Supreme Court’s Mayo Foundation Opinion Grants Chevron Deference to Treasury Regulations

By Clifford M. Sloan, B. John Williams, Jr., and David W. Foster

For decades, many taxpayers and the government have disagreed over the level of deference that courts should grant to Treasury regulations. In Mayo Foundation for Medical Education & Research v. United States, 131 S. Ct. 704 (2011), the Supreme Court of the United States, in an opinion authored by Chief Justice John Roberts, unanimously and emphatically resolved that disagreement in favor of the government. Henceforth:

- Courts will apply the two-part Chevron inquiry to Treasury regulations and therefore will defer to a properly issued Treasury regulation if that regulation reasonably resolves a statutory ambiguity.
- All Treasury regulations, whether issued pursuant to the general grant of rulemaking authority in section 7805(a) of the Internal Revenue Code or pursuant to a more specific congressional grant of rulemaking authority, will be evaluated under the Chevron framework.
- The history of the regulation, such as whether it represents a reversal of Treasury policy or whether it was issued in response to government litigation losses, is irrelevant to the question whether the regulation is valid.
- The Supreme Court, absent strong justification, will not treat tax law differently from other areas of administrative law.

The most immediate effects of the Mayo Foundation decision will be felt in litigation, where challenges to regulations will center on the substance of the regulations rather than their history. But the effects of the decision are unlikely to be limited to litigation. Mayo Foundation may change the way that both Treasury and the Internal Revenue Service approach the issuance of guidance. The decision may also have subtle effects on the interaction between taxpayers and those responsible for drafting revenue legislation in Congress. Finally, the decision, which rejects the concept of tax “exceptionalism,” may undermine the sense among tax practitioners, inside and outside the government, that tax law is distinct from all other areas of administrative law.

The Mayo Foundation Litigation

A. Background

Mayo Foundation arose out of a recurring dispute between the IRS and the medical community over whether medical residents are “students” who are therefore exempt from FICA taxation. The “student exemption” dates back to 1939, and provides that employment, for FICA tax purposes, shall not include “service performed in the employ of a . . . university . . . if such service is performed by a student who is enrolled and regularly attending classes.” I.R.C. § 3121(b)(10). For more than 50 years, the Treasury regulations have provided “[a]n employee who performs services in the employ of a school, college, or university as an incident to and for the purpose of pursuing a course of study at such school, college, or university has the status of a student in the performance of such services.” See T.D. 6190, § 31.3121(b)(10)-2(c), 1956-2 C.B. 605, 653.

Medical residents inhabit a netherworld between student and professional status. On the one hand, residents at the Mayo Clinic take part in a “formal and structured educational program,” which includes assigned readings, weekly lectures, and written examinations. Mayo Foundation, 131 S. Ct. at 708-09. On the other hand, Mayo residents “spend between 50 and 80 hours a week caring for patients,” are paid “annual ‘stipends’ ranging between $41,000 and $56,000,” and receive “health insurance, malpractice insurance, and paid vacation time.” Id. at 708.

In 1998, the Eighth Circuit held that medical residents were students for purposes of the Social Security Act’s student exception, which is identical to the FICA student exemption. See Minnesota v. Apfel, 151 F.3d 742, 743 (8th Cir. 1998). The Apfel decision triggered an “avalanche” of litigation and “prompted the filing of more than 7,000 claims with the IRS, as medical schools sought refunds of FICA taxes on medical resident ‘wages,’ based on the student exception.” Mayo Foundation for Medical Education & Research v. United States, 568 F.3d 675, 676-77 (8th Cir. 2009). After the government lost many of these cases, it decided to change the rules of the game. In 2004, after giving public notice and soliciting comment, the Treasury Department issued new regulations that set forth a simple rule: Any full-time employee (including any employee who works more than 40 hours a week) cannot qualify for the student exemption from FICA. Treas. Reg. § 31.3121(b)(10)-2(d)(3)(iii). Given the notorious working hours of most medical residency programs, the regulation effectively denied the student exemption to all medical residents.

