CHALLENGING TEMPORARY TREASURY REGULATIONS: AN ANALYSIS OF THE ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE REENACTMENT DOCTRINE, DEFERENCE, AND INVALIDITY

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I. INTRODUCTION

When a taxpayer challenges a regulation in court, the court faces a two-pronged inquiry: 1) what level of deference does the regulation deserve, and 2) under that level of deference, is the

regulation valid? To decide the first prong, a court evaluates many different issues that can make up the deference landscape. This article will review two of these issues that are especially relevant when challenging temporary treasury regulations. These issues are the Administrative Procedure Act ("APA") and the legislative reenactment doctrine.

From a taxpayer's perspective, the issues are stated as follows: 1) the temporary regulation is not in compliance with the APA, and 2) the temporary regulation violates the legislative reenactment doctrine.[1] After the APA and legislative reenactment doctrine are reviewed, this article will evaluate: 1) what level of deference should be given to a particular temporary regulation (see *Skidmore*,[2] *National Muffler*,[3] *Chevron*,[4] or the latest Supreme Court cases in *Mead*[5] and *Boeing*[6] for the different levels of deference) and 2) whether a particular temporary regulation is invalid. Temporary Treasury Regulation § 145-4051-1, and more specifically, Temporary Regulation § 145-4051-1(e)(1),[7] has been selected to analyze the APA, legislative reenactment doctrine, deference, and validity issues.

II. THE IMPACT OF THE ADMINISTRATIVE PROCEDURE ACT ON TREASURY REGULATIONS

Under I.R.C. § 7805(a), the Secretary of the Treasury or his delegate has the power to "prescribe all needful rules and regulations for enforcement of [the tax laws]."[8] This general

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1. The legislative reenactment doctrine reflects to the proposition that Congress is aware of "all administrative interpretations of a statute it reenacts, thereby" implicitly approving the interpretation and giving it the force of law. MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[4][b][IV] (2d ed. 1991). *See also infra* Part IV.

2. Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

3. Nat'l Muffler Dealers Ass'n Inc. v. United States, 440 U.S. 472, 476–78 (1979).

4. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844–45 (1984).

5. United States v. Mead Corp., 533 U.S. 218, 226–28 (2001).

6. Boeing Co. v. United States, 123 S.Ct. 1099, 1107 (2003).

7. Temp. Treas. Reg. § 145.4051-1(e)(1) (2000).

8. I.R.C. § 7805(a) (2000), which provides the following:

> (a) AUTHORIZATION.—Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules

grant of congressional authority provides the Internal Revenue Service ("IRS") the power to issue interpretative regulations. Interpretative regulations merely interpret, explain, and apply rules set out by Congress.[9]

Regulations issued pursuant to a specific grant of congressional authority under a particular Code section are termed legislative regulations.[10] A legislative regulation has the force of law if it is "(1) within the granted power of the agency; (2) issued pursuant to proper procedure; and (3) reasonable."[11] The "proper procedure" for issuing legislative regulations is prescribed by the APA, which requires an agency seeking to adopt a "substantive" rule to

> (1) publish a notice of proposed rule making in the Federal Register;
>
> (2) give interested persons an opportunity to comment on the proposed rule; and
>
> (3) postpone the effective date of the rule until 30 days after publication in the Federal Register.[12]

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and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

9. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 110.4.2 (2d ed. 1992) (noting that because interpretative regulations are not meant to fill gaps specifically left in the Code by Congress, they are more susceptible to judicial challenge to determine whether the agency's interpretation of the Code is a distortion of what Congress intended).

10. This specific grant of congressional authority can be stated in a variety of ways. For example, I.R.C. § 6404(f)(3) provides that "[w]ithin 180 days after the date of the enactment of this subsection, the Secretary shall prescribe such initial regulations as may be necessary to carry out this subsection." I.R.C. § 6404(f)(3) (2000). Another example of the phrasing of a specific grant of congressional authority, as found in the excise tax arena, is under I.R.C. § 4051(b), which states: "Under regulations prescribed by the Secretary . . ." I.R.C. § 4051(b) (2000). Additional examples in the Code are found at §§ 1502 (relating to consolidated returns), 170(a)(1) (relating to charitable deductions), 163(f)(2)(C) (relating to denial of interest deduction for non-registered obligations), 163(i)(5) (relating to applicable high yield discount obligations), and 163(l)(5) (relating to disallowance of deduction on certain corporate debt instruments). Various cases discussed a specific grant of authority. *See* United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981); Batterton v. Francis, 432 U.S. 416, 425 (1977); Wing v. Comm'r, 81 T.C. 17, 28 (1983).

11. SALTZMAN, *supra* note 1, ¶ 3.02[3][a]; *see also* BITTKER & LOKKEN, *supra* note 9, ¶ 110.4.2 ("Legislative regulations . . . are often said to have the force of law because they entail an exercise of power delegated by Congress to the agency, as though it were a deputy legislature.").

12. Administrative Procedure Act, 5 U.S.C. § 553(b)–(d) (2000). The Act provides in

The opportunity to comment cannot be overstated because persons who may be subject to the tax have the most at stake and may want to comment. Thus, the APA rightly provides these

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pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
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> > (1) a statement of the time, place, and nature of public rule making proceedings;
> >
> > (2) reference to the legal authority under which the rule is proposed; and
> >
> > (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
> >
> > Except when notice or hearing is required by statute, this subsection does not apply—
> >
> > > (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
> > >
> > > (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
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> (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
>
> > (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
> >
> > (2) interpretative rules and statements of policy; or
> >
> > (3) as otherwise provided by the agency for good cause found and published with the rule.

Id.

individuals (and the public at large) with an opportunity to be heard, and for their views to be considered.[13]

Even though Treasury is only required to issue legislative regulations pursuant to the APA procedures, it also issues interpretative regulations according to the same notice-and-comment procedures.[14] As a result, both legislative and interpretative regulations are generally first published in proposed form and subsequently go through the notice-and-comment process before being published in final form.[15] The distinction between legislative and interpretative regulations can lead to different outcomes (and different levels of judicial deference) when a tax regulation is challenged in court.

A temporary regulation can be effective immediately and, as its name implies, is intended to be only "temporary."[16] Temporary regulations gained prominence in the early 1980s when the Treasury targeted individual tax shelters and tried to respond to Congress' issuance of several complex new Code sections.[17]

Under I.R.C. § 7805(e)(1), a temporary regulation must also be issued as a proposed regulation.[18] A proposed regulation is "a draft administrative regulation that is circulated among interested parties for comment."[19] Mandating that the Treasury

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13. *See* ACLU v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987); Rodway v. USDA, 514 F.2d 809, 817–18 (D.C. Cir. 1975).

14. BITTKER & LOKKEN, *supra* note 9, ¶ 110.4.1 ("[T]he Treasury ordinarily follows a notice and hearing procedure (including an opportunity for oral argument, which is discretionary under the Administrative Procedure Act), even for regulations of an interpretative character."); SALTZMAN, *supra* note 1, ¶ 3.02[2] ("Although the APA does not subject interpretative rules to these notice-and-comment procedures, the Treasury Department nevertheless follows them when adopting interpretative rules.").

15. *See* I.R.C. § 6404(f)(3) (2000) and corresponding Treas. Reg. § 301.6404-3 (2000); BITTKER & LOKKEN, *supra* note 9, ¶ 110.4.1, at 110–34.

16. *See* Kikalos v. Comm'r, 190 F.3d 791, 796 (7th Cir. 1999), *rev'g* 75 T.C.M. (CCH) 1924 (1998) (stating that a temporary regulation "is every bit as binding as a final regulation, but is issued without prior notice and comment"); E. Norman Peterson Marital Trust v. Comm'r, 78 F.3d 795, 798 (2d Cir.1996) ("Until the passage of final regulations, temporary regulations are entitled to the same weight [as] final regulations."). *See also* Greenberg Bros. P'ship #4 v. Comm'r, 111 T.C. 198, 205 n.12 (1998); Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 TAX LAW. 343, 343–44 (1991) (describing a technique used by the Service for "treasury regulations that are effective immediately upon publication").

17. *See Kikalos*, 190 F.3d at 795–96; Asimow, *supra* note 16, at 343; Garrison Grawoig DeLee, *Abusive Tax Shelters: Will the Latest Tools Really Help?*, 57 S. CAL. L. REV. 431, 438 (1984) (describing that "[a]s abusive tax shelters continued to proliferate, the IRS strengthened its attack by developing a coordinated tax shelter audit program, and issuing for the first time revenue rulings targeting specific tax shelter arrangements").

18. I.R.C. § 7805(e)(1) (2000) (providing that "[a]ny temporary regulation issued by the Secretary shall also be issued as a proposed regulation").

19. BLACK'S LAW DICTIONARY 1235 (7th ed. 1999).

issue a temporary regulation also as a proposed regulation ensures the regulation at issue will go through a notice-and-comment process. Even though this seemingly required use of the APA procedures seems inevitable, the Treasury's use of two exceptions has all but obliterated the APA's notice-and-comment procedures. Under APA § 553(b)(3), notice-and-comment procedures do not apply "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or (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 procedure thereon are impracticable, unnecessary, or contrary to the public interest."[20] This "good cause" exception was intended to be a high standard.[21] An agency invoking the "good cause" exception is required to show exigent circumstances, such as an imminent statutory deadline that is about to be reached, or that a judicial decision or public health emergency dictates such actions.[22] The exception is not applicable if an agency's only justification is to provide immediate guidance.[23]

Unfortunately, repeated IRS invocation of the "good cause" exception has shown that either the IRS always has "good cause" or that the standard is easily met (or is rarely challenged). For example, the IRS has used the exception on numerous occasions

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20. *See* Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(A)–(B) (2000).

21. *See* Council of S. Mountains, Inc. v. Donovan, 653 F.2d 573, 581 (D.C. Cir. 1981) (stating that the good cause exception

> permits avoidance of APA procedures only in exceptional circumstances. Otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the "good cause" banner and promulgate rules without following APA procedures. Because of this possibility for abuse, "the mere existence of deadlines for agency action . . . [can] not in itself constitute good cause for a [section] 553(b)(B) exception.")

(citations omitted); Administrative Procedure Act, S. DOC. NO. 248, 79th Cong., 2d 200, 258 (1946) (providing that the good cause exemption applies "in situations of emergency or necessity" and "is not an escape clause" from required procedures, and also that "a true and supported or supportable finding of necessity or emergency must be made and published").

22. Asimow, *supra* note 16, at 348; *see also* N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 750–52 (10th Cir. 1987); Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1320–21 (8th Cir. 1981).

23. Mobil Oil Corp. v. Dep't of Energy, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (holding that "a desire to provide immediate guidance, without more, does not suffice for good cause. . . . because . . . 'an exception to the notice requirement would be created that would swallow the rule'") (quoting Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975)); United States Steel Corp. v. EPA, 595 F.2d 207, 213–15 (5th Cir. 1979) (describing various reasons this argument fails)..

to issue temporary regulations that remain temporary and in effect for many years.[24] These regulations shall be referred to as "permanently temporary" regulations. The IRS' continued reliance on the "good cause" exception is clearly an abuse of the process as well as an abuse of discretion. Such blatant abuses have occurred for over twenty years with Temporary Treasury Regulation § 145.4051-1.[25]

I.R.C. § 7805(e)(2) mandates that "[a]ny temporary regulation shall expire within 3 years after the date of issuance."[26] However, this 3-year expiration date applies only to temporary regulations issued after November 20, 1988.[27] Therefore, the 3-year expiration rule does not apply to Temporary Regulation § 145.4051-1 because it was issued well before 1988.[28] As such, this specific temporary regulation falls into an abyss and is "permanently temporary" because it has no expiration date. This status is unfortunate because the reason for the 3-year expiration date was Congress' concern with the length of time that temporary regulations remained in "temporary" form and also because Congress wanted to mandate the notice-and-comment process for temporary regulations.[29] This concern over the longevity of temporary regulations was especially acute in the Senate, which wanted temporary regulations to expire after only two years.[30]

III. BACKGROUND OF TEMPORARY REGULATION § 145.4051-1

Under I.R.C. § 4051(a)(1)(E), a twelve percent tax is imposed on the "first retail sale" of "[t]ractors of the kind chiefly used for highway transportation in combination with a trailer or

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24. 5 U.S.C. § 553 (b)(B) (2000) (setting forth the good cause exception); Juan J. Lavilla, *Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act,* 3 ADMIN. L.J. 317, 341 n.90 (1989) (stating "[i]n 21 out of the 37 rules issued by the IRS, good cause for dispensing with public procedures was found").

