

Substance Over Form? Phantom Regulations and the Internal Revenue Code

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I. Introduction

The Secretary of the Treasury is a busy man. In addition to serving as the principal economic advisor to the President, he is responsible for formulating domestic and international financial, economic, and tax policy, and participating in the formulation of other broad fiscal policies of national significance.¹ Though he receives considerable assistance from personnel in the Department and from other government agencies, the Secretary's duties are nonetheless substantial.

It is hardly surprising, then, that when Congress imposes further duties upon the Secretary, he is sometimes slow to act. While a sluggish government is certainly nothing new, the problems posed by agency delay are particularly acute when Congress delegates to the Secretary the task of implementing policy objectives contained in the Internal Revenue Code.

Typically, these statutory delegations instruct the Secretary to issue regulations to accomplish a specific result, and take various forms. For example, Congress may provide that “the Secretary shall issue regulations allowing taxpayers to claim benefit X whenever Y occurs.” Where the Secretary has promulgated such regulations, the taxpayer may examine those regulations to determine if he is entitled to X upon the occurrence of Y. However, where such

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¹ <http://www.ustreas.gov/education/duties/treas/sec-treasury.shtml>. Congress created the Department of Treasury and initially described the scope of the Secretary's duties in 1789. *See* Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67 (“An Act to establish the Treasury Department.”). Various sections in the U.S. Code delegate further duties to him.

regulations have *not* been issued, the taxpayer faces considerable uncertainty in determining whether he is entitled to X.²

The taxpayer may be similarly confused when Congress has not framed the delegation in “mandatory” terms, as above, but has instead left the implementation of the policy objective to the Secretary’s discretion. These “discretionary” delegations are often in the form: “The Secretary *may* issue regulations allowing taxpayers to claim benefit X whenever Y occurs.” At other times, Congress does not explicitly define scope of the Secretary’s discretion, but instead provides that a rule is to apply “in accordance with regulations” or “pursuant to regulations.”

Occasionally, these delegations instruct or authorize the Secretary to issue regulations disallowing the taxpayer a benefit or prohibiting a type of transaction otherwise permitted under the Code. The taxpayer may again be uncertain whether his course of conduct will subject him to penalties if regulations have not been issued.³ Similarly, the Internal Revenue Service may be uncertain whether it can enforce provisions of this sort in the absence of regulations.⁴

Among the hundreds (perhaps thousands) of delegations found in the Internal Revenue Code, considerable variation in the form of such delegations exists. Common to all these delegations is a difficult issue—absent any action by the Secretary, does the delegating statute have any operative effect? Or, in the language commonly used by courts in the administrative procedure setting, is the statute “self-executing” in the absence of regulations? As the number of

² See, e.g., Jasper L. Cummings, *Treasury’s 2005-2006 Corporate Priority Guidance Plan*, Tax Notes, Sept. 5, 2005, p. 1195 (“Some IRS agents have been willing to allow a section 336(e) election without regulations, but the word is that the Joint Committee on Taxation disagrees, in reviewing large refund claims.”) and Lee A. Sheppard, *News Analysis: Corporate Planning and Tax Shelters*, Tax Notes, Oct. 10, 2005, p. 165 (“Some taxpayers take the position that they [can make the 336(e) election in absence of regulations]...At the PLI seminar, Alexander [IRS associate chief counsel (corporate)] insisted that taxpayers cannot make that election in the absence of regulations, because it is not self-implementing.”).

³ See, e.g. Morris L. Kramer, *Final Guidance On C Corporations and Asset Transfers to Reits*, 30 Real Estate Tax’n 148 (2003) (“There were many practitioners who believed that Section 337(d) was not self-executing and that, absent the actual issuance of regulations, neither Section 337(d) nor the Notice itself should be given effect. To the author’s knowledge, however, nobody has been brave enough to take this position in an actual case.”).

⁴ See, e.g., IRS FSA 200018018, available at 2000 WL 1930441 (concluding that an attempt to enforce § 448(d)(8) in the absence of regulations would pose “litigation hazards”).

delegations continues to rise, and the Treasury's backlog grows, determining whether such delegations are self-executing has become increasingly important. Though Congress sometimes sets forth temporary or default rules to remain in effect until the Secretary exercises his delegated authority to promulgate different rules, such provisions are uncommon.

As one might expect, where the delegating statute offers a benefit the taxpayer commonly argues that the Secretary should not be able to withhold the enjoyment of such benefits by delaying the issuance of regulations. Similarly, where the delegation is taxpayer-unfriendly, the Service may argue that the statute is self-executing, notwithstanding the lack of implementing regulations. In prior litigation addressing these issues, the parties have typically devoted much of their energy to scrutinizing the language in the statute describing the rules or policies that the Secretary might implement (the "substance"), while paying less attention to the language that delegates to him the authority to prescribe such rules and limits the manner in which he may prescribe them (the "form").

Over the past several decades, the lower courts have had numerous occasions to address these arguments, with many of the cases decided in the U.S. Tax Court. Though the decisions are hardly a model of consistency, the courts have generally treated statutory delegations as self-executing, even in the absence of implementing regulations. To give the statute effect, the reviewing court invokes "phantom regulations,"⁵ deciding the case in accordance with the interpretation it believes the Secretary might offer were he to issue regulations. Though the

⁵ The phrase "phantom regulations" is generally used by courts to refer to those rules which an agency has failed to issue pursuant to a statutory delegation but wishes to enforce anyway. *See, e.g.*, *Twenty Four Hour Fuel Oil Corp. v. United States*, 38 F.Supp.2d 223 (E.D.N.Y.1999). ("[The IRS is operating under the misconception that] if the plaintiff was not complying with those phantom regulations then it must be operating improperly and, therefore, clearly not entitled to the relief sought."); *Branstad v. Veneman*, 212 F.Supp.2d 976, 994 (N.D. Iowa 2002) ("The Branstads also argue that the USDA has relied on a 'phantom' regulation...because no such regulation exists."). *See also Dana Corp. v. City of Toledo*. Not Reported in N.E.2d (Ohio App. 6 Dist.), *available at* 2000 WL 1867257.

courts sometimes express discomfort with doing the Secretary's job for him, they believe that doing so is consistent with Congress's intent.

Several commentators have analyzed this unusual response to “spurned”⁶ delegations, but have focused mostly on cases interpreting delegations found in the Internal Revenue Code.⁷ Because those cases are themselves inconsistent, however, it is not possible to extract clear principles from analysis of those cases alone. Surprisingly, a close examination of *non-tax* sources reveals a clear (if imperfect) solution to the problems posed by spurned delegations. This paper fills the void in the current literature by examining these overlooked authorities, and argues that they mandate an approach different from the ones currently used to deal with spurned delegations. Part II briefly describes the prevailing approaches used by the courts and the IRS. Part III criticizes these approaches, arguing that they ignore well-settled principles of administrative law and improperly render the statute's delegating language superfluous. Part IV argues that phantom regulations are never an appropriate response to agency delay, and offers an alternative remedy available to taxpayers aggrieved by the Secretary's inaction.

Part II: Current Approaches to Spurned Delegations in the Code

⁶ See Phillip Gall, *Phantom Tax Regulations: The Curse of Spurned Delegations*, 56 Tax Law. 413 (2003). Phrases coined by Gall (e.g. “spurned delegation,” “mandatory delegation,” “discretionary delegation,” etc.) are followed in this paper.

⁷ In addition to Gall, *id.*, see, e.g., William F. Ferreira, Note, *Fishing For Regulations: The Tax Court Makes Its Own Sourcing Rules in Francisco v. Commissioner*, 57 Tax Law. 817 (2004); Robert J. Crnkovich & Kenneth H. Heller, “*To the Extent*” Provisions: *When Do They Operate Without Regulations?*, 76 J. Tax'n. 176 (March 1992); Shop Talk, *No Regs.? “Less than Clear” Statutes May Be Unenforceable, CA-7 Says*, 86 J. Tax'n 318 (May 1997); Shop Talk, *No Final Regs.? Taxpayer Wins Again*, 87 J. Tax'n 253 (October 1997). Commentators have thus far expressed some approval for the use of phantom regulations. See, e.g., Gall at 450 (“Phantom regulations should be applied to effect a mandatory delegation in two situations: (1) where the delegation is intended to provide a taxpayer benefit and (2) where it is reasonably clear how to accomplish the desired result of the delegation. In all other situations, courts should not get involved.”) and Ferreira at 837 (“When it is *absolutely clear* how the Secretary would have effectuated congressional intent, the court stands on firm ground when applying its own rules in the absence of regulations. In all other cases, the court must exercise great caution.”). This paper concludes instead that phantom regulations are *never* appropriate—the courts' use of such regulations amounts to judicial lawmaking. See *infra* Parts III and IV.

Unsurprisingly, taxpayer-friendly delegations are the most commonly litigated in the courts, as the Service frequently challenges taxpayers who claim tax benefits in the absence of regulations contemplated by Congress.⁸ When the situation is reversed, the Service often argues that taxpayer-unfriendly delegations *are* self-executing.⁹ On other occasions, both the Service and the taxpayer will agree that a delegation is self-executing, but will dispute the contents of the phantom regulations.¹⁰

The current judicial treatment of spurned tax delegations is quite confused, and the Service's inconsistent litigating positions do not help clear the confusion. Because it might be impossible to reconcile the approaches, no attempt to do so is made here. Rather, this paper discusses the most common approaches employed by the courts, and argues that they should be abandoned in favor a textual approach.

The major cases deal largely with *mandatory* delegations, which the courts usually deem self-executing.¹¹ Typically, one of the following approaches (singly or in combination with others) is used to reach that conclusion:

- (A) The court determines that the legislative history provides sufficient guidance to enable the court to ascertain the content of the phantom regulations.
- (B) The court decides that, because the delegation is taxpayer-friendly, treating the statute as self-executing is the only equitable solution.

⁸ See, e.g., *Hillman v. Commissioner*, 114 T.C. 103, 111 (2000), *rev'd*, *Hillman v. Internal Revenue Service*, 263 F.3d 338 (4th Cir. 2001).

⁹ See, e.g., *Traylor v. Commissioner*, 59 T.C.M. 93 (1990).

¹⁰ See, e.g., *Estate of Hoover v. Commissioner*, 102 T.C. 777 (1994), *rev'd*, 69 F.3d 1044 (10th Cir. 1995), *acq.* 1999-1 I.R.B. 5.

¹¹ Courts that have addressed statutory delegations in Subtitle A (i.e. those relating to the income tax) have generally treated those statutes as self-executing. However, the Tax Court has ruled that a *discretionary* delegation is not self-executing. See *Alexander v. Commissioner*, 95 T.C. 467 (1990), discussed *infra* note 34. When a statutory delegation does not relate to the income tax, courts usually follow the language of the statute, and not the approaches described in this Part. See *infra* note 113.

(C) The court examines the statute, and if the delegation relates to “whether” a specified result shall occur, the statute will not be self-executing; however, if the delegation relates merely to “how” that specified result shall occur, the statute *will* be deemed self-executing.

Under each of these approaches, the reviewing court is principally concerned with the *substance* of the statute. In (A), where the legislative history offers guidance as to the substantive content of the regulations, the statute will be treated as self-executing consistent with that guidance. In (B), the court will determine whether the substance of the delegating statute is intended to confer a benefit upon taxpayers, in which case the court will treat the statute as self-executing to prevent inequity. Lastly, (C) requires the court to examine the substance of the delegation to determine whether Congress simply required the Secretary to determine “how” a tax provision applies, as opposed to providing him the discretion to determine “whether” the tax result in question should occur at all.

In practice, the courts often blend these approaches. For example, under both the “whether versus how” and “equity” approaches the court will likely consult legislative history, though the absence of such history will not necessarily stop the court from invoking phantom regulations. The tripartite division described above is nonetheless useful in understanding the judicial attitude towards spurned delegations in the Code. The discussion below will use this division for analytical purposes, though any given opinion may rely on more than one of these approaches.

A. Legislative History Approach

i. *International Multifoods v. Commissioner*¹²

¹² 108 T.C. 579 (1997).

In *Multifoods*, the Tax Court confronted a statutory delegation that had languished in the Code for more than a decade. Perhaps frustrated by the Secretary’s failure to issue final regulations,¹³ the court gave effect to the statute by invoking phantom regulations consistent with its legislative history.

At issue in *Multifoods* were the “source” rules governing sales of personal property. The Internal Revenue Code generally draws distinctions between income derived from domestic sources and income derived from foreign sources.¹⁴ Classifying income (or a portion of such income) as either “U.S. source” or “foreign source” can have significant consequences for the taxpayer.

The source of income from sales of personal property is now determined under IRC § 865(a),¹⁵ which generally provides that income from the sale of personal property will be sourced at the residence of the seller. Section 865(a) does not provide source rules for *losses* relating to the sale of personal property, though § 865(j)(1) instructs the Secretary to develop those rules. That section provides:

The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of this section, including regulations...relating to the treatment of losses from sales of personal property.¹⁶

Prior to the Tax Reform Act of 1986, sections 861 and 862 of the Code provided source rules governing the sales of personal property, and the Secretary had issued regulations pursuant to those sections providing source rules for losses.¹⁷

¹³ At the time the case was decided, the Secretary had issued only proposed regulations. *See* 61 Fed. Reg. 35696 (July 8, 1996).

¹⁴ *See* I.R.C. §§ 861-865.

¹⁵ Unless the context suggests otherwise, all section references are to the Internal Revenue Code of 1986, as amended.

