No. 11-139

In the Supreme Court of the United States

United States of America,
Petitioner,

v.

Home Concrete & Supply, LLC, et al.,
Respondents.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR KRISTIN E. HICKMAN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a Professor of Law at the University of Minnesota Law School who teaches and writes in the areas of tax and administrative law. *Amicus* has a longstanding academic interest in issues implicated by this case. *Amicus* has written extensively about judicial review of agency legal interpretations both generally and in the context of tax cases. *See, e.g.*, Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 Colum. L. Rev. 1235 (2007); Kristin E. Hickman, *The Need for* Mead*, Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833 (2001). This Court has previously cited *Amicus*'s work regarding the scope of *Chevron* review. *See United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001). *Amicus* has also written extensively about the interplay between the Administrative Procedure Act (APA) and the Internal Revenue Code (IRC) as well as the comparability of APA procedural requirements with Treasury Department and Internal Revenue Service practices in administering the IRC. *See, e.g.*, Kristin E. Hickman, *IRB Guidance: The No Man's Land of Tax Code Interpretation*, 2009 Mich. St. L. Rev. 239;

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[1] Consistent with Supreme Court Rule 37.3(a), *Amicus* files this brief with the written consent of both parties. Consistent with Supreme Court Rule 37.6, *Amicus* hereby certifies that this brief was not authored in whole or in part by counsel for any party and that *Amicus* received no monetary contribution toward the preparation or submission of this brief other than the general financial support of the academic institution with which she is affiliated.

Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 Geo. Wash. L. Rev. 1154 (2008); and, 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 (2007). *Amicus* also co-authors an administrative law textbook, *see* Kristin E. Hickman & Richard J. Pierce, Jr., Federal Administrative Law (2010).

This case raises significant issues of administrative law and tax administration that reach far beyond Treas. Reg. § 301.6501(e)-1 and the parties at bar. Consistent with her scholarly interests, *Amicus* submits this brief solely to address issues regarding the procedures utilized by the Treasury Department in promulgating Treas. Reg. § 301.6501(e)-1 and the resulting implications for the standard of review for evaluating Treas. Reg. § 301.6501(e)-1. *Amicus* disclaims any view regarding either the clarity of Internal Revenue Code § 6501(e) or the substantive reasonableness of Treas. Reg. § 301.6501(e)-1 as an interpretation of that statute. *Amicus* hopes this brief will assist the Court in resolving the important questions of administrative law and tax administration raised by this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To the government, this is a case about a tax shelter, the Son-of-BOSS transaction, and about whether the Court will respect Treasury's interpretation of the six year limitations period of Internal Revenue Code (IRC) § 6501(e), 26 U.S.C. § 6501(e), to allow the government to continue its pursuit of taxpayers who participated in Son-of-BOSS transactions to the detriment of the fisc. (Gov't Br. at 2-10.) Of course, Treasury's position affects many more taxpayers engaged in run-of-the-mill asset sales than merely participants in Son-of-BOSS transactions. Most significantly however, this is a case about the power of federal government agencies to define the parameters of the laws that they administer, the limitations that Congress has imposed on agencies as they exercise that power, and the role of the courts in policing agency action.

In the event this Court decides that IRC § 6501(e) is ambiguous, the government claims that Treas. Reg. § 301.6501(e)-1 resolves the case and is entitled to *Chevron* deference. (Gov't Br. at 12, 37-39.) Throughout the litigation giving rise to this case, the procedural validity of Treas. Reg. § 301.6501(e)-1 and its temporary predecessor, Temp. Treas. Reg. § 301.6501(e)-1T, and the significance of those regulations' procedural invalidity for judicial review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 465 U.S. 837 (1984), have been the subject of disagreement among the litigants and the lower courts. Assessing whether the Court should extend *Chevron* deference to Treas. Reg. §

301.6501(e)-1 potentially raises several previously unaddressed questions of administrative law doctrine generally and tax administration particularly.

First, did the procedures by which the Treasury Department (Treasury) adopted Treas. Reg. § 301.6501(e)-1 and its predecessor, Temp. Treas. Reg. § 301.6501(e)-1, violate or comply with congressionally imposed procedural requirements? In adopting these regulations, Treasury employed an inverted procedural sequence known commonly in administrative law as interim-final rulemaking—issuing legally binding, temporary regulations with only post-promulgation notice and comment undertaken in the course of replacing the temporary regulations with final ones. In the absence of a valid claim to an exception from pre-promulgation notice and comment under APA § 553, courts and scholars have sharply criticized interim-final rulemaking as noncompliant with either the letter or the spirit of the Administrative Procedure Act (APA). Neither the language of IRC § 7805(e) nor the interpretative rule exception of APA § 553(b)(A) excuses Treasury's deviation from APA procedural requirements, and Treasury has simply failed to articulate a good cause claim under APA § 553(b)(B) in connection with Treas. Reg. § 301.6501(e)-1 or its temporary predecessor. The lower courts have struggled, however, to find an appropriate remedy when agencies engage in procedurally improper interim-final rulemaking. While invalidating a regulation adopted invalidly through interim-final rulemaking may not always the best remedy, the Court should grant that remedy in this case and invalidate Treas. Reg. § 301.6501(e)-1. The fact that Treasury failed to

comply with APA procedural requirements in the course of promulgating Treas. Reg. § 301.6501(e)-1 for the purpose of influencing ongoing litigation, taken together, should disqualify that regulation from judicial leniency.

A second question raised by this case concerns the relationship between procedural compliance and *Chevron* deference. Even if the Court is inclined to conclude that Treas. Reg. § 301.6501(e)-1 reflects a *substantively* permissible interpretation of IRC § 6501(e), it does not necessarily follow that *Chevron* deference is appropriate for a regulation that fails to satisfy congressionally-imposed *procedural* requirements. Although the Court has declined to deny *Chevron* deference as a general rule either to regulations lacking notice and comment or adopted in the course of litigation, the Court has also linked the *Chevron* step two inquiry with broader compliance with the APA. In this case, Treasury's lack of compliance with APA § 553 should lead the Court to declare Treas. Reg. § 301.6501(e)-1 unreasonable at *Chevron* step two.