25. T.D. 7882, 48 Fed. Reg. 14361 (1983) (stating that Temporary Treasury Regulation § 145.4051-1 became effective for articles sold on or after April 1, 1983). The regulation is still on the books and full of "temporary" vitality.

26. I.R.C. § 7805(e)(2) (2000).

27. *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232(b), 102 Stat. 3342, 3735 (1988).

28. T.D. 7882, 48 Fed. Reg. 14361 (1983).

29. *See* S. REP. NO. 100-309, at 7 (1988); H. R. CONF. REP. NO. 100-1104, at 217 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5277 (providing that "[t]he committee is also concerned about the length of time that some regulations remain in temporary form"); *see also* Asimow, *supra* note 16, at 363.

30. *See* H.R. CONF. REP. NO. 100-1104 at 217–18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5277, 5278.

semitrailer."[31] I.R.C. § 4051 was enacted in 1982, replacing former § 4061.[32] In addition to increasing the excise tax from ten percent[33] to twelve percent,[34] Congress changed the incidence of tax from the "manufacturer, producer, or importer"[35] of an article to the article's "first retail sale"[36] when it substituted § 4051 for § 4061.[37] However, the article subject to tax remained identical under both old and new Code sections; namely, "[t]ractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer."[38]

Under Treasury Regulation § 48.4061(a)-3(c), which corresponded to former section 4061, the term "tractor" is defined as "any tractor chiefly used for highway transportation in

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31. I.R.C. § 4051(a)(1)(E) (2000).

32. Highway Revenue Act of 1982, Pub. L. No. 97-424, § 512, 96 Stat. 2097, 2174 (1982).

33. I.R.C. § 4061(a)(1) (1982), *repealed by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 735(a)(1), 98 Stat. 494, 980 (1984).

34. I.R.C. § 4051(a)(1) (2000).

35. I.R.C. § 4061(a)(1) (1982), *repealed by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 735(a)(1), 98 Stat. 494, 980 (1984).

36. I.R.C. § 4051(a)(1).

37. *See id.* Former section 4061(a)(1) stated:

> (a) Trucks, Buses, Tractors, Etc.—
>
> (1) Tax Imposed.—There is hereby imposed upon the following articles (including in each case parts or accessories therefore sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax of 10 percent of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5 percent—
>
> Automobile truck chassis.
>
> Automobile truck bodies.
>
> Automobile bus chassis.
>
> Automobile bus bodies.
>
> Truck and bus trailer and semitrailer chassis.
>
> Truck and bus trailer and semitrailer and bus trailer and semitrailer chassis.
>
> Truck and bus trailer and semitrailer bodies.
>
> Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.
>
> A sale of an automobile truck, bus, truck or bus trailer or semitrailer shall, for purposes of this subsection, be considered to be a sale of a chassis and of a body enumerated in this subsection.

I.R.C. § 4061(a)(1) (1982), *repealed by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 735(a)(1), 98 Stat. 494, 980 (1984).

38. I.R.C. § 4051(a)(1)(E); I.R.C. § 4061(a)(1), *repealed by* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 735(a)(1), 98 Stat. 494, 980 (1984).

combination with a trailer or semitrailer."[39] Treasury Regulation § 48.4061(a)-3(c), which is a "final" or "permanent" regulation, has defined "tractor" since its effective date of April 13, 1963.[40] Thus, for treasury regulation purposes, the IRS defined "tractor" by mirroring the language of former § 4061(a)(1). This is relevant for two reasons: (1) the regulations under former § 4061 are still in effect and (2) the legislative history of § 4051 indicates Congress did not intend a change in the definition of "tractor" from that which had been in place since 1963.[41]

The regulations corresponding to § 4051 make multiple references to the former § 4061 regulations.[42] Thus, the regulations under § 48.4061 are still valid and in effect. In fact, the Federal Excise Tax Reporter specifically cautions that, although I.R.C. § 4061 was repealed, "Reg. § 48.4061(a)-3 is still in effect."[43] This includes § 48.4061(a)-3(c), which includes the definition of "tractor."[44]

The language of current § 4051 and former § 4061 ("tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer") has been a part of the Code since enactment of the Revenue Act of 1938.[45] Prior to the 1938 enactment, "tractors" in the excise tax context were specifically excluded from taxation.[46] Section 710 of the Revenue Act of 1938, entitled "Tax on tractors," amended the pertinent section to read as follows:

> (a) Automobile truck chassis, automobile truck bodies, *tractors of the kind chiefly used for*

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39. Treas. Reg. § 48.4061(a)-3(c) (1977). This definition is identical to the Internal Revenue Code language for sections 4061(a)(1) and 4051(a)(1)(E).

40. *See* T.D. 6648, 28 Fed. Reg. 3633 (Apr. 13, 1963).

41. The legislative history also mirrors the language of former section 4061 when referring to "tractor". Beyond this, Congress did nothing to alter the definition of "tractor." By not making any changes to the definition, this shows that Congress did not intend that any change be made to the definition of "tractor". This concept, which is referred to as the legislative reenactment doctrine, is expanded upon later in the article.

42. *See* Treas. Reg. § 145.4051-1(a)(2) (referring to § 48.4061(a)-1); Treas. Reg. § 145.4051-1(c)(1) (referring to § 48.4061(b)-2(b)); Treas. Reg. § 145.4051-1(f) (referring to § 48.4061(a)-1).

43. Federal Excise Tax Reports 7334 (CCH 1997) ("Although Code Sec. 4061 was stricken by P.L. 98-369 (1984), Reg. § 48.4061(a)-3 is still in effect.").

44. *Id.*

45. *See* Revenue Act of 1938, Pub. L. No. 75-554, § 710, 52 Stat. 447, 571 (1938).

46. The Revenue Act of 1926 provided an excise tax on "[a]utomobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), *except* automobile truck chassis and bodies, automobile wagon chassis and bodies, and *tractors*, 3 per centum." Revenue Act of 1926, Pub. L. No. 69-20, § 600, Stat. 9, 93–94 (1926) (emphasis added).

> *highway transportation in combination with a trailer or semitrailer* (including in each of the above cases parts or accessories therefor sold or in connection therewith or with the sale thereof), 2 per centum. . . .[47]

The legislative history to the 1938 Act reveals that Congress was concerned with tractors to which "there is attached by means of a 'fifth wheel' or similar attachment a trailer or semitrailer which contains the load."[48] Congress concluded that the manufacturers of these tractors "are in competition with truck manufacturers and there seems no sound reason why they should not both be subject to the same tax."[49]

Regulation § 145.4051-1(e)(1), which defines "tractor", is a temporary interpretative regulation.[50] It is an interpretative regulation because Congress did not delegate to the IRS a specific grant of authority relating to I.R.C. § 4051(a)(1).[51] In contrast, Congress did grant such legislative authority under I.R.C. § 4051(b).[52] Regulation § 145.4051-1(e)(1) is also interpretative in nature because the regulation, which corresponds to I.R.C. § 4051(a)(1)'s reference to "tractor", seeks to expand the scope of taxable articles by providing a definition that is beyond what Congress intended.[53] This expansion was certainly accomplished through Temporary Regulation § 145.4051-1(e)(1).[54]

This article contends that Temporary Regulation § 145.4051-1(e)(1) is either entitled to the lowest level of deference or is invalid. Treasury Regulation § 145.4051-1 was issued as a temporary regulation in response to I.R.C. § 4051,

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47. Revenue Act of 1938, Pub. L. No. 75-554, 52 Stat. 447 (1938) (emphasis added).

48. *See* H.R. Rep. No. 75-1860, at 67, *reprinted in* 1939-1 C.B. (Pt. 2), 728, 776.

49. *Id.*

50. *See* Temp. Treas. Reg. § 145.4051-1(e)(1) (2000); T.D. 7882, 48 Fed. Reg. 14361 (1983) (stating that "temporary regulations relating to the retail tax on heavy trucks as provided in section 512 of the Act" [referring to the Highway Revenue Act of 1982]). In addition, T.D. 7882 also states that the authority for the temporary regulation is under "sections 4051, 4052, 4061, and 7805 [of the I.R.C.] . . . and sections 522 [and] 523 of the Highway Revenue Act of 1982. . . ." (emphasis added).

51. *See* I.R.C. § 4051(a)(1) (2000); *see also* Lee G. Knight & Ray A. Knight, *A New Approach to Judicial Review of Interpretative Regs*, 65 J. TAX'N 326, 326 (1986) ("Unlike legislative Regulations, interpretative Regulations do not involve a delegation of legislative power.").

52. *See* I.R.C. § 4051(b) ("Under regulations prescribed by the Secretary . . . ").

53. Temp. Treas. Reg. § 145.4051-1 (2000) (providing definitions for taxable items).

54. This Temporary Regulation permits the IRS to impose the excise tax on any vehicle that tows or has an air brake system. *See* Temp. Treas. Reg. § 145.4051-1(e)(1) (2000).

originally enacted as part of the Highway Revenue Act of 1982.[55] At the time this particular temporary regulation was promulgated, Treasury intended it to remain in effect only until final regulations were adopted.[56]

Temporary Regulation § 145.4051-1(a)(1) provides that there is an excise tax imposed on the "first retail sale" of "(iii) Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer."[57] Section 145.4051-1(e)(1) then defines "tractor" in the following manner:

> (i) The term "tractor" means a highway vehicle primarily designed to tow a vehicle, such as a trailer or semitrailer, but does not carry cargo on the same chassis as the engine. A vehicle equipped with air brakes and/or towing package will be presumed to be primarily designed as a tractor.
>
> (ii) An incomplete chassis cab shall be treated as a tractor if it is equipped with one or more of the following:
>
> (A) A device for supplying pressure from the chassis cab to the brake system (air or hydraulic) of the towed vehicle;
>
> (B) A mechanism for protecting the chassis cab brake system from the effects of a loss of pressure in the brake system of the towed vehicle;
>
> (C) A control linking the brake system of the chassis to the brake system of the towed vehicle;
>
> (D) A control in the cab for operating the towed vehicle's brakes independently of the chassis cab's brakes; or

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55. Temp. Treas. Reg. § 145.4051-1 (2000); *see* T.D. 7882 (1983), 48 Fed. Reg. 14361-02 (1983).

56. T.D. 7882, 48 Fed. Reg. 14361-02, 14361 (1983) (stating that "[t]he temporary regulations provided by this document will remain in effect until superseded by final regulations on this subject").

57. Temp. Treas. Reg. § 145.4051-1(a)(1).

> (E) Any other equipment designed to make it suitable for use as a tractor.
>
> An incomplete chassis cab which is not equipped with any of the devices set forth in paragraphs (e)(1)(ii)(A) through (E) of this section shall be treated as a truck if the purchaser certifies in writing that the vehicle will not be equipped for use as a tractor.[58]

This temporary regulation greatly expands the scope of items subject to the excise tax. Formerly, under I.R.C. §§ 4051(a)(1)(E) and 4061(a)(1), and Treasury Regulation §§ 48.4061(a)-1 and 48.4061(a)-3(c), only "tractors of the kind chiefly used for highway transportation with a trailer or semitrailer" were subject to excise tax.[59] Under new Temporary Regulation § 145.4051-1(e)(1), however, the IRS is now able to tax essentially any vehicles that tow or have an air brake system.[60] This expansion of articles potentially subject to excise taxation is an aggressive and unauthorized expansion by Treasury and contrary to section 4051(a)(1)(E).

