SUBSTANCE OVER FORM? PHANTOM REGULATIONS AND THE INTERNAL REVENUE CODE

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I. INTRODUCTION

The Secretary of the Treasury is a busy man. In addition to serving as the principal economic advisor to the President, he is responsible for formulating domestic and international financial, economic, and tax policies, and participating in the formulation of other broad fiscal policies of national significance.[1] Though he receives considerable assistance from personnel in the Department and from other government agencies, the Secretary's duties are nonetheless substantial.

It is hardly surprising, then, that when Congress imposes further duties upon the Secretary, he is sometimes slow to act. While a sluggish government is certainly nothing new, the problems posed by agency delay are particularly acute when Congress delegates to the Secretary the task of implementing policy objectives contained in the Internal Revenue Code.[2]

Typically, these statutory delegations instruct the Secretary to issue regulations to accomplish a specific result, and take various forms. For example, Congress may provide that "the Secretary shall issue regulations allowing taxpayers to claim benefit X whenever Y occurs." Where the Secretary has promulgated such regulations, the taxpayer may examine those regulations to determine if he is entitled to X upon the occurrence of Y. However, where such regulations have *not* been issued, the taxpayer faces considerable uncertainty in determining whether he is entitled to X.[3]

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1. U.S. Dept. of Treasury, Duties & Functions of Secretaries of the Treasury, http://www.ustreas.gov/education/duties/treas/sec-treasury.shtml (last visited Oct. 1, 2006). Congress created the Department of Treasury and initially described the scope of the Secretary's duties in 1789. *See* Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65-6 ("An Act to establish the Treasury Department"). Various sections in the United States Code delegate further duties to the Secretary.

2. All textual references to sections of the Internal Revenue Code (the "Code") are to the Code of 1986, as amended.

3. *See, e.g.*, Jasper L. Cummings, Jr., *Treasury's 2005-2006 Corporate Priority Guidance Plan*, 108 TAX NOTES (TA) 1195, 1197 (Sept. 5, 2005) (stating that with regard to election under I.R.C. § 336(e), "some IRS agents have been willing to allow [such an] election without regulations, but the word is that the Joint Committee on Taxation disagrees, in reviewing large refund claims."); Lee A. Sheppard, *News Analysis: Corporate Planning and Tax Shelters*, 109 TAX NOTES (TA) 165, 168-69 (Oct. 10, 2005) (discussing new "guidance under section 336(e), for which the question is whether the privilege of a

The taxpayer may be similarly confused when Congress has not framed the delegation in "mandatory" terms, as above, but has instead left the implementation of the policy objective to the Secretary's discretion. These "discretionary" delegations are often in the form: "The Secretary *may* issue regulations allowing taxpayers to claim benefit X whenever Y occurs." At other times, Congress does not explicitly define the scope of the Secretary's discretion, but instead provides that a rule is to apply "in accordance with regulations" or "pursuant to regulations."

Occasionally, these delegations instruct or authorize the Secretary to issue regulations disallowing the taxpayer a benefit or prohibiting a type of transaction otherwise permitted under the Code. The taxpayer may again be uncertain whether his course of conduct will subject him to penalties if regulations have not been issued.[4] Similarly, the Internal Revenue Service ("the IRS") itself may be uncertain whether it can enforce provisions of this sort in the absence of regulations.[5]

Among the hundreds (perhaps thousands) of delegations found in the Code, there exists considerable variations in the form of such delegations. Common to all these delegations is a difficult issue—absent any action by the Secretary, does the delegating statute have any operative effect? Or, in the language commonly used by courts in the administrative procedure setting, is the statute "self-executing" in the absence of regulations? As the number of delegations continues to rise and the Treasury's backlog grows, determining whether such delegations are self-executing has become increasingly important. Although Congress sometimes sets forth temporary or default rules to remain in effect until the Secretary exercises his delegated authority to promulgate different rules, such provisions are uncommon.

As one might expect, where the delegating statute offers a

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section 338(h)(10) election will be extended to noncorporate acquirers and members of affiliated groups. Some taxpayers take the position that they have that power already. At [a Practising Law Institute] seminar, Alexander [IRS associate chief counsel (corporate)] insisted that taxpayers cannot make that election in the absence of regulations, because it is not self-implementing.").

4. *See, e.g.*, Morris L. Kramer, *Final Guidance On C Corporation Conversions and Asset Transfers to REITs*, 30 REAL ESTATE TAX'N 148 (2003) (noting that many tax practitioners thought IRS Notice 88-19 and I.R.C. § 337(d) should not be given effect, based on the lack of related regulations and the belief that § 337(d) was not self-executing, but pointing out that it appeared no one had made that argument in court).

5. *See, e.g.*, I.R.S. Field Serv. Adv. Mem. 2000-18-018 (May 5, 2000), *available at* 2000 WL 1930441 (concluding that an attempt to enforce § 448(d)(8) in the absence of regulations would pose "litigation hazards").

benefit, the taxpayer frequently argues that the Secretary should not be able to withhold the enjoyment of that benefit by delaying the issuance of regulations. Similarly, where the delegation is taxpayer-unfriendly, the IRS often argues that the statute is self-executing, notwithstanding the lack of implementing regulations. In prior litigation addressing these issues, the parties have typically devoted much of their energy to scrutinizing the language in the statute describing the rules or policies that the Secretary might implement (the "substance"), while paying less attention to the language that delegates to him the authority to prescribe such rules and limits the manner in which he may prescribe them (the "form").

Over the past several decades, the lower courts have had numerous opportunities to interpret statutory delegations, with many of the cases decided in the U.S. Tax Court. Though the decisions are hardly a model of consistency, the courts have generally treated statutory delegations as self-executing, even in the absence of implementing regulations. To give the statute effect, the reviewing court invokes "phantom regulations,"[6] deciding the case in accordance with the interpretation it believes the Secretary might offer were he to issue regulations. Though the courts sometimes express discomfort with doing the Secretary's job for him, they believe that doing so is consistent with Congress's intent.[7]

Several commentators have analyzed this unusual response to "spurned"[8] delegations, but have focused mostly on cases interpreting delegations found in the Code.[9] Because those cases

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6. The phrase "phantom regulations" has been used by courts to refer to those rules which an agency has failed to issue pursuant to a statutory delegation but wishes to enforce anyway. *See, e.g.*, Branstad v. Veneman, 212 F. Supp. 2d 976, 994 (N.D. Iowa 2002) ("The Branstads . . . argue that the USDA has relied on a 'phantom' regulation . . . because no such regulation exists."); Twenty Four Hour Fuel Oil Corp. v. United States, 38 F. Supp. 2d 217, 222-23 (E.D.N.Y. 1999), *vacated*, 47 F. Supp. 2d 1103 (1999) ("[The IRS is operating under the misconception that] if the [taxpayer] was not complying with [the] phantom regulations then it must be operating improperly and, therefore, clearly not entitled to the relief sought."); *see also* Dana Corp. v. City of Toledo, No. L-00-1128, 2000 WL 1867257, at *2 (Ohio Ct. App. Dec. 22, 2000) (holding that city must properly promulgate and codify tax regulations in order to enforce them, and attempts to enforce phantom regulations were unlawful).

7. *See, e.g.*, First Chicago Corp. v. Comm'r, 842 F.2d 180 (7th Cir. 1988) ("We do not relish doing the Secretary's work for him, but we have no other course to follow."). The courts do, in fact, have another course to follow. *See infra* Parts III, IV.

8. *See* Phillip Gall, *Phantom Tax Regulations: The Curse of Spurned Delegations*, 56 TAX LAW. 413, 414 (2003). Phrases coined by Gall, such as "spurned delegation," "mandatory delegation," and "discretionary delegation" are followed in this paper.

9. *See, e.g.*, Robert J. Crnkovich & Kenneth H. Heller, *"To the Extent" Provisions: When Do They Operate Without Regulations?*, 76 J. TAX'N 176 (1992); William F. Ferreira,

are themselves inconsistent, however, it is not possible to extract clear principles from analysis of those cases alone. Surprisingly, a close examination of *non*-tax sources reveals a clear (if imperfect) solution to the problems posed by spurned delegations. This paper fills the void in the current literature by examining those overlooked authorities, and argues that they mandate an approach different from the ones currently used to deal with spurned delegations. Part II briefly describes the prevailing approaches used by the courts and the IRS. Part III criticizes these approaches, arguing that they ignore well-settled principles of administrative law and improperly render the statute's delegating language superfluous. Part IV argues that phantom regulations are never an appropriate response to agency delay and offers an alternative remedy available to taxpayers aggrieved by the Secretary's inaction.

II. CURRENT APPROACHES TO SPURNED DELEGATIONS IN THE CODE

Unsurprisingly, taxpayer-friendly delegations are the most commonly litigated in the courts, as the IRS frequently challenges taxpayers who claim tax benefits in the absence of regulations contemplated by Congress.[10] When the situation is reversed, the IRS often argues that taxpayer-*un*friendly delegations *are* self-executing.[11] On other occasions, both the IRS and the taxpayer agree that a delegation is self-executing

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Note, *Fishing for Regulations: The Tax Court Makes Its Own Sourcing Rules in* Francisco v. Comm'r, 57 TAX LAW. 817 (2004); Gall, *supra* note 8, at 414; Shop Talk, *No Final Regs.? Taxpayer Wins Again*, 87 J. TAX'N 253 (1997); Shop Talk, *No Regs.? "Less than Clear" Statutes May Be Unenforceable, CA-7 Says*, 86 J. TAX'N 318 (1997). Commentators have thus far tentatively approved the use of phantom regulations. *See, e.g.*, Crnkovich & Heller, *supra* this note, at 176 ("Under general principles of statutory construction, [mandatory delegations] are self-executing at their effective dates, even in the absence of Regulations."); Gall, *supra* note 8, at 450 ("Phantom regulations should be applied to effect a mandatory delegation in two situations: (1) where the delegation is intended to provide a taxpayer benefit and (2) where it is reasonably clear how to accomplish the desired result of the delegation. In all other situations, courts should not get involved."); Ferreira, *supra* this note, at 831 ("When it is *absolutely clear* how the Secretary would have effectuated congressional intent, the court stands on firm ground when applying its own rules in the absence of regulations. In all other cases, the court must exercise great caution.") (emphasis added). This paper concludes instead that phantom regulations are *never* appropriate—the courts' use of such regulations amounts to judicial lawmaking. *See infra* Parts III, IV.

10. *See, e.g.*, Hillman v. Comm'r, 114 T.C. 103, 111 (2000), *rev'd on other grounds*, 263 F.3d 338 (4th Cir. 2001).

11. *See, e.g.*, Traylor v. Comm'r, 59 T.C.M. (CCH) 93 (1990), *aff'd*, 959 F.2d 970 (11th Cir. 1992).

but dispute the contents of the phantom regulations.[12]

The current judicial treatment of spurned tax delegations is quite confused, and the IRS's inconsistent litigating positions do not help clear the confusion. Because it might be impossible to reconcile the approaches, no attempt to do so is made here. Rather, this paper discusses the most common approaches employed by the courts and argues that they should be abandoned in favor a textual approach.

The major cases deal largely with *mandatory* delegations, which the courts usually deem self-executing.[13] Typically, one of the following approaches (singly or in combination with others) is used to reach that conclusion:

(A) The court determines that the legislative history provides sufficient guidance to enable the court to ascertain the content of the phantom regulations.[14]

(B) The court decides that, because the delegation is taxpayer-friendly, treating the statute as self-executing is the only equitable solution.[15]

(C) The court examines the statute, and if the delegation relates to "whether" a specified result shall occur, the statute will not be self-executing; however, if the delegation relates merely to "how" that specified result shall occur, the statute *will* be deemed self-executing.[16]

Under each of these approaches, the reviewing court is principally concerned with the *substance* of the statute. In (A), where the legislative history offers guidance as to the substantive content of the regulations, the statute will be treated as self-executing consistent with that guidance. In (B), the court will determine whether the substance of the delegating statute is intended to confer a benefit upon taxpayers, in which case the

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12. *See, e.g.*, Estate of Hoover v. Comm'r, 102 T.C. 777, 782 (1994), *rev'd on other grounds*, 69 F.3d 1044 (10th Cir. 1995).

13. Courts that have addressed statutory delegations in Subtitle A (i.e., those relating to the income tax) have generally treated those statutes as self-executing, though the Tax Court has ruled that a *discretionary* delegation is not self-executing. *See* Alexander v. Comm'r, 95 T.C. 467, 473 (1990) *aff'd without published opinion sub nom.* Stell v. Comm'r, 999 F.2d 544 (9th Cir. 1993); discussion *infra* note 53. When a statutory delegation does not relate to the income tax, courts usually follow the language of the statute, and not the approaches described in this Part. *See* cases cited *infra* note 173.

14. *See* Int'l Multifoods Corp. v. Comm'r, 108 T.C. 579, 583, 589 (1997).

15. *See* Occidental Petroleum Corp. v. Comm'r, 82 T.C. 819 (1984); *infra* notes 47-50 and accompanying text.

16. *See* Estate of Neumann v. Comm'r, 106 T.C. 216, 221 (1996); discussion *infra* Part II.C.2.

court will treat the statute as self-executing to prevent inequity. Lastly, (C) requires the court to examine the substance of the delegation to determine whether Congress simply required the Secretary to determine "how" a tax provision applies, as opposed to providing him the discretion to determine "whether" the tax result in question should occur at all.

In practice, the courts often blend these approaches. For example, under both the "whether versus how" and "equity" approaches the court will likely consult legislative history, although the absence of such history will not necessarily stop the court from invoking phantom regulations. The tripartite division described above is nonetheless useful in understanding the judicial attitude towards spurned delegations in the Code. The discussion below will use this division for analytical purposes, though any given opinion may rely on more than one of these approaches.

A. *Legislative History Approach*

1. *International Multifoods Corporation v. Commissioner*[17]

In *Multifoods,* the Tax Court confronted a statutory delegation that had languished in the Code for more than a decade.[18] Perhaps frustrated by the Secretary's failure to issue final regulations,[19] the court gave effect to the statute by invoking phantom regulations consistent with its legislative history.[20]

At issue in *Multifoods* were the "source" rules governing sales of personal property.[21] The Code generally draws distinctions between income derived from domestic sources and income derived from foreign sources.[22] Classifying income (or a portion of such income) as either "U.S. source" or "foreign source" can have significant consequences for the taxpayer.

The source of income from sales of personal property is now determined under § 865(a), which generally provides that income

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17. 108 T.C. 579 (1997).

18. *Id.* at 581-82.

19. At the time the case was decided, the Secretary had issued only proposed regulations. *See id.* at 580; Allocation of Loss on Disposition of Stock, 61 Fed. Reg. 35696 (proposed July 8, 1996) (to be codified at 26 C.F.R. pt. 1).

