

2009

IRB Guidance: The No Man's Land of Tax Code Interpretation

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Recommended Citation

Kristin Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 MICH. ST. L. REV. 239 (2009), available at https://scholarship.law.umn.edu/faculty_articles/206.

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IRB GUIDANCE: THE NO MAN’S LAND OF TAX CODE INTERPRETATION

*Kristin E. Hickman**

2009 MICH. ST. L. REV. 239

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INTRODUCTION

Legal scholars have long recognized that many or even most agency legal interpretations are made informally rather than by regulations promulgated through notice-and-comment rulemaking and published in the Code of Federal Regulations. Agencies adopt interpretations of law informally using a range of formats from official pronouncements vetted by top agency officials to letters and e-mails issued by relatively low-level agency em-

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ployees.¹ The relative weight and significance of such informal guidance varies tremendously, although prudent regulated parties take seriously agency guidance in virtually any form.²

The Internal Revenue Service (IRS or Service) stands as no exception to this phenomenon. Although Treasury regulations are the most formal and authoritative expression of Treasury Department (Treasury) and IRS interpretations of the Internal Revenue Code (I.R.C.),³ the IRS's national office publishes a series of official and authoritative, if informal, guidance documents in the Internal Revenue Bulletin (IRB) each week and the Cumulative Bulletin (CB) annually.⁴ By far the most common and prominent of these documents are revenue rulings, revenue procedures, and notices, which are often referred to collectively as "IRB guidance," or sometimes "other published guidance."⁵

1. See generally, e.g., Robert Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1332-55 (1992) (documenting broad agency utilization of informal formats); Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 DUQ. L. REV. 323, 330-72 (2008) (discussing legal authority, reliability, and retroactive effect of twenty-five different informal IRS formats ranging from published rulings to oral communications).

2. Scholars sometimes speak of informal guidance as carrying practical if not legal binding effect and debate over the extent to which that should matter. See, e.g., 1 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 4.60 (2d ed. 1997) (acknowledging practical binding effect of interpretative rules, guidelines, and policy statements, but suggesting that "[o]n the other hand, agencies should be encouraged to . . . give as much guidance as possible to the regulated"); Anthony, *supra* note 1, at 1327-32 (discussing problems of non-legislative rules with practical binding effect); Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497 (1992) (attempting to balance practical binding effect and agency willingness to consider alternative views).

3. See, e.g., Korb, *supra* note 1, at 326 ("[Treasury] regulations constitute the primary source for guidance as to the Service's position regarding the interpretation of the [I.R.C.]").

4. See Treas. Reg. § 601.601(d)(1) (as amended in 1987) (describing the IRB as "the authoritative instrument of the Commissioner for the announcement of official rulings, decisions, opinions, and procedures" and the policy of the IRS as being "to publish in the Bulletin all substantive and procedural rulings of importance or general interest" including revenue procedures "which are of general applicability and which have continuing force and effect" and "statements of internal practices and procedures affecting rights or duties of taxpayers"); Rev. Proc. 89-14 § 4.01, 1989-1 C.B. 814 (recognizing the IRB as "authoritative"); INTERNAL REVENUE SERV., DEP'T OF TREASURY, INTERNAL REVENUE MANUAL § 32.2.2.1(1) (2004) [hereinafter INTERNAL REVENUE MANUAL] (noting that "[r]evenue rulings, revenue procedures, [and] notices . . . are issued only by the national office and are published in the IRB").

5. Revenue rulings, revenue procedures, and notices are not the only informal guidance formats the IRS publishes in the CB and IRB. The IRS also routinely publishes documents labeled "announcements," which the IRS defines as "a public pronouncement that has only immediate or short-term value." See INTERNAL REVENUE MANUAL, *supra* note 4, § 32.2.2.3.4. The IRS claims that announcements lack substantive interpretations of the I.R.C. See *id.* This assertion appears accurate, as most announcements merely highlight and reite-

IRB guidance is not the only informal guidance that the IRS makes available to taxpayers.⁶ Thanks in part to a string of lawsuits seeking access to myriad unpublished IRS letter rulings, internal memoranda, and other documents containing IRS legal interpretations and analysis, reams of such material are publicly available through Westlaw, Lexis, and other sources.⁷ Nevertheless, unlike other unpublished IRS materials, the IRS designates IRB guidance as “official” and, in litigation, claims a heightened level of judicial deference for the interpretations advanced therein. Accordingly, IRB guidance is particularly relevant to taxpayers, and thus especially worthy of closer academic inquiry.

Having studied in some depth the complex of administrative law issues surrounding the government’s utilization of Treasury regulations as a mechanism for interpreting the I.R.C., I have heretofore assumed IRB guidance to be a more straightforward proposition. Tax scholars and practitioners recognize a certain, widely-accepted narrative regarding the role and legal significance of IRB guidance. In contemplating my contribution to this Symposium, therefore, I originally conceived a short essay reviewing this narrative and suggesting IRB guidance as a comparatively simple mechanism by which the IRS could provide guidance to taxpayers while avoiding the messy legal and jurisprudential problems of Treasury regulations.

In examining IRB guidance more closely, however, I have found instead that these documents raise an even more profound set of doctrinal

rate information that taxpayers could find elsewhere. *See, e.g.*, I.R.S. Announcement 2009-10, 2009-9 I.R.B. 644 (Mar. 2, 2009) (identifying several entities whose public charity status the IRS recently revoked); I.R.S. Announcement 2009-8, 2009-8 I.R.B. 598 (Feb. 23, 2009) (announcing disciplinary actions taken against named tax professionals); I.R.S. Announcement 2008-128, 2008-52 I.R.B. 1376 (Dec. 29, 2008) (noting minor corrections to temporary regulations also published in the Federal Register). Consequently, at least for now, announcements are distinguishable from other IRB guidance formats, do not raise the same issues, and thus fall outside the scope of this Essay.

6. *See, e.g.*, Korb, *supra* note 1, at 342-73 (describing a few dozen different types of other IRS documents that potentially contain insights into IRS thinking regarding the I.R.C.); *see also* David L. Click & Jennifer B. Green, *New IRS Legal Advice Vehicles: New and Improved or Needs Improvement?*, 761 PLI/TAX 721, 726 (2007) (listing and discussing some of these other interpretive formats similarly).

7. Freedom of Information Act (FOIA) suits against the IRS seeking disclosure of internal agency documents are quite common; in particular, Tax Analysts, an organization that publishes daily and weekly periodicals documenting tax legislative, judicial, and regulatory news, has sued the government several times under FOIA to obtain access to various IRS rulings, agreements, and memoranda. *See, e.g.*, Tax Analysts v. IRS, 495 F.3d 676, 677 (D.C. Cir. 2007); Tax Analysts v. IRS, 294 F.3d 71 (D.C. Cir. 2002); Tax Analysts v. IRS, 117 F.3d 607, 620 (D.C. Cir. 1997); Tax Analysts & Advocates v. IRS, 505 F.2d 350 (D.C. Cir. 1974); *see also* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1201(a), 90 Stat. 1520, 1660-67 (1976) (codified as amended at I.R.C. § 6110 (2000)) (requiring public disclosure of “any written determination” including rulings, determination letters, and technical advice memoranda).

questions than Treasury regulations. A full exploration of these doctrinal problems is beyond the scope of this Symposium and this Essay. My purpose here, therefore, is to introduce this much larger project in two ways: first, by identifying inconsistencies between the accepted wisdom and contemporary reality of IRB guidance; and second, by observing that IRB guidance falls directly into a large doctrinal void of what it means for a rule to carry the force of law and the extent to which that concept defines the intersection between Administrative Procedure Act (APA) rulemaking procedures⁸ and the judicial deference doctrine.⁹

Accordingly, I begin in Part I by describing the three primary IRB guidance formats and documenting how the IRS defines and utilizes them. In Part II, I summarize generally accepted understandings in administrative law doctrine as it relates to informal agency guidance, including the uncertainty concerning the force of law question. Finally, in Part III, I recognize the accepted wisdom of courts and scholars regarding how IRB guidance fits within those general administrative law understandings, and also how changes in the reality of IRB guidance arguably push that guidance squarely into the force of law no man's land.

I. WHAT IS IRB GUIDANCE?

As noted, three primary formats comprise the bulk of contemporary IRB guidance: revenue rulings, revenue procedures, and notices. The tax community, including the IRS, views these formats as distinct from one another; in theory, each of these formats possesses characteristics that distinguish it from the others. As colloquially understood, revenue rulings express the IRS's interpretation of existing law as applied to facts;¹⁰ revenue procedures are, well, procedural;¹¹ and notices are informal statements of IRS policy regarding enforcement and other issues.¹² Official definitions

8. See *infra* Part II.A (describing APA rulemaking procedures).

9. See *infra* Part II.B (describing the deference doctrine and standards of judicial review).

10. See, e.g., Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1044-45 (1995); Korb, *supra* note 1, at 330; Peter A. Lowy & Juan F. Vasquez, Jr., *Judicial Deference for Revenue Rulings in a Post-Mead World*, 6 J. TAX PRAC. & PROC. 27, 28 (2004).

11. See, e.g., Terence Floyd Cuff, *Community Property Partnerships and Like-Kind Exchanges*, 814 PLI/TAX 723, 732 (2008); Theodore M. David, *Trammels of the Tax Tangle: What Every Lawyer Should Know About the IRS*, BENCH & B. OF MINN., Mar. 2005, at 21; Korb, *supra* note 1, at 337.

12. See, e.g., *Stobie Creek Invs., L.L.C. v. United States*, 82 Fed. Cl. 636, 671 (2008) (describing IRS notices as "press releases stating the IRS's position on a particular issue and informing the public of its intentions"); see also Korb, *supra* note 1, at 339-42 (stating alternatively that the IRS "resorts to notices . . . when there is need for guidance on an expedited basis").

contained in various Treasury regulations and IRS pronouncements are a little broader.

Perhaps not surprisingly, actual practice is somewhat different from both the common perception and the official definitions. Changes in usage over time have blurred the distinctions, so that there is now significant overlap among the IRB guidance formats and tremendous variation within each format. Consequently, when evaluating IRB guidance in relation to administrative law doctrine, it is arguably more appropriate to consider what each individual document does, rather than evaluate the formats categorically.

A. Revenue Rulings

Of the three principal IRB guidance formats, the IRS has promulgated and published revenue rulings the longest—since 1953.¹³ The IRS adopted the revenue ruling format to address in a more generalized form questions that were identified and otherwise addressed through unpublished private letter rulings issued to individual taxpayers and through litigation.¹⁴ The IRS formally defines a revenue ruling as “an official interpretation by the Service of the internal revenue laws and related statutes, treaties, and regulations, that has been published in the [IRB] . . . for the information and guidance of taxpayers, Service officials, and others concerned.”¹⁵ More practically, the IRS elaborates that a revenue ruling “is the conclusion of the

13. The IRS published the first revenue ruling in 1953. See Rev. Rul. 1, 1953-1 C.B. 36 (1953); see also Rev. Rul. 2, 1953-1 C.B. 484 (summarizing key aspects of the new revenue ruling program). The IRS changed its system for numbering revenue rulings in 1954 by adding the last two digits in the year to the otherwise consecutively-numbered revenue rulings. See, e.g., Rev. Rul. 54-1, 1954-1 C.B. 29. The IRS altered the numbering for revenue rulings again in 2000 to include the entire year. See, e.g., Rev. Rul. 2000-1, 2000-1 C.B. 250.

14. See Korb, *supra* note 1, at 333-34 (documenting the history of revenue rulings); Mitchell Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity: A View from Within*, 43 TAXES 756, 763-67 (1965) (same).

15. Rev. Proc. 89-14 § 3.01, 1989-1 C.B. 814. Although Rev. Proc. 89-14 is merely the latest among a string of revenue procedures to define revenue rulings, the official definition has not changed materially since the IRS introduced the program in 1953. See Rev. Proc. 86-15, 1986-1 C.B. 544 (superseding Rev. Proc. 78-24, 1978-2 C.B. 503, and superseded by Rev. Proc. 89-14, 1989-1 C.B. 814); Rev. Proc. 78-24, 1978-2 C.B. 503 (superseding Rev. Proc. 72-1, 1972-1 C.B. 693); Rev. Proc. 72-1, 1972-1 C.B. 693 (superseding Rev. Proc. 68-44, 1968-2 C.B. 954); Rev. Proc. 68-44, 1968-2 C.B. 954 (superseding Rev. Rul. 2, 1953-1 C.B. 484). Treasury regulations contain a similar but more abbreviated definition that recognizes the official status and interpretive function of revenue rulings without specifying exactly what they interpret. See Treas. Reg. § 601.601(d)(2)(i)(a) (as amended in 1987) (defining revenue ruling as “an official interpretation by the Service that has been published in the [IRB]”); Treas. Reg. § 601.201(a)(6) (as amended in 2002) (same).

