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Tax Law Section

Saturday, January 21

The Major Questions Doctrine and its Effect on Federal Tax Administration

Clinton Wallace

Wallace, Clinton 1/4/2023
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124 T.C.M. (CCH) 51, T.C.M. (RIA) 2022-080, 2022 RIA TC Memo 2022-080

T.C. Memo. 2022-80
United States Tax Court.

Donald W. THOMPSON, Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 8792-20
|
Filed July 20, 2022.
|
Served July 20, 2022

Synopsis
Background: Taxpayer petitioned for redetermination of income tax deficiencies and accuracy-related penalties arising from disallowed charitable contribution deductions claimed by taxpayer for conservation easement donation during three taxable years at issue. Internal Revenue Service (IRS) moved for partial summary judgment.

Holdings: The Tax Court, Albert G. Lauber, J., held that:

genuine issue of material fact as to whether conservation purpose of donated easement was "protected in perpetuity," as was required to claim charitable contribution deductions, precluded summary judgment for IRS, but

IRS secured requisite written supervisory approval before communicating proposed imposition of penalties to taxpayer.

Motion granted in part and denied in part.

Procedural Posture(s): Tax Court Petition; Motion for Summary Judgment.

West Codenotes

Recognized as Invalid
26 C.F.R. § 1.170A-14(g)(6)(ii)

Attorneys and Law Firms

Vivian D. Hoard and Elizabeth K. Blickley, for petitioner.

Amber B. Martin, Daniel K. McClendon, and John T. Arthur, for respondent.

MEMORANDUM OPINION

LAUBER, Judge:

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124 T.C.M. (CCH) 51, T.C.M. (RIA) 2022-080, 2022 RIA TC Memo 2022-080

***1** This case involves charitable contribution deductions claimed by petitioner for a conservation easement donation. The Internal Revenue Service (IRS or respondent) issued petitioner a notice of deficiency disallowing these deductions and determining accuracy-related penalties under section 6662(a). [1] In his Answer respondent asserted additional penalties for substantial valuation misstatement under section 6662(e) and for gross valuation misstatement under section 6662(h). Petitioner timely petitioned this Court for redetermination.

Currently before the Court is respondent's Motion for Partial Summary Judgment. Respondent contends that the deductions were **[*2]** properly disallowed because the easement's conservation purpose was not "protected in perpetuity." *See* § 170(h)(5)(A). Separately, respondent contends that the IRS complied with the requirements of section 6751(b)(1) by securing timely supervisory approval of the penalties. We will deny the Motion on the section 170(h)(5)(A) question but grant it with respect to section 6751(b)(1).

Background

The following facts are derived from the pleadings, the parties' motion papers, and the exhibits and declarations attached thereto. They are stated solely for purposes of deciding respondent's Motion and not as findings of fact in this case. *See Sundstrand Corp. v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 (7th Cir. 1994). Petitioner resided in Georgia when he petitioned this Court.

Petitioner is the sole member of DWT Properties, LLC (DWT). DWT is a single-member limited liability company organized under the laws of South Carolina. At all relevant times DWT, for Federal income tax purposes, was disregarded as an entity separate from its owner. *See* Treas. Reg. § 301.7701-3(b)(1)(ii).

On June 28, 2012, DWT acquired roughly 176 acres of land (Property) in Edgefield County, South Carolina. DWT's acquisition cost for the Property was $1,234,597. On November 5, 2013, petitioner secured an appraisal valuing the Property at $10,989,000; he thus took the position that the Property had appreciated in value by 890% in 16 months. On November 18, 2013, DWT granted to the City of North Augusta (City) a conservation easement over the Property.

Petitioner timely filed Form 1040, U.S. Individual Income Tax Return, for his 2013 tax year. On that return he reported a charitable contribution deduction of $10,800,000 for DWT's donation of the conservation easement. He claimed carryforward deductions of $1,134,594, $1,161,900, and $1,246,172, respectively, on his 2016–2018 tax returns. [2]

***2** The easement deed recites the conservation purposes and generally prohibits commercial or residential development. But it reserves certain rights to DWT, including the rights to build a golf course and hold golf tournaments on the Property. In connection with the golf course DWT reserved the rights to build food concession stands, rest **[*3]** stations, rain shelters, paths for golf carts, and other structures "customary and beneficial to the operation of the Golf Course."

Article 6.5 expresses the parties' intention that "no change in conditions ... will at any time or in any event result in the extinguishment of any of the covenants, restrictions or easements" specified in the deed. However, if a change in conditions nevertheless gives rise to the extinguishment of the easement, then on any subsequent sale or conversion the City is entitled to a portion of the "proceeds of sale." The deed defines "proceeds of sale" as the consideration received in exchange for the Property, minus any "amount attributable to the improvements constructed upon the [Property]" by the grantor.

The IRS selected petitioner's 2016–2018 returns for examination and assigned the case to Revenue Agent (RA) Bernard Dawson. [3] In November 2019, as the examination neared completion, RA Dawson recommended assertion of penalties

against petitioner under section 6662(a) and (b)(1) and (2) for negligence or substantial understatements of income tax. His recommendations to this effect were set forth in a civil penalty approval form. RA Dawson's acting group manager, Amber Carper, nee Pryor, signed the form on November 25, 2019.

Later that day RA Dawson sent petitioner Form 4549, Income Tax Examination Changes, for discussion purposes. The Form 4549 was a substantially complete draft, with "lead sheets" discussing the charitable contribution deductions and the understatement penalties that were under consideration. Roughly three weeks later, on December 10, 2019, RA Dawson telephoned petitioner's representative to discuss the case. Petitioner's representative stated that petitioner would not agree to the proposed adjustments. RA Dawson offered a conference with his acting group manager, but petitioner's representative declined that offer.

After the call RA Dawson prepared, and his acting group manager signed, a Letter 950. This letter transmitted "an examination report ... showing proposed changes" for 2016–2018 and explaining petitioner's right to request a conference with the IRS Independent Office of Appeals. The examination report was materially identical to the Form 4549 that RA Dawson had mailed to petitioner on November 25, 2019.

[*4] At some point thereafter, RA Dawson's acting group manager married and changed her surname to Carper. On January 22, 2020, she signed another copy of the civil penalty approval form, affixing her digital signature as "Amber R. Carper." Ms. Carper has submitted a declaration confirming that she supervised RA Dawson's work during the examination and that she signed both the November 25, 2019, and the January 22, 2020, copies of the penalty approval form.

On March 20, 2020, the IRS issued petitioner a notice of deficiency disallowing the charitable contribution deductions and determining for 2016–2018 deficiencies of $449,299, $460,112, and $461,083, respectively. The notice also determined a penalty for each year under section 6662(a) and (b)(1) and (2). Petitioner timely petitioned this Court for redetermination.

***3** In his Answer respondent asserted additional penalties for substantial valuation misstatement under section 6662(e) and for gross valuation misstatement under section 6662(h). The Answer was signed by Christopher D. Bradley, an IRS attorney in Atlanta Group 1, and by John T. Arthur, the Associate Area Counsel for Atlanta Group 1. In the Answer respondent represented that Mr. Bradley "made an initial determination to assert" these penalties and that "this determination was personally approved, in writing, by [his] immediate supervisor, [Mr.] Arthur, by virtue of [Mr.] Arthur's signature on this pleading."

Discussion

I. *Summary Judgment Standard*

The purpose of summary judgment is to expedite litigation and avoid costly, unnecessary, and time-consuming trials. *See FPL Grp., Inc. & Subs. v. Commissioner*, 116 T.C. 73, 74 (2001). We may grant partial summary judgment regarding an issue as to which there is no genuine dispute of material fact and a decision may be rendered as a matter of law. *See* Rule 121(b); *Sundstrand Corp.*, 98 T.C. at 520. In deciding whether to grant partial summary judgment, we construe factual materials and inferences drawn from them in the light most favorable to the nonmoving party. *Sundstrand Corp.*, 98 T.C. at 520. Where the moving party properly makes and supports a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of such party's pleading" but must set forth specific facts, by affidavit or otherwise, showing that there is a genuine dispute for trial. Rule 121(d).

[*5] II. *Analysis*

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A. *"Protected in Perpetuity"*

The Internal Revenue Code generally restricts a taxpayer's charitable contribution deduction for the donation of "an interest in property which consists of less than the taxpayer's entire interest in such property." § 170(f)(3)(A). But there is an exception for a "qualified conservation contribution." § 170(f)(3)(B)(iii), (h)(1). For the donation of an easement to be a "qualified conservation contribution," the conservation purpose must be "protected in perpetuity." § 170(h)(1)(C), (5)(A).

In 1986 the Department of the Treasury issued final rules for determining whether this "protected in perpetuity" requirement is met. Of importance here are the rules governing the mandatory division of proceeds in the event the property is sold following extinguishment of the easement. *See* Treas. Reg. § 1.170A-14(g)(6). The regulations recognize that "a subsequent unexpected change in the conditions surrounding the [donated] property ... can make impossible or impractical the continued use of the property for conservation purposes." *Id.* subdiv. (i). Despite that possibility, "the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding" and the easement deed ensures that the charitable grantee, following sale of the property, will receive a proportionate share of the proceeds and use those proceeds consistently with the conservation purposes underlying the original gift. *Ibid.* In effect, the "perpetuity" requirement is deemed satisfied because the sale proceeds replace the easement as an asset deployed by the donee "exclusively for conservation purposes." § 170(h)(5)(A).

In *Coal Property Holdings, LLC v. Commissioner*, 153 T.C. 126, 137–40 (2019), we held that a deed of easement failed to satisfy these requirements where the donee's share of post-extinguishment sale proceeds was improperly reduced by carve-outs for "donor improvements." *See also TOT Prop. Holdings, LLC v. Commissioner*, 1 F.4th 1354, 1363 (11th Cir. 2021); *PBBM-Rose Hill, Ltd. v. Commissioner*, 900 F.3d 193, 207–08 (5th Cir. 2018). Respondent contends that the deed in this case has this defect.

***4** Petitioner contends that the Motion should be denied in the light of *Hewitt v. Commissioner*, 21 F.4th 1336 (11th Cir. 2021), *rev'g and remanding* T.C. Memo. 2020-89. In *Hewitt* the U.S. Court of Appeals for the Eleventh Circuit held that "the Commissioner's interpretation of **[*6]** § 1.170A-14(g)(6)(ii), to disallow the subtraction of the value of postdonation improvements ..., is arbitrary and capricious and therefore invalid under the [Administrative Procedure Act's] procedural requirements." *Id.* at 1353. *Contra Oakbrook Land Holdings, LLC v. Commissioner*, 28 F.4th 700, 717–18 (6th Cir. 2022) (disagreeing with *Hewitt* and finding the regulation to be valid), *aff'g* 154 T.C. 180 (2020).

Absent stipulation to the contrary, appeal of this case would lie to the Eleventh Circuit. *See* § 7482(b)(1)(A). We are therefore obligated to follow the law as established by the Eleventh Circuit on this question. *See Golsen v. Commissioner*, 54 T.C. 742, 756–57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). We will accordingly deny respondent's Motion for Partial Summary Judgment on this point, without prejudice to his resubmission of the arguments set forth therein should subsequent developments warrant that action.

B. *Penalty Approval*

Section 6751(b)(1) provides that "[n]o penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination." As a threshold matter, respondent must show that he complied with section 6751(b)(1). *See Chai v. Commissioner*, 851 F.3d 190, 221 (2d Cir. 2017) (ruling that "compliance with § 6751(b) is part of the Commissioner's burden of production" under section 7491(c)), *aff'g in part, rev'g in part* T.C. Memo. 2015-42.

In *Belair Woods, LLC v. Commissioner*, 154 T.C. 1, 14–15 (2020), we explained that the "initial determination" of a penalty assessment is typically embodied in a letter "by which the IRS formally notifie[s] [the taxpayer] that [it] ha[s] completed its work and ... ha[s] made a definite decision to assert penalties." Once the Commissioner introduces evidence sufficient to show

written supervisory approval, the burden shifts to the taxpayer to show that the approval was untimely, i.e., "that there was a formal communication of the penalty [to the taxpayer] before the proffered approval" was secured. *Frost v. Commissioner*, 154 T.C. 23, 35 (2020).

1. *Section 6662(a) Penalties*

Respondent has produced a copy of the civil penalty approval form by which RA Dawson recommended assertion of substantial understatement penalties against petitioner. RA Dawson's immediate supervisor, Ms. Carper, signed the penalty approval form on November 25, **[*7]** 2019. [4] The Form 4549 notifying petitioner of the proposed penalties was issued later that day. The Letter 950 with the enclosed examination report was issued on December 10, 2019, and the notice of deficiency was issued on March 20, 2020. Because RA Dawson secured supervisory approval from Ms. Carper before any of those communications to petitioner occurred, the approval was timely. *See ibid.* [5]

***5** Petitioner does not allege that the IRS formally communicated to him, before November 25, 2019, its decision to assert penalties under section 6662(a). Rather, petitioner argues that "respondent did not make any effort to authenticate the documents attached to his motion," including the civil penalty approval forms and the sworn declaration from Ms. Carper. Petitioner asserts that the relevant facts must be established at trial.

We are not persuaded. The civil penalty approval forms identify RA Dawson as the examining agent who made the initial determination to assert the section 6662(a) penalties and Ms. Carper as his acting group manager. We have repeatedly held that a "group manager's signature on the Civil Penalty Approval Form is sufficient to satisfy the statutory requirements." *Belair Woods*, 154 T.C. at 17. Moreover, Ms. Carper has supplied a declaration, under penalties of perjury, averring: "In my role as acting group manager, I reviewed Mr. Dawson's work, including his revenue agent's report and work papers from the examination." *See Sand Inv. Co. v. Commissioner*, 157 T.C. 136, 142 (2021) **[*8]** (holding that the "immediate supervisor" is "the person who supervises the agent's substantive work on an examination").

Petitioner nonetheless asserts that he should have the opportunity to cross-examine RA Dawson and Ms. Carper at trial. We disagree. We have regularly decided section 6751(b)(1) questions on summary judgment on the basis of IRS records and declarations from relevant IRS officers. *See, e.g.*, *Sand Inv. Co.*, 157 T.C. at 137–44; *Morgan Run Partners, LLC v. Commissioner*, T.C. Memo. 2022-61; *Long Branch Land, LLC v. Commissioner*, T.C. Memo. 2022-2. And in so doing, we have routinely rejected the notion that examining agents and their supervisors must be subjected to cross-examination. *See Raifman v. Commissioner*, T.C. Memo. 2018-101, 116 T.C.M. (CCH) 13, 27–28 (holding that cross-examination "would be immaterial and wholly irrelevant to ascertaining whether [the IRS] complied with the written supervisory approval requirement").

To defeat a motion for summary judgment, petitioner "must set forth specific facts showing that there is a genuine dispute for trial." Rule 121(d). Petitioner has set forth no "specific facts" to dispute the existence or timeliness of Ms. Carper's signature. We thus hold that the section 6662(a) penalties received the requisite supervisory approval.

2. *Section 6662(e) and (h) Penalties*

In his Answer respondent asserted additional penalties for gross valuation misstatement under section 6662(h) and (in the alternative) for substantial valuation misstatement under section 6662(e). Mr. Bradley signed the Answer as "Senior Attorney (Atlanta, Group 1)," and Mr. Arthur signed the Answer as "Associate Area Counsel (Atlanta, Group 1)." Mr. Arthur has

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submitted a declaration confirming that, as the Associate Area Counsel for Atlanta Group 1, he regularly reviewed Mr. Bradley's work and was his "immediate supervisor" when the Answer was filed.

Petitioner does not contend that the IRS formally communicated to him, before filing the Answer, its decision to assert these additional penalties. Instead petitioner asserts that "respondent has made no attempt to value the easement." He argues that the section 6662(e) and (h) penalties, which involve valuation questions, are "inappropriate and cannot have been the result of meaningful review." Specifically, petitioner contends that Mr. Arthur and Ms. Carper were incapable of meaningful review because they "lacked real estate expertise" and did **[*9]** not seek advice from a real estate expert regarding valuation of the Property.

***6** Petitioner misapprehends the requirements of section 6751(b). That provision is captioned "Approval of Assessment," not "Explanation of Assessment." *See Pickens Decorative Stone, LLC v. Commissioner*, T.C. Memo. 2022-22, at *7. As we have said before: "The written supervisory approval requirement ... requires just that: written supervisory approval." *Ibid.* (quoting *Raifman*, 116 T.C.M. (CCH) at 28).

We have repeatedly rejected any suggestion that a penalty approval form or other document must "demonstrate the depth or comprehensiveness of the supervisor's review." *Belair Woods*, 154 T.C. at 17. Indeed, because petitioner's claimed deductions presupposed that the Property had appreciated by 890% in just over a year, the IRS did not need a formal appraisal to support its determination that a valuation misstatement likely existed. In any event we have held that a supervising attorney's signature on an answer, without more, is sufficient to satisfy the statutory requirements for penalties first asserted in the answer. *See Roth v. Commissioner*, T.C. Memo. 2017-248, 114 T.C.M. (CCH) 649, 652 (finding an associate area counsel's signature on an answer sufficient), *aff'd*, 922 F.3d 1126 (10th Cir. 2019). [6]

To reflect the foregoing,

An order will be issued granting in part and denying in part respondent's Motion for Partial Summary Judgment.

All Citations

T.C. Memo. 2022-80, 2022 WL 2826856, 124 T.C.M. (CCH) 51, T.C.M. (RIA) 2022-080, 2022 RIA TC Memo 2022-080

Footnotes

1 Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, all regulation references are to the Code of Federal Regulations, Title 26 (Treas. Reg.), in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

2 Because DWT is disregarded for Federal income tax purposes, petitioner claimed the deductions directly.

3 The record does not establish whether the IRS challenged the charitable contribution deduction claimed for the easement on petitioner's 2013 return.

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4 Ms. Carper signed that form using her maiden name, Amber Pryor. She later married and changed her surname to Carper. On January 22, 2020, adopting a belt-and-suspenders approach, she signed another copy of the civil penalty approval form using her married name. Petitioner does not dispute that Ms. Carper in fact signed both copies of the form.

5 Because RA Dawson secured supervisory approval on November 25, 2019, we need not decide whether the "initial determination" to assert penalties was embodied in the Form 4549, the Letter 950, or the notice of deficiency. In *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner*, 29 F.4th 1066 (9th Cir. 2022), *rev'g and remanding* 154 T.C. 68 (2020), the U.S. Court of Appeals for the Ninth Circuit considered the timeline for obtaining supervisory approval of "assessable penalties," which are not subject to deficiency procedures. The court held that, for an assessable penalty, supervisory approval is timely if secured before the penalty is assessed or "before the relevant supervisor loses discretion whether to approve the penalty assessment." *Id.* at 1074. The court suggested that, in a deficiency case such as this, the deadline for securing supervisory approval would be the issuance of the notice of deficiency. *Id.* at 1071 n.4. If that analysis were adopted here, supervisory approval of the penalties was clearly timely: Approval was secured in November 2019, and the notice of deficiency was not issued until March 2020.

6 Three weeks after asserting in his Objection that the IRS made "no attempt to value the easement," petitioner issued informal discovery asking whether the IRS had attempted to value the easement. Petitioner then issued formal discovery directed to the same point, to which respondent objected. Because the information sought (i.e., whether the supervisor attempted to value the property or the easement) is not relevant to any issue in this Opinion, we need not further address this discovery dispute. *See* Rule 70(b); *see also Estate of Goldstein*, T.C. Memo. 1986-599, 52 T.C.M. (CCH) 1244, 1246–47 (finding taxpayer's discovery request irrelevant when the information sought would not affect the outcome).

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tion that MSD lacked a KPDES permit also misses the notice mark.

IV.

For these reasons, we affirm the district court's judgment.

OAKBROOK LAND HOLDINGS, LLC; William Duane Horton, Tax Matters Partner, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 20-2117

United States Court of Appeals, Sixth Circuit.

Argued: October 27, 2021

Decided and Filed: March 14, 2022

Background: Taxpayer, a limited liability company (LLC), petitioned for readjustment of income tax after charitable contribution deduction for perpetual conservation easement was disallowed and to challenge validity of Department of Treasury regulation establishing value of a donee's proportionate interest in proceeds upon judicial extinguishment of perpetual conservation easement. Following bench trial, the United States Tax Court, Mark V. Holmes, J., 2020 WL 2462832, determined that deed granting easement violated regulation, and Albert G. Lauber, J., 154 T.C. 180, upheld validity of regulation. Taxpayer appealed.

Holdings: The Court of Appeals, Moore, Circuit Judge, held that:

(1) Treasury's concise statement of basis and purpose of regulation was adequate;

(2) Treasury's failure to address public comments that specifically mentioned regulation did not violate APA's notice-and-comment requirements;

(3) Treasury's interpretation of deduction's statutory perpetuity requirement was entitled to *Chevron* deference; and

(4) regulation was not arbitrary and capricious.

Affirmed.

Guy, Circuit Judge, filed opinion concurring in judgment only.

1. Internal Revenue ⚿3513.20

Gifts that consist of less than the taxpayer's entire interest in the property, such as an easement, are generally disallowed from qualifying for a charitable contribution income tax deduction. 26 U.S.C.A. § 170(f)(3)(A).

2. Internal Revenue ⚿3513.20

Easements can qualify as a conservation contribution that is excepted from the general rule that gifts consisting of less than the taxpayer's entire interest in the property do not qualify for a charitable contribution income tax deduction. 26 U.S.C.A. §§ 170(f)(3)(A), 170(f)(3)(B)(iii), 170(h)(1)(A)-(C).

3. Internal Revenue ⚿3513.20

The donation of a conservation easement will not qualify for a charitable contribution income tax deduction unless the taxpayer can guarantee that both the grant of the interest and the conservation goals which it serves will endure forever. 26 U.S.C.A. §§ 170(a)(1), 170(f)(3)(B)(iii), 170(h)(2)(C), 170(h)(5)(A).

4. Internal Revenue ⚿3515

To determine the proportionate value of a perpetual conservation easement pursuant to the regulation governing the income tax deduction for a qualified conservation contribution, the fair market value of the conservation easement at the time of the gift must be divided by the value of the property as a whole at that time. 26 U.S.C.A. § 170(h)(5)(A); 26 C.F.R. § 1.170A-14(g)(6)(ii).

5. Internal Revenue ⚿3515

In establishing the value of a donee's proportionate interest upon the judicial extinguishment of a perpetual conservation easement pursuant to the regulation governing the income tax deduction for a qualified conservation contribution, no amount, including that attributable to improvements, may be subtracted out of the donee's proportionate share of the proceeds from a sale, exchange, or involuntary conversion. 26 U.S.C.A. § 170(h)(5)(A); 26 C.F.R. § 1.170A-14(g)(6)(ii).

6. Internal Revenue ⚿4705, 4730

The Court of Appeals reviews the Tax Court's findings of fact for clear error and its application of law de novo.

7. Administrative Law and Procedure ⚿1741

The function of the Court of Appeals in reviewing final agency action following informal rulemaking is prescribed by the Administrative Procedure Act (APA). 5 U.S.C.A. § 706(2)(A).

8. Internal Revenue ⚿4687

IRS Commissioner waived argument that deed granting perpetual conservation easement did not satisfy statute governing income tax deduction for a qualified conservation contribution because deed failed to compensate donee at fair market value should easement be judicially extinguished, such that validity of implementing regulation need not be determined, on taxpayer's appeal from Tax Court decision upholding validity of regulation, where Commissioner introduced argument concerning fair-market-value requirement for first time on appeal. 26 U.S.C.A. § 170(h)(1)(A); 26 C.F.R. § 1.170A-14(g)(6)(ii).

9. Federal Courts ⚿3391

Appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.

10. Administrative Law and Procedure ⚿1192

Under the Administrative Procedure Act (APA), whenever agencies promulgate a rule that intends to create new law, rights, or duties, they must engage in a process known as notice-and-comment rulemaking. 5 U.S.C.A. § 553(b).

11. Internal Revenue ⚿3042

Department of Treasury's concise statement of basis and purpose of regulation governing income tax deduction for a qualified conservation contribution that prohibited subtracting value of any post-donation improvements when calculating donee's proportionate interest in proceeds upon judicial extinguishment of conservation easement was adequate, and thus, did not violate notice-and-comment requirements of Administrative Procedure Act (APA), even though statement lacked specific explanation of policy behind proceeds regulation, since information provided by Treasury in background section of proposed regulation made its basis and purpose apparent, which was to fill void of how to guarantee deduction's perpetuity requirement in event of extinguishment. 5 U.S.C.A. §§ 553(b), 553(c); 26 U.S.C.A. § 170(h)(5)(A); 26 C.F.R. § 1.170A-14(g)(6)(ii).

12. Administrative Law and Procedure ⚿1209

What an agency promulgating a rule must include in a concise general statement of basis and purpose to comply with the notice-and-comment requirements under the Administrative Procedure Act (APA) is dictated by competing considerations: courts, on the one hand, must be able to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did, and agencies, on the other hand, operate with scarce time and limited resources. 5 U.S.C.A. § 553(c).

13. Administrative Law and Procedure ⚿1869(1)

Judicial scrutiny of an agency's concise general statement of the basis and purpose of a final rule does not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. 5 U.S.C.A. § 553(c).

14. Administrative Law and Procedure ⚿1209

An agency seeking to comply with the Administrative Procedure Act's (APA's) requirement of a concise general statement of the basis and purpose of a final rule cannot discuss every item of fact or opinion included in the submissions made to it in informal rule making. 5 U.S.C.A. § 553(b).

15. Administrative Law and Procedure ⚿1209, 1869(1)

The Administrative Procedure Act's (APA) requirement of a concise general statement of the basis and purpose of a final rule is not meant to be particularly onerous, and absent an ideal statement, courts may still conduct judicial review and uphold a regulation where the basis and purpose are considered obvious. 5 U.S.C.A. § 553(c).

16. Administrative Law and Procedure ⚿1869(1)

On judicial review, if an agency's statement of the basis and purpose of a final rule is truly concise, then careful reading of the agency's published notices, from its original grant of the petition for rulemaking to its final rule, may still disclose a reasoned path that the agency followed to reach its ultimate rule. 5 U.S.C.A. § 553(c).

17. Internal Revenue ⚿3038

Department of Treasury's failure, in its final regulation governing income tax deduction for a qualified conservation contribution that prohibited subtracting value of any post-donation improvements when calculating donee's proportionate interest in proceeds upon judicial extinguishment of conservation easement, to address public comments that specifically mentioned proceeds regulation did not violate Administrative Procedure Act's (APA's) notice-and-comment requirements; comments did not raise any concern about regulation failing to satisfy deduction's perpetuity requirement to which regulation was directed. 5 U.S.C.A. § 553(b); 26 U.S.C.A. § 170(h)(5)(A); 26 C.F.R. § 1.170A-14(g)(6)(ii).

18. Administrative Law and Procedure ⚿1191

In addition to increasing the quality of rules, the required public participation in rulemaking under the Administrative Procedure Act (APA) helps ensure fair treatment for persons to be affected by regulation. 5 U.S.C.A. § 553(b).

19. Administrative Law and Procedure ⚿1202

Under the Administrative Procedure Act's (APA's) notice-and-comment require-

ments, an agency engaged in rulemaking has a duty to respond to significant points raised by the public in comments. 5 U.S.C.A. § 553(b).

20. Administrative Law and Procedure ⚿1202

Assessing the significance of a public comment, in determining whether the agency is required to respond to the comment as part of its rulemaking, is context dependent and requires reading the comment in light of both the rulemaking of which it was part and the statutory ends that the proposed rule is meant to serve. 5 U.S.C.A. § 553(b).

21. Administrative Law and Procedure ⚿1202

An agency engaged in rulemaking must respond to public comments that can be thought to challenge a fundamental premise underlying the proposed agency decision. 5 U.S.C.A. § 553(b).

22. Administrative Law and Procedure ⚿1202

A public comment to a proposed rule that provides enough facts and reasoning to show the agency what the issue is and how it is relevant to the agency's aims is significant enough to step over a threshold requirement of materiality needed for the agency to be required to address it. 5 U.S.C.A. § 553(b).

23. Internal Revenue ⚿3511

Department of Treasury's interpretation of statute, which required conservation easement's purpose to be protected in perpetuity for donor to be eligible for income tax deduction for qualified conservation contribution, as requiring donee's proportionate interest in proceeds upon judicial extinguishment of conservation easement to be calculated without subtracting value of any post-donation improvements was entitled to *Chevron* deference; statute was silent as to how judicial extinguishment affected deduction's perpetuity requirement, and providing donee with additional funds at its disposal upon extinguishment of easement allowed donee to further easement's original conservation purpose. 26 U.S.C.A. § 170(h)(5)(A); 26 C.F.R. § 1.170A-14(g)(6)(ii).

24. Administrative Law and Procedure ⚿2210

The initial question under step one of the *Chevron* framework is whether Congress has directly spoken to the precise question at issue by employing precise, unambiguous statutory language.

25. Administrative Law and Procedure ⚿2205

If a statute is ambiguous, and if the implementing agency's construction is reasonable, the *Chevron* framework requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.

26. Administrative Law and Procedure ⚿2210, 2211

Determining at the second step of the *Chevron* framework whether an agency's construction of an ambiguous statute is reasonable depends, in part, on the construction's fit with the statutory language, as well as its conformity to statutory purposes.

27. Internal Revenue ⚿3512

Regulation governing income tax deduction for a qualified conservation contribution that prohibited subtracting value of any post-donation improvements when calculating donee's proportionate interest in proceeds upon judicial extinguishment of conservation easement was not arbitrary or capricious; concise statement of basis and purpose that accompanied proceeds

regulation adequately explained Department of Treasury's rationale, which was to create administrable mechanism for enforcing deduction's perpetuity requirement, and Treasury was not required to consider sources of possible alternatives to proceeds regulation that either did not exist when Treasury promulgated regulation or were not identified in public comments. 5 U.S.C.A. § 706(2)(A); 26 U.S.C.A. § 170(h)(5)(A); 26 C.F.R. § 1.170A-14(g)(6).

28. Administrative Law and Procedure ⚿1743, 1749

When determining whether a final agency action is arbitrary or capricious, the scope of review is an extremely narrow one, and a court may not substitute its judgment for that of the agency. 5 U.S.C.A. § 706(2)(A).

29. Administrative Law and Procedure ⚿1743

When determining whether a final agency action is arbitrary or capricious, a court considers whether the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C.A. § 706(2)(A).

30. Administrative Law and Procedure ⚿1933

Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned. 5 U.S.C.A. § 706(2)(A).

31. Administrative Law and Procedure ⚿1935

Under the Administrative Procedure Act's (APA's) arbitrary and capricious standard of review, an agency must defend its actions based on the reasons that animated the act at issue, not for reasons that it formulated during litigation. 5 U.S.C.A. § 706(2)(A).