¹⁶ I.R.C. § 865(j)(1).

¹⁷ Treas. Reg. 1.861-8(e)(7).

In *Multifoods*, the taxpayer (a U.S. resident) incurred a substantial loss from the sale of personal property and argued that the loss should be deemed U.S. source. The taxpayer contended that the § 865(a) “residence” rule compelled symmetrical treatment for both gains and losses.¹⁸ The Commissioner countered that until he exercised his authority under § 865(j)(1), the pre-existing regulations applied and required that the taxpayer’s loss be deemed foreign source.¹⁹

The Tax Court first held that §§ 861-862 (and the regulations issued thereunder) were no longer applicable to determine the source of gain or loss from the sale of personal property, as the Tax Reform Act’s amendments removed such sales from the scope of those sections. The court found that the § 865(j)(1) delegation instead governed determinations of source, notwithstanding the absence of regulations, and delved into extra-statutory sources to determine legislative intent. In addition to the statute’s legislative history, the court consulted the so-called “Blue Book,” a guide prepared by the Joint Committee on Taxation to explain previously enacted legislation. The court stated:

First, we conclude [from an analysis of the Blue Book] that Congress did intend that regulations promulgated pursuant to section 865(j) would embody a “particular rule”; i.e., residence-based sourcing would generally be used for losses realized on the sale of noninventory personal property. Second, [we find that the Commissioner’s] reliance on the absence of any mention of section 865(j) in the committee reports is erroneous, since Congress articulated the overall purpose behind section 865 in the legislative history... In addition, the [Blue Book] confirms that it was expected that losses generally would be sourced similarly to gains.²⁰

¹⁸ *Multifoods*, 108 T.C. 584.

¹⁹ *Id.* Though the opinion does not say so explicitly, the Commissioner probably relied on § 7807(a) in making this assertion. See IRS FSA dated February 28, 1995, n.1 (“Until regulations are published under section 865(j)(1), section 7807(a) provides that existing regulations that could be prescribed under the authority of section 865(j)(1) shall apply.”). See *infra* Part III.B for a discussion § 7807. The Commissioner probably erred in advancing this argument. See Bruce N. Davis & Steven R. Lainoff, *U.S. Taxation of Foreign Joint Ventures*, 46 Tax L.Rev. 165, n.348 (1991) (“Note that the provisions of § 7807(a) do not operate to mandate the application of § 1.861-8(e)(7) of the regulations during the period prior to the promulgation of regulations under the 1986 Act, since title 26 was not reenacted by the 1986 Act and, therefore, those regulations were not ‘in effect immediately prior to the enactment of this title.’”).

²⁰ *Multifoods*, 108 T.C. 584.

Having determined the “particular rule” it believed Congress contemplated when it delegated rulemaking authority to the Secretary, the court concluded that the statute should be operative, even without regulations. “When Congress directs that regulations be promulgated to carry out a statutory purpose, the fact that regulations are not forthcoming cannot be a basis for thwarting the legislative objective. It is well established that the absence of regulations is not an acceptable basis for refusing to apply the substantive provisions of a section of the Internal Revenue Code.”²¹ Gleaning Congress’s supposed intent from the Blue Book and the statute’s legislative history, the court held that § 865(j)(1) required the taxpayer’s loss to be deemed US-source, consistent with the taxpayer’s residence. Though the delegation did not state that the Secretary must adopt a *residence*-based source rule, the court nonetheless used phantom regulations to find for the taxpayer. Perhaps because of the statute’s ambiguity on this point, the court warned that it was not establishing a broad rule, and that the residence-based sourcing approach used in *Multifoods* would not always be appropriate:

We emphasize the narrow scope of our decision herein. Our opinion does not hold that sec. 865 requires that losses realized on the disposition of noninventory personal property must always be sourced at the residence of the seller. To the contrary, we recognize, and the [Blue Book] confirms, that exceptions to the general rule of residence-based sourcing may be appropriate to prevent abuse.²²

ii. *The Service’s Approach: T.A.M. 2004-47-037*²³

Though the IRS has at times argued that a spurned delegation is self-executing, and at other times argued that it is not,²⁴ a recent Technical Advice Memorandum perhaps best reflects the Service’s current approach.²⁵

²¹ *Multifoods*, 108 T.C. 587.

²² *Multifoods*, 108 T.C. 589 n.7.

²³ November 19, 2004.

²⁴ See *supra* notes 8 & 9.

²⁵ Prior guidance had adopted other approaches to spurned delegations. See, e.g., T.A.M. 1997-14-002 (Dec. 6, 1996) (applying “whether versus how” test, discussed *infra* in III.C). See also T.A.M. 1994-44-001 (July 6, 1994).

In T.A.M. 2004-47-037, the Service considered whether a reference to regulations in § 384(c)(3) had any effect in the absence of action by the Secretary. Section 384(c)(3) defines the term “preacquisition loss” for purposes of § 384’s loss limitations. The flush language to § 384(c)(3) provides, “Except as provided in regulations, the net operating loss shall [for purposes of calculating pre-acquisition losses] be *allocated ratably* to each day of the year.”²⁶

Notwithstanding the lack of regulations, the taxpayer argued that a method other than “ratable allocation” could be used to allocate the taxpayer’s net operating loss (“NOL”).

The Service rejected the taxpayer’s argument.²⁷ After examining the statute’s legislative history, the Service concluded that the statute was not self-executing:

It is the position of the IRS that a statute is not self-executing with respect to a reference to regulations unless the statute itself or the legislative history gives some specific guidance as to what the content of the regulations should be. Where such guidance is missing, the statute is not self-executing. Similarly, in a case such as the one at hand, where the statute not only specifically prescribes a method of allocation but also states that regulations can provide for a different method, but where neither the statute nor the legislative history provide any guidance as to what that other method might be, the statute is not self-executing with respect to regulations concerning such other method. In this case, the statute provides for ratable allocation, except as provided in regulations, and is silent as to what the regulations might provide. The legislative history of section 384 is silent on this issue.

The IRS did not believe itself constrained by the plain language of the statute, which states that ratable allocation of NOLs is required “except to the extent provided in regulations.” Rather, the Service concluded that the legislative history should be examined whenever a statute references regulations and that, if the legislative history is sufficiently enlightening, a statutory delegation may be self-executing even in the absence of regulations.

²⁶ Emphasis supplied.

²⁷ Curiously, the Service acknowledged that it had “issued PLRs in which it permitted taxpayers to use the ‘closing of the books’ method for purposes of allocating losses under § 384.” T.A.M. 2004-47-037 n.4 and accompanying text (citing PLR 200238017 (June 11, 2002), PLR 9734028 (May 22, 1997), PLR 9734029 (May 22, 1997), PLR 9734030 (May 22, 1997), PLR 9644004 (Aug. 6, 1996), PLR 9306013 (Nov. 13, 1992), and PLR 9027008 (March 30, 1990)).

The IRS further stated that exceptions to the ratable allocation method could be provided not only via the issuance of regulations, but also through informal agency guidance (such as Revenue Procedures or Announcements).²⁸ Again, the IRS did not accord the statutory language (“except as provided in regulations”) its plain meaning, and instead concluded that it could provide guidance in any form it chose so long as the guidance was consistent with statute’s legislative history.²⁹

B. The “Equity” Approach

The Tax Court has frequently found mandatory, taxpayer-friendly delegations self-executing, concluding that treating such delegations otherwise would inequitably deprive taxpayers of legislatively intended benefits. In this line of cases, the Tax Court has not examined the language of the delegation (other than to note that it is phrased in mandatory terms), but has instead concluded that forcing the taxpayer to wait for the issuance of regulations would be inequitable. For example, in *Occidental Petroleum v. Commissioner*,³⁰ the delegation at issue commanded the Secretary to promulgate a “tax benefit rule” for purposes of the alternative minimum tax. The taxpayer argued that the delegation was self-executing, even in the absence

²⁸ “Because the IRS has not issued regulations, a revenue ruling, a revenue procedure, a notice, or an announcement providing for an election under § 384 and establishing due date for such an election, we conclude that no such regulatory election exists.” T.A.M. 2004-47-037.

²⁹ The IRS had used this informal approach in previous guidance. See, e.g., Notice 2001-64, 2001-2 C.B. 316 (“Prior to the issuance of regulations, the determination of whether a transaction is a disguised sale of a partnership interest under § 707(a)(2)(B) is to be made on the basis of the statute and its legislative history.”). The IRS’s approach is arguably narrower than the Tax Court’s approach in *Multifoods*. In *Multifoods*, the Tax Court extracted broad principles from the statute’s legislative history, and then did its best to apply those principles to the taxpayer’s situation. The IRS’s approach, contrarily, seems to require concrete indications of the likely contents of the Treasury’s regulations, and not merely general principles. The Tax Court’s approach is quite favorable to taxpayers seeking benefits pursuant to a spurned delegation, but the circuits may be inclined to take a narrower view. Compare *Hillman v. Commissioner*, 114 T.C. 103 (2000) (employing phantom regulations based on a broad reading of a statutory delegation’s legislative history) with *Hillman v. Internal Revenue Service*, 263 F.3d 338 (4th Cir. 2001) (reversing the Tax Court, and refusing to invoke phantom regulations in the absence of concrete statements in the legislative history). However, guidance in a statute’s legislative history is not necessarily a pre-requisite to the enforcement of a spurned delegation. See, e.g. *Estate of Hoover v. Commissioner*, 102 T.C. 777 (1994) (applying phantom regulations despite the legislative history’s silence) and *IRS FSA* (February 2, 1994), available at 1994 FSA LEXIS 430.

³⁰ 82 T.C. 819, 829 (1984).

of regulations, and that the “tax benefit rule” contemplated by the statute should operate to reduce the taxpayer’s income tax liability. The Tax Court agreed:

[T]he failure to promulgate the required regulations can hardly render [the delegation] inoperative. We must therefore do the best we can with these new provisions. Certainly we cannot ignore them. Congress could hardly have intended to give the Treasury the power to defeat the legislatively contemplated operative effect of such provisions merely by failing to discharge the statutorily imposed duty to promulgate the required regulations. As already indicated, we must give effect to these provisions in the absence of regulations.³¹

Similarly, the Tax Court in *Hillman v. Commissioner* used phantom regulations to allow the taxpayer a benefit, though the decision was later reversed by the Fourth Circuit. The Tax Court stated:

Respondent’s position that congressionally intended benefits can be withheld simply by the refusal of the Secretary to issue regulations is peculiarly Draconian...we must do the best we can with the statutory provision now before us in the absence of pertinent regulations, since, in our view, the Secretary cannot deprive a taxpayer of rights which the Congress plainly intended to confer simply by failing to promulgate the required regulations.³²

Where the statute clearly requires the Secretary to issue regulations conferring a benefit to taxpayers, the Tax Court tends to treat the statute as self-executing.³³ Contrarily, the Tax Court has indicated that “discretionary” taxpayer-friendly delegations should not be given effect in the absence of regulations, though the case law on this issue is limited.³⁴

³¹ 82 T.C. at 829. Section 58(h), the delegation at issue, provided “Regulations To Include Tax Benefit Rule.--The Secretary shall prescribe regulations under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer’s tax under this subtitle for any taxable years.”

³² 114 T.C. 103, 113 (2000) (quoting *Estate of Maddox v. Commissioner*, 93 T.C. 228, 234, (1989)), *rev’d*, *Hillman v. Internal Revenue Service*, 263 F.3d 338 (4th Cir. 2001).

³³ *See also Francisco v. Commissioner*, 119 T.C. 317, *aff’d* 370 F.3d 1228 (D.C. Cir. 2004). In *Francisco*, the Tax Court, in a reviewed opinion, gave effect to a taxpayer-friendly statutory delegation. Though both parties agreed that the delegation was self-executing, the Tax Court did not shy away from acknowledging that taxpayer-friendly delegations generally should be deemed self-executing. “We have frequently held that the Secretary may not prevent implementation of a tax benefit provision simply by failing to issue regulations.” *Id.* at 324. Judge Foley provided a vigorous dissent. The D.C. Circuit affirmed, though noted that because neither party argued that the delegation was not self-executing, it had no occasion to pass on the issue. 370 F.3d at n.1.

³⁴ In *Alexander v. Commissioner*, 95 T.C. 467 (1990), *aff’d. without published opinion sub nom.* *Stell v. Commissioner*, 999 F.2d 544 (9th Cir.1993), the Tax Court, consistent with the Commissioner’s contention, did not

C. “Whether Versus How” Test

The Tax Court has frequently distinguished between delegations that it believes deal with “whether” a tax result should occur, and those that deal only with “how” that result shall occur. Under this approach, the Tax Court will not deem a statute self-executing where the regulations themselves would determine whether or not a particular rule will apply. Conversely, where the Tax Court concludes that Congress has merely recognized that regulations may be needed to fill in some of the details of a statute, the statute will be deemed self-executing. As the following discussion shows, it is not entirely clear how the Tax Court determines which characterization is appropriate for any given delegation.

i. *H Enterprises v. Commissioner*³⁵

Although the Tax Court did not explicitly discuss the “whether versus how” test in *H Enterprises*, this case laid the foundation for the doctrine’s later development, and it thus warrants comment here. The relevant facts in *H Enterprises* were as follows: H Enterprises, Inc., was a Delaware corporation and the parent of a consolidated group.³⁶ H Enterprises owned a controlling share of Waldorf Corp. stock.³⁷ Waldorf borrowed \$175 million from a third party (GECC) and granted a security interest in substantially all of its corporate assets to GECC.³⁸ Soon thereafter, Waldorf distributed approximately \$123 million to H Enterprises.³⁹ H

treat a delegation as self-executing where the statute provided that the taxpayer-friendly rule would “apply only to the extent provided in regulations prescribed by the Secretary.” 95 T.C. at 473. Presumably, the court believed the delegation left the implementation of the rule entirely to the Secretary’s discretion, and thus should not be deemed self-executing.

