ALM | LAW.COM

Prepare Now to Make the Most of a Post-'Chevron' World

By Gary Feldon and Matthew Malinowski
April 26, 2024

Like spectators waiting for the starting pistol, the legal profession is holding its collective breath, awaiting the Supreme Court's forthcoming rulings deciding the future of the *Chevron* doctrine. But, if you want to be in the race, you are already late to start lacing up your running shoes.

The *Chevron* doctrine holds that, when reviewing a federal regulation, courts should defer to the relevant agency's reasonable interpretation of any ambiguous statutory terms. In a pair of decisions expected this summer—*Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*—the Supreme Court is overwhelmingly likely to strike down or substantially limit the doctrine. Overruling *Chevron* will represent a dramatic decrease in the authority wielded by federal agencies.

But the government will not be caught flatfooted. From the moment the Supreme Court's decisions set a new legal standard, the government will begin to re-write its regulations and adjust its litigation strategy to adapt to a post-*Chevron* world. The court's decisions may therefore create only a narrow window of opportunity for regulated entities to successfully challenge regulations, either as a defense in an agency enforcement proceeding or through a lawsuit against the agency under the Administrative Procedure Act (APA).

Courtesy photos

Gary Feldon (left) and Matthew Malinowski of Hollingsworth.

In March of this year, Utah passed a law that positions the state to be first off the legal starting line. State agencies must conduct an audit to identify federal regulations that affect them and have been interpreted under *Chevron*, then provide the results to the state's attorney general by Jan. 1, 2025. Assuming the Supreme Court overrules or limits *Chevron* this term, the state attorney general is immediately authorized to file lawsuits challenging the regulations identified. Notably, Utah's attorney general is one of 27 who signed onto an amicus brief in *Loper Bright*

that urged the Supreme Court to strike down or limit *Chevron*.

Private businesses—especially in heavily regulated industries—should likewise audit unfavorable federal regulations to determine which ones may soon be susceptible to a post-*Chevron* challenge. And, like the state of Utah, businesses should consider taking the initiative by bringing affirmative litigation against the government under the APA.

The 'Chevron' Audit: Reassessing Regulations Affecting Business

We advise all businesses adversely impacted by government regulations to work with experienced APA counsel now to conduct what we term a "*Chevron* audit." The audit includes identifying the historical impact of *Chevron* on the regulations governing their industry and assessing whether those regulations (or agency policies implementing them) are likely to be upheld under a new standard that is less deferential to federal agencies.

For parties in administrative enforcement proceedings or other active litigation against federal agencies, a *Chevron* audit may identify winning arguments or grounds to revisit adverse rulings. At the very least, parties need to be aware of *Chevron*'s potential impact to preserve the issue for any appeals of adverse outcomes.

Even without active litigation, businesses armed with the knowledge of whether a regulation is likely to be enforceable can better assess the costs and benefits of their business strategies. Advance analysis means businesses can prepare to adapt immediately upon the Supreme Court's rulings, instead of proceeding as if there had not been a seismic shift in the regulatory landscape.

APA Litigation: Your Best Defense Is a Good Offense

When a *Chevron* audit identifies a viable basis to challenge a regulation, the smart move is often to file an APA lawsuit instead of standing idle until the issue is needed as a defense.

Holding onto a potentially viable challenge as a possible defense may be a losing strategy. Agency enforcement proceedings plainly favor the government. The government picks its targets and proceeds on its own timeline. Proceedings focus on the defendant's alleged regulatory violations, may include additional fact investigation, and may be initially decided by an administrative law judge within the agency. Even if the *Chevron* issue could immediately resolve the case, appellate review of an adverse ruling will typically have to wait until the completion of all agency proceedings, including internal agency appeals. In short, allowing the government to move on its chosen timeline and in its chosen venue will typically not be the most advantageous strategy.

Filing a lawsuit under the APA puts the regulated business in control. As the plaintiff, a business can decide the timing and forum for its challenge. Choice of forum is especially important because some judges and federal circuits have shown themselves to be more open to the prospect of striking down a federal regulation or policy that harms businesses, while others tend to defer to the government. Having control over the litigation allows businesses to enhance their odds of success by framing their legal challenge without regard to extraneous issues or potentially prejudicial facts. Additionally, while courts may sometimes order the government to provide discovery

in APA proceedings, it is exceedingly rare for a plaintiff to be the subject of any discovery whatsoever.

A further benefit of APA litigation is its comparative speed and economy. Parties often proceed to file written summary judgment motions shortly after the government produces the administrative record. In the right circumstances, APA litigation can move even more quickly via a motion for a preliminary injunction. Compared to the time and cost of responding to a government investigation or enforcement action, APA litigation moves at lightning speed for pennies.

The real downside of APA litigation is that there are many hurdles to clear before a court will hear the merits of a claim. In addition to the Article III case-in-controversy requirements (e.g., standing, ripeness), a court will consider the merits of an APA claim only if it challenges a final agency action not committed to agency discretion as a matter of law or otherwise exempt from review. Experienced APA counsel know how to clear these hurdles, so they are essential to seizing the opportunities presented by the end of *Chevron*.

Chevron has been the law of the land for forty years. A new era is about to begin, with a tremendous shift of authority from federal agencies to the courts. Like the state of Utah, businesses affected by federal regulations should be taking stock and preparing to vindicate their rights through affirmative APA litigation. If you want to be in the race, now is the time to take your mark and get set. Because things are about to get going.

Gary Feldon *is partner at Hollingsworth, representing clients in high-stakes, complex civil litigation, including pharmaceutical and medical device litigation, toxic torts, and products liability matters. Before joining the firm, he served as a trial attorney in the Federal Programs Branch of the U.S. Department of Justice, where he defended the federal government against APA challenges to agency regulations, policies, and actions, as well as bringing affirmative litigation to enforce agency enforcement rulings.*

Matthew Malinowski *is partner at Hollingsworth, representing clients in highly complex, "bet the company" trials and litigation, including medical device and pharmaceutical products liability defense, construction and commercial contract disputes, high-dollar lost business value and business interruption claims, and putative class action matters.*