Service on how the law is applied to a specific set of facts.”¹⁶ In other words, the function of the revenue ruling format is to communicate substantive interpretations of the tax laws.¹⁷ Treasury and the IRS explicitly limit the official applicability of revenue rulings to the facts articulated therein.¹⁸ Because the IRS views revenue rulings as interpretations of existing, more authoritative legal sources, it generally applies these rulings retroactively, except where a revenue ruling revokes or modifies another published ruling.¹⁹

Consistent with the ruling program’s original purpose as well as these official definitions, most early revenue rulings apply existing sources of law to various factual scenarios. Many of these early rulings follow a simple format of (1) offering one or more hypothetical fact patterns; (2) identifying a particular legal issue raised thereby; (3) analyzing the relevant I.R.C. provisions, Treasury regulations, and judicial opinions that inform the issue; and (4) reaching a holding or conclusion as to the proper tax treatment of the facts as outlined.²⁰ Other early revenue rulings achieve similar results by acknowledging a particular source of ambiguity in the I.R.C., articulating various guiding principles that the IRS considers relevant in deciphering the ambiguous language, and providing examples of fact patterns demonstrating the application of those principles.²¹ Still other early revenue rulings summarize facts, legal analysis, and conclusions of court cases for the purpose of announcing that the IRS will or will not acquiesce in their holdings.²²

Many contemporary revenue rulings resemble their early predecessors, analyzing and interpreting the tax laws to address particular fact patterns or announcing reactions to court cases.²³ Yet, quite a few rulings deviate from

16. INTERNAL REVENUE MANUAL, *supra* note 4, § 32.2.2.3.1; *see also supra* note 10 and accompanying text (describing corresponding common conceptions of revenue rulings).

17. *See* Rev. Proc. 89-14 § 7.01(1), 1989-1 C.B. 814, 815 (“Rulings and other communications involving substantive tax law published in the Bulletin are published in the form of revenue rulings.”).

18. Treas. Reg. § 601.601(d)(2)(v)(a) (as amended in 1987) (“The conclusions expressed in a revenue ruling will be directly responsive to, and limited in scope by, the pivotal facts stated in the revenue ruling.”); Rev. Proc. 89-14 § 7.01(1), 1989-1 C.B. 814, 815 (same).

19. *See* Treas. Reg. § 601.601(d)(2)(v)(c) (as amended in 1987) (declaring that most revenue rulings apply retroactively unless otherwise specified); Rev. Proc. 89-14 § 7.01(3), 1989-1 C.B. 814, 815 (same); *see also* I.R.C. § 7805(b)(8) (2000) (“The Secretary may prescribe the extent, if any, to which any ruling . . . relating to the internal revenue laws shall be applied without retroactive effect.”).

20. *See, e.g.*, Rev. Rul. 14, 1953-1 C.B. 348; Rev. Rul. 9, 1953-1 C.B. 468; Rev. Rul. 7, 1953-1 C.B. 224; Rev. Rul. 6, 1953-1 C.B. 120; Rev. Rul. 3, 1953-1 C.B. 37.

21. *See, e.g.*, Rev. Rul. 12, 1953-1 C.B. 290; Rev. Rul. 8, 1953-1 C.B. 300.

22. *See, e.g.*, Rev. Rul. 4, 1953-1 C.B. 48; Rev. Rul. 20, 1953-1 C.B. 426.

23. *See, e.g.*, Rev. Rul. 2009-4, 2009-5 I.R.B. 408; Rev. Rul. 2008-42, 2008-30 I.R.B. 175; Rev. Rul. 2008-39, 2008-31 I.R.B. 252; Rev. Rul. 2008-30, 2008-25 I.R.B. 1156; Rev. Rul. 2008-23, 2008-18 I.R.B. 852.

the prototype.²⁴ For example, the IRS each month uses the revenue ruling format to publish applicable federal interest rates and adjustable percentages for various purposes in the I.R.C.²⁵ Another regularly-issued series of revenue rulings provides quarterly interest rate tables applicable to tax overpayments and underpayments pursuant to I.R.C. § 6621.²⁶ In fact, almost half of the revenue rulings issued in 2008 differed in this way from the more traditional revenue ruling format—providing monthly, quarterly, biannual, or annual rate tables for one purpose or another rather than substantive applications of the law to various circumstances.²⁷ The IRS frequently uses the revenue procedure format to provide similar information,²⁸ which leads one to wonder why the IRS chooses one format versus the other for such purposes.

24. Revenue rulings deviating from the original, fact-based format are not entirely a contemporary phenomenon. Before the IRS started publishing revenue procedures, it occasionally used revenue rulings to convey procedural rules. *See, e.g.*, Rev. Rul. 18, 1953-1 C.B. 15 (tables for calculating individual income tax liabilities); Rev. Rul. 22, 1953-1 C.B. 84 (instructions for filing return deadline extension requests); Rev. Rul. 5, 1953-1 C.B. 87 (guidelines for reproducing tax forms and schedules). Such use of the revenue ruling format seems to have declined precipitously with the introduction of the revenue procedure format in 1955. *See infra* notes 33-36 and accompanying text (discussing history of revenue procedures).

25. *See, e.g.*, Rev. Rul. 2008-53, 2008-49 I.R.B. 1231; Rev. Rul. 2008-50, 2008-45 I.R.B. 1098; Rev. Rul. 2008-49, 2008-40 I.R.B. 811; Rev. Rul. 2008-46, 2008-36 I.R.B. 572; Rev. Rul. 2008-43, 2008-31 I.R.B. 258; Rev. Rul. 2008-33, 2008-27 I.R.B. 8; Rev. Rul. 2008-28, 2008-22 I.R.B. 1029; Rev. Rul. 2008-24, 2008-18 I.R.B. 861; Rev. Rul. 2008-20, 2008-14 I.R.B. 716; Rev. Rul. 2008-11, 2008-10 I.R.B. 541; Rev. Rul. 2008-9, 2008-5 I.R.B. 343; Rev. Rul. 2008-4, 2008-3 I.R.B. 272; *see also* BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 46.05[7] (3d ed. 2002) (describing the contents of these monthly rulings).

26. *See* Rev. Rul. 2008-54, 2008-52 I.R.B. 1352; Rev. Rul. 2008-47, 2008-39 I.R.B. 760; Rev. Rul. 2008-27, 2008-26 I.R.B. 1181; Rev. Rul. 2008-10, 2008-13 I.R.B. 676.

27. In 2008, in addition to the sixteen revenue rulings described in the two preceding footnotes, the IRS issued two revenue rulings with annual inflation adjustments for debt instruments under I.R.C. § 1274A (2000). *See* Rev. Rul. 2008-52, 2008-49 I.R.B. 1233; Rev. Rul. 2008-3, 2008-2 I.R.B. 249. The IRS also issued two revenue rulings with biannual rates for calculating the value of non-commercial airline flights provided as fringe benefits. *See* Rev. Rul. 2008-48, 2008-38 I.R.B. 713; Rev. Rul. 2008-14, 2008-11 I.R.B. 578. The IRS further produced three revenue rulings with monthly bond factor amounts related to dispositions of qualified low-income buildings for various periods. *See* Rev. Rul. 2008-36, 2008-30 I.R.B. 165; Rev. Rul. 2008-21, 2008-15 I.R.B. 734; Rev. Rul. 2008-2, 2008-2 I.R.B. 247. Finally, the IRS released three other revenue rulings with assorted annual interest rate tables. *See* Rev. Rul. 2008-51, 2008-47 I.R.B. 1171; Rev. Rul. 2008-44, 2008-32 I.R.B. 292; Rev. Rul. 2008-19, 2008-13 I.R.B. 669. Collectively these represent 26 of the 54 revenue rulings issued in 2008, or 48% of the total.

28. *See, e.g.*, Rev. Proc. 2008-71, 2008-49 I.R.B. 1251; Rev. Proc. 2008-70, 2008-49 I.R.B. 1240; Rev. Proc. 2008-66, 2008-45 I.R.B. 1107; Rev. Proc. 2008-22, 2008-12 I.R.B. 658.

Finally, although both the IRS and the tax community at large tend to regard revenue rulings as a format for providing substantive interpretive guidance, the IRS occasionally disclaims any such intent in individual revenue rulings. Consider, for example, Revenue Ruling 2008-17.²⁹ Sections 872 and 883 of the I.R.C. exempt from U.S. taxation certain income of non-resident alien individuals and foreign corporations from countries that grant “equivalent exemption[s]” to U.S. citizens, residents, and corporations.³⁰ In Revenue Ruling 2008-17, the IRS updated lists provided in earlier revenue rulings of countries that “may provide various forms of equivalent exemptions” for these purposes.³¹ Nevertheless, the IRS explicitly stated in Revenue Ruling 2008-17 that the ruling was not intended to provide “substantive guidance.”³² This statement is difficult to reconcile with the IRS’s choice of a format intended to provide official, substantive guidance to taxpayers regarding how to interpret the I.R.C.

B. Revenue Procedures

The IRS has promulgated and published revenue procedures for almost as long as it has issued revenue rulings—since 1955.³³ In the very first revenue procedure, announcing the revenue procedure program, the IRS described the format’s scope as limited to “statements of practice and procedure issued primarily for internal use . . . which affect rights or duties of taxpayers or other members of the public” or “which should be a matter of public knowledge.”³⁴ Although a series of successor revenue procedures have superseded that initial document, the descriptions of the revenue procedure program contained in these successive documents have not changed materially.³⁵ Currently, Treasury and the IRS define a revenue procedure as “a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or informa-

29. Rev. Rul. 2008-17, 2008-12 I.R.B. 626.

30. See 26 U.S.C. §§ 872(b)(1)-(2), 883(a)(1)-(3), 883(c) (2006).

31. Rev. Rul. 2008-17, 2008-12 I.R.B. 626.

32. *Id.*

33. See Rev. Proc. 55-1, 1955-2 C.B. 897; see also Korb, *supra* note 1, at 336-37 (documenting the history of revenue procedures).

34. Rev. Proc. 55-1, 1955-2 C.B. 897. As with revenue rulings, the numbering for revenue procedures changed to include the entire year of issuance beginning in 2000. See, e.g., Rev. Proc. 2000-1, 2000-1 C.B. 4.

35. See Rev. Proc. 89-14, 1989-1 C.B. 814 (superseding Rev. Proc. 86-15); Rev. Proc. 86-15, 1986-1 C.B. 544 (superseding Rev. Proc. 78-24); Rev. Proc. 78-24, 1978-2 C.B. 503 (superseding Rev. Proc. 72-1); Rev. Proc. 72-1, 1972-1 C.B. 693 (superseding Rev. Proc. 68-44); Rev. Proc. 68-44, 1968-2 C.B. 954 (superseding Rev. Proc. 55-1).

tion that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.”³⁶

From the perspective of many in the tax community, the key element of these definitional statements is their emphasis on the procedural nature of revenue procedures, rather than their recognition of a potential impact on taxpayer rights or obligations.³⁷ Notwithstanding the official definition, recent IRS Chief Counsel Donald Korb asserted last year that revenue procedures “do not . . . typically address matters that affect the rights and duties of taxpayers” and thus “would generally not be useful to taxpayers in planning transactions or determining positions to be taken on returns.”³⁸ Korb’s claim echoes the view that one of his predecessors as Chief Counsel, Mitchell Rogovin, articulated in 1965.³⁹

Pinning down what it means to affect the rights and duties of taxpayers is a difficult task; but many revenue procedures do seem wholly, or at least mostly, nonsubstantive. As previously noted, many revenue procedures serve as easily accessible sources for inflation adjustments, interest rate tables, and other measures mandated by various I.R.C. or Treasury regulation provisions.⁴⁰ Other revenue procedures offer instructions for accomplishing particular tasks or otherwise communicating with the IRS.⁴¹ For example, the first revenue procedure issued each year updates instructions and checklists for taxpayers seeking to file requests for private letter rulings with the IRS.⁴²

Nevertheless, Korb also admits that the IRS uses revenue procedures “in keeping the public informed of certain transactions that the Service may closely scrutinize.”⁴³ In making this statement, Korb refers specifically to a

36. Treas. Reg. § 601.601(d)(2)(i)(b) (as amended in 1987); see also Rev. Proc. 89-14, 1989-1 C.B. 814 (adopting a similar definition); INTERNAL REVENUE MANUAL, *supra* note 4, § 32.2.3.2 (same).

