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The Death of *Chevron* Deference?

A Potential Shift in Federal Court Review of Agency Decisions

Presenters:
John Longstreth, Partner, K&L Gates
Steven R. Valentine, Partner, K&L Gates
Moderator: Sandra Safro, Partner, K&L Gates

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JUDICIAL REVIEW OF AGENCY ACTIONS

- Two important bases of judicial review:
  - Arbitrary and capricious
    - Applies to an agency's policy judgments and determinations of fact
  - Contrary to law
    - Applies to an agency's interpretations of statutory authority and requirements, and
    - An agency's interpretations of its own regulations

CONTRARY TO LAW – BASIC STANDARDS

- *Chevron* Standard -- Statutes
  - Applies to an agency's interpretation, under a process of sufficient formality, of statutes it is given the authority to enforce, interpret, or administer
    - *Chevron* Step 1: Court determines if Congress has spoken clearly on the matter – if so, no deference to the agency is afforded
    - *Chevron* Step 2: If the statutory language is ambiguous or Congress was silent on the matter, the reviewing court defers to the agency's interpretation if it is "reasonable"

CONTRARY TO LAW – BASIC STANDARDS

- *Auer* Deference -- Regulations
  - Applies to an agency's interpretation of its own regulations
  - Agency's interpretation is controlling unless "plainly erroneous or inconsistent with the regulation."

AGENCY DEFERENCE UNDER ATTACK

- Legislative efforts
  - Regulatory Accountability Act of 2017
    (passed the U.S. House of Representatives on January 11, 2017)
- Judicial efforts?
  - Pres. Trump's nominee for the U.S. Supreme Court, Hon. Neil Gorsuch
  - Criticism of *Auer* by several current Justices

REGULATORY ACCOUNTABILITY ACT OF 2017

- Title I – Regulatory Accountability Act
- **Title II – Separation of Powers Restoration Act**
- Title III – Small Business Regulatory Flexibility Improvements Act
- Title IV – Require Evaluation Before Implementing Executive Wishlists Act
- Title V – All Economic Regulations are Transparent Act
- Title VI – Providing Accountability Through Transparency Act

REGULATORY ACCOUNTABILITY ACT OF 2017

Current Text of the relevant portion of 5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing 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.

REGULATORY ACCOUNTABILITY ACT OF 2017

Text as proposed under Section 202 of the Regulatory Accountability Act of 2017

To the extent necessary to decision and when presented, the reviewing court shall [] determine the meaning or applicability of the terms of an agency action and decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. . . .

> [This is the guts of the amendment; the term *de novo* generally means without deference to the decision being reviewed, and the amendment also makes clear that *de novo* review also applies to an agency's construction of its rules]

REGULATORY ACCOUNTABILITY ACT OF 2017

Text as proposed under Section 202 of the Regulatory Accountability Act of 2017 (cont'd)

. . . If the reviewing court determines that a statutory or regulatory provision relevant to its decision contains a gap or ambiguity, the court shall not interpret that gap or ambiguity as an implicit delegation to the agency of legislative rule making authority and shall not rely on such gap or ambiguity as a justification either for interpreting agency authority expansively or for deferring to the agency's interpretation on the question of law.

[This essentially restates what eliminating *Chevron* deference means. It was not in the version of this legislation that passed the House in the last Congress, and seems intended to make sure that courts get the point.]

REGULATORY ACCOUNTABILITY ACT OF 2017

Text as proposed under Section 202 of the Regulatory Accountability Act of 2017 (cont'd)

. . . Notwithstanding any other provision of law, this subsection shall apply in any action for judicial review of agency action authorized under any provision of law. No law may exempt any such civil action from the application of this section except by specific reference to this section.

[This is intended to make sure the rule applies to review of action by independent agencies under review provisions such as the Hobbs Act, the FCC Act, and the Federal Power and Natural Gas Acts]

HOW WOULD THE ELIMINATION OF CHEVRON ALTER REVIEW?

- **Current approach**
  - Court uses traditional tools of statutory construction, "to determine whether Congress has "directly spoken to the precise question at issue," or left a gap for the agency to fill with its own interpretation.
  - Question is whether Congress has "unambiguously foreclosed the agency's statutory interpretation . . . if we determine that statutory ambiguity has left the agency with a range of possibilities and that the agency's interpretation falls *within* that range, then the agency will have survived *Chevron* step one."
  - Challenger "must do more than offer a reasonable or, even the best, interpretation; it must show that the statute *unambiguously* forecloses the [agency's] interpretation."

HOW WOULD THE ELIMINATION OF CHEVRON ALTER REVIEW?

- **Current approach (cont'd)**
  - *Brand X* case (2005): "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion;" contrary rule would "mean that whether an agency's interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on the order in which the interpretations issue."
  - *Arlington v FCC* (2013): *Chevron* deference applies on review of an agency's interpretation of statutory terms that define the agency's jurisdictional limits

APPROACH UNDER "DE NOVO" REVIEW

- Court would not defer to agency's construction in any circumstances
- Court would be fully free to pick what it considers "the best interpretation" even if a competing reading adopted by the agency is reasonable
- "Zone of reasonableness" that allows for differing interpretations of ambiguous terms would be eliminated
- Purpose is to reverse *Chevron*'s having "broadly increased the power" of federal agencies by "ceding them authority to determine the metes and bounds of their authority" where statutes are ambiguous, thus sowing "uncertainty for the public, regulated entities, and even Congress."