Mayo Foundation brought litigation asserting that the regulation was invalid. The district court agreed and struck down the regulation. 503 F. Supp. 2d 1164 (D. Minn. 2007). The Eighth Circuit, however, reversed the district court and reinstated the regulation. See 568 F.3d 675 (8th Cir. 2009). At the urging of Mayo Foundation and numerous amici from the medical community, the Supreme Court granted certiorari. 130 S. Ct. 3353 (2010).

B. National Muffler or Chevron?

In his unanimous 8-0 opinion for the Court, Chief Justice John Roberts first concluded that the definition of a “student” in the FICA student exemption was ambiguous. Because of conflicting Supreme Court precedents, however, it was not clear what the Court should do after concluding that the statutory text was ambiguous. Two of the Court’s precedents created a conflict that for

National Muffler, which had deferred to a Treasury regulation, suggested that the Court should examine the history of the regulation to determine whether it merited judicial deference:

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 reenactments of the statute.

National Muffler, 467 U.S. at 477.

By contrast, Chevron, a later decision that deferred to an Environmental Protection Agency regulation, offered a different approach to judicial review of regulations:

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.

Chevron, 467 U.S. at 842-43 (footnotes omitted). Entirely absent from Chevron’s two-part test was any inquiry into the motivations for and history of the challenged regulation.


The lower courts were justifiably confused about the proper standard for reviewing Treasury regulations. The Tax Court held that Chevron did not displace the National Muffler inquiry in tax cases. See Swallows Holding, Ltd. v. Commissioner, 126 T.C. 96, 131 (2006), rev’d, 515 F.3d 162 (3d Cir. 2008); see also id. at 180-81 (Holmes, J., dissenting) (cataloging positions of courts of appeals). Several circuits continued to cite National Muffler after Chevron. See, e.g., United States v. Tucker, 217 F.3d 960, 965 (8th Cir. 2000); Nalle v. Commissioner, 997 F.2d 1134, 1138 (5th Cir. 1993). By contrast, several circuits held that Chevron overruled National Muffler. See Swallows Holding, Ltd. v. Commissioner, 515 F.3d 162 (3d Cir. 2008); see also, e.g., Peoples Federal Savings & Loan Association of Sidney v. Commissioner, 948 F.2d 289, 304-05 (6th Cir. 1991). And some circuits applied National Muffler to interpretative regulations (regulations that “clarify ambiguous terms found in the statute or explain how a provision operates”), while applying Chevron to legislative regulations (those where “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation”). See Snowa v. Commissioner, 123 F.3d 190, 197 (4th Cir. 1997) (quoting Chevron, 467 U.S. at 843-44).

The circuits further disagreed over whether the dispute made any “practical difference.” General Electric Co. v. Commissioner, 245 F.3d 149, 154 n.8 (2d Cir. 2001) (detailing the debate but declining to take a position). The Seventh Circuit said that any difference was “negligible at best.” See Bell Fed. Savings & Loan Association v. Commissioner, 40 F.3d 224, 227 (7th Cir. 1994). The Tax Court held that the “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.” Central Pennsylvania Savings Association v. Commissioner, 104 T.C. 384, 392 (1995). By contrast, in Swallows Holding, the Third Circuit held that the standard of review was outcome determinative: “Our inquiry would be a simple one if, as the Tax Court suggested, the result of this case would be the same regardless of which standard we apply. This, however, is not the case.” 515 F.3d at 167. These fundamental differences among the courts of appeals and the Tax Court invited Supreme Court resolution.

