

**Federal Tax Research (2d Ed.)**

**Update**

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## Chapter 4. Treasury Regulations

### B. 1. Types of Regulations—Legislative and Interpretative (page 93-97)

For a number of years, there has been an on-going dispute about how much deference the courts should give legislative and interpretative regulations. Even though interpretative regulations are not subject to the APA notice and comment procedures, Treasury nearly always follows those procedures. Because both types of regulations have the benefit of the notice and comment procedures, the line between the two types of regulations has become blurred and not all courts continued to give different weight to the different types of regulations. In *Bankers Life and Casualty Co. v. United States*,<sup>1</sup> the Seventh Circuit held that the determining factor as to whether “*Chevron* deference”<sup>2</sup> is given to the regulation is not whether the regulation was issued under a specific grant or general grant of authority, but whether the agency followed the notice and comment procedures.

Under *Chevron* deference, a two-step analysis is used. First, if the statute is clear, the agency has no interpretive authority. Second, if the statute is silent or ambiguous, the IRS’s interpretation will be given deference if it is a permissible interpretation.

In contrast, under what is often referred to as traditional deference,<sup>3</sup> the court must defer to the Commissioner’s interpretation as long as it is a reasonable interpretation. In determining if the interpretation is reasonable, various factors are considered, such as whether the regulation—

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.<sup>4</sup>

While some courts see the *Chevron* test as being more deferential to the IRS, some courts found there is no meaningful distinction between the two tests, as they both depend on the regulation being reasonable.<sup>5</sup>

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<sup>1</sup> 142 F.3d 973 (7<sup>th</sup> Cir. 1998).

<sup>2</sup> The test is derived from the court’s holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

<sup>3</sup> See, e.g., *Cottage Savings Ass’n v. Commissioner*, 499 U.S. 554, 560-61 (1991); *National Muffler Dealers Association v. United States*, 440 U.S. 472, 476 (1979).

<sup>4</sup> *Swallows Holding v. Commissioner*, 126 T.C. 96, J. Holmes dissenting at 173, citing *National Muffler Dealers Association, Ltd.*, 467 U.S. at 477. The Third Circuit reversed the Tax Court’s holding that *National Muffler* applied to interpretative tax regulations. The Circuit Court followed *United States v. Mead*, 533 U.S. 218 (2001), and found that *Chevron* deference should apply. *Swallows Holding v. Commissioner, Ltd.*, 515 F.3d 162 (3d Cir. 2008).

<sup>5</sup> See, e.g., *Bankers Life and Casualty Co. v. United States*, 142 F.3d 973, 981-82 (7<sup>th</sup> Cir. 1998).

The Supreme Court also had previously held (in a non-tax case) that *Chevron* deference should be applied when Congress delegated to the government the authority to adopt rules carrying the force of law.<sup>6</sup>

In 2011, in *Mayo Foundation for Medical Education and Research v. United States*,<sup>7</sup> the Supreme Court considered the validity of regulations issued under the general authority of Section 7805. The Court used the *Chevron* analysis, first finding that the underlying Code Section (§ 3121) was ambiguous, and, therefore, open to agency interpretation. Second, the court declined to utilize the factors from the traditional test. Instead, it followed *Chevron*. It also noted that the deference would be the same irrespective of whether an interpretative or legislative regulation was at issue.

For additional information on the implications of the Supreme Court's holding in *Mayo*, see:

- Jeffrey N. Starkey & Thomas A. Cullinan, *Is the IRS Always Right? Judicial Deference to Treasury Regulations and Other IRS Positions*, J. TAX PRACT. & PROC. 31, 32, Aug.-Sep. 2012.
- Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643 (2012).
- Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269 (2012).
- Tomas D. Sykes, *The "Mayo" Decision's Problematic Tax Analysis*, 52 BNA DAILY TAX REP.J-1 (March 22, 2011).
- Patrick J. Smith, *Life After Mayo: Silver Linings*, 131 TAX NOTES 1251 (2011).
- Irving Salem, *Mayo Dissected: Some Dragons Slain, Some Still Breathing Fire*, 130 TAX NOTES 1327 (2011).
- Leandra Lederamn & Stephen W. Mazza, *More Mayo Please? Temporary Regulations After Mayo Foundation v. United States*, 30 ABA SEC. OF TAX'N NEWSQUARTERLY 15 (2011).
- Steve R. Johnson, *Mayo and the Future of Tax Regulations*, 130 TAX NOTES 1547 (2011).

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<sup>6</sup> *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>7</sup> 131 S. Ct. 704 (2011).

## **Chapter 5. Judicial Opinions**

In the Practice Note at the end of page 116, carrying over to the following page, the cost of a copy of the rules has decreased from \$30 to \$20.

## **Chapter 6. Public Guidance from the Office of Chief Counsel**

Update the Practice Note on page 143, carrying over to page 144.

