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Chevron and the Administrative Regulation of Indexation: Challenging the Cooper Memorandum

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SPECIAL REPORT

CHEVRON AND THE ADMINISTRATIVE REGULATION OF INDEXATION: CHALLENGING THE COOPER MEMORANDUM

by Linda Galler

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In this article, Professor Galler responds to a memorandum prepared by Charles J. Cooper, which concludes that the Treasury Department has legal authority to issue a regulation providing for indexation of capital gains. Professor Galler argues that Mr. Cooper misinterprets Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., a Supreme Court decision dealing with administrative authority to issue interpretative regulations, and misapplies the principles of administrative law that flow from the Chevron opinion. Professor Galler presents the method of analysis that should have been followed in the Cooper Memorandum, and that is customarily followed by courts considering challenges to administrative regulations.

Professor Galler gratefully acknowledges the contributions of her research assistants, Marji Gordon and Michael Lowitt.

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The president's recent interest in unilaterally indexing capital gains for inflation (see *Tax Notes*, Aug. 31, 1992, p. 1123) raises a number of interesting legal questions. Chief among them is the issue addressed in a 92-page memorandum prepared by Charles J. Cooper and Michael A. Carvin of Shaw, Pittman, Potts, and Trowbridge, on behalf of the National Taxpayers Union Foundation and the National Chamber Foundation (the "Cooper Memorandum"): does the Treasury Department have legal authority to promulgate a regulation providing that gain on the sale or exchange of a capital asset must be indexed to reflect inflation?[1] The Cooper memorandum answers in the affirmative, primarily on the basis of an analysis of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[2] a case involving Environmental Protection Agency (EPA) interpretive regulations, in which the Supreme Court held that courts must accept an agency's reasonable interpretation of an ambiguous statute administered by the issuing agency. The Cooper Memorandum essentially concludes that *Chevron* would prevent a court from overturning a Treasury regulation mandating indexation, if the regulation were judicially challenged.

The Treasury and Justice Departments advised the president against issuing the regulation and, on the basis of that advice, the president has indicated that he will not pursue indexation administratively. Because the proposal raises numerous political and legal questions, it is difficult to know precisely the basis for the agencies' advice to the president. It is likely, however, that Treasury and Justice disagreed with the Cooper Memorandum's evaluation of *Chevron*, as that memorandum does not present an accurate examination of the issue.

Because tax professionals may not have been familiar with *Chevron* before the regulatory proposal

[1] IRC section 1012 defines the basis of property as "the cost of such property." Under the proposed regulation, "cost" would include adjustments to reflect inflation. The Cooper Memorandum refers to basis only in the context of property acquired by purchase. Thus, "cost" would refer to original purchase price plus inflationary adjustments.

[2] 467 U.S. 837 (1984).

was publicized,[3] the Cooper Memorandum is significant in providing an introduction to *Chevron* principles. The *Chevron* analysis presented in the Cooper Memorandum, however, is flawed. It is the purpose of this article to present the method of analysis that should have been followed in the Cooper Memorandum, and that is customarily followed by courts considering challenges to administrative regulations.[4]

The Chevron analysis presented in the Cooper Memorandum . . . is flawed.

Although beyond the scope of this article, it should be noted preliminarily (but without any opinion or conclusion) that the Cooper Memorandum omits a crucial issue by assuming that the proposed regulation would be interpretive merely because it would be issued under the general authority of IRC section 7805(a), which permits Treasury to "prescribe all needful rules and regulations" for enforcement of the Internal Revenue Code. The fundamental distinctions between legislative and interpretive regulations do not emanate from the enabling authority (i.e., code section-specific authorization versus general IRC section 7805(a) authority), but rather pertain to content and legal effect. Legislative rules create rights and duties; they "complete an incomplete statute and affect rights or obligations."[5] Because they amount to making law, legislative rules must be issued under explicit statutory authority.[6] Interpretive rules, on the other hand, merely state an agency's opinion on what the statute means; they articulate rights and duties already implicit in a statute, but do not create new ones.[7] Interpretive rules are issued under the general authority of a federal agency to interpret and enforce a particular statute.[8]

In a legal proceeding challenging the validity of a Treasury regulation mandating indexation, the court would have to decide whether Treasury had the authority to issue the regulation before reaching the substantive issues raised by *Chevron*. If it were characterized as legislative in terms of content, the regulation would represent an unlawful exercise of administrative power since Congress did not expressly empower Treasury to issue such a rule, and the regulation would be void without regard to *Chevron*.