C. The Supreme Court

The Supreme Court recognized the tension in its precedents and candidly admitted that National Muffler and Chevron “call for different analyses of an ambiguous statute.” Mayo Foundation, 131 S. Ct. at 712. Under National Muffler, “a court might view an agency’s interpretation of a statute with heightened skepticism when it has not been consistent over time, when it was promulgated years after the relevant statute was enacted, or because of the way in which the regulation evolved.” Id. It might also find relevant “that the regulation had been promulgated after an adverse judicial decision.” Id. The Supreme Court made clear that, under Chevron, “deference to an agency’s interpretation of an ambiguous statute interpretation does not turn on such considerations.” Id. Indeed, the Supreme Court noted that, in another case, it had “expressly invited the Treasury Department to ‘amend its regulations’ if troubled by the consequences of our resolution of the case.” Id. at 712-13 (quoting United Dominion Industries, Inc. v. United States, 532 U.S. 822, 838
(2001)). Having concluded that National Muffler was inconsistent with its current approach to administrative law, the Supreme Court held that “[t]he principles underlying our decision in Chevron apply with full force in the tax context.” 131 S. Ct. at 713.

The Supreme Court stated that “we are not inclined to carve out an approach to administrative review good for tax law only.” 131 S. Ct. at 713. Instead, it noted the “importance of maintaining a uniform approach to judicial review of administrative action.” Id. (quoting Dickinson v. Zurko, 527 U.S. 150, 154 (1999)). If there was any doubt, the Supreme Court made clear that it saw “no reason why our review of tax regulations should not be guided by agency expertise pursuant to Chevron to the same extent as our review of other regulations.” Id.

The Court confronted one additional impediment to full adoption of Chevron in the tax context. It had previously held that regulations issued under the Treasury Department’s general authority under section 7805(a) of the Code to “prescribe all needful rules and regulations for the enforcement” were entitled to less deference than those “issued under a specific grant of authority to defined a statutory term or prescribe a method of executing a statutory provision.” Rowan Cos. v. United States, 452 U.S. 247, 253 (1981). In Mayo Foundation, however, the Court quickly disposed of Rowan by noting that, since that case, “the administrative landscape has changed significantly.” 131 S. Ct. at 713. That the challenged regulation was issued “only after notice-and-comment procedures” was “a ‘significant’ sign that a rule merits Chevron deference.” Id. at 714 (quoting United States v. Mead Corp., 533 U.S. 218, 230-231 (2001)).

Accordingly, the Court held that all Treasury regulations, like other administrative agency regulations from other Departments and agencies, are entitled to Chevron deference when “an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority.”” 131 S. Ct. at 714 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007)).

Having concluded that the Treasury’s regulation regarding the FICA student exemption was entitled to deference, the Court quickly concluded that the regulation was valid. In so doing, however, the Court made one more significant holding. Mayo Foundation had argued that Treasury’s categorical exclusion of all full-time employees was arbitrary and that Treasury was required to engage in a case-by-case inquiry into what each employee does in his service and why. The Supreme Court disagreed, and endorsed Treasury’s bright-line rule, noting summarily that “[r]egulation, like legislation, often requires drawing lines.” 131 S. Ct. at 715. Accordingly, the Supreme Court upheld the challenged regulation.

**Litigation Following Mayo Foundation**

Upon issuance of Mayo Foundation, the Justice Department and the IRS moved immediately in lower courts to take advantage of the decision. The day after the opinion was handed down, Acting Deputy Assistant Attorney General Gilbert Rothenberg invoked the decision in oral argument in the Federal Circuit. See News Analysis: Federal Circuit Grapples With Aftermath of Mayo, Tax Notes Today (Jan. 13, 2011) (2001 TNT 9-2) (discussing oral argument in Grapevine Imports, Ltd. v. United States, No. 2008-5090). In the weeks since the Supreme Court issued its opinion, the government has filed numerous briefs invoking Mayo Foundation.

As courts begin to apply the case to pending and future tax disputes, several changes are likely to occur. Courts examining challenges to regulations will spend much less time examining the history of Treasury’s position on the issues in question, such as how much time elapsed between passage of the statute and issuance of the regulation. On the other hand, taxpayers may invoke Mayo Foundation’s emphasis on notice and comment to contest deference to regulations not issued after notice and comment pursuant to the APA.