32. Administrative Law and Procedure ⚿1935

A reviewing court's inquiry into an agency's contemporaneous rationale for its action is not limited solely to the agency's concise general statement of basis and purpose of a final rule; rather, courts may accept the explanation provided by an agency during litigation for its conduct when this is the only plausible explanation of the course taken in the rulemaking. 5 U.S.C.A. § 706(2)(A).

33. Administrative Law and Procedure ⚿1191

An agency's rulemaking cannot be found wanting under the Administrative Procedure Act (APA) simply because the agency failed to include every alternative device and thought conceivable by the mind of man, regardless of how uncommon or unknown that alternative may have been or how distant in the future that alternative was from existing. 5 U.S.C.A. § 706(2)(A).

On Appeal from the United States Tax Court. No. 005444-13—Mark V. Holmes, Judge.

ARGUED: David William Foster, SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP, Washington, D.C., for Appellants. Nathaniel S. Pollock, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC, for Appellee. ON BRIEF: Michelle Abroms Levin, SIROTE & PERMUTT, P.C., Huntsville, Alabama, Gregory P. Rhodes, SIROTE & PERMUTT, P.C., Birmingham, Alabama, for

Appellants. Nathaniel S. Pollock, Francesca Ugolini, Arthur T. Catterall, UNITED STATES DEPARTMENT OF JUSTICE, Washington, DC, for Appellee. Joseph D. Henchman, NATIONAL TAXPAYERS UNION FOUNDATION, Washington, D.C., Kip D. Nelson, FOX ROTHSCHILD LLP, Greensboro, North Carolina, for Amici Curiae.

Before: GUY, MOORE, and GIBBONS, Circuit Judges.

MOORE, Circuit Judge, delivered the opinion of the court in which GIBBONS, Circuit Judge, joined. GUY, Circuit Judge (pg. 722–32), delivered a separate opinion concurring in the judgment only.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Under § 170(h) of the Internal Revenue Code, taxpayers who donate an easement in land to a conservation organization may be eligible to claim a charitable deduction on their Federal income tax returns. Crucially, the easement's conservation purpose must be guaranteed to extend in perpetuity to qualify for the deduction. *See* 26 U.S.C. (I.R.C.) § 170(h)(5)(A). Unexpected developments, however, may make this impossible long after the donor has deeded the easement away. How, then, can an easement satisfy the perpetuity requirement?

Contemplating such scenarios, the Department of Treasury has promulgated a rule, 26 C.F.R. (Treas. Reg.) § 1.170A-14(g)(6). This regulation addresses situations in which unforeseen changes to the surrounding land make it "impossible or impractical" for an easement to fulfill its conservation purpose. Treas. Reg. § 1.170A-14(g)(6)(i). In these events, the conservation purpose may still be protected in perpetuity "if the restrictions are extinguished by judicial proceeding and all of the donee's proceeds . . . from a subsequent sale or exchange of the property are used by the donee" to further the original conservation purpose. *Id.* Proceeds are calculated by a formula in § 1.170A-14(g)(6)(ii), a provision to which we refer as the "proceeds regulation."

On this appeal from the United States Tax Court, the petitioners, Oakbrook Land Holdings, LLC (Oakbrook) and William Duane Horton, challenge the validity of the proceeds regulation. The petitioners contend that, in promulgating this rule, Treasury violated the notice-and-comment requirements of the Administrative Procedure Act (APA). The petitioners also argue that Treasury's interpretation of § 170(h)—the statute that the rule implements—is unreasonable. Finally, the petitioners argue that the proceeds regulation is arbitrary or capricious. The full Tax Court considered these arguments and found them to be unpersuasive. *See Oakbrook Land Holdings v. Comm'r*, 154 T.C. 180, 181 (T.C. 2020). We agree with the Tax Court and **AFFIRM**.

I. BACKGROUND

Due to the nature of the issues, we outline the statutory and regulatory framework that governs charitable deductions for conservation easements before describing the rulemaking process of the proceeds regulation. Once that is established, we turn to the facts of this case.

A. Statutory and Regulatory Framework

[1, 2] Section 170(a)(1) of the Internal Revenue Code allows taxpayers to deduct charitable donations made during the tax year. The Code generally disallows gifts that consist of less than the taxpayer's entire interest in the property—such as an easement—from qualifying for a deduc-

tion. *See* I.R.C. § 170(f)(3)(A); *Glass v. Comm'r*, 471 F.3d 698, 706 (6th Cir. 2006). There is an exception if the interest is a "qualified conservation contribution." I.R.C. § 170(f)(3)(B)(iii). This type of gift may qualify for a deduction if it is "of a qualified real property interest," "to a qualified organization," and is "exclusively for conservation purposes." I.R.C. § 170(h)(1)(A)–(C). Easements can qualify as such contributions. *See Glass*, 471 F.3d at 699–700.

[3] Perpetuity is vital to the statutory scheme. An easement is a qualified real property interest only if its deed creates "a restriction (granted *in perpetuity*) on the use which may be made of the real property." I.R.C. § 170(h)(2)(C) (emphasis added). Driving home how important the parenthetical phrase in § 170(h)(2)(C) is, a nearby provision explains that a contribution will not be treated as having been made exclusively for conservation purposes "unless the conservation purpose is protected *in perpetuity*." I.R.C. § 170(h)(5)(A) (emphasis added). In other words, the donation of an easement will not qualify for a charitable deduction unless the taxpayer can guarantee that both the grant of the interest and the conservation goals which it serves will endure for quite a long time—forever, to be exact. *See Hoffman Props. II, LP v. Comm'r*, 956 F.3d 832, 835 (6th Cir. 2020).

Although I.R.C. § 170(h)(5)(A) expressly mandates that a donated easement's conservation purpose must be protected in perpetuity, the section does not detail what should happen if some external event frustrates this purpose, such as when unforeseen changes in the surrounding land undermine the easement's conservation goals or when a government entity condemns the property. *See generally* Nancy A. McLaughlin, *Conservation Easements and the Proceeds Regulation*, 56 REAL PROP. TR. & EST. L. J. 111, 122, 150–52 (2021) (discussing ways in which easements' conservation purposes can be thwarted). For guidance in these scenarios, taxpayers must turn from the text of I.R.C. § 170(h)(5)(A) to the administrative regulation implementing it.

Treasury Regulation § 1.170A-14(g)(6) governs in the event of an "extinguishment." When a "subsequent unexpected change in the conditions surrounding the property .... make[s] impossible or impractical the continued use of the property for conservation purposes," the perpetuity requirement of I.R.C. § 170(h)(5)(A) can still be satisfied if two conditions are met. First, the restriction is "extinguished by judicial proceeding." Treas. Reg. § 1.170A-14(g)(6)(i). Second, "all of the donee's proceeds (determined under paragraph (g)(6)(ii) of this section) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution." *Id.*

[4, 5] Upon extinguishment, a donee organization must receive as proceeds "a fair market value that is at least equal to the *proportionate value* that the perpetual conservation restriction at the time of the gift[ ] bears to the value of the property as a whole at that time." Treas. Reg. § 1.170A-14(g)(6)(ii) (emphasis added). To determine the "proportionate value" of an easement, the fair market "value of the conservation easement at the time of the gift [must be] divided by the value of the property as a whole at that time." *PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193, 207 (5th Cir. 2018). For example, if, at the time of the donation, the fair market value of an easement was $25,000 and the value of the land was $100,000, then the easement would be assessed at twenty-five percent of the value of the property. Next, if a judicial extinguishment occurs, the donee

must receive proceeds equal to the proportionate value from any "subsequent sale, exchange, or involuntary conversion." Treas. Reg. § 1.170A-14(g)(6)(ii). The donee in the previous example would therefore receive twenty-five percent of any proceeds of a sale, exchange, or involuntary conversion that followed judicial extinguishment of the easement. Finally, no "amount, including that attributable to improvements, may be subtracted out" of this percentage.[1] *PBBM-Rose Hill, Ltd.*, 900 F.3d at 208.

Although the possibility of an easement being judicially extinguished is a contingency, taxpayers still need to address this issue in the easement's deed. The deed must entitle the donee "to a portion of the proceeds at least equal to that proportionate value of the perpetual conservation restriction" should a judicial extinguishment occur.[2] Treas. Reg. § 1.170A-14(g)(6)(ii). Failure to draft a deed that achieves this goal will leave the taxpayer unable to claim a charitable deduction for their donation. Treas. Reg. § 1.170A-14(g)(1).

B. Promulgation of Treas. Reg. § 1.170A-14(g)(6)(ii)

On May 23, 1983, Treasury issued a notice of proposed rulemaking with "proposed regulations relating to contributions of partial interests in property for conservation purposes." 48 Fed. Reg. 22940, 22940 (May 23, 1983). In that notice, Treasury detailed the legislative history of § 170(h), describing how Congress had shifted from limiting the deductibility of conservation easements to allowing them when the easement was "perpetual." *Id.* The preamble noted that the proposed regulations "reflect the major policy decisions made by the Congress and expressed in [its] committee reports." *Id.* Among the proposed rules was the proceeds regulation.

A period of public input followed Treasury's publication of the notice of proposed rulemaking in which the agency received comments regarding the regulations. Ninety organizations submitted over 700 pages of commentary that addressed various aspects of the regulations. *Oakbrook Land Holdings*, 154 T.C. at 186. Of these commentators, approximately a dozen mentioned the proceeds regulation, though mostly in passing. *Id.* We detail several of these comments further below. Treasury also held a public hearing on the proposed regulations on September 15, 1983. *Id.* at 188.

When Treasury issued the final regulations, the accompanying preamble stated that the agency had promulgated the regulations "[a]fter consideration of all comments regarding the proposed amendments." 51 Fed. Reg. 1496, 1496 (Jan. 14, 1986). Some comments that Treasury received during the rulemaking process did cause the agency to alter parts of the regulations, leading the agency to summarize these comments and the changes that they prompted. *Id.* at 1497–98. Treasury also revised the proceeds regulation, but these changes were editorial in nature and aimed at clarifying the rule, not altering its meaning.[3] Treasury did not specifically ad-

1. The parties do not appear to dispute how proceeds are calculated under the regulation.

2. Treasury Regulation § 1.170A-14(g)(6)(ii) also contains an exception for when "state law provides that the donor is entitled to the full proceeds from the conversion without regard to the terms of the prior perpetual conservation restriction," but the current case does not implicate this provision.

3. Instead of providing that the donor agree at the time of the gift that the donee receive on a subsequent sale, exchange, or involuntary conversion of the property "a minimum as-

dress any comments that it received about the proceeds regulation.

C. Oakbrook's Easement

Oakbrook is a Tennessee Limited Liability Company with its principal place of business in Chattanooga. Joint Appendix (J.A.) at 98–99 (Stipulation of Facts at ¶ 1). William Duane Horton and a group of investors formed the company to purchase and develop a 143-acre parcel of land on White Oak Mountain, an outcropping of the Appalachians near Chattanooga. *Id.* at 1179–80 (Tax Ct. Mem. Op. at 3–4). In 2007, Oakbrook bought the land for $1,700,000. *Id.* at 1180 (Tax Ct. Mem. Op. at 4).

Originally Horton and his wife found the property in their search for a place to build a home. *Id.* at 1179 (Tax Ct. Mem. Op. at 3). The property's proximity to Chattanooga led Horton to believe that residential units could be developed there, and this is what Oakbrook set about to achieve after purchasing the land. *Id.* at 1180 (Tax Ct. Mem. Op. at 4). After learning about conservation easements, Horton convinced his fellow investors in 2008 to have Oakbrook donate a conservation easement on 106 acres of the land to the Southeast Regional Land Conservancy (SRLC), reserving the remaining acreage for development. *Id.* at 1181 (Tax Ct. Mem. Op. at 5).

The deed that conveyed the easement provided for allocation of proceeds upon extinguishment or condemnation, and the parties do not dispute how this calculation works. *Id.* at 121–22 (Deed at Article VI, § B(2)–(3)). Under the deed, the fair market value of the easement is determined by calculating the fair market value of the land *without* the encumbrance of the easement, and then subtracting from this number the fair market value of the land *with* the easement. *Id.* at 121 (Deed at Art. VI, § B(2)). The fair market value of each is determined at the time of the gift, creating a fixed value. *Id.* The deed then requires one more subtraction: the fixed value of the easement must be reduced by the value of any post-donation improvements made by Oakbrook to the land as specified by any subsequent condemnation award. *Id.* at 121–22 (Deed at Art. VI, § B(2)).

While negotiating these terms, Oakbrook arranged for an appraisal of the conservation easement to determine the amount to claim as a charitable deduction. *Id.* at 1184 (Tax Ct. Mem. Op. at 8). Initially, the appraiser valued the easement at $19,500,000, but Horton expressed unease about setting the value so high, likely because Oakbrook had bought all 143 acres the year before for $1,700,000. *Id.* The appraiser then reassessed the easement at $9,545,000. *Id.* Oakbrook claimed this amount as a charitable deduction for the 2008 tax year. *Id.* at 1184–85 (Tax Ct. Mem. Op. at 8–9).

D. Procedural History

After Oakbrook filed its 2008 tax return, the Internal Revenue Service (IRS) examined the claimed charitable contribution deduction. *Id.* at 1185 (Tax Ct. Mem. Op. at 9). Because the easement's deed did not comply with Treas. Reg. § 1.170A-14(g)(6)(ii), the IRS disallowed Oakbrook's deduction in full. *Id.* at 17–29, 213–22 (Disallowances). Oakbrook timely petitioned the Tax Court for a readjustment. *Id.* at 8–16 (Pet. for Readjustment). Tax Court Judge Holmes held a bench trial in Octo-

certainable proportion of the fair market value to the entire property,'' 48 Fed. Reg. at 22946, the final rule ensured that the donee receive ''a fair market value that is at least equal to the proportionate value that the perpetual conservation restriction at the time of the gift[ ] bears to the value of the property as a whole at that time.'' 51 Fed. Reg. at 1505.

ber 2016 to resolve the matter. *Id.* at 4 (Tax Ct. Dkt. at 4).

In the Tax Court, the petitioners argued both that the easement deed satisfied Treas. Reg. § 1.170A-14(g)(6)(ii) and, alternatively, that the regulation was invalid. *Id.* at 1179 (Tax Ct. Mem. Op. at 3). The full Tax Court heard argument concerning the validity of Treas. Reg. § 1.170A-14(g)(6)(ii), *see Oakbrook Land Holdings*, 154 T.C. at 180–81, while Judge Holmes heard arguments about whether Oakbrook's deed violated the regulation, J.A. at 1179 (Tax Ct. Mem. Op. at 3). The full Tax Court upheld the regulation. *See Oakbrook Land Holdings*, 154 T.C. at 180–81, 198–200, 230. At the same time, Judge Holmes held that Oakbrook's deed violated the proceeds regulation in two ways: first by ascribing a fixed rather than proportionate value that would go to SRLC upon judicial extinguishment, and second by subtracting from this amount any post-donation improvements that Oakbrook made to the land. J.A. at 1212–17 (Tax Ct. Mem. Op. at 36–41).

The petitioners timely appealed. *Id.* at 1226–27 (Notice of Appeal). *See* 26 U.S.C. § 7483. We have jurisdiction over the case under 26 U.S.C. § 7482(a).

II. ANALYSIS

[6, 7] On appeal, the petitioners take aim directly at the proceeds regulation, arguing that the Tax Court erred in upholding the regulation. We review the Tax Court's findings of fact for clear error and its application of law de novo. *Glass*, 471 F.3d at 706. Our "function in reviewing final agency action following informal rulemaking [such as Treasury's promulgation of the proceeds regulation] is prescribed by the APA." *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1003 (6th Cir. 1995). Under § 706(2)(A) of the APA, we must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

A. Enforceability of Oakbrook's Deed Under I.R.C. § 170(h)

[8] Before addressing the proceeds regulation's validity, we must address a preliminary matter. To count as a qualified real property interest under I.R.C. § 170(h)(1)(A), the Commissioner argues that a conservation easement's deed must guarantee that the donee will receive the fair market value of the interest upon judicial extinguishment. Pointing to the provisions in the deed that fix the easement's value at the time of the gift and then subtract the worth of post-donation improvements, the Commissioner concludes that Oakbrook's deed would fail to compensate SRLC at fair market value should the easement be extinguished. Under this reading of I.R.C. § 170(h)(1)(A), the Commissioner argues, we need not determine whether Treas. Reg. § 1.170A-14(g)(6)(ii) is a valid regulation because Oakbrook's deed violates the statute.

Regardless of whether this interpretation of I.R.C. § 170(h)(1)(A) is correct, the Commissioner introduces it for the first time on appeal. The only issue that the Commissioner raised below about Oakbrook's deed satisfying § 170(h) was the argument in his pretrial memorandum that the deed inadequately defined the physical area intended for conservation purposes, leaving it impossible to determine what was being conserved and what was not. J.A. at 40, 47–49 (Resp't Pretrial Mem. at 3, 10–12). Nowhere did the Commissioner argue that the deed would fail to compensate SRLC at fair market value should the easement be extinguished. Instead, Judge Toro's concurrence in the Tax Court's opinion raised this issue *sua sponte* with neither the majority nor the dissent ad-

dressing it. *Oakbrook Land Holdings*, 154 T.C. at 203–07.

[9] "[A]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Wood v. Milyard*, 566 U.S. 463, 473, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012). This case demonstrates the wisdom of this approach. For Oakbrook's deed to violate the Commissioner's interpretation of the statute, it must fail to provide whatever the fair market value of the easement will be upon extinguishment. But this conclusion relies on an assessment of the projected economic worth of the property interest, which is not in the record.[4] Should the fair market value of the interest have increased by the time of extinguishment, then the Commissioner will be proven right. Should the value decline, then the Commissioner will be proven wrong. Either way, future events, not statutory text, hold the answer. *Cf. United States v. Ellison*, 462 F.3d 557, 560–61 (6th Cir. 2006) (addressing argument not raised below where issue turned on pure question of law). For this reason, we decline to address the Commissioner's newly raised argument.

B. Procedural Issues with Treas. Reg. § 1.170A-14(g)(6)(ii)

[10] This leaves us to examine the validity of Treas. Reg. § 1.170A-14(g)(6)(ii). Under the APA, whenever agencies promulgate "a rule that 'intends to create new law, rights or duties' " such as this regulation does, they must engage in a process known as notice-and-comment rulemaking. *Tennessee Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) (quoting *Michigan v. Thomas*, 805 F.2d 176, 182–83 (6th Cir. 1986)). *See also* 5 U.S.C. § 553(b). There are three steps involved in this process. First, the agency must publish a "notice of proposed rule making" in the Federal Register. 5 U.S.C. § 553(b). Next, the agency must afford "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." § 553(c). Finally, "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.*

The petitioners contend that the agency deviated from the APA's notice and comment requirements in two ways. First, the petitioners argue that Treasury inadequately explained the rationale for the proceeds regulation in its concise general statement of basis and purpose. Second, the petitioners argue that the agency failed to respond to certain comments about the regulation, which, according to the petitioners, raised significant issues. We consider each argument in turn.

1. Adequacy of Treasury's Concise Statement of Basis and Purpose

[11] After the comment period closed, Treasury issued a concise statement of

4. Instead of citing to the record, the Commissioner cites to data pulled from Zillow.com and Neighborhoodscout.com to support the proposition that under the terms of the deed, judicial extinguishment "20, 50, or 100 years from now" would lead to SRLC receiving less than the easement's fair market value. Resp't Br. at 36. Likewise, the Commissioner asserts, without any citations, that the value of fixed structures that Oakbrook may add to the property will likely increase over time, which, because of the mechanism in the deed that allows Oakbrook to recoup this value, would further cut into the amount SRLC would receive in the event of judicial extinguishment. *Id.* at 38. Although the concurrence appears confident in these assessments, we are hesitant to rely on economic projections that have not been vetted by the adversarial process, provide no supporting evidence, and are based on commercial real estate websites.

basis and purpose for Treas. Reg. § 1.170A-14 that explained the regulations' goals and addressed various comments made about the rules. *See* 51 Fed. Reg. at 1497–98. This statement lacked an explanation for the policy rationale behind Treas. Reg. § 1.170A-14(g)(6)(ii) specifically. Instead, Treasury explained that the regulations contained in Treas. Reg. § 1.170A-14 "provide necessary guidance to the public for compliance with the law and affect donors and donees of qualified conservation contributions." 51 Fed. Reg. at 1496. To the petitioners, this explanation is far too succinct to provide adequate insight into the proceeds regulation's rationale. Placing this explanation within the context of the rulemaking leads us to the opposite conclusion.

[12–14] What an agency must include in a concise general statement of basis and purpose is dictated by competing considerations. Courts, on the one hand, must be able "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." *Simms*, 45 F.3d at 1005 (quoting *Auto. Parts & Accessories Ass'n, Inc. v Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). Judicial scrutiny does not "contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution." *Auto. Parts & Accessories Ass'n, Inc.*, 407 F.2d at 338. Agencies, on the other hand, operate with scarce time and limited resources. *See Vermont Yankee Nuclear Power Corp. v. Nat. Res. Defense Council, Inc.*, 435 U.S. 519, 551, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). These limitations mean that an agency cannot "discuss every item of fact or opinion included in the submissions made to it in informal rule making." *Simms*, 45 F.3d at 1005 (quoting *Auto. Parts & Accessories Ass'n, Inc.*, 407 F.2d at 338).

[15, 16] Balancing these considerations, the APA's concise-general-statement requirement "is not meant to be particularly onerous." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 700 (D.C. Cir. 2008). Absent an ideal statement, courts may still conduct judicial review and uphold a regulation "where the basis and purpose [are] considered obvious." *Cal-Almond, Inc. v. U.S. Dep't of Agric.*, 14 F.3d 429, 443 (9th Cir. 1993); *see also Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 303 (2d Cir. 2006); *Citizens to Save Spencer Cnty. v. U.S. EPA*, 600 F.2d 844, 884 (D.C. Cir. 1979). If a statement is truly concise, then "[a] careful reading of the agency's published notices, from its original grant of the petition for rulemaking to its final rule, [may still] disclose[ ] a 'reasoned path' " that the agency followed to reach its ultimate rule. *Simms*, 45 F.3d at 1006 (quoting *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984)).

Juxtaposing the final version of Treas. Reg. § 1.170A-14(g)(6)(ii) with the notice of proposed rulemaking reveals that the basis and purpose of the rule are apparent. In the background section of the proposed version of the proceeds regulation, Treasury provided a brief history of how the Code had treated the charitable deductions of conservation easements. 48 Fed. Reg. at 22940. This history traced how contributions of partial interests went from being disfavored under the Tax Reform Act of 1969, to being allowed under the Tax Reduction and Simplification Act of 1977. *Id.* This allowance came with a caveat: conservation easements had to "be perpetual in order to qualify for a deduction under section 170." *Id.* After Congress again amended the Code with the Tax Treatment Extension Act of 1980, Treasury pro-

posed the proceeds regulation to implement I.R.C. § 170(h). 48 Fed. Reg. at 22940. Notably, although I.R.C. § 170(h)(5)(A) required that easements' conservation purposes be protected in perpetuity, the provision was silent about how to guarantee this requirement in the event of extinguishment. Facing this lacuna, it was obvious that Treasury would need to craft a regulation that spoke to the issue of protecting an easement's conservation purpose should unforeseen circumstances stymie this end.[5]

As it contemplated promulgating the regulations of which Treas. Reg. § 1.170A-14(g)(6)(ii) was a part, Treasury noted its animating concerns. Foremost among these was the "problem" of "how to provide a workable framework for donors, donees, and the Internal Revenue Service to judge the deductibility of open space easements." 48 Fed. Reg. at 22940. Treasury's explicit reliance on the committee reports that accompanied the 1980 reforms to the Code make clear the contours of this problem. *See id.* (detailing how the proposed regulations "reflect the major policy decisions . . . expressed" in H.R. REP. NO. 96-1278 (1980) and S. REP. NO. 96-1007 (1980)).

Both the House Ways and Means Committee and the Senate Finance Committee noted that conservation easements threatened to incentivize "tax-avoidance transactions in which the taxpayer could obtain a deduction for a gift to a charity of the use of part of his property." H.R. REP. NO. 96-1278, at 14; S. REP. NO. 96-1007, at 8. To avoid such abuse, the committees emphasized that the "bill would restrict the qualifying contributions where there is no assurance that the public benefit, if any, furthered by the contribution would be substantial enough to justify the allowance of a deduction." H.R. REP. NO. 96-1278, at 15; S. REP. NO. 96-1007, at 10. Key among these restrictions was the addition of a requirement not previously in the Code: that an easement's conservation purpose be protected in perpetuity to qualify for a charitable deduction. *See* H.R. REP. NO. 96-1278, at 18 ("Moreover, the bill explicitly provides that [the] requirement [that a contribution is made exclusively for conservation purposes] is not satisfied unless the conservation purpose is protected in perpetuity."); S. REP. NO. 96-1007, at 13 (same). An easement's deed needed to "prevent uses of the retained interest inconsistent with the conservation purposes" for an eternity. H.R. REP. NO. 96-1278, at 18; S. REP. NO. 96-1007, at 13.

Along with stressing the need for restrictions in the deed to ensure that an easement served its conservation purpose in perpetuity, the congressional committees were concerned about how the burdens and benefits associated with fulfilling this requirement might be allotted. For instance, when the Senate Committee on Finance reported the bill out of committee, it noted that the perpetuity requirement of I.R.C. § 170(h)(5)(A) aimed "to limit the deduction only to those cases where the conservation purposes will in practice be carried out." S. REP. NO. 96-1007, at 14. With this goal in mind, the Committee noted that contributions must "be made to organizations which have the commitment and the resources to enforce the perpetual restrictions and to protect the conservation purposes." *Id.* Yet whereas the Committee was concerned about the welfare of the donee, it sought to bar the donor from

5. Although Congress was aware that extinguishment could pose difficulties for ensuring that a conservation easement's purpose was protected in perpetuity, a coalition of land trusts convinced it to leave the creation of rules to govern these circumstances to Treasury. *See* McLaughlin, *supra,* at 122–23 (detailing legislative history).

receiving any benefit from the donation above and beyond the deduction. *See id.* at 15 ("[T]here may be instances in which the grant of an easement may serve to enhance, rather than reduce, the value of property, and in such instances no deduction would be allowable . . . ."). Solely in circumstances where these high bars could be cleared would an easement qualify for a charitable deduction under § 170(h). *See id.* at 14, 15; *see also* H.R. REP. NO. 96-1278, at 19, 20 (same discussion).

Taken together, then, the statutory text and the legislative history that Treasury contemplated in promulgating Treas. Reg. § 1.170A-14(g)(6)(ii) illuminate the regulation's basis and purpose: to provide an administrable mechanism that would ensure that an easement's conservation purpose as per I.R.C. § 170(h)(5)(A) continued to be protected should the interest be extinguished. That the regulation allots proceeds in a manner more favorable to donees than to donors merely demonstrates Treasury's acute awareness of Congress's decision to concern itself with the welfare of one entity over the other once the donation was made. Because we can discern this from the information that Treasury provided during the rulemaking, its concise statement suffices.[6]

2. Failure to Respond to Comments

[17] In the concise general statement of basis and purpose that accompanied the final rule, Treasury also did not address any comments that touched on Treas. Reg. § 1.170A-14(g)(6)(ii). For the petitioners, this oversight is the main procedural deficiency with the rule. To this end, they list a series of comments that mentioned the proceeds regulation, argue that at least some of these required Treasury's attention, and conclude that the agency's failure to do so is fatal to the regulations. Having thoroughly examined these comments, we disagree.

[18, 19] The APA's requirement of soliciting comments serves several ends. "In addition to increasing the quality of rules, the required public participation helps 'ensure fair treatment for persons to be affected by' regulation." *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (quoting *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 678 (6th Cir. 2005)). From these principles follows an agency's duty to respond to "significant points raised by the public." *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977)). After all, if an agency could ignore every comment regardless of its content, then the process of soliciting public input would be pointless. *See id.*

Yet the inverse is true, too. Requiring an agency to respond to every comment regardless of its content would transform rulemaking into

> a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after

6. Unlike *Dominion Resources, Inc. v. United States,* on which the concurrence relies to reach the opposite conclusion, the proceeds regulation does not "directly contradict[ ]" Congress's intent, as is clear from the legislative history that Treasury provided in its notice of proposed rulemaking. 681 F.3d 1313, 1317 (Fed. Cir. 2012). The fact that Treasury provided citations to the congressional reports that informed its thinking provides another contrast to the agency's actions in *Dominion,* where Treasury provided no indication of its rationale for the proposed rule. *Id.* at 1319. These citations allow us to discern what the Federal Circuit could not: the "reasoned path" that Treasury followed in arriving at the regulation. *Simms,* 45 F.3d at 1006 (quoting *Neighborhood TV,* 742 F.2d at 639).

> failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vermont Yankee, 435 U.S. at 553–54, 98 S.Ct. 1197. Recognizing that notice-and-comment rulemaking is not an administrative sport, we have repeatedly concluded that an agency must "give reasoned responses to all *significant* comments in a rulemaking proceeding," not that an agency must respond to *all* comments. *United States v. Utesch*, 596 F.3d 302, 310 (6th Cir. 2010) (quoting *PPG Indus., Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980)) (emphasis added); *see also Navistar Int'l Transp. Corp. v. U.S. EPA*, 941 F.2d 1339, 1359 (6th Cir. 1991).

[20] Significance is difficult to measure in the abstract. The petitioners catalog cases that they argue use different "tests" for determining whether a comment requires an agency's response. *See, e.g.*, *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987); *Home Box Office, Inc.*, 567 F.2d at 35 n.58; *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977). Rather than provide discrete tests, however, these cases demonstrate that assessing significance is context dependent and requires reading the comment in light of both the rulemaking of which it was part and the statutory ends that the proposed rule is meant to serve.

[21, 22] "Accordingly, an agency must respond to comments 'that can be thought to challenge a fundamental premise' underlying the proposed agency decision." *Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (quoting *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000)). A comment must provide enough facts and reasoning to show the agency what the issue is and how it is relevant to the agency's aims. *See Vermont Yankee*, 435 U.S. at 553, 98 S.Ct. 1197; *Home Box Office, Inc.*, 567 F.2d at 35 n.58. Comments that do so are "significant enough to step over a threshold requirement of materiality" needed for an agency to address them. *Vermont Yankee*, 435 U.S. at 553, 98 S.Ct. 1197 (quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973)).

