taxnotes® state

Volume 107, Number 2 ■ January 9, 2023

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by Loren M. Opper

Reprinted from *Tax Notes State*, January 9, 2023, p. 161

Private Entity Participation in Legislation: Justice Alito and the CAMT

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In this article, Opper discusses a recent statement from Justice Samuel A. Alito Jr. in *Texas v. Commissioner*, in which Justice Alito expressed his opposition to what he perceived as an unconstitutional delegation of congressional power to a private entity in the context of Medicaid. Opper asks whether that same logic could be extended to the corporate alternative minimum tax.

Congressional Legislative Powers

Federal legislative powers are vested in Congress,[1] which over the years has delegated powers for specific purposes to private entities. The U.S. Supreme Court has defined constitutional limits on the scope of permissible delegation.[2] The Inflation Reduction Act of 2022 relies on the Financial Accounting Standards Board (FASB), a private entity, to determine principles relevant for the calculation of the new corporate alternative minimum tax (CAMT), effective for tax years beginning after December 31, 2022.[3] Reliance on FASB poses the question whether Congress unconstitutionally exceeded the limit on delegating legislative power to a private entity. The question is significant because of a statement that Justice Samuel A. Alito Jr. appended to the Supreme Court's denial of a petition for certiorari in *Texas v. Commissioner*,[4] suggesting that certiorari should be granted in a later case if the determinations of a private entity — in that case, the Actuarial Standards Board (ASB) — have any future effect. Justices Clarence Thomas and Neil Gorsuch joined Alito's statement.

Texas v. Commissioner — the Delegation Issue

In *Texas v. Commissioner*,[5] Texas, along with Indiana, Kansas, Louisiana, Nebraska, and Wisconsin, sued the Department of Health and Human Services and the Internal Revenue Service to recover an amount that HHS required the states to pay to their managed healthcare organizations as a condition for receiving matching federal funds for their Medicaid programs. The states prevailed at the district court level on the question of unconstitutional delegation of congressional

[1] U.S. Const. Art. I, sec. 1.

[2] *See, e.g.*, *Currin v. Secretary*, 306 U.S. 1, 15 (1939) (congressional power constitutionally delegated when legislation must be adapted to conditions involving details with which it is impracticable for the legislature to deal directly).

[3] Sections 55(a), 56A(b), 451(b)(3). The corporate alternative minimum tax generally equals 15 percent of the taxpayer's "applicable financial statement income" minus the taxpayer's regular tax for the year. The tax applies to an applicable corporation. Section 55(b)(2). This generally means the average corporation's annual adjusted financial statement income for the three-tax-year period ending with a tax year before the year for which the tax is calculated exceeds $1 billion. IRC section 59(k). In other words, the CAMT applies to taxpayers whose book income is large but whose taxable income is small. Of course, taxable income might be small because taxpayers availed themselves of congressional tax incentives — like bonus depreciation — that are not deductible for book purposes.

[4] 142 S. Ct. 1308, 1309 (2022) (Alito, J., concurring).

[5] *Texas v. Commissioner*, 987 F.3d 518 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 1308 (2022).

power. HHS appealed to the Fifth Circuit, which reversed the district court on the delegation issue.

A state that provides Medicaid for individuals in need of healthcare is entitled to federal matching funds for a share of the state's cost. Most states enroll their Medicaid beneficiaries in a private health insurance plan — a managed care organization plan (MCO) — and pay a monthly premium — a capitation rate — to the insurer for each enrollee. The federal government reimburses a state for a portion of the capitation rate but only if the contract between the state and the MCO is "actuarially sound."

The Fifth Circuit opinion in the *Texas* case explained that to be actuarially sound, the capitation rate must satisfy three requirements. First, the court wrote that the rates must "have been developed in accordance with generally accepted actuarial principles and practices," which, as explained by the actuarial office within HHS that reviews state-MCO contracts, requires accounting for all reasonable, appropriate, and attainable costs. Second, the rates must be "appropriate for the populations to be covered, and the services to be furnished under the contract." Third, the rates must satisfy the certification rule; that is, they must "*have been certified*, as meeting the requirements of this [provision], by actuaries *who* meet the qualification standards established by the American Academy of Actuaries and *follow the practice standards established by the Actuarial Standards Board*."[6]

In 2014 MCOs became subject to a federal healthcare provider tax,[7] which was intended to fund, in part, the cost of the Affordable Care Act. Moreover, Congress expressly applied the tax to contracts that MCOs had with states, which necessarily included the contracts that states had with MCOs for their Medicaid beneficiaries. The first requirement for actuarial soundness — accounting for all reasonable, appropriate, and attainable costs — consequently required that the healthcare provider tax be considered to determine capital rates.[8]

