrutiny.

Since *National Muffler* operates as a sliding scale, there is nothing that prohibits a court reviewing a regulation under this standard from granting strong deference. Despite following different analyses, applying *National Muffler* or *Chevron* could both conclude that a general authority regulation issued after public notice and comment or an administrative hearing is permitted complete deference. The difference is that a court following *Mayo*'s holding would conclude the regulation is controlling because *Mayo* requires the application of *Chevron*, whereas the finding under *National Muffler* would be based on the fact that public notice and comment or an administrative hearing—in addition to the other relevant factors—tends to enhance the authority of a particular regulation and therefore warrants greater deference. Under *Chevron* as explained in *Mayo*, even a rule that has not undergone public notice and comment may still receive controlling deference. Therefore, replacing the *Mead–Chevron* analysis of *Mayo* with *National Muffler* does not prevent a court from arriving at the same conclusion. Instead, it reduces the overall steps required in a review and balances interpretative power more evenly between the agency and judiciary by considering what it is about the regulation that merits lesser or greater deference.

2. National Muffler *Offers a More Appropriate Test than* Skidmore *for Non-Regulations and* Chevron *for Regulations*

Under current law, if a rule or regulation issued pursuant to the general grant of authority by Congress is not deemed to have been created with the intent that it possesses the force of law, then that piece of guidance will be reviewed under *Skidmore*. Recall that *Skidmore* provides for deference on the basis of a rule's consistency with prior pronouncements and its persuasive power.[88] Without more specific guidance, like the *National Muffler* factors, this standard can result in extreme unfairness to either litigant. First, the test is entirely subjective and, thus, places too much power in the hands of the courts. Second, as a completely subjective test, *Skidmore* disregards the importance of Congress's delegation and offers too little protection for agencies.[89]

By counseling courts to consider "all those factors which give [the regulation] power to persuade," *Skidmore* gives courts the power to justify a wide and potentially unpredictable range of conclusions that may offer little guidance to taxpayers or the Service.[90] The *Mead* Court claimed that

[88] For a discussion of *Skidmore*'s intermediate deference, see *supra* notes 39–44 and accompanying text.

[89] *See, e.g.*, Hickman, *supra* note 14, at 1552 ("By its own terms, *Skidmore* 'respect' is both limited and open ended. *Skidmore* allows a reviewing court to be the final arbiter of whether the agency's interpretation is persuasive . . . .").

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

"totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation."[91] Further, this purely subjective approach affords the Service hardly more deference than if a court were reviewing the matter *de novo*.

Under *Chevron*, a regulation receives either controlling deference or none at all. The outcome depending on whether the court believes the regulation is a "permissible construction of the statute," which has been interpreted to mean a reasonable interpretation.[92] Contrary to *Skidmore*, which places too much power in the hands of the court, *Chevron* is a largely objective test that places too much power in the hands of the agency. The reasonable standard test sets the bar too low for an agency with the power to promulgate binding regulations without at least complying with the requirements of the APA.

Compared to *Skidmore* and *Chevron*, *National Muffler* offers a better compromise between judicial independence and deferential treatment for general authority guidance. *National Muffler* instructs courts to consider a list of factors that give the courts a meaningful guide for determining the proper weight of an agency interpretation. These factors can help ensure that decisions have some consistency and that there will be some uniformity among courts' analyses. Under this standard, power is more evenly balanced between the Service and the courts in a way that is consistent with the manner of Congress's legislative delegation. The Service is afforded some deference which it is owed based on its expertise and Congressional delegation, but the level of deference is considered against other factors that may reveal the rule being challenged is in fact improper or invalid. Also, courts may still make subjective determinations, but the determinations will be based on a defined set of factors that limit potential abuse and inconsistency.

One of the often-cited criticisms of the less deferential *National Muffler* approach is the concern that something less than *Chevron* deference will impede an agency's ability to adapt its policy to societal changes if those changes are inconsistent with the statute or prior rulings. For instance, in *Brand X* the Court averred that the Court of Appeals's decision to follow precedent over applying *Chevron* deference would inhibit the agency's ability respond to changed factual circumstances or administrations and "lead to the ossification of large portions of our statutory law by precluding agencies from revising unwise judicial constructions of ambiguous statutes."[93] This fear is unfounded. The *National Muffler* standard does not suggest that courts strictly following precedent. Rather, it instructs courts to consider consistency with prior construction of the interpretation and congressional intent in order to understand the reason for a change. This

[91] United States v. Mead Corp., 533 U.S. 218, 250 (2001).