To make this concrete, consider one of the cases upon which petitioners rely. In *United States v. Nova Scotia Food Products Corp.*, the Second Circuit considered a rule issued by the Food and Drug Administration (FDA) to address a spate of botulism cases within the inland fish market and ensure that fish could be safely consumed. 568 F.2d at 243. While promulgating the rule, which required all fish to be cooked or brined according to its specifications, the FDA ignored a comment by Nova Scotia Food Products Corp., a company that sold smoked whitefish. *Id.* at 245. Nova Scotia had recommended that the agency adopt a rule tailored to the heat tolerance of each species so that their product would not be "completely destroy[ed]," due to whitefish being unable to withstand the rigors of the proposed rule. *Id.* The Second Circuit held that the FDA's failure to respond to Nova Scotia's and similar comments rendered the rule arbitrary or capricious. *Id.* at 253. It was unclear how making a fish product inedible would further the FDA's goal of rendering fish safe for human consumption. *Id.*

After examining the comments that petitioners have identified, we hold that none required Treasury's response as Nova Scotia's did the FDA's. Of the comments to which Treasury did not respond, the petitioners focus their attention on four: those made by the New York Landmarks Conservancy, the Landmarks Preservation Council of Illinois, the Land Trust Ex-

change, and the Trust for Public Land. Situating these comments in the context of the problem that Treasury sought to solve—providing a method for I.R.C. § 170(h)(5)(A)'s perpetuity requirement to be met upon judicial extinguishment—shows why they do not qualify as significant.

The New York Landmarks Conservancy's comment noted three issues with the proceeds regulation: that, based on undisclosed anecdotal evidence, the rule would deter donors from donating easements; that providing the donee with the value of post-donation improvements made by the donor was inequitable; and that it was "possible" that the regulation's allocation of proceeds would conflict with some states' condemnation laws, though the organization did not identify the laws or states. J.A. at 671–72 (N.Y. Landmarks Conservancy Cmt. at 3–4). Although these remarks registered the New York Landmarks Conservancy's dissatisfactions with the proceeds regulation, the comment did not engage with I.R.C. § 170(h)(5)(A)'s perpetuity requirement and whether the rule served this end. Instead, it left Treasury to guess at the connection, if any, between the organization's problems and the proceeds regulation's basis and purpose. Treasury was not required to respond to the comment.

Next, the Landmarks Preservation Council of Illinois commented that how Treas. Reg. § 1.170A-14(g)(6)(ii) calculated proceeds would put a donor at risk of having to pay the donee additional funds if a condemnation award did not cover the amount of money calculated by the rule. J.A. at 778 (Landmarks Pres. Council of Ill. Cmt. at 5). The organization's concern, however, was not only "purely speculative." *Home Box Office, Inc.*, 567 F.2d at 35 n.58. It was also wrong. Because Treas. Reg. § 1.170A-14(g)(6)(ii) calculates proceeds by using a formula based on the proportionate value, not the fixed value, of the easement, the donor could never owe to the donee more than what the extinguishment proceeds are. So, if an easement was worth fifty percent of the value of the donor's entire property at the time of the grant, then the donee would be entitled to fifty percent of any extinguishment proceeds, whatever the amount of those proceeds is. Given that the comment did not raise a significant issue, Treasury was not obliged to respond it.

Both the Land Trust Exchange and the Trust for Public Land suggested that Treasury adopt the remote future event rule in lieu of the proceeds regulation. J.A. at 685 (Land Tr. Exchange Cmt. at 7); *id.* at 795 (Tr. for Pub. Land Cmt. at 7). The organizations' proposals refer to the provision of the regulations that bears the same name, Treas. Reg. § 1.170A-14(g)(3). The remote future event rule provides a "narrow exception to the perpetuity requirement" of I.R.C. § 170(h)(5)(A), *Hoffman Props.*, 956 F.3d at 837, allowing deductions when the conservation purpose of an easement may be defeated by an "act or event" whose occurrence is "so remote as to be negligible." Treas. Reg. § 1.170A-14(g)(3). Neither organization provided any indication of how expanding this rule—which permits deductions in the face of uncertainty—would fulfill Congress's express aim in I.R.C. § 170(h)(5)(A) of limiting deductions to those instances where an easement's conservation purpose can be safeguarded forever. Because Treasury could not ignore this goal, the agency was not required to respond to comments that would have led it to do so.

The Land Trust Exchange asserted that the tax benefit rule rendered the proceeds regulation unnecessary as well. J.A. at 685 (Land Tr. Exchange Cmt. at 7). Again, how so is unclear from the comment. The

tax benefit rule allows a taxpayer to exclude "income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter." I.R.C. § 111(a). This rule—which benefits the donor—bears no relation to the requirement under I.R.C. § 170(h)(5)(A) that an easement's conservation purpose be protected in perpetuity. Nor did the Land Trust Exchange Treasury provide an explanation that would have made it necessary for Treasury to consider the tax benefit rule in this context.

Finally, the other comments that the petitioners reference in passing did not raise significant concerns. Pet'r Br. at 33. Most comments provided only cursory commentary on Treas. Reg. § 1.170A-14(g)(6)(ii), often with either no discussion of the facts on which they were basing their criticisms, or only vague indications of the sources of these facts. *See Home Box Office, Inc.*, 567 F.2d at 35 n.58. Comments that provided alternatives to the proceeds regulation failed to discuss how these alternatives would satisfy I.R.C. § 170(h)(5)(A). *See* J.A. at 721 (Brandywine Conservancy Cmt. at 3); *id.* at 723 (Wash. Tr. for Hist. Pres. Cmt. at 1); *id.* at 801 (Ginsberg Cmt. at 5). Indeed, no comment that addressed the regulation raised a concern about it failing to satisfy that provision's perpetuity requirement. The APA thus did not require that Treasury provide a response to these comments either.

The petitioners' attempt to reach a different conclusion based on the facts of two of our cases—*Simms v. National Highway Traffic Safety Administration* and *PPG Industries, Inc. v. Costle*—falls short. *Simms* provides little guidance here. In that case, the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation promulgated a rule regarding how wheelchairs were to be secured on school buses based on "static" rather than "dynamic" testing of securements. 45 F.3d at 1005. Addressing challenges on the adequacy of NHTSA's response to comments that advocated for dynamic testing, we upheld the rule, pointing to the fact that, although NHTSA acknowledged in its concise general statement that "dynamic testing was the preferred approach among commentators," the agency had also "explained the benefits of using static testing and discussed its rationale for rejecting dynamic testing." *Id.* Besides the fact that in the present case there was no well-developed, "preferred approach" among the commentators that Treasury ignored, *Simms* illustrates only what an adequate response to significant comments looks like. But such comments were not before Treasury here.

PPG Industries is unhelpful as well. In that case, the Environmental Protection Agency (EPA) designated Summit County, Ohio as needing to take special air pollution abatement measures. *PPG Industries*, 630 F.2d at 464. The EPA had previously relied on faulty computer modelling in making its designation. *Id.* at 465. When the plaintiffs challenged the new designation, the EPA responded that it had "reanalyzed" the previously faulty data that it computed. *Id.* at 466. The EPA, however, was unable to point to anywhere in the administrative record to support this reanalysis. *Id.* We remanded to the agency so that an administrative record could be developed. *Id.* at 468. Although the petitioners in the present case rely on the fact that we criticized "EPA's perfunctory treatment" of comments that made it "impossible to determine whether the agency's Summit County designation was arbitrary [or] capricious," this misses the forest for the trees. *Id.* at 466. Unlike in *PPG Industries, Inc.*, there is no indication here that Treasury relied on faulty or impermissible

premises in promulgating the proceeds regulation.

The petitioners also direct us to a recent decision by the Eleventh Circuit that held the proceeds regulation to be procedurally invalid under the APA. *See Hewitt v. Comm'r*, 21 F.4th 1336, 1339 (11th Cir. 2021). Unlike the concurrence, we find that decision's reasoning to be unpersuasive. In concluding that the New York Landmarks Conservancy's comment raised significant concerns about possible deterrent effects that the proceeds regulation could have on donations, the Eleventh Circuit stressed that one of I.R.C. § 170's aims is "to allow deductions for the donation of conservation easements to encourage donation for such easements." *Id.* at 1352. Although encouraging the donation of conservation easements is undeniably a goal of the statute, highlighting this point overlooks a crucial condition that Congress demanded be met by donors seeking deductions: an easement's conservation purpose must be "protected in perpetuity."[7] I.R.C. § 170(h)(5)(A).

That the proceeds regulation interprets I.R.C. § 170(h)(5)(A) and is meant to enforce Congress's goal of limiting deductions to those instances in which the perpetuity requirement can be satisfied is evident from the regulations. Not only does the plain language of the proceeds regulation address this end, *see* Treas. Reg. § 1.170A-14(g)(6)(i) ("the conservation purpose can nonetheless be treated as protected in perpetuity" if the proceeds regulation is followed upon judicial extinguishment), but the rule is also part of a section in the regulations titled "Enforceable in perpetuity," Treas. Reg. § 1.170A-14(g), that contemplates various scenarios in which the perpetuity requirement of I.R.C. § 170(h)(5)(A) would not be met, *see, e.g.*, Treas. Reg. § 1.170A-14(g)(2), *id.* § 1.170A-14(g)(4). Other than missing § 1.170A-14(g)(2), which regulates how mortgages impact the perpetuity requirement and was added in response to other comments, the proposed rule contained the same relevant language. *See* 48 Fed. Reg. at 22945–47. Put differently, I.R.C. § 170(h)(5)(A) embodies a particular policy that restricts deductions to where an easement's conservation purpose can be protected forever, and Treas. Reg. § 1.170A-14(g)(6)(ii) interprets how to implement that policy. The Eleventh Circuit's decision thus does not alter our conclusion that Oakbrook has failed to cite comments that raised valid concerns about how the regulation served this policy.

At this point, the concurrence interjects to accuse us of treating the perpetuity requirement of I.R.C. § 170(h)(5)(A) as a trump card. But we did not decide that perpetuity should play a vital role in the statutory scheme. Congress did. Even aside from the legislative history on which Treasury expressly relied in crafting the proceeds regulation, the statute's text makes it apparent that what Congress sought to encourage is not simply the donation of conservation easements as the concurrence believes. Rather, Congress intended to incentivize the donations of only those easements that met a highly circumscribed set of prerequisites. These easements must be "of a qualified real property interest," which includes the requirement that the interest contain a perpetual restriction on its use. I.R.C. § 170(h)(1)(A), (2)(C). Donations must be "to a qualified organization." I.R.C. § 170(h)(1)(B). And, of course, they must be "exclusively for conservation purposes"—purposes that must be ensured to

7. As noted *supra*, the committee reports emphasized this restriction, too. *See* H.R. REP. NO. 96-1278, at 18; S. REP. NO. 96-1007, at 13.

endure forever. I.R.C. § 170(h)(1)(C), (5)(A). *Cf. Carlson*, 938 F.3d at 342, 345–46 (noting that "simplicity of structure" was one of the "fourteen [statutory] factors" that Congress explicitly deemed it necessary for the Postal Service to contemplate in rulemaking).

Congress has long understood that any deductions it crafts are to be "strictly construed." *Indopco, Inc. v. Comm'r*, 503 U.S. 79, 84, 112 S.Ct. 1039, 117 L.Ed.2d 226 (1992) (citing *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 440, 54 S.Ct. 788, 78 L.Ed. 1348 (1934); *Deputy v. Du Pont*, 308 U.S. 488, 493, 60 S.Ct. 363, 84 L.Ed. 416 (1940)). If there ever was an instance in which this canon of statutory interpretation lined up with congressional intent, it is one in which Congress created a deduction predicated on eternal, unending, ceaseless vigilance. Such a requirement is strict indeed. We thus cannot do as the comments identified by petitioners did and overlook Congress's decision to emphasize that a conservation easement's purpose be protected in perpetuity. Instead, we agree with the Tax Court. Treasury's lack of a response to these comments does not jeopardize the validity of Treas. Reg. § 1.170A-14(g)(6)(ii).

C. *Chevron* Deference

[23] The petitioners also challenge Treas. Reg. § 1.170A-14(g)(6)(ii) as violating *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As background, the proceeds regulation implements I.R.C. § 170(h)(5)(A), which provides: "A contribution shall not be treated as exclusively for conservation purposes unless the conservation purpose is protected in perpetuity." Because the regulation does not allow donors to be compensated for post-donation improvements, the petitioners maintain that the proceeds regulation is not a permissible construction of I.R.C. § 170(h). We are unpersuaded.

[24] "In *Chevron*, the Supreme Court observed that, pursuant to the principle of deference to administrative interpretations, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.' " *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 776 (6th Cir. 2008) (quoting *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778). To determine whether deference to Treasury's statutory interpretation is warranted, we employ the familiar, two-step *Chevron* analysis. *See Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 53–58, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011). "The initial question under step one of the *Chevron* framework is 'whether Congress has directly spoken to the precise question at issue' by employing precise, unambiguous statutory language." *Alliance for Cmty. Media*, 529 F.3d at 776–77 (quoting *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778). It is undisputed that I.R.C. § 170(h)(5)(A), the provision requiring that the conservation purpose of a donation be "protected in perpetuity," does not speak to the precise question at issue: how judicial extinguishment affects the perpetuity requirement.

[25, 26] Our analysis thus proceeds to the second step of *Chevron*, which asks whether Treasury's interpretation was "based on a permissible construction of the statute." *Tennessee Hosp. Ass'n*, 908 F.3d at 1037–38 (quoting *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778). "If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory inter-

pretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). "Whether an agency's construction is reasonable depends, in part, 'on the construction's "fit" with the statutory language, as well as its conformity to statutory purposes.' " *Good Fortune Shipping SA v. Comm'r*, 897 F.3d 256, 262 (D.C. Cir. 2018) (quoting *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006)).

At its core, the petitioners' position centers on the fact that "[n]othing in § 170(h) suggests that a qualified organization must be compensated above the value of its qualified real property interest in the event the easement is extinguished." Pet'r Br. at 55. This statement is true, but incomplete: nothing in that section suggests that donors must be compensated for their post-donation improvements upon extinguishment either. Instead, the section is silent on what should happen if an easement is extinguished by judicial proceedings, including about what should happen with the value added by any post-donation improvements made by a donor.

Although it does not answer this exact question, the text of I.R.C. § 170(h)(5)(A) still provides direction. Section 170(h)(5)(A) requires that easements' conservation purposes be protected in perpetuity after the donation. This leaves donees responsible for stewarding the interest through eternity, a task that consumes not only time but resources, too.[8] A rule that, in the event of extinguishment, allowed donors to retain the value of post-donation improvements such as the petitioners propose would "likely enrich property owners at the public's expense, and leave donees with fewer proceeds with which to advance similar conservation purposes elsewhere." McLaughlin, *supra* at 139. Erring on the side of providing the donee with higher rather than lower proceeds, moreover, buoys the donee's ability to ensure that the conservation purpose of the easement continues upon extinguishment. With additional funds at its disposal, the conservation organization will likely have more options available to further the original conservation purpose in line with § 170(h)(5)(A). *See id.* at 136. Treasury Regulation § 1.170A-14(g)(6)(ii) does just that and is thus a reasonable interpretation of the section.

Bolstering the reasonableness of the proceeds regulation is the fact that Congress has amended I.R.C. § 170 over thirty times during the past thirty-four years but has not voided Treas. Reg. § 1.170A-14(g)(6)(ii). *See Oakbrook Land Holdings*, 154 T.C. at 199–200, 199 n.5 (cataloguing amendments to § 170). "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 561, 111 S.Ct. 1503, 113 L.Ed.2d 589 (1991) (quoting *United States v. Correll*, 389 U.S. 299, 305–06, 88 S.Ct. 445, 19 L.Ed.2d 537 (1967)). Over three decades of congressional acquiescence to the proceeds regulation leaves us confident that the regulation is owed our deference under *Chevron*.

Against this conclusion, the petitioners point to the other provision of I.R.C. § 170(h) that contains a perpetuity requirement, § 170(h)(2)(C). This subsection provides the definition of "qualified real property interest," which is "a restriction

8. As also noted *supra,* the legislative history that Treasury cited in its notice of proposed rulemaking confirms that Congress was concerned about donees having sufficient resources to ensure that an easement's conservation purpose be protected in perpetuity. *See* H.R. REP. NO. 96-1278, at 19; S. REP. NO. 96-1007, at 14.

(granted in perpetuity) on the use which may be made of the real property." I.R.C. § 170(h)(2)(C). According to the petitioners, a donee has no interest in donor improvements under this subsection, and therefore it is unreasonable to give a donee the proceeds after judicial extinguishment that result from a donor's post-donation improvements.

Whatever else I.R.C. § 170(h)(2)(C) requires, the petitioners have not established that it requires donors to receive the value of their post-donation improvements. The subsection's text does not dictate this outcome, for all that it provides is that a qualified real property interest both be a restriction on the use of real property, and that the restriction be "granted in perpetuity." *Id.* Subsection 170(h)(2)(C) simply does not encompass post-donation improvements or suggest to whom their value should accrue upon judicial extinguishment. That gap was left for Treasury to fill, as it reasonably did with the proceeds regulation.

D. Arbitrary or Capricious Review

[27] Coupled with their *Chevron* argument, the petitioners argue that Treasury acted arbitrarily or capriciously in promulgating Treas. Reg. § 1.170A-14(g)(6)(ii) for two distinct reasons: because Treasury provided no explanation for why it adopted the rule, and because Treasury failed to consider a variety of alternatives.[9] Neither argument is convincing.

[28–30] When determining whether a final agency action is arbitrary or capricious, the scope of our review is "an extremely narrow one." *Navistar Int'l Transp. Corp.*, 941 F.2d at 1352. A court may not "substitute its judgment for that of the agency." *Greenbaum v. U.S. EPA*, 370 F.3d 527, 542 (6th Cir. 2004) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)). Instead, we consider whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ne. Ohio Reg'l Sewer Dist. v. U.S. EPA*, 411 F.3d 726, 731 (6th Cir. 2005) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)). "Even when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Id.* (quoting *Alaska Dep't of Env't Conservation v. U.S. EPA*, 540 U.S. 461, 497, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004)).

The petitioners' first argument for why Treas. Reg. § 1.170A-14(g)(6)(ii) is arbitrary or capricious duplicates their argument for why the rule's concise general statement of basis and purpose is deficient. In essence, the petitioners argue that the proceeds regulation could not be the product of reasoned decision-making because Treasury provided no explanation for why the agency settled on that formula for calculating proceeds. Yet given the context of the rulemaking and the statutory issue that the agency confronted, we reiterate that the concise statement of basis and purpose that accompanied the proceeds regulation adequately explained Treasury's

9. The petitioners insist that their arbitrary-or-capricious arguments are part of the *Chevron* analysis. Because we have previously analyzed these issues separately, *see Atrium Med. Ctr. v. U.S. Dep't of HHS*, 766 F.3d 560, 567 (6th Cir. 2014), we do so here.

rationale: to create an administrable mechanism for enforcing I.R.C. § 170(h)(5)(A)'s perpetuity requirement.

[31, 32] Insofar as the petitioners try to bolster their arbitrary-or-capricious argument by relying on *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943), this, too, fails. In *Chenery*, the Supreme Court limited the grounds on which an agency's action could be upheld to those on which the agency relied at the time. 318 U.S. at 88, 63 S.Ct. 454. Under this rule, an agency must defend its actions based on the reasons that animated the act at issue, not for reasons that it formulated during litigation. *State Farm*, 463 U.S. at 50, 103 S.Ct. 2856. *Chenery* does not, however, narrow our inquiry into an agency's contemporaneous rationale solely to the concise general statement. *See State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. As the Supreme Court has held in the context of determining whether a particular statutory interpretation guided an agency's actions, courts may accept the explanation provided by an agency during litigation for its conduct when this is "the only plausible explanation" of the course taken in the rulemaking. *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992); *see also Nat'l Elec. Mfrs. Ass'n v. U.S. Dept. of Energy*, 654 F.3d 496, 513 (4th Cir. 2011).

Such is the case here. Contrary to what the petitioners maintain, the Commissioner's rationale for the proceeds regulation—namely, that it was promulgated to create an administrable rule which ensured that a donee would receive sufficient funds upon extinguishment to continue the conservation purpose—aligns with the obvious concern evinced by Treasury during the rulemaking process that I.R.C. § 170(h)(5)(A)'s perpetuity requirement be satisfied in the event of judicial extinguishment. This rationale both tethered the regulation to its statutory source and left us a clear thread to trace how Treasury navigated between these two points. Treasury's citations to the committee reports provided further guidance into its decision to craft a rule that stood to benefit donees over donors upon extinguishment, an aim which coincided with Congress's "major policy decisions" concerning which entity should be favored post-donation.[10] 48 Fed. Reg. at 22940.

[33] Moving to the petitioners' second rationale, none of the alternatives to which they point required Treasury's consideration. Two sources of possible alternatives—the RESTATEMENT (THIRD) OF PROPERTY § 7.11 (Am. Law. Inst. 2000) and the testimony of SLRC's Executive Director, James Wright, at the trial before Judge Holmes in 2016, *see* J.A. 405–08 (Wright Test. Tr. at 205–08); Pet'r Br. at 51—did not exist when Treasury was promulgating the proceeds regulation in the 1980s. "[A] rulemaking 'cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been"—or, in this case, regardless of how distant in the future that alternative was from existing. *State Farm*, 463 U.S. at 51, 103 S.Ct. 2856 (quoting *Vermont Yankee*, 435 U.S. at 551, 98 S.Ct. 1197); *see also Simms*, 45 F.3d at 1006.

10. The concurrence would have us ignore the Supreme Court because of its reading of *National Railroad Passenger Corp.* as a "dead letter in legal history." Concur. op. at 729. We must, however, decline to conclude that "more recent cases have, by implication, overruled an earlier precedent" of the Court. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

The petitioners also flag a Maryland statute that governed condemnation awards and which the Maryland Agricultural Land Preservation Foundation attached to its comment. *See* J.A. at 742 (Md. Agric. Land Pres. Found. Cmt. attach.). According to the petitioners, this statute provided an alternative approach to how Treas. Reg. § 1.170A-14(g)(6)(ii) allocates proceeds. If it did, however, the Maryland Agricultural Land Preservation Foundation apparently did not think so. The organization's comment neither drew attention to this statute, nor put it forward as an alternative to the proceeds regulation. Instead, the Maryland Agricultural Land Preservation Foundation lumped this statute in with a series of laws from which the organization derived its legislative mandate. *Id.* at 725 (Md. Agric. Land Pres. Found. Cmt. at 1). Because even the organization that cited the statute did not consider it to be an alternative to the proceeds regulation, Treasury did not have to assess whether it was one.

Finally, the petitioners' heavy reliance on *State Farm* and *Judulang v. Holder*, 565 U.S. 42, 132 S.Ct. 476, 181 L.Ed.2d 449 (2011), to support their arbitrary-or-capricious arguments is misplaced. In *State Farm*, the alternative that the agency failed to consider—airbags—was well-known at the time, including to the agency itself. *See* 463 U.S. at 48, 103 S.Ct. 2856. In *Judulang*, the agency had applied diverse statutory factors in an arbitrary manner. *See* 565 U.S. at 58–59, 132 S.Ct. 476. The petitioners have not pointed to an alternative to the proceeds regulation that was both well established and that Treasury ignored. Additionally, the regulation is a reasonable way to ensure that the perpetuity requirement of I.R.C. § 170(h)(5)(A) is protected in the event of a judicial extinguishment of a conservation easement. Therefore, Treasury acted neither arbitrarily nor capriciously in promulgating Treas. Reg. § 1.170A-14(g)(6)(ii).

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the Tax Court upholding the procedural and substantive validity of Treas. Reg. § 1.170A-14(g)(6)(ii).

RALPH B. GUY, JR., Circuit Judge, concurring in the judgment only.

CONCURRING IN THE JUDGMENT

The Department of the Treasury must play by the same rules as other federal agencies. The Supreme Court made that clear when it refused to "carve out an approach to administrative review good for tax law only" and "expressly 'recognized the importance of maintaining a uniform approach to judicial review of administrative action.' " *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) (cleaned up) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154, 119 S.Ct. 1816, 144 L.Ed.2d 143 (1999)). But it seems the majority opinion has done the opposite for Treasury's proceeds regulation (Treas. Reg. § 1.170A-14(g)(6)(ii)). In my view, the regulation is procedurally invalid under the Administrative Procedure Act (APA) for substantially the same reasons stated by the Eleventh Circuit in *Hewitt v. Commissioner of IRS*, 21 F.4th 1336 (11th Cir. 2021), and by the concurring and dissenting opinions in *Oakbrook Land Holdings, LLC v. Commissioner of IRS*, 154 T.C. 180, 200-30 (2020) (Toro, J., concurring in the judgment, joined in full by Urda, J., and joined in part by Gustafson and Jones, JJ.); *id.* at 230-259 (Holmes, J., dissenting). But I would conclude that the Commissioner's statutory argument is not forfeited and affirm on that basis.

2016); *see also Garcia-Martinez v. Sessions*, 886 F.3d 1291, 1296 (9th Cir. 2018).

Recognizing that " 'moral turpitude' is perhaps the quintessential example of an ambiguous phrase," we have attempted to resolve these cases on a case-by-case basis. *Marmolejo-Campos*, 558 F.3d at 909. "Absent consistent or logical rules to follow as we determine whether a crime . . . involves moral turpitude, our most useful guidance often comes from comparing the crime with others that we have previously deemed morally turpitudinous." *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010). This approach has been, as Judge Fletcher stated, a "failed enterprise." *Islas-Veloz*, 914 F.3d at 1261 (Fletcher, J., concurring). We should instead recognize that, "[a]bsent consistent or logical rules," *Nunez*, 594 F.3d at 1131, the phrase "crime involving moral turpitude" is unconstitutionally vague.

I recognize that history is not on our side. The term "crime involving moral turpitude" has persisted in our immigration law since 1891, and in our common law tradition for nearly a century longer. *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1010, 1039. Indeed, in holding in 1951 that the term was not void for vagueness, the Supreme Court thought it "significant that the phrase has been part of the immigration laws for more than sixty years." *De George*, 341 U.S. at 229, 71 S.Ct. 703; *see also Martinez-de Ryan v. Whitaker*, 909 F.3d 247, 252 (9th Cir. 2018). Committed to the principle of stare decisis, we judges are loath to upset long-settled doctrine. As the Supreme Court has recognized, however, "*stare decisis* does not matter for its own sake. It matters because it 'promotes the evenhanded, predictable, and consistent development of legal principles.' " *Johnson*, 135 S. Ct. at 2563 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)).

In *Johnson*, the Court recognized that "[d]ecisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent." *Id.* The same is true of our tortured attempts to find logical consistency in the term "moral turpitude." Especially given the revitalization of the void-for-vagueness doctrine in *Johnson* and *Sessions v. Dimaya*, —— U.S. ——, 138 S. Ct. 1204, 200 L.Ed.2d 549 (2018), the time is ripe for reconsideration of this issue.

ALTERA CORPORATION & SUBSIDIARIES, Petitioner-Appellee,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.

Nos. 16-70496
16-70497

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 16, 2018 San Francisco, California

Filed June 7, 2019

Background: Affiliated group of corporations that filed consolidated returns for subject tax years petitioned for redetermination of income tax deficiencies based on Treasury's final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs. Parties cross-moved for summary judgment. The Tax Court, Nos. 6253-12 and 9963-12, Marvel,

J., entered summary judgment for group. IRS appealed.

Holdings: The Court of Appeals, Thomas, Chief Judge, held that:

(1) Internal Revenue Code provision governing the allocation of income and deductions among related entities was ambiguous as to method by which Treasury was to make allocations based on stock-based compensation, thereby requiring determination as to whether Treasury's final rule was based on permissible construction of Code provision;

(2) rule was based on permissible construction of Code provision and, thus, was not arbitrary, capricious or manifestly contrary to Code provision; and

(3) Treasury did not act arbitrarily or capriciously, so as to violate Administrative Procedure Act (APA), when enacting final rule.

Reversed.

O'Malley, Circuit Judge, issued dissenting opinion.

1. Administrative Law and Procedure ⚿2210

Under *Chevron*, a court reviewing a rule promulgated by administrative agency first applies the traditional rules of statutory construction to determine whether Congress has directly spoken to the precise question at issue.

2. Administrative Law and Procedure ⚿2210

Under *Chevron*, a court reviewing a rule promulgated by administrative agencies starts with the plain statutory text and, when deciding whether the language is plain, the court must read the words in their context and with a view to their place in the overall statutory scheme.

3. Administrative Law and Procedure ⚿2210

Under *Chevron*, a court reviewing a rule promulgated by administrative agencies examines legislative history, the statutory structure, and other traditional aids of statutory interpretation in order to ascertain congressional intent.

4. Administrative Law and Procedure ⚿2210, 2211

Under *Chevron*, after reviewing a rule promulgated by administrative agencies, if a court concludes that the statute the agency administers is silent or ambiguous on the issue, the court then defers to the agency's interpretation so long as it is based on a permissible construction of the statute, which is a construction that is not arbitrary, capricious, or manifestly contrary to the statute.

5. Administrative Law and Procedure ⚿2205

Under *Chevron*, questions of judicial deference to an agency's interpretation of a statutory provision boil down to whether it appears Congress delegated authority to the agency generally to make rules carrying the force of law and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

6. Administrative Law and Procedure ⚿2210, 2212

Under *Chevron*, when Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

7. Administrative Law and Procedure ⚿2244

Internal Revenue ⚿3867

Under *Chevron*, Internal Revenue Code provision governing the allocation of income and deductions among related entities was ambiguous as to method by which Department of Treasury was to make allocations based on stock-based compensation, thereby requiring determination as to whether Treasury's final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs was based on permissible construction of Code provision; text of provision did not limit its application to preexisting intangibles. 26 U.S.C.A. § 482; 26 C.F.R. § 1.482-7A(d)(2).

8. Administrative Law and Procedure ⚿2205, 2212

When determining under *Chevron* whether agency's interpretation of statutory authority was a permissible interpretation of the statute, the agency's interpretation is examined in light of the statute's text, structure and purpose, and the interpretation fails if it is unmoored from the purposes and concerns of the underlying statutory regime.

9. Internal Revenue ⚿3879

Under *Chevron*, Department of Treasury's final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs was based on permissible construction of Internal Revenue Code provision governing the allocation of income and deductions among related entities commensurate with income attributable to each entity and, thus, was not arbitrary, capricious or manifestly contrary to Code provision; Congress sought approach to allocation that would reasonably reflect the actual economic activity undertaken by each party to a QCSA, Treasury determined uncontrolled cost-sharing arrangements did not provide helpful guidance regarding allocation of employee stock compensation, and that doing away with analysis of comparable transactions was efficient means of ensuring Code provision would operate to assure adequate allocations to domestic taxable entity of income attributable to intangibles in QCSAs. 26 U.S.C.A. § 482; 26 C.F.R. § 1.482-7A(d)(2).

10. Internal Revenue ⚿3879

The congressional purpose in enacting Internal Revenue Code provision, which provides for the allocation of income and deductions among related entities, was to establish tax parity. 26 U.S.C.A. § 482.

11. Administrative Law and Procedure ⚿1607

The Administrative Procedure Act (APA) sets forth the full extent of judicial authority to review executive agency action for procedural correctness. 5 U.S.C.A. § 706.

12. Administrative Law and Procedure ⚿1200, 1202

To comport with procedural correctness when engaging in notice and comment rulemaking under Administrative Procedure Act (APA), an agency must consider and respond to significant comments received during the period for public comment. 5 U.S.C.A. § 553(c).

