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CONGRESSIONAL DISTRIBTION MEMORANDUM

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Subject: **Legal Analysis of Availability of Premium Tax Credits in State and Federally Created Exchanges Pursuant to the Affordable Care Act**

This memorandum has been prepared for distribution to more than one congressional office.

This memorandum analyzes whether premium tax credits available to certain individuals under §36B of the Internal Revenue Code, as established under §1401 of the Patient Protection and Affordable Care Act (ACA),[1] would be available for individuals who participate in federally created health insurance exchanges. It has been argued that, under this section, premium tax credits would only be available in exchanges established by a state and not those established by the federal government. This memorandum provides a brief background on relevant provisions of ACA, addresses considerations that a court could take into account in interpreting the statutory language of §36B of the Act; and, finally, discusses how regulations implementing the premium tax credit could be evaluated.

Background

As part of ACA's intended goal of improving the private health insurance market and accessibility for health coverage, ACA specifies that by January 1, 2014, each state must establish an American Health Benefit Exchange ("exchange") that is either a state governmental agency or a nonprofit entity, in order to provide health coverage to qualified individuals and/or employers.[2] ACA generally provides that if a state does not elect to establish an exchange, or if the Secretary of Health and Human Services (HHS) determines that an electing state will not have an operational exchange by January 1, 2014, or has not taken certain specified actions, the Secretary must establish and operate an exchange within the state.[3]

In order to assist individuals in purchasing health insurance in an exchange, §36B of the Internal Revenue Code, created by §1401 of ACA, provides that, beginning in 2014, certain lower income taxpayers may receive a refundable tax credit that is paid directly to an insurer and applied toward the cost of the health insurance premium.[4] In general, there are two principal factors one must consider in determining whether

[1] P.L. 111-148 (2010). ACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010). (HCERA). These Acts will be collectively referred to in this memorandum as "ACA." It should be noted that section 1401 of ACA has been subsequently amended, but these amendments are not relevant to this analysis.

[2] P.L. 111-148, §§1311(b)(1), 1311(d)(1).

[3] P.L. 111-148, §1321(c).

[4] 26 U.S.C. § 36B.

a taxpayer will be eligible for a premium tax credit: (1) whether the taxpayer meets the income and other requirements for the credit;[5] and (2) whether any months during the taxable year qualify as "coverage months" for the taxpayer. With respect to this second requirement, in order for a taxpayer to receive a health insurance premium credit under ACA, at least one month in the year must qualify as a coverage month for the taxpayer.[6] The term "coverage month" in §36B means the following:

> [W]ith respect to an applicable taxpayer, any month if--
>
> (i) as of the first day of such month the taxpayer, the taxpayer's spouse, or any dependent of the taxpayer is covered by a qualified health plan … *enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act …*[7]

In addition, the amount of the premium tax credit is equal to the sum of the "premium assistance credit amount" for each coverage month the taxpayer experiences during the taxable year. The premium assistance credit amount is defined as the amount equal to the lesser of--

> (A) the monthly premiums for such month for 1 or more qualified health plans offered in the individual market within a State which cover the taxpayer, the taxpayer's spouse, or any dependent … of the taxpayer *and which were enrolled in through an Exchange established by the State under 1311 of the Patient Protection and Affordable Care Act*, or
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> (B) the excess (if any) of--
>
> (i) the adjusted monthly premium for such month for the applicable second lowest cost silver plan with respect to the taxpayer, over
>
> (ii) an amount equal to 1/12 of the product of the applicable percentage and the taxpayer's household income for the taxable year.[8]

It has been argued that, based on this language in §36B, i.e., "an Exchange established by the State under section 1311 of [ACA]," premium tax credits are not available to taxpayers in exchanges created by the federal government.[9] However, in May 2012, the Internal Revenue Service (IRS) rejected this interpretation in final regulations related to the premium tax credit, providing that premium tax credits are available to taxpayers who obtain coverage in both state and federally facilitated exchanges.[10] The preamble to the regulations explains the IRS's position that the statutory language of §36B supports this interpretation, and provides further that "… the relevant legislative history does not demonstrate that

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[5] In order to be eligible for a premium credit, a taxpayer's household income must be between 100% and 400%, inclusive, of the federal poverty line (FPL) for the taxpayer's family size. 26 U.S.C. § 36B(c)(1). Individuals with income below 100% of the FPL are ineligible for a premium credit, but may qualify for assistance under Medicaid. An exception is made for lawfully present aliens with income below 100% of the FPL, who are ineligible for Medicaid on account of their alien status. 26 U.S.C. § 36B(e). These taxpayers will be treated as though their income is exactly 100% of FPL for purposes of the credit.