[92] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[93] Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981, 983 (2005).

process of challenging an agency to explain the reason for an inconsistent regulation imposes the need for an agency to fully develop its reasoning for the change and fosters greater transparency in the administration of the law. Unlike *Brand X*, which calls for reading the plain terms of a statute without considering congressional intent or the purpose of a statute, *National Muffler* advocates a more holistic review of the interpretation that takes into account the language of the statute, its origin, its purpose, congressional intent, the time the regulations have been in effect, reliance placed on it, consistency with past interpretations, and the level of scrutiny given by the Congress during any re-enactments of the statute.[94]

Another reason *Chevron* is touted as the better standard for reviewing agency guidance is the institutional expertise of the Treasury and Service devising the regulation.[95] Specialized knowledge and experience present a strong justification for deference and should be given some weight, but not necessarily controlling deference. Founded largely by reliance on agency expertise, *Chevron* grants controlling deference to any reasonable interpretation of an ambiguous statute regardless of whether it appears inconsistent with the language of the statute or prior interpretations, or even if it was promulgated as a temporary regulation before notice and comment or retroactively under § 7805(b) in response to an unsuccessful litigation position. This does not produce the best result. The reasonable basis analysis under *Chevron* represents the lowest standard of legislative review, and yet agency guidance is not legislation that has been drafted, negotiated, and passed by elected members of Congress. Rather, agency guidance exists because Congress delegated some of its legislative power to supplement the agency's enforcement powers. Furthermore, while the Treasury was charged with the task of enforcing Congress's laws, it alone does not create tax policy. Thus, it is wrong to place all our faith in the institutional competence of one agency. It makes more sense for a court to follow *National Muffler*, which incorporates the intent of Congress and purpose of the statute into its review of an agency's interpretation. Also, a majority of tax related matters begin litigation in the Tax Court, which holds at least as much expertise as members of the Treasury and does not need to rely entirely on the agency's explanation of a statute.

3. National Muffler *Not Dead*

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[94] *See* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (describing the factors a court should consider in reviewing an agency rule).

[95] *See, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 713 (2011) (noting that formulating policy is "complex" and requires "more than ordinary knowledge respecting the matters subjected to agency regulations"); *Brand X*, 545 U.S. at 1003 ("The Commission is in a far better position to address these questions than we are"); *Chevron*, 467 U.S. at 865 (suggesting that Congress believed "those with great expertise and charged with responsibility for administering the provision would be in a better position to do so . . ."); *Skidmore*, 323 U.S. at 140 ("[R]ulings, interpretations and opinions of the Administrator . . . do constitute a body of experience and informed judgment[.]").

Despite being dealt a heavy blow when the Supreme Court decided *Mayo*, there is reason to believe that *National Muffler* is not dead. It remains possible that the Supreme Court may later cite *National Muffler* as the proper standard for interpreting informal agency guidance other than final Treasury regulations. In *Mayo*, the Court stated that Mayo did not present "any justification for applying a less deferential standard of review . . . [and] in the absence of such justification, we are not included to carve out an approach to administrative review good for tax law only."[96] This language appears to reserve for the Supreme Court an argument that *National Muffler* should be used to interpret guidance other than final Treasury regulations. During a D.C. Bar Taxation Section panel discussion of judicial deference under *Mayo*, Ronald Buch of Bingham McCutchen LLP postulated that *National Muffler* has not ended because "[w]hen you have something other than a final [Treasury regulation] subject to notice and comment, aren't you really back at the same sliding scale?"[97] Similarly, Christopher Rizek of Caplin & Drysdale Chartered said the "next front" for litigation on judicial deference will focus on non-regulation guidance, in which case *National Muffler* "may still be viable."[98]

CONCLUSION

The degree of deference conferred to the interpretation of a statute by an agency charged by Congress with administering that statute has been steadily and often confusingly shifting for decades. Courts reviewing final Treasury regulations promulgated pursuant to general authority have been afforded no deference, controlling deference, and various degrees in between, including a standard specifically for tax issues. Under current law, final Treasury regulations promulgated pursuant to general authority that satisfy the APA or similar procedural hurdles receive total deference under *Chevron* while other guidance receives deference only to the extent it possesses the power to persuade under *Skidmore*.

Courts have not directly considered the issue of guidance other than final Treasury regulations, such as temporary regulations, revenue rulings, and revenue procedures. However, such guidance constitutes the majority of taxpayer guidance, and the Service has noted that it will follow its own published guidance, including revenue rulings, as though this guidance was binding precedent.[99] For these agency interpretations, courts should adopt

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

[97] J.P. Finet, *Despite Supreme Court's 'Mayo' Ruling, Practitioners Say 'National Muffler' Not Dead*, 43 DAILY REP. EXEC. (BNA), at K-3 (Mar. 4, 2011).

[98] *Id.*

[99] *See* Lederman, *supra* note 15, at 26 n.131 (Chief Counsel attorneys may not "argue contrary to final guidance" nor "rely on case law to take a position that is less favorable to the taxpayer in a particular case than the position set forth in published guidance" (quoting Chief Counsel Notice CC-2003-014 (May 8, 2003))).

National Muffler's multi-factored, case-by-case analysis rather than the pro-Treasury *Chevron* doctrine or ambiguous *Skidmore* analysis.

This Essay does not suggest that *National Muffler* is a perfect method for reviewing informal administrative guidance. Rather, it suggests that of the existing standards of review, *National Muffler* best avoids *Skidmore*'s problem of circumventing the legislative process by inappropriately applying *Chevron* and failing to provide consistent guidance or give any consideration to the knowledge and experience of agencies. The *National Muffler* standard strikes an appropriate balance between agencies like the Treasury and the courts. In applying the complex administrative law framework of the Treasury under § 7805(a), *National Muffler* offers the fairest alternative for taxpayers and the government.