THE FUTURE OF DEFERENCE TO TREASURY AND IRS INTERPRETATIONS AFTER LOPER-BRIGHT OVERRULED CHEVRON: AN ANALYSIS OF THE EMPLOYEE RETENTION CREDIT AND IRS NOTICE 2021-20'S "MORE THAN NOMINAL" STANDARD

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We live in what could be described as the Gilded Age of the Digital Era. What once took weeks or months now takes days, and what once took days now takes only minutes. Within seconds, one can transmit data across or even outside the globe. Beholden to no one, technology continues to defy conventional rules and advances at an almost lightning pace; a pace, some worry, we as a Nation will have difficulty with keeping. Indeed, at a practical level many of these areas of accelerated growth remain unregulated and quite specialized, such as the world of cryptocurrency as well as the field of artificial intelligence, and the federal government cannot seem to keep up. After the Supreme Court's decision in *Loper Bright*, it will be difficult for federal agencies tasked with issuing regulations and other rulemaking policies to properly keep up unless they fully comply with the Administrative Procedure Act (hereafter "APA").

On June 28, 2024, the Supreme Court in *Loper Bright* overturned the *Chevron* doctrine, a four-decade-old ruling and corresponding precedent that afforded judicial deference to a federal agency's interpretation of an ambiguous statute.[1] Essentially, the doctrine gave agencies authority to interpret ambiguous statutes directly affecting their field of expertise and to fill in any perceived gaps that may have been left by Congress.[2] Although this decision by the Supreme Court does not directly and immediately upend any tax laws now in effect, it does create ample opportunities for challenges to be made to existing agency interpretations and calls into question the modes used to interpret statutory legislation and the agency's corresponding interpretation, which will have an immediate and very direct effect on the U.S. legal landscape. It will most certainly have a significant impact on the tax world in particular.

For decades, the Internal Revenue Service (hereafter "IRS") as a federal agency has issued revenue rulings under its current revenue ruling program as well as subregulatory guidance in order to advise taxpayers and tax practitioners in the interpretation and application of the tax laws.[3] These revenue rulings and subregulatory guidance are not statutes and therefore do not hold the full force and effect of law.[4] In fact, the Tax Court and other courts have consistently and unequivocally maintained that revenue rulings are "nothing more than the legal contentions of a frequent litigant," and accordingly granted them

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1. *See Loper Bright Enters. v. Raimondo*, No. 22-451, slip op. at 35 (U.S. June 28, 2024) (consolidated with *Relentless Inc. v. Dep't of Com.*, No. 22-1219).

2. *See Chevron U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 843-44 (1984).

3. *See* Peter A. Lowy & Juan F. Vasquez Jr., *Judicial Deference for Revenue Rulings in a Post-Mead World*, J. TAX PRAC. & PROC., Aug.-Sept. 2004, at 27, 27.

4. *Id.* at 28.

deference only to the extent their reasoning was persuasive.[5] However, their weight has varied by courts over the years from being afforded "no deference," to "*Chevron*-style deference," to "respectful consideration," to "weight as expressing the studied view of the agency whose duty it is to carry out the statute."[6] Sometimes these rulings are given as high a level of deference by the IRS as the statutes they seek to interpret.[7]

One audit-driving piece of guidance that receives such significant deference from the IRS is Notice 2021-20, 2021-11 IRB 922, which provides guidelines on employers' eligibility for the employee retention credit.[8] While certain parts of Notice 2021-20 are commended and helpful, other parts are expansive, problematic, and inconsistent with the plain language of the CARES Act statute and beyond the scope of Congressional intent. Specifically, Notice 2021-20 goes further in its interpretation of the statute by adding in its own requirements, such as the requirement that suspended operations of an affected business be "more than nominal,"[9] which does not appear anywhere in the statute.[10] Before the Supreme Court's decision in *Loper Bright*, Notice 2021-20's "more than nominal" requirement was arguably already entitled to little if any deference because the Notice was not issued under the notice and comment procedures of the APA. Now, post-*Loper*, the IRS's "more than nominal" standard contained in Notice 2021-20 should be entitled to no deference at all.

I. CHEVRON DEFERENCE OVERRULED

Federal agencies have relied on the *Chevron* doctrine for over four decades when litigants sought to challenge agency interpretations of statutory legislation. In *Chevron*, the Supreme Court addressed the level of deference accorded to agency promulgations.[11] At issue in *Chevron* was the Environmental Protection Agency's interpretation of a term in its regulations.[12] The Supreme Court determined that whenever there is an express or implied gap in statutory interpretation and policy formulation, there is an express delegation of authority for the

5. *Estate of McLendon v. Comm'r*, 135 F.3d 1017, 1023 (5th Cir. 1998); *See Exxon Mobil Corp. v. Comm'r*, 102 T.C. 721, 726 n. 8 (1994); *M.W. Spiegelman v. Comm'r*, 102 T.C. 394, 405 (1994); *V.D. Rath v. Comm'r*, 101 T.C. 196, 205 n. 10 (1993).

6. *See* Lowy & Vasquez Jr., *supra* note 3, at 31.

7. *Id.* at 34.

8. *See* I.R.S. Notice 2021-20, 2021-11 I.R.B. 922.

9. I.R.S. Notice 2021-20, Q&A #11.

10. *See* I.R.C. § 3134(b)(1)(A)-(B) (2021); Coronavirus Aid, Relief, and Economic Security Act (hereinafter "CARES Act"), Pub. L. No. 116-136, § 2301(b)(1) (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

11. *See Chevron U.S.A., Inc.*, 467 U.S. at 865.

