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In this article, Sykes explores the doctrinal shift and practical effects of the Supreme Court's recent overruling of the *Chevron* doctrine — for Treasury, the IRS, taxpayers, tax practitioners, and perhaps even Congress.

On June 28 the Supreme Court issued an opinion that is being hailed as effecting a momentous change in federal administrative law, particularly regarding the test to be used to determine the validity of disputed agency regulations.[1] The Court relied on section 706 of the Administrative Procedure Act[2] to overrule the four-decade-old *Chevron* doctrine. The case arose in a nontax context: a rule promulgated by the National Marine Fisheries Service under the Magnuson-Stevens Act.[3]

In the realm of federal taxation, *Loper Bright* should have large implications for the following — at least if one believes that Treasury and the IRS, in issuing regulations, have often been more focused on serving their own aggressive "protect the fisc" agendas or on administrative convenience than on carrying out the textually expressed will of Congress:

- the approach that the lower federal courts take in determining "what the law is" when the IRS asserts reliance on an existing Treasury regulation — and how that judicial approach might affect the IRS's or the Justice Department's willingness to settle a case involving a disputed regulation;
- the approach that the IRS takes, during administrative proceedings in which an existing regulation expresses a relevant position, to assessing what the agency's stance should be, including its position regarding settlement;
- the approach that taxpayers with a position that is in tension with a Treasury regulation will take regarding whether they move forward with — or abandon — their disputed position (on a return, during administrative proceedings, or during litigation);
- the approach that Treasury and the IRS will take regarding the issuance of new guidance, especially when that guidance lacks a basis in the "best meaning" of the text and structure of the statute being interpreted; and
- possibly, the approach that Congress will take in drafting substantive statutes or statutes that delegate interpretive authority to Treasury.

It thus seems likely that the *Loper Bright* opinion will bring about a multifaceted change, perhaps not yet fully understood, in how federal tax statutes are interpreted and applied.

[1] *Loper Bright Enterprises v. Raimondo*, No. 22-451 (U.S. June 28, 2024) (slip op.).

[2] 5 U.S.C. section 551 et seq.

[3] 16 U.S.C. section 181 et seq.

I. *Chevron*'s Role in Tax Administration

For the last 40 years, ever since the Supreme Court decided *Chevron*,[4] federal courts have usually used the principles set out in that case to determine the validity of, and the deference to be given to, agency regulations. That includes Treasury regulations invoked by the IRS to control the meaning of the Internal Revenue Code. From *Chevron*, the federal courts derived and applied the famous two-step test for the validity of federal regulations: whether the regulation (1) is inconsistent with the plain meaning of a statute and (2) reflects an unreasonable interpretation of the statute. If the regulation passed both elements of that two-step test, it was given legally binding effect, known as *Chevron* deference.

The impact of *Chevron* deference could be pivotal to a taxpayer's situation. *Mayo* provides a stark illustration.[5] In that case the Supreme Court upheld and applied a FICA tax regulation issued under the general authorization of section 7805(a), which provides:

> Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

To make sense of *Chevron* in the context of section 7805(a), the Court in *Mayo* viewed it as a gloss on section 7805(a). It then applied the two-step *Chevron* test to uphold a Treasury regulation that prospectively reversed the uniformly favorable results obtained by teaching hospitals in several courts of appeal. The role of *Chevron* deference, which was given to post-litigation Treasury regulations designed to reverse in-court losses, was absolutely pivotal in denying the teaching hospitals' enormous refund claims.

Treasury regulations occupy tens of thousands of pages in the Code of Federal Regulations. Most are issued under the authority of section 7805(a), but the IRC includes many provisions that expressly or implicitly authorize regulations that are specific to a particular provision, using text that does not necessarily mirror the language found in section 7805(a).[6] It is safe to say that Treasury regulations (1) are written by Treasury and IRS officials under widely varying delegation statutes and (2) pertain to substantive provisions displaying variety and often enormous complexity.

