WINSTON & STRAWN LLP

SEPTEMBER 2024

The Follow-On

A Quarterly Recap of Key Content from Winston's **Public Company Gateway**

Upcoming Events

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PUBLIC COMPANY PRIORITIES BREAKFAST OR LUNCH PROGRAM

Please join us for Winston & Strawn's Public Company Advisory series, where our seasoned attorneys will delve into the latest hot topics affecting public companies.

During this session, we will cover:

- **Security Breaches: Developing and Executing an Effective Response Plan**
- **AI Governance: Policies and Issue Spotting**
- **Securities Litigation Update: Blockbuster 1H 2024 for SCOTUS and Delaware**
- **SEC Latest Developments: What Really Matters?**

For your convenience, you can opt to attend either the breakfast session of the lunch session, whichever aligns best with your schedule.

Thursday, September 26, 2024

Breakfast 8:00 – 9:30 a.m CT | Lunch 11:30 a.m. – 1:15 p.m. CT

YES, I WILL ATTEND

Questions? Brittney Crawford

Stockholder Agreements, *Moelis* and the latest DGCL Amendments

OVERVIEW

An amendment to the Delaware General Corporation Law (the DGCL) in response to a recent court decision could significantly affect the traditional reservation of corporate governance powers for boards of directors under Section 141(a) of the DGCL.

On February 23, 2024, the Delaware Court of Chancery issued an opinion in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.* (*Moelis*), which challenged the validity of provisions in a stockholders agreement that (1) required the prior written consent of the company's founder and majority stockholder (the Founder-Stockholder) in order for the company's board of directors (the Board) to take a range of actions, (2) allowed the Founder-Stockholder to select a majority of the Board's members, and (3) required that Board committees be comprised of a number of the Founder-Stockholder's designees proportionate to the overall composition of the company's Board. Plaintiff challenged the agreement under Section 141(a) of the DGCL on the grounds that it comprised an internal governance arrangement that purported to confer rights and obligations that (a) were not provided for in the company's certificate of incorporation and (b) improperly prevented the company's Board from carrying out its duties under Section 141(a).

Section 141(a) of the DGCL provides that "[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." The cornerstone of Delaware's board-centric governance system, Section 141(a) reserves to a Board the right to manage the company. In exercising that authority, directors owe fiduciary duties of care and loyalty to the corporation and its stockholders.

In an unexpected decision, the Delaware Court of Chancery found that certain provisions in the *Moelis* agreement violated Section 141(a) by delegating management rights traditionally held by corporate boards to the Founder-Stockholder, thus depriving the company's Board of a significant portion of the authority bestowed to it by the statute. Specifically, the court found that the agreement was facially invalid under Section 141(a) because it effectively precluded directors from exercising their best judgment and imposed substantive (as opposed to procedural) limitations on their discretion over management decisions.

The *Moelis* decision spawned immediate backlash, including criticism from those who have long believed that Delaware corporations should be free to enter contractual governance arrangements with their stockholders. Perhaps the most prominent criticism was that *Moelis* contradicted a longstanding (and theretofore generally accepted) corporate practice and thus "called into question … market practice, creating confusion and uncertainty for untold numbers of Delaware corporations and their executives, employees, investors and advisers."

AMENDMENTS TO THE DGCL

On March 28, 2024, about five weeks after the *Moelis* decision was published, the Council of the Corporation Law Section of the Delaware State Bar Association (DSBA) released proposed amendments to the DGCL that directly addressed the *Moelis* decision. The amendments added a new subsection (18) to Section 122 of the DGCL ("Specific powers") providing that, notwithstanding Section 141(a) of the DGCL, and whether or not provided for in a corporation's charter, a corporation may enter into contracts with current or prospective stockholders that delegate to stockholders those governance rights addressed in *Moelis*, including but not limited to consent rights (and thus veto rights) on corporate actions and management decisions.

The amendments were approved by a special committee within the DSBA 11 days later, on April 8, 2024, and then introduced to the Delaware General Assembly as Delaware Senate Bill 313 (S.B. 313) on May 23, 2024. The Assembly passed S.B. 313 on June 20, 2024, and the bill was signed into law by Governor Carney on July 17, 2024. The amendments to the DGCL will be effective on August 1, 2024.