12. *Id.* at 860-61.

appropriate administrative agency to fill in the gap and provide clarity.[13] In fact, the Court went even further by adding that those legislative regulations are given controlling weight unless they were arbitrary, capricious, or contrary to the statute.[14]

This means that when a legal question or issue arose that was already directly and clearly addressed by Congress through an unambiguous statute, a court would rely on the plain meaning of the statute when interpreting a specific issue related to that area of legislation.[15] However, when the plain language of the statute was silent or ambiguous regarding a specific issue, the court would have to answer two questions: First, has the appropriate regulatory agency already provided an answer on that specific issue?[16] If yes, then the second question for the court to answer was whether that agency's answer to the issue was based on a permissible, or reasonable, construction of the statute.[17] Typically, the answer to both questions would already be yes, or the court would simply punt the responsibility of filling in the legislative gap back to the respective administrative agency.[18] The *Chevron* doctrine essentially gave agencies authority to interpret ambiguous statutes directly affecting their field and to fill in any gaps that may have been left by Congress.[19] Thus, courts would frequently rely on, or defer to, the agency's interpretation of an ambiguous statute. This has been true in tax statutes as well.

II. DEFERENCE FOR IRS INTERPRETATIONS OF THE CARES ACT AND ERC POST-*LOPER*

In *Loper Bright*, the Supreme Court ruled that courts must now exercise their own independent judgment in interpreting a statute and reviewing an agency interpretation of the statute.[20] According to the Court, the APA, which was enacted to help govern the process by which federal agencies develop and issue regulations, makes it clear that agencies are not entitled to deference when interpreting statutes.[21] This means that judges, rather than the regulatory and administrative agencies of the executive branch, will now be responsible for interpreting unclear laws and filling in the gaps left by Congress.[22]This ruling raises a number of questions, including with respect to the

13. *Id.* at 843-44.
14. *Id.* at 844.
15. *Id.* at 842-43.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See Loper Bright Enters.*, slip op. at 35.
21. *Id.* at 14-15.
22. *Id.*

authority this decision now grants to judges who may lack any specialized knowledge in various areas of law (including tax law) generally requiring more heightened and particularized expertise.

The Employee Retention Credit ("ERC") is a refundable credit against payroll taxes for certain employers whose operations were fully or partially suspended due to COVID-19 related governmental orders or that experienced a substantial decline in gross receipts.[23] The ERC was first introduced in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act");[24] later updated and expanded by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 ("TCDTR Act");[25] expanded, extended, and codified by the American Rescue Plan Act of 2021 ("ARP Act");[26] and finally terminated as of September 30, 2021 for most employers by the Infrastructure Investment and Jobs Act ("IIJ Act").[27] The intent of the CARES Act, in relevant part, was to provide emergency assistance for businesses affected by the COVID-19 pandemic by ensuring they had the liquidity to survive the crisis.[28] The ERC encouraged businesses to keep employees on their payroll in the face of governmental restrictions, negative economic impact related to the pandemic, or both.[29] Access to this credit is critical to many employers that provided continuous support to their employees and the communities they served during the pandemic.

III. ERC ELIGIBILITY PLAIN LANGUAGE REQUIREMENTS

Eligibility for the ERC is contingent on an employer meeting certain criteria outlined in Section 2301(c)(2)(A) of the CARES Act, which was later codified in section 3134 of the Internal Revenue Code. The relevant provisions of section 3134 provide as follows:[30]

In general. In the case of an eligible employer, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to 70 percent of the qualified wages

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23. *See* I.R.C. §§ 3134(a)-(b) (2021); CARES Act, Pub. L. No. 116-136, § 2301(b)(1) (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

24. *See* CARES Act, Pub. L. No. 116-136 (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

25. *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020 (hereinafter "TCDTR Act"), Pub. L. No. 116-260.

26. *See* American Rescue Plan Act of 2021 (hereinafter "ARP Act"), Pub. L. No. 117-2.

27. *See* Infrastructure Investment and Jobs Act of 2021 (hereinafter "IIJ Act"), Pub. L. No. 117-58.

28. *See* Juan F. Vasquez et. al., *IRS Undermines Congressional Intent for Paycheck Protection Program Loans*, BLOOMBERG TAX DAILY TAX REP. (July 23, 2020), https://news.bloomberg-tax.com/daily-tax-report/insight-irs-undermines-congressional-intent-for-relief-loans-62.

29. *See id.*

30. *See* I.R.C. §§ 3134 (a), (c)(2)(A) (2021).

with respect to each employee of such employer for such calendar quarter.

Section 3134 also defines "eligible employer" as follows:

> (c)(2) Eligible employer.
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> (A) In general. The term "eligible employer" means any employer—
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> (i) which was carrying on a trade or business during the calendar quarter for which the credit is determined under subsection (a), and
>
> (ii) with respect to any calendar quarter, for which—
>
> (I) the operation of the trade or business described in clause (i) is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to the coronavirus disease 2019 (COVID-19),
>
> (II) the gross receipts (within the meaning of section 448(c) [IRC Sec. 448(c)]) of such employer for such calendar quarter are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019, or
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> (III) the employer is a recovery startup business (as defined in paragraph (5)).

According to this provision, an eligible employer is defined as any employer that engaged in a trade or business during the COVID-19 pandemic.[31] Furthermore, for each specific calendar quarter, the employer must satisfy one of two conditions to qualify for the ERC:

"the operation of the trade or business. . . is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to coronavirus disease 2019 (COVID-19)[;]" or

the employer's gross receipts (within the meaning of section 448(c)) for that calendar quarter ". . .are less than 80 percent of the gross receipts of such employer for the same calendar quarter in calendar year 2019."[32]

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31. *See* I.R.C. § 3134 (c)(2)(A) (2021). A recovery start-up business can also be an eligible employer; however, we do not further discuss this provision.