20. *Int'l Multifoods*, 108 T.C. at 589.

21. *Id.* at 583.

22. *See* I.R.C. §§ 861-865 (2000 & Supp. 2003).

from the sale of personal property will be sourced at the residence of the seller.[23] Section 865(a) does not provide source rules for *losses* relating to the sale of personal property, although § 865(j)(1) instructs the Secretary to develop those rules. That section provides: "The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of this section, including regulations . . . relating to the treatment of losses from sales of personal property . . ."[24] Prior to the Tax Reform Act of 1986, sections 861 and 862 provided source rules governing the sales of personal property, and the Secretary had issued regulations pursuant to those sections providing source rules for losses.[25]

In *Multifoods*, the taxpayer (a U.S. resident) incurred a substantial loss from the sale of personal property and argued that the loss should be deemed U.S. source.[26] The taxpayer contended that the § 865(a) "residence" rule "compel[led] symmetrical treatment for gains and losses."[27] The Commissioner countered that until he exercised his authority under § 865(j)(1), the pre-existing regulations applied and required that the taxpayer's loss be deemed foreign source.[28]

The Tax Court first held that the pre-1987 versions of §§ 861-862 (and the regulations issued thereunder) were no longer applicable to determine the source of gain or loss from the sale of personal property, as the Tax Reform Act's amendments removed such sales from the scope of those sections.[29] The court found that the § 865(j)(1) delegation instead governed determinations of source, notwithstanding the absence of regulations, and delved into extra-statutory sources to determine

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23. *Id.* § 865(a) (2000).

24. *Id.* § 865(j)(1).

25. Treas. Reg. § 1.861-8(e)(7) (1984).

26. *Int'l Multifoods*, 108 T.C. at 583.

27. *Id.* at 584.

28. *Id.* Although the opinion does not say so explicitly, the Commissioner probably relied on § 7807(a) in making this assertion. *See* I.R.S. Field Serv. Adv. (Feb. 28, 1995), *available at* 1995 WL 1918496, n.1 ("Until regulations are published under section 865(j)(1), section 7807(a) provides that existing regulations that could be prescribed under the authority of section 865(j)(1) shall apply."); discussion *infra* Part III.B. The Commissioner probably erred in advancing this argument. *See* Bruce N. Davis & Steven R. Lainoff, *U.S. Taxation of Foreign Joint Ventures*, 46 TAX L. REV. 165, 236 n.348 (1991) ("Note that the provisions of § 7807(a) do not operate to mandate the application of § 1.861-8(e)(7) of the regulations during the period prior to the promulgation of regulations under the 1986 Act, since title 26 was not reenacted by the 1986 Act and, therefore, those regulations were not 'in effect immediately prior to the enactment of this title.'").

29. *Int'l Multifoods*, 108 T.C. at 586.

legislative intent.[30] In addition to the statute's legislative history, the court consulted the so-called "Blue Book," a guide prepared by the Joint Committee on Taxation to explain previously enacted legislation.[31] The court stated:

> First, we conclude [from an analysis of the Blue Book] that Congress did intend that regulations promulgated pursuant to section 865(j) would embody a "particular rule"; i.e., residence-based sourcing would generally be used for losses realized on the sale of noninventory personal property. Second, [the Commissioner's] reliance on the absence of any mention of section 865(j) in the committee reports is erroneous, since Congress articulated the overall purpose behind section 865 in the legislative history. In addition, the [Blue Book] confirms that it was expected that losses generally would be sourced similarly to gains.[32]

Having determined the "particular rule" it believed Congress contemplated when it delegated rulemaking authority to the Secretary, the court concluded that the statute should be operative, even without regulations:

> When Congress directs that regulations be promulgated to carry out a statutory purpose, the fact that regulations are not forthcoming cannot be a basis for thwarting the legislative objective. It is well established that the absence of regulations is not an acceptable basis for refusing to apply the substantive provisions of a section of the Internal Revenue Code.[33]

Gleaning Congress's supposed intent from the Blue Book and the statute's legislative history, the court held that § 865(j)(1) required the taxpayer's loss be deemed U.S. source, consistent with the taxpayer's residence.[34] Though the delegation did not state that the Secretary must adopt a *residence*-based source rule, the court nonetheless used phantom regulations to find for the taxpayer. Perhaps because of the statute's ambiguity on this

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30. *Id.*

31. *Id.* (referring to the Blue Book under its more formal name, "The General Explanation of the Tax Reform Act of 1986").

32. *Id.* at 588 (internal citation omitted).

33. *Id.* at 587.

34. *Id.* at 589.

point, the court warned that it was not establishing a broad rule, and that the residence-based sourcing approach used in *Multifoods* would not always be appropriate:

> We emphasize the narrow scope of our decision herein. Our opinion does not hold that sec. 865 requires that losses realized on the disposition of noninventory personal property must always be sourced at the residence of the seller. To the contrary, we recognize, and the [Blue Book] confirms, that exceptions to the general rule of residence-based sourcing may be appropriate to prevent abuse.[35]

2. The IRS's Approach: I.R.S. Technical Advice Memorandum 2004-47-037[36]

Although the IRS has argued on some occasions that a spurned delegation is self-executing, and on other occasions argued that it is not,[37] a recent Technical Advice Memorandum ("T.A.M.") perhaps best reflects the IRS's current approach.[38] In T.A.M. 2004-47-037, the IRS considered whether a reference to regulations in § 384(c)(3) had any effect in the absence of action by the Secretary.[39] Section 384(c)(3) defines the term "preacquisition loss" for purposes of § 384's loss limitations. The flush language to § 384(c)(3)(A) provides, "Except as provided in regulations, the net operating loss shall [for purposes of calculating preacquisition losses] be *allocated ratably* to each day in the year."[40] Despite the lack of regulations, the taxpayer argued that a method other than "ratable allocation" could be used to allocate the taxpayer's net operating loss ("NOL").[41]

The IRS rejected the taxpayer's argument.[42] After

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35. *Int'l Multifoods*, 108 T.C. at 589 n.7.

36. I.R.S. Tech. Adv. Mem. 2004-47-037 (Nov. 19, 2004), *available at* 2004 WL 2636492.

37. *See supra* text accompanying notes 10-11.

38. Prior guidance had adopted other approaches to spurned delegations. *See, e.g.*, I.R.S. Tech. Adv. Mem. 97-14-002 (Dec. 6, 1996) (applying "whether versus how" test), *available at* 1997 WL 155993; I.R.S. Tech. Adv. Mem. 94-44-001 (July 6, 1994), *available at* 1994 WL 602219; *see also* discussion *infra* Part II.C.

39. I.R.S. Tech. Adv. Mem. 2004-47-037.

40. I.R.C. § 384(c)(3)(A) (2000) (emphasis added).

41. I.R.S. Tech. Adv. Mem. 2004-47-037.

42. *Id.* Curiously, the Service acknowledged it had "issued [Private Letter Rulings] in which it permitted taxpayers to use the 'closing of the books' method for purposes of allocating losses under § 384." *Id.* (citing I.R.S. Priv. Ltr. Rul. 2002-38-017 (June 11,

examining the statute's legislative history, the IRS concluded that the statute was not self-executing:

> It is the position of the IRS that a statute is not self-executing with respect to a reference to regulations unless the statute itself or the legislative history gives some specific guidance as to what the content of the regulations should be. Where such guidance is missing, the statute is not self-executing. Similarly, in a case such as the one at hand, where the statute not only specifically prescribes a method of allocation but also states that regulations can provide for a different method, but where neither the statute nor the legislative history provide any guidance as to what that other method might be, the statute is not self-executing with respect to regulations concerning such other method. In this case, [the] statute provides for ratable allocation, except as provided in regulations, and is silent as to what the regulations might provide. The legislative history for § 384 is silent on this issue.[43]

The IRS did not believe itself constrained by the plain language of the statute, which states that ratable allocation of NOLs is required "[e]xcept as provided in regulations."[44] Rather, the IRS concluded that the legislative history should be examined whenever a statute references regulations, and that if the legislative history is sufficiently enlightening, a statutory delegation may be self-executing even in the absence of regulations.

The IRS went on to state that exceptions to the ratable allocation method could be provided not only via the issuance of regulations, but also through informal agency guidance (such as Revenue Procedures or Announcements).[45] Again, the IRS did not accord the statutory phrase "except as provided in

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2002); I.R.S. Priv. Ltr. Rul. 97-34-028 (May 22, 1997); I.R.S. Priv. Ltr. Rul. 97-34-029 (May 22, 1997); I.R.S. Priv. Ltr. Rul. 97-34-030 (May 22, 1997); I.R.S. Priv. Ltr. Rul. 96-44-004 (Aug. 6, 1996); I.R.S. Priv. Ltr. Rul. 93-06-013 (Nov. 13, 1992); I.R.S. Priv. Ltr. Rul. 90-27-008 (Mar. 30, 1990)).

43. I.R.S. Tech. Adv. Mem. 2004-47-037.

44. *See* I.R.C. § 384(c)(3)(A).

45. I.R.S. Tech. Adv. Mem. 2004-47-037 ("Because the statute is not self-executing, and because the IRS has not issued regulations, a revenue ruling, a revenue procedure, a notice, or an announcement providing for an election under § 384 and establishing due date for such an election, we conclude that no such regulatory election exists.").

regulations" its plain meaning, and instead concluded that it could provide guidance in any form it chose so long as the guidance was consistent with the statute's legislative history.[46]

B. *The "Equity" Approach*

The Tax Court has frequently found mandatory, taxpayer-friendly delegations self-executing, concluding that treating such delegations otherwise would inequitably deprive taxpayers of legislatively intended benefits.[47] In this line of cases, the Tax Court has not examined the language of the delegation (other than to note that it is phrased in mandatory terms), but has instead concluded that forcing the taxpayer to wait for the issuance of regulations would be inequitable. For example, in *Occidental Petroleum Corp. v. Commissioner*, the delegation at issue commanded the Secretary to promulgate a "tax benefit rule" for purposes of the alternative minimum tax.[48] The taxpayer argued the delegation was self-executing, even in the absence of regulations, and that the "tax benefit rule" contemplated by the statute should operate to reduce the taxpayer's income tax liability.[49] The Tax Court agreed:

> [T]he failure to promulgate the required regulations can hardly render [the delegation] inoperative. We must therefore do the best we can with these new provisions. Certainly we cannot

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46. The IRS has used this informal approach in previous guidance. *See, e.g.*, I.R.S. Notice 2001-64, 2001-2 C.B. 316 (stating that determinations made under § 707(a)(2)(B) in the absence of regulations should be based on the statute and its legislative history). The IRS's approach is arguably narrower than the Tax Court's approach in *Int'l Multifoods Corp. v. Comm'r*, 108 T.C. 579 (1997). In *Multifoods*, the Tax Court extracted broad principles from the statute's legislative history, and then did its best to apply those principles to the taxpayer's situation. *Id.* The IRS's approach, contrarily, seems to require concrete indications of the likely contents of the Treasury's regulations, and not merely general principles. The Tax Court's approach is quite favorable to taxpayers seeking benefits pursuant to a spurned delegation, but the circuits may be inclined to take a narrower view. *Compare* Hillman v. Comm'r, 114 T.C. 103, 109-12 (2000) (employing phantom regulations based on a broad reading of a statutory delegation's legislative history), *with* Hillman v. Comm'r, 263 F.3d 338, 343 (4th Cir. 2001) (reversing the Tax Court and refusing to invoke phantom regulations in the absence of concrete statements in the legislative history). However, guidance in a statute's legislative history is not necessarily a pre-requisite to the enforcement of a spurned delegation. *See, e.g.*, Estate of Hoover v. Comm'r, 102 T.C. 777, 784 (1994), *rev'd*, 69 F.3d 1044 (10th Cir. 1995) (applying phantom regulations despite the lack of legislative history); I.R.S. Field Serv. Adv. Mem. (Feb. 2, 1994), *available at* 1994 WL 1866354.

47. *See* Occidental Petroleum Corp. v. Comm'r, 82 T.C. 819 (1984); *Hillman*, 114 T.C. 103.

48. *Occidental Petroleum*, 82 T.C. at 826.

49. *Id.* at 822.

> ignore them.
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> Congress could hardly have intended to give the Treasury the power to defeat the legislatively contemplated operative effect of such provisions merely by failing to discharge the statutorily imposed duty to promulgate the required regulations. As already indicated, we must give effect to these provisions in the absence of regulations . . . .[50]

Similarly, the Tax Court in *Hillman v. Commissioner* allowed the taxpayer to benefit from phantom regulations, although its decision was later reversed by the Fourth Circuit. The Tax Court stated:

> [The IRS]'s position that congressionally intended benefits can be withheld simply by the refusal of the Secretary to issue regulations is peculiarly Draconian . . . "we must do the best we can with the statutory provision . . . now before us in the absence of pertinent regulations, since, in our view, the Secretary cannot deprive a taxpayer of rights which the Congress plainly intended to confer simply by failing to promulgate the required regulations."[51]

Where a statute clearly requires the Secretary to issue regulations conferring a benefit to taxpayers, the Tax Court tends to treat the statute as self-executing.[52] However, the Tax Court has also indicated that "discretionary" taxpayer-friendly delegations should not be given effect in the absence of

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50. *Id.* at 829. The delegation at issue, regarding the "tax benefit rule," provided: "The Secretary shall prescribe regulations under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer's tax under this subtitle for any taxable years." *Id.* at 823 (quoting I.R.C. § 58(h) (1954)).

51. *Hillman*, 114 T.C. at 113 (quoting Estate of Maddox v. Comm'r, 93 T.C. 228, 234, (1989)), *rev'd*, 263 F.3d 338 (4th Cir. 2001).

52. *See, e.g.*, Francisco v. Comm'r, 119 T.C. 317, *aff'd*, 370 F.3d 1228 (D.C. Cir. 2004). In *Francisco*, the Tax Court, in a reviewed opinion, gave effect to a taxpayer-friendly statutory delegation. *Id.* Although both parties agreed that the delegation was self-executing, the Tax Court did not shy away from acknowledging that taxpayer-friendly delegations generally should be deemed self-executing. *Id.* at 324 ("We have frequently held that the Secretary may not prevent implementation of a tax benefit provision simply by failing to issue regulations."). Judge Foley provided a vigorous dissent. The D.C. Circuit affirmed, although the court noted that because neither party argued that the delegation was not self-executing, it had no occasion to pass on that issue as raised in Jude Foley's dissent. *Francisco*, 370 F.3d at 1230 n.1.

regulations, although the case law on this issue is limited.[53]

C. *"Whether Versus How" Test*

As discussed below, the Tax Court has frequently distinguished between delegations that it believes deal with "whether" a tax result should occur and those that deal only with "how" that result shall occur. Under this approach, the Tax Court will not deem a statute self-executing where the regulations themselves would determine whether or not a particular rule will apply. Conversely, where the Tax Court concludes that Congress has merely recognized that regulations may be needed to fill in some of the details of a statute, the statute will be deemed self-executing. As the following discussion shows, it is not entirely clear how the Tax Court determines which characterization is appropriate for any given delegation.