The third requirement — that an actuary certified by the ASB certify to HHS that the capitation rates paid by a state included all reasonable, appropriate, and attainable costs — is, for Alito, the problematic delegation of congressional power.[9]

In 2015 the ASB adopted an actuarial standard of practice (ASOP 49) stating that "Medicaid capitation rates are actuarially sound if they 'provide for all reasonable, appropriate, and attainable costs,' which 'include . . . government-mandated assessments, fees, and taxes.'"[10] The term "taxes" in the ASB's standard included the new federal health insurance provider tax levied on MCOs. Consequently, under ASOP 49, a certified actuary would certify a state's capitation rate only if the state reimbursed its MCO for the organization's federal health insurance provider tax.

Texas and five other states objected to their increase in the capitation rate from inclusion in the actuarial soundness determination of the federal healthcare provider tax, which they had to pay to obtain certification from an actuary — a private person.

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[6] *Id.* at 411, citing 42 C.F.R. section 438.6(c)(1)(i)(A)-(C) (2002) (emphasis added by the court).

[7] Reg. section 57.4(a)(3). Congress repealed the tax in 2020.

[8] *State v. Rettig*, 987 F.3d 518, 524-525 (5th Cir. 2021) (footnotes omitted). HHS's Office of the Actuary stated that actuarially sound capitation rates have consistently required that all reasonable, appropriate, and attainable costs be covered by rates that include all taxes, fees, and assessments. *State v. Rettig*, 987 F.3d 518.

[9] The Fifth Circuit explained the sequence of steps that led to the delegation to the ASB as follows:

In 2010, Congress enacted the ACA, comprised by the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Reconciliation Act of 2010 ("HCERA"). The ACA made two changes to the regulatory scheme requiring states that requested Medicaid reimbursements for their MCO contracts to provide actuarially sound capitation rates. First, Congress imposed a new cost on certain MCOs: a federal health-insurance provider tax (the "Provider Fee"). This Provider Fee must be paid annually by covered entities — "any entity which provides health insurance for any United States health risk," excluding governmental entities. Second, Congress amended the Medicaid Act to expressly require that capitation rates included in state-MCO contracts be actuarially sound. ("[C]apitation rates . . . shall be based on actual cost experience related to rebates and subject to the Federal regulations requiring actuarially sound rates[.]"). What remained unchanged was that actuarially sound capitation rates required accounting for all reasonable, appropriate, and attainable costs. Thus, when the [IRS] began collecting the Provider Fee from covered entities in 2014, states with MCO contracts were required to account for the Provider Fee to meet the actuarial soundness requirement of the Medicaid Act. *State v. Rettig*, 987 F.3d 518, 525 (5th Cir. 2021) (internal citations omitted).

[10] *Id.* at 526.

Texas v. Commissioner — District Court Decision

The states filed an action in federal district court arguing that the delegation by HHS to the ASB to decide standards applicable for certifying capitation rates was a delegation of legislative power to a "private lawmaker" in violation of U.S. Const. Art. 1, section 1.[11] The district court agreed with the states, finding "that there is no genuine dispute of material fact that the Certification Rule delegated legislative power to private entities in violation of Article I's Vesting Clause."[12]

Texas v. Commissioner — Fifth Circuit Decision

The Fifth Circuit reversed the district court on two distinct grounds. First, "an agency does not improperly subdelegate its authority when it 'reasonabl[y] condition[s]' federal approval on an outside party's determination of some issue; such conditions only amount to legitimate requests for input."[13] The court found that the requirement for actuarial certification was reasonably conditioned or connected to ensuring actuarially sound rates because a qualified actuary provided institutional expertise to HHS. In essence, HHS merely incorporated the ASB's standards in the certification rule, and it could have achieved the same result by publishing a regulation that adopted the board's standards.

