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Closing *Chevron*: Administrative Law Developments

A Webinar on the Sunsetting of Chevron Deference, and the Implications for Financial Services Regulation

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Presentation prepared by **Katten**

What was *Chevron* Deference?

- Chevron[1] is one of the most cited Supreme Court cases of all time[2] that establishes the "two-step" framework for evaluating agency rules interpreting statutory commands.
- First (step 1) "is the question whether Congress has directly spoken to the precise question at issue."[3] "If a court, employing traditional tools of statutory construction, ascertains that Congress has an intention on the precise question at issue, that intention is the law and must be given effect."
- If Congress has not spoken directly to the precise question at issue, a court moves to "step 2." In step 2, "the question for the court is whether the agency's answer is based upon a permissible construction of the statute."

- [1] Chevron USA, Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837 (1984).
- [2] See, e.g., Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, and Matthew L. Spitzer, Administrative Law and Regulatory Policy: Problems, Text, and Cases 289 (5th ed. 2002) ("In a remarkably short period of time, Chevron has become one of the most cited cases in all of American law. Indeed, it may have become the most frequently cited case of all time.")
- [3] Chevron, 467 U.S. at 842.
- Id. at 843 n. 9
- Id. at 843.

How did *Loper Bright* get to the Supreme Court?

- *Loper Bright* involved the Magnuson-Stevens Act of 1976, 16 U.S.C. 1801 et seq., ("MSA") which provides for fishery management by the National Marine Fisheries Service ("NMFS").
- NMFS promulgated a rule that in some circumstances would require certain herring fishing companies to fund the monitoring of their fishing vessels for compliance with the MSA. Petitioners challenged the rule arguing, among other things, that the NMFS did not have authority to promulgate the rule.
- The district court, applying *Chevron*, ruled for the NMFS under step 1, holding that the MSA unambiguously allowed the NMFS to require the fishing industry to pay for its monitoring.[1] The D.C. Circuit, in a split decision, affirmed the district court's decision, but under a different rationale. The D.C. Circuit concluded that the statute was ambiguous at step 1 but that the interpretation was reasonable and was thus sufficient under Chevron step 2.[2]

- Notes
- [1] Loper Bright Enterprises, Inc. v. Raimondo, 544 F. Supp. 3d 82, 107 (D.D.C. 2021).
- [2] Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 370 (D.C. Cir. 2022).

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What was the Supreme Court's Holding in *Loper Bright?*

- *Loper Bright* overruled *Chevron* on the ground that the holding in Chevron – requiring deference to agency interpretations of federal statutes – conflicts with the foundational understanding of the judicial function as codified in the Administrative Procedure Act (APA).[1]
- The Court held that the APA "codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to Marbury: that courts decide legal questions by applying their own judgment. It specifies that courts, not agencies, will decide "all relevant questions of law" arising on review of agency action . . . —even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it."[2]

Notes

[1] *Loper Bright Enterprises v. Raimondo*, 603 U.S. __ (2024) (No. 22-451), at 14.

[2] Id.

Remaining Agency Advantage: Expertise

Some "deference" remains

- *Loper Bright* left intact "*Skidmore* deference,"[1] which will likely become even more important in litigating agency action.
  - — Under *Skidmore,* courts should carefully consider an agency's consistent interpretation of an ambiguous statutory provision—particularly one adopted shortly after the statute's enactment.
  - — A court should follow an agency interpretation to the extent it has the "power to persuade"—but can't be *bound* by it.
- This may help agencies in borderline cases.
- But nothing compels courts to be persuaded, and anti-agency judges could easily reason around *Skidmore* factors and find alternative readings more "persuasive"
- *Skidmore* likely becomes tiebreaking factor after all other canons of statutory interpretation are exhausted.

- Notes
- [1]Skidmore v. Swift & Co., 323 U.S. 134 (1944)

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What Impact is the Loper Bright Holding Likely to Have in Litigation of SEC and CFTC Regulations?

- Per Dan M. Berkovitz[1]: not much!
- “In this author's experience, SEC and CFTC officials have been fully aware of the trend of the courts to bypass Chevron in major cases. In interpreting statutes, formulating policies or evaluating litigation risks, the agencies have considered traditional principles of statutory construction and have not assumed that Chevron deference will apply upon judicial review.The securities and commodities laws have been developed over decades through legislation by Congress, followed by the interpretation and application of the legislation by the regulatory agencies, subject to judicial review. The Chevron doctrine never was a significant factor in the outcome of this process.[2]

- Notes
- [1] Dan was SEC general counsel from 2021-2023, a CFTC commissioner from 2018-2021 and CFTC general counsel from 2009-2013.
- [2] See Dan Berkovitz, After Chevron: No Deference, No Difference For SEC Or CFTC, Law360 (Jully 2, 2024), available at https://www.law360.com/articles/1853931/after-chevron-no-deference-no-difference-for-sec-or-cftc?copied=1.