1. *H Enterprises v. Commissioner*[54]

Although the Tax Court did not explicitly discuss the "whether versus how" test in *H Enterprises*, that case laid the foundation for the later development of the doctrine, and it thus warrants comment here. The relevant facts in *H Enterprises* were as follows: H Enterprises, Inc., was a Delaware corporation and the parent of a consolidated group.[55] H Enterprises owned a controlling share of Waldorf Corp. stock.[56] Waldorf borrowed $175 million from a third party, GECC, granting GECC "a security interest in substantially all of its corporate assets."[57] Soon thereafter, Waldorf distributed approximately $123 million to H Enterprises.[58] H Enterprises used a portion of those proceeds to purchase portfolio stock and later received dividends on that stock.[59]

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53. *See, e.g.*, Alexander v. Comm'r, 95 T.C. 467, 473 (1990), *aff'd without published opinion sub nom.* Stell v. Comm'r, 999 F.2d 544 (9th Cir. 1993) (consistent with the IRS's position, refusing to treat a delegation as self-executing where the statute provided that the taxpayer-friendly rule would "apply only to the extent provided in regulations prescribed by the Secretary."). The court held the delegation left the implementation of the rule entirely to the Secretary's discretion, and thus should not be deemed self-executing. *Id.* at 473-74.

54. 105 T.C. 71 (1995), *aff'd*, 183 F.3d 907 (8th Cir. 1999).

55. *Id.* at 72-73.

56. *Id.* at 74.

57. *Id.*

58. *Id.* at 75.

59. *Id.* at 76. H Enterprises also purchased tax-exempt securities with the funds

Although the Code usually allows corporations to take a deduction for dividends received,[59] § 246A reduces the deduction to the extent the dividends are attributable to *debt-financed* portfolio stock.[61] The Commissioner argued that the stock purchased by H Enterprises was in fact "debt-financed."[62] H Enterprises countered that the funds used to finance the stock purchase were attributable to *Waldorf's* borrowing, and § 246A was thus inapplicable; because H Enterprises itself did no borrowing, its purchase of stock could not possibly be deemed "debt-financed."[63]

To support its position, H Enterprises argued that two statutory delegations indicated that regulations were required to apply § 246A(a) to related-party transactions.[64] Section 7701(f)(1) provided, in relevant part: "Use of related persons or pass-thru entities. The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with the linking of borrowing to investment . . . through the use of related persons."[65] Section 246A(f) provided a related delegation: "The regulations prescribed for purposes of this section under section 7701(f) shall include regulations providing for the disallowance of interest deductions or other appropriate treatment (in lieu of reducing the dividend received deduction) where the obligor of the indebtedness is a person other than the person receiving the dividend."[66] H Enterprises contended that, because the statutory delegations ordered the Secretary to issue regulations providing "other appropriate treatment" where a person other than the corporation that purchased the stock did the borrowing, and because no regulations had yet been issued, the IRS could not use § 246A(a) to deny H Enterprises the dividends received deduction.[67] As the Tax Court explained, the Commissioner disagreed:

> It is [the Commissioner's] position that since there

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received from Waldorf. *Id.* The purchase of those securities posed issues similar to those posed by H Enterprises' purchase of the portfolio stock. *Id.* For simplicity's sake, the discussion of those parallel issues is omitted here.

60. I.R.C. § 243 (2000).
61. *Id.* § 246A.
62. *H Enters.*, 105 T.C. at 78.
63. *Id.* at 73.
64. *Id.* at 78.
65. I.R.C. § 7701(f) (2000).
66. *Id.* § 246A(f).
67. *H Enters.*, 105 T.C. at 78.

> is no requirement in . . . section 246A . . . that the borrowings be by the same entity in an affiliated group that purchases the portfolio stock . . . there is no prohibition to the statute's applying when one entity of the group borrows the funds and another entity purchases the stock or securities.[68]

The Commissioner argued that the regulations presupposed by the statutory delegation would not *alter* the application of § 246A(a).[69] Rather, the regulations would serve only to clarify the application of that section.[70] The Tax Court found for the Commissioner, noting:

> [I]t is clear that [§ 7701(f)] does not state or imply that where one member of an affiliated group of corporations borrows money and another member of that group has that money transferred to it and uses the funds to purchase portfolio stock and tax-exempt securities, the provisions of section[ ] 246A [applies] only to the extent prescribed by regulations. We, therefore, conclude that the fact that regulations have not been issued under sections 246A(f) and 7701(f) does not resolve the issue in this case of whether the borrowing by one member of an affiliated group and the purchase of the portfolio stock and tax-exempt securities by another comes within the [statutory] provisions . . . ."[71]

The Tax Court thus viewed the § 7701(f) and § 246A(f) delegations as dealing only with "how" § 246A(a) might apply, as opposed to dealing with "whether" related-party transactions were covered by that section.[72] It is against this backdrop that the court later articulated its "whether versus how" test.[73]

2. *Estate of Neumann v. Commissioner*[74]

In *Neumann*, the Tax Court formalized its "whether versus

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68. *Id.*
69. *See id.*
70. *See id.*
71. *Id.* at 84 (footnote omitted).
72. *See id.*
73. *See* discussion *infra* Part II.C.2.
74. 106 T.C. 216 (1996).

how" test.[75] After examining *H Enterprises* and related cases, the court concluded: "[T]he teaching of the decided cases is that issuance of regulations is to be considered a precondition to the imposition of a tax where the applicable provision directing the issuance of such regulations reflects a "whether" characterization, . . . and not where the provision simply reflects a "how" characterization."[76]

In *Neumann*, the taxpayer's estate wished to avoid application of the Generation Skipping Transfer tax ("the GST tax"), which complements other wealth transfer taxes imposed by the Code.[77] Because the decedent was a nonresident alien, her estate's representative argued that the transfer of U.S.-situs property to her grandchildren should not be subject to the GST tax.[78] However, § 2663(2) grants the Secretary authority to prescribe various regulations for purposes of the GST tax, including "regulations . . . providing for the application of [the GST tax] in the case of transferors who are nonresidents not citizens of the United States."[79]

The estate's representative argued that § 2663(2) could not apply in the absence of regulations, but the Commissioner countered that § 2663(2) imposed the GST tax on the transfer of the property.[80] The court found for the Commissioner, holding that § 2663(2) merely reflected "how" the GST tax should apply, and that a nonresident was subject to the tax even in the absence of regulations:

> Under these circumstances . . . we hold that the regulations contemplated under section 2663(2) reflect a "how" characterization and their issuance is not a necessary precondition to the imposition of the GST tax on the transfers involved herein. In enacting section 2663(2), Congress simply recognized that there would be problems of allocation and calculations of tax in respect of nonresident aliens because, unlike citizens and residents, not all the property of nonresident aliens is subject to U.S. estate tax.[81]

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75. *Id.* at 219.
76. *Id.* at 221.
77. *Id.* at 218-19.
78. *Id.*
79. I.R.C. § 2663(2) (West 2006).
80. *Neumann*, 106 T.C. at 218-19.
81. *Id.* at 221.

In so ruling, the Tax Court did not heed the actual language of the delegating statute, which directed the promulgation of regulations "providing for the application" of the GST tax.[82] Rather, the opinion suggests that § 2663(2) *itself* imposed the tax on nonresident aliens, and that regulations were needed only to deal with ancillary issues.[83]

The "whether versus how" test articulated in *Neumann* differs from the Tax Court's holding in *H Enterprises*. *H Enterprises* involved a statutory scheme where subsection A provides a rule and subsection B delegates authority to the Secretary to promulgate regulations defining the details of section A's operation.[84] In *Neumann*, the court concluded that a single subsection provided both a self-executing rule *and* a delegation to the Secretary to prescribe clarifying regulations.[85] Whereas the *H Enterprises'* formulation of the test is premised on (at least) two separate sections of a statute,[86] the *Neumann* approach focuses solely on the subsection delegating authority to the Secretary and decides if that delegation determines "whether" or merely "how" the statute shall operate.

Subsequent applications of the "whether versus how" test have followed the *Neumann* articulation.[87] However, in the Tax Court's most recent opinion dealing with a spurned delegation, *Francisco v. Commissioner*, the test received no mention.[88] Nonetheless, the test may remain viable with respect to taxpayer-unfriendly delegations, like the one involved in *Neumann*, since *Francisco* involved a taxpayer-friendly delegation.[89]

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82. *See* I.R.C. § 2663(2).

83. The court's holding would make much more sense if the court cited another statute in Chapter 13 that imposed the GST tax on the transfer. If the court concluded, for example, that § 2601 imposed the tax on the transfer and that § 2663(2) related only to "how" that tax would be implemented, such a result would be consistent with *H Enterprises*.

84. H Enters. v. Comm'r, 105 T.C. 71, 78 (1995), *aff'd*, 183 F.3d 907 (8th Cir. 1999).

85. *Neumann*, 106 T.C. at 221.

86. Or, at the very least, two independent clauses in a statutory section are required.

87. *See, e.g.*, Hillman v. Comm'r., 114 T.C. 103, 113 (2000) ("The command provision of section 469(l) contemplates regulations that reflect a 'how' characterization and does not contain the type of 'only to the extent' language that is found in statutes that are not self-executing.").

88. *See* Francisco v. Comm'r, 119 T.C. 317, *aff'd*, 370 F.3d 1228 (D.C. Cir. 2004).

89. For a further discussion of the factors that the Tax Court may consider in determining if a statute reflects a "whether" or "how" characterization, see Gall, *supra* note 8, at 430-41.

III. CRITICISMS OF CURRENT APPROACHES TO SPURNED TAX DELEGATIONS

As discussed in Part II, courts have paid little attention to the manner in which Congress delegates to the Secretary the duty to issue regulations. Rather, courts simply acknowledge that Congress has referenced "regulations," and then proceed to examine the substance of the delegation. Under that approach, the language authorizing regulations is treated as mere surplusage to the delegation's substantive provisions. The lower courts have ignored the otherwise well-settled principle that Congress, by delegating rulemaking authority to the Secretary, has entrusted him specifically to administer the statutory scheme.[90]

This Part argues that the courts and the IRS have likely underestimated the degree to which the use of "phantom" regulations subverts Congress's desire to implement its policy objectives through the use of regulations developed pursuant to the notice-and-comment procedures in the Administrative Procedure Act ("APA"). This Part also argues that numerous statutory and judicial authorities indicate that language in a statute referencing regulations should not be deemed mere surplusage.

A. *Phantom Regulations Are an Inappropriate Substitute for Regulations Issued Pursuant to 5 U.S.C. § 553*

Section 553 of the APA governs informal rulemaking[91] by federal agencies, including the Department of Treasury,[92] and imposes certain procedural requirements on the agency issuing rules.[93] The agency, first and foremost, must notify the public of its decision to engage in rulemaking.[94] Further, the agency

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90. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

91. *See* 5 U.S.C. § 553(c) (2000). "Informal" rulemaking in the context of the APA refers to rules issued pursuant to the notice-and-comment process. "Formal" rulemaking refers to rules developed pursuant to the trial-type procedures provided by 5 U.S.C. §§ 556-557. This paper makes numerous references to "informal" IRS guidance. These references use the term in its colloquial sense and indicate agency guidance promulgated in the form of Revenue Rulings, Notices, Announcements, etc.

92. Section 551 of the APA generally defines "agency" to include any authority of the United States government, which of course includes the Department of Treasury. 5 U.S.C. § 551(1).

93. *Id.* § 553.

94. *Id.* § 553(b).

issuing the rules must allow the public to comment on the substance of the proposed rules, and, upon consideration of such comments, must "incorporate in the rules adopted a concise general statement of their basis and purpose."[95] Such requirements add considerable legitimacy to these rules, and rules promulgated in this fashion are superior to those made through ad hoc agency action:

> The public benefits of pre-adoption public participation are well recognized. Public input provides valuable information to rulemaking agencies at low cost to the agencies. Rules adopted with public participation are likely to be more effective and less costly to administer than rules written without such participation. They contain fewer mistakes. They are more likely to deal with unexpected and unique applications or exceptional situations, and are more politically acceptable to the persons who must live with them.[96]

There is no shortage of literature detailing the wide benefits of the notice-and-comment process.[97] These benefits often lead an agency to issue rules through this process, even when it does not believe it is required by law to do so. Indeed, although the Treasury contends that regulations promulgated pursuant to the agency's *general* grant of rulemaking authority need not comply with § 553, it nonetheless subjects those regulations to the notice-and-comment process.[98]

Judicially-decreed phantom regulations, of course, do not comply with any of the requirements of § 553, and they consequently offer none of the benefits typically associated with notice-and-comment rulemaking. When courts invoke phantom

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95. *Id.* § 553(c).

96. Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 707-08 (1999) (footnote omitted).

97. *See id.* at 708; *see also* Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 59-60 (1995).

98. *See* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1544-45 (2006) (quoting I.R.C. § 7805(a) (2000)) (noting that "Treasury rarely admits to the applicability of the APA's notice and comment requirements" with respect to regulations issued under § 7805, but subjects those regulations to notice and comment regardless). The preamble to a regulation issued pursuant to § 7805 often includes a statement that the Treasury has "determined that section 553(b) of the Administrative Procedure Act does not apply to these regulations." *See, e.g.*, T.D. 8799, 1999-1 C.B. 438, 440. The statutes discussed in this paper are "specific authority" delegations, however, which Treasury acknowledges must comply with APA § 553.

regulations, the public is not notified of the proposed rule, nor is the public able to meaningfully comment on the substance of the proposed rules. Additionally, while § 553 ensures that interested persons are given the right to petition for the amendment or repeal of a rule, taxpayers not involved in the actual litigation have no opportunity to seek reconsideration of the court's phantom regulations. Similarly, when the IRS provides that a statute's legislative history should serve the function of regulations until actual regulations are issued, the public has no opportunity to participate in this "interim" rulemaking process.