³⁵ 105 T.C. 71 (1995), *aff’d* 183 F.3d 907 (8th Cir. 1999).

³⁶ *Id.* at 74.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 75.

Enterprises used a portion of these proceeds to purchase portfolio stock,⁴⁰ and later received dividends with respect to this stock.

Though the Code usually allows a corporation a deduction for dividends received,⁴¹ § 246A reduces the deduction to the extent the dividends are attributable to *debt-financed* portfolio stock. The Commissioner argued that the stock H Enterprises purchased was in fact “debt-financed.” H Enterprises countered that the funds used to purchase the stock were attributable to *Waldorf’s* borrowing, and § 246A was thus inapplicable; because H Enterprises itself did no borrowing, its purchase of stock could not possibly be deemed “debt-financed.”

To support its position, H Enterprises argued that two statutory delegations indicated that regulations were required to apply § 246A(a) to related-party transactions. Section 7701(f)(1) provided, in relevant part:

Use of related persons or pass-thru entities. The Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of those provisions of this title which deal with the linking of borrowing to investment through the use of related persons.

Section 246A(f) provided a related delegation:

The regulations prescribed for purposes of this section under section 7701(f) shall include regulations providing for the disallowance of interest deductions or other appropriate treatment (in lieu of reducing the dividend received deduction) where the obligor of the indebtedness is a person other than the person receiving the dividend.

H Enterprises contended that, because the statutory delegations ordered the Secretary to issue regulations providing “other appropriate treatment” where a person other than the corporation that purchased the stock did the borrowing, and because no regulations had yet been issued, the

⁴⁰ H Enterprises also purchased tax-exempt securities with the funds received from Waldorf. The purchase of these securities posed issues similar to those posed by H Enterprises’ purchase of the portfolio stock. For simplicity’s sake, the discussion of those parallel issues is omitted here.

⁴¹ I.R.C. § 243.

IRS could not use § 246A(a) to deny H Enterprises the dividends received deduction. The Commissioner disagreed:

It is respondent's position that since there is no requirement in...section 246A...that the borrowings be by the same entity in an affiliated group that purchases the portfolio stock..., there is no prohibition to the statute's applying when one entity of the group borrows the funds and another entity purchases the stock or securities.⁴²

The Commissioner argued that the regulations presupposed by the statutory delegation would not *alter* the application of § 246A(a). Rather, the regulations would serve only to clarify the application of that section. The Tax Court found for the Commissioner, noting:

[I]t is clear that [7701(f)] does not state or imply that where one member of an affiliated group of corporations borrows money and another member of that group has that money transferred to it and uses the funds to purchase portfolio stock and tax-exempt securities, the provisions of section 246A [apply] only to the extent prescribed by regulations. We, therefore, conclude that the fact that regulations have not been issued under sections 246A(f) and 7701(f) does not resolve the issue in this case of whether the borrowing by one member of an affiliated group and the purchase of the portfolio stock and tax-exempt securities by another comes within the [statutory] provisions..."

The Tax Court thus viewed the § 7701(f) and § 246A(f) delegations as dealing only with "how" § 246A(a) might apply, as opposed to dealing with "whether" related-party transactions were covered by that section. It is against this backdrop that the court later articulated its "whether versus how" test.

ii. *Estate of Neumann v. Commissioner*⁴³

In *Neumann*, the Tax Court formalized its "whether versus how" test. After examining *H Enterprises* and related cases, the court concluded:

The teaching of the decided cases is that issuance of regulations is to be considered a precondition to the imposition of a tax where the applicable provision directing the issuance of such regulations reflects a "whether"

⁴² 105 T.C. 78.

⁴³ 106 T.C. 216 (1996).

characterization, and not where the provision simply reflects a “how” characterization.⁴⁴

In *Neumann*, the taxpayer’s estate wished to avoid application of the Generation Skipping Transfer tax (“the GST tax”), which complements other wealth transfer taxes imposed by the Code. Because the decedent was a nonresident alien, her estate’s representative argued that the transfer of U.S.-situs property to her grandchildren should not be subject to the GST tax. However, section 2663(2) grants the Secretary authority to prescribe various regulations for purposes of the GST tax, “including regulations providing for the application of [the GST tax] in the case of transferors who are nonresidents not citizens of the United States.”

The Commissioner argued that § 2663(2) imposed the GST tax on the transfer of the property, but the estate’s representative countered that § 2663(2) could not apply in the absence of regulations. The court found for the Commissioner, holding that § 2663(2) merely reflected “how” the GST tax should apply, and that a nonresident was subject to the tax even in the absence of regulations:

Under these circumstances and applying the teaching of the decided cases, we hold that the regulations contemplated under section 2663(2) reflect a “how” characterization and their issuance is not a necessary precondition to the imposition of the GST tax on the transfers involved herein. In enacting section 2663(2), Congress simply recognized that there would be problems of allocation and calculations of tax in respect of nonresident aliens because, unlike citizens and residents, not all the property of nonresident aliens is subject to U.S. estate tax.⁴⁵

In so ruling, the Tax Court did not heed the actual language of the delegating statute, which directed the promulgation of regulations “providing for the application” of the GST tax. Rather,

⁴⁴ *Id.* at 221.

⁴⁵ *Neumann*, 106 T.C. 221.

the opinion suggests that § 2663(2) *itself* imposed the tax on nonresident aliens, and that regulations were needed only to deal with ancillary issues.⁴⁶

The “whether versus how” test articulated in *Neumann* differs from the Tax Court’s holding in *H Enterprises*. *H Enterprises* involved a statutory scheme where section A provides a rule and section B delegates authority to the Secretary to promulgate regulations defining the details of section A’s operation. In *Neumann*, the court concluded that a single statute provided both a self-executing rule *and* a delegation to the Secretary to prescribe clarifying regulations. Whereas the *H Enterprises* formulation of the test is premised on (at least) two separate sections of a statute,⁴⁷ the *Neumann* approach focuses solely on the subsection delegating authority to the Secretary and decides if that delegation determines “whether” or merely “how” the statute shall operate.

Subsequent applications of the “whether versus how” test have followed the *Neumann* articulation.⁴⁸ However, in the Tax Court’s most recent opinion dealing with a spurned delegation, *Francisco v. Commissioner*, the test received no mention.⁴⁹ Nonetheless, the test may remain viable with respect to taxpayer-unfriendly delegations, like the one involved in *Neumann*, since *Francisco* involved a taxpayer-friendly delegation.⁵⁰

Part III: Criticisms of Current Approaches to Spurned Tax Delegations

As discussed in Part II, the courts have paid little attention to the manner in which Congress delegates to the Secretary the duty of issuing regulations. Rather, courts simply

⁴⁶ The court’s holding would make much more sense if the court cited another statute in Chapter 13 that imposed the GST tax on the transfer. If the court concluded, for example, that § 2601 imposed the tax on the transfer and that § 2663(2) related only to “how” that tax would be implemented, such a result would be consistent with *H Enterprises*.

⁴⁷ Or, at the very least, two independent clauses in a statutory section are required.

⁴⁸ *See, e.g.*, Hillman v. Commissioner, 114 T.C. 103 (2000) (“The command provision of section 469(l) contemplates regulations that reflect a ‘how’ characterization and does not contain the type of ‘only to the extent’ language that is found in statutes that are not self-executing.”).

⁴⁹ *See supra* note 33.

⁵⁰ For a further discussion of the factors that the Tax Court may consider in determining if a statute reflects a “whether” or “how” characterization, see Gall, *supra* note 6 at 430-441.

acknowledge that Congress has referenced “regulations,” and proceed to examine the substance of the delegation. Under these approaches, the language authorizing regulations is treated as mere surplusage to the delegation’s substantive provisions. The lower courts have ignored the otherwise well-settled principle that Congress, by delegating rulemaking authority to the Secretary, has entrusted him specifically to administer the statutory scheme.⁵¹

This Part argues that the courts and the IRS have likely underestimated the degree to which the use of “phantom” regulations subverts Congress’s desire to implement its policy objectives through the use of regulations developed pursuant to the APA’s notice-and-comment procedures. This Part also argues that numerous statutory and judicial authorities indicate that language in a statute referencing regulations should not be deemed mere surplusage.

A. Phantom Regulations Are an Inappropriate Substitute for Regulations Issued Pursuant to 5 U.S.C. § 553

Section 553 of the Administrative Procedure Act (the “APA”) governs informal rulemaking⁵² by federal agencies, including the Department of Treasury.⁵³ That section imposes certain procedural requirements on the agency issuing rules. The agency, first and foremost, must notify the public of its decision to engage in rulemaking.⁵⁴ Further, the agency issuing the rules must allow the public to comment on the substance of the proposed rules, and, upon consideration of such comments, must incorporate in the rules adopted a concise general

⁵¹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (“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.”).

⁵² “Informal” rulemaking in the context of the APA refers to rules issued pursuant to the notice-and-comment process. “Formal” rulemaking refers to rules developed pursuant to the trial-type procedures provided by 5 U.S.C. §§ 556-557. This paper makes numerous references to “informal” IRS guidance. These references use the term in its colloquial sense and indicate agency guidance promulgated in the form of Revenue Rulings, Notices, Announcements, etc.

⁵³ Section 551 of the APA generally defines “agency” to include any authority of the Government of the United States, which would of course include the Department of Treasury. 5 U.S.C. § 551(1) (2000).

⁵⁴ 5 U.S.C. § 553(b) (2000).

statement of their basis and purpose.⁵⁵ These requirements add considerable legitimacy to these rules, and Congress believed that rules promulgated in this way would be superior to those made through ad hoc agency action:

The public benefits of pre-adoption public participation are well recognized. Public input provides valuable information to rulemaking agencies at low cost to the agencies. Rules adopted with public participation are likely to be more effective and less costly to administer than rules written without such participation. They contain fewer mistakes. They are more likely to deal with unexpected and unique applications or exceptional situations, and are more politically acceptable to the persons who must live with them.⁵⁶

There is no shortage of literature detailing the wide benefits of the notice-and-comment process.⁵⁷ These benefits often lead an agency to issue rules through this process, even when it does not believe it is required by law to do so. Indeed, though the Treasury contends that regulations promulgated pursuant to the agency's *general* grant of rulemaking authority need not comply with § 553 of the APA, it nonetheless subjects such regulations to the notice-and-comment process.⁵⁸

Judicially-decreed phantom regulations, of course, comply with none of § 553's requirements and they consequently offer none of the benefits typically associated with notice-and-comment rulemaking. When courts invoke phantom regulations, the public is not notified of the proposed rule, nor is the public able to meaningfully comment on the substance of the proposed rules. Additionally, while § 553 ensures that interested persons are given the right to

⁵⁵ 5 U.S.C. § 553(c) (2000).

⁵⁶ Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. Law Rev. 703, 707-708 (1999).

⁵⁷ *See id.* at 708-709. *See also* Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59, 59-60 (1995).

⁵⁸ The preamble to a regulation issued pursuant to § 7805 often includes a statement that the Treasury has "determined that section 553(b) of the Administrative Procedure Act does not apply to these regulations." *See, e.g.*, T.D. 8799. *See also* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, Minnesota Law Review, Vol. 90, June 2006, at 6-7 (noting that "Treasury rarely admits to the applicability of the APA's notice and comment requirements" with respect to regulations issued under § 7805, but subjects those regulations to notice and comment regardless), available at SSRN: <http://ssrn.com/abstract=883721>. The statutes discussed in this paper are "specific authority" delegations, however, which Treasury acknowledges must comply with APA § 553.

petition for the amendment or repeal of a rule, taxpayers not involved in the actual litigation will have no opportunity to seek reconsideration of the court's phantom regulations. Similarly, when the IRS provides that a statute's legislative history should serve the function of regulations until actual regulations are issued, the public has no opportunity to participate in this "interim" rulemaking process.

Except in limited circumstances, the use of the notice-and-comment process is required whenever an agency wishes to engage in rulemaking.⁵⁹ Indeed, "when substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced."⁶⁰

The circuit courts have insisted on strict compliance with the APA's requirements, recognizing the important public policies at stake. In *Wagner Electric v. Volpe*,⁶¹ the Third Circuit examined a National Highway Traffic Safety Administration order governing the performance of turn signal and hazard warning flashers.⁶² Though the agency properly announced that it was engaging in rulemaking, and solicited comments from the public, the final rule adopted by the agency differed materially from rule it originally proposed. The court held

⁵⁹ The limited exceptions to the § 553 notice-and-comment requirements are provided in § 553(b)(3)(A)-(B). Under subparagraph (A), interpretive rules, general statements of policy, and rules of agency organization are exempt from § 553's requirements. Under subparagraph (B), when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest, it may forego the otherwise required notice-and-comment procedures. The delegations at issue in this paper are specific authority delegations, which all agree give rise to "legislative" rules and thus do not qualify for the "interpretive" exception. See Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 Tax Law. 343, 357 (1991) ("[T]ax authorities almost uniformly assume that regulations adopted pursuant to the Treasury's general rulemaking power in section 7805(a) of the Code are interpretive and that rules adopted pursuant to specific grants of rulemaking authority are legislative.") (cited in *Lomont v. O'Neill*, 285 F.3d 9, 16 (D.C.Cir. 2002)). Also, courts have interpreted § 553's "good cause" exception narrowly, requiring the agency to demonstrate "exigent circumstances" to justify its noncompliance with the section. See, e.g. *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006). Thus, the exceptions found in § 553(b)(3)(A)-(B) will generally be unavailable to the Secretary, though the Treasury occasionally invokes the "good cause" exception when it promulgates temporary regulations. See also *infra* notes 69 & 70.

