Retroactive Notice 2017-10 Is Problematic

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In this article, Moore and Yablonicky argue that Notice 2017-10 imposes burdensome obligations and massive liability on syndicated conservation easement transactions completed years before it was published, and they explain why the notice may be invalid.

On December 23, 2016, the IRS released Notice 2017-10, 2017-4 IRB 544, in final form without prior public notice.[1] The notice identified syndicated conservation easement transactions as listed transactions and advised taxpayers and their representatives that some syndicated conservation easement transactions would be treated as tax avoidance transactions. In general, the notice categorizes as "listed" any transaction that (1) has an investor who purchases an interest in a passthrough entity (such as a partnership) that holds real property, (2) involves a contribution by the passthrough entity of a conservation easement encumbering the property to a tax-exempt entity, and (3) allocates a charitable deduction to the investor. The investor then reports a charitable contribution deduction that meets or exceeds an amount that is two and a half times the amount of the investor's investment on a federal income tax return.[2]

Notice 2017-10 also imposed substantial new reporting obligations on taxpayers who participated in syndicated conservation easements and their advisers. It required investors in syndicated conservation easements to file Form 8886, "Reportable Transaction Disclosure Statement," and their advisers to file Form 8918, "Material Advisor Disclosure Statement." The notice did not just impose these reporting obligations prospectively, however. Instead, it required the filing of these forms for all syndicated conservation easement transactions fitting the general description of a listed transaction going back to December 23, 2010, and provided for assessment of penalties under sections 6707 and 6707A for a failure to do so.[3]

In an instant, anyone who participated in or advised on a conservation easement transaction for six years prior had to scramble to do three things: first, to determine if the records from old, completed transactions were still available; second, if so, to analyze those records to determine if the transaction qualified as listed; and finally, if so, to work to complete and file the detailed, cumbersome forms that were not required when the transaction was consummated. Participants in syndicated conservation easements

[1] *See, e.g.*, Jay Adkisson, "The IRS Leaves a Lump of Coal for Syndicated Conservation Easements in Notice 2017-10," *Forbes*, Dec. 27, 2016 ("By waiting until the very end of the year to issue this guidance, the IRS also acts as an mischievous Santa who will send promoters and clients scrambling to unwind these deals for tax year 2016."); Partnership for Conservation, "Our Position on IRS Notice 2017-10" (Notice 2017-10 "was issued in final form without a process by which interested members of the public could participate and provide input.").

[2] Notice 2017-10.

[3] *Id.*

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and their advisers worked diligently to comply with the notice, but the task was monumental and had to be completed only months after the initial notice was issued.[4]

But taxpayers and their advisers may do well to challenge the retroactive nature of this notice as the IRS seeks to impose penalties for years before 2016. Statutory requirements, Supreme Court precedent, and Executive Order 13892 all militate against IRS enforcement of Notice 2017-10 regarding transactions completed before 2016. In addition, because it imposes new duties on the public and was issued without notice and comment, the notice itself may be invalid.

Administrative Procedure Act Requirements

An IRS notice is a public pronouncement published in the Internal Revenue Bulletin that may contain procedural or substantive guidance regarding an IRS position on the tax law.[5] The Internal Revenue Bulletin describes itself as "the authoritative instrument of the Commissioner of Internal Revenue for the publication of official rulings and procedures of the Internal Revenue Service."[6] Notices are a way for the IRS to issue substantive or procedural guidance on matters that the IRS determines require immediate guidance without the red tape associated with promulgating regulations.[7] The IRS published the first document labeled a notice in 1976.[8]

There are no special procedures that the IRS must follow to issue a notice. The agency simply publishes the notice in the Internal Revenue Bulletin. The IRS typically does not follow the procedure required for regulations in the Administrative Procedure Act (APA) for notices.

