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Introduction

In *Mayo Foundation for Medical Education & Research v. United States*,[1] the Supreme Court held that judges interpreting regulations promulgated by the Treasury Department should apply the standard of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[2] *Chevron* deference is applied when courts hear challenges to regulations issued by other federal agencies, such as the Environmental Protection Agency (EPA), and prior to *Mayo* it was unclear if this standard also applied in tax administration cases, or if tax cases warranted greater scrutiny.[3] Despite *Mayo's* holding that *Chevron* deference applies to all areas of administrative law evenly, the Supreme Court's current trend is a narrowing of *Chevron's* application,[4] and an overall curtailing of deference to federal agencies.[5] The resulting uncertainty surrounding *Chevron* translates into uncertainty over how much reliance can be placed on regulations issued by agencies, such as those promulgated by the Treasury Department pursuant to the Tax Cuts and Jobs Act

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1. 562 U.S. 44, 56-57 (2011).

2. 467 U.S. 837, 842-43 (1984).

3. Michael W. McConnell, *Kavanaugh And The "Chevron Doctrine*, SLS BLOGS (Aug. 2, 2018), https://law.stanford.edu/2018/08/02/kavanaugh-and-the-chevron-doctrine/; Steve R. Johnson, The Rise and Fall of Chevron in Tax: From the Early Days to King and Beyond, PEPP. L. REV. 14, 21-23 (2015).

4. Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Judge Kavanaugh, Chevron Deference, and the Supreme Court,* THE REGUL. REV. (Sept. 3, 2018), https://www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/.

5. *See infra* Section III.

(TCJA) of 2017.[6] This expansive tax legislation left open many questions for businesses and tax professionals regarding definitions, calculations, and other implementation concerns.[7] The Treasury Department attempted to answer these questions and concerns with over 1,000 pages of regulations and sub-regulatory guidance.[8] The question now is how much deference will courts afford this regulatory guidance?[9] Due to the ambiguities and gaps left in TCJA and taxpayers' need for answers, courts will likely be deferential to this Treasury guidance, despite the general trend away from deference.[10] It is unclear however, if *Chevron* deference will be the precise standard used to uphold the regulations and sub-regulatory guidance, or if a less deferential standard will be created in TCJA's wake.

Courts should maintain the current standards of deference in the tax administration arena, as this will foster a sense of certainty for businesses and tax professionals, and will support uniformity in interpretation and application of the law.[11] This comment traces the case law that developed the various standards of deference, including *Chevron*,[12] as well as the history of the application of these standards specifically in tax administration.[13] This comment then explores how deference is likely to be, and should be, applied to regulations and sub-regulatory guidance that followed the enactment of TCJA.[14] Specifically addressed herein are Treasury Regulation § 1.199A[15] and Revenue Procedure 2019-11,[16] both published to clarify the 26 U.S.C. § 199A deduction for qualified business income of passthrough entities,[17] using Maryland's small business economy to exemplify the important role of these agency rules.[18]

6. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (to be codified in scattered sections of 26 U.S.C.); *see infra* Section IV.

7. Alexandra Minkovich et al., *TCJA – So Many Questions, So Little Time*, THE TAX ADVISER (Dec. 3, 2018), https://taxexecutive.org/tcja-so-many-questions-so-little-time/.

8. Garrett Watson, *Two Years After Passage, Treasury Regulations for the Tax Cuts and Jobs Act Surpass 1,000 Pages*, TAX FOUND. (2019), https://taxfoundation.org/treasury-regulations-for-the-tcja/.

9. Shannon Meraw, *The Supreme Court Curtails but Retains Agency Rule Deference – How Much Will it Matter?*, THE BROOKINGS INST. (Sept. 24, 2019), https://www.brookings.edu/research/the-supreme-court-curtails-but-retains-agency-rule-deference-how-much-will-it-matter/; Alex Guillen & Paul Demko, *How the New Supreme Court Could Stymie a Biden Presidency*, POLITICO (Sept. 25, 2020, 6:16 PM), https://www.politico.com/news/2020/09/25/supreme-court-regulations-biden-421934.

10. *See infra* Section III, IV.

11. *See infra* Section IV.

12. *See infra* Section I.

13. *See infra* Section II.

14. *See infra* Section IV.

15. 26 C.F.R. § 1.199A-1 (2019); 26 C.F.R. § 1.199A-3 (2020); *see infra* Section IV.B.

16. Rev. Proc. 2019-11, 2019-09 I.R.B. 742; *see infra* Section IV.C.

17. *See infra* Section IV.A.

18. *See infra* Section IV.

I. The Development of Judicial Deference

Deference refers to the concept that courts will be respectful of decisions and rules created by federal agencies developing and implementing regulatory guidance, and will not be overly scrutinous if these regulations and rules are challenged in court.[19] *Chevron* deference, the primary standard discussed herein, often arises in challenges to regulations produced by agencies that have gone through the notice and comment rulemaking process.[20] Such regulations are often representations of how agencies interpret the statutes governing them.[21] While deference does not mean that courts will blindly follow decisions of federal agencies, "courts may treat an agency's interpretation as binding so long as it is reasonable — even if another interpretation may also be reasonable, or even more reasonable."[22] There are three primary standards of deference a court will grant, depending on the type of guidance and the context with which it was issued: *Chevron*,[23] *Skidmore*,[24] and *Auer*.[25]

A. Chevron Deference

Chevron deference provides the most deferential standard of the three and in the modern judicial context, generally applies in all cases involving an agency regulation that courts may consider,, including Treasury regulations.[26] *Chevron* "applies . . . where Congress delegated authority to the agency to make rules carrying the force of law, and where the interpretation is made pursuant to that authority – that is, by notice-and-comment rulemaking or formal adjudication."[27] *Chevron* deference, established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[28] will

19. *Deference (administrative state)*, BALLOTPEDIA, https://ballotpedia.org/Deference_(administrative_state) (las visited Feb. 12, 2021).

20. Steven Katz, *Supreme Court Rewrites the Rules for Judicial Deference to Agency Interpretations*, CONSTANGY, BROOKS, SMITH & PROPHETE LLP (July 2, 2019), https://www.constangy.com/newsroom-newsletters-870; *Notice and Comment*, JUSTIA, https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/notice-and-comment/ (last updated Apr. 2018) (explaining the notice and comment rulemaking procedure, which government agencies use when developing regulations and other rules. During this process, agencies (1) "publish notice of a proposed rule in the *Federal Register,"* (2) collect comments, data, and arguments from the public, and (3) consider and respond to these comments).

21. Valerie C. Brannon & Jared P. Cole, *Chevron Deference: A Primer*, CONG. RSCH. SERV. (Sept. 19, 2017), https://fas.org/sgp/crs/misc/R44954.pdf.

22. Andrew R. Roberson & Timothy S. Shuman, *Deference Principles: Tax Litigation's Next Battleground*, MCDERMOTT WILL & EMERY, https://www.mwe.com/insights/deference-principles-tax-litigations-next-battleground/ (last visited Oct. 23, 2020).

23. Developed in Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

24. Developed in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

25. Developed in Auer v. Robbins, 519 U.S. 452, 461 (1997).

26. Roberson & Shuman, *supra* note 22.

27. Katz, *supra* note 20.

28. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

generally be applied when the congressional statute that the regulation in question is addressing is "ambiguous" and the applicable agency interpretation is "based on a permissible construction of the statute." [29] In this case, "a court will apply the agency's interpretation, [even if another interpretation is] possibly even more reasonable."[30]

Courts apply a two-step inquiry to determine if *Chevron* deference is appropriate.[31] At step one, the court will ask whether the statute being addressed by the regulation in question has plain meaning and whether the department or agency acted consistently with that meaning in promulgating the subsequent regulation.[32] If the court determines that the statute in question was, in fact, ambiguous, then under step two, the court will ask whether the agency's interpretation was reasonable, and not arbitrary or capricious.[33]

The *Chevron* case, which developed this two-step inquiry, involved a challenge by environmental groups to the EPA's interpretation of the word "source" in the Clean Air Act of 1963.[34] In regulations governing permit requirements for pollutant-emitting factories,[35] companies planning to build or install any major "source" of air pollutants were required to first go through a review process.[36] The relevant statute[37] did not precisely define what constituted a "source" of air pollutants, so the EPA initially developed a definition that covered essentially any significant change or addition to a plant or factory.[38] In 1981, the EPA changed this definition to a more flexible one that could encompass a plant or factory in its entirety.[39] This new definition favored factories, allowing them to avoid the "new-source review" process entirely if, when increasing their plant's emissions through building or modifying, they simultaneously modified other parts of their plant to reduce emissions so that the overall change in the plant's emissions was zero.[40] The Court upheld the EPA's new definition and formulated the crucial two step inquiry, now known as the *Chevron* standard of deference.[41]

29. *Id.* at 843.

30. Roberson & Shuman, *supra* note 22.

31. Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L. J. 833, 834 (2001).

32. *Chevron*, 467 U.S. at 842-43.

33. *Id.* at 843.

34. 42 U.S.C. § 7401 (1963).

35. *Chevron* cites the regulation as 40 C.F.R. § 51.18(j)(1) (1983), but the current regulation is 40 C.F.R. § 51.165(a)(3)(ii)(j) (2011).

36. *Chevron*, 467 U.S. at 849-51.

37. 42 U.S.C. § 7401 (1963).

38. *Chevron*, 467 U.S. at 858-59.