⁶⁰ *Western Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

⁶¹ 466 F.2d 1013 (3rd Cir. 1972).

⁶² *Id.* at 1014.

that the public did not receive adequate notice of rulemaking, as required by § 553(b), and set aside the order. Similarly, in *Western Oil & Gas Ass'n v. EPA*,⁶³ the Ninth Circuit held that the EPA failed to meet § 553(b) procedural requirements when it sought comments from the public only *after* the promulgation of a rule. Though the EPA faced strict statutory deadlines for promulgating the disputed rules, the court held that such pressing deadlines did not constitute “good cause” for failing to comply with § 553’s requirements.⁶⁴ The Supreme Court has similarly ruled that “regulations subject to the APA cannot be afforded the ‘force and effect of law’ if not promulgated pursuant to the statutory procedural minimum found in that Act.”⁶⁵

As noted above, phantom regulations comply with none of § 553’s requirements. Yet, they are frequently given the force and effect of law by the lower courts and the IRS. Given that a regulation may be denied the effect of law if an agency fails to comply with even *one* of § 553’s requirements, it is hard to understand how phantom regulations can carry the force of law despite their *complete* noncompliance. If the agency to which the rulemaking authority was delegated cannot enforce a statutory provision without following § 553’s notice-and-comment requirements, a court should not step into the Secretary’s shoes and skirt the procedures that the Secretary himself could not bypass.

The statutory delegations discussed above require not only that action be taken by the Secretary (as opposed to the courts), but also that the Secretary act by providing guidance in the

⁶³ 633 F.2d 803 (9th Cir. 1980).

⁶⁴ 633 F.2d at 812 (“We cannot accept the view that the EPA’s action as a whole can be justified under either of the good cause exceptions... The EPA has argued before this Court for a blanket exemption for agencies operating under pressure of statutory deadlines. Such an interpretation of ‘good cause’ would amount to judicial legislation.”).

⁶⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (citing *Morton v. Ruiz*, 415 U.S. 199 (1974), and *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972)). See also *Joseph v. U.S. Civil Service Commission*, 554 F.2d 1140, 1153-54 (D.C. Cir. 1977) (“When an agency seeks to exercise such legislative rulemaking authority it must follow the notice and comment procedures of [§ 553] of the Administrative Procedure Act. The Commission’s failure to comply with those requirements when it promulgated the exemption regulation at issue in this case renders that regulation invalid. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-66, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).”); *Cf. Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87 (1995) (acknowledging that legislative regulations issued pursuant to a statutory delegation must comply with § 553(b)).

form of *regulations*.⁶⁶ Where the Secretary or the IRS proposes to discharge the statutory mandate by issuing informal guidance instead of regulations, agency expertise is compromised—regulation projects receive much more consideration from within the agency than do informal notices and announcements.⁶⁷ Further, when Congress instructs the Secretary to issue *regulations*, the statute, on its face, requires that the implementing rules be subject to the APA’s procedural requirements.⁶⁸ When Congress decides that rules do not need to be developed through the notice-and-comment process, it will provide language in the statute allowing the Secretary to prescribe rules informally. For example, § 409(p)(7)(B) of the Code provides:

The Secretary may, by regulation or *other guidance of general applicability*, provide that a nonallocation year occurs in any case in which the principal purpose of the ownership structure of an S corporation constitutes an avoidance or evasion of this subsection.

Where the delegating statute states that the Secretary shall prescribe regulations, but does not allow for the prescription of “other guidance,” the Secretary *must* observe the APA’s procedural requirements.⁶⁹ The Secretary has no basis for discharging the statutory mandate by issuing informal guidance in the place of regulations.⁷⁰

⁶⁶ References to “regulations” in Subtitle A of the Code are commonly understood to trigger § 553’s procedural requirements. *See infra* note 69. The word “regulation,” by itself, might not necessarily require an agency to prescribe rules through the notice-and-comment process. For example, various statutes in Subtitle F of the Code instruct the Secretary to issue “regulations” pertaining to agency organization, and the Secretary can fulfill the statutory mandate without observing the notice-and-comment process. *See supra* note 59. Though in some statutory contexts “rules” and “regulations” are used interchangeably, this probably is not true of the Internal Revenue Code—the Treasury does attach some significance to the word “regulations,” and the term is not synonymous with “rules” in this statutory context. *Cf.* 26 C.F.R. § 601.601(a) (1) (“Internal revenue rules take various forms. The most important rules are issued as regulations and Treasury decisions prescribed by the Commissioner and approved by the Secretary or his delegate.”).

⁶⁷ *See generally* Sheryl Stratton, *How Regulations Are Made: A Look at the Reg. Writing Process*, 97 TNT 23-7, (Feb. 4, 1997). *See also* 26 C.F.R. § 601.601 (detailing the Treasury’s internal procedures relating to the development of regulations) and Michael I. Saltzman, *IRS Practice and Procedure* 3.02[2] (2d ed. 1991).

⁶⁸ *See supra* note 66.

⁶⁹ The Internal Revenue Code contains several references to the prescription of “other guidance,” though that phrase is uncommon in other titles of the U.S. Code. *See, e.g.,* § 35(g)(9); § 165(i)(4); § 170(f)(12)(F); § 911(c)(2)(B); § 1092(a)(2)(C). Whenever the delegation does not call for the issuance of *regulations*, the Secretary can probably exercise his authority without observing § 553’s notice-and-comment requirements. For example, the Service implemented § 368(a)(2)(G)(ii) (“The Secretary may waive the application of clause (i) to any transaction subject to any conditions the Secretary may prescribe.”) by issuing Rev. Proc. 89-50, 1989-2 C.B. 631. One can plausibly

The current approach to spurned delegations ignores Congress’s clearly announced desire for *regulations*, and is difficult to reconcile with Supreme Court holdings concerning principles of administrative law. Though the use of phantom regulations produces rules more quickly than rules that comply with the APA’s notice-and-comment requirements, this does not justify judicial usurpation of the agency’s role. Congress obviously understands that notice-and-comment rulemaking will take time,⁷¹ and in such circumstances it cannot possibly intend that a statute with an express delegation of rulemaking authority will have immediate effect. A court has no basis for using principles of equity or surmises about Congress’s policy goals to justify the use of phantom regulations. “Although it is much too late to deny that there is a significant body of federal law that has been fashioned by the federal judiciary in the common-law tradition, it remains true that federal courts, unlike their state counterparts, are courts of limited jurisdiction

argue that a reference to “other guidance” (as opposed to “regulations”) does not absolve the Secretary of his duty to employ notice-and-comment rulemaking procedures. *See, e.g.* *Am. Mining Cong. v. U.S. Dep’t of Labor*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (adopting a “legal effect” test for determining whether notice-and-comment procedures must be observed, without attaching any importance to the specific words used in the delegation). Section 553 of the APA reaches agency rulemaking generally, and not only mandates to provide “regulations.” Nonetheless, at least in Subtitle A of the Internal Revenue Code, it appears that Congress anticipates that only references to “regulations” trigger § 553’s notice-and-comment requirements, but this issue is not firmly resolved. *See* Michael I. Saltzman, *IRS Practice and Procedure* 3.02[1] (2nd ed. 1991). Perhaps a statute that allows the Secretary to implement a substantive policy goal via “other guidance” is so out of comport with § 553 that that section simply becomes inapplicable by virtue of APA § 559, but this is not certain. *See infra* notes 66 and 70.

⁷⁰ *See* *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (“It is well-established that an agency may not escape the notice and comment requirements...by labeling a major substantive legal addition to a rule a mere interpretation.”). Note, however, that an agency can avoid § 553’s notice-and-comment requirements whenever Congress expressly provides that § 553 is inapplicable. 5 U.S.C. § 559. *See, e.g.* *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (“In this statutory scheme, Congress specified procedures under § 45301(b)(2) that cannot be reconciled with the notice and comment requirements of § 553...Were we to hold that the FAA had to issue a proposed rule and allow meaningful opportunity to comment before issuing the IFR, the resulting process would be so nearly indistinguishable from normal notice and comment as to deprive this special procedural provision of any effect, and to thwart the apparent intent of Congress in enacting the special procedure.”). *See also* *Air Transp. Ass’n of Can. v. FAA*, 254 F.3d 277 (D.C. Cir. 2001) (“The question now before us is whether section 45301(b)(2) authorizes the adoption of the 2000 Rule without notice and comment as well. We conclude that it does.”) and Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 *Admin. Law Rev.* 703, 713, n.40 (1999) (describing statutory grants to prescribe rules via the “interim-final” method, rather than pursuant to the standard § 553 notice-and-comment procedures).

⁷¹ *See also* *Williams v. National School of Health Technology, Inc.*, 836 F.Supp. 273 (E.D. Pa 1993) (“Some delay between the enactment of legislation and its enforcement is inevitable whenever Congress creates a scheme which calls for the issuance of regulations.”).

that have not been vested with open-ended lawmaking powers.” *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981).

B. *Delegating Language Is Not Surplusage*

The current approach to spurned delegations, by focusing on the substance of the statute, renders the form of the delegation largely irrelevant in the analysis. As discussed in Part II above, courts and the IRS typically examine the substance of the delegation without regard to the language Congress used to grant the Secretary the authority to issue regulations. That is, where a delegation provides, “The Secretary shall prescribe regulations allowing X,” the courts and the IRS typically attempt to determine what “X” is—i.e., what is it that the Secretary should allow? That “allowing X” is prefaced by a command to the Secretary is deemed inconsequential; rather, the reviewing court glides past this command by emphasizing that it “certainly cannot ignore”⁷² the substantive goal that Congress desired to accomplish in the statute. The Seventh Circuit in *Pittway v. U.S.* observed the inherent contradiction in this approach:

[T]he statute refers to regulations that do not exist. While encouraging us to apply the “plain meaning” rule to the part of the statute imposing a tax on any taxable chemical, the government does not likewise insist that we read the first six words of Section 4662(b)(1) literally: “Under regulations prescribed by the Secretary....”⁷³

Failing to accord the delegating language its plain meaning violates principles central to statutory interpretation. The plain meaning of legislation should be conclusive,⁷⁴ and the Supreme Court has repeatedly stated that it is a court’s duty to give effect to every clause and

⁷² *Occidental Petroleum*, 82 T.C. at 829.

⁷³ 102 F.3d 932, 936 (7th Cir.) (1996). The court nonetheless accepted the Commissioner’s argument, but acknowledged that if the substance of a delegation were more ambiguous, the Service might not be able to enforce it. (“In a statute less clear on its face, failure to promulgate regulations as Congress orders could result in a provision not enforceable due to the Secretary’s failure.”). *Id.* The Seventh Circuit’s approach seems to rely on the plain language of the statute, *sans* the delegating language. If the statute’s reference to regulations is removed, and the resulting statute provides a clear rule, the Seventh Circuit will probably treat the statute as self-executing.

⁷⁴ *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

word of a statute.⁷⁵ Absent unusual circumstances, treating words in a statute as superfluous is tantamount to ignoring Congress’s command. A careful review of the various delegations found in the Internal Revenue Code demonstrates that those words are indeed paramount in determining whether a statute is self-executing.

The current approach to spurned delegations ignores subtle (but significant) differences in the form of the delegations. These differences should be examined closely, as such differences in language are presumed intentional. Rather than simply acknowledge that the statute “refers to regulations,” a reviewing court should recognize that a delegation can be framed in such a way that Congress’s rule is immediately effective. For example, § 280G(d)(5) provides:

*Except as otherwise provided in regulations, all members of the same affiliated group shall be treated as 1 corporation for purposes of this section.*⁷⁶

In this statute, Congress provided an immediately effective definition, subject to change by the Secretary. The plain language of this statute requires that all members of the same affiliated group to be treated as a single corporation, unless contrary regulations are issued.⁷⁷ This statute is plainly “self-executing” in the absence of regulations.

Now, suppose that § 280G(d)(5) were instead drafted in a manner similar to the delegations discussed in Part II. “Modified” § 280G(d)(5) would then read:

⁷⁵ *Duncan v. Walker* 533 U.S. 167, 174 (2001) (“Further, were we to adopt respondent’s construction of the statute, we would render the word ‘State’ insignificant, if not wholly superfluous. ‘It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also* *Williams v. Taylor*, 529 U.S. 362, 404, (2000) (describing this rule as a “cardinal principle of statutory construction”); *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879) (“As early as in Bacon’s Abridgment, sect. 2, it was said that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”). We are thus “reluctant[t] to treat statutory terms as surplusage” in any setting. *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995); *see also* *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994).”) (internal parallel citations omitted).

⁷⁶ Emphasis supplied.

⁷⁷ T.A.M. 2004-47-037, discussed *supra* Part II.A.ii, did not reach this conclusion. In the T.A.M., a delegation of similar form was at issue, and the Service held that it could grant exceptions to the rule in the statute notwithstanding the absence of regulations.