The second ground for rejecting the constitutional argument was that HHS performed a review of the ASB determination — exercised surveillance — of the actuarial soundness of the capitation rate. The court wrote:

> Here, HHS's subdelegation of certain actuarial soundness requirements to the Board did not divest HHS of its final reviewing authority. HHS "reviewed and accepted" the Board's standards. Further, HHS has the ultimate authority to approve a state's contract with MCOs; certification is a small part of the approval process. . . . If the state provides all required documentation, the Office of the Actuary ("OACT"), an office within HHS, will begin its actuarial review. . . . The contract approval process is closely "superintended by [HHS] in every respect." Therefore, even assuming arguendo that HHS subdelegated certain actuarial soundness requirements to third parties, we hold that HHS's subdelegations were lawful.[14]

The two grounds relied on by the Fifth Circuit are consistent with grounds relied on by the Supreme Court and other circuits to reject an argument that Congress delegated its power to a private entity.[15]

Supreme Court — Alito's 'Statement'

Texas and five other states filed a petition for a writ of certiorari with the Supreme Court to review the Fifth Circuit's decision. The Court denied the petition, but Alito filed a statement, joined by Thomas and Gorsuch, expressing their disapproval of a doctrine that permitted delegation of legislative authority to a private entity. He wrote:

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[11] *See Texas v. United States*, 300 F. Supp. 3d 810, 840 (N.D. Tex. 2018) ("Plaintiffs argue that the Certification Rule gives the ASB and its actuaries "a discretionary veto" over CMS's approval of Plaintiffs' Medicaid contracts and is therefore an unconstitutional delegation of legislative power to a private entity.").

[12] *See id.* at 848 (citing U.S. Const. Art. I, section 1, cl. 1).

[13] *Rettig*, 987 F.3d at 531 (internal citation omitted).

[14] *Rettig*, 987 F.3d at 533 (internal citations omitted).

[15] *See, e.g., Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 601 (D.C. Cir. 1997) ("We do not agree that FERC surrendered its responsibility for adopting accounting principles simply because it acted in conformity with standards endorsed by a leading professional organization."); *Louisiana Forestry Association Inc. v. Secretary U.S. Department of Labor*, 745 F.3d 653, 673 (3rd Cir. 2014) ("We find that there is a 'reasonable connection' between the DHS's determination of H-2B petitions and the DOL's decisions on temporary labor certifications in light of the statute's silence as to what constitutes permissible 'consultation' and the specific agencies with which the DHS may consult in making H-2B visa determinations."); *Iowa Citizens for Environmental Quality Inc. v. Volpe*, 487 F.2d 849, 854-855 (8th Cir. 1973) ("Since the enactment of NEPA [National Environmental Policy Act], FHWA [Federal Highway Administration] with the acquiescence of the Council on Environmental Quality, and the knowledge of Congress, has consistently interpreted the provisions of NEPA as permitting the delegation of the physical act of gathering the information necessary for the preparation of Section 102(2)(C) EIS to the state highway departments recommending the proposed federal-aid highways."). *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (U.S. 1940) ("Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid."); *Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 708 (fn. 5) (D.C. Cir. 1977) ("Permitting association members to short-cut the regular certification process does not mean that the Board has delegated its control over that process. Each applicant can obtain certification through a process superintended by the Board in every respect.").

> In 2015, the Actuarial Standards Board published a binding definition of "actuarial soundness" as used in the Medicaid statute. Known as ASOP 49, this standard required that States include funds for any "government-mandated assessments, fees, and taxes" in their payments to private managed-care organizations that assist States in the management of Medicaid. In simple terms, this meant that States had to reimburse their HMOs for the cost of those HMOs' share of the annual HIPF [federal health insurance provider tax]. If a State did not do so, its Medicaid payment scheme could not be certified as "actuarially sound." *Texas v. United States*, 300 F.Supp.3d 810, 845 (ND Tex. 2018). The Actuarial Standards Board thus effectively mandated that States absorb the costs of the HIPF taxes Congress assessed on non-government entities.[16]

Alito acknowledged that the Fifth Circuit held that the doctrine prohibiting delegation of legislative authority to a private entity "had not been violated because HHS retained control over the private entities' process." However, he continued:

> I agree with petitioners that this case presents an important separation-of-powers question. "Our Constitution, by careful design, prescribes a process for making law, and with that process there are many accountability checkpoints." *American Railroads*, 575 U.S., at 61, 135 S. Ct. 1225 (Alito, J., concurring). To ensure the Government remains accountable to the public, it "'cannot delegate regulatory authority to a private entity.'" *Ibid.*; *see also Carter Coal*, 298 U.S. 238, 56 S. Ct. 855. Here, however, that is precisely what happened. What was essentially a legislative determination — the actuarial standards that a State must meet in order to participate in Medicaid — was made not by Congress or even by the Executive Branch but by a private group. And this was no inconsequential matter. It has cost the States hundreds of millions of dollars.[17]

Alito thus inferentially rejected the Fifth Circuit's reliance on the "reasonably conditioned or connected" test and the "surveillance test" as a constitutional means to delegate determinations to a private entity. He "reluctantly concurred" in the denial of the petition because of other issues in the case that would have complicated a decision on the delegation issue. Nonetheless, he expressly invited review of an appropriate case "if determinations of the Actuarial Board have any future effect."[18]