A. *APA Not Followed in Temporary Regulation § 145.4051-1*

In its initial listing of this temporary regulation in the Federal Register in 1983, the IRS invoked the "good cause" exception to avoid following the APA notice-and-comment procedure. The IRS succinctly stated that "[t]here is need for immediate guidance with respect to the provisions contained in this Treasury decision" and, therefore, it would be "impracticable to issue it with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section."[61] Unlike other temporary regulations issued during the 1980s to provide "immediate guidance,"[62] no such guidance was important

58. Temp. Treas. Reg. § 145.4051-1(e)(1).

59. I.R.C. §§ 4051, 4061; Treas. Reg. §§ 48.4061(a)-3(c); 48.4061(a)(1)(iii) (2000).

60. *See* Temp. Treas. Reg. § 145.4051-1(e)(1).

61. *Floor Stocks Credits or Refunds and Consumer Credits or Refunds with Respect to Certain Tax Repealed Articles; Excise Tax on Heavy Trucks*, T.D. 7882, 48 Fed. Reg. 14361 (1983). One has to wonder if a real problem existed for the Treasury to invoke the "good cause" exception due to a necessity for "immediate guidance" on the excise tax.

62. STAFF OF THE JOINT COMM. ON TAX'N, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986 1363 (Comm. Print 1987) (For example, the passive loss temporary regulations were issued without notice-and-comment because they were

to understand the excise tax. In fact, such "immediate guidance" was unnecessary and it was not "impracticable" for the IRS to follow the APA.[63] Instead, the IRS simply invoked the "good cause" exception because it had the ability to do so.[64] As such, Treasury has had these temporary regulations in effect for over twenty years without completing all steps required under the APA. The result is a temporary regulation that has effectively become "permanently temporary."[65] This "permanently temporary" regulation constitutes an abuse of discretion by expanding the definition of "tractor" from a limited and defined coverage area to virtually anything that tows or has a brake system.

While the IRS found an escape hatch to complying with the APA's notice-and-comment procedures because it invoked the "good cause" exception,[66] it nevertheless invited post promulgation comment by publishing a notice in the Federal Register on October 12, 1983.[67] Even though the IRS sought comments, the fact it issued the invitation only after promulgating the temporary regulation does not cure the problem.[68] After the IRS issued the post promulgation notice, several parties responded with objections to the expanded definition of "tractor." For instance, the President and CEO of

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expected to raise $36 billion in revenue between 1987 and 1991).

63. APA Legislative History, S. DOC. NO. 79-404, at 258 (1946) (stating that, under the APA, rulemaking procedures for an agency are considered "impracticable" if "the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings").

64. *See* Lavilla, *supra* note 24, at 341 n.90 (finding that the IRS had repeatedly misused the "good cause" exception and that it had invoked the "good cause" exception in 21 out of the 37 rules issued in the first half of 1987).

65. While this may be an oxymoron, the phrase "permanently temporary" is most appropriate for a description of this type of abuse. One commentator asserted that the trouble with temporary rules stems from the fact that it is convenient to set them aside once they have been adopted. Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 ADMIN. L. REV. 703, 705, 736–37 (1999). Essentially, the rule is already in effect, the public is complying with it, and, thus, the Treasury feels no pressure to modify the rule in light of comments received. *Id.* at 736. This commentator's study of the Federal Register indicated that many temporary rules remain in a temporary state even three years after adoption. *Id.* at 736–37.

66. *See* BITTKER & LOKKEN, *supra* note 9, at 1–2 (noting that "the Treasury ordinarily follows a notice and hearing procedure . . ., even for regulations of an interpretative character" and describing the general contours of this procedure).

67. Solicitation for Draft Regulations, 48 Fed. Reg. 46,465 (Oct. 12, 1983).

68. *See* United States Steel Corp. v. EPA, 595 F.2d 207, 214–15 (5th Cir. 1979) (holding that the EPA's failure to comply with the § 553(b) notice requirement was not cured simply by the agency inviting comment after promulgation of its regulation). The Fifth Circuit pointed out that "[s]ection 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas." *Id.* at 214.

the Motor Vehicle Manufacturers Association ("MVMA"), V.J. Adduci, complained that "MVMA member companies do not understand the reasoning for the phrase 'air brakes and/or towing package.'"[69]

Mr. Adduci went on to add:

> [I]f a chassis cab was equipped with both air brakes and towing package the presumption would have to be that the vehicle was intended to be used as a tractor. A user might purchase a vehicle with air brakes but no towing package for use as a truck. MVMA concludes that there is no need or requirement to impose a distinction and the 'or' should be stricken from the Temporary Regulations. . . . .
>
> Because of the way the Temporary Regulations were drafted, a purchaser of a chassis cab equipped with any of the devices at (e) (ii) A through E which has been completed by the dealer installing the body would not be taxed, but a purchaser of an incomplete chassis cab would be taxed because it is equipped with one or more of the devices enumerated in the Temporary Regulations. It is very common in the industry for purchasers to buy chassis cabs and have the body installed in their own workshop or by outside vendors.
>
> MVMA does not feel that this was the intent of the drafters. Therefore, we strongly suggest that this paragraph of the Regulations be amended . . . [70]

In addition, Mr. McCaffrey, an attorney representing the National Truck Equipment Association ("NTEA"), "urge[d] that the term 'tractor' be defined with greater specificity so that distributors and manufacturers will be aware of the vehicles on which tax must be paid."[71] He added:

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69. Letter from V.J. Adduci, President and CEO of the Motor Vehicle Manufacturers Association, to George H. Bradley, Director, Legislation and Regulations Division of Internal Revenue Service (November 29, 1983) (on file with the author).

70. *Id.*

71. Letter from R. Lawrence McCaffrey, Jr., on behalf of the National Truck Equipment Association, to John E. Chapoton, Assistant Secretary for Department of the

> [A] tractor is designed to serve no highway function other than hauling a semitrailer. Acknowledgment of these facts in the regulations would eliminate the uncertainty that exists regarding (a) trucks equipped with pintle hooks or other coupling devices which are not suitable for use with a semitrailer, and (b) vehicles which are designed primarily for a purpose other than pulling a semitrailer but are also capable of pulling a semitrailer. . . . . NTEA urges that a vehicle be taxed as a tractor only if it is designed primarily for over-the-road use to haul a semitrailer.[72]

As noted from the two comments above, the Treasury Department's expansion of the definition of "tractor" in Temporary Regulation § 145.4051-1(e)(1) stirred up a debate.[73] In spite of the comments received, however, Treasury and IRS have not amended the temporary regulation to address the concerns of these individuals who represent very influential players in the industry that is subject to excise tax.[74] Treasury and IRS also have not finalized the regulation, meaning the regulation has become "permanently temporary." Thus, it can be argued that while Treasury and IRS have sought comment on Temporary Regulation § 145-4051-1 by way of its October 12, 1983 post promulgation notice ,such comments were not, and have yet to be, seriously considered. The APA's notice-and-comment procedure[75] has either: 1) not been completed in a meaningful fashion within the spirit of the APA or 2) not been completed at all. This failure to comply with the APA illustrates why this "permanently temporary" regulation is still labeled as "temporary"—because it is simply not finished.

IV. LEGISLATIVE REENACTMENT DOCTRINE

Assume Code § A has been in existence for over twenty years, as has final regulation § 1.A-1, which corresponds to § A.

Treasury (November 30, 1983) (on file with the author).

72. *Id.*

73. *See id.*; Letter from V.J. Adduci, *supra* note 69.

74. Temp. Treas. Reg. § 145.4051-1(e)(1) (as amended 2000) (showing the definition of "tractor" has remained the same).

75. The occurrence or nonoccurrence of the notice-and-comment process is an important element in a court's analysis regarding deference paid to an agency. *See* David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 354 (2000) (discussing the effect on judicial deference if the notice-and-comment process has not occurred).

Further assume Congress revokes § A and enacts Code § B, which contains large portions identical to former § A, including the portion subjecting certain articles or persons to type X tax. Next, assume Treasury enacts regulation § 1.B-1, which, as to the portions of § B that were identical to § A (those relating to the articles or persons subject to tax), greatly expands the number and type of articles and the number and type of persons who are now subject to X tax. Taxpayer 1 was not previously taxed under § A, but is now subject to tax under regulation § 1.B-1. If regulation § 1.B-1 were not in existence, Taxpayer 1 would not be subject to tax under § B because § B uses identical language to former § A. Is Taxpayer 1 without recourse, or is there something to save him from being subject to this expansion of X tax? Taxpayer 1 does have a tool at his disposal, as the legislative reenactment doctrine (also referred to as the successive reenactment doctrine)[76] can step in to save the day.

The legislative reenactment doctrine refers to the proposition that Congress is aware of all administrative interpretations (in this case Treasury regulations) of a statute it reenacts, thereby implicitly approving the interpretation (regulation) and giving it the force of law.[77] Specifically, this doctrine assumes that members of Congress, and more specifically, members and staffs of the tax committees, actually review all existing regulations (relating to the current Code section) prior to reenacting a Code section.[78]

The Supreme Court has held that the legislative reenactment doctrine applies to Treasury regulations.[79] In *Cottage Savings Ass'n v. Commissioner*, the Court noted, "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law."[80] Further, "an

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76. *See* Tutor-Saliba Corp. v. Comm'r, 115 T.C. 1, 11 n.8 (2000).

77. SALTZMAN, *supra* note 1, ¶ 3.02[3][b][iv].

78. *Id.*

79. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 561 (1991) (holding that Treasury Regulation § 1.1001-1 was subject to the legislative reenactment doctrine); United States v. Correll, 389 U.S. 299, 305–06 (1967).

80. *Cottage Sav. Ass'n*, 499 U.S. at 561 (1991) (quoting United States v. Correll, 389 U.S. 299, 305–06 (1967)). Elaborating on the contours of the reenactment doctrine, the Supreme Court, in a later case, stated:

> A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant

agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view."[81] Other courts have applied the doctrine in a variety of tax cases.[82]

Even though the Supreme Court supports the general proposition that the legislative reenactment doctrine is a viable tool for interpretation, the Court appears inconsistent when evaluating Congress' actual versus presumed awareness of a preexisting regulation upon reenactment of a statute. This apparent conflict is best illustrated by the Supreme Court's decisions in *Lorillard v. Pons*[83] and *Brown v. Gardner*.[84]

In *Lorillard*, the Court noted that "Congress is *presumed* to be *aware* of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."[85]

Contrast the result in *Lorillard* with that found in *Brown v. Gardner*. In *Brown*, the Supreme Court reinforced the legislative reenactment doctrine's vitality, but noted that "the record of congressional discussion preceding reenactment makes no reference to the . . . regulation, and there is no other evidence to

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> considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and *the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.*").

Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (emphasis added). *See also* United States v. Hill, 506 U.S. 546, 553–54 (1993) (treasury regulations defining "mineral deposit" and "mineral enterprise" were well established at the time Congress amended the statute; it was therefore reasonable to assume Congress relied on the accepted distinction between the two terms when it referenced "mineral deposit" in the new statute). For application of the reenactment doctrine as it relates to congressional awareness of court decisions, see Dresser Indus., Inc. v. United States, 238 F.3d 603, 614 (5th Cir. 2001); United States v. Barlow, 41 F.3d 935, 943 (5th Cir. 1994).

81. Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994); *see also* Watt v. Alaska, 451 U.S. 259, 273 (1981).

82. *See* Casey v. Comm'r, 830 F.2d 1092, 1094–95 (10th Cir. 1987) (regarding the application of Treasury Regulation § 1.164-3(e)(1) to a deduction for "general sales taxes" under I.R.C. § 164(a)(4)); Tutor-Saliba Corp. v. Comm'r, 115 T.C. 1, 11 n.8 (2000) ("Under the successive reenactment doctrine, if Congress reenacts without change the statutory language that has been construed by the agency administering that statute, Congress' decision not to change that statutory language may be persuasive evidence that the agency's construction is the one intended by Congress.").