ARGUMENT

I. TREAS. REG. § 301.6501(E)-1 IS PROCEDURALLY INVALID.

Modern American government consists of a conglomeration of executive and independent agencies with thousands of officials exercising tremendous delegated power not only to execute the laws as enacted by Congress but indeed to define in great detail what those laws are. When agencies exercise delegated power to adopt regulations carrying the force and effect of law, they generally are bound to follow certain procedures mandated by Congress to ensure transparency and accountability and to gain democratic legitimacy through public participation. *See* Bernard Schwartz, Administrative Law § 4.12 (3d ed. 1991). Consistent with these goals, absent express congressional command to the contrary, APA § 553 provides the procedures that govern agency rulemaking. *See* 5 U.S.C. § 553. Much like the legislative process, APA § 553 prescribes a regime of public notice and comment in the promulgation of agency rules, thus "reintroduce[ing] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies." *American Hospital Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)). Agency regulations are legally invalid if they fail to comply with the procedural requirements of APA § 553 or else to qualify for a specific exception therefrom. *See* 5 U.S.C. § 706(2)(D) (instructing reviewing courts to invalidate agency

actions found to be "without observance of procedure required by law").

A. Treasury Failed To Comply With APA § 553 In Promulgating Treas. Reg. § 301.6501(e)-1.

To advance the goals of transparency, accountability, public participation and fairness in agency rulemaking, APA § 553 contemplates a particular procedural sequence for agencies adopting regulations that carry the force and effect of law. APA § 553(b) requires an agency to provide public notice of its proposed rulemaking through publication in the Federal Register. *See* 5 U.S.C. § 553(b). Next, APA § 553(c) commands the agency pursuing the rulemaking process to offer interested persons an opportunity to participate through the submission of written comments. *See* 5 U.S.C. § 553(c) (calling for opportunity to comment "after notice"). Only "after consideration of the relevant matter presented" through the comments may the agency issue final regulations along with a "concise general statement of their basis and purpose." *Id.* In other words, the APA anticipates that regulated parties will receive notice of proposed agency rules and have the opportunity to submit comments *before* finding themselves legally bound by those rules.

Though establishing notice-and-comment rulemaking as the default, Congress acknowledged that not all agency rules necessitate such extensive procedures. Thus, APA § 553 provides exceptions for interpretative rules, procedural rules, and policy statements. *See* 5 U.S.C. § 553(b)(A). Additionally,

Congress recognized that, in some instances, agencies may legitimately need to issue legally binding rules without public notice and comment. Hence, APA § 553 authorizes agencies to dispense with notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B).

Treasury did not follow the procedural sequence contemplated by APA § 553 in promulgating Treas. Reg. § 301.6501(e)-1. Instead, though without using the label, Treasury employed an alternative procedural sequence known most commonly by courts and administrative law scholars as "interim-final rulemaking." Specifically, interim-final rulemaking occurs when an agency issues legally-binding rules without notice and comment but simultaneously requests post-promulgation public comment with the promise that the agency will consider comments received and may make modifications in adopting replacement final rules. *See, e.g.*, Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 704 (1999) (describing interim-final rulemaking); Administrative Conference of the United States, *Notice; Adoption of Recommendations*, 60 Fed. Reg. 43108, 43111 (Aug. 18, 1995) (same). In other words, with interim-final rulemaking, the agency begins with the legal equivalent of a final rule rather than with merely a nonbinding proposal, thus inverting the procedural sequence contemplated by APA § 553 and tainting the procedural validity of the

replacement rules adopted after post-promulgation notice and comment.

Consistent with the interim-final rulemaking pattern, here Treasury began its rulemaking process in September 2009 by issuing and publishing in the Federal Register and the Internal Revenue Bulletin a "temporary" but legally binding regulation, Temp. Treas. Reg. § 301.6501(e)-1T, without pre-promulgation notice and comment.[2] *See* T.D. 9466,

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[2] Lest there be any doubt regarding its status for both taxpayers and the government, Temp. Treas. Reg. § 301.6501(e)-1 carried precisely the same legal force as the final Treas. Reg. § 301.6501(e)-1. As a general matter, temporary as well as final Treasury regulations are legal equivalents. Both temporary and final Treasury regulations are published in the Code of Federal Regulations. In interpreting congressionally-enacted penalty provisions requiring taxpayers and tax return preparers to comply with tax "rules or regulations," 26 U.S.C. § 6662(a)-(b)(1), (c); 26 U.S.C. § 6694(b), Treasury through regulations has defined rules or regulations to include all "temporary or final Treasury regulations issued under the [IRC]." Treas. Reg. §§ 1.6662-3(b)(2), 1.6694-3(e). As a result, Treasury, the Internal Revenue Service, tax professionals, taxpayers, and the courts all operate with the understanding that temporary and final Treasury regulations are equally binding on taxpayers and the government. *See, e.g.*, *Estate of Gerson v. Comm'r*, 507 F.3d 435, 438 (6th Cir. 2007) (noting that both temporary and final Treasury regulations are legally binding); Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 Tax Law. 717, 735 (2004) ("Unlike proposed regulations, temporary regulations are effective when they initially appear in the Federal Register, thus providing immediate and binding guidance to taxpayers."). Though Temp. Treas. Reg. § 301.6501(e)-1T concerned the limitations period for assessing a tax deficiency and thus was not the sort of regulation to give rise to penalty potential directly, the government quite clearly signaled Treasury's intent regarding the temporary regulation's legal force through various court

74 Fed. Reg. 49321 (Sept. 28, 2009), 2009-43 I.R.B. 551. Simultaneously, Treasury issued and published in the Federal Register a notice of proposed rulemaking advancing precisely the same regulatory language as the temporary regulation and inviting public comment. *See* 74 Fed. Reg. 49,354 (Sept. 28, 2009). Subsequently, in December 2010, after contemplating the comment that it received, Treasury withdrew the temporary regulation and published the final regulation at issue in this case. *See* T.D. 9511, 75 Fed. Reg. 78897 (Dec. 17, 2010), 2011-6 I.R.B. 455. As the government acknowledges, "[t]he text of the final regulation tracks the temporary regulation in virtually every respect." (Gov't Br. 28-29.)