13. Administrative Law and Procedure ⚿1743

The touchstone of "arbitrary and capricious" review under the Administrative Procedure Act (APA) is reasoned decision-making; an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. 5 U.S.C.A. § 706(2)(A).

14. Administrative Law and Procedure ⚷1743

Agency action is lawful under the arbitrary and capricious standard of review of the Administrative Procedure Act (APA) only if it rests on a consideration of the relevant factors. 5 U.S.C.A. § 706(2)(A).

15. Administrative Law and Procedure ⚷1876, 1933

Under arbitrary and capricious standard of review of Administrative Procedure Act (APA), a reviewing court may not set aside agency action simply because the rulemaking process could have been improved; rather, it must determine whether the agency's path may reasonably be discerned. 5 U.S.C.A. § 706(2)(A).

16. Administrative Law and Procedure ⚷1206

When considering and responding to comments pursuant to notice and comment rulemaking provisions of Administrative Procedure Act (APA), an agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. 5 U.S.C.A. § 553(c).

17. Administrative Law and Procedure ⚷1202, 1994

When considering and responding to comments pursuant to notice and comment rulemaking provisions of Administrative Procedure Act (APA), an agency need only respond to significant comments, that is, those that raise relevant points and that, if adopted, would require a change in the agency's proposed rule; if the comments ignored by the agency would not bear on its consideration of the relevant factors, the reviewing court may not reverse the agency's decision. 5 U.S.C.A. § 553(c).

18. Internal Revenue ⚷3867

Department of Treasury did not act arbitrarily or capriciously, so as to violate Administrative Procedure Act (APA), when enacting final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs, despite contention that it improperly rejected comments submitted in opposition to rule; submitted comments were irrelevant to issues Treasury was considering, as it did away with analysis of comparable transactions, a decision made clear by citations to legislative history in notice of proposed rulemaking and in preamble to final rule. 5 U.S.C.A. § 553; 26 C.F.R. § 1.482-7A(d)(2).

19. Administrative Law and Procedure ⚷1932, 1934

Under Administrative Procedure Act (APA), a reviewing court must judge the propriety of agency action solely by the grounds invoked by the agency; if those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. 5 U.S.C.A. § 706.

20. Administrative Law and Procedure ⚷2208(1), 2211

Under the arbitrary and capricious standard of review of the Administrative Procedure Act (APA), a reviewing court must defer to an agency's interpretation of statute it administers that was a necessary presupposition of the agency's decision, if reasonable, even when alternative interpretations are available. 5 U.S.C.A. § 706.

21. Internal Revenue ⚷3867

Department of Treasury did not act arbitrarily or capriciously, so as to violate Administrative Procedure Act (APA), when enacting final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs, despite contention that its current litigation

position was inconsistent with statements made during rulemaking process; Treasury reasonably interpreted congressional intents in amendments to Internal Revenue Code provision, governing the allocation of income and deductions among related entities commensurate with income attributable to each entity, as permitting it to dispense with comparable transaction analysis in absence of actual comparable transactions, and Treasury consistently asserted that using internal method of reallocation was consistent with arm's length standard because it attempted to bring parity to tax treatment of controlled and uncontrolled taxpayers. 5 U.S.C.A. § 553; 26 U.S.C.A. § 482; 26 C.F.R. § 1.482-7A(d)(2).

22. Internal Revenue ⚿3867

Department of Treasury did not act arbitrarily or capriciously, so as to violate Administrative Procedure Act (APA), when enacting final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs, despite contention that Treasury did not adequately support its position that employee stock compensation was a cost; Treasury articulated why treating such compensation as a cost led to arm's length results, and generally accepted accounting principles supported Treasury's conclusion. 5 U.S.C.A. § 553; 26 C.F.R. § 1.482-7A(d)(2).

23. Administrative Law and Procedure ⚿1287

Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change.

24. Administrative Law and Procedure ⚿1268, 1287

When an agency changes its existing position, it need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate; however, an agency may not depart from a prior policy sub silentio or simply disregard rules that are still on the books.

25. Administrative Law and Procedure ⚿1287

An administrative agency's policy change complies with the Administrative Procedure Act (APA) if it: (1) displays awareness it is changing position; (2) shows the new policy is permissible under the statute; (3) believes the new policy is better; and (4) provides good reasons for the new policy which, if the new policy rests upon factual findings that contradict those which underlay its prior policy, must include a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy. 5 U.S.C.A. § 706(2)(A).

26. Internal Revenue ⚿3867

Department of Treasury did not act arbitrarily or capriciously, so as to violate Administrative Procedure Act (APA), when enacting final rule requiring controlled entities entering into qualified cost-sharing agreements (QCSAs) to share stock-based compensation (SBC) costs, despite contention that Treasury altered its position with enactment of rule and amendments, thereby requiring heightened review; regulations clarified, rather than altered, prior policy change occasioned by congressional addition of "commensurate with income" requirement to Internal Revenue Code provision governing the allocation of income and deductions among related entities commensurate with income attributable to each entity. 5 U.S.C.A. § 553; 26 U.S.C.A. § 482; 26 C.F.R. § 1.482-7A(d)(2).

27. Internal Revenue ⚿3879

The broad language of Internal Revenue Code provision which provides for the allocation of income and deductions among related entities reflects an intentional ef-

fort to confer the flexibility necessary to forestall obsolescence. 26 U.S.C.A. § 482.

Appeal from Decisions of the United States Tax Court, Tax Ct. Nos. 6253-12 9963-12

Arthur T. Catterall (argued), Richard Farber, and Gilbert S. Rothenberg, Attorneys; Travis A. Greaves, Deputy Assistant Attorney General; Richard E. Zuckerman, Principal Deputy Assistant Attorney General; Tax Division, United States Department of Justice, Washington, D.C.; for Respondent-Appellant.

Donald M. Falk (argued), Mayer Brown LLP, Palo Alto, California; Thomas Kittle-Kamp and William G. McGarrity, Mayer Brown LLP, Chicago, Illinois; Brian D. Netter and Travis Crum, Mayer Brown LLP, Washington, D.C.; A. Duane Webber, Phillip J. Taylor, and Joseph B. Judkins, Baker & McKenzie LLP, Washington, D.C.; for Petitioner-Appellee.

Susan C. Morse, University of Texas School of Law, Austin, Texas; Stephen E. Shay and Allison Bray, Certified Law Students, Harvard Law School, Cambridge, Massachusetts; for Amici Curiae J. Richard Harvey, Reuven Avi-Yonah, Lily Batchelder, Joshua Blank, Noël Cunningham, Victor Fleischer, Ari Glogower, David Kamin, Mitchell Kane, Michael Knoll, Rebecca Kysar, Leandra Lederman, Zachary Liscow, Ruth Mason, Susan Morse, Daniel Shaviro, Stephen Shay, John Steines, David Super, Clinton Wallace, and Bret Wells.

Jonathan E. Taylor, Gupta Wessler PLLC, Washington, D.C.; Clint Wallace, Vanderbilt Hall, New York, New York; for Amici Curiae Anne Alstott, Reuven Avi-Yonah, Lily Batchelder, Joshua Blank, Noel Cunningham, Victor Fleischer, Ari Glogower, David Kamin, Mitchell Kane, Sally Katzen, Edward Kleinbard, Michael Knoll, Rebecca Kysar, Zachary Liscow, Daniel Shaviro, John Steines, David Super, Clint Wallace, and George Yin.

Larissa B. Neumann, Ronald B. Schrotenboer, and Kenneth B. Clark, Fenwick & West LLP, Mountain View, California, for Amicus Curiae Xilinx Inc.

Christopher J. Walker, The Ohio State University Moritz College of Law, Columbus, Ohio; Kate Comerford Todd, Steven P. Lehotsky, and Warren Postman, U.S. Chamber Litigation Center, Washington, D.C.; for Amicus Curiae Chamber of Commerce of the United States of America.

John I. Forry, San Diego, California, for Amicus Curiae TechNet.

Alice E. Loughran, Michael C. Durst, and Charles G. Cole, Steptoe & Johnson LLP, Washington, D.C.; Bennett Evan Cooper, Steptoe & Johnson LLP, Phoenix, Arizona; for Amici Curiae Software and Information Industry Association, Financial Executives International, Information Technology Industry Council, Silicon Valley Tax Directors Group, Software Finance and Tax Executives Counsel, National Association of Manufacturers, American Chemistry Council, BSA | the Software Alliance, National Foreign Trade Council, Biotechnology Innovation Organization, Computing Technology Industry Association, The Tax Council, United States Council for International Business, Semiconductor Industry Association.

Kenneth P. Herzinger and Eric C. Wall, Orrick Herrington & Sutcliffe LLP, San Francisco, California; Peter J. Connors, Orrick Herrington & Sutcliffe LLP, New York, New York; for Amici Curiae Charles W. Calomiris, Kevin H. Hassett, and Sanjay Unni.

Roderick K. Donnelly and Neal A. Gordon, Morgan Lewis & Bockius LLP, Palo Alto, California; Thomas M. Peterson, Morgan Lewis & Bockius LLP, San Fran-

cisco, California; for Amicus Curiae Cisco Systems Inc.

Christopher Bowers, David Foster, Raj Madan, and Royce Tidwell, Skadden Arps Slate Meagher & Flom LLP, Washington, D.C.; Nathaniel Carden, Skadden Arps Slate Meagher & Flom LLP, Chicago, Illinois; for Amicus Curiae Amazon.com Inc.

Before: Sidney R. Thomas, Chief Judge, and Susan P. Graber * and Kathleen M. O'Malley,** Circuit Judges.

Dissent by Judge O'Malley

OPINION

THOMAS, Chief Judge:

This appeal presents the question of the validity of 26 C.F.R. § 1.482-7A(d)(2),[1] under which related business entities must share the cost of employee stock compensation in order for their cost-sharing arrangements to be classified as qualified cost-sharing arrangements ("QCSA"). Although the case appears complex, the dispute between the Department of the Treasury and the taxpayer is relatively straightforward. The parties agree that, under the governing tax statute, the "arm's length" standard applies; but they disagree about how the standard may be met. The taxpayer argues that Treasury must employ a specific method to meet the arm's length standard: a comparability analysis using comparable transactions between unrelated business entities. Treasury disagrees that the arm's length standard requires the specific comparability *method* in all cases. Instead, the standard generally requires that Treasury reach an arm's length *result* of tax parity between controlled and uncontrolled business entities. With respect to the transactions at issue here, the governing statute allows Treasury to apply a purely internal method of allocation, distributing the costs of employee stock options in proportion to the income enjoyed by each related taxpayer.

Our task, of course, is not to assess the better tax policy, nor the wisdom of either approach, but rather to examine whether Treasury's regulations are permitted under the statute. Applying the familiar tools used to examine administrative agency regulations, we conclude that the regulations withstand scrutiny. Therefore, we reverse the judgment of the Tax Court.

I

For many years, Congress and the Treasury have been concerned with American businesses avoiding taxes through the creation and use of related business entities. In the last several decades, Congress has directed particular attention to the potential for tax abuse by multinational corporations with foreign subsidiaries. If, for example, the parent business entity is in a high-tax jurisdiction, and the foreign subsidiary is in a low-tax jurisdiction, the business enterprise can shift costs and revenue between the related entities so that more taxable income is allocated to the lower tax jurisdiction. Similarly, a parent and foreign subsidiary can enter into significant tax-avoiding cost sharing arrangements.

* The Honorable Stephen R. Reinhardt was originally assigned to this panel. Following his death, the Honorable Susan P. Graber was drawn by lot to replace him on the panel.

** The Honorable Kathleen M. O'Malley, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

1. The 2003 amendments are at issue. Although they are still in effect, the Tax Code has been reorganized, and what was § 1.482-7 in 2003 is now numbered § 1.482-7A. To minimize confusion, our citations are to the current version of the regulation unless otherwise specified.

This potential for tax abuse is generally not present when similar transactions occur between unrelated business entities. In those instances, each separate unrelated entity has the incentive to maximize profit, and thus to allocate costs and income consistent with economic realities. However, among related parties, those incentives do not exist. Rather, among related parties, after-tax maximization of profit may depend on how costs and income are allocated between the parent and the subsidiary regardless of economic reality, given that after-tax profits are commonly shared.

The concern about tax avoidance through the use of related business entities is not new. In the Revenue Act of 1928, Congress granted the Secretary of the Treasury the authority to reallocate the reported income and costs of related businesses "in order to prevent evasion of taxes or clearly to reflect the income of any such trades or businesses." Revenue Act of 1928, ch. 852, § 45, 45 Stat. 791, 806. This statute was designed to give Treasury the flexibility it needed to prevent transaction-shuffling between related entities for the purpose of decreasing tax liability. *See* H.R. REP. NO. 70-2, at 16–17 (1927) ("[T]he Commissioner may, in the case of two or more trades or businesses owned or controlled by the same interests, apportion, allocate, or distribute the income or deductions between or among them, as may be necessary in order to prevent evasion (by the shifting of profits, the making of fictitious sales, and other methods frequently adopted for the purpose of 'milking'), and in order clearly to reflect their true tax liability."); *accord* S. REP. NO. 70-960, at 24 (1928). The purpose of the statute was "to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer." *Comm'r v. First Sec. Bank of Utah*, 405 U.S. 394, 400, 92 S.Ct. 1085, 31 L.Ed.2d 318 (1972) (quoting 26 C.F.R. § 1.482-1(b)(1) (1971)). In short, the primary aim of the statute was to prevent tax evasion by related business taxpayers.[2]

In 1934, the Commissioner adopted regulations implementing the statute and first adopted the familiar "arm's length" standard: "The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." Treas. Reg. 86, art. 45-1(b) (1935). In the context of a controlled transaction, the arm's length standard is satisfied "if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm's length result)." 26 C.F.R. § 1.482-1(b)(1). The relevant regulation also noted: "However, because identical transactions can rarely be located, whether a transaction produces an arm's length result generally will be determined by reference to the results of comparable transactions under comparable circumstances." *Id.*

Although the Secretary adopted the arm's length standard, courts did not hold related parties to that standard by exclusively requiring the examination of comparable transactions. For example, in *Seminole Flavor Co. v. Commissioner*, the Tax Court rejected a strict application of the arm's length standard in favor of an inquiry into whether the allocation of income between related parties was "fair and reasonable." 4 T.C. 1215, 1232 (1945); *see also id.* at 1233 ("Whether any such business agreement would have been entered into by petitioner with total strangers is wholly problematical."); *Grenada Indus., Inc. v. Comm'r*, 17 T.C. 231, 260 (1951) ("We ap-

2. An important, but secondary purpose was to avoid double taxation of multi-national corporations, which the United States effected through various tax treaties. *See, e.g.,* Convention Concerning Double Taxation, Fr.-U.S., art. IV, Apr. 27, 1932, 49 Stat. 3145.

prove an allocation . . . to the extent that such gross income in fact exceeded the fair value of the services rendered . . . .”). And in 1962, we collected various allocation standards and outright rejected the superiority of the arm’s length bargaining analysis over all others:

> [W]e do not agree . . . that “arm’s length bargaining” is the sole criterion for applying the statutory language of [26 U.S.C. § 482] in determining what the “true net income” is of each “controlled taxpayer.” Many decisions have been reached under [§ 482] without reference to the phrase “arm’s length bargaining” and without reference to Treasury Department Regulations and Rulings which state that the talismanic combination of words—“arm’s length”—is the “standard to be applied in every case.”

Frank v. Int’l Canadian Corp., 308 F.2d 520, 528–29 (9th Cir. 1962).

Frank noted that “it was not any less proper . . . to use here the ‘reasonable return’ standard than it was for other courts to use ‘full fair value,’ ‘fair price including a reasonable profit,’ ‘method which seems not unreasonable,’ ‘fair consideration which reflects arm’s length dealing,’ ‘fair and reasonable,’ ‘fair and reasonable’ or ‘fair and fairly arrived at,’ or ‘judged as to fairness,’ all used in interpreting [the statute].” *Id.* (footnotes omitted). We later limited *Frank* to situations in which “it would have been difficult for the court to hypothesize an arm’s-length transaction.” *Oil Base, Inc. v. Comm’r*, 362 F.2d 212, 214 n.5 (9th Cir. 1966). However, *Frank*’s central point remained: the arm’s length standard based on comparable transactions was not the *sole* basis of reallocating costs and income under the statute.

In the 1960s, the problem of abusive transfer pricing practices created a new adherence to a stricter arm’s length standard. In response to concerns about the undertaxation of multinational business entities, Congress considered reworking the Tax Code to resolve the difficulty posed by the application of the arm’s length standard to related party transactions. H.R. REP. NO 87-1447, at 28–30 (1962). However, it instead asked Treasury to “explore the possibility of developing and promulgating regulations . . . which would provide additional guidelines and formulas for the allocation of income and deductions” under 26 U.S.C. § 482. H.R. REP. NO 87-2508, at 19 (1962) (Conf. Rep.), *as reprinted in* 1962 U.S.C.C.A.N. 3732, 3739. Legislators believed that § 482 authorized the Secretary to employ a profit-split allocation method without amendment. *Id.*; H.R. REP. NO 87-1447, at 28–29. In 1968, following Congress’s entreaty, Treasury finalized the first regulation tailored to the issue of intangible property development in QCSAs. 26 C.F.R. § 1.482-2(d) (1968).

The 1968 regulations “constituted a radical and unprecedented approach to the problem they addressed—notwithstanding their being couched in terms of the ‘arm’s length standard,’ and notwithstanding that that standard had been the nominal standard under the regulations for some 30 years.” Stanley I. Langbein, *The Unitary Method and the Myth of Arm’s Length*, 30 TAX NOTES 625, 644 (1986). In addition to three arm’s length pricing methods, the 1968 regulations included a “fourth method,” which was essentially open-ended: “Where none of the three methods of pricing . . . can reasonably be applied under the facts and circumstances as they exist in a particular case, some appropriate method of pricing other than those described . . ., or variations on such methods, can be used.” 26 C.F.R. § 1.482-2(e)(1)(iii) (1968).

Following the promulgation of the 1968 regulation, courts continued to employ a

comparability analysis, but not to the exclusion of other methodologies. Reuven S. Avi-Yonah, *The Rise & Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 VA. TAX REV. 89, 108–29 (1995). Indeed, a study determined that direct comparable transactions were located and applied in only 3% of the Internal Revenue Service's adjustments prior to the 1986 amendment. U.S. GEN. ACCOUNTING OFFICE., GGD-81-81, IRS COULD BETTER PROTECT U.S. TAX INTERESTS IN DETERMINING THE INCOME OF MULTINATIONAL CORPORATIONS (1981). The decades following the 1968 regulations involved

> a gradual realization by all parties concerned, but especially Congress and the IRS, that the [comparability method of meeting the arm's length standard], firmly established . . . as the sole standard under section 482, did not work in a large number of cases, and in other cases its misguided application produced inappropriate results. The result was a deliberate decision to retreat from the standard while still paying lip service to it.

Avi-Yonah, *supra*, at 112; *see also* James P. Fuller, *Section 482: Revisited Again*, 45 TAX L. REV. 421, 453 (1990) ("[T]he 1986 Act's commensurate with income standard is not really a new approach to § 482.").

Ultimately, as controlled transactions increased in frequency and complexity, particularly with respect to intangible property, Congress determined that legislative action was necessary. The Tax Reform Act of 1986 reflected Congress's view that strict adherence to the comparability method of meeting the arm's length standard prevented tax parity. Thus, the Tax Reform Act of 1986 added a sentence to § 482 that largely forms the basis of the present dispute, providing that:

> In the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.

Tax Reform Act of 1986, 26 U.S.C. § 482 (1986) (as amended 2018).

The House Ways and Means Committee recommended the addition of the commensurate with income clause because it was "concerned" that the current code and regulations "may not be operating to assure adequate allocations to the U.S. taxable entity of income attributable to intangibles." H.R. REP. NO. 99-426, at 423 (1985). The clause was intended to correct a "recurrent problem"—"the absence of comparable arm's length transactions between unrelated parties, and the inconsistent results of attempting to impose an arm's length concept in the absence of comparables." *Id.* at 423–24.

The House Report makes clear that the committee intended the commensurate with income standard to displace a comparability analysis where comparable transactions cannot be found:

> A fundamental problem is the fact that the relationship between related parties is different from that of unrelated parties. . . . [M]ultinational companies operate as an economic unit, and not "as if" they were unrelated to their foreign subsidiaries. . . .
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> . . . .
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> Certain judicial interpretations of section 482 suggest that pricing arrangements between unrelated parties for items of the same apparent general category as those involved in the related party transfer may in some circumstances be considered a "safe harbor" for related party pricing arrangements, even though there are significant differences in the volume and risks involved, or in other factors. While the committee is concerned that such decisions may unduly emphasize the concept of compa-

> rables even in situations involving highly standardized commodities or services, it believes that such an approach is sufficiently troublesome where transfers of intangibles are concerned that a statutory modification to the intercompany pricing rules regarding transfers of intangibles is necessary.
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> . . . .
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> . . . There are extreme difficulties in determining whether the arm's length transfers between unrelated parties are comparable. The committee thus concludes that it is appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation . . . be commensurate with the income attributable to the intangible. . . .
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> . . . .
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> . . . [T]he committee intends to make it clear that industry norms or other unrelated party transactions do not provide a safe-harbor minimum payment for related party intangible transfers. Where taxpayers transfer intangibles with a high profit potential, the compensation for the intangibles should be greater than industry averages or norms.

Id. at 424–25 (footnote and citation omitted).[3]

Treasury's first response to the Tax Reform Act was the "White Paper," an intensive study published in 1988. *A Study of Intercompany Pricing Under Section 482 of the Code*, I.R.S. Notice 88-123, 1988-2 C.B. 458 ("White Paper"). The White Paper confirmed that Treasury believed the commensurate with income standard to be consistent with the arm's length standard (and that Treasury understood Congress to share that understanding). *Id.* at 475. Treasury wrote that a comparability analysis must be performed where possible, *id.* at 474, but it also suggested a "clear and convincing evidence" standard for comparable transactions, indicating that a comparability analysis would rarely be possible. *Id.* at 478.

The White Paper signaled a shift in the interpretation of the arm's length standard as it had been defined following the 1968 regulations. Treasury advanced a new allocation method, the "basic arm's length return method," White Paper at 488, that would apply only in the absence of comparable transactions and would essentially split profits between the related parties, *id.* at 490. Commentators understood that, by attempting to synthesize the arm's length standard and the commensurate with income provision, Treasury was moving away from a view that the arm's length standard always requires a comparability analysis. Marc M. Levey, Stanley C. Ruchelman, & William R. Seto, *Transfer Pricing of Intangibles After the Section 482 White Paper*, 71 J. TAX'N 38, 38 (1989); Josh O. Ungerman, Comment, *The White Paper: The Stealth Bomber of the Section 482 Arsenal*, 42 SW. L.J. 1107, 1128–29 (1989).

In 1994 and 1995, Treasury issued new regulations that defined the arm's length standard as result-oriented, meaning that the goal is parity in *taxable income* rather than parity in the method of allocation itself. 26 C.F.R. § 1.482-1(b)(1) (1994) ("A controlled transaction meets the arm's

3. The Conference Committee suggested only one change—to broaden the sweep of the amendment so as to encompass domestic related-party transactions—in order to better serve the objective of the amendment, "that the division of income between related parties reasonably reflect the relative economic activity undertaken by each." H.R. REP. NO. 99-841, at II-637 (1986) (Conf. Rep.), *as reprinted in* 1986 U.S.C.C.A.N. 4075, 4725. The Report also clarified that cost-sharing arrangements would not generally be subject to § 482 allocations—but only "if and to the extent . . . the income allocated among the parties reasonably reflect the actual economic activity undertaken by each." *Id.* at II-638.

length standard if the results of the transaction are consistent with the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances (arm's length result)."). However, the arm's length standard remained "the standard to be applied in every case." *Id.*

The regulations also set forth methods by which income could be allocated among related parties in a manner consistent with the arm's length standard. *Id.* § 1.482-1(b)(2)(i) (1994). According to Treasury, the 1994 regulations defined the arm's length standard in terms of "the results that would have been realized if uncontrolled taxpayers had engaged in the same transaction under the same circumstances." Compensatory Stock Options Under Section 482, 67 Fed. Reg. 48,997-01, 48,998 (proposed July 29, 2002).

The 1995 regulation provided that "[i]ntangible development costs" included "all of the costs incurred by [a controlled] participant related to the intangible development area." 26 C.F.R. § 1.482-7(d)(1) (1995). By contrast to the 1994 regulation, the 1995 regulation—consistent with the 1986 Conference Report —"implement[ed] the commensurate with income standard in the context of cost sharing arrangements" by "requir[ing] that controlled participants in a [QCSA] share all costs incurred that are related to the development of intangibles in proportion to their shares of the reasonably anticipated benefits attributable to that development." Compensatory Stock Options Under Section 482, 67 Fed. Reg. at 48,998.

Neither the Tax Reform Act nor the implementing regulations specifically addressed allocation of employee stock compensation, which is the issue in this dispute. However, that omission was unsurprising given that the practice did not develop on a major scale until the 1990s. Zvi Bodie, Robert S. Kaplan, & Robert C. Merton, *For the Last Time: Stock Options Are an Expense*, HARV. BUS. REV., Mar. 2003, at 62, 67. Beginning in 1997, the Secretary interpreted the "all . . . costs" language to include stock-based compensation, meaning that controlled taxpayers had to share the costs (and associated deductions) of providing employee stock compensation. *Xilinx, Inc. v. Comm'r*, 598 F.3d 1191, 1193–94 (9th Cir. 2010).

In 2003, Treasury issued the cost-sharing regulations that are challenged in this case. Treasury intended for the 2003 amendments to clarify, rather than to overhaul, the 1994 and 1995 regulations. The clarifications were twofold. First, the amendments directly classified employee stock compensation as a cost to be allocated between QCSA participants. Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. at 48,998; 26 C.F.R. § 1.482-7A(d)(2). Second, the "coordinating amendments" clarified Treasury's belief that the cost-sharing regulations, including § 1.482-7A(d)(2), operate to produce an arm's length result. Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. at 48,998; 26 C.F.R. § 1.482-7A(a)(3).

Specifically, § 1.482-7A provides that costs shared by related parties to a QCSA are not subject to IRS reallocation for tax purposes if each entity's share of the intangible property development costs equals each entity's reasonably anticipated benefits. Section 1.482-7A(a)(3) incorporates and coordinates with the arm's length standard:

> A qualified cost sharing arrangement produces results that are consistent with an arm's length result . . . if, and only if, each controlled participant's share of the costs (as determined under paragraph (d) of this section) of intangible development under the qualified cost sharing

> arrangement equals its share of reasonably anticipated benefits attributable to such development . . . .

Section 1.482-7A(d)(2) provides that parties to a QCSA must allocate stock-based compensation between themselves:

> [In a QCSA], a controlled participant's operating expenses include all costs attributable to compensation, including stock-based compensation. As used in this section, the term stock-based compensation means any compensation provided by a controlled participant to an employee or independent contractor in the form of equity instruments, options to acquire stock (stock options), or rights with respect to (or determined by reference to) equity instruments or stock options, including but not limited to property to which section 83 applies and stock options to which section 421 applies, regardless of whether ultimately settled in the form of cash, stock, or other property.

These regulations, and the procedure employed in adopting them, form the basis of the present controversy.

II

At issue is Altera Corporation ("Altera") & Subsidiaries' tax liability for the years 2004 through 2006. During the relevant period, Altera and its subsidiaries designed, manufactured, marketed, and sold programmable logic devices, which are electronic components that are used to build circuits.

In May of 1997, Altera entered into a cost-sharing agreement with one of its foreign subsidiaries, Altera International, Inc., a Cayman Islands corporation ("Altera International"), which had been incorporated earlier that year. Altera granted to Altera International a license to use and exploit Altera's preexisting intangible property everywhere in the world except the United States and Canada. In exchange, Altera International paid royalties to Altera. The parties agreed to pool their resources to share research and development ("R&D") costs in proportion to the benefits anticipated from new technologies. The question in this appeal is whether Treasury was permitted, for tax liability purposes, to re-allocate the cost of employee stock-based compensation.

Altera and the IRS agreed to an Advance Pricing Agreement covering the 1997–2003 tax years. Pursuant to this agreement, Altera shared with Altera International stock-based compensation costs as part of the shared R&D costs. After the Treasury regulations were amended in 2003, Altera and Altera International amended their cost-sharing agreement to comply with the modified regulations, continuing to share employee stock compensation costs.

The agreement was amended again in 2005 following the Tax Court's opinion in *Xilinx Inc. & Consolidated Subsidiaries v. Commissioner*, which involved a challenge to the 1994–1995 cost-sharing regulations. 125 T.C. 37 (2005). The parties agreed to "suspend the payment of any portion of [a] Cost Share . . . to the extent such payment relates to the Inclusion of Stock-Based Compensation in R&D Costs" unless and until a court upheld the validity of the 2003 cost-sharing regulations. The following provision explains Altera's reasoning:

> The Parties believe that it is more likely than not that (i) the Tax Court's conclusion in *Xilinx v. Commissioner*, 125 T.C. [No.] 4 (2005), that the arm's length standard controls the determination of costs to be shared by controlled participants in a qualified cost sharing arrangement should also apply to Treas. Reg. § 1.482-7(d)(2) (as amended by T.D. 9088), and (ii) the Parties' inclusion of Stock-Based Compensation in R&D Costs pursuant to Amendment I would

be contrary to the arm's length standard.

Altera and its U.S. subsidiaries did not account for R&D-related stock-based compensation costs on their consolidated 2004–2007 federal income tax returns. The IRS issued two notices of deficiency to the group, applying § 1.482-7(d)(2) to increase the group's income by the following amounts:

2004	$ 24,549,315
2005	$ 23,015,453
2006	$ 17,365,388
2007	$ 15,463,565

Altera timely filed petitions in the Tax Court. The parties filed cross-motions for summary judgment, and the Tax Court granted Altera's motion. Sitting en banc, the Tax Court held that § 1.482-7A(d)(2) is invalid under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. *Altera Corp. & Subsidiaries v. Comm'r*, 145 T.C. 91 (2015).

The Tax Court unanimously determined: (1) that the Commissioner's allocation of income and expenses between related entities must be consistent with the arm's length standard; and (2) that the arm's length standard is not met unless the Commissioner's allocation can be compared to an actual transaction between unrelated entities. The Tax Court reasoned that the Commissioner could not require related parties to share stock compensation costs, because the Commissioner had not considered any unrelated party transactions in which the parties shared such costs. The Tax Court held that the agency's decisionmaking process was fundamentally flawed because: (1) it rested on speculation rather than on hard data and expert opinions; and (2) it failed to respond to significant public comments, particularly those pointing out uncontrolled cost-sharing arrangements in which the entities did not share stock compensation costs. *Id.* at 133–34.