37. See, e.g., Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 730 (2004) (noting that the IRS initially “distinguished revenue procedures from revenue rulings, the latter pertaining to ‘substantive tax law,’ as opposed to ‘internal practices or procedures’”); see also *supra* note 11 and accompanying text (describing a common conception of revenue procedures as addressing procedural matters).

38. Korb, *supra* note 1, at 338; see also Salem et al., *supra* note 37, at 730 (observing that “[i]n recent years, however, the IRS seems to have expanded the function of revenue procedures,” and identifying the same line of revenue procedures).

39. See Rogovin, *supra* note 14, at 764 n.40.

40. See *supra* note 28 and related text (discussing and providing examples).

41. See, e.g., Rev. Proc. 2008-52, 2008-36 I.R.B. 587; Rev. Proc. 2008-35, 2008-29 I.R.B. 132; see also Rev. Proc. 2008-1, 2008-1 I.R.B. 1 app. E (listing other revenue procedures providing various checklists and other instructions relevant to taxpayers).

42. See, e.g., Rev. Proc. 2008-1, 2008-1 I.R.B. 1; see also BITTKER ET AL., *supra* note 25, ¶ 46.05[2][a] (describing the first revenue procedure for each year as prescribing “in a general way the facts, documents, and data that must be included in requests for rulings”).

43. See Korb, *supra* note 1, at 337.

series of revenue procedures interpreting Treasury Regulation § 1.6011-4,⁴⁴ which requires taxpayers to file with the IRS a disclosure statement for any “reportable transaction” in which the taxpayer participates.⁴⁵ The regulation in turn defines a reportable transaction as any transaction that falls within one of several categories of varying breadth and detail.⁴⁶ In other words, whether or not a taxpayer is required to file a disclosure statement for a particular transaction depends entirely upon whether that transaction falls within the scope of the reportable transaction definition. Taxpayers who fail to properly disclose a reportable transaction are subject to congressionally mandated penalties for their failure.⁴⁷ The IRS has issued several revenue procedures identifying specific transactions as falling outside the scope of that regulatory definition.⁴⁸ In theory, one might argue that Treasury Regulation § 1.6011-4 is a procedural rule in that it merely imposes a filing requirement, and thus that revenue procedures elaborating that requirement are likewise procedural. In litigation, however, the government has recognized that Treasury Regulation § 1.6011-4 is substantive, not procedural, at least as administrative law doctrine understands those terms.⁴⁹ It would seem to follow, therefore, that any revenue procedure that elaborates Treasury Regulation § 1.6011-4 by identifying transactions outside its scope is likewise substantive.

The IRS’s utilization of the revenue procedure format to articulate substantive legal interpretations, however, far exceeds the limited context that Korb acknowledges.⁵⁰ For example, the IRS routinely uses the revenue procedure format to establish safe harbors for satisfying various I.R.C. requirements.⁵¹ Revenue Procedure 2008-26 identifies circumstances in which the IRS will not challenge whether a security is a “readily marketable security” for certain purposes relevant to controlled foreign corporations.⁵² Revenue Procedure 2008-16 outlines conditions under which it will recognize a dwelling unit as “property held for productive use in a trade or busi-

44. *See id.* at 337 n.63.

45. Treas. Reg. § 1.6011-4(a) (as amended in 2007).

46. *Id.* § 1.6011-4(b).

47. *See* I.R.C. § 6707A (West 2008).

48. *See* Rev. Proc. 2007-20, 2007-1 C.B. 517; Rev. Proc. 2004-68, 2004-2 C.B. 969; Rev. Proc. 2004-67, 2004-2 C.B. 967; Rev. Proc. 2004-66, 2004-2 C.B. 966.

49. Brief for Respondent on APA Section 553(b)(3)(A) at 4, *BLAK Invs. v. Comm’r*, No. 1283-07 (T.C. Jan. 19, 2007).

50. The government has admitted as much in litigation. *See, e.g.*, Reply Brief for the United States in Support of Its Cross-Motion for Partial Summary Judgment at 19, *Fed. Nat’l Mortgage Ass’n v. United States*, No. 00-369T, 2002 WL 34346912, at *11 (Ct. Fed. Cl. Aug. 23, 2002) (conceding that “a revenue procedure may . . . address the interpretation of a statute where the interpretation is integral to the prescription of the procedural rule”).

51. *See, e.g.*, Rev. Proc. 2009-10, 2009-2 I.R.B. 267; Rev. Proc. 2008-43, 2008-30 I.R.B. 186; Rev. Proc. 2008-25, 2008-13 I.R.B. 686.

52. *See* Rev. Proc. 2008-26, 2008-21 I.R.B. 1014.

ness or for investment” purposes under the provisions governing like-kind exchanges.⁵³ Revenue Procedure 2002-12 articulates parameters under which restaurants can deduct rather than capitalize “smallwares” (dishes, cutlery, and glassware).⁵⁴

Perhaps revenue procedures that offer safe harbors reflect administrability concerns and resulting enforcement policy choices more than the IRS's true beliefs as to the meaning of the statute or regulation at issue. Practically and substantively, however, it is difficult to distinguish these revenue procedures from revenue rulings interpreting the law as applied to specified fact patterns. Much of the text of these revenue procedures is dedicated to analyzing the relevant statutory or regulatory provisions to explain the interpretive rationale behind the safe harbor and limiting the scope of the safe harbor's applicability. Some of these revenue procedures do impose procedural requirements as well, but others do not. Revenue Procedure 2002-12, concerning smallwares, asks taxpayers seeking the safe harbor to file a particular IRS form designated for requesting accounting method changes.⁵⁵ Revenue Procedure 2008-26, on the other hand, contains no similar procedural requirement. By way of comparison, in Revenue Ruling 2007-3, the IRS recognized two situations in which an accrual-basis taxpayer incurs liabilities and also declared that taxpayers altering their tax accounting method to comply with the ruling must first satisfy certain procedural requirements.⁵⁶

C. Notices

Routine IRS utilization of the notice format is a newer development, the origins of which are less clear. Treasury regulations expressly recognizing, defining, and governing publication of the revenue ruling and revenue procedure formats do not mention notices.⁵⁷ Unlike with revenue rulings and revenue procedures, there is no document in which the IRS announced the notice format. In the Internal Revenue Manual, the IRS defines notices merely as “public pronouncement[s] by the Service that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law.”⁵⁸

53. See Rev. Proc. 2008-16, 2008-10 I.R.B. 547.

54. See Rev. Proc. 2002-12, 2002-1 C.B. 374.

55. See *id.*; see also DEP'T OF THE TREASURY, INTERNAL REVENUE SERV., FORM 3115: APPLICATION FOR CHANGE IN ACCOUNTING METHOD (2003), available at <http://www.irs.gov/pub/irs-pdf/f3115.pdf>.

56. See Rev. Rul. 2007-3, 2007-4 I.R.B. 350; see also Rev. Rul. 2005-42, 2005-2 C.B. 67; Rev. Rul. 2004-62, 2004-1 C.B. 1072.

57. See Treas. Reg. § 601.601 (as amended in 1987).

58. INTERNAL REVENUE MANUAL, *supra* note 4, at § 32.2.2.3.3.

The first notice so-labeled seems to have been published in the IRB in 1976.⁵⁹ The IRS published just a few notices in the late 1970s, without serial numbering, and for seemingly random purposes: waiving a filing requirement for certain subordinate exempt organizations for the 1975 tax year because governing regulations had not been finalized,⁶⁰ or publishing and updating a list of countries subject to certain international boycott limitations, for example.⁶¹ The notice format became more regularized in the 1980s, including more frequent IRS issuance of notices and numbering resembling that of revenue rulings and revenue procedures.⁶² The subject matter of notices, however, continues to be somewhat eclectic.⁶³

As with revenue rulings and revenue procedures, some notices provide interest rate or other tables in connection with various provisions of the I.R.C.⁶⁴ Some notices respond to new issues, for example by telling taxpayers how the IRS interprets and intends to enforce recently-enacted substantive tax laws,⁶⁵ or by offering taxpayers extensions, penalty waivers, or other temporary relief until the IRS can provide further guidance essential for effective implementation.⁶⁶ Still other notices grant other relief to taxpayers affected by natural disasters⁶⁷ or other identified crises.⁶⁸ In theory, at least,

59. I.R.S. Notice, 1976-1 C.B. 541. This Notice appears unnumbered in the C.B.

60. *Id.*

61. I.R.S. Notice, 1977-1 C.B. 528 (titled "List of Countries Requiring Cooperation With an International Boycott"); I.R.S. Notice, 1976-2 C.B. 627 (titled "List of Countries Requiring Cooperation with an International Boycott"). Although these notices appear in the C.B. with titles, they are not numbered. The IRS updated this list of countries regularly through 1995 using the notice format. *See, e.g.*, I.R.S. Notice 95-65, 1995-2 C.B. 342; I.R.S. Notice 95-41, 1995-2 C.B. 328; I.R.S. Notice 95-20, 1995-1 C.B. 303; I.R.S. Notice 95-3, 1995-1 C.B. 290; I.R.S. Notice 94-95, 1994-2 C.B. 564.

62. *See, e.g.*, I.R.S. Notice 80-1, 1980-1 C.B. 576.

63. *See* Korb, *supra* note 1, at 339-40 (noting that topics of notices "can include changes to forms or to other previously published materials, solicitation of public comments on issues under consideration, and advance notice of rules to be provided in regulations when the regulations may not be published in the immediate future").

64. *See, e.g.*, I.R.S. Notice 2009-16, 2009-8 I.R.B. 572; I.R.S. Notice 2009-2, 2009-4 I.R.B. 344; I.R.S. Notice 2008-114, 2008-51 I.R.B. 1322; I.R.S. Notice 2008-85, 2008-42 I.R.B. 905.

65. *See, e.g.*, I.R.S. Notice 2009-12, 2009-6 I.R.B. 446; I.R.S. Notice 2008-109, 2008-50 I.R.B. 1282; I.R.S. Notice 2008-101, 2008-44 I.R.B. 1082.

66. *See, e.g.*, I.R.S. Notice 2009-14, 2009-7 I.R.B. 516; I.R.S. Notice 2009-11, 2009-5 I.R.B. 420; I.R.S. Notice 2008-90, 2008-43 I.R.B. 1000.

67. *See, e.g.*, I.R.S. Notice 2008-87, 2008-42 I.R.B. 930; I.R.S. Notice 2008-66, 2008-31 I.R.B. 270; I.R.S. Notice 2008-58, 2008-28 I.R.B. 81; I.R.S. Notice 2008-57, 2008-28 I.R.B. 80; I.R.S. Notice 2005-73, 2005-2 C.B. 723; *see also* I.R.C. § 7805A (granting Treasury and IRS authority and discretion to grant certain relief in response to Presidentially-declared disasters).

68. *See, e.g.*, I.R.S. Notice 2008-88, 2008-42 I.R.B. 933; I.R.S. Notice 2008-55, 2008-27 I.R.B. 11.

notices are less formal than revenue rulings or revenue procedures, and thus are better suited to provide meaningful substantive guidance quickly.⁶⁹

Nevertheless, there are two particularly significant functions for which the IRS now routinely publishes notices. The first arises particularly in the context of tax shelters. Whereas the IRS uses the revenue procedure format to notify taxpayers of transactions that are not reportable under Treasury Regulation § 1.6011-4,⁷⁰ the IRS has issued numerous notices declaring particular transactions to be “listed transactions” that are thus, by regulatory definition, reportable.⁷¹ Other notices merely identify certain transactions as potentially abusive, and thus “of interest” and subject to disclosure under Treasury Regulation § 1.6011-4.⁷² These notices tend to provide factual descriptions of the transactions at issue but little legal analysis to explain or support the designation. Nevertheless, either label represents a substantive legal conclusion with particular consequences because, again, taxpayers engaging in such transactions must file disclosure statements with the IRS or face substantial financial penalties.⁷³

The IRS also frequently uses the notice format as a companion to the APA's notice-and-comment rulemaking process.⁷⁴ Many notices announce that the IRS is contemplating a potential regulation or other guidance project and solicit preliminary comments.⁷⁵ These notices often include “interim guidance” in the form of preliminary rules that the IRS proposes to incorporate in the forthcoming proposed rules.⁷⁶ Sometimes, the IRS explicitly proclaims the rules announced in such notices as optional “safe harbors” until the rulemaking process converts the safe harbors to require-

69. See, e.g., Korb, *supra* note 1, at 339 (emphasizing relative informality of notices and consequent suitability for providing immediate guidance).

