



# Agenda

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Overview of Administrative Law and the APA

Tax Rules and Regulations

Challenges to Agency (IRS) Rulemaking

The Downfall of the *Chevron* Doctrine

Deference to Agency Rulemaking following *Loper Bright*

Looking Ahead

# General Background on Administrative Law

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**General Concept** – Administrative law focuses on the process by which federal agencies develop, issue, amend, and repeal regulations, which is commonly called rulemaking.

**Administrative Procedure Act (APA) (1946):**

Provides the statutory basis for Federal Administrative Law.

Categorizes agency actions as rulemaking or adjudication.

Creates framework that agency rulemaking can be proposed and evaluated.

**Internal Revenue Code:** Gives additional rules for IRS and Treasury Department.

**U.S. Code:** Other Federal laws impose additional requirements for agencies.

## Requirements for Agency Rulemaking

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**Notice – 5 USC § 553(b)**

Agency must publish a Notice of Proposed Rulemaking in the Federal Register, which shall include:

- Time, place, and nature of the public rulemaking proceeding;
- Legal authority for the proposed rule;
- Either terms or substance of the rule or description of the issue.

**Comment – 5 USC § 553(c)**

Agency must give interested persons the opportunity to participate by submitting written data, views, or arguments (may include oral presentation); and

Agency must consider any relevant matter presented and incorporate in any final rules a “concise general statement of the basis and purposes.”

**Publication – 5 USC § 553(d)**

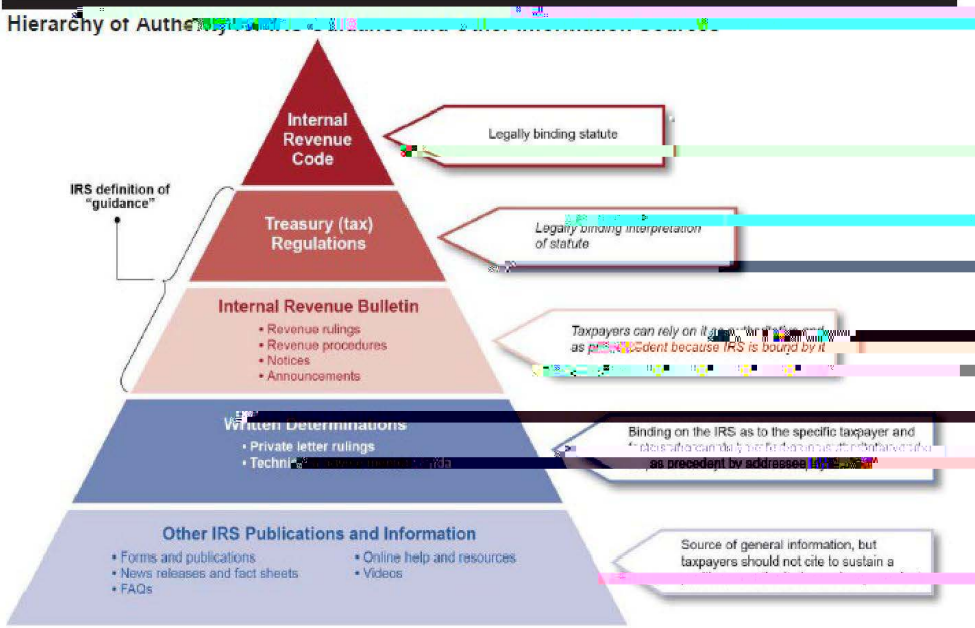
Final rule must be published at least 30 days before a rule’s effective date, except for:

- Substantive rule that grants or recognizes an exemption or relieves restriction;
- Interpretive rules and statements of policy; or
- Good cause found and published with the rule.

# Requirements for Agency Rulemaking (cont'd)

The Attorney's General Manual on the APA provides definitions of substantive and

## Tiers of IRS Guidance



Source: GAO analyses of IRS guidance.

# Treasury Regulations

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Regulations come in proposed, temporary, and final form.

**Proposed** – not binding, but sometimes can be relied on by taxpayers.

**Temporary:**

Must be accompanied by proposed regulations which will go through notice-and-comment process.

