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## US Supreme Court reshapes the regulatory landscape

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Over the course of a few days before the end of its summer session, the U.S. Supreme Court issued three decisions that reshaped the regulatory landscape in the United States. Two of the decisions (SEC v. Jarkesy and *Loper Bright Enterprises v. Raimondo*) shift the balance of power from the executive to the judicial branch of government and the third (*Corner Post, Inc. v. Board of Governors*) extends the timeframe in which regulatory actions can be challenged.

- In *SEC v. Jarkesy*, the Supreme Court ruled that when the Securities and Exchange Commission (SEC) seeks civil penalties from defendants for securities fraud, the Seventh Amendment requires it to bring the action in a court of law where the defendant is entitled to a trial by jury.
- In *Loper Bright Enterprises v. Raimondo*, the Supreme Court held that federal agencies are no longer entitled to deference when they interpret ambiguous statutes, thus overruling a 1984 Supreme Court ruling – *Chevron v. Natural Resources Defense Council*. (Despite overturning *Chevron*, the Supreme Court emphasised that the ruling does not invalidate prior cases decided under the *Chevron* framework.)
- On the last day of the current term, the Supreme Court issued a decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, which held that a claim under the Administrative Procedure Act does not accrue for purposes of the six-year statute of limitations until the plaintiff is injured by final agency action.

These decisions are the latest in the growing trend by courts to curtail the reach of the executive branch and are likely to have far-reaching impacts for many industries, particularly financial services, technology and energy. All three of the decisions were based on a 6–3 opinion.

## Why it matters

Views on the merits and effects of these decisions vary significantly. What is indisputable, however, is that the decisions will have an impact on rulemaking – both the way rules are made and how they are subsequently interpreted.

## What they say

*U.S. Chamber of Commerce*

Overruling Chevron "is an important course correction that will help create a more predictable and stable regulatory environment," said U.S. Chamber of Commerce President and CEO Suzanne P. Clark. "The Supreme Court's previous deference rule allowed each new presidential administration to advance their political agendas through flip-flopping regulations and not provide consistent rules of the road for businesses to navigate, plan, and invest in the future. The Chamber will continue to urge courts to faithfully interpret statutes that govern federal agencies and to ensure federal agencies act in a reasonable and lawful manner."

*U.S. Senator Elizabeth Warren*

"For every federal law passed in the last forty years, Congress understood that agency experts would execute the will of democratically elected representatives and that court challenges would occur during a short, defined time period. That was settled law. This decision [Corner Post, Inc. v. Board of Governors], along with the Court's decision to overturn Chevron, is an assault on the separation of powers under the Constitution."

*Thomas Vartanian, Executive Director, Financial Technology & Cybersecurity Center*

"I find the public discussions about the demise of the Chevron Doctrine – as many things are these days – colourfully exaggerated. In my view, the creation of the Chevron defence in 1984 did no more or less than legitimise the deference in regulatory cases that was already occurring. Very little will change except for the fact that Congress, regulators, and judges will now have to do their jobs a little more assiduously."

"Congress will need to be clearer about what it's saying and not take the easy way out by allowing unelected officials to fill in the blanks. Government agencies will have to prepare and present a cogent record along with persuasive arguments rather than arguing their views should be rubber-stamped by the court. That shouldn't be much of an added burden since it's what every private party must do."

*Jo Ann Barefoot, CEO, The Alliance for Innovative Regulation*

"The impacts of the Supreme Court's Chevron decision will take time to unfold and will be mixed. On one hand, regulatory overreach is a real problem. On the other, it's hard to fix it through statutory clarity without choking the system with detailed laws and without exacerbating the problem of rules lagging behind reality in today's environment of fast-paced change. On top of that, the ruling will surely fuel a whole lot of litigation."

## What we say

Prepare for changes in the policy-making process. Regardless of your view on the Supreme Court's decisions, they, principally the reversal of Chevron, likely foreshadow changes in how rules are promulgated including stricter adherence to statutory language, the need for greater justification of agency positions, a more protracted rulemaking timeline, and heightened challenges to regulatory interpretations.

## The bottom line

To be clear, these Supreme Court decisions mean that federal agencies will not have as much discretion in interpreting laws as they previously did or, at least in the case of securities fraud, in determining penalties for violations of law. This means there will be a greater emphasis on the clarity of legislative directives and potentially greater judicial involvement in reviewing and shaping regulatory policy and determinations – the full impact of which will be clearer over time as we see how agencies and the courts respond to these changes.

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