**A. Chevron and Legislative History**

Debates that have raged for years in other areas of administrative law are likely to take on heightened importance in the tax area. For example, although more than 25 years have passed since Chevron, there are still many fundamental questions about how to apply it that will affect how much discretion Treasury has in interpreting statutes. Tax practitioners often examine and rely on legislative history in taking positions on uncertain issues in tax law. If legislative history can be invoked at Chevron step one to eliminate statutory ambiguity, then Treasury will not have discretion to choose among multiple readings of the statute at step two. The Supreme Court has not directly addressed whether and how legislative history is relevant to the Chevron inquiry. On the one hand, Chevron itself encouraged courts to employ “traditional tools of statutory construction” at step one, and included discussion of the legislative history in its opinion. 467 U.S. at 843 n.9, 845. On the other hand, in National Cable & Telecommunications Association v. Brand X Internet Services, 545 U.S. 967, 982 (2005), the Supreme Court implied that the Chevron step one inquiry was limited to “the unambiguous terms of the statute.”

The courts of appeals are in conflict over whether a court should examine legislative history in step one of the Chevron inquiry. Compare Intermountain Insurance Service of Vail, LLC v. Commissioner, 134 T.C. 211, 222-24 & n.18 (2010) (reviewing legislative history at Chevron step one); Catawba County v. EPA, 571 F.3d 20, 35 (D.C. Cir. 2009) (“To be sure, a statute may foreclose an agency’s preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque.”); North Dakota ex rel. Olson v. Centers for Medicare & Medicaid Services, 403 F.3d 537, 539-40 (8th Cir. 2005) (finding the legislative history determinative at Chevron step one); Micsouwe Tribe of Indians of Florida v. United States, 566 F.3d 1257, 1273 (11th Cir. 2009); New York v. U.S. Department of Health & Human Services Services Administration for Children & Families, 556 F.3d 90, 97 (2d Cir. 2009); Anderson v. U.S. Department of Labor, 422 F.3d 1155, 1180 (10th Cir. 2005) (“To determine whether Congress had an intent on the precise question at issue, courts utilize the traditional tools of statutory construction, including the statutory language and legislative history.”); Natural Resources Defense Council v. EPA, 526 F.3d 591, 603 (9th Cir. 2008); Wheatland Tube Co. v. United States, 495 F.3d 1355, 1359-60 (Fed. Cir. 2007); Succar v. Ashcroft, 394 F.3d 8, 22-23 (1st Cir. 2005); with United States v. Geiser, 527 F.3d 288, 292 (3d Cir. 2008) (“The Government is
correct that legislative history should not be considered at Chevron step one.”); Bankers Life & Casualty Co. v. United States, 142 F.3d 973, 983 (7th Cir. 1998) (same).

B. Brand X

Under the Supreme Court’s decision in Brand X, the scope of the inquiry in Chevron step one is important for an additional reason. “A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to Chevron deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” Brand X, 545 U.S. at 982. In other words, an administrative agency is free to adopt in a regulation any reasonable construction of the statute, even if a court previously has given an interpretation of a statute that is permissible but not compelled. “Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.” Id. at 982-83. In a concurring opinion in Brand X, Justice Stevens suggested that this holding should be limited to prior opinions of the Court of Appeals, and necessarily not to Supreme Court opinions. Id. at 1003 (Stevens, J., concurring). No other Justice, however, joined his concurrence.