Under regulations prescribed by the Secretary, all members of the same affiliated group shall be treated as 1 corporation for purposes of this section.

“Actual” § 280G(d)(5) plainly differs from modified § 280G(d)(5)—whereas the former sets forth a self-executing rule for purposes of the section, the latter is merely a command to the Secretary to prescribe a rule. Given that the two delegations contain different language, they should be given different meanings. Nonetheless, under the approaches discussed in Part I, modified § 280G(d)(5) might be treated as self-executing if (for example) a reviewing court believed that the legislative history provided guidance as to what the anticipated regulations would contain.

Giving two materially distinct delegations the same meaning violates principles central to statutory interpretation. “A change in phraseology creates a presumption of a change in intent...Congress would not have used such different language...without thereby intending a change of meaning.”⁷⁸ The current approaches to spurned delegations do not adequately distinguish between statutes that state that a specified rule is to apply “except to the extent provided in regulations,” and statutes that state that “the Secretary shall prescribe regulations” implementing a rule. A reviewing court should recognize that Congress frequently drafts delegations whose form is similar to § 280G(d)(5), and treat those statutes as self-executing.⁷⁹ Contrarily, where the form of the statute indicates that regulations are needed before the statute can be given effect, the reviewing court should presume that Congress acted deliberately in imposing this requirement, and it should not delve into the statute’s substance as a predicate for crafting phantom regulations.

⁷⁸ *Crawford v. Burke*, 195 U.S. 176, 190 (1904). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”) (citing 2A N. Singer, *Statutes and Statutory Construction* § 46:06, p. 194 (6th ed. 2000)).

⁷⁹ Of course, only the substantive portion of § 280G(d)(5) is self-executing. The formative portion of the delegation—i.e. the portion stating “except to the extent provided in regulations”—does not permit exceptions to the “1 corporation” rules until such regulations are issued.

That Congress acts advisedly when crafting statutes that depend on regulations for their efficacy is clearly illustrated by § 7807(a). That section provides:

Interim provision for administration of title.-- *Until regulations are promulgated under any provision of this title which depends for its application upon the promulgation of regulations* (or which is to be applied in such manner as may be prescribed by regulations) all instructions, rules or regulations which are in effect immediately prior to the enactment of this title shall, to the extent such instructions, rules, or regulations could be prescribed as regulations under authority of such provision, be applied as if promulgated as regulations under such provision.⁸⁰

This statute explicitly acknowledges that the application of provisions of the Code may depend upon regulations. Congress would have no reason to adopt “interim” rules if such delegations had immediate effect. The Tax Court’s view that statutory delegations become the “law of the land”⁸¹ upon their enactment and “cannot be ignored”⁸² is plainly inconsistent with § 7807—Congress anticipates that some statutory delegations *do* require regulations to be effective.

Other Code sections contain interim rules, and they provide additional evidence that statutory delegations are not necessarily self-executing. Under § 179D(a), taxpayers are allowed a deduction equal to the cost of energy efficient commercial building property placed into service during the taxable year. The property must be certified as “energy efficient” to be eligible for the deduction. Congress, in § 179D(d)(1)(B), commanded the Secretary of the Treasury and the Secretary of Energy to develop “targets” for a building’s energy systems to meet in order to be deemed “energy efficient”:

Regulations. The Secretary, after consultation with the Secretary of Energy, shall establish a target for each [energy] system... which, if such targets were met for all such systems, the building would meet the [statute’s energy efficiency requirements].

⁸⁰ Emphasis supplied.

⁸¹ *Occidental Petroleum*, 82 T.C. 829 n.6.

⁸² *Occidental Petroleum*, 82 T.C. 829.

Under the “legislative history” approach, the “whether versus how” approach, or the “equity” approach, § 179D(d)(1)(B) might be deemed self-executing. If, for example, the legislative history provided guidance as to the content of the regulations,⁸³ or if the statute was deemed to relate only to “how” the statute was implemented, or if a long period passed without the issuance of regulations, the reviewing court might treat the statute as self-executing.

In this case, however, Congress made it absolutely clear that § 179D(d)(1)(B) is not self-executing, and that Congress meant exactly what it said—the Secretaries of the relevant agencies must take the time necessary to formulate regulations. Indeed, Congress enacted a separate section of the statute, § 179D(f), to provide limited interim rules:

Interim rules for lighting systems. Until such time as the Secretary issues final regulations under [179D(d)(1)(B)] with respect to property which is part of a lighting system-- (1) In general. The lighting system target under subsection (d)(1)(A)(ii) shall be...[remainder of interim rules omitted].

Because Congress can provide statutory interim rules that give immediate effect to the statute pending the development of final regulations, a strong inference arises that a statute should not be deemed self-executing on the basis of a delegation to the Secretary to formulate regulations.

Congress may provide interim rules to give immediate effect to a statute in yet another way. Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”),⁸⁴ the Federal Government provides financial assistance to troubled banks. Section 597 of the Internal Revenue Code provides that the income tax consequences of such financial assistance payments “shall be determined under regulations prescribed by the Secretary.”⁸⁵

⁸³ For example, if the legislative history provided guidance as to the specific “targets” that the energy systems must meet, the “legislative history” approach might deem a taxpayer’s commercial building “energy efficient” if the building met those targets, and the taxpayer would consequently be eligible for the § 179D deduction.

⁸⁴ Pub.L. 101-73, August 9, 1989, 103 Stat. 183 (codified in scattered sections of the U.S.C.).

⁸⁵ I.R.C. § 597(a).

Recognizing that the statute could not apply in the absence of regulations, Congress provided an interim rule:

INTERIM RULE.-- In the case of any payment pursuant to a transaction on or after May 10, 1989, and before the date on which the Secretary of the Treasury (or his delegate) takes action in exercise of his regulatory authority under section 597 of the Internal Revenue Code of 1986 (as amended by subsection (a)(3)), the taxpayer *may rely on the legislative history* for the amendments made by subsection (a)(3) in determining the proper treatment of such payment.⁸⁶

Through this provision, Congress explicitly sanctioned the use of legislative history to determine the proper application of the statute pending exercise of the Secretary's delegated authority.⁸⁷ A natural inference of this is that, when Congress does not so provide, the courts and the IRS should *not* adopt a "legislative history" approach to spurned delegations.⁸⁸

Congress does not always take it upon itself to provide interim rules, however. Rather, recognizing the inherent delay between the enactment of a statute calling for regulations and the statute's effectiveness, Congress may empower an *agency* to adopt "interim-final" rules. These rules become effective without prior notice and public comment, but invite *post*-effective public comment.⁸⁹ For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")⁹⁰ imposes various requirements on group health plans. As part of the Act, Congress instructed the Secretary to issue rules pertaining to these requirements. That delegation (codified in § 9833 of the Code) provides:

⁸⁶ FIRREA, § 1401(c)(3)(B).

⁸⁷ The statute probably refers to language found in the committee report describing interim rules for the application of § 597. *See* 135 Cong. Rec. H4714-01, 1989 WL 194174 (Cong.Rec.) ("Under the interim rules for taxable asset acquisitions set forth in the legislative history of this provision, financial assistance received by, or paid with respect to, financially troubled financial institutions is generally treated as taxable."). The plain language of the statute permits the use of any legislative history materials, however, and not only the committee report.

⁸⁸ Though reliance on negative inferences is frequently perilous, the conclusion reached here is consistent with numerous other indications that statutory delegations are not self-executing.

⁸⁹ Asimov, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. Law Rev. 703, 704 (1999). Though such "interim final" rulemaking procedures conflict with § 553's notice-and-comment requirements, statutes which expressly supersede § 553 escape that section's application. *See* 5 U.S.C. § 559, discussed *supra* note 70.

⁹⁰ Pub. L. 104-191, August 21, 1996, 110 Stat 1936.

The Secretary, consistent with section 104 of the Health Care Portability and Accountability Act of 1996, may promulgate such regulations as may be necessary or appropriate to carry out [the group health plan requirements]. The Secretary may *promulgate any interim final rules* as the Secretary determines are appropriate to carry out [the group health plan requirements].⁹¹

When Congress believes that the benefits of providing immediate guidance outweigh the costs of forsaking § 553's notice-and-comment procedures, it may allow the Secretary to issue interim-final rules, as it did here. Contrarily, when Congress has not provided such authority, the Secretary should follow § 553's notice-and-comment procedures.

Congress is plainly aware of the various methods by which interim rules may be prescribed.⁹² Under § 7807, Congress commands that existing regulations, in limited circumstances, should provide interim rules. At other times, as with § 179D, Congress will enact a separate set of interim rules along with the delegation.⁹³ Congress might even empower the agency itself to prescribe interim rules pending the adoption of final regulations.⁹⁴ When Congress has not done any of these things even though it could have, the courts and the IRS should not take it upon themselves to give immediate effect to the statute by invoking phantom regulations.

⁹¹ I.R.C. § 9833 (emphasis supplied).

⁹² The Supreme Court “assume[s] that Congress is aware of existing law when it passes legislation.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). When examining a statutory delegation, one should assume that Congress *knew* that it could provide statutory interim rules. When Congress does not provide interim rules, Congress's choice to condition the operation of the statute on the issuance of regulations should be deemed intentional.

⁹³ Congress has enacted even more elaborate statutory schemes to serve until an agency acts. *See, e.g.*, 30 U.S.C. 801-960 (2000). 30 U.S.C. § 801(g) provides, “It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners.” Most attempts to provide statutory interim rules are not as bold. *See, e.g.*, Pub.L. 100-647, § 5011(c)(2), 102 Stat. 3342 (Nov. 10, 1988) (providing interim rules regarding the application of I.R.C. 7702(c)(3)(B)(i)); Pub.L. 93-463, § 404, 88 Stat. 1389. (Oct. 23, 1974) (providing interim rules regarding hedging transactions); I.R.C. 857(b)(7)(F) (providing interim rules regarding REITs); 33 U.S.C.A. § 2703(d)(4)(D)(ii) (providing interim rules regarding oil pollution liability).

⁹⁴ *See, e.g.*, 46 U.S.C.A. Appx. § 1716(b) (“The Commission may prescribe interim rules and regulations necessary to carry out this Act. For this purpose, the Commission is excepted from compliance with the notice and comment requirements of section 553 of title 5, United States Code.”). *See also, e.g.*, 7 U.S.C.A § 2008e(c); 8 U.S.C.A § 1255a(g)(3); 15 U.S.C.A § 7244(b)(2); 16 U.S.C.A § 6515(a); 20 U.S.C.A § 9276(c); 42 U.S.C.A § 239f (b); 42 U.S.C.A § 607(i)(1)(A)(ii); 42 U.S.C.A § 16014(g).

The judicial confusion caused by spurned delegations may be due to the courts' habit of not looking to outside sources of law to resolve issues arising under the Code—the tax law is often mistakenly viewed by judges as a “self-contained body of law.”⁹⁵ The failure to consider outside authorities “impairs the development of the tax law by shielding it from other areas of law that should inform the tax debate.”⁹⁶ This myopia is evidenced not only by the courts' failure to fully appreciate the requirements of the APA, discussed earlier, but also in their failure to appreciate the force of analogous Supreme Court cases.⁹⁷

In *California Bankers Association v. Shultz*,⁹⁸ the plaintiffs challenged the constitutionality of the Bank Secrecy Act of 1970.⁹⁹ Specific provisions in Title II of the Act (§§ 201-242) gave the Secretary of the Treasury broad authority to require certain reports of financial transactions. The plaintiffs contended that the broad authorization given to the Secretary amounted to the power to commit an unlawful search of the banks and their customers.¹⁰⁰ Section 221 of the Act, entitled “Reports of currency transactions required,” provides:

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

Section 222 of the Act provides that the report of any transaction required to be reported under § 221 shall be signed both by the domestic financial institution involved and by one or more of the

⁹⁵ Paul Caron, *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 Va. Tax Rev. 517, 518 (1994).

⁹⁶ *Id.*

⁹⁷ See also *infra* note 113 (listing various instances where circuit courts have refused to treat statutes calling for regulations as self-executing).

⁹⁸ 416 U.S. 21 (1974).

⁹⁹ Pub. L. No 91-508, October 26, 1970, 84 Stat. 1114.

¹⁰⁰ *California Bankers*, 416 U.S. 53.

other parties to the transactions, as the Secretary may require. Sections 207 and 209 provide civil and criminal penalties, respectively, for violations of any provision of Title II.

At the time the case was decided, the Secretary had promulgated regulations requiring financial institutions to report currency transactions to the Internal Revenue Service, but had not promulgated any regulations subjecting any other party to the reporting requirements. Under the regulations, the financial institutions were required to file reports only with respect to transactions involving the payment of currency exceeding \$10,000.¹⁰¹

The depositor-plaintiffs nonetheless argued that the Act violated their Fourth Amendment rights, despite the fact that Secretary had not issued regulations applicable to them. The lower court accepted this argument and enjoined enforcement of the reporting provisions. As the Supreme Court described the proceedings below:

The District Court went on to pose, as the question to be resolved, whether “these provisions, broadly authorizing an executive agency of government to require financial institutions and parties [thereto] . . .to routinely report . . . the detail of almost every conceivable financial transaction . . .[are] such an invasion of a citizen’s right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment.”¹⁰²

The District Court thus judged the constitutionality of the reporting provisions by reference to the regulations that might be promulgated—in other words, the court tested the constitutionality of the statute by assuming the existence of phantom regulations. The Supreme Court reversed:

Since . . .the statute is not self-executing, and were the Secretary to take no action whatever under his authority there would be no possibility of criminal or civil sanctions being imposed on anyone, the District Court was wrong in framing the question in this manner. The question is not what sort of reporting requirements *might* have been imposed by the Secretary under the broad authority given him in the Act, but rather what sort of reporting requirements he did *in fact* impose under that authority.¹⁰³

¹⁰¹ *California Bankers*, 416 U.S. 58 (citing 31 C.F.R. § 103.22 (1974)).