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SEC v. Jarkesy

- Before the 2008–09 financial crisis, the SEC's ability to bring a case seeking civil penalties (for alleged securities law violations) using Administrative Proceedings was limited, in many cases, to fact patterns where the respondent(s) were directly within the SEC's regulatory purview (e.g., an SEC-registered entity or associated person) — otherwise, the SEC had to bring the case in federal court. In 2010, after the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress meaningfully expanded the SEC's enforcement powers by authorizing the SEC to impose such penalties through Administrative Proceedings with respect to any person charged with violating the securities laws (regardless of whether such persons fell within the SEC's direct regulatory supervision). As a result, beginning in 2010, the SEC could bring virtually any case seeking significant monetary penalties in Administrative Proceedings.
- Not long after the passage of the Dodd-Frank Act, in 2013, the SEC brought a cease-and-desist case before one if its ALJs in an Administrative Proceeding, against, among others, George Jarkesy, the manager of Patriot28 LLC—an investment adviser. The SEC alleged that Jarkesy and Patriot28 violated the anti-fraud provisions of various securities laws. The ALJ ordered Jarkesy and Patriot28 to pay a penalty of $300,000, disgorge $685,000 in illicit profits, and barred Jarkesy.
- Jarkesy and Patriot28 appealed the decision (which was reviewed first by the Commission) to the US Fifth Circuit Court of Appeals and a divided panel of the court vacated the final order, holding, among other findings, that the SEC's decision to adjudicate the matter in-house violated Jarkesy's and Patriot28's Seventh Amendment right to a jury trial. The US Supreme Court granted certiorari and as framed by the majority of the Court, posed a straightforward question: Whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against them for securities fraud?[1]
- In a 6-3 decision, the Supreme Court upheld the Fifth Circuit's ruling, finding that the Seventh Amendment guarantees the right to a jury trial for statutory claims that are legal in nature. Whether a claim is "legal in nature" — the Court noted that it must consider whether the cause of action resembles common law causes of action and whether the remedy sought was of the type traditionally obtained in a court of law. The Court found a close relationship between federal securities fraud (as alleged here by the SEC) and common law fraud and further held that SEC civil penalties are "a type of remedy at common law that could only be enforced in courts of law."[2] Accordingly, the Court held that the Seventh Amendment applies such that the SEC's claims should have been tried before a jury.

- Notes
- [1] 603 U.S. ___ (2024), No. 22-859 (June 27, 2024) (slip op.).
- [2] Id. at 9.

Corner Post Inc. v. Board of Governors of the Federal Reserve System

- The APA established a framework for federal agencies to issue regulations and for affected parties to challenge these rules in court. To provide finality to agency actions, Congress enacted 28 U.S.C. § 2401(a), setting a six-year statute of limitations for civil actions against the United States. Corner Post arose from a challenge to a 2011 Federal Reserve regulation on debit card fees, brought a decade after its implementation. This raised questions about when the statute of limitations should begin, especially for entities that did not exist when the regulation was issued.
- In 2010, Congress mandated that the Federal Reserve Board issue rules regulating debit card interchange fees. The Board complied in 2011 by issuing Regulation II, which capped interchange fees at 21 cents per transaction plus 0.05 percent of the transaction value. Several trade groups immediately challenged Regulation II, but the DC Circuit ultimately upheld it in 2014. Corner Post, a truck stop and convenience store, opened for business in 2018, several years after Regulation II had been implemented and judicially reviewed.
- In 2021, two trade associations filed a lawsuit challenging Regulation II under the APA. The government moved to dismiss the case based on the 6-year statute of limitations in 28 U.S.C. § 2401(a). In response, the trade groups amended their complaint to add Corner Post as a plaintiff. The amended complaint was nearly identical to the original, except for the addition of Corner Post. The district court dismissed the suit as time-barred under Section 2401(a), and the Eighth Circuit affirmed, holding that for facial challenges to agency regulations, the 6-year limitations period begins running when the regulation is published. The Supreme Court then granted certiorari to resolve a circuit split on when the Section 2401(a) limitations period begins for APA challenges to agency regulations.
- The Supreme Court effectively eliminated the statute of limitations to challenge agency rulemaking. The Court held that for claims brought under the APA, the six-year statute of limitations established by 28 U.S.C. § 2401(a) begins to run when the plaintiff is first injured by the rule, not when the agency rule is published. This interpretation hinges on the Court's reading of the phrase "right of action first accrues" in Section 2401(a), which the Court held means the point at which a plaintiff has a complete and present cause of action. For APA claims, the Court reasoned, this requires both final agency action and an injury to the plaintiff.[1]
- The Court acknowledged but dismissed concerns about the potential for perpetual litigation, stating that such policy considerations cannot override the clear text of the statute. While acknowledging the government's arguments about the need for regulatory finality and the potential burden of perpetual litigation, the majority held that such "pleas of administrative inconvenience" cannot justify departing from the statute's clear text.[2] Court opined that the impact may not be as severe as feared, noting that "regulated parties may always assail a regulation as exceeding [an] agency's statutory authority in enforcement proceedings against them," and that established precedent may limit the burden of addressing new suits.[3]
- Notes
- [1] 603 U.S. ___ (2024), No. 22-1008 (July 1, 2024) (slip op.).
- [2] Id. at 5.
- [3] Id. at 20.