One example of the battle over Brand X arises out of disputes over the statute of limitations for adjustments related to Son-of-BOSS tax shelters. The Code extends the general three-year statute of limitations to six years “[i]f the taxpayer omits from gross income an amount” that exceeds the stated gross income by 25 percent. I.R.C. § 6501(e)(1)(A). In Colony, Inc. v. Commissioner, 357 U.S. 28, 32-33 (1958), however, the Supreme Court reviewed the legislative history of a predecessor statute to section 6501(e)(1)(A) and concluded that “Congress had not intended a basis overstatement to be an omission from gross income.” Intermountain, 134 T.C. at 213-14. Applying Colony, the Tax Court concluded in Intermountain that basis overstatements arising from Son-of-BOSS tax shelters were subject to the three-year statute of limitations. Id. at 211. Treasury “subsequently issued two temporary regulations, sections 301.6229(c)(2)-1T and 301.6501(e)-1T,” and “on the basis of the application of those temporary regulations” before finalizing them suggested that they were not entitled to Chevron deference.

The Tax Court refused, without dissent, to vacate its prior opinion, but the Tax Court judges differed in the rationales for refusing to do so. Seven judges denied the motion in part because the temporary regulations did not apply to the case, Intermountain, 134 T.C. at 220, and in part because the regulations were invalid under Brand X. Id. at 224. Four judges held that the temporary regulations did not provide a sufficient reason to grant a motion to reconsider, id. at 226 (Cohen, J., concurring), and two judges found the temporary regulations invalid under the APA because they were not subjected to proper notices and comments procedures. Id. at 227 (Halpern and Holmes, JJ., concurring in the result only). The Intermountain case is currently on appeal to the D.C. Circuit.

After the Tax Court’s Intermountain decision, the temporary regulations became final. See Treas. Reg. § 301.6501(e)-1(a)(1)(iii)-(e)(i). In the first Court of Appeals case to cite Mayo Foundation, the Fourth Circuit held the regulations invalid on the ground that dicta in the Supreme Court’s Colony decision suggested that the case was decided on the basis of the plain language of the statute (and thus would have been decided at Chevron step one). See Home Concrete & Supply, LLC v. United States, No. 09-2353, ___ F.3d ___, 2011 WL 361495 (4th Cir. Feb. 7, 2011). In a concurring opinion, Judge Wilkinson noted the difficulty of determining whether pre-Chevron cases were decided at Chevron step one or step two for purposes of the Brand X inquiry. Id. at *8 (Wilkinson, J., concurring). In concluding, he offered a warning to those who read Mayo Foundation to grant unfettered discretion to Treasury to interpret statutes: “[A]gencies are not a law unto themselves. No less than any other organ of government, they operate in a system in which the last words in law belong to Congress and the Supreme Court.” Id. at *9. “Chevron, Brand X, and more recently, Mayo Foundation rightly leave agencies with a large and beneficial role, but they do not leave courts with no role where the very language of the law is palpably at stake. There is a balance to be struck here, and courts still must play a part in determining where ‘here’ is.” Id.

Two days later, the Fifth Circuit also found that the statutory language unambiguously foreclosed Treasury’s position on the statute of limitations issue. See Burks v. United States, No. 09-11061, ___ F.3d ___, 2011 WL 438640 (5th Cir. Feb. 9, 2011). It also stated that, even if the language of the statute was ambiguous, Mayo Foundation might not require it to evaluate the regulations under Chevron. “‘Deference to what appears to be nothing more than an agency’s convenient litigating position’ is ‘entirely inappropriate.’” Id. n.9 (quoting Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988)). Moreover, “[t]he Commissioner ‘may not take advantage of his power to promulgate retroactive regulations during the course of a litigation for the purpose of providing himself with a defense based on the presumption of validity accorded to such regulations.’” Id. (quoting Chock Full O’ Nuts Corp. v. United States, 453 F.2d 300, 303 (2d Cir. 1971)). The Fifth Circuit also noted that Treasury’s failure to submit the regulations for notice and comment before finalizing them suggested that they were not entitled to Chevron deference. Id.