RESPONSE TO THE AMENDMENTS

In his opinion in *Moelis*, Vice Chancellor Laster acknowledged that legislative intervention may be appropriate, noting that "[t]he expansive use of stockholder agreements suggests that greater statutory guidance may be beneficial." Proponents of S.B. 313 point to the court's invitation and say that the amendments will properly allow boards greater flexibility to achieve their goals without limiting directors' fiduciary duties or stockholders' ability to pursue claims for fiduciary breaches, which, in turn, is sufficient to curtail abuse.

Critics, on the other hand, believe that S.B. 313 was rushed and is likely to harm both stockholders and companies because it "provides bright-line authorization" to enter into the very stockholder agreements that, per the court's *Moelis* decision, would otherwise violate Delaware statutory law. Those critics point out that the new law both nullifies the *Moelis* decision before the Delaware Supreme Court has the opportunity to adjudicate the holding and effectively undercuts Section 141(a) by preemptively blessing the delegation of governance rights while imposing no meaningful restrictions. In one of many LinkedIn posts on the topic, Vice Chancellor Laster (posting in his personal capacity) posted his criticism of Section 122(18): "instead of a small renovation project tailored to the need to allow contract based vetoes in discrete areas, Section 122(18) blows up the edifice that was Section 141(a)."

In a letter to the Delaware State Bar Association, the Council of Institutional Investors (CII) wrote, "[t]he need for a more deliberative approach in this case is underscored by the fact that the proposed legislation appears to contain no limit in terms of how far a stockholder agreement can go in changing a company's corporate governance." Similarly, in a post for the Harvard Law School Forum on Corporate Governance, Professors Marcel Kahan and Edward Rock of New York University School of Law expressed concern that the amendments will undermine Section 141(a), described as the "heart of Delaware's 'board centric' governance system[,]" by "introduce[ing] a fundamental change into Delaware law without adequate examination."

Finally, a letter signed by corporate law professors at law schools across the country urged the Delaware Legislature to forgo S.B. 313 in favor of allowing the Delaware Supreme Court to review the *Moelis* decision, calling the amendments "hasty legislative action." The CII suggests that the "legislative rush" threatens "Delaware's preeminence in corporate law," which is "dependent on the law being almost entirely 'judge-made.'"

While S.B. 313 faced no objection in the Delaware Senate, it passed subject to some criticism in the House on June 20, 2024, with some representatives echoing the concerns of academics, including that S.B. 313 will threaten Delaware's dominance in corporate law and that the Delaware General Assembly is acting too quickly while the *Moelis* case is still pending and subject to appeal.

AN ALTERNATIVE PATHWAY

Had S.B. 313 not been enacted, a recent development in Delaware case law provided a possible alternative path around the obstacles posed by *Moelis*.

In *Wagner v. BRP Group*, decided on May 28, 2024, Vice Chancellor Laster addressed claims challenging a stockholder agreement that, like the *Moelis* agreement, required a particular stockholder's written approval before the Board could take action on specific internal matters. The challenged provisions required the stockholder's written approval before:

(1) making "any significant decision regarding any senior official" (the Officer Pre-Approval Requirement); (2) amending the certificate of incorporation (the Certificate Amendments Pre-Approval Requirement); and (3) entering into significant transactions (the Transaction Pre-Approval Requirement). Each provision was challenged under Section 141(a) on the same grounds asserted in *Moelis*—the rights and powers conferred in the agreement were not provided for in the company's charter and prevented the company's Board from carrying out its mandate under Section 141(a). The Officer Pre-Approval Requirement was also challenged under Section 142 (governing officers), and the Certificate Amendments Pre-Approval Requirement was also challenged under Section 242 (governing charter amendments).

While the court held that the Officer Pre-Approval Requirement and the Certificate Amendments Pre-Approval Requirement were facially invalid under Sections 142 and 242, respectively, it departed from *Moelis* in finding each provision valid under Section 141(a). The key differentiating factor in *BRP* was that, following the filing of the lawsuit, the stockholder and the company entered into a Consent and Defense Agreement (the Consent Agreement) that placed guardrails around the stockholder's consent rights. Specifically, with respect to the matters subject to the consent right, the Consent Agreement obligated the stockholder to grant consent if the matter was unanimously approved in good faith by a newly formed committee comprised of each independent director of the board.

The court found that this arrangement – which is all that distinguishes *Wagner* from *Moelis* – sufficiently freed the board to act in accordance with Section 141(a).