I. AN INTRODUCTION TO *CHEVRON*

In *Chevron*, the Supreme Court considered the validity of an EPA regulation that allowed states to treat all pollution-emitting devices within the same industrial plant as though they were encased within a single "bubble." As a prelude to its analysis of the "bubble" regulation, the Court established the following two-step approach:

> First, always is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.[9]
>
> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The question how to determine whether an agency's interpretation is "permissible" was answered as follows:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.
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> Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not

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[3]It is understandable that tax professionals would have paid little attention to *Chevron* since *Chevron* only recently became a part of tax jurisprudence. The Tax Court has cited *Chevron* only twice, in opinions issued eight years after *Chevron* was decided by the Supreme Court. *Georgia Federal Bank v. Commissioner*, 98 T.C. No. 9 (1992); *Pepcol Manufacturing Co. v. Commissioner*, 98 T.C. No. 11 (1992). In *Peoples Federal Savings & Loans Association v. Commissioner*, 948 F.2d 289, 299 n. 6 (6th Cir. 1991), *rev'g*, T.C.M. (P-H) para. 90,129, the Sixth Circuit Court of Appeals criticized the Tax Court for its lack of attention to *Chevron*. The Sixth Circuit's rebuke apparently enlightened the Tax Court as to the existence of *Chevron* and its role in judicial challenges to administrative rules.

[4]Because the Cooper Memorandum pertains only to regulations, this article likewise is so limited. Issues that could be raised in challenges to less formal administrative pronouncements are not addressed either by the Cooper Memorandum or this article. *But see* Linda Galler, "Emerging Standards for Judicial Review of Revenue Rulings," 72 *B.U.L. Rev.* (1992) (forthcoming).

[5]*See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); *cf. New Jersey v. Department of Health and Human Services*, 670 F.2d 1262, 1282 (3d Cir. 1981) (legislative rules create new law affecting rights and obligations of individuals).

[6]*Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Chrysler*, 441 U.S. at 302-03.

[7]*Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944); *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); *cf. New Jersey v. Department of Health and Human Services*, 670 F.2d at 1281-82 (interpretive rules give guidance to agency staff and affected parties as to how the agency intends to administer a statute or regulation).

[8]*General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976).

[9]The court employs "traditional tools of statutory construction" to ascertain congressional intent. *Chevron*, 467 U.S. at 843.

substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

The Cooper Memorandum inverts the two-step approach by starting with (and, then, concentrating on) the delegation issue (step 2) rather than the intent issue (step 1). The importance of sequence is not merely a reflection of compulsive tendencies on the part of this author, but rather goes to the heart of the *Chevron* question. If a court were to find that Congress intended "cost" in the context of basis to refer only to the original purchase price of property, the case would be decided, the government would lose, and the delegation and reasonableness issues would be moot. On the other hand, if the court found that Congress manifested no specific intent, *Chevron* could compel an assumption that Congress intended to delegate authority to Treasury to interpret the term "cost," and the only remaining issue would be the reasonableness of the regulation.

II. *CHEVRON* STEP 1

In step 1, the court must determine whether Congress has spoken to the question addressed in the regulation. If Congress' intent is clear, the agency's interpretation must be consistent with congressional intent. The *Chevron* opinion explicitly directs courts to employ "traditional tools of statutory construction" in ascertaining congressional intent.