¹⁰² *California Bankers*, 416 U.S. 64.

¹⁰³ *Id.* (emphasis in original). The court proceeded to test the Fourth amendment claims against the regulations that were actually promulgated, and found that no Fourth amendment violation occurred.

The Court unequivocally held the delegation was not self-executing, even though § 221 requires the Secretary to act.¹⁰⁴

California Bankers' holding is at odds with the approaches to statutory delegations discussed in Part II. Though the Act carried a voluminous legislative history,¹⁰⁵ the Court made no attempt to determine the content of the regulations that the Secretary might promulgate on the basis of that material. Indeed, the Court did not deem the substance of the delegation relevant—rather, it gave the statute its plain meaning, and concluded that the statute was not self-executing.

This was not the first time that the Supreme Court encountered a spurned delegation.¹⁰⁶ In *Dunlap v. U.S.*, 173 U.S. 65 (1899), the Court addressed whether a statute that instructed the Secretary to prescribe regulations granting taxpayers rebates for alcohol taxes paid was self-

¹⁰⁴ Section 221's heading ("Reports of Currency Transactions Required") and the language of the statute (providing that the Secretary *shall prescribe* regulations) suggests that the delegation to the Secretary is mandatory. Though the statute does indicate that the Secretary "may" prescribe certain rules, this probably should not indicate that the Secretary's duties under the Bank Secrecy Act are wholly discretionary. The Bank Secrecy Act is a comprehensive statutory scheme, and its enforcement depends almost entirely on the promulgation of regulations. It might be an "absurd result" to conclude that the Secretary has complete discretion in determining whether to issue regulations pursuant to the Act. Perhaps upon a close review of the statute one might conclude that certain portions of the Act provide discretionary delegations and others provide mandatory delegations. No attempt to perform that laborious task is made here—it should suffice to note that the Act provided a delegation to the Secretary, and the Supreme Court emphasized the importance of implementing regulations in determining whether the statute was self-executing. Further, under a textual approach, neither a mandatory delegation nor a discretionary delegation is self-executing in the absence of regulations. *See infra* Part IV.

¹⁰⁵ *California Bankers*, 416 U.S. 21 n.1 ("See generally S. Rep. No. 91-1139 (1970); H. R. Rep. No. 91-975 (1970); Hearings on Foreign Bank Secrecy and Bank Records (H. R. 15073) before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess. (1969-1970); Hearings on Foreign Bank Secrecy (S. 3678 and H. R. 15073) before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. (1970).").

¹⁰⁶ *See also* *United States v. Mersky*, 361 U.S. 431, 437-438 (1960) ("Once promulgated, these regulations, called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other."), *distinguished by* *United States v. Weller*, 401 U.S. 254, 258 (1971) ("The relation between the Selective Service Act and the regulation forbidding representation by counsel before local boards is wholly different from the situation in *Mersky*. The regulation is not at all 'called for by the statute itself.' Indeed, so independent are the statute and the regulation that it would be entirely possible for a regulation covering the same subject matter to provide exactly the reverse of what the present regulation requires.") (internal citations omitted).

executing.¹⁰⁷ The taxpayer, Dunlap, requested a rebate notwithstanding the absence of implementing regulations. The Court denied Dunlap relief, emphasizing that “[C]ourts cannot perform executive duties, nor treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled.”¹⁰⁸ Rather, the Court held that the “plain words”¹⁰⁹ of the statute indicated that the issuance of the regulations was a condition precedent to the vesting of any rights under the statute.¹¹⁰

Both *California Bankers* and *Dunlap* are fairly distinguishable from the cases discussed in Part II. The statute at issue in *California Bankers* allowed for the imposition of *criminal*

¹⁰⁷ The delegation at issue provided: “Any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the secretary of the treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the treasurer of the United States a rebate or repayment of the tax so paid.”

¹⁰⁸ *Dunlap*, 173 U.S. 75 (citing U. S. v. McLean, 95 U. S. 750, 753 (1878)). The *Dunlap* court distinguished its holding from that of an earlier case dealing with a statutory delegation, *Campbell v. United States*, 107 U.S. 407 (1883). In *Campbell*, regulations had been issued pursuant to a statutory delegation, but a recalcitrant Secretary refused to abide by those regulations. *Campbell* at 410 (“It is the order of the Secretary of the Treasury forbidding the collector to proceed under these regulations or in any other mode, which is the real obstacle...Can he thus defeat the law he was appointed to execute, by making regulations, and then, by ordering his officers not to act under them, and not to act at all, place himself above the law and defy it?”). However, in *Dunlap*, the Court interpreted *Campbell* to stand for the proposition that a statutory delegation was self-executing in the absence of regulations. *Dunlap* at 72. Thus, the Court nonetheless distinguished its holding in *Dunlap* from its earlier holding in *Campbell*, though it misconstrued the earlier case.

¹⁰⁹ *Id.* at 73.

¹¹⁰ *Id.* at 76. The Court further noticed that the statute at issue provided a discretionary delegation, which supported its conclusion that the statute should not be deemed self-executing. “But it is insisted that, by reason of the exercise of discretionary power necessarily involved in prescribing regulations as contemplated, the secretary could not have been thus compelled to act. We think the argument entitled to great weight, and that it demonstrates the intention of congress to leave the entire matter to the treasury department, to ascertain what would be needed in order to carry the section into effect... All this, however, only tends to sustain the conclusion of the court of claims that this was not the case of a right, granted in praesenti to all persons who might, after the passage of the law, actually use alcohol in the arts...but that the grant of the right was conditioned on use in compliance with regulations to be prescribed, in the absence of which the right could not vest so as to create a cause of action by reason of the unregulated use.” *Id.*

penalties, and the Court seemed primarily concerned with doctrines of ripeness and standing.¹¹¹

Dunlap emerged in a context entirely different from that present today—the APA was not promulgated until 1946 (long after the case was decided), so it is difficult to compare it to today’s cases.¹¹² Nonetheless, a reviewing court should at least consider the principles espoused in these decisions before stepping into the Secretary’s shoes. When interpreting statutory delegations in non-tax contexts, numerous circuits have acknowledged that such statutes lack force in the absence of regulations.¹¹³ The principles of *California Bankers* and *Dunlap* seem obvious to all except the IRS and a small minority of federal courts.

¹¹¹ Note, however, that the Court in *California Bankers* did not invoke any substantive canon of construction (e.g. the rule of lenity) in holding that the statute at issue was not self-executing. Rather, its holding followed the plain language of the statute. Regardless, even if *California Bankers* is not controlling, other statements from the Court confirm that phantom regulations are inappropriate. See *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) (stating that courts have no power to control the contents of regulations, but can compel the agency to act), discussed *infra* Part IV. See also *infra* note 113.

¹¹² It is tempting to make too much out of *Dunlap*. The delegation at issue in that case looks similar to the delegations found in the Code today, thus suggesting that the case is highly relevant. Further, the Court relied on a “plain language” approach in deciding the case. It would be a mistake, however, to conclude that what was plain in 1899 remains plain today. “Words are not plain in themselves.” *First Chicago Corp. v. Commissioner*, 842 F.2d 180, 183 (7th Cir. 1988). Rather, “[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted.” *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 n.17 (2000). “[I]t is our role to make sense rather than nonsense out of the corpus juris.” *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (U.S. 1991). Given that the delegation at issue in *Dunlap* existed in a rather different statutory context from that present today, *Dunlap’s* reasoning is not directly relevant. Note, however, that the Court’s conclusion that it cannot perform “executive duties” remains true today, as the Constitution has not been amended since 1899 to provide the judiciary with that power. *But see* Edward S. Corwin, *Constitution v. Constitutional Theory*, in *American Constitutional History* 99, 108 (Alpheus Mason & Gerald Garvey eds., 1964) (“[T]he proper point of view from which to approach the task of interpreting the constitution is that of regarding it as a living statute, palpitating with the purpose of the hour, reenacted with every waking breath of the American people.”).

¹¹³ When a statutory delegation does not relate to the income tax, courts readily conclude that the statute requires regulations for its operation. See, e.g., *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 785-786 (11th Cir. 1987) (“The express language of section 1437d(c)(4)(A) simply indicates that local housing authorities ‘shall comply with such procedures and requirements as the Secretary may prescribe.’ 42 U.S.C. § 1437d(c)(4)(A) (1982 & Supp. III 1985) (emphasis added). By its express terms, the statute does not require HUD to prescribe preferences; nor does it require local housing authorities to grant preferences absent HUD implementing regulations.”); *Nebraska v. United States*, 238 F.3d 946 (8th Cir.2001) (“However, the Act is not self-executing; rather, it is applied through EPA regulations. See 42 U.S.C. § 300g-1(b)(1)(A) (requiring the EPA to promulgate national public drinking water regulations.)”); *Riegel Textile Corp. v. Celanese Corp.*, 649 F.2d 894, 905 (2nd Cir.1981) (“In enacting section 1274, however, Congress deleted the word ‘immediately’ and provided that repurchase be ‘in accordance with regulations of the secretary.’ While no reason is stated for the change, given the complexity of relationships between manufacturers, distributors, and retailers, it appears Congress believed a self-executing repurchase provision would prove unworkable. Thus, Congress intended that the repurchase obligation be initiated only upon action by the Secretary.”); *Mobil Oil Corporation v. DOE*, 647 F.2d 142, 146, n.10 (Em. App.

Part IV: Recommended Approach to Spurned Delegations

Where the interpretation of a statutory delegation is at issue, a reviewing court should first examine whether the *form* of the delegation makes the issuance of regulations a condition precedent to the effectiveness of the statute. The substance of the delegation—that is, the subject matter of the rules that the Secretary is to prescribe—should be deemed irrelevant to this determination. Though one can reasonably criticize Congress for making important provisions in the Code subject to the issuance of regulations,¹¹⁴ “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004).¹¹⁵

When the Secretary has failed to issue regulations, a court should not craft phantom regulations. If the government wishes to enforce a statutory provision that is not self-executing and contains a delegation of authority, it must issue regulations to give effect to the statute.

Informal agency publications purporting to interpret a statutory delegation lack the force and

1981) (“It is true, as the DOE argues, that the statutory amendment was not self-executing and that Congress contemplated that regulations were required to give effect to the statutory command.”); *Magnolia Petroleum Co. v. Federal Power Commission*, 236 F.2d 785, 799-800 (5th Cir. 1956) (“And in this situation particularly, it is the impact of the regulation alone which brings about the necessity for filing of the rate schedules. The Act itself is not self-executing and requires the regulations as a condition precedent.”). In the context of FICA taxes, the Court of Appeals for the Federal Circuit found that a statutory delegation was not self-executing. *CSX Corp. v. United States*, 52 Fed. Cl. 208, 312 (Fed. Cir. 2002) (“Congress has indeed gone on record as saying that the income-tax withholding system and the FICA-tax withholding system each serves a different interest which may, in turn, dictate differences in the make-up of their respective wage bases. But, as plaintiffs correctly point out, the statute that Congress enacted to facilitate such differentiation is not self-executing—its operation depends on the promulgation of regulations that in fact establish distinctions between wages for income-tax withholding purposes and wages for FICA-tax withholding purposes. Absent such regulations, this court has no basis for distinguishing between the content of the term ‘wages’ for income-tax withholding purposes and the content of that term for FICA-tax withholding purposes.”). See also *Kleine v. United States*, 539 F.2d 427, 432-33 (5th Cir. 1976) (“Moreover, the Internal Revenue Code itself provides several alternative means of procuring lien divestiture, although, unlike 6324(a)(1), those provisions are not self-executing. For example, 6325(c) expressly authorizes the Service to issue an administrative release or partial discharge of the properties, in accordance with certain regulations adopted pursuant thereto.”).

¹¹⁴ See, e.g., David Shores, *Repeal Of General Utilities And The Triple Taxation Of Corporate Income*, 46 Tax Law. 177, 207 (1992) (noting that Congress “blundered badly” by conditioning section 336(e)’s operation on the issuance of regulations).

¹¹⁵ Quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))).

effect of law, and cannot serve as substitutes for regulations that comply with § 553 of the Administrative Procedure Act. When Congress wishes the Secretary to exercise his delegated authority by means of pronouncements short of “regulations,” Congress is perfectly capable of drafting the statute to say so.¹¹⁶

If a taxpayer wishes to give effect to a statutory delegation where the Secretary has unreasonably delayed the issuance of regulations, he should seek relief under § 706(1) of the APA, which allows an aggrieved party to “compel agency action unlawfully withheld or unreasonably delayed.”¹¹⁷ Parties have successfully invoked § 706(1) against a number of agencies,¹¹⁸ and taxpayers who have been unreasonably deprived of benefits by the Treasury’s delay should proceed under that statute as well. As the First Circuit noted in *N.A.A.C.P. v. Secretary of Housing and Urban Development*, “A court can enforce the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress. To read section

¹¹⁶ See *supra* Part III.B.

¹¹⁷ 5 U.S.C. § 706(1) (2000).