RECOMMENDATIONS

Beginning August 1, 2024, Delaware companies will be entitled by statute to enter into agreements vesting governance rights traditionally reserved to corporate boards in stockholders or "potential stockholders" without amending their charters. Time will tell whether the new law effects any significant change on corporate governance or litigation practices or, instead, maintains a practice that has long been the status quo. Either way, stockholders are likely to test the limits of new Section 122(18) given the broad nature of the language. Companies should prepare for this, including the increase in bylaw proposals that would have ordinarily violated Section 141(a) of the DGCL. See here for our previous post about one such bylaw proposal.

Additionally, given the scope of authority conferred by these types of stockholder agreements, boards that are contemplating them should consider – at least until the law becomes effective and perhaps going forward – some form of limitation along the lines of the consent agreement in *Wagner*, which would serve as a check on otherwise unrestricted authority over corporate management functions.

We will continue to monitor the impacts of Section 122(18) on corporate governance issues.

For more on this topic, reach out to the authors below.

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Non-Competes, the FTC and the Latest Litigation

The Federal Trade Commission's rule banning nearly all non-compete agreements with workers was blocked, nationwide, by a Texas federal court on August 20, 2024. The court's decision found that the rule exceeded the FTC's statutory authority and that it was arbitrary and capricious. The non-compete rule is now entirely set aside and will not take effect on September 4, 2024, as was previously anticipated.

Specifically, the Texas court's opinion found that (i) the statutory provision invoked by the FTC to issue the rule, Section 6(g) of the FTC Act, authorized only procedural rulemaking and not substantive rulemaking like the non-compete ban; and (ii) the rule was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), because the FTC disregarded evidence of positive benefits of non-compete agreements and failed to consider less restrictive alternatives to a sweeping nationwide ban. In an earlier ruling in the same case, *Ryan LLC et al. v. Federal Trade Commission*, No. 3:24-cv-00986-E (N.D. Tex.), the court entered a preliminary injunction with respect only to the named plaintiffs, leaving uncertainty for all other employers. After considering the merits and arguments raised in cross-motions for summary judgment, the court's August 20 opinion is now a final ruling with nationwide effect.

The future of the FTC's non-compete rule looks questionable, but the FTC is considering appeal options, and the legal battles are likely to continue. Litigation around the FTC rule is also continuing in other cases pending in Pennsylvania and Florida federal district courts, where the impact of the Texas ruling is still to be seen.[1] The upcoming November 2024 elections add further uncertainty to the future of the FTC rule and broader antitrust policy, although candidates from both major parties have indicated that antitrust enforcement will remain a priority. If the issue ultimately reaches the U.S. Supreme Court, the FTC will face a skeptical Court. In *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, the Supreme Court recently overruled its own landmark *Chevron* decision, which previously held that courts should defer to federal agencies' interpretations when laws passed by Congress do not clearly answer a question arising under a statute administered by the agency. See here for Winston's earlier post about these developments.

While the *Ryan* decision is a major victory for employers that use non-competes and stops the FTC rule from going into effect for the time being, the future of non-competes remains uncertain. Regardless of what happens to the federal rule, state-level lawmakers and enforcers continue to scrutinize non-competes. Four states already have nearly complete bans on non-competes. Several other states have substantial limitations on worker non-

[1] In the challenge pending in the Eastern District of Pennsylvania, the court previously denied plaintiff's motion for a preliminary injunction, and indicated it was likely to uphold the FTC rule on the merits. Meanwhile, a judge in the Middle District of Florida issued a preliminary injunction on August 15, 2024, blocking the rule as to the plaintiff in that case, but did so on a different basis than the Texas court in *Ryan*. The Florida court found that the FTC likely *does* have substantive rulemaking authority under Section 6(g) of the FTC Act, but that this particular non-compete rule was still likely unauthorized under the "major questions doctrine" due to its sweeping consequences.

compete agreements, while others are considering new restrictions or enforcement focus on non-competes. If the FTC rule is invalidated, more state legislatures and enforcers may take up the issue.

Given this uncertainty, businesses should monitor this space and assess their current agreements. It is still a good time for businesses to consider how best to future-proof their employee agreements against changing laws. Winston attorneys are carefully monitoring the developments with non-competes and regularly advising clients on ways to navigate the shifting landscape.