39. *Id.*

40. *Id.*

41. "First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to

Under the first step, the Court agreed that the statute did not speak to the precise issue, namely the appropriate definition of "source."[42] In determining the reasonableness under step two, the court noted that the EPA's interpretation was consistent with one of the principal goals of the statute – bridging environmental concerns with economic growth.[43] There were also policy reasons underlying the Court's decision to defer to the EPA[44] given its expertise and "greater institutional competence . . .as compared to courts."[45]

B. Skidmore Deference

While *Chevron* typically applies to more formal agency promulgations, like regulations, *Skidmore* deference, a less deferential standard, "has traditionally been applied to . . . forms of published guidance such as . . . revenue rulings [,] procedures, notices and announcements."[46] *Skidmore* deference, developed in *Skidmore v. Swift & Co.*,[47] considers whether an agency's "interpretation is thoroughly considered, well-reasoned and consistent with prior and subsequent [agency] positions," through a multi-factor assessment.[48] These factors, although not explicitly outlined in the case itself, include: [49] (i) contemporaneousness,[50] (ii) long-

the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43.

42. *Id.* at 860-61.

43. *Id.* at 865-66.

44. *Id.* at 864-65.

45. Brannon & Cole, *supra* note 21 at 3.

46. Roberson & Shuman, *supra* note 22.

47. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

48. Roberson & Shuman, *supra* note 22; *Skidmore*, 323 U.S. at 140.

49. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1236-37 (2007).

50. Contemporaneousness assesses temporal proximity of the interpretation's promulgation to the statute's enactment. Hickman & Krueger, *supra* note 49, at 1288. "A contemporaneous interpretation may trigger deference because the agency's proximity to the statute's enactment suggests that the interpretation benefited from special insight into Congress's wishes." *Id.*

standing duration,[51] (iii) consistency,[52] (iv) reliance,[53] (v) complexity of the issue,[54] (vi) presence of rulemaking authority,[55] (vii) need for agency action to implement the statute,[56] and (viii) congressional ratification.[57] In *Skidmore*, a case involving the rulings and interpretations of an Administrator within the Department of Labor,[58] the Court held that while courts do not have to defer to an agency's statutory interpretation for questions of fact, the agency's interpretation of the statute should be taken into consideration because through the agency's pursuit of its duties, it has accumulated considerable experience through its work.[59]

51. Long-standing duration looks at how long the agency interpretation in question has been in effect. *Id.* Such "interpretations may trigger deference because, in theory, Congress has acquiesced, especially where it has reenacted the statutory provision after the agency's interpretation was made public." *Id.*

52. Consistency assess whether an agency interpretation is consistent with other rules and decisions the agency has made with respect to the same or similar legal issues, or is consistent with other Congressional enactments. *Id.* at 1286-87. "Generally, courts value consistency because it protects parties' reliance interests, promoted the rule of law by ensuring similarly situated parties are treated, and guards against capricious or ill-intentioned agency action." *Id.*

53. Reliance assesses whether or not there has been significant "public or private reliance on [the] agency rules or guidances" promulgated. William N. Eskridge, Jr. & Lauren E. Bear, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdaan, 96 GEO L. J. 1083, 1092 (2007-08).

54. Complexity of the issue assess the value of agency expertise that Congress or the Judiciary may lack in a given area of law. Hickman & Krueger, *supra* note 49 at 1249.

55. Presence of rule-making authority assess whether there was a specific grant by Congress authorizing the agency to generate rules on the issue in question, or if the agency is operating under a general delegation of authority to an agency to generate rules. Hickman & Krueger, *supra* note 49, at 1300.

56. Need for agency action to implement the statute assesses how crucial the agency interpretation in question is in order to carry out the relevant statute. Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why it Matters*, 59 ADMIN. L. REV. 673, 681 (2007).

57. Congressional ratification assesses whether Congress has later incorporated the agency's interpretation in subsequent legislation. Hickman & Krueger, *supra* note 49, at 1288.

58. Skidmore v. Swift & Co., 323 U.S. 134, 138-39 (1944). This case was brought pursuant to the Fair Labor Standards Act by firemen working at a packing plant who were required to periodically stay overnight and on-call in order to respond to fire alarms, but without overtime pay for the time spent not responding to fires. *Id.* at 135-36. The specific question was whether courts could consider agency guidance, such as an interpretive bulletin by the U.S. Department of Labor's Wage and Hour Division that read the Fair Labor Standards Act flexibly, so that if employees had significant downtime while on-call, it was permissible to not count the hours as overtime pay, with which the trial court agreed. *Id.* Although the Supreme Court here agreed that courts may look to agency guidance, it ultimately reversed, finding it to be a "restricted" view that "waiting time may not be work." *Id.* at 140.

59. *Id.* at 137.

C. Auer Deference

Lastly is Auer deference, established in *Auer v. Robbins*,[60] which is a standard of deference applied in cases where an agency is interpreting its own ambiguous regulation.[61] Under this standard,

> *"[i]f certain conditions[62] are met, the [agency's] interpretation will be afforded controlling deference based on the theory that the agency is the best party to interpret its own regulations" [and] "so long as the necessary requirements are satisfied, a court will accept the agency's interpretation even if it believes another interpretation is also reasonable."*[63]

II. Deference in the Tax Administration Arena

Initial post-*Chevron* cases involving court interpretations of Treasury regulations applied a less deferential standard than *Chevron*, because it was believed that a *Chevron* standard might inhibit a taxpayer's abilities to effectively challenge regulations.[64] This was the case until *Mayo Foundation for Medical Education &*

60. 519 U.S. 452 (1997). This case was brought pursuant to the Fair Labor Standards Act by police officers alleging that they were entitled to overtime pay, to which the Board of Police Commissioners argued that the officer was considered exempt from the Act. *Id.* at 455. Pursuant to one Secretary of Labor regulation, an employee could be exempt from the Act, and therefore not entitled to overtime pay, if a certain amount of their pay was on a "salary basis." *Id.* A later Secretary of Labor interpretation of this regulation carved out an exception to the salary basis rule for reductions in pay based on quality of work, meaning employees whose pay is adjusted for disciplinary purposes could still qualify as salary basis employees and therefore be excluded from receiving overtime pay. *Id.* at 456. The issue was how much weight the second rule interpreting the first regulation should be afforded and the Supreme Court here agreed that courts should look favorably to agency interpretations of their own regulations, and affirmed the denial of overtime pay for the offices as they were considered salary basis employees under the Act. *Id.* at 463-64.

61. Christopher J. Walker, *What Kisor Means for the Future of Auer Deference: The New Five-Step Kisor Deference Doctrine*, YALE J. ON REG. (2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/.

62. In Kisor v. Wilkie, 139 S. Ct. 2400 (2019), Justice Elena Kagan "reframe[ed]" the test to use in an application of Auer deference. Walker, *supra* note 61. First, "[t]he regulation must be 'genuinely ambiguous' after applying all 'traditional tools' of interpretation." *Id.* Second, "the agency's interpretation of the ambiguous provision must be 'reasonable.'" *Id.* Third, "[i]f the agency regulatory interpretation passes steps one and two, the reviewing court must then engage in 'an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight.'" *Id.* Under this step, "[t]he agency's regulatory interpretation 'must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." *Id.* Lastly, "[t]he 'agency's interpretation must in some way implicate its substantive expertise.'" *Id.*

63. Roberson & Shuman, *supra* note 22.

64. Steve R. Johnson et al., *The Upsides and Downsides of Ending* Chevron *Deference*, 154 TAX NOTES 1287, 1287 (Mar. 6, 2017), https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1594&context=articles.

Research v. United States[65] established that *Chevron* was the appropriate standard of deference to apply in tax administration cases.[66]

A. Regulations and Sub-regulatory Guidance Promulgated by the Treasury Department

Section 7805 of the Internal Revenue Code establishes the statutory authority for the Secretary of Treasury to "prescribe all needful rules and regulations for the enforcement of [the tax code]."[67] The Secretary does this through regulatory and sub-regulatory guidance, all with varying degrees of authority. Primarily used, and with the most weight, are regulations.[68] Sub-regulatory guidance includes revenue rulings,[69] revenue procedures,[70] private letter rulings,[71] and technical advice memoranda.[72]

B. Tax Cases Applying Deference

Immediately following *Chevron*, which was decided in 1984, it was often unclear if tax cases should be granted *Chevron* deference, or a lesser degree of deference than other administrative areas, which translates into greater judicial scrutiny.[73] This was

65. 562 U.S. 44, 56-57 (2011).

66. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011).

67. 26 U.S.C. § 7805 (2018).

68. The Treasury Department issues regulations "to address issues that arise with respect to existing Internal Revenue Code sections. Regulations interpret and give directions on complying with the law." Regulations are developed through formal notice and comment rulemaking to generate public input through comments and hearings. *Understanding IRS Guidance – A Brief Primer*, IRS (Nov. 6, 2019), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer; There are general regulations issued pursuant to the general authority of 26 U.S.C. 7805(a) as well as specific regulations issued pursuant to a specific statutory authority in certain sections of the Code. Islame Hosny, *Interpretations by Treasury and the IRS: Authoritative Weight, Judicial Deference, and the Separation of Powers*, 72 RUTGERS U. L. REV. 281, 302 (2020).

69. Revenue rulings discuss "how the law is applied to a specific set of facts." *Understanding IRS Guidance – A Brief Primer*, IRS (Nov. 6, 2019), https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer.