The holdings of the cases Alito cited are not directly on point on the question of whether regulatory authority cannot be delegated to a private entity. At issue in *American Railroads*[19] was a regulation published cooperatively by the Federal Railroad Administration (FRA) and Amtrak. The regulation prescribed metrics and standards for Amtrak's passenger trains to use trackage owned by rail companies that haul freight. The metrics and standards gave priority to Amtrak's passenger service. The freight rail companies challenged the regulation on the ground that Amtrak was a private company and could not constitutionally exercise regulatory power, especially to their detriment. The Supreme Court rejected the characterization of Amtrak as private, writing that it "was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers."[20]

Alito wrote a concurring opinion in which he entirely agreed that Amtrak was a federal

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[16] *Texas v. Commissioner*, 142 S. Ct. 1309 (2022).

[17] *Id.*

[18] *Id.*

[19] *Department of Transportation v. Association of American Railroads*, 575 U.S. 43 (2015).

[20] *Id.* at 53-54.

instrumentality. He also expanded on his view — not in issue — about a private actor exercising legislative power:

> When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with "legislative Powers." Art. I, section 1. Nor are they vested with the "executive Power," Art. II, section 1, cl. 1, which belongs to the President. Indeed, it raises "[d]ifficult and fundamental questions" about "the delegation of Executive power" when Congress authorizes citizen suits. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 197, 120 S. Ct. 693, 145 L.Ed.2d 610 (2000) (Kennedy, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311, 56 S. Ct. 855, 80 L.Ed. 1160 (1936).[21]

Alito made no mention of the reasonable connection or surveillance tests that justify participation of a private entity in the regulatory process. Their absence from a discussion of delegation to private entities might indicate his belief that these tests are "not even a fig leaf of constitutional justification."

Alito's statement in the *Texas* case also relied on *Carter v. Carter Coal Co.*,[22] a 1936 Supreme Court decision. In *Carter*, federal legislation delegated the power to fix maximum hours of labor and minimum wages to most producers of bituminous coal and to mine workers. The Court invalidated the delegation:

> The effect, in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority, since, by refusing to submit, the minority at once incurs the hazard of enforcement of the drastic compulsory provisions of the act to which we have referred. To "accept," in these circumstances, is not to exercise a choice, but to surrender to force. The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.[23]

Alito cited *Carter* for the simple proposition that regulatory authority cannot be delegated to a private entity. The ASB had no interest adverse to Texas and the other states, but the absence of an adverse interest appears immaterial to Alito's analysis.

Jurisprudence of Other Supreme Court Justices

One more vote in the *Texas* case would have granted the petition for the writ of certiorari. Two more votes consistent with Alito's statement might have rejected the reasonable connection test and the surveillance test as justifying participation of a private entity in the regulatory process, leading to the conclusion that any private entity participation violates the constitutional provision vesting legislative power in Congress.

Forecasting the vote of other Supreme Court justices based on their opinions on other matters is a fraught task. The absence of the signatures of the other six justices who did not sign Alito's statement in the *Texas* case might lead to the inference that the other justices agree that congressional power may be delegated to a private entity if the delegating agency can show either a reasonable connection between the agency's statutory authority and the private entity's decision or that the agency actively surveilled the decisions of the private entity. Alternatively, the other justices not signing the

[21] *Id.* at 62 (Alito, J., concurring).

[22] *Carter v. Carter Coal Co.*, 298 U.S. 238, 278 (1936).

[23] *Id.* at 310-311.

statement simply may have decided not to express their views about delegation to a private entity until their votes are meaningful.[24]

The Inflation Reduction Act of 2022

Calculation of the corporate alternative minimum tax based on Securities and Exchange Commission filings. The Inflation Reduction Act of 2022 imposes a CAMT on applicable corporations. The tax generally is equal to 15 percent of the corporation's adjusted financial statement income, subject to statutory adjustments, minus the corporation's regular tax for the tax year.[25] Adjusted financial statement income is determined from an applicable financial statement,[26] which most often is the taxpayer's financial statement prepared in accordance with generally accepted accounting principles, certified by a public accounting firm, and filed with the SEC.[27] The use of GAAP to determine a federal income tax component is not novel.[28]

Like a determination of the ASB that changes a state's Medicaid reimbursement amount, a determination by FASB concerning GAAP can change the amount of CAMT due. FASB thus has the power to control the tax liability of corporations, which Alito, Thomas, and Gorsuch might condemn. The FASB reported on December 13, 2022, to *Tax Notes* that the FASB does not currently have any active projects on the CAMT.