32. *See id.* Calendar year 2020 requires a 50 percent decline each applicable quarter compared with 2019 to satisfy the gross receipts test, whereas 2021 requires a 20 percent decline each applicable quarter compared with 2019.

The CARES Act was enacted in a matter of days, and there is no formal legislative history. Until recently, Treasury did not issue any regulations to provide additional guidance, and the recent regulations at issue do not address ERC eligibility.

IV. TREASURY DEPARTMENT AND IRS TYPES OF GUIDANCE

The IRS issues many types of pronouncements that provide insight into how the IRS believes statutes should be interpreted. The most formal of these are revenue rulings, which are published positions of the IRS regarding its interpretation and application of the law to a putative or streamlined fact pattern.[33] The IRS publishes revenue rulings in the Internal Revenue Bulletin, which, according to the Treasury Department, is the "authoritative instrument of the Commissioner."[34] When issued, revenue rulings are not intended to have the force and effect of law, and they are not intended to have application beyond the pivotal facts stated in the ruling.[35] Indeed, the Service designs revenue rulings to apply to a narrow, carefully circumscribed set of facts and if the taxpayer disagrees with a ruling, the IRS expects the taxpayer to argue for a different interpretation or application of the law in litigation.[36]

While we do not have any regulations or revenue rulings to assist in interpreting the plain meaning of the CARES Act, we do have subregulatory guidance provided by the IRS in the form of Notices.[37] Specifically, Notice 2021-20 is one of several — but perhaps the most heavily relied upon — pieces of subregulatory guidance the IRS has issued regarding the ERC. In Q&A form, Notice 2021-20 contains extensive discussion of various eligibility requirements.[38] Similar to revenue rulings, subregulatory guidance is not binding on taxpayers and does not have the force and effect of law.[39] As Treasury explained in its March 2019 policy statement on the tax regulatory process:

Subregulatory guidance is not intended to affect taxpayer rights or obligations independent from underlying statutes or regulations. Unlike statutes and regulations, subregulatory guidance does not have the force and effect of law. Taxpayers can have confidence, however, that

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33. *See* Lowy & Vasquez Jr., *supra* note 3, at 28.

34. *See* Treas. Reg. §601.601(d) (1967); 2024-27 I.R.B 7.

35. *See* Peter A. Lowy & Juan F. Vasquez Jr., *How Revenue Rulings Are Made, and the Implications of That Process for Judicial Deference*, 101 J. TAX'N 230, 233 (2004).

36. *See id.* at 231.

37. *See id.* at 233.

38. *See* I.R.S. Notice 2021-20, *supra* note 8, at 922.

39. *Feigh v. Comm'r*, 152 T.C. 267, 274 (2019) ("As we have noted, IRS notices — as mere statements of the Commissioner's position — lack the force of law . . . Thus, they can only provide insight into the Commissioner's interpretation of the law; they cannot effect substantive changes in the law.").

the IRS will not take positions inconsistent with its subregulatory guidance when such guidance is in effect. In applying subregulatory guidance, the effect of subsequent legislation, court decisions, rulings, and procedures must be considered.

When proper limits are observed, subregulatory guidance can provide taxpayers the certainty required to make informed decisions about their tax obligations. Such guidance cannot and should not, however, be used to modify existing legislative rules or create new legislative rules. The Treasury Department and the IRS will adhere to these limits and will not argue that subregulatory guidance has the force and effect of law. In litigation before the U.S. Tax Court, as a matter of policy, the IRS will not seek judicial deference under *Auer v. Robbins*, 519 U.S. 452 (1997) or *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), to interpretations set forth only in subregulatory guidance.[40]

In other words, while companies and employers may rely on the subregulatory guidance in Notice 2021-20 to support their position that they are eligible to claim the ERC, the *Loper Bright* decision proves that Notice 2021-20's "more than nominal" test should not be afforded deference by future courts when relied on by the IRS to challenge a taxpayer's ERC eligibility.[41]

V. CARES ACT CONGRESSIONAL GUIDANCE

In addition to subregulatory guidance, comments from elected public officials providing their views regarding congressional intent for the CARES Act includes the following:

[Then-Rep. Kevin Brady, R-Tex.:] We take unprecedented action to save America's local businesses and their workers. Main Street businesses face a crushing cash-flow problem. Their customers have disappeared. They now face a cascading sequence of layoffs and closures. Through temporary tax relief and lending, this bill injects cash directly into our local businesses, small and large, to stop this cash-flow crisis. We focus on preserving business to preserve jobs, to get them through these next few weeks . . . Finally, the new worker retention credit, championed by Ways and Means Republicans and Leader Kevin McCarthy, is to help our local businesses keep workers on the job. For businesses closed or partially closed due to a government order . . . if they pay half of their workers' salaries, we will pay the other half, up to $10,000, through this crisis.[42]

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40. Dep't of the Treasury, *Policy Statement on the Tax Regulatory Process* (Mar. 5, 2019), https://home.treasury.gov/system/files/131/2019-Policy-Statement-on-the-Tax-Regulatory-Process.pdf.

41. *See Loper Bright Enters.*, slip op. at 35.

42. 166 CONG. REC. H1819 (daily ed. Mar. 27, 2020) (statement of Rep. Brady).

. . . .

[Rep. Richard Neal, D-Mass.]: This legislation could be called the families' health and economic security stabilization act because that is what we are doing this morning, providing stability.

. . . .

We also fought to include provisions to shore up the financial health of small business and other struggling employers. We were adamant about the inclusion of the employee retention credit because we know that the American economy will bounce back from this, and employers who take action to keep their employees on the payroll should be rewarded.[43]

. . . .

