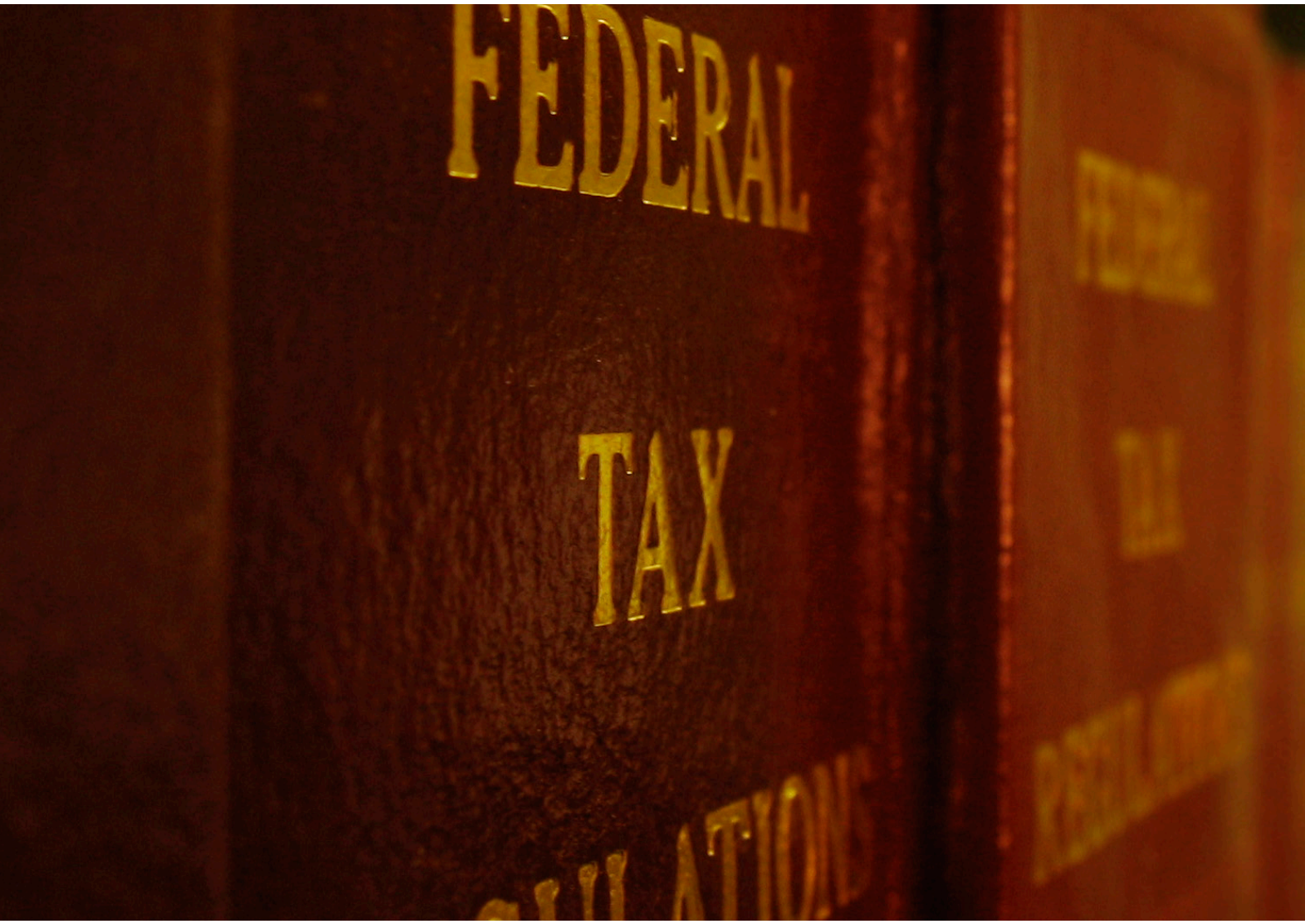
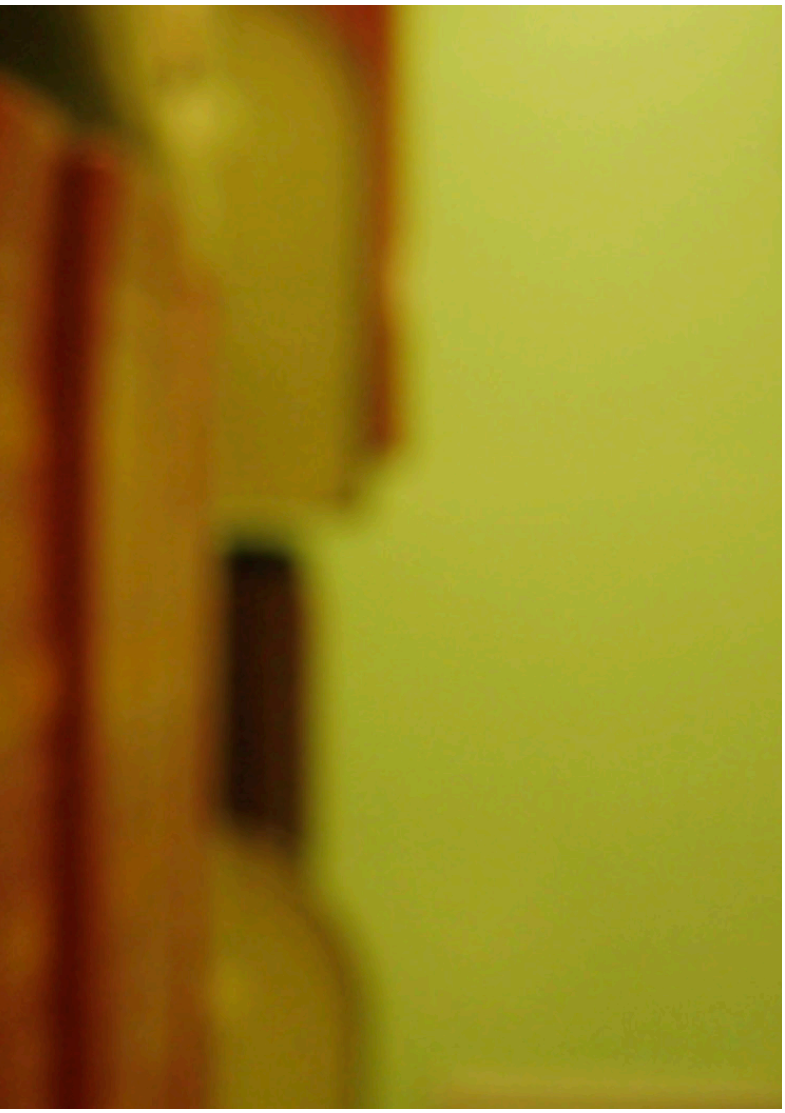
Deference to IRS Interpretations and the Challenges of *Auer* Deference

