

CADWALADER

The End of Chevron: Considerations for Private Equity, Banks and Investors

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No one would confuse *Fund Finance Friday* with the *Yale Law Journal*, but today we must discuss an actual Supreme Court case. Our story begins in 1984, when the Supreme Court set the rules for challenging a federal agency's interpretation of ambiguous statutory provisions. To lawyers, this became a landmark case: *Chevron USA v. National Resources Defense Council* ("*Chevron*"). (For a more complete but concise overview, please see Mercedes Tunstall's excellent write-up [here](#).) For the last 40 years, the doctrine of "*Chevron* deference" required courts to defer to an agency's interpretation of ambiguous statutory provisions, even if the court would have interpreted such provisions differently. This doctrine made it difficult to challenge agency rulemaking and enforcement in those circumstances where the original statutory provision was ambiguous.

To oversimplify, courts could not look over the shoulder of an administrative agency so long as that agency was interpreting an ambiguous provision. The doctrine was generally considered to be very cool by people who liked stable rulemaking of administrative law and very uncool by people who thought you should be able to sue the government when they acted upon an ambiguous statute. For those of us who went to law school, it was the subject of curiosity, discussion and led to ultimate nerd combat about the role of administrative agencies in American life.

The Supreme Court's 6-3 overruling of *Chevron* on June 28th will not lead to sudden and sweeping change, but it could open the door to legal challenges over time and a more complex regulatory environment, at least initially. Here are six key regulatory areas where we might observe substantial changes and potential legal actions:

1. ESG Regulation

The first issue is a live one—as in the oral arguments for trial started this week in the Fifth Circuit Court of Appeals. In 2022, the Department of Labor created a rule that allowed pension managers to consider ESG factors as a "tiebreaker" when considering two or more investments that equally serve the financial interest of the pension fund. Various state attorneys general sued the Department of Labor arguing that the ESG rule violated fiduciary duties owed to the beneficiaries of the plan to maximize investment gains. The case was dismissed in district court, but the district court judge relied heavily on *Chevron* deference in deciding for the Department of Labor. The parties to the suit have amended their filings in light of overruling *Chevron*, and it is highly uncertain who will prevail, as the Department of Labor maintains that the rule can stand even without *Chevron* deference.

2. Securities Regulation

The Securities and Exchange Commission ("SEC") often interprets and enforces complex securities laws that govern the private equity industry. Without *Chevron* deference, private equity funds might face more challenges in assessing the regulatory compliance and stability of their funds and structure. Conversely, private equity funds could challenge the SEC's interpretations of certain rules, such as disclosure requirements under the Investment Advisers Act of 1940. For example, by arguing that certain disclosure mandates are overly burdensome and not clearly supported by statutory language, funds might seek to reduce compliance costs and streamline their operations—we have already seen litigation to this effect before the demise of *Chevron*.

3. Taxation

The Internal Revenue Service ("IRS") plays a crucial role in interpreting tax laws that affect private equity funds, particularly concerning carried interest and capital gains treatments, but also the tax liabilities of investors. Without *Chevron* deference, IRS interpretations could be more frequently contested. If there are divergent judicial rulings on tax matters, this could increase the complexity of tax analysis for private funds and their investors.

4. Environmental Regulation

The Environmental Protection Agency ("EPA") issues regulations that impact a wide range of industries in which private equity funds invest. Overruling *Chevron* could lead to more frequent legal challenges to EPA rules, creating uncertainty around the compliance and valuation of portfolio companies within private equity funds with environmental exposure. However, funds could challenge EPA interpretations that impose stringent environmental regulations on portfolio

companies, which could unlock additional value for such companies. By arguing that certain regulations exceed statutory authority or lack clear legislative backing, funds could aim to lower compliance costs for their investments in sectors like energy, manufacturing and real estate.

