Simpson Thacher

Memorandum

Supreme Court Decisions—Implications for Bank Regulation

July 3, 2024

On June 28, 2024, the Supreme Court overturned its 1984 decision in *Chevron v. Natural Resources Defense Council* by a 6-3 vote. Over the last several decades, *Chevron* has become the foundational doctrine for administrative law decisions by generally giving "controlling weight" to a federal agency's interpretation of an ambiguous statutory provision unless the interpretation is "arbitrary, capricious, or manifestly contrary to the statute." In its decisions on *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, the majority concluded that the Administrative Procedure Act requires courts to use their independent judgment in deciding whether an agency has acted within its statutory authority and may not completely defer to an agency interpretation of the law simply because a statute is ambiguous.

Ever since the Court agreed to hear *Relentless* and *Loper*, there has been concern from all sides over how the federal administrative state would function in a post-*Chevron* world. Banking organizations have at times in the past benefitted from the fruits of *Chevron* deference in important ways. However, in recent years, the banking industry—like many other industries—has become increasingly concerned about the growing expansiveness and burdensome nature of rules and guidance issued by the federal agencies that the industry feels exceed the agencies' authority or do not follow appropriate administrative procedures. In an industry that rarely mounts legal challenges against its own prudential supervisors, the last several years have seen a noticeable change in rhetoric and action on issues of significant importance. Bank industry groups filed a suit against the federal banking agencies in connection with the final Community Reinvestment Act rulemaking and are actively litigating a number of rule and guidance issuances by the CFPB.

Only time will prove the full ramification of *Relentless* and *Loper*. The dissent points out the obvious challenges of having courts opine on topics far outside of their areas of expertise and accuses the majority of judicial hubris by giving "itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law." For their part, the majority opinion harkens back to a time before *Chevron* where the informed judgment of federal agencies could be entitled to "great weight" depending on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." The majority noted that an agency's "body of experience and informed judgment," among other information, will continue to be relevant moving forward.

Importantly, the decision clearly states that by overturning *Chevron*, "the Court does not call into question prior cases that relied on the *Chevron* framework." Accordingly, there are no immediate implications for current regulations or guidance. Moving forward, many are anticipating more frequent litigation over bank regulatory actions. On the positive side, this could provide a check on the most extreme policy changes by federal banking agencies or prompt federal banking agency staff to include additional justification and support for their actions (which means a longer rule writing process). On the other hand, increased litigation will inevitably result in additional disruption of existing and proposed practices (either through the uncertainty and length of the litigation process or the decisions directly) and fragmentation of regulatory requirements as judges in different jurisdictions come to different conclusions on the same topics. In any case, banks must continue to have effective compliance programs in the face of this uncertainty. Many banks will feel compelled to continue planning for proposed rules or guidance facing legal challenge given the time and resources required for banks to comply with requirements that may or may not be impacted by litigation.

Relentless and *Loper* were not the only cases in front of the Supreme Court this session that implicate the banking industry. On May 30, 2024, the Supreme Court in a 9-0 decision in *Cantero v. Bank of America, N.A.*, concluded that there is no "categorical test that would preempt virtually all state laws that regulate national banks." Instead, the Court found that "a practical assessment of the nature and degree of the interference caused by a state law" is required to determine if there is substantial interference with the powers of a national bank. The decision in *Cantero* is something of a setback to the perpetual hope of national banks and the OCC for a clearer and more consistent set of rules for when state law may be preempted. Some states and plaintiffs lawyers will potentially see the decision in *Cantero* as an opportunity and we will likely see additional litigation over whether particular state laws apply to national banks.

Additionally, on June 27, 2024, the Supreme Court in a 6-3 decision in *SEC v. Jarkesy*, limited the ability of federal agencies to use administrative law judges in enforcement proceedings resulting in civil actions or penalties without the full scope of procedural rights and formalities attendant to litigation in federal court. This decision will materially impact the SEC and other federal agencies that rely heavily on administrative proceedings. The federal banking agencies do use administrative proceedings to enforce banking laws, however, it is not their primary enforcement method. The vast majority of enforcement actions taken by the federal banking agencies are done by consent order or other written agreement between the party and the agency. These are functionally settlement agreements where the party waives its right to a hearing or judicial proceeding. As a result, the consequences of *Jarkesy* may not be as significant for the banking industry.

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