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BOARD PERSPECTIVES

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Implications of the Changing U.S. Regulatory Landscape

Dealing with regulatory change and uncertainty continuously ranks among the top risks identified by board members and C-suite executives across the globe.[1] Some believe that recent U.S. Supreme Court decisions will increase this risk for companies doing business in the United States, while others applaud the Court's actions. What is happening, and what does this mean for boards and their companies?

One metric used to assess the "quantity of regulation" in the United States tracks the number of prescriptive words, such as "shall" and "must" in the U.S. Code of Federal Regulations. These words appeared 400,000 times in the 1970s; today, they appear more than 1.1 million times.[2] This proliferation of regulations is not unique to the United States and, at least in part, reflects governments' and regulators' efforts to deal with newer and broader areas of concern, such as technological innovation, climate change, and data privacy and security. It makes clear, if empirical evidence is needed, why managing regulatory change and uncertainty remains a business imperative and a significant risk for many companies.

The rulemaking process in the United States was designed to ensure transparency, public participation and accountability. Since 1946, with the enactment of the Administrative Procedure Act (APA), the rulemaking process has worked as follows: Congress enacts a law setting forth broad principles and

[1] *Executive Perspectives on Top Risks for 2024 and a Decade Later*, Protiviti and NC State University's ERM Initiative, December 2023: www.protiviti.com/us-en/survey/executive-perspectives-top-risks.

[2] "Up to Code: The Costs of Regulation and Regulatory Uncertainty," by Arzu Ozoguz, Kenan Institute of Private Enterprise, April 25, 2024: https://kenaninstitute.unc.edu/kenan-insight/up-to-code-the-costs-of-regulation-and-regulatory-uncertainty/.

The Supreme Court's mandate known as the Chevron deference doctrine was in place for 40 years. That all changed in the last week of the 2023-2024 Supreme Court session.

intentions and delegates to a federal agency the authority to develop implementing regulations; the appropriate agency drafts a regulation and publishes it for comment; the agency reviews and considers the comments submitted, modifies the initial proposal as it deems appropriate, and publishes a final regulation; and interested parties challenge the final rule in court if they believe it exceeds the statutory authority or is arbitrary or capricious.

The Chevron doctrine and its reversal

In the 1984 Supreme Court case titled *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[3] the petitioner challenged a change in the Environmental Protection Agency's interpretation of the word "source" — a word that was not precisely defined — in the Clean Air Act of 1963. In its ruling, the Supreme Court set forth a "two-part framework" for resolving challenges to an agency's interpretation of a statute it administers. Under the first step, the court must determine if Congress has "directly spoken to the precise question at issue." If Congress has done so, then the court and the agency must give effect to the unambiguously expressed intent of Congress. But "if the statute is silent or ambiguous with respect to the specific issue," then the reviewing court will determine whether the agency has adopted a reasonable interpretation of the statute (even if the court itself might have interpreted the statute differently) and, if it is concluded this is the case, the court will defer to the agency's interpretation.[4]

Notwithstanding debate over the years about the application and scope of this decision, with critics arguing that it gave too much authority to agencies without appropriate accountability, the Supreme Court's mandate known as the Chevron deference doctrine (Chevron) was in place for 40 years. That all changed in the last week of the 2023-2024 Supreme Court session with the Court's decision in *Loper Bright Enterprises v. Raimondo*[5] to reverse Chevron.

[3] *Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984)*, Justia U.S. Supreme Court Center, June 25, 1984: https://supreme.justia.com/cases/federal/us/467/837/.

[4] "U.S. Supreme Court Strikes Down Chevron Doctrine — What You Need to Know," by Rachel Rodman and Alec Albright, White & Case, July 8, 2024: www.whitecase.com/insight-alert/us-supreme-court-strikes-down-chevron-doctrine-what-you-need-know#:~:text=Most%20famously%2C%20in%20its%201984,of%20a%20statute%20it%20administers.&text=The%20test%20was%20deferential%20to%20administrative%20agencies.

[5] *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al.*, Syllabus, Supreme Court of the United States, October Term, 2023: www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf.

Writing for the majority, Chief Justice John Roberts concluded that Chevron was inconsistent with the APA, which directs courts to "decide legal questions by applying their own judgement" and therefore "makes clear that agency interpretations of statutes … are not entitled to deference." He also noted that, under the APA, "it thus remains the responsibility of the court to decide whether the law means what the agency says."[6]

In the dissenting opinion, Justice Elena Kagan argued that the reversal of Chevron would be a "jolt" to the legal system and, by overturning a well-established precedent, would result in unpredictability and instability, increased judicial burden, increased litigation, and concerns about potentially politicising decision-making.[7]

The Chevron reversal marks a fundamental shift in power away from the executive branch to the judicial branch. Although courts may still look to an agency's interpretation of a statute for guidance, particularly if the guidance is long-standing or well-reasoned, agencies will only be given what amounts to "respectful consideration"[8] under *Skidmore v. Swift & Co.*,[9] a 1944 Supreme Court decision that left the ultimate interpretive authority with the courts.

Implications of the Chevron reversal

Potential outcomes of the Chevron reversal include:

- **A more protracted rulemaking process:** Agencies, knowing that their interpretations of law will be subject to increased challenge, may be more cautious and deliberate in their rulemaking, taking extra care to support their views. The agencies' job would be easier, of course, if Congress were more precise and targeted in drafting laws, but that would require a fundamental change in the way laws are generally crafted and seems extremely unlikely in the current polarised congressional climate.