Notice-and-comment rulemaking is time consuming, and particularly where the good cause exception applies, agencies may feel the need to act more quickly but still value public input. Accordingly, practitioners and scholars have applauded interim-final rulemaking as an important

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documents filed shortly thereafter. *See, e.g.*, Respondent's Brief in Support of Motion to Vacate Order and Decision at n.2, *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 134 T.C. 211 (2010) (No. 25868-06), 2010 WL 2285587 (analogizing the issuance of Temp. Treas. Reg. § 301.6501(e)-1T to the extension by a legislature of a statute of limitations during an appeal of a court ruling, thus requiring the court to apply the new limitations period); Appellee's Petition for Panel Rehearing, *Salman Ranch, Ltd. v. United States*, 573 F.3d 1362 (Fed. Cir. 2009) (No. 2008-5053, 2009 WL 361165 at *1-2, 8-9, 13-14 (describing Temp. Treas. Reg. § 301.6501(e)-1T as an "intervening legal development[ ]" requiring the court to reconsider its opinion, as entitled to *Chevron* deference, and as compelling an outcome in favor of the government).

compromise between agency flexibility and efficiency on the one hand and the legitimacy gained through public participation in the rulemaking process on the other, *but only when the rules in question qualify for an exception from the procedural requirements of APA § 553*. Otherwise, the legal consensus holds that interim-final rulemaking violates the APA. *See, e.g.*, Administrative Conference of the United States, *supra*, at 43111-12 ("Courts generally have not allowed post-promulgation comment as an alternative to the prepromulgation notice-and-comment process in situations where no exemption is justified."); Asimow, *Interim-Final Rules*, *supra*, at 717, 725-26 (observing that, "absent such an exception, a rule adopted with post- rather than pre-adoption notice and comment is procedurally invalid," but criticizing that conclusion).

The reasons for this conclusion are two-fold. First, as noted above, because interim-final rulemaking begins the rulemaking process with the legal equivalent of a final rule, without a valid exception, the procedural sequence deviates from the congressionally-enacted text of APA § 553. Second, courts and scholars have long recognized that inverting the APA procedural sequence by beginning with legally-binding temporary or interim-final rules conveys a stronger message of agency commitment to a particular outcome, chills public participation, and thus undermines the very congressional goals that notice-and-comment rulemaking is designed to advance. *See, e.g.*, *Levesque v. Block*, 723 F.2d 175, 187-88 (1st Cir. 1983) ("[C]itizens will recognize that the agency is less likely to pay attention to their views after a rule is in place, and therefore the public

is less likely to participate vigorously in comment."); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (reflecting similar concern); Administrative Conference of the United States, *supra*, at 43112 (discouraging agency use of interim-final rulemaking on such grounds); *cf. National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) ("People naturally tend to be more close-minded and defensive once they have made a 'final' determination."); Stephanie Stern, *Cognitive Consistency: Theory Maintenance and Administrative Rulemaking*, 63 U. Pitt. L. Rev. 589, 620-30 (2002) (drawing from academic literature in cognitive psychology to support a similar thesis regarding even standard notices of proposed rulemaking that offer draft regulatory language).

In its opening brief, the government contended that, because Treasury adopted the final Treas. Reg. § 301.6501(e)-1 after public notice and comment, a procedural challenge against Temp. Treas. Reg. § 301.6501(e)-1T was rendered "irrelevant to the proper disposition of this case." (Gov't Br. at 29.) This claim misses the point. To be absolutely clear, the procedural flaw is not merely with Temp. Treas. Reg. § 301.6501(e)-1T for its lack of pre-promulgation notice and comment. Rather, final Treas. Reg. § 301.6501(e)-1 is also invalid because Treasury started its rulemaking for that regulation with a legally-binding temporary regulation rather solely with a notice of proposed rulemaking, thus inverting the procedural sequence outlined in APA § 553.

B. No Statutory Exception Excuses Treasury's Failure To Comply With APA § 553.

As noted above, APA § 553 includes several exceptions from notice-and-comment rulemaking—for interpretative rules, procedural rules, policy statements, and good cause. Congress, of course, can and sometimes does provide specific exceptions from APA § 553 in other statutes.

In the preambles to both Temp. Treas. Reg. § 301.6501(e)-1T and Treas. Reg. § 301.6501(e)-1T, Treasury offered no justification for dispensing with pre-promulgation notice and comment beyond the bald assertion that APA § 553(b) "does not apply to these regulations." T.D. 9511, 75 Fed. Reg. 78897, 78898 (Dec. 17, 2010); T.D. 9466, 74 Fed. Reg. 49321, 49322 (Sept. 28, 2009). In its opening brief, the government cursorily made a claim that it has developed more fully before the circuit courts, that IRC § 7805(e) authorizes its departure from APA § 553. (Gov't Br. at 29.) Though not in its opening brief before this Court, throughout this litigation and in other cases challenging Treas. Reg. § 301.6501(e)-1, the government has contended that both Treas. Reg. § 301.6501(e)-1 and its temporary predecessor are exempt from APA procedural requirements as interpretative rules. *See* Brief for the Appellee at 39-42, *United States v. Home Concrete & Supply, LLC*, (No. 09-2353) (4th Cir. Apr. 30, 2010); *see also, e.g.*, Reply Brief for the Appellant, *Wilmington Partners L.P. v. Comm'r*, (No. 10-4183) (2d Cir. May 19, 2011), 2011 WL 2113367 at *25-26 (claiming that Treas. Reg. § 301.6501(e)-1 is an interpretative rule); Brief

for the Appellant at 52-60, *Intermountain Ins. Serv. of Vail, LLC v. Comm'r*, 650 F.3d 691 (D.C. Cir. 2011) (No. 10-1204), 2010 WL 6210551 (arguing that Temp. Treas. Reg. § 301.6501(e)-1 is an interpretative rule). Finally, agencies using interim-final rulemaking usually claim the good cause exception. *See* Administrative Conference of the United States, *supra*, at 43111. None of these alternatives operate to excuse Treasury's lapse in this case.