[Then-Rep. Rodney Davis, R-Ill.]: But it is our Main Street businesses and our Main Street companies that line the streets of every rural community that I represent and line the streets of this great country that are hurting the most. It is their economic disaster. They are being told that they are not able to operate. We need to do better. We need to pass this bill and give them the revenue, the opportunity, and the cash flow to get through this so we can get through this as Americans.[44]

. . . .

VI. IRS NOTICE 2021-20 STANDARD, SAFE HARBORS, AND DEFERENCE

It is against this backdrop of COVID-19 history that future courts will one day interpret the intended reach of the ERC program and its mandated employer eligibility analysis. It is clear from the comments of the elected public officials regarding the congressional intent of the CARES Act as well as from the subsequent expansions to the CARES Act via the TCDTR Act and ARP Act that the true intent and spirit of the Act is to provide funds to as many eligible employers (and corresponding American families) as possible.[45] However, disappointedly, some parts of Notice 2021-20 are more restrictive than the statute's plain language, such as the requirement that suspended operations meet the IRS's "more than nominal" test.[46] That requirement does not exist in the

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43. *Id.* at H1820 (statement of Rep. Neal).

44. *Id.* at H1822 (statement of Rep. Davis); Molly F. Sherlock, *The Employee Retention and Employee Retention and Rehiring Tax Credits*, CONG. RSCH. SERV. (Jan. 7, 2021), https://www.everycrsreport.com/files/2021-01-07_IF11721_51b4e9df9a1c2efb100524941887ddc064a79bd2.pdf. The Congressional Research Service also explains: "Employee retention credits have historically been deployed as a policy tool to provide disaster tax relief. The goal has been to reduce the cost to employers of keeping employees on their payrolls during the disaster recovery period. An employee retention tax credit (ERTC) was enacted as a policy response to the COVID-19 pandemic, which has caused prolonged labor market disruptions."

45. *See* Vasquez et. al., *supra* note 28.

46. *See generally* I.R.S. Notice 2021-20.

statute, and the IRS's development of that requirement was entitled to little if any deference prior to *Loper*, and should be entitled to no deference now post-*Loper.*[47]

A court normally interprets a statute in accordance with the ordinary public meaning of its terms at the time of the statute's enactment.[48] Courts typically find the ordinary public meaning of terms in a statute through the use of dictionaries.[49] The CARES Act itself does not use the "more than nominal" standard.[50] The statute instead defines an "eligible employer" as any employer "which [is] carrying on a trade or business during the calendar quarter . . ." where "the trade or business . . . is fully or *partially* suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to coronavirus disease 2019 (COVID-19). . ."[51] Specifically, rather than using the IRS Notice 2021-20 mandate of establishing that a business impact was "more than nominal," the ERC authorizing statute instead plainly uses the word "partially," which Merriam-Webster defines as "to some extent."[52] Another leading dictionary defines "partially" as "not completely.[53] As such, under a plain reading of the statute, a business is eligible for the ERC during any calendar quarter in which its business operations were suspended to some or any extent "due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to coronavirus disease 2019 (COVID-19)."[54]

Notice 2021-20 seemingly expands upon the CARES Act's use of "partially" by creating a new and more restrictive mandate for employer eligibility in its interpretation of the statute through its "more than nominal" requirement.[55] Specifically, Q&A 11 addresses the

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47. *See* I.R.C. § 3134 (2021); CARES Act, Pub. L. No. 116-136, § 2301(b)(1) (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

48. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 826 (2018).

49. *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 730 (2020).

50. *See* CARES Act, Pub. L. No. 116-136, § 2301(b)(1) (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

51. *See* I.R.C. § 3134(c)(2)(A) (2021).

52. *Partially*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/partially (last visited Aug. 17, 2024).

53. *Partially*, DICTIONARY.CAMBRIDGE.ORG, https://dictionary.cambridge.org/dictionary/english/partially (last visited Aug. 17, 2024).

54. *See* I.R.S. Notice 2021-20, *supra* note 46, at 7.

55. *See* Paul Cheung & Norma Sharara, *IRS Issues Additional Guidance on the Employee Retention Credit*, BDO (Aug. 11, 2021), www.bdo.com/insights/tax/irs-issues-additional-guidance-on-the-employee-retention-credit.

requirements for a business to be considered "partially suspended" under the statute:

Question 11: If a governmental order requires non-essential businesses to suspend operations but allows essential businesses to continue operations, is an essential business considered to have a full or partial suspension of operations due to a governmental order?

Answer 11: An employer that operates an essential business is not considered to have a full or partial suspension of operations if the governmental order allows all of the employer's operations to remain open. However, an employer that operates an essential business may be considered to have a partial suspension of operations if, under the facts and circumstances, more than a nominal portion of its business operations are suspended by a governmental order. For example, an employer that maintains both essential and non-essential business operations, each of which are more than nominal portions of the business operations, may be considered to have a partial suspension of its operations if a governmental order restricts the operations of the non-essential portion of the business, even if the essential portion of the business is unaffected. In addition, an essential business that is permitted to continue its operations may, nonetheless, be considered to have a partial suspension of its operations if a governmental order requires the business to close for a period of time during normal working hours. Solely for purposes of this employee retention credit, a portion of an employer's business operations will be deemed to constitute more than a nominal portion of its business operations if either (i) the gross receipts from that portion of the business operations is not less than 10 percent of the total gross receipts (both determined using the gross receipts of the same calendar quarter in 2019), or (ii) the hours of service performed by employees in that portion of the business is not less than 10 percent of the total number of hours of service performed by all employees in the employer's business (both determined using the number of hours of service performed by employees in the same calendar quarter in 2019).[56]

While not expressly stated, it is widely understood by tax practitioners experienced in the ERC that if either of the IRS's "more than nominal" 10% safe harbors are met (i.e., either gross receipts or hours 10% or more reductions are satisfied), the IRS will seemingly agree that an applicable partial suspension satisfied the IRS "more than nominal" standard.[57] However, the safe harbors should not be construed as overriding the commonly understood definition of "nominal," which means of little value; insignificant; or, literally, in name only.[58] The plain

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56. *See* I.R.S. Notice 2021-20, Q&A #11, *supra* note 9.