For years, scholarly commentators have cast a critical eye on *Chevron*. For example, in a 2020 law review article, *Chevron* was described as ubiquitous, ambiguous, and controversial:

> Decades after the Supreme Court decided *Chevron*, courts and commentators continue to disagree over how *Chevron* works and what it requires courts to do. How ambiguous must a statute be before courts shift into a deferential posture, and what makes an interpretation reasonable, and thus worthy of deference? On its face, *Chevron* has two steps, but some argue the two steps are really one, plus the Court added a step zero many years ago, leading still others to contend we should add even more steps, or maybe already have.[7] [Footnotes omitted.]

One aspect of *Chevron* that has troubled many observers, including me, is that as the doctrine's application went forward, the lower federal courts appeared far too quick to conclude that (1) the statute being interpreted did not have a plain meaning — that is, that it was ambiguous (step 1) and (2) the agency's regulation had expressed an interpretation that was reasonable (step 2). It

[4] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

[5] *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44, 52 (2011), *aff'g* 568 F.3d 675 (8th Cir. 2009).

[6] *See, e.g.*, section 482 (conferring broad authority on Treasury to "distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among . . . organizations, trades, or businesses" that are "owned or controlled directly or indirectly by the same interests"); section 483(f) (authorizing regulations that are "necessary or appropriate to carry out the purposes" of section 483 (respecting the accounting for interest on certain deferred payments)); and section 1502 (delegating broad authority to prescribe regulations as Treasury "may deem necessary" to clearly reflect the income tax liability of, or prevent avoidance of tax liability by, members of an affiliated group filing a consolidated return).

[7] Kristin Hickman and R. David Hahn, "Categorizing *Chevron*," 81 *Ohio St. L.J.* 611, 613-614 (2020). *See* slip op. at 32 ("Because *Chevron* in its original, two-step form was so indeterminate and sweeping, we have instead been forced to clarify the doctrine again and again.").

seemed that the lower federal courts often skipped over step 1 without sufficiently honoring the directive found in *Chevron* itself that in determining whether ambiguity exists, a court must use "traditional rules of statutory construction."[8] The Eighth Circuit in *Mayo* spoke candidly. Regarding *Chevron* step 1 it said that the words of a statute "must be construed in context, and when the context is a provision of the Internal Revenue Code, a Treasury Regulation interpreting the words is nearly always appropriate."[9] After having jumped to step 2, a court had to take only a short hop to conclude that an agency's regulation was reasonable.

Notice how *Chevron* would "nearly always" — if the Eighth Circuit's observation was correct — block courts addressing a statute interpreted by a regulation from applying the *best* ascertainable statutory meaning to the resolution of a tax dispute. The focus of *Chevron* step 1 on whether there was statutory ambiguity put Treasury's thumb on the scale.[10]

As a secondary effect, *Chevron* emboldened agencies to essentially rewrite statutes to serve their own objectives. The judiciary, through the judge-made *Chevron* test, effectively conferred enormous power on federal administrative agencies. But agency objectives were not necessarily aligned with those of Congress, as textually discernible under a "best reading" of a statute, however ambiguous that statute may have been.

A vivid and recent example of agency overreach comes out of the Corporate Transparency Act, passed by Congress in 2021. That statutory regime imposes sweeping reporting rules that will apply to the nation's 30 million small businesses, many of them undercapitalized, owned by immigrants, or both.[11] In 2022 regulations that were issued under title 31,[12] Treasury required that previously reported beneficial ownership information be updated within 30 days after the change. The statute, however, had more generously and unambiguously provided that the updating be done "in a timely manner, and not later than 1 year after the date on which there is a change."[13] Obviously, the foreshortened deadline, however helpful to Treasury's Financial Crimes Enforcement Network, is a trap for tens of millions of small business owners just trying to stay afloat — owners who perhaps have little contact with professional advisers. That is dubious public policy and antithetical to the textually expressed congressional intent.

Another stark example is found in reg. section 1.1061-3(b)(2)(i),[14] purportedly interpreting section 1061(c)(4)(A). Section 1061 dealt with the long-contested dispute over the treatment of carried interest. After years of lobbying and highly visible public debate, section 1061, enacted by the Tax Cuts and Jobs Act in 2017, somewhat trimmed — but surely did not eliminate — the tax benefits available for carried interest. The statute drew lines. In section 1061(c)(4)(A), the new statute carved out an exception from the reach of the statute for interests held by a "corporation." Reg. section 1.1061-3(b)(2)(i), however, views and treats that statutory "corporation" exception as not encompassing S corporations.