1. IRC § 7805(e) Does Not Authorize Treasury To Disregard APA § 553.

IRC § 7805(e) does two things. First, when Treasury issues a temporary regulation, IRC § 7805(e)(1) requires Treasury to issue a corresponding notice of proposed rulemaking. *See* 26 U.S.C. § 7805(e)(1) ("Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation."). Second, IRC § 7805(e)(2) sunsets temporary regulations after three years, thus setting a time frame within which Treasury must complete APA notice-and-comment procedures to finalize any temporary regulation it issues and wishes to retain. *See* 26 U.S.C. § 7805(e)(2) ("Any temporary regulation shall expire within 3 years after the date of issuance of such regulation."). The government's reliance on this language to excuse its failure to comply with APA rulemaking requirements is misplaced and should be rejected by this Court.

Congress certainly has the power to alter APA procedural requirements in specific instances. However, Congress has also instructed the courts

that "[s]ubsequent statute may not be held to supersede or modify" APA rulemaking requirements "except to the extent that it does so expressly." 5 U.S.C. § 559. Consistent with this provision, this Court has adopted a policy of uniformity in administrative law absent clear congressional command to the contrary. *See, e.g.*, *Mayo Foundation for Medical Educ. and Research v. United States*, 131 S.Ct. 704, 713 (2011) (expressing disinclination for carving out a tax law exception from general administrative law principles); *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999) ("The APA was meant to bring uniformity to a field full of variation and diversity. It would frustrate that purpose to permit divergence on the basis of a requirement 'recognized' only as ambiguous."). Hence, while by no means binding this Court, the lower courts have generally "looked askance at agencies' attempts to avoid the standard notice and comment procedures" and have construed supposed statutory exceptions from APA § 553 narrowly. *Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 6 (D.C. Cir. 2011) (quoting *Asiana Airlines v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998), and *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). Finally, absent clearly expressed congressional intent to the contrary, this Court has consistently advised construing seemingly competing statutes harmoniously to give effect to all. *See, e.g.*, *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); *Radzanlower v. Touche Ross & Co.*, 426 U.S. 148, 154-55 (1976).

IRC § 7805(e) fails to satisfy the high threshold for recognition as an exception from APA rulemaking requirements, as its terms are easily reconciled with

APA § 553. Further, a more cooperative reading of the two provisions better fits the history surrounding the enactment of IRC § 7805(e).

Contrary to the government's claim, the text of IRC § 7805(e) authorizes nothing. Rather, the text of IRC § 7805(e) is better read as restricting Treasury's authority by imposing limitations on Treasury: *if* Treasury issues temporary regulations, *then* Treasury must simultaneously issue a notice of proposed rulemaking and finalize its temporary regulations within three years. As already discussed in Part I.A. above, as with other agencies, APA § 553 authorizes Treasury to adopt legally binding temporary regulations without notice and comment *so long as Treasury falls within the good cause exception offered by APA § 553(b).* Under APA § 553, however, an agency that issues temporary or interim final regulations pursuant to a good cause claim is under no fixed obligation to pursue post-promulgation notice and comment. Thus, acknowledging that Treasury, like other agencies, has the power to and sometimes does adopt temporary regulations without public notice and comment, and operating under the assumption that Treasury has done validly so within the parameters established by APA § 553, IRC § 7805(e) imposes extra requirements on Treasury to publish a notice of proposed rulemaking immediately and act upon submitted comments within three years. *See* Michael Asimow, *Public Participation in the Adoption of Temporary Treasury Regulations*, 44 Tax Law. 343, 363 (1991) (advocating this reading of IRC § 7805(e)).

This cooperative reading of APA § 553 and IRC § 7805(e) stands in stark contrast to the more obvious irreconcilability of other congressional commands with APA § 553. For example, in the Federal Aviation Reauthorization Act, Congress instructed the Federal Aviation Authority to "publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule, pursuant to which public comment will be sought and a final rule issued." 49 U.S.C. § 45301(b)(2). In upholding the agency's issuance of an interim final rule without notice and comment or a good cause claim, the reviewing court observed that requiring notice and comment both before and after the FAA published its interim final rule would render the post-issuance notice and comment largely superfluous. *See Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998). This example is easily distinguishable from the relationship between APA § 553 and IRC § 7805(e) since, as demonstrated in the preceding paragraph, those provisions can be read cooperatively in a way that eliminates any redundancy.

Furthermore, reading APA § 553 and IRC § 7805(e) cooperatively in this manner better effectuates the congressional purpose driving that provision's adoption. Congress adopted IRC § 7805(e) in 1988 as part of the Taxpayer Bill of Rights. Treasury had only started issuing temporary regulations without pre-promulgation notice and comment regularly in the 1980s. *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, 1797 (2007), (describing the evolution of Treasury's use of temporary regulations); Asimow, *Public Participation*, *supra*, at 343 (linking temporary Treasury regulations to the 1980s). Then, as now, Treasury maintained that most of its regulations were exempt from APA § 553 requirements as interpretative rules. But up until the 1980s, Treasury had routinely followed APA § 553 procedures regardless in adopting its regulations. As documented extensively by Professor Michael Asimow, Congress's primary concern in adopting IRC § 7805(e) was the number of temporary Treasury regulations languishing on the books for several years with no indication of when or whether Treasury might finalize them using public notice and comment. *See* Asimow, *Public Participation*, *supra*, at 363-64; *see also* Irving Salem et al., *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 Tax Law. 717, 735 (2004) (recognizing same); Juan F. Vasquez, Jr. & Peter A. Lowy, *Challenging Temporary Treasury Regulations*, 3 Hous. Bus. & Tax L.J. 248, 254 (2003) (describing similar reasons for adopting IRC § 7805(e)). Wanting Treasury to stop avoiding notice and comment, and accepting without further inquiry Treasury's position that most of its regulations were exempt from APA notice and comment requirements as interpretative rules, Congress contemplated language eliminating or restricting the interpretative rule exception in the tax context. *See id.* Ultimately instead, Congress chose to require post-promulgation notice and comment within three years. *See id.* In short, Congress adopted the requirements of IRC § 7805(e) as additions to rather than subtractions from the requirements of APA § 553, and with the goal of more

rather than less public participation in the development of Treasury regulations.