70. See *supra* notes 43-49 and accompanying text (discussing revenue procedures and reportable transactions).

71. See, e.g., I.R.S. Notice 2008-111, 2008-51 I.R.B. 1299; I.R.S. Notice 2008-34, 2008-12 I.R.B. 645; I.R.S. Notice 2007-83, 2007-45 I.R.B. 960. A more complete list of transactions designated by the IRS as abusive, including listed transactions and delisted transactions, is available on the IRS website. See Internal Revenue Service, U.S. Dep't of Treasury, Recognized Abusive and Listed Transactions, <http://www.irs.gov/businesses/corporations/article/0,,id=120633,00.html#17> (last visited Feb. 27, 2009).

72. See, e.g., I.R.S. Notice 2009-7, 2009-3 I.R.B. 312; I.R.S. Notice 2008-99, 2008-47 I.R.B. 1194; I.R.S. Notice 2007-73, 2007-36 I.R.B. 545; I.R.S. Notice 2007-72, 2007-36 I.R.B. 544.

73. See I.R.C. § 6707A (West 2008).

74. See *infra* Part II.A (describing notice-and-comment rulemaking under the APA).

75. See, e.g., I.R.S. Notice 2009-17, 2009-8 I.R.B. 575; I.R.S. Notice 2008-27, 2008-10 I.R.B. 543; I.R.S. Notice 2008-13, 2008-3 I.R.B. 282; I.R.S. Notice 2007-8, 2007-3 I.R.B. 276.

76. See, e.g., I.R.S. Notice 2008-116, 2008-52 I.R.B. 1372; I.R.S. Notice 2009-8, 2009-4 I.R.B. 347; I.R.S. Notice 2006-96, 2006-46 I.R.B. 902.

ments.⁷⁷ Although the IRS does not pursue the APA notice-and-comment process for IRB guidance, the IRS will sometimes issue notices requesting public comment on proposed revenue rulings or revenue procedures.⁷⁸ The IRS also has used notices to announce changes in effective dates for final regulations⁷⁹ or to preliminarily attempt to alleviate unanticipated problems arising from existing regulations pending further action.⁸⁰

In sum, the IRS's actual use of the three principal IRB guidance formats demonstrates both considerable functional overlap and routine deviation from tax community understandings of what each format represents. As a result, in considering the administrative law consequences of IRB guidance according to the doctrines outlined in Part II of this Essay, it makes little sense categorically to distinguish a legal interpretation advanced through a revenue ruling from one adopted in a revenue procedure or notice purely on the basis of labels. Thus, for example, in assessing whether a pronouncement is merely procedural or advances a substantive interpretation of law, one should consider carefully what the individual document actually does, irrespective of whether the IRS uses the revenue procedure format.

At the same time, as this Essay discusses further in Part III, the different IRB guidance formats share certain attributes in common—*e.g.*, potential penalties for noncompliance—that are arguably relevant in determining the administrative law consequences of each. The fact that the IRS utilizes these formats in ways that functionally overlap suggests that a judicial conclusion regarding the administrative law consequences of a revenue ruling may be significant for judicial review of a revenue procedure or notice, and vice versa.

II. THE ADMINISTRATIVE LAW OF AGENCY RULES

Administrative law doctrine is notoriously murky and complex. A full exposition of the many administrative law questions that bedevil scholars and judges alike is beyond the scope of this Essay. Nevertheless, before proceeding to ponder the administrative law questions raised by IRB guidance, some basic administrative law background may be helpful.

77. See, *e.g.*, I.R.S. Notice 2008-78, 2008-41 I.R.B. 851; I.R.S. Notice 2008-23, 2008-7 I.R.B. 433; see also I.R.S. Notice 2008-68, 2008-34 I.R.B. 418; I.R.S. Notice 2008-62, 2008-29 I.R.B. 130.

78. See, *e.g.*, I.R.S. Notice 2008-80, 2008-40 I.R.B. 820; I.R.S. Notice 2008-63, 2008-31 I.R.B. 261; I.R.S. Notice 2007-59, 2007-30 I.R.B. 135.

79. See, *e.g.*, I.R.S. Notice 2008-98, 2008-44 I.R.B. 1080; I.R.S. Notice 2008-21, 2008-7 I.R.B. 431; I.R.S. Notice 2008-9, 2008-3 I.R.B. 277.

80. See, *e.g.*, I.R.S. Notice 2009-13, 2009-6 I.R.B. 447; I.R.S. Notice 2008-43, 2008-15 I.R.B. 748.

Two potentially overlapping strains of administrative law doctrine are particularly relevant in evaluating IRS utilization of IRB guidance. The first involves APA procedural requirements for agency rulemaking. The second concerns judicial review of agency legal interpretations.

A. Rulemaking and Procedure

Administrative Procedure Act § 553 imposes procedural requirements on agency rulemaking efforts.⁸¹ That statute contemplates legislative rules as a default category that the promulgating agency must subject to specific procedures, including but not limited to public notice and opportunity for comment, before the rules go into effect.⁸² The same provision provides several exceptions from those requirements, including exceptions for “interpretative rules, general statements of policy, or rules of agency organization, procedure or practice.”⁸³

Legislative rules arise when federal statutes authorize agencies to promulgate rules and regulations to implement statutory commands or purposes.⁸⁴ When agencies exercise such authority in the pursuit of statutory objectives, they are said to “create law,”⁸⁵ to “prescribe, modify, or abolish duties, rights, or exemptions,”⁸⁶ or to “fill” statutory “gaps.”⁸⁷ The resulting legislative rules carry the force and effect of law,⁸⁸ which is why the APA

81. 5 U.S.C. § 553 (2006).

82. *See id.* § 553(b)–(d).

83. *Id.* § 553(b)(A). Section 553 also provides exemptions from its procedural requirements for rules involving military or foreign affairs and rules “relating to agency management or personnel or to public property, loans, grants, benefits, or contracts,” and “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” *Id.* § 553(a)(2), (b)(B). These exceptions are not relevant for the purposes of this Essay.

84. *See, e.g.,* *Save Our Valley v. Sound Transit*, 335 F.3d 932, 954 (9th Cir. 2003); *Ass’n for Regulatory Reform v. Pierce*, 849 F.2d 649, 652 (D.C. Cir. 1988); *Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 351 (D.C. Cir. 1985) (quoting *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980)).

85. *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 602 (5th Cir. 1995); *Indiana v. Sullivan*, 934 F.2d 853, 856 (7th Cir. 1991) (quoting *Cabais v. Egger*, 690 F.2d 234, 238 (D.C. Cir. 1982)); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)).

86. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 383 (1985); *see also, e.g.,* *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1978) (describing legislative rules as “affecting individual rights and obligations”); *Hemp Indus. Ass’n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003) (recognizing that legislative rules “create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress”).

87. *See* *Splane v. West*, 216 F.3d 1058, 1063 (Fed. Cir. 2000); *United Techs. Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987).

88. *Chrysler Corp.*, 441 U.S. at 295; U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 23, 30 (1947) [hereinafter ATTORNEY

ordinarily subjects these rules to public notice and comment before they become final.

Even the most carefully constructed statutory or regulatory scheme, however, leaves a host of unresolved details involving both procedural administration and substantive application of the law to individual facts. Agencies often publish informal guidance documents containing nonlegislative rules to address at least some of these issues. Whether characterized as interpretative rules,⁸⁹ procedural rules,⁹⁰ or policy statements,⁹¹ none of these nonlegislative rules carries the force and effect of law.⁹² Rather, interpretative rules “seek only to interpret language” already existing in statutes or “properly issued regulations;”⁹³ “merely clarify or explain existing law or regulations;”⁹⁴ or “simply state[] what the administrative agency thinks the statute means.”⁹⁵ Procedural rules govern how an agency “organiz[es] [its] internal operations”⁹⁶ and “do not themselves alter the rights or interests of

GENERAL’S MANUAL]; see also *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (recognizing that the distinction between legislative rules and interpretative rules or policy statements is that the former carries “the force of law”); Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1046 (2000) (describing legislative rules as “legally binding”); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1464 (1992) (defining legislative regulations as binding both the government and regulated parties).

89. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

90. See, e.g., *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995); *Utah Env’tl. Cong. v. Bosworth*, 443 F.3d 732, 746 (10th Cir. 2006); see also Robert A. Anthony, “Interpretive” Rules, “Legislative” Rules and “Spurious” Rules: *Lifting the Smog*, 8 ADMIN. L.J. AM. U. 1, 12 (1994) (stating that “[b]ecause an interpretive rule has not been set forth legislatively, it is not legally binding”).

91. See, e.g., *Lowry v. Barnhart*, 329 F.3d 1019, 1022 (9th Cir. 2003).

92. See also Strauss, *supra* note 88, at 1464 (observing that interpretive formats falling within the scope of rulemaking for APA purposes “may be binding or not, and may bind the issuing agency, members of the regulated public, neither, or both”).

93. *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (quoting *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003)); see also *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (finding a rule legislative because it “does not purport to construe any language in a relevant statute or regulation; it does not interpret anything”).

94. *Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 679 (6th Cir. 2005) (citations omitted); *Nat’l Org. of Veterans’ Advocates, Inc.*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (quoting *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998)).

95. *Ass’n of Am. R.R.s*, 198 F.3d 944, 947 (D.C. Cir. 1999) (quoting *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984)); see also *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995) (observing that interpretative rules may be “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers”); *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992) (stating that a rule may be interpretative if it “represents the agency’s explanation of a statutory or regulatory provision”).

96. *Chamber of Commerce of U.S. v. U.S. Dep’t. of Labor*, 174 F.3d 206, 211 (D.C. Cir. 1999) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)); *Aulenback*,

parties.”⁹⁷ Policy statements set forth “the manner in which [an] agency proposes to exercise a discretionary power,”⁹⁸ such as “how the agency plans to exercise its enforcement discretion,”⁹⁹ allowing agencies “to announce their ‘tentative intentions for the future’ without binding themselves.”¹⁰⁰ They “[do] not seek to change the normative standards under which [a] statute operates.”¹⁰¹

Agencies have an incentive to characterize their rules as non-legislative to avoid the procedural burdens of notice-and-comment rulemaking.¹⁰² Also, while pronouncements that agencies label as nonlegislative by definition cannot be legally binding, they nevertheless may enjoy what is known as practical binding effect, because prudent regulated parties seeking to avoid confrontation with the government tend to comply with whatever guidance the agency cares to offer.¹⁰³ The lower courts have developed standards for evaluating whether a rule that an agency labels as nonlegislative is in fact binding, and thus carries the force of law and is subject to notice-and-comment rulemaking requirements.¹⁰⁴ Yet, beyond opining gener-

Inc. v. Fed. Highway Admin., 103 F.3d 156, 168 (D.C. Cir. 1997) (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

97. *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994); see also *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 349 (4th Cir. 2001) (applying same standard and quoting *JEM Broadcasting*).

98. *Conn. Dep't of Children & Youth Servs. v. Dep't of Health & Human Servs.*, 9 F.3d 981, 984 (D.C. Cir. 1993) (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 88, at 30 n.3, and citing enforcement criteria as an example); *United States v. Thompson*, 687 F.2d 1279, 1291 (10th Cir. 1982) (quoting ATTORNEY GENERAL'S MANUAL, *supra* note 88, at 30 n.3).

99. *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 839 (9th Cir. 2006); see also *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 96 (D.C. Cir. 1997) (suggesting that enforcement discretion is relevant in connection with distinguishing policy statements from legislative rules).

100. *Bowen*, 834 F.2d at 1046 (quoting *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)); see also *Veneman*, 469 F.3d at 839 (quoting *Bowen* for same proposition); *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995).

101. *Conn. Dep't of Children & Youth Servs.*, 9 F.3d at 984; see also *Prof'ls & Patients for Customized Care*, 56 F.3d at 596 (“A general statement of policy, on the other hand, does not establish a ‘binding norm.’”).