WHAT EMPLOYERS CAN DO TO PROTECT THEIR INTERESTS WHEN WORKERS DEPART

There are many options in addition to non-competes that can help protect a company's legitimate interests when workers depart. Amid continuing uncertainty about the FTC rule and ongoing scrutiny of non-competes at the state level, it remains advisable for businesses to take stock of where they currently use non-competes and consider additional options, such as non-solicitation agreements, enhanced non-disclosure agreements, garden leaves, and training repayment programs.

Where non-competes remain available, these provisions can act as complements. And where non-competes cannot be used, these provisions can protect company interests to the fullest extent possible. In all cases, post-employment restrictive covenants will be at their strongest and most enforceable when they are tailored to clear procompetitive interests that the company wishes to protect. Companies should proactively consider when the following types of provisions are appropriate for their agreements and what information they are seeking to protect:

- **Non-solicits.** Non-solicits can protect customer relationships and ensure that a former employee does not take advantage of the company's relationships. Such agreements are at their strongest when tailored to specific customers or other valuable relationships in which the employee was involved at the company.
- **Non-disclosure agreements (NDAs).** Targeted NDAs and confidentiality agreements can help protect a company's intellectual property information or trade secrets. Additionally, information-management policies can be updated and enhanced to keep access to sensitive information limited to those employees that need to know the information and who have agreed to heightened confidentiality terms in advance.
- **Garden leaves.** Employers can contractually agree with employees to extend notification periods before the employee departs the company. During this notice period, employers can instruct a departing employee not to work, deny them access to confidential information, and prohibit them from communicating with customers, company employees, or other important business partners. During the garden leave, the employer continues to pay the employee their salary, but typically does not need to pay bonus or other compensation above that base salary. The FTC has recognized that such garden leaves are not a post-employment restriction on competition and are therefore explicitly carved out of the FTC's non-compete rule.

- **Incentives forfeitures.** A wide variety of incentive award structures can be used to encourage long-term employment and reduce the likelihood that an employee will depart for a competitor. Terms that require departing employees to forfeit incentives or future compensation if they leave for a competitor can be effective while not actually prohibiting an employee from potentially competing, but such terms should be used carefully because several states, and the FTC's rule, analyze forfeiture-for-competition clauses similarly to non-competes.
- **Training cost repayment programs.** Training cost repayment programs aim to protect investments in training workers and require repayment of training expenses if the employee leaves the company within a certain period of time. Repayment terms should generally be tied to the company's actual costs associated with the training.

Winston attorneys are carefully monitoring the developments involving non-competes and are regularly advising clients on ways to navigate the shifting landscape and to implement additional protections including these examples and beyond. For more on this topic, reach out to the author below.

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Insider Trading Conviction and 10b5-1 Trading Plans

On June 21, 2024, a federal jury convicted the founder and former CEO of Ontrak Inc., a publicly traded telehealth company, of securities fraud and insider trading – marking the first insider trading prosecution (and subsequent conviction) brought by the Department of Justice ("DOJ") based exclusively on trades placed in accordance with a Rule 10b5-1 trading plan.[2]

The charges were unsealed in March 2023, just days after the effective date of several amendments to Rule 10b5-1 aimed at "strengthen[ing] investor protections concerning insider trading and to help shareholders understand when and how insiders are trading in securities for which they may at times have material nonpublic information".[3]

Originally adopted in 2000, Rule 10b5-1 under the Securities Exchange Act of 1934 provides an affirmative defense to insider trading liability under Section 10(b) of the Exchange Act and Rule 10b-5 in circumstances where, subject to certain conditions, the trade is pursuant to (1) a binding contract, (2) an instruction to another person to execute the trade for the instructing person's account, or (3) a written plan adopted when the trader was not aware of material nonpublic information.[4] Essentially, plans adopted under the Rule allow executives and other corporate insiders to set a predetermined date for selling or buying shares contingent upon their certifying that they are not aware of any material nonpublic information that is informing their decision. However, in response to what it perceived as abusive practices associated with Rule 10b5-1 trading plans, in January 2022, the SEC proposed amendments to the rule.

Among the revisions were an added requirement in Rule 10b5-1(c)(1)(ii) that any person entering into a Rule 10b5-1 contract, instruction, or plan has "acted in good faith with respect to" the contract, instruction, or plan.[5] The new Rule 10b5-1(c)(1)(ii) also narrowed the availability of the affirmative defense for any Rule 10b5-1 plan adopted by a director or Section 16 officer—that is, a director or "officer" as defined by Rule 16a-1(f)—by requiring the director or officer to include a representation in the trading plan certifying that, at the time of adoption or modification, they (1) are not aware of material nonpublic information about the issuer or its securities and (2) are adopting the contract, instruction, or plan in good faith and not as part of a plan or

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[2] The same day that the DOJ's indictment was unsealed, the SEC brought a parallel civil suit against Peizer for violations of (i) Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b); (ii) Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a); and (iii) Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a). The civil action was stayed in April 2023 pending conclusion of the criminal proceedings.