ANDREW R. ROBERSON AND JEFFREY M. GLASSMAN



Federal tax law begins with the Internal Revenue Code (the Tax Code), found in Title 26 of the U.S. Code. The Tax Code comprises thousands of pages but is only a small portion of the authorities relating to federal taxation (the tax laws). There are many tens of thousands of pages of regulations and judicial opinions interpreting the tax laws.

The Internal Revenue Service (IRS) also contributes to the tax laws through various forms of guidance, ranging from formal regulations published in the *Federal Register* and republished in the *Internal Revenue Bulletin* to informal frequently asked questions (FAQs) posted on the IRS website. Other authoritative guidance (e.g., revenue rulings and revenue procedures) is also published in the *Internal Revenue Bulletin*.[1] In addition, the IRS issues unpublished guidance known as "written determinations." Written determinations include materials such as letter rulings, determination letters, technical advice memoranda, and chief counsel advice.[2]



By sheer volume alone, it is evident that the tax laws are complex. The IRS' own employee manual notes, "Income tax law is too complex for examiners to immediately perceive its ramifications and provisions in all examinations. In the words of Supreme Court Justice Robert Jackson, 'No other branch of the law touches human activities at so many points. It can never be made simple.' "[3]

Agency interpretations of hard-to-square tax provisions can therefore be helpful and in some instances may even be necessary. When a court finds that a level of weight should be accorded to an agency interpretation—which in practice may guide the ultimate result in a case—the court is applying "deference." Deference to IRS interpretations is an established and sometimes appropriate undertaking, but care must be taken to ensure that it is applied only when warranted.

The Supreme Court has confirmed that the tax laws are subject to the same deference principles as other federal laws.[4] The Court emphasized the "importance of maintaining a uniform approach to judicial review of agency action." There are different levels of deference to agency action. Which level of deference potentially applies to an agency's interpretation depends on a variety of factors, including the medium in which the interpretation is expressed, the opportunity for outside parties to participate in the process, and the agency's intent behind the interpretation. This article summarizes the three levels of deference, and then focuses on what is commonly referred to as *Auer* deference.