¹¹⁸ See Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction under Section 706(1) of the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 635 n.76 (1987) (“Section 706(1) may also be successfully used to challenge an agency’s failure to promulgate regulations. See *Association of Am. R.Rs. v. Costle*, 562 F.2d 1310, 1321 (D.C. Cir. 1977) (holding that the EPA’s failure to promulgate standards for certain railroad facilities violated the Noise Control Act, and ordering injunctive relief for agency action unlawfully withheld); *Kingsbrook Jewish Medical Center v. Richardson*, 486 F.2d 663, 670 (2d Cir. 1973) (using section 706(1) to compel the Secretary of Health, Education and Welfare to issue regulations providing for retroactive corrective adjustments to Medicare rates paid to the plaintiff nursing home). See also *Public Citizen Health Research Group v. Commissioner, Food and Drug Administration*, 724 F.Supp. 1013, 1023 (“this Court DECLARES that defendants have delayed issuing a final regulation requiring standardizing tampon absorbency labeling in violation of both the Administrative Procedure Act, 5 U.S.C. §§ 555(e) and 706(1), and their obligations under the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 352, 371, to protect the public health. It is therefore ORDERED that defendants shall be enjoined to issue a final tampon absorbency regulation”); *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226-1227 (10th Cir. 2002), *rev’d on other grounds* (“Courts have regularly held that an agency may be required to take action and make a decision even if the agency retains ultimate discretion over the outcome of that decision.”); *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C.Cir.1992) (“There is a point when the court must ‘let the agency know, in no uncertain terms, that enough is enough,’ and we believe that point has been reached...we think the delay in promulgating a final rule that OSHA believes is necessary to workers’ well-being has been too lengthy for us to temporize any longer.”) (internal citations omitted); *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001) (finding that the Secretary of Commerce unreasonably delayed the performance of certain dolphin stress studies mandated by Congress); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 16 (D.C. Cir. 1977) (“Therefore, we today enter an order ‘compel(ling) agency action * * * unreasonably delayed.’”); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (“We are here faced with a clear statutory mandate, a deadline nine-years ignored, and an agency that has admitted its continuing recalcitrance. For the foregoing reasons, we hereby direct the Coast Guard to undertake prompt § 4110 rulemaking.”).

706(1) as precluding such an order would be inconsistent with the need to provide a hospitable interpretation of the APA. *Abbott Laboratories v. Gardner*, 387 U.S. at 141.”¹¹⁹

The Supreme Court recently endorsed the use of § 706(1) to compel the issuance of regulations in appropriate circumstances. In *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), the Court unanimously held that “a claim under section 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*.”¹²⁰ Justice Scalia, writing for the Court, illustrated this holding:

The limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law). Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be. For example, 47 U.S.C. section 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, *would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations*.¹²¹

The Court's disapproval of phantom regulations seems clear. Where an agency has failed to act, a judicial declaration setting forth the content of regulations is inappropriate. Rather, if the issuance of the regulations has been unreasonably delayed, the court may compel the agency to act, but cannot step into the agency's shoes.¹²²

¹¹⁹ 817 F.2d 149 (1st Cir. 1987) (internal quotations omitted).

¹²⁰ *S.U.W.A.*, 542 U.S. 64. (emphasis in original).

¹²¹ *Id.* at 65. (emphasis in original).

¹²² Though the Court's example involved a statute that gave the agency an explicit deadline, such a deadline is not required to proceed under § 706(1). The Court held that § 706(1) relief can be granted whenever a plaintiff successfully asserts that an agency failed to take a *discrete* agency action that it is *required to take*. *Id.* at 64. Though failure to comply with a specific statutory deadline would most likely constitute “unreasonable delay,” an agency's prolonged delay may be “unreasonable” even in the absence of a firm statutory deadline. See *TRAC v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). See also *supra* note 118 (discussing the numerous instances where parties have successfully invoked § 706(1)).

Unfortunately, the § 706(1) remedy is not perfect, and the petition process may be slow and costly.¹²³ There are no established standards for determining whether an agency has “unreasonably” delayed action, though the D.C. Circuit has provided six factors that are to provide “useful guidance” in making the determination.¹²⁴ Even if a taxpayer successfully compels agency action under § 706(1), he will not enjoy any benefits immediately—rather, he must await the issuance of the regulations. Nonetheless, even if a reviewing court deems the § 706(1) remedy inadequate, this does not justify judicial usurpation of the Secretary’s role. Through § 706(1), Congress has specifically addressed the problems posed by agency delay and has communicated its intent to the judiciary. Courts should not invent a remedy when Congress has already provided one.¹²⁵ Indeed, “once Congress addresses a subject, even a subject previously governed by federal common law, the justification for lawmaking by the federal courts is greatly diminished. Thereafter, the task of the federal courts is to interpret and apply statutory law, not to create common law.” *Northwest Airlines v. Transp. Workers Union*, 451 U.S. 77, 95 n.34 (1981).

The remainder of this Part applies this approach to various forms of statutory delegations. Except where otherwise noted, the discussion below assumes that the relevant delegation requires the Secretary to issue regulations, and not informal guidance.

¹²³ See Sidney A. Shapiro & Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L. J. 819, 834 (“Although courts recognize the need for judicially enforceable deadlines as a remedy for unreasonable delay, they frequently seem uncomfortable enforcing such deadlines.”). See also *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (“The agency is now in the concluding phase of the rulemaking; it predicts final issuance of a rule in five months from now. It is hard to conceive of why that date cannot be met. Yet for three years, OSHA has not met any timetable proposed to the court, and we have grave cause for concern that if we do not insist on a deadline now, some new impediment will be pleaded five months hence. OSHA’s asserted justifications for the delay become less persuasive the longer the delay continues.”). Judges may even be bashful in deciding § 706(1) cases. See, e.g., *N.A.A.C.P., Boston Chapter v. Kemp*, 721 F.Supp. 361, 370 (D. Mass., 1989) (“The court of appeals expressly noted that my remedial power under the APA, 5 U.S.C. § 706(1), includes the power to compel the Secretary to promulgate regulations to carry out the intent of Congress, where he has failed to exercise his discretion to do so. *NAACP v. HUD*, *supra*, 817 F.2d at 160. Nevertheless, I am very reluctant to add to the existing mountain of federal rules and regulations.”).

¹²⁴ Miaskoff, *supra* note 118, at 651-657 (citing *TRAC*, 750 F.2d 70 (D.C. Cir. 1984)).

¹²⁵ See U.S. Const., Art. 1, §1 (vesting *all* legislative powers in Congress).

A. *Recommended Approach to Mandatory Delegations*

A statute providing that “The Secretary shall prescribe regulations...” should not be deemed self-executing. Congress has provided only a command to an agency; it has not enacted a self-executing statute that a taxpayer must heed in determining his income tax liability. The plain language of the statute would seem to support no other interpretation. Thus, when a statute provides that “the Secretary shall issue regulations...,” the Secretary should not be able to enforce the statute until he discharges his statutory responsibility to issue the regulations in question. If the IRS seeks to enforce “phantom” regulations, the taxpayer should ask that a court set aside such action as “arbitrary, capricious, or otherwise not in accordance with law.”¹²⁶

If the taxpayer instead complains that the Secretary’s has unreasonably delayed the issuance of regulations, he should petition the court under § 706(1) to compel the Secretary to act. Making guesses as to the substantive content of the Secretary’s regulations anticipated regulations is inappropriate. Parties aggrieved by agency delay often seek relief under § 706(1),¹²⁷ and there is no reason that the statute cannot be used to compel the Department of Treasury to initiate rulemaking. “Through § 706 Congress has stated unequivocally that courts *must* compel agency action unlawfully withheld or unreasonably delayed.”¹²⁸

Taxpayers can use § 706(1) to enforce *mandatory* delegations only. Thus, taxpayers may use § 706(1) whenever a statute provides that the Secretary “shall” prescribe regulations, and he has neglected this duty—the Supreme Court has held that when a statute uses the word “shall,” Congress has imposed a mandatory duty upon the subject of the command.¹²⁹

¹²⁶ 5 U.S.C. § 706(2)(A). *See also* §§ 706(2)(C) & (D) (providing that agency action can be set aside as in excess of statutory authority or for failure to observe procedures required by law).

¹²⁷ *See supra* note 118.

¹²⁸ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir.1999) (emphasis in original).

¹²⁹ *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir.1999) (citing *United States v. Monsanto*, 491 U.S. 600, 607 (1989)).

Sometimes, it is difficult to determine whether a statute provides a mandatory delegation, as opposed to a discretionary one. Statutory delegations come in many forms, and Congress does not always specify whether the Secretary “shall” implement a rule, or whether he “may” implement it. Instead, Congress might provide that a rule will apply “in accordance with regulations” or “pursuant to regulations,” and it is difficult to determine whether such language requires the Secretary to act or instead leaves the implementation of the rule solely to his discretion. Determining whether these statutes are in fact “mandatory” delegations probably requires a case-by-case analysis.

B. *Recommended Approach to Discretionary Delegations*

A discretionary delegation, like a mandatory delegation, should not be deemed self-executing. Whether Congress tells the Secretary that he *must* do something, or that he *may* do something, a statutory delegation amounts to nothing more than an instruction from the legislature to the agency. In the absence of regulations, taxpayers cannot claim any benefits pursuant to these delegations, and the IRS cannot challenge taxpayers who violate the perceived intention of the statute.

Because, by definition, the Secretary is not *required* to act on a discretionary delegation, taxpayers cannot seek redress under § 706(1). “The only agency action that can be compelled under the APA is action legally *required*.”¹³⁰ Though § 706(1) is unavailable when a discretionary delegation is at issue, the taxpayer may seek relief under APA § 553(e) (“Each

¹³⁰ *S.U.W.A.*, 542 U.S. 64. See also *American Ass’n of Retired Persons v. E.E.O.C.*, 823 F.2d 600, 605 (D.C. Cir. 1987), *rev’g* 655 F.Supp. 228 (D.D.C. 1987) (“[T]he double ‘mays’ imbedded in section 9 effectively relieve the Commission of any duty to promulgate a regulation...we conclude that the district court exceeded its authority in ordering rulemaking.”).

agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”),¹³¹ but this provision probably lacks teeth.

C. *Recommended Response to Informal IRS Guidance Interpreting Statutory Delegations*

Where Congress permits the issuance of informal guidance to implement a policy objective, notices and other informal agency announcements are effective. A statute permitting informal guidance may state that the Secretary is to issue “other guidance,” as opposed to “regulations.”¹³² When such permissive language is included in the delegation, a taxpayer is ordinarily unable to challenge the IRS for failure to comply with APA § 553.

Contrarily, IRS notices and other informal agency publications do not carry the force of law and do not suffice wherever Congress requires that the “Secretary shall issue regulations.”¹³³ The government *must* comply with § 553 of the APA if it wishes to give such guidance legal effect. The plain meaning of a statutory delegation requiring “regulations” would seem to support no other interpretation.

Some *legislative history*, however, is inconsistent with the plain meaning of such statutes.

The Conference Report to the Tax Reform Act of 1986 provides:

A number of provisions of the conference agreement provide that the Secretary of the Treasury or his delegate is to prescribe regulations. Notwithstanding any of these references, the conferees intend that the Treasury may, prior to prescribing these regulations, issue guidance for taxpayers with respect to the provisions of the conference agreement by issuing Revenue Procedures, Revenue Rulings, forms and instructions to forms, announcements, or other publications or releases.¹³⁴

¹³¹ Also see Treasury’s implementing regulation, 26 C.F.R. 601.601(c) (“Interested persons are privileged to petition for the issuance, amendment, or repeal of a rule.”). That regulation requires only that the Service give such petitions “careful consideration,” and is certainly less potent than APA § 706(1).

¹³² A statute may also allow an agency to bypass § 553 when it grants the Secretary the authority to issue “interim-final rules” or specifies other procedures. *But see supra* notes 69 & 70.

¹³³ Of course, the Secretary is empowered to issue nonbinding interpretive rules pursuant to § 7805 grant of rulemaking authority. The IRS can, for example, issue a notice describing the scope of regulations anticipated under a statutory delegation, but cannot implement the statute via such a notice.

¹³⁴ H.R.Conf.Rep. No. 841, 99th Cong., 2d Sess. II-837 (1986) (cited in I.R.S. Tech Adv. Mem 1997-14-002 (Dec. 6, 1996)).

The conferees' intention, by their own admission, is contrary to the plain language of the statutes whose meaning they purport to modify. Where unambiguous statutory language conflicts with language in a committee report, the former should control. Nonetheless, though the use of legislative history as an *authoritative* expression of Congressional intent is questionable,¹³⁵ such history is frequently given considerable weight by the courts and the IRS.¹³⁶ Some have even suggested that the views of a single Congressional committee deserve interpretive weight even when those views are expressed only *after* a statute's enactment.¹³⁷

Regardless, the textual approach adopted here assumes that legislative history materials cannot alter the plain meaning of a statute. Conference reports, after all, do not represent the

¹³⁵ See *Conroy v. Aniskoff*, 507 U.S. 511, 518 (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”). See generally John F. Coverdale, *Text as Limit; A Plea for Decent Respect for the Tax Code*, 71 Tul. L. Rev. 1501 (1997). Though some argue that a statute should be interpreted in the “context” of its legislative history, this approach is questionable. Legislative history materials may very well represent the context that a *legislator* understands a statute's text, but the legislative powers granted to Congress are to be exercised for the benefit of the *people*. See U.S. Const., Preamble. Courts should thus interpret statutory language in the context that a reasonable person understands those words, and *not* the context that a legislator understands them. Thus, dictionaries and thesauruses are a natural starting point for determining a statute's meaning, though “[s]tatutory construction...is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear.” *United Sav. Asso. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). For a more thorough discussion of the arguments touched upon here, see Antonin Scalia, *A Matter of Interpretation* (Amy Gutmann, ed., Princeton University Press 1997). For a contrary perspective, see, e.g., Bradford C. Mank, 34 Ariz. St. L.J. 815, 830 (2002) (“Textualism is a flawed method of interpretation because it selectively weighs external information related to the meaning of words in the text, but rejects sources of information that are sometimes more pertinent to understanding Congress's intended meaning...[textualists] arbitrarily refuse to consult other contextual information such as legislative history that is sometimes more pertinent.”).