Federal agencies are empowered to interpret the law and make rules that bind the public. Such binding rules can only be promulgated after notice to the public and an opportunity to comment. The APA "prescribes a three-step procedure for so-called 'notice-and-comment rulemaking.'"[9] First, the proposed rule must be published in the *Federal Register*.[10] Second, the public must be given the chance to submit views to the agency, in writing or orally, and the agency must consider and respond to significant comments it receives.[11] Finally, the agency must include with the final rule "a concise general statement of [its] basis and purpose."[12] The purpose of APA notice and comment is "to afford persons an opportunity to influence agency action in the formative stage, before implementation, when the agency is more likely to be receptive to argument."[13]

Not all agency statements must undergo notice and comment. If a statement published without notice and comment is challenged, the court must assess whether the rule "has the force and effect of law" — that is, binds the public.[14] If it does, then it needed to undergo notice and comment, and the agency's failure to do so makes the rule invalid. If, however, the rule does not have the force and effect of law — that is, it is a policy or similar statement that does not bind the public — then the court decides whether the rule can be upheld because it is a reasonable interpretation of the statute it interprets.

The bedrock case on deference to agency rules relates to binding rules issued after notice and comment. *Chevron*[15] established a deferential standard for courts reviewing such rules. Under what has become known as *Chevron* step 1, the reviewing court must decide "whether Congress has directly spoken to the precise question at issue." If not, the court reaches step 2 and must

[4] Notice 2017-10 was modified twice, once by Notice 2017-19, 2017-9 IRB 1000, to extend the deadline for disclosure of Forms 8918 from June 21, 2017, to October 2, 2017, and once by Notice 2018-58, 2018-33 IRB 305, which extended the filing deadline for taxpayers affected by Hurricane Harvey, Hurricane Irma, and Hurricane Maria to October 31, 2017.

[5] Internal Revenue Manual section 4.10.7.2.4.1.

[6] This statement is printed at the beginning of each weekly bulletin. *See also* reg. section 601.601(d).

[7] IRM section 32.2.2.3.3.

[8] IRS Notice 1976-1 C.B. 541.

[9] *Altera Corp. v. Commissioner*, 926 F.3d 1061, 1080 (9th Cir. 2019) (quoting *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199, 1203 (2015)).

[10] 5 U.S.C. section 553(b).

[11] 5 U.S.C. section 553(c); *Altera*, 926 F.3d at 1080.

[12] *Altera*, 926 F.3d at 1080 (quoting 5 U.S.C. section 553(c)).

[13] *Kollett v. Harris*, 619 F.2d 134, 145 (1st Cir. 1980).

[14] *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 96-97 (2015) ("Rules issued through the notice and comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.' . . . Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'") (internal citations omitted).

[15] *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842 (1984).

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decide "whether the agency's answer is based on a permissible construction of the statute."[16] That analysis involves a detailed inquiry into whether the agency adequately discussed its goals for the rule, the rule's relationship to the statute and its context, and alternatives to the rule — virtually mandating that the agency complete the notice and comment process to secure these answers.[17]

Importantly, only regulations issued in the exercise of an agency's authority to make rules carrying the force of law are entitled to *Chevron* deference.[18] Deference is appropriate when Congress delegated authority to the agency generally to make rules carrying the force of law and the agency interpretation was promulgated in the exercise of that authority, typically through notice and comment rulemaking.[19]

At Treasury, notice and comment rulemaking normally is the way that the agency shows it is formally exercising its congressionally delegated rulemaking authority.[20] Pronouncements issued without notice and comment, such as revenue rulings and revenue procedures, do not have the force or effect of law,[21] are not binding on any court, and are not entitled to *Chevron* deference,[22] as properly recognized by the Justice Department.[23] Revenue rulings are the product of far less deliberation than regulations, even proposed regulations, to which courts uniformly give no deference at all. Revenue rulings are issued without input from the public and typically are generated by just one branch of the IRS Office of Chief Counsel.

IRS notices rank even lower than revenue rulings and revenue procedures in the pantheon of IRS pronouncements.[24] Notices are essentially expedited revenue rulings and, as such, must fall below revenue rulings on the authoritative scale. The haste with which notices are issued tends to make them even less persuasive than a similar revenue ruling would be.[25]

Mechanics of Notice 2017-10

Treasury has significant authority to enforce the Internal Revenue Code. Congress initially passed sections 6111 and 6112 in 1984, requiring disclosure of specified tax shelters (now referred to as listed or reportable transactions) and maintenance of lists of participants.[26] The Treasury secretary may prescribe regulations that

[16] *Id.* at 843.

