ABA Business Law Section
Business Law Section Fall Meeting
September 7-9, 2023

U. S. Supreme Court to Revisit Chevron Deference: What the SCOTUS Decision Could Mean For CFPB/ FTC/HUD/Federal Banking Agency Regulations

In *Loper Bright Enterprises v. Raimondo*, No. 22-451, the U.S. Supreme Court has agreed to hear a case in which the petitioners are challenging the continued viability of the *Chevron* framework that courts typically invoke when reviewing a federal agency's interpretation of a statute. The *Chevron* framework derives from the Supreme Court's 1984 decision in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837. Under the *Chevron* framework, a court will typically use a two-step analysis to determine if it must defer to an agency's interpretation. In step one, the court looks at whether the statute directly addresses the precise question before the court. If the statute is ambiguous, the court will proceed to step two and determine whether the agency's interpretation is reasonable. If it determines the interpretation is reasonable, the court will ordinarily defer to the agency's interpretation.

The Magnuson-Stevens Act ("MSA") governs fishery management in federal waters and provides that the National Marine Fisheries Services ("NMFS") may require vessels to "carry" federal observers onboard to enforce the agency's regulations. In three circumstances not applicable in the *Raimondo* case, the MSA goes further and requires vessels to pay the salaries of the federal observers. The statutory question underlying the cert. petition in *Raimondo* is whether the NMFS can force a wide variety of other vessels to pay the salaries of NMFS observers they must carry up to 20% of their revenues. The precise question presented is: "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency. A divided panel of the D.C. Circuit, applying *Chevron*, held that statutory silence with respect to the precise issue produced an ambiguity that justified deferring to the agency's regulations.

While *Loper* involves a regulation of the NMFS, the Supreme Court's decision could have significant potential implications for when courts should give deference to regulations issued by all federal agencies, including, most importantly, the CFPB, FTC, HUD, and federal banking agencies (collectively, the "CFS Agencies").

During this program, we will explore:

- Supreme Court pre-*Chevron* doctrine regarding judicial deference to federal agency regulations
- the role of *Chevron* deference in judicial determinations regarding the validity of regulations and guidance issued by the CFS Agencies
- the gradual erosion of *Chevron* deference, including the Supreme Court's recent invocation of the "major questions" doctrine

- whether the *Raimondo* decision will overrule or further erode *Chevron* and the potential impact on regulations and other guidance issued or to be issued by the CFS Agencies

- what a Supreme Court decision overruling or limiting *Chevron* could mean for prior court decisions upholding the validity of regulations issued by the CFS Agencies based exclusively on *Chevron* deference

- how these developments will affect consumers, the consumer financial services industry, and the CFS Agencies

We will provide a few examples of how the retrospective application of a *Raimondo* opinion overruling *Chevron* could undermine the justifiable reliance of stakeholders (financial services industry and consumers). To take just one example, in *Smiley v. Citibank*, 517 U.S. 735 (1966), the Supreme Court held that a flat credit card late fee constituted "interest" as that word is used in Section 85 of the National Bank Act of 1863 which states, in relevant part: "Any [national bank] may take, receive, reserve, and charge on any loan…or upon any notes…or other evidences of debt, interest at the rate allowed by the laws of the State…where the bank is located…" While the *Smiley* case was pending before the Supreme Court, the Office of the Comptroller of the Currency ("OCC") issued a final regulation which defined "interest" within the meaning of Section 85 of the National Bank Act as follows: "any payment compensating a creditor or prospective creditor for an extension of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things…late fees…." The Supreme Court in *Smiley*, relying exclusively upon *Chevron*, concluded that "interest" includes late fees. If *Chevron* is overruled, will the Smiley opinion no longer be precedential and, if so, will banks no longer be able to export to the states where borrowers reside late fees permitted by the law of the states where the banks are located?

Finally, we will discuss the policy implications of overruling *Chevron*. While politics plays a large role in determining whether stakeholders like or dislike a particular regulation, industry and consumers generally want regulatory certainty. Even if industry uniformly dislikes a particular regulation, businesses will comply with the regulations knowing that there is a strong likelihood that it will be validated if there is a challenge in court. If *Chevron* is overruled, that will create tremendous uncertainty which could increase the risks of complying with regulations unless and until the judiciary decides whether to validate the regulation. This could, among other things, stifle innovation.