Just as wrong, Treasury's casual attitude toward the text of section 1061(c)(4)(A) appears to ignore a well-established definition found outside section 1061. Beginning in 1997, a provision of the check-the-box regulations defined the term "corporation" in a way that encompasses S corporations.[15] Under the doctrine of legislative reenactment, that provision was entitled to be given the force of law. And the 2017 Congress, enacting section 1061 two decades down the road, was surely aware of the far-from-obscure, code-wide definitional provision and easily could have had section 1061(c)(4)(A)'s exception refer to a "C corporation" if that limitation was truly its intention. Treasury later made several attempts to

[8] *Chevron*, 467 at 843 n.9.

[9] *Mayo*, 568 F.3d at 680.

[10] This situation has long concerned me. In 2013 *All Rise*, the alumni magazine of The Ohio State University College of Law, asked me what I would change about the law (in general) if I could change one thing. My response: the *Chevron* doctrine.

[11] *See generally* Thomas Sykes, "New FinCEN Reporting Will Challenge Small Companies," *Tax Notes Federal*, Jan. 10, 2022, p. 191.

[12] 31 C.F.R. section 1010.380(a)(2).

[13] 31 U.S.C. section 5336(b)(1)(D).

[14] T.D. 9945.

[15] Reg. section 301.7701(a)(3)-2(b)(7). *See* section 1374 (requiring S corporations to pay income tax on built-in gains and referring to "C corporation[s]").

have Congress "fix" the perceived problem, but it could not get legislators to act. More could be said, and has, about dubious reg. section 1.1061-3(b)(2)(i).[16]

II. *Loper Bright*'s Holdings

Chevron was not overruled hastily. The Supreme Court allowed over 60 amicus briefs in *Loper Bright* and its companion case, *Relentless*.[17] The majority and concurring opinions run to 73 pages. The majority opinion was written by Chief Justice John G. Roberts Jr. and joined by Justices Clarence Thomas, Samuel A. Alito Jr., Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett. Concurring opinions were filed by Justices Thomas and Gorsuch. Justice Elena Kagan dissented, joined by Justice Sonia Sotomayor. Justice Ketanji Brown Jackson, who recused herself from *Loper Bright*, joined in the dissent as it applied to *Relentless*.

The majority opinion centered on the point that *Chevron* intrudes on the dictates of section 706 of the APA, enacted in 1946 and found in title 5 of the U.S. Code. The Court also emphasized that Article III of the Constitution vests in the judiciary the power to "say what the law is," and that *Chevron* has been an obvious impediment to accomplishing that task.[18] Much of the opinion is devoted to describing the analytical and practical problems with *Chevron*, which led to misgivings that surfaced soon after the case was decided. The Court emphasized that in its opinions in recent years, it last relied on *Chevron* in 2016. Straws for the overruling of *Chevron* have long been in the wind.

A. APA Section 706 and *Marbury v. Madison*

The first principles driving *Loper Bright*'s rejection of *Chevron*'s test for the validity of agency regulations are succinctly captured in the following paragraph of the opinion:

> The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "*all* relevant questions of law" arising on review of agency action, section 706 (emphasis added) — even those involving ambiguous laws — and set aside any such action inconsistent with the law as they interpret it. And it prescribes no deferential standard for courts to employ in answering those legal questions. That omission is telling, because Section 706 *does* mandate that judicial review of agency policymaking and factfinding be deferential. See section 706(2)(A) (agency action to be set aside if "arbitrary, capricious, [or] an abuse of discretion"); section 706(2)(E) (agency factfinding in formal proceedings to be set aside if "unsupported by substantial evidence").[19] [Footnotes omitted.]

More precisely, section 706 of the APA states that courts must "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action." The Court thought this 1946 provision echoed Chief Justice John Marshall's famous declaration in *Marbury v. Madison*[20] that "it is emphatically the province and duty of the judicial department to say what the law is."

