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Practice Update

The End of *Chevron* – The Takeaways

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On June 28, 2024, the U.S. Supreme Court overruled *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and the so-called *Chevron* doctrine that developed from that case. The decision in *Loper Bright Enters. v. Raimondo*, No. 22-451 (slip-op. June 28, 2024) (consolidated) overruling *Chevron* was expected, and there has been much written about the anticipated impact. Some of what has been written is factual, some is speculative, and some is inaccurate. This alert explains what the *Loper* ruling did, what it did not do, and what to anticipate the future impact of that ruling could be.

What Was the *Chevron* Doctrine?

As described by Chief Justice Roberts in *Loper*, *Chevron* required federal courts to use a "two step framework to interpret statutes administered by federal agencies." Step one was for the court to determine whether the statute under consideration addressed the precise question at issue in the case. If the law, as written, addressed the issue and expressed Congressional intent clearly (i.e., there was no ambiguity in the written words), the court was bound by that intent in interpreting the statute, and in the Supreme Court's words, "that [wa]s the end of the inquiry." If, however, the statute was silent or ambiguous on the issue the court had to address, step two required the court to defer to the federal agency's interpretation of the law if it was "based on a permissible construction of the statute."

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For example, at issue in *Loper* was the application of the Magnuson-Stevens Fishery and Conservation and Management Act (MSA) as administered by the National Marine Fisheries Service (NMFS) as part of the U.S. Department of Commerce. In *Loper*, an interpretation of the MSA that imposed costs on fishing companies that are not clearly authorized by the MSA was challenged. The lower court in *Loper* concluded the MSA was ambiguous on whether imposing those costs was authorized by the statute and it therefore deferred to the NMFS interpretation that allowed imposing the costs.

The *Loper* Ruling

In *Loper*, five Justices joined Chief Justice Roberts in unequivocally overruling *Chevron. Chevron* was wrongly decided because it usurped the courts' role of deciding what the law is. That role includes deciding what statutes mean, even those statutes that are silent or ambiguous on the issue under a court's consideration. Accordingly, courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." Instead, courts must treat statutes addressing regulatory agency authority and functions like any other statute, and must decide what a law means using all of the tools available to courts for statutory interpretation. The Supreme Court was also clear, however, that by overruling *Chevron*, it was not overruling prior cases that applied the *Chevron* framework. The Supreme Court remanded the case to the lower court to apply the proper process of statutory interpretation to decide the challenge to the statute.

The Issues *Chevron* and *Loper* Did Not Address

Importantly, there were issues related to the actions of federal regulatory agencies that *Chevron* did not address. That case did not address Congress' ability to delegate the enforcement of statutes to regulatory agencies. It also did not address the authority of regulatory agencies to issue regulations or make rules within the regulatory area delegated by

Congress. And *Chevron* did not address whether an agency's interpretation of its own regulations was entitled to deference from courts interpreting those regulations. Those issues therefore were not addressed in the *Loper* ruling overruling *Chevron*. *Loper* likewise did not hold or mandate that any current interpretation of a statute or any regulation be reversed, overruled, or abandoned.

The Implication for Interpretation of Agency Issued Regulations

Loper obviously weakened agencies' abilities to expand or change interpretations of the statutes governing their authority or functions. An agency interpretation is now only one factor a court may consider in determining what a statute means. And *Loper* discussed that statutory interpretations that were made at or near the time a statute became law or that have been consistent over time could be a persuasive factor, although not controlling, to reviewing courts. The ruling at least implies that historically inconsistent or novel statutory interpretations used by regulatory agencies may be more vulnerable to challenge.

The ruling in *Loper* may also weaken another form of deference to regulatory agencies known as *Auer* deference. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court articulated a rule of deference to federal agencies' interpretations of the regulations they issue. In that case, the court ruled that an agency's interpretation of its own regulations is controlling unless "plainly erroneous or inconsistent with the regulation." Under the same rationale applied in *Loper,* such deference seems to invade the province of the courts to say what the law is. Indeed, in 2019, although the Supreme Court upheld *Auer* deference, four justices currently on the Supreme Court dissented and wrote or joined opinions that *Auer* deference should be discarded. *Kisor v. Wilkie*, 588 U.S. 558 (2019). Since that time, Justice Coney Barrett has joined the Supreme Court and she joined the majority in overruling *Chevron*. If she agrees

with the four dissenters in *Kisor*, *Auer* deference could also be ripe to be overruled.

Considerations for Organizations Operating in Regulatory Environments

For organizations that are subject to regulatory oversight, the demise of *Chevron* deference and the possibility that *Auer* deference is on infirm ground presents an opportunity to change approaches to relationships with regulators. Regulators will no longer be permitted to impose their interpretation of their governing statutes or those subject to their regulation by simply setting forth an interpretation. New or expansive interpretations of agency authority or powers are no longer controlling on reviewing courts, and those subject to agency regulation will now be able to challenge those interpretations to get an independent court evaluation of the enforceability of the agency interpretation as a matter of law. The implication is similar for agency issued regulations. At a minimum, the elimination of *Chevron* deference should make agencies more amenable to discussions with regulated organizations about the scope of their authority and their interpretation of the governing statutes and regulations before enforcement actions are taken. In addition, litigation against agencies challenging novel or expanded interpretations of statutes or regulations is now a viable and potentially promising option to challenge agency interpretations and enforcement actions.
