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# *Loper Bright* Creates ESG Regulatory Speedbumps for Companies

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The US Supreme Court's decision to end the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo* could significantly impact environmental, social, and governance regulation in the US. Federal agencies have issued guidance on greenhouse gas emissions, sustainable investing and advertising, workplace and board diversity, and anti-corruption measures.

Because of this potential disruption to the regulatory landscape, it is imperative for businesses to monitor legal challenges that could complicate ESG regulatory compliance if successful. Companies should also account for ESG-related expectations from stakeholders, separate from agencies' rules, as those expectations may differ (and sometimes exceed) those rules.

The *Loper Bright* majority concluded that courts must use their "independent judgment" in determining whether an agency has acted within its statutory authority. Although courts may still seek aid from an agency's interpretations, they don't have to defer to those interpretations. The majority reasoned that interpreting statutes was always a function of the judiciary. That said, the Supreme Court refrained from overruling prior cases that relied on *Chevron*.

**Pending ESG Challenges**

Challengers to some regulations have already incorporated *Loper Bright* into their arguments, and others will likely follow suit. For example, the attorneys general challenging the Department of Labor's ESG rule supplemented their briefing to the Fifth Circuit with a letter, noting that *Loper Bright* supported their argument that the rule violates the Administrative Procedure Act. The Department of Labor refuted that argument, claiming its arguments on appeal weren't dependent on *Chevron* deference.

The Securities and Exchange Commission's climate-related disclosure rules, which are being challenged in the Eighth Circuit, are another potential target for this type of *Loper Bright* argument, particularly if the Fifth Circuit sides with the attorneys general on the ESG rule. The parties' briefing is ongoing, so *Loper Bright* hasn't yet been invoked.

At present, challengers to the SEC rule have made several arguments, including that Congress didn't give the agency the power to issue the rule; that even if Congress did grant the agency authorization for the rule, it didn't state clearly that it intended the agency to tackle a major question like this; and that the rule is arbitrary and capricious under the Administrative Procedure Act.

**Potential Impact**

To the extent agencies become more hesitant to issue rules given *Loper Bright* or due to more challenges to those rules—which will delay enforcement, at a minimum — it may hinder the ability of administrative agencies to efficiently govern in the ESG sector. If this occurs, the burden on providing ESG guidance may shift to Congress.

But Congress remains divided on ESG issues, so it likely won't suddenly increase legislation in this arena. It passed the Inflation Reduction Act, which addressed funding and incentives for climate change mitigation, among other things, but only by a bare majority in both houses as all votes fell along party lines.

Congress' reaction to the SEC's climate-related disclosure rules is another example of its division. While some members have expressed their support of the rules (or advocated for them to go further), other members have objected and found them to exceed the SEC's authority.

States will likely continue to legislate in this arena on both pro- and anti-ESG initiatives, and companies may need to comply with a further fragmented patchwork of ESG regulations at the state and federal level. That fragmentation will especially frustrate businesses confronting ESG regulations in other countries that are in force or in the process of being adopted.

**Considerations for Companies**

Businesses should be wary of ignoring new or pending regulations from administrative agencies simply because a legal challenge is filed. *Chevron* deference is helpful, but not a requirement, for agencies to defend their regulations.

That's why the ongoing ESG challenges will be instructive. Companies shouldn't try to figure out how to comply with regulations on a compressed timetable given the scope of some ESG regulations.

Further, many businesses are likely required to (or will be required to) comply with either state-level regulations or international requirements.

Although certain regulations can provide benefits, such as consistent standards and increased transparency, the ESG sector doesn't depend on those rules. Businesses often take their ESG stances in response to pressure from consumers and other stakeholders, and that is unlikely to change even if administrative agencies struggle to issue or enforce related regulations.

Companies should ensure they engage with their stakeholders to remain abreast of ESG-related expectations placed on their operations regardless of whether they are legally obligated to do so. Without that knowledge, businesses may risk making avoidable and costly missteps.

The cases are *Loper Bright Enterprises v. Raimondo*, U.S., No. 22-451, decided 6/28/24 and *Relentless v. Department of Commerce*, U.S., No. 22-1219, decided 6/28/24.

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