Except in limited circumstances, use of the notice-and-comment process is required whenever an agency wishes to engage in rulemaking.[99] Indeed, "when substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced."[100]

The circuit courts have insisted on strict compliance with APA requirements, recognizing the important public policies at stake.[101] For example, in *Wagner Electric Corp. v. Volpe*, the Third Circuit examined a National Highway Traffic Safety Administration order regulating the performance of turn signal

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99. The limited exceptions to the § 553 notice-and-comment requirements are provided in § 553(b)(3)(A)-(B). Subparagraph (A) exempts interpretive rules, general statements of policy, and rules of agency organization from the requirements of § 553. 5 U.S.C. § 553(b)(3)(A) (2000). Under subparagraph (B), "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest," it may forego the otherwise required notice-and-comment procedures. *Id.* § 553(b)(3). The delegations at issue in this paper are specific authority delegations, which all agree give rise to "legislative" rules and thus do not qualify for the "interpretive" exception. *See* Lomont v. O'Neill, 285 F.3d 9, 16 (D.C. Cir. 2002) ("[T]ax authorities almost uniformly assume that regulations adopted pursuant to the Treasury's general rulemaking power in section 7805(a) of the Code are interpretive and that rules adopted pursuant to specific grants of rulemaking authority are legislative.") (quoting Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 357 (1991)). Also, courts have narrowly interpreted the "good cause" exception of § 553, requiring agencies to demonstrate "exigent circumstances" to justify noncompliance with the section. *See, e.g.*, Chamber of Commerce of the United States v. SEC, 443 F.3d 890, 908 (D.C. Cir. 2006) (holding that the risk of delaying a rulemaking associated with a change in the SEC's membership was not a sufficiently exigent circumstance to fit within the exception). Thus, the exceptions found in § 553(b)(3)(A)-(B) will generally be unavailable to the Secretary, although the Treasury occasionally invokes the "good cause" exception when it promulgates temporary regulations. *See also infra* notes 112-113.

100. W. Oil & Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980).

101. *See, e.g.*, Wagner Elect. Corp. v. Volpe, 466 F.2d 1013, 1019-20 (3rd Cir. 1972) (holding notice of proposed rulemaking inadequate and noting the curious lack of comment from certain affected groups likely resulted from failure to give adequate notice); *see also W. Oil & Gas*, 633 F.2d at 810-12.

and hazard warning flashers.[102] Although the agency properly announced that it was engaging in rulemaking and solicited comments from the public, the final rule adopted by the agency differed materially from the rule it originally proposed.[103] The court held that the public did not receive adequate notice of rulemaking, as required by § 553(b), and set aside the order.[104] Similarly, the Ninth Circuit in *Western Oil & Gas Ass'n v. EPA* held that the EPA failed to meet § 553(b) procedural requirements when it sought comments from the public only *after* the promulgation of a rule.[105] Though the EPA faced strict statutory deadlines for promulgating the disputed rules, the court held that pressing deadlines did not constitute "good cause" for failing to comply with the requirements of § 553.[106] The Supreme Court has similarly ruled that "regulations subject to the APA cannot be afforded the 'force and effect of law' if not promulgated pursuant to the statutory procedural minimum found in that Act."[107]

As noted above, phantom regulations comply with none of the APA's notice-and-comment requirements. Yet they are frequently given the force and effect of law by the lower courts and the IRS. Given that a regulation may be denied the effect of law if an agency fails to comply with even *one* of the requirements of § 553, it is hard to see how phantom regulations can carry the force of law in light of their *complete* noncompliance. If the agency to which the rulemaking authority was delegated cannot enforce a statutory provision without following the notice-and-comment requirements of § 553, a court should not step into the Secretary's shoes and skirt the

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102. *Wagner Elect.*, 466 F.2d at 1014.

103. *Id.* at 1016-19.

104. *Id.* at 1020-21.

105. *W. Oil & Gas*, 633 F.2d at 810-11.

106. *Id.* at 812 ("We cannot accept the view that the EPA's action as a whole can be justified under *either* of the good cause exceptions. . . . The EPA has argued before this Court for a blanket exemption for agencies operating under pressure of statutory deadlines. Such an interpretation of 'good cause' would amount to judicial legislation.").

107. Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) (citing Morton v. Ruiz, 415 U.S. 199 (1974)); *see* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 758 (1972)); *see also* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 101 (1995) (O'Connor, J., dissenting) (acknowledging that legislative regulations issued pursuant to a statutory delegation must comply with § 553(b) notice and comment procedures); Joseph v. U.S. Civil Serv. Comm'n, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977) (citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 763-66 (1969)) ("When an agency seeks to exercise . . . legislative rulemaking authority it must follow the notice and comment procedures of [§ 553] of the Administrative Procedure Act. The Commission's failure to comply with those requirements when it promulgated the exemption regulation at issue in this case renders that regulation invalid.") (footnotes omitted).

procedures that the Secretary himself could not bypass.

Statutory delegations require not only that action be taken by the Secretary (as opposed to the courts), but also that the Secretary act by providing guidance in the form of *regulations.*[108] Where the Secretary or the IRS proposes to discharge the statutory mandate by issuing informal guidance instead of regulations, agency expertise is compromised—regulation projects receive much more attention within the agency than do informal notices and announcements.[109] Further, when Congress instructs the Secretary to issue *regulations*, the statute plainly requires that the implementing rules be subject to the APA's procedural requirements.[110] When Congress decides that rules do not need to be developed through the notice-and-comment process, it will provide language in the statute allowing the Secretary to prescribe rules informally. For example, § 409(p)(7)(B) of the Code provides: "The Secretary may, by regulation or *other guidance of general applicability*, provide that a nonallocation year occurs in any case in which the principal purpose of the ownership structure of an S corporation constitutes an avoidance or evasion of this subsection."[111] Where the delegating statute states that the Secretary shall prescribe regulations, but does not allow for the prescription of "other guidance," the Secretary *must* observe APA procedural requirements.[112] Absent statutory authority, the Secretary has

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108. References to "regulations" in Subtitle A of the Code are commonly understood to trigger the procedural notice-and-comment requirements of § 553. *See infra* note 112. The word "regulation," by itself, might not necessarily require an agency to prescribe rules through the notice-and-comment process. For example, various statutes in Subtitle F of the Code instruct the Secretary to issue "regulations" pertaining to agency organization, and the Secretary can fulfill the statutory mandate without observing the notice-and-comment process. *See* discussion *supra* note 99 (noting the limited exceptions of § 553). Although some statutory contexts use "rules" and "regulations" interchangeably, this probably is not true of the Internal Revenue Code—the Treasury does attach some significance to the word "regulations." *See* 26 C.F.R. § 601.601(a)(1) (2006) ("Internal revenue rules take various forms. The most important rules are issued as regulations and Treasury decisions prescribed by the Commissioner and approved by the Secretary or his delegate."). Thus, the statutory term "regulation," when found in Subtitle A of the Code, will almost always indicate that the Secretary must proceed by notice-and-comment rulemaking, although the analytical underpinning of this conclusion is not totally clear. *See also infra* note 112.

109. *See* Sheryl Stratton, *How Regulations Are Made: A Look at the Reg Writing Process*, 97 TAX NOTES TODAY 23-7 (Feb. 4, 1997) *available at* LEXIS, 97 TNT 23-7; *see also* 26 C.F.R. § 601.601 (2006) (detailing the Treasury's internal procedures relating to the development of regulations); MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[2] (Warren, Gorham & Lamont, Inc. 2d ed. 1991).

110. *See, e.g.*, I.R.C. § 409(p)(7)(B) (Supp. 2003).

111. *Id.* (emphasis added).

112. The Internal Revenue Code contains several references to the prescription of "other guidance," though that phrase is uncommon in other titles of the U.S. Code. *See,*

no basis for discharging the statutory mandate by issuing informal guidance in the place of regulations.[113]

The current approach to spurned delegations ignores Congress's clearly announced desire for *regulations*, and is difficult to reconcile with Supreme Court holdings concerning principles of administrative law. Though the use of phantom regulations produces rules quickly, that does not justify judicial usurpation of the agency's role. Congress obviously understands that notice-and-comment rulemaking will take time,[114] and in such circumstances it cannot possibly intend that a statute with an express delegation of rulemaking authority will have immediate effect. A court has no basis for using principles of

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e.g., I.R.C. § 35(g)(9) (West 2006); I.R.C. § 165(i)(4) (West 2006); I.R.C. § 170(f)(12)(F) (West 2006); I.R.C. § 911(c)(2)(B) (2000); I.R.C. § 1092(a)(2)(C) (West 2006). Whenever a delegation does not call for the issuance of *regulations*, the Secretary can probably exercise his authority without observing § 553 notice-and-comment requirements. However, one can plausibly argue that a reference to "other guidance" (as opposed to "regulations") does not absolve the Secretary of his duty to employ notice-and-comment rulemaking procedures. *See, e.g.*, Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993) (adopting a "legal effect" test for determining whether notice-and-comment procedures must be observed, without attaching any importance to the specific words used in the delegation). Section 553 of the APA not only mandates provision of "regulations," but also reaches agency rulemaking generally. Nonetheless, at least in Subtitle A of the Code, it appears Congress anticipated that only references to "regulations" trigger § 553's notice-and-comment requirements. *See* SALTZMAN, *supra* note 109, ¶ 3.02[1]. On at least one occasion, Congress has responded to concerns that a statute would not be effective until the issuance of "regulations" by amending the statute to allow for the prescription of "other guidance." *See infra* notes 211 and 213. Such an amendment would be superfluous if "regulations" and "other guidance" both triggered § 553's procedural requirements. *See also supra* note 109; *infra* note 113.

113. *See* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation."). Note, however, that an agency can avoid the § 553 notice-and-comment requirements whenever Congress expressly provides that § 553 is inapplicable. 5 U.S.C. § 559 (2000); *see, e.g.*, Asiana Airlines v. FAA, 134 F.3d 393, 398 (D.C. Cir. 1998) ("In this statutory scheme, Congress specified procedures under § 45301(b)(2) that cannot be reconciled with the notice and comment requirements of § 553. . . . Were we to hold that the FAA had to issue a proposed rule and allow meaningful opportunity to comment before issuing the [Interim Final Rule], the resulting process would be so nearly indistinguishable from normal notice and comment as to deprive this special procedural provision of any effect, and to thwart the apparent intent of Congress in enacting the special procedure."); *see also* Air Transp. Ass'n of Can. v. FAA, 254 F.3d 271, 277 (D.C. Cir. 2001), *vacated*, 276 F.3d 599 (D.C. Cir. 2001) (holding that because the *Asiana Airlines* decision reinstated prior rules, the FAA was "entitled to . . . [use] an interim rulemaking without notice and comment"); Asimow, *supra* note 96, at 713 n.40 (describing statutory grants to prescribe rules via the "interim-final" method, rather than pursuant to the standard § 553 notice-and-comment procedures).

114. *See* Williams v. Nat'l Sch. of Health Tech., Inc., 836 F. Supp. 273, 280 (E.D. Pa. 1993), *aff'd*, 37 F.3d 1491 (3rd Cir. 1994) ("Some delay between the enactment of legislation and its enforcement is inevitable whenever Congress creates a scheme which calls for the issuance of regulations.").

equity or surmising about Congress's policy goals to justify the use of phantom regulations:

> Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.[115]

B. *Delegating Language Is Not Surplusage*

The current approaches to statutory delegations largely ignore form. Instead, the courts and the IRS primarily examine the substance of the delegations, with little regard to the language Congress used when granting authority to the Secretary to issue regulations. Where a delegation provides, "the Secretary shall prescribe regulations allowing X," the courts and the IRS typically attempt to determine what "X" is—i.e., what it is that the Secretary should allow. That "allowing X" is prefaced by a command to the Secretary is deemed inconsequential; rather, the reviewing court glides past this command by emphasizing that it cannot ignore the substantive goal that Congress desired to accomplish in the statute.[116] The Seventh Circuit in *Pittway Corp. v. United States* observed the contradiction inherent in this approach:

> [T]he statute refers to regulations that do not exist. While encouraging us to apply the "plain meaning" rule to the part of the statute imposing a tax on any taxable chemical, the government does not likewise insist that we read the first six words of [the delegation] literally: "Under regulations prescribed by the Secretary . . . ."[117]

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115. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 (1981).

116. *See, e.g.*, Occidental Petroleum Corp. v. Comm'r, 82 T.C. 819, 829 (1984).

117. 102 F.3d 932, 936 (7th Cir. 1996). The court nonetheless accepted the government's argument, but acknowledged that if the substance of a delegation were more ambiguous, the IRS might not be able to enforce it. *Id.* ("In a statute less clear on its face, failure to promulgate regulations as Congress orders could result in a provision not enforceable due to the Secretary's failure."). The Seventh Circuit relies on the plain language of the statute, *sans* the delegating language. If the statutory reference to regulations is removed, and the remainder of the statute provides a clear rule, the Seventh Circuit will probably treat the statute as self-executing. *See id.* This approach is misguided, however. If Congress views the issuance of regulations as a ministerial task,

Failing to accord the delegating language its plain meaning violates principles central to statutory interpretation. "The plain meaning of legislation should be conclusive,"[118] and the Supreme Court has repeatedly stated that it is a court's duty to give effect, if possible, to every clause and word of a statute.[119] Absent unusual circumstances, treating words in a statute as superfluous is tantamount to ignoring Congress's command. A careful review of the various delegations found in the Internal Revenue Code demonstrates that the delegating language is indeed paramount in determining whether a statute is self-executing.

The current approach to spurned delegations ignores subtle (but significant) differences in the form of the delegations. These differences should be examined closely, because such differences in phrasing are considered intentional. Rather than simply acknowledge that the statute "refers to regulations," a reviewing court should recognize that a delegation can be framed in such a way that Congress's rule is immediately effective. For example, § 280G(d)(5) of the Code provides: "*Except as otherwise provided in regulations*, all members of the same affiliated group . . . shall be treated as [one] corporation for purposes of this section."[120] In that statute, Congress provided an immediately effective definition, subject to change by the Secretary. The plain language of § 280G(d)(5) requires that all members of the same affiliated group to be treated as a single corporation, unless

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it will not condition the operation of the statute on the issuance of regulations. The Seventh Circuit should recognize that when "interpreting a statute a court should always turn first to one, cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Seventh Circuit's approach presumes that the statute's delegating language was inserted by accident. That presumption cannot be reconciled with the Supreme Court's clear instructions.

118. United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

119. Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528, 538-39 (1955)) ("[W]ere we to adopt respondent's construction of the statute, we would render the word 'State' insignificant, if not wholly superfluous."); *see* Williams v. Taylor, 529 U.S. 362, 404, (2000) (describing this rule as a "cardinal principle of statutory construction"); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 698 (1995) (citing Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 837 (1988)) (indicating the Court's "reluctance to treat statutory terms as surplusage" generally); Mkt. Co. v. Hoffman, 101 U.S. 112, 115-16 (1879) (noting the long-recognized rule that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"); *see also* Ratzlaf v. United States, 510 U.S. 135, 140-41 (1994), *superseded by statute on other grounds*, 47 F.3d 1252 (3rd Cir. 1995).

120. I.R.C. § 280G(d)(5) (2000) (emphasis added).

contrary regulations are issued.[121] This statute is undoubtedly "self-executing" in the absence of regulations.