B. The Best-Meaning Polestar

Contrary to *Chevron* step 1, *Loper Bright* held that agency interpretations are not eligible for deference merely because a statute is ambiguous. *Loper Bright* held that courts must understand that "statutes, no matter how impenetrable, do — in fact, must — have a single, best meaning."[21] This best meaning is "necessarily discernable by a court deploying its full interpretive toolkit."[22] "In the business of statutory interpretation," the

[16] *See* Sykes, "The 'Corporation' Exception to Carried Interest: A Litigator's View," *Tax Notes Federal*, Nov. 2, 2020, p. 769.

[17] *Relentless Inc. v. Department of Commerce*, No. 22-1219 (U.S. June 28, 2024) (decided together with *Loper Bright*).

[18] Slip op. at 7 and 32 (citation omitted).

[19] *Id.* at 14.

[20] *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

[21] Slip op. at 22.

[22] *Id.* at 31.

Court said, "if it is not the best, it is not permissible."[23] No longer is a court to defer to a regulation if the statute being interpreted is ambiguous.

The "interpretive toolkit" to which the Court referred consists of the extensive rules that govern the judicial exercise of statutory construction. (As mentioned, *Chevron*, too, had instructed that application of the traditional rules of statutory construction should attend the step 1 determination of whether a statute was ambiguous.[24])

For a concise list and explanation of the most prominent of these rules of statutory construction, see Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) (setting out five fundamental principles and 51 canons and exposing 13 falsities).

C. *Skidmore*: Sometimes Relevant but No Deference

A species of deference much weaker than *Chevron* deference has sometimes been thought to emanate from *Skidmore*.[25] The *Loper Bright* opinion stated as follows about the role that *Skidmore* might properly play in ascertaining the best meaning of the code:

> In exercising such judgment, though, courts may — as they have from the start — seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" consistent with the APA. And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.[26] [Citations omitted.]

Further:

> In an agency case in particular, the court will go about its [interpretive] task with the agency's "body of experience and informed judgment," among other information, at its disposal. And although an agency's interpretation of a statute "cannot bind a court," it may be especially informative "to the extent it rests on factual premises within [the agency's] expertise." Such expertise has always been one of the factors which may give an Executive Branch interpretation particular "power to persuade, if lacking power to control."[27]

Having said this, the future role of *Skidmore* is sharply cabined by the fundamental rationale *of Loper Bright* — and its extraordinary overruling of *Chevron* — that (1) "it is emphatically the province and duty of the judicial department to say what the law is" (citation omitted);[28] and (2) section 706 of the APA requires *courts* to "decide *all* relevant questions of law" and "interpret . . . statutory provisions" (emphasis in original).[29] "Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."[30] Accordingly, *Skidmore* appears to retain vitality to the extent it authorizes respectful consideration of an agency position, especially a position resting on factual experiences and premises. Indeed, it would be surprising if the courts were precluded from giving respectful *consideration* to the position of a coordinate branch of government, at least if that position has gone through notice and comment under section 553 of APA.[31]

D. Tax Statutes That Delegate

As mentioned, section 7805(a) authorizes Treasury to "prescribe all needful rules and

[23] *Id.* at 23.

[24] *Chevron*, 467 at 843 n.9.

[25] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See* slip op. at 29 (Kagan, J., dissenting).

[26] Slip op. at 16-17.

[27] *Id.* at 25.

[28] *Id.* at 7 and 32.

[29] *Id.* at 21.

[30] *Id.* at 25.

[31] In recent years, a *Chevron* step zero has emerged. That element of the *Chevron* case law cut off application of *Chevron*'s two-step test. *See generally* Cass Sunstein, "Chevron Step Zero," 92 *Va. L. Rev.* 187 (2006). It may well be that the rationale or discussion found in various step zero cases sometimes would be useful to a taxpayer trying to cut off Treasury's reliance on the *Skidmore* aspect of the majority opinion. The point warrants further consideration elsewhere.

regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."

Loper Bright addresses delegations of this sort:

> To stay out of discretionary policymaking left to the political branches, judges need only fulfill their obligations under the APA to independently identify and respect such delegations of authority, police the outer statutory boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA.[32] [Citations omitted.]

Further on this point:

> In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes "expressly delegate[]" to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to "fill up the details" of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that "leaves agencies with flexibility," such as "appropriate" or "reasonable."
>
> When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, "fix[ing] the boundaries of [the] delegated authority," and ensuring the agency has engaged in "'reasoned decisionmaking'" within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.[33] [Citations and footnote omitted.]