102. See, e.g., Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 555 (2000).

103. See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000); see also Robert A. Anthony, *Three Settings in Which Nonlegislative Rules Should Not Bind*, 53 ADMIN. L. REV. 1313, 1314 (2001) (“[T]he agency can make [interpretative guidance] practically binding by routinely applying it as a fixed criterion for decisions. Beyond that, the practical binding effect of an interpretive [sic] guidance is a function of the likelihood that it will be challenged in court, and then of the likelihood that the court will uphold the guidance.”).

104. See, e.g., *JEM Broad. Co. v. FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994) (discussing characteristics distinguishing procedural rules from substantive ones); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993) (articulat-

ally that legislative rules possess legal force and nonlegislative rules do not, the Supreme Court has offered little guidance as to what the force of law means for this purpose.

B. Judicial Review and Deference

Separately from these efforts to classify rules for APA procedural purposes, the courts have addressed the question of what standard of review they should employ in reviewing agency legal interpretations. In *Christensen v. Harris County*¹⁰⁵ and *United States v. Mead Corp.*,¹⁰⁶ the Supreme Court outlined two possibilities. The first, articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, contains a two-part inquiry that asks first whether the statute being interpreted clearly and unambiguously resolves the issue and, if not, whether the administering agency's interpretation of the statute is a permissible one.¹⁰⁷ The second option comes from *Skidmore v. Swift*, which calls upon a reviewing court to decide for itself the appropriate level of judicial deference for an agency's interpretation of the law by analyzing various factors including, but not limited to, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."¹⁰⁸ According to the Court in *Mead*, *Chevron* applies only if Congress has given the agency in question the authority to bind regulated parties with "the force of law" and if the agency has in fact "exercised that authority."¹⁰⁹ If either of these conditions is lacking, then *Skidmore* provides the appropriate evaluative standard.¹¹⁰

Just as agencies have an incentive to characterize their rules as nonlegislative, they also have good reason to push and pull at the boundaries of *Chevron*: to obtain the maximum level of deference for their rules, whether or not they have satisfied the requirements of notice-and-comment rulemak-

ing criteria for determining when an agency rule reflects agency intent to exercise congressionally-delegated legislative power, and thus carries the force of law); 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 6.3-6.5 (4th ed. 2004) (summarizing evolution of standards for distinguishing legislative rules from policy statements, interpretative rules, and procedural rules).

105. *Christensen v. Harris County*, 529 U.S. 576 (2000).

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

107. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

108. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Citing *Skidmore*, the *Mead* Court paraphrased these factors in describing the standard as based upon "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead Corp.*, 533 U.S. at 228.

109. *Mead Corp.*, 533 U.S. at 227.

110. *See id.*

ing. Here too, however, the Court has been reticent to offer guidance. Having pronounced the force of law as the touchstone of *Chevron* deference, the Court has declined to specify what it means by that concept. In *Christensen*, the Court made clear that opinion letters as well as “policy statements, agency manuals, and enforcement guidelines” do not carry the force of law, but offered no further explanation.¹¹¹ In *Mead*, the Court recognized agency utilization of notice-and-comment rulemaking or formal adjudication as evidence of the legal force requisite for *Chevron* deference.¹¹² Yet the Court explicitly declined to limit *Mead*'s force of law requirement to those two procedural contexts, while offering little further guidance about the concept's parameters.¹¹³ The Court has maintained this position to date.¹¹⁴

In sum, whether a rule carries the force and effect of law is a question of great significance for rules that have a claim to being nonlegislative, both for determining whether the procedural requirements of notice-and-comment rulemaking apply after all and for deciding whether *Chevron* or *Skidmore* provides the appropriate standard for judicial review. Indeed, judicial rhetoric regarding both questions is remarkably similar.

But when can a rule be said to possess legal force? Does the same definition apply to resolve both when an agency must use the notice-and-comment process to promulgate a rule and when *Chevron* deference applies, or is the meaning of the force of law context-specific? These questions remain unanswered, and are particularly relevant in the context of IRB guidance.

III. ENTERING THE NO MAN'S LAND

A reasonably consistent narrative exists concerning administrative law doctrine and IRB guidance. This common understanding is not entirely static, but nevertheless reflects comfortable old assumptions that may no longer be quite accurate. We have already seen, for example, that current IRS utilization of IRB guidance formats does not necessarily fit either tax community perceptions or official definitions.

111. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

112. *Mead Corp.*, 533 U.S. at 230 (“Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.”).

113. *See id.* at 231 (rejecting procedural formality as a necessary condition for *Chevron* deference).

114. *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (quoting *Mead Corp.*, 533 U.S. at 231) (quoting *Mead* for the proposition that “notice-and-comment rulemaking [does] ‘not decide the case’” for or against *Chevron* deference); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) (agreeing that “deference under *Chevron* does not necessarily require an agency's exercise of express notice-and-comment rulemaking power”).

Three additional contemporary aspects of IRB guidance further threaten the established consensus by placing IRB guidance squarely in the gray area of the force of law concept. The first involves the imposition of penalties upon taxpayers who decline or otherwise fail to comply with IRB guidance. The second is the current litigating posture of the Department of Justice and IRS claiming *Chevron* deference for IRB guidance. The third involves a provision in the I.R.C. permitting Treasury to predicate retroactive application of Treasury regulations upon the prior issuance of a notice addressing the issue, and Treasury's utilization of that authority.

A. The Emerging Consensus

When the IRS first announced the revenue ruling and revenue procedure programs in the 1950s, courts and commentators considered even most Treasury regulations—specifically, those promulgated under the general authority grant of I.R.C. § 7805(a) to “prescribe . . . all needful rules and regulations”—to be interpretative rules lacking legal force.¹¹⁵ Given that understanding, there was simply no doubt that IRB guidance was nonbinding and merely advisory in nature.¹¹⁶

While the legal force of Treasury regulations is no longer seriously questioned, whether APA notice-and-comment rulemaking requirements apply to them remains a matter of some debate.¹¹⁷ Meanwhile, as the proper

115. See, e.g., Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 930 (1948) (characterizing general authority Treasury regulations as “[a] leading example of interpretative regulations”); Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 557-58 (1940) (adopting similar view); Comment, *Denying Retroactive Effect to Invalidation of Administrative Rules*, 12 STAN. L. REV. 826, 830 n.25 (1960) (“Treasury regulations, often classified as interpretive, are regarded as merely stating the Treasury’s construction of the statute and not binding on the taxpayer.”). This conclusion applied not only to general authority Treasury regulations but to non-tax general authority regulations as well. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1564-72 (2006) (comparing tax and non-tax understandings of legislative and interpretative rules through period including the 1950s).

116. See, e.g., *Dixon v. United States*, 381 U.S. 68, 73 (1965) (stating that “[t]he Commissioner’s rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law”); Rogovin, *supra* note 14, at 763-75 & n.40 (describing the revenue ruling and revenue procedure programs as intended merely to provide guidance and information in the interest of uniformity, fairness, and efficiency).

117. See, e.g., *Wing v. Comm’r*, 81 T.C. 17, 28 (1983) (noting that while general authority Treasury regulations are “usually deemed to have the force of law, [they] still qualify as ‘interpretative’ rules of the Secretary of the Treasury, and therefore are exempt from the requirements of 5 U.S.C. section 553(c)”). For an overview of this debate, see 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, 1760-63 (2007) (arguing that Treasury’s continued reliance on the interpretative rule exception is misplaced in light of contemporary jurisprudence); Jasper L. Cummings, Jr., *Treasury*

characterization of Treasury regulations for APA purposes remains in dispute, both Treasury regulations and the CB and IRB continue to state, as they have for decades, that IRB guidance documents “do not have the force and effect of Treasury Department Regulations.”¹¹⁸ Based largely on this representation, courts and commentators have placed IRB guidance, and particularly revenue rulings, squarely in the nonlegislative category, and thus as exempt from notice-and-comment rulemaking requirements.¹¹⁹

The accepted standard for judicial review of IRB guidance is somewhat less clear. Before deciding *Chevron*, the Supreme Court described a revenue ruling as merely reflecting “a legal opinion within the agency”¹²⁰ and “of little aid in interpreting a tax statute.”¹²¹ More recently, but still pre-*Mead*, the Court in *Davis v. United States* stated with respect to a revenue ruling that, although it did not possess “the force and effect of regulations,” it was nevertheless entitled to “considerable weight” to the extent that it represented “the contemporaneous construction of a statute and . . . [had] been in long use.”¹²² In the decade before the Court decided *Mead*,

Violates the APA?, 117 TAX NOTES 263 (Oct. 15, 2007) (disagreeing with the reasoning set forth in *Coloring Outside the Lines*); Kristin E. Hickman, *Chevron Isn't the Answer to APA Question*, 117 TAX NOTES 553 (Oct. 29, 2007) (responding to Cummings's article); and Amy S. Elliott, *Panel Explores Noncompliance with Administrative Procedure Act*, 121 TAX NOTES 1114 (Dec. 8, 2008) (describing a District of Columbia Bar Association Taxation Session panel debating Treasury's noncompliance with the APA).

118. Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1987); 2005-2 C.B., introduction, ii; 1980-1 C.B., introduction, v; 1970-1 C.B., introduction, xii; 2002-1 I.R.B. introduction, iii; 1984-1 I.R.B. 3; see also *Bartels v. Birmingham*, 332 U.S. 126, 132 (1947) (characterizing IRS rulings published in the IRB as lacking “the force and effect of” Treasury regulations); *Comm'r v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990)) (same).

119. *Redhouse v. Comm'r*, 728 F.2d 1249, 1253 (9th Cir. 1984) (describing revenue rulings as “classic examples of interpretative rules” exempt from APA § 553 procedural requirements); *E. Ky. Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1290 (D.C. Cir. 1974) (same); Peter A. Appel, Note, *Administrative Procedure and the Internal Revenue Service: Delimiting the Substantial Understatement Penalty*, 98 YALE L.J. 1435, 1436 (1989) (observing that courts characterize revenue rulings and revenue procedures as interpretative rules not subject to APA notice and comment requirements); Galler, *supra* note 10, at 1045 (“Because they are considered interpretive rules for purposes of the APA, revenue rulings are exempt from notice and comment issuance procedures and are published without a precedent announcement.”).

120. *Comm'r v. Idaho Power Co.*, 418 U.S. 1, 22 (1974).

121. *Id.* at 22 n.4 (quoting *Biddle v. Comm'r*, 302 U.S. 573, 582 (1938)).

122. *Davis v. United States*, 495 U.S. 472, 484 (1990). In a few cases after *Davis*, the Supreme Court seemed to suggest that the tax-specific judicial deference standard articulated in *National Muffler Dealers Ass'n v. Comm'r*, 440 U.S. 472, 475-77 (1979) might apply to revenue rulings. See *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001) (citing *National Muffler* among other precedents generally supporting deference for reasonable IRS interpretations, in cases involving revenue rulings); *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 563 n.7 (1991) (suggesting *National Muffler* as the appropriate deference standard for revenue rulings). The continued applicability of *National Muffler* to gen-

the attitude of the lower courts toward IRB guidance ranged from no deference at all,¹²³ to intermediate deference,¹²⁴ to the strongly deferential *Chevron* standard.¹²⁵ Since the Court's decision in *Mead*, most courts and commentators have assumed or concluded that *Skidmore* provides the appropriate evaluative standard for revenue rulings and, to a lesser extent, other IRB guidance as well,¹²⁶ although not everyone agrees.¹²⁷

In sum, whatever disagreements exist at the margins, there seems to be broad agreement within the tax community that revenue rulings, revenue procedures, and notices are nonlegislative rules exempt from notice-and-comment rulemaking requirements and are eligible at most for some lesser degree of judicial deference than *Chevron* review. This position is consistent with traditional understandings that IRB guidance is nonbinding and does not enjoy the same legal weight as Treasury regulations. The question, therefore, is whether the traditional understandings hold and, thus, whether the consensus view is sustainable.

eral authority Treasury regulations is a subject of much controversy, but is outside the scope of this Essay.

123. The Tax Court in particular has long characterized revenue rulings as mere IRS litigating positions meriting only the respect due to any party's well-reasoned argument. *See, e.g.,* *McLaulin v. Comm'r*, 115 T.C. 255, 263 (2000); *Norfolk S. Corp. v. Comm'r*, 104 T.C. 13, 45-46 (1995). The Tax Court has made similar statements with respect to revenue procedures and notices. *See, e.g.,* *Philips Petroleum Co. v. Comm'r*, 101 T.C. 78, 99 n.17 (1993) (comparing notices to revenue rulings and revenue procedures and denying them "special deference").