The Tax Court's decision rested largely on its own opinion in *Xilinx*, in which it determined that the arm's length standard mandates a comparability analysis. *Id.* at 118 (citing *Xilinx*, 125 T.C. at 53–55). In its decision in this case, as well, the Tax Court suggested that the Commissioner cannot require related entities to share stock compensation costs unless and until the Commissioner locates uncontrolled transactions in which these costs are shared. *Id.* at 118–19.

The Tax Court reached five holdings: (1) the 2003 amendments constitute a final legislative rule subject to the requirements of the APA; (2) *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), provides the appropriate standard of review because the standard set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), incorporates *State Farm*'s " reasoned decisionmaking" standard; (3) Treasury did not support adequately its decision to allocate the costs of employee stock compensation between related parties; (4) Treasury's procedural regulatory deficiencies were not harmless;[4] and (5) § 1.482-7A(d)(2) is invalid under the APA.

III

Our task in this appeal, then, is to determine whether Treasury's 2003 regulations

4. On appeal, the Commissioner does not claim that any error in the decisionmaking process, if it existed, was harmless. Thus, we decline to address the issue.

are lawful. In the context of the arguments made in this case, we evaluate the validity of the agency's regulations under both *Chevron* and *State Farm*, which "provide for related but distinct standards for reviewing rules promulgated by administrative agencies." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 521 (2d Cir. 2017). "*State Farm* is used to evaluate whether a rule is procedurally defective as a result of flaws in the agency's decisionmaking process." *Id.* "*Chevron*, by contrast, is generally used to evaluate whether the conclusion reached as a result of that process—an agency's interpretation of a statutory provision it administers—is reasonable." *Id.*[5] "A litigant challenging a rule may challenge it under *State Farm*, *Chevron*, or both." *Id.* Altera challenges both the procedural adequacy of the APA process and the substance of the regulation.[6]

A

We first turn to *Chevron* analysis.

1

[1, 2] Under *Chevron*, we first apply the traditional rules of statutory construction to determine whether "Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 104 S.Ct. 2778. We start with the plain statutory text and, "when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' " *King v. Burwell*, —— U.S. ——, 135 S. Ct. 2480, 2489, 192 L.Ed.2d 483 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000)).

[3, 4] In addition, we examine the legislative history, the statutory structure, and "other traditional aids of statutory interpretation" in order to ascertain congressional intent. *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). If, after conducting that *Chevron* step one examination, we conclude that the statute is silent or ambiguous on the issue, we then defer to the agency's interpretation so long as it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778.

[5, 6] Ultimately, questions of deference boil down to whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27,

5. There are circumstances when the two analyses may overlap. *See, e.g., Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 830 F.3d 552, 561 (D.C. Cir. 2016) (We are mindful that, "[i]n [some] situations, what is 'permissible' under *Chevron* is also reasonable under *State Farm*." (quoting *Arent v. Shalala*, 70 F.3d 610, 616 n.6 (D.C. Cir. 1995))).

6. We afforded the parties the opportunity to file optional supplemental briefs on the question whether the six-year statute of limitations under 28 U.S.C. § 2401(a)—which generally applies to procedural challenges to regulations under the APA—applies to this case. The Commissioner responded that it had waived this non-jurisdictional defense by failing to assert it to the Tax Court. We agree with the parties that the Commissioner waived the defense. *Day v. McDonough*, 547 U.S. 198, 210 n.11, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) ("[S]hould a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."); *Whidbee v. Pierce County*, 857 F.3d 1019, 1024 (9th Cir. 2017) ("[E]ven if a claim has expired under a state statute of limitations, a defendant can still waive this affirmative defense."). Therefore, we need not address it.

121 S.Ct. 2164, 150 L.Ed.2d 292 (2001). "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 227, 121 S.Ct. 2164 (quoting *Chevron*, 467 U.S. at 843–44, 104 S.Ct. 2778).

[7] Here, the resolution of our step one *Chevron* examination is straightforward. Section 482 does not speak directly to whether the Commissioner may require parties to a QCSA to share employee stock compensation costs in order to receive the tax benefits associated with entering into a QCSA. Thus, there is no question that the statute remains ambiguous regarding the method by which Treasury is to make allocations based on stock-based compensation.

Altera argues that the statute, by its terms, cannot apply to stock-based compensation. According to Altera, stock-based compensation is not "transferred" between parties because only preexisting intangibles can be transferred. Thus, for Altera, Treasury has exceeded the delegation of authority apparent from the plain text of the statute.

We are not persuaded. When parties enter into a QCSA, they are *transferring* future distribution rights to intangibles, albeit intangibles that have yet to be developed. Indeed, the present-day transfer of those rights provides the main incentive for entering into a QCSA. The right to distribute intangibles to be developed later is, itself, one right in the bundle of property rights that exists at the time that parties enter into a QCSA.

Moreover, even assuming that the crucial transfer does not occur contemporaneously, § 482 applies "[i]n the case of *any* transfer ... of intangible property" that produces income. (Emphasis added.) That phrasing is as broad as possible, and it cannot reasonably be read to exclude the transfers of expected intangible property. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) ("Read naturally, the word 'any' has an expansive meaning ...."); *see also Republic of Iraq v. Beaty*, 556 U.S. 848, 856, 129 S.Ct. 2183, 173 L.Ed.2d 1193 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning, giving us no warrant to limit the class of provisions of law [encompassed by the statutory provision]." (citation omitted)). Additionally, the sentence necessarily is forward-looking because the production of taxable income always follows the transfer.

In short, the text of the statute does not limit its application to preexisting intangibles in the way Altera's argument suggests. Because parties to a QCSA transfer cost-shared intangibles—including stock-based compensation—they are subject to regulation under 26 U.S.C. § 482.

2

[8] Thus, we must move on to *Chevron* step two to consider whether Treasury's interpretation of § 482 as to allocation of employee stock option costs is permissible. An agency's interpretation of statutory authority is examined "in light of the statute's text, structure and purpose." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007). The interpretation fails if it is "unmoored from the purposes and concerns" of the underlying statutory regime. *Judulang v. Holder*, 565 U.S. 42, 64, 132 S.Ct. 476, 181 L.Ed.2d 449 (2011). Thus, Congress's purpose in enacting and amending § 482 in 1986 is key to resolution of this issue.

[9, 10] The congressional purpose in enacting § 482 was to establish tax parity. *First Sec. Bank of Utah*, 405 U.S. at 400, 92 S.Ct. 1085. In the 1986 amendments, Congress called for an approach to allocation of costs and income that would "reasonably reflect the actual economic activity undertaken by each [party to a QCSA]," H.R. REP. NO. 99-841, at II-638 (1986) (Conf. Rep.). Put another way, Congress's objective in amending § 482 was to ensure that income follows economic activity. *Id.* at II-637. Although the 1986 amendment delegates to Treasury the choice of a specific methodology to achieve that end, it suggested: "In the case of any transfer (or license) of intangible property . . ., the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible." This standard is a purely internal one, that is, internal to the entity being taxed, and evidence supports Treasury's belief that Congress intended it to be. H.R. REP. NO. 99-426, at 423–35; H.R. REP. NO. 99-841, at II-637 (Conf. Rep.). In the QCSA context, Congress did not want to interfere with controlled cost-sharing arrangements, but only to the degree that the allocation of costs and income "reasonably reflect[s] the actual economic activity undertaken by each." H.R. REP. NO. 99-841, at II-638 (Conf. Rep.). In light of this history, Treasury's decision to adopt a methodology that followed actual economic activity was reasonable.

So was Treasury's determination that uncontrolled cost-sharing arrangements do not provide helpful guidance regarding allocations of employee stock compensation. When it amended § 482 in 1986, Congress bemoaned the difficulties associated with finding and using data involving high-profit intangibles. *See* H.R. REP. NO. 99-426, at 425 ("There are extreme difficulties in determining whether the arm's length transfers between unrelated parties are comparable. . . . [I]t is appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation be commensurate with the income attributable to the intangible."); *see also* Compensatory Stock Options Under Section 482, 68 Fed. Reg. 51,171-02, 51,173 (Aug. 26, 2003) (citing H.R. REP. NO. 99-426, at 423–25) ("As recognized in the legislative history of the Tax Reform Act of 1986, there is little, if any, public data regarding transactions involving high-profit intangibles.").[7] It follows that Congress granted Treasury authority to develop methods that did not rely on analysis of these problematic comparable transactions. Indeed, Treasury echoed Congress's rationale for amending § 482 in the first place when it published the final rule. *Id.* at 51,173 ("The uncon-

7. Although the 2017 amendment to § 482 has no bearing on our analysis, we note that Congress has not changed its mind:

> The transfer pricing rules of section 482 and the accompanying Treasury regulations are intended to preserve the U.S. tax base by ensuring that taxpayers do not shift income properly attributable to the United States to a related foreign company through pricing that does not reflect an arm's-length result. . . . The arm's-length standard is difficult to administer in situations in which no unrelated party market prices exist for transactions between related parties. . . .
>
> . . . For income from intangible property, section 482 provides ''in the case of any transfer (or license) of intangible property (within the meaning of section 936(h)(3)(B)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.'' By requiring inclusion in income of amounts commensurate with the income attributable to the intangible, Congress was responding to concerns regarding the effectiveness of the arm's-length standard with respect to intangible property—including, in particular, high-profit-potential intangibles.
>
> H. REP. NO.115-466, at 574–75 (2017).

trolled transactions cited by commentators do not share enough characteristics of QCSAs involving the development of high-profit intangibles to establish that parties at arm's length would not take stock options into account in the context of an arrangement similar to a QCSA.").

What is more, although Altera suggests there can be only one understanding of the methodology required by the arm's length standard, historically the definition of the arm's length standard has been a more fluid one. Indeed, as we have discussed, for most of the twentieth century the arm's length standard explicitly permitted the use of flexible methodology in order to achieve an arm's length *result*. *See also* H.R. REP. NO. 87-2508, at 18–19 (1962) (Conf. Rep.) (noting that, in 1962, Congress stated that Treasury should "provide additional guidelines and formulas" to achieve arm's length results). It is true that, more recently, an understanding that the primary means of reaching an arm's length result suggested the analysis of comparable transactions. But, in the lead-up to the 1986 amendments, Congress voiced numerous concerns regarding reliance on this methodology. Further, as we have discussed, courts for more than half a century have held that a comparable transaction analysis was not the exclusive methodology to be employed under the statute. In light of the historic versatility of methodology, it is reasonable that Treasury would understand that Congress intended for it to depart from analysis of comparable transactions as the exclusive means of achieving an arm's length result.

In addition, Treasury reasonably concluded that doing away with analysis of comparable transactions was an efficient means of ensuring that § 482 would "operat[e] to assure adequate allocations to the U.S. taxable entity of income attributable to intangibles in [QCSAs]." H.R. REP. NO. 99-426, at 423. Congress expressed numerous concerns that pre-1986 allocation methods permitted entities to undervalue their tax liability by placing undue emphasis on "the concept of comparables" and basing allocations on industry norms, rather than on actual economic activity. *Id.* at 424–25. Doing away with analysis of comparable transactions, and instead requiring an internal method of allocation, proves a reasonable method of alleviating these concerns.

In sum, Treasury reasonably understood § 482 as an authorization to require internal allocation methods in the QCSA context, provided that the costs and income allocated are proportionate to the economic activity of the related parties. These internal allocation methods are reasonable methods for reaching the arm's length results required by statute. While interpreting the statute to do away with reliance on comparables may not have been "the only possible interpretation" of Congress's intent, it proves a reasonable one. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009). Thus, Treasury's interpretation is not "arbitrary, capricious, or manifestly contrary to the statute," and it is therefore permissible under *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

3

Altera contends that the Commissioner misreads § 482 and its history, arguing that the addition of the commensurate with income standard to § 482 did nothing to change the meaning and operation of the arm's length standard, thus rendering Treasury's interpretation unreasonable. Altera supports its argument with a canon of construction: "Amendments by implication, like repeals by implication, are not favored." *United States v. Welden*, 377 U.S. 95, 103 n.12, 84 S.Ct. 1082, 12 L.Ed.2d 152 (1964). That canon does not apply

here. It operates to prevent courts from attributing unspoken motives to legislators, not to force courts to ignore legislative action and express legislative history. In addition, cases invoking the maxim typically refer to a later-enacted, *separate* statute or provision amending a previous statute or provision; most cases do not involve changes to the same statute or provision.[8] It is illogical to argue that amending a singular statute does not alter its meaning.

Altera's interpretation of the 1986 amendment would render the commensurate with income clause meaningless except in two circumstances: (1) to allow the Commissioner periodically to adjust prices initially assigned following a comparability analysis; and (2) to reflect a party's contribution of existing intangible property or "buy-in" to a cost-sharing arrangement. This narrow reading of § 482 is not supported by the text or history of the 1986 amendment.

The Commissioner's allocation of employee stock compensation costs between related parties is necessary for Treasury to fulfill its obligation under § 482. Congress did not intend to interfere with qualified cost-sharing arrangements when those arrangements provided for the allocation of income consistent with the commensurate with income provision. H.R. REP. NO. 99-841, at II-638 (Conf. Rep.).

4

Altera makes much of the United States's treaty obligations with other countries, asserting that a purely internal standard is inconsistent with the standards agreed to therein and is therefore unreasonable. However, there is no evidence that our treaty obligations bind us to the analysis of comparable transactions. As demonstrated by nearly a century of interpreting § 482 and its precursor, the arm's length standard is not necessarily confined to one methodology. It reflects neither how related parties behave nor how they are taxed. Moreover, our most recent treaties incorporate not only the arm's length standard, but also the 2003 regulations. *See, e.g.*, U.S. DEP'T OF TREASURY, TECHNICAL EXPLANATION OF THE CONVENTION BETWEEN THE UNITED STATES AND POLAND FOR THE AVOIDANCE OF DOUBLE TAXATION 31 (2013) ("It is understood that the Code section 482 'commensurate with income' standard for determining appropriate transfer prices for intangibles operates consistently with the arm's-length standard. The implementation of this standard in the regulations under Code section 482 is in accordance with the general principles of paragraph 1 of Article 9 of the Convention . . . .").

B

Though Treasury's interpretation of its statutory grant of authority was reasonable, we also must examine whether the procedures used in its promulgation prove defective under the APA. *Catskill Mountains*, 846 F.3d at 522 ("[I]f an interpretive rule was promulgated in a procedurally defective manner, it will be set aside regardless of whether its interpretation of the statute is reasonable."). After reviewing the administrative record, we conclude that Treasury complied with the procedur-

8. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650–52, 664 n.8, 127 S.Ct. 2518, 168 L.Ed.2d 467 (2007) (considering whether a later-enacted provision of the Endangered Species Act could amend a provision of the Clean Water Act); *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (considering whether the Rail Act amended a remedy provided by the Tucker Act); *United States v. Dahl*, 314 F.3d 976, 977–78 (9th Cir. 2002) (considering whether a provision codified as a separate note to an existing statute amended the statute).

al requirements of the APA and, therefore, the regulations survive *State Farm* scrutiny.

Section 706 of the APA directs courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (flush language). Agencies may not act in ways that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

[11, 12] The APA "sets forth the full extent of judicial authority to review executive agency action for procedural correctness." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). It "prescribes a three-step procedure for so-called 'notice-and-comment rulemaking.' " *Perez v. Mortg. Bankers Ass'n*, —— U.S. ——, 135 S. Ct. 1199, 1203, 191 L.Ed.2d 186 (2015) (citing 5 U.S.C. § 553). First, a "[g]eneral notice of proposed rule making" must ordinarily be published in the Federal Register. 5 U.S.C. § 553(b). Second, provided that "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). "An agency must consider and respond to significant comments received during the period for public comment." *Perez*, 135 S. Ct. at 1203. Third, the agency must incorporate in the final rule "a concise general statement of [its] basis and purpose." 5 U.S.C. § 553(c).

Altera does not dispute that Treasury satisfied the first step by giving notice of the 2003 regulations. *Id.* Nor does there appear to be a controversy as to whether Treasury included in the final rule "a concise general statement of [its] basis and purpose." *Id.*; 5 U.S.C. § 553. Rather, Altera argues that the regulations fail on the second step, asserting that: (1) Treasury improperly rejected comments submitted in opposition to the proposed rule, (2) Treasury's current litigation position is inconsistent with statements made during the rulemaking process, (3) Treasury did not adequately support its position that employee stock compensation is a cost, and (4) a more searching review is required under *Fox*, because the agency altered its position. We address each in turn.

1

[13–15] Under *State Farm*, the touchstone of "arbitrary and capricious" review under the APA is "reasoned decisionmaking." *State Farm*, 463 U.S. at 52, 103 S.Ct. 2856. "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Id.* at 43, 103 S.Ct. 2856 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). "[A]gency action is lawful only if it rests 'on a consideration of the relevant factors.' " *Michigan v. EPA*, —— U.S. ——, 135 S. Ct. 2699, 2706, 192 L.Ed.2d 674 (2015) (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856). However, we may not set aside agency action simply because the rulemaking process could have been improved; rather, we must determine whether the agency's "path may reasonably be discerned." *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856 (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974)).

[16, 17] In considering and responding to comments, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Id.* (quoting *Burlington Truck Lines*, 371 U.S. at 168,

83 S.Ct. 239). "[A]n agency need only respond to 'significant' comments, *i.e.*, those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." *Am. Mining Congress v. EPA*, 965 F.2d 759, 771 (9th Cir. 1992) (quoting *Home Box Office v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977) (per curiam)). If the comments ignored by the agency would not bear on the agency's "consideration of the relevant factors," we may not reverse the agency's decision. *Id.*

Treasury published its notice of proposed rulemaking in 2002. Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. 48,997-01. In its notice, Treasury made clear that it was relying on the commensurate with income provision. *Id.* at 48,998. To support its position, Treasury drew from the legislative history of the 1986 amendment, explaining that Congress intended a party to a QCSA to "bear its portion of all research and development costs." *Id.* (quoting H.R. REP. NO. 99-841, at II-638 (Conf. Rep.)). It also informed interested parties of its intent to coordinate the new regulations with the arm's length standard, suggesting that it was attempting to synthesize the potentially disparate standards found within § 482 itself. *Id.* at 48,998, 49,000–01.

Commenters responded by attacking the proposed regulations as inconsistent with the traditional arm's length standard because the methodology did not involve analysis of comparable transactions. To support their position, they primarily discussed arm's length agreements in which unrelated parties did not mention employee stock options. They explained that unrelated parties do not share stock compensation costs because it is difficult to value stock-based compensation, and there can be a great deal of expense and risk involved.

In the preamble to the final rule, Treasury dismissed the comments (and, relatedly, the behavior of controlled taxpayers):

> Treasury and the IRS continue to believe that requiring stock-based compensation to be taken into account for purposes of QCSAs is consistent with the legislative intent underlying section 482 and with the arm's length standard (and therefore with the obligations of the United States under its income tax treaties . . .). The legislative history of the Tax Reform Act of 1986 expressed Congress's intent to respect cost sharing arrangements as consistent with the commensurate with income standard, and therefore consistent with the arm's length standard, if and to the extent that the participants' shares of income "reasonably reflect the actual economic activity undertaken by each." *See* H.R. CONF. REP. NO. 99-481, at II-638 (1986). . . . [I]n order for a QCSA to reach an arm's length result consistent with legislative intent, the QCSA must reflect all relevant costs, including such critical elements of cost as the cost of compensating employees for providing services related to the development of the intangibles pursuant to the QCSA. Treasury and the IRS do not believe that there is any basis for distinguishing between stock-based compensation and other forms of compensation in this context.
>
> Treasury and the IRS do not agree with the comments that assert that taking stock-based compensation into account in the QCSA context would be inconsistent with the arm's length standard in the absence of evidence that parties at arm's length take stock-based compensation into account in similar circumstances. . . . The uncontrolled transactions cited by commentators do not share enough characteristics of QCSAs involving the development of high-profit

> intangibles to establish that parties at arm's length would not take stock options into account in the context of an arrangement similar to a QCSA.

Compensatory Stock Options under Section 482 (Preamble to Final Rule), 68 Fed. Reg. 51,171-02, 51,172–73 (Aug. 26, 2003).

> Treasury added:
>
> Treasury and the IRS believe that if a significant element of [the costs shared by unrelated parties] consists of stock-based compensation, the party committing employees to the arrangement generally would not agree to do so on terms that ignore the stock-based compensation.

Id. at 51,173.

[18] By submitting the cited transactions between unrelated parties, the commentators apparently assumed that Treasury would employ analysis of comparable transactions. This assumption, however, overlooks Treasury's decision to do away with analysis of comparable transactions in the first place—a decision that was made clear enough by citations to legislative history in the notice of proposed rulemaking and in the preamble to the final rule. As discussed in our *Chevron* analysis, Treasury's conclusion that it could require parties to a QCSA to share all costs was a reasonable one. Thus, "significant" comments that required a response would have spoken to why this interpretation was not, in fact, reasonable, so that adopting the comments would require Treasury to change the regulation. *Am. Mining Congress*, 965 F.2d at 771. As an example, Treasury would have been required to respond to comments demonstrating that doing away with analysis of comparables did not, in fact, serve the purposes of parity set out in the statute.

Indeed, the cited transactions actually reinforced the original justification for adopting a purely internal methodology—the lack of transactions comparable to those occurring between parties to a QCSA. Specifically, as Treasury remarked, the submitted transactions did not "share enough characteristics of QCSAs involving the development of high-profit intangibles" to provide grounds for accurate comparison. Because of this lack of similar transactions, Treasury justifiably chose to employ methodology that did not depend on non-existent comparables to satisfy the commensurate with income test and achieve tax parity. In this way, the comments reinforced Treasury's premise for adopting the purely internal methodology, but were irrelevant to the underlying choice of methodology. Treasury did not err in refusing to examine them more rigorously.

In sum, we cannot find a failure in Treasury's refusal to consider comments that proved irrelevant to its decisionmaking process. Here, Treasury gave sufficient notice of what it intended to do and why, and the submitted comments were irrelevant to the issues Treasury was considering. Because the comments had no bearing on "relevant factors" to the rulemaking, nor any bearing on the final rule, there was no APA violation. *Am. Mining Congress*, 965 F.2d at 771.

2

[19] Treasury's current litigation position is not inconsistent with the statements it made to support the 2003 regulations at the time of the rulemaking. Altera argues that its position is justified by *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947). "[A] reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency." *Id.* at 196, 67 S.Ct. 1760. "If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.*

[20] Altera argues that the Commissioner cannot now claim that "Treasury reasonably determined that it was statutorily authorized to dispense with comparability analysis" because "[n]owhere in the regulatory history did the Secretary suggest that he 'was statutorily authorized to dispense with comparability analysis.' " But these arguments misunderstand the rulemaking requirements imposed by *Chenery*. *Chenery* does not require us to adopt Altera's position as to how the arm's length standard operates. Instead, we must "defer to an interpretation which was a necessary presupposition of [the agency's] decision," if reasonable, even when alternative interpretations are available. *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 419–20, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992).

[21] Treasury reasonably interpreted congressional intent in the 1986 amendments as permitting it to dispense with a comparable transaction analysis in the absence of actual comparable transactions. Its interpretation was all the more reasonable given, as we have discussed, that the arm's length standard has historically been understood as more fluid than Altera suggests. Because *Chenery* does not require agencies to provide "exhaustive, contemporaneous legal arguments to preemptively defend its action," its references to the 1986 amendments provide an adequate ground for its determination. *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 515 (4th Cir. 2011).

Altera contends further that the Commissioner's position is incompatible with Treasury's statements during the rulemaking process, when the Secretary claimed that the cost-sharing regulations were consistent with the arm's length standard (as well as the commensurate with income standard). This argument misinterprets Treasury's position. Treasury asserted then, and still asserts in this litigation, that using an internal method of reallocation is consistent with the arm's length standard because it attempts to bring parity to the tax treatment of controlled and uncontrolled taxpayers, as does comparison of comparable transactions when they exist. Treasury's position was also consistent with its White Paper,[9] and Treasury's interpretation in the 1994 regulation of the arm's length standard as result-oriented, rather than method-oriented, with the goal of achieving tax parity. 26 C.F.R. § 1.482-1(b)(1) (1994).

Altera's argument is founded on its belief that an arm's length analysis always must be method-oriented, and rooted in actual transactional analysis. But the question before us is not which view is superior; it is whether Treasury's position in 2003 was incompatible with its prior position in promulgating the 1994 and 1995 regulations. As we have discussed, it was clear in 1994 and 1995 that, in implementing the commensurate with income amendment, Treasury was moving away from a purely method-based, comparable-transaction view of the arm's length standard in attempting to achieve tax parity. Treasury's citation to the amendment, and its legislative history, demonstrates that its position was not inconsistent, and there is no basis under *Chenery* to invalidate it.

3

[22] Altera also argues that Treasury did not adequately support its position that

9. Altera argues that a passage in the White Paper, in which Treasury wrote that "intangible income must be allocated on the basis of comparable transactions if comparables exist," demonstrates inconsistency. However, that statement is entirely consistent with Treasury's view that a different methodology must be applied when comparable transactions do *not* exist.

employee stock compensation is a cost, asserting that Treasury wrongfully ignored evidence that companies do not factor stock-based compensation into their pricing decisions. As an accounting matter in the past, this issue may have been disputed. Indeed, at one point, "[t]he debate on accounting for stock-based compensation ... became so divisive that it threatened the [Financial Accounting Standards] Board's future working relationship with some of its constituents." FINANCIAL ACCOUNTING STANDARDS BOARD, FINANCIAL ACCOUNTING FOUNDATION, ACCOUNTING FOR STOCK-BASED COMPENSATION: STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 123, at 25 (1995). However, as we will discuss, it is uncontroversial today. Since 1995, the Financial Accounting Standards Board has supported treating stock options as costs. *Id.*

Treasury's rulemaking process was sufficient. Treasury articulated why treating stock-based compensation as a cost led to arm's length results. It first noted that stock-based compensation is a "critical element" of R&D costs for parties to a QCSA and noted that such compensation is "clearly related to the intangible development area." Compensatory Stock Options Under Section 482 (Preamble to Final Rule), 68 Fed. Reg. at 51,173. Logic supports these conclusions. Parties dealing at arm's length, as Treasury explained, would not "ignore" stock-based compensation if such compensation were a "significant element" of the compensation costs one party incurs and another party agrees to reimburse when developing high-profit intangibles. *Id.* Rather, "through bargaining," each party would ensure that the cost-sharing agreement is in its best interest, meaning that the parties will consider the internal costs of stock compensation without requiring the other party to recognize those costs. *Id.*

Though commentators presented evidence of some transactions in which stock-based compensation was not a cost, this evidence provided little guidance because it did not concern parties to a QCSA developing high-profit intangibles. This out-of-context data did not require a different decision. In the absence of applicable evidence, Treasury's analysis provides a logical explanation of how treating stock-based compensation as a cost leads to arm's length results.

In addition, as we have noted, generally accepted accounting principles supported Treasury's conclusion, and Treasury cited generally to "tax and other accounting principles" for its determination that there is a "cost associated with stock-based compensation." Compensatory Stock Options Under Section 482 (Proposed), 67 Fed. Reg. at 48,999. One such principle is that a distinction exists between the economic costs of stock compensation—which are debatable—versus the accounting costs—which are not. Because entities account for the cost of providing employee stock options, it is reasonable for Treasury to allocate that cost. In light of these fundamental understandings, Treasury's reference to "tax and other accounting principles" provides a solid foundation for the Commissioner's interpretation.[10]

Most notably, the Tax Code classifies stock-based compensation as a trade or business "expense." 26 U.S.C. § 162(a). And the challenged regulation cites the provision providing that this expense is a

10. *See, e.g.,* Andrew Barry, *How Much Do Silicon Valley Firms Really Earn?,* BARRON'S(June 27, 2015), (http://www.barrons.com/articles/how-much-do-silicon-valley-firms-really-earn-1435372718) (noting that numerous companies, including Google and Qualcomm, reported stock compensation "total[ling] five percent or more of revenue in recent years").

deductible expense. 26 C.F.R. § 1.482-7A(d)(2)(iii)(A) ("[T]he operating expense attributable to stock-based compensation is equal to the amount allowable . . . as a deduction for Federal income tax purposes . . . (for example, under [26 U.S.C. § 83(h)])."). The reference to the Tax Code's classifications in the regulation itself serves as yet another articulation of Treasury's reasoning, the reasonableness of which is made clear by the Tax Code's treatment of stock-based compensation as a cost.

Though it could have been more specific, Treasury "articulated a rational connection" between its decision and these industry standards. *County of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012, 1027 (9th Cir. 2017) (internal quotation marks omitted), *cert. denied*, —— U.S. ——, 139 S. Ct. 64, 202 L.Ed.2d 21 (2018). Presuming that Treasury was authorized to dispense with a comparability analysis, making the economic behavior of uncontrolled taxpayers irrelevant, Altera does not offer any compelling argument against the reasonableness of Treasury's determination.

4

Finally, in addition to its general *State Farm* argument, Altera asks for a more searching review under *Fox*. Altera claims that the cost-sharing amendments present a major shift in administrative policy such that Treasury could not issue the regulations without carefully considering and broadcasting its decision. Altera argues that "[t]he assertion that the commensurate with income clause supplants the arm's-length standard with a 'purely internal' analysis is a sharp—but unacknowledged—reversal from Treasury's longstanding prior policy."

[23–25] "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S. Ct. 2117, 2125, 195 L.Ed.2d 382 (2016). Indeed, "[w]hen an agency changes its existing position, it 'need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.' " *Id.* at 2125–26 (quoting *Fox*, 556 U.S. at 515, 129 S.Ct. 1800). However, an agency may not "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox*, 556 U.S. at 515, 129 S.Ct. 1800.

> [A] policy change complies with the APA if the agency
>
> (1) displays "awareness that it is changing position,"
>
> (2) shows that "the new policy is permissible under the statute,"
>
> (3) "believes" the new policy is better, and
>
> (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."

Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (format altered) (quoting *Fox*, 556 U.S. at 515–16, 129 S.Ct. 1800).

[26] At its core, this argument is not meaningfully different from Altera's general APA argument. If the arm's length standard allows the Commissioner to allocate costs between related parties without a comparability analysis, there is no policy change, merely a clarification of the same policy. Further, as we have discussed, the policy change was occasioned by the congressional addition of the "commensurate with income" sentence in the Tax Reform Act of 1984 and the 1994 and 1995 implementing regulations. Those changes occurred well before 2003. The 2003 regula-

tions clarified, rather than altered, prior policy. And the enactment of a statutory amendment obviously makes a concomitant regulatory amendment appropriate.

5

Thus, the 2003 regulations are not arbitrary and capricious under the standard of review imposed by the APA. Treasury's regulatory path may be reasonably discerned. Treasury understood § 482 to authorize it to employ a purely internal, commensurate with income approach in dealing with related companies. It provided adequate notice of its intent and adequately considered the objections. Its conclusion that stock based compensation should be treated as a cost was adequately supported in the record, and its position did not represent a policy change under *Fox*.