Based on the Taxpayer Advocate's Report, from June 1, 2012, through May 31, 2013, the ten most litigated issues were:

- Accuracy-related penalty (IRC § 6662(b)(1) and (2));
- Trade or business expenses (IRC § 162(a) and related Code sections);
- Gross income (IRC § 61 and related Code sections);
- Summons enforcement (IRC §§ 7602(a), 7604(a), and § 7609(a));
- Collection due process (CDP) hearings (IRC §§ 6320 and 6330);
- Failure to file penalty (IRC § 6651(a)(1)), failure to pay penalty (IRC § 6651(a)(2), and estimated tax penalty (IRC § 6654);
- Charitable deductions (IRC §170);
- Frivolous issues penalty (IRC § 6673 and related appellate-level sanctions);
- Civil actions to enforce federal tax liens or to subject property to payment of tax (IRC § 7403);
- Relief from joint and several liability for spouses (IRC § 6015)

## **Chapter 8. Documents Generated to Assist with Examinations**

In the Practice Note at the bottom of page 199, continuing to page 200, the list of available Audit Technique Guides should be updated to the following:

Aerospace Industry  
Air Transportation  
Architects and Landscape Architects  
Art Galleries  
Attorneys  
Business Consultants  
Capitalization v Repairs  
Cash Intensive Businesses  
Child Care Providers  
Coal Excise Tax  
Commercial Banking  
Conservation Easement  
Construction Industry  
Continuation of Employee Health Care Coverage  
Cost Segregation  
Credit for Increasing Research Activities (i.e., Research Credit) IRC § 41  
Excise Tax on Indoor Tanning Services  
Executive Compensation—Fringe Benefits  
Factoring of Receivables  
Farmers  
Fishing  
Foreign Insurance  
Golden Parachute  
Hardwood Timber Industry  
IC-DISC  
Inland Waterways  
IRC § 162(m) Salary Deduction Limitation  
IRC § 183: Activities Not Engaged in For Profit  
Lawsuits, Awards, Settlements  
Low-Income Housing Credit- Guide for Completing Form 8823  
Ministers  
New Market Tax Credits  
New Vehicle Dealership  
Non-Qualified Deferred Compensation  
Obligations Not in Registered Form  
Obligations Not in Registered Form D  
Oil and Gas Industry  
Ozone Depleting Chemicals  
Partnerships  
Passive Activity Losses  
Placer Mining

The Port Project  
Reforestation Industry  
Rehabilitation Tax Credit  
Research Credit Claims: Credit for Increasing Research Activities § 41  
Retail Industry  
Section 48A and 48B—Advanced Coal and Gasification Project Credits  
Split Dollar Life Insurance  
Stock Based Compensation  
Structured Settlement Factoring  
Timber Casualty Loss  
Veterinary Medicine  
Wine Industry

## **Chapter 9. Gaining Access to Government Documents**

In the second Practice Note on page 211, update the phone number for the National Office Reading Room to 202-317-4997.

### **B.2. Freedom of Information Act**

Additional information about obtaining documents under the Freedom of Information Act can be found on the IRS website at [http://www.irs.gov/uac/Freedom-of-Information-Act-\(FOIA\)-Guidelines](http://www.irs.gov/uac/Freedom-of-Information-Act-(FOIA)-Guidelines).



## **Chapter 10. Researching the Issue**

On page 265, in the list of websites, change the URLs as follows:

Congressional Record                      [www.gpoaccess.gov](http://www.gpoaccess.gov)

Constitution                                      [www.gpoaccess.gov](http://www.gpoaccess.gov)

### **Chapter 13. Tax Conferences, Seminars, and Tax Institutes**

In the Practice Note on page 329, the website for the Tax-Talent is current, but information on tax seminars can be found by clicking on “Tax Professionals” and under “Career Optimization” selecting “Tax Training Events.”

## Chapter 14. Organizing the Research Into a Finished Product

### B.1.d. Tax Opinions (page 345):

- On page 345, delete the last sentence of the first paragraph.
- On pages 346–47, delete the language beginning under the Case on Point box through the paragraph at the top of page 347.

In the first Practice Note on page 349, add the following:

A petitioner must provide his social security number or, if applicable, employer identification number. Tax Court Rule 20(b). Form 4 in Appendix I can be used for this purpose.

In the second Practice Note on page 349, the cost of a copy of the rules has decreased from \$30 to \$20.

**B. 2. Circular 230.** Delete the information on pages 355–61 and replace with the following:

Treasury has the authority to issue regulations to regulate practice before the IRS and has done so through Circular 230. Recently, the IRS has made significant revisions to Circular 230.

#### Quick Find:

**Circular 230** is a publication issued by the IRS. It contains the regulations that govern practice before the IRS. It can be found on the IRS website, [www.irs.gov](http://www.irs.gov).

Previously, Circular 230 contained fairly complicated rules for what constitutes a “covered opinion.” If written advice constituted a covered opinion, the practitioner had to comply with specific requirements. The current version of Circular 230 eliminates the covered opinion rules in § 10.35. Instead, written tax advice is subject to streamlined standards of § 10.37.

Section 10.37 requires the practitioner to:

- base written advice on reasonable factual and legal assumptions;
- reasonably consider all relevant facts and circumstances the practitioner knows or reasonably should know;
- use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;
- not rely upon representations, statements, findings, or agreements of the taxpayer or any other person if such reliance would be unreasonable;
- Relate applicable law and authorities to facts; and

- Not take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.<sup>8</sup>

In determining if a practitioner complied with the requirements, the IRS will apply a reasonable practitioner standard, considering all facts and circumstances including, but not limited to, the scope of the engagement and the type and specificity of the advice sought.<sup>9</sup> If the practitioner knows or has reason to know the opinion will be used in promoting, marketing, or recommending to one or more taxpayers a partnership, investment plan or arrangement a significant purpose of which is the avoidance or evasion of Federal tax, the IRS will apply a reasonable practitioner standard, considering all the facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether the practitioner has failed to comply with Section 10.37.<sup>10</sup>

### **C. Main Points**

Delete the last three bullet items under Circular 230.

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<sup>8</sup> 31 C.F.R. § 10.37(a)(2).

<sup>9</sup> 31 C.F.R. § 10.37(c)(1).

<sup>10</sup> 31 C.F.R. § 10.37(c)(2).