A. Legislative History

Among the tools of statutory construction traditionally used by courts is the examination of legislative history. Because the court's sole task in step 1 is to discern Congress' state of mind when it enacted the statute that is interpreted by a challenged regulation, only the legislative history of the enacting Congress is relevant. In this regard, the Cooper Memorandum's lengthy discussion of postenactment congressional activity (or inactivity) in the area of indexation is largely irrelevant.[10]

The account of legislative history presented by the Cooper Memorandum supports an argument that Congress intended the term cost to refer only to the original purchase price of property. The statutory rule that "the basis [of property] shall be . . . the cost"[11] was originally enacted in 1918. This definition of basis derived from Treasury Regulations issued under the Revenue Act of 1916, which referred to capital gain as "the difference between the price at which disposed of and the cost."[12] Although these regulations did not define "cost," the Treasury Department had issued several Treasury Decisions ("TDs") indicating that "cost" referred to the original purchase price paid for property. Because the court in step 1 would be attempting to ascertain Congress' state of mind when it statutorily adopted the then-existing administrative definition of basis, the existence of the TDs is highly probative. The assertion in the Cooper Memorandum that the importance of the TDs should be discounted because they do not have the interpretive significance of Treasury regulations simply is inapposite. Because the committee reports do not refer to the TDs, however, a court would have to draw its own conclusions regarding the weight or importance of the TDs.[13]

In step 1, the court must determine whether Congress has spoken to the question addressed in the regulation.

In maintaining that only highly specific legislative history "supersedes and controls an arguably inconsistent agency interpretation," the Cooper Memorandum misses the point. Even if the court were to conclude that the legislative history alone is not persuasive, that history would still be considered together with other factors in accordance with traditional statutory construction principles, and the combination could be persuasive. Of course, a lack of specificity in the committee reports also contributes to an argument that

[10]In a memorandum responding to the Cooper Memorandum (*see Tax Notes*, Sept. 7, 1992, p. 1252, *92 TNT 179-45*), the New York State Bar Association (NYSBA) Tax Section misses this point as well. The NYSBA argues that post-1918 legislative activity indicates that Congress has recognized that the "cost" of property for basis purposes does not reflect adjustments for inflation. Regardless of the accuracy of this assertion, even the expressed views of subsequent Congresses are irrelevant in determining what Congress meant when it first used the term "cost" to define basis.

Legislative reports issued in conjunction with legislation that substantially reenacts the statutory provision might be considered relevant in this connection. As discussed in the Cooper Memorandum, however, congressional reports that advert to basis have consistently referred to original purchase price.

[11]Revenue Act of 1918, ch. 18, section 202, 40 Stat. 1057, 1062 (1919); *accord* IRC section 1012.

[12]Treas. Reg. 33, art. 90 (1918).

[13]Even if the court did not regard the TDs as part of legislative history, they might be considered in connection with common usage, *see infra*, since the TDs reflect the manner in which the term "cost" was commonly used in 1918.

legislative intent is equivocal and, therefore, that the court should proceed to step 2.[14]

B. Common Usage

Another traditional tool for ascertaining congressional intent is the analysis of common usage of the statutory term or phrase at issue.[15] Because the sole objective in *Chevron's* step 1 is to understand Congress' state of mind when it enacted the statute that is interpreted by a challenged regulation, only the common usage at the time of enactment should be considered.[16] Although the dictionary definition of "cost" probably has not changed much over the years, the Cooper Memorandum should have quoted from a 1918 dictionary rather than a dictionary published in 1987. Similarly, the 1980s economic theory discussed in the Memorandum sheds no light on congressional understandings in prior years.[17]

C. Legislative Reenactment

Under the doctrine of legislative reenactment, administrative pronouncements are deemed to receive congressional approval whenever Congress reenacts an interpreted statute without amendment.[18] The doctrine is often expressed as positive law — once congressional endorsement has been presumed, the agency interpretation is accorded "force equivalent to a congressionally enacted statute"[19] — but also is depicted as a presumption, which can be rebutted by demonstrating that Congress was not aware of the agency interpretation and therefore could not have tactitly approved of it,[20] or merely as an aid in statutory construction.[21]

In the *Chevron* context, the relevance of legislative reenactment is limited to its use as an aid in statutory construction.[22] Despite courts' historical reliance on legislative reenactment, however, the doctrine sheds no light on the intentions of the enacting Congress, and, in any event, is based on fabricated assumptions regarding the knowledge and motivations of subsequent Congresses. Therefore, little can be inferred from reenactment of the code's basis provisions.