2. Treas. Reg. § 301.6501(e)-1 Is Not An Interpretative Rule.

The APA does not define the interpretative rule category, and the Court has had little occasion to do so precisely, either. Nevertheless, the Court has observed that legislative rules are "binding" or carry the "force and effect of law," with the characteristic that they "affect[ ] individual rights and obligations," while interpretative rules lack these qualities. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-02 (1979) (quoting *Morton v. Ruiz*, 415 U.S. 199, 232, 236 (1974)). Hence, established administrative law doctrine holds that legislative rules carry the force of law, binding members of the public, the government, and even the courts to the extent such rules represent a legitimate exercise of agency authority. *See, e.g.*, 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.4 (5th ed. 2010). Interpretative rules, by contrast, bind no one. *See id.* While the precise parameters of the force of law concept are unclear, for the reasons discussed in footnote 2 of Part I.A. of this brief, both Treas. Reg. § 301.6501(e)-1 and Temp. Treas. Reg. § 301.6501(e)-1 plainly carry such legal force: all Treasury regulations are published in the Code of Federal Regulations and carry penalty potential; members of the tax community, including Treasury, consider all Treasury regulations to be legally binding on taxpayers and the government alike; and the government has repeatedly argued not just that the courts ought to be persuaded to adopt the government's interpretation of IRC § 6501(e) as

articulated in its regulations, but that those regulations are binding on the courts as well as taxpayers, controlling the outcome of this case and others.

In characterizing Treas. Reg. § 301.6501(e)-1 and its temporary predecessor as interpretative, the government has relied principally on two alternative arguments. First, the government has argued that, in adopting the regulations, Treasury relied on its general authority under IRC § 7805(a) to "prescribe all needful rules and regulations for the enforcement of" the IRC. *See, e.g.*, Brief for the Appellee at 41-42, *United States v. Home Concrete & Supply, LLC*, (No. 09-2353) (4th Cir. Apr. 30, 2010). Second, the government has claimed that the regulations merely elaborated an undefined and ambiguous statutory term and thus clarified rather than changed existing law. *See id.* at 39-40. These arguments reflect a fundamental misunderstanding of the scope of the interpretative rule exception.

The government's first argument derives from the tax community's historic habit of reserving the legislative rule label for specific authority Treasury regulations while referring to regulations adopted by exercising general authority under IRC § 7805(a) as "interpretative" or "interpretive." *See, e.g.*, Salem et al., *supra*, at 728. Both drawing from and contributing to this practice, Treasury claimed for decades that the vast majority of its regulations interpreting the Internal Revenue Code are promulgated under the general authority of IRC § 7805(a) and, thus, are interpretative rules exempt from notice-and-comment rulemaking under APA §

553. In fact, through at least the 1950s, the general consensus among courts and scholars held that a general authority grant (whether tax or nontax) that authorized legally binding regulations would violate the nondelegation doctrine under the United States Constitution and thus be constitutionally invalid. *See, e.g.*, Kenneth Culp Davis, *Administrative Rules—Interpretative, Legislative, and Retroactive*, 57 Yale L.J. 919, 928-29 (1948); 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). Thus, for a long time, most Treasury regulations were indeed considered nonbinding—*i.e.*, lacking the force of law. *See* 1 Kenneth Culp Davis, Administrative Law Treatise § 5.03, at 300 (1958).

Understandings regarding the legal status of general authority regulations began to shift around the 1970s. Professor Richard Pierce has documented a dramatic rise in agency rulemaking in the late 1960s, traceable to (1) the enactment of several new federal statutes in the mid to late 1960s that gave new or existing agencies general rulemaking authority and (2) decisions of this Court that largely replaced formal rulemaking under APA §§ 556 and 557 with informal rulemaking under APA § 553 as the rulemaking norm and precluded judges from imposing procedural requirements beyond those expressed in APA § 553 upon informal rulemaking efforts. *See* 1 Richard J. Pierce, Jr., Administrative Law Treatise § 1.6 (5th Ed. 2010). Professors Thomas Merrill and Kathryn Watts have traced changing perceptions regarding the legal force of general authority regulations to efforts during that same period by agencies like the Federal Trade

Commission, the Food and Drug Administration, and the National Labor Relations Board to claim previously unasserted legislative authority under general authority grants. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 549-70 (2002).[3]

In *Mayo Foundation for Medical Education and Research v. United States*, 131 S.Ct. 704 (2011), this Court acknowledged the demise of the specific versus general authority distinction in administrative law for purposes of assessing whether agency action carries the force of law and recognized that, when the Treasury Department promulgates general authority regulations like Treas. Reg. § 301.6501(e)-1, it seeks to bind regulated parties with legal force. *See id.* at 714. *Mayo* concerned the eligibility of general authority Treasury regulation for *Chevron* deference rather than its characterization as a legislative rule, but it is difficult to imagine that a general authority Treasury regulation could carry the force of law for one purpose and not the other.[4] Perhaps in light of

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[3] Merrill and Watts suggest a different outcome with respect to general authority Treasury regulations, but do so based on a misconstruction of the penalty provisions in the War Revenue Act of 1917. *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism In Judicial Deference*, 90 Minn. L. Rev. 1537, 1603-04 (2007) (addressing Merrill and Watts).