57. *See* Cheung & Sharara, *supra* note 55.

58. *Nominal*, MERRIAM-WEBSTER.COM, https://www.merriamwebster.com/dictionary/nominal (last visited Aug. 17, 2024). Merriam-Webster defines "nominal" as follows: Such an

text of the ERC statute also supports this reading because Section 2301 of the CARES Act contains no reference to a "nominal" standard.[59] The CARES Act does not define "nominal." Further, common dictionary definitions of nominal suggest some amount that is small or insignificant, of low value, and — in direct translation — in name only.[60] "Nominal" as commonly used can be much less than 10%.

Interestingly, prior to the Court's decision in *Loper*, the IRS's "more than nominal" requirement served as a bar to eligibility for the ERC rather than a safe harbor to support or qualify for eligibility. The requirement has been seemingly weaponized by IRS auditors to deny eligibility for the ERC to otherwise eligible employers whose businesses were negatively impacted by the pandemic. The nationwide audit adjustment rate thus far has been significant and unreasonably high, with agents largely relying on Notice 2021-20 and the IRS's "more than nominal" requirement as the basis for their denials and adjustments.[61] During recent IRS examinations, different IRS auditors have commented about how IRS Team Managers are pushing for significant denial rates and forcing auditors to write rebuttals much more than normal in response to filed Protests, which further questions whether the true intent of the statute is being fulfilled. This treatment has resulted in many ERC cases being sent to the Independent Office of Appeals, which has further strained the tax administration system and created a backlog of ERC cases. Some taxpayers are now filing cases in Federal District Court because impacted businesses simply cannot or do not want to wait for their ERC refunds, or because they have been denied by the IRS.[62]

Notably, the *Loper Bright* decision only reinforces the position that Notice 2021-20's "more than nominal" requirement should be afforded no deference as courts may no longer defer to the regulatory agency's

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insignificantly quantifiable amount is universally not "equal to or greater than 10 percent." Notice 2021-20 redefines this commonly understood word and seeks now to impose the safe harbor as a minimum threshold.

59. *See* CARES Act, Pub. L. No. 116-136, § 2301(b)(1) (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

60. *See* MERRIAM-WEBSTER.COM, *supra* note 52.

61. *See* Juan F. Vasquez, Jr., *Understanding the Employee Retention Tax Credit and Preparing Against the Risk of IRS Audit and Tax Litigation*, TAX TOPICS, TODAY'S CPA (July-Aug. 2023), https://www.tx.cpa/resources/news/articles/employee-retention-tax-credit.

62. *See* I.R.C. § 6511 (2008). Under IRC 6511, Taxpayers generally can file a refund claim within the later of three years from the date the return was filed or two years from the date the applicable tax was paid. To file a refund case in Federal District Court, 6 months or more must have elapsed since the time a taxpayer filed a valid claim for refund with the IRS under IRC 6632(a), or if the IRS denies the refund claim. In the ERC context, a number of Taxpayers are now filing refund cases because it has been more than 6 months since they filed their ERC refund claims, of if the ERC refund claim was acted upon by the IRS and subsequently denied, then taxpayers can also proceed to district court within 2 years of a denial of an ERC refund request.

interpretations on issues regarding ambiguous statutes.[63] Furthermore, no deference should be afforded to Notice 2021-20's "more than nominal" standard because the statute is clear and the plain language, in addition to the contemporaneous statements from members of Congress, support ERC eligibility that is not restricted by the "more than nominal" standard.[64]

VII. IMPLICATIONS ON NOTICE 2021-20'S "MORE THAN NOMINAL" STANDARD

Prior to the Supreme Court's decision in *Loper*, Notice 2021-20, generally, should have been entitled to little or no judicial deference because the IRS failed to follow the APA's notice and comment procedures in issuing the Notice. Of course, the APA was enacted to help govern the process by which federal agencies develop and issue regulations.[65] As expressed by the Supreme Court majority in *Loper Bright*, these APA procedures must be followed if an administrative agency wants to write a rule that can be enforceable on taxpayers.[66] Now, post-*Loper*, it is clear that Notice 2021-20's more than nominal's subregulatory guidance deserves no deference whatsoever.

The Administrative Procedures Act, or APA, enacted in 1946, establishes the procedures that federal agencies use for rulemakings and adjudications.[67] It also sets out procedures for how courts may review those agency actions.[68] These judicial review procedures are default rules that apply unless another law supersedes them.[69] It provides that a reviewing court should consider whether an agency failed to observe the procedures required by law, including the APA and the agency's own regulations.[70] This review could include whether an agency complied with the APA's notice-and-comment provisions before issuing a final rule.[71]

The notice-and-comment rulemaking procedures for regulations are significant for several reasons. First, they produce better-informed decision-making because federal agencies who, pre-*Loper*, were relied upon to issue final rules on highly specialized matters, such as the Treasury, receive valuable insight from nongovernment practitioners

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63. *See Loper Bright Enters.*, slip op. at 35.

64. *See* I.R.C. § 3134(b)(1)(A)-(B) (2021); CARES Act, Pub. L. No. 116-136, § 2301(b)(1) (2020) (as amended by the Taxpayer Certainty and Disaster Relief Act of 2020, and as amended by the American Rescue Plan Act of 2021).

65. *See* 5 U.S.C. §§ 551–559.

66. *See Loper Bright Enters.*, slip op. at 13.

67. *See* 5 U.S.C. §§ 551–559.