C

Altera also argues that the outcome of this case is controlled by our court's decision in *Xilinx*. We disagree. Although the *Xilinx* panel could have reached a holding that would foreclose the Commissioner's current position, it did not.

In *Xilinx*, we considered the 1994 and 1995 cost-sharing regulations. The case involved a matter of regulatory interpretation, not executive authority. Xilinx, Inc., another maker of programmable logic devices, challenged the Commissioner's allocation of employee stock options between Xilinx and its Irish subsidiary. 598 F.3d at 1192. As framed by the panel, the issue was whether § 1.482-1 (1994)—which sets forth the arm's length standard—could be reconciled with § 1.482-7(d)(1) (1995)—under which parties to a QCSA were required to share "all . . . costs" incurred in developing intangibles. *Id.* at 1195.

Xilinx does not govern here. First, the parties in *Xilinx* were not debating administrative authority, and we did not consider the "commensurate with income" standard, which Congress itself did not see as inconsistent with the arm's length standard. Second, and more significantly, the *Xilinx* panel was faced with a conflict between two rules. If the rules were conceptually distinguishable, they were also in direct conflict. The arm's length rule, § 1.482-1(b)(1) (1994), listed specific methods for calculating an arm's length result. The all-costs provision was not one of those methods, as the first *Xilinx* majority noted. 567 F.3d at 491. Treasury issued the coordinating amendment in 2003, *after* the tax years at issue in *Xilinx*, and the arm's length regulation now expressly references the cost-sharing provision that Altera challenges. The *Xilinx* panel did not address the "open question" of whether the 2003 regulations remedied the error identified in that decision. 598 F.3d at 1198 n.4 (Fisher, J., concurring). Today, there is no conflict in the regulations, and Altera does not challenge the regulations on the ground that a conflict exists.

Xilinx did not involve the question of statutory interpretation, the Commissioner's authority, or the regulation at issue in this appeal: 26 C.F.R. § 1.482-7A(d)(2). Accordingly, it does not assist Altera.

IV

[27] The 1986 amendment focused specifically on intangibles, and it gave Treasury the ability to respond to rapid changes in the high tech industry. "The broad language of [§ 482] reflects an intentional effort to confer the flexibility necessary to forestall . . . obsolescence." *Massachusetts v. EPA*, 549 U.S. 497, 532, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). In the modern economy, employee stock options are integral to R&D arrangements. In fact, in Altera's 2015 annual report, its stock-based compensation cost equaled nearly five percent of total revenue. ALT-

ERA CORP., ANNUAL REPORT FOR THE FISCAL YEAR ENDED DEC. 31, 2014 (FORM 10-K). Simply speaking, the rise in employee stock compensation is an economic development that Treasury cannot ignore without rejecting its obligations under § 482.

In sum, we disagree with the Tax Court that the 2003 regulations are arbitrary and capricious under the standard of review imposed by the APA. While the rulemaking process was less than ideal, the APA does not require perfection. We are able to reasonably discern Treasury's path—Treasury understood § 482 to authorize it to employ a purely internal, commensurate with income approach where comparable transactions are not comparable.

In light of the statute's plain text and the legislative history, Treasury also reasonably concluded that Congress intended to hone the definition of the arm's length standard so that it could work to achieve an arm's length *result*, instead of forcing application of a particular comparability *method*. Given the long history of the application of other methods, and the text and legislative history of the Tax Reform Act of 1984, Treasury's understanding of its power to use methodologies other than a pure transactional comparability analysis was reasonable, and we defer to its interpretation under *Chevron*. The Commissioner did not exceed the authority delegated to him by Congress in issuing the regulations.

REVERSED.

O'MALLEY, Circuit Judge, dissenting:

"[T]he foundational principle of administrative law [is] that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, —— U.S. ——, 135 S. Ct. 2699, 2710, 192 L.Ed.2d 674 (2015) (citing *SEC v. Chenery Corp.* ("*Chenery I*"), 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943)). Prior to promulgating Treas. Reg. § 1.482-7A(d)(2), whose validity we consider here, Treasury repeatedly recognized that 26 U.S.C. § 482 requires application of an arm's length standard when determining the true taxable income of a controlled taxpayer—i.e., it requires Treasury to assess what a taxpayer dealing with an uncontrolled taxpayer would do in the same circumstances. And, Treasury just as consistently asserted that a comparability analysis is the only way to determine the arm's length standard; indeed, Treasury made clear that a comparability analysis is the cornerstone of the arm's length standard. Despite these consistent practices and declarations, in its preamble to § 1.482-7A(d)(2), Treasury stated, for the first time and with no explanation, that it may, *instead*, employ the "commensurate with income" standard to reach the required arm's length result.

Today, the majority justifies Treasury's about-face in three steps: (1) it finds that, by citing to the legislative history surrounding the enactment of the Tax Reform Act of 1986 in the preamble to § 1.482-7A(d)(2), Treasury implicitly communicated its understanding that Congress "permitt[ed] it to dispense with a comparable transaction analysis," Op. 1083; (2) it finds that, by including that same cryptic citation to legislative history in its proposed notice of rulemaking, Treasury made it "clear enough" to interested parties that Treasury was changing its longstanding practice of applying a comparability analysis, Op. 1081–82; and (3) it justifies Treasury's resort to the commensurate with income standard by invoking the second sentence of § 482 to conclude that Treasury may jettison the arm's length standard altogether—a justification Treasury never provided and one which does not withstand careful scrutiny.

The majority, thus, "suppl[ies] a reasoned basis for the agency's action that the

agency itself has not given," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citing *SEC v. Chenery Corp.* ("*Chenery II*"), 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947)), encourages "executive agencies' penchant for changing their views about the law's meaning almost as often as they change administrations," *BNSF Ry. Co. v. Loos*, 586 U.S. ——, 139 S.Ct. 893, 908, 203 L.Ed.2d 160 (2019) (Gorsuch, J., dissenting), and endorses a practice of requiring interested parties to engage in a scavenger hunt to understand an agency's rulemaking proposals. That practice is inconsistent with another fundamental Administrative Procedure Act ("APA") principle: that a notice of proposed rulemaking "should be sufficiently descriptive of the 'subjects and issues involved' so that interested parties may offer informed criticism and comments." *Am. Mining Cong. v. U.S. EPA*, 965 F.2d 759, 770 (9th Cir. 1992) (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir. 1976) (en banc)). In so doing, the majority stretches "highly deferential" review, *Providence Yakima Med. Ctr. v. Sebelius*, 611 F.3d 1181, 1190 (9th Cir. 2010) (quoting *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043, 1051 (9th Cir. 2007)), beyond its breaking point.

I would instead find, as the Tax Court did, that Treasury's explanation of its rule (to the extent any was provided) failed to satisfy the *State Farm* standard, that Treasury did not provide adequate notice of its intent to change its longstanding practice of employing the arm's length standard and using a comparability analysis to get there, and that its new rule is invalid as arbitrary and capricious. I would also hold that this court's previous decision in *Xilinx, Inc. v. Commissioner of Internal Revenue* ("*Xilinx II*"), 598 F.3d 1191 (9th Cir. 2010), controls and mandates an order affirming the Tax Court's decision. I therefore would affirm the judgment of the Tax Court that expenses related to stock-based compensation are not among the costs to be shared in qualified cost sharing arrangements ("QCSAs") under Treas. Reg. § 1.482-7(d)(1) (as amended in 2013). *See Altera Corp. v. Comm'r*, 145 T.C. 91, 92 (2015). For these reasons, I respectfully dissent.

I. BACKGROUND

A. The Arm's Length Standard

1. Before 1986

"The purpose of section 482 is to place a controlled taxpayer on a tax parity with an uncontrolled taxpayer, by determining according to the standard of an uncontrolled taxpayer, the true taxable income from the property and business of a controlled taxpayer." *Comm'r v. First Sec. Bank of Utah*, 405 U.S. 394, 400, 92 S.Ct. 1085, 31 L.Ed.2d 318 (1972) (quoting Treas. Reg. § 1.482-1(b)(1) (1971)). The "touchstone" of this tax parity inquiry is the arm's length standard. *Xilinx II*, 598 F.3d at 1198 n.1 (Fisher, J., concurring). Indeed, the first sentence of § 482 states that, "[i]n any case of two or more organizations, trades, or businesses ... owned or controlled directly or indirectly by the same interests, the Secretary may ... allocate gross income ... if he determines that such ... allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses." This sentence has always been viewed as requiring an arm's length standard. *See First Sec. Bank of Utah*, 405 U.S. at 400, 92 S.Ct. 1085; *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 305, 114 S.Ct. 2268, 129 L.Ed.2d 244 (1994).

Since the 1930s, Treasury regulations consistently have explained that, "[i]n determining the true taxable income of a controlled taxpayer, the standard to be

applied *in every case* is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer." Treas. Reg. § 1.482-1(b)(1) (2003) (emphasis added). That is, income and deductions are to be allocated among related companies in the same way that unrelated companies negotiating at arm's length would allocate income and deductions. As far back as 1968, Treasury's regulations also required that, "[i]n order for the sharing of costs and risks to be considered on an arm's length basis, the terms and conditions *must be comparable* to those which would have been adopted by unrelated parties similarly situated had they entered into such an arrangement." Allocation of Income and Deductions Among Taxpayers, 33 Fed. Reg. 5848, 5854 (April 16, 1968) (emphasis added). That same regulation provided that Treasury may not allocate income with respect to QCSAs involving the development of intangible property unless doing so would be consistent with the arm's length standard. *Id.* (providing that, in "a bona fide cost sharing arrangement with respect to the development of intangible property, the district director shall not make allocations with respect to such acquisition except as may be appropriate to reflect each participant's arm's length share of the costs and risks of developing the property."). Therefore, at the time Congress enacted the 1986 amendment, Treasury's own regulations explicitly required a determination of what an arm's length result would show *and* required a comparability analysis to reach that result where comparable transactions exist.

The majority attempts to water down the text of Treasury's own regulations at the time. It contends that, "[a]lthough the Secretary adopted the arm's length standard, courts did not hold related parties to the standard by exclusively requiring the examination of comparable transactions." Op. 1068. To support its position, the majority cites this court's decision in *Frank v. Int'l Canadian Corp.*, 308 F.2d 520, 528–29 (9th Cir. 1962), which disagreed that " 'arm's length bargaining' is the sole criterion for applying the statutory language of [§ 482] in determining what the 'true net income' is of each 'controlled taxpayer.' " But, in *Oil Base, Inc. v. Commissioner of Internal Revenue*, 362 F.2d 212, 214 n.5 (9th Cir. 1966), this court clarified that the holding in *Frank* was an outlier, limited only to the peculiar facts of that case. *Frank*'s departure from the arm's length analysis, the court held, was justified, in part, because "there was no evidence that arm's-length bargaining upon the specific commodities sold had produced a higher return" and because "the complexity of the circumstances surrounding the services rendered by the subsidiary" made it "difficult for the court to hypothesize an arm's-length transaction." *Id.* Significantly, the parties in *Frank* had stipulated to applying a standard other than the arm's length standard. *Id.*

There really can be no doubt that, prior to the 1986 amendment, this Circuit believed that an arm's length standard based on comparable transactions was the sole basis for allocating costs and income under the statute in all but the narrow circumstances outlined in *Frank*—including the presence of the stipulation therein. The majority's attempt to breathe life back into *Frank* is, simply, unpersuasive.

2. The 1986 Amendment

The 1986 amendment passed against the backdrop of Treasury's own longstanding practices did not change the obligation to employ an arm's length standard. Indeed, Congress left the first sentence of § 482—the sentence that undisputedly incorporates the arm's length standard—intact. It merely added a second sentence providing that, "[i]n the case of any transfer (or license) of intangible property . . ., the in-

come with respect to such transfer or license shall be commensurate with the income attributable to the intangible." Tax Reform Act of 1986, Pub. L. No. 99-514, § 1231(e)(1), 100 Stat. 2085, 2562 (1986) (codified as amended at 26 U.S.C. § 482). The plain text of the statute limits the application of the commensurate with income standard to only *transfers* or *licenses* of intangible property.

This is consistent with the underlying purpose of the 1986 amendment. Congress explained in the committee report that it was introducing the commensurate with income standard to address a "recurrent problem" with transfers of highly valuable intangible property: "the absence of comparable arm's length transactions between unrelated parties, and the inconsistent results of attempting to impose an arm's length concept in the absence of comparables." H.R. REP. NO. 99-426, at 423–24 (1985). Congress noted that "[i]ndustry norms for transfers to unrelated parties of less profitable intangibles frequently are not realistic comparables in these cases," and that "[t]here are extreme difficulties in determining whether the arm's length transfers between unrelated parties are comparable." *Id.* at 424–25. To address this *specific* gap, Congress found it "appropriate to require that the payment made on a transfer of intangibles to a related foreign corporation ... be commensurate with the income attributable to the intangible." *Id.* at 425. Congress did not make any other findings regarding the use of the commensurate with income standard for any transactions other than transfers or licenses of intangible property. Thus, the statute—read in light of this legislative history—did not grant Treasury the flexibility to depart from a comparability analysis whenever it sees fit; rather, it permitted a departure in the limited context of "any transfer (or license) of intangible property" because it had found that comparable transactions in such cases are frequently unrealistic.

Treasury reiterated the limited circumstances in which the commensurate with income standard applies in its 1988 "White Paper." It stated there that, even in the context of transfers or licenses of intangible property, the "intangible income must be allocated on the basis of comparable transactions if comparables exist." *A Study of Intercompany Pricing under Section 482 of the Code* ("White Paper"), I.R.S. Notice 88-123, 1988-1 C.B. 458, 474; *see also id.* at 473 (noting that, where "there is a true comparable for" the licensing of a "high profit potential intangible," the royalty rate for the license "must be set on the basis of the comparable because that remains the best measure of how third parties would allocate intangible income"). Only "in situations in which comparables do not exist" for transfers of intangible property would the commensurate with income standard apply. *Id.* at 474. Indeed, the United States continued to insist in tax treaties, and in documents that Treasury issued to explain these treaties, that § 482 mandated the arm's length principle, in all but this narrow category of intangible transfers. *See Xilinx II*, 598 F.3d at 1196–97 (citing tax treaty explanations); *see also id.* at 1198 n.1 (Fisher, J., concurring) (noting that "the 1997 United States–Ireland Tax Treaty, ... and others like it, reinforce the arm's length standard as Congress' intended touchstone for § 482").[1]

1. As the majority observes, more recent tax treaty explanations have also cited the alternative commensurate with income standard. Op. 1079–80 (citing Technical Explanation of the US-Poland Tax Treaty, at 31 (Feb. 13, 2013)). Even these explanations, however, emphasize the primacy of the arm's length standard, and they assure the reader that the commensurate with income standard "operates consistently with the arm's-length standard." Technical Explanation of the US-Poland Tax Treaty, at 30–31 (Feb. 13, 2013).

B. Treatment of Stock-Based Compensation

In the early 1990s, related companies began to compensate certain employees who performed research and development activities pursuant to QCSAs by granting stock options and other stock-based compensation. *See id.* at 1192–93. This manner of compensation allowed companies to avoid the income reallocation mechanisms available under § 482 by including only the employees' cash compensation in the cost pool under the agreement, but not their stock-based compensation.

To address this loophole, Treasury promulgated new regulations governing the tax treatment of controlled transactions in 1994 and 1995. These regulations affirmed that "the standard to be applied in every case" was the arm's length standard and that "an arm's length result generally will be determined by reference to the results of comparable transactions" because "identical transactions can rarely be located." Treas. Reg. § 1.482-1(b)(1) (as amended in 1994). They also provided that intangible development costs included "all of the costs incurred by . . . [an uncontrolled] participant related to the intangible development area." Treas. Reg. § 1.482-7(d)(1) (as amended in 1995). The IRS interpreted this latter "all costs" provision to include stock-based compensation, so that related companies in cost-sharing agreements would have to share costs of providing such compensation. *Xilinx II*, 598 F.3d at 1193–94.

When Xilinx, Inc. ("Xilinx") challenged the IRS's interpretation, the Tax Court decided that the agency's interpretation was inconsistent with Treas. Reg. § 1.482-1 because the IRS had not adduced evidence sufficient to show that unrelated parties transacting at arm's length would, in fact, share expenses related to stock-based compensation. *Xilinx v. Commissioner* ("*Xilinx I*"), 125 T.C. 37, 53 (2005). The Commissioner did not appeal this underlying factual finding and, instead, argued on appeal to this court that Treas. Reg. § 1.482-7 superseded the arm's length requirement of Treas. Reg. § 1.482-1. All three members of the divided panel therefore assumed that sharing expenses related to stock-based compensation would be inconsistent with the arm's length standard. *Xilinx II*, 598 F.3d at 1194 ("The Commissioner does not dispute the tax court's factual finding that unrelated parties would not share [employee stock options] as a cost."); *id.* at 1199 (Reinhardt, J., dissenting) (assuming that the Tax Court "correctly resolved" the issue of whether sharing stock-based compensation costs would constitute an arm's length result). The panel also assumed that Treas. Reg. § 1.482-7 required stock-based compensation expenses to be shared. *Id.* at 1196 (majority opinion) (noting that the "all costs" provision "does not permit any exceptions, even for costs that unrelated parties would not share"); *id.* at 1199 (Reinhardt, J., dissenting) (assuming that the "all costs" provision includes "employee stock option costs"). But a majority of the panel ultimately held that the arm's length standard, which it described as the fundamental "purpose" of the regulations, trumped Treas. Reg. § 1.482-7, and that stock-based compensation expenses could not be shared in the absence of evidence that unrelated parties would share such costs. *Id.* at 1196 (majority opinion); *see also id.* at 1198 n.1 (Fisher, J., concurring) (finding "the arm's length standard" to be "Congress' intended touchstone for § 482"). On that ground, this court affirmed the Tax Court's judgment in favor of Xilinx. *Id.* at 1196 (majority opinion).

C. The Regulations at Issue

While *Xilinx II* was pending before this court, Treasury promulgated the regulations at issue here. Compensatory Stock

Options Under Section 482, 68 Fed. Reg. 51,171, 51,172 (Aug. 26, 2003) (codified at 26 C.F.R. pts. 1 and 602). The amended regulations sought to reconcile the apparent contradiction between the arm's length standard in Treas. Reg. § 1.482-1 and the requirement that stock-based compensation expenses be shared under Treas. Reg. § 1.482-7. The former provision now specifies that § 1.482-7 "provides the specific methods to be used to evaluate whether a [QCSA] produces results consistent with an arm's length result." Treas. Reg. § 1.482-1(b)(2)(i) (2003). And § 1.482-7, in turn, now provides that a QCSA produces an arm's length result "if, and only if," the participants share all of the costs of intangible development—explicitly including costs associated with stock-based compensation—in proportion to their shares of reasonably anticipated benefits attributable to such development. Treas. Reg. § 1.482-7(d)(2) (2003).

Altera Corp. ("Altera U.S."), a Delaware corporation, and its subsidiary Altera International, a Cayman Islands corporation, (collectively "Altera") entered into a technology research and development cost-sharing agreement under which the related participants "agreed to pool their respective resources to conduct research and development using the pre-cost-sharing intangible property" and "to share the risks and costs of research and development activities they performed on or after May 23, 1997." *Altera*, 145 T.C. at 93. This agreement was effective from May 23, 1997 through 2007. *Id.* During the 2004–2007 taxable years, Altera U.S. granted stock options and other stock-based compensation to certain employees who performed research and development activities pursuant to the agreement. *Id.* The employees' cash compensation was included in the cost pool under the agreement, but their stock-based compensation was not. *Id.*

Altera timely filed an income tax return for its 2004–2007 taxable years. *Id.* at 94. Treasury responded by mailing notices of deficiency for those years, allocating income from Altera International to Altera U.S. by increasing Altera International's cost-sharing payments. *Id.* Treasury claimed its cost-sharing adjustments were for the purpose of bringing Altera in compliance with § 1.482-7(d)(2), now § 1.482-7A(d)(2). *Id.* Altera challenged the validity of § 1.482-7A(d)(2) in Tax Court, arguing that the new rule is arbitrary and capricious. *Id.* at 92. The Tax Court unanimously held, as discussed in more detail below, that the explanation Treasury offered in the preamble accompanying the new regulations was insufficient to justify those regulations under *State Farm*. *Id.* at 120–33. The Commissioner appeals that decision.

II. Discussion

The Tax Court considered and rejected Treasury's plainly stated explanation for its regulation—that Treasury applied the commensurate with income test because it could find no transactions comparable to the QCSAs at issue and that Treasury's analysis was actually *consistent* with the arm's length standard. The Commissioner now argues on appeal, however—and the majority accepts its new claim—that what Treasury was *actually* saying is that § 482 no longer requires a comparability analysis when Treasury concludes that any comparable transactions are imperfect and that the methodology for arriving at an arm's length result is, and always has been, fluid. I disagree. Specifically, as explained below, I believe that: (1) Treasury's rule is procedurally invalid and the majority's attempt to recreate the record surrounding its adoption cannot cure that flaw; (2) Treasury's purported interpretation of § 482 is wrong; and (3) related companies may not be required to share the cost of stock-based compensation under current law be-

cause comparable uncontrolled taxpayers would not do so.

A. The New Rule is Procedurally Invalid

Under the Administrative Procedure Act, we must "hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Our review of an agency regulation is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009) (quoting *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)). But "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50, 103 S.Ct. 2856 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)). For that reason, "[w]e may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* at 43, 103 S.Ct. 2856 (quoting *Chenery II*, 332 U.S. at 196, 67 S.Ct. 1760).

I start, therefore, with what Treasury said when it promulgated the regulation at issue. In Treasury's notice of proposed rulemaking, the agency explained the origins of the commensurate with income standard and discussed the White Paper. Compensatory Stock Options Under Section 482, 67 Fed. Reg. 48,997, 48,998 (proposed July 29, 2002) (to be codified at 26 C.F.R. pt. 1). Treasury noted, in particular, the White Paper's observation "that Congress intended that Treasury and the IRS apply and interpret the commensurate with income standard consistently with the arm's length standard." *Id.* (citing White Paper, 1988-1 C.B. at 458, 477).

Treasury then detailed how the proposed rules would function, including that the new rules required stock-based compensation costs to be included among the costs shared in a QCSA to produce "results consistent with an arm's length result." *Id.* at 49,000–01. It acknowledged that "[t]he Tax Reform Act of 1986 ... amended section 482 to require that consideration for intangible property *transferred* in a controlled transaction be commensurate with the income attributable to the intangible" property. *Id.* at 48,998 (emphasis added). But it then conclusively stated, based on a vague reference to the "legislative history of the Act," that parties may continue to enter into bona fide *research and development* cost sharing arrangements so long as "the income allocated among the parties reasonably reflect actual economic activity undertaken by each"—i.e., so long as these agreements to develop intangible property survive the commensurate with income standard. *Id.* (emphasis added). Not once did Treasury justify its application of the commensurate with income standard by stating that QCSAs of this kind constitute "transfers" of intangible property under the Tax Reform Act. And, while it generally cited to the legislative history of the 1986 amendments to § 482—a fact on which the majority places great weight—it did not explain what portions of the legislative history it found pertinent or how any of that history factored into its thinking.

Treasury expanded on its reasoning in the preamble to the final rule. It explained that the tax treatment of stock-based compensation in QCSAs would have to be consistent "with the arm's length standard (and therefore with the obligations of the United States under its income tax treaties and with the OECD transfer pricing guidelines)." 68 Fed. Reg. at 51,172. Treasury observed, however, that the legislative history of the 1986 amendment to § 482 "expressed Congress's intent to respect cost

sharing arrangements as consistent with the commensurate with income standard, and therefore consistent with the arm's length standard, if and to the extent that participants' shares of income 'reasonably reflect the actual economic activity undertaken by each.' " *Id.* (quoting H.R. REP. NO. 99-481, at II-638 (1986) (Conf. Rep.)). Again, Treasury never explained why QCSAs in which controlled parties share costs to develop intangibles would constitute "transfers" of intangibles sufficient to trigger the commensurate with income standard in the first place. Instead, it simply declared that, "in order for a QCSA to reach an arm's length result consistent with legislative intent," the QCSA must include stock-based compensation among the costs shared. *Id.*

Throughout the preamble, Treasury repeatedly emphasized that it was continuing to apply the arm's length standard. Treasury explained, for example, that "[t]he regulations relating to QCSAs *have as their focus* reaching results consistent with what parties at arm's length generally would do if they entered into cost sharing arrangements for the development of high-profit intangibles." *Id.* (emphasis added). Treasury determined that "[p]arties *dealing at arm's length* in [a cost-sharing] arrangement based on the sharing of costs and benefits generally would not distinguish between stock-based compensation and other forms of compensation." *Id.* (emphasis added). And Treasury concluded that "[t]he final regulations provide that stock-based compensation must be taken into account in the context of QCSAs *because* such a result is consistent with the arm's length standard." *Id.* (emphasis added).

Yet, Treasury failed to consider comparable transactions submitted by commentators demonstrating that unrelated companies would never share the cost of stock-based compensation. Treasury responded to these comments invoking the arm's length standard. *See id.* (rejecting "comments that assert that taking stock-based compensation into account in the QCSA context would be inconsistent with the arm's length standard in the absence of evidence that parties at arm's length take stock-based compensation into account in similar circumstances"). Treasury acknowledged that these comparable arm's-length transactions are typically relevant, but it determined that there were no comparable transactions available for QCSAs for the development of high-profit intangibles:

> While the results actually realized in similar transactions under similar circumstances ordinarily provide significant evidence in determining whether a controlled transaction meets the arm's length standard, in the case of QCSAs such data may not be available. As recognized in the legislative history of the Tax Reform Act of 1986, there is little, if any, public data regarding transactions involving high-profit intangibles. The uncontrolled transactions cited by commentators do not share enough characteristics of QCSAs involving the development of high-profit intangibles to establish that parties at arm's length would not take stock options into account in the context of an arrangement similar to a QCSA.

Id. at 51,172–73 (internal citation omitted).

The Tax Court held that Treasury's explanation for its regulation was insufficient under *State Farm*. *Altera*, 145 T.C. at 120–33. It found that Treasury "failed to provide a reasoned basis" for its "belief that unrelated parties entering into QCSAs would generally share stock-based compensation costs." *Id.* at 123. The court acknowledged that agencies need not gather empirical evidence for *some* policy-based propositions, but it held that "the belief that unrelated parties would share

stock-based compensation costs in the context of a QCSA" was not such a proposition. *Id.* In reaching this conclusion, the court observed that commentators submitted significant evidence during the rulemaking process indicating that unrelated parties would not share stock-based compensation costs in QCSAs; that the Tax Court itself had made a factual determination on that issue in *Xilinx I*—concluding they would not; and, that Treasury was required at least to attempt to gather empirical evidence before declaring that no such evidence was available. *Id.* at 123–24.

The Tax Court then detailed why Treasury's explanation for the regulations was insufficient. The court noted that only some QCSAs involved high-profit intangibles or included stock-based compensation as a significant element of compensation, yet Treasury failed to distinguish between QCSAs with and without those characteristics. *Id.* at 125–27. And the court found that Treasury responded only in conclusory fashion to a number of comments identifying comparable transactions or explaining why unrelated parties would not share stock-based compensation costs in QCSAs. *Id.* at 127–30. On these grounds, the Tax Court struck down the regulation. *Id.* at 133–34.

On appeal, the Commissioner does not meaningfully dispute the Tax Court's determination that Treasury's analysis under the arm's length standard was inadequate and unsupported. In its opening brief, it contends, instead, "that, in the context of a QCSA, the arm's-length standard does *not* require an analysis of what unrelated entities do under comparable circumstances." Appellant's Br. 57 (internal quotation marks omitted). In the Commissioner's view, Treasury's detailed explanations regarding its comparability analysis were merely "extraneous observations"—"since Treasury reasonably determined that it was statutorily authorized to dispense with comparability analysis in this narrow context, there was no need for it to establish that the uncontrolled transactions cited by commentators were insufficiently comparable." Appellant's Br. 64.

In its supplemental brief, the Commissioner reiterates that—despite its own earlier machinations to the contrary—one should not conflate comparability analysis with the arm's length standard. Appellant's Suppl. Br. 29–31. It also argues for the first time that Treasury's passing reference to the legislative history of § 482 not only justified its departure from a comparability analysis, but also explained that QCSAs to *develop* intangibles constitute *transfers* of intangibles under the second sentence of § 482.

The majority accepts the latest of the Commissioner's ever-evolving post-hoc rationalizations and then, amazingly, goes even further to justify what Treasury did here. First, it accepts the Commissioner's new explanation that the taxpayer's agreement to "divide beneficial ownership of any Developed Technology" constitutes a transfer of intangibles. E.R. 145. Second, it holds that Treasury's reference to the legislative history communicated its understanding that, when Congress enacted the 1986 amendment, it "delegate[d] to Treasury the choice of a specific methodology to" "ensure that income follows economic activity." Op. 1077. The majority finds that Treasury implicitly communicated its understanding that Congress called upon it to move away from a comparability analysis and "to develop methods that [d]o not rely on analysis of" what it deems "problematic comparable transactions" when it sees fit. Op. 1077–78. The majority finds that Treasury was therefore entitled to ignore the comparable transactions submitted by commentators because they purportedly did not "bear[ ] on 'relevant factors' to the rulemaking." Op. 1082–83

(quoting *Am. Mining Cong.*, 965 F.2d at 771). As to Altera's rejoinder that Treasury never suggested that it had the authority to "dispense with" the comparability analysis entirely, Appellee's Br. 43, the majority dismisses this argument, stating that, "historically[,] the definition of the arm's length standard has been a more fluid one." Op. 1077. Finally, the majority concludes that the second sentence of § 482 not only allowed Treasury to dispense with a comparability analysis *but also allowed it to ignore the arm's length test altogether*.

I do not share the majority's views. Treasury may well have thought—incorrectly, I believe—that QCSAs involving the development of high-profit intangibles constitute transfers of intellectual property under the second sentence of § 482. It may also have believed that, given the fundamental characteristics of stock-based compensation in QCSAs and what the majority here calls the "fluid" definition of the arm's length standard, it could dispense with a comparability analysis entirely, regardless of whether QCSAs constitute transfers. *Cf. Xilinx II*, 598 F.3d at 1197 (Fisher, J., concurring) (hypothesizing why unrelated companies may not share stock-based compensation costs). It may—despite never taking this position before rehearing in this appeal—have even believed that the arm's length standard was not required at all in these circumstances by virtue of the second sentence of § 482. But the APA required Treasury to *say* that it was taking these positions, which depart starkly from Treasury's previous regulations. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.").