[6] 26 U.S.C. § 36B(b)(1). It should also be noted that any month during which an individual is eligible for other minimum essential coverage would not be counted as a coverage month. Examples of other minimum essential coverage include, but are not limited to, affordable employer provided coverage, Medicare, and Medicaid.

[7] 26 U.S.C. § 36B(c)(2) (emphasis added).

[8] 26 U.S.C. § 36B(b)(2)(A)-(B) (emphasis added). It should be noted that the reference to the "silver plan" in subsection (B) refers to one that is offered in the "same Exchange" as plans described in subsection (A). 26 U.S.C. § 36B(b)(3)(B).

[9] *See, e.g.,* Wall Street Journal, Health Law Opponents Challenge Tax Credit, July 16, 2012, available at http://online.wsj.com/article/SB10001424052702303933704577531271643114572.html.

[10] Department of the Treasury, Internal Revenue Service, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377 (May 23, 2012).

Congress intended to limit the premium tax credit to State Exchanges," and that this reading of the language of §36B "is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole."[11]

Potential Statutory Interpretation of Section 1401 of ACA

In general, the starting point for courts in interpreting the meaning of a statute is the language of the statute itself. The Supreme Court often recites the "plain meaning rule," that if the language of the statute is clear and unambiguous, it must be applied according to its terms. As the United States Supreme Court stated in *Connecticut National Bank v. Germain*:

> [I]n interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there .... When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.[12]

Applying the plain meaning rule to §36B, it is possible that a court could read the phrase "an exchange established by the State under 1311 of ACA," as being clear to not include an exchange established by the federal government. Indeed, this language seems to be straightforward on its face, which has perhaps led some commentators to suggest that the lack of reference to a federally created exchange could have been a drafting error.[13] However, courts often assume that the language Congress employs, including additions and omissions to a particular statute, is intentional.[14] Therefore, a court may be inclined to find that §36B presents a clear statement regarding the types of exchanges in which taxpayers may receive a premium tax credit, and may not look to any additional factors in its analysis.[15]

On the other hand, it is possible that a court could find that it is unable to rely on a plain meaning interpretation of §36B, perhaps finding the language to be ambiguous.[16] In examining whether §36B is

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[11] *Id*. at 30378.

[12] 503 U.S. 249, 254 (1992)(citations omitted). *See also* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").

[13] *See e.g.,* Brett Ferguson, *IRS Rule Related to Employer Mandate May Be Next Challenge in Courts, Critics Say*, BNA Health Care Policy Report, July 16, 2012 (statements of Judith Solomon).

[14] *See generally*, Russello v. United States, 464 U.S. 16, 23 (1983)("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

[15] It should be noted that there seems to be general consensus that the plain meaning rule aptly characterizes interpretational priorities (statutory language is primary, other considerations of intent and purpose secondary). However, agreement on the basic meaning of the plain meaning rule—if it occurs—does not guarantee agreement in the rule's application. For example, there have been cases in which Justices of the Supreme Court have agreed that the statutory provision at issue is plain, but have split 5-4 over what that plain meaning is. *See, e.g.,* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (disagreement over the scope of civil RICO). *See also* Corley v. United States, 556 U.S. 303 (2009). There are other cases in which strict application is simply ignored; courts, after concluding that the statutory language is plain, nonetheless look to legislative history, either to confirm that plain meaning, or to refute arguments that a contrary interpretation was "intended." *See, e.g*., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 209 (1994); *see also* Darby v. Cisneros, 509 U.S. 137, 147 (1993) ("Recourse to the legislative history of §10(c) is unnecessary in light of the plain meaning of the statutory text." The Court considered the legislative history, nevertheless, and found nothing inconsistent between it and the Court's reading of statutory language.). For general information on the plain meaning rule, *see* CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Larry M. Eig.