Congressional and Treasury adjustments to adjusted financial statement income. The income in the applicable financial statement is subject to several statutory adjustments.[29] Also, Treasury is authorized to issue regulations and other guidance necessary to carry out the purposes of the minimum tax provision.[30] Congress, thus, has not turned over calculation of the CAMT to FASB without either adjustments or Treasury surveillance. Based on its explanation of the limits of delegation of congressional power to private entities in the *Texas* case, the Fifth Circuit most likely would find that Treasury retained oversight of FASB and that Congress did not delegate congressional power to FASB to calculate the CAMT.

The Role of FASB in Certification of a Financial Statement

A financial statement is certified by a certified public accountant, who typically is licensed by a state agency.[31] The CPA is not a state actor.

Generally accepted accounting principles. GAAP is published by the FASB, which was established in 1973 and is a private-sector, not-for-profit organization based in Norwalk, Connecticut. FASB establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations that follow GAAP.

The role of the SEC. The SEC has the statutory duty to ensure that financial statements use GAAP:

> Every issuer of a security registered pursuant to section 78l of this title shall file

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[24] While sitting in the D.C. Circuit, then-Judge Brett Kavanaugh had the opportunity to sign a concurrence critical of a delegation of legislative authority to a private contractor. He did not do so. *Hays v. Sebelius*, 589 F.3d 1279 (D.C. Cir. 2009). Rather, he signed the majority opinion, which reasoned that the federal statute at issue expressly stated the amount of a Medicare beneficiary's reimbursement for a covered drug. Reliance on a private Medicare contractor for the determination was not contemplated by the statute, thus making the action by the private Medicare contractor irrelevant. Kavanaugh opposes dilution of the presidential power to dismiss members of the executive branch. *PHH Corporation v. Consumer Financial Protection Bureau*, 881 F.3d 75, 164, 434 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("Of course, the President executes the laws with the assistance of subordinate executive officers who are appointed by the President, often with the advice and consent of the Senate. To carry out the executive power and be accountable for the exercise of that power, the President must be able to supervise and direct those subordinate officers. In its landmark decision in *Myers v. United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L.Ed. 160 (1926), authored by Chief Justice and former President Taft, the Supreme Court recognized the President's Article II authority to supervise, direct, and remove at will subordinate officers in the Executive Branch.") The president cannot, of course, dismiss members of a private entity that formulate federal policy. Whether this limitation is enough for Kavanaugh to join Alito, Thomas, and Gorsuch is unclear.

[25] *See supra* note 3.

[26] The source of financial statement income for the CAMT is the corporation's "applicable financial statement," which for most corporations is "a financial statement which is certified as being prepared in accordance with generally accepted accounting principles and which is (i) a Form 10-K (or successor form), or annual statement to shareholders, required to be filed by the taxpayer with the United States Securities and Exchange Commission." IRC sections 56A(b), 451(b)(3).

[27] Section 451(b)(3)(A)(i). A protocol identifies in descending order other applicable financial statements if the taxpayer does not have a higher order financial statement.

[28] Sections 451(b)(3)(A), 471(c)(1)(B), 56(f)(2)(B) (before amendment by P.L. 101-508 (1990)), 965(b) (before amendment by P.L. 115-97 (2017)).

[29] Section 56A(c), -(d).

[30] Section 56A(e).

[31] *See, e.g.*, Mich. Comp. L., section 339.722.

> with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security — (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application.[32]

Public Company Accounting Oversight Board (PCAOB). Federal law creating the PCAOB updated the SEC's authorization to recognize accounting principles as generally recognized if adopted by a "standard setting body (A) that is (i) organized as a private entity" and possesses specified features.[33] The features of the private entity that the PCAOB legislation described were FASB's features, and the SEC expressly stated that FASB was that private entity on whose determinations it depended, writing:

> The Securities and Exchange Commission has determined that the Financial Accounting Standards Board (FASB or Board) and its parent organization, the Financial Accounting Foundation (FAF), satisfy the criteria in section 108 of the Sarbanes-Oxley Act of 2002 and, accordingly, FASB's financial accounting and reporting standards are recognized as "generally accepted" for purposes of the federal securities laws. As a result, registrants are required to continue to comply with those standards in preparing financial statements filed with the Commission, unless the Commission directs otherwise. Our determination is premised on an expectation that the FASB, and any organization affiliated with it, will address the issues set forth in this statement and any future amendments to this statement, and will continue to serve investors and protect the public interest. This policy statement updates Accounting Series Release No. 150, issued on December 20, 1973, which expressed the Commission's intent to continue to look to the private sector for leadership in establishing and improving accounting principles and standards through the FASB with the expectation that the body's conclusions will promote the interests of investors.[34]

Having relied on FASB, the SEC explained that its reliance satisfies the reasonable connection and surveillance tests that must be passed to delegate decisions to a private entity. The connection between the SEC and FASB is reasonable because FASB supports the SEC in performing its statutory duty "to assist it in meeting this responsibility, the Commission historically has looked to private-sector standard-setting bodies designated by the accounting profession to develop accounting principles and standards."

