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PERSPECTIVES

Crosscurrents: Companies Face Regulatory Uncertainties in Wake of SCOTUS Decisions

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INTRODUCTION: RECENT SCOTUS DECISIONS EXPAND LITIGANTS' ABILITY TO CHALLENGE FEDERAL AGENCY REGULATIONS

Federal agencies are under attack. Recent decisions from the United States Supreme Court are eroding long standing principles of administrative law. While many are touting these as a win for business, recent decisions have injected less certainty into regulatory schemes and will likely result in many more challenges to existing programs, which could result in significant changes across federal regulatory programs.

Recently, the United States Supreme Court issued two decisions that many are viewing as the culmination of decades of effort to reduce government intervention in American businesses. On Friday, June 28, 2024 the Court overturned 40 years of precedent (and tens of thousands of lower court cases) in *Loper Bright Enterprises v. Raimondo*, No. 22-451, by deeming so-called Chevron deference to agency interpretations of federal statutes inconsistent with the Administrative Procedures Act (APA). The next business day, Monday, July 1, 2024, the Court followed this landmark decision with another blow to agency authority in *Corner Post v. Board of Governors of the Federal Reserve System*, No. 22-1008, by holding that the "clock starts" for filing lawsuits when a regulation first affects a business rather than when the regulation is adopted. Together, these decisions have major implications for companies as they expand litigants' ability to challenge regulations issued by various federal agencies and heighten uncertainty for questions of administrative law.

UNDERSTANDING THE IMPLICATIONS OF *CHEVRON* DEFERENCE

Decided in 1984, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, granted federal agencies wide authority to interpret and apply federal law. The purpose of Chevron deference was to allow an agency to fill in gaps if Congress passed legislation that left something unclear. Under Chevron, courts were to defer to a federal agency's interpretation of an ambiguous federal statute if: (1) Congress had not spoken directly to the specific question, and (2) the agency's interpretation was based on a permissible construction of the statute. The reasoning for such deference was that scientists, economists, and other experts employed by agencies were viewed as having more expertise than judges in determining narrow questions often involving technical application of broad federal statutes. In practical application, it also narrowed litigants' ability to challenge administrative decisions and increased executive regulatory control of American businesses.

HOW *LOPER* IMPACTS *CHEVRON* DEFERENCE

The Court in recent years has signaled its unease with allowing another branch such broad control over the interpretation of federal law. In 2022's *West Virginia v. EPA*, 142 S. Ct. 2587, the Court adopted a "major questions doctrine" which bars agencies from resolving questions of economic and political significance without clear statutory authorization. Effectively creating an exception to *Chevron* deference (though not explicitly overruling *Chevron*), the Court opined, "We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies."

The *Loper* decision follows that reasoning to its perhaps inevitable conclusion with the Court now explicitly holding in an opinion authored by Chief Justice Roberts that "[t]he deference *Chevron* requires of courts reviewing agency action cannot be squared with the [Administrative Procedures Act]." This opinion marks a

return to "the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions." The Court explained, "It [] makes no sense to speak of a 'permissible' interpretation that is not the one of the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible." The opinion further characterized *Chevron* deference as "misguided," remarking that "agencies have no special competence in resolving statutory ambiguities."

Moving forward, the *Loper* opinion both severely diminishes agency authority and greatly increases the ability of companies to challenge unfavorable regulations or administrative rulings. Cases that courts may have previously been able to dismiss on procedural grounds citing *Chevron* deference to agency understandings of federal law will now require explicit judicial interpretation of federal statutes. Of course, by increasing litigants' ability to challenge administrative decisions, this means that the validity of agency regulations may also stay in question for longer, which could mean regulatory uncertainty for businesses. At the same time, it may also mean less regulatory volatility following particularly contentious election cycles and shifts in executive leadership.

HOW *CORNER POST* FURTHER WEAKENS AGENCY AUTHORITY

Issued the following business day with slightly less fanfare, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* further expanded a company's ability to challenge administrative regulations. At issue in the case was a default statute of limitations for suits against the United States which requires "the complaint [to be] filed within six years after the right of action first accrues." According to the agency (and the lower courts), this limitation should mean that a litigant must file a challenge to an agency regulation within six years of the enactment of that regulation. But not so, said the Court. Rather, the Court held that the statute of limitations does not begin to run until the plaintiff is injured. In other words, the six-year time limit on filing a lawsuit starts when a regulation first affects a business and not when the regulation was issued by the agency.

In dissent, Justice Jackson predicts that, particularly combined with the *Loper* decision, this decision has the potential to "wreak[] havoc on Government agencies, businesses, and society at large." She writes: "Put differently, a fixed statute of limitations, running from the agency's action, was one barrier to the chaotic upending of settled agency rules; the requirement that deference be given to an agency's reasonable interpretations concerning its statutory authority to issue was another. The Court has now eliminated both."

As Justice Jackson points out, the combined decisions have reduced what businesses want most—certainty. After years of being able to rely upon federal agency regulations once rulemaking was completed and challenges exhausted, that certainty no longer exists. For companies that make substantial investments to comply with regulatory requirements this has the potential to create unequal playing fields. Imagine a new competitor in your industry successfully appealing a long-standing Clean Air Act requirement, one that you invested hundreds of millions of dollars in for scrubbers to comply with, only to learn the competitor does not have to meet the same requirement.

This combination of decisions has the potential to "wreak havoc" across multiple industries. It will add complexity to determining what version of agency rules are applicable to your business — including compliance monitoring and reporting requirements. Companies can also expect that the administrative rules that they are trying to implement across business operations are now subject to an even higher risk of being challenged in litigation. This puts executive teams, in-house counsel, compliance managers, risk managers, and other personnel in a tough spot as they try to provide direction on how companies can comply with federal legal requirements.

CONCLUSION: PRACTICING REGULATORY VIGILANCE & ENLISTING EXPERT HELP

To increase resilience to potentially shifting regulatory burdens in the wake of these decisions, it is imperative that companies evaluate their regulatory exposure while also staying abreast of any new developments related to applicable agency requirements or other expectations. To safely and confidently navigate regulatory volatility that now exists, businesses should consider enlisting the help of experts, particularly those with backgrounds as former federal agency employees, practicing attorneys, and regulatory experts, across numerous fields and industries.

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