[17] *See* David J. Shakow, "Who's Afraid of the APA?" *Tax Notes*, Feb. 13, 2012, p. 825.

[18] *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (holding that tariff classification ruling was not entitled to *Chevron* deference because it was not issued in the agency's exercise of authority to "make rules carrying the force of law").

[19] *Id.* at 226-227; *see also City of Arlington v. FCC*, 569 U.S. 290, 320 (2013) (Roberts, C.J., dissenting) (finding that agency action claiming deference must have been promulgated in the exercise of its statutory authority; if not, it does not have the force of law).

[20] *Mayo Foundation for Medical Education and Research v. United States*, 562 U.S. 44, 57 (2011); *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (observing that notice and comment rulemaking is a "very good indicator" that Congress intended the regulation to carry the force of law) (quoting *Mead*, 533 U.S. at 229-230).

[21] Reg. section 601.601(d).

[22] In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Supreme Court faced the issue of the deference owed to rulings under the Fair Labor Standards Act. The Court held that several factors contributed to the deference to be given to agency interpretations, including "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *See also Federal National Mortgage Association v. United States*, 379 F.3d 1303, 1308 (Fed. Cir. 2004) (holding that revenue procedures are not a legislativelike interpretation and are therefore entitled to *Skidmore*, not *Chevron*, deference). The Tax Court has firmly rejected *Chevron*-style deference for revenue rulings. *See, e.g., Taproot Administrative Services Inc. v. Commissioner*, 133 T.C. 202 n.15 (2009); Kathryn Sedo and Katrina Wessbecker, "Should Courts Ever Give Deference to Revenue Procedures?" *Tax Notes*, Jan. 9, 2012, p. 225 ("The consensus among courts and commentators after *United States v. Mead Corp.* is that *Skidmore*, and not *Chevron*, is the appropriate standard of deference for revenue rulings.").

[23] Marie Sapirie, "DOJ Won't Push Chevron Deference for Revenue Rulings," *Tax Notes*, May 16, 2011, p. 674.

[24] *Id.* (indicating that the counselor to the associate chief counsel (procedure and administration) called chief counsel notices and the Internal Revenue Manual "lesser forms of guidance").

[25] *See BMC Software Inc. v. Commissioner*, 780 F.3d 669, 676 (5th Cir. 2015) (finding a notice "entirely unpersuasive and unworthy of deference" because it contained no reasoning or analysis).

[26] Sections 6111, 6112, P.L. 98-369, Div. A, Title I, section 142(a), July 18, 1984, 98 Stat. 681; 98 Stat. 677, *amended by* P.L. 108-357, section 815(a) and (b)(2), Oct. 22, 2004, 118 Stat. 1581-1583.

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provide, among other things, "such rules as may be necessary or appropriate to carry out the purposes" of sections 6111 and 6112.[27] In accordance with that authority and the authority granted in sections 6011 and 7805(a), which provide that the Treasury secretary shall prescribe all needful rules and regulations for enforcing the IRC, the IRS promulgated reg. section 1.6011-4. That regulation provides in part that a "listed transaction is a transaction that is the same as or substantially similar to one of the types of transactions that the Internal Revenue Service (IRS) has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction."[28]

Notice 2017-10 designated some syndicated conservation easement transactions as listed transactions for purposes of reg. section 1.6011-4(b)(2) and sections 6111 and 6112.[29] Section 6111 requires material advisers to disclose reportable transactions to the secretary.[30] A material adviser is defined as any person:

> (i) who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
>
> (ii) who directly or indirectly derives gross income in excess of the threshold amount (or such other amount as may be prescribed by the Secretary) for such aid, assistance, or advice.[31]

The threshold amount is $50,000 for reportable transactions benefiting natural persons and $250,000 in any other case.[32] The threshold amount for listed transactions drops to $10,000 and $25,000, respectively.[33] Reportable transaction means any transaction "of a type which the Secretary determines as having potential for tax avoidance or evasion."[34] Section 6111(c) authorizes the secretary to prescribe regulations that provide "such rules as may be necessary or appropriate to carry out the purposes of this section."[35]