The APA's safeguards ensure that those regulated do not have to guess at the regulator's reasoning; just as importantly, they afford regulated parties a meaningful opportunity to respond to that reasoning. Treasury's notice of proposed rulemaking ran afoul of these safeguards by failing to put the relevant public on notice of its intention to depart from a traditional arm's length analysis.[2] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (holding that a final rule "violates the APA's notice requirement where 'interested parties would have had to divine [the agency's] unspoken thoughts' " (alteration in original) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259–60 (D.C. Cir. 2005))). Asking Treasury to show its work in the preamble to its final rule—that is, to set forth when and why the agency believed that a comparability analysis is not required or even why an arm's length analysis can be eschewed—does not, as the majority states, "require agencies to provide 'exhaustive, contemporaneous legal arguments to preemptively defend its action.' " Op. 1083 (quoting *Nat'l Elec. Mfrs. Ass'n v. U.S. Dep't of Energy*, 654 F.3d 496, 515 (4th Cir. 2011)). It is the essence of the review that the APA demands.

When the Tax Court conducted that review, it considered the explanation that Treasury offered, and it found that Trea-

2. The majority also glosses over the Tax Court's criticism that the final rule applied to all QCSAs but was based only on Treasury's beliefs about the subset of QCSAs involving "high-profit intangibles" where stock-based compensation is a "significant element" of compensation. *Altera,* 145 T.C. at 125–26 (quoting Compensatory Stock Options Under Section 482, 68 Fed. Reg. at 51,173). Treasury's failure to explain this leap and the Commissioner's failure to defend it provide another reason that Treasury failed to comply with the APA.

sury "failed to provide a reasoned basis" for its "belief that unrelated parties entering into QCSAs would generally share stock-based compensation costs." *Altera*, 145 T.C. at 123. The Tax Court set forth in detail why Treasury's explanation for the regulations was insufficient. *Id.* at 125–30. Treasury offers no response to these findings; it simply invites this court to recreate the record and interpret § 482 in a way it never asked the Tax Court to do in order to supply a post-hoc justification for its decisionmaking. I would hold, as the Tax Court did, that Treasury's belated arguments are insufficient to justify the 2003 regulations and that those regulations are, thus, are procedurally invalid.

B. *Chevron* Does Not Save Treasury's Flawed Interpretation of Section 482

Even if Treasury did not err procedurally, I would still find that the regulations are impermissible under *Chevron*. The Commissioner does not argue that its interpretation of § 482 is compelled by the unambiguous text of the statute at step one of *Chevron*. Rather, he contends that § 482 does not directly resolve the question of whether Treasury may allocate the cost of stock-based compensation between related parties. The majority similarly reasons that "[§] 482 does not speak directly to whether the Commissioner may require parties to a QCSA to share employee stock compensation costs in order to receive the tax benefits associated with entering into a QSCA." Op. 1076. It thus concludes that "there is no question that the statute remains ambiguous regarding the method by which Treasury is to make allocations based on stock-based compensation." Op. 1076.

While I agree with the majority and the Commissioner that the statute is silent as to the precise question of whether the Commissioner may require parties to a QCSA to share the cost of stock-based compensation, I believe that the statute unambiguously communicates the types of cases in which each methodology applies. Specifically, § 482 dictates that the status quo—i.e, the arm's length standard—controls in "any case of two or more organizations, trades, or businesses owned or controlled directly or indirectly by the same interests." It also allows Treasury to employ the commensurate with income standard, but only "[i]n the case of any transfer (or license) of intangible property." Accordingly, the precise gap left by Congress in this case is the question of whether QCSAs constitute a "transfer" of "intangible property" under the second sentence of the statute. If yes, then Treasury may employ the commensurate with income standard to determine if related parties to a QCSAs would share the cost of stock-based compensation. If no, then Treasury must make that determination by employing a comparability analysis to reach an arm's length result. Because the statute does not expressly state that QCSAs for the development intangibles constitute "transfers" of intangibles, I would proceed to step two of *Chevron*.

At step two, we consider whether Treasury's interpretation is "arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53, 131 S.Ct. 704, 178 L.Ed.2d 588 (2011) (internal citations omitted). The agency's interpretation is not arbitrary and capricious if it is "rationally related to the goals of the Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). "If the [agency]'s interpretation is permissible in light of the statute's text, structure and purpose, we must defer under *Chevron*." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007). Accordingly, I begin with the text of the statute.

The statutory text provides in relevant part:

> In any case of two or more organizations, trades, or businesses . . . owned or controlled directly or indirectly by the same interests, the Secretary may distribute, apportion, or allocate gross income, deductions, credits, or allowances between or among such organizations . . . *if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such organizations, trades, or businesses*. In the case of any *transfer (or license) of intangible property* (within the meaning of section 367(d)(4)), the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.

Section 482 (emphases added). It is undisputed that the first sentence of the statute requires an arm's length analysis; even the majority agrees with that longstanding principle. As previously explained, moreover, at the time Congress amended § 482, the arm's length standard was understood to require a comparability analysis. But, because transfers of intangible property oftentimes lacked comparable transactions, Congress added a second sentence to the statute. This sentence allows the Secretary to apply the commensurate with income standard to reach an arm's length result in the case of any *transfer* of intangible property.

The Commissioner contends, based on Treasury's purported belief that QCSAs are transfers of intangible property, that Treasury correctly interpreted § 482 to require that controlled companies share the cost of stock-based compensation. But, as noted above, Treasury never made, much less supported, a finding that QCSAs constitute transfers of intangible property. We cannot and should not conclude that the Commissioner's post-hoc interpretation would be permissible when Treasury never articulated such an interpretation. Even if it had, Treasury's own characterization of QCSAs as arrangements "for the *development* of high-profit intangibles" contradicts any conclusion that QCSAs constitute *transfers* of already existing intangible property. 68 Fed. Reg. at 51,173 (emphasis added). No rights are transferred when parties enter into an agreement to *develop* intangibles; this is because the rights to later-developed intangible property would spring *ab initio* to the parties who shared the development costs without any need to transfer the property. And, there is no guarantee when the cost-sharing arrangements are entered into that any intangible will, in fact, be developed. In such circumstances, Treasury should not have employed the commensurate with income standard.

The majority attempts to justify Treasury's departure from the comparability analysis in these circumstances by stating it was reasonable for Treasury to "determin[e] that uncontrolled cost-sharing arrangements," such as those submitted by the commentators, "do not provide helpful guidance regarding allocations of employee stock compensation." Op. 1077. According to the majority, the legislative history "makes clear" that Congress "intended the commensurate with income standard to displace a comparability analysis where comparable transactions cannot be found." Op. 1070. This reasoning fails for several reasons.

As noted, the text of the statute provides that Treasury may employ the commensurate with income standard only in the case of a transfer or license of intangible property—not whenever Treasury finds that uncontrolled transactions fail to provide helpful guidance. Congress did not leave a gap in the statute allowing Treasury to choose when one methodology displaces the other. Rather, it made its own

findings regarding the relative helpfulness of comparable uncontrolled transactions in the case of a transfer or license of intangible property. It then amended § 482 to allow for the use of the commensurate with income methodology in those specific cases, but not in others. Congress's findings in the legislative history do not invite Treasury to make its own determinations regarding the helpfulness of other uncontrolled transactions. Nor do they allow Treasury to expand the category of cases in which the commensurate with income standard would apply when the statutory text states otherwise. Here, Treasury's only justification for eschewing the comparability analysis was its insistence that the legislative history allows it to disregard comparable transactions that it deems imperfect. This rationale is inconsistent with the plain text of the statute and thus, is impermissible under *Chevron*.

Even if Treasury could dispense with a comparability analysis whenever it believed no comparables exist, that interpretation would still fail step two of *Chevron* because uncontrolled comparable transactions do exist here. Even the majority acknowledges Treasury's view that a different methodology may only be applied "*when comparable transactions do not exist*." Op. 1083 n.9 (emphasis added). Treasury itself explained, in effect, that a precondition for the applicability of the commensurate with income standard is the lack of real-world comparable transactions with which to make an arm's length comparison. Such transactions, as Treasury admitted, would "ordinarily provide significant evidence in determining whether a controlled transaction meets the arm's length standard." 68 Fed. Reg. at 51,173. According to the majority, however, imperfect comparables are tantamount to the absence of comparables.

But the arm's length standard of § 482 does not require perfectly identical transactions—only comparable ones. As Altera notes, the Commissioner cannot "avoid the statutory limits on his ability to reallocate income by asserting that a related-party transaction is fundamentally different from all similar transactions between unrelated parties by virtue of the very fact that the parties are related." Appellee's Suppl. Br. 33. Such an interpretation would allow Treasury to dispense with the comparability analysis altogether because related parties, by virtue of common ownership, are always positioned differently than unrelated parties. Legislative history can only do so much—if any—work, and it certainly cannot set out an exception that swallows a rule codified by statute.

Even if Treasury were correct that no comparable transactions exist, Treasury's reasoning would still fail. Treasury concluded that it could allocate costs because there were no transactions in which parties at arm's length would even consider taking stock options into account in the context of an arrangement similar to a QCSA. *See* 68 Fed. Reg. at 51,173. But the absence of evidence is not evidence of absence. Indeed, the absence of any comparable transactions could itself mean that uncontrolled taxpayers would not share the costs of stock-based compensation. Treasury believes, however, that uncontrolled taxpayers would not enter into such transactions, and, rather than find the absence of such transactions meaningful to a comparison, believes it is justified in using different methodologies to assess income. But the fact that evidence of the absence of comparable transactions might support more favorable tax treatment does not mean that no comparison can be made.

Finally, while Treasury's interpretation of § 482 is "entitled to no less deference . . . simply because it has changed over time, . . . the agency must nevertheless engage in reasoned analysis sufficient to

command our deference." *Good Fortune Shipping SA v. Comm'r of Internal Rev. Serv.*, 897 F.3d 256, 263 (D.C. Cir. 2018) (internal quotations and citations omitted); *Judulang v. Holder*, 565 U.S. 42, 132 S. Ct. 476, 483 n.7, 181 L.Ed.2d 449 (2011) (clarifying that the court's analysis of whether an agency provided a reasoned explanation under *State Farm* and its analysis of whether an agency's interpretation is permissible under *Chevron* step two is "the same, because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance' "). Such a reasoned explanation, at a minimum, requires Treasury to "display awareness that it *is* changing position." *Good Fortune Shipping*, 897 F.3d at 263 (quoting *Fox*, 556 U.S. at 515, 129 S.Ct. 1800). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox*, 556 U.S. at 515, 129 S.Ct. 1800. And an agency may need to "provide a more detailed justification than what would suffice for a new policy created on a blank slate . . . when, for example, . . . its prior policy has engendered serious reliance interests that must be taken into account." *Id.* (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996)). " 'Unexplained inconsistency' between agency actions is 'a reason for holding an interpretation to be an arbitrary and capricious change.' " *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 966 (9th Cir. 2015) (en banc) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005)).

As this court held in *Xilinx II*, the previous regulations preserved the primacy of the arm's length standard and its requirement of comparability analysis. *See Xilinx II*, 598 F.3d at 1195–96 (explaining the then-operative version of Treas. Reg. § 1.482-1). In amending those regulations, however, Treasury never indicated—either in the notice of proposed rulemaking or in the preamble accompanying the final rule—any awareness that it was changing course. Treasury instead repeated its previous policy that it need not conduct a comparability analysis where no comparable transactions can be found. *See* 68 Fed. Reg. at 51,172–73. It then ignored existing comparable transactions to reach what it claimed was "an arm's length result." *Id.*

The majority contends that this does not constitute a change because, "historically[,] the definition of the arm's length standard has been a more fluid one." Op. 1078. But, as explained above, the comparability analysis has always been a defining aspect of the arm's length standard. The mere fact that Treasury may have been inconsistent in the way it has applied the arm's length standard, as the majority contends, does not mean that the statute permits a fluid definition of the standard. *City of Arlington v. FCC*, 569 U.S. 290, 327, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge."). Because Treasury departed from the comparability analysis and failed to provide a reasoned explanation for why the commensurate with income standard is permissible under the statute, I would find that Treasury's regulations constitute an impermissible interpretation of the statute at *Chevron* step two.

C. Stock-based Compensation Is Not a Shared Cost Under Section 482

Because I would find that Treasury's regulations are procedurally and substantively defective, I would interpret the statute in the first instance, without deference. *Encino Motorcars, LLC v. Navarro*, —— U.S. ——, 136 S. Ct. 2117, 2125, 195 L.Ed.2d 382 (2016) ("*Chevron* deference is not warranted where the regulation is procedurally defective—that is, where the

agency errs by failing to follow the correct procedures in issuing the regulation." (internal quotations and citations omitted)); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) ("[A]n agency interpretation that is inconsistent with the design and structure of the statute as a whole does not merit deference." (internal citations and quotations omitted)).

Because I would find the 2003 regulations were invalid, I believe that this court's decision in *Xilinx II* controls, and that the Tax Court properly entered judgment in favor of Altera. *Altera*, 145 T.C. at 134. Even if *Xilinx II* did not control, I would hold that related parties in QCSAs need not share costs associated with stock-based compensation.

I agree with the majority that § 482 does not address this issue expressly. But I agree with *amicus curiae* Cisco Systems, Inc. ("Cisco"), that, under the best reading of § 482, QCSAs are not subject to the commensurate with income standard. As Cisco points out, the commensurate with income standard applies only to a "transfer (or license) of intangible property," § 482, which is distinct from a cost sharing agreement for the joint development of intangibles, *see* White Paper, 1988-1 C.B. at 474 (noting that "bona fide research and development cost sharing arrangements" provide a way to "avoid[ ] section 482 transfer pricing issues related to the licensing or other transfer of intangibles"). The plain meaning of "transfer" indicates shifting ownership of an existing right from one party to another. But under a cost-sharing arrangement, parties agree to develop intangibles together. Because the intangible does not exist at the time the cost sharing arrangement is entered into, there can be no transfer either.

The majority contends that Congress's choice to use the word "any" is significant. It reasons that, because "§ 482 applies '[i]n the case of *any* transfer . . . of intangible property,' " the statute "cannot reasonably be read to exclude the transfers of expected intangible property." Op. 1076. But, while "any" can be a broadening modifier, it must be read in the context of its surrounding text. *Cf. United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (finding that use of "any" modifies the term it precedes.); *see Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226, 128 S.Ct. 831, 169 L.Ed.2d 680 (2008) (narrowing the effect of "any" based on the context in which it appears because "a word is known by the company it keeps." (internal citations and quotations omitted)).

Here, "any" does not modify "intangible property." Rather, it precedes and thus, applies only to "transfer." This indicates that, while the statutory text may cover any kind of transfer, including expected transfers, it does not cover any kind of intangible property—say, for example, intangible property that does not yet exist. Indeed, § 482 expressly defines the term "intangible property" by referencing the definition provided in § 367(d)(4). *See* § 482 ("... any transfer (or license) of intangible property (*within the meaning of section 367(d)(4)*)." (emphasis added)). We need not guess at whether Congress intended a broad reading of the term because § 367(d)(4) enumerates specific categories of intangible property covered under the statute, and none of those categories contemplates the mere possibility that intangible property may someday exist.

While "any" may modify "transfer," moreover, QCSAs do not provide for future transfers; rather, as noted above, rights to later-developed intangible property—if ever developed—would spring *ab initio* to the parties who shared the development costs and would thereby dispense

with any need to transfer those rights at some time in the future. I would conclude, absent additional evidence to conclude otherwise, that QCSAs are not transfers subject to the commensurate with income standard under § 482.

Rather, I would find that QCSAs are governed under the first sentence of § 482 and that Treasury may only allocate the cost of stock-based compensation among related companies if unrelated companies dealing at arm's length would do so under comparable circumstances. The evidence of comparable transactions submitted by commentators demonstrates that unrelated companies do not and would not share such costs. Thus, I would hold that an arm's length result is one in which related parties in QCSAs do not share costs associated with stock-based compensation.

The Commissioner contends that the backdrop against which Congress enacted the 1986 amendment demonstrates that Congress intended § 482 to require related companies to share stock-based compensation. But, as the majority admits, "[n]either the Tax Reform Act nor the implementing regulations specifically addressed allocation of employee stock compensation." Op. 1072. This is because the practice of providing stock-based compensation did not develop on a major scale until the 1990s—after Congress passed the 1986 amendment. Therefore, Congress could not have been legislating against the backdrop of this particular type of tax avoidance. While it may choose to address this practice now, it cannot be deemed to have done so then.

Not all forms of tax avoidance amount to illegal tax evasion. The very definition of a loophole is a gap in the law or a set of rules. While Treasury may promulgate regulations to close such gaps, it must do so in a manner consistent with its statutory authority under the Tax Reform Act and with the procedures outlined in the APA. When it fails to comply with those requirements, its actions cannot be justified by the mere existence of the loophole. In other words, an arm's length result is not simply any result that maximizes one's tax obligations. For these reasons, I dissent.

Royce C. GOUVEIA, Petitioner-Appellee,

v.

Nolan P. ESPINDA, Warden, Director of the Department of Public Safety for the State of Hawaii; Clare Connors, Attorney General of the State of Hawaii, Respondents-Appellants.

No. 17-16892

United States Court of Appeals, Ninth Circuit.

Argued and Submitted October 12, 2018 Honolulu, Hawaii

Filed June 12, 2019

Background: Following affirmance of trial court's decision to grant state's motion for mistrial in manslaughter prosecution, 139 Hawai'i 70, 384 P.3d 846, accused filed petition for writ of habeas corpus alleging that Double Jeopardy Clause precluded state from retrying him. The United States District Court for the District of Hawaii, No. 1:17-cv-00021-SOM-KJM, Susan O. Mollway, J., 2017 WL 3687309, granted petition, and state appealed.

Holdings: The Court of Appeals, Berzon, Circuit Judge, held that:

(1) *Rooker-Feldman* doctrine did not preclude district court from exercising ju-

Major Questions About Tax Administration

Clint Wallace

South Carolina Bar Convention

Jan. 21, 2023

UNIVERSITY OF
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School of Law

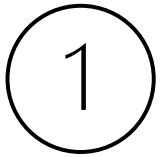
WV v. EPA – Major Questions

Chevron v. NRDC – Substantive Review: Deference to Agency

U.S. v. Mead – Force of Law

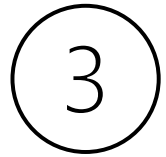
MVMA v. State Farm – Procedural Review: Hard Look

SEC v. Chenery – Agency's Reasoning Controls



Going Through Notice and Comment?

Preambles and Responding to Comments?



Exceptions to the APA

Univ of SC School of Law

Background: General Administrative Law + *Mayo Foundation*

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

"not inclined to carve out an approach to administrative review good for tax law only," absent some "justification"

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

(1) "precise question at issue"? …. (2) "reasonable"? ….

Administrative Procedure Act – agency procedures – 5 U.S.C. §§ 551–559, 701-706

Informal rulemaking: (1) notice; (2) accept and consider comments; (3) final rule with "concise general statement" explaining basis -- § 553(b), (c)

"hold unlawful and set aside" any action that is "arbitrary, capricious, an abuse of discretion, or not in accordance with the law" -- § 706(2)

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)

agencies must engage in "reasoned decision making," which includes requirements to "examine the relevant data and articulate a satisfactory explanation"

Altera Corp. v. Commissioner, 145 T.C. 91 (2015)

Big Issue #1: Force of Law + Notice & Comment

Mann Construction v. U.S., No. 21-1500 (Mar. 3, 2022)

Notice 2007-83: §§ 6707A, 6111; Treas. Reg. § 1.6011-4(b)

United States v. Mead Corp., 533 U.S. 218 (2001)

Chevron deference applies to agency actions that carry the "force of law."

Force of law exists where "it appears that Congress has delegated" such authority, and that the agency action was, in turn, "promulgated in the exercise of that authority."

Big Issue #2: Hard Look Review + Regulatory Preambles

Perez v. Mortgage Bankers Ass'n, 575 U.S. 92 (2015)

Agency must "consider and respond to significant comments received" (citing *Citizens to Preserve Overton Park*, 401 U.S. 402 (1971).

Oakbrook Land Holdings, LLC v. Comm'r, 154 T.C. 180 (2020), *aff'd*, No. 20-2117 (6th Cir. Mar. 14, 2022)

Hewitt v. Comm'r, 21 F.4th 1336, 1353 (11th Cir. 2021)

Thompson v. Comm'r, T.C.M. 2022-80, No. 8792-20 (July 20, 2022)

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)

courts are instructed to "judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

Big Issue #3: Justifying Tax as Different

Administrative Procedure Act – 5 U.S.C. § 559

a "[s]ubsequent statute" may "supersede or modify" the APA "to the extent that it does so expressly."

Asiana Airlines v. FAA, 134 F.3d 393 (D.C. Cir. 1998)

"express" modification requirement is satisfied where "Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm."

(1) Retroactive Regulations

§ 7805(b)

(2) Anti-Injunction Act

§ 7821(a) CIC Services, LLC v. IRS, 141 S.Ct. 1582 (2021)

(3) Reportable Transaction Notices

§§ 6111, 6707, 6707A, 6708

Major Questions

King v. Burwell, 576 U.S. 473 (2015)

"deep economic and political significance" … it was "especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."

"This is not a case for the IRS."

Nat'l Fed'n Indep. Bus. v. OSHA, 142 S. Ct. 661 (2022)

West Virginia v. EPA, 597 U.S. ____, No. 20-1530 (June 30, 2022)

"major questions"

"clear congressional authorization," not "a merely plausible textual basis for the agency action."

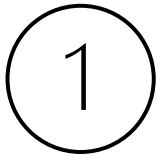
WV v. EPA – Major Questions

Chevron v. NRDC – Substantive Review: Deference to Agency

U.S. v. Mead – Force of Law

MVMA v. State Farm – Procedural Review: Hard Look

SEC v. Chenery – Agency's Reasoning Controls



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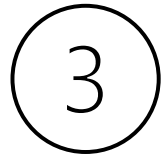

Exceptions to the APA

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Thank you!

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Tax Law Section

Saturday, January 21

Recent Trends and Developments in State and Local Tax

Jason P. Luther

The Twelve Days of Taxmas

State and Local Tax Update

SOUTH CAROLINA BAR CONVENTION – JANUARY 21, 2023

Jason P. Luther, Chief Legal Officer
Jason.Luther@dor.sc.gov

Disclaimer

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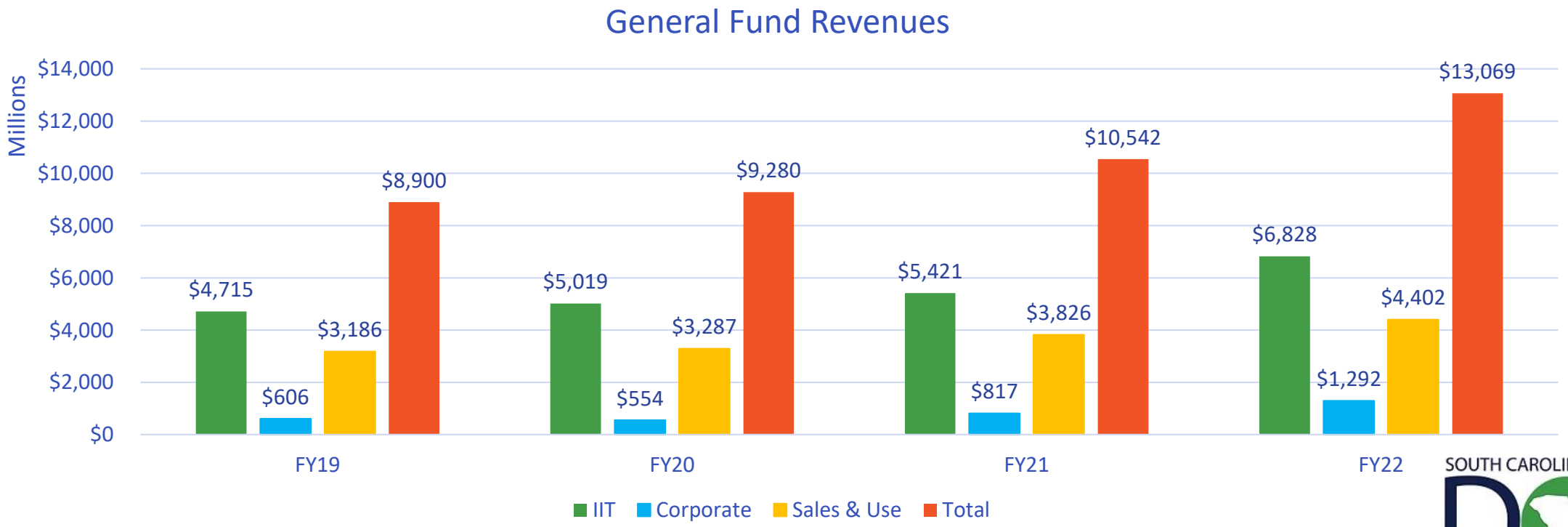
SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

General Fund Revenues Collected by SCDOR



SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the first day of Taxmas*, the Department gave to me…

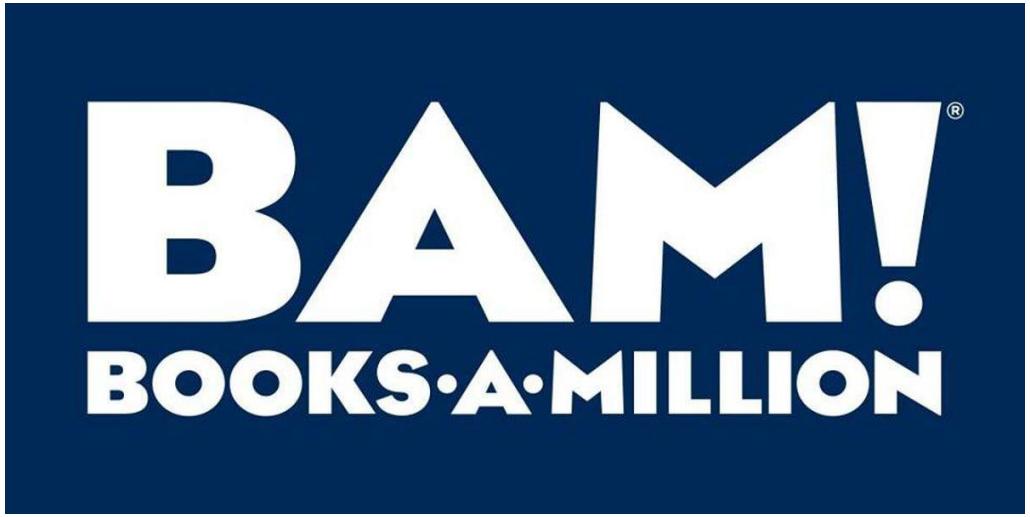
…a Millionaire's Club membership for $25.

Plus sales tax.

*_See_ Klatzkin & Company LLP, www.klatzkin.com

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Books-A-Million, Inc. v. S.C. Dep't of Revenue, --- S.E.2d --- (2022)



- ***Issue*:** Are the sales of Membership Fees part of "gross proceeds" and subject to sales tax?
- *Court of Appeals*: Yes.
- *Supreme Court*: Yes (r'hg petition denied Dec. 13, 2022)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Books-A-Million, Inc. v. SCDOR

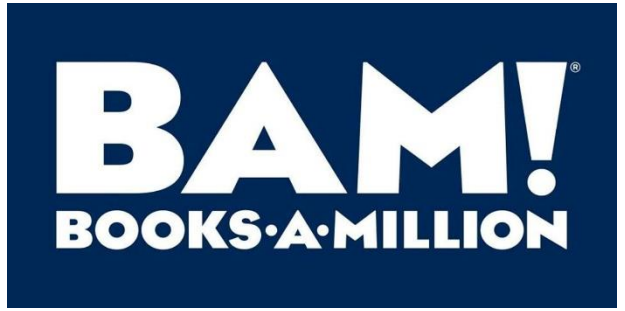
- Section 12-36-910 – **6% tax on gross proceeds of sales** of every person engaged in the business of selling tangible personal property at retail in South Carolina.

- Section 12-36-90 – **gross proceeds of sales means the value proceeding or accruing from** the sale, lease, or rental of tangible personal property.

Books-A-Million, Inc. v. SCDOR

- Millionaire's Club membership fee ($25); discounts, free shipping
- Supreme Court: *"[We] have interpreted our tax code to have* ***broad language*** *which* ***inextricably links value to sales****."*
  - The Legislature has tied together taxable tangible goods with the sale of related intangible assets.
  - *"The Millionaire's Club memberships* ***possess value*** *based solely on the discounts they afford on taxable sales. Therefore, [they] are subject to sales tax . . . ."*

Books-A-Million, Inc. v. SCDOR



- What about:
  - Other "member's-only warehouses"?
  - Golf courses and zoos and museums?
  - Grocery stores and gift cards?
- Supreme Court rejected these "parade-of-horribles scenarios"

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the second day of Taxmas, the Department gave to me…

…a forced combination with a profitable-not-profitable retailer.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Combined Reporting - Refresher

- Allocation and apportionment seeks to impose income tax on a base that "reasonably represents the proportion of the [taxpayer's] trade or business carried on within this State." *See* Section 12-6-2210(B).
- If the standard apportionment formula does not fairly represent the taxpayer's business activity in SC, Department can require other methods "to effectuate an equitable allocation and apportionment of the taxpayer's income." *See* Section 12-6-2320.
- *Carmax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 411 S.C. 79 (2014)
- *Rent-A-Center West, Inc. v. S.C. Dep't of Rev.*, 418 S.C. 320 (2016)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Combined Reporting - Refresher

- S.C
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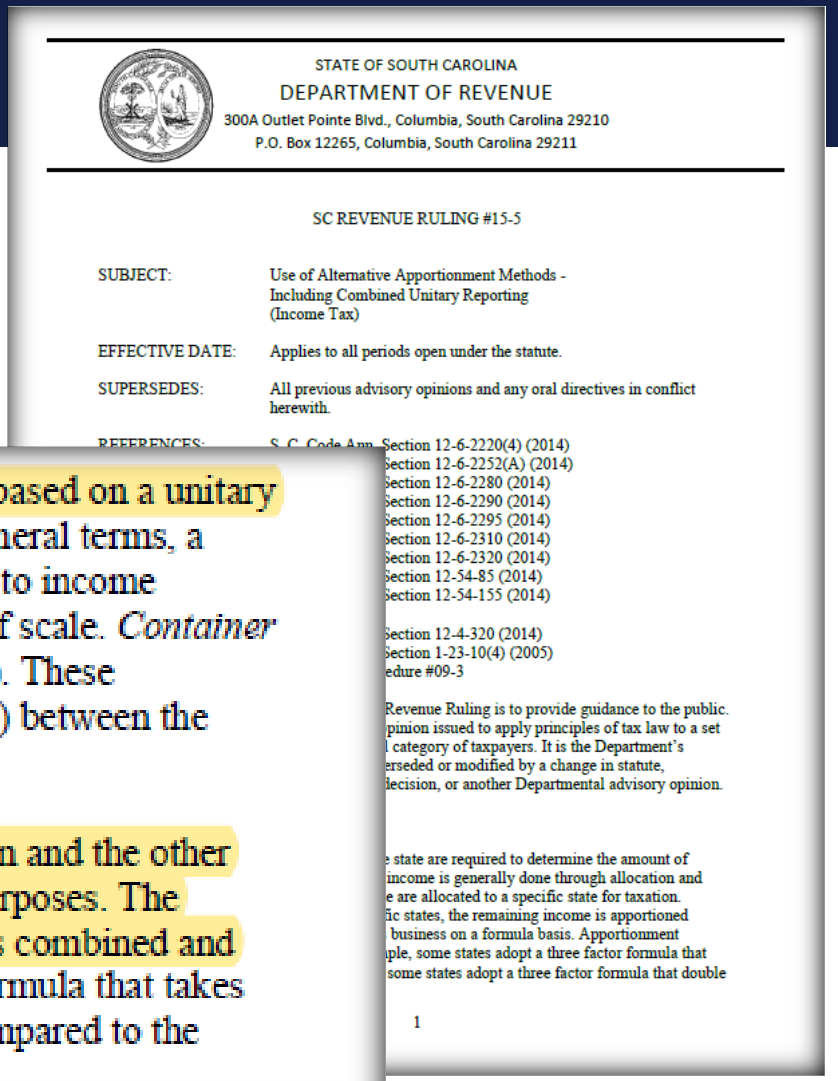


STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211

SC REVENUE RULING #15-5

SUBJECT: Use of Alternative Apportionment Methods - Including Combined Unitary Reporting (Income Tax)

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: All previous advisory opinions and any oral directives in conflict herewith.