Presumably, a court's policing of a delegation under section 7805(a) will focus on whether the regulations are *needed* to carry out the will of Congress, as textually expressed. The will of Congress, of course, is to be ascertained, in the first instance, with reference to the best meaning or reading of the statute being interpreted. It is that best meaning or reading that should inform the determination of the outer boundaries of a statute making a delegation.

The focus of the judicial "policing" exercise should not be on what the IRS believes it needs to pursue under a "protect the fisc" agenda or an administrative convenience agenda (unless that "convenience" agenda has been specifically authorized or operates in a way that is fair to taxpayers). If those general, far-reaching, pro-IRS agendas were sufficient to satisfy the "needful and necessary" standard of section 7805(a), the delegation would be untethered to the statute being interpreted, and there would be no limit to the IRS's regulatory power. The IRS's thumb would be back on the scale.

E. Broad Retroactivity for *Loper Bright*

The Court in *Loper Bright* addressed whether its overruling of *Chevron* should be retroactive. Obviously, there are tens of thousands of pages of Treasury regulations, and few of them have had their validity conclusively addressed by the courts. The *Loper Bright* majority said:

> We do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful — including the Clean Air Act holding of *Chevron* itself — are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a "'special justification'" for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, "just an argument that the precedent was wrongly decided." That is not enough

[32] Slip op. at 26.

[33] *Id.* at 17-18.

to justify overruling a statutory precedent.[34] [Citations omitted.]

Because relatively few Treasury regulations have been addressed by the Supreme Court or the federal courts of appeal under the *Chevron* framework, rarely will *stare decisis* bar a challenge mounted under *Loper Bright*. For example, the dubious regulations that interpret the Corporate Transparency Act or the carried interest carveout for a "corporation" will be subject to a challenge under *Loper Bright*. Even regulations that have *passed Chevron*'s test in a federal circuit court will remain subject to review under the *Loper Bright* standard in circuit courts that are not controlled by the earlier precedent. Of course, if the Supreme Court has addressed a regulation under the *Chevron* standard, as in *Mayo*, additional review of that regulation under *Loper Bright* is foreclosed in all courts, absent some change in the underlying substantive statutes or in the regulations previously addressed.

III. Unsettled Issues

Issues will surely arise in the wake of *Loper Bright*, many of them having to do with the response of Treasury and the IRS. The unresolved issues may include the following:

- Will the IRS persist with its long-standing internal policy that it will not administratively settle disputes with taxpayers that are based on a taxpayer's challenge to the validity of a Treasury regulation?
- Will the IRS continue to assert the 20 percent penalty under section 6662(a) and (b)(1) for disregard of a rule or regulation in view of *Loper Bright*'s holding that regulations are not entitled to deference and the fact that section 6664(c)(1) provides a reasonable cause defense to that penalty?
- Will Treasury seek from Congress legislation that restores the *Chevron* standard for the regulations of some or all federal agencies, or for some or all prior tax periods — and how will Congress respond?
- What role, if any, will *Chevron* step zero cases or concepts play in determining whether respectful consideration should be given to a Treasury regulation under *Skidmore*?
- Regarding state and local taxation, how will state authorities and courts, especially those that have adopted *Chevron*'s test for the validity of regulations, react to *Loper Bright*? Will they jettison *Chevron*? Will they follow *Loper Bright* or some modified version of it?

IV. Next Steps for Tax Practitioners

The complacency that practitioners have displayed when it comes to challenging a dubious Treasury regulation is no longer warranted. No longer will the IRS be entitled to a near-automatic win if it can establish that the statute is ambiguous. No longer is it a *fait accompli* that a court will uphold a challenged regulation.

Instead, practitioners must become familiar with traditional rules of statutory construction which courts will now robustly apply in ascertaining a statutory best meaning. A first step for practitioners facing a dubious regulation is to review and understand these rules, which are mandatory interpretive tools at a court's disposal.

The best way for a tax practitioner to get up to speed on those rules is to consult the wonderful book coauthored in 2012 by Scalia and his frequent collaborator Garner, mentioned earlier. If one wishes to drill down more deeply (although not necessarily more authoritatively), one might consult a venerable two-volume treatise first published 130 years ago: *Sutherland on Statutes and Statutory Construction*, by Norman J. Singer and J.D. Shambie Singer,[35] which comprehensively addresses both state and federal statutes and case law, and is periodically updated.