Chevron Deference

Chevron deference—often viewed as the highest level of deference—can apply where Congress explicitly leaves a gap for an agency to fill.[5] In such situations, where Congress was likely ill-equipped to legislate regarding a particular issue or simply desired to leave an interpretation up to an agency, prudence dictates that the agency's perspective is important. For an interpretation to qualify for *Chevron* deference, however, the agency must intend for that interpretation to have the force of law. The use of the Administrative Procedure Act's (APA) notice-and comment procedures typically indicates the requisite intent.[6]

Chevron deference can apply to tax regulations, which normally go through notice-and-comment procedures.[7] To date, courts have not applied *Chevron* deference to other materials published in the *Internal Revenue Bulletin* (e.g., revenue rulings, revenue procedures, notices, or announcements). Nor have courts applied it to materials not published in the *Internal Revenue Bulletin*, such as private letter rulings, chief counsel advice, technical advice memoranda, etc., issued by the IRS. Neither the IRS nor the Department of Justice Tax Division currently advocates for *Chevron* deference for nonregulatory tax guidance.[8]

Skidmore Deference

The Supreme Court has made clear that guidance not deserving *Chevron* deference may still be entitled to *Skidmore* deference.[9] The amount of deference is limited, however, to the guidance's persuasive power. Per *Skidmore*, this will depend on the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and [other] factors which give it power to persuade …"[10]

Skidmore deference can apply to agency interpretations issued without using notice-and-comment procedures.[11] In *Skidmore*, the Court held that agency rulings, interpretations, and opinions "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[12] *Skidmore* deference is generally considered a lesser form of deference than *Chevron*.

Skidmore deference has been found applicable to revenue rulings and revenue procedures where the reasoning underlying the interpretation was sufficient.[13] *Skidmore* deference also seems potentially applicable to other IRS interpretations that appear to meet the thoroughness, validity-of-reasoning, and consistency mandates of *Skidmore*. Thus, it could be argued that IRS notices and announcements published in the *Internal Revenue Bulletin* should be entitled to *Skidmore* deference.[14] The IRS Chief Counsel Directives Manual (CCDM) provides that both are public pronouncements of IRS interpretations of the Code or other provisions of the law.[15] Seemingly, the IRS would thoroughly consider the merits, and implications, of these interpretations—they are, after all, directed to the public—before they are released to the public. But *Skidmore* deference may be inappropriate for IRS interpretations that are not released to the public, at least where it appears that the interpretation was not as thoroughly considered within the IRS.

Auer Deference

Another form of deference, now known as *Auer* deference, can apply to an agency's interpretation of its own regulations. *Auer* deference derives from language in the Supreme Court's *Bowles v. Seminole Rock & Sand Co.* opinion issued approximately 70 years ago.[16] There, the Supreme Court stated:[17]

> Since this involves an interpretation of an administrative regulation a court must look to the administrative construction of the regulation if the meaning of the words is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

The Supreme Court in *Seminole Rock* ultimately agreed with the agency's interpretation, but despite its references to the "ultimate criterion" and "controlling weight," the Court did not ultimately "defer" to the interpretation—at least not in the same way the term "defer" is currently understood. Instead, the Court appeared to rely on the agency's consistent interpretation—which was issued very soon after the release of the applicable regulation—to validate the Court's own interpretation of the regulation.[18] Thus, in the original *Auer* deference case, the Court found an agency interpretation helpful; but it did not entirely defer to the interpretation. It is worth noting that the agency interpretation in *Seminole Rock* was set forth in a bulletin made available to those impacted by the regulation.

> *Auer* presents a unique dilemma for much of the guidance issued in the tax arena. Taxpayers and the IRS are both statutorily prohibited from citing or relying on "written determinations" (i.e. letter rulings, determination letters, technical advice memoranda, and chief counsel advice). A court could be faced with determining whether an IRS interpretation of its own regulation articulated in written determination should be entitled to any deference. On one hand, the IRS should not be able to cite, as authority, the written determination. But, on the other hand, a court could find the underlying analysis persuasive and reflective of IRS subject-matter expertise.

Since *Seminole Rock,* the Court periodically cited to the above deference language.[19] In 1997, the Court in *Auer* reaffirmed, and appeared to broaden, *Seminole Rock*. Consistent with *Seminole Rock, Auer* held that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."[20] Potentially inconsistent, however, *Auer* accorded deference to an amicus brief—not to a contemporaneously rendered interpretation. Moreover, unlike in *Seminole Rock,* the Court in *Auer* primarily relied on the agency interpretation, rather than secondarily relied on the agency interpretation to buttress the Court's own interpretation.