83. 434 U.S. 575 (1978).

84. 513 U.S. 115 (1994).

85. *Lorillard*, 434 U.S. at 580–81 (emphasis added).

suggest that Congress was even *aware* of the . . . interpretative position. 'In such circumstances we consider the . . . re-enactment to be *without significance*.'"[86]

In comparing the two standards, the *Lorillard* standard presumes Congress was aware of the agency regulations,[87] whereas the *Brown* standard requires proof that Congress was aware of the agency regulations.[88] The former automatically assumes Congress has knowledge of an agency's interpretation when it reenacts a statute.[89] This standard assumes members of Congress, their staffs, and the tax committee personnel have reviewed applicable regulations.[90] The reason this standard works well, pragmatically, is because the alternative is too frightening to contemplate. The alternative is that when Congress reenacts a statute, it does so completely blindfolded and ambivalent as to how an agency—charged with that statute's interpretation—did or viewed its job. If this were true, the level of "congressional deference" (to put it in terms similar to "judicial deference"), would be viewed as Congress' apathy concerning how an agency views or interprets the statute.

A significant problem with the *Brown* standard is that it would almost certainly require members of Congress to utilize their oratory skills and purposefully attempt to become a part of the legislative history.[91] Congressmen would do this to make clear they were actually aware of an agency position upon reenactment. In other words, applying the *Brown* standard would be counterproductive, as legislators could potentially take the task of proving actual awareness to an extreme and try to influence future judicial interpretation by planting statements in the legislative history.

The Supreme Court recently reaffirmed the *Lorillard* standard when it cited *Lorillard* for the application of the legislative reenactment doctrine.[92] In *Boeing Co. v. United States*, the Supreme Court noted "[t]he fact that Congress did not legislatively override [the regulation] . . . serves as persuasive

86. *Brown*, 513 U.S. at 121 (emphasis added) (quoting United States v. Calamaro, 354 U.S. 351, 359 (1957)).

87. *Lorillard*, 434 U.S. at 580–81.

88. *Brown*, 513 U.S. at 121–22.

89. *See Lorillard*, 434 U.S. at 580–81.

90. *See* SALTZMAN, *supra* note 1, ¶ 3.02[3][b][iv] (discussing the legislative reenactment doctrine generally).

91. *See Brown*, 513 U.S. at 121 (noting the absence of any congressional discussion on the record before reenactment of the statute).

92. *See Boeing Co. v. United States*, 123 S. Ct. 1099, 1111–12 (2003); *Lorillard*, 434 U.S. at 580–81.

evidence that Congress regarded that regulation as a correct implementation of its intent.[93]

Perhaps the best standard is to simply allow the legislative reenactment doctrine to apply to both actual awareness or implied awareness, as the Tenth Circuit did in *Casey v. Commissioner*.[94]

A. *Application to Temporary Treasury Regulation § 145.4051-1(e)(1)*

As it relates to Temporary Treasury Regulation § 145.4051-1(e)(1), the *Lorillard* standard is far superior to the *Brown* standard. This is because it is difficult to prove Congress was actually aware of Treasury Regulation § 48.4061-1 (and its corresponding definition of "tractor" found in § 48.4061-3(c)) when it reenacted major portions of I.R.C. § 4061 into § 4051.[95]

The *Lorillard* case is also helpful because Congress adopted "a new law incorporating sections of a prior law" when it enacted § 4051,[96] a substantial part of which consisted of former § 4061.[97] In fact, §§ 4051 and 4061 are identical in that they both tax "[t]ractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer."[98] Thus, an argument can be made that when Congress enacted § 4051 with the exact same language as existed in § 4061, Congress intended the same definition to continue to govern.

If the *Lorillard* standard is not satisfied, one would be forced to argue, pursuant to the *Brown* standard, that Congress was actually aware of the applicable regulation (*i.e.*, Treasury Regulation § 48.4061(a)-3(c)) under § 4061 when it reenacted

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93. *See Boeing Co.*, 123 S.Ct. at 1111–12.

94. *See* Casey v. Comm'r, 830 F.2d 1092, 1095 (10th Cir. 1987) ("When Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress' amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation."); Paragon Jewel Coal Co. v. Comm'r, 380 U.S. 624, 636 (1965) (applying the same rule).

95. I.R.C. § 4051(c) has been extended four times since the original enactment of § 4051. Each extension relates only to the termination date for § 4051. *See* Transportation Equity Act for the 21st Century, P.L. 105-178, § 9002(a)(1)(D) (1998); Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240, § 8002(a)(1) (1991); Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, § 11211(c)(1) (1990); Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. 100-17, § 502(a)(2).

96. *See* Pub. L. No. 97-424, § 512, 96 Stat. 2097 (1983) (codified as amended at scattered sections of 26 U.S.C., including §§ 4051–53).

97. *See id.*

98. *See* I.R.C. § 4051(a)(1)(E); I.R.C. § 4061 (1982) *repealed* by Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 735(a)(1), 98 Stat. 980 (1984).

current § 4051.[99] In attempting to prove actual congressional awareness of Treasury Regulation § 48.4061(a)-3(c), the best argument may be the following:

Congress was actually aware of the Treasury Regulation because the regulation defined "tractor" identically to the language of old § 4061, and it is that identical language that was duplicated in new § 4051. In fact, one can argue Congress had been aware since 1963 of the IRS definition of "tractor" because the definition appears in permanent Treasury Regulation § 48.4061(a)-3(c),[100] which has tracked the Code language that existed since 1938.[101] Thus, when reviewing the Conference Committee Report for § 4051 and its absence of a discussion regarding the definition of "tractor,"[102] it is reasonable to presume Congress intended no change in the definition of "tractor" and, accordingly, no enlargement of the scope of "tractors" subject to the excise tax.

Further, the fact that similar language ("highway tractors used in combination with a trailer or semitrailer") was used in the Conference Committee Report demonstrates congressional awareness of the regulatory definition of "tractor" when it amended the law.[103] While the legislative history of § 4051 does not refer to the regulatory definition by number (*i.e.*, Treasury Regulation § 48.4061(a)-3(c)),[104] such an explicit reference by number is *not* required by the case law to establish actual congressional awareness.[105]

V. JUDICIAL DEFERENCE

Having reviewed some of the pieces of the deference landscape, the analysis moves to what result a taxpayer challenging a temporary regulation can seek to obtain: either for the deciding court to afford a certain level of deference to the

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99. *See Brown*, 513 U.S. at 120–21; Treas. Reg. § 48.4061(a)-3(c) (1963) (providing that "[t]he term 'tractor' means any tractor chiefly used for highway transportation in combination with a trailer or semitrailer").

100. Treas. Reg. § 48.4061(a)-3(c) (2000).

101. Treas. Reg. § 48.4061(a)-1(a)(iii) (2000); *see also* Revenue Act of 1938, *supra* note 45.

102. *See* H.R. REP. NO. 97-555, at 180 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3639, 3761 (noting that, under present law, "[a] 10-percent manufacturers excise tax is imposed on the sale of . . . highway tractors used in combination with a trailer or semitrailer . . .").

103. *Compare id.*, *with* Treas. Reg. § 48.4061(a)-3(c) (1977).

104. *See* H.R. REP. NO. 97-555, at 180 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3639, 3761.

105. *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978) (stating that there is a presumption Congress is aware of an administrative interpretation of a statute when Congress reenacts that statute).

regulation at issue or for the court to declare the regulation invalid. The first of these areas to be addressed is judicial deference.[106] For this purpose, the major Supreme Court cases regarding the level of deference a court gives to agency interpretations and regulations is analyzed.[107] The latest Supreme Court cases in the area are *United States v. Mead*[108] and *Boeing Co. v. United States.*[109] As such, subsequent opinions interpreting *Mead* will also be evaluated.[110] In general, courts have used an array of methods and levels of deference to decide these cases.[111]

In terms of trying to view the Supreme Court's deference cases on a long-term basis, the deference levels the Court has paid to agency interpretations can best be analogized to a pendulum. One end of the pendulum (the "far left") would symbolize the court giving an interpretation no deference[112] and the other side of the pendulum (the "far right") would be the equivalent of complete deference.[113]

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106. *See generally* Joanne Constantino, et al., *Judicial Deference to Administrative Construction*, 2 AM. JUR. 2D *Administrative Law* § 240 (1994).

107. *See, e.g.*, Boeing Co. v. United States, 123 S.Ct. 1099, 1107 (2003); United States v. Mead Corp., 533 U.S. 218, 226–38 (2001); Christensen v. Harris County, 529 U.S. 576, 586–88 (2000); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984); Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 484 (1979); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Because the "level of deference" cases concern a broad area of administrative law, the cases researched were not limited to the tax area.

108. 533 U.S. 218 (2001).

109. 123 S.Ct. 1099.

110. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212,222 (2002); Robert Wood Johnson Univ. Hosp. v. Thompson, 297 F.3d 273, 281–82 (3d Cir. 2002); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d 219, 226–28 (2d Cir. 2002); Fontana v. Caldera, 160 F. Supp. 2d 122, 127–29 (D.D.C. 2001); *see also* Joseph I. Liebman, *A Panel Discussion: Judicial Deference Under* Mead*: Where Do You Draw the Line?*, 12 FED. CIR. B.J. 239, 249–56 (2002) (discussing cases applying the *Mead* standard). At the time of this article's submission, there were no subsequent opinions interpreting*Boeing Co. v. United States.*

111. *See, e.g.*, *Robert Wood Johnson Univ. Hosp.*, 297 F.3d at 281 (holding that a court must first determine whether Congress spoke directly to the issue, and if its intent is clear, end the inquiry there; however, if congressional intent is silent or ambiguous on the issue, the court must defer to the agency's interpretation as long as the interpretation is reasonable). *But see Mead*, 121 S. Ct. at 2171 (holding that *Chevron* deference, as described above, applies only when "it appears Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority").

112. A "no deference" standard essentially allows a court to review an issue de novo because it does not have to acknowledge an agency interpretation is present. Paul R. Verkuil, *An Outcome Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 688 (2002).

113. A "complete deference" standard would give an agency's decision full force, and a court would have no power to alter the decision of the agency. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("a court may not substitute its own construction of a statutory provision . . . ").

In *Skidmore v. Swift & Co.*, the Court held that it would defer to an administrative agency's interpretation only to the extent of the agency's "power to persuade."[114] As such, the *Skidmore* deference represents the mid-left side of the pendulum in this analysis. *Skidmore* was followed by *National Muffler*, in which the Court's standard shifted more toward the middle of the pendulum. The Court held that a regulation would be sustained if it "harmonizes with the plain language of the statute, its origin, and its purpose."[115]

The Supreme Court then handed down *Chevron*,[116] in which it announced a new standard that was as close to the right of the pendulum as possible without giving absolute and unlimited discretion to the government. In *Chevron*, the Court held that an agency's interpretation of a statute is given "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute."[117] With the Supreme Court's decision in *Mead*,[118] the deference "pendulum" has taken a drastic swing back to the left, where it originated with *Skidmore*.[119] Finally, the Supreme Court's latest decision in *Boeing Co.*[120] has retreated the deference "pendulum" back towards the middle, akin to *National Muffler*.[121]

Although the following is not an exhaustive list of factors, the level of deference given to a temporary regulation frequently depends on 1) whether the regulation is legislative or interpretative (while some courts fail to view this as a distinguishing factor,[122] other courts, especially the Tax Court,

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114. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

115. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979).

116. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

117. *Id.* at 843–44. This "arbitrary, capricious, or manifestly contrary to the statute" reference applies when "Congress has explicitly left a gap for the agency to fill . . . " (*i.e.*, legislative regulations). "[I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer [*i.e.*, interpretive regulation] is based on a permissible construction of the statute." *Id.* at 843.