[3] The amendments to Rule 10b5-1 were adopted by the SEC on December 14, 2022 and became effective on February 27, 2023. See Insider Trading Arrangements and Related Disclosures, Exchange Act Release Nos. 33-11138; 34-96492, 17 C.F.R. § 240.10b5-1 (Dec. 14, 2022).

[4] 17 C.F.R. § 240.10b5-1.

[5] Insider Trading Arrangements and Related Disclosures, Exchange Act Release Nos. 33-11138; 34-96492, 17 C.F.R. § 240.10b5-1 (Dec. 14, 2022).

scheme to evade the confines of Rule 10b5-1.[6] Additionally, the amendments instituted new "cooling-off periods," which prevent a Section 16 officer who adopts a new Rule 10b5-1 plan (or makes certain changes to an existing plan) from relying on the Rule 10b5-1 affirmative defense unless the plan provides that trading under the plan will not begin until the later of (a) 90 days after the adoption or modification of the plan or (b) two business days following disclosure of the issuer's financial results in a Form 10-Q or 10-K for the fiscal quarter in which the plan was adopted (but not to exceed 120 days following adoption or modification of the plan).[7]

The DOJ's indictment charged Terren S. Peizer, Ontrak's former CEO, with one count of engaging in a securities fraud scheme (18 U.S.C. §§ 1348(1)) and two counts of securities fraud (15 U.S.C. §§ 78j(b)) for allegedly engaging in insider trading via fraudulent use of a Rule 10b5-1 trading plan. The indictment alleged that, despite having knowledge that Ontrak's $90 million contractual relationship with its then-largest customer, Cigna, was in serious jeopardy of being terminated and Ontrak faced significantly reduced potential billings, in May 2021, Peizer established a Rule 10b5-1 trading plan via his personal investment vehicle in which he attested to being unaware of any material nonpublic information concerning the company and subsequently sold nearly 600,000 shares of company stock worth more than $19.2 million. When Cigna later informed Ontrak in August 2021 of its intent to terminate its relationship with the company, Peizer—allegedly just one hour later—set up a second Rule 10b5-1 trading plan pursuant to which he sold another 45,000 shares of stock worth more than $1 million.[8] In total, the DOJ alleged that by exercising his Ontrak warrants and selling the resulting shares pursuant to his Rule 10b5-1 plans, Peizer avoided more than $12.5 million in losses when, six days after Peizer adopted his second plan, Ontrak's stock price dropped by more than 44% when the company disclosed the Cigna contract termination in a Form 8-K.[9]

According to reports, among the witnesses heard at trial were Peizer's Jefferies Wealth Management broker who executed his trades under the Rule 10b5-1 plans, a former Ontrak consultant who gave Peizer strategic counseling in business growth and challenges, and an RBC Capital Markets stock analyst who covers publicly traded companies like Ontrak. The jury heard how Peizer informed his broker that he wanted to immediately begin selling his shares under the plan, that Peizer had expressed anxiety over the Cigna relationship to Ontrak's consultant, and that Peizer and other Ontrak executives failed to inform the RBC stock analyst or include in the company's August 2021 Form 8-K and 10-Q filings any of the issues it was experiencing with Cigna. Despite Peizer maintaining that he simply sought to sell his warrants for 1 million shares that were set to expire and that he expressed his trading intentions in January 2021, long before Cigna began communicating its grievances to the company, the jury was ultimately not persuaded. Also unpersuasive were the defense's attempts to emphasize that Peizer was only selling warrants and not common stock, that these

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[6] *Id.*

[7] *Id.*

[8] The plan provided for the sale of approximately 450,000 shares; however, Peizer was only able to sell 45,000 shares under the plan before the customer formally notified Ontrak of its contract termination.