Auer deference is unique from other forms of deference in that it limits the interpreted subject matter. On its face, and as some courts have concluded, *Auer* can be a particularly strong form of deference.[21] At first glance, it may seem logical to accord deference to an agency's interpretation of its own regulation. The agency is certainly

in a unique position to explain an ambiguity.[22] Despite the facial appeal of this approach, however, it may not always be appropriate (or necessary).

By way of example, let us suppose that the IRS promulgates a mostly clear regulation in January 2016. In February 2016, a taxpayer discovers an ambiguity in the regulation and requests that the IRS clarify. In March 2016, the IRS clarifies in published guidance. If the taxpayer were to disagree with the IRS clarification and set forth its own interpretation, the IRS interpretation should, in all likelihood, be accorded more deference than the taxpayer's interpretation. This scenario appears to more closely track the facts of *Seminole Rock* for determining when deference is appropriate.

The analysis is not always so straightforward. First, it is rare that the ambiguity will be discovered and clarified, let alone also challenged, in just a few months. Most tax disputes center around transactions that occurred many years earlier. Are the people who contributed to the drafting of the regulation still employed by the IRS? Even if these people are still with the IRS, are they the people being approached for, and providing, clarification? Considering the size of many agencies—the IRS had almost 80,000 employees during FY 2014[23]—this is unlikely. The underlying rationale behind *Seminole Rock* may rely on these assumptions being satisfied, but it is rare that they both will.

A more frequently encountered scenario: A taxpayer is under audit in 2015 relating, in part, to a position taken relating to a regulation promulgated in 1995. The taxpayer's position is based in part on its favorable, and arguably reasonable, interpretation of an ambiguous regulation. The IRS examination team solicits guidance from IRS Area Counsel concerning the IRS' view of the proper interpretation of the regulation.[24] Area Counsel then elevates a request to the IRS national office for technical advice.[25] The IRS employees in the national office interpreting the regulation were not at the IRS at the time the regulation was originally promulgated. Moreover, the process for issuing technical advice is necessarily more streamlined (e.g., generally fewer IRS employees are involved and may only represent one branch of the IRS) than the procedures for issuing a regulation. If one were to analyze this form of interpretation under the *Skidmore* power-to-persuade inquiry, a lack of thorough consideration could preclude deference. Indeed, the Supreme Court ruled similarly in *SmithKline Beecham*.[26]

Auer presents a unique dilemma for much of the guidance issued in the tax arena. Taxpayers and the IRS are both statutorily prohibited from citing or relying on "written determinations" (i.e., letter rulings, determination letters, technical advice memoranda, and chief counsel advice).[27] A court could be faced with determining whether an IRS interpretation of its own regulation articulated in written determination should be entitled to any deference. On one hand, the IRS should not be able to cite, as authority, the written determination. But, on the other hand, a court could find the underlying analysis persuasive and reflective of IRS subject-matter expertise. *Auer* is certainly more easily applied to the IRS' published guidance (e.g., revenue rulings and revenue procedures).

Since *Auer*'s release in 1997, the Supreme Court has been ratcheting back the situations to which *Auer* deference can apply, and *Skidmore*-like limitations have made their way into the jurisprudence. This is a welcome development. Much like *Skidmore*'s "thoroughness evident in [] consideration, the validity of [] reasoning, [and] consistency with earlier and later pronouncements" requirements, *Auer* deference cannot apply if an interpretation does not reflect an agency's "fair and considered judgment on the matter in question."[28] Other limitations also restrict *Auer*'s application, many of which are summarized in the table below. *Auer* deference is inappropriate for an interpretation that makes a provision illogical.[29] Indeed, *Auer* itself said an interpretation cannot be plainly erroneous.[30]

***Auer* Deference Limitations**
The regulation must be ambiguous.[31]
The position may not be plainly erroneous or inconsistent with the regulation.[32] The "current interpretation [must not] run [] counter to the intent at the time of the regulation's promulgation."[33]
The position must "reflect the agency's fair and considered judgment on the matter in question."[34] It cannot be: (1) a convenient litigating position,[35] (2) a post hoc rationalization designed to defend past agency action against attack,[36] or (3) a position that conflicts with a prior interpretation of the same regulation.[37]
The regulation cannot merely parrot or restate the statutory language;[38] thus, an agency may not, "under the guise of interpreting a regulation, [] create de facto a new regulation."[39]
The interpretation must not be an unfair surprise or one that imposes a new liability for past actions taken in good faith reliance on prior agency pronouncements or positions.[40] The interpretation should be long known to, or relied upon by, the regulated community.[41]
Deference may not be available unless the IRS' interpretation "is a matter of public record and is an interpretation upon which the public is entitled to rely when planning their affairs."[42]