118. United States v. Mead Corp., 533 U.S. 218 (2001).

119. *Mead*, 533 U.S. at 226–27; *Skidmore*, 323 U.S. at 140.

120. *Boeing Co. v. United States*, 123 S. Ct. 1099 (2003).

121. *Boeing Co.,* 123 S. Ct. at 1107 (citing Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–61 (1991); which in turn cites *National Muffler*, 440 U.S. at 476–77).

122. For instance, the Eleventh Circuit did not distinguish between these two types of regulations, stating instead that *any* Treasury regulation would be upheld "if found to 'implement the congressional mandate in some reasonable manner.'" Beard v. United States, 992 F.2d 1516, 1520 (11th Cir. 1993) (quoting United States v. Cartwright, 411 U.S. 546, 550 (1973)). *See also* Anderson, Clayton & Co. v. United States, 562 F.2d 972, 985 n.30 (5th Cir. 1977) (stating that "whatever sharpness the distinction between legislative and interpretative rules might otherwise have is dulled by [section] 7805(a) of the Code, which authorizes the Secretary generally to prescribe all rules that enforcement of the Code requires"); Cont'l Equities, Inc. v. Comm'r, 551 F.2d 74, 82 (5th Cir. 1977)

continue to acknowledge the distinction),[123] 2) whether the agency (in this case the IRS) followed the APA notice-and-comment procedures,[124] which is especially applicable to temporary regulations, and 3) whether the agency violated the legislative reenactment doctrine.

A. Skidmore *Deference*

In *Skidmore v. Swift*, the Supreme Court held that the term "working time," as used in the Fair Labor Standards Act, allowed the plaintiffs to recover overtime.[125] At issue was the level of deference paid to the Administrator's (of the Fair Labor Standards Act) determination that "working time" equaled waiting time on the job.[126] The Court noted:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[127]

As discussed below, this "power to persuade" deference standard has gained renewed vitality with the Supreme Court's recent decision in *Mead*.

(eliminating the distinction between legislative and interpretative regulations by characterizing all regulations as legislative because they are issued pursuant to expressly delegated rulemaking authority). It should be noted that the Fifth Circuit has changed its position and now distinguishes between legislative and interpretative regulations. *See* Dresser Indus., Inc. v. Comm'r, 911 F.2d 1128, 1137–38 (5th Cir. 1990).

123. *See, e.g.*, United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981); Ann Jackson Family Found. v. Comm'r, 15 F.3d 917, 920 (9th Cir. 1994); *Dresser Indus., Inc.*, 911 F.2d at 1137–38; City of Tucson v. Comm'r, 820 F.2d 1283, 1287–88 (D.C. Cir. 1987); Mordkin v. Comm'r, 71 T.C.M. (CCH) 2796, 2805 (1996).

124. *See* Edelman v. Lynchburg Coll., 122 S. Ct 1145, 1155 (2002); *Mead*, 533 U.S. at 230–31.

125. *See* Skidmore v. Swift & Co., 323 U.S. 134, 136 (1944).

126. *Id.*

127. *Id.* at 140.

B. National Muffler *Deference*

In *National Muffler Dealers Ass'n v. United States*, the Supreme Court upheld Treasury Regulation § 1.501(c)(6)-1, which defined the requirements of a tax-exempt "business league."[128] In its holding, the Court stated:

> In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute.[129]

The Tax Court and some Circuit Courts of Appeal rely on this particular language ("harmonizes with the plain language of the statute") when determining the proper amount of deference to give an agency rule or interpretation.[130] *National Muffler* deference has been interpreted as constituting a reasonableness test.[131]

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128. Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 474, 476–77, 488 (1979).

129. *Id.* at 477.

130. *See, e.g.*, McKnight v. Comm'r, 7 F.3d 447, 451 (5th Cir. 1993) (holding that Temporary Treasury Regulation section 301.6231(a)(1)-1T "harmonizes with the plain language, the origin, and the purpose of TEFRA's small-partnership exemption"); Dresser Indus., Inc. v. Comm'r, 911 F.2d 1128, 1137–38 (5th Cir. 1990); Coca-Cola Co. v. Comm'r, 106 T.C. 1, 19 (1996) (providing that a treasury regulation's validity turns on whether it "harmonizes with the plain language of the statute, its origin, and its purpose"); Hughes Int'l Sales Corp. v. Comm'r, 100 T.C. 293, 304 (1993) ("[A] regulation is not a reasonable statutory interpretation unless it harmonizes with the plain meaning of the statute, its origins, and its purpose.").

131. *See, e.g.*, Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 476–77 ([W]e must defer to . . . regulatory interpretations of the Code so long as they are reasonable"); Hughes Int'l Sales Corp. v. Comm'r, 100 T.C. 293, 304 (1993).

C. Chevron *Deference*

In *Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court redefined and greatly expanded the level of deference given to agency decisions and regulations.[132] *Chevron* involved a challenge to the EPA's definition of "stationary source" contained in one of its regulations.[133] In upholding the EPA's interpretation of the term, the Court established the following two-step test that would be followed by most circuits for the next sixteen years:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[134]

In short, if the statute under review is unambiguous, the *Chevron* analysis is resolved at step one: the court must follow the expressed intent of Congress.[135] Many courts refer to this first step as the "plain meaning" approach.[136] If the statute is

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132. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S 837, 865–66 (1984).

133. *Id.* at 840.

134. *Id.* at 842–43.

135. *Id.*

136. This approach implies that, because the words Congress uses in a statute are clear, the reviewing court need not look beyond the "plain meaning" of those words to decide the case. For a sample of cases upholding an administrative agency's interpretation based on the "plain meaning" of the statute, see Withrow v. Roell, 288 F.3d 199, 203 (5th Cir. 2002) (stating that courts must stick with the plain meaning of the statute unless doing so would cause "a result so bizarre that Congress could not have intended it"); McLaulin v. Comm'r, 276 F.3d 1269, 1275 n.12 (11th Cir. 2001) ("[B]ased upon the plain meaning of the statute, we need not resolve the issue of the amount of

either silent or ambiguous on a particular issue, then the analysis is resolved in step two: the court accepts the agency interpretation as long as it is "permissible" (*i.e.*, reasonable).[137] While the *Chevron* two-step approach may seem to be a great departure from the *National Muffler* deference standard, the Tax Court has correctly noted that only subtle distinctions exist.[138]

When a court is forced to proceed to step two of *Chevron* due to ambiguity in the statute, the court must then examine the administrative interpretation, rule, or regulation at issue.[139] The *Chevron* Court explained:

> 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. Such *legislative regulations* are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[140]

Due to the difficulty of proving "legislative regulations" are "arbitrary, capricious, or manifestly contrary to the statute,"[141] it becomes clear a taxpayer stands a much better chance of winning under *Chevron* if the statute is deemed unambiguous, thereby enabling a court to decide the case at step one by using the plain meaning of the statutory term or phrase.[142] This point was

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deference due agency rulings . . . ."); Rite Aid Corp. v. United States, 46 Fed. Cl. 500, 505 (2000) (finding that Treasury Regulation § 1.1502-20 was not arbitrary, capricious, or manifestly contrary to the plain meaning of I.R.C. § 1502, the statute under which the regulation was promulgated).

137. *Chevron*, 467 U.S. at 843.

138. *See* Cent. Pa. Sav. Ass'n v. Comm'r, 104 T.C. 384, 392 (1995) ([W]e find it unnecessary to dissect the differences, if any, between *Chevron* and *National Muffler*, although we are inclined to the view that the impact of the traditional, i.e., *National Muffler* standard, has not been changed by *Chevron*, but has merely been restated in a practical two-part test with possibly subtle distinctions as to the role of legislative history and the degree of deference to be accorded to a regulation.").

139. *Chevron*, 467 U.S. at 843.

140. *Id.* at 843–44 (emphasis added).

141. *See id.* at 844.

142. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (providing the results of a study that analyzed federal appeals cases utilizing the *Chevron*

emphasized by Orin S. Kerr, who conducted an empirical study of all cases in the U.S. Courts of Appeal between 1995 and 1996 that applied the *Chevron* doctrine.[143] Mr. Kerr found that, in those two years alone, courts applied the *Chevron* analysis a total of 253 times.[144] Of those 253 applications, the agency interpretation was accepted seventy-three percent of the time.[145] Mr. Kerr further evaluated the numbers to determine how many of the decisions applied the full two-step *Chevron* analysis (as opposed to condensing it to a one-step determination), as noted below:

> When the courts applied the full two-step framework, they resolved the Chevron question at step one 38% of the time and at step two 62% of the time. When the analysis was resolved at step one, agency views were upheld 29 times and rejected 40 times. When the statute was declared ambiguous and the court moved on to step two, the agency constructions were accepted in 100 cases and rejected in 12 cases. Thus, courts resolving applications at step one upheld the agency interpretations only 42% of the time (compared to 73% overall), and those resolving applications at step two upheld the agency view in 89% of the applications.[146]

If a court is going to apply a *Chevron* level of deference, Mr. Kerr's empirical evidence illustrates the importance of prevailing at step one. If a case cannot be resolved at this initial stage by the statute's plain meaning, then the odds are heavily against (89 percent[147]) the taxpayer.

The implicit/explicit delegation of power distinction made by the *Chevron* Court has been interpreted as placing interpretative regulations on the same deferential footing as that of legislative regulations.[148] The problem with this view is that it disregards

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two-step test).

143. *Id.* at 4.

144. *Id.* at 30.

145. *Id.*

146. *Id.* at 30–31.

147. *Id.* at 31.

148. Kevin W. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 ARIZ. L. REV. 769, 775–77 (1988).

the distinction between legislative regulations and I.R.C. § 7805(a) (relating to interpretative regulations) and Congress' decision to choose one form of regulation or the other (and impliedly to grant different levels of deference). If it had meant for all Treasury regulations to be given equal weight, Congress would abdicate its responsibility to make a Code section clear on its face and explicitly invite the Treasury Department to issue regulations under all Code sections, thereby making all regulations legislative in nature. For this reason, "*Chevron* has had a checkered career in the tax arena."[149] Accordingly, whether a regulation is legislative or interpretative must continue to play a role in a court's determination. Since *Chevron* was decided, many courts have continued to recognize this distinction.[150] One court even questioned whether *Chevron* applies at all to interpretative regulations.[151]

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149. Cent. Pa. Sav. Ass'n v. Comm'r, 104 T.C. 384, 391 (1995); *see also* Wolpaw v. Comm'r, 47 F.3d 787, 790 (6th Cir. 1995), *rev'g* 66 T.C.M. (CCH) 177 (1993) (stating, "[T]he degree to which courts are bound by agency interpretations of law has been like quicksand. The standard seems to have been constantly shifting, steadily sinking, and, from the perspective of the intermediate appellate courts, frustrating").

