U.S. Supreme Court Jettisons Chevron Deference: Practical Impact for Government Contractors

A Practical Guidance® Article by W. Barron A. Avery, Alexander B. Hastings, Bryan M. Killian, Sarah-Jane Lorenzo, and Casey Weaver, Morgan, Lewis & Bockius, LLP

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The U.S. Supreme Court on June 28 overruled longstanding precedent and expanded the ability of government contractors to challenge agency interpretations and applications of certain statutes. In *Loper Bright Enterprises v. Raimondo and Relentless v. Department of Commerce (Loper Bright)*, the Court set aside the 40-year Chevron doctrine and held that courts may no longer defer to an agency's interpretation of an ambiguous statute. Instead, courts must exercise their own judgment to assess the agency's statutory interpretation by employing the usual tools of statutory interpretation, such as considering the plain language and congressional intent.

By overruling *Chevron*, the Supreme Court has created new opportunities for government contractors to challenge agency rulemaking. *Loper Bright* provides government contractors the opportunity to raise new or enhanced arguments at all stages of the rulemaking process to support or oppose an agency's interpretation. The decision could also allow for new proactive challenges to existing agency rules, such as FAR clauses or agency supplements to the FAR.

A Functional Tombstone for Chevron Deference

Agencies routinely promulgate regulations to implement federal statutes. Each year, for example, the National Defense Authorization Act (NDAA) contains policy and procurement

directives that the Department of Defense and other federal agencies implement through rulemaking. Congress also authorizes regulation of government contractors by directing the Federal Acquisition Regulatory Council (FAR Council) to implement or revise government contracting regulations. The FAR Council currently has over 50 open rulemaking actions.

For more than 40 years, the Supreme Court's decision in Chevron generally required courts to defer to agencies' permissible interpretations of ambiguities in statutes when undertaking rulemaking activities and adjudicating matters. *Chevron* held that judicial deference was appropriate because agencies had subject-matter expertise that courts lack. Because of *Chevron* deference, government contractors had to clear a high bar to challenge agency interpretations—they had to prove the agency adopted an unreasonable or impermissible statutory interpretation, or otherwise violated some procedural obligation associated with the rule.

In *Loper Bright*, the Supreme Court "place[d] a tombstone on *Chevron* no one can miss." (Justice Gorsuch, concurring). The Court held that, consistent with the Administrative Procedure Act, courts must exercise their independent judgment in deciding whether an agency has correctly interpreted a statute. Courts may consider the agency's views when making this assessment, but they may not defer to the agency's interpretation. We provide additional analysis of the *Loper Bright* decision in our June 30 LawFlash.

Government Procurement Rulemaking

Two current examples of rulemakings related to government contracting demonstrate how *Loper Bright*'s overruling of *Chevron* could have a big impact for contractors.

TikTok Ban

The No TikTok on Government Devices Act (the TikTok Ban) requires agencies to prohibit TikTok on government devices. It directs the Executive Branch to "develop standards and guidelines for executive agencies requiring the removal of any covered application from information technology." The statute defines the terms "covered application" and "information technology," and the FAR Council adopted those definitions when it issued an interim rule prescribing a Federal Acquisition Regulation (FAR) clause implementing the TikTok Ban, FAR 52.204-27 – Prohibition on a ByteDance Covered Application.

But many government contractors believe those definitions are ambiguous and have requested clarity in the final rule. Because of *Loper Bright*, if the FAR Council elaborates on these definitions, its interpretation will not be conclusive and could be subject to a court's interpretation of the best meaning of the relevant statutory language.

Semiconductor Ban

The FY 2023 NDAA directs the Department of Defense to prohibit procurement of semiconductors from certain Chinese companies, as well as electric parts and products that use electronic parts or that include semiconductors when used in certain critical systems. The FAR Council took the first steps to implement this prohibition by releasing an advanced notice of proposed rulemaking.

In our May 20, 2024 LawFlash, we discussed how the implementing statute and FAR Council action leave open many questions as to how this semiconductor ban will impact industry. As with the TikTok Ban, *Loper Bright* opens the possibility that the FAR Council's implementation of the semiconductor ban, including what qualifies as "use" of a prohibited semiconductor in a covered part and what qualifies as a "critical system," could be challenged. The analysis is no longer whether the agency has adopted a permissible or reasonable position, rather a court must determine whether the agency has adopted the correct interpretation.

Post-Chevron Landscape

Following *Loper Bright*, agencies will doubtlessly argue that their interpretations reflect the "best meaning" of the statute. That said, agencies may take steps to avoid litigation over their interpretations and may choose not to promulgate rules interpreting ambiguous statutory language, even when such interpretations would offer clarification to industry. In the context of FAR rulemaking, such an approach may mean that ambiguous statutory language could more frequently make its way into FAR clauses and then into contracts. As a result, contractors could find themselves in a position of interpreting these terms without the potential benefit of official clarification from the agency.

The increased prospect of judicial review also increases the likelihood of uncertainty for government contractors. Historically, after the FAR Council issued a final rule, contractors proceeded to meet the compliance obligations, sometimes seeking waivers if compliance could not be met in the near term. After *Loper Bright*, contractors will need to track whether rules have been challenged and, if so, whether those rules are enjoined while the challenge proceeds. If a FAR clause rulemaking is enjoined, contractors will need to consider whether a prior version of a FAR clause that was enacted before the challenged rulemaking applies to their contract or, perhaps, the applicable FAR clause does not apply at all while the litigation is pending.

As always, we will monitor decisions and agency actions to see how these important developments play out.

We continue to monitor ongoing developments as courts implement the *Loper Bright* decision. In the meantime, contractors should monitor FAR Council rulemaking closely to assess whether any agency interpretations of statutes may warrant challenge under the new approach to reviewing agency action under the *Loper Bright* decision. Morgan Lewis lawyers are ready to assist contractors in responding to this new landscape by reviewing agency rulemaking actions, assessing the applicability of FAR clauses, and advising on potential rulemaking challenges.

Stay Informed

For the latest on evolving developments around the Chevron decision and its impact on companies, subscribe to our Chevron Doctrine mailing list.

Contacts

If you have any questions or would like more information on the issues discussed in this Law Flash, including on how the Court's decision impacts government contracts, grants, or nontraditional procurement agreements, please reach out to any of the contacts below or any member of our Chevron Task Force.

Related Content

Statutes & Regulations

- 48 C.F.R. § 52.204-27

Cases

- Loper Bright Enters. v. Raimondo, Nos. 22-451, 22-1219, 2024 U.S. LEXIS 2882 (June 28, 2024)
- Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984)

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