[16] According to a leading statutory construction treatise, "[a] statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses." SINGER & SINGER, STATUTES AND STATUTORY (continued...)

ambiguous, a court may look, for example, to the definition of "exchange" in ACA. ACA defines the term "exchange" as the following:

> EXCHANGE.—The term 'Exchange' means an American Health Benefit Exchange established under section 1311 of the Patient Protection and Affordable Care Act.[17]

Section 1311 of ACA, as referenced in this definition, seems to only address the creation of state-established exchanges. The section does not explicitly speak to federally created exchanges -- those are addressed in §1321 of ACA. However, section 1321 of ACA also uses the term "exchange": it states that the Secretary of HHS must establish an "exchange" if a state should fail to take certain specified actions:

> (c) Failure to establish Exchange or implement requirements.
>
> (1) In general. If--
>
> (A) a State is not an electing State ; or
>
> (B) the Secretary determines, on or before January 1, 2013, that an electing State--
>
> (i) will not have any required Exchange operational by January 1, 2014; or
>
> (ii) has not taken the actions the Secretary determines necessary to implement [certain requirements]--
>
> the Secretary shall … establish and operate such Exchange within the State and the Secretary shall take such actions as are necessary to implement such other requirements.

Plugging in ACA's general definition of "exchange" into §1321 above arguably links a federally created exchange to one established by a state pursuant to the requirements of §1311. Thus, it may be questioned whether, based on the definition of "exchange," a federally created exchange should in some way be synonymous with one created by a state under §1311 and how this could affect the interpretation of §36B.

If a court considers the language in §36B to be ambiguous, it may look at legislative history and other extrinsic aids to determine congressional intent. While a survey of the legislative history of ACA with respect to §36B is beyond the scope of this memorandum, some have asserted that Congress intended to have premium tax credits only available in state-run exchanges in order to incentivize states to establish an exchange.[18] Conversely, others may claim that premium tax credits were part of ACA's goal of improving access to health care, which is arguably undermined if the availability of premium credits is limited to state-run exchanges. It has also been noted that reports by the Congressional Budget Office and the Joint Committee on Taxation assumed in their analyses of the legislation that premium tax credits

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(...continued)

CONSTRUCTION (Sutherland Stat. Const.) (7th ed.), vol. 2A, § 46.4 (2007).

[17] P.L. 111-148, § 1563(b). Section 1563(b) of ACA, entitled Conforming Amendments, amends section 2791 of the Public Health Service Act. Section 1551 of ACA states that unless specifically provided for otherwise, the definitions contained in section 2791 of the Public Health Service Act shall apply with respect to title I of ACA (which contains the provisions related to exchanges).

[18] *See* Julie Rovner, *Could the Health Law End Up Back in Court? Opponents Think So*, National Public Radio Health Blog, July 18, 2012, available at http://www.npr.org/blogs/health/2012/07/18/156936766/could-the-health-law-end-up-back-in-court-opponents-think-so.

would be available in both state and federally run exchanges.[19] Arguments such as these may be explored by a reviewing court.

Another important canon of statutory construction provides that parts or sections of statutes or Acts should be evaluated in connection with other parts and sections as one "harmonious whole" – requiring examination of not just one particular provision, but the broader legislative scheme in which the provision is included.[20] A court relying on this canon may look to §36B(f)(3), addressing certain reporting requirements with respect to the premium tax credit. This subsection states:

> ''(3) INFORMATION REQUIREMENT.— Each Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act) shall provide the following information to the Secretary and to the taxpayer with respect to any health plan provided through the Exchange …
>
> ''(B) The total premium for the coverage without regard to the [premium tax] credit under this section or cost-sharing reductions under section 1402 of such Act.
>
> ''(C) The aggregate amount of any advance payment of such credit …
>
> ''(E) Any information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit.

Unlike the language in question, §36B(f)(3) addresses reporting requirements which seem to explicitly apply to both state and federally created exchanges (i.e., "Each Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act")). While one may argue that it is possible for this information requirement to be fulfilled without premium credits being provided to individuals participating in federally run exchanges (i.e., it could be reported to the Secretary that no taxpayer in a state with a federally run exchange received a credit), others may argue that if you look at this provision along with the other language in §36B, this demonstrates congressional intent to have premium tax credits available to taxpayers in both state and federally created exchanges, or, perhaps highlights a discrepancy that must be resolved by a court or the IRS in implementing the provision.

It is also possible that a reviewing court could examine how the language in §36B arises in other provisions of ACA and whether those other applications provide insight as to congressional intent.[21] The phrase "an Exchange established by the State under 1311 of [ACA]" arises numerous times throughout the Act. For example, §2001(b) of ACA, entitled "Maintenance of Medicaid Income Eligibility (MOE)," provides that states with Medicaid programs in effect on the date of enactment of ACA must maintain their programs with the same eligibility standards, methodologies, and procedures until the Secretary of

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[19] *See, e.g.*, Timothy Jost, *Implementing Reform: Funding And Flexibility For States On Exchanges*, Health Affairs Blog (Nov. 30th, 2011), available at http://healthaffairs.org/blog/2011/11/30/implementing-reform-funding-and-flexibility-for-states-on-exchanges/.