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Three Examples: (I) *Private Fund Managers v. SEC*

- In June the 5th Circuit vacated an SEC final rule to enhance the regulation of private fund advisers, "designed to protect investors who invest in private funds and to prevent fraud, deception, or manipulation by the investment advisers to those funds."[1]
- The 5th Circuit opinion does not cite *Chevron*. Rather it decides the case under section 706 of the APA, which states:
- "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
- "(1) compel agency action unlawfully withheld or unreasonably delayed; and
- "(2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
- "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."[2]

- Notes
- [1] Nat'l Assoc. of Private Fund Mgrs. v. SEC, No. 23-60471 (5th Cir. June 5, 2024) (slip op.) at 1.
- [2] 5 U.S.C. § 706.

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- In 2012 ISDA and SIFMA challenged the position limits rule adopted by the CFTC in 2011 pursuant to the mandate of the Dodd-Frank Act.
- In this case, unlike the other two, the district court did cite *Chevron*'s two-part test.[1] Applying step 1, the court determined that the position limits mandate of Commodity Exchange Act including the Dodd-Frank revisions thereto, unambiguously requires the CFTC to find that position limits are necessary, prior to imposing them; but then the court found the statute unclear and unambiguous as between at least two plausible readings of the statute:
- First is the CFTC's interpretation: that the CFTC was mandated to set position limits, that it was stripped of any discretion not to set limits, that it was not required to find (either implicitly or explicitly) that the imposition of position limits both generally and with respect to certain commodities was necessary, that it was not required to determine whether the actual imposition of limits was appropriate both generally and with respect to certain commodities, and that it was required to impose those limits expeditiously.
- The second is that the only reasonable reading of the Dodd–Frank amendments is that Congress intended the Commission to immediately gather evidence relating to whether excessive speculation was harming commodity markets and to impose position limits where necessary and appropriate to prevent an undue burden on the economy.
- So under step 1 of the Chevron analysis the court could not uphold the CFTC's approach to the 2011 rulemaking. What about step 2?
- Under step 2, recall, if a statute is silent or ambiguous, the court had to defer to an agency's interpretation of the statute if that interpretation was reasonable and consistent with the statutory purpose. Notably, however, under the law applicable in the DC Circuit at the time:
    - "*Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face."[3]
- In adopting the 2011 rules, the CFTC had viewed the statute as clear and unambiguous, and the Dodd–Frank amendments as compelling a particular result: that the agency was required to set position limits regardless of whether the agency thought it necessary and appropriate. Accordingly, the rulemaking was not entitled to deference under step 2 analysis.
- Query: Would the result have been different had the case been litigated under the *Loper Bright* standard, instead of *Chevron*?
- Notes
- [1] Int'l Swaps & Derivatives Ass'n v. United States Commodity Futures Trading Comm'n, 887 F. Supp. 2d 259, 268 (D.D.C. 2012)
- [2] Id. at 279-80.
- [3] *Id. at 280.*