LEGISLATIVE OUTLOOK

- Senate consideration
  - Homeland Security and Governmental Affairs Committee
  - Full Senate
- Position of the Executive Branch

JUDICIAL EFFORTS?: *CHEVRON*

"[W]hat would happen in a world without *Chevron*? . . . The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*."

- Hon. Neil Gorsuch in *Gutierrez-Brizuela v. Lynch*

JUDICIAL EFFORTS?: *AUER*

- *United Student Aid Funds Inc. v. Bryana Bible*, No. 15–861, May 16, 2016: Justice Thomas, dissenting from the denial of certiorari on a petition asking the Court to overrule *Auer* and the earlier case on which it is based, *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945), stated that the "question is worthy of review."
- At least two other sitting Justices and one former Justice have called for review of the *Auer* doctrine. *See Perez v. Mortgage Bankers Ass'n* (2015) (Alito concurring, and Scalia concurring in the judgment); *Decker v. Northwest Environmental Defense Center* (2013)(Roberts concurring)
- The criticism, as expressed by Justice Scalia, is that the doctrine allows an agency to enact "vague rules" and then "do what it pleases" in later litigation, which "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."

IMPLICATIONS

- Agency actions affected
  - Rulemakings/policy statements/informal adjudicatory actions/docketed proceedings: effects will depend on the extent to which they get deference now
  - Prior agency actions or only future actions?
- Theory and Practice
- Benefits and potential costs of eliminating *Chevron* deference for regulated entities

A QUICK LOOK AT TITLE I: REGULATORY ACCOUNTABILITY ACT

- All rules must be "based on evidence" and consider alternatives and costs and benefits
- All information considered by the agency, including risk assessments and impact analyses, must be made available for comment
- An "achievable objective" and "metrics for measuring progress" must be provided
- Agency shall hold a hearing if any person presents a *prima facie* case that evidence the agency is relying on fails to comply with the Information Quality Act.

A QUICK LOOK AT TITLE I: REGULATORY ACCOUNTABILITY ACT (CONT'D)

- New requirements for rules designated by OMB (OIRA) as "major," "high impact," or "negative impact on jobs and wages"
  - Advanced Notice of Proposed Rulemaking 90 days before NPRM
  - On the record hearings for any high impact rule (likely to impose a cost of $1 billion or more)
- Interim rules can be in effect only 9 months (or 18 months if major or high impact) and are immediately reviewable

A QUICK LOOK AT TITLE I: REGULATORY ACCOUNTABILITY ACT (CONT'D)

- "Major Guidance" documents (like major rules, these impose an annual cost of $100 million or more) must also consider alternatives and identify costs and benefits. They are not subject to notice and comment but must state expressly that they are nonbinding
- Cost-benefit analyses must comply with OMB OIRA guidelines or they will receive no deference on review
- Title I (RAA) would not apply to pending rulemakings

QUESTIONS?

MORE INFORMATION

- Supreme Court's Perez Decision Shines the Light on Federal Agencies' Authority to Use "Interpretations" (Often called Shadow Regulations) to Regulate Business
- Federal Judge: Authority Lacking for Regulation of Hydraulic Fracking
- D.C. Circuit Calls Strike Two on EPA's Cross-State Air Pollution Rule
- *Homer City* – Has the D.C. Circuit Signaled an Alternate Approach to Judicial Review of Agency Regulations?
- Facing Two Strikes, EPA Gets a Hit: Supreme Court Upholds EPA Cross-State Air Pollution Rule
- "Not A Close Call": The D.C. Circuit Restores The Safe Harbor To Section 8 of RESPA
- Federal Court Upholds FERC's Approach on LNG Environmental Permitting and Shifts Focus to Challenges to DOE's Environmental Review
- Court of Appeals Limits Judicial Review of "Proprietary" Decisions by State Agencies
- Supreme Court Authorizes Judicial Review of Clean Water Act Jurisdictional Determinations Over Federal Government's Objection
- D.C. District Court Decision Supports Principle of Allowing Companies to Challenge CFPB Information Requests without Fear of Public Disclosure of Investigation
- 340B Orphan Drug Interpretive Rule Struck Down by D.C. District Court: HHS and HRSA Lose In Second Round of Litigation Over 340B Orphan Drug Rules
- EPA's Chesapeake Bay TMDL Survives Legal Challenge: Stricter Water Quality Regulation of Farms, Municipalities, Industry, and Business May Follow
- Safe Harbor Means Safe Harbor: Sixth Circuit Rejects Any Judicial Deference to HUD's Sham Affiliated Business Guidelines

THANK YOU

Steven (Rick) Valentine
K&L Gates LLP
steven.valentine@klgates.com
202.661.3802

John Longstreth
K&L Gates LLP
john.longstreth@klgates.com
202.661.6271

Sandra Safro
K&L Gates LLP
sandra.safro@klgates.com
202.778.9178

K&L GATES