¹³⁶ See, e.g., Rev. Rul. 2006-1 (arguing that with respect to I.R.C. 851(b)(2), “the best evidence of Congressional intent is found in the floor statement when the provision was added to the Senate bill and in other floor statements and Administration comments concerning related legislation.”). See generally, Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 Tex. L. Rev. 819 (1991) and *Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes*, 51 Tax L. Rev. 677 (1996). See also Treas. Reg. 1.6662-4(d)(iii) (allowing taxpayers to rely on floor statements and committee reports for purposes of determining whether there is substantial authority for the tax treatment of an item).

¹³⁷ See, e.g., Hon. Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 Suffolk U. L. Rev. 807, 821 (arguing that the Blue Book, despite being written after the enactment of a statute, “provides important guidance as to the congressional thinking behind the tax code.”). See also Noel B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 Va. Tax Rev. 1, 18-19 (2004) (suggesting that a committee report explaining a previously enacted provision is entitled to interpretive weight).

“intent” of Congress—they represent only the subjective intentions of their authors’.¹³⁸ Further, though courts have in the past failed to acknowledge the primacy of text in statutory interpretation, the Supreme Court and the circuits have shown renewed interest in according statutes their plain meaning, and have been reluctant to examine legislative history.¹³⁹

Under a textual approach, then, informal IRS publications cannot implement a statutory delegation that calls for *regulations*. However, these publications cannot necessarily be ignored. Section 7805(b)(1)(C) expressly grants the Secretary the authority to issue regulations retroactive to the date that a notice is issued describing those regulations.¹⁴⁰ If one believes that the

¹³⁸ The sole manner by which Congress may pass laws (and thereby communicate its “intent”) is described unambiguously in the Constitution. *See* U.S. Const. art. I, § 7, cl. 2. Committee reports cannot possibly reflect Congress’s intent, as such reports do not undergo bicameral approval and presentment to the President. Though courts sometimes “believ[e] that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole...[t]here is no basis either in law or in reality for this naive belief.” *Zedner v. United States*, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring). Rather, Congressional intent is best defined by “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.” *See* Scalia, *supra* note 135 at 17. Even if one wished to discover the legislators’ subjective intent, it is unlikely any such “intent” actually exists—Congressmen probably do not read (much less understand) the text of the bills they vote on. Regardless, even if all Congressmen do agree on an interpretation of a statute, that agreement is not authoritative unless it is itself embodied in a properly enacted statute. *See* *Aldridge v. Williams*, 44 U.S. 9, 24 (1844) (“If every member of the legislature had preferred that the regulations under the act of 1832 should not have been sanctioned by that of 1833, it would not have been effective to repeal the act of 1832, *unless they had expressed their wish in a legislative form.*”) (emphasis supplied). *See also* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) (“We do not inquire what the legislature meant; we ask only what the statute means.”).

¹³⁹ *See, e.g.*, *Gitlitz v. Commissioner*, 531 U.S. 206, 220 (2001) (“Because the Code’s plain text permits the taxpayers here to receive these benefits, we need not address [policy concerns].”); *Tax Analysts v. IRS*, 350 F.3d 100, 104 (D.C. Cir. 2003) (“Given the clarity of the statute’s language and structure, we have no need to resort to legislative history...the court does not ‘resort to legislative history to cloud a statutory text that is clear.’”) (citations omitted); *Black & Decker Corp. v. United States*, 436 F.3d 431, 437 (4th Cir. 2006) (“The legislative history argument does not persuade us. The prototypical transaction Congress had in mind in drafting § 357(c)(3) may well have been one in which a corporation exchanged liabilities as part of a transfer of an entire trade or business to a controlled subsidiary, but nothing in the section’s plain language embraces such a limitation.”). *See also* Allen D. Madison, 43 Santa Clara L. Rev. 699, 749 (2003) (“Under the Supreme Court’s recent trend of resolving tax cases using textualist interpretation methods, it is doubtful that the Court would allow the standard sham transaction doctrine, the business purpose doctrine, the economic substance doctrine, or the step-transaction doctrine to stand.”).

¹⁴⁰ Section 7805(b)(1)(C) further confirms a statutory delegation is not necessarily self-executing. Congress would have no need to provide the Secretary the authority to issue regulations retroactive to the date of a notice if either the statute or the notice had the force and effect of law prior to the issuance of regulations. Section 7805(b)(1)(C) once again shows that Congress says what it means and means what it says—delegations which call for regulations lack effect in the absence of such regulations.

Secretary will make good on his promise to promulgate such regulations, an informal notice may have the practical effect of a properly issued regulation.¹⁴¹

D. Recommended Approach to Delegations Whose Substance Overlaps with Other Code Provisions

Though statutory language whose operation is conditioned upon the issuance of regulations should not be given independent effect, separate provisions of the Code may otherwise impose the detriment or provide the benefit described in the delegation—nothing in this paper contradicts the holding of *H Enterprises*.¹⁴² Thus, where subsection (a) of a Code provision states that “Rule X is to apply to all persons,” and subsection (b) states that “The Secretary shall prescribe regulations applying rule X to corporations,” one should not necessarily infer that rule X does not apply to corporations. Rather, subsection (a) is a self-executing provision which applies that rule to all persons, including corporations—subsection (b) merely commands the Secretary to issue clarifying regulations.

E. Recommended Approach to Delegations That Intersect With Other Code Provisions

Statutory delegations which intersect with other Code provisions present particularly challenging questions of interpretation. Nonetheless, given that Code sections often intersect, it is important to consider how one should interpret a self-executing statute that contains a cross-reference to a statutory delegation. For example, where a taxpayer-friendly, self-executing provision of the Code *requires* compliance with another provision of the Code, and the application of that other provision depends upon the issuance of regulations, can a taxpayer enjoy the benefits of the self-executing provision in the absence of such regulations? The answer is “no.”

¹⁴¹ Taxpayers should be aware that § 7805(b) permits the Service to issue regulations retroactively in some other circumstances as well. *See* Saltzman at 3.02[4].

¹⁴² Discussed *supra* Part II.C.i.

Consider § 1092(a)(1), which limits a taxpayer’s ability to recognize loss from straddles. Section 1092(a)(2)(A) exempts “identified straddles” from the application of § 1092(a)(1).

Section 1092(a)(2)(B) provides that an “identified straddle” is any straddle which:

- i) is clearly identified on the taxpayer’s records,
- ii) *to the extent provided by regulations*, the value of each position of which (in the hands of the taxpayer immediately before the creation of the straddle) is not less than the basis of such position in the hands of the taxpayer at the time the straddle is created, and
- iii) is not part of a larger straddle.

The delegation in § 1092(a)(2)(B)(ii) is *not* a self-executing provision—it operates only to the extent provided in regulations, and it carries no *independent* effect. It does, however, receive effect via § 1092(a)(2)(A)—the words requiring compliance with § 1092(a)(2)(B)(ii) *are* self-executing, even if § 1092(a)(2)(B)(ii) itself is not. Thus, the taxpayer cannot enjoy the benefits of § 1092(a)(2)(A) until he meets all of its requirements, including those found in § 1092(a)(2)(B)(ii).¹⁴³ One should not make the mistake of thinking that, until the issuance of regulations, § 1092(a)(2)(B)(ii)’s conditions need not be met in order to enjoy the § 1092(a)(2)(A) exemption.¹⁴⁴ Rather, the absence of regulations indicates only that they *cannot* be met.¹⁴⁵

¹⁴³ *But see* Gregory F. Jenner, *ACLI Suggests Technical Corrections to Straddle Provisions*, 2005 TNT 201-24, (August 31, 2005) (“While [I.R.C. § 1092], by its terms, is clearly self-executing, we believe it is essential that this be clarified by Congress in order to prevent frustration of Congressional intent.... The provision relating to Treasury guidance should be amended to provide that, until such time as there is any such guidance, any reasonable identification method is sufficient.”).

¹⁴⁴ Congress could have drafted § 1092(a)(2)(B)(ii) in such a way that its condition would have to be met only “to the extent *required by* regulations,” rather than “to the extent *provided by* regulations.” When a condition must be met to the extent that it is *required by* regulations, and no regulations exist, there is effectively no condition to be met. As drafted, however, a taxpayer is required to show that the value of his straddle position is not less than its basis at creation, as *provided by* regulations; until regulations make this provision, a taxpayer cannot enjoy § 1092(a)(2)(A)’s benefits.

¹⁴⁵ Contrarily, where a statutory delegation exists in isolation from other Code provisions, it will generally lack independent *or* dependent effect. For example, if Congress removed § 1092(a)(2)(B)(ii) from the statute, and instead added a new subsection (h) to section 1092 which provided, “The Secretary shall prescribe regulations

Section 1092 illustrates one way that a statutory delegation may intersect with other Code provisions. When analyzing these intersections, one must appreciate that though a statutory delegation has no independent legal effect, it cannot necessarily be ignored—if another provision cross-references it, the absence of regulations may affect the operation of the referencing statute.

F. *Ancillary Issues*

Section 7807(a) provides that certain previously issued regulations may serve as “interim” regulations for a provision in the Code whose application depends on the issuance of regulations, to the extent that such previously issued regulations *could* be issued under the authority of the new delegation.¹⁴⁶ It is unlikely that § 7807(a) will apply very often—the “previously issued regulations” referred to in the statute probably comprise only those existing before the enactment of the 1954 Code.¹⁴⁷ The cautious advisor will nonetheless carefully examine those regulations to determine if any of those regulations *could* be issued pursuant to the spurned delegation before concluding that the statute lacks effect.

V. *Conclusion*

Justice Frankfurter once quipped that lawyers heed the words of a statute only when the legislative history is ambiguous.¹⁴⁸ Nowhere is this cavalier attitude towards statutory interpretation clearer than in the current approaches to spurned delegations in the Internal Revenue Code. Indeed, one may wonder why the use of phantom regulations is commonplace. Though one is left to conjecture, perhaps the courts and the IRS have simply overlooked authorities in analogous areas of the law that require a different approach. The circuit courts

limiting ‘identified straddles’ to mean any straddle the value of each position of which (in the hands of the taxpayer immediately before the creation of the straddle) is not less than the basis of such position in the hands of the taxpayer at the time the straddle is created,” the taxpayer would not need to satisfy the additional requirements found in the delegation, absent regulations. Perhaps Congress should have drafted the statute in this manner, but it did not, and its choice should be deemed intentional.

¹⁴⁶ See *supra* Part III.B.

¹⁴⁷ See *supra* note 19.

¹⁴⁸ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 542-43 (1947).

have often noticed that the taxpayers and the IRS have failed to advance all possible arguments with respect to spurned delegations, and have sometimes even criticized them for this.¹⁴⁹

Regardless, this paper advocates a particular, systematic approach to spurned delegations, without concern for whose ox is gored. Taxpayers face considerable confusion in complying with the Code even without regard to spurned delegations, and a sensible approach is badly needed. Unfortunately, the solution offered here is hardly ideal. Frequent amendments to the Code and the growing backlog of regulation projects at the Treasury ensure significant delay between the enactment of a statutory delegation and the issuance of final regulations. Though such delay does not justify the failure to heed Supreme Court jurisprudence and the Administrative Procedure Act, Congress can allow the Secretary to use informal guidance more frequently or expand its practice of providing statutory interim rules. Alternatively, Congress may consider requiring the Secretary to meet strict deadlines in issuing regulations, though even a firm deadline does not fully ensure compliance. Creative solutions to the problems posed by spurned delegations would be a welcome addition to the current literature, to which the textual approach described here makes a modest contribution.

¹⁴⁹ See, e.g., *Pittway Corp. v. United States*, 102 F.3d 932, 935 (7th Cir. 1996) (“What may be Pittway’s best argument it makes only in passing: that the IRS dropped the ball by never issuing regulations interpreting Section 4662(b)(1) even though the statute explicitly stated that such regulations were forthcoming.”); *First Chicago Corp. v. Commissioner*, 842 F.2d 180 (7th Cir. 1988) (“The government might have been expected to, but does not, take the exceptionally hard line that since the Treasury never issued regulations under which items of tax preference ‘shall be properly adjusted’ where the items yield no tax benefit to the taxpayer, section 58(h) is not in play at all...”); *Francisco v. Commissioner*, 370 F.3d 1228 n.1 (D.C. Cir. 2004) (“Neither party in this appeal asserts [that the statute is not self-executing], and we have no occasion to pass upon the question it raises.”). The courts have even expressed discomfort with playing the Secretary’s role. See, e.g., *First Chicago Corp. v. Commissioner*, 88 T.C. 663, 667 (1987) *aff’d* 842 F.2d 180 (7th Cir. 1988) (“We do not relish doing the Secretary’s work for him, but we have no other course to follow.”).