Loper Bright and the post-*Chevron* Regulatory Environment for Food & Ag

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The Administrative Procedure Act

- APA enacted in 1946; creates framework for federal administrative agencies.
- Congress enacts laws establishing federal agencies and directs/instructs on functions/authorities.
- Federal courts may review legality of agency rules and other actions.

5 USC § 706

- Courts may set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."
- A court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

Chevron v. NRDC (1984)

- The Supreme Court created a 2-step tool for courts when reviewing if an agency interpretation of a statute is in accordance with what Congress enacted.
- The Chevron 2-step.
  - If the statute addresses the precise issue, the clear, plain language controls
  - If the statute is ambiguous or silent, the reviewing court would defer to the agency's reasonable interpretation
- In *Chevron*, under the Clean Air Act, what does "stationary source" mean?
  - The Court deferred to EPA interpretation of undefined, ambiguous term

Food Law Applications of *Chevron*

- Plaintiff consumer and patient groups sued FDA over the 2016 voluntary GRAS affirmation rule
  - The court relied on *Chevron;* concluded that FDA's interpretation of its authority to implement the rule was a permissible construction of the FDCA. *Ctr. for Food Safety v. Becerra*, 565 F.Supp.3d 519 (S.D.N.Y. 2021).
- FDA set aflatoxin "action levels" – not binding regulations - and made a temporary ruling to permit higher action levels
  - Plaintiffs' groups sued and Supreme Court deferred to FDA's permissible interpretation. *Young v. Commun. Nutrition Inst.*, 476 US 974 (1986).

Chevron since 1984

- Congress could enact broad, vague, statutes, trusting agencies to implement them.
- *Chevron* deference expanded across federal agencies; influenced regulatory drafting.
- Cited and relied upon frequently in rulemaking and litigation.
- Agencies would use *Chevron* deference to justify and support policy decisions not addressed in law.

Loper Bright v. Raimondo

- The Magnuson-Stevens Fishery Conservation and Management Act required *Pacific* fisheries to pay to have observers aboard their vessels for conservation
- National Marine Fisheries Service issued a rule to require *Atlantic* herring fisheries to pay for observers - $700+/day
- Herring fisheries challenged the payment rule as beyond agency authority in the Act
- Relying upon *Chevron*, the lower courts deferred to NMFS's interpretation that it could impose fees under the Act on Atlantic fisheries

Loper Bright and *Chevron*

- Supreme Court overruled *Chevron.*
  - It is for courts, not agencies, to decide legal questions by applying their own independent judgment.
  - The APA provides no deference for courts to apply in interpreting the law in agency cases.
  - Courts may not defer to agencies on their "reasonable" and "permissible" interpretations of ambiguous statutory provisions.
- Courts should use *Skidmore v. Swift & Co.* (1944) and can "seek aid" from an agency's interpretation but not defer to it. Courts may consider:
  - Agency's thoroughness.
  - Validity of agency's analysis.
  - Consistency over time.
  - Overall persuasiveness.

Loper Bright and *Chevron* – *What Didn't Change?*

- Courts must continue to respect Congress's delegation to an agency, if the agency acts within that authority
  - Congress instructs an agency to define a term.
  - Agency asked to determine what is "reasonable," "necessary," or "appropriate"
- Under APA, policymaking and factfinding within the agency's delegated authority is still generally subject to deferential "arbitrary and capricious" review
- Agency (for now) still receives deference for interpretations of its own regulation

What does this mean?

- In courts,
  - More, and more complex, litigation
  - Litigation exacerbated by *Corner Post, Inc. v. Bd. of Governors of the FRB*—holding that 6-year statute of limitation on an APA claim does not start until party is injured, permitting challenges to old agency actions
- Before agencies,
  - Probably less rulemaking, more caution, guidance, and enforcement discretion
  - Old actions that relied on *Chevron* are not automatically overruled but are vulnerable under *Corner Post*
- For regulated industry,
  - Important to comment on whether an agency's interpretation is contemplated in statute, whether interpretation is best interpretation
  - Could lead to less uncertainty and burden – but established rules and helpful agency flexibility could be challenged more easily

Post-*Chevron* Regulatory Actions

- FDA & AAFCO MOU Expired
  - FDA had historically participated in AAFCO ingredient definition process; accepted AAFCO ingredient definitions
  - August 2024: FDA announced it would not renew
- Packers and Stockyards Act
  - June 2024 proposed rule to define "unfair practices" under P&S
  - Justification geared towards *Skidmore* analysis
  - Withdrawn on Jan. 16, 2025 citing legal vulnerability
- FSIS Proposed *Salmonella* Framework
  - Would have deemed certain products with *Salmonella* adulterated
  - Facing legal questions under *Loper Bright*, *Supreme Beef*
    - Withdrawn on April 25, 2025

Implications for FDA and Food Regulation

- FDA policies and rules are vulnerable,
  - Where FDA previously relied on Chevron (GRAS rule); or,
  - Where FDA goes beyond explicit statutory language (AAFCO, FOP, tracing).
- May be litigation to compel strict compliance with FDC Act (Delaney, GRAS, risk-based approaches).
- Old rules/actions could be reopened under *Corner Post.*
- *Loper Bright* dissent raises concerns with mixed law/fact and highly technical questions within agency, not judicial, expertise.