70. Revenue Procedures are "official statement[s] of a procedure that affects the rights or duties of taxpayers or other members of the public under the Internal Revenue Code, related statutes, tax treaties and regulations and that should be a matter of public knowledge" often pertaining to technical guidance relating to the filing of taxes. *Id.*

71. Private letter rulings are "written statement[s] issued to taxpayer[s] . . . interpret[ing] and appl[ying] tax laws to the taxpayer's specific set of facts." *Id.*

72. Technical Advice Memorandum are responses to "technical or procedural questions that develop during a [tax] proceeding[involving an] examination of a taxpayer's return, a consideration of a taxpayer's claim for a refund or credit, or any other matter involving a specific taxpayer." *Id.*

73. *See* Jeffrey N. Starkey & Thomas A. Cullinan, *Is the IRS Always Right? Judicial Deference to Treasury Regulations and Other IRS Positions*, 14 J. TAX PRAC. & PROC. 31, 31 (2012); Merrill & Hickman, *supra* note 31 at 835; Nathaniel Cushman, *The Impact of Illegal Tax Guidance: Notice 2008-83*, 62 TAX LAW. 867, 882 (2009); Johnson, *supra* note 3.

due to "tax exceptionalism," or a belief that "tax is special and should be treated differently from other areas of administrative law."[74] It was thought that the application of a *Chevron* standard of deference would unfairly inhibit taxpayers' abilities to challenge tax regulations given that *Chevron* "is often thought of as a pro-agency rule."[75] *Mayo Clinic*, however, ultimately established that *Chevron* was the appropriate standard in tax administration.[76]

In some early tax cases, courts instead applied a standard of deference grounded in *National Muffler Dealers Association v. United States*,[77] pre-dating *Chevron*, and holding that "[i]n determining whether a particular regulation carries out a congressional mandate in a proper manner, [the court] look[s] to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose."[78] In *National Muffler*, a company challenged the denial of a tax exemption, but the Court upheld this denial when the company could not establish that the IRS's interpretation of the law failed to reasonably implement Congress' mandate.[79] The interpretation in question involved what qualified as a "business league" for the purposes of a business league exemption, which the Treasury Department chose to define broadly.[80] The Court's analysis in this case called for a flexible, multifactor inquiry, similar to that of *Skidmore*, to determine whether an interpretive regulation "harmonizes with the plain language of the statute, its origin and its purpose."[81] A court applying the *National Muffler* standard examines the age of the regulation, whether the regulation was issued contemporaneously with the underlying statute, the reliance placed on the regulation by third parties, whether the IRS has consistently interpreted the regulation, and the degree of scrutiny that the regulation was given by Congress.[82]

One example of a case applying the *National Muffler* standard is *Cottage Savings Association. v. Commissioner*.[83] In *Cottage Savings*, the Court held that the exchange of different participation interests in home mortgages by a savings and loan

74. Kristin Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1540 (2006).

75. Johnson et al., *supra* note 64 at 1287.

76. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011).

77. 440 U.S. 472 (1979).

78. *Id.* at 477.

79. *Id.* at 488-89.

80. *Id*. at 480.

81. *Id.* at 477.

82. *Id.*; Matthew H. Friedman, *Reviving National Muffler: Analyzing The Effect Of Mayo Foundation on Judicial Deference as Applied To General Authority Tax Guidance*, 107 NW. U. L. REV. 115, 121 (2012); David J. Shakow, *Pass the Mayo: The Supreme Court Says Goodbye to National Muffler,* MARTINDALE (Jan. 18, 2011), https://www.martindale.com/litigation-law/article_Chamberlain-Hrdlicka-White-Williams_1224698.htm.

83. 499 U.S. 554, 560-61 (1991).

association was a "disposition of property" under 26 U.S.C § 1001(a).[84] The Court came to this conclusion by relying on Regulation §1.1001-1,[85] which the court found reliable given it's reasonableness, as dictated by *National Muffler*.[86] This reasonableness was evidenced by the Congress' explicit delegation of authority[87] as well as the consistency of the regulation's language.[88]

However, there began to be disagreement among the courts as to which standard applied: *Chevron* or *National Muffler*.[89] This tension was evidenced in cases such as *Swallows Holding Ltd. v. Commissioner*,[90] where the "Third Circuit reversed the Tax Court and upheld the requirement of the regulations under [§] 882[91] that a foreign corporation file a tax return within a prescribed deadline in order to be entitled to deductions and credits related to its U.S. business income (the "timely filing requirement")."[92] While the Tax Court applied *National Muffler*, the Third Circuit disagreed and instead applied *Chevron*, thus reaching a different outcome by employing greater deference to the Treasury Department and its regulation.[93]

Whether tax cases should receive the *Chevron* treatment afforded to other areas of administrative law, or should receive more scrutiny as under *National Muffler*, was finally determined in the 2011 case *Mayo Foundation for Medical Education & Research v. United States*, which held that *Chevron* was the appropriate standard.[94] In *Mayo Clinic*, the Treasury Department adopted rules that medical residents did not qualify as "students" exempt from payroll taxes as these students often worked more than 40 hours a week performing substantial tasks, which the Mayo Clinic challenged, because although their residents worked 50-80 hours a week, their educational experiences were also a crucial component of the residency program.[95]

In its opinion, the Supreme Court concluded that: (1) *Chevron* deference, rather than the *National Muffler* standard, should apply and (2) under a *Chevron* analysis,

84. Cottage Savings, 499 U.S. at 559-60.

85. 26 C.F.R. 1.1001-1 (1990) (stating that "the gain or loss realized from the conversion of property into cash, or from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained").

86. Cottage Savings, 499 U.S. at 560-61.

87. *See* 26 U.S.C § 7805(a) (establishing the statutory authority for the Secretary of Treasury to "prescribe all needful rules and regulations for the enforcement of [the tax code]."

88. Cottage Savings, 499 U.S. at 560-62.

89. Shakow, *supra* note 82.

90. 126 T.C. 96 (2006), *rev'd*, 515 F.32d 162 (3d Cir. 2008).

91. 26 U.S.C. § 882 (2017).

92. Aditi Banerjee et al., *Court of Appeals Upholds Timely Filing Requirement for Foreign Corporations*, Sullivan & Cromwell, LLP (Feb. 27, 2008), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Court_of_Appeals_Upholds_Timely_Filing_Requirement_for_Foreign_Corporations.pdf.

93. *Swallows Holding*, 515 F.32d at 164.

94. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 55 (2011).

95. *Id.* at 48.

the regulation[96] is valid because Congress did not precisely speak to this issue and the regulation's interpretation of the statute was reasonable.[97] The Court also found *Chevron* deference appropriate given that the regulation had been promulgated following notice and comment rulemaking procedures and had been issued pursuant to an explicit authorization by Congress granted to the Treasury Department to prescribe necessary rules.[98] Overall, this case is key because it held that tax cases were to be granted the same level of deference as other areas of the law.[99]

III. Recent Trends in Deference

Despite the confirmation that *Chevron* applies to all areas of administrative law, including tax, there is currently a general shift away from judicial deference[100] through a narrowing of its application, primarily stemming from an ideological shift in the Court.[101] The Court has "curtailed but retain[ed]" deference[102] and while "[t]he Supreme Court is unlikely to overrule *Chevron* outright, . . . [the current trend] suggests that the Court may begin to apply a less robust form of *Chevron* deference."[103] State courts are also shifting away from deference, [104] and the House of Representatives has proposed at least one bill to curtail *Chevron*, although none have made it very far.[105]

One example of the Court narrowing its application of *Chevron* deference, is *King v. Burwell*,[106] a 2015 case in which "the Court considered whether states participating in a federal health care exchange were eligible for tax credits under the [ACA]."[107] Although the Court ultimately upheld the regulation that allowed for ACA tax

96. 26 C.F.R. § 31.3121(b)(10)-2(d)(3)(iii) (2004).

97. *Mayo Found*., 562 U.S. at 60.

98. *Id.* at 57-58.

99. *Id.* at 56.

100. Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE (June 21, 2018), https://takecareblog.com/blog/the-imminent-demise-of-chevron-deference.

101. Phillip Dane Warren, *The Impact of Weakening* Chevron *Deference on Environmental Deregulation*, 118 COLUM. L. REV. 62, 66-68 (2018).

102. Meraw, *supra* note 9.

103. Warren, *supra* note 100, at 63; Evan Bernick, *Notice & Comment: Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. ON REG. (2018), https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/.

104. David M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REG. (2020), https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/.

105. Separation of Powers Restoration, H.R. 76, 115th Cong. (2017) (requiring de novo review of challenges statutory and regulatory provisions).

106. 576 U.S. 473 (2015).

107. Brannon & Cole, *supra* note 21, at 12.

subsidies, the Court declined to apply *Chevron* deference due to "economic and political" implications.[108] The Court concluded that these factors rendered *Chevron* entirely inapplicable, and asserted the judicial branch's role in interpreting the law.[109] Overall, this case embodies the current trend of moving away from *Chevron*.[110]

There are several arguments in favor of the continued application of judicial deference as well as valid arguments against its continued use.[111] Beginning with the arguments favoring deference; first, employing deferential judicial standards respects agency expertise,[112] which can produce better policy outcomes.[113] Deference also recognizes the constitutional allowance for congressional delegations of authority to agencies,[114] as it has become a relatively common practice for Congress to leave the technicalities related to implanting laws to agencies, which have policymakers and experts better equipped to manage these issues.[115] In tax specifically, deference to the Treasury Department means that courts are more likely to treat similarly situated taxpayers the same, a hallmark of a fair tax system, fostering uniformity in application of the law.[116] In a business context, taxpayers may

108. *King*, 576 U.S. at 485-86 (internal citation omitted). ("When analyzing an agency's interpretation of a statute, [courts] often apply the two-step framework announced in *Chevron*[,] . . . [in which] we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance[.]" . . . It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.