Now, suppose that § 280G(d)(5) were instead drafted in a manner similar to the delegations discussed in Part II. "Modified" § 280G(d)(5) would then read: "*Under regulations prescribed by the Secretary*, all members of the same affiliated group shall be treated as [one] corporation for purposes of this section." "Actual" § 280G(d)(5) plainly differs from modified § 280G(d)(5)—whereas the former sets forth a self-executing rule for purposes of the section, the latter is merely a command to the Secretary to prescribe a rule. Given that the two delegations contain materially different language, they should be given different meanings. Nonetheless, under the approaches discussed in Part I, modified § 280G(d)(5) might be treated as self-executing if, for example, a reviewing court believed that the legislative history provided guidance as to what the anticipated regulations would contain.

Giving two materially distinct delegations the same meaning violates principles central to statutory interpretation. "[A] change in phraseology creates a presumption of a change in intent, and . . . Congress would not have used such different language . . . without thereby intending a change of meaning."[122] The current approaches to spurned delegations do not adequately distinguish between statutes stating that a specified rule is to apply "except to the extent provided in regulations" and statutes stating that "the Secretary shall prescribe regulations" implementing a rule. A reviewing court should recognize that Congress frequently drafts delegations whose form is similar to § 280G(d)(5), and treat those statutes as self-executing.[123] Contrarily, where the form of the statute indicates that regulations are needed before the statute can be given effect, the reviewing court should presume that Congress acted deliberately

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121. I.R.S. Tech. Adv. Mem. 2004-47-037 did not reach this conclusion. *See* discussion *supra* Part II.A.2. In that memorandum, a delegation of similar form was at issue, and the IRS held that it could grant exceptions to the rule in the statute notwithstanding the absence of regulations. I.R.S. Tech. Adv. Mem. 2004-47-037 (Nov. 19, 2004), *available at* 2004 WL 2636492.

122. Crawford v. Burke, 195 U.S. 176, 190 (1904). *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (citing 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th ed. 2000)).

123. Of course, only the substantive portion of § 280G(d)(5) is self-executing. The formative portion ("except to the extent provided in regulations") does not permit exceptions to the "one corporation" rule until such regulations are issued. *See* I.R.C. § 280G(d)(5) (2000).

in imposing this requirement, and it should not delve into the statute's substance as a predicate for crafting phantom regulations.

That Congress acts advisedly when crafting statutes that depend on regulations for their efficacy is clearly illustrated by § 7807(a). That section provides:

> Interim provision for administration of title. *Until regulations are promulgated under any provision of this title which depends for its application upon the promulgation of regulations* (or which is to be applied in such manner as may be prescribed by regulations) all instructions, rules or regulations which are in effect immediately prior to the enactment of this title shall, to the extent such instructions, rules, or regulations could be prescribed as regulations under authority of such provision, be applied as if promulgated as regulations under such provision.[124]

This statute explicitly acknowledges that the application of provisions of the Code may depend upon regulations. Congress would have no reason to adopt "interim" rules if such delegations had immediate effect. The Tax Court's view that statutory delegations become the "law of the land"[125] upon their enactment and "cannot [be] ignore[d]"[126] is plainly inconsistent with § 7807(a)—Congress anticipates that some statutory delegations *do* require regulations to be effective.

Other Code sections contain interim rules, and they provide additional evidence that statutory delegations are not necessarily self-executing. For example, under § 179D(a), taxpayers are allowed a deduction "equal to the cost of energy efficient commercial building property placed into service during the taxable year."[127] The property must be certified as "energy efficient" to be eligible for the deduction.[128] To be deemed "energy efficient," a building's energy systems must meet certain "targets" developed by the Secretary of the Treasury and the Secretary of Energy as commanded by Congress in the statute.[129] Under the "legislative history" approach, the "whether versus

124. *Id.* § 7807(a) (emphasis added).
125. Occidental Petroleum Corp. v. Comm'r, 82 T.C. 819, 829 n.6 (1984).
126. *Id.* at 829.
127. I.R.C. § 179D(a) (West 2006).
128. *Id.* § 179D(c)(1)(D), (d)(6).
129. *Id.* § 179D(d)(1)(B).

how" approach, or the "equity" approach, § 179D(d)(1)(B) might be deemed self-executing. If, for example, the legislative history provided guidance as to the content of the regulations,[130] or if the statute were deemed to relate only to "how" the statute was implemented, or if a long period passed without the issuance of regulations, the reviewing court might treat the statute as self-executing.

In this case, however, Congress made it absolutely clear that § 179D(d)(1)(B) is not self-executing, and that Congress meant exactly what it said—the Secretaries of the relevant agencies must take the time necessary to formulate regulations. Indeed, Congress enacted a separate section of the statute, § 179D(f), to provide limited interim rules:

> Interim rules for lighting systems. Until such time as the Secretary issues final regulations under [179D(d)(1)(B)] with respect to property which is part of a lighting system— (1) In general. The lighting system target under subsection (d)(1)(A)(ii) shall be . . . [remainder of interim rules omitted].[131]

Because Congress can provide statutory interim rules that give immediate effect to the statute pending the development of final regulations, a strong inference arises that a statute should not be deemed self-executing on the basis of a delegation to the Secretary to formulate regulations.

Congress may provide interim rules to give immediate effect to a statute in yet another way. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the federal government provides financial assistance to troubled banks.[132] Section 597 of the Code provides that the income tax consequences of such financial assistance payments "shall be determined under regulations prescribed by the Secretary."[133] Recognizing that this statute could not apply in the absence of regulations, Congress provided an interim rule:

> In the case of any payment pursuant to a transaction on or after May 10, 1989, and before

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130. For example, if the legislative history provided guidance as to the specific "targets" that the energy systems must meet, the "legislative history" approach might deem a taxpayer's commercial building "energy efficient" if the building met those targets, and the taxpayer would consequently be eligible for the § 179D deduction.

131. I.R.C. § 179D(f) (West 2006).

132. Pub. L. No. 101-73, § 101, 103 Stat. 183, 187 (codified in scattered sections of the U.S.C.).

133. I.R.C. § 597(a) (2000).

> the date on which the Secretary of the Treasury (or his delegate) takes action in exercise of his regulatory authority under section 597 of the Internal Revenue Code of 1986 (as amended by subsection (a)(3)), the taxpayer *may rely on the legislative history* for the amendments made by subsection (a)(3) in determining the proper treatment of such payment.[134]

Through this provision, Congress explicitly sanctioned the use of legislative history to determine the proper application of the statute pending exercise of the Secretary's delegated authority.[135] A natural inference of this is that, when Congress does not so provide, the courts and the IRS should *not* adopt a "legislative history" approach to spurned delegations.[136]

Congress does not always take it upon itself to provide interim rules, however. Rather, recognizing the inherent delay between the enactment of a statute calling for regulations and the statute's effectiveness, Congress may empower an *agency* to adopt interim rules. These "[i]nterim-final rules . . . become effective without prior notice and public comment, [but] invite *post*-effective public comment."[137] For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") imposes various requirements on group health plans.[138] As part of the Act, Congress instructed the Secretary of the Treasury to issue rules pertaining to these requirements.[139] That delegation (codified in § 9833 of the Code) provides:

> The Secretary, consistent with section 104 of the

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134. FIRREA § 597(c)(3)(B), 103 Stat. at 550 (emphasis added).

135. The statute probably refers to language found in the committee report describing interim rules for the application of § 597. *See* H.R. REP. NO. 101-209, at 523 (1989) (Conf. Rep.) ("Under the interim rules for taxable asset acquisitions set forth in the legislative history of this provision, financial assistance received by, or paid with respect to, financially troubled financial institutions is generally treated as taxable."). The plain language of the statute permits the use of any legislative history materials, however, and not just the committee report.

136. Indeed, unless Congress (in its statute) specifically refers to legislative history materials, the use of those materials is inappropriate. *See generally* John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529, 1541 (2000).

137. Asimow, *supra* note 96, at 704 (emphasis altered). Although such "interim final" rulemaking procedures conflict with § 553's notice-and-comment requirements, statutes which expressly conflict with § 553 escape the application of that section's application. *See* 5 U.S.C. § 559 (2000); *see also supra* note 113.

138. Pub. L. No. 104-191, 110 Stat 1936 (1996) (codified as amended in scattered sections of the U.S.C.).

139. *See* I.R.C. § 9833 (2000).

> Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out [the group health plan requirements]. The Secretary may *promulgate any interim final rules* as the Secretary determines are appropriate to carry out [the group health plan requirements].[140]

When Congress believes that the benefits of providing immediate guidance outweigh the costs of forsaking the notice-and-comment procedures of § 553, it may allow the Secretary to issue interim-final rules, as it did here. Contrarily, when Congress has not provided such authority, the Treasury should subject its regulations to public notice and comment.[141]

Congress is plainly aware of the various methods by which interim rules may be prescribed.[142] Under § 7807, Congress stated that existing regulations, in limited circumstances, should provide interim rules.[143] At other times, as with § 179D, Congress will enact a separate set of interim rules along with the delegation.[144] Congress might even empower the agency itself to

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140. *Id.* (emphasis added).

141. *See* 5 U.S.C. § 553(b)-(c) (2000).

142. The Supreme Court "assume[s] that Congress is aware of existing law when it passes legislation." South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) (quoting Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990)). Therefore, when examining a statutory delegation, one should assume Congress *knew* that it could provide statutory interim rules. When Congress does not provide interim rules, its choice to condition the operation of the statute on the issuance of regulations should be deemed intentional. For a strident criticism of the Supreme Court's "omniscient" Congress approach, see William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 245 (2000) ("The one-Congress fiction is a text-based interpretive move, yet it undercuts textualism's strongest goals. When utilized only in text-to-text comparisons, this interpretive move is highly manipulable and vulnerable to error. Both in theory and in practice, it has been used in ways that unnecessarily unsettle referent law. It also constitutes an odd or paradoxical anthropomorphizing of the legislature by justices who generally shun any references to legislative intent, decline to draw inferences from legislative silence, and criticize dynamic modes of interpretation.").

143. I.R.C. § 7807(a) (2000).

144. Congress has enacted even more elaborate statutory schemes to serve until an agency acts. *See* 30 U.S.C. §§ 801-78 (2000). Section 801(g) describes the scheme: "It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners . . . ." *Id.* at § 801(g). Most attempts to provide statutory interim rules are not as bold. *See* I.R.C. § 857(b)(7)(F) (West 2006) (providing interim rules regarding real estate investment trusts ("REITs")); 33 U.S.C.A. § 2703(d)(4)(D)(ii) (West 2004) (providing interim rules regarding oil pollution liability); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 659(c)(2), 115 Stat. 38, 141 (codified at 29 U.S.C.A. § 1054 (West 2006)) (providing interim rules regarding the application of I.R.C. § 4980F(e)(2), (3)); Technical and

prescribe interim rules pending the adoption of final regulations.[145] When Congress has not done any of these things even though it could have, the courts and IRS should not take it upon themselves to give immediate effect to a statute by invoking phantom regulations.

The judicial confusion caused by spurned delegations may be due to the courts' habit of not looking to outside sources of law to resolve issues arising under the Code—tax law is often mistakenly viewed by judges as a "self-contained body of law."[146] This failure to consider outside authorities "impair[s] the development of the tax law by shielding it from other areas of law that should inform the tax debate."[147] This myopia is evidenced

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Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 5011(c)(2), 102 Stat. 3342, 3661 (codified at I.R.C. § 7702(c)(3)(B)(i) (2000)) (providing interim rules regarding the application of I.R.C. § 7702(c)(3)(B)(i)); Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, § 404, 88 Stat. 1389, 1413 (codified as amended at 7 U.S.C. § 6a (2000 & West 2006)) (providing interim rules regarding hedging transactions). Occasionally, a committee report will purport to provide interim rules pending the issuance of regulations. *See* STAFF OF J. COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1997 167 n.204 (Comm. Print 1997) (providing interim rules relating to I.R.C. § 731(c)(2) (2000)); H.R. REP. NO. 99-841, at 704-05 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 4075, 4822-23 (providing interim rules regarding the accrual of market discount on market discount bonds). Though there is no doubt that taxpayers may rely on interim rules found in the Statutes at Large, the same cannot be said for those found in committee reports. Committee reports merely reflect the intentions of the individual committee members. Only if *Congress* acknowledges a previously written report through a properly enacted statute should a taxpayer be entitled to rely upon it. *See infra* notes 200, 203; *see generally* Manning, *supra* note 136. Of course, as a practical matter, the IRS often does not understand the difference between a statute and its legislative history, so the agency might not challenge a taxpayer who relies on a committee report. *Cf.* Treas. Reg. § 1.6662-4(d)(3)(iii) (2006).

145. *See* 46 U.S.C. app. § 1716(b) (West 2006) ("The Commission may prescribe interim rules and regulations necessary to carry out this chapter. For this purpose, the Commission is excepted from compliance with the notice and comment requirements of [APA] section 553 . . ."); *see, e.g.*, 7 U.S.C. § 2008e(c) (2000) (rural development programs); 8 U.S.C. § 1255a(g)(3) (2000) (status of persons "admitted for lawful residence"); 15 U.S.C. § 7244(b)(2) (West 2006) ("[n]otice requirements to participants and beneficiaries under ERISA"); 16 U.S.C. § 6515(a) (West 2006) ("hazardous fuel reduction project on Forest Service land"); 20 U.S.C. § 9276(c)(1) (2000) (transition from authority under the Adult Education Act to the Adult Education and Family Literacy Act); 21 U.S.C. § 343(r)(7) (2000) (misbranded foods); 42 U.S.C. § 239f(b) (West 2006) (public health and welfare); 42 U.S.C.A § 607(i)(1)(A)(ii) (West 2006) (mandatory work requirements for needy families receiving block grant assistance); 42 U.S.C. § 1395w-26(b)(1) (West 2006) (other standards for Medicare+Choice organizations and plans); 42 U.S.C. § 1395nn(g)(6)(C) (West 2006) (issuance of advisory opinions regarding prohibition of certain medical referrals); 42 U.S.C.A § 16014(g) (West 2006) ("standby support for certain nuclear plant delays").

146. 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).

