

**Federal Bar Association Insurance Tax Seminar**  
**June 1, 2012**  
**Update on APA and Deference to Regulations**  
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***Mayo's Two Principles*<sup>1</sup>**

1. *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011), established two important principles for the tax world:
  - a. *Mayo* held that challenges to the validity of IRS regulations are evaluated under the same two-step test in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that applies for all other federal agencies.
  - b. More generally, *Mayo* also made clear that judicial review of action by the IRS is subject to the same administrative law principles that apply to judicial review of agency action for all other federal agencies.
2. *Mayo's* holding that the *Chevron* two-step test applies to tax regulations was the aspect of the case that received almost all the attention when *Mayo* was decided.
3. This holding was generally seen as unfavorable for taxpayers because the *Chevron* two-step test is more deferential to agencies than the tax-specific standard it replaced.
4. However, *Mayo's* holding that *Chevron* applies in tax cases also brings with it various principles the Supreme Court has developed concerning the application of *Chevron*.
5. These principles include how to determine which agency positions *Chevron* applies to and what weight is given to agency positions to which *Chevron* does not apply.
6. These principles include several aspects that are favorable for taxpayers.
7. Moreover, *Mayo's* more general holding that the IRS is not special for purposes of judicial review is favorable for taxpayers, because it makes clear that the Administrative Procedure Act standards for judicial review of agency action apply to the IRS.
8. In particular, the application of the APA's arbitrary and capricious standard to the IRS is favorable for taxpayers.

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<sup>1</sup> This outline was prepared by Mr. Smith and includes certain conclusions that are not necessarily endorsed by Judge Halpern or Mr. Rothenberg.

## ***Chevron* Step One**

1. *Chevron* step one says an agency position on the meaning of a statutory provision will be rejected as invalid if the position is contrary to the intent of Congress.
2. The difficulty comes in applying this general principle in particular cases.
3. This difficulty is increased by the fact that *Chevron* used seemingly inconsistent verbal formulations to describe step one.
4. Some of the formulations used in *Chevron* to describe step one made it seem that an agency position would be invalidated under step one only if Congress had *explicitly* addressed the specific point at issue.
5. For example, *Chevron* said step one asks whether “Congress has directly spoken to” (or “directly addressed”) “the precise question at issue,” and also asks whether there is an “unambiguously expressed intent of Congress,” or whether instead “the statute is silent or ambiguous with respect to the specific issue.”
6. In contrast, however, *Chevron* also described step one in seemingly different terms suggesting that explicit statutory statements on the point at issue are *not* necessary in order to conclude that an agency position conflicts with Congressional intent.
7. In this regard, *Chevron* also said step one asks whether “Congress had an intention on the precise question at issue” that a court could “ascertain” by “employing traditional tools of statutory construction.”
8. “Traditional tools of statutory construction” include, for example, the principle that a statutory provision is interpreted based on its statutory context rather than in isolation.
9. If step one required an explicit statutory statement on the point at issue to invalidate an agency position, “traditional tools of statutory construction” would not be needed.
10. Since this reference to “traditional tools of statutory construction” occurs in a footnote explaining the reference to “the unambiguously expressed intent of Congress,” the better reading of *Chevron* step one is that “traditional tools of statutory construction” are used under step one, so the terms “ambiguous” and “unambiguous” are merely shorthand to describe the conclusion reached with “traditional tools of statutory construction.”
11. Nevertheless, some courts have read “ambiguous” and “unambiguous” literally and have thus applied step one very narrowly and restrictively.
12. In support of a literal reading of “ambiguous” and “unambiguous,” the government has cited the Supreme Court’s 2005 *Brand X* decision, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

13. In *Brand X*, the Court used the terms “ambiguous” and “unambiguous” to describe *Chevron* step one without expressing any explicit reaffirmation that “traditional tools of statutory construction” must be used in applying step one.
14. However, nothing else in the *Brand X* opinion suggested an intent on the part of the Court to change the content of step one to exclude “traditional tools of statutory construction.”
15. Thus, it seems incorrect to conclude that *Brand X* changed step one.
16. Even assuming “traditional tools of statutory construction” can be used in *Chevron* step one, there is some uncertainty as to whether those “tools” include legislative history.
17. *Mayo* provided no new insight on the meaning of step one.
18. The Supreme Court’s recent decision in *United States v. Home Concrete & Supply, LLC*, No. 11-139 (U.S. April 25, 2012), dealing with overstated basis and the six-year statute of limitations, failed to provide any significant clarification on *Chevron* and related issues, because Justice Scalia’s concurrence failed to join the plurality opinion on these issues and instead turned on his continuing disagreement with *Brand X*.