124. *See, e.g.,* *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir. 1998) (extending "some weight" or "respectful consideration" to revenue rulings, but recognizing range of deference accorded by other lower courts).

125. *See, e.g.,* *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 977 (6th Cir. 1993); *Centra Inc. v. United States*, 953 F.2d 1051, 1055-57 (6th Cir. 1992).

126. *See, e.g.,* *Kornman & Assoc., Inc. v. United States*, 527 F.3d 443, 452-57 (5th Cir. 2008) (concluding after full consideration that *Skidmore* rather than *Chevron* deference applies to revenue rulings); *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 181 (6th Cir. 2003) (holding that *Mead* requires *Skidmore* rather than *Chevron* deference for revenue rulings); *PBS Holdings, Inc. v. Comm'r*, 129 T.C. 131, 144-45 (2007) (identifying *Skidmore* as the appropriate evaluative standard for revenue rulings); BITTKER ET AL., *supra* note 25, at ¶46.05[4] & n.174 (recognizing post-*Mead* that some courts have applied *Skidmore* deference to revenue rulings); Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081, 2123 (2005) (recognizing that "a consensus is emerging that revenue rulings are entitled to *Skidmore* deference"); Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, *supra* note 37, at 720 (recommending that the courts apply *Mead* to "give revenue rulings, certain revenue procedures, and notices, deference under the doctrine of *Skidmore v. Swift & Co.*").

127. *See, e.g.,* *Tualatin Valley Builders Supply, Inc. v. Comm'r*, 522 F.3d 937, 945-47 (9th Cir. 2008) (O'Scannlain, J. concurring) (contending *Chevron* deference is appropriate for Rev. Proc. 2002-40); Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 43-44 (2006) (advocating deference as described in *National Muffler Dealers Ass'n v. Comm'r*, 440 U.S. 472, 475-77 (1979), for IRB guidance).

B. Contrary Litigating Positions

In litigating tax cases, the government faces the same questions concerning the legal force of and deference due to IRB guidance, although more often respecting the latter. Department of Justice and IRS attorneys regularly express their views in tax cases regarding the appropriate standard for judicial review of IRB guidance. By contrast, I know of no contemporary cases in which taxpayers have challenged the validity of IRB guidance for failing to satisfy APA procedural requirements for legislative rules. In at least two ongoing cases, however, the government is defending Treasury regulations against such claims with arguments that one can only expect it would assert with respect to IRB guidance as well. The government's litigating positions on both the judicial deference and APA compliance questions do not quite comport with the emerging consensus regarding the administrative law of IRB guidance described in Part III.A above. Indeed, the government's arguments regarding judicial deference for IRB guidance are arguably inconsistent with those concerning APA rulemaking requirements.

Regarding the judicial deference question, the government consistently takes the litigating position that IRB guidance is entitled to *Chevron* deference. The government arguably sought *Chevron* deference for IRB guidance for some time before *Christensen* and *Mead*, although its arguments in those days tended to be vague calls for deference accompanied by cites to several cases including but not limited to *Chevron*.¹²⁸ Since the Supreme Court decided *Christensen* and *Mead*, however, the government's arguments have become significantly more explicit, asserting outright that IRB guidance carries the force of law.

As noted above, to establish *Chevron* eligibility, *Mead* requires that Congress delegate to an agency the power to bind regulated parties with the force of law and that the agency exercise that authority in adopting the legal interpretation at issue.¹²⁹ In tax cases involving IRB guidance, therefore, the government asserts that the I.R.C. gives Treasury and the IRS as its delegate the power to bind regulated parties with the force of law. The government claims this status for both specific grants of rulemaking power contained in substantive provisions of the I.R.C.¹³⁰ and the general authority to adopt "all

128. See, e.g., Brief for the Appellee at 11-12, *Kiourtsis v. Comm'r*, No. 97-4016 (2d Cir. Aug. 18, 1997), 1997 WL 33616668, at *11-12; Brief for the Appellant-Cross-Appellee at 22-23, *Intel Corp. v. Comm'r*, Nos. 94-70105 & 94-70158 (9th Cir. Dec. 1994), 1994 WL 16508431, at *22-23 (same).

129. See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

130. See, e.g., Brief for the Defendant-Appellant at 56, *General Mills, Inc. v. United States*, No. 08-1638 (8th Cir. June 12, 2008), 2008 WL 2505866, at *58 (identifying specific authority under I.R.C. § 404(k)(5) for Rev. Rul. 2001-6); Brief for the Appellee at 58, *Conopco, Inc. v. United States*, No. 07-3564 (3d Cir. May 7, 2008), 2008 WL 4126843, at *58 (making same argument regarding Rev. Rul. 2001-6); Brief for the Appellee at 23, *Lehrer v.*

needful rules and regulations” extended by I.R.C. § 7805(a).¹³¹ The government also observes that IRB guidance documents are “official” agency pronouncements, reviewed and issued by top agency officials and published in the IRB, just like regulations.¹³² Revenue rulings are “formal interpretative rulings involving ‘substantive tax law’”¹³³ and have precedential effect for the disposition of other cases.¹³⁴ Revenue procedures at least “pre-

Comm’r, No. 06-75584 (9th Cir. Apr. 23, 2007), 2007 WL 1577418, at *12 (identifying specific rulemaking authority under I.R.C. § 475(f) for Rev. Proc. 99-17).

131. See, e.g., Brief for the Appellee at 59-60, *Conopco, Inc. v. United States*, No. 07-3564 (3d Cir. May 7, 2008), 2008 WL 4126843, at *59-60 (identifying I.R.C. § 7805(a) general authority as also supporting Rev. Rul. 2001-6); Brief for the Defendant-Appellant at 39, *U.S.A. Choice Internet Serv., L.L.C. v. United States*, No. 2007-5077 (Fed. Cir. June 13, 2007), 2007 WL 1997157, at *20 (relying solely on I.R.C. § 7805(a) general rulemaking authority in claiming *Chevron* deference revenue rulings); Brief for the Defendant-Appellant at 27-28, *Texaco Inc. v. United States*, No. 06-16098 (9th Cir. Sept. 29, 2006), 2006 WL 3623262, at *13 (same); Brief for the Respondent-Appellant at 31, *Aeroquip-Vickers, Inc. v. Comm’r*, No. 01-2741 (6th Cir. May 20, 2002), 2002 WL 34200821, at *17 (same); see also Reply Brief for the Appellant, the United States at 25, *Fed. Nat’l Mortgage Ass’n v. United States*, No. 03-5162 (Fed. Cir. Mar. 9, 2004), 2004 WL 3763424, at *25 (claiming I.R.C. § 7805(a) as supporting Rev. Proc. 99-43).

132. Brief for the Appellee at 60, *Conopco, Inc. v. United States*, No. 07-3564 (3d Cir. May 7, 2008), 2008 WL 4126843, at *60; Brief for Defendant-Appellant at 42-43, *Fortis, Inc. v. United States*, No. 05-2518 (2d Cir. Nov. 21, 2005), 2005 WL 5280992, at *21-22; Reply Brief for the Appellant, the United States at 25, *Fed. Nat’l Mortgage Ass’n v. United States*, No. 03-5162 (Fed. Cir. Mar. 9, 2004), 2004 WL 3763424, at *25; Brief for the Respondent-Appellant at 31, *Aeroquip-Vickers, Inc. v. Comm’r*, No. 01-2741 (6th Cir. May 20, 2002), 2002 WL 34200821, at *17; see also Brief for the Defendant-Appellant at 28, *Texaco Inc. v. United States*, No. 06-16098 (9th Cir. Sept. 29, 2006), 2006 WL 3623262, at *13 (acknowledging that, like Treasury regulations, revenue rulings are “published,” in addition to being “written and reviewed at the same level of the IRS and the Department of Treasury”).

133. Brief for the Appellant at 58, *General Mills, Inc. v. United States*, No. 08-1638 (8th Cir. June 12, 2008), 2008 WL 2505866, at *58; Brief for the Appellee at 60, *Conopco, Inc. v. United States*, No. 07-3564 (3d Cir. May 7, 2008), 2008 WL 4126843, at *60; Brief for the Appellant, the United States at 39-40, *U.S.A. Choice Internet Serv., L.L.C. v. United States*, No. 2007-5077 (Fed. Cir. June 13, 2007), 2007 WL 1997157, at *20; Brief for Defendant-Appellant at 42-43, *Fortis, Inc. v. United States*, No. 05-2518 (2d Cir. Nov. 21, 2005), 2005 WL 5280992, at *22.

134. See, e.g., Brief for the Appellant at 58, *General Mills, Inc. v. United States*, No. 08-1638 (8th Cir. June 12, 2008), 2008 WL 2505866, at *58; Brief for the Appellee at 60, *Conopco, Inc. v. United States*, No. 07-3564 (3d Cir. May 7, 2008), 2008 WL 4126843, at *60; Brief for the Appellant, the United States at 39-40, *U.S.A. Choice Internet Serv., L.L.C. v. United States*, No. 2007-5077 (Fed. Cir. June 13, 2007), 2007 WL 1997157, at *20; Brief for the Appellant at 27 n.10, 28, *Texaco Inc. v. United States*, No. 06-16098 (9th Cir. Sept. 29, 2006), 2006 WL 3623262, at *13 & n.10; Brief for Defendant-Appellant at 42-43, *Fortis, Inc. v. United States*, No. 05-2518 (2d Cir. Nov. 21, 2005), 2005 WL 5280992, at *21-22.

scribe[] necessary rules for the application of the statute,”¹³⁵ if the government does not acknowledge their substantive character outright.¹³⁶

The government acknowledges that IRB guidance documents do not satisfy the procedural requirements of notice-and-comment rulemaking.¹³⁷ In one case, the government claimed that “the only material distinction” between Treasury regulations and revenue rulings “is that the latter are not issued pursuant to notice-and-comment procedures.”¹³⁸ Yet, as noted above, the government also correctly observes that the Court has expressly declined to require such procedures for *Chevron* deference. For all of these reasons, according to the government, IRB guidance carries the force of law, and thus satisfies *Mead*'s requirements and qualifies for *Chevron* deference.¹³⁹

Meanwhile, the government has not said very much about APA procedural requirements and IRB guidance beyond acknowledging that it does not utilize notice-and-comment rulemaking. Yet, while the government claims the force of law for the supposedly lesser IRB guidance for purposes of *Mead*, the IRS continues to maintain that most Treasury regulations are exempt from notice-and-comment rulemaking as interpretative rules. In two ongoing cases regarding the procedural validity of Treasury regulations, the government makes just that argument.¹⁴⁰

135. Brief for the Appellee at 26, *Lehrer v. Comm'r*, No. 06-75584 (9th Cir. Apr. 23, 2007), 2007 WL 1577418, at *12.

136. See, e.g., Reply Brief for the Appellant, the United States at 25, *Fed. Nat'l Mortgage Ass'n v. United States*, No. 03-5162 (Fed. Cir. Mar. 9, 2004), 2004 WL 3763424, at *25 (contending that Rev. Proc. 99-43 “contains not just procedural instructions, but rather a substantive rule regarding when a taxpayer meets the requirements for application of the special rule”).

137. See, e.g., Brief for the Appellee at 23, *Lehrer v. Comm'r*, No. 06-75584 (9th Cir. Apr. 23, 2007), 2007 WL 1577418, at *12; Brief for Defendant-Appellant at 42-43, *Fortis, Inc. v. United States*, No. 05-2518 (2d Cir. Nov. 21, 2005), 2005 WL 5280992, at *22; Brief for the Appellant at 31, *Aeroquip-Vickers, Inc. v. Comm'r*, No. 01-2741 (6th Cir. May 20, 2002), 2002 WL 34200821, at *17.

138. Brief for the Appellant at 28, *Texaco Inc. v. United States*, No. 06-16098 (9th Cir. Sept. 29, 2006), 2006 WL 3623262, at *13.

139. Although this argument is implicit in all of the government's claims that, under *Mead*, IRB guidance deserves *Chevron* deference, most of the government's briefs are explicit in stating that IRB guidance carries the force of law. See, e.g., Brief for the Appellee at 58, *Conopco, Inc. v. United States*, No. 07-3564 (3d Cir. May 7, 2008), 2008 WL 4126843, at *60 (“Revenue rulings consequently have the ‘force of law’ within the meaning of *Mead*, and *Chevron* deference is therefore required.”); Brief for the Appellee at 26, *Lehrer v. Comm'r*, No. 07-3564 (3d Cir. Apr. 23, 2007), 2007 WL 1577418, at *12 (claiming that Rev. Proc. 99-17 “has the force and effect of law”); Brief for Defendant-Appellant at 43, *Fortis, Inc. v. United States*, No. 05-2518 (2d Cir. Nov. 21, 2005), 2005 WL 5280992, at *22 (arguing that, “[l]ike regulations, revenue rulings have legal force and effect” and “[r]evenue rulings consequently have the ‘force of law’ within the meaning of *Mead*”).