109. *Id.*

110. Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2412 (2018).

111. Justin S. Daniel, *Scrutinizing Deference to Administrative Agencies*, THE REG. REV. (Nov. 27, 2017), https://www.theregreview.org/2017/11/27/daniel-scrutinizing-deference/ (This article discusses some of the core arguments for and against. judicial deference. Some arguments for the continued use of judicial deference includes the existence of congressional intent to outsource some rulemaking to agencies, which oftentimes have expertise in their respective field. The primary arguments against judicial deference is that this principle violates the separation of powers and leads to a "'dangerous consolidation of law-making and law-execution powers' in federal agencies.").

112. Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L. J. 908, 976 (2017); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND. L. REV. 937, 961 n.148 (2018).

113. Matz, *supra* note 100.

114. Henry Paul Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6 (1983).

115. Justin S. Daniel, *Scrutinizing Deference to Administrative Agencies*, THE REGUL. REV. (Nov. 27, 2017), https://www.theregreview.org/2017/11/27/daniel-scrutinizing-deference/.

116. Kristin E. Oglesby, *Granting Chevron Deference to IRS Revenue Rulings: The "Charitable" Thing to Do*, 78 LA. L. REV. 632, 669-70 (2018).

often desire certainty in the laws, regulations, and sub-regulatory guidance affecting them, and *Chevron* deference contributes to a greater level of certainty.[117]

There are, however, also arguments in opposition to deference, and these arguments are increasingly important as the Court continues to bend towards a conservative majority.[118] The arguments against deference are generally grounded in concerns regarding the separation of powers.[119] One argument, for example, is "that judicial deference to ambiguous agency statutory interpretations contradicts the Constitution's vestment of judicial power in Article III courts, which requires the Judiciary, rather than the Executive, to 'say what the law is.'"[120] Another separation of powers argument is that executive agencies are formulating policy under the guise of regulating to fill statutory gaps, which is, in fact, a legislative job that has been vested to Congress.[121] Lastly, there are arguments that *Chevron* is not applied uniformly and where one judge may find ambiguity in a statute and reasonableness in an agency interpretation, another may not.[122] As courts continue to embrace these arguments and chip away at *Chevron's* application, relying on agency regulations becomes precarious.

117. *Id.* at 663 (arguing in favor of granting *Chevron* deference to regulations and revenue rulings given agency expertise as well as taxpayer certainty and consistency in the law).

118. Daniel, *supra* note 115 (providing some of the key arguments against deference); Bernick, *supra* note 103 (noting the increasingly conservative Court's shift away from deference).

119. The primary arguments for cutting back on deference are rooted in separation of powers arguments, based on roles created by the first three articles of the Constitution. There are Article I concerns that it is the job of Congress to make laws and through deference they are allowing administrative agencies take this role on. *Arguments Against Judicial Deference: Deference Violates Separation of Powers Principles*, BALLOTPEDIA https://ballotpedia.org /Arguments_against_judicial_deference:_Deference_violates_separation_of_powers_principles (last visited Dec. 20, 2020). There are Article II concerns that deference creates a large administrative state which presents concerns that they are reaching too far outside the bounds of Article II. *Id.* Additionally, Article III concerns arise because it is the Court's duty to say what the law is, whereas in deference cases it is the administrative agencies saying what the law is. *Id.*

120. Brannon & Cole, *supra* note 21, at 22 (citing Campbell v. Michigan, 135 S. Ct. 2357, 2712 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803))).

121. *Id.* at 5. *See also* Stephen Wemiel, *SCOTUS for law students: Non-delegation doctrine returns after long hiatus*, SCOTUSBLOG (Dec. 4, 2014, 8:00 PM), https://www.scotusblog.com/2014/12/scotus-for-law-students-non-delegation-doctrine-returns-after-long-hiatus/ (discussing how opponents to *Chevron* deference tend to prefer the non-delegation doctrine, which is the idea that Congress can't give their powers away to non-elected parties).

122. Brannon & Cole, *supra* note 21.

IV. Deference in the Wake of the Tax Cuts and Jobs Act: What Does This Mean for Business and Tax Planning?

Changes to the Court's application of deference can have significant implications for businesses due to reliance placed on Treasury guidance in tax-planning.[123] One concern is that if businesses rely on Treasury regulations that are later challenged and tossed out in court, that this has the potential to be costly and time-consuming; for example, businesses may develop accounting methods specifically to comply with an initial regulation, only to need to re-develop their methods after the initial regulation is tossed out in court.[124]

Treasury guidance played a particularly important role in the wake of the Tax Cuts and Jobs Act (TCJA),[125] the major tax reform passed in 2017,[126] as many gaps were left in the legislation.[127] TCJA made some major changes to the U.S. tax code and was "the largest tax overhaul since 1986."[128] Key features of this law included: a lowered corporate tax rate from 35% to 21%; implementation of a 20% qualified business income deduction for businesses other than corporations; a decrease in most personal tax rates; and an increase of the standard deduction for personal income taxes."[129]

123. James Gray et al., *Treasury and IRS Release Proposed 199A Regulations on the 20% Pass-Through Deduction*, SQUIRE PATTON BOGGS (2018), https://www.squirepattonboggs.com/-/media/files/insights/publications/2018/08/treasury_irs_release_proposed_199a_regulations/treasury_irs_release_proposed_199a_regulations.pdf ("Regulations in the areas where [TCJA] was most unclear and the areas in which taxpayers and tax advisors were pressing Treasury for guidance so they could proceed with tax planning or estimating tax liability.").

124. Scott A. Hodge, *The Compliance Costs of IRS Regulations*, TAX FOUND. (June 15, 2016), https://taxfoundation.org/compliance-costs-irs-regulations/ (noting that "[t]he growing complexity of the U.S. tax code has led to large compliance costs for . . . businesses" and "[t]he cost of complying with U.S. business income taxes accounts" costs about "$147 billion").

125. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (to be codified in scattered sections of 26 U.S.C.).

126. *How did the Tax Cuts and Jobs Act Change Business Taxes*, TAX POL'Y CTR. https://www.taxpolicycenter.org/briefing-book/how-did-tax-cuts-and-jobs-act-change-business-taxes (last visited Oct. 26, 2020).

127. Minkovich et al., *supra* note 7.

128. William G. Gale, *A Fixable Mistake: The Tax Cuts and Jobs Act*, THE BROOKINGS INST. (Sept. 25, 2019), https://www.brookings.edu/blog/up-front/2019/09/25/a-fixable-mistake-the-tax-cuts-and-jobs-act/.

129. *How did the Tax Cuts and Jobs Act Change Business Taxes*, TAX POL'Y CTR. https://www.taxpolicycenter.org/briefing-book/how-did-tax-cuts-and-jobs-act-change-business-taxes (last visited Oct. 26, 2020); *Overview of the TCJA Effects Tracker*, UNC TAX CENTER, https://tax.unc.edu/index.php/what-do-we-know-about-the-effects-of-the-tax-cuts-and-jobs-act/overview-of-the-tcja-effects-tracker/ (last visited March 20, 2021). *See also* Gale, *supra* note 128 (noting that the CBO expects this law to "increase in the primary deficit at $1.3 trillion over 10 years and the overall debt increase (counting interest payments) at $1.9 trillion" and we are already seeing a decrease in annual tax revenue).

This statute was sped through Congress though, and many details were left out; details that left business owners and tax professionals with questions regarding definitions, calculations, and other implementation concerns regarding the new law.[130] Specific examples where clarity in the law was lacking include: the "valuation rules for the personal use of employer-provided vehicles,"[131] how sexual harassment settlements should be deducted,[132] and when the changes to deductions for net operating losses were to become effective.[133] The initial legislation enacted also included at least one technical error.[134]

These questions were largely left to the Treasury Department and the IRS to address, and Treasury issued over 1,000 pages of regulations in the year following TCJA's passage.[135] As the courts scale back on deference though, the question arises as to how much reliance can be placed on this regulatory and sub-regulatory guidance.[136] This question has implications for businesses across the country, who must work to comply with new complexity in an already complex taxation landscape.[137]

Exploring specific regulations and sub-regulatory guidance issued pursuant to TCJA might allow for a better understanding of the trends in deference within the area of tax administration, and how courts may approach potential challenges to these. The rest of this section evaluates one regulation[138] and one revenue ruling[139]

130. Minkovich et al., *supra* note 7.

131. Watson, *supra* note 8.

132. *Lawmakers Explain TCJA Errors & Request IRS Guidance Reflect Congressional Intent Pending Corrections*, THOMAS REUTERS (Aug. 20, 2018), https://tax.thomsonreuters.com/news/lawmakers-explain-tcja-errors-request-irs-guidance-reflect-congressional-intent-pending-corrections/.

133. *TCJA Glitches and the Extender: Uncertainty Looms Over Some Federal Income Tax Provisions*, BARNES WENDLING CPAS (Apr. 12, 2019), https://www.barneswendling.com/tcja-glitches-and-the-extenders-uncertainty-looms-over-some-federal-income-tax-provisions/ (explaining that the new law "limits the [net operating losses (NOLs)] deduction to 80 percent of taxable income" but while "[t]he statutory text states that changes to carrybacks and carryforwards apply to NOLs arising in taxable years *ending* after Dec. 31, 2017 — . . . the Conference Report says they apply to NOLs arising in taxable years *beginning* after Dec. 31, 2017.").