REFERENCES: S. C. Code Ann. Section 12-6-2220(4) (2014)
Section 12-6-2252(A) (2014)
Section 12-6-2280 (2014)
Section 12-6-2290 (2014)
Section 12-6-2295 (2014)
Section 12-6-2310 (2014)
Section 12-6-2320 (2014)
Section 12-54-85 (2014)
Section 12-54-155 (2014)

Section 12-4-320 (2014)
Section 1-23-10(4) (2005)
edure #09-3

Revenue Ruling is to provide guidance to the public.
pinion issued to apply principles of tax law to a set
category of taxpayers. It is the Department's
erseded or modified by a change in statute,
ecision, or another Departmental advisory opinion.

state are required to determine the amount of
income is generally done through allocation and
are allocated to a specific state for taxation.
ic states, the remaining income is apportioned
business on a formula basis. Apportionment
ple, some states adopt a three factor formula that
some states adopt a three factor formula that double

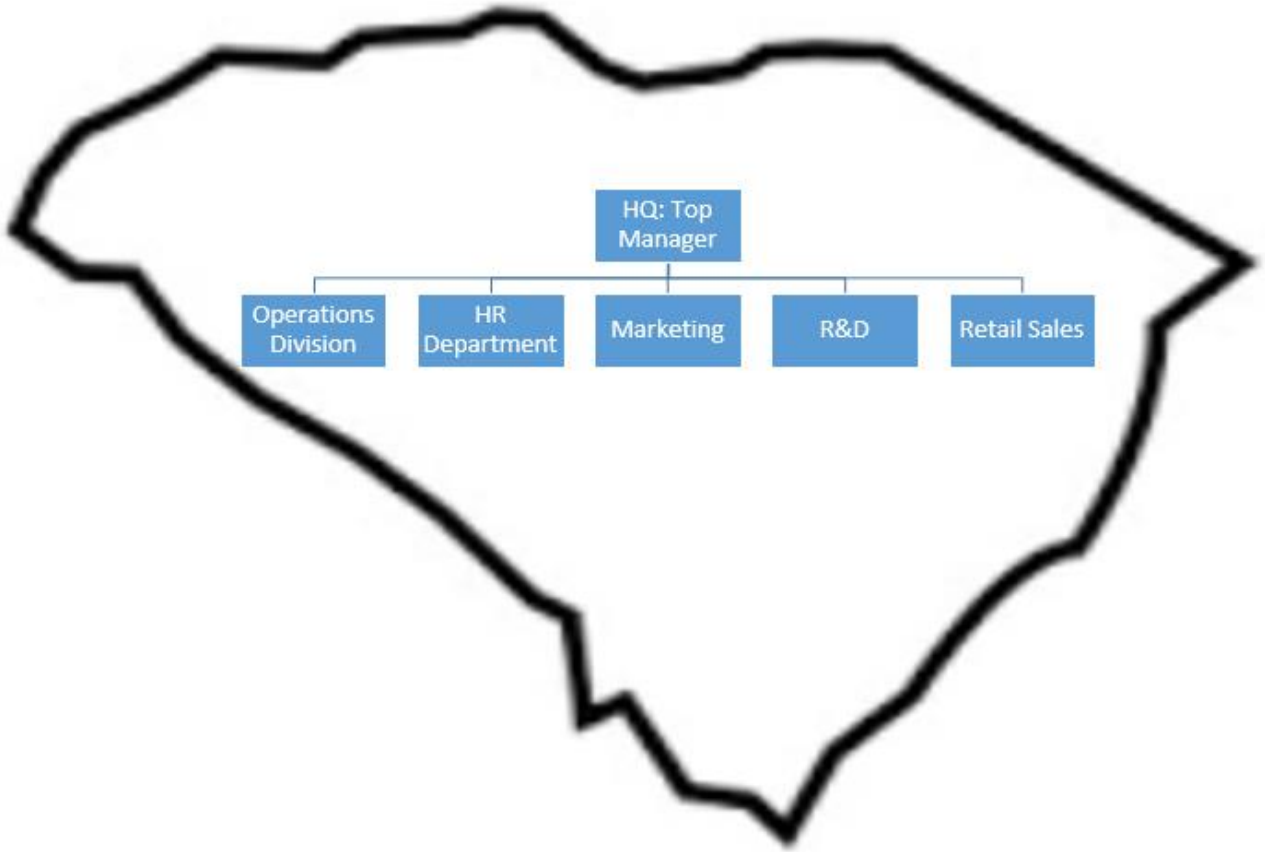
1

Under combined unitary reporting, taxpayers apportion their income to a state based on a unitary business with multiple entities rather than on a separate entity basis. In very general terms, a unitary business group is one in which the members of the group all contribute to income through functional integration, centralization of management, and economies of scale. *Container Corp. of America v. Franchise Tax Bd. of California*, 463 U.S. 159, 181 (1983). These contributions are evidenced by a flow of value (not necessarily a flow of goods) between the components of the business operation. *Id.* at 178.

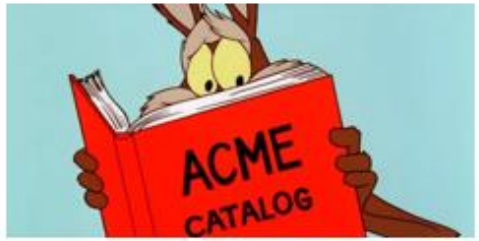
Combined unitary reporting essentially treats the income of a parent corporation and the other members of the unitary business group as one entity for state apportionment purposes. The unitary business group's nationwide ("water's edge") or worldwide[11] income is combined and the state taxes a share of that combined income. The share is calculated by a formula that takes into account the combined unitary members' level of activity in the state as compared to the members' level of activity in all states.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Classic Corporate Organizational Structure



SOUTH CAROLINA DOR DEPARTMENT OF REVENUE



ACME INC. AND SUBSIDIARIES (ACME GROUP)

Acme Inc.
(parent holding company)

Acme
Subsidiaries
(disregarded)

Acme
Corp.

In public filings, Acme Group reports hugely profitable business.
Nearly 100% of revenue comes from retail stores.

REIT
Owns lands and buildings
Income paid back as dividend
Income is tax-exempt

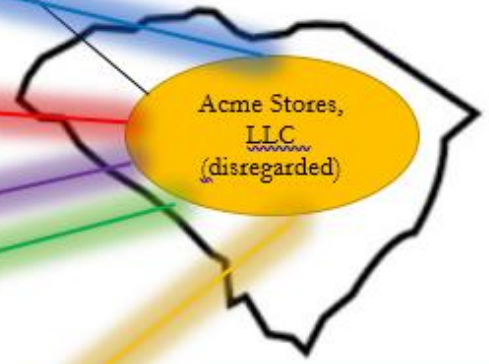
Intangibles
Owns trademark/intangibles related to retail operations
License intangibles to stores for fee
Fee profits are nontaxable
Owns lands and buildings
Income paid back as dividend
Income is tax-exempt

Loan/Interest
Promissory note to retail stores with high interest rate.
Retail stores write-off interest payment.

Procurement
Provides "key management functions" for a fee, e.g. marketing, accounting, HR, IT, legal, procurement.
In "combined" state so income is not increased.

Inventory
Purchases inventory, sells to distribution company with markup; distribution then sells to retail company with additional markup.

Acme Stores,
LLC
(disregarded)



Operates retail stores in multiple states
Files return with South Carolina (nexus)
Zero or minimal tax liability in SC
"Losing money" every year in SC

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Combined Reporting - Example

- Trade or business of the unitary group is retail sales.
- Intercompany transactions shift income/profit from retail operation in SC to different non-filing affiliates.
- Unitary group is highly profitable (see 10-K) but retail stores in SC operate at a loss every year.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Combined Reporting – upcoming cases

- *AutoZone Investment Corporation v. SCDOR* (trial conducted in Oct. 2022)
- *Tractor Supply Company v. SCDOR* (trial scheduled for January 2023)
- *Bed Bath & Beyond v. SCDOR* (trial scheduled for April 2023)
- *CarMax Auto Super Stores, Inc.* v. SCDOR (trial scheduled for May 2023)
- *AE Outfitters Retail Co.* v. SCDOR (trial scheduled for January 2024)
- *Best Buy Stores LLP* v. SCDOR (discovery phase)
- *Home Depot USA* v. SCDOR (discovery phase)
- *Dollar Tree Stores, Inc. v. SCDOR* (discovery phase)
- *Laboratory Corp. of America Holdings* v. SCDOR (discovery phase)
- *XPO Logistics* v. SCDOR (discovery phase)
- *Ross Stores Inc. v. SCDOR* (discovery phase)
- *Wal-Mart Stores v. SCDOR* (discovery phase)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the third day of Taxmas, the Department gave to me…

…an IPA in South Carolina.

(No, not that kind.)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Mastercard International, Inc. v. SCDOR, Docket No. 20-ALJ-17-0008-CC

- ***Issue***: Does Mastercard have income-producing activities (IPA) in South Carolina subject to income tax in the State?
- *ALC:* (trial March 8-11, 2022)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Sourcing - Refresher

- Section 12-6-2210(B): if taxpayer is transacting business partly within and without the State, SC "income tax is imposed upon a base which *reasonably represents* the proportion of the trade or business carried on within this State."
- Section 12-6-2290: apportion income using this fraction for each taxable year:

$$\frac{\text{Gross receipts from within SC}}{\text{Total gross receipts from everywhere}}$$

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

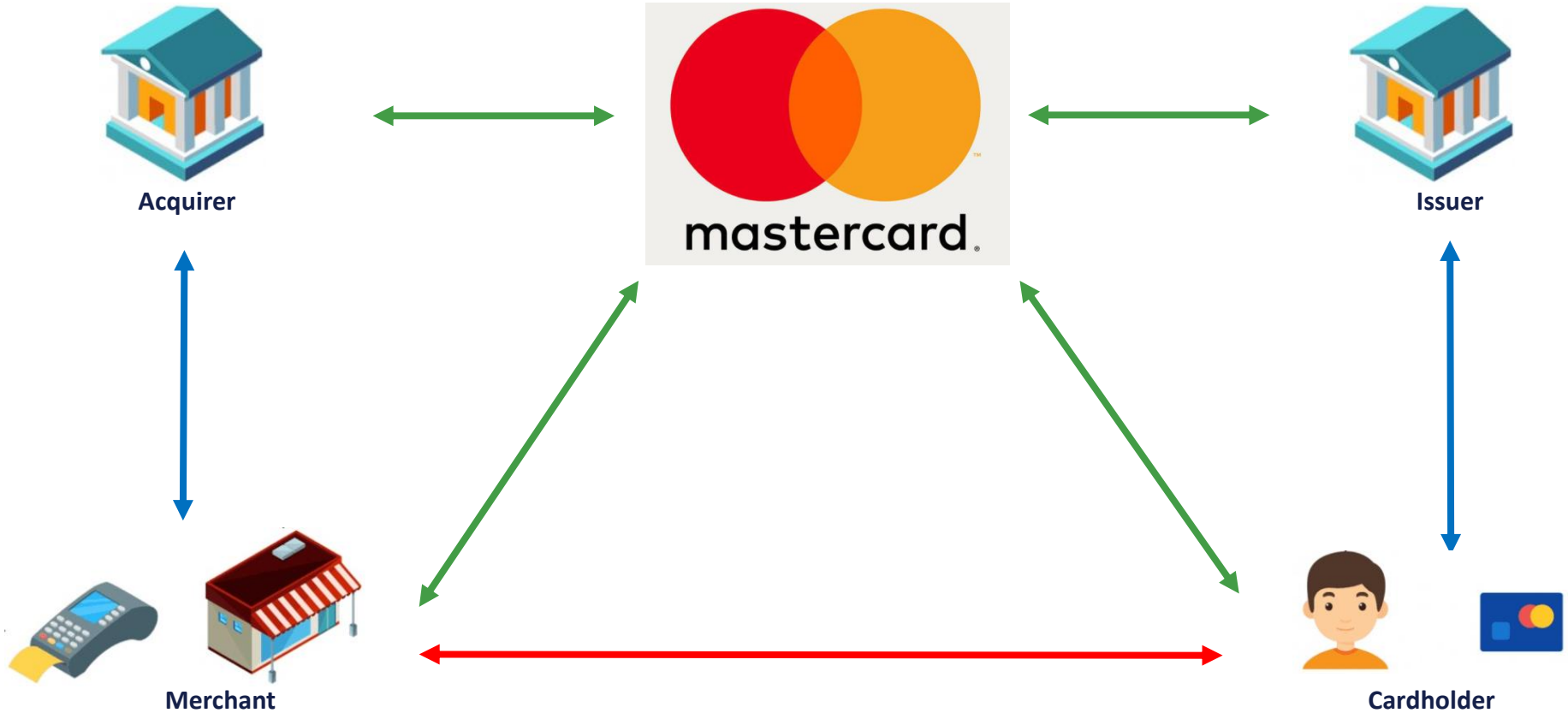
Sourcing - Refresher

- Gross receipts for service providers – Section 12-6-2295(A)(5):
  - "If the **income-producing activity** is performed partly within and partly without this State, sales are attributable to this State to the extent the **income-producing activity** is performed within this State."

- What is the income producing activity?

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Mastercard International, Inc. v. SCDOR, Docket No. 20-ALJ-17-0008-CC



SOUTH CAROLINA DEPARTMENT OF REVENUE

Mastercard International, Inc. v. SCDOR, Docket No. 20-ALJ-17-0008-CC

- SCDOR: IPA is the provision of a credit card network that enables cardholders to purchase goods and services from merchants in South Carolina.
  - contracts with merchants and banks; advertises; maintains, operates, and regulates network
  - generates fees (from Acquirers and Issuers) when card is used in SC, based on **quantity and $ volume of transactions**

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Mastercard International, Inc. v. SCDOR, Docket No. 20-ALJ-17-0008-CC

- Mastercard: business is to connect Issuers and Acquirers; customers are banks, not merchants or cardholders

- Authorization and Clearing

- IPA occurs only at central data centers (Missouri) or MIPs machines

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the fourth day of Taxmas, the Department gave to me…

…a sales tax cap on ATVs/UTVs.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Jack's Custom Cycles, Inc. v. Dept. of Revenue, 18-ALJ-17-0393-CC

- *Issue:* Is an ATV/UTV a "motor vehicle" for purposes of the maximum motor vehicle sales tax?
- *ALC:* Yes.
- Oral argument November 16

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Jack's Custom Cycles, Inc. v. Dept. of Revenue, 18-ALJ-17-0393-CC

- "Max Tax" of $300 on:
  - Aircraft
  - **Motor vehicle**
  - Motorcycle
  - Boat and watercraft motor
  - Trailer or semitrailer pulled by a truck tractor
  - Recreational vehicle (campers, motor homes, fifth wheel)
  - Self-propelled light construction equipment

- SCDOR guidance in 2008 and 2018 (in conjunction with DMV)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Jack's Custom … *f Revenue*, 18-ALJ-17-0393-C

- "Max Tax …
  - Recrea…
  - Self-propelled light…
- SCDOR guidance in 2008 and 2018 (in conjunction with DMV)

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211

SC REVENUE RULING #18-1

SUBJECT: Motor Vehicles, Motorcycles, Trailers, Semitrailers, Pole Trailers and Other Vehicles
(Sales and Use Tax)

EFFECTIVE DATE: July 1, 2017

A maximum tax does not apply to the sale or lease of the following items:

…meeting the definition of a motor vehicle.

31. Are sales by a retailer of all-terrain vehicles ("ATVs") subject to the sales and use tax?

Yes. Since ATVs are not required to be registered with the SCDMV, sales of ATVs are subject to the sales and use tax at a rate of 6%, plus any applicable local sales and use taxes.

[1] See Question #29 of this advisory opinion (SC Revenue Ruling #18-1).
[2] See Questions #31 and 33 of this advisory opinion (SC Revenue Ruling #18-1).

1

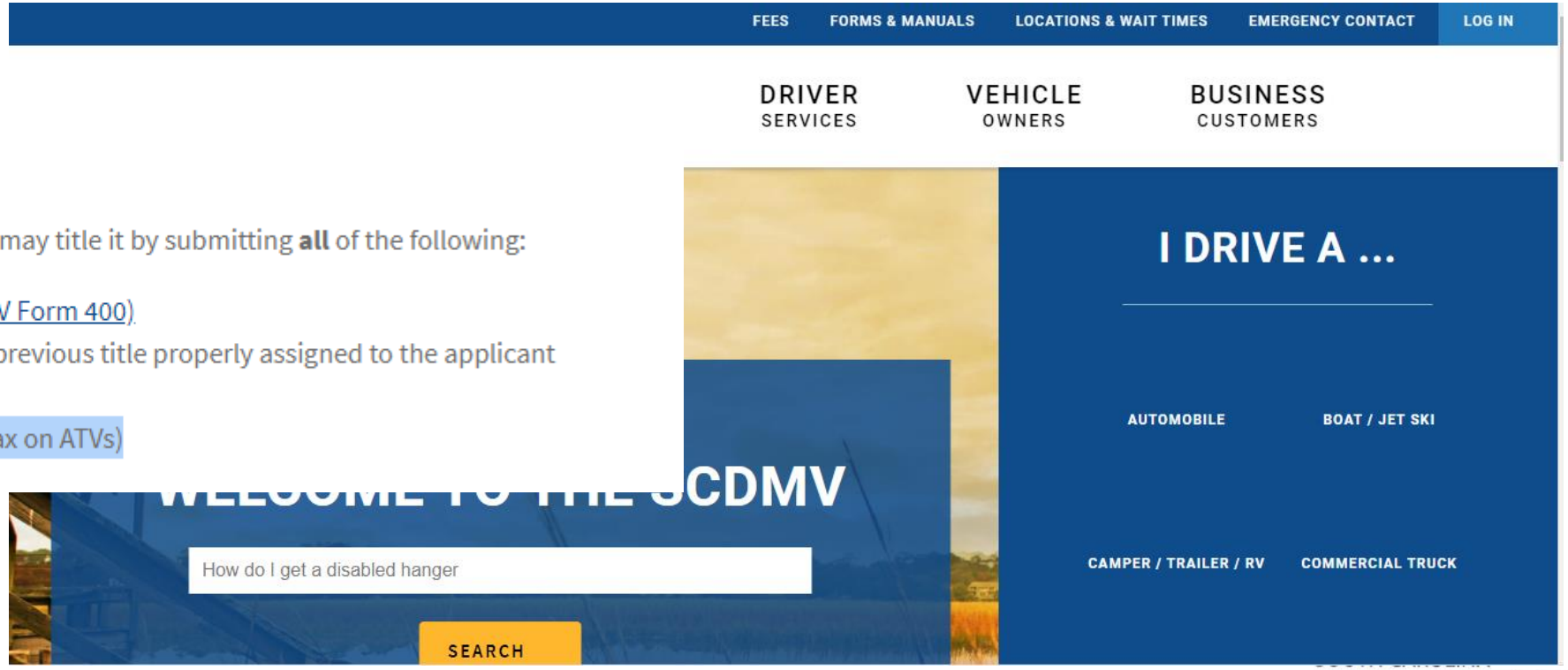
SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Jack's Custom Cycles, Inc. v. Dept. of Revenue, 18-ALJ-17-0393-CC

Titling an ATV

If you own an all-terrain vehicle (ATV), you may title it by submitting **all** of the following:

- Completed Application for Title (SCDMV Form 400)
- Manufacturer's Certificate of Origin or previous title properly assigned to the applicant
- $15
- Sales tax (there is no maximum sales tax on ATVs)



DEPARTMENT OF REVENUE

Jack's Custom Cycles, Inc. v. Dept. of Revenue, 18-ALJ-17-0393-CC

- Title 56 – "all terrain vehicle" means a "motor vehicle . . . designed primarily for off-road recreational use."
  - "Vehicle" means every device which a person or property may be transported or drawn upon a highway.
  - ATVs not designed for highway use; DMV does not register or license ATVs
- Agency Deference
- Legislative intent
  - *Bodman v. SCDOR* (2013)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Jack's Custom Cycles, Inc. v. Dept. of Revenue, 18-ALJ-17-0393-CC

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the fifth day of Taxmas, the Department gave to me…

…cash, and 4 golden properties!

(to be used as State parks)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Dominion Energy SC Inc. f/k/a SCE&G v. SCDOR, Docket No. 19-ALJ-17-0170-CC

Issue: Are construction materials exempt from sales tax if the project is never completed/operational?

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Dominion Energy SC Inc. f/k/a SCE&G v. SCDOR, Docket No. 19-ALJ-17-0170-CC

Two exemptions in § 12-36-2120 for "**machines** used in manufacturing" and "**construction materials** used in the construction of a new or expanded single manufacturing or distribution facility"

Dominion Energy SC Inc. f/k/a SCE&G v. SCDOR, Docket No. 19-ALJ-17-0170-CC

- Abandoned construction in August 2017
- Direct Pay Certificate and Special (19) Agreement
- Initial assessment based on limited information
- Final resolution included $ and four properties to be used as State parks

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Dominion Energy SC Inc. f/k/a SCE&G v. SCDOR, Docket No. 19-ALJ-17-0170-CC

- Misty Lake & Franklin Branch – 190 acres in Aiken County
- Bundrick Island – 94 acres on Lake Murray in Lexington County
- Pine Island – 27 acres on Lake Murray in Lexington County
- Ramsey Grove Plantation – 2,600 acres on the Black River in Georgetown County

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Dominion Energy SC Inc. f/k/a SCE&G v. SCDOR, Docket No. 19-ALJ-17-0170-CC

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the sixth day of Taxmas, the Department gave to me…

…a straightforward (?) process to determine tax disputes with SCDOR.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Shirley Whitfield, Individually and as Personal Representative of the Estate of William Whitfield v. SCDOR, Appellate Case No. 2019-001748

- Filed tax return/claim for refund in 2017/2018 for taxes paid in 2012/2013
- Denied as untimely under section 12-54-85
- Taxpayer did not file written protest within 90 days
- Taxpayer appealed to ALC; dismissed for failure to exhaust administrative remedies

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Shirley Whitfield, Individually and as Personal Representative of the Estate of William Whitfield v. SCDOR, Appellate Case No. 2019-001748

- Is the RPA confusing?
  - Section 12-60-20 – intended to provide the people of this State with a straightforward procedure to determine disputes with the Department

- Was the initial refund claim untimely?
  - Two-step analysis in Section 12-54-85
  - Timely filed, and taxes paid during look-back period

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the seventh day of Taxmas, the Department gave to me…

…a Dormant Commerce Clause challenge to a sales tax exemption.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Orthofix, Inc. v. Dept. of Revenue, Case No. 2021-CP-32-02752
KCI USA, Inc. v. Dept. of Revenue, Case No. 2021-CP-32-02753

- *Issue:* Does the sales tax exemption for durable medical equipment contain an unconstitutional "principal place of business" requirement?
- Circuit Court; ALC

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Orthofix, Inc. v. Dept. of Revenue, Case No. 2021-CP-32-02752
KCI USA, Inc. v. Dept. of Revenue, Case No. 2021-CP-32-02753

Section 12-36-2120(74) - sales tax exemption for durable medical equipment and related supplies:

> (c) sold by a provider who holds a South Carolina retail sales license and **whose principal place of business is located in this State**….

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Orthofix, Inc. v. Dept. of Revenue, Case No. 2021-CP-32-02752
KCI USA, Inc. v. Dept. of Revenue, Case No. 2021-CP-32-02753

- Dormant Commerce Clause prohibits economic protectionism, i.e. regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors

- What remedy? Sever the unconstitutional language (i.e. PPOB requirement) or eliminate the entire exemption?

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the eighth day of Taxmas, the Department gave to me…

…a pre-appeal procedural requirement for tax cases.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

CDT, Inc. v. SCDOR, Appellate Case No. 2021-001528

Issue: Was taxpayer required to pay tax or post bond before appealing?

Court of Appeals: Yes.

Supreme Court: Petition for Cert pending

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

CDT, Inc. v. SCDOR, Appellate Case No. 2021-001528

- Section 12-60-3370 requires taxpayer to pay (or post a bond for) all taxes determined to be due by the administrative law judge **before appealing the decision to the court of appeals**.

- Section 1-23-610(A)(1) (the APA) provides that an appeal for judicial review of a final decision of an administrative law judge "is by right."

- Do these statutes conflict?

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the ninth day of Taxmas,
the Department gave to me…

…2,732 transactions claiming the farm machines sales tax exemption.

SOUTH CAROLINA
DOR
DEPARTMENT OF REVENUE

Ag Pro, LLC v. SCDOR, Docket No. 21-ALJ-17-0331-CC (July 11, 2022)

- § 12-36-2120(16) – farm machinery sales tax exemption

- § 12-36-2510 – exemption certificate absolves seller of tax liability, unless retailer **solicited** a purchaser to participate in an unlawful claim of an exemption. **Seller must maintain proper records** of exempt or excluded transactions.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Ag Pro, LLC v. SCDOR, Docket No. 21-ALJ-17-0331-CC (July 11, 2022)

- 3 issues related to 2,732 (of 10,000) transactions
  - Transactions without documented exemption elections
  - Transactions with no exemption claimed
  - Transactions involving ineligible property
- Practice tips:
  - TP bears burden of proving transactions are exempt – keep records!
  - TP cannot wait for the hearing to create issue of fact
  - Motion for Sanctions – R4P are not "abusive discovery"

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the tenth day of Taxmas, the Department gave to me…

…a Declaratory Judgment action re: home delivery of beer, wine, and alcoholic liquor.

(yes, these IPAs!)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Shipt, Inc. v. SCDOR, Civil Action No. 2021-CP-10-01318

- Declaratory Judgment Action
- Third-party provider that facilitates purchase and delivery of groceries, including alcohol
- Does South Carolina's Three-Tier System permit alcohol delivery?
  - Off-premises licensee must transfer possession of alcohol at licensed premises
  - Application requirements; no drive-through or curb service; limited exception for wine delivery directly to consumer
  - Policy and enforcement issues (no sales to minors or intoxicated; local jurisdiction Sunday sales; age of employees)

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

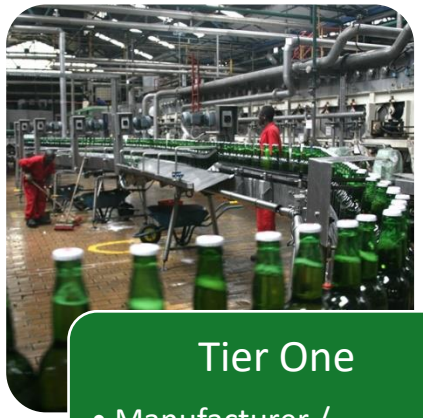
On the eleventh day of Taxmas, the Department gave to me…

…a challenge to the Three-Tier System.

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

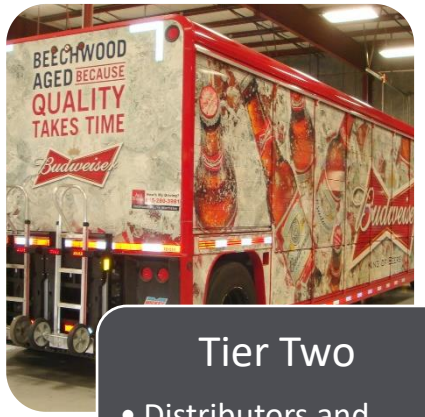
Columbia Fine Wine, Inc. et al. v. SCDOR; WSWA of SC, Civil Action No. 2022-CP-40-04397

Three-Tier System (designed to prevent "tied houses" (vertical integration) and excessive consumption of alcohol).



Tier One

- Manufacturer / Producer
- Distillers, Wineries, Brewers, Importers



Tier Two

- Distributors and wholesalers

Tier Three

- Licensed retailers
- Off-premise and on-premise

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Columbia Fine Wine, Inc. et al. v. SCDOR; WSWA of SC, Civil Action No. 2022-CP-40-04397

- Declaratory Judgment Action
  - Regulations exceed SCDOR power
  - Statutes and regulations are unconstitutional
  - Police powers v. economic protectionism
- General issues:
  - Ownership or financial interest in more than one tier
  - Retailer liquor dealer can only purchase from SC wholesaler
  - Liquors for exclusive use of specific retailer
  - Delivery – retailer or platform; no diverting in route or direct shipment

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

On the twelfth day of Taxmas, the Department gave to me…

…an $800 rebate!

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Rebate – Act 228 (2022)

- One time rebate for taxpayers that filed IIT return for 2021
- Rebate = tax liability for 2021, up to $700 (or prorated) ($800)
- DOR must issue refunds by 12/31/22
  - Hurricane Ian – extension filers moved from October 17 to February 15
- 2.6 million returns filed through October 17
- 1.39 million rebates
- $942 million
- Phone bank – over 29,000 calls through 12/9/22

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Miscellaneous

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

Miscellaneous / Upcoming Cases

Court of Appeals

- ***Amazon Services v. SCDOR*** (2019-1706) – (oral argument – Feb 14)
- ***Synovus Bank v. SCDOR*** (2020-0999) – On Preliminary List
- ***Duke Energy Carolinas v. SCDOR*** (2020-1542) – ready for consideration
- ***Lowe's Home Center, LLC v. SCDOR*** (2021-0031) – ready for consideration
- ***Colonial Pipeline Co. v. SCDOR*** (2021-0219) – ready for consideration

SOUTH CAROLINA DOR DEPARTMENT OF REVENUE

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/dor.sc.gov

@scdor

Jason P. Luther

Chief Legal Officer

Office of General Counsel

803-898-5785

jason.luther@dor.sc.gov

South Carolina Bar
Continuing Legal Education Division

2023 SC BAR CONVENTION

Tax Law Section

Saturday, January 21

The Effects of the New Funding on the IRS

Kris Gutting

No Materials Available