Generally considered binding (although questions arise over satisfaction of APA's good-cause requirement).

Temporary regulations issued after November 20, 1988, must be finalized within three years.

If temporary regulations expire, the proposed regulation nevertheless remains in proposed form unless it is withdrawn.

**Final** – binding if validly promulgated (i.e., pass *Loper Bright* and APA requirements).

## Treasury Regulations (cont.)

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Section 7805(b) restricts use of retroactive regulations.

**Limitations:** if authority exists to make the regulation retroactive, the effective date of final, temporary or proposed regulation may not be before earliest of (i) final rule published in the Federal Register, (ii) proposed or temporary rule published in the Federal Register, or (iii) notice substantially describing expected contents of regulation issued.

**Authorization to Issue Retroactive Regulations:**

Regulations to “prevent abuse.”

Correction of procedural defects in prior regulations.

## Treasury Regulations (cont.)

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Congress has delegated authority to IRS to issue regulations in two ways:

- Section 7805(a) general grant of authority.

- Specific authority granted in the relevant statute.

Both before and after *Mayo*, courts have invalidated § 7805(a) regulations that cannot point to a gap in the relevant Code section that needs to be filled, or that add a requirement or restriction not supported by statutory text.

# Treasury Policy Statement

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Department of the Treasury issued a Policy Statement on the Tax Regulation Process (March 5, 2019):

Commitment to notice and comment rulemaking, even for interpretive rules.

Limited use of temporary regulations, with “good cause” statement.

Limits on sub-regulatory guidance:

IRS will not seek judicial deference under *Auer* or *Chevron* in Tax Court litigation.

Limit effectiveness of notices setting forth anticipated proposed regulations after 18 months (taxpayers may rely but IRS will not assert adverse position based on notice).

Current Administration has thus far not rescinded or modified this Policy Statement.

# Challenging Agency Rules

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**Judicial Review:**

5 USC § 702: persons

## Challenging Agency Rules (cont.)

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In theory, there are three potential times to challenge an agency action.

Pre-enforcement;

During enforcement; or

After enforcement (deficiency or refund litigation).

Taxpayers face the greatest obstacles in pre-enforcement and during enforcement challenges.

Obstacles to a taxpayer's challenging IRS rulemaking include standing, the Anti-injunction Act, the Declaratory Judgment Act, and relevant statutes of limitation.

## Tools for Attacking Treasury Regulations

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Procedurally Defective (APA):

Argument:

# Chevron

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*Chevron* was based on a presumption that, when Congress left an ambiguity in a statute administered by an agency, it generally intended to let the agency resolve the ambiguity.

Typically expressed as a two-step test:

**Step 1:** Is the statute ambiguous on the precise question at issue? If the statute is unambiguous, follow the statute, not the agency's interpretation of it.

**Step 2:** If the statute is ambiguous, is the agency's interpretation of the statute reasonable? If so, then defer to the regulation – even if it differs from the court's view of the best interpretation.

# Skidmore - Alternative Deference

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The commonly cited standard is from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

The weight given to an administrative judgment in a particular case depends upon, among other things, **the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.**

Other factors may include, *e.g.*, whether the interpretation was issued contemporaneously with the statute, how formal the guidance is, and the agency's relative expertness on the subject.

*Skidmore* deference was the standard courts generally applied to regulations and subregulatory guidance before *Chevron*; after *Chevron*, *Skidmore* still applied as to subregulatory guidance.



# *Auer* Deference as to Interpreting Regulations

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The Supreme Court recently reaffirmed so-called *Auer* deference, where courts defer to an agency's interpretation of its own ambiguous regulations (not statutes). *Auer v. Robbins*, 519 U.S. 452 (1997),

Whether *Auer* deference will survive is unclear:

*Auer* is based on the presumption that an agency's power to interpret its own regulations is a component of its delegated authorities.

But there is still tension with the APA, which requires courts to "decide all relevant questions of law" and "determine the meaning" of relevant agency action.

Regardless, *Auer* deference was narrowed significantly in *Kisor v. Wilkie*, 588 U.S. 558 (2019):

A regulation must be **genuinely ambiguous** after exhausting all tools of interpretation.

