WINSTON & STRAWN LLP

CLIENT ALERT

Chevron Deference No More: How SCOTUS' Landmark Reversal Will Affect the Financial Services Industry

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I. OVERVIEW

For the last 40 years, thanks to *Chevron* deference, federal administrative agencies have won 93.8% of the lawsuits filed against them by private plaintiffs seeking to set aside final agency regulations or final agency orders.[1] But the regulatory landscape drastically changed this month when the Supreme Court of the United States in *Loper Bright Enterprises v. Raimondo* abandoned the *Chevron* deference doctrine. Now, federal courts must interpret ambiguous federal statutory language without being required to accept an agency's interpretation. Ultimately, this change in interpretative methodology will frustrate federal financial agencies in their attempts to make policy and embolden regulated financial firms to challenge agency action.

KEY TAKEAWAYS

- Courts are no longer required to accept an agency's "permissible" interpretation of an ambiguous statute.
- Courts must exercise independent judgment when deciding whether an agency acted within its statutory authority.
- Going forward, federal financial agencies will need to more closely track the language of any enabling legislation when enacting rules affecting the financial services industry.
- The federal financial agencies can no longer take overly aggressive interpretations of statutes in rulemaking and enforcement proceedings.
- Congress will need to draft statutes more precisely to make the congressional intent of delegated authority clear rather than rely on federal financial agencies to "fill statutory gaps."

II. BACKGROUND

A. The *Chevron* Doctrine

The federal financial agencies derive their authority from enabling statutes that Congress directs them to administer. For over 40 years, courts applied a two-step analysis under which, where a federal statute was "ambiguous," courts

deferred to “permissible” agency interpretations of those enabling statutes. Even if those interpretations were not the “best” interpretations.

B. Overruling *Chevron*

That deference to agency interpretation is no more after the Supreme Court overruled *Chevron* in *Loper*. Courts will now exercise independent judgment when deciding whether an agency has acted within its statutory authority. Although courts may still give persuasive weight to an agency’s view,[2] the court must decide the “best reading” of the statute.

III. LOOKING FORWARD: WHAT FINANCIAL INSTITUTIONS NEED TO KNOW

Loper will embolden financial firms who feel that their regulators have been operating well beyond their statutory lanes. Consequently, we expect agencies to take less aggressive interpretations of statutes in rulemaking and enforcement proceedings.

Below are considerations that the financial services industry should be aware of:

***Loper* is not retroactive.** The Court in *Loper* expressly stated that it is not overturning previous cases that relied on *Chevron*. For now, all agency rules that were enforceable before *Loper* remain enforceable.

Increased challenges. We can expect to see increased challenges under the Administrative Procedure Act to final agency rulemaking and enforcement proceedings. The Court’s rejection of *Chevron* may even reverse the recent trends of federal financial agencies’ aggressive exercise of authority. For instance, the CFPB has in recent years sought to ratchet up enforcement measures on companies’ use of sensitive personal data, issued a new rule on the use of AI in home appraisal tools, and targeted Buy Now, Pay Later products. Other agencies, like the SEC, have also taken increasingly aggressive enforcement measures. The SEC is already fighting challenges to recent rules in federal court and a court recently vacated the SEC’s rules aimed at regulating private fund managers.[3]

No one likes to lose in court, and the federal financial agencies are no different. Moving forward, agencies should be less aggressive to avoid being challenged in court. Even when an agency thinks it has the right interpretation of a statute, it will need a detailed rationale to support its interpretation. For instance, the federal banking agencies will need to carefully articulate the rationale for adopting a regulation under the broad, catch-all “unsafe and unsound” banking practice standard that forms the basis of many regulations and orders.

Possibility of split decisions. With each federal judge making his or her own independent judgment, split decisions of law may emerge when plaintiffs challenge agency action. Financial services companies will need to monitor these developments closely to ensure they are complying with the law and accurately forecasting future legal developments.[4] Although there may be some short-term instability, as time goes on, case law will likely become more stable as (1) more courts interpret similar statutory language, (2) Congress drafts more precise and tailored statutes granting authority to agencies, and (3) agencies find it increasingly difficult to change their interpretations of statutes with newly elected White House administrations.

We will continue to monitor developments in the emerging regulatory landscape that may impact company strategy. If you have any questions, please contact Juan Azel (Partner, Financial Services Practice), Carl Fornaris (Partner and Co-Chair, Financial Services Practice), Basil Godellas (Partner and Co -Chair, Financial Services Practice), Kimberly Prior (Partner, Financial Services Practice), Daniel Stabile (Partner, Financial Services Practice) or your Winston & Strawn relationship attorney.

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[1] Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 35 fig.3 (2017) (finding that federal circuit courts affirm agency action in 93.8% of the cases they hear when *Chevron* two-step analysis is applied).

[2] This persuasive weight is often referred to as "*Skidmore* weight." Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), a court may extend respectful consideration to an agency's interpretation of the law. But a court is not required to follow an agency's interpretation.

[3] For example, different industries challenged a rule that sought to expand the statutory term "dealer" under the Securities Exchange Act of 1934. Other SEC rules, such as climate-related disclosures and heightening disclosure requirements on proxy advisory firms, are also in the courts. See also the Fifth Circuit's decision in National Association of Private Fund Managers (NAPFM) v. SEC, No. 23-60471 (5th Cir. 2024), which invalidated five regulations and related amendments known as the "Private Fund Adviser Rules".

[4] This is not a new landscape for practitioners in Florida. Since 2018, the Florida Constitution has outlawed the concept of *Chevron* deference. *See* art. V, § 21, Fla. Const. (providing that "a state court or an officer hearing an administrative action ... may not defer to an administrative agency's interpretation of [a] statute or rule").

4 Min Read

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