Section 6112 provides that every material adviser must, for each reportable transaction, maintain a list of advisees and other information as the secretary may by regulations require.[36] The list must be retained by the adviser for seven years, unless the secretary provides otherwise in regulations.[37]

Notice 2017-10 provided that syndicated conservation easement transactions are listed transactions effective December 23, 2016.[38] Material advisers who made a tax statement on or after January 1, 2010, regarding transactions entered into on or after January 1, 2010, have disclosure and list maintenance obligations under sections 6111 and 6112.[39] If they fail to disclose, or to maintain or turn over their lists of investors, they may be subject to penalty under sections 6707 and 6708(a), and to other penalties, such as the valuation misstatement penalty for incorrect appraisals under section 6695A. Section 6707 imposes a penalty of the greater of $200,000 or 50 percent of the gross income derived by the adviser for failure to disclose.[40] Section 6708(a) imposes a penalty of $10,000 *per day* for failure to turn over a list of advisees. Section 6695A imposes a penalty of the lesser of (1) the greater of 10 percent of the tax understatement or $1,000, or (2) 125 percent of

[27] *Id.* at section 6111(c)(3).

[28] Reg. section 1.6011-4(b)(2). Section 6707A(c), which was not enacted when reg. section 1.6011-4 was promulgated, also provides that a reportable transaction "means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under section 6011, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion" (section 6707A(c)(1)); and a listed transaction "means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011" (section 6707A(c)(2)).

[29] Notice 2017-10, para. 1. Syndicated conservation easement transactions became listed transactions with the publication of Notice 2017-10. They became one the "dirty dozen," the "worst of the worst tax scams," in 2019. *See* IRS, "Dirty Dozen."

[30] Section 6111(a).

[31] *Id.* at section 6111(b)(1).

[32] *Id*. at section 6111(b)(2).

[33] Reg. section 301.6111-3(b)(3)(i)(B).

[34] Section 6111(b)(2) (cross-reference to section 6707A(c)).

[35] *Id*. at section 6111(c).

[36] Section 6112(a).

[37] *Id*. at section 6112(b)(1).

[38] Notice 2017-10 section 3.

[39] *Id*.

[40] Section 6707(a), (b).

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the gross income received by the appraiser, if a substantial or gross valuation misstatement is made.

Notice 2017-10 does not explain why, if syndicated conservation easement transactions are listed transactions effective December 23, 2016, participants and material advisers will be penalized if they fail to disclose or maintain lists regarding transactions occurring between January 1, 2010, and December 22, 2016.

Notice 2017-10 Cannot Be Applied Retroactively

Retroactivity is disfavored in tax law, and with good reason. After 1996, Congress expressly forbade it except in rare circumstances. Since 1996, section 7805 provides:

> No temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:
>
> (A) The date on which such regulation is filed with the Federal Register.
>
> (B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.
>
> (C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.[41]

Section 7805 did not always prohibit retroactive rules. The Treasury secretary used to have authority to "prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."[42] The law allowing Treasury alone to prescribe the extent to which regulations would apply retroactively was changed because the House Ways and Means "Committee believes that it is generally inappropriate for Treasury to issue retroactive regulations."[43] Congress's decision to strip the Treasury secretary of the authority to make regulations retroactive was part of the Taxpayer Bill of Rights II that established the position of the national taxpayer advocate and provided for other, increased taxpayer protections.[44] If the Treasury secretary is prohibited from enacting retroactive regulations, which have additional procedural protections of notice and comment, surely he is not permitted to enact retroactive notices. No doubt if challenged, Treasury would point to section 7805(b)(3), which provides an exception to the retroactivity prohibition to "prevent abuse." But if the risk of abuse was so significant as to justify six years of retroactivity, Treasury failed to say so in Notice 2017-10. Moreover, even if Treasury were to argue that the retroactivity was implemented to prevent abuse, Supreme Court precedent strongly weighs against it in the tax context.

A rule that "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,"[45] is retroactive. When a rule attaches new consequences to events completed before its promulgation, a court may reject its retroactive effect based on factors such as fair notice, reasonable reliance, and settled expectations.[46] "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact,"[47] therefore, "prospectivity remains the appropriate default rule."[48] Courts do not construe laws to operate retroactively when to do so would cause "manifest injustice," as when

[41]Section 7805(b)(1).

