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High Court increases regulatory uncertainty and risk for businesses in the US

BY CLINT VINCE, SIMON STEEL AND JENNIFER MORRISSEY

In a series of rulings at the end of the US Supreme Court's 2023-24 term, the court's conservative majority upended US administrative law, significantly narrowing the broad regulatory authority that administrative agencies have enjoyed over the last several decades.

The court's rulings will usher in an era of uncertainty regarding the legality and viability of federal regulatory programmes across the government, and add new layers of complexity for businesses in all sectors of the economy.

On the one hand, the result of *Loper Bright Enterprises v. Raimondo* has long been on the wish lists of conservative (particularly economic libertarian) policymakers and regulated industries, and stems directly from the conservative Supreme Court majority's express concern about excessive regulation of business. It is likely to present new opportunities for businesses – especially the most heavily regulated and environmentally sensitive industries – to use litigation and the threat of litigation to reduce the regulatory burdens they bear.

On the other hand, *Loper* is about who decides, not what is decided – it shifts statutory interpretive power from regulatory agencies to courts. Whether in fact this means lesser or greater regulatory burdens will depend, at least in part, on who controls the government and on the jurisdiction where a rule is challenged. It will unquestionably mean more regulatory uncertainty, as less reliance can be placed on agency regulations and actions, and hundreds of judges may reach differing decisions. This will create significant business risk, particularly for companies and investors that depend on a consistent and predictable regulatory environment.

What exactly did the court change in *Loper*? Under the Administrative Procedure Act (APA), federal agency action is subject to reversal by the judiciary if it is "arbitrary and capricious" or otherwise contrary to law.

Forty years ago, the court established a two-step framework to interpret statutes administered by federal agencies. Dubbed '*Chevron* deference', a court first assessed whether the governing statute was clear

with respect to the question at issue; then, if the statute was silent or ambiguous, the court generally deferred to the agency's formal interpretation if it was based on a permissible construction of the statute, even if the court read the statute differently than the agency did.

Under *Chevron*, there could be a range of reasonable interpretations of a statute, and two conflicting interpretations – often adopted by an agency before and after a change in power in Washington – would sometimes both be upheld in court. *Chevron* was founded on the notion that in writing ambiguous statutes on regulatory, especially technical, subjects, Congress probably intended ambiguities to be resolved by a single federal agency deploying its specialist expertise rather than by whatever judges the case came before.

In *Loper*, the Supreme Court expressly overruled *Chevron*, ruling that in cases governed by the APA, a court must exercise its independent judgment in questions of statutory interpretation. In doing so, a court is to use all the traditional tools of statutory interpretation, including giving respectful consideration to an agency interpretation, but only to the extent that the court concludes that the interpretation has "the power to persuade".

Application of that rather circular criterion will typically hinge on how close the court deems the statutory interpretation question is, how much it implicates agency technical expertise, and whether the agency's conclusion has been held consistently and is well-reasoned. The court based its rejection of *Chevron*'s default rule of deference to agency interpretation on the APA's command that courts decide "all relevant questions of law" which, it explained, implements traditional understandings of the role of courts under article III of the US Constitution.

Within the broad and undefined limits of the non-delegation doctrine (which prohibits Congress from abdicating its legislative or major policymaking role to agencies), Congress can still revise statutes, or write new ones, to expressly delegate discretionary power to an agency, including the power to define specific statutory terms.

Congress can also write and amend statutes with more clarity and detail to prevent statutory interpretation under *Loper* from becoming judicial policymaking. But whether Congress has the institutional competence to achieve that is questionable, particularly given current gridlock and polarisation.

The shift does not come as a surprise. As the majority has swung further to the right, the demise of longstanding precedent on agency discretion has been foreshadowed for some time in opinions critical of an outsized administrative role in federal regulation. The effect will be felt for years to come, not only in traditional regulated industries, including energy, transportation, finance and healthcare, but also across a wide range of businesses by potentially disrupting employment practices, intellectual property rights, tax strategies, permitting (especially environmental permitting) and beyond.

The nuances and practical applications of *Loper* are the subject of hundreds of pending cases. The Supreme Court stated that agency actions and regulations previously upheld under a *Chevron* analysis will generally remain undisturbed; however, *Loper* will govern challenges both to future agency actions and past agency actions that have not yet been upheld on judicial review.

Loper's effects will likely be magnified by another Supreme Court decision from June 2024, *Corner Post*. In *Corner Post*, the same conservative majority of the court ruled that the default six-year statute of limitations for suing the federal government runs from the date of injury to the petitioner and plaintiff, not from the date of the government action.

This opens the potential for agency regulations to be challenged many years after they were issued where there is a challenger, such as a new participant in a regulated industry, that was not immediately affected by them. In combination, *Loper* and *Corner Post* represent a vast expansion of judicial power to overturn regulations and other federal agency actions, which will inject uncertainty and disrupt business investment and operational decisions for the foreseeable future.

Loper's effects could be felt in any part of the economy, on issues large and small. *Loper* itself was a case about inspection fees levied on herring fishing. But given the court's conservative majority's focus on excessive delegation by Congress and perceived over-regulation in the environmental sphere, it seems a safe bet that *Loper* will have its most pronounced effects on climate change, energy transition, and other environmental and emerging technology regulation.

In the energy sector, *Loper* could have a significant impact on the Federal Energy Regulatory Commission's ability to further the government's effort to make the clean energy transition, for example where statutes are silent or ambiguous as to the treatment of new energy resources such as battery storage, demand response and energy efficiency. Meanwhile, *Loper* will be featured heavily in pending and forthcoming challenges to power plant and vehicle emissions regulations.

In the healthcare sector, lawsuits in different courts across the country already result in inconsistent application of federal regulations, for example regarding coverage and reimbursements for healthcare expenses. In a post-*Loper* world, this will be exacerbated, creating uncertainty, inequity and even operational gaps.

In the labour and employment context, rules promulgated by several federal agencies that address minimum salaries and overtime pay, non-compete clauses and disability accommodations, among other things, are all facing challenges that will be stronger under *Loper*.

These are only a few examples of *Loper*'s possible reach. Of course, it is early days, and the Supreme Court does not operate in a vacuum. Much will depend on how other participants in the regulatory system respond, and neither party's policy initiatives are immune. *Loper* could constrain a conservative administration's immigration initiatives just as it could constrain a liberal administration's clean energy initiatives.

Either way, for the foreseeable future, those constraints will come from the courts. While increased litigation is anticipated, we are unlikely to see a similar uptick in

the pace of legislation despite the court's invitation to lawmakers to provide explicit guidance to agencies, as Congress rarely moves swiftly on technocratic regulatory issues. Where we are likely to see a flurry of activity is in congressional lobbying. It will be faster and easier to make policy through subtle word changes buried in the hundreds of pages of an appropriations bill than through the transparent notice and comment rulemaking process at the agency level.

To some extent, regulatory and policy gaps will be filled by states, as often occurs during congressional gridlock. Federal pre-emption prevents states from acting on some matters, but in other instances, states may be able to do things that cannot be achieved at the federal level.

Even so, the takeaway from *Loper* is that regulation may take a back seat as the judiciary steers the policy wheel. Businesses and investors will need to fasten their seatbelts and settle in for a bumpy ride.

The Supreme Court has taken on a new and assertive role for the judiciary in determining regulatory policy while ensuring that opponents to federal agency regulations will have their 'day in court', which means that the fate of regulations will be uncertain for a long time. ■