134. David McGuire, *Why Uncertainty Still Remains With Tax Cuts and Jobs Act*, FORBES (Jan. 28, 2019, 8:00 AM), https://www.forbes.com/sites/forbesfinancecouncil/2019/01/28/why-uncertainty-still-remains-with-tax-cuts-and-jobs-act/?sh=1f8705ae9590 (The primary drafting error concerned Qualified Improvement Property (QIP). "QIP was supposed to be assigned a depreciable life of 15 years; if that had been done, QIP would be eligible for 100% bonus depreciation under code section 168(k). Unfortunately, during the final negotiations over the TCJA, an error was made. During the drafting, the portion of the law providing a 15-year life for QIP was eliminated by mistake. Under the final version of the law, QIP is assigned a life of 39 years and is not bonus eligible.").

135. Watson, *supra* note 8.

136. Minkovich et al., *supra* note 7.

137. *Small Business Introduction to the Tax Cuts and Jobs Act: Part 1*, NFIB RSCH. CTR. (May 2018), https://www.nfib.com/assets/TCJA-Survey.pdf.

138. 26 C.F.R. § 1.199A-1 (2019).

139. Rev. Proc. 2019-11, 2019-09 I.R.B. 742.

that attempted to clarify the implementation of TCJA's § 199A deduction for qualified business income.[140] Included is an assessment of how courts would be likely to, and should, address challenges to these, as well as the impacts of these judicial concerns on small businesses in Maryland.[141]

A. Section 199A Deduction for Qualified Business Income

One TCJA provision with a wide scope in terms of its impact on businesses, especially small and local businesses, is § 199A, which allows for passthrough businesses[142] (partnerships, sole proprietorships, and S-corporations) to deduct up to 20% of qualified business income (QBI) and 20% of qualified real estate investment trust (REIT) dividends.[143] QBI is essentially net profit excluding capital gains or losses, dividends, interest income, and income earned outside the United States.[144] REITs are entities established for the purpose of "own[ing] or finance[ing] income-producing real estate"[145] and are "a preferred vehicle for investment in income producing real estate portfolios"[146] given the steady stream of income produced.[147]

In the QBI calculation, there are also limits on the amount of the deduction, as well as what types of business are eligible.[148] For example, if a taxpayer exceeds a certain income level, then the deduction is limited in that it "cannot exceed the greater of 50% of the owner's share of W-2 wages for a business, or 25% of those wages

140. 26 U.S.C. § 199A (2018).

141. *See infra* text accompanying notes 178-84 and 221-22.

142. Passthrough businesses are those that "are not subject to the corporate income tax or any other entity-level tax. Instead, their owners or members include their allocated shares of profits in taxable income under the individual income tax." *Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR. (May 2020), https://www.taxpolicycenter.org/briefing-book/what-are-pass-through-businesses.

143. Toni Nitti, *Understanding the New Sec. 199A Business Income Deduction*, THE TAX ADVISOR (Apr. 1, 2018), https://www.thetaxadviser.com/issues/2018/apr/understanding-sec-199A-business-income-deduction.html#fn_22; *Qualified Business Income Deduction*, IRS https://www.irs.gov/newsroom/qualified-business-income-deduction (last updated Oct. 6, 2020).

144. Andrea Coombes & Tina Orem, *What is the Qualified Business Income Deduction (QBI) & How Can I Get it?*, NERD WALLET (Sept. 24, 2020), https://www.nerdwallet.com/blog/taxes/pass-through-income-tax-deduction/.

145. *REITs: Real Estate Working for You*, NAREIT https://www.reit.com (last visited Dec. 14, 2020).

146. Elizabeth L. McGinley & Steven J. Lorch, *Utilizing REITs for Midstream Assets*, THE NAT'L LAW REV. (Jan. 15, 2020), https://www.natlawreview.com/article/utilizing-reits-midstream-assets.

147. *A Short Lesson on REIT Taxation*, INTELLIGENT INCOME BY SIMPLY SAFE DIVIDENDS https://www.simplysafedividends.com/intelligent-income/posts/18-a-short-lesson-on-reit-taxation (last visited Dec. 14, 2020) (noting that "[l]egally, a REIT must pay out at least 90% of its taxable income as dividends" which generally creates a steady stream of income for its shareholders).

148. *See* Nitti, *supra* note 144 (discussing how for taxpayers with taxable income greater than $157,5000, "[t]he deduction is limited to the greater of (1) 50% of the W-2 wages with respect to the trade or business, or (2) the sum of 25% of the W-2 wages, plus 2.5% of the unadjusted basis immediately after acquisition of all qualified property.").

plus 2.5% of the owner's share of the unadjusted basis of qualified property used in the business."[149] In addition, there is a reduction in the amount an owner can claim in the deduction if the business is a "specified service trade or business."[150]

The TCJA statute itself left out details regarding calculations and other implementation concerns of § 199A, leaving accountants, tax professionals, and business owners with questions.[151] For example, it was unclear whether § 199A applied to rental properties, how businessowners with multiple entities should calculate net QBI, how fiscal year businesses should be treated, what exactly qualified as a service business,[152] and "if the [§] 199A deduction would apply to [regulated investment companies] (RICs)[153] invested in REITs."[154] These questions raised even more concern in light of the penalty associated with understating income under 199A.[155]

B. Treasury Regulation §1.199A

Given these questions, and others, the Treasury Department promulgated guidance pertaining to numerous TCJA provisions, including § 199A,[156] following a

149. Gary Guenther, *The Section 199A Deduction: How it Works and Illustrative Examples*, CONG. RSCH. SERV. (June 10, 2020), https://www.everycrsreport.com/files/2020-06-10_R46402_ce8364a4e8e395af8b6e2fe708f68530389d8aa4.pdf.

150. Jamie Hopkins, *Understanding the 199A Deduction After the New IRS Final Regulations*, FORBES (Feb. 13, 2019), https://www.forbes.com/sites/jamiehopkins/2019/02/13/understanding-the-199a-deduction-after-the-new-irs-final-regulations/?sh=1156e5ca5770 (noting that "a specified service trade or business" is "any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees").

151. Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L. J. 209, 227-28 (2019).

152. Nitti, *supra* note 143.

153. *Understanding Regulated Investment Companies: Tax-Exempt Municipal Bonds within RICs*, INVESCO https://www.invesco.com/pdf/U-RIC-FLY-1-E.pdf (last visited Dec. 17, 2020) ("A[n] RIC is an association taxable as a corporation for federal income tax purposes. Many unit trusts and most mutual funds are organized as RICs for tax purposes. If a[n] RIC adheres to very specific requirements regarding portfolio diversification, types of assets, distribution minimums and year-end reporting, it avoids taxation at the corporate level. Investors in RICs own units of the trust, not the underlying securities.").

154. Andreana Shengelya & Robert A. Velotta, *Sec. 199A Dividends Paid by a RIC with Interest in REITs and PTPs*, THE TAX ADVISER (Aug. 1, 2019), https://www.thetaxadviser.com/issues/2019/aug/sec-199a-dividends-ric-interest-reits-ptps.html.

155. Tracey Fielman, *Impact of Sec. 199A in Computing Substantial-Understatement Penalties*, THE TAX ADVISER (May 1, 2019), https://www.thetaxadviser.com/issues/2019/may/sec-199a-computing-substantial-understatement-penalties.html.

156. *Final Sec. 199A Qualified Business Income Deduction Regs: Qualified Business Income*, THOMAS REUTERS TAX & ACCT. (Jan. 23, 2019), https://tax.thomsonreuters.com/news/final-sec-199a-qualified-business-income-deduction-regs-qualified-business-income/.

notice-and-comment rulemaking process.[157] Regulation §1.199A was issued to clarify a few key points of § 199A, most notably, (1) the definition of capital gains, (2) whether rental real estate activities qualify as a trade or business, (3) how to calculate this deduction in instances where a taxpayer is engaged in multiple trades or businesses, and (4) whether regulated investment companies (RICs) that receive dividends from real estate investment trusts (REITs) may take the § 199A deduction.[158]

First, pursuant to TCJA, capital gains or losses[159] were not to be taken into account when computing QBI, which begged the question as to how capital gain and loss were being defined in this context. Regulation § 1.199A,[160] specifies that net capital gain is the sum of: (1) the excess of net long-term capital gain over net short-term capital loss for the tax year,[161] plus (2) qualified dividend income.[162]

> *"Under the final regulations, taxpayers must first net their Section 1231 gains and losses in order to determine whether the amounts will be treated as a capital gain or ordinary loss. If the net result is an excess gain, the character of the gain is capital and is excluded from QBI. If the net result is an excess loss, the character of the loss is ordinary and reduces QBI."*[163]

When following Regulation § 1.199A, "[t]axpayers . . . should note that the amount they treat as net capital gain for [§] 1 purposes may not be the same as the amount they treat as net capital gain for [§]199A purposes."[164]

157. Rules for Cooperatives and Their Patrons, 84 Fed. Reg. 28668 (proposed June 19, 2019) (to be codified at 26 C.F.R. pt. 1).

158. 26 CFR § 1.199A-1 (2019).