150. *See, e.g.*, Ann Jackson Family Found. v. Comm'r, 15 F.3d 917, 920 (9th Cir. 1994) ("Interpretative regulations . . . are entitled to less judicial deference than are those issued pursuant to a specific grant of authority."); McKnight v. Comm'r, 7 F.3d 447, 451 (5th Cir. 1993) (giving legislative regulations *Chevron* deference and interpretative regulations *National Muffler* deference); Dresser Indus., Inc. v. Comm'r, 911 F.2d 1128, 1137–38 (5th Cir. 1990) ("Regulations 'issued under a specific grant of authority' . . . are to be accorded more weight than those promulgated under a more general authority. . . . The latter category of regulations, sometimes characterized as 'interpretive,' must 'harmonize[] with the plain language of the statute, its origin, and its purpose.'") (quoting Rowan Cos. v. United States, 452 U.S. 247, 253 (1981)) (citations omitted); City of Tucson v. Comm'r, 820 F.2d 1283, 1287 (D.C. Cir. 1987) ("A treasury regulation commands significant judicial deference . . . especially when, as here, the statute so construed . . . contains an express grant of rulemaking power."); Pac. First Fed. Sav. Bank v. Comm'r, 94 T.C. 101, 106 (1990), *rev'd*, 961 F.2d 800 (9th Cir. 1992) ("[W]hile the challenged provisions are entitled to deference, they are not entitled to as much deference as that owed to 'legislative regulations,' which are promulgated under more specific grants of authority."); Mordkin v. Comm'r, 71 T.C.M. (CCH) 2796, 2805 (1996) ("The judicial deference accorded to a regulation generally depends on whether the regulation is classified as a legislative or an interpretative regulation."). Many courts that distinguish between the level of deference paid to legislative and interpretative regulations continue to cite *Rowan Cos. v. United States*, despite this case being decided prior to *Chevron*. In *Rowan*, the Supreme Court stated: "Because we therefore can measure the Commissioner's interpretation against a specific provision in the Code, we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision." Rowan Cos. v. United States, 452 U.S. 247, 253 (1981). For a sample of these cases, see United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Comm'r v. Portland Cement Co. of Utah, 450 U.S. 156, 169 (1981).

151. *See* E.I. du Pont de Nemours & Co. v. Comm'r, 41 F.3d 130, 136 (3d Cir. 1994), *aff'g* 102 T.C. 1 (1994).

D. Mead *Deference: Collapse of the* Chevron *Doctrine?*

Through the *Christensen v. Harris County*[152] and *United States v. Mead Corp.*[153] decisions issued in the last several years, the Supreme Court has greatly reduced the deference paid to an agency interpretation, so much so that the future of *Chevron* deference seems to lie in serious doubt.[154]

Christensen involved the level of deference paid to an opinion letter issued by the Department of Labor.[155] In refusing to give deference to the opinion letter, the Court noted:

> we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference . . . . Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore* . . . but only to the extent that those interpretations have the "power to persuade."[156]

The Supreme Court found the lack of a notice-and-comment process to be especially significant when drawing a deference line.[157] This is very important because most temporary regulations, including § 145.4051-1(e)(1), are issued without notice-and-comment under the APA. The Supreme Court, however, did note that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a

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152. 529 U.S. 576 (2000).

153. 533 U.S. 218 (2001).

154. *See* Ellen P. Aprill, *Muffled* Chevron*: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51 (1996); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833 (2001); *see also* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1274–75 (2002) (interpreting the *Mead* decision as creating the potential for the judicial branch to resolve statutory ambiguities); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2140 (2002) (explaining the deference levels in the *Christensen* and *Mead* holdings).

155. *Christensen*, 529 U.S. at 586–88.

156. *Id.* at 587 (citations omitted).

157. *Id.*

regulation."[158] This language, without further explanation, appears unfortunate for a taxpayer challenging a temporary regulation. But, when coupled with the emphasis the Court places on the notice-and-comment process, a strong argument can be made that the Court was referring only to "an agency interpretation contained in a regulation" that also completes the notice-and-comment process.[159]

In *Mead*, the Supreme Court determined that a U.S. Customs tariff classification ruling was entitled to "some deference," holding:

> [A]dministrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent. The Customs ruling at issue here fails to qualify,

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158. *Id.*

159. *See* Merrill & Hickman, *supra* note 151, at 833. The Merrill & Hickman article takes the position that many questions relating to the *Chevron* doctrine remain unanswered after *Christensen*, including whether a temporary regulation issued under the "good cause" exception and, therefore, without notice-and-comment (*e.g.*, Temporary Regulation § 145.4051-1), is entitled to deference. *Id.* at 846–47. They a draw attention to discrepancy resulting from the *Christensen* decision:

> Agencies sometimes issue regulations having the force of law without following notice-and-comment rulemaking procedures. For example, both procedural rules and interim rules promulgated pursuant to the APA's "good cause" exception are legally binding, and yet, are excused from notice-and-comment requirements. Christensen is unclear about whether these sorts of rules are entitled to Chevron deference. And where do interpretative rules—not mentioned by the majority—fit within its categories? Interpretative rules are often said not to have the force of law, and like procedural rules and interim rules issued under the good cause exception they are exempt from notice-and-comment requirements. Yet, some agencies routinely use notice-and-comment in adopting interpretative rules. Christensen leaves the door open to the possibility that Chevron would apply to interpretative rules if the agency voluntarily affords notice-and-comment before such rules are promulgated.

Id. at 846–47.

> although the possibility that it deserves some deference under Skidmore leads us to vacate and remand.[160]

In so holding, the Court pointed out that the tariff classification ruling at issue was entitled to deference "proportional to its 'power to persuade.'"[161] In stressing the importance of the notice-and-comment process, the Court noted:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force . . . . Thus, the overwhelming number of our cases applying Chevron deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to Chevron authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded.[162]

With the Supreme Court's decision in *Mead*, the deference pendulum effectively swung back to where it originally started in *Skidmore*.[163] As Justice Scalia, the Court's sole dissenter, remarked: "Today the Court collapses [the *Chevron*] doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so." [164]

The *Mead* majority recognized, however, that *Chevron* still applies in some circumstances and did not overrule its two-step approach.[165] *Mead* replaces *Chevron* deference (agency

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160. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

161. *See id.* at 235 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

162. *Id.* at 230–31. It is also worth noting that a Customs classification ruling does not go through the notice-and-comment procedure. *Id.* at 233.

163. *Compare Mead*, 533 U.S. at 234, *with Skidmore*, 323 U.S at 140.

164. *Mead*, 533 U.S. at 240 (Scalia, J., dissenting).

165. *See id.* at 219 (citing *Chevron*, 467 U.S. at 842–46). The Supreme Court also stated:

> In *Chevron*, this Court recognize[ed] that Congress engages not only in

interpretation must be followed unless it is "arbitrary, capricious, or manifestly contrary to the statute") with a return to *Skidmore* ("proportional" deference according to the interpretation's "power to persuade").[166]

E. *Court Decisions Applying the* Mead *Standard*

Courts interpreting and applying *Mead* have placed a heavy emphasis on an agency's failure to engage in a notice-and-comment process.[167] In fact, the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit") stated that "it would be plain error for us to rely on [*Chevron*]" where an agency rule was "not the product of a statutorily-created decision-making process, such as formal adjudication or notice-and-comment rulemaking."[168]

Relating specifically to tax regulations, the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") noted that "[a]fter *Mead*, we know that we give full deference under *Chevron* . . . only to regulations that were promulgated with full

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> express, but also implicit, delegation of specific interpretative authority. It can be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when addressing ambiguity in the statute or fill in a space in the enacted law, even one about which Congress did not have intent as to a particular result. When circumstances implying such an expectation exist, a reviewing court must accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.

Id. at 219.

166. *Compare Mead*, 533 U.S. at 227, *with Skidmore*, 323 U.S. at 140.

167. *See, e.g.*, Ind. Family & Soc. Servs. Admin. v. Thompson, 286 F.3d 476, 480 (7th Cir. 2002) (stating that, under *Mead*, "[o]nly those [agency interpretations] subject to notice-and-comment or comparable formalities qualify [for *Chevron* deference]") (citing U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1141 (7th Cir. 2001)); TeamBank, N.A. v. McClure, 279 F.3d 614, 619 (8th Cir. 2002) (holding that, under *Mead*, "*Chevron* deference is generally reserved for interpretations reached through 'relatively formal' administrative procedures, such as 'notice-and-comment rulemaking or formal adjudication'"); Am. Fed'n of Gov't Employees, AFL-CIO v. Veneman, 284 F.3d 125, 129 (D.C. Cir. 2002); Landmark Legal Found. v. IRS, 267 F.3d 1132, 1135–36 (D.C. Cir. 2001); Hall v. EPA, 273 F.3d 1146, 1156 n.6 (9th Cir. 2001); Schlumberger Tech. Corp. v. United States, 55 Fed. Cl. 203, 212 n.5 (Fed. Cl. 2003) (finding that Revenue Rulings are not afforded *Chevron* deference "because they have not been subject to notice and comment. . . ."); Tax Analysts v. IRS, 215 F. Supp. 2d 192, 198 (D.D.C. 2002) (holding that tax regulations "must be made in a 'notice-and-comment rulemaking or formal adjudication'" to receive *Chevron* deference). For a discussion of how *Mead* deference should have applied to Temporary Regulation § 1.163-9T(b)(2)(i)(A), see the dissent of Judge Vasquez in Robinson v. Commissioner, 119 T.C. 44, 147–64 (2002) (Vasquez, J., dissenting).

168. *Am. Fed'n of Gov't Employees, AFL-CIO*, 284 F.3d at 129.

notice-and-comment or comparable formalities."[169] The D.C. Circuit agreed with this sentiment, holding that *Chevron* deference applied only "if the Service had reached the interpretation asserted here in a notice-and-comment rulemaking, a formal agency adjudication, or in some other procedure meeting the prerequisites for *Chevron* deference. . . ."[170] Interestingly, the Seventh Circuit also announced that the *Chevron* two-step test is still applicable to cases concerning treasury regulations,[171] but that the applicable level of deference should be under the *Mead* (and thus, *Skidmore*) standard when the agency passed the regulation under questionable formalities.[172] The D.C. Circuit also found it appropriate to give only *Skidmore* deference in this situation.[173]

F. Boeing *Deference*

In *Boeing Co. v. United States*, the Supreme Court was deciding the deference that should be paid to interpretive regulation 1.861-8(e)(3).[174] In laying out what deference should be accorded to an interpretive regulation, the Court noted: "[e]ven if we regard the challenged regulation as interpretive because it was promulgated under § 7805(a)'s general rulemaking authority, we must still treat the regulation with deference."[175]

The follow up question that must be asked is: how much deference must we accord to an interpretive regulation? The

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169. *U.S. Freightways Corp.*, 270 F.3d at 1141.

170. *Landmark Legal Found.*, 267 F.3d at 1135–36.

171. *See U.S. Freightways Corp.*, 270 F.3d at 1141.

172. *See id.* at 1142. The court stated:

> Both the informality of this interpretation and the context in which it has arisen persuade us that full *Chevron* deference is not appropriate here. *Mead* expressly disapproved of the exercise of such deference for the customs regulations that were at issue there, in part because of the boot-strapping that could otherwise occur. With full *Chevron* deference, agencies could pass broad or vague regulations through notice-and-comment procedures, and then proceed to create rules through *ad hoc* interpretations that were subject only to limited judicial review. All told, we think this is a clear case for the flexible approach *Mead* described . . . .

Id. For an example of how *Chevron* deference applies to a tax regulation passed under formal rulemaking procedures, including notice and comment, see *Tax Analysts*, 215 F. Supp. 2d at 198 (finding that Regulation § 301.6110-1(a) was entitled to *Chevron* deference because it was enacted "in a formal rulemaking process").

173. *Landmark Legal Found.*, 267 F.3d at 1135–36.

174. Boeing Co. v. United States, 123 S. Ct. 1099, 1101 (2003).

175. *Boeing Co.*, 123 S. Ct. at 1107.

answer is not explicitly stated in *Boeing*. The answer is implicitly located in *Boeing* if one follows deference case trail. The answer is that an interpretive regulation that is also issued with the APA notice-and-comment procedures is accorded deference if it is reasonable. This statement is correct because the *only* case cited by the Supreme Court in support of its deference statement cited above is *Cottage Savings Ass'n v. Commissioner.*[176]

In *Cottage Savings*, the Court held that interpretive regulations are entitled to deference "so long as they are reasonable."[177] Following the trail of the *only* case cited by the *Cottage Savings* Court in support of its "reasonable" deference statement leads back to *National Muffler.*[178]

In *Boeing*, the fact that *only* one case was cited to support the Court's deference standard is important. This one cited case was not *Mead* or *Chevron.* As noted above, the Court went back to the *Cottage Savings/National Muffler* reasonableness standard.[179] This is important because the prior deference case heard by the Court (*Mead*) was one in which there was some dissent over *Chevron's* future application.[180] Accordingly, *Boeing* seems to reiterate Justice Scalia's concern that *Chevron's* continued vitality is in doubt.[181]

VI. INVALID REGULATIONS

Assuming a court accepts the taxpayer's interpretation of a regulation, should the court give the temporary regulation little or no deference, invalidate the regulation, or both? While a court's finding that a temporary regulation is entitled to little or no deference may implicitly invalidate a regulation, tax administration could be better served by a court explicitly invalidating the regulation. [182] Therefore, the discussion in this section focuses on cases in which the court decided in favor of the

176. *Boeing Co.,* 123 S. Ct. at 1107 (citing Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 560–61 (1991)).