147. *Id. See also* Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 710 (1996) ("The tax debate seems strangely uninformed by broader interpretation scholarship, which regards purpose as a

not only by the courts' failure to fully appreciate the requirements of the APA, discussed earlier, but also in their failure to appreciate the force of analogous Supreme Court cases.[148]

In *California Bankers Association v. Shultz*, the plaintiffs challenged the constitutionality of the Bank Secrecy Act of 1970 ("BSA").[149] Specific provisions in Title II of the BSA (§§ 201-242) give the Secretary of the Treasury broad authority to require certain reports of financial transactions.[150] The plaintiffs "contend[ed] that the broad authorization given . . . to the Secretary . . . amount[s] to the power to commit an unlawful search of the banks and the customers."[151] Section 221 of the BSA, entitled "Reports of currency transactions required," provides:

> Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.[152]

Section 222 of the BSA provides that the report of any transaction required to be reported under § 221 shall be signed both by the domestic financial institution involved and by one or more of the other parties to the transactions, as the Secretary may require.[153] Sections 207 and 209 provide civil and criminal penalties, respectively, for violations of any provision of Title II.[154]

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rather old-fashioned concept. It exaggerates both the logical coherence of tax law and the special expertise of tax scholars.").

148. *See also infra* note 173 (listing various instances where circuit courts have refused to treat statutes calling for regulations as self-executing).

149. 416 U.S. 21 (1974). *See generally* Currency and Foreign Transactions Reporting (Bank Secrecy) Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of the U.S.C.).

150. *Cal. Bankers*, 416 U.S. at 26.

151. *Id.* at 53.

152. Bank Secrecy Act § 221, 84 Stat. 1144, 1122 (codified as amended at 31 U.S.C. § 5213 (Supp. 2003)).

153. *Id.* § 222, 84 Stat. at 1122 (codified as amended at 31 U.S.C. § 5313 (Supp. 2003)).

154. *Id.* §§ 207, 209, 84 Stat. at 1120-21 (codified as amended at 31 U.S.C. §§ 5321-22

At the time the case was decided, the Secretary had promulgated regulations requiring financial institutions to report currency transactions to the IRS, but had not promulgated any regulations subjecting any other organizations to the reporting requirements.[155] Under the regulations, the financial institutions were required to file reports only with respect to transactions involving the payment of currency exceeding $10,000.[156]

The depositor-plaintiffs nonetheless argued that the BSA violated their Fourth Amendment rights, despite the fact that the Secretary had not issued regulations applicable to them.[157] The lower court accepted this argument and enjoined enforcement of the reporting provisions.[158] As the Supreme Court described the proceedings below:

> The District Court went on to pose, as the question to be resolved, whether "these provisions, broadly authorizing an executive agency of government to require financial institutions and parties [thereto] . . . to routinely report . . . the detail of almost every conceivable financial transaction . . . [are] such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment."[159]

The District Court thus judged the constitutionality of the reporting provisions by reference to the regulations that might be promulgated—in other words, the court tested the constitutionality of the statute by assuming the existence of phantom regulations.[160] The Supreme Court reversed:

> Since . . . the statute is not self-executing, and were the Secretary to take no action whatever under his authority there would be no possibility of criminal or civil sanctions being imposed on anyone, the District Court was wrong in framing the question in this manner. The question is not what sort of reporting requirements *might* have been imposed

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(Supp. 2003)).

155. *Cal. Bankers*, 416 U.S. at 58.

156. *Id.* (citing 31 C.F.R. § 103.22 (then in effect)).

157. *Id.* at 41.

158. *Id.*

159. *Id.* at 64 (omissions and alterations in original).

160. *See id.* at 42.

> by the Secretary under the broad authority given him in the Act, but rather what sort of reporting requirements he did *in fact* impose under that authority.[161]

The Court unequivocally held that the delegation was not self-executing, emphasizing the importance of implementing regulations.[162]

The *California Bankers* holding is at odds with the approaches to statutory delegations discussed in Part II. Although the BSA carried a voluminous legislative history, the Court made no attempt to determine the content of the regulations that the Secretary might promulgate on the basis of that material.[163] Indeed, the Court did not deem the substance of the delegation relevant—rather, it gave the statute its plain meaning, and concluded that the statute was not self-executing.[164]

This was not the first time the Supreme Court encountered a spurned delegation.[165] In *Dunlap v. United States*, the Court addressed whether a statute instructing the Secretary to prescribe regulations granting taxpayers rebates for alcohol taxes paid was self-executing.[166] The taxpayer (Dunlap) requested a

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161. *Id.* at 64. The Court proceeded to test the Fourth Amendment claims against the regulations that were actually promulgated, and found that no Fourth Amendment violation occurred. *Id.* at 64-70.

162. *Id.* at 64.

163. *See id.* at 26 n.1 (citing S. REP. No. 91-1139 (1970); H.R. REP. No. 91-975 (1970); *Hearings on Foreign Bank Secrecy and Bank Records (H.R. 15073) before the H. Comm. on Banking & Currency*, 91st CONG., (1969-1970); *Hearings on Foreign Bank Secrecy (S. 3678 and H.R. 15073) before the Subcomm. on Financial Institutions of the Senate Comm. on Banking & Currency*, 91st CONG., (1970)).

164. *Cal. Bankers*, 416 U.S. at 64.

165. *See* Dunlap v. U.S., 173 U.S. 65, 72 (1899); *see also* United States v. Mersky, 361 U.S. 431, 437-38 (1960) ("Once promulgated, . . . regulations, called for by the statute itself, have the force of law, and violations thereof incur . . . prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other."). *But see* United States v. Weller, 401 U.S. 254, 258 (1971) ("The relation between the Selective Service Act and the regulation forbidding representation by counsel before local boards is wholly different from the situation in *Mersky*. The regulation is not at all 'called for by the statute itself.' Indeed, so independent are the statute and the regulation that it would be entirely possible for a regulation covering the same subject matter to provide exactly the reverse of what the present regulation requires.") (internal citations omitted).

166. *Dunlap*, 173 U.S. 65 at 70. The delegation at issue provided: "Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the secretary of the treasury, and on satisfying the collector of internal revenue for the district wherein he

rebate, notwithstanding the absence of implementing regulations.[167] The Court denied Dunlap relief, emphasizing that:

> [C]ourts cannot perform executive duties, nor treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled.[168]

Rather, the Court held that the "plain words"[169] of the statute indicated that the issuance of the regulations was a condition precedent to the vesting of any rights under the statute.[170]

Both *California Bankers* and *Dunlap* may be distinguishable from the cases discussed in Part II. The statute at issue in *California Bankers* allowed for the imposition of *criminal* penalties, and the Court seemed primarily concerned with doctrines of ripeness and standing.[171] *Dunlap* emerged in an

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resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the treasury of the United States a rebate or repayment of the tax so paid." *Id.* (citing Act of Aug. 28, 1894, § 61).

167. *See id.* at 70.

168. *Id.* at 72 (quoting United States v. McLean, 95 U.S. 750, 753 (1878)). The *Dunlap* court distinguished its holding from that of *Campbell v. United States*, 107 U.S. 407 (1883), an earlier case dealing with a statutory delegation. In *Campbell*, regulations had been issued pursuant to a statutory delegation, but a recalcitrant Secretary refused to abide by those regulations. *Campbell*, 107 U.S. at 410 ("It is the order of the secretary of the treasury forbidding the collector to proceed under these regulations, or in any other mode, which is the real obstacle . . . . Can he thus defeat the law he was appointed to execute, by making regulations, and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?"). However, in *Dunlap*, the Court interpreted *Campbell* to stand for the proposition that a statutory delegation was self-executing in the absence of regulations. *Dunlap*, 173 U.S. at 72. The Court needlessly distinguished its holding in *Dunlap* from its earlier holding in *Campbell*, misconstruing the earlier case. *See id.*

169. *Dunlap*, 173 U.S. at 73.

170. *Id.* at 76. The Court also noted that the statute at issue provided a discretionary delegation, which seemed to support its conclusion that the statute should not be deemed self-executing. *See id.* ("[I]t is insisted that, by reason of the exercise of discretionary power necessarily involved in prescribing regulations as contemplated, the Secretary could not have been thus compelled to act. We think the argument entitled to great weight . . ."). Of course, even if a delegation is mandatory, it should not be deemed self-executing. *See infra* Part IV.

171. *See* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 44-45 (1974). Note, however, that the Court in *California Bankers* did not invoke any substantive canon of construction (e.g. the rule of lenity) in holding that the statute at issue was not self-executing. Rather, its holding followed the plain language of the statute. *See id.* at 64. Regardless, even if

entirely different context—the APA was not promulgated until 1946[172] (long after the case was decided), so it is difficult to compare it to today's cases. Nonetheless, a reviewing court should at least consider the principles espoused in these decisions before stepping into the Secretary's shoes. Indeed, when interpreting statutory delegations in non-income tax contexts, most circuits readily conclude that such statutes lack force in the absence of regulations.[173] The principles of

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California Bankers is not controlling, other statements from the Supreme Court confirm that phantom regulations are inappropriate. *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004) (stating that courts have no power to control the contents of regulations); discussion *infra* Part IV; *see also infra* note 173.

172. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of the U.S.C.); *see also Dunlap*, 173 U.S. at 65. It is tempting to make too much out of *Dunlap*. The delegation at issue in that case looks similar to the delegations found in the Code today, thus suggesting that the case is highly relevant. Further, the Court relied on a "plain language" approach in deciding the case. *Dunlap*, 173 U.S. at 73. It would be a mistake, however, to conclude that what was plain in 1899 remains plain today or carries the same "plain" meaning. "Words are not plain in themselves." First Chicago Corp. v. Comm'r, 842 F.2d 180, 183 (7th Cir. 1988). Rather, "it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 786 n.17 (2000). "[I]t is our role to make sense rather than nonsense out of the *corpus juris*." W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991). Given that the delegation at issue in *Dunlap* existed in a rather different statutory context from that present today, *Dunlap's* reasoning is not necessarily controlling. Note, however, that the Court's conclusion that it cannot perform "executive duties" remains true today, as the Constitution has not been amended since 1899 to provide the judiciary with that power. *See Dunlap*, 173 U.S. at 72 (citing United States v. McLean, 95 U.S. 750, 753 (1878)). *But see* EDWARD S. CORWIN, *Constitution* versus *Constitutional Theory*, *in* AMERICAN CONSTITUTIONAL HISTORY 99, 108 (Alpheus Thomas Mason & Gerald Garvey eds., 1964) ("The proper point of view from which to approach the task of interpreting the constitution is that of regarding it as a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people.").

173. *See, e.g.*, Neb. *ex rel.* Stenberg v. United States, 238 F.3d 946, 949 (8th Cir. 2001) (citing 42 U.S.C. § 300g-1(b)(1)(A)) ("[T]he [Safe Drinking Water] Act is not self-executing; rather, it is applied through EPA regulations."); Gholston v. Hous. Auth. of Montgomery, 818 F.2d 776, 785-86 (11th. Cir. 1987) (citing 42 U.S.C. § 1437d(c)(4)(A) (1982 & Supp. 1985)) ("The express language of section 1437d(c)(4)(A) simply indicates that local housing authorities 'shall comply with such procedures and requirements as the Secretary *may* prescribe.' . . . By its express terms, the statute does not require HUD to prescribe preferences; nor does it require local housing authorities to grant preferences absent HUD implementing regulations.") (emphasis added) (footnote omitted); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470-71 (11th Cir. 1986) ("The employees . . . simply [assert] the argument that the phrase 'to the extent provided in regulations prescribed by the Secretary of the Treasury' should be read out of the statute. This we cannot do."); Riegel Textile Corp. v. Celanese Corp., 649 F.2d 894, 905 (2nd Cir. 1981) ("In enacting section 1274, however, Congress deleted the word 'immediately' and provided that repurchase be 'in accordance with regulations of the secretary.' While no reason is stated for the change, given the complexity of relationships between manufacturers, distributors, and retailers, it appears Congress believed a self-executing repurchase provision would prove unworkable. Thus, Congress intended that the repurchase obligation be initiated

California Bankers and *Dunlap* seem obvious to everyone except the IRS and a small minority of federal courts.

IV. RECOMMENDED APPROACH TO SPURNED DELEGATIONS

Where the interpretation of a statutory delegation is at issue, a reviewing court should first examine whether the *form* of the delegation makes the issuance of regulations a condition precedent to the effectiveness of the statute. The substance of the delegation—that is, the subject matter of the rules that the Secretary is to prescribe—should be deemed irrelevant to this determination. Though one can reasonably criticize Congress for making important provisions in the Code subject to the issuance of regulations,[174] "when the statute's language is plain, the sole

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only upon action by the Secretary."); Mobil Oil Corp. v. Dep't of Energy, 647 F.2d 142, 146 n.10 (Temp. Emer. Ct. App. 1981) ("It is true, as the DOE argues, that the statutory amendment was not self-executing and that Congress contemplated that regulations were required to give effect to the statutory command."); Kleine v. United States, 539 F.2d 427, 432-33 (5th Cir. 1976) ("[T]he Internal Revenue Code . . . provides several alternative means of procuring lien divestiture, although . . . those provisions are not self-executing. For example, [I.R.C. §] 6325(c) expressly authorizes the [IRS] to issue an administrative release or partial discharge of the properties, in accordance with certain regulations adopted pursuant thereto."); Magnolia Petroleum Co. v. Fed. Power Comm'n, 236 F.2d 785, 799-800 (5th Cir. 1956) ("And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The [Natural Gas] Act itself is not self-executing and requires the regulations as a condition precedent."); CSX Corp. v. United States, 52 Fed. Cl. 208, 213 (Fed. Cl. 2002) ("Congress has indeed gone on record as saying that the income-tax withholding system and the FICA-tax withholding system each serves a different interest which may, in turn, dictate differences in the make-up of their respective wage bases. But, as plaintiffs correctly point out, the statute that Congress enacted to facilitate such differentiation is not self-executing—its operation depends on the promulgation of regulations that in fact establish distinctions between wages for income-tax withholding purposes and wages for FICA-tax withholding purposes. Absent such regulations, this court has no basis for distinguishing between the content of the term 'wages' for income-tax withholding purposes and the content of that term for FICA-tax withholding purposes."); *see also In re* Moorhous, 180 B.R. 138, 150 (E.D. Va. 1995), *aff'd*, 108 F.3d 51 (4th Cir. 1997) ("While the Congressional intent, as expressed in the language of 37 U.S.C. § 701(a), is far from a model of clarity, the Court concludes that Congress intended to require an implementing regulation by the Secretary of the service concerned as a precondition to assignments of pay by officers.").