159. *Definition of 'Capital Gain/Loss,'* THE ECON. TIMES, https://economictimes.indiatimes.com/definition/capital-gainloss ("Capital gain is the profit one earns on the sale of an asset like stocks, bonds or real estate. It results in capital gain when the selling price of an asset exceeds its purchase price. It is the difference between the selling price (higher) and cost price (lower) of the asset. Capital loss arises when the cost price is higher than the selling price.") (last visited Dec. 15, 2020).

160. 26 CFR § 1.199A-1 (2019).

161. 26 U.S.C. § 1222(11).

162. 26 U.S.C. § 1(h)(11)(B).

163. Jeffrey Bilsky et al., *Final Regulation of Section 199A*, BDO USA LLP (Jan. 2019), https://www.bdo.com/getattachment/2754f12a-2225-40ff-bda8-d7bfdddd66fc/attachment.aspx?BDOK-Tax-Reform_Final-regulations-regarding-determination-Sec-199A.pdf.

164. *Final Section 199A Regulations and Other Guidance Provide Welcome Guidance, Leave Questions Unanswered and Raise New Issues*, ERNST & YOUNG LLP (Jan. 24, 2019), https://taxnews.ey.com/news/2019-0218-final-section-199a-regulations-and-other-guidance-provide-welcome-guidance-leave-questions-unanswered-and-raise-new-issues.

Second, regarding concerns over whether rental real estate property qualified as a trade or business,[165] Regulation § 1.199A, put forth five factors to consider whether such enterprises could qualify.[166] These factors include:

> *"(i) the type of rented property (commercial real property versus residential property), (ii) the number of properties rented, (iii) the owner's or the owner's agents day-to-day involvement, (iv) the types and significance of any ancillary services provided under the lease, and (v) the terms of the lease (for example, a net lease versus a traditional lease and a short-term lease versus a long-term lease)."*[167]

The regulation itself do not explain how these factors are to be applied, but it is "surmise[d] that the IRS is more likely to agree that a rental real estate activity is a trade or business if the taxpayer is leasing a number of commercial properties and providing daily, on-the-ground services to lessees under traditional, long-term leases."[168] The regulation also established a safe harbor provision, whereby "a rental real estate enterprise may be treated as a trade or business" for purposes of [§]199A if at least 250 hours of services are performed each taxable year with respect to the enterprise.[169]

Third was the issue of "whether the [QBI] deduction would need to be determined separately for each trade or business, or if the IRS would allow taxpayers to aggregate different trades or businesses into one basket."[170] "An individual can have an ownership interest in more than one pass-thr[ough] business" and one pass-through entity can conduct "[m]ultiple and often different trades or businesses."[171] While "[t]he general rule under [§]199A is that each business 'stands on its own,'"

165. The Treasury regulations noted that many individuals who submitted comments during the notice and comment rulemaking process regarded concerns over this issue. Qualified Business Income Deduction, 84 Fed. Reg. 2952 (proposed Feb. 8, 2019) (to be codified at 26 C.F.R. pt. 1). "Commenters noted inconsistency in the case law in determining whether a taxpayer rental real estate is engaged in a trade or business" and several believed this category of revenue should qualify as the QBI deduction. *Id.*

166. 26 CFR § 1.199A-1 (2019).

167. Lou Vlahos, *Rental Real Estate and the Sec. 199A Deduction: Round Two*, FARRELL FRITZ (Jan. 29, 2019), https://www.taxlawforchb.com/2019/01/rental-real-estate-and-the-sec-199a-deduction-round-two/#_ednref12.

168. Elizabeth Yablonicky & Guinevere Moore, *A Primer on Deducting Losses from Real Estate Activities for "the Rest of Us"*, THE AM. BAR ASS'N (Feb. 22, 2019), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/19feb/19feb-pp-yablonicky-moore-a-primer-on-deducting-losses/.

169. *Id.*

170. Anthony Delvalle & Shmuli Fromovitz, *Aggregation & Netting Under Section 199A*, MARKS PANETH ACCT. & ADVISORS (Feb. 18, 2019), https://www.markspaneth.com/insights/category/articles/aggregation-netting-under-section-199a.

171. Erik Doerring, *Section 199A – The Decision to Aggregate*, TAX LAW INSIHTS: A BURR & FORMAN BLOG (July 2, 2019), https://www.jdsupra.com/legalnews/section-199a-the-decision-to-aggregate-90427/.

through Regulation §1.199A, the Treasury Department permitted "an individual to 'aggregate' or combine multiple trades or businesses for purposes of applying the W-2 wages and depreciable property limits for the deduction."[172] Income from service businesses, however, cannot be aggregated with other businesses, and the method chosen must be applied consistently from year to year.[173] Aggregating can "result[] in combining the QBI, W-2 wages and qualified property of the aggregated separated businesses. This can be very helpful, for example, if some businesses have little wages or qualified property. . . and other businesses have a relative abundance of W-2 wages or qualified property."[174]

Lastly, in response to the question of whether the QBI deduction applies to RICs invested in REITs, § 199A regulations indicate that "the payment by RICs of dividends that certain shareholders may [be] include[d] as qualified REIT dividends under Sec. 199A(b)(1)(B)."[175] This was in contrast to initial understandings of the law, which found that RICs did not qualify, given their status as C-corporations, as opposed to the passthrough businesses intended to benefit from the § 199A deduction.[176]

These regulations were influential to many U.S. businesses, especially small businesses, engaged in tax planning following the passage of the act, and will continue to be influential for tax planning so long as these TCJA provisions remain in effect. Looking at Maryland, for example, there are over 594,124 small businesses, comprising over 99% of Maryland businesses.[177] That is a significant number of

172. *Id.*

173. Kate Abdoo, Lee Gay & John Kerrigan, *Determining What is a Separate Trade or Business for Sec. 199A Purposes*, THE TAX ADVISER (July 1, 2019), https://www.thetaxadviser.com/issues/2019/jul/determining-separate-trade-business-sec-199A.html.

174. Steve R. Akers, *Section 199A – Qualified Business Income Deduction Including Highlights of Final and Newly Proposed Regulations*, BESSMER TR. (Feb. 2019), https://www.bessemertrust.com/sites/default/files/2019-02/Section%20199A%20Final%20Regulations%20Summary_02_15_19.pdf.

175. Eric Mauner, *REIT dividends and PTP income under Prop. Regs. Sec. 1.199-3(d)*, THE TAX ADVISER (May 1, 2019), https://www.thetaxadviser.com/issues/2019/may/reit-dividends-ptp-income.html (discussing the regulations found at 26 C.F.R. § 1.199A-3 (2019)). *See also* Martin T. Hamilton et al., *"Passthrough Deduction" Regulations for RICs Finalized with No Major Changes,* THE PROSKAUER TAX BLOG (Jun. 29, 2020), https://www.proskauertaxtalks.com/2020/06/passthrough-deduction-regulations-for-rics-finalized-with-no-major-changes/ ("A 'Section 199A dividend' is eligible for the passthrough deduction to the extent it is derived from the aggregate amount of qualified REIT dividends includible in the RIC's taxable income for the taxable year less expenses properly allocable to the qualified REIT dividends. Generally, most dividends made by a REIT in the ordinary course of business are qualified REIT dividends.").

176. Mauner, *supra* note 175.

177. *See Maryland Small Business Profile, 2019*, U.S. SMALL BUS. ADMIN. OFFICE OF ADVOC. (2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142650/2019-Small-Business-Profiles-MD.pdf (While being a small business does not equate being a pass-through entity, there is a correlation between the two, and statistics on pass-through entities in Maryland could not be located while statstics on small businesses were available.). *See also* Mark P. Keightley & Joseph S. Hughes, *Pass-Throughs, Corporations, and Small Businesses: A Look at Firm Size*, CONG. RSCH. SERV. (March 15, 2018), https://www.everycrsreport.com/reports

businesses that might be impacted by how Treasury regulations interpret § 199A. These businesses now have clarity on the capital gains calculation for § 199A,[178] and a better understanding of the rules surrounding aggregation.[179]

Furthermore, in 2019, 54,764 of Maryland's small businesses fell into the category of "Real Estate and Rental and Leasing."[180] This is a significant number of rental and leasing businesses that would need to know if their income from these activities qualifies for the QBI deduction, and how to structure their operations so that they may take such deduction.[181] Lastly, Maryland is a popular state for REITs with "[a]bout two-thirds of the nation's publicly traded REITs are organized in Maryland."[182] This is a significant number of participants left wondering if dividends passing through to RICs might qualify for the deduction.[183] While these companies now have regulations addressing these concerns, the question turns to how these regulations will be treated in court.

Despite the trend away from judicial deference to federal agency rulemaking, the Court would still be likely to, and should, be deferential to the Treasury Department under the *Chevron* standard in the event that the regulations clarifying § 199A are challenged. As a brief reminder, the *Chevron* inquiry asks (1) whether the statute has plain meaning, and in the case that a statute is, in fact, ambiguous, (2) whether the agency interpretation was reasonable or whether it was arbitrary or capricious.[184] When applying step one, regarding the ambiguity of the relevant statute,[185] "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent"[186] but "a court cannot waive the ambiguity flag just because it found the regulation impenetrable on first read."[187] It remains difficult to say that TCJA was anything

/R44086.html (explaining how "[i]n tax policy discussions it is not uncommon for the terms pass-through and small business to be interchanged" and after an assessment of 2015 U.S. Census data, "the majority of [pass-through] firms were [in fact,] small" businesses).