### ***Chevron* Step Two**

1. If an agency position is not invalidated under *Chevron* step one, *Chevron* step two says the agency position will be accepted provided it is “reasonable” or “permissible,” even if it is not the position the court would have chosen as the “best” interpretation.
2. Under step two, an agency is free to make a choice among reasonable alternative positions based on policy considerations.
3. Moreover, under step two, an agency is free to change its position, provided the new position is reasonable.
4. Thus, step two gives agencies very broad discretion in choosing among positions.
5. The prevailing view is that in order for a challenge to an agency position to prevail under *Chevron*, it is necessary to prevail at step one, since step two is viewed as a very difficult standard for a challenge to meet, because of the broad discretion it gives to agencies.
6. However, that view may be subject to revision based on developments described below.
7. After the *Mayo* decision, tax professionals wondered how to determine whether an agency position is “reasonable” or “permissible” under *Chevron* step two.
8. The answer to that question is provided by the Administrative Procedure Act.

## **The Administrative Procedure Act and Tax Law**

1. The APA was enacted in 1946 in response to the growth of federal agencies in the 1930s.
2. The APA contains two sets of rules, one set that directly prescribe procedures that agencies must follow in taking certain kinds of actions, and another set of rules governing judicial review of agency action. 5 U.S.C. §§ 551 to 559 and 701 to 706.
3. As noted above, the second, more general, principle established by *Mayo* was that the actions of the IRS are subject to the same administrative law principles governing judicial review of agency action that apply to all other federal agencies.
4. The most obvious application of this principle is to apply the Administrative Procedure Act judicial review provisions in tax cases.
5. *Mayo* did not cite the APA in stating the principle that judicial review of IRS action is no different from judicial review of action by other agencies.
6. However, *Mayo* quoted an APA decision in expressing this principle.
7. Last summer, the D.C. Circuit in an *en banc* opinion in *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011), held the APA's judicial review provisions apply to judicial review of action by the IRS, relying in part on *Mayo*. *Id.* at 736.
8. *Cohen* stated explicitly that "[t]he IRS is not special" and that "no exception exists shielding it" from the application of the APA. *Id.* at 723.

## **Chevron Step Two and the APA's Arbitrary and Capricious Standard**

1. Section 706(2)(A) of the APA states that a reviewing court "shall ... set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).
2. This is the "arbitrary and capricious" standard for judicial review of agency action.
3. It is clear that the arbitrary and capricious standard applies to judicial review of IRS action, including regulations, in light of the holdings in *Mayo* and *Cohen* that the IRS is not special for purposes of administrative law generally and the APA in particular.
4. Moreover, the applicability of the APA's arbitrary and capricious standard to judicial review of IRS regulations has been reinforced by the fact that *Chevron* step two has now clearly been held to be equivalent to the arbitrary and capricious standard.
5. In *Judulang v. Holder*, 132 S. Ct. 476 (2011), an immigration case decided in December of last year, the Supreme Court explicitly stated for the first time that *Chevron* step two is equivalent to the arbitrary and capricious standard. *Id.* at 483 n.7.

## **Prevalence of Arbitrary and Capricious Standard Outside the Tax World**

1. One possible reaction someone might have to this equivalence between *Chevron* step two and the arbitrary and capricious standard might be that “arbitrary and capricious” may not seem any easier to apply than *Chevron*’s “reasonableness” standard.
2. However, a substantial body of case law gives content to the arbitrary and capricious standard that is much more informative than the case law under *Chevron* step two. *See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).
3. In addition, the prospects for success in a challenge under the arbitrary and capricious standard are likely to be greater than in a challenge under *Chevron* step two where the arbitrary and capricious standard is not invoked as providing the content for step two.
4. Most people think *Chevron* challenges need to succeed at step one, because the prospects of success at *Chevron* step two are generally considered to be quite remote.
5. However, that is not the case for arbitrary and capricious challenges.
6. Outside tax, virtually every litigated challenge to agency action is based in part or in whole on a claim by the party bringing the challenge that the agency violated the APA arbitrary and capricious standard.
7. In contrast, in tax cases, challenges to IRS action based on claims that the IRS has violated the arbitrary and capricious standard have been very rare.

