

Temporary Treasury Regulations and IRB Guidance in a Post-Mead and Mayo World

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Kristin Hickman, [Unpacking the Force of Law](#), 66 **Vand. L. Rev.** 465 (2013).

With the Supreme Court's recent decision in *Mayo Foundation for Education and Research v. United States*, there is a huge void of scholarship regarding how administrative law principles apply in the tax context. Kristin Hickman helps fill that void by continuing her work at the intersection of administrative law and tax procedure in her recent *Vanderbilt Law Review* article "Unpacking the Force of Law," which deals with the treatment of temporary treasury regulations and IRB guidance after the Supreme Court's decisions in *Mayo* and *United States v. Mead Corp.*

In *Mead* and *Mayo*, the Court clarified that agency regulations received *Chevron* deference if they were based on either specific grants of rulemaking authority contained in a statute or on general rulemaking authority granted by Congress to a specific agency. *Mead* explained that an agency's regulation was entitled to *Chevron* deference as long as "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." In addition, in *Mayo*, the Supreme Court rejected the idea of tax exceptionalism stating "[w]e are not inclined to carve out an approach to administrative review good for tax law only."

In this article, Hickman explores how existing administrative procedures used by the Treasury and the IRS to issue Treasury Regulations and Internal Revenue Bulletin (IRB) guidance comport with the Supreme Court's recent decision in *Mayo* and *Mead*. In the past, Treasury argued that most Treasury regulations and IRB guidance were interpretative rules exempt from the notice-and-comment procedures required by the Administrative Procedure Act (APA). Treasury issued temporary regulations (with concurrent proposed regulations) with only post-promulgation notice and comment, and did not seek notice-and-comment for IRB guidance. Hickman explains that this creates a conundrum for those grappling with the force of law and/or validity of temporary regulations and IRB guidance. If temporary regulations and IRB guidance carry the force of law and thus are entitled to *Chevron* deference, must they also be promulgated in compliance with the APA? And if the answer is yes, are temporary regulations (and the final regulations that follow them) and IRB guidance that were promulgated without notice and comment invalid?

Hickman then walks readers through the thicket of administrative law and tax procedure. She notes that Treasury argued (and maybe stills argues) that most of its regulations are pursuant to its general authority and therefore are per se interpretative, and therefore not subject to the APA. While the Supreme Court rejected this dichotomy with regard to *Chevron* deference, it is possible that the distinction still exists for purposes of the application of the APA. It seems incoherent, however, for an agency regulation to regularly receive *Chevron* deference but not be required to comply with the APA's notice-and-comment procedures. It appears that while *Chevron* deference and application of the APA may not exclusively overlap, the APA generally applies to those regulations that carry the force of law in the *Mead/Chevron* context. (For more on that you will have to read her article.)

Hickman then concludes that both temporary regulations and IRB guidance carry the force of law

because taxpayers are subject to penalties for failure to comply with the regulations and guidance. As a result, Hickman concludes that both temporary regulations and IRB guidance are subject to notice and comment and are invalid to the extent that they are promulgated without such procedures. Hickman realizes the serious consequences of such a conclusion, and notes the practical implications “for the systemic integrity of the tax system are challenging.” She then describes ways to ameliorate the negative consequences of concluding that all current temporary regulations, and the concomitant final regulations, as well as IRB guidance that were promulgated without notice and comment are invalid.

Her article raises interesting questions about the penalty provisions, disclosure and force of law, especially in the context of IRB guidance. IRB guidance may be seen as notice to the taxpayer with regard to the IRS’s position in a certain situation. In a system that depends on voluntary compliance, it is reasonable to require taxpayers to notify the taxing authority when they are taking a position inconsistent with what the taxing authority believes to be the correct interpretation of the law. The penalty can be seen more as a penalty on the failure to disclose when a taxpayer is taking an aggressive position than a penalty for not following the IRB guidance. If IRB guidance lacks the force of law, it would receive *Skidmore* deference and notice and comment would not be required.

Hickman’s work here is insightful, and she clearly and painstakingly explains the application of administrative law principles in the tax context. Her conclusions naturally come from her argument that temporary Treasury regulations and IRB guidance have the “force of law,” and her work here is incredibly important. The Treasury has routinely argued that the APA does not apply in the tax context. Hickman’s work convincingly argues that it does and also sets out the significant mess that will be caused if Treasury does not ensure that its regulatory practices comply with the APA. Hickman’s work reminds us all, and most importantly the Treasury, that tax exceptionalism does not apply in the administrative law context and that the Treasury should take action to ensure that its promulgation of temporary Treasury regulations (and maybe IRB guidance) comply with the APA.

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