[9] In March 2021, shareholders brought a federal securities class action suit against Ontrak, Peizer, and three other Ontrak officers alleging that they had made materially false and misleading statements about the company's relationships with two major customers – Aetna Inc. and Cigna Corp. Defendants filed a motion to dismiss, which the court took under review in April 2024. The case is *Farhar v. Ontrak, Inc. et al.*, C.A. No. 2:21-cv-01987.

warrants represented only a fraction of his ownership in the company, and that he continued to sell shares even after the company announced Cigna's termination of the contract –the jury found Peizer guilty on all three charges.

SO WHERE DID PEIZER GO WRONG?

Though not legally required at the time Peizer entered into the plans,[10] the DOJ largely focused on Peizer's disregarding advice to observe a cooling-off period before trading under the plan. Peizer sought to exercise warrants that were set to expire in August 2021 and wanted to sell the shares under Rule 10b5-1. When the first broker he approached informed him of the recommended 30-day cooling-off period which was potentially negotiable down to 14 days at best, Peizer sought out another broker. Despite the second broker advising Peizer that a 30-day cooling-off period was "industry best practice," which failure to follow along with "rapid transaction executions subsequent to plan adoption" could "create an appearance of impropriety," Peizer allegedly refused to abide by any cooling-off period before he began selling his shares.[11]

The government also emphasized Peizer's allegedly false certifications that he was not in possession of material nonpublic information. Text messages included in the DOJ's indictment and subsequently heard by the jury reflected various conversations occurring from March 2021 to May 2021 among Peizer, Ontrak consultants and Ontrak's CEO in which Peizer said, among other things, that they needed to "save Cigna" and described the Cigna relationship as a "nightmare."[12] One consultant testified at trial that Peizer frequently consulted with her by phone, email, and text about anything related to the success of Ontrak and that Peizer and Ontrak executives "knew the company was starting to have problems with Cigna in the spring of 2021."

WHAT IS THE TAKEAWAY?

The SEC and the DOJ have stated outright that they are undertaking a "data-driven initiative" in search of 10b5-1 trading plan violations – and they are holding true to their word.[13] The conviction makes Peizer the first individual to ever be criminally convicted based exclusively on an executive's use of

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[10] As noted, Peizer was charged the same week that the SEC's new Rule 10b5-1 rules went into effect. The amended Rule 10b5-1 implements a mandatory "cooling-off period," but because the rules were not in effect that the time Peizer created the plans, they did not apply.

[11] Indictment at 8-9, *United States of America v. Terren Scott Peizer*, 2023 WL 2369980 (C.D. Cal. Feb. 2023).

[12] *Id.* at 6-7.

[13] In public remarks following the indictment, Assistant Attorney General Kenneth Polite credited the work of DOJ analysts who searched 10b5-1 filings to identify "company insiders who greatly outperformed the market when trading pursuant to 10b5-1 plans." *See* Press Release, *Assistant Attorney General Kenneth A. Polite, Jr. Delivers Keynote at the ABA's 38th Annual National Institute on White Collar Crime*, U.S. Dep't of Justice (Mar. 3, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national.

Rule 10b5-1 trading plans, but—per comments made by both the SEC and the DOJ—it will likely not be the last.[14] Martin Estrada, the U.S. Attorney for the Central District of California, responsible for the DOJ's Corporate Crime and Securities Fraud Strike Force, stated that the verdict should serve as a "clear message" that even corporate executives must abide by the law.[15]

With the DOJ and the SEC likely to increase their scrutiny of trading under Rule 10b5-1 plans, companies should be mindful of the parameters of Rule 10b5-1 and update their insider-trading compliance programs and policies accordingly. While the SEC did not charge the company with any wrongdoing in this case, Ontrak's compliance officer and chief financial officer certified and approved both trading plans and testified at trial that they were not entered into based on material nonpublic information. With corporate officers certifying and approving plans, potential risk may run to the company where the individual entering into the plan makes false certifications concerning material nonpublic information.

Further, given that the SEC and the DOJ have taken an aggressive position when it comes to identifying trades that are based on material nonpublic information, companies should provide or update comprehensive guidance to their officers and directors as to what may be deemed material nonpublic information so individuals can be sure to avoid entering into or amending any plans when potentially in possession of such information. Officers and directors should exercise caution when setting up plans during periods in which it could even possibly be construed that they are in possession of material nonpublic information and fully comply with the now-required cooling-off period. Failure to do so, as Peizer makes clear, can have serious consequences.