## **Content of Arbitrary and Capricious Standard**

1. The arbitrary and capricious standard has two components.
  - a. First: the agency must engage in “reasoned decision-making.”
  - b. Second: the agency must provide an explanation of the reasons supporting the agency’s decision at the same time the decision is made.
2. The requirement that an agency must provide an explanation of the reasons for its decisions at the time the decisions are made is a mechanism for enforcing the requirement that the agency must engage in reasoned decision-making.
3. Without a contemporaneous explanation of the agency’s reasoning, a court charged with reviewing the agency action would have no way to evaluate whether the agency had complied with the requirement to engage in reasoned decision-making.

## **Application of the Arbitrary and Capricious Standard to the IRS**

1. IRS regulations are particularly vulnerable to challenge under the arbitrary and capricious standard because the IRS's preambles to its regulations ordinarily do not explain the reasons why the IRS adopted the particular rules it adopted.
2. Instead, the only type of explanation these preambles typically provide is an explanation of how the rules in the regulations operate.
3. This type of explanation is not the type of explanation that is necessary to satisfy the arbitrary and capricious standard.
4. In addition, the preambles to IRS regulations generally discuss the comments that were submitted on the proposed regulations and whether the suggestions made in the comments were accepted or rejected.
5. Sometimes this discussion of the comments received and the action taken in response to the comments may provide the type of explanation required by the arbitrary and capricious standard, but this is haphazard.
6. One explanation for why IRS preambles do not ordinarily explain the reasons for the rules in the regulations is that the Internal Revenue Manual section dealing with drafting regulations and preambles explicitly instructs IRS personnel that in drafting preambles, "it is not necessary to justify the rules that are being proposed or adopted." I.R.M. § 32.1.5.4.7.3(1).
7. This statement in the Internal Revenue Manual essentially instructs IRS employees to draft preambles in a way that violates the arbitrary and capricious standard by omitting explanations of the reasons for the rules in regulations.
8. One exception to the APA reasoned-explanation requirement is where the agency's "path" can be "discerned" without such an explanation. *See, e.g., State Farm, supra*, 463 U.S. at 43.
9. Thus, if it is obvious why the agency must have adopted the rule that is at issue, no explanation is required.
10. Consequently, an argument based on the failure to provide a contemporaneous explanation will probably be more effective if the argument is supported by an identification of possible alternative rationales the IRS might have used in arriving at the rule.
11. If some of these plausible alternative rationales are clearly improper, that will help support the contention that the lack of explanation was improper.

## The Tax Court and the APA

1. In some cases within the last ten years, but before *Mayo*, some judges on the Tax Court have expressed the view that the APA does not apply to the Tax Court.
2. These statements have come in the context of the principle that Tax Court deficiency proceedings have always been conducted as trials de novo.
3. This use of trials de novo is unusual in the context of judicial review of agency action.
4. In most cases outside tax where a court reviews agency action, the judicial review is limited to the administrative record compiled by the agency during its consideration of the matter, and no new evidence is taken in the course of judicial review.
5. In such non-tax cases, the applicable standard by which the court reviews the agency action is ordinarily the arbitrary and capricious standard in section 706(2)(A) of the APA.
6. The statements by some Tax Court judges that the APA does not apply to the Tax Court are based on this well-established disparity between the use of trials de novo in Tax Court deficiency proceedings and the fact that judicial review of agency action, in cases outside the tax context, is limited to the administrative record and is based on the arbitrary and capricious standard.
7. However, section 706(2)(F) of the APA recognizes that trials de novo can sometimes be used in judicial review of agency action, although nothing in the text of the APA directly specifies when such trials de novo are appropriate.
8. The fact that section 706(2)(F) of the APA specifically contemplates the use of trials de novo for judicial review of agency action in appropriate cases means there is no tension between the fact that Tax Court deficiency proceedings are conducted as trials de novo and the application of the APA to Tax Court review of IRS action.
9. Thus, the fact that Tax Court deficiency proceedings are conducted as trials de novo under section 706(2)(F) does not mean that the arbitrary and capricious standard of section 706(2)(A) cannot also apply in those proceedings where appropriate, such as in a case where the taxpayer challenges the validity of an IRS regulation based on a claimed violation of the arbitrary and capricious standard.
10. *Mayo*'s holding that tax is not special with respect to judicial review of agency action, together with the D.C. Circuit's holding in *Cohen* that the judicial review provisions of the APA apply to the IRS, should help alleviate any uncertainty as to whether the APA's arbitrary and capricious standard applies where appropriate in Tax Court proceedings.

