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GOP’s Tax Package Grapples With Impact of Loper Bright Ruling

- **Bill’s explicit grants of regulatory power help shield Treasury**
- **Protection must be weighed against other factors, observers say**

Congressional tax writers are taking steps to head off any future legal challenges to their new tax bill, but it’s a delicate balancing act.

The giant bill that got the House Ways and Means Committee’s stamp of approval Wednesday includes numerous provisions that explicitly grant the Treasury Department authority to issue regulations implementing tax-free tips, a higher cap on deducting state and local taxes, and many other changes. The grants of authority indicate that the Treasury secretary “shall prescribe such regulations or other guidance as may be necessary” to implement a particular provision, or otherwise direct Treasury to act.

That might help bolster Treasury against any court challenges arising out of a key 2024 US Supreme Court ruling giving judges more power to overrule agencies’ regulations. The result may be to help ease the way for some of the sweeping tax changes from congressional Republicans and President Donald Trump.

But in shielding Treasury against any challenges stemming from the court’s *Loper Bright Enterprises v. Raimondo* ruling, Congress also must weigh a host of other, sometimes competing priorities, tax practitioners and other observers say. At the same time lawmakers are making clear that they’re delegating their power, they also want to make sure they keep the agencies on a tight leash.

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They’re also conscious that one day the *Loper Bright* shoe will be on the other foot, when a future Democratic administration’s Treasury would enjoy the same protection against being overruled on regulations to implement the bill.

"It is three-dimensional chess," said Devon Bodoh, a partner at Weil Gotshal & Manges LLP. "There are a number of imperatives out there that absolutely need to be balanced."

Clear Regulatory Authority

Awarding agencies broad, explicit grants of authority to issue regulations will be "a recipe for uncertainty" for taxpayers, given how long it can take to write regulations and the possibility that a new administration with different priorities may ultimately end up doing it, said Leila Carney, a member at Caplin & Drysdale. "They can expand agency interpretation in the near future to be in line with their goals, but down the line that's not going to be assured."

Conservative lawmakers have indicated they're conscious of *Loper Bright*, both because it highlights the need for Congress to be clear about delegating authority to agencies and because it emphasizes and preserves Congress's own power to write laws instead of simply leaving it to agencies to interpret them via regulation.

Loper Bright allows Congress to put "more limits on the abilities for bureaucrats to add cost to families by coming up with rules and regulations Congress never voted on," House Majority Leader Steve Scalise (R-La.) said Wednesday.

The bill would enact a variety of tax cuts and make permanent or extend many parts of the 2017 tax-law overhaul. House leaders have said they hope to have the full chamber pass the bill by Memorial Day, and Republicans are aiming to have it pass the Senate as well and sent to Trump's desk by July 4.

The bill includes references that specifically delegate from Congress to Treasury the authority to issue regulations on a wide variety of new and revised tax provisions. In addition to "no tax on tips" and the SALT cap, other provisions over which the bill grants Treasury regulatory authority include the "no tax on overtime income" measure; aspects of how the bill's proposed new "MAGA accounts" would work; amortization of companies' research and development costs; the excise tax on college endowments' income; and aspects of how unfair foreign taxes would be defined.

Congress Managing 'New World'

While the *Loper Bright* ruling scrapped a longstanding requirement for courts to defer to agencies like Treasury when they interpret the law in the regulations they issue, it also indicated that courts should still defer to the agencies in cases where Congress has explicitly delegated its regulatory authority to them.

Congress has often delegated regulatory authority to agencies in the past, but *Loper Bright* made it more important that such delegations be clear and specific, said Kristin Hickman, a University of Minnesota law professor who specializes in tax and administrative issues. "There's no question a number of members of Congress are very cognizant of *Loper Bright*."

The bill's directives for Treasury to act are "more deliberative and detailed" than usual, and that added specificity "may be aimed at reinforcing the Treasury's authority to issue regulations in anticipation of potential challenges" after *Loper Bright*, said Jennifer Breen, a partner at Morgan Lewis & Bockius LLP.

The ruling was “a wake-up call to Congress,” Bodoh said. “*Loper Bright* has caused a re-focus on regulatory validity. I don’t think Congress is leaving any of this to chance.”

The tax bill’s moves suggest “an evolution in the relationship between Congress and the IRS,” Breen said. Congress isn’t just telling Treasury to act, it’s also directing Treasury exactly what to do in many cases, “leaving less to agency discretion than ever before.”

The balancing act Congress has undertaken has left it with a “middle of the road approach,” somewhere between what it did in the 2017 overhaul, where Congress was “very constrained” in delegating regulatory authority, and the 2022 tax-and-climate law, which was more explicit in calling out Treasury’s regulatory authority, said Pat Brown, co-leader of PwC’s Washington National Tax Services practice.

“It’s interesting how they’re trying to manage this new world,” Brown said.

Chris Cioffi in Washington also contributed to this story.

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