[20] *See* Sutherland, note 17 *supra*, at 201. Also, as the Supreme Court has noted, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme… A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

[21] However, it is important to note that it is possible for two statutory provisions with similar language to interpreted differently. *See, e.g.*, *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), where the Court determining that the word "age" is used in different senses in different parts of the Age Discrimination in Employment Act, and that consequently the presumption of uniform usage throughout a statute should not be followed.

HHS determines that "an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act is fully operational." Thus, as part of an analysis of the §36B language, a court might examine whether the MOE language applies solely to state-created exchanges, or, also to federal-run exchanges. If the MOE requirements end only when a state-created exchange is fully operational, then a question may be raised whether the MOE requirements would continue indefinitely in a state that chose not to establish its own exchange, and whether that would be a result intended by Congress. An assessment of Congress's intent regarding the application of the MOE requirements for state and federally-run exchanges might inform an analysis of the same language in the context of premium credits under §36B.

Administrative Authority to Interpret §36B to Include Federally Created Exchanges

As noted above, the Treasury Department, through the IRS, has issued final regulations that define an exchange, for purposes of §36B, to include both state and federally created exchanges. If these regulations were to be challenged as being outside the scope of the IRS's authority under the Administrative Procedure Act,[22] a determination of whether the Service exceeded its delegated authority in issuing the regulations under §36B may hinge on the degree of deference that a reviewing court accords the IRS's understanding of the scope of its authority under ACA. Courts have traditionally "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[23] However, whether a court will defer to a specific agency interpretation or implementation requires an application of the "familiar standards of review" established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[24] In *Chevron*, the Supreme Court outlined what is largely considered a deferential test for reviewing an agency's formal interpretation of its own authorizing statute or a statute it administers. At step one, a reviewing court must determine "whether Congress has directly spoken to the precise question at issue."[25] If Congress has clearly addressed the issue, the court "must give effect to the unambiguously expressed intent of Congress."[26] An agency interpretation that is contrary to the clear intent of Congress must be rejected. If, however, the court determines that Congress's intent is unclear, or that the statutory language in question is ambiguous, the court proceeds to step two. At step two, a reviewing court will generally defer to any "permissible construction" of the pertinent statutory language.[27] This analysis is commonly referred to as the *Chevron* "two-step."

Although *Chevron* is generally associated with judicial review of agency statutory interpretation, the analysis is "principally concerned with whether an agency has authority to act under a statute" and is used

[22] The Administrative Procedure Act (APA) provides standards of judicial review that a court will use to determine whether an agency's action is valid. 5 U.S.C. §§ 702, 704. For example, the APA provides that a reviewing court must set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The APA also states that a reviewing court must "hold unlawful and set aside agency actions, findings, and conclusions found to be … in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. 5 U.S.C. § 706(2)(C).

[23] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 844 (1984).

[24] *Id*.; Am. Library Ass'n v. FCC, 406 F.3d 689, 698; *id.*

[25] *Chevron*, 467 U.S. at 842.

[26] *Id*. 842-43. ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[27] *Id*. at 843. *See also* Astrue v. Capato, 566 U.S. __, __ (2012)(deferring to the Social Security Administration's longstanding interpretation in regulations issued after a notice-and-comment rulemaking and finding that the regulations "warrant the Court's approbation" as they were "neither 'arbitrary or capricious in substance, [n]or manifestly contrary to statute'"(quoting Mayo Found. for Med. Ed. and Research v. United States, 562 U.S. __ (2011); 131 S. Ct. 704 (2011)).

to discern "the boundaries of Congress' delegation of authority."[28] In 2001, the Supreme Court revisited *Chevron* and reinforced this point. In *United States v. Mead Corporation,* the Court held that an agency's implementation of statutory authority "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[29] *Mead* thus established a threshold requirement (what has been referred to as "step zero"[30]) restricting *Chevron* deference to only formal rules and other interpretations holding the "force of law" and promulgated pursuant to delegated authority. Policy statements, agency manuals, and interpretive letters, on the other hand, generally do not warrant such deference.

Given this framework, the question of whether a reviewing court will defer to the Treasury Department's interpretation of the scope of §36B will depend principally on whether that interpretation was made with the force of law pursuant to an exercise of delegated authority; whether the extent of that delegation was ambiguous; and whether the implemented interpretation was reasonable.