68. *See id*.

69. *See* Jonathan M. Gaffney, *Judicial Review Under the Administrative Procedure Act (APA)*, CONG. RSCH. SERV. (Dec. 8, 2020), https://www.everycrsreport.com/files/2020-12-08_LSB10558_babd79c50d2e4d559e06c1e0a31490db815f7558.pdf.

70. *Id.*

71. *Id.*

and taxpayers about the practical effects of the proposed regulations which then further informs their decision-making.[72] Second, the public participation aspect lends the regulatory process a democratic quality.[73] Practically speaking, the public has no means to hold regulation drafters and decisionmakers accountable. The notice-and-comment procedures thus provide a forum for the public to express displeasure and be heard by the government, with the sincere hope that appropriate comments are taken into account when final regulations are issued.[74] If such public comments are not appropriately taken into account when the applicable regulations are finalized, then the applicable regulations have a higher chance of subsequently being invalidated by a Court after they are challenged. This could be either in a preemptive challenge by an affected taxpayer or industry group, or potentially in a court action by an impacted taxpayer.

There are different standards of review and different rulemaking procedures required for different administrative pronouncements. The IRS, entirely within its discretion, issues revenue rulings.[75] The Internal Revenue Manual prescribes the levels of review and approval necessary for their issuance.[76] The decision to publish a revenue ruling resides with the assistant commissioner responsible for the subject matter to which the ruling relates.[77] Thus, although Treasury's Office of Tax Policy is involved in the process, that involvement is informal and technically a matter of courtesy. Revenue rulings are also not an exercise of rulemaking power under Code section 7805.[78]

In contrast, the publication of regulations is within the discretion of the Secretary of the Treasury.[79] The IRS has no formal involvement in the process, although Treasury does use the resources of the Office of Chief Counsel and, as a matter of courtesy, seeks "approval" of the relevant assistant chief counsel.[80] The Secretary or her delegate then must approve the regulations' publication in the *Federal Register* in proposed form.[81] Proposed regulations are subject to the notice-and-comment rulemaking process under the APA.[82] They are subject to public comment, which enriches the debate by adding a diversity of perspectives and analysis — exactly what should be brought to bear on

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72. *See* Vasquez et. al., *supra* note 28.
73. *Id.*
74. *Id.*
75. *See* Lowy & Juan F. Vasquez Jr., *supra* note 35, at 232-33.
76. *Id.*
77. *Id.* at 232.
78. See Lowy & Juan F. Vasquez Jr., *supra* note 3, at 34.
79. *See* Lowy & Juan F. Vasquez Jr., *supra* note 35, at 232.
80. *Id.* at 230.
81. *Id.* at 232.
82. *Id.*

rules intended for general application.[83] Before issuing the regulations in final form, Treasury conducts further deliberations that take the public comments into account.[84] Often, the regulations are redrafted and modified to incorporate valid suggestions raised during the notice-and-comment period.[85] Once Treasury has reviewed and considered the public comments received, the Secretary or her delegate (currently the Assistant Secretary for Tax Policy or the Deputy Assistant Secretary) must approve publication of the regulations in final form.[86] They are then published in the *Federal Register* and later in the Code of Federal Regulations.[87]

Unlike revenue rulings, Treasury regulations (both legislative and interpretative) withstand the notice-and-comment rulemaking set forth in the APA. Revenue rulings and IRS Notices are not tested by such a process and ordinarily receive no public scrutiny before they are published.[88] As a result, Treasury regulations receive greater attention and scrutiny than revenue rulings and IRS Notices from high-level IRS personnel and from the Treasury's Office of Tax Policy.[89] Thus, the notice, comment, and evaluation and potential incorporation of public comments process is a critically important facet of the APA.[90]

Comparatively, Notice 2021-20's "more than nominal" standard is a subregulatory or interpretive rule, but certain IRS Exam Teams treat it as a legislative rule based on their extreme deference to the standard. The IRS has at times sought to impose penalties on taxpayers when their reporting positions were inconsistent with Notice 2021-20's "more than nominal" standard. IRC section 6662(b)(1) gives the IRS authority to impose penalties on taxpayers who underreport and underpay their taxes as the result of "negligence or disregard of rules or regulations."[91] Treasury Regulation section 1.6662-3 defines rules and regulations for this purpose as including "revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin."[92] Thus, Notices have become a strong and compelling tool that the agency uses to force taxpayers to comply with its stated rules and interpretations, lest they risk penalties that can be significant.[93] Because of that harsh result,

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83. *Id.* at 231.
84. *Id.*
85. *See* Lowy & Juan F. Vasquez Jr., *supra* note 35, at 231.
86. *See* Vasquez et. al., *supra* note 28.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. 26 I.R.C. § 6662(b)(1) (2010).
92. 26 I.R.C. § 1.6662-3(b)(2) (2010).
93. 26 I.R.C. § 6662(a) (2010). The IRC section 6662 accuracy-related penalties impose a 20 percent penalty on any applicable underpayment.

experts in the area typically agree that penalties are the hallmark of a legislative rule.[94] The Tax Court likely agrees.[95]

If Notice 2021-20's "more than nominal" standard is one day deemed a legislative rule rather than a subregulatory or interpretive rule, the guidance is enforceable only if (1) it meets the APA's notice-and-comment requirements or (2) qualifies for one of the APA's exceptions to that procedure.[96] Here, it fails both. Under the first test, it is worth noting that Notice 2021-20 was issued without notice-and-comment. Recently, on June 4, 2024, the Eleventh Circuit held that the IRS violated the APA notice-and-comment procedures in issuing Notice 2017-10, 2017-4 IRB 544.[97] The Eleventh Circuit concluded that the IRS must follow APA notice-and-comment procedures unless explicitly exempted by Congress.[98] In the case of Notice 2021-20, which the IRS did not submit through the notice-and-comment procedures, Congress provided no such exemption. Similarly, on March 24, 2024, the U.S. Tax Court in another case declared Treasury Regulation section 1.170A-14(g)(6)(ii) as invalid, citing non-compliance with the APA's notice and comment requirement, and concluded that the Treasury Department had failed to address significant comments made during the rulemaking process as required by the APA.[99] Therefore, like Notice 2017-10 and Treasury Regulation section 1.170A-14(g)(6)(ii), Notice 2021-20's "more than nominal" standard should be declared invalid and have received little to no deference even prior to the *Loper Bright* decision.

