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# Regulatory Shakeups

# July 11, 2024

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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.

# FinCEN and Federal Banking Agencies Propose Amendments to Anti-Money Laundering Rules

**July 11, 2024**

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On June 28, 2024, The U.S. Treasury's Financial Crimes Enforcement Network ("FinCEN") released a **notice of proposed rulemaking** (the "Proposed Rule") that would amend FinCEN's anti-money laundering ("AML") program rules for financial institutions. The federal banking agencies also released a **proposed rule** that would harmonize those agencies' AML program rules with FinCEN's proposed regulations.

The proposed amendments formalize and harmonize existing regulatory expectations under the Bank Secrecy Act ("BSA"), and implement portions of the **Anti-Money Laundering Act of 2020** ("AMLA"). Some financial institutions would need to make only limited changes to comply with the proposed rule; others, and non-banks in particular, may need to make more significant adjustments.

Key changes under the Proposed Rule include:

- **Specific reference to countering the financing of terrorism ("CFT")**. Consistent with AMLA's reference in Section 6101 to "countering the financing of terrorism," the Proposed Rule adds a new defined term, "AML/CFT Program," and uses it throughout the Proposed Rule to describe a financial institution's compliance program to counter illicit finance.
- **A new statement of purpose for AML/CFT programs**. Under the Proposed Rule, the purpose of FinCEN's regulations is to ensure that financial institutions' AML/CFT programs are "effective, risk-based, and reasonably designed." A financial institution's AML/CFT program is expected to comply with the BSA and focus attention and resources according to the financial institution's risk profile. Notably for financial institutions evaluating artificial intelligence and other innovative compliance technologies, the Proposed Rule formalizes portions of **earlier FinCEN guidance** on innovation. The Proposed Rule states that a financial institution "may include consideration and evaluation of innovative approaches to meet its AML/CFT compliance obligations."
- **An express requirement that financial institutions conduct a risk assessment**. Under the Proposed Rule, financial institutions would be expected to use the findings of a periodic risk assessment to develop risk-based policies, procedures, and controls to identify and mitigate risks, and to provide "highly useful" information to government authorities. The Proposed Rule would require the risk assessment to identify, evaluate, and document the financial institution's risks, including consideration of (1) the **AML/CFT Priorities** contemplated under AMLA, (2) the money laundering and terrorist financing risks of the financial institution based on its products, services, channels, customers, intermediaries, and geographic locations, and (3) reports financial institutions file pursuant to 31 C.F.R. Chapter X, including suspicious activity reports.
- **A requirement that AML/CFT compliance remain onshore**. The Proposed Rule states that the duty to establish, maintain, and enforce a financial institution's AML/CFT program shall remain the responsibility of, and performed by, persons in the United States.

The Proposed Rule includes a number of specific questions for financial institutions, including:

- Whether financial institutions should be required to update their risk assessment at a regular, specified interval (such as annually or every two years) or based on triggers such as a material change to products, services, distribution channels, customer categories, intermediaries, or geographies.
- Whether a new comprehensive risk assessment should be required where a material change affects only a portion of a financial institution's business, or whether updating only portions of the risk assessment would be appropriate.
- The reasons financial institutions have AML/CFT staff and operations located outside the United States.
- Whether the onshore requirement would necessitate changes to a financial institution's operations outside the United States.

Financial institutions are encouraged to provide comments to FinCEN and the federal functional regulators by September 3, 2024.