A month later in Grapevine Imports, Ltd. v. United States, No. 2008-5080, ___ F.3d ___, 2011 WL 832915 (Fed. Cir. March 11, 2011), the Federal Circuit rejected the holdings in Home Concrete and Burks. Citing Mayo Foundation, it concluded that the statutory language was ambiguous and that Chevron mandated deference to the regulations. The Supreme Court will likely be called upon to resolve the circuit split over the regulations in the near future.

C. Other Forms of Guidance

Mayo Foundation itself addressed only Treasury regulations, but the government will likely invoke it to argue that other forms of Treasury and IRS guidance are entitled to Chevron deference. For example, in discussing Mayo Foundation, Acting Deputy Assistant Attorney General Rothenberg said the DOJ believes that even revenue rulings should be subject to Chevron deference. “Officials Comment on Interpreting Mayo, Tax Notes Today (Jan. 25, 2011) (2011 TNT 16-4).” In United States v. Meal, 533 U.S. 218 (2001), the Supreme Court
attempted to separate the circumstances under which agency interpretations merit *Chevron* deference from those under which the interpretations merit deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), based on their persuasiveness. *Mead* held that:

administrative 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.

533 U.S. at 226-27. Although a detailed review of *Mead* is beyond the scope of this article, the government to date has proved unsuccessful in arguing that Revenue Rulings are entitled to *Chevron* deference. See Treas. Reg. § 601.601(d)(2)(v)(d) (“Revenue Rulings . . . do not have the force and effect of Treasury Department Regulations . . . , but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.”); *Taproot Administrative Services, Inc. v. Commissioner*, 133 T.C. 202, 208-09 & nn.15-16 (declining to accord *Chevron* deference to Revenue Rulings under *Mead*); *Kornman & Associates, Inc. v. United States*, 527 F.3d 443, 453 (5th Cir. 2008) (“After careful consideration, we conclude that revenue rulings are not entitled to *Chevron* deference[].”); *Wetzler v. Illinois CPA Society & Foundation Retirement Income Plan*, 586 F.3d 1053, 1058 (7th Cir. 2009) (“Revenue rulings are not binding on this Court and we give them the lowest degree of deference which equates to some deference or respectful consideration.” (internal quotation marks and citation omitted)); but see Tualatin Valley Builders Supply, Inc. v. United States, 522 F.3d 937, 946-48 (9th Cir. 2008) (O’Scanlain, J., specially concurring) (acknowledging contrary circuit precedent, but asserting that the Revenue Procedure at issue in that case should be entitled to *Chevron* deference). It seems likely that *Mayo Foundation* will encourage the government to advocate for *Chevron* deference for Revenue Rulings and other Treasury and IRS guidance not subject to notice and comment rulemaking.

**Effects on Issuance of Guidance**

Although the most immediate and obvious effects of *Mayo Foundation* will be felt in litigation, the decision may affect the way that Treasury and the Service approach guidance as well.

Since the decision, several IRS officials have offered their take on the case. In a January 25, 2011, speech to the New York State Bar Association Tax Section, IRS Chief Counsel William J. Wilkins described *Mayo Foundation* as “slaying” four “dragons”: (1) the myth that tax regulations were evaluated under *National Muffler*; (2) the myth that “the IRS could not adopt regulations that are inconsistent with prior judicial decisions,” (3) the myth that “so-called ‘fighting regulations’ deserved less deference,” and (4) the myth that regulations promulgated pursuant to section 7805 deserve less deference than those promulgated under substantive Code sections. See IRS Chief Counsel Discusses Guidance, IRS Challenges, Tax Notes Today (Feb. 2, 2010) (2011 TNT 22-15).

Mr. Wilkins said that “[i]n pending cases and in future cases, we will be dealing with many advocates and judges who have been fond of these dragons, so I am sure we will need to point out repeatedly that they are not merely dead, they’re really most sincerely dead.” Id. Mr. Wilkins said that it had “not escape[d] our attention” that *Mayo Foundation* involved notice-and-comment regulations. Id. He conceded that “[i]t may or may not be the case that other kinds of guidance will receive *Chevron* deference, but at least we know that notice-and-comment regulations will.” Id. Finally, Mr. Wilkins said that “we recognize that this is a moment to consider for ourselves the implication of the famous quote about great power bringing with it equally great responsibility.” Id. The principles underlying *Chevron* “impl[y] the need to make choices based on wise public policy.” Id.