177. *Cottage Sav.*, 499 U.S. at 561.

178. *Cottage Sav.*, 499 U.S. at 561 (citing Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 476–77 (1979)).

179. *Boeing Co.,* 123 S. Ct. at 1107 (citing *Cottage Sav.*, 499 U.S. at 560–61).

180. *See Mead*, 533 U.S. at 240 (Scalia, J., dissenting) ("Today the Court collapses [the *Chevron*] doctrine, announcing instead a presumption that agency discretion does not exist unless the statute, expressly or impliedly, says so.").

181. *Id.*

182. *See, e.g., U.S. Freightways Corp.*, 270 F.3d at 1142–47 (giving the agency's interpretation a *Mead* level of deference in finding for the taxpayer, but not actually declaring the regulation invalid).

taxpayer on the deference argument but did not actually declare the regulation invalid.[183] Courts likely choose to take this approach simply because it is easier to craft a narrow application for one particular case rather than affecting hundreds of potential cases by invalidating the regulation.

Invalidating a regulation is a difficult step because it requires a court to imply or overtly state that the regulation's language is not what Congress intended when enacting a particular Code section and that Treasury exceeded its authority in promulgating such regulation. Pragmatically, a court may find it easier to afford a temporary regulation a low level of deference under *Mead* because this approach allows for great flexibility.

If a court takes the deference approach and decides against the IRS' position, when in reality the court should declare the temporary regulation invalid, a result would be reached that is detrimental to tax administration. For example, assume a court holds that a regulation should be afforded little or no deference. In so holding, is the court , in effect, ruling that the regulation is invalid? The court's action would, in fact, amount to a *de facto* declaration that the regulation is invalid.

Is this any better than simply declaring the regulation invalid? Would not invalidating the regulation this lead to a better result? This article asserts that invalidating a regulation is better for efficient tax administration because invalidity strongly encourages Treasury to immediately revisit the drawing board and reformulate the regulation. Without invalidity, the government may repeatedly apply a regulation that received little or no deference in one court challenge until a subsequent court found the regulation invalid.

In the tax arena, wide arrays of regulations (without regard to the level of deference) have been declared invalid. This array includes legislative regulations,[184] interpretive regulations,[185] and

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183. *See id.*

184. *See* Rite Aid Corp. v. United States, 255 F.3d 1357, 1359 (Fed. Cir. 2001) (invalidating legislative regulation § 1.1502-20); City of Tuscon, Ariz. v. Comm'r, 820 F.2d 1283, 1290 (D.C. Cir. 1987) (invalidating legislative regulation § 1.103-13(g)); Goodson-Todman Enters. v. Comm'r, 784 F.2d 66, 74 (2d Cir. 1986) (invalidating legislative regulation § 1.48-8(a)(3)(iii) to the extent of "game shows"); Phillips Petroleum Co. v. Comm'r, 97 T.C. 30, 34 (1991), *aff'd per curiam*, 70 F.3d 1282 (10th Cir. 1992) (invalidating legislative regulation § 1.863-1(b)(1)); Nat'l Westminster Bank, PLC v. United States, 44 Fed. Cl. 120 (1999) (invalidating legislative regulation § 1.882-5).

185. *See* Nalle v. Comm'r, 997 F.2d 1134, 1139 (5th Cir. 1993) (invalidating interpretive regulation § 1.48-12(b)(5)); Iglesias v. United States, 848 F.2d 362, 366–67 (2d Cir. 1988) (invalidating interpretive regulation § 1.861-2(a)(1)); Walton v. Comm'r, 115 T.C. 589, 598–99 (2000) (invalidating example 5 of interpretive regulation

temporary questions.[186] For instance, in *United States v. Cartwright*,[187] the Supreme Court invalidated Treasury Regulation § 20.2031-8(b), which defined the fair market value of mutual fund shares for estate tax purposes, because the Court found that

> Congress surely could not have intended [section] 2031 to be interpreted in such a manner. The Regulation also imposes an unreasonable and unrealistic measure of value. We agree with Judge Tannenwald [of the Tax Court], who stated . . . that "it does not follow that, because (the Commissioner) has a choice of alternatives, his choice should be sustained where the alternative chosen is unrealistic. In such a situation the regulations embodying that choice should be held to be unreasonable."[188]

In *Rowan Companies v. United States*, the Supreme Court invalidated Treasury Regulation §§ 31.3121(a)-1(f) and 31.3306(b)-1(f), which defined the term "wages" for FICA tax purposes as including the value of meals and lodging provided by an employer for the employer's own convenience.[189] The Court held the regulations invalid because "they fail to implement the congressional mandate in a consistent and reasonable manner."[190] Almost immediately after *Rowan*, the Supreme Court handed down *United States v. Vogel Fertilizer Co.*, in which it invalidated Treasury Regulation § 1.1563-1(a)(3), which defined the term "brother-sister controlled group" for purposes of the corporate surtax exemption.[191]

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§ 25.2702-3(e)); Hughes Int'l Sales Corp. v. Comm'r, 100 T.C. 293, 305 (1993) (invalidating interpretive regulation § 1.993-6(e)(1)); Home Group, Inc. v. Comm'r, 91 T.C. 265, 272 (1988), *aff'd*, 875 F.2d 377 (2d Cir. 1989) (invalidating last sentence of interpretive regulation § 1.593-6(a)(3)); Minihan v. Comm'r, 88 T.C. 492 (1987) (invalidating interpretive regulation §§ 301.7430-1(b)(1)(i)(B) and 301.7430-1(f)(2)(i)).

186. *See* Microsoft Corp. v. Comm'r, 311 F.3d 1178 (9th Cir. 2002) (invalidating temporary interpretive regulation § 1.927(a)-1T(f)(3)); Ann Jackson Family Found. v. Comm'r, 15 F.3d 917, 920 (9th Cir. 1994) (invalidating temporary interpretive regulation § 53.4942(a)-2(b)(2); Prof'l Equities, Inc. v. Comm'r, 89 T.C. 165, 181 (1987) (invalidating temporary legislative regulation § 15A.453-1(b)(3)(ii)).

187. 411 U.S. 546 (1973).

188. *Id.* at 557.

189. Rowan Cos. v. United States, 452 U.S. 247, 251–53 (1981).

190. *Id.* at 253.

191. United States v. Vogel Fertilizer Co., 455 U.S. 16,18, 21–22 (1982).

In *City of Tucson v. Commissioner*,[192] the D.C. Circuit held that Treasury Regulation § 1.103-13(g) "stretches the language of Section 103(c) (2) (B) beyond the breaking point [and, therefore,] we cannot sustain it as an authorized implementation thereof."[193] The court then cited Treasury's expansion of the Code section, noting that "the [Treasury] Department has forged, not a reasonable implementation of the legislative mandate, but rather an impermissible enlargement by an unnatural construction of the statutory language."[194]

The Tax Court is also willing to invalidate a regulation, whether it be permanent or temporary.[195] In *Tate & Lyle v. Commissioner*, the court held that a portion of Regulation § 1.267(a)-3 was invalid because it did not apply the matching principles of I.R.C. § 267(a)(2).[196] In holding the regulation invalid, the court noted that the regulation was "manifestly beyond the mandate of the statutory authorization and therefore is invalid."[197]

If the Treasury does not comply with the APA when enacting a regulation, the regulation may be declared invalid.[198] In

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192. 820 F.2d 1283 (D.C. Cir. 1987).

193. *Id.* at 1290. Other circuit courts have invalidated tax regulations. *See* Nalle v. Comm'r, 997 F.2d 1134, 1135 (5th Cir. 1993); Iglesias v. United States, 848 F.2d 362, 367 (2d Cir. 1988); Goodson-Todman Enters., Ltd. v. Comm'r, 784 F.2d 66, 77 (2d Cir. 1986); Estate of Gresham v. Comm'r, 752 F.2d 518 (10th Cir. 1985).

194. *City of Tucson*, 820 F.2d at 1290.

195. The Tax Court held for a number of years that Temporary Regulation § 1.163-9T(b)(2)(i)(A) was invalid. *See* Kikalos v. Comm'r, 190 F.3d 791, 799 (7th Cir. 1999), *rev'g* 75 T.C.M. (CCH) 1924 (1998); Redlark v. Comm'r, 141 F.3d 936, 942 (9th Cir. 1998), *rev'g* 106 T.C. 31 (1996). However, in a recent case, Robinson v. Commissioner, 119 T.C. 44, 75 (2002), the Tax Court decided to no longer follow its decision in *Redlark* and now holds that the regulation is valid. For another Tax Court case finding a temporary regulation invalid, see Prof'l Equities, Inc. v. Comm'r, 89 T.C. 165, 181 (1987). Similarly staunch position invalidating a regulation in the face of decisions from Courts of Appeal have occurred. *See* Ga. Fed. Bank v. Comm'r, 98 T.C. 105 (1992) (challenging Treasury Regulation § 1.593-6A(b)(5)); Pac. First Fed. Sav. v. Comm'r, 94 T.C. 101 (1990), *rev'd*, 961 F.2d 800 (9th Cir. 1992); Bell Fed. Sav. & Loan Ass'n v. Comm'r, 62 T.C.M. (CCH) 376 (1991), *rev'd*, 40 F.3d 224 (7th Cir. 1994); Leader Fed. Sav. & Loan Ass'n v. Comm'r, 62 T.C.M. (CCH) 201 (1991); Peoples Fed. Sav. & Loan Ass'n v. Comm'r, 59 T.C.M. (CCH) 85 (1990), *rev'd*, 948 F.2d 289 (6th Cir. 1991). Other regulations have been invalidated by the Tax Court. *See* Tate & Lyle, Inc. v. Comm'r, 103 T.C. 656, 679 (1994); W. Nat'l Mut. Ins. Co. v. Comm'r, 102 T.C. 338, 361 (1994), *aff'd*, 65 F.3d 90 (8th Cir. 1995); Hughes Int'l Sales Corp. v. Comm'r, 100 T.C. 293 (1993); Pepcol Mfg. Co. v. Comm'r, 98 T.C. 127, 137 (1992); Phillips Petroleum Co. v. Comm'r, 97 T.C. 30, 39–40 (1991); Morris v. Comm'r, 70 T.C. 959 (1978).