5. Labor and Employment Law Liability

The National Labor Relations Board (“NLRB”) is responsible for interpreting and enforcing labor laws that affect many private equity-owned companies. Without *Chevron* deference, NLRB decisions might face more legal challenges, impacting labor rules for portfolio companies. Private equity funds might challenge NLRB interpretations that broaden the definition of joint employers, which could hold funds liable for labor practices at portfolio companies. By arguing that the statutory language does not support such broad interpretations, funds could seek to limit their liability.

6. Antitrust Regulations

The Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) oversee antitrust laws that govern mergers and acquisitions, including those involving many portfolio companies. If courts no longer defer to these agencies’ interpretations, it is possible some parties could challenge the FTC or DOJ’s interpretations of antitrust laws that apply stringent scrutiny to mergers and acquisitions. To the extent that certain interpretations are overly restrictive and not clearly supported by the statutory text, funds could seek to facilitate smoother approval processes for their transactions.

Conclusion

In addition to the foregoing, there are many other potential changes that will affect funds, banks and investors—for example, we have not even mentioned the impact of overruling *Chevron* on the Consumer Financial Protection Bureau or the Basel III endgame, which merit their own articles for discussion. In the end, sometimes you may like a rule protected by *Chevron* deference, other times not. There are therefore no clear winners or losers in overruling *Chevron*, just that the rules of the game have changed. Funds, banks and investors now have a greater opportunity to challenge certain agency decisions—but also other parties may bring suit who may have divergent interests, such as environmental groups, unions or state attorneys general of various political persuasions. In any case, courts are likely to give great weight to long-standing rules, with or without *Chevron* deference, so the pace of any change is likely to be gradual.

Four Cadwalader Partners Named to The 2024 Lawdragon 500 X

July 12, 2024



Four Cadwalader partners have been named to “The 2024 *Lawdragon* 500 X – The Next Generation,” announced on June 28.

Firm honorees include [Patrick Calves](#), [Danyeale Chung](#), [Matthew Karlan](#) and [George Pelling](#).

Now in its second year, the 500 X focuses on lawyers who “look and sound anew – with eyes turned toward the future and an undiminished belief in the opportunity each of them has to make an impact in their chosen field of expertise.”

In naming Patrick, Danyeale, Matthew and George, *Lawdragon* noted that “Among the [200] firms represented [is] Cadwalader – with more than 200 years of history. The honorees from [the firm] represent every lawyer recognized here, carrying forward in their late 20s and 30s the accomplishments of generations of lawyers past, infusing fresh thought, ideas and relevance.”

Read the article [here](#).

Save the Date: Cadwalader Finance Forum - October 23

July 12, 2024



We are thrilled to announce that the 8th Annual Cadwalader Finance Forum will take place on **Wednesday, October 23**, in Charlotte. This premier event brings together industry leaders and experts for a day of networking and insightful discussions on the latest market trends and opportunities across various sectors including commercial real estate, fund finance, leveraged finance, middle market lending, private credit, securitization and structured finance.

Stay tuned for the full schedule detailing the fantastic speakers, substantive panels and our keynote speaker, a high-profile founder and president of an award-winning direct lender. We look forward to welcoming you in October!

[Register now.](#)

Women in Fund Finance Toronto

July 12, 2024



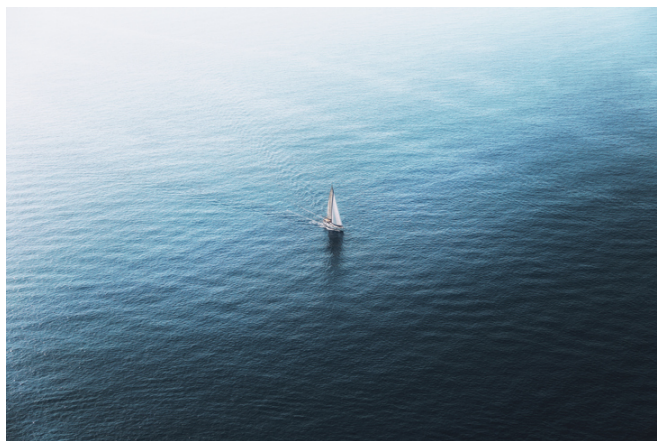
Women in Fund Finance held its inaugural event in Canada which was held at CIBC in Toronto. The event consisted of a panel discussion covering the fund finance market and covered topics ranging from the current fundraising environment, M&A activity, different forms of fund level financing, and the rating of fund finance facilities.