178. *Final Section 199A Regulations and Other Guidance Provide Welcome Guidance, Leave Questions Unanswered and Raise New Issues*, ERNST & YOUNG LLP (Jan. 24, 2019), https://taxnews.ey.com/news/2019-0218-final-section-199a-regulations-and-other-guidance-provide-welcome-guidance-leave-questions-unanswered-and-raise-new-issues.

179. Akers, *supra* note 174.

180. *Maryland Small Business Profile*, 2019, U.S. SMALL BUS. ADMIN. OFFICE OF ADVOC. (2019), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/04/23142650/2019-Small-Business-Profiles-MD.pdf.

181. Yablonicky & Moore, *supra* note 168.

182. Heather Harlan, *REITs Find a Comfortable Home in Md.*, BALT. BUS. J. (Mar. 27, 2020), https://www.bizjournals.com/baltimore/stories/2000/03/27/story4.html.

183. Shengelya & Velotta, *supra* note 154.

184. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

185. Congress must first confer authority on an agency to act. Brannon & Cole, *supra* note 21 at 1.

186. *Chevron*, 467 U.S. at 843, n.9.

187. Kisor v. Wilkie, 139 S.Ct. 2400, 2415 (2019).

other than ambiguous and full of gaps that needed to be filled.[188] Following the Act's passage, questions and concerns immediately arose regarding issues surrounding the lack of understanding as to how portions of the law would be defined, computed, and implemented.[189] Technical errors were also uncovered in TCJA.[190] Additionally, Treasury's authority to issue regulations is well-recognized pursuant to the previously discussed 26 U.S.C. § 7805, and it seems clear that Congress clearly intended to Treasury to delegate authority to implement TCJA, in particular.[191] At step one, TCJA, the statute in question, does appear to be ambiguous, particularly with regards to § 199A given the specific questions just discussed that were immediately raised by businesses and tax professionals.[192]

How courts rule at this first step is highly influential to the outcome at the second step,[193] but there is some variation in how the second step can be applied.[194] At the first step, one judge may find ambiguity in a statute while another may "employ[] a wide array of interpretive tools to find statutory clarity."[195] Moving to the second step, though, under a narrow reading of *Chevron*, courts will concede that a statute is vague, but will scrutinize the regulation with a heavier hand in search of a hint of arbitrariness or capriciousness; whereas under a broader reading of *Chevron*, courts will take the vagueness of a statute as an indication that Congress intended for the agency to fill the gaps and be more likely to find "reasonableness."[196] Courts will then be deferential to a "permissible construction" of the agency's regulation, or interpretation of the statute.[197] The current trend among the Court is to apply the former: the narrow application of *Chevron*.[198] That said, even under a narrow application, courts would still be likely to uphold the Treasury's regulations and sub-regulatory guidance interpreting § 199A, given that Treasury relied on notice and

188. Minkovich et al., *supra* note 7.

189. Nitti, *supra* note 143.

190. *See* McGuire, *supra* note 134 (discussing the primary drafting error in the Tax Cuts and Jobs Act, which concerned Qualified Improvement Property (QIP)).

191. *Lawmakers Explain TCJA Errors & Request IRS Guidance Reflect Congressional Intent Pending Corrections*, Thomson Reuters (Aug. 20, 2018), https://tax.thomsonreuters.com/news/lawmakers-explain-tcja-errors-request-irs-guidance-reflect-congressional-intent-pending-corrections/.

192. Minkovich et al., *supra* note 7.

193. Catherin M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 Fordham L. Rev. 2365, 2384 (2018).

194. *See* Johnson et al., *supra* note 64, at 1287 ("[T]he *Chevron* step two inquiry has become more rigorous. It used to be thought that step two was largely an empty formality, that an agency position would be invalidated at step one or not at all. More recently, courts have been holding against agencies at step two, as either principal or alternative grounds for decision[.]").

195. Shelby L. Hancock, *2018 Supreme Court Cases Suggest Narrow View of Agency Deference Under Chevron*, Manko Gold Katcher Fox LLP (Jan. 14, 2019), https://www.mankogold.com/publications-Chevron-Natural-Resources-Defense-Council-Deference.html; Johnson et al., *supra* note 64, at 1288.

196. Brannon & Cole, *supra* note 21, at 18-20.

197. *Id.*

198. *See supra* Section III.

comment proceedings[199] and on definitions created by Congress elsewhere in the code[200] in developing regulations that were addressing pressing questions.[201]

Furthermore, courts should continue to exercise deference to Treasury regulations that are not arbitrary or capricious because Treasury employs policymakers with expertise of the complex tax code needed to make necessary regulations, and because this will foster uniformity among cases involving challenges to regulations and guidance.[202] In terms of TCJA specifically, Congress intended to defer to Treasury on these matters with all the technical questions that were left unanswered,[203] which creates stability in the law by allowing businesses to feel comfortable relying on these regulations in their operations.[204] There were numerous regulations promulgated following TCJA,[205] which should be granted some degree of deference, but should ideally be assessed under the *Chevron* standard of deference.[206]

199. *See* Leigh Osofsky & Shu-Yi Oei, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L. J. 209, 242-55 (2019) (tracing the history of the notice and comment process for the regulations addressing § 199A).

200. Joseph Most, *Section 199A: Treasury Regulations Answer Many Questions*, BERDON LLP (Feb. 5, 2019), https://www.berdonllp.com/section-199a-treasury-regulations-answer-many-questions/ ("The Final [§ 199A] Regulations adopt the commonly used Section 162(a) definition of "trade or business" found throughout the Internal Revenue Code and interpreted extensively in case law.).

201. Minkovich et al., *supra* note 7. *But see* Christopher P. Murphy et al., *Challenging Tax Cuts and Jobs Act Regulations and IRS Guidance*, SKADDEN'S 2020 INSIGHTS (Jan. 21, 2020), https://www.skadden.com /insights/publications/2020/01/2020-insights/challenging-tax-cuts-and-jobs-act (highlighting that "[s]ome of the guidance issued by the IRS and Treasury appears to be inconsistent with or goes beyond the scope of controlling statutes[,]" meaning that not all guidance promulgated by Treasury pursuant to TCJA would survive a judicial challenge).

202. Daniel T. Shedd & Todd Garvey, Chevron *Deference: Court Treatment of Agency Interpretation of Ambiguous Statutes*, CONG. RSCH. SERV. (Aug. 28, 2013), https://fas.org/sgp/crs/misc/R43203.pdf.

203. Howard Gleckman, *How Will Treasury Fill In the Blanks Of The Tax Cuts and Jobs Act?*, TAX POL'Y CTR. (Apr. 17, 2018), https://www.taxpolicycenter.org/taxvox/how-will-treasury-fill-blanks-tax-cuts-and-jobs-act.

204. Oglesby, *supra* note 116, at 669-70.

205. Some examples include: Additional Rules Regarding Base Erosion and Anti-Abuse Tax, 84 Fed. Reg. 67046 (proposed Dec. 6, 2019) (to be codified at 29 C.F.R. pt. 1); Determination of the Maximum Value of a Vehicle for Use With the Fleet-Average and Vehicle Cents-per-Mile Valuation Rules, 84 Fed. Reg. 44258 (proposed Aug. 23, 2019) (to be codified at 26 C.F.R. pt. 1); Advance Payments for Goods and Long-Term Contracts, 84 Fed. Reg. 33691 (proposed July 15, 2019) (to be codified at 26 C.F.R. pts. 1 & 602).

206. Leandra Lederman, *The Fight Over "Fighting Regs" and Judicial Deference in Tax Litigation*, 92 B. U. L. REV. 643, 698 (2012) (arguing that courts should maintain *Chevron* deference – or *Skidmore*, where appropriate – but with the added caveat that "courts could find a regulation arbitrary or capricious under *Chevron*, . . . if it prejudices the taxpayer and its timing appears to reflect opportunism rather than careful application of the agency's expertise").

But see Grant Marshall, *Hold the* Mayo*: Why Strong Deference to Treasury Regulations Might Not be Healthy*, 13 TRANSACTIONS: THE TENN. J. OF BUS. L. 343, 356 (2012) (arguing that experts within the IRS are influenced by their own biases and reliance on heuristics, they may not achieve optimal policy outcomes through

C. Treasury Revenue Procedure 2019-11

The future of deference is also uncertain with regards to other categories of sub-regulatory guidance that the Treasury Department promulgates, such as revenue rulings, revenue procedures, private letter rulings, and technical advice memoranda.[207] The standard applied to these types of agency output, *Skidmore*, is less deferential than that of *Chevron*, applied to regulations.[208] While the Court has indicated "that guidance not deserving [of] *Chevron* deference may still be entitled to *Skidmore* deference . . . depend[ing] 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," courts may take opportunities to curtail deference access of the board.[209]

Regardless of how courts may decide to defer to sub-regulatory guidance under *Skidmore* or *Auer*, business and tax professionals should be cautious of relying on these categories of guidance, given the Treasury Department's stated commitment to not requesting deference regarding sub-regulatory guidance.[210] Shortly after TCJA was enacted and after Treasury had issued some key regulations, Treasury issued a policy statement that they would not seek deference with regards to sub-regulatory guidance:

> *When proper limits are observed, subregulatory guidance can provide taxpayers the certainty required to make informed decisions about their tax obligations. Such guidance cannot and should not, however, be used to modify existing legislative rules or create new legislative rules. The Treasury Department and the IRS will adhere to these limits and will not argue that subregulatory guidance has the force and effect of law. In litigation before the U.S. Tax Court, as a matter of policy, the IRS will not seek judicial deference under* Auer v. Robbins*, 519 U.S. 452 (1997) or* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467*

regulations and sub-regulatory guidance, and reducing the amount of judicial deference granted to them will help counter-act such biases and heuristics).

