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By Ditching Chevron Deference, SCOTUS Drastically Changes the Litigation and Compliance Landscape

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On June 28, the Supreme Court overruled four decades of case law that required courts defer to federal agencies charged with implementing laws under their purview. "*Chevron* deference," as the doctrine was known, required that courts defer to federal agencies' interpretation of statutes those agencies were charged with enforcing — so long as the agencies' interpretation was reasonable and even if the statute-in-question could be read differently. In more recent years, however, signs emerged that the future of *Chevron* was in doubt. Ultimately, those reading the 'anti-*Chevron*' tea leaves were right, as the Supreme Court overruled this precedent in *Loper Bright Enterprises v. Raimondo*. By overturning *Chevron*, the Supreme Court has set in motion a major shift in the world of administrative law which will have massive implications on how federal regulations are challenged, interpreted, and drafted.

Forty years ago, the Supreme Court decided *Chevron, U.S.A., Inc. v. NRDC, Inc.*, creating a two-step framework to interpret statutes administered by federal agencies, colloquially known as *Chevron* deference. *Chevron* deference requires courts first ask whether Congress has directly addressed the precise question at issue. If the answer is "yes," that is the end of the matter, meaning the court must give effect to the unambiguously expressed intent of Congress. But if the answer is "no," the court then asks whether the agency's explanation is based on a permissible — but not unassailable — construction of the statute.

Chevron had historically been important to litigation in a variety of contexts. For example, in *Mayo Foundation for Medical Education & Research v. U.S.*,the Supreme Court held that *Chevron* applies "with full force in the tax context," which has led to tax litigants looking to the Department of the Treasury's published federal tax regulations to predict how the Internal Revenue Code will be interpreted and applied. The EPA and FDA, among other federal agencies, have also consistently relied on *Chevron* when defending regulations against legal challenges.

In last month's *Loper Bright* case, the National Marine Fisheries Service claimed the Magnuson-Stevens Act required fishing vessels to pay for their own observers if a government-paid one wasn't available. The fishermen from Cape May disagreed, arguing the Act didn't authorize such payments. The lower court sided with NMFS, deferring to the agency's interpretation under *Chevron*, and the case was appealed to the nation's high court.

The Supreme Court, led by Chief Justice Roberts, seized the opportunity to nix *Chevron*. Roberts argued that a statute's ambiguity doesn't equal a free pass for agencies to interpret it as they wish. Instead, courts should use all available tools to find the best reading of the law, consulting agency expertise only

as needed. The chief justice criticized *Chevron*'s assumption of congressional intent, emphasizing that the framers intended judges to interpret the law with clear heads and honest hearts, free from policy biases.

Importantly, Roberts' clarified that overturning *Chevron* deference as a doctrine did not nullify the preceding 40 years of case law decided under that framework. Roberts specifically stated that prior rulings, including those under the Clean Air Act, remain binding under stare decisis. The takeaway: While the methodology has changed, the historical applications of *Chevron* still stand.

But what will the post-*Chevron* era look like?

Overturning *Chevron* deference has significant implications for various industries and may lead to increased uncertainty and risk. Imagine, for example, following one map for 40 years, only to suddenly be told the directions provided by its author might not be right. Businesses, which could previously rely on federal agencies' interpretations of statutes to guide their actions and investments, now face a more unpredictable regulatory environment. In short, following an agency's interpretation is no longer a guarantee of compliance if your company's actions are challenged. As businesses of all stripes must now consider the possibility that agency interpretations may be overturned by courts, more rigorous legal scrutiny and potentially higher compliance costs are easily foreseeable.

The *Loper Bright* decision is likely to generate both difficulties and opportunities. For instance, businesses may find new and better grounds to contest unfavorable regulations, potentially benefiting from a judicial system that is more willing to question agency authority. On the flip side, companies will need to allocate more resources to monitor and respond to regulatory changes and legal disputes. Indeed, as Justice Elena Kagan noted in her dissent, private parties have organized their businesses and made financial and healthcare decisions around agency actions, rulemaking and interpretations that are now subject to challenges.

Of course, the end of *Chevron* does not mean a complete devaluation of the persuasive weight of agencies' statutory interpretation. Before *Loper Bright*, guidance, manuals, policy statements and other interpretive materials of and from federal agencies that were not otherwise entitled to *Chevron* deference were still considered "informed judgment to which courts and litigants may properly resort for guidance," according to the Court's 1944 decision in *Skidmore v. Swift & Co*. Under the less deferential *Skidmore* standard, as applied in *Alaska Department of Environmental Conservation v. EPA*, agency interpretation — though not controlling — was entitled to a "measure of respect. To that end, courts will likely still give some — perhaps even substantial — weight to agency interpretations of unclear statutes. Especially where those agencies' interpretations have been consistent and longstanding. Accordingly, businesses should not simply eschew agency guidance in the wake of *Loper Bright*.

The full and future impact of overturning *Chevron* is unclear, but it is safe to assume that innumerable businesses and industries will be impacted. We will continue to monitor the fallout from *Loper Bright* on corporate litigants before courts who, previously, would have been guided by *Chevron*. Businesses with questions about the immediate and prospective impact of *Loper Bright* should contact outside counsel for guidance.

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