[42]*Id.* section 7805(b) (effective through July 29, 1996), P.L. 101-508, Title XI, section 11621(a).

[43]H.R. Rep. 104-506 at 44 (Mar. 28, 1996).

[44]*Id.*

[45]*Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994) (quoting Justice Joseph Story). In *Landgraf*, the Supreme Court went to great lengths to explain that even a rule that is retrospective, in that it takes away or impairs "vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retroactive" because it "attaches new legal consequences to events completed before its enactment." *Id.* at 269, 270.

[46]*Id.* at 270.

[47]*Id.*

[48]*Id.* at 296 ("The well-established presumption against retroactive legislation, which serves to protect settled expectations, is grounded in a respect for vested rights.").

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an individual's rights or obligations would be changed by surprise.[49] When, as here, a rule creates a new duty and attaches a penalty to transactions from years past, and the statute enacting the rule does not contain an "express command" authorizing retroactivity, Supreme Court precedent "teaches that it does not govern absent clear congressional intent favoring such a result."[50] Here, there is only a notice providing for the imposition of new duties regarding past events, and no congressional intent at all.

Congress may enact tax laws with some retroactive effect, usually to the beginning of the tax year or to the date of introduction of the bill that changed the law.[51] The Supreme Court may uphold retroactive tax legislation as constitutional if it is reasonable and if Congress acted promptly in changing the law, so the period of retroactivity is short.[52] As the Court has explained, "taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract."[53] No one has a "vested right in the Internal Revenue Code" as it exists at any moment in time.[54]

A period of retroactivity longer than the year preceding the legislative session in which the law was enacted, however, raises serious constitutional challenges.[55] Moreover, while retroactive taxes are often acceptable, retroactive penalties are not: It is arbitrary for the government to penalize conduct that was not subject to penalties when the person engaged in the conduct.[56] If the six-year retroactive reporting and list maintenance requirements for material advisers announced in Notice 2017-10 were enacted by Congress, the Supreme Court almost certainly would hold them to be unconstitutional, because they impose new burdens on individuals well after the fact, and the period of retroactivity at issue here is anything but modest.

Even in cases in which a retroactive law passed through bicameralism and presentment would be upheld, it does not follow that agencies possess the power to issue retroactive guidance that imposes new duties and penalties.[57] Rather, courts require affirmative statutory authorization before they will uphold retroactive agency action.[58] Indeed, Congress's grant of authority to agencies to interpret statutes "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[59] In other words, "even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant."[60]

In particular, an agency must not impose a new liability on individuals for past actions in a case involving penalties.[61] As the Supreme Court put it in *Christopher*, "it is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable" when the agency, years later, creates new obligations.[62]

Analyzing whether a rule can be retroactive is a two-step inquiry. First, the statute authorizing the rule must clearly allow retroactive interpretations. If so, then the rule must be

[49] *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 717 (1974); *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F.2d 141, 148 (9th Cir. 1952) (refusing to impose sanctions on a company for violating a labor rule that was published only after the company committed the acts complained of); *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (A "decision branding as 'unfair' conduct stamped 'fair' at the time a party acted, raises judicial hackles considerably. . . . And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known.").

[50] *Landgraft*, 511 U.S. at 280.

[51] *United States v. Darusmont*, 449 U.S. 292, 296-297 (1981).

[52] *See United States v. Carlton*, 512 U.S. 26, 32 (1994) (upholding a retroactive tax statute because "Congress acted promptly" to fix a mistake and "established only a modest period of retroactivity," about 14 months).

[53] *Welch v. Henry*, 305 U.S. 134, 146 (1938).

[54] *Carlton*, 512 U.S. at 33.

[55] *See Carlton*, 512 U.S. at 38 (O'Connor, J., concurring).

[56] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012).

[57] *Bowen*, 488 U.S. at 223 (Scalia, J., concurring).

[58] *Id*. at 224 (Scalia, J., concurring).

[59] *Id*. at 208.

[60] *Id*.

[61] *Christopher*, 567 U.S. at 156 (citing *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)); *see also* U.S. Const., Art. I, section 9 ("No bill of attainder or ex post facto Law shall be passed.").