Action Taken Pursuant to Delegated Authority and with the Force of Law

The IRS has asserted that the "statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange."[31] In effect, the agency has interpreted the term "exchange" to encompass all forms of health exchanges envisioned by ACA. As previously noted, §36B generally provides, among other things, that taxpayers may receive a premium tax credit during a "coverage month" where they were "enrolled in through an Exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act …."[32] Notably, §36B also provides the Secretary of the Treasury with broad authority to "prescribe such regulations as may be necessary to carry out the provisions of this section…."[33]

Based on the reasoning of the *Mead* case, an agency's implementation of a statutory provision qualifies for *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[34] Under this broad language, it would appear that the IRS Rule would meet *Mead's* preliminary threshold requirement. The IRS Rule was promulgated in the exercise of the broad authority delegated to the IRS to issue rules "necessary to carry out" §36B. Moreover, the Rule was adopted pursuant to notice and comment rulemaking and therefore clearly carries the "force of law." In *Mead*, the Court noted that "congressional authorization to engage in the process of rulemaking" is a "very good indicator of delegation meriting *Chevron* treatment."[35]

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[28] Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir. 1995).

[29] 533 U.S. 218, 226-27 (2001).

[30] *See, e.g.,* Cass Sunstein, *Step Zero*, 92 Va. L. Rev. 187, 207 (2006).

[31] Department of the Treasury, Internal Revenue Service, Health Insurance Premium Tax Credit, 77 Fed. Reg. 30377, 30378 (May 23, 2012).

[32] 26 U.S.C. § 36B(c)(2).

[33] 26 U.S.C. § 36B(g).

[34] *Mead*, 533 U.S. at 226-27.

[35] *Id*. at 229. It should be noted that the *Mead* opinion has generated confusion among lower courts. The D.C. Circuit has issued a limited number of decisions that appear to more heavily scrutinize the threshold question of whether an agency was acting "pursuant to delegated authority." *See*, American Library Association et al. v. Federal Communications Commission, 406 F.3d 689, 699 (D.C. Cir. 2005) ("The agency's self-serving invocation of *Chevron* leaves out a crucial threshold consideration, i.e.
(continued...)

The IRS Rule appears to be an exercise of the authority delegated to the agency to implement §36B, which includes the authority to provide refundable tax credits for taxpayers enrolled in a health insurance exchange. It may be argued that whether the scope of the IRS Rule was a proper interpretation of the statutory delegation, or specifically whether the agency misinterpreted the delegation by including tax credits for federally-facilitated exchanges in addition to state exchanges, is precisely the query the *Chevron* analysis was developed to address. This conclusion seems to be reaffirmed by the Supreme Court's recent decision in *Mayo Foundation for Medical Education & Research v. United States*,[36] where the Court evaluated the validity of regulations that prevented medical residents from being considered students for purposes of an exemption from Federal Insurance Contributions Act (FICA) taxes. The rules were issued pursuant to the Treasury Department's general authority to "prescribe all needful rules and regulations for the enforcement"[37] of the Internal Revenue Code. In finding it appropriate to evaluate the regulations under the *Chevron* analysis, the Court cited to *Mead* and noted that the Court indicated that its "inquiry in [this] regard does not turn on whether Congress's delegation of [rulemaking] authority was general or specific."[38]

Step One: Whether Congress has Spoken to the Precise Question at Issue

If a reviewing court proceeds to the first step of the *Chevron* analysis, it will ask whether "Congress has spoken to the precise question at issue."[39] Thus, a court will consider whether Congress has clearly articulated a position on the breadth of the IRS's authority to provide premium tax credits for taxpayers enrolled in health insurance exchanges. The plain language of §36B suggests that premium tax credits are available only where a taxpayer is enrolled in an "Exchange established by the State." As noted previously, a strictly textual analysis of the plain meaning of the provision would likely lead to the conclusion that the IRS's authority to issue the premium tax credits is limited only to situations in which the taxpayer is enrolled in a state-established exchange. Therefore, an IRS interpretation that extended tax credits to those enrolled in federally facilitated exchanges would be contrary to clear congressional intent, receive no *Chevron* deference, and likely be deemed invalid. However, given the previously discussed alternative interpretive arguments that may suggest a more inclusive construction—including legislative history, legislative purpose, and context—a more searching analysis of Congress's intent in enacting the provision may lead to a less clear result.