### **For Which Agency Positions Is *Chevron* Applicable?**

1. As noted above, *Mayo*'s holding that *Chevron* applies in the tax world brings with it the various principles the Supreme Court has adopted for applying *Chevron*.
2. The most important case establishing several of these principles is *United States v. Mead Corp.*, 533 U.S. 218 (2001).
3. The first point on which *Mead* provides guidance is how to determine for which agency positions *Chevron* is applicable.
4. *Mead* says *Chevron* applies to a particular agency position only if Congress gave the agency the authority to make rules having the force of law and the agency position at issue was adopted pursuant to that authority.
5. For the IRS, it is clear Congress has given the IRS the authority to adopt rules with the force of law, so the only issue in applying this test to the IRS is whether the specific IRS position that is being challenged in a particular case was adopted pursuant to that authority.
6. *Mead* says the agency's use of notice and comment rulemaking procedures will ordinarily mean *Chevron* applies to the agency position since notice and comment procedures ordinarily show the agency intends the position to have the force of law.
7. Thus, in the case of IRS documents, *Chevron* ordinarily applies to regulations issued using notice and comment procedures.
8. In contrast, *Chevron* does not apply to IRS documents such as revenue rulings and revenue procedures because the IRS does not claim such documents have the force of law and does not ordinarily use notice and comment procedures for issuing such documents.
9. Before *Mayo*, there was uncertainty about the status of revenue rulings and revenue procedures.
10. This clarification of the lower-level status of revenue rulings and revenue procedures for purposes of judicial review is an example of one way that *Mayo* produced a result that is clearly favorable for taxpayers.



### What Weight is Given to Agency Positions to Which *Chevron* Does Not Apply?

1. The second point on which *Mead* provides guidance is how to determine the weight given to agency positions that do not satisfy the requirements for applying *Chevron*.
2. *Mead* says the weight that is given an agency position to which *Chevron* does not apply is determined under the standard in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
3. *Skidmore* says an agency position is given weight according to the position's "power to persuade." *Id.* at 140.
4. The "power to persuade" is based on "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Id.*
5. Since *Chevron* does not apply to IRS documents such as revenue rulings and revenue procedures, such documents are instead evaluated under *Skidmore*.
6. Under the *Skidmore* test, if a revenue ruling or a revenue procedure contains persuasive reasoning in support of its conclusion, it will be given appropriate weight.
7. However, under the *Skidmore* test, if a revenue ruling or revenue procedure contains no reasoning, it will be given no weight.
8. Since revenue procedures ordinarily contain no reasoning, they will ordinarily be given no weight under *Skidmore*.
9. This result that revenue rulings or revenue procedures that contain no reasoning are given no weight is another result from *Mayo* that is favorable for taxpayers.
10. IRS documents such as PLRs and TAMs are evaluated under the same *Skidmore* "power to persuade" standard that applies to revenue rulings and revenue procedures.
11. Thus, if there is a PLR or TAM that is favorable to a taxpayer other than the taxpayer for whom the PLR or TAM was issued and the PLR or TAM contains persuasive reasoning, it should be given appropriate weight.
12. Although the IRS and DOJ are likely to resist this conclusion, giving weight under *Skidmore* to a PLR or a TAM that contains persuasive reasoning and favors the position the taxpayer is asserting, but that was not issued for that taxpayer, is not contrary to section 6110(k)(3), which provides that IRS documents in these categories may not be used or cited as precedent.
13. Giving appropriate weight under *Skidmore* to a PLR or TAM is not using or citing the PLR or TAM as precedent within the meaning of section 6110(k)(3), since the PLR or TAM is not being treated as controlling or binding, in the way that "precedent" is controlling or binding, but only as persuasive.