[62] *Christopher*, 567 U.S. at 159; *see also Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

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examined to see whether the retroactivity violates the due process clause.[63] Retroactivity violates the Constitution's due process clause if it is unduly harsh and oppressive.[64] Due process considerations prevent an agency from clarifying rules that can result in a penalty being imposed on someone who acted before clarification was available.[65] Under the APA, a rule's effective date normally cannot be sooner than 30 days after publication, unless the rule grants an exception, the rule is interpretive, or there is good cause for a different effective date.[66] In other words, the default for notice and comment rules is prospectivity.[67]

Section 6111 simply does not authorize retroactive rulemaking. Notice 2017-10 created brand new reporting duties for investors and material advisers and imposes harsh penalties for any failure to comply — with retroactive effect that would likely be unconstitutional even if done by Congress itself, and that is certainly impermissible when done by Treasury alone.[68] Imposing these penalties on six prior years' worth of transactions is unduly harsh and oppressive. Simply stated, investors and their advisers would have had to have a crystal ball in 2010 to know that in 2017 they would have stringent reporting obligations for their 2010 appraisals. The law cannot possibly require that.

Although slightly retroactive tax laws are commonplace, Notice 2017-10 is not a tax law, it is a notice, and it is not "slightly" retroactive. It creates new obligations for advisers and imposes substantial penalties on those who were unable to comply with reporting requirements on six-year-old transactions because they did not anticipate that reporting would be required. This does not pass constitutional muster. When Notice 2017-10 is inevitably challenged in court, the court will likely apply the presumption against retroactive rulemaking and hold that the notice does not apply to transactions completed before 2016.[69]

EO 13892 Prohibits Penalizing Past Conduct

Supreme Court precedent disfavoring retroactivity is entirely consistent with Executive Order 13892, "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication." The executive order begins by saying that "the rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions"[70] and goes on to say:

> Agencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication. No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct.[71]

It also states that guidance documents, such as notices issued without notice and comment, "may not be used to impose new standards of conduct on persons . . . except as expressly authorized by law."[72] Moreover, an agency may not penalize noncompliance with a standard of conduct announced solely in a guidance document, unless the agency shows that the noncompliance violated not only the guidance document, but also a specific statute or regulation.[73] Finally, the executive order provides that when an agency makes any determination that has legal consequence for a person, "it may only apply

[63] *Carlton*, 512 U.S. at 32.

[64] *Id.* at 30 (quoting *Welch*, 305 U.S. at 147).

[65] Shakow, *supra* note 17.

[66] 5 U.S.C. section 553(d).

[67] *Guy F. Atkinson Co.*, 195 F.2d 141, 150 (9th Cir. 1952) (indicating that in the APA, "Congress expressed a mood . . . of disapproval of the application of agency policies to persons who acted without an opportunity to know that such policy would be applied to their conduct. The mood was one of disapproval of retroactive agency action.").

[68] *Landgraf*, 511 U.S. at 281 (citing *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts.").

[69] *Bowen*, 488 U.S. at 213. Indeed, the notion that taxpayers or advisers would have records over six years old is belied by the IRS's guidance to taxpayers published on IRS.gov about how long to retain records, which in general advises keeping records for three years. *See* IRS, "How Long Should I Keep Records?"

[70] Executive Order 13892, section 1.

[71] *Id.*

[72] *Id.* at section 3.

[73] *Id.*

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standards of conduct that have been publicly stated in a manner that would not cause unfair surprise."[74] Indeed, the agency "must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law."[75]

This executive order makes clear that the IRS cannot penalize participants and conservation easement advisers, including attorneys, accountants, and appraisers, for failing to provide complete information returns for transactions completed during the six years before Notice 2017-10 was published. When transactions were completed in 2010 through most of 2016, advisers were not required to prepare and file Form 8886 or Form 8918 regarding their conservation easement engagements. To apply those filing obligations to transactions completed in years past — and impose penalties for noncompliance — without prior public notice is contrary to Executive Order 13892. In other words, to find that advisers' conduct during 2010 through 2015 violated standards of conduct announced in December 2016 is an unfair surprise entirely inconsistent with the executive order's call for agencies to act transparently.