In the ERC context, the Treasury Department and the IRS have complied with the notice-and-comment procedures of the APA. In July 2023, the Treasury Department issued final regulations under IRC sections 3111 and 3221 that treat the overpayment of employment tax credits under the CARES Act and the Families First Coronavirus Response Act ("FFCRA") as an underpayment of federal employment tax.[100] Under these "Recapture Regulations," so much of the taxes imposed under section 3221(a) as are attributable to the rate of tax under section 3111(a) or 3111(b), as applicable, are subject to assessment and administrative collection procedures.[101] These final

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94. *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 *VAND. L. REV.* 465, 524 (2013) (characterizing penalties as a leading indicator that a regulation is legislative rather than interpretive).

95. *See Intermountain Ins. Serv. of Vail v. Comm'r*, 134 T.C. 211, 243 (2010) (Halpern and Holmes, J.J., concurring and stating that "regulations carry the force of law, because the Code imposes penalties for failing to follow them.").

96. *Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 781 (10th Cir. 1998).

97. *See Green Rock LLC v. Internal Revenue Serv.*, 104 F.4th 220, 225 (11th Cir. 2024).

98. *See id.* at 227.

99. *See Valley Park Ranch, LLC v. Comm'r*, No. 12384-20, 2024 WL 1328847, at *13 (T.C. Mar. 28, 2024).

100. Treas. Reg. § 31.3111-6 (as amended in 2023).

101. *Id.*

regulations were issued after a notice-and-comment period in compliance with the APA's rulemaking procedures.

On July 2, 2024, the Treasury Department published proposed regulations addressing the overpayment of interest paid to a taxpayer on an erroneous refund.[102] These proposed regulations would be applicable to all interest amounts paid under section 6611 on or after July 2, 2024, for any erroneous refund of the COVID-19 credits.[103] The deadline for the general public to provide comments and requests for a public hearing was on August 16, 2024, and a number of comments were received by the government. Thus, the finalization of these proposed regulations should take into consideration the comments received by the general public, resulting in final regulations that are subsequently issued that look different than the ones initially proposed. If the government does not take comments received appropriately into account in the final regulations, then – like Tax Court in *Valley Park Ranch* – a court may one day invalidate part or all of the regulation.[104]

When issuing Notice 2021-20 and its "more than nominal" standard, the IRS did not invoke the good cause exception under § 553(b)(B) of the APA, which is available when the agency finds ". . .that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[105] Given the urgency for guidance during the pandemic and Congress's intention to get money into qualifying employers' hands so they could continue paying employees (thereby saving jobs, families, and livelihoods), the IRS could theoretically have argued for the good cause exception. The problem for the IRS is that any invocation of the good cause exception requires that the agency incorporate the finding ". . .and a brief statement of reasons therefor. . ." in the rule issued.[106] The IRS made no such statement in Notice 2021-20 and certainly gave no reasons for otherwise dispensing with the APA's notice and comment procedures.[107] Accordingly, even before the Supreme Court's decision in *Loper Bright*, courts should have given little to no deference to Notice 2021-20's "more than nominal" standard.

Assuming, however, it is subsequently determined that Notice 2021-20's "more than nominal" standard is not a legislative rule but

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102. Prop. Treas. Reg. § 31.3111-6, 89 Fed. Reg. 54742, 54745 (July 2, 2024).

103. *Id.*

104. *See Valley Park Ranch, LLC*, 2024 WL 1328847, at *13.

105. 5 U.S.C. § 553(b)(3)(B).

106. *Id.*

107. IRM 32.1.5.4.7.4.1. Internal Revenue Manual ("IRM") § 32.1.5.4.7.4.1 states that when there is good cause to skip notice and comment because immediate guidance is necessary, the regulation relying on the good cause exception should use language similar to the following: "These regulations are necessary to provide taxpayers with immediate guidance. Accordingly, good cause is found for dispensing with notice and public comment pursuant to 5 U.S.C. 553(b) and (c) and with a delayed effective date pursuant to 5 U.S.C. 553(d)."

instead a regulatory guideline used to fill in a gap or any statutory ambiguity conceivably left by Congress in the CARES Act, the Notice should, post-*Loper Bright*, receive no deference at all.

In *Mead,* the Supreme Court set forth an analytical framework for lower courts to determine the level of deference, if any, owed to administrative pronouncements.[108] The Court established a sliding scale that measures deference based on the procedural formalities, such as APA notice-and-comment, and deliberative processes that precede the issuance of these pronouncements.[109] While views may differ on where guidance such as Notice 2021-20's "more than nominal" standard should fall on this sliding scale, it is clear where IRS auditors believe it should fall: many IRS examiners already view Notice 2021-20's "more than nominal" standard with extreme reverence, giving it complete and total deference, even though the plain meaning of the CARES Act language it seeks to interpret is unambiguously clear and not as restrictive as the "more than nominal" standard.

Considering the demise of *Chevron* deference, Notice 2021-20's "more than nominal" standard should not be afforded deference. It is, on the one hand, a subregulatory, interpretive, or legislative rule that should be given no deference because of its violation of the APA notice-and-comment procedure. On the other hand, it is an agency interpretation that is not entitled to any deference under the APA post-*Loper*.