Because it is merely a tool of statutory construction, the legislative reenactment doctrine cannot prevent an agency from altering a long-standing position. In fact, the Supreme Court in *Chevron* expressly endorsed agencies' license to change their positions, and rejected the notion that long-standing agency positions are en-

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[14]Despite an acknowledgment that legislative meaning should not be inferred from legislative inaction, the Cooper Memorandum draws conclusions regarding congressional support for indexation from the fact that Congress recently passed a bill that included an indexation provision. This argument, however, precisely reflects the reason for courts' reticence to draw inferences from anything but the written word: it is impossible to know why any particular legislator voted in favor of a bill, particularly when he or she knew that President Bush would veto the bill as a whole. Thus, by voting in favor of the 1992 bill, members of Congress could effect political gains without any real cost. Moreover, it is possible that some members voted for the bill despite an aversion to indexation, because they believed that the legislation as a whole was preferable to no legislation at all.

Justice Scalia made this point eloquently in *Edwards v. Aguillard*, 482 U.S. 578, 636-637 (1987) (Scalia, J., concurring):

> [D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fund-raising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

[15]*See Davis v. United States*, 495 U.S. 472, 581 (1990).

[16]The TDs previously discussed would be relevant in demonstrating common usage of the term "cost" in 1918.

[17]The Cooper Memorandum discusses common usage in the context of step 2 rather than step 1. The Memorandum argues that common usage of "cost" is broad enough to encompass inflation adjustments to original purchase price. Common usage has no bearing on the delegation aspect of step 2 because that issue is reached only where the court has concluded that the statute is ambiguous and that congressional intent does not clearly resolve the ambiguity. The unresolved ambiguity itself establishes delegation; possible interpretations of the ambiguous language are irrelevant to the question of whether Congress has delegated interpretive authority.

Common usage may, however, be relevant to the reasonableness aspect of step 2. If common usage of the term "cost" encompasses inflation adjustments, a regulatory definition of "cost" that includes such adjustments arguably would be reasonable.

[18]*Helvering v. R.J. Reynolds Tobacco Co.*, 306 U.S. 110 (1939); *United States v. Correll*, 389 U.S. 299, 305 (1967).

[19]*Samson v. United States*, 144 F. Supp. 620, 629 (S.D. N.Y. 1956).

[20]*Mitchell v. Commissioner*, 300 F.2d 533, 537 (4th Cir. 1962).

[21]*Helvering v. Reynolds*, 313 U.S. 428, 432 (1941).

[22]*Cf.* The Honorable Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law," 1989 *Duke L.J.* 511, 518 (existence of long-standing, consistent agency interpretation that dates to the original enactment of the statute may be relevant to the first step of *Chevron* because it may show that the statute is not ambiguous and has a clearly defined meaning).

titled to more deference than recently adopted ones.[23] Thus, while the legislative reenactment doctrine has no bearing on the intentions of Congress when it enacted the statute that defines basis in terms of "cost," the doctrine itself would not prevent Treasury from changing its long-standing administrative construction of that statute.

D. Contemporaneous Administrative Constructions

Courts traditionally have used contemporaneous administrative constructions as aids in resolving statutory ambiguities based on an assumption that the issuing agency was familiar with congressional intent by virtue of its participation in the legislative process. Thus, an agency's postenactment interpretations are presumed to reflect congressional intent.[24]

Despite inclusion in the category of 'traditional tools of statutory construction,' contemporaneously issued interpretations may not accurately reflect congressional intent.

Despite inclusion in the category of "traditional tools of statutory construction," contemporaneously issued interpretations may not accurately reflect congressional intent. Judicial reliance on contemporaneous administrative constructions presumes not only that the agency is familiar with legislative meaning or intent, but also that it will faithfully implement the intent of Congress that the agency is deemed to have acquired. Courts, however, cannot realistically expect that Congress' intentions will always be implemented by executive branch agencies, which do not invariably agree with Congress, and may implement or construe statutes in contravention of legislative meaning. Although there is no indication in the basis area that Congress and Treasury were of two minds in 1918, courts hearing challenges to other regulations should not accede to contemporaneous agency interpretations, without corroborating indications of congressional intent.

Moreover, knowledge of congressional intent is a matter of legal argument, not historical reportage. Because there is no single purpose or design underlying most statutes,[25] the job of ascertaining what a majority of Congress must have intended belongs to judges and not administrators.