If a practitioner concludes that a Treasury regulation is possibly invalid under *Loper Bright*, it might make sense to file a refund claim, depending on the amount of tax involved in open and future tax years. A taxpayer ordinarily has three years from when a return was filed, or two years from when tax was paid, to file a timely and sufficient refund claim detailing the facts and grounds on which the taxpayer is relying.[36] Both the Internal

[34] *Id.* at 34.

[35] 2023 edition published by Clark Boardman Callaghan.

[36] Section 6511.

Revenue Manual and case law provide that a taxpayer who wishes to have the IRS take no action on a refund claim that is premised on the outcome of pending litigation (perhaps brought by others) may file a protective claim for refund within the applicable limitations period.

If the IRS has disallowed a refund claim, a taxpayer generally has two years within which to file suit in U.S. district court or the Court of Federal Claims,[37] unless the taxpayer previously signed a Form 2297, "Waiver of Statutory Notice of Claim Disallowance," in which case the two years begins to run when that form is signed. A taxpayer who has received a notice of deficiency from the IRS has only 90 days to file its petition in Tax Court, and that deadline may not be extended. If the taxpayer wishes to challenge a dubious regulation, the challenge should be teed up in the taxpayer's petition.

Any original return, refund claim, Tax Court petition, or similar document that is premised on a position that contradicts a Treasury regulation should, out of an abundance of caution, be accompanied by a Form 8275-R, "Regulation Disclosure Statement," disclosing the conflict and detailing the basis for the taxpayer's position. This will help protect the taxpayer from possible penalties if the challenge is rejected.

Tax practitioners should not overlook the recent activity around the six-year "outer limit" limitations statute found in 28 U.S.C. section 2401(a). If a taxpayer could have, but did not, mount a court challenge to a regulation within six years after its promulgation, a court challenge may be barred. That is, taxpayers sometimes don't bother to challenge a regulation because the tax liability stemming from its application is insufficient to warrant the expense and effort. If, however, the tax at stake increases sharply in a future tax year, a challenge at that time might make financial sense. But at that point, if the six-year limit of section 2401(a) has passed, would the IRS assert that section 2401(a) bars the challenge, despite the various other tax-specific limitations periods found in the code?[38]

V. Conclusion

Loper Bright, having overruled *Chevron*, will require courts to ascertain the best meaning of a tax statute, read in its statutory context, when a dispute arises. No longer will the IRS be able to rely on statutory ambiguity to achieve a virtually automatic win. The *Loper Bright* rule will affect how the agency does business, both in terms of how it handles disputes with taxpayers when a regulation plays a role and in terms of how it, through Treasury, issues new regulations and other guidance. It is not an overstatement to say that *Loper Bright* (which originated in cases involving a commercial fishing regulation) will bring about a sea change in how disputes between taxpayers and the IRS will arise, are handled, and are resolved.

Tax practitioners need to shake off the complacency that has set in over the last four decades in matters in which even a dubious Treasury regulation was assumed to lead to an automatic IRS win. No longer will a Treasury regulation be allowed to override the best meaning of a tax statute, properly construed. To ascertain that meaning and properly evaluate the hazards of litigation for return-position and settlement purposes, tax practitioners must understand the rules of statutory construction, including those found in nontax case law. Most nonlawyer tax practitioners will have to crack the books and begin to monitor the flow of new opinions being issued by the courts, or instead lean on an experienced tax lawyer who keeps up with the tax and nontax rules of statutory construction. This attention to the rules of statutory construction will likely be a new experience for many, even most, tax practitioners, who are used to checking for a regulation and then adhering to it — end of story. Often, federal tax litigators will have the most expertise with the rules of statutory construction: In the litigation crucible, they will have drilled down deeply in an attempt to show, usually without success, that a Treasury regulation was contrary to an unambiguous statute. ■

[37] *See* section 6501.

[38] *See Corner Post Inc. v. Board of Governors of the Federal Reserve System*, No. 22-1008 (U.S. July 1, 2024) (six-year limit starts to run when a litigant is adversely affected by the regulation).