  Realistically, the Chevron reversal may also make it more difficult for regulators to apply existing laws to new and emerging areas not contemplated by the original statute.
- **Increased state law activity:** To the extent that the federal rulemaking process slows, it is probable that states will more aggressively attempt to fill the void by adopting their own requirements, not a new phenomenon per se but one that generally complicates the compliance efforts of businesses that operate in more than one state.

[6] "U.S. Supreme Court Strikes Down Chevron Doctrine — What You Need to Know."

[7] "Supreme Court Overrules Chevron Framework," Congressional Research Service, June 28, 2024: https://crsreports.congress.gov/product/pdf/LSB/LSB11189.

[8] "Loper Bright Enterprises v. Raimondo: Chevron is Dead; Long Live Skidmore," by Professor Richard Pierce, *The George Washington Law Review*, July 8, 2024: www.gwlr.org/loper-bright-enterprises-v-raimondo-chevron-is-dead-long-live-skidmore/.

[9] *Skidmore et al. v. Swift & Co.*, Supreme Court of the United States, December 4, 1944: https://scholar.google.com/scholar_case?case=3762971005508365670&q=323+US+134&hl=en&as_sdt=6,47.

There may be greater opportunity post-Chevron for companies to influence rulemaking if they can thoughtfully and convincingly make the case that the regulators are overreaching.

- **More challenges to federal rulemaking:** Whether the increase in challenges rises to the levels expected by Justice Kagan remains to be seen, but it does seem reasonable to expect that there will be more challenges and that these will include "forum shopping" to identify a court that may be more empathetic to the plaintiff's point of view. It is also possible that there will be challenges to the authority under which federal preemption rules have been promulgated, potentially also adding to the states' preeminence.

  It is also important to note within the context of discussing potential challenges to federal law that the Chevron reversal was not the only case in the 2023-2024 Supreme Court session that affected the rulemaking process. Another decision with potentially broad implications is *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[10] which held that a claim under the APA does not accrue for purposes of the six-year statute of limitations until the plaintiff is injured by final agency action, thereby potentially extending the period in which challenges may be brought.

Even for proponents of the Supreme Court's decision who applaud what they view as a levelling of the playing field between business and the government, the Chevron reversal adds uncertainty and lack of clarity to the already complex regulatory environment in which U.S.-based companies operate, requiring that the board and management be aware of the potential effects and how they are being addressed.

The post-Chevron regulatory environment

The post-Chevron environment presents both opportunity and additional risk to companies doing business in the United States.

There may be greater opportunity post-Chevron for companies to influence rulemaking if they can thoughtfully and convincingly make the case that the regulators are overreaching. The better way — less disruptive and less costly than litigation — to make this argument is to comment on regulatory proposals. Boards will want to ensure that their companies are actively engaging in the rulemaking process when the outcome will impact the company's business and operations. Many

[10] *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, Syllabus, Supreme Court of the United States, October Term, 2023: www.supremecourt.gov/opinions/23pdf/22-1008_1b82.pdf.

While the full impact of the Chevron reversal will unfold over time, what is clear already is that businesses used to dealing with regulatory frameworks shaped by agency interpretations must now adapt to a more uncertain regulatory environment determined by the courts.

companies do this already; others will want to enhance their engagement. This does not mean, however, that companies should not use their right to challenge in court regulatory interpretations that they believe are based on regulatory overreach.

Companies face additional risk from the need to monitor a more complex environment, which may be more affected by court decisions than has been the case traditionally.

- Companies should assess the short- and medium-term potential impact of the Chevron reversal by assessing which areas of their business and operations are more exposed to and potentially subject to judicial challenge. For example, some believe that Chevron's repeal opens the door to a wave of litigation that could result in myriad reinterpretations of laws governing clean air and water, public lands, forest management and climate policy, as well as healthcare, taxes and emerging technology.[11]
- On an ongoing basis, many companies will need to expand their horizon-scanning functions to track not just legislative and regulatory developments at the federal and state levels (and more broadly for multinational companies), but also in the courts. This will require added focus and potentially added investment in the company's horizon-scanning capabilities.
- The Chevron reversal may also complicate a company's implementation of new regulations in cases where it is reasonable to conclude that the regulation may be subject to judicial challenge. Companies will need to balance the affirmative requirement to comply with the new requirement, and the cost thereof, with the possibility that the regulation will be reversed or modified. This will highlight the need for an agile and adaptable regulatory change program.

While the full impact of the Chevron reversal will unfold over time, what is clear already is that businesses used to dealing with regulatory frameworks shaped by agency interpretations must now adapt to a more uncertain regulatory environment determined by the courts. Directors should keep this shifting environment in mind when discussing regulatory matters with management.

[11] "The sweeping impact of the Supreme Court's Chevron reversal," by Erin X. Wong, Route Fifty, July 8, 2024: www.route-fifty.com/management/2024/07/sweeping-impact-supreme-courts-chevron-reversal/397876/.

How Protiviti can help

Disruptive technologies, regulatory pressures, evolving customer loyalty, pressure to enhance economic returns and a changing global regulatory landscape are just some of the challenges organisations need to overcome by innovating and managing their compliance risks to succeed over the next decade. The dynamic regulatory landscape and increased emphasis on cost reduction only add to the complexity of organisations achieving profitable growth.

Protiviti brings a blend of experience and fresh thinking to regulatory change through a unique mix of consulting talent combined with former industry professionals and former regulators.

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