These limitations can be compared with *Skidmore*'s validity-of-reasoning requirements. In addition, an agency cannot "under the guise of interpreting a regulation, [] create [] a new regulation."[43] Nor can an agency's interpretation create an unfair surprise or impose liability for past actions taken in good faith reliance on past agency positions.[44] These limitations can be compared with *Skidmore*'s consistency requirements. Basic construction principles should also apply.[45]

Based on the foregoing, it is unclear whether *Auer* is necessary or helpful. Some may argue that *Auer* creates an added layer of unnecessary complexity. And some may query whether agency lawyers,

continued on page 85

Andrew R. Roberson is a partner in the law firm of McDermott Will & Emery LLP, where he specializes in tax controversy and litigation matters. He represents clients before the IRS Examination Division and Appeals Office and has been involved in more than 50 matters at all levels of the federal court system. He has represented taxpayers in several cases involving deference issues, including before the Supreme Court in United States v. Home Concrete & Supply LLC, 132 S. Ct. 1836 (2012). *Jeffrey M. Glassman is an associate in the law firm of McDermott Will & Emery LLP. His practice focuses on defending clients in all stages of federal civil and criminal tax controversies, including litigation, matters before the IRS Examination Division and Appeals Office, and voluntary disclosures.*

in fact, have more subject-matter expertise than lawyers in private practice.

Notwithstanding whether it makes sense analytically to retain a separate *Auer* framework, statements made by all sitting Supreme Court justices cast doubt on *Auer*'s continuing viability.

In *Perez v. Mort. Bankers Ass'n,* issued last term, all nine Supreme Court justices either wrote or joined in an opinion that cast serious doubts regarding *Auer*.[46] Justice Sonia Sotomayor, writing for the Court stated that "[e]ven in cases where an agency's interpretation receives *Auer* deference, [] it is the court that ultimately decides whether a given regulation means what the agency says."[47] Justice Antonin Scalia, would go even further, commenting in a concurring opinion that the proper course is "abandoning *Auer* and applying the [Administrative Procedure Act] as written."[48] Scalia emphasized that "deference *compels* the reviewing court to 'decide' the text means what the agency says."[49] Justice Clarence Thomas, in a concurring opinion, noted that the *Auer* doctrine[50] "undermines [the Court's] obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."[51]

A few years earlier, in *SmithKline Beecham,* Justice Samuel Alito's majority opinion discussed the implicit risks underlying *Auer* (quoted at length, infra).[52] This discussion borrowed heavily from Scalia's side opinion in *Talk America,* in which Scalia argued *Auer* is bad law.[53] And in *Decker,* Chief Justice John Roberts, in a concurring opinion joined by Alito, noted that "[i]t may be appropriate to reconsider [the principles of *Auer*] in an appropriate case."[54] Other justices have, in prior cases, also seemed open to revisiting the principles of *Auer.*[55]

The government, in practice, tends to take an expansive reading of *Auer.* Recently, in a brief opposing a taxpayer's petition to the Supreme Court for writ of certiorari, the IRS argued that deference should continue to be accorded to agency interpretations advanced in government briefing—even where the government is itself a party to the case.[56] Prior to the taxpayer's petition, the Court of Appeals for the Second Circuit, sua sponte, accorded deference to the interpretation advanced by the government in briefing.[57] Recall in *Auer,* the government advanced its interpretation in an amicus brief—i.e., it was not a party to the case. Ultimately, the Supreme Court denied the taxpayer's petition.[58] In another recently filed brief, the government argued for—and the Court ultimately accorded—deference to the government's consistent litigating position regarding an interpretation of a tax regulation.[59] It is worth noting that in this case, the Department of Justice, not the IRS (i.e., the agency) advanced the interpretation. Even though the Department of Justice represents the IRS in litigation, the Department of Justice takes the position that it can argue what it thinks is right and is not bound by IRS positions.[60]