[4] In fact, courts and scholars have on occasion used language quite similar to the two-part inquiry for *Chevron* eligibility articulated in *United States v. Mead Corp.*, 533 U.S. 218 (2001), to describe the force of law distinction between legislative and interpretative rules. For example, in *American Mining Congress v. Mine Safety & Health Admin.*, the court described a legislative rule as arising "if Congress has delegated legislative

Mayo, the Internal Revenue Service recently amended the Internal Revenue Manual to concede that some general authority Treasury regulations might be legislative rules, even while it continues insist that "most IRS/Treasury regulations will be interpretative." Internal Revenue Serv., Internal Revenue Manual § 32.1.1.2.8 (reflecting changes dated Sept. 23, 2011, and providing that "[w]hether a regulation is promulgated under a specific grant of authority in the [IRC] does not govern whether the regulation is interpretative or legislative"). Hence, the government may well have decided to drop this argument altogether.

The government's second claim, that its regulations merely elaborated an undefined and ambiguous statutory term and thus clarified rather than changed the law, is really beside the point. Whether an agency rule merely elaborates undefined or ambiguous statutory terms may serve as an indicator that a rule is interpretative rather than legislative. Some such rules are interpretative. Others, however, are legislative. If an agency with the congressionally delegated power to bind regulated parties with the force and effect of law exercises that power to elaborate a previously undefined statutory term, then that rule carries the force of law and is legislative. *See* Pierce, *supra*, at § 6.4 ("A rule that performs an interpretative function is a legislative rule rather than an interpretative rule if the agency has the statutory authority to promulgate a legislative rule and the agency exercises that power.")

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power to the agency and if the agency intended to exercise that power in promulgating the rule." *See* 995 F.2d 1106 (D.C. Cir. 1993).

Hence, the regulation at issue in *Mayo*, Treas. Reg. 31.3121(b)(10)-2(d), merely elaborated the meaning of the word "student" as utilized in the statute, yet this Court had no difficulty concluding that Treasury regulation was an exercise of delegated power and carried the force of law. *See* 131 S.Ct. at 714. Treas. Reg. § 301.6501(e)-1 is no different in this regard than the one in *Mayo*, except that the latter was promulgated consistently with the procedural requirements of APA § 553.

3. The Good Cause Exception Does Not Apply To Treas. Reg. § 301.6501(e)-1.

As noted, the usual justification that agencies offer for using interim-final rulemaking with post-promulgation notice and comment is the good cause exception of APA § 553(b)(B). That provision excuses agencies from engaging in pre-promulgation notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The government's failure to articulate a good cause claim in issuing either Temp. Treas. Reg. § 301.6501(e)-1 or Treas. Reg. § 301.6501(e)-1 should preclude its ability to rely on this exception now.

Ccourts generally require agencies asserting the good cause exception to do so expressly and contemporaneously. *See, e.g.*, *Buschmann v. Schweiker*, 676 F.2d 352, 356-57 (9th Cir. 1982);

Bohner v. Daniels, 243 F. Supp. 2d 1171, 1176 (D. Or. 2003); *see also* 1 Charles H. Koch, Jr., Administrative Law and Practice § 4.13[1] (3d ed. 2010) ("An agency cannot claim the 'good cause' exemption for the first time after its procedures have been challenged in court. It must invoke the exemption at the time of rulemaking and explain why it needs to bypass APA procedures."). The terms of APA § 553(b)(B) requires an agency claiming the exception to include both its finding of good cause and its reasons for that finding "in the rules issued." 5 U.S.C. § 553(b)(B). Reading this language strictly is consistent with the bedrock principal of administrative law, that reviewing courts should limit their evaluation of agency action to justifications offered contemporaneously. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). Treasury did not mention the good cause exception by name or offer any particular reasons for avoiding notice and comment in the preambles to either Temp. Treas. Reg. § 301.6501(e)-1 or Treas. Reg. § 301.6501(e)-1. *See* T.D. 9511, 75 Fed. Reg. 78897, 78898 (Dec. 17, 2010); T.D. 9466, 74 Fed. Reg. 49321, 49322 (Sept. 28, 2009). To date, the government has not claimed the good cause exception as justifying its use of interim-final rulemaking for Treas. Reg. § 301.6501(e)-1 or offered any explanation, either contemporaneously or on a post hoc basis, for why pre-promulgation notice and comment were impracticable, unnecessary, or contrary to the public interest.

Moreover, Treasury's failure to mention the good cause exception in the preamble to its

regulations is prima facie evidence of its contemporaneous intent not to make such a claim. The Internal Revenue Manual, which guides Internal Revenue Service employees in drafting Treasury regulations, provides instructions for claiming good cause including proposed justifications and language to be included in the regulatory preamble, none of which were included here.[5] *See* Internal Revenue Serv., Internal Revenue Manual § 32.1.5.4.7.5.1. The government should not be able to maintain claim to the good cause exception at this late date, in a reply brief before this Court.

C. Treasury's Post-Promulgation Notice And Comment In Finalizing Temp. Treas. Reg. § 301.6501(e)-1T Does Not Cure The Procedural Violation.

While courts and scholars agree that temporary or interim-final rules such as those used by Treasury in adopting Treas. Reg. § 301.6501(e)-1 violate APA § 553(b), they disagree over how to handle the breach. Courts have sometimes simply invalidated the succeeding final regulations. *See,*

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[5] For many years, the Internal Revenue Manual merely instructed IRS employees to include the following language in regulatory preambles to claim good cause: "These regulations are necessary to provide taxpayers with immediate guidance." *See* Hickman, *Coloring Outside the Lines*, *supra*, at 1781 (documenting manual's language at that time and identifying several Treasury Decisions containing such language). Earlier this year, on September 30, 2011, the Internal Revenue Service updated the Internal Revenue Manual retaining this instruction but identifying additional considerations potentially supporting a good cause claim. *See* Internal Revenue Manual § 32.1.5.4.7.5.1(7) & (8) (Sept. 30, 2011).