Notice 2017-10 May Be Invalid

As described earlier, sections 6707A, 6707, 6111, and 6112 are all laws passed by Congress to together require reporting by participants and their advisers in transactions that the IRS has determined to be listed or reportable transactions. These statutes give the Treasury secretary authority to prescribe regulations necessary to carry out the code sections.

Section 6707A provides definitions of reportable and listed transactions. A "Reportable transaction" means "any transaction with respect to which information is required to be included with a return of statement because, *as determined under regulations prescribed under section 6011*, such transaction is of a type which the Secretary determines as having a potential for tax avoidance or evasion."[76] A "listed transaction" means "a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of section 6011.[77] Listed transactions are reportable transactions, and Congress expressly provided that reportable transactions must have potential for tax avoidance or evasion as determined under regulations.

Reg. section 1.6011-4(b)(2) provides that a listed transaction is a transaction that the IRS determined to be a tax avoidance transaction and identified by "notice, regulation, or other form of published guidance as a listed transaction." It is not at all clear, however, that the IRS has authority to designate by notice, instead of by regulation, specific transactions as reportable and thus subject to sections 6707A, 6707, 6111, and 6112. In other words, by promulgating reg. section 1.6011-4(b)(2) and further authorizing *itself* to identify what a listed or reportable transaction is merely by notice, and not by regulation promulgated after notice and comment, Treasury may have exceeded its authority to carry out the purpose of sections 6707A, 6707, 6111, and 6112. The plain language of section 6707A, which provides that reportable and listed transactions will be determined by regulation, does not appear to contemplate that the IRS will simply identify reportable and listed transactions by notice instead of by regulation.

Had the IRS proposed regulations providing that syndicated conservation easements were to be considered a listed transaction and submitted those regulations for notice and comment, the agency's determination of what constitutes a reportable transaction would be entitled to *Chevron* deference.[78] Instead, however, the IRS issued Notice 2017-10 without prior opportunity for public comment. Notice 2017-10 presented a major shift in IRS administrative policy toward

[74] *Id.* at section 4.

[75] *Id.*; *see also* Jenny L. Johnson Ware, "New Executive Orders Shift Conservation Easement Battleground," *Tax Notes Federal*, Nov. 4, 2019, p. 785.

[76] Section 6707A(c)(1) (emphasis added).

[77] Section 6707A(c)(2).

[78] *See, e.g.*, *Chevron*, 467 U.S. at 843; *Mead*, 533 U.S. 218, 227 (holding tariff classification ruling not entitled to *Chevron* deference because not issued in agency's exercise of authority to "make rules carrying the force of law").

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charitable deductions that could not have been announced without the agency carefully considering and pronouncing the new rule.[79] The IRS failed to request public comment on Notice 2017-10, despite its having created new, retroactive obligations and imposing civil penalties for those who fail to meet them.

In *In re Long-Distance Telephone Service*,[80] the plaintiff taxpayers asserted that Notice 2006-50, 2006-1 C.B. 1141, which provided procedures for taxpayers to obtain a refund of wrongfully collected long-distance telephone excise tax, was invalid because the IRS did not comply with the APA's notice and comment procedures.[81] The court observed that whenever an agency issues a binding pronouncement, it must follow the APA's legislative rulemaking procedures, including notice and comment.[82] Only nonbinding pronouncements that do not impose any rights or obligations are exempt from notice and comment requirements.[83] Notice 2006-50 was a binding pronouncement, so the IRS violated the APA by issuing it without first complying with notice and comment.[84] The court vacated the notice and remanded the matter to the IRS.[85]

When an IRS notice goes beyond mere notification, and instead imposes significant reporting requirements and monetary penalties, the notice should be treated as having the force of law, just like Notice 2006-50 in *In re Long-Distance Telephone Service*. The IRS presumably wants Notice 2017-10 to carry the force of law, to regulate participants and their advisers to specified conduct or else face penalties. But it wants the same notice *not* to carry the force of law for purposes of the procedural requirements of the APA, because the agency's failure to subject Notice 2017-10 to notice and comment may doom enforcement of those penalties. After *In re Long-Distance Telephone Service*, the IRS should not be permitted to evade the notice and comment process to promulgate a binding rule that creates new obligations and imposes draconian penalties retroactively.[86]