An expansive reading of *Auer* can present unforeseen consequences. The Supreme Court, in an opinion authored by Alito and citing Scalia's prior side opinion in *Talk America,* summarized this risk in *SmithKline Beecham*:[61]

> Our practice of deferring to an agency's interpretation of its own ambiguous regulations undoubtedly has important advantages, but this practice also creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rule-making. It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

This risk of unfair surprise would seemingly be mitigated to some degree by requiring agency interpretations to be published to provide prospective guidance—just as the interpretation in *Seminole Rock* was. It is unclear what remains of *Auer,* but as of today it remains the law. On one hand, many limitations have been placed in the jurisprudence. On the other hand, some courts seem to be expanding the reach of *Auer.* Whether *Auer* retains any vitality in the future depends on if or when the Supreme Court revisits and squarely addresses the issue.

It is also unclear whether *Auer* deference can apply to some of the IRS' informal guidance upon which taxpayers are statutorily precluded from citing or relying.[62] The U.S. Tax Court does not appear to be a big proponent of according deference to informal IRS guidance. In *CSI Hydrostatic,* the court declined to accord "any deference" to an IRS private letter ruling where the IRS "ha[d] not cited any *published* ruling, procedure, or practice interpreting the interplay" of a Code section and regulation.[63] These cases are consistent with the Tax Court's directive years earlier that "in order for an agency's interpretation to be binding in a given situation, it must be clearly made a matter of public record such that all affected parties are aware of it."[64] Indeed, the IRS' stated position, as published on the inside cover of each issue of the *Internal Revenue Bulletin*, is that "[u]npublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases."[65] This runs counter to any argument that an unpublished ruling reflects that informal IRS guidance reflects the "fair and considered judgment" of the IRS, which is necessary for *Auer* to apply. If an agency thoroughly vetted the implications of a particular interpretation, would not the agency also publish the interpretation and present a more clear case for deference? Other courts have similarly acknowledged the perils in granting *Auer* deference to nonbinding agency interpretations.[66]

Conclusion

The future of *Auer* deference is difficult to predict. The government has, at times, advocated for such deference for private guidance and even arguments made for the first time on brief. If courts were to extend *Auer* deference to apply to these forms of guidance—as well as to interpretations advanced by parties in a case—it could prove a pyrrhic victory. If the IRS were to receive *Auer* deference for a private letter ruling's interpretation of an ambiguous regulation, what is to stop a taxpayer from also citing a private letter ruling to support the taxpayer's interpretation? Is it a one-way street for the government only? What about IRS arguments on brief? In the current electronic age, taxpayers can easily access briefs in other cases to determine the IRS' litigating position on brief. As renowned tax

law scholar Martin D. Ginsburg once said: "Every stick crafted to beat on the head of a taxpayer will metamorphose sooner or later into a large green snake and bite the [IRS] commissioner on the hind part."[68] Perhaps so too with *Auer* deference. ⊙