14. This conclusion is supported by the fact that the type of agency document that was at issue in *Mead* was subject to a rule in a regulation that said other parties could not rely on the document, and thus was similar to the rule in section 6110(k)(3), but this did not prevent the Court from concluding the document should be evaluated under *Skidmore*.
15. This conclusion that PLRs and TAMs can be given weight under *Skidmore*'s power-to-persuade standard is another taxpayer-favorable result that flows from *Mayo*.
16. Another application of the arbitrary and capricious standard, entirely apart from *Chevron* step two, is that with respect to PLRs and TAMs that adopt a position favorable to the taxpayer but that were issued with respect to a different taxpayer, the taxpayer can argue that it is arbitrary and capricious for the IRS to reach a different result than was reached in the PLR or the TAM without providing a satisfactory explanation for the different result.
17. This argument is based on case law holding that it is a violation of the arbitrary and capricious standard for an agency to treat similarly situated parties differently without an adequate explanation for the differential treatment.
18. However, a taxpayer making such an argument needs to make clear that is not relying on the *IBM* case, *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965), where a taxpayer successfully argued that the IRS was required to give it the same ruling that had been given to a competitor without regard to whether that result was correct.
18. The reason a taxpayer should make clear that it is not relying on the *IBM* case is that subsequent cases make clear that taxpayers are very unlikely to prevail on that basis. *See, e.g., Florida Power & Light Co. v. United States*, 375 F.3d 1119 (Fed. Cir. 2004).

### ***Brand X: Courts Versus Agencies***

1. Another principle regarding the application of *Chevron* that is brought into the tax world by *Mayo* concerns the relationship between a prior court decision interpreting a statutory provision and a subsequent agency interpretation of the same provision that differs from the prior court interpretation.
2. If a court has interpreted a statutory provision in a certain way, at a time when the agency responsible for the administration of the statute has not adopted an interpretation to which *Chevron* applies, can the agency subsequently adopt a different interpretation from the interpretation previously adopted by the court?
3. According to the Supreme Court's 2005 *Brand X* decision, cited earlier, the answer to this question depends on whether the prior court decision on the meaning of the statutory provision was arrived at under *Chevron* step one or instead under *Chevron* step two.

4. If the prior court interpretation was an application of *Chevron* step one, the agency is not permitted to adopt a different interpretation than the one previously adopted by the court, since such an interpretation is the only permissible interpretation.
5. However, if the prior court interpretation was an application of *Chevron* step two, the agency is permitted to adopt an interpretation different from the prior court interpretation, since, under *Chevron* step two, there are multiple alternative permissible interpretations.
6. Conceptually, this approach makes sense, since it should not make a difference under *Chevron* whether a court or an agency interprets a particular provision first.
7. In practice, however, this approach is not easy to apply.
8. The most obvious problem in applying this approach is that since the prior court interpretation was not dealing with an agency interpretation to which *Chevron* applies, there was no reason for the prior court opinion to apply the *Chevron* two-step framework.
9. This problem becomes even more serious if the prior court interpretation preceded *Chevron*, as is the case in *Home Concrete*, cited earlier, where the prior interpretation was in a 1958 Supreme Court decision, long before the 1984 *Chevron* decision.
10. However, *Home Concrete* failed to provide an answer to the question of whether *Brand X* applies when the prior judicial interpretation was a Supreme Court decision, since Justice Breyer's plurality opinion was based on the conclusion that the prior Supreme Court opinion was a *Chevron* step one holding and since Justice Scalia's concurrence was based on his continuing disagreement with *Brand X*.

