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Quorum
Insights Into Corporate Governance, M&A and Securities Law

Loper Bright, Jarkesy, and Implications for the SEC

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"Chevron is overruled," Chief Justice Roberts wrote in *Loper Bright Enterprises v. Raimondo*, because "[t]he deference that Chevron requires of courts reviewing agency action cannot be squared with the [Administrative Procedure Act of 1946 (APA)]." The decision – described by Justice Gorsuch, concurring, as placing a "tombstone" on Chevron – was released the day after *SEC v. Jarkesy*, which prohibits the SEC from requiring the adjudication of fraud cases in which civil penalties are sought before Administrative Law Judges (ALJs). While *Loper Bright*'s rejection of Chevron is likely to have a significant impact across federal agencies, the SEC has already largely implemented the changes required by *Jarkesy*. Both decisions evidence the Court's trend toward limiting the regulatory power of agencies including by minimizing the role of agency expertise in the evaluation and enforcement of regulations.

The Court's decision in *Loper Bright*, specifically, may result in (1) increased litigation targeting SEC rules made pursuant to an APA regulatory rulemaking procedure where ambiguity can be found in the underlying statute, (2) the SEC taking a more conservative approach in its rulemaking and being more cautious when bringing enforcement actions, and (3) an amplification of the pressure on Congress to legislate with greater specificity the extent of the SEC's authority.

Loper Bright: The End of Ambiguity in Statutory Interpretation

Much of the discussion of *Loper Bright* has focused on its historic overturning of precedent, but the opinion is actually a rejection of the concept of ambiguity that underpinned *Chevron*. The first step in the now defunct *Chevron* two-step framework required courts – when considering challenges to an agency's interpretation of a statute – to evaluate whether the language of the statute was ambiguous. Where ambiguity was found, courts then had to defer to the agency's interpretation if it was "reasonable" and supported by agency expertise.

In *Loper Bright*, the Court expressly rejected the existence of ambiguity, holding that statutes "do—in fact, must—have a single, best meaning." And, as the majority emphasized, determinations about best meaning are "emphatically the province and duty" of the courts unconstrained by deference to any *permissible* interpretation advanced by an agency (citing *Marbury v. Madison* and referencing Article III). Further, to act in accordance with *Chevron* is to "def[y] the command of the APA that 'the reviewing court' – not the agency whose action it reviews – is to 'decide *all* relevant questions of law' and 'interpret . . . statutory provisions,'" (quoting §706 with emphasis added).

Previously, *Chevron* deference provided the SEC an advantage in litigation challenging the agency's statutory interpretations. This acted as a deterrent against would-be litigants. Without that advantage, challenges to SEC regulations are likely to be more frequent and have a higher likelihood of success, or (at the very least) will result in delaying the implementation of new rules. Additionally, uncertainty about the weight SEC expertise should be afforded by courts moving forward presents a greater opportunity for challenges to SEC regulations to succeed.

Uncertainty About the Future Value of Agency Expertise

Although the effect of *Loper Bright* is to replace *Chevron* deference with *de novo* review of questions of statutory interpretation, the opinion ostensibly preserves "*Skidmore* respect," under which courts may take into account the "body of experience and informed judgment" (i.e. subject-matter expertise) of agencies for guidance in their decision-making.

However, the value courts should place on that expertise was left unclear. The majority only reaffirmed that agency expertise has the power to persuade, but lacks the power to control. Yet, as the dissent warned, "If the majority thinks that the same judges who argue today about where 'ambiguity' resides . . . are not going to argue tomorrow about what 'respect' requires, I fear it will be gravely disappointed."

While *Loper Bright* does not explicitly undercut the value courts may place on agency expertise, the dissent's prediction highlights a trend in this direction. In response, the SEC may move toward developing more robust records to support their reasoning (i.e., to bolster their case in the event of future litigation). This could result in the extension of the timeframe on the promulgation of new rules. The SEC may also become more cautious in bringing enforcement actions, particularly where those actions are rooted in tenuous interpretations of Congressional grants of authority.

Discretionary Grants of Authority to the SEC Are Not Affected

The dissent's prediction about waning respect for agency expertise aside, *Loper Bright* does nothing to limit Congress's power to confer discretionary authority on agencies or the ability of agencies to act pursuant to delegated authority. Per the opinion, where a statute grants power to an agency to exercise discretion, the role of the court under the APA is to recognize those delegations, determine the constitutional limit of them, and ensure an agency acts with "reasoned decisionmaking" within those limits. Thus, the SEC's ability to promulgate rules pursuant to statutes explicitly authorizing that type of action remains unaffected by this decision.

The natural result of this is likely to be greater pressure on Congress by the SEC, regulated entities, and the courts. The SEC may increase its efforts to lobby Congress for additional and/or clearer grants of statutory authority. Both regulated entities and the courts – seeking greater certainty in the regulatory environment – are likely to push for legislative clarity about the legitimacy of existing and newly proposed SEC regulations.

A New Opportunity to Challenge SEC Regulations

The greatest impact likely to result from *Loper Bright* is an increase in both the volume and success rate of challenges to SEC actions. By stripping away the deference previously afforded to agency statutory interpretations and signaling a decreased respect for agency expertise, the Court has opened a new avenue for litigants to challenge SEC regulations.

The Limited Impact of *Jarkesy*

Conversely, *Jarkesy* is unlikely to have a significant practical effect. Under the limited holding in *Jarkesy*, the Court ruled that the Seventh Amendment entitles defendants facing securities fraud charges to a jury trial when the SEC is seeking civil penalties. Ongoing challenges to SEC administrative proceedings over the past several years have already caused the SEC to largely abandon the use of ALJs in these types of cases. Notably, since the June 2018 Supreme Court decision, *Lucia v. SEC* (which invalidated the staff-appointments of the then sitting SEC ALJs), the SEC has filed the vast majority of fraud cases seeking civil penalties in federal courts. Although *Jarkesy* merely solidifies the SEC's existing trend toward the use of federal (as opposed to in-house) courts for securities fraud cases, like *Loper Bright*, it acts to remove agency expertise (here, in the form of ALJs) from the regulatory equation.

Minimizing the Role of Agency Expertise

Taken together, *Loper Bright* and *Jarkesy* are two (of many) recent examples of the Court limiting the authority of federal agencies based on concerns about constitutional and statutory overreach. Because *Loper Bright* overruled *Chevron* (effectively eliminating the requirement that courts defer to "reasonable" agency decisions) but maintained *Skidmore*, there remains significant uncertainty about the role of agency expertise for courts moving forward. However, *Jarkesy*'s elimination of the use of ALJs in certain enforcement actions suggests a trend toward the elimination of agency expertise from the administration of agency regulations.