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U.S. Supreme Court Upends 40 Years of Judicial Deference to Regulations

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In a historical opinion in *Loper Bright Enterprises v. Raimondo, Secretary of Commerce*, released at the end of June, the U.S. Supreme Court overturned the "Chevron" doctrine, which for so long had controlled judicial review of U.S. federal regulations. *Chevron*, decided in 1984, created a framework for courts to review regulations that interpreted statutes passed by Congress. Put simply, if a statute was ambiguous, courts were generally required under *Chevron* to defer to the interpretation of the regulatory agency as long as the interpretation was reasonable.

The Supreme Court has eliminated this so-called Chevron deference (a result that did not come as a complete surprise after the Supreme Court struck down several other established precedents in the past few years), and, instead, courts are to apply their own analysis and interpretation, even if the agency's regulatory interpretation is reasonable.[1]

Less than a week after overturning *Chevron*, the Supreme Court reversed a decision of a federal appeals court and allowed a plaintiff to challenge a regulation more than six years after it was promulgated. The Court held that the six-year statute of limitations under the U.S. *Administrative Procedure Act* "begins to run only when the plaintiff has a complete and present cause of action." In other words, a regulation can be challenged at any time as long as the claim is made within six years of the injury caused by the regulation.

The potential consequences of these two decisions are broad and likely to create mischief in the law from a policy perspective. They are likely to encourage more challenges to U.S. federal regulations, including tax regulations, as legal counsel (and their clients) will more frequently have realistic incentives to challenge regulations (and in some cases counsel might be ethically bound to raise the possibility of such a challenge); they could also affect ongoing cases. As a result, tax planners who rely on existing regulations will need to take into account the possibility of challenges to those regulations and the potential effect on their tax planning. We also expect the decisions to affect how federal agencies promulgate regulations, accept or reject comments, and attempt to implement existing and future legislation.

For example, the decisions are likely to influence the Internal Revenue Service and Treasury Department in deciding what changes to make when finalizing regulations on the stock buyback excise tax (for further details, see our bulletin). Taxpayers might also consider challenging the final regulations that implement a "look-through" rule for domestically controlled real estate investment trusts (for details on this rule, see our bulletin).

The two decisions will undoubtedly have far-reaching implications in both the tax and non-tax context, including with respect to rules and regulations that have been promulgated by the Securities and Exchange Commission as well as the Federal Trade Commission's recently promulgated ban of most employee non-competes.

We will provide updates on important developments and challenges to U.S. federal regulations as they occur.

[1] However, the Supreme Court did not overturn an even older case from 1944, Skidmore v Swift & Co., which addressed judicial reliance on agency interpretations but did not permit those interpretations to determine outcome. The Skidmore opinion said that agency interpretations, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

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