The agency's interpretation must be **reasonable**, within the zone of ambiguity identified.

The **character and context** of the agency's interpretation must entitle it to deference: It must be authoritative, implicate the agency's expertise, and represent fair and considered judgment.

# *Loper Bright / Relentless: The Opinion*

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Impact of

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## *Loper Bright Relentless*

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“In a case involving an agency ... the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion,” as when “statutes ‘expressly delegate[]’ to an agency the authority to give meaning to a particular statutory term. ... Others empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme, ... or to regulate subject to the limits imposed by a term or phrase that ‘leaves agencies with flexibility,’ ... such as ‘appropriate’ or ‘reasonable.’”

“When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, ‘fix[ing] the boundaries of [the] delegated authority,’ ... and ensuring the agency has engaged in “‘reasoned decisionmaking’” within those boundaries.... By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.”

*Loper Bright / Relentless* may force Congress to delegate expressly (when it wants to), bringing nondelegation concerns to the forefront:

Congress cannot delegate its legislative authority, but historically this has just meant that Congress needs to provide an “intelligible principle.”

The Supreme Court has not invalidated a delegation since the 1930s, but a more robust nondelegation principle is gaining traction among some Justices and lower courts.

## *Will Auer Survive after Loper Bright?*

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Whether *Auer* deference will survive is unclear:

*Chevron* was based on a (fictional) presumption of what Congress intended regarding the interpretation of statutes.

*Auer* is based on a different presumption — that an agency’s power to interpret its own regulations is a component of its delegated authorities.

But there is still tension with the APA, which requires courts to “decide all relevant questions of law” and “determine the meaning” of relevant agency action.

Regardless, *Auer* deference was narrowed significantly in *Kisor*, so *Auer*’s survival may not matter in the end.

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## *Corner Post* – Holding and Rationale

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**Issue:** When does a plaintiff's APA claim first accrue under 28 U.S.C. § 2401(a)?

**Facts:**

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## Corner Post – Practical Considerations

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Under *Corner Post*, an APA claim does not accrue for the purposes of 28 U.S.C. § 2401(a)'s six-year statute of limitations until the plaintiff is injured by final agency action.

The Court reasoned that because an APA plaintiff may not file suit and obtain relief until they suffer an injury from final agency action under 5 U.S.C. §§ 702 and 704, the statute of limitations does not begin to run until they are injured.

Combined with *Loper Bright*, *Corner Post's* expanded time frame to bring suit against administrative agencies will likely lead to more litigation challenges to federal regulations.

Potential increase in regulation challenges:

- New opportunities to challenge older regulations.

- Opportunities for revisiting agency positions previously upheld on deference grounds.

Impact on the courts:

- Preliminary injunctions, supplemental briefing, and stare decisis

## Looking Ahead

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Several recent and pending cases highlight the current state of affairs.

*See, e.g.:*

- Liberty Global, Inc. v. U.S.*, No. 1:20-cv-03501-RBJ (D. Colo., Apr. 4, 2022), on appeal to 10<sup>th</sup> Circuit;

- Kyocera AVX Components Corp. v. U.S.*, No. (D.S.C., complaint filed July 28, 2022);

- 3M Co. v. Commissioner*, T.C. No. 5816-13, on appeal to 8<sup>th</sup> Circuit;

- Mann Construction, Inc. v. US*, 24 F.4th 1138 (6th Cir. 2022);

- CIC Services, LLC v. IRS*, No. 317-cv-110 (E.D. Tenn. 2022);

- GBX Associates, LLC v. US*, No. 1:22-cv-401 (N.D. Ohio).

These challenges can be broken down as:

- Cases involving IRS/courts purportedly not following regulations;

- Cases involving challenges to the substantive and/or procedural invalidity of regulations;

- Challenges to the procedural validity of subregulatory guidance.

# Regs Ripe for Scrutiny

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Section 482?

Consolidated Return Regs?

Sec. 367 regs/ Anti-inversion regs

DCL Regs

Taxpayer Favorable v. Antiabuse rules



## Questions?

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