The SEC, through its Office of Chief Accountant and its subgroup, the Accounting Group, surveilles FASB. The SEC described the relationship thusly:

> The occasions where the Commission has not accepted a particular FASB standard have been rare due, in part, to our recognition and support of FASB's independence. As noted elsewhere in this release, the Commission and its staff do not prohibit the FASB from addressing a particular topic and do not dictate the direction or outcome of specific FASB projects provided that the conclusions reached by the FASB are in the interest of investor protection.[35]

> The Accounting Group provides expert advice related to accounting and financial reporting matters. The Accounting Group leads the SEC's efforts to oversee accounting standard-setting by the Financial Accounting Standards Board (FASB) and to monitor international accounting standard-setting by the

[32] 15 U.S.C. section 78m.

[33] *See* 15 U.S.C. section 77s(b)(1).

[34] SEC Release (Apr. 25, 2003).

[35] *Id.*, n. 18.

International Accounting Standards Board (IASB).

The SEC's reliance on FASB under the traditional constitutional tests for delegation of decisions to a private entity is unassailable.

Evaluation of Delegation of Taxing Power to FASB Under Alito's Statement

The more immediate question is not whether the IRS and SEC can rely on FASB determinations but whether Alito, Thomas, and Gorsuch are expressing in the statement in the *Texas* case an intention to change the law regarding delegation of congressional power to private entities. More specifically, the question is whether the reasonable connection test and the surveillance test will survive a Supreme Court challenge if at least two more justices accept their position.

Comparing delegation to the ASB to determine capitation rates for managed care organizations with delegation to the FASB to determine financial statement income — at least as a starting point — will identify distinctions, but whether they are legally significant must await the outcome of an "appropriate case" brought by a taxpayer that responds to Alito's invitation.

Congressional Incorporation of Preexisting Rules

An accepted means to avoid an argument of unconstitutional delegation of congressional authority to a private entity is for Congress to incorporate the entity's preexisting rules. The rationale is that Congress had the opportunity to examine the rules and knew what it was enacting. Of course, this rationale fails if the private entity publishes the rules after Congress enacted the enabling statute.[36]

While FASB may update its accounting standards in the future, it is unlikely that Congress will update the CAMT for changes made by FASB. Congressional enthusiasm for the CAMT may wane with a change in the composition of Congress, setting the stage for a refusal to update even if the votes do not exist to repeal the statute outright.

[36]Daniel Schwarcz, "Is U.S. Insurance Regulation Unconstitutional?" 25 *Conn. L.J.* 222 (2018).

Difficulties in Challenging CAMT

Affected taxpayers. A study by the University of North Carolina, published on September 21, 2022, used tax year 2021 public data to calculate the CAMT liability of public companies for tax year 2021 if the tax had been in effect.[37] The study identified 78 corporations that would have owed a combined $31.8 billion in tax. The top three would have been Berkshire Hathaway at $8.3 billion, Amazon at $2.8 billion, and Ford Motor Company at $1.6 billion. Of course, the estimated 2021 liability may not predict the 2023 liability, but any of these 78 corporations could decide that the amount of minimum tax more than justifies challenging its constitutionality.

Penalty risk with deficiency litigation. A taxpayer may refrain from paying a tax that the IRS asserts is owed and contest an IRS-issued notice of assessment in the Tax Court.[38] The taxpayer may also have to contend with the IRS asserting a 20 percent accuracy-related penalty on underpayments of tax.[39] The penalty applies to an underpayment attributable to a substantial understatement of income tax.[40] An income tax for the tax year is substantially understated if the amount of the understatement exceeds 10 percent of the tax required to be shown on the return for the tax year.[41] A taxpayer that refrains from paying the CAMT may well be exposed to the penalty.