174. *See, e.g.*, David Shores, *Repeal of General Utilities and the Triple Taxation of Corporate Income*, 46 TAX LAW. 177, 207 (1992) (noting that Congress "blundered badly" by conditioning the operation of § 336(e) on the issuance of regulations); *see also* STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986, VOLUME I: STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM 65 (Comm. Print 2001) ("The practice [of providing statutory delegations] is so common that it seems unremarkable, yet as a practical matter it leads to a situation in which the statute, the primary source of law, increasingly states only a general rule. Taxpayers cannot rely on the statute because the statute does not state a rule. As a general matter, simplicity would be improved if more statutory sections were self-executing, that is, do not require regulations to be effective or understood.").

function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[175]

When the Secretary has failed to issue regulations, a court should not craft phantom regulations. If the government wishes to enforce a statutory provision that is not self-executing and contains a delegation of authority, it must issue regulations to give effect to the statute. Informal agency publications purporting to interpret a statutory delegation lack the force and effect of law and cannot serve as substitutes for regulations that comply with APA § 553. When Congress wishes the Secretary to exercise his delegated authority by means of pronouncements short of "regulations," Congress is perfectly capable of drafting the statute to say so.[176]

If a taxpayer wishes to give effect to a statutory delegation where the Secretary has unreasonably delayed the issuance of regulations, he should seek relief under § 706(1) of the APA, which allows an aggrieved party to "compel agency action unlawfully withheld or unreasonably delayed."[177] Under § 706(1), a court can enforce "the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress."[178] Parties have successfully invoked § 706(1) against a number of agencies,[179] and taxpayers who have been

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175. Lamie v. United States Tr., 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

176. *See* discussion *supra* Part III.B.

177. 5 U.S.C. § 706(1) (2000).

178. Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 352 (8th Cir. 1985).

179. *See* Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction under Section 706(1) of the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 635 n.76 (1987) (citing Ass'n of Am. R.Rs. v. Costle, 562 F.2d 1310, 1321 (D.C. Cir. 1977); Kingsbrook Jewish Med. Ctr. v. Richardson, 486 F.2d 663, 670 (2d Cir. 1973)) (noting that "[s]ection 706(1) may . . . be successfully used to challenge an agency's failure to promulgate regulations."). In *Costle*, the D.C. Circuit held that the EPA's failure to promulgate standards for certain railroad facilities violated the Noise Control Act, and ordered injunctive relief for agency action "unlawfully withheld," *Costle*, 562 F.2d at 1321, while the Second Circuit in *Kingsbrook* used § 706(1) to compel the Secretary of Health, Education and Welfare to issue regulations providing for retroactive corrective adjustments to Medicare rates paid to the plaintiff nursing home. *Kingsbrook*, 486 F.2d at 670; *see also* S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1226-27 (10th Cir. 2002), *rev'd on other grounds*, 542 U.S. 55 (2004) ("Courts have regularly held that an agency may be required to take action and make a decision even if the agency retains ultimate discretion over the outcome of that decision."); Brower v. Evans, 257 F.3d 1058, 1071 (9th Cir. 2001) (finding that the Secretary of Commerce unreasonably delayed the performance of certain dolphin stress studies mandated by Congress); *In re* Bluewater Network, 234 F.3d 1305, 1316 (D.C. Cir. 2000) ("We are here faced with a clear statutory mandate, a deadline nine-years ignored, and an agency that has admitted its continuing recalcitrance. For the foregoing reasons, we hereby direct the Coast Guard to undertake prompt . . . rulemaking [under § 4110 of the Oil Pollution Act of 1990]."); *In re* Int'l Chem.

unreasonably deprived of benefits by the Treasury's delay should proceed under that statute as well.

The Supreme Court recently endorsed the use of § 706(1) to compel the issuance of regulations in appropriate circumstances. In *Norton v. Southern Utah Wilderness Alliance*, the Court held that "a claim under section 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."[180] Justice Scalia, writing for a unanimous Court, illustrated that holding:

> The limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law). Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be. For example, 47 U.S.C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, *would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations.*[181]

The Court's disapproval of phantom regulations seems clear. When an agency has failed to act, a judicial declaration setting forth the content of regulations is inappropriate.[182] Rather, if the issuance of the regulations has been unreasonably delayed, the

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Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (per curiam) ("There is a point when the court must 'let the agency know, in no uncertain terms, that enough is enough,' and we believe that point has been reached . . . . [W]e think the delay in promulgating a final rule that OSHA believes is necessary to workers' well-being has been too lengthy for us to temporize any longer.") (internal citation omitted); Pub. Citizen Health Research Group v. Comm'r, Food & Drug Admin., 724 F. Supp. 1013, 1023 (D.C. Cir. 1989) (declaring that the FDA "delayed issuing a final regulation requiring standardizing tampon absorbency labeling in violation of both the Administrative Procedure Act, 5 U.S.C. §§ 555(e) and 706(1), and . . . the Food, Drug and Cosmetic Act" and ordering issuance of a final regulation"); Home Box Office, Inc. v. FCC, 567 F.2d 9, 18 (D.C. Cir. 1977) ("[E]ntering an order 'compel[ling] agency action . . . unreasonably delayed.'").

180. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004).

181. *Id.* at 65 (emphasis added).

182. *Id.* at 65-67.

court may compel the agency to act, but absolutely cannot step into the agency's shoes.[183]

Unfortunately, the § 706(1) remedy is not perfect, and the petition process may be slow and costly.[184] There are no established standards for determining whether an agency has "unreasonably" delayed action, though the D.C. Circuit has presented six factors that are to provide "useful guidance" in making the determination.[185] Even if a taxpayer successfully compels agency action under § 706(1), he will not enjoy any benefits immediately—rather, he must await the issuance of the regulations. Nonetheless, even if a reviewing court deems the § 706(1) remedy inadequate, this does not justify judicial usurpation of the Secretary's role. Through § 706(1), Congress has specifically addressed the problems posed by agency delay

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183. *See id.* at 63-64. Although the Court's example involved a statute that gave the agency an explicit deadline, such a deadline is not required to proceed under § 706(1). *Id.* The Court stated that relief under § 706(1) can be considered whenever a plaintiff successfully "asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64. While failure to comply with a specific statutory deadline would most likely constitute "unreasonable delay," an agency's prolonged delay may be "unreasonable" even in the absence of a firm statutory deadline. *See id.* at 62-63; Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984); *see also supra* note 179 (describing the numerous occasions when parties have successfully invoked § 706(1)).

184. *See* Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 834 (1988) ("Although courts recognize the need for judicially enforceable deadlines as a remedy for unreasonable delay, they frequently seem uncomfortable enforcing such deadlines.") (footnote omitted); *see also In re Int'l Chem. Workers*, 958 F.2d at 1150 (noting the failure of OSHA to meet various proposed timetables during a three-year period and expressing "grave . . . concern that if we do not insist on a deadline now, some new impediment will be pleaded five months hence. OSHA's asserted justifications for the delay become less persuasive the longer the delay continues."). Judges may even be bashful in deciding § 706(1) cases. *See, e.g.*, NAACP, Boston Chapter v. Kemp, 721 F. Supp. 361, 370 (D. Mass. 1989) (citing NAACP v. HUD, 817 F.2d 149, 160 (1st Cir. 1987)) ("The court of appeals expressly noted that [the district judge's] remedial power under the APA, 5 U.S.C. § 706(1), includes the power to compel the Secretary to promulgate regulations to carry out the intent of Congress, where he has failed to exercise his discretion to do so. . . . Nevertheless, [the district judge was] very reluctant to add to the existing mountain of federal rules and regulations.").

185. Miaskoff, *supra* note 179, at 651-57 (citing Telecomms. Research & Action Ctr., 750 F.2d 70, 80 (1984)). The six factors are:

> (1) [T]he agency's pace of decision must follow a "rule of reason"; (2) the agency's enabling statute may provide a timetable to give substance to this "rule of reason"; (3) delays are less tolerable when human health and welfare are at stake than when commercial concerns are involved; (4) expediting delayed agency action should not adversely affect the agency's ability to act on proceedings of a higher or competing priority; (5) the nature and extent of the interests prejudiced by delay should be considered; and (6) impropriety is not essential to a finding of unreasonable delay.

Id. (citing *Telecomms. Research & Action Ctr.*, 750 F.2d at 80).

and has communicated its intent to the judiciary.[186] Courts should not invent a remedy when Congress has already provided one.[187] "Once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law."[188]

The remainder of this part applies a textual approach to various forms of statutory delegations. Except where otherwise noted, the discussion below assumes that the relevant delegation requires the Secretary to issue regulations, and not informal guidance.

A. *Recommended Approach to Mandatory Delegations*

A statute providing that "the Secretary shall prescribe regulations" should not be deemed self-executing. Congress has provided only a command to an agency; it has not enacted a self-executing statute that a taxpayer must heed in determining his income tax liability. The plain language of the statute seems to support no other interpretation. Thus, when a statute provides that "the Secretary shall issue regulations," the Secretary should not be able to enforce the statute until he discharges his statutory responsibility to issue the regulations in question. If the IRS seeks to enforce "phantom" regulations, the taxpayer should ask that a court set aside such action as "arbitrary, capricious, . . . or otherwise not in accordance with law."[189]

If the taxpayer instead complains that the Secretary has unreasonably delayed the issuance of regulations, he should petition the court under § 706(1) to compel the Secretary to act. Making guesses as to the substantive content of the Secretary's anticipated regulations is inappropriate. Parties aggrieved by agency delay often seek relief under § 706(1),[190] and there is no reason that the statute cannot be used to compel the Secretary to initiate rulemaking. "Through § 706 Congress has stated

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186. *See Telecomms. Research & Action Ctr.*, 750 F.2d at 79.

187. *See* U.S. CONST. art. I, §1 (vesting all legislative powers in Congress). The Supreme Court has, however, recognized limited judicial lawmaking powers (i.e., federal common law) when Congress has *not* spoken on an issue. *See* Milwaukee v. Illinois, 451 U.S. 304, 313 (1981).

188. Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 95 n.34 (1981).

189. 5 U.S.C. § 706(2)(A) (2000). *See also id.* § 706(2)(C)-(D) (providing that agency action can be set aside for being in excess of statutory authority or for failure to observe procedures required by law).

190. *See supra* note 179.

unequivocally that courts *must* compel agency action unlawfully withheld or unreasonably delayed."[191]

Taxpayers can use § 706(1) to enforce *mandatory* delegations only.[192] Thus, taxpayers may use § 706(1) whenever a statute provides that the Secretary "shall" prescribe regulations, and the Secretary has neglected that duty. The Supreme Court has held that "when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command."[193]

Sometimes, it is difficult to determine whether a statute provides a mandatory delegation, as opposed to a discretionary one. Statutory delegations come in many forms, and Congress does not always specify whether the Secretary "shall" implement a rule, or whether he "may" implement it. Instead, Congress might provide that a rule will apply "in accordance with regulations" or "pursuant to regulations," and it is unclear whether such language requires the Secretary to act or instead leaves the implementation of the rule solely to his discretion. Determining whether these statutes are in fact "mandatory" delegations probably requires a case-by-case analysis.

B. *Recommended Approach to Discretionary Delegations*

A discretionary delegation, like a mandatory delegation, should not be deemed self-executing. Whether Congress tells the Secretary that he *must* do something, or that he *may* do something, a statutory delegation amounts to nothing more than an instruction from the legislature to the agency. In the absence of regulations, taxpayers cannot claim any benefits pursuant to these delegations and the IRS cannot challenge taxpayers who violate the perceived intention of the statute.

Because, by definition, the Secretary is not *required* to act on a discretionary delegation, taxpayers cannot seek redress under § 706(1). The only agency action that can be compelled under the APA is action legally *required*.[194] Although § 706(1) is unavailable when a discretionary delegation is at issue, the

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191. Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999) (emphasis added).

192. *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004).

193. *Forest Guardians*, 174 F.3d at 1187 (citing United States v. Monsanto, 491 U.S. 600, 607 (1989)).

194. *See Norton*, 542 U.S. at 64; *see also* Am. Ass'n of Retired Pers. v. EEOC, 823 F.2d 600, 605 (D.C. Cir. 1987), *rev'g* 655 F. Supp. 228 (D.D.C. 1987) ("[T]he double 'mays' imbedded in section 9 effectively relieve the Commission of any duty to promulgate a regulation. . . . [W]e conclude that the district court exceeded its authority in ordering rulemaking.").

taxpayer may try seeking relief under APA § 553(e)[195] (but this provision probably lacks teeth).

C. *Recommended Response to Informal IRS Guidance Interpreting Statutory Delegations*

Where Congress permits the issuance of informal guidance to implement a policy objective, notices and other informal agency announcements are effective. A statute permitting informal guidance may state that the Secretary is to issue "other guidance," as opposed to "regulations."[196] When such permissive language is included in the delegation, a taxpayer is ordinarily unable to challenge the IRS for failure to comply with APA § 553.

By contrast, IRS notices and other informal agency publications do not carry the force of law and do not suffice wherever Congress requires that the "Secretary shall issue regulations."[197] The government *must* comply with APA § 553 if it wishes to give such guidance legal effect. The plain meaning of a statutory delegation requiring "regulations" does not seem to support any other interpretation.

Some *legislative history*, however, is inconsistent with the plain meaning of such statutes. The Conference Report to the Tax Reform Act of 1986 provides:

> A number of provisions of the conference agreement provide that the Secretary of the Treasury or his delegate is to prescribe regulations. Notwithstanding any of these references, the conferees intend that the Treasury may, prior to prescribing these regulations, issue guidance for taxpayers with respect to the provisions of the conference agreement by issuing Revenue Procedures, Revenue Rulings, forms and

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195. *See* 5 U.S.C. § 553(e) (2000) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); *see also* 26 C.F.R. § 601.601(c) (2006) ("Interested persons are privileged to petition for the issuance, amendment, or repeal of a rule."). This, the Treasury's implementing regulation, requires only that the agency give such petitions "careful consideration," *id.*, and is undoubtedly less potent than APA § 706(1).

196. A statute may also allow an agency to bypass § 553 when it grants the Secretary the authority to issue "interim-final rules" or specifies other procedures. *See* APA § 559; *see also supra* notes 112-113.

197. Of course, the Secretary is empowered to issue nonbinding interpretive rules pursuant to the grant of rulemaking authority in I.R.C. § 7805. The IRS can, for example, issue a notice describing the scope of regulations anticipated under a statutory delegation, but cannot implement the statute via such a notice.

> instructions to forms, announcements, or other publications or releases.[198]

The conferees' intention, by their own admission, is contrary to the plain language of the statutes whose meaning they purport to modify. Where unambiguous statutory language conflicts with language in a committee report, the former should control.[199] Nonetheless, although the use of legislative history as an authoritative expression of Congressional intent is questionable,[200] such history is frequently given considerable

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198. H.R. REP. NO. 99-841, at 782 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 4075, 4909.

199. *See, e.g.*, United States v. Erickson P'ship (In re Erickson P'ship), 856 F.2d 1068, 1070 (8th Cir. 1988) ("The mere fact that statutory provisions conflict with language in the legislative history is not an exceptional circumstance permitting a court to apply the legislative history rather than the statute."); United Air Lines, Inc. v. Civil Aeronautics Board, 569 F.2d 640, 647 (D.C. Cir. 1977) ("We find no mandate in logic or in case law for reliance on legislative history to reach a result *contrary* to the plain meaning of a statute.").

