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Supreme Court Has Driven Chevron to the Levee, and the Levee Is Dry

July 11, 2024

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Little else gets regulatory lawyers more excited than changes to how the Administrative Procedure Act (APA) is applied to regulators and the rules that they make, so as readers have likely seen already, the whole of the regulatory lawyer bar has been discussing the Supreme Court's overruling of Chevron in **Loper Bright Enterprises v. Raimondo**. For this Cabinet issue, we are providing an overview of the opinion and a few observations about its potential implications for some of our favorite regulators and rules, but to the extent readers are interested in a deeper (and nerdier) dive into the reasons behind our observations, we will be publishing a more comprehensive Client & Friends memo, in the next few weeks. We will include a link to that memo in a future Cabinet News & Views.

On June 28, 2024, Chief Justice John Roberts wrote the majority opinion in a 6-3 split, with Kagan, Sotomayor and Jackson dissenting. The opinion states unequivocally, "*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." This decision overturns forty (40) years of precedent and returns the standard for evaluating regulatory agency actions under the APA to what the majority calls a "traditional" position where courts and judges "decide legal questions by applying their own judgment."

As a reminder, *Chevron* is the 1984 Supreme Court decision that found that when a statute is ambiguous and an administrative agency interprets that statute, then courts need to provide deference to the agency's interpretation. To determine whether *Chevron* deference was applicable, there were two steps to reaching that conclusion – the first step required courts to determine that the statute in question is silent or ambiguous regarding the issue at hand, and then the second step required courts to ascertain whether the agency's interpretation "is based upon a permissible construction of the statute" (i.e., is the construction in keeping with Constitutional limits and authority).

Accordingly, this has effectively meant for the past four decades that it has been difficult to challenge regulator interpretations as expressed in the rules they have promulgated pursuant to the APA, unless the rule is expressly at odds with the underlying statute. The *Loper* decision finds that "the deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA." In support of this conclusion, the majority's opinion points out that there were further refinements to the two steps of *Chevron* – something Roberts refers to as "step zero"—referring to the "byzantine set of preconditions and exceptions" established by cases such as *U.S. v. Mead* ("where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is inapplicable") and *King and Burwell* (which held that *Chevron* does not apply if the question is one of "deep economic and political significance"). The result being that the majority opinion asserts that "*Chevron*'s fictional presumption of congressional intent was always unmoored from the APA's demand that courts exercise independent judgment in construing statutes administered by agencies" and that "[b]y its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty."

On that note, we leave the finer parts of the majority opinion for further dissection at a later time, and turn to some of our observations. First, yes, we think that *Loper* represents a significant and lasting impact to how financial regulators will be able to promulgate their rules under the APA. In addition, we think that the decision likely means that financial regulators will also need to be more careful about enforcing their rules, especially when they have stretched their interpretive powers. But, this also means that financial institutions that have been loath to spend time and money on challenging financial regulators in court, expecting to have their challenges swatted away by *Chevron* deference, now have broader scope to actively consider litigation as a tool to check regulators, when appropriate. Of course, not all financial regulatory rules are made pursuant to an APA regulatory rulemaking procedure, and not all statutes underlying such rules have ambiguities. But, in particular, we think that *Loper* may significantly curtail certain rules being promulgated by agencies such as the Consumer Financial Protection Bureau (CFPB) and may result in regulators

paying more attention than previously to comments submitted for rulemakings such as those involving the Basel Endgame. Stay tuned.