A taxpayer can avoid the penalty if the taxpayer discloses nonpayment of the CAMT in its return and has a reasonable basis for treating it as unconstitutional.[42] A basis is reasonable if it is reasonably based on legal authorities, including court cases, considering their relevance, persuasiveness, and subsequent developments.[43]

Alito's statement appended to the denial of the writ of certiorari in *Texas* cites two Supreme Court decisions — *American Railroads*[44] and *Carter*

[37]Jeffrey Hoopes and Christian Kindt, "Estimating the Minimum Tax on Book Income Liability Using Public Data," UNC Tax Center (Sept. 21, 2022).

[38]Section 6213(a).

[39]Section 6662(a).

[40]Section 6662(b)(2).

[41]Section 6662(d)(1)(A)(i).

[42]Section 6662(d)(2)(B).

[43]Reg. sections 1.6662-3(b)(3), 1.6662-4(d)(3).

[44]*American Railroads*, 575 U.S. 43.

Coal[45] — for the proposition that the power of Congress to delegate authority to private entities is limited. Alito, Thomas, and Gorsuch may well think that those cases would provide a reasonable basis for avoiding the accuracy-related penalty if they were presented with the issue of penalty relief. Whether a majority of the justices would reach the same conclusion obviously cannot be forecast.

Alternatively, a taxpayer might avoid an accuracy-related penalty if the taxpayer discloses nonpayment on its return, has a reasonable cause for the underpayment, and acted in good faith in underpaying the tax.[46] Reliance on advice from a professional tax adviser may be evidence that the taxpayer "reasonably relied in good faith on the advice,"[47] but in doing so, the advice must consider all the facts and circumstances and cannot make unreasonable assumptions.[48] In applying this rule to advice concluding that the CAMT is unconstitutional, a professional tax adviser might track the analysis in Alito's statement, but whether that would be persuasive is not assured.

A taxpayer's difficulty in making the analysis is that nonpayment has competing interests. One can envision a taxpayer's governmental relations and public relations departments having a view different from the tax department's about whether to challenge the constitutionality of the CAMT. The taxpayer's decision about whether to proceed may depend as much on the taxpayer's assessment of its governmental and public relations as on close legal analysis of the text of the CAMT and the cases discussing delegation of congressional authority.

Penalty risk with refund litigation. A taxpayer may decide to pay the CAMT and file an action in federal district court[49] or the Court of Federal Claims[50] for refund on the theory that Congress unconstitutionally delegated legislative power to FASB.[51] The action must be filed within three years of the time that the return was filed or within two years of the payment of the tax, whichever is later.[52] If the court denies the claim or even determines that it is excessive, the taxpayer may be subject to a 20 percent penalty on the excessive amount unless the amount is because of reasonable cause.[53] Reasonable cause probably has the same meaning in avoiding a penalty for an excessive refund claim as in avoiding a penalty for underpayment of tax.[54]

Injunction litigation. The Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax."[55] In *CIC Services LLC v. IRS*,[56] the Supreme Court recently ruled that a court may enjoin the IRS from enforcing a requirement that a "material adviser" maintain a list of his or her clients and make the list available to the IRS for inspection. The basis of the ruling was that an action to enjoin the requirement to maintain and produce client lists was not an action to restrain the assessment or collection of tax because the material adviser "stands nowhere near the cusp of tax liability."[57]

The CAMT, like the material adviser list maintenance requirement, incorporates a reporting requirement. A taxpayer typically will file a Form

[45] *Carter Coal Co.*, 298 U.S. 238.

[46] Section 6664(c)(1).

[47] Reg. section 1.6664-4(c)(1).

[48] *Id.*

[49] 28 U.S.C. section 1346(a)(1).

[50] 28 U.S.C. section 1491.

[51] An administrative claim for refund must first be filed with the IRS. Section 7422(a). The filing of an action in federal district court or the Court of Federal Claims must await the earlier of disallowance of the claim or expiration of six months from the date the claim was filed. Section 6532(a)(1).

[52] Section 6511(a).

[53] Section 6676(a).

[54] Section 6676 was amended by P.L. 114-113, effective December 19, 2015, by inserting the reasonable cause standard in place of a reasonable basis standard for avoidance of an excessive refund claim penalty. Like the reasonable cause standard, the now-repealed reasonable basis standard was not defined in section 6676 or in a related regulation. Nonetheless, the IRS administered the reasonable basis standard in section 6676 as if it had the same meaning as in section 6662(d)(2)(B)(ii)(II), which reduced the accuracy-related penalty for a tax underpayment. The IRS relied on *Atlantic Cleaners & Dryers Inc. v. United States*, 286 U.S. 427, 433 (1932), for the proposition that "where the same words or phrase appear within a text, they are presumed to have the same meaning." Program Mgr. Legal Advice 2014-015. "Reasonable cause" appears in section 6664(c)(1) to provide relief from the underpayment penalty but adds a requirement that the taxpayer has acted in good faith. See reg. section 1.6664-4 for the showing required to avoid the accuracy-related underpayment penalty. IRC section 6676 conditions relief from the overpayment penalty on only reasonable cause. Good faith is not a statutory condition for penalty relief. It would seem, nonetheless, that a taxpayer, defending against an erroneous refund penalty, who showed that the refund claim was filed with reasonable cause and in good faith as defined for purposes of the accuracy-related underpayment penalty, should have a strong argument that Congress did not contemplate meaningful differences between "the reasonable cause" exception in section 6664(d)(1) and in section 6676(a).