Endnotes

[1]*See* Rev. Proc. 89-14, § 5, 1989-1 C.B. 814.
[2]*See* 26 U.S.C. § 6110(i)(1).
[3]IRS Internal Revenue Manual (I.R.M.) 4.10.7.1(3) (Jan. 1, 2006).
[4]*See Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011).
[5]*Id.*
[6]*See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).
[7]*See* Treas. Reg. § 601.601(a)(2). In *Mayo*, the Supreme Court concluded that general- and specific-authority tax regulations receive the same level of deference. 562 U.S. at 45.
[8]*See, e.g., Webber v. Commissioner*, 144 T.C. No. 17, slip op. at 48-49 n.12 (June 30, 2015); Treas. Reg. § 601.601(d)(2)(v)(d); *DOJ Won't Argue for Chevron Deference for Revenue Rulings and Procedures*, 131 Tax Notes 674 (May 16, 2011).
[9]*See Mead*, 533 U.S. at 227-28.
[10]*Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).
[11]*Id.*
[12]*Id.*
[13]*See, e.g., Est. of Schaefer v. Commissioner*, 145 T.C. No. 4, slip op. at 16 (July 28, 2015); *Cf. PSB Holdings Inc. v. Commissioner*, 129 T.C. 131, 142 (2007) (declining to apply *Skidmore* deference to a revenue ruling where the relevant statement in the ruling was limited to one sentence and did not properly interpret the statutory text or contain adequate reasoning).
[14]*See, e.g., Blakeney v. Commissioner*, T.C. Memo. 2012-289 (noting that *Skidmore* deference may apply to IRS notices but finding resolution of that question unnecessary).
[15]*See* C.C.D.M. 32.2.2.3.3 and 4 (Aug. 11, 2004).
[16]325 U.S. 410 (1945).
[17]*Id.* at 413-14.
[18]*Id.* at 417.
[19]*See, e.g., Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Thorpe v. Hous. Auth. Of Durham*, 393 U.S. 268, 276 (1969); *Immigration and Naturalization Serv. v. Stanisic*, 395 U.S. 62, 72 (1969); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *N. Indiana Pub. Serv. Co. v. Porter Cty. Chapter of Izaak Walton League of Am. Inc.*, 423 U.S. 12, 15 (1975); *Transamerican Freight Lines Inc. v. Brada Miller Freight Sys. Inc.*, 423 U.S. 28, 41 n.7 (1975); *United States v. Larionoff*, 431 U.S. 864, 872-73 (1977); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Mullins Coal Co. of Virginia v. Dir., Office of Workers' Comp. Programs, U.S. Dep. of Labor*, 484 U.S. 135, 159-60 (1987); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Stinson v. United States*, 508 U.S. 36, 36-37 (1993); *Sec. Servs. Inc. v. Kmart Corp.*, 511 U.S. 431, 436, n.2 (1994); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 200 (1996).
[20]*Auer v. Robbins*, 519 U.S. 452, 461 (1997).
[21]*See, e.g., Union Carbide Corp. v. Commissioner*, 697 F.3d 104, 109 (2d Cir. 2012), *aff'g* T.C. Memo. 2009-50, *cert. denied*, 133 S. Ct. 1626 (2012); *Intermountain Ins. Service of Vail v. Commissioner*, 650 F.3d 691, 708 (D.C. Cir. 2011), *judgment vacated by* 132 S. Ct. 2120 (2012); *Abbott Laboratories v. United States*, 573 F.3d 1327, 1332-33 (Fed. Cir. 2009).
[22]*See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152 (1991) ("Because the Secretary promulgates these standards, the Secretary is in a better position … to reconstruct the purpose of the regulations in question.")
[23]IRS Data Book, at 66 (2014) *available at:* www.irs.gov/pub/irs-soi/14databk.pdf.
[24]*See* I.R.M. 4.2.3.3 through 4.2.3.3.1.3 (Oct. 1. 2003). Area Counsel is the legal advisor to the IRS Area Director. I.R.M. 4.2.3.3.1 (Oct. 1, 2003).
[25]*See* I.R.M. 4.2.3.4 through 4.2.3.4.5 (Oct. 1, 2003).
[26]*Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012) ("where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.")
[27]*See* 26 U.S.C. § 6110(k)(3).
[28]*SmithKline Beecham*, 132 S. Ct. at 2166, citing as an example, *Chase Bank USA NA v. McCoy*, 562 U.S. 195 (2011).
[29]*See W. Mass. Elec. Co. v. FERC*, 165 F.3d 922, 926 (D.C. Cir. 1999) ("In a competition between possible meanings of a regulation, the agency's choice receives substantial deference so long as it is logically consistent with the language of the regulation.") (internal citations omitted); *Cassell v. FCC*, 154 F.3d 478, 484 (D.C. Cir. 1998) ("interpretation follow[ed] logically from the language [of the interpreted subject matter].")
[30]*Auer*, 519 U.S. at 461.
[31]*Christensen v. Harris Cnty.,* 529 U.S. 576, 588 (2000).
[32]*Auer,* 519 U.S. at 461.
[33]*Gonzales v. Oregon,* 546 U.S. 243, 257 (2006) (quotations omitted).
[34]*SmithKline Beecham,* 132 S. Ct. at 2166 (quoting *Auer*, 519 U.S. at 462).
[35]*Id.* at 2167*; Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213 (1988).
[36]*SmithKline Beecham,* 132 S. Ct. at 2167; *Auer,* 519 U.S. at 462.
[37]*SmithKline Beecham,* 132 S. Ct. at 2167; *Gonzales*, 546 U.S. at 257.
[38]*Gonzales,* 546 U.S. at 255, 257.
[39]*Christensen*, 529 U.S. at 588.
[40]*SmithKline Beecham*, 132 S. Ct. at 2167.
[41]*Udall v. Tallman,* 380 U.S. 1, 16-18 (1965).
[42]*CSI Hydrostatic Testers Inc. v. Commissioner,* 103 T.C. 398, 409 (1994), *aff'd* 62 F.3d 136 (5th Cir. 1995); *see also S. Pac. Transp. Co. v. Commissioner,* 75 T.C. 497, 541 (1980).
[43]*Christensen*, 529 U.S. at 588.
[44]*SmithKline Beecham*, 132 S. Ct. at 2167.
[45]*See, e.g., Gelman v. F.E.C.*, 631 F.2d 639, 643 (D.C. Cir. 1980)" (holding that a "construction" leads to a conclusion that is illogical or at odds with the apparent purpose of the statute, there can be no doubt as to the correctness of the agency's position.")
[46]135 S. Ct. 1199 (2015).
[47]*Id.* at 1208 n.4 (majority joined by Roberts, Kennedy, Ginsburg, Breyer, and Kagan, JJ; Alito, J. joined in part, including the part relating to *Auer*).
[48]*See id.* at 1213 (Scalia, J. concurring).
[49]*Id.* at 1212 (emphasis in original).
[50]Justice Thomas referred to the *Seminole Rock* line of cases, which includes *Auer.*
[51]*Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring).
[52]*SmithKline Beecham*, 132 S. Ct. at 2168 (quoted, *infra* n.61).
[53]*See Talk Am. Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring).
[54]*Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1338 (2013) (Roberts, J., concurring).
[55]*See, e.g., Shalala v. Guernsey Memorial Hosp.,* 514 U.S. 87, 102-14 (1995) (O'Connor, J., dissenting, joined by Scalia, Souter,