The panelists were Harj Shoan, Senior Managing Director and Head of Global Funds, Equities at Ontario Teachers' Pension Plan); Julian Deschatelets, Managing Partner, Renewable Power & Transition at Brookfield Asset Management); Samina Sajanalal, Managing Director, Global Fund Finance at CIBC; Peter Gargiulo, Senior Director, Fund & Asset Manager at Fitch Ratings; and Amanda Balasubramanian, Partner, Co-Head Debt Finance at Torys LLP. The panel was moderated by Ann Richardson Knox, partner and global head of fund finance at Mayer Brown in New York.

The planning committees in Canada consisted of Samina Sajanalal, Amanda Balasubramanian, Priyanka Chandran, CFA and Erin Garner, CFA and WFF has expressed its appreciation for Jenifer Lee, CPA, CA, and Amelia Meng for their support in bringing this event to life!

Investec's Secondaries Report 2024 Out Now

July 12, 2024



Investec's latest Secondaries Report, Charting a course for further growth is out now. It's packed with the latest insights on the secondaries market and explores the exceptional performance over the last year, despite deep dislocation across the wider private equity space.

The report contains a wealth of expert views from 50 global secondaries managers into how secondaries firms are approaching fundraising, transaction activity, deal financing and the rapidly evolving general partner (GP)-led space.

Key findings include:

- **68%** expect deal activity to increase by 10-25% in 2024
- **75%** expect to be more active in GP-led deals in the next 12 months
- **98%** expect their next fund to be larger than current vehicles
- **90%** expect their next fund to have more investment from high-net-worth individuals

Find out more about what industry experts had to say now: <https://link.investec.com/scpan2>

Fund Finance Tidbits – On the Move

July 12, 2024

CADWALADER FUND FINANCE 'ON THE MOVE'

Congratulations to the following individual(s) who are on the move in Fund Finance!

A number of senior individuals have recently joined NLC Capital Partners LLP including:



Bernard Kantor

Bernard Kantor joined NLC Capital Partners as Non-executive Director. Bernard is a renowned figure in the financial world and co-founder of Investec.



Kresimir Slugan

Kresimir Slugan joined NLC Capital Partners as the new Chief Technology Officer. Prior to joining NLC, Kresimir spent six years at Meta as a Data Engineer. His work involved designing, constructing, and maintaining high-performance data management and visualisation systems.



Ruth Pearson

Ruth Pearson joined NLC Capital Partners as General Counsel. Prior to joining NLC, Ruth served as General Counsel and Company Secretary at LendInvest plc, a listed lending, asset management, and investment advisory business.



Shailen Patel

Shailen Patel joined NLC Capital Partners as Head of Strategy and Product. Prior to joining NLC, Shailen served as the Head of Corporate Advisory at Macfarlanes.

Fund Finance Hiring

July 12, 2024

Fund Finance Hiring

Here is who's hiring in Fund Finance:

Wells Fargo Fund Solutions is looking for a number of roles to join their Fund Finance team including:

- **Vice President, Lead Investment Banker** to lead the origination, structuring and execution of Fund Solutions products. This role will spearhead the origination, structuring and portfolio management of NAV lending transactions. Learn more and apply [here](#).
- **Investment Banking Program Associate** to help support the origination, structuring and execution of Fund Solutions products. Learn more and apply [here](#).
- **Investment Banking Program Associate (Modeling)** to help support the origination, structuring and execution of Fund Solutions products with a preference for a candidate with a strong technical background and/or direct experience in modeling structured finance transactions. Learn more and apply [here](#).