Clarissa Potter, IRS Deputy Associate Chief Counsel (Technical), drew different implications from the Court’s decision: “The court recognizes very clearly that in a world where we have really complicated facts and really complicated law, sometimes the best solution is not the perfect” one. See *Mayo Decision ‘Means More Guidance Faster’ from IRS, Official Says, Tax Notes Today* (Jan. 24, 2011) (2011 TNT 15-7). Ms. Potter read *Mayo Foundation* as approving the issuance of bright-line rules in many circumstances. Id. “I find that really refreshing and sort of exciting . . . . That means more guidance faster.” Id. This is perhaps good news for taxpayers that struggle with statutory ambiguity, but more expeditious issuance of IRS guidance is not always a good thing for taxpayers. According to the news article, Ms. Potter “said the IRS will take to heart the court’s emphasis on the importance of notice and comment in its regulatory process, although she cautioned that it will take some time to fully integrate the policy impact of the decision throughout the agency.” Id.

*Mayo Foundation* addressed the deference due to a Treasury regulation issued after notice and comment, not to any form of IRS guidance. Moreover, the deference due to non-regulation Treasury and IRS guidance is likely to be the subject of vigorous dispute in court, especially if the IRS continues its practice of issuing Revenue Rulings without notice and comment to affect the outcome of pending litigation. Nevertheless, it seems clear that the IRS, and likely Treasury, have drawn conclusions from *Mayo Foundation* that they will apply to all forms of tax guidance, not just Treasury regulations.

First, Treasury and the IRS are likely to conclude that they will face more judicial deference to all of their regulatory pronouncements. Taxpayers should therefore expect them to adopt a more aggressive stance, both in issuing regulations and in defending those regulations in court. Treasury is likely to issue more of what Mr. Wilkins called “fighting regulations”—regulations issued in response to or in anticipation of litigation. Subject to existing limits on retroactivity, courts are likely to be much more receptive to fighting regulations than they have been in the past. Taxpayers should be aware that even if they have a strong case under existing regulations, Treasury is free to change the regulations as a result of litigation.

Additionally, the IRS seems interested in the part of *Mayo Foundation* that allows an agency to change course for policy reasons if it decides that prior guidance is outdated or incorrect. Taxpayers should...
expect Treasury and the IRS to make more use in the next few years of their authority to revoke prior guidance and take a different position in new guidance. In exercising their authority to interpret ambiguous regulations under *Chevron*, however, Treasury and the IRS would do well to keep in mind the large number of judicial decisions rejecting regulations under *Chevron*. While *Chevron* requires judicial deference to reasonable interpretations of statutory ambiguity, judges have not hesitated to reject interpretations that they find unreasonable.

Second, both Mr. Wilkins and Ms. Potter noted the Supreme Court’s emphasis of the use of notice and comment as a reason for deferring to Treasury’s judgment in issuing the regulation. It is far from clear, however, that Treasury’s current regulations are in full compliance with the notice-and-comment requirements of the Administrative Procedure Act. “Almost as often as not, Treasury does not follow the traditional APA-required pattern of issuing [a Notice of Proposed Rulemaking], accepting and considering public comments, and only then publishing its final regulations.” Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury’s (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 Notre Dame L. Rev. 1727, 1730 (2007). To the extent that Treasury and the IRS interpret *Mayo Foundation* as encouraging them to make use of the notice-and-comment procedure on a more regular basis, taxpayers will have additional opportunities to influence regulatory guidance before it becomes final.