The Cooper Memorandum argues that provisions in the 1918 Treasury regulations defining "cost" in terms other than original purchase price (e.g., as fair market value in the context of gifts and bequests) reflected Treasury's view that it had some flexibility in defining the term "cost." Although this interpretation might reflect Congress' intention to give Treasury some latitude in defining "cost," contemporaneous constructions are, at best, flimsy evidence of congressional intent.

III. *CHEVRON* STEP 2

A court moves on to *Chevron's* step 2 only if it has determined in step 1 that congressional intent is not clear on the question addressed in the regulation. Step 2 consists of two mutually exclusive questions:

> 1. Is there an express delegation of authority to the agency to elucidate by regulation? If so, the regulations are given controlling weight unless they are arbitrary, capricious, or contrary to the statute.
>
> 2. Is there an implicit delegation to the agency? If so, the court must accept any reasonable interpretation made by the agency.

One might recognize the separation of explicitly delegated rules from other rules as merely reflecting the historical distinction between legislative and interpretive rules. *Chevron*, then, would be consistent with prior case law, under which legislative rules were reviewed under the more exacting arbitrary or capricious standard, while interpretive rules were entitled to less regard under a reasonableness standard.[26] The element

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[23] An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Chevron, 467 U.S. at 863-64. Indeed, Justice Scalia has suggested that *Chevron* acknowledges that an agency's change in position need not reflect an admission that in its prior position, the agency "got the law wrong." Rather, *Chevron* recognizes an agency's prerogative to change its position when new information surfaces or social attitudes change. Scalia, *supra* note 22, at 518-19.

[24] *See, e.g., National Muffler Dealers Association, Inc. v. United States*, 440 U.S. 472, 477 (1979). Some courts give weight to contemporaneous constructions without ever considering the issuing agency's familiarity with legislative purpose. These courts view contemporaneous constructions as necessary components in the effectuation of newly enacted statutes. Thus, the responsibility for implementing a statute may compel a modicum of freedom to issue rules or guidance to carry out the statutory mandate. *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496, 501 (1948). These opinions have no bearing under *Chevron* because they do not inquire into, or reflect upon, the intent of the enacting Congress.

[25] The assumption that congressional intent can be ascertained in the same sense that a single individual intent can be ascertained is itself highly questionable, as is evidenced in the spirited debate that is ongoing among several prominent judges. *See* Abner J. Mikva, "Reading and Writing Statutes," 48 *U. Pitt. L. Rev.* 627 (1987); Abner J. Mikva, "Statutory Interpretation: Getting the Law To Be Less Common," 50 *Ohio St. L.J.* 979 (1989); Kenneth W. Starr, "Observations About the Use of Legislative History," 1987 *Duke L.J.* 371; Patricia M. Wald, "Some Observations on the Use of Legislative History in the 1981 Supreme Court Term," 38 *Iowa L. Rev.* 195 (1982). An interesting aspect of this debate is the consensus on both sides that there is no single purpose or design underlying most statutes. *See, e.g.*, Mikva, *supra*, at 980; Wald, *supra*, at 206; Starr, *supra*, at 375-76; *accord Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1987) (Scalia, J., concurring).

[26] *See, e.g., Dresser Industries, Inc. v. Commissioner*, 911 F.2d 1128, 1137-38 (5th Cir. 1990) (legislative Treasury regulation reviewed under arbitrary or capricious standard).

arguably added by *Chevron*, however, is the requirement that agency interpretations that are reasonable *must* be accepted, even where the court believes that the agency's choice among competing policies was not the best.[27]

Many courts and commentators, however, have interpreted *Chevron's* second step as mandating the same level of judicial acceptance for both legislative and interpretive rules.[28] On this reading, *Chevron* was "both evolutionary and revolutionary,"[29] as acceptance of interpretive agency interpretations had never before been so emphatically demanded. Treating legislative and interpretive rules equally for purposes of judicial deference is based on a presumption that by its silence, Congress intends to delegate policymaking authority to the agency. Thus, an implicit delegation is equivalent to an explicit one, and the status of legislative and interpretive rules is identical. After *Chevron*, interpretive rules may have legislative effect.[30]

A regulation . . . is likely to be sustained if a judicial challenge reaches the question of reasonableness.