and Thomas, JJ.) (concluding an agency's interpretation to be plainly erroneous and inconsistent with the applicable regulation); *Thomas Jefferson Univ.*, 512 U.S. at 518-531 (Thomas, J., dissenting, joined by Stevens, O'Connor, and Ginsburg, JJ.) (criticizing the majority opinion as "if this were a case of model agency action" and concluding the [agency]'s construction … runs afoul of the plain meaning of the regulation and therefore is contrary to law;") *accord Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (there is probably "little left of *Auer*").

[56]*See* Brief for the Respondent in Opposition at *11-14, *Union Carbide Corp. v. Commissioner*, No. 12-685 (U.S. Feb. 4, 2013), 2013 WL 476351.

[57]*Union Carbide Corp. v. Commissioner*, 697 F.3d 104, 108-09 (2d Cir. 2012).

[58]*Union Carbide Corp. v. Commissioner*, 133 S. Ct. 1626 (2013).

[59]*See* U.S. Memorandum of Law in Support of Its Motion for Partial Summary Judgment, at 17-18, *Goodrich Corp. v. United States*, No. 03:10-cv-00105 (W.D.N.C.), opinion at 846 F.Supp.2d 445, 459 (2012).

[60]*See, e.g.*, Opening Brief for United States, at 57, *Illinois Lumber and Material Dealers Ass'n Health Ins. Trust v. United States*, 2014 WL 4802341 (8th Cir.) ("a refund suit is a *de novo* proceeding at which [the Government] is not estopped, or otherwise bound, by the earlier statements of IRS employees,") opinion at 794 F.3d 907 (2015).

[61]132 S. Ct., 2156, 2168 (2012) (internal citations and footnotes omitted).

[62]The IRS' stated position, as published on the inside cover of each issue of the *Internal Revenue Bulletin*, is that "[u]npublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases." "Published rulings" are limited to revenue rulings, revenue procedures, notices, announcements, and news releases. I.R.M. 32.2.1.2 (Aug. 11, 2004).

[63]*CSI Hydrostatic Testers*, 103 T.C. at 409 (emphasis added). This case was decided pre-*Auer* but relied upon *Seminole Rock*.

[64]*S. Pac. Transp.*, 75 T.C. at 541-42 (citing *Udall*, 380 U.S. at 16-18).

[65]"Published rulings" are limited to revenue rulings, revenue procedures, notices, announcements, and news releases. I.R.M. 32.2.1.2 (Aug. 11, 2004); *accord Laue v. Commissioner*, T.C. Memo. 2010-105 at *10 (explaining that a Service Center Advice is not precedent, is not law, and is not binding); *see also* 26 U.S.C. § 6110(i), (k)(3).

[66]*E.g., Eastman Kodak Co. v. STWB Inc.*, 452 F.3d 215, 222 n.8 (2d Cir. 2006); *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298, 304-05 (5th Cir. 2003).

[67]Ginsburg, Martin D., *Making Tax Law Through the Judicial Process*, 70 A.B.A. J. 74, 76 (1984).