140. See Brief for the Appellee at 64-66, *CNG Transmission Mgmt. VEBA v. United States*, No. 2009-5025 (Fed. Cir. Apr. 17, 2009), 2009 WL 1307200, at *28-29; Respon-

In *BLAK Investments v. Commissioner*, in contending that Treasury regulations are interpretative rules exempt from notice-and-comment rule-making, the government does not claim outright that these regulations do not carry the force of law; the government never uses that phrase at all. Instead, drawing from other judicial rhetoric on the legislative versus interpretative rule distinction, the government notes that the regulations were issued under I.R.C. § 7805(a) general authority rather than a specific “‘blank slate’ grant of authority . . . to create the substantive law necessary to achieve” a particular end result.¹⁴¹ Further, the government suggests that the regulations do not create new law but merely “provide discretionary fine-tuning” to existing reporting requirements.¹⁴² Similarly, in *CNG Transmission Management VEBA v. United States*, the government claims that the Treasury regulation at issue merely “clarified and explained the language of” the statute.¹⁴³ Here, at least, the government seems to acknowledge that even Treasury regulations issued under the general authority of I.R.C. § 7805(a) are “‘usually deemed to have the force of law.’”¹⁴⁴ Nevertheless, relying on a single Tax Court precedent that predates both *Chevron* and other significant evolutionary changes in administrative law doctrine, and without further analysis, the government contends that such Treasury regulations are exempt from APA notice and comment requirements as interpretative rules.¹⁴⁵ It seems reasonable to anticipate that the government would make similar arguments in defending against a procedural challenge to the validity of IRB guidance.

If the force of law is truly the critical dividing line between both *Chevron* and *Skidmore* on the one hand and legislative and interpretative rules on the other, and if we accept that the force of law concept has only one meaning, then the government’s litigating positions seem wholly inconsistent. Yet, as noted, the Supreme Court does not currently require such consistency. Hence, the government has merely positioned IRB guidance precisely in the gray area that the Supreme Court has left regarding the force

dent’s Statement Under Rule 50(c) With Respect to Respondent’s Motion for Partial Summary Judgment and Petitioner’s Cross-Motion for Partial Summary Judgment at 20-24, *BLAK Invs. v. Comm’r*, No. 1283-07 (T.C. May 14, 2008).

141. Respondent’s Statement Under Rule 50(c) With Respect to Respondent’s Motion for Partial Summary Judgment and Petitioner’s Cross-Motion for Partial Summary Judgment at 21, *BLAK Invs. v. Comm’r*, No. 1283-07 (T.C. May 14, 2008) (contrasting *Snap-Drape, Inc. v. Comm’r*, 98 F.3d 194 (5th Cir. 1996)).

142. *Id.* at 20, 23-24 (quoting *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992)).

143. Brief for the Appellee at 64-66, *CNG Transmission Mgmt. VEBA v. United States*, No. 2009-5025 (Fed. Cir. Apr. 17, 2009), 2009 WL 1307200, at *29.

144. *Id.* at 66 (quoting *Wing v. Comm’r*, 81 T.C. 17, 28 (1983)).

145. *Id.* (relying on *Wing v. Comm’r*, 81 T.C. 17, 27-28 & n.11 (1983)).

and effect of law, both with respect to *Mead* and the line between legislative and interpretative rules.

C. Penalties

Another potential complication for the emerging consensus on the administrative law of IRB guidance comes from the I.R.C.'s penalty provisions. Specifically, I.R.C. § 6662 imposes a 20% penalty for any "underpayment of tax required to be shown on a return" that is attributable to, among other things, "[n]egligence or disregard of rules or regulations."¹⁴⁶ "Rules or regulations" for this purpose includes not only I.R.C. provisions and Treasury regulations but also "revenue rulings or notices (other than notices of proposed rulemaking) issued by the Internal Revenue Service and published in the Internal Revenue Bulletin."¹⁴⁷ Revenue procedures "may or may not be treated as 'rules or regulations' depending on all facts and circumstances."¹⁴⁸ In other words, taxpayers are potentially subject to the underpayment penalty, and tax professionals may face the tax preparer penalty, should they decline or otherwise fail to comply with legal interpretations that the IRS articulates in revenue rulings, notices, and some revenue procedures. Legislative history plainly supports this interpretation,¹⁴⁹ although the meaning of similar language was much less clear in the 1950s when the IRS initiated the revenue ruling and revenue procedures.¹⁵⁰

146. I.R.C. § 6662(a)-(b)(1) (2000).

147. Treas. Reg. § 1.6662-3(b)(2) (as amended in 1991); T.D. 8381, 1992-1 C.B. 374, 376 (adopting regulatory definition).

148. T.D. 8381, 1992-1 C.B. 374, 376 (discussing revenue procedures in the regulatory preamble).

149. In the Tax Reform Act of 1976, Congress adopted a new penalty for tax return preparers guilty of "negligent or intentional disregard of rules and regulations," Pub. L. No. 94-455, § 1203, 90 Stat. 1520, 1689 (1976) (codified at 26 U.S.C. § 6694 (2000)) and indicated that "rules and regulations" included "Treasury regulations and IRS rulings," and declared that the new penalty should be interpreted consistently with the provision concerning negligence and intentional disregard by taxpayers. H.R. REP. NO. 94-658, at 278 (1975), as reprinted in 1976 U.S.C.C.A.N. 2897, 3174; S REP. NO. 94-938, pt. 1, at 355-56 (1976), as reprinted in 1976 U.S.C.C.A.N. 3439, 3784-85; H.R. REP. NO. 94-1515, at 484 (1976) (Conf. Rep.), as reprinted in 1976 U.S.C.C.A.N. 4117, 4188.

150. Penalties for negligence and for disregarding rules and regulations have been part of the tax laws since 1918 and 1921, respectively. See Revenue Act of 1918, Pub. L. No. 254, § 250(b), 40 Stat. 1057, 1083 (1919) (adopting negligence penalty); Revenue Act of 1921, Pub. L. No. 67-98, § 250(b), 42 Stat. 227, 264-65 (1921) (adding intentional disregard language). The legislative history of these provisions failed to explain Congress's intent, and for decades their meaning was unclear, and they were not applied if taxpayers could articulate a reasonable argument for the inapplicability or invalidity of a rule or regulation. See, e.g., Michael Asimow, *Civil Penalties for Inaccurate and Delinquent Tax Returns*, 23 UCLA L. REV. 637, 659 (1976); Donald Arthur Winslow, *Tax Penalties - "They Shoot Dogs, Don't They?"*, 43 FLA. L. REV. 811, 836-43 (1991); Arnold Hoffman, *Intentional Disregard of Rules and Regulations*, 28 TAXES 111, 111-13 (1950).

Yet, the current standards for assessing penalties for negligence or disregard differ depending upon whether the taxpayer fails to comply with a Treasury regulation or IRB guidance. Taxpayers who adopt return positions inconsistent with Treasury regulations must both disclose their noncompliance on their tax returns and have a “reasonable basis” for the position taken to avoid the 20% underpayment penalty entirely.¹⁵¹ Furthermore, a taxpayer’s decision not to comply with a Treasury regulation must represent “a good faith challenge to the validity of the regulation.”¹⁵² By comparison, a taxpayer who declines or otherwise fails to follow mere IRB guidance is exempt from the 20% penalty if the taxpayer’s position “has a realistic possibility of being sustained on its merits,” whether or not the taxpayer discloses the noncompliance or intends to challenge the rule’s validity.¹⁵³

At least at one time, the tax bar understood the reasonable basis standard as requiring only a colorable claim.¹⁵⁴ Treasury regulations adopted in 1991 described reasonable basis as “arguable, but fairly unlikely to prevail in court.”¹⁵⁵ By contrast, Treasury historically has defined the realistic possibility standard as requiring the taxpayer to demonstrate “a one in three, or greater, likelihood” of success.¹⁵⁶ Consequently, some commentators have

151. Disclosure is not required to avoid a penalty for negligence alone, as “[a] return position that has a reasonable basis . . . is not attributable to negligence.” Treas. Reg. § 1.6662-3(b)(1) (as amended in 1991). Yet reasonable basis alone is inadequate to avoid a penalty for “intentional disregard,” as the regulations define that phrase. See Treas. Reg. § 1.6662-3(b)(2) (explaining the parameters of the intentional disregard language); BITTKER ET AL., *supra* note 25, at ¶ 50.05[2].

152. Treas. Reg. § 1.6662-3(c)(1).

153. Treas. Reg. § 1.6662-3(a), (b)(2). This standard does not apply to taxpayers who take positions contrary to IRB guidance with respect to a reportable transaction. See *id.*; see also *supra* notes 43-49 & 70-73 (discussing the role of certain revenue procedures and notices in identifying reportable transactions).

154. See, e.g., K.H. Sharp, *A Smile, a Frown, and a Few New Wrinkles: The Changing Face of Practice Before the IRS*, 70 N.D. L. REV. 965, 967 (1994); Gwen Thayer Handelman, *Law and Order Comes to “Dodge City”: Treasury’s New Return Preparer and IRS Practice Standards*, 50 WASH & LEE L. REV. 631, 633 (1993) (reprinted in 60 TAX NOTES 1623, 1625 (1993)); see also Paul M. Predmore, *New Reasonable Basis Standard for Return Disclosure Likely to be Troublesome*, 80 J. TAX’N 22, 23 (1994) (suggesting that “‘merely a colorable claim’” describes the “not-frivolous” standard and that Congress intended reasonable basis to be “‘significantly higher’” than that, but recognizing that the initial Treasury definition of reasonable basis was only slightly different from not frivolous).

155. T.D. 8381, 1992-1 C.B. 374, 384 (adopting former Treas. Reg. § 1.6662-4(d)).

156. See T.D. 8382, 1992-1 C.B. 392, 394 (adopting former Treas. Reg. § 1.6694-2(b)(2), containing one in three definition of realistic possibility); Treas. Reg. § 1.6662-3(a) (as amended in 1991) (referring taxpayers to Treas. Reg. § 1.6694-2(b)(2) for description of realistic possibility); see also BITTKER ET AL., *supra* note 25, at ¶ 50.05[2] (recognizing the one in three definition of realistic possibility); Sharp, *supra* note 154, at 967 & n.25 (1994) (same). Recent regulatory amendments have rendered the realistic possibility standard’s definition somewhat ambiguous. In response to 2007 legislation amending I.R.C. § 6694, Treasury eliminated the definition of the realistic possibility standard previously contained in

suggested that the realistic possibility standard applicable to noncompliance with IRB guidance seems actually more onerous than the reasonable basis standard applicable to Treasury regulations, with reasonable basis representing a 10-20% chance of success relative to the 33% threshold for realistic possibility.¹⁵⁷

Yet it is clear that Treasury has at least tried to close any perceived gap between the two standards. Current regulations, adopted in 1998, define the reasonable basis standard as “a relatively high standard of tax reporting,” “higher than not frivolous or not patently improper,” and “not satisfied by a return position that is merely arguable or that is merely a colorable claim.”¹⁵⁸ Even more specifically, the definition expresses the expectation that, to satisfy the reasonable basis standard, a return position must be “reasonably based on one or more” of several interpretive documents listed elsewhere as “substantial authority,” including the I.R.C., legislative history, Treasury regulations, and published IRS guidance.¹⁵⁹ Treasury requires a similar analysis to satisfy the realistic possibility standard.¹⁶⁰ Treasury expressly declined taxpayer requests to rate reasonable basis relative to other standards such as realistic possibility, to avoid diluting the focus of reasonable basis.¹⁶¹ Meanwhile, in defending its use of the realistic possibility for

Treas. Reg. § 1.6694-2(b) without explaining the impact of that change to the cross-reference to Treas. Reg. § 1.6694-2(b) contained in Treas. Reg. § 1.6662-3(a). See T.D. 9436, 2009-3 I.R.B. 268 (discussing changes in the regulatory preamble). Congress did not change I.R.C. § 6662 when it amended I.R.C. § 6694, and Treasury has not signaled any intention to replace the realistic possibility standard in Treas. Reg. § 1.6662-3. Accordingly, the one in three definition of realistic possibility presumably still applies for purposes of Treas. Reg. § 1.6662-3(a) and (b)(2). Nevertheless, the disjunction between the cross-reference in Treas. Reg. § 1.6662-3(a) and the amendments to Treas. Reg. § 1.6694-2(b) simply renders unclear the appropriate standard for evaluating a taxpayer's decision not to comply with IRB guidance for purposes of the 20% underpayment penalty.