196. Tate & Lyle v. Comm'r, 103 T.C. 656, 671 (1994).

197. *Id.*

198. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301–02 (1979) (holding that, absent public notice and comment under the APA, the rule was invalid); Reeder v. FCC, 865 F.2d 1298, 1304 (D.C. Cir. 1989) (declaring rule invalid after improper notice and comment, even though the agency received curative comments after the fact); Florida Fruit &

American Standard, Inc. v. United States, the United States Claims Court invalidated a portion of Regulation § 1.1502-25(c), which excludes all corporations with losses from the fraction determining the portion of consolidated taxable income, because the regulation was "in violation of the delegation of rulemaking power and of the notice requirement of the Administrative Procedure Act."[199]

Just because a temporary regulation has remained "permanently temporary" for a number of years does not preclude it from being declared invalid. In *Jackson Family Foundation v. Commissioner*, the Ninth Circuit agreed with the Tax Court's holding that Regulation § 53.4942(a)-2(b)(2) was invalid.[200]

The Ninth Circuit noted that "the mere fact that the interpretative regulation . . . was issued . . . some twenty years ago is no argument against either the Tax Court's overturning that regulation or our upholding that ruling if the regulation fails to 'implement the congressional mandate in some reasonable manner.'"[201] The court then held that the temporary regulation was invalid because it "fails to implement the congressional mandate in a reasonable manner."[202]

VII. DEFERENCE STANDARD AND INVALID ARGUMENT FOR TEMPORARY REGULATION § 145.4051-1(e)(1)

As applied to I.R.C. § 4051(a)(1)(E), one could argue that under its plain meaning, the term "[t]ractors" is unambiguous, and that a court could therefore decide this issue at step one.[203] In support of this plain meaning, one could say that "[t]ractors" should be given its ordinary meaning,[204] which has the same meaning in the industry sense.[205]

Vegetable Ass'n v. Brock, 771 F.2d 1455, 1460 (11th Cir. 1985); Am. Standard, Inc. v. United States, 602 F.2d 256 (Ct. Cl. 1979). For cases in which the court invalidated a temporary rule adopted under the "good cause" exception, see Air Transp. Ass'n of Am., 900 F.2d 369, 378–81 (D.C. Cir. 1990); Levesque v. Block, 723 F.2d 175, 187–89 (1st Cir. 1983); Buschmann v. Schweiker, 676 F.2d 352, 355–58 (9th Cir. 1982); Am. Iron & Steel Inst. v. EPA, 568 F.2d 284, 291–92 (3d Cir. 1977).

199. *Am. Standard, Inc.*, 602 F.2d at 269.

200. *Id.*

201. *Id.* at 920 (quoting Pac. First Fed. Sav. Bank v. Comm'r, 961 F.2d 800, 803 (9th Cir.)).

202. *Id.* at 922.

203. I.R.C. § 4051(a)(1)(E) (2000).

204. *See* City of Tucson v. Comm'r, 820 F.2d 1283, 1288 (D.C. Cir. 1987) ("Courts attribute to nontechnical statutory words their 'known and ordinary signification.'"). A "tractor" is obviously a nontechnical word. This statement is made in light of a recent case that was decided on the basis of the word "the." *See* Limited, Inc. v. Comm'r, 286 F.3d 324, 334 (6th Cir. 2002).

205. Samuel B. Sterrett, *Use of Industry Definitions in Interpretation of the Internal*

If a court cannot decide the issue at step one, it is required to move towards a deference analysis. In this case, one could argue that the definition of "tractors" in Regulation § 145.4051-1(e)(1)[206] is not what Congress contemplated in I.R.C. § 4051(a)(1)(E).[207] As a result, the temporary regulation is an impermissible expansion beyond what Congress intended, and the Treasury Department and IRS should not be allowed to "usurp the authority of Congress by adding restrictions to [I.R.C. § 4051] which are not there."[208] Congress' intent should be narrowly construed and any doubt should be resolved in favor of the taxpayer.[209] Therefore, Temporary Regulation § 145.4051-1(e)(1) expands and contorts the term "[t]ractors" to unforeseen dimensions, and for that reason, should either be given the lowest level of deference or held invalid.[210]

If the IRS argues the regulation cannot be held invalid because of the length of time it has been active (over twenty years), this argument can be countered as not viable because there is no time limit on the corrective action of the courts.[211]

Alternatively, one could argue that Temporary Regulation § 145.4051-1(e)(1) is entitled to the lowest level of deference, or no deference at all, because it is "temporary" and should be given the same level of deference that a proposed regulation receives.[212] This argument is based on the mandate of I.R.C. § 7805(e)(1) that temporary regulations be issued as proposed regulations.[213] Once could argue § 7805(e)(1) implies that Congress intended for

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Revenue Code: Towards a More Systematic Approach, 16 VA. TAX REV. 1, 4 (1996) (noting that the former Chief Judge of the Tax Court advocates for plain meaning, as used in the industry sense, and that "the primary assumption of Congress, and all who read, interpret, and apply the Code (from the Treasury Department and the Internal Revenue Service . . . to the individual filling out his or her 1040EZ) should be that the words in the Code carry their common and ordinary meaning to their intended audience").

206. *See* Treas. Reg. § 145.4051-1(e)(1) (2000).

207. I.R.C. § 4051(a)(1)(E) (2000).

208. Nalle v. Comm'r, 99 T.C. 187, 191 (1992) ("A regulation is not a reasonable interpretation unless it harmonizes with the plain language of the statute, its origin, and its purpose.") (citations omitted); *see also* United States v. Calamaro, 354 U.S. 351, 357, 359 (1957); Koshland v. Helvering, 298 U.S. 441, 447 (1936).

209. *See City of Tucson*, 820 F.2d at 1288 n.31; Luben Indus., Inc. v. United States, 707 F.2d 1037, 1041 (9th Cir. 1983); Davenport v. Ralph N. Peters & Co., 386 F.2d 199, 209 (4th Cir. 1967) (stating "taxing statutes are construed most strongly against the government and in favor of the taxpayer").

210. Treas. Reg. § 145.4051-1(e)(1) (2000); *see also* Oshkosh Truck Corp. v. United States, 123 F.3d 1477, 1481 (Fed. Cir. 1997) (stating that if an agency's interpretation is markedly different from the intent of Congress, then no deference should be given).

211. *See* Ann Jackson Family Found. v. Comm'r, 15 F.3d 917, 920 (9th Cir. 1994) (invalidating a regulation even though it had been in place for twenty years).

212. Treas. Reg. § 145.4051-1(e)(1) (2000).

213. *See* I.R.C. § 7805(e)(1) (2000).

temporary regulations to receive a level of deference similar or identical to proposed regulations.[214]

A proposed regulation is not entitled to any more deference than the Commissioner would normally have on brief, meaning they are entitled to little or no deference.[215] This is because a proposed regulation has not gone through a proper notice-and-comment period and the Treasury has not had the opportunity to consider all of its ramifications.[216] Therefore, if a court determined a "temporary" regulation was accorded "proposed" status, the deference level paid to the regulation could, in fact, be none. If a court paid no deference to the regulation, it may be easier for the court to hold the regulation invalid. The Seventh Circuit said it best when referring to a temporary regulation that had not undergone the notice-and-comment process and had been on the books for twelve years.[217] The court stated that "[i]n the absence of any confirmation that the temporary regulation has, after the fact, undergone the scrutiny that typifies a pre-adoption

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214. I.R.C. § 7805(e)(1) (2000); Naftali Z. Dembitzer, *Beyond the IRS Restructuring and Reform Act of 1998: Perceived Abuses of the Treasury Department's Rulemaking Authority*, 52 TAX LAW. 501, 502 (1999).

215. Robinson v. Comm'r, 119 T.C. 44, 153 n.4 (2002); Gen. Dynamics Corp. v. Comm'r, 108 T.C. 107, 120 (1997); Laglia v. Comm'r, 88 T.C. 894, 897 (1987); Zinniel v. Comm'r, 89 T.C. 357, 369 (1987).

216. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 845 (1986) (stating

> It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound. Indeed, it would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, to tax an agency with "inconsistency" whenever it circulates a proposal that it has not firmly decided to put into effect and that it subsequently reconsiders in response to public comment.).

217. *See* Kikalos v. Comm'r, 190 F.3d 791, 796 (7th Cir. 1999). Another case of notating the importance of a temporary regulation without notice and comment, see Judge Swift's dissent in Robinson v. Commissioner, 119 T.C. 44, 128–46 (2002) (regarding Temporary Treasury Regulation § 1.163-9T(b)(2)(i)(A) [the same regulation reviewed by the Seventh Circuit, which, at the time of review by the Tax Court, had remained in temporary status for over fifteen years]). Judge Swift noted:

> [T]here is scant indication of respondent's deliberations and degree of care exercised prior to promulgation of the temporary regulation. No history of the development of the temporary regulation is available. No hearing was held. No notice and comment were provided. No proposed regulation was made available. No history of respondent's development of the policy position reflected in the temporary regulation is available.

Id. at 134.

notice and comment period, one could argue that [the section] is entitled to no more deference than a proposed regulation."[218]

As emphasized by the empirical evidence, it is important for a taxpayer to win at step one of *Chevron*.[219] As an example, one could argue that the plain meaning of § 4051(a)(1)(E) dictates exactly which "[t]ractors" are subject to excise tax and that Treasury and the IRS abusively expanded this definition well beyond the scope of congressional intent in Temporary Regulation § 145.4051-1(e)(1).[220] This plain meaning argument could effectively save a court from having to not only determine which level of deference to afford the regulation but having to declare the regulation invalid.[221]

If forced into step two,[222] one could argue that the APA's notice-and-comment procedures for Temporary Regulation § 145.4051-1(e)(1) have not been completed. Therefore, the court should either apply the *Mead* (and thus *Skidmore*) level of deference according to the temporary regulation's "power to persuade," afford the regulation no deference at all, or hold the regulation invalid.

VIII. CONCLUSION

The notice-and-comment procedures proscribed by the APA are an important and necessary step in the promulgation of treasury regulations. Unfortunately, Treasury has frequently invoked the "good cause" exception to complying with notice-and-comment. With respect to certain temporary regulations that were promulgated prior to November 20, 1988, the "good cause" exception has caused these regulations to become "permanently temporary." This is the case with temporary regulation § 145.4051-1.

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218. *Robinson*, 119 T.C. at 136 (quoting *Kikalos*, 190 F.3d at 796). The Seventh Circuit did not have the opportunity to address whether Temporary Treasury Regulation § 1.163-9T(b)(2)(i)(A) was entitled to any deference because the issue was not raised by either of the contesting parties. *Id.* *See also* United Transp. Union-Ill. Legislative Bd. v. Surface Transp. Bd., 169 F.3d 474, 480 (7th Cir. 1999) ("Lesser deference may be in order depending on the 'circumstances surrounding the agency's adoption of its statutory interpretation.'") (citations omitted).

219. *See supra* text accompanying notes 129–34 (discussing the first prong of the *Chevron* test).

220. *See* Treas. Reg. § 145.4051-1(e)(1) (2000).

221. *See* Caroline Elizabeth Costle, *Judicial Deference to Interpretive Regulations in the Face of Inconclusive Legislative History: The Example of* Nalle v. Commissioner, 47 TAX LAW. 259, 265–66 (1993) (stating that if the statutory language is clear, then the plain meaning rule should be applied).

222. *See supra* text accompanying notes 137–39 (discussing the second prong of the Chevron test).

With respect to the legislative reenactment doctrine, *Lorillard* and *Boeing* told us that Congress is presumed to be aware (*i.e.*, implied awareness) of an existing regulation when it reenacts a statute, or portions of a statute.

We reviewed deference from a historical perspective and from the using the analogizing the various deference standards using a pendulum. The pendulum has changed over time, it started out mid-left with *Skidmore's* power to persuade, returned to the middle with *National Muffler's* reasonableness test, then went to the far right with *Chevron's* two step test. In recent years, the pendulum has returned to its past, with *Mead* taking us back to *Skidmore* and our latest case, *Boeing*, returning us to *National Muffler*. Going forward, it is clear that both *Mead* and *Boeing* can coexist in the deference world by applying each of the deference standards to a set of facts. For example, *Mead* should be limited to regulations which have not gone through the complete notice-and-comment process. This includes temporary regulations, including regulation § 145.4051-1(e)(1), that have become "permanently temporary." *Boeing* can also coexist as applying a reasonableness test for interpretive regulations that have been through the notice-and-comment process.

Finally, with respect to invalidating a treasury regulation, we acknowledged that courts may implicitly invalidate a regulation when granting little or no deference to a regulation. Despite this implicit invalidation, the article argued that for the improved tax administration, it was better policy for courts to explicitly invalidate a regulation. The article then reviewed some of the regulations that have been invalidated by various courts over the years.