- In 2020 the SEC issued an order directing treatment of the Minneapolis Grain Exchange's SPIKES contract as a futures contract, rather than a security futures contract. The contract was based on the SPIKES Index, which measures the volatility of the S&P 500 stock market index. The contract was intended by MGEX to promote competition with futures based on the CBOE's VIX Index contract (a factor the SEC cited in approving the SPIKES contract). The VIX contract of course had been a listed futures contract for many year.
- Because security futures are more heavily regulated (and more heavily taxed) than futures, MGEX was anxious to see its new listing treated as futures, not security futures.
- The SEC order regarding the SPIKES is styled as an exemptive order under Section 36 of the Exchange Act.[1] As noted, the SEC's rationale for the exemption is that allowing SPIKES futures to trade as futures contracts, rather than security futures, "should foster competition as [SPIKES futures] could serve as an alternative to the only comparable incumbent volatility product in the market," i.e., VIX futures.[2]
- The CBOE filed a petition for review of the exemptive order in the DC Circuit. The court reviewed under same standard as the 5th Circuit in *Private Funds,* namely section 706(2)(A) (that is, whether the SEC's action was unlawful, arbitrary, or capricious).[3]
- The court held that the exemptive order was arbitrary and capricious, citing two deficiencies in the SEC's analysis: first, the order "contains no explanation whatsoever of how the grant of exemptive relief relates to the goal of promoting competition in the first place. Instead, the order simply identifies that goal and asserts without elaboration that, to achieve it, SPIKES futures 'will need to trade, clear, and settle as . . . futures contract[s],' rather than as security futures."[4]
- Relatedly, the order "fails to explain why no existing products meaningfully compete with 'the only comparable incumbent volatility product in the market.' . . . Indeed, the order does not even identify the 'incumbent volatility product' by its name or characteristics, although all parties acknowledge that the phrase refers to VIX futures. And the order likewise fails to explain what it means for a product to be 'comparable' to that incumbent or what characteristics a product must have to compete effectively with that incumbent. To the extent the order could be read to consider the relevant market of 'comparable' products to be volatility futures (as opposed to all volatility products, including volatility security futures), it still invites the question: why is that the relevant market? That is, why is it that only volatility futures, and not other volatility products (including security futures), can meaningfully compete with other volatility futures? In short, the order leaves too many key questions unanswered to satisfy the APA.[5]
- Notes
- [1] See Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") With Respect to Futures Contracts on the SPIKES™ Index, 85 Fed. Reg. 77297 (Dec. 1, 2020).
- [2] Id. at 77298–99..
- [3] *CBOE Futures Exchange, LLC v. SEC*, No. 21-1038 (D.C. Cir. July 28, 2023) (slip op.), at 9.
- [4] *Id. at 10.*
- [5] *Id. at 11.*

Will *Loper Bright* Impact SEC's Crypto Enforcement Campaign? What about *West Virginia v. EPA*?

- The legal standards in recent enforcement cases have not directly implicated *Chevron* deference – rather, we've seen courts "deciding relevant questions of law" based on the deep reservoir of securities law precedents, much of it judicial rather than statutory. See, for example, SEC v. Telegram Group, Inc., where the court granted the SEC's motion for a preliminary injunction under the standard for such relief and the standards under the Securities Act of 1933 for section 5 liability.[1]
- Recently, the defendants in a crypto enforcement action argued that the major questions doctrine prevents the SEC from using an enforcement action to allege that crypto assets are "investment contracts."[2]
- The major questions doctrine states that Congress does not delegate extraordinary powers that transform an agency's authority without speaking clearly.[3] It is reserved for the most "extraordinary cases," and is therefore rarely invoked.[4]
- In the Coinbase litigation, the court declined to find a basis for invoking the major questions doctrine, on two grounds:
  - First, while certainly sizable and important, the cryptocurrency industry "falls far short of being a 'portion of the American economy' bearing 'vast economic and political significance.'"
  - And, more importantly, the court found, the SEC is asserting neither a "transformative expansion in its regulatory authority," nor a "highly consequential power beyond what Congress could reasonably be understood to have granted" it (citing West Virginia, 597 U.S. at 724).
  - To the contrary, in filing this action, the SEC is exercising its Congressionally bestowed enforcement authority to regulate "virtually any instrument that might be sold as an investment," "in whatever form they are made and by whatever name they are called," including "[n]ovel, uncommon, or irregular devices" like the cryptoassets at issue here.[5]
- Rejecting the crypto industry's derogation of "regulation by enforcement" the court added:
  - "The very concept of enforcement actions evidences the Commission's ability to develop the law by accretion. The SEC has a long history of proceeding through such actions to regulate emerging technologies and associated financial instruments within the ambit of its authority as defined by cases like Howey — a test that has existed for nearly eight decades. . . . Using enforcement actions to address crypto-assets is simply the latest chapter in a long history of giving meaning to the securities laws through iterative application to new situations. More to the point, a finding that transactions involving certain crypto-assets qualify as investment contracts would merely result in those sales having to comply with longstanding securities laws."[6]
- Notes
- [1] SEC v. Telegram Group, Inc., 448 F. Supp. 3d 352 (S.D.N.Y. 2020).
- [2] SEC v. Coinbase, Inc. et al, 23 Civ. 4738 (SDNY 2024) (slip op.) at
- [3] *See West Virginia v. EPA, 597 U.S. 697, 716 (2022).*
- [4] West Virginia, 597 U.S. at 721 (stating that the major questions doctrine applies only in "extraordinary cases … in which the history and breadth of the authority that the agency has asserted, and the economic and political significance of the assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority").
- [5] SEC v. Coinbase, slip op. at 33-34.
- [6] Id. at 34.

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