



## The End of *Chevron* Deference: A Primer on *Loper Bright*

### The Basics

*Chevron* held: Courts defer to agency interpretations of ambiguous statutes.

*Loper Bright* holds: Courts determine the meaning of ambiguous statutes as part of their judicial review function.

### What Does this Mean in Practice?

1. Under *Chevron*, federal agencies had broad latitude to interpret statutes under their purview.
  - For example, in *Teva v. FDA*, the DC federal district court applied *Chevron* deference to the FDA's definition of the term "protein."
2. Under *Loper Bright*, regulated companies have broad latitude to advocate for their own statutory interpretation.
  - Previously, challenging an agency interpretation would likely be an expensive, uphill battle. That is not necessarily the case any longer.

### Are the Floodgates Open? Probably.

1. Prior opinions applying *Chevron* stand, and are subject to statutory *stare decisis*, despite the change in interpretive methodology. No abrogation of precedent, but it may be revisited, including through forum-shopping.
2. Although not binding, agency interpretations may be persuasive.

3. Agencies may exercise discretion delegated to them by Congress, pursuant to an express grant of authority. The end of deference should not impact agency actions taken with explicit permission from Congress.
4. Congressional Republicans sent letters to approximately 30 agencies demanding information targeted to identifying agency rules ripe for legal challenges post *Chevron*. An excerpt from one of those letters is below, which requests a roadmap to any vulnerable rules:

“

1. Please provide the following concerning agency legislative rules proposed or promulgated since January 20, 2021, identifying in each relevant listing the rule or rulemaking and agency statutory interpretation concerned:
  - a. A list of all pending judicial challenges to final agency rules that may be impacted by the Court's *Loper Bright* decision.
  - b. A list of all final agency rules not yet challenged in court that may be impacted by the Court's *Loper Bright* decision if they are so challenged.
  - c. A list of all pending agency rulemakings in which the agency is relying on an agency interpretation of statutory authority that might have been eligible for *Chevron* deference prior to the Court's decision in *Loper Bright*.

”

5. The *Corner Post* decision extended the time for a facial challenge to agency regulation: the statute of limitations runs from the date of the plaintiff's injury, not from the date of final rule promulgation. This change opens the possibility that a new entity could be created for purposes of bringing suit.
6. *Loper Bright* in action – litigants have started to take advantage of the change in the law:
  - *Tribune Media Co. v. Commissioner*: taxpayer appealing a Tax Court decision wrote to the Seventh Circuit to urge the court to apply independent scrutiny to review Treasury's assertion of authority to promulgate partnership anti-abuse regulations.
  - *3M Co. v. Commissioner*: taxpayer filed a similar letter with the Eighth Circuit arguing that *Loper Bright*'s reversal of *Chevron* nullifies the Tax Court's argument regarding an ambiguity in the transfer pricing statute and regulations that warrants reversal of the Tax Court's opinion.
7. Potential Agency Reactions:
  - Increased regulation by enforcement.
  - More detailed rulemaking, with a slower approach.
  - This could create a more dynamic regulatory environment – and a lot more uncertainty.
8. Potential Congressional Reaction:
  - Senate Democrats introduced a bill to codify *Chevron* deference, but it is unlikely to garner Republican support.
  - Avoid ambiguity and gaps in legislation.
  - Write the law with more clarity.
  - This may prove challenging, but time will tell.

## Regulated Areas Likely To Be Impacted:

- Railroads / Transportation
- Energy
- Financial Services
- Telecommunications
- Antitrust
- Tax
- International Trade
- Higher Education
- Consumer Products
- Intellectual Property

**For more information, please contact:**



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