As such, whether a court finds that there is sufficient ambiguity in §36B to proceed to *Chevron* step two may depend on the extent to which the court is willing to engage in a searching statutory interpretation involving text, context, legislative purpose, and legislative history, or whether the court would limit itself to a consideration of only the plain text of the provision.[40] In *Chevron* itself, the Supreme Court noted that a court should employ the "traditional tools of statutory construction" to "ascertain" whether

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whether the agency acted pursuant to delegated authority."). However, in these cases the court has made clear that the rule in question would have failed under either *Chevron* "Step One" or "Step Two." *See,* Aid Association for Lutherans v. United States Postal Service, 321 F.3d 1166 (D.C. Cir. 2003) (holding that the Post Office had exceeded its delegated authority in broadly interpreting its authority under 39 U.S.C. 3626(j), but explaining that, "[o]ur judgment in this case is the same whether we analyze the agency's statutory interpretation under *Chevron* Step One or Step Two.").

[36] 131 S. Ct. 704 (2011).

[37] 26 U.S.C. § 7805(a).

[38] Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704 at 713-14.

[39] *Chevron*, 467 U.S. at 842.

[40] This has been described as the "textualist-intentionalist divide." *See generally*, Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 Admin. L. Rev. 725 (2007).

"congress had an intention on the precise question at issue."[41] The majority opinion then went on to consider text, purpose, and legislative history in concluding that the meaning of "stationary source" under the Clean Air Act was ambiguous.[42] Justice Scalia, on the other hand, has led the opposition to the use of legislative history and legislative purpose at "Step One", favoring a purely textualist approach to discerning whether a statute is ambiguous.[43]

In a 2007 case potentially relevant to the instant situation, *Zuni Public School District No. 89 v. Department of Education,* the Supreme Court considered a situation in which the legislative history behind the provision seemed to suggest a congressional understanding contrary to the plain language of the statute.[44] In *Zuni*, the majority, invoking C*hevron*, upheld an interpretation by the Secretary of Education of the Impact Aid Act's "equalization requirement" for aid expenditures to public school districts. Although the majority seemed to initially favor the textualist approach, noting that "normally neither the legislative history nor the reasonableness of the Secretary's method would be determinative if the plain language of the statute unambiguously indicated that Congress sought to foreclose the Secretary's interpretation," the court then turned to legislative history and purpose "because of the technical nature of the language in question."[45] Based on an evaluation of the statute's history, the majority determined that Congress's intent was unclear, and that the agency's interpretation was reasonable. While the regulations in the *Zuni* case involved complex calculations, something that is arguably not analogous to the applicability of the premium tax credits in §36B, the case still arguably indicates Court's willingness under certain circumstances to evaluate more than just the text of a statute in determining whether Congress has spoke on a particular issue.

Step Two: Whether the Agency Interpretation was Reasonable

As noted above, under "Step Two" of *Chevron*, if Congress has not directly spoken to the question at issue, the reviewing court's role is limited to determining whether the agency's interpretation was "based on a permissible construction of the statute."[46] Where Congress has not clearly expressed its intent, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation" of the agency.[47] Therefore, if Congress's intent is unclear, the Court's role at *Chevron "*Step Two" is generally to defer to any reasonable agency interpretation of the pertinent statutory language.[48] The Supreme Court has indicated that deference to an agency's interpretation under step two is appropriate "whether or not it is the only possible interpretation or even one a court might think best."[49] Thus, if a reviewing court determines that there is ambiguity surrounding the issue of whether premium credits are available in federal exchanges and reaches step two of the *Chevron* analysis with respect to the

[41] *Chevron*, 467 U.S. at 843 n.9.

[42] *Id.* at 862-65.

[43] Under Justice Scalia's *Chevron* approach, the first step is simply to ask whether the enacted text is clear. Although initially following the intentionalist approach, some commentators have suggested that the majority of the Court now seems to generally support the textualist position. At least one commentator has asserted that "[t]oday, *Chevron*'s first step is routinely described and applied as a search for mere textual clarity." Jellum, *supra* note 41, at 761.

[44] 550 U.S. 81 (2007).

[45] *Id*. at 90.

[46] *Chevron*, at 842-43.

[47] *Id*. at 844.

[48] *Id.* at 843.

[49] *See, e.g.,* Holder v. Gutierrez, 566 U.S. __ (2012); 2012 U.S. LEXIS 3783, citing *Chevron*, 467 U.S. at 843-44.

regulations issued under §36B, the regulations will very likely be considered a reasonable agency interpretation of the statute and accorded deference by the court.[50]

[50] *See*, Thomas J. Miles and Cass R Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823 (2006) (finding that more than 90 percent of invalidations under Chevron occurred at Step One).