

Litigation, Professional Perspective - The Potential Fall of the Chevron Doctrine & Its Implications for SEC Rulemaking

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June 2024

In two pending cases, the U.S. Supreme Court is considering whether to overrule the Chevron doctrine governing judicial deference to agency interpretations of the statutes they implement. A decision is expected toward the end of the term in June, and whether the Chevron doctrine is eliminated or upheld subject to guardrails, the decision likely will significantly affect rulemaking and regulations across industries from many different federal agencies.

The Securities and Exchange Commission (SEC), in particular, has been pursuing an aggressive rulemaking agenda, including its recently adopted Climate Disclosures Rule and its Private Fund Advisers Rule. Both rules have been challenged by industry participants, and the fate of Chevron deference along with other developments in administrative law—such as the Major Questions Doctrine—are likely to feature prominently in the litigation.

Background to the Chevron Doctrine

Derived from the 1984 case, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) the Chevron doctrine involves a two-step framework. The first step asks whether “Congress has directly spoken to the precise question at issue,” or “if the statute is silent or ambiguous with respect to the specific issue.” If the statute is clear, then it controls. If the statute is silent or ambiguous, then the court proceeds to the second step and must defer to the agency's interpretation if the interpretation is “based on a permissible construction of the statute.”

As the Supreme Court clarified in *United States v. Mead*, 533 U.S. 218 (2001), an agency interpretation only “qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.” This threshold inquiry is also referred to as Chevron “Step Zero.”

The Chevron doctrine stands in contrast to the prior approach described in the 1944 case *Skidmore v. Swift*, 323 U.S. 134 (1944)—an approach that currently applies to less formal agency interpretations that do not qualify for Chevron deference under *Mead*. Under *Skidmore*, agency interpretations “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance” based on their “power to persuade,” including factors such as the thoroughness and validity of the agency's reasoning and its consistency with earlier and later pronouncements.

The rationale underlying Chevron deference is that agencies are better suited than courts to make the policy judgments necessary to implement a statute and fill in the gaps. Because Congress typically legislates in broad terms and cannot anticipate every issue that will arise, the Chevron

doctrine presumes that Congress implicitly delegated the authority to resolve gaps or ambiguities to the agency charged with implementing the statute.

Petitioners challenging Chevron deference argue that the doctrine arrogates too much power to agencies at the expense of both courts (whose job is to interpret the law) and Congress (who should be incentivized to write clearer laws). Petitioners further argue that the doctrine encourages agency overreach and allows the meaning of the law to change from one administration to the next—all at the expense of the people subject to the regulations.

What Happened at Oral Argument

The oral arguments featured repeated questions regarding how to identify questions of legal interpretation versus questions of policy, what it means to identify a statute as ambiguous at Chevron Step One, and what would happen to prior cases if Chevron is overruled.

Several Justices, led by Justice Gorsuch, asked questions suggesting an inclination to eliminate Chevron deference. Such a decision would mean the return to a Skidmore regime where courts would be solely responsible for interpreting a statute based on the text and traditional canons of construction, subject to giving agency interpretations weight where appropriate.

Three Justices (Justice Sotomayor, Kagan, and Jackson) appeared to be in favor of preserving Chevron, potentially subject to modification—similar to what the Court recently did in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)—a case involving so-called Auer deference given to an agency's interpretation of its own regulations. The Solicitor General, in particular, argued for four guardrails in applying Chevron:

- Courts should be rigorous at Step One (“don't wave the ambiguity flag too readily”).
- At Step Two, reasonableness is not “anything goes.” Courts should enforce the outer bounds of reasonableness and may apply more scrutiny to changed interpretations.
- Deference only applies when the agency formally speaks with the force of law (Mead).
- Courts should look for any other statutory indication about whether Congress would or would not expect Chevron to apply—i.e., to look more carefully at whether there is an implied delegation to the agency to resolve the specific gap or ambiguity. This inquiry could involve the Major Questions Doctrine and recognizes that Congress can act to rebut any presumption of deference.

Based on questions at oral argument, the Chief Justice and Justice Barrett could be swing votes. The Chief Justice asked relatively few questions, while Justice Barrett asked whether eliminating Chevron deference would invite a flood of litigation.

Since the *Relentless/Loper Bright* argument, the Court's consideration of the Chevron doctrine came up in another administrative law case: *Corner Post, Inc. v. Bd. of Governors of the Federal Reserve System*, No. 22-1008, argued on February 20, 2024. *Corner Post* involves whether the

statute of limitations for a claim under the Administrative Procedure Act (APA) runs from when an agency issues a rule, or when the rule causes harm to the particular plaintiff (effectively rendering agency rules subject to challenge indefinitely).

At oral argument, Justice Kagan asked about the interplay between the limitations period and a potential ruling on the Chevron doctrine—“if Chevron were reinforced, were affirmed, if Chevron were reversed”—and the Government responded that expanding the limitations period would magnify the effect of any change in the Chevron doctrine. When Petitioners noted that the Sixth Circuit did not see an uptick in litigation after it adopted the broader limitations period, Justice Jackson asked whether that is “because we had other doctrines that prevented [the uptick], so, you know, for example, Chevron existed” (emphasis added).

Potential Implications of Relentless/Loper Bright & SEC Rulemaking

Based on the questions at oral argument in *Relentless/Loper Bright* and in *Corner Post*, it appears likely that the Court will eliminate the Chevron doctrine. Doing so will have significant implications for agency rulemaking across areas of law and industries, particularly to the extent that agencies in the past had specifically relied on Chevron to expand their powers. Even if the Chevron doctrine is affirmed subject to modification—e.g., the Solicitor General's guardrails—one would still expect to see increased challenges to agency regulations.

Overruling Chevron could impact not just future regulatory interpretations but past decisions as well. Any prior decisions upholding agency interpretations based on Chevron Step Two arguably would not be entitled to stare decisis because the prior decision would have failed to resolve what the statute actually means. And while certain APA challenges must be brought in a specific venue (typically the D.C. Circuit), plaintiffs may be more inclined to pursue cases in their home venue where allowed, and one would expect to see more Circuit splits over interpretive issues.

With respect to the SEC in particular, the loss of Chevron deference will likely have an immediate effect on the pending cases challenging some of the SEC's most significant new rules. The highest profile litigation is probably the challenge to the SEC's Climate Disclosure Rule, which has been consolidated in the Eighth Circuit. See *State of Iowa, et al v. SEC*, No. 24-01522 (8th Cir. Filed Mar. 12, 2024). Opponents of the rule may challenge the rule on numerous grounds—including the Administrative Procedures Act, the Major Questions Doctrine, and the nondelegation doctrine—and those challenges will inevitably be stronger if the SEC lacks Chevron deference to help it defend its expansive view of its powers under the federal securities laws.

Similarly, in the pending challenge to SEC's Private Fund Adviser Rules, the SEC has relied heavily on a dubious interpretation of the Dodd-Frank Act to support its authority to promulgate the new rules. See *Nat'l Assn. of Private Fund Managers v. SEC*, No. 23-60471 (5th Cir. argued Feb. 5, 2024). At oral argument, the Fifth Circuit seemed skeptical of the SEC's position, and the SEC may be even less likely to prevail if its interpretation is not entitled to deference in a post-Chevron world.

The SEC's rulemaking agenda under Chair Gensler has been ambitious and aggressive, but a Supreme Court decision overruling Chevron could jeopardize the agency's ability to defend that agenda against the current and future challenges.

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