### **The APA Notice and Comment Requirements for Rulemaking**

1. Even before *Mayo*, taxpayers had begun relying on the notice and comment requirements in section 553 of the APA as a basis for challenging certain categories of IRS regulations.
2. Section 553 provides that, before issuing final regulations, the agency must issue a notice of proposed rulemaking, the agency must give interested persons an opportunity to submit comments on the proposed rules, and the agency must consider the comments in determining the content of the final rules.
3. The category of IRS regulations that has been challenged under the APA notice and comment requirements is temporary regulations.
4. IRS temporary regulations are almost always issued without having been preceded by proposed regulations.
5. However, as a result of the enactment of section 7805(e) in 1988, IRS temporary regulations are simultaneously issued in proposed form with a request for comments.

6. The challenges to IRS temporary regulations are based on the contention that issuance of temporary regulations without prior issuance of proposed regulations violates the APA notice and comment requirements.
7. There are several responses that the IRS usually makes to these challenges.
8. One response is to invoke the statutory exception in section 553 for situations where the agency has “good cause” for not following notice and comment procedures, based on the claim that there is a need for immediate guidance and that this is good cause.
9. However, the court decisions interpreting the good cause exception hold that the exception is interpreted narrowly and applies only to genuine emergency situations ordinarily involving public health or public safety.
10. These decisions hold that a need for immediate guidance by itself does not constitute good cause.
11. Another response the IRS ordinarily makes to challenges to temporary regulations based on the notice and comment requirements is to invoke a second statutory exception in section 553 for “interpretative rules.”
12. The IRS sometimes contends that a particular regulation is “interpretative” because it was issued under the general authority of section 7805(a) rather than under more specific authority to issue regulations in the substantive Code section to which the regulation relates.
13. The IRS’s reliance on the exception for “interpretative rules” would seem to be self-defeating, since “interpretative rules” do not have the force of law and would therefore not provide a basis for deciding the case if the IRS were to prevail in the argument that a particular regulation was exempt from notice and comment as an “interpretative rule.”
14. Moreover, the argument that regulations issued under section 7805(a) are automatically “interpretative rules” for purposes of the notice and comment requirements would seem to be refuted by *Mayo*’s holding that regulations issued under section 7805(a) do not have an inferior status to regulations issued under more specific statutory authority.
15. The IRS also responds to challenges to temporary regulations based on the notice and comment requirements by claiming that temporary tax regulations are exempt from these requirements because section 7805(e) specifically refers to temporary regulations.
16. This argument seems inconsistent with section 559 of the APA, which provides that in order for statutes enacted subsequent to the 1946 enactment of the APA to override the requirements of the APA (such as the notice and comment requirements), such subsequent statutes must do so expressly, which section 7805(e) does not.

17. The APA notice and comment requirements are also important under *Mayo* and *Chevron* because of the role played under *Mead* by the issue of whether notice and comment procedures were used in deciding whether *Chevron* applies to a particular agency position.

### **Retroactive application of regulations**

1. Prior to being amended in 1996, section 7805(b) authorized the IRS to issue retroactive regulations.
2. The 1996 amendments to section 7805(b) substantially restricted the authority of the IRS to issue retroactive regulations.
3. However, these 1996 amendments to section 7805(b) apply only to regulations that relate to statutory provisions enacted after the 1996 amendments.
4. Consequently, the pre-1996 version of section 7805(b) with a broad authorization of retroactive regulations continues to apply even to newly issued regulations so long as the regulations relate to statutory provisions enacted before the 1996 amendments to section 7805(b).
5. Are there any limits on the ability of the IRS to issue regulations relating to statutory provisions enacted before the 1996 amendment to section 7805(b) that are effective retroactively?
6. If the substantive scope of such regulations requires the application of the broad discretion given to agencies by *Chevron* step two in order to be sustained, it can be argued that when Congress enacted the original version of section 7805(b) in 1954, Congress clearly could not have contemplated that the IRS would be issuing regulations with the broad substantive scope authorized by *Chevron*, since *Chevron* was not decided until 30 years later, in 1984, and particularly since *Chevron* was not definitively held applicable to tax regulations until *Mayo* in 2011.
7. Consequently, the 1954 authorization to issue retroactive regulations cannot reasonably be interpreted as authorizing retroactive application of regulations if the substantive scope of the regulations exercises the broad administrative discretion granted by *Chevron* in 1984 and *Mayo* in 2011.