Finally, both taxpayers and legislators and their staff may react to *Mayo Foundation* in the legislative arena as well. Where taxpayers and legislators perceive that Treasury is hostile to their interests, *Mayo Foundation* may cause them to seek more specific language in legislation to eliminate the possibility that Treasury will interpret ambiguity against them. Conversely, where taxpayers perceive that Treasury may be more favorable to their interests than the existing congressional majority, they may seek ambiguous legislation that offers Treasury broad discretion to make law. Any legislative changes that stem from *Mayo Foundation*, however, may be subtle and difficult to quantify.

**Conclusion**

*Mayo Foundation* likely will change the way that Treasury and the IRS interpret regulations, and the way that courts evaluate those regulations in litigation. Absent a significant change in delegation of authority from Congress, *Mayo Foundation* will decrease the role of judges (including the specialist judges on the Tax Court) in construing tax law, and cede more of that authority to Treasury and the IRS. The executive branch agencies charged with administering the Internal Revenue Code will be free to overturn some of the precedents set by unfavorable litigation outcomes without further congressional sanction, and to revoke the guidance issued by past administrations without fear that the change itself will decrease the deference due from courts to the guidance. *Mayo Foundation* aligns judicial treatment of Treasury and the IRS with that of other agencies. As with other agencies, however, the increased power that *Mayo Foundation* gives Treasury does not mean that its actions are immune to challenge. Treasury’s statutory interpretations still may be successfully challenged on the ground that they are inconsistent with the statute, unreasonable, unexplained, or on other grounds. 

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**Clifford M. Sloan** is a partner at Skadden, Arps, Slate, Meagher & Flom LLP. He has litigated cases at all levels of federal and state courts, and he has made five arguments in Supreme Court of the United States and numerous arguments in the U.S. Courts of Appeals, and has handled matters in trial and district courts across the country. Mr. Sloan’s practice focuses on a wide range of litigation and appeals, including cases involving tax controversies, constitutional issues, and administrative law. Mr. Sloan has served in high-ranking positions in all three branches of the federal government, including experience as Associate Counsel to the President and Assistant to the Solicitor General; he also has served on the U.S. Court of Appeals for the District of Columbia Circuit’s Advisory Committee on Procedures. Mr. Sloan may be contacted at clif.sloan@skadden.com.

**B. John Williams, Jr.** is a partner at Skadden, Arps, Slate, Meagher & Flom LLP. He represents clients in federal tax controversy and litigation matters, from IRS examinations and administrative appeals through trial and appeal in the federal courts. Mr. Williams has served as Chief Counsel of the Internal Revenue Service, as a judge on the United States Tax Court, and as deputy assistant attorney general in the Tax Division of the U.S. Department of Justice. Mr. Williams has extensive experience both with promulgating and challenging Treasury regulations, including having a consolidated return regulation invalidated under *Chevron* on behalf of his client in Rite Aid Corp. v. United States, 255 F.3d 1357 (Fed. Cir. 2001). Mr. Williams may be contacted at bjohn.williams@skadden.com.

**David W. Foster** is an associate with Skadden, Arps, Slate, Meagher & Flom LLP, where he represents clients in civil and criminal tax matters before the IRS and in litigation. His practice focuses on tax controversy and litigation as well as appellate matters. Previously, Mr. Foster served as a law clerk to the Honorable Alex Kozinski of the United States Court of Appeals for the Ninth Circuit and the Honorable Anthony M. Kennedy of the Supreme Court of the United States. Mr. Foster may be contacted at david.foster@skadden.com.

1. Justice Kagan recused herself, likely because of her prior work on the case in the Solicitor General’s office.

2. Where the Treasury Department has changed its position, it must give a reasoned explanation for the change, just as it must for other important issues. See *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983). Treasury, like other agencies, is required to “examine the relevant data and articulate a satisfactory explanation for its action.” *Id.* at 43. The explanation will be unsatisfactory where “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.* Moreover, regulatory history may remain relevant in circumstances where it could be used to establish the background understanding under which Congress passed subsequent legislation.

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