[55] Section 7421(a).

[56] *CIC Services LLC v. IRS*, 141 S. Ct. 1588 (2021).

[57] *CIC Services*, 141 S. Ct. 1591. Had the IRS first followed the requirements of the Administrative Procedure Act in 5 UPS Section 553(b)(c) — including public notice of its intention to impose list maintenance requirements opportunity for interested persons like the litigant in *CIC Services* to comment — the outcome in this case most probably would have been in favor of the IRS.

10-K (or successor form) or an annual statement to shareholders.[58] While these forms are required by other provisions of law, they are the centerpiece of the CAMT. Unlike the reporting requirement in *CIC Services*, the reporting requirement for the CAMT stands on the very "cusp of tax liability." An action to enjoin the reporting requirement most probably would fail under the AIA.

Planning

Each taxpayer must decide how, if at all, to challenge the CAMT by considering its own cash forecast and circumstances. Reliance on deficiency litigation results in daily compounding of deficient interest, which can quicky accumulate to shocking amounts. A taxpayer may make a deposit to preserve Tax Court jurisdiction, but each taxpayer has unique considerations, so one course of action for all taxpayers is impossible to recommend.

All other things being equal, refund litigation may be a more prudent course of action. A corporate taxpayer may prefer to fund the CAMT now and pursue a refund later. If its constitutionality is upheld, perhaps a taxpayer can more readily avoid a penalty on the amount of an excessive refund claim than a penalty on a tax underpayment because the showing to avoid the excess refund claim penalty is based on only reasonable cause, unlike the showing to avoid the accuracy-related underpayment penalty that also requires proof of good faith.[59] While that is not assured, a court might be more forgiving if refund litigation was motivated, in part, by seeking clarity on the constitutionality of the tax.

Conclusion

Alito, Thomas, and Gorsuch showed little enthusiasm for delegation of congressional power to a private entity, even if the reasonable connection test or the surveillance test is satisfied. In the right case, they may convince a majority of the Court that delegation of the power to make determinations affecting a taxpayer's CAMT to FASB renders the tax unconstitutional, at least in its present form. If a majority of the Court agrees with their view, the constitutionality of the CAMT may well fail. Such a holding may have profound effects on administrative law because federal agencies have incorporated by reference over 1,200 standards established by private entities.[60]

While the Inflation Reduction Act was in bill form, 14 Republican senators, writing to their colleagues, criticized the proposed CAMT as delegating tax writing authority to FASB on the theory that it is not subject to congressional oversight. They undoubtedly will press their position if in a position to do so.

This is not the first time the issue of delegation in a tax context has arisen. Delegation of congressional tax writing power was an issue during the drafting of the Tax Reform Act of 1986.[61] Then-chairman of Ways and Means, Democrat Dan Rostenkowski, opposed use of financial statements based on FASB standards to impose federal income taxes. The bill was enacted but with the proviso that Congress enacts substitute provisions to calculate the CAMT based on IRC provisions and not on FASB accounting standards. The statutory substitute, "adjusted current earnings," was added to the IRC, effective for tax years beginning after 1989.[62] The code-based CAMT remained in the federal tax law until 2017, when the Republican Congress passed the Tax Cuts and Jobs Act, repealing the CAMT. In 2022, the Democrat-controlled Congress could have resurrected the CAMT with the statutory adjusted current earnings provision that had been in the law for 30 years. Instead, it enacted the FASB provision, which raises the unconstitutional delegation issue.

Taxpayers subject to the CAMT may wish to consider the procedural steps they need to take to protect their interests. ■

[58] Sections 56A (a), (b), 451(b)(3).

[59] *See supra* note 54.

[60] *Rettig*, 987 F.3d at 532.

[61] P.L. 99-514 (1986).

[62] Joint Committee on Taxation, "General Explanation of the Tax Reform Act of 1986," at 448 (May 4, 1907).