e.g., Air Transp. Ass'n of Am. v. Dep't of Transp., 900 F.2d 369, 379-80 (D.C. Cir. 1990) (holding final regulations invalid due to procedural failings of interim-final regulations), *vacated without opinion and remanded*, 498 U.S. 1023 (1991), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991); *cf. Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979) (holding post-promulgation notice and comment inadequate to remediate procedurally flawed final regulations). In other decisions, however, courts have declined to invalidate final regulations on such grounds, based upon a finding that the agency's handling of post-promulgation comments demonstrated an "open mind" in the process of adopting the final regulations. *See, e.g.*, *Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994); *Levesque v. Block*, 723 F.2d 175, 188 (1st Cir. 1983). Some courts are reluctant to undo agency regulations where doing so will yield no substantive difference. *See, e.g.*, *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 291 (7th Cir. 1979). Other courts are more concerned that allowing post-promulgation notice and comment to cure the procedural flaws of temporary regulations eviscerates the notice and comment requirements of APA § 553. *See, e.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 768 (3d Cir. 1982); *Sharon Steel Corp.*, 597 F.2d at 381 ("If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation.").

As a practical matter, the Court should be wary of taking too hard a line against interim-final rulemaking in the absence of a statutory exception from APA § 553. The procedural flaw that afflicts Treas. Reg. § 301.6501(e)-1 is not isolated to one or even a small number of regulations. Treasury has been issuing temporary regulations with only post-promulgation notice and comment and without contemporaneous good cause claims for three decades. In one relatively recent three-year period, Treasury issued temporary regulations in 84 of 232—or 36.2%—of regulation projects undertaken. *See* Hickman, *Coloring Outside the Lines*, *supra*, at 1748-49. Hundreds of Treasury regulations currently on the books could be endangered if the Court were to adopt a strict compliance model, and the tax system would be thrown into chaos to the undoubted detriment of taxpayers. Other areas of law might suffer similarly, as many other agencies employ interim-final rulemaking; presumably at least some of those efforts are premised on flawed assertions of good cause or another exception from APA § 553. *See* Asimow, *Interim-Final Rules*, *supra*, at 712-15 (counting interim-final rules published in the Federal Register and the agencies publishing them over time).

Furthermore, agencies that employ temporary or interim-final rules with post-promulgation notice and comment often do so based on claims of good cause or other exceptions that they believe in good faith to be valid and that only later prove to be flawed. In many instances, invalidating final regulations for the procedural flaws of their temporary predecessors will often be wasteful and

create unnecessary uncertainty in the law with no substantial apparent payoff for regulated parties. Particularly where an agency can demonstrate that it approached public comments with an open mind, invalidating a final regulation for the procedural flaws of its temporary predecessor may seem more arbitrary to regulated parties than the agency's failure to comply precisely with the terms of APA § 553.

At the same time, the Court should not simply permit agencies to ignore the terms of APA § 553 without consequence. Pre-promulgation public notice and opportunity for comment plays an important role in enhancing the legitimacy of agency rulemaking. If the Court consents entirely to agency uses of interim-final rulemaking that lack a valid exception from APA § 553, then agencies will have the power to act with the force of law and bind the actions of regulated parties for months or years without first pursuing public notice and comment, and Congress's goals for APA § 553 will be subverted.

Hence, as a general matter, a middle path based on some version of the open mind standard may ultimately prove to be the best alternative. *See, e.g.*, *Levesque v. Block*, 723 F.2d 175, 187-88 (2d Cir. 1983) (discussing and comparing the costs of interim-final rulemaking with the benefits of the open mind standard). The instruction in APA § 706 that reviewing courts take "due account . . . of the rule of prejudicial error" may offer a textual anchor for an open mind standard for evaluating interim-final rulemaking where no statutory exception from APA § 553 applies. 5 U.S.C. § 706. That said, the Court

need not resolve fully the parameters of such a compromise approach in this case, for the circumstances of Treas. Reg. § 301.6501(e)-1 should render it ineligible for leniency.

Where, as here, an agency adopts a procedurally invalid temporary or interim-final rule in the midst of litigation, the Court ought not to allow the final replacement of that rule to stand. The combination of ongoing litigation and a procedurally invalid temporary or interim-final rule is simply irreconcilable with the goal of meaningful public participation, as this case demonstrates.

In this instance, Treasury issued Temp. Treas. Reg. § 301.6501(e)-1T and its corresponding notice of proposed rulemaking in the midst of a protracted and very public litigation battle over the meaning of IRC § 6501(e). At the time that Treasury issued its temporary and proposed regulations, at least two circuit courts of appeals had rejected its interpretation in light of this Court's decision in *Colony v. Comm'r*, 357 U.S. 28 (1958). Not only had the IRS vowed to soldier on, but Treasury was quite explicit in the preamble to Temp. Treas. Reg. § 301.6501(e)-1 regarding the agency's disagreement with the adverse circuit court opinions and its goal of using the temporary regulations to obtain *Chevron* deference for its own view. *See* T.D. 9466, 74 Fed. Reg. 49321, 49321-22 (Sept. 28, 2009). IRS Associate Chief Counsel Deborah Butler was quoted as promising publicly that the government would seek reconsideration in some cases and appeal others based on the newly-issued temporary regulations. *See* Jeremiah Coder, *IRS Strikes Back Against*