157. See, e.g., Richard Lavoie, *Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code*, 23 AKRON TAX J. 1, 5-6 (2008); Dennis J. Ventry Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 470 (2008); see also Predmore, *supra* note 154, at 23 (ranking the realistic possibility standard as more onerous than the reasonable basis standard); Sharp, *supra* note 154, at 990 (same).

158. Treas. Reg. § 1.6662-3(b)(3).

159. *Id.* (referring taxpayers to Treas. Reg. § 1.6662-4(d)(3)(iii) for substantial authority); see also Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 1991) (listing types of authority on which taxpayers may rely as substantial authority).

160. See Treas. Reg. § 1.6662-3(a) (referring taxpayers to Treas. Reg. § 1.6694-2(b)(2) for definition of realistic possibility standard; T.D. 8382, 1992-1 C.B. 392 (adopting the old Treas. Reg. § 1.6694-2(b) defining the realistic possibility standard and incorporating Treas. Reg. § 1.6662-4(d)(3)(ii) and (iii) within that definition). But see *supra* note 156 (discussing the ambiguity created when Treasury recently amended Treas. Reg. § 1.6694-2 and eliminated that definition).

161. See T.D. 8790, 1998-2 C.B. 723.

IRB guidance, Treasury has expressed the view that use of that standard is “taxpayer-favorable.”¹⁶²

Given, too, the lack of a disclosure requirement or the need to expressly challenge the validity of IRB guidance, it seems likely that Treasury and the IRS at least intend for the threshold for avoiding the 20% underpayment penalty to be lower for IRB guidance than for Treasury regulations. As a practical matter, a taxpayer who flags his noncompliance with a Treasury regulation on his return and directly challenges the regulation’s validity may as well paint a bulls-eye on his forehead; given the high level of deference that courts typically give to Treasury regulations under either *Chevron* or *National Muffler*, a taxpayer who declines to follow a Treasury regulation, fails to adequately disclose his noncompliance, and gets audited is highly likely to be penalized. By contrast, given low audit rates and the lack of a disclosure requirement, it is unlikely that a taxpayer who fails to follow a legal interpretation advanced in IRB guidance will actually be penalized for that failure.

Nevertheless, as a purely legal matter, taxpayers may be assessed penalties if they decline to comply with IRB guidance with which they disagree and the IRS or the courts decide that their arguments do not satisfy the realistic possibility threshold. The question, then, is whether this legal possibility is sufficient to claim that IRB guidance carries the force and effect of law—and thus whether IRB guidance that adopts substantive legal interpretations must comply with APA rulemaking requirements and is entitled to *Chevron* rather than *Skidmore* deference.¹⁶³

Administrative law scholars have debated the extent of the link between *Mead*’s force of law premise and congressional imposition of penalties for noncompliance with agency legal interpretations.¹⁶⁴ Further, Thomas Merrill and Kathryn Watts document in their exhaustive examination of twentieth century regulatory legislation that “knowledgeable participants in the legislative process understood the presence or absence of a provision establishing a sanction for rule violations as the key variable differentiating

162. T.D. 8381, 1992-1 C.B. 374, 376.

163. Accord Peter A. Appel, Note, *Administrative Procedure and the Internal Revenue Service: Delimiting the Substantial Understatement Penalty*, 98 YALE L.J. 1435, 1436 (1989) (recognizing a potential clash between IRS application of penalties to IRB guidance and administrative law requirements).

164. See, e.g., David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 217 & n.62 (2001); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2139-40 (2002); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 881 (2001); see also William T. Mayton, *A Concept of a Rule and the “Substantial Impact” Test in Rulemaking*, 33 EMORY L.J. 889, 905 (1984) (defining “force of law” as “whether a rule is an authoritative implementation of the statute under which an agency acts, authoritative in the sense that in an enforcement action an agency need prove only that the defendant’s conduct was contrary to the rule”).

legislative rulemaking grants from housekeeping ones.”¹⁶⁵ Yet these discussions all seem to assume that all penalties (or at least all civil penalties) are equal, and lack a more nuanced discussion of whether different standards for assessing penalties might influence the question. Does the lesser standard for evaluating the applicability of penalties for noncompliance mean that *Skidmore* rather than *Chevron* should apply in considering the legal interpretations adopted in IRB guidance? Does it make a difference whether that lesser standard renders enforcement comparatively unlikely; and, if so, then is there some point at which one might conclude that the relative lack of enforcement potential suggests ignoring the penalty potential in evaluating whether an interpretation carries the force of law? These unanswered questions—highly relevant in evaluating the administrative law of IRB guidance—lie at the heart of that gray area of the force of law concept, where the jurisprudence potentially intersects regarding *Mead*, *Chevron*, and *Skidmore* on the one hand and the legislative versus interpretative rule distinction on the other.

D. Notices and Retroactivity

Finally, I.R.C. § 7805(b) raises an interesting potential question for the force of law concept as applied to certain notices. That provision generally precludes retroactive application of Treasury regulations¹⁶⁶ and offers several exceptions.¹⁶⁷ In articulating the initial prohibition, however, Congress explicitly authorized Treasury to make its regulations applicable as of “[t]he date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.”¹⁶⁸

Of course, Congress may authorize retroactive regulations, subject only to a few, easily surmountable constitutional constraints.¹⁶⁹ Correspondingly, Treasury may exercise the authority granted by I.R.C. § 7805(b),

165. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 503 (2002). Merrill and Watts suggest that tax represents a departure from this understanding, but they fail to take into account the imposition of the negligence and intentional disregard penalties in the Revenue Acts of 1918 and 1921, respectively. See also *supra* note 150 (summarizing history of these penalties).

166. See I.R.C. § 7805(b)(1) (2000).

167. See *id.* § 7805(b)(2)-(8).

168. *Id.* § 7805(b)(1)(C) (granting authority to Secretary of Treasury); Treas. Reg. § 301.7805-1(b) (1967) (delegating authority from the Secretary to the Commissioner of Internal Revenue).

169. See, e.g., William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 114; Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1016 (2006).

limited primarily by a judicial finding of abuse of discretion.¹⁷⁰ Yet, the power to make regulations retroactively effective does not automatically overwrite APA procedural requirements for adopting the regulations in the first instance, nor does it bear any obvious relationship to the standard of judicial deference applicable to the regulations.

Assume, for a moment, that none of the arguments acknowledged above result in IRB guidance generally carrying the force of law, and consider the following hypothetical scenario: A notice articulates a particular interpretation of the law. Treasury later exercises its authority under I.R.C. § 7805(b) to make a final regulation containing the same interpretation effective retroactively to the date the IRS published the notice. Finally, the government in an enforcement action seeks to penalize a taxpayer for failing to comply with the interpretation advanced in the notice.

In fact, this scenario is not a hypothetical one. As noted in Part I above, the IRS frequently publishes notices with interim guidance, seeking comments before proceeding with the more formal notice-and-comment rulemaking process, and instructing taxpayers that they may rely on the rules advanced in the notice pending final regulations. Treasury occasionally makes its regulations retroactively effective to the date the IRS published such a notice, consistent with Treasury's authority under I.R.C. § 7805(b).

Pursuing the *Mead* line of inquiry, one might reasonably argue that, in adopting I.R.C. § 7805(b) and authorizing Treasury to make regulations effective as of the date of notice publication, Congress signaled its intent that at least some notices bind taxpayers with the same force as the regulations themselves. Legislative history of I.R.C. § 7805(b) suggests that Congress chose to limit the retroactive application of Treasury regulations to protect taxpayers from penalties for noncompliance with rules they could not have anticipated.¹⁷¹ In permitting retroactive effect where the IRS pre-

170. Courts have used the abuse of discretion standard in evaluating Treasury's decisions to apply its regulations retroactively both before and since 1996 amendments to I.R.C. § 7805(b). See, e.g., *Tate & Lyle, Inc. v. Comm'r*, 87 F.3d 99, 107-08 (3d Cir. 1996); *Klamath Strategic Inv. Fund, L.L.C. v. United States*, 440 F. Supp. 2d 608, 625 (E.D. Tex. 2006); see also BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 110.4.3 (2d ed.) (discussing abuse of discretion standard as applied to decisions to apply Treasury regulations retroactively, including after 1996 amendments).

171. See, e.g., STAFF OF H. COMM. ON WAYS AND MEANS, 104th CONG., *OVERSIGHT INITIATIVE REPORT ON NEED FOR TAXPAYER BILL OF RIGHTS, 2 LEGISLATION AND REFORM OF THE INTERNAL REVENUE SERVICE 15* (Comm. Print 1995) (reprinted in *TAX NOTES TODAY*, Sept. 18, 1995, at 1386-87) ("If the taxpayer interprets the law in a way which is different from the position taken in a subsequent regulation, the taxpayer may be subject to additional taxes, penalties, and interest. The Subcommittee believes taxpayers should have more protections from the retroactive application of tax regulations."); see also Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. CIN. L. REV. 531, 560-62 (2005) (documenting history of changes to I.R.C. § 7805(b)).

cedes regulations with a sufficiently detailed notice, Congress presumably was unconcerned about taxpayers feeling bound under such circumstances. Similarly, one could contend that, when the IRS publishes a notice with interim guidance and states its intention to incorporate that guidance in forthcoming regulations, the IRS exercises that congressionally delegated power. For purposes of assessing whether APA procedural requirements apply, at a minimum, one can easily conceive of the argument that such a notice would have practical binding effect.

CONCLUSION

The bottom line is that the perception and reality of IRB guidance are very different. The potential consequences of that difference are quite significant and, frankly, a bit disturbing.

The tax system needs informal guidance. It is simply not practical for Treasury and the IRS to put all of their interpretations of the I.R.C. into Treasury regulations. Both the IRS and the tax community rely heavily on IRB guidance to understand the IRS's thinking on innumerable tax issues.

Yet, it turns out that IRB guidance may not be quite so informal after all. Congressional actions, government litigating positions, and the IRS's own utilization all raise a serious question concerning the administrative law of IRB guidance: does IRB guidance carry the force of law?

Further, in raising this question, IRB guidance requires administrative law to confront questions thus far left unanswered: what does the force of law mean, and does it mean the same thing for purposes of APA rulemaking requirements and judicial deference?

The tax system relies heavily on IRB guidance to direct taxpayer behavior. If IRB guidance leads to penalties for noncompliance, retroactively-applicable rules, and *Chevron* deference, then taxpayers and courts may be justifiably concerned by the lack of systematic public input in the promulgation of such pronouncements. Yet, if the lack of procedure attending to IRB guidance means that these interpretations cannot bind taxpayers' actions with the force of law, then the IRS loses an important tax enforcement tool. These are important questions, with real consequences, for the tax community and beyond. They are worth taking seriously.

AUTHOR'S NOTE

In Section III.B of the foregoing essay, I stated that I knew of "no contemporary cases in which taxpayers have challenged the validity of IRB guidance for failing to satisfy APA procedural requirements for legislative rules." On August 7, 2009, after the foregoing essay was complete and had been formatted for publication, the D.C. Circuit Court of Appeals issued an opinion in *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009), in which a

divided panel reversed the district court's dismissal of just such a challenge against Notice 2006-50, 2006-25 I.R.B. 1141.¹⁷² The merits of whether the IRS should have satisfied APA notice and comment requirements in adopting Notice 2006-50 were not before the *Cohen* court, and the court accordingly did not opine on that issue. Accordingly, the *Cohen* opinion does not alter any of the analysis in the foregoing essay. Should the panel's decision remain intact, however, the taxpayers' APA challenge against Notice 2006-50 will proceed in district court. The government has petitioned for rehearing *en banc* of the *Cohen* decision.

172. *Cohen v. United States*, 578 F.3d 1, 3 (D.C. Cir. 2009); *see also* *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281, 288 (D.D.C. 2008); Sloan Second Am. Compl. at ¶¶ 89-94, *In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281 (D.D.C. 2008), 2006 WL 2444139.