200. *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); *see generally* John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501 (1997). Though some argue that a statute should be interpreted in the "context" of its legislative history, this approach is questionable. While there is no doubt that the meaning of language depends on its context, legislative history materials merely represent the context in which a *legislator* understands a statute's text. Contrarily, it is the duty of courts to interpret statutory language in the context that the public understands it—the legislative powers granted to Congress are to be exercised for the benefit of the *people*. *See* U.S. CONST. pmbl. Thus, a dictionary, to the extent it reflects the commonly understood definition of a word, is a natural starting point for determining a statute's meaning, though the analysis hardly ends there:

> [The textualist approach] is not a mechanical, dictionary-based process, but a creative one in which the reader actively engages the text to derive meaning . . . . [Textualism] is thus a methodology based on the presumption and desirability of solutions grounded in statutory language, not a guarantee that such solutions can be found or agreed upon universally.

Edward A. Zelinsky, *Text, Purpose, Capacity and* Albertson's*: A Response to Professor Geier*, 2 FLA. TAX REV. 717, 731-32 (1996). Legislative purpose—as indicated by the ordinary meaning of the statutory language—is indeed paramount. *See* Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). Commentators frequently confuse "textualism" with "strict constructionism." *See, e.g.*, Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 118 (2004) ("Strict statutory construction, as advanced by Justice Scalia and other Justices of the Supreme Court . . .is premised on a flawed perception of the Rule of Law that ignores the law's cultural connection.") (footnote omitted). However, it is worth emphasizing that the two theories of statutory interpretation are not the same. Textualists endeavor to read a statute reasonably, not "literally" or "strictly." *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (Amy Gutmann ed., Princeton University Press 1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be."); *see also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997)

weight by the courts and the IRS.[201] Some have even suggested that the views of a single Congressional committee deserve interpretive weight even when those views are expressed only *after* a statute's enactment.[202]

Regardless, the textual approach adopted here assumes legislative history materials cannot alter the plain meaning of a statute. Conference reports, after all, do not represent the intent of Congress—they represent only the subjective intentions of the conferees.[203] Further, though courts have in the past failed to acknowledge the primacy of text in statutory interpretation, the Supreme Court and circuit courts have shown renewed interest in according statutes their plain meaning and have been

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("Textualism is not literalism. Not even the most committed textualist would claim that statutory texts are inherently 'plain on their face,' or that all interpretation takes place within the four corners of the Statutes at Large."). Indeed, to the textualist, "[s]tatutory construction . . . is a holistic endeavor." United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988).

201. *See, e.g.*, Treas. Reg. § 1.6662-4(d)(3)(iii) (2006) (allowing taxpayers to rely on floor statements and committee reports for purposes of determining whether there is substantial authority for the tax treatment of an item); Rev. Rul. 2006-1, 2006-2 I.R.B. 262, 263 (arguing that with respect to I.R.C. § 851(b)(2) (West 2006), "the best evidence of Congressional intent is found in the floor statement when the provision was added to the Senate bill and in other floor statements and Administration comments concerning related legislation."). *See generally* Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 850-67 (1991).

202. *See, e.g.*, Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 18-19 (2004) (arguing that a committee report explaining a previously enacted provision is entitled to interpretive weight).

203. The sole manner by which Congress may pass laws (and thereby communicate its "intent") is described unambiguously in the Constitution. *See* U.S. CONST. art. I, § 7, cl. 2. Committee reports cannot possibly reflect the intent of Congress as a whole, because such reports do not undergo bicameral approval and presentation to the President. Congress speaks through statutes—not through committee publications. Though courts sometimes "believ[e] that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole . . . . [t]here is no basis either in law or in reality for this naive belief." Zedner v. United States, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring). Even if one wished to discover the legislators' subjective intent, it is unlikely any such "intent" actually exists—members of Congress probably do not read (much less understand) the text of the bills on which they vote. And even if all members of Congress did agree on an interpretation of a statute, that agreement is not authoritative unless it is itself embodied in a properly enacted statute. *See, e.g.*, Aldridge v. Williams, 44 U.S. 9, 20 (1845) ("If every member of the legislature had preferred that the regulations under the act of 1832 should not have been sanctioned by that of 1833, it would not have been effective to repeal the act of 1832, *unless they had expressed their wish in a legislative form.*") (emphasis added); *see also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). Attempts to determine any such subjective intent are misplaced—congressional intent should instead be defined by "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris." *See* SCALIA, *supra* note 200, at 17.

reluctant to examine legislative history.[204]

Under a textual approach, then, informal IRS publications cannot implement a statutory delegation that calls for *regulations*. However, these publications cannot necessarily be ignored. Section 7805(b)(1)(C) of the Code expressly grants the Secretary the authority to issue regulations retroactive to the date that a notice is issued describing those regulations.[205] If one believes the Secretary will make good on his promise to promulgate such regulations, an informal notice may have the practical effect of a properly issued regulation.[206]

D. *Recommended Approach to Delegations Whose Substance Overlaps with Other Code Provisions*

Statutory language whose operation is conditioned upon the issuance of regulations should not be given independent effect. Nevertheless, separate provisions of the Code may impose the detriment or provide the benefit described in the delegation—nothing in this paper contradicts the holding of *H Enterprises*.[207] Thus, where subsection (a) of a Code provision states that "Rule X is to apply to all persons," and subsection (b) states that "The Secretary shall prescribe regulations applying Rule X to

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204. *See, e.g.*, Gitlitz v. Comm'r, 531 U.S. 206, 220 (2001) ("Because the Code's plain text permits the taxpayers here to receive [the] benefits [of a double windfall], we need not address this policy concern."); Black & Decker Corp. v. United States, 436 F.3d 431, 437 (4th Cir. 2006) ("The legislative history argument does not persuade us. The prototypical transaction Congress had in mind in drafting § 357(c)(3) may well have been one in which a corporation exchanged liabilities as part of a transfer of an entire trade or business to a controlled subsidiary, but nothing in the section's plain language embraces such a limitation."); Tax Analysts v. IRS, 350 F.3d 100, 104 (D.C. Cir. 2003) ("Given the clarity of the statute's language and structure, we have no need to resort to legislative history.") (citing AT&T Corp. v. FCC, 317 F.3d 227, 235 (D.C. Cir. 2003) ("[The court does] not 'resort to legislative history to cloud a statutory text that is clear.'")); *see also* Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 749 (2003) ("Under the Supreme Court's recent trend of resolving tax cases using textualist interpretation methods, it is doubtful that the Court would allow the standard sham transaction doctrine, the business purpose doctrine, the economic substance doctrine, or the step-transaction doctrine to stand.").

205. I.R.C. § 7805(b)(1)(C) (2000). Section 7805(b)(1)(C) further confirms a statutory delegation is not necessarily self-executing. *See id.* Congress would have no need to provide the Secretary the authority to issue regulations retroactive to the date of a notice if either the statute or the notice had the force and effect of law prior to the issuance of regulations. Section 7805(b)(1)(C) once again shows that Congress says what it means and means what it says—delegations which call for regulations lack effect in the absence of such regulations.

206. Taxpayers should be aware that § 7805(b) permits the IRS to issue regulations retroactively in some other circumstances as well. *See* SALTZMAN, *supra* note 109, at ¶ 3.02[4].

207. *See* discussion *supra* Part II.C.1.

corporations," one should not necessarily infer that Rule X does not apply to corporations. Rather, subsection (a) is a self-executing provision which applies that rule to all persons, including corporations—subsection (b) merely commands the Secretary to issue clarifying regulations.

E. *Recommended Approach to Delegations That Intersect With Other Code Provisions*

Statutory delegations that intersect with other Code provisions present particularly challenging questions of interpretation. Nonetheless, given that Code sections often intersect, it is important to consider how one should interpret a self-executing statute that contains a cross-reference to a statutory delegation. For example, where a taxpayer-friendly, self-executing provision of the Code *requires* compliance with another provision of the Code, and the application of that other provision depends upon the issuance of regulations, can a taxpayer enjoy the benefits of the self-executing provision in the absence of such regulations? The answer is "no."

Consider § 1092(a)(1) of the Code, which limits a taxpayer's ability to recognize loss from straddles.[208] Section 1092(a)(2)(A) exempts "identified straddles" from the application of § 1092(a)(1).[209] Section 1092(a)(2)(B) provides that an "identified straddle" is any straddle:

> i) which is clearly identified on the taxpayer's records . . . ,
> ii) *to the extent provided by regulations*, the value of each position of which (in the hands of the taxpayer immediately before the creation of the straddle) is not less than the basis of such position in the hands of the taxpayer at the time the straddle is created, and
> iii) which is not part of a larger straddle.[210]

The delegation in § 1092(a)(2)(B)(ii) is *not* a self-executing provision—it operates only to the extent provided in regulations, and it carries no *independent* effect. It does, however, receive effect via § 1092(a)(2)(A)—the words requiring compliance with § 1092(a)(2)(B)(ii) *are* self-executing, even if § 1092(a)(2)(B)(ii) itself is not. Thus, the taxpayer cannot enjoy the benefits of § 1092(a)(2)(A) until he meets all of its requirements, including

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208. I.R.C. § 1092(a)(1) (West 2006).
209. *See id.* § 1092(a)(2)(A).
210. *Id.* § 1092(a)(2)(B) (emphasis added).

those found in § 1092(a)(2)(B)(ii).[211] One should not make the mistake of thinking that, until the issuance of regulations, the conditions of § 1092(a)(2)(B)(ii) need not be met in order to enjoy the § 1092(a)(2)(A) exemption.[212] Rather, the absence of regulations indicates only that they *cannot* be met.[213]

Section 1092 illustrates one way that a statutory delegation may intersect with other Code provisions. When analyzing these intersections, one must appreciate that though a statutory delegation has no independent legal effect, it cannot necessarily be ignored—if another provision cross-references it, the absence of regulations may affect the operation of the referencing statute.

F. *Ancillary Issues*

Section 7807(a) of the Code provides that certain previously issued regulations may serve as "interim" regulations for a Code provision whose application depends on the issuance of regulations, to the extent that such previously issued regulations could be issued under the authority of the new delegation.[214] It is unlikely that § 7807(a) will apply very often—the "previously issued regulations" referred to in the statute probably comprise

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211. *But see* Gregory F. Jenner, *ACLI Suggests Technical Corrections to Straddle Provisions*, TAX NOTES TODAY (Aug. 31, 2005) *available at* LEXIS, 2005 TNT 201-24 ("While [I.R.C. § 1092], by its terms, is clearly self-executing, we believe it is essential that this be clarified by Congress in order to prevent frustration of Congressional intent . . . . The provision relating to Treasury guidance should be amended to provide that, until such time as there is any such guidance, any reasonable identification method is sufficient.").

212. Congress could have drafted § 1092(a)(2)(B)(ii) in such a way that its condition would have to be met only "to the extent *required by* regulations," rather than "to the extent *provided by* regulations." *See* § 1092(a)(2)(B)(ii). When a condition must be met to the extent that it is *required by* regulations, and no regulations exist, there is effectively no condition to be met. As drafted, however, a taxpayer is required to show that the value of his straddle position is not less than its basis at creation, as *provided by* regulations. *See id.* Until regulations make this provision, a taxpayer cannot enjoy § 1092(a)(2)(A) benefits. Alternatively, Congress can make the statute self-executing by striking § 1092(a)(2)(B)(ii), and instead adding a new subsection (h) that provides, "The Secretary shall prescribe regulations limiting 'identified straddles' to mean any straddle the value of each position of which (in the hands of the taxpayer immediately before the creation of the straddle) is not less than the basis of such position in the hands of the taxpayer at the time the straddle is created." The taxpayer would not need to satisfy the additional requirements found in this hypothetical § 1092(h) delegation, absent regulations.

213. Recent amendments to § 1092 somewhat ameliorate this harsh result. *See* Gulf Opportunity Zone Act, Pub. L. No. 109-135, § 403(ii), 119 Stat. 2577, 2632 (2005) (codified at I.R.C. § 1092(a)(2)(C)) (allowing the Secretary to prescribe regulations *or* "other guidance" with respect to taxpayers who fail to comply with the statutory identification requirements).

214. *See* discussion *supra* Part III.B.

only those existing before the enactment of the 1954 Code.[215] The cautious advisor will nonetheless carefully examine those regulations to determine if any of those regulations *could* be issued pursuant to the spurned delegation before concluding that the statute lacks effect.

V. CONCLUSION

Justice Frankfurter once quipped that lawyers heed the words of a statute only when the legislative history is ambiguous.[216] Nowhere is this cavalier attitude towards statutory interpretation clearer than in the current approaches to spurned delegations in the Internal Revenue Code. Indeed, one may wonder why the use of phantom regulations is commonplace. Though one is left to conjecture, perhaps the courts and the IRS have simply overlooked the controlling authorities that require a different approach. The circuit courts have often noticed that taxpayers and the IRS have failed to advance all possible arguments with respect to spurned delegations, and have occasionally even criticized them for this.[217]

Regardless, this paper advocates a particular, systematic approach to spurned delegations, without concern for whose ox is gored. Taxpayers face considerable confusion in complying with the Code even without regard to spurned delegations, and a sensible approach is badly needed.

Unfortunately, the solution offered here is hardly ideal. Frequent amendments to the Code and the growing backlog of regulation projects at the Treasury ensure significant delay between the enactment of a statutory delegation and the issuance of final regulations. Although such delay does not justify the failure to heed Supreme Court jurisprudence and the

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215. *See supra* note 28.

216. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 542-43 (1947).

217. *See, e.g.*, Francisco v. Comm'r, 370 F.3d 1228, 1230 n.1 (D.C. Cir. 2004) ("Neither party in this appeal asserts [that the statute is not self-executing], and we have no occasion to pass upon the question [that theory] raises."); Pittway Corp. v. United States, 102 F.3d 932, 935 (7th Cir. 1996) ("What may be Pittway's best argument it makes only in passing: that the IRS dropped the ball by never issuing regulations interpreting Section 4662(b)(1) even though the statute explicitly stated that such regulations were forthcoming."); First Chicago Corp. v. Comm'r, 842 F.2d 180, 182 (7th Cir. 1988) ("The government might have been expected to, but does not, take the exceptionally hard line that since the Treasury never issued regulations under which items of tax preference 'shall be properly adjusted' where the items yield no tax benefit to the taxpayer, section 58(h) is not in play at all . . . ").

Administrative Procedure Act, Congress can allow the Secretary to use informal guidance more frequently or expand its practice of providing statutory interim rules. Alternatively, Congress may consider requiring the Secretary to meet strict deadlines in issuing regulations, though even a firm deadline does not fully ensure compliance. Creative solutions to the problems posed by spurned delegations would be a welcome addition to the current literature, to which the textual approach described here makes a modest contribution.