VIII. FUTURE CHALLENGES TO IRS ERC INTERPRETATIONS BEFORE THE IRS INDEPENDENT OFFICE OF APPEALS

After decades of uncertainty surrounding the weight with which IRS interpretations should be given, the Supreme Court's decision in *Chevron* provided the tax community with some semblance of consistent footing. Over four decades later, the Supreme Court seeks to throw us back into the age of uncertainty as its recent decision in *Loper Bright* makes a sharp turn and risks inciting a maelstrom of litigation as a result. The majority in *Loper Bright* clearly explained that agencies are not entitled to deference when interpreting ambiguous statues.[110] Indeed, one can only imagine the number of vexed taxpayers who, previously denied ERC eligibility by overaggressive IRS auditors based on the IRS's imposition of Notice 2021-20's "more than nominal" requirement, will now seek reconsideration of their claims and challenge the IRS's authority to both interpret the statute and defer to

108. *See United States v. Mead Corp.*, 533 U.S. 218, 227-29 (2001).

109. *See* Lowy & Juan F. Vasquez Jr., *supra* note 3, at 33.

110. *See Loper Bright Enters.*, slip op. at 35.

their own interpretation even when the plain language of the statute is unambiguously clear.[111]

When that wave of IRS determination challenges hits, as it undoubtedly will, the IRS Office of Independent Appeals will suddenly find themselves facing an almost dire situation based on its existing backlog. The IRS Independent Office of Appeals prides itself on being impartial and separate from the compliance function that makes the initial determination in a taxpayer's case.[112] The Appeals mission is as follows:

Appeals is an independent function within the IRS, completely separate from the compliance functions responsible for collecting and assessing taxes. Appeals provides an informal forum for taxpayers who disagree with an IRS determination. Our job is to resolve tax disputes without litigation, where possible, consider each case fairly and impartially and improve public confidence in the integrity and efficiency of the IRS.[113]

In a post-*Loper* world, the IRS Independent Office of Appeals must ask itself whether it will uphold IRS Exam's restrictive interpretation of the CARES Act by imposing the additional requirement of Notice 2021-20's more than nominal standard, or if it will truly evaluate the "hazards of litigation" and offer taxpayers a fair case evaluation based on the plain language of the CARES Act, the Congressional intent of the statute, and the pandemic's impact on affected taxpayers. What is a fair settlement if the validity of a significant ERC refund that was previously disallowed by IRS Exam is subsequently challenged on the basis that the IRS's "more than nominal" requirement is not entitled to any deference under the APA? After all, there will be a number of justified court challenges to the IRS Notice 2021-20's "more than nominal" standard. The overall results from Appeals in ERC cases, based on personal experience and communications with other tax practitioners, have been generally positive thus far. Appeals has been maintaining independence and resolving ERC cases while appropriately evaluating the hazards of

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111. *See Varian Med. Sys. Inc. et al. v. Comm'r,* No. 8435-23, 2024 WL 3936396, at *19 (T.C. Aug. 26, 2024). The Tax Court's recent decision in *Varian Medical Systems* provides a roadmap for the Court's future approach to statutory interpretation and challenges to Treasury Regulations seeking to interpret those statutes.. . The Court in *Varian* held that the plain language of the statute at issue in that case was clear and unambiguous and ultimately invalidated the contemporaneous Treasury Regulation attempting to interpret the statute. The Court concluded that the regulation "purports to modify the effective date provision for new section 78, which could hardly have been clearer. In other words, it impermissibly attempts to change an unambiguous provision of the statute." *Varian* thus creates a new standard upon which future cases involving issues of regulatory deference and statutory interpretation will hinge. That standard will require courts to consider what is the single best meaning of the statute, rather than relying on a regulatory interpretation of the plain language of the statute.

112. *See* Andy Keyso, *A Closer Look at the IRS Independent Office of Appeals*, I.R.S. (Feb. 22, 2024), www.irs.gov/about-irs/a-closer-look-at-the-irs-independent-office-of-appeals.

113. *See id.*

litigation, including issuing complete case concessions where appropriate.

The actions of the IRS Independent Office of Appeals will certainly be closely scrutinized in the months and years to come and will provide insight to how tax practitioners may want to help taxpayers evaluate their risks and avenues for ERC case resolution, whether it be at Exam, Appeals, or in litigation.

IX. CONCLUSION

The Supreme Court's decision in *Loper Bright* overrules 40 years of *Chevron*-level deference to agencies such as the IRS and instead concludes that judges are best qualified to fill in any gap when the dispute involves ambiguous interpretations of statutory construction. The Court's decision will have a significant and lasting impact on not only the legislative bureaucracy and on the IRS and taxpayers, but also on judges, who are considered the final arbiters of unclear code interpretations. Judges will be asked more and more to weigh in on challenges to Treasury Regulations, Revenue Rulings, IRS Notices, and more. While litigation from frustrated taxpayers has already commenced in terms of taxpayers seeking their ERC refund, it remains unclear the extent to which taxpayers will challenge statutory interpretations made by Treasury and IRS. In particular, their interpretation of the ERC's "more than nominal" standard in Notice 2021-20, and how the IRS Independent Office of Appeals will respond to the coming litany of ERC challenges.

What does remains clear, however, is that the Supreme Court's upending of the decades-old *Chevron* doctrine has inadvertently and unceremoniously thrown us into what us proud Tax Controversy Attorneys here in the Great State of Texas can only anticipate will soon become the Wild West of challenges to Treasury and IRS interpretations, including Notice 2021-20's "more than nominal" standard. And to that we say. . .Yee-haw!