Shifting Sands:

Agency Authority, Ag, & Food in a Post-Chevron World

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Loper Bright Enterprises v. Raimondo

- Highly advertised as a significant change in administrative law
- *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* directed Courts to defer to Federal Agency interpretations of "ambiguous" statutory provisions.
- Deference to Agency interpretations of the guiding law and their own regulations has long been accepted by our District Courts

View from the Bench?

What do we do now?

- The Courts quickly became aware of the *Loper Bright decision*
- But, what to do with the decision was not clear
- District Court's invited opinions from Counsel, requested re-briefing of cases under review pursuant to the Administrative Procedure Act, and promptly questioned how the ruling would impact the Courts' review of Federal Regulations

Loper Bright

- Courts need not, and under the Administrative Procedure Act (APA) may not, defer to an agency's interpretation of the law.

- “interpretive issues arising in connection with a regulatory scheme often “may fall more naturally into a judge’s bailiwick” than an Agency’s.”

- An Agency interpretation of an ambiguous statute is no longer entitled to deferential treatment by the Courts

View from Counsel

- *The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether a Federal agency has acted within its statutory authority, and . . . United States District Courts may not defer to agency interpretations as to the law. This holding does not impact the statutory "standard of review" . . .*

- *Joint Notice* filed in *Derick Miller vs. Federal Crop Insurance Corp.*, U.S.D.C. Case No. 5:23–CV–00069 (N.D. Texas).

What didn’t Change . . .

- The Administrative Procedure Act

- The APA still provides that a “reviewing court shall … hold unlawful and set aside agency action … found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law … [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

What didn’t change . . .

- The goal of review, pursuant to the APA, is still **not** to find the truth or to ensure that an Agency reached the correct decision

- Even if a Court is not required to defer to an Agency’s interpretation of an ambiguous statute, the statutory standard of review suggests that Courts defer to the Agency’s decision-making authority

What didn’t change . . .

- Deference is not dead

- *Auer/Skidmore* Deference

- Courts may still “consider an agency’s interpretation as a body of experience and informed judgment to which courts and litigants may properly resort for guidance, especially when the interpretation “rests on factual premises within the agency's expertise.”

So what is the impact of *Loper Bright?*

- "Ordinary judicial interpretation of statutes, and courts are free to review and reject statutory interpretations that federal agencies offer."

- *Skidmore* Deference is alive. *Skidmore v. Swift & Co., 323 U.S. 134 (1944)*

- *Skidmore* deference assigns weight to an administrative judgment based 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." *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 295 (3d Cir. 2012).

The Impact of *Loper Bright*

- *Auer* Deference appears to be on its last leg

- *Auer* deference has been historically applied by our Federal Courts to provide for the Court’s affirmation of an agency's interpretation of its own rules unless that interpretation is “plainly erroneous or inconsistent with the regulation.”

Auer Deference

- when agencies interpret their regulations -- to, for example, adjudicate whether a regulated party is in compliance with them -- courts accord agencies what is known as *Auer* or *Seminole Rock* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997).

- "***The agency's interpretation will be accepted if, though not the fairest reading of the regulation, it is a plausible reading -- within the scope of the ambiguity that the regulation contains***."

Auer Deference

- Litigants are now arguing whether *Auer* is still good Law.
- Agencies argue that *Auer* has not been explicitly overturned and is good law
- Those contesting Agency decision-making use the reasoning of *Loper Bright* to argue that Courts/Administrative Judges are to give no deference to Agency interpretations of the Law

Auer Deference

- Multiple District Courts have been critical of *Auer* Deference, post- *Loper Bright*.

- *New Mexico Cattle Growers' Ass'n v. United States Forest Serv.*, No. CIV 23-0150 JB/GBW, 2025 WL 327265 (D.N.M. Jan. 29, 2025).
  - Highly Critical of *Auer* deference based on the Court's review of *Loper Bright* and expressed Separation of Powers concerns.
  - However, the Court concludes that *Auer* is *"still the law of the land."*

Auer Deference At the USDA National Appeals Division

- In at least one recent controversy where an Agency argued it was entitled to *Auer* Deference and the Appellant argued that *Auer* was no longer good law, the Director of the National Appeals Division applied the *Skidmore* deference framework, in affirming an Agency interpretation of its own administrative guidance.
- The question of whether *Auer* deference is still good law is up for debate. However, the Director resorted to applying a *Skidmore* analysis

Auer Deference At the USDA National Appeals Division

- While the Agency may be entitled to some degree of "Skidmore deference," the NAD Director's opinion suggests an acceptance that *Auer* deference will be short-lived following the SCOTUS decision *Loper Bright*.
- The Director did note that the focus of review is on "whether the agency has examined the relevant facts and has articulated a satisfactory explanation for its decision that reflects a 'rational connection between the facts found and the choice made.'"

Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109 (2024).

- *Jaresky* can now be cited for the proposition that when an Agency seeks civil penalties against a defendant for fraud, the Seventh Amendment entitles the defendant to a jury trial.

  - In sum, the civil penalties in this case are designed to punish and deter, not to compensate. They are therefore "a type of remedy at common law that could only be enforced in courts of law." *Ibid*. That conclusion effectively decides that this suit implicates the Seventh Amendment right, and that a defendant would be entitled to a jury on these claims.

    Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109, 125 (2024).

CONCLUSION

- **Thank you**
- **Questions?**

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