207. *See supra* notes 69-72.

208. *See supra* Section II.

209. Andrew R. Roberson & Jeffrey M. Glassman, *Deference to IRS Interpretations and the Challenges of* Auer *Deference*, THE FED. LAW. (Mar. 2016), https://taxcontroversy360.com/wp-content/uploads/2016/03/Deference.pdf (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

210. *Policy Statement on the Tax Regulatory Process by the U.S. Department of the Treasury*, THE TREASURY DEP'T (Mar. 5, 2019), https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process.pdf; Alistair M. Nevius, *Treasury Announces Changes to Tax Regulatory Process*, THE TAX ADVISER (2019), https://www.thetaxadviser.com/news/2019/mar/tax-regulatory-process-changes-201920765.html.

> *U.S. 837 (1984), to interpretations set forth only in subregulatory guidance.* [211]

In its statement, the Department asserted a commitment to formal, notice and comment rule-making, meaning businesses should exercise care in relying on sub-regulatory guidance.[212] It should be noted, however, that Skidmore, the primary standard for sub-regulatory guidance, was not explicitly mentioned in the policy statement, whereas *Chevron* and *Auer* were, despite the statement's main point that Treasury would not seek deference for sub-regulatory guidance.[213] Therefore, it is unclear if the Treasury intended to leave the door open for Skidmore, assumed its inclusion, or if this was an oversight.

One example of sub-regulatory guidance in the tax administration context includes revenue procedures, and shifting back to our discussion of § 199A, one specific revenue procedure involves proper calculations of W-2 wages pursuant to the statute.[214] If a taxpayer finds him or herself eligible for the deduction, "[t]he wage and property limitation limits the tentative deductible amount for each activity to the greater of 50% of qualified W-2 wages of the activity or 25% of qualified W-2 wages of the activity plus 2.5% of the unadjusted basis immediately after acquisition (UBIA) of qualified property."[215] Under § 199A, if a taxpayer earns more than $210,700, or $421,400 if married filing jointly, the deduction may be limited by W-2 wages.[216] Revenue Procedure 2019-11[217] provides three ways a taxpayer can calculate W-2 wages: (1) the unmodified box method,[218] (2) the modified box 1

211. *Policy Statement on the Tax Regulatory Process by the U.S. Department of the Treasury*, *supra* note 211; Nevius, *supra* note 211.

212. *Policy Statement on the Tax Regulatory Process by the U.S. Department of the Treasury*, *supra* note 211; Carina C. Frederico et al., *Insight: Treasury Issues Policy Statement that May Be the Death Knell for '*Auer*' Deference in Tax Cases and Zombie Notices*, BLOOMBERG TAX (2019), https://news.bloombergtax.com/daily-tax-report/insight-treasury-issues-policy-statement-that-may-be-the-death-knell-for-auer-deference-in-tax-cases-and-zombie-notices.

213. *Policy Statement on the Tax Regulatory Process by the U.S. Department of the Treasury*, *supra* note 211.

214. 26 CFR 1.199A-2 (2019).

215. Thomas M. Dalton, *ICYMI: Proposed Regulation Clarify the IRC Section 199A Deduction*, THE CPA J. (Jan. 2020), https://www.cpajournal.com/2020/01/30/proposed-regulations-clarify-the-irc-section-199a-deduction/.

216. Jin Dong Park & Zhen Zhang, *W-2 Wages and Sec. 199A*, JOURNAL OF ACCT. (July 1, 2019), https://www.journalofaccountancy.com/issues/2019/jul/w-2-wages-sec-199a.html.

217. Rev. Proc. 2019-11, 2019-09 I.R.B. 742.

218. Unmodified box method: wages are calculated by taking "the lesser of (1) the total entries in box 1 (wages, tips, and other compensation) of all Forms W-2 . . .filed by the taxpayer with the SSA or (2) the total entries in box 5 (Medicare wages and tips) of all Forms W-2 filed by the taxpayer with the SSA." Alistair Nevius, *Guidance Provided on Calculating W-2 wages for Sec. 199A Purposes*, THE TAX ADVISER (Apr. 1, 2019), https://www.thetaxadviser.com/issues/2019/apr/guidance-calculating-w-2-wages-sec-199A-purposes.html.

method,[219] and (3) tracking wages method.[220] The primary difference between the three is "generally with respect to whether elective retirement deferrals to qualified retirement plans are taken into account."[221]

This is important for businesses to keep in mind because "[e]mployers may benefit from comparing the W-2 wages under all methods in order to determine which method is most beneficial . . . particularly if the employer provides tax-qualified retirement arrangements for its employees or offers other benefits that are not treated as wages for federal income tax withholding purposes."[222] Furthermore, in this revenue procedure does not require an employer to use the same method of calculation from year to year but rather grants a "flexibility [that] may be useful for employers, particularly if they adopt or change their employee benefit plans."[223]

Given the Treasury's statement that it won't rely on deference, in addition to the court's curtailing of deference, there may be concerns over reliance on this guidance. Courts, however, should adhere to an application of *Skidmore*, should the Treasury Department defend the revenue procedure in court.

A court would be likely to uphold Revenue Procedure 2019-11 under *Skidmore*.[224] Pursuant to the *Skidmore* deference test, the factors a court will consider include (1) contemporaneousness, (2) long-standing duration, (3) consistency, (4) reliance, (5) complexity of issue, (6) presence of rulemaking authority, (7) need for agency action to implement statute, (8) congressional ratification, and (9) quality of agency explanation.[225] In the present case, Revenue Procedure 2019-11 was issued contemporaneously as it was promulgated in direct response to TCJA and the need for clarity, which "suggests that the interpretation benefited from . . . insight into Congress's wishes."[226] As businesses begin to formulate accounting methods to account for W-2 wages for §199A purposes, reliance will likely build. The issue is

219. Modified box 1 method: wages are calculated by "making modifications to the total entries in box 1 of all Forms W-2 filed by the taxpayer with the SSA by subtracting amounts that are not wages for federal income tax withholding purposes (such as supplemental unemployment compensation benefits) and adding the total amounts of various elective deferrals that are reported in box 12." *Id.*

220. Tracking wages method: wages are calculated by "track[ing] total wages subject to federal income tax withholding and elective deferrals reported in box 12." *Id.*

221. *Guidance Clarifies How to Calculate W-2 Wages for Purposes of Section 199A*, Deloitte tax@hand (May 22, 2019), https://www.taxathand.com/article/11643/United-States/2019/Guidance-clarifies-how-to-calculate-W-2-wages-for-purposes-of-section-199A.

222. *Id.*

223. *Id.*

224. Roberson & Shuman, *supra* note 22.

225. *See supra* notes 50-57.

226. Hickman & Krueger, *supra* note 49, at 1288.

arguably one of complexity, given the difficult accounting tax and technicalities.[227] Additionally, the Treasury Department is recognized as having the authority to promulgate necessary regulations and sub-regulatory guidance in order to implement tax legislation,[228] and in this case, there was pressing need for clarity for taxpayers in order to enforce TCJA.[229]

Turning back to the impact on small businesses in Maryland, there are costs associated with adhering to tax rules, and uncertainty in sub-regulatory guidance has the potential impact of increasing these costs. With Revenue Procedure 2019-11, in particular, a business may go through the efforts of computing all three W-2 wage calculations to later find the one ideal for their operations, only to later find the one they selected for use was challenged in court and set aside as no good, resulting in a need for a new accounting system. This lends support to the argument that courts should be deferential to sub-regulatory guidance enacted pursuant to TCJA, even if the standard is one that is less deferential than *Chevron* or *Skidmore*.

V. Conclusion

Overall, despite indications that the Supreme Court is shifting away from deference,[230] courts will still be likely to uphold many of the regulations and sub-regulatory guidance promulgated pursuant to the Tax Cuts and Jobs Act of 2017, such as those relating to the qualified business income deduction of § 199A discussed here, due to ambiguities in the statute, Congressional intent for Treasury to address these concerns, and need for swift agency action.[231] Courts should also continue to apply the deferential standards of *Chevron* and *Skidmore* to the Treasury Department's regulatory and sub-regulatory guidance as this creates stability in the law and allows businesses to have a greater sense of certainty in their reliance on these regulations and sub-regulatory guidance in their operations, as they develop accounting methods and other tools to comply with the tax law.[232]

227. C. Eugene Steuerle, *The TCJA Will Create More Complexity for Taxpayers than it Claims*, THE TAX POL'Y CTR. (Jan. 5, 2018), https://www.taxpolicycenter.org/taxvox/tcja-will-create-more-complexity-taxpayers-it-claims.

228. *Tax Research – Federal: About Treasury Regulations*, DORRAINE ZIEF LAW LIBRARY (Dec. 6, 2019), https://legalresearch.usfca.edu/c.php?g=523831&p=3581100.

229. Christopher P. Murphy, Royce L. Tidwell, & Nathan P. Wacker, *Challenging Tax Cuts and Jobs Act Regulations and IRS Guidance*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Jan. 21, 2020), https://www.skadden.com/insights/publications/2020/01/2020-insights/challenging-tax-cuts-and-jobs-act.

230. *See* supra Section III.

231. *See supra* Section IV.

232. *See supra* Section IV.