While Congress has not expressly delegated to Treasury the authority to construe the terms "basis" or "cost," *Chevron* presumes that delegation exists whenever a statute is silent or ambiguous. In addition, the Treasury Department clearly has the general authority to construe and enforce the code under IRC section 7805(a). Thus, while an issue, the question of delegation would seem to weigh in favor of Treasury's right to issue the proposed regulation.[31]

The regulation would be reviewed under a reasonableness standard. *Chevron's* formulation of that standard slants generously toward the agency: a regulation need not be the only permissible interpretation of a statute and, if reasonable, an agency interpretation must be upheld even though the reviewing court might have construed the statute differently. An agency may change its interpretation so long as its new position is reasonable. A regulation, then, is likely to be sustained if a judicial challenge reaches the question of reasonableness.

Reasonableness is determined by reference to the agency's textual analysis and the compatibility of such analysis with the congressional purpose.[32] The court decides only whether the interpretation reflects the policy behind the statute and whether the agency has reasonably explained how the regulation serves the statutory objective.

The Cooper Memorandum discusses at great length factors supporting the reasonableness of the proposed regulations on indexation. Because agency interpretation is largely a matter of discretionary policymaking, and there are plausible arguments in support of reasonableness, it is likely that the proposed construction of "cost" would be upheld, if a challenge were to reach the reasonableness aspect of *Chevron's* step 2.

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[27]*See National Resources Defense Council v. Thomas*, 805 F.2d 410, 430 (D.C. Cir. 1986) ("The agency's response is also a reasonable interpretation of congressional intent, and in that situation the agency always wins under *Chevron*").

[28]Kevin W. Saunders, "Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation," 1986 *Duke L.J.* 346, 365-66; Note, "Judicial Review of Agency Rulemaking," 98 *Harv. L. Rev.* 247, 250-51 (1984); Sheldon E. Hochberg, " 'Two-Step' Method of Analysis Still in Transition After Chevron," *Nat'l L.J.*, May 16, 1988, at 22, 26 n. 9.

[29]Kenneth W. Starr, "Judicial Review in the Post-*Chevron* Era," 3 *Yale J. Reg.* 283, 284 (1986).

[30]*See* Saunders, *supra* note 28, at 346. Deference to agency interpretations under *Chevron* is not premised upon the expertise of the agency. Thus, even where regulations resolve broad questions of policy rather than technical issues relating to implementation, courts are required to accept them under *Chevron*.

[31]In its recent memorandum, *supra* note 10, the NYSBA argues that courts should not defer to a Treasury regulation indexing capital gains because only regulations requiring tax-related expertise are within the scope of Treasury's regulatory authority. According to the NYSBA, arguments advanced in favor of indexation relate to questions of economic policy, not tax policy.

The NYSBA's argument raises interesting issues in connection with the delegation aspect of step 2. On the one hand, *Chevron's* requirement that courts accept administrative positions is broad enough to encompass pure policy judgments:

> [A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66. Thus, it may be argued that any policy judgment reflected in the proposed regulation would be entitled to deference under *Chevron*. On the other hand, it may be argued that the delegation arising from the statutory gap or ambiguity in IRC section 1012 permits Treasury to resolve only tax policy issues arising under that section. Because a regulation indexing capital gains would reflect economic policy choices, not tax policy choices, the regulation might exceed Treasury's interpretive authority.

[32]*Continental Air Lines v. Department of Transportation*, 843 F.2d 1444, 1449, 1452-53 (D.C. Cir. 1988).

IV. CONCLUSION

If a Treasury regulation providing for indexation of capital gains were judicially challenged, the *Chevron* opinion would provide the legal milieu in which the legitimacy of the regulation was determined. As in any challenge to regulatory interpretation, the court would follow the two-step approach prescribed in *Chevron.* The challenge likely would be won or lost in step 1, the case ultimately coming down to the question whether Congress intended to permit Treasury to issue regulations that included inflation adjustments in "cost." If Congress were found to have intended "cost" to refer only to original purchase price, the government would lose. If, however, a court were to find that congressional intent was not clear, the existence of a statutory ambiguity would be regarded as signifying an implied delegation to Treasury of authority to construe the term "cost," within the bounds of reasonableness. Although the issue of reasonableness would be considered, a reviewing court would be required to accept any position that represented a plausible interpretation of the term.