Judicial Losses in Overstated Basis Cases, 125 Tax Notes 19 (Oct. 5, 2009). The government has observed that Treasury received only a single comment concerning the regulation's retroactive effect in response to its notice of proposed rulemaking, (Gov't. Br. at 29), meaning that Treasury received no comments at all regarding the wisdom or the substantive validity of extending the six-year statute of limitations to encompass basis overstatements. The Court should not take the paucity of comments in this instance as suggesting a lack of interest in or controversy surrounding Treasury's actions. In fact, shortly after announcing Temp. Treas. Reg. § 301.6501(e)-1T, Deborah Butler was also quoted acknowledging, "We anticipate controversy," and the temporary regulations were in fact highly controversial. Coder, *supra*, at 19 (reporting comments and reactions thereto). Instead, the Court should appreciate the lack of public participation in Treasury's rulemaking process as reflecting the tax community's lack of faith that such participation would be meaningful. Subsequent comments by Deborah Butler at another American Bar Association Tax Section meeting, delivered after the Tax Court invalidated Temp. Treas. Reg. § 301.6501(e)-1 and before Treasury issued its final regulation, aptly reflect the tax community's perception of Treasury's attitude toward the regulatory process: that judicial rejections of the IRS's preferred interpretation of IRC § 6501(e) would not change the agency's view, that the agency was committed to "a long haul to get to the right answer" and that the IRS would continue to litigate until it obtained "the right answer." Jeremiah Coder, *IRS Undeterred After Tax Court's Intermountain Decision*,

127 Tax Notes 729 (May 17, 2010) (reporting comments).

Any agency in the midst of litigation will have a difficult time convincing regulated parties that it approached notice-and-comment rulemaking fairly. Where, as here, the agency compounds a perception of intransigence by improperly postponing notice and comment in its quest to win, the courts ought to consider the agency hopelessly compromised.

II. THE COURT SHOULD NOT EXTEND *CHEVRON* DEFERENCE TO AGENCY REGULATIONS PROMULGATED IN VIOLATION OF CONGRESSIONALLY IMPOSED PROCEDURAL REQUIREMENTS.

A second question raised by this case concerns the relationship between procedural compliance and *Chevron* deference. In several cases regarding the scope of IRC § 6501(e), the significance of Treasury's procedural noncompliance for judicial review under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 465 U.S. 837 (1984), has generated disagreement and confusion among the litigants and the lower courts. In particular, the Fifth Circuit has suggested that, if IRC § 6501(e) were ambiguous, then Treasury's failure to comply with APA § 553 might mean that Treas. Reg. § 301.6501(e)-1 should be denied *Chevron* deference. *See Burks v. United States*, 633 F.3d 347, 360-61 n.9 (5th Cir. 2011). The Seventh Circuit, by contrast, has suggested its inclination to give *Chevron* deference to both temporary Treasury regulations and their final replacements, notwithstanding their arguable procedural invalidity. *See Comm'r v. Beard*, 633 F.3d

616, 623 (7th Cir. 2011). This case thus offers the Court an opportunity to clarify the extent to which *Chevron* step two and procedural compliance are related.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), this Court made clear that a lack of public notice and comment, by itself, would not leave agency action ineligible for *Chevron* review. *Id.* at 230-31. This conclusion is consistent with the standard articulated in *Mead* of looking to whether agency action carries the force of law. Congress may include language in a statute authorizing agency rules with the force of law but modifying the terms of APA § 553 in that context. *See, e.g., Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998). The APA itself authorizes legislative rules without notice and comment upon a contemporaneous and valid assertion of the good cause exception. *See* 5. U.S.C. § 553(b)(B).

Likewise, the Court has sometimes declined to deny *Chevron* deference to regulations merely because the agency adopted them in the midst of ongoing litigation. *See, e.g.*, *Mayo Foundation for Medical Education and Research v. United States*, 131 S.Ct. 704, 712-13 (2011); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740 (1996). In both of these cases, however, the Court observed that the agency adopted the regulation granted *Chevron* deference using the full notice-and-comment rulemaking procedures mandated by Congress. *See Mayo*, 131 S.Ct. at 714; *Smiley*, 517 U.S. at 741.

The Court has also suggested that, in evaluating the reasonableness of agency action at

Chevron step two, the Court's inquiry encompasses questions of broader compliance with the APA. For example, the Court just this month indicated that process review under *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983), and *Chevron* step two analysis are "the same" because both represent variations of the arbitrary and capricious standard of APA § 706(2)(A). *See Judulang v. Holder*, No. 10-694, Slip. Op. at 9 n.7, 2011 WL 6141311 (U.S. Dec. 12, 2011); *see also, e.g., National Ass'n of Regulatory Utility Comm'rs v. ICC*, 41 F.3d 721 (D.C. Cir. 1994) (noting that "the inquiry at the second step of *Chevron* overlaps analytically with a court's task under the [APA] . . . in determining whether agency action is arbitrary and capricious (unreasonable)"); Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi-Kent L. Rev. 1253, 1285-86 (1997) (advocating a merger of *Chevron* step two and process review under *State Farm* based on analysis of D.C. Circuit jurisprudence).

Although APA § 706(2)(D) specifically instructs reviewing courts to invalidate regulations that fail to comply with statutory procedures, APA § 706(2)(A) correspondingly compels reviewing courts to set aside regulations found to be "arbitrary, capricious, an abuse of discretion, or *otherwise not in accordance with law*." 5 U.S.C. § 706(2)(A) (emphasis added). Failing to comply with congressionally-mandated procedural requirements, whether found in APA § 553(b) or elsewhere, is obviously not in accordance with law. Treas. Reg. § 301.6501(e)-1 was adopted in the midst of litigation using procedures other than those mandated by Congress. As a result, *Chevron*

deference should not be available to Treas. Reg. § 301.6501(e)-1 given the circumstances of its issuance.

CONCLUSION

Tax shelters are a scourge. One does not need to be tremendously sympathetic to tax collectors to recognize that tax shelters undermine the viability of the federal tax system. Not everyone agrees which transactions are or are not tax shelters, but few would argue that the Son-of-BOSS transaction is not a tax shelter. Moreover, Treas. Reg. § 301.6501(e)-1 reaches many more taxpayers than merely tax shelter participants. Nevertheless, in its war against tax shelters, Treasury has itself gone too far in pushing the limits of the law. Treasury's failure to comply with the procedural requirements that Congress has imposed upon it is just as corrosive to the tax system as the behavior of tax shelter rogues. For all of the reasons stated above, in the interest of preserving taxpayer confidence in Treasury's fairness in administering the tax system, the Court should invalidate Treas. Reg. § 301.6501(e)-1.

Respectfully submitted,

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