Notice and comment procedures exist for good reason. An agency must give interested parties fair notice and an opportunity to comment on a proposed rule to ensure that regulated entities understand their legal obligations and to produce a rule that reflects the collective expertise of industry participants.[87] Notice 2017-10 failed on both counts. Without notice, investors' and their advisers' reporting obligations ballooned. They became liable for severe penalties if they failed to file IRS forms going back six years. The IRS failed to notify affected parties before imposing these new obligations and failed to get the input from material advisers that their industry does not require maintenance of six prior years of records in the ordinary course.

The American College of Tax Counsel put it this way recently: "The need for powerful enforcement tools in the attack on tax shelters does not justify issuance of tax rules outside of the requirements of the Administrative Procedure Act or other Congressionally enacted safeguards on regulatory action, or the insulation of those rules from judicial review."[88] While the IRS has broad powers to enforce the IRC, those powers do not extend to circumventing the notice and comment requirements of the APA. It remains to

[79] *Altera*, 926 F.3d at 1085; *Guy F. Atkinson Co.*, 195 F.2d at 149 ("The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.").

[80] *In re Long-Distance Telephone Service Federal Excise Tax Refund Litigation*, 853 F. Supp. 2d 138, 143 (D.C. Cir. 2012).

[81] *Id.* at 141.

[82] *Id.* at 142.

[83] *Id.*; *see also* Shakow, *supra* note 17 (observing that "if the rule is essential to support agency enforcement, it is legislative," even if the rule tries to "masquerade" as interpretive).

[84] *In re Long-Distance Telephone Service*, 853 F. Supp. 2d at 143. The district court was ruling on remand from the D.C. Circuit, which had determined that Notice 2006-50 was binding. *Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011).

[85] *In re Long-Distance Telephone Service*, 853 F. Supp. 2d at 145. The case was appealed again after the IRS failed to issue a new notice. *In re Long-Distance Telephone Service*, 751 F.3d 629 (D.C. Cir. 2014). The circuit court held that the IRS was not obligated to promulgate a new rule and could not be ordered by any court to do so. *Id.* at 634.

[86] *Perez*, 575 U.S. 92, 109 (Scalia, J., concurring) ("An agency may use interpretive rules to advise the public by explaining its interpretation of the law. But an agency may not use interpretive rules to bind the public by making law."); *cf.* Executive Order 13891 (imposing a requirement that every agency guidance document below the level of regulations "clearly state that it does not bind the public").

[87] *Majestic Weaving Co.*, 355 F.2d 854, 862 n.4 ("We also think it highly undesirable for an agency to announce a new per se rule without either a rule-making or an evidentiary hearing, thereby denying itself the light on the proper content of the rule which such proceedings would afford.").

[88] Brief for the American College of Tax Counsel in *CIC Services LLC v. IRS*, No. 19-930, *3.

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be seen whether Treasury's authorization to itself in reg. section 1.6011-4(b)(2) was an adequate form of informing taxpayers of new duties, obligations, and potential penalties associated with syndicated conservation easement transactions completed in years past.

Conclusion

Federal agencies have vast powers not only to interpret the law but also, for practical purposes, to make law. When they do so, justice requires that they exercise their power in an informed and thoughtful way to protect regulated parties from agency abuse. The APA's notice and comment procedures promote participation by, and fairness to, affected parties when legislative authority has been delegated to unrepresentative agencies.

Notice 2017-10 imposes burdensome obligations and massive liability by administrative fiat, rather than through formal agency action, for transactions completed years before the notice was published. To uphold Notice 2017-10 for pre-2016 transactions would seriously undermine the principle, enshrined in both Supreme Court precedent and Executive Order 13892, that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires."[89] ■

[89] *See Christopher*, 567 U.S. at 156 (quoting *Gates & Fox Co. v. Occupational Safety and Health Review Commission*, 790 F.2d 154, 156 (D.C. Cir. 1986)); Executive Order 13892 (stating that an agency "may only apply standards of conduct that have been publicly stated in a manner that would not cause unfair surprise").

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