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[14] Press Release, *Chairman of Publicly Traded Health Care Company Convicted of Insider Trading*, U.S. Dep't of Justice (June 21, 2024), https://www.justice.gov/opa/pr/chairman-publicly-traded-health-care-company-convicted-insider-trading.

[15] *Id.*

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The End of the *Chevron* Doctrine

In *Loper Bright v. Raimondo* and *Relentless v. Department of Commerce*, the Supreme Court overruled its landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984).

KEY POINTS

- Courts will now interpret federal statutes without being required to accept an agency's "permissible" interpretation of an ambiguous statute.
- The Administrative Procedure Act requires courts to exercise independent judgment when deciding whether an agency has acted within its statutory authority.
- Courts may still give persuasive weight or "careful attention" to an agency's views about ambiguous statutes, but the court must decide the best reading of the statute and resolve the ambiguity.

SUMMARY

THE *CHEVRON* DOCTRINE

Federal administrative agencies derive their authority from the statutes that Congress directs them to administer. For the past 40 years under *Chevron*, courts applied a two-step analysis when reviewing an agency's exercise of authority. First, courts used traditional tools of statutory interpretation to determine whether the text directly resolved the issue. Second, if the text was silent or ambiguous, courts deferred to the agency if its interpretation was "based on a permissible construction of the statute," even if that was not the "best" interpretation. In other words, if an agency's interpretation was reasonable, courts deferred to it.

LOPER AND RELENTLESS

The Magnuson-Stevens Fishery Conservation and Management Act established a "national program for the conservation and management" of the country's fishery resources. The law allowed the National Marine Fisheries Service to require fishing vessels to carry observers to collect data about fishing. The Service adopted a rule requiring ship owners to pay part of the cost of those observers. Some owners sued, but the reviewing courts applied *Chevron* to find in the agency's favor.

In a 6–3 decision, the Supreme Court held that *Chevron* deference violated the Administrative Procedure Act (APA) by improperly prioritizing agencies' interpretations over courts' interpretations. Writing for the majority, Chief Justice Roberts explained that Congress enacted the APA to serve as a "check" on administrative agencies' exercises of authority. The APA provides for judicial review of agency actions, and Section 706 of the APA establishes the scope of that review: "The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Section 706(2)(a) requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law." In short, the majority explained, courts must "decide legal questions by applying their own judgment." And because the APA does not mention courts deferring to agencies, agency interpretations of statutes "are *not* entitled to deference."

The Court held, however, that reviewing courts may still "seek aid" or "guidance" from agency interpretations. The Court referred to its decision in *Skidmore v. Swift & Co.* (1946) when explaining that courts may sometimes give "weight" to agency interpretations. The Court did not explain in detail how lower courts should apply *Skidmore*, but it emphasized that agency interpretations may be particularly useful when they are "issued contemporaneously with the statute at issue" and "have remained consistent over time." The Court also recognized that Congress may expressly authorize an agency to define statutory terms or "fill in details of a statutory scheme." In that situation, a reviewing court's role would be limited to ensuring that the agency engaged in reasoned decision making.

Justice Kagan dissented, joined by Justices Sotomayor and Jackson. Justice Kagan objected to the majority's decision to reverse a "longstanding precedent at the crux of administrative governance," which she asserts reflects a "bald assertion of judicial authority." She also defended *Chevron* deference as appropriate because statutes "often contain ambiguities and gaps," and where Congress has not addressed an issue, it is proper for the Court to assume that it intended for the expert agency to fill in those gaps and have its construction control. The majority responded that administrative agencies "have no special competence in resolving statutory ambiguities"—but "courts do." And without textual support for presuming that Congress intended courts to defer to agencies, the APA's requirement that courts decide issues of law must control.

WHAT IT MEANS

Although the decision overturned *Chevron* itself, it claimed *not* to overturn 40 years of judicial decisions made using *Chevron* deference. The Court explained that the change in interpretive methodology did not "call into question" those decisions because the principle of "statutory stare decisis" still applies.

The decision will encourage new challenges to agency interpretations, but its full effect is not yet clear. How often *Chevron*'s end will result in courts interpreting statutes differently than agencies in close cases remains to be seen. The Court's decision leaves open the possibility that agency interpretations may still persuade courts, although the Court did not decide the exact "weight" that agency interpretations may carry under *Skidmore*. Also, as agencies issue new regulations with the knowledge that the *Chevron* era is over, they may put more effort into persuading courts that their statutory interpretations are correct. View the opinion here.

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