The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION **NOVEMBER-DECEMBER 2024**

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 141 **NUMBER 10** **November-December 2024**

LexisNexis®

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ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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MATTHEW BENDER

(2024–Pub.4815)

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POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

After *Loper Bright* Overruled *Chevron* Deference, What Parts of Regulation F Have the Power to Persuade?

By Louis J. Manetti, Jr.*

In this article, the author discusses the impact of the U.S. Supreme Court's decision overruling the Chevron *doctrine on Regulation F, which implements the Fair Debt Collection Practices Act, prescribing federal rules governing the activities of debt collectors.*

Toward the very end of its last term, the U.S. Supreme Court overruled the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*.[1] The decision eliminated the requirement that courts must defer to agency interpretations of the federal laws they administer. This has important implications for Regulation F; in addition to expounding on the Fair Debt Collection Practices Act (FDCPA), Regulation F sought to update the statute for modern communication technology and resolve circuit splits, and these efforts are no longer authoritative.

LOPER BRIGHT ENDS *CHEVRON* DEFERENCE TO AGENCY INTERPRETATIONS OF FEDERAL LAW

In *Loper Bright*, the National Marine Fisheries Service, an agency that administers a federal fishery statute, promulgated a rule that would require fishing vessels to declare to the NMFS the species the vessel intended to harvest and, if necessary, pay for a government-certified observer to monitor.[2] At issue was whether the rule was authorized under the federal statute.[3] The lower courts had held that, under *Chevron*'s rubric, the rule was a reasonable construction of the federal statute.[4]

The Supreme Court stressed that the Constitution is structured to allow judges to exercise their judgment independent of influence from the political branches, and that it "is emphatically the province and duty of the judicial department to say what the law is."[5] The Court acknowledged that "from the

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1 Nos. 22-451 and 22-1219, 2024 U.S. LEXIS 2882 (Sup. Ct. June 28, 2024).

2 Id. at *20.

3 Id. at *22-23.

4 Id.

5 Id. at *25 (citing Marbury v. Madison, 1 Cranch 137, 177 (1803)).

outset" part of exercising independent judgment often included giving due respect to Executive Branch interpretations of federal statutes, but respect "was just that. The views of the Executive Branch could inform the judgment of the judiciary, but did not supersede it."[6]

The Supreme Court noted that the Administrative Procedure Act prescribes procedures for agency action and "delineates the basic contours of judicial review of such action."[7] Under the APA, "courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action."[8] It declared that the APA "makes clear that agency interpretations of statutes – like agency interpretations of the Constitution – are *not* entitled to deference."[9]

Chevron, the Court noted, "rested on 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'"[10] This presumption cannot be squared with the APA, the Court reasoned, because statutory ambiguity is not a delegation of law-interpreting power.[11] The Supreme Court declared that "the basic nature and meaning of a statute does not change when an agency happens to be involved. Nor does it change just because the agency has happened to offer its interpretation through the sort of procedures necessary to obtain deference, or because the other preconditions for *Chevron* happen to be satisfied."[12] The Court acknowledged, however, that although an agency's interpretation cannot bind a court, "it may be especially informative to the extent it rests on factual premises within" the agency's expertise, as that "has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'"[13]

It concluded that "*Chevron* is overruled."[14] Regarding agency interpretation for the statutes they implement: "Careful attention to the judgement of the

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[6] Id. at *25-26.

[7] Id. at *32.

[8] Id. at *33 (emphasis in original) (citing 5 U.S.C. § 706).

[9] Id. at *34 (emphasis in original).

[10] Id. at *41 (citing Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996)).

[11] Id. at *43.

[12] Id. at *56.

[13] Id. at *48 (citing Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1983), then Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[14] Id. at *61.

Executive Branch may help inform" the judge's inquiry, and "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."[15]

LOPER BRIGHT'S POTENTIAL IMPACT ON REGULATION F'S PERSUASIVENESS ON COURTS

Regulation F is unique among agency regulations. It is relatively new, having only been effective since November 30, 2021. And although certain portions of the regulation expound on the Fair Debt Collection Practices Act (FDCPA), other portions either sought to modernize the FDCPA or to resolve circuit splits that arose regarding the federal statute. These differing aims could impact the degree to which courts find the regulation persuasive.

For instance, Regulation F prescribes detailed rules for when a communication with a consumer occurs at an inconvenient time or place,[16] and specifies that violating the 7-7-7 Rule (calling a consumer more than 7 times in 7 consecutive days, with a 7-day break in between conversations) is presumptively harassing under the FDCPA.[17] Regulations like these expound on notions of inconvenience and harassment present in the FDCPA.

However, certain provisions of Regulation F do not correspond to basic notions expressed in the FDCPA. For example, Regulation F specifies that a debt collector may not furnish information about a debt to a consumer reporting agency until it corresponds with the consumer about the debt.[18] And a core aspect of Regulation F was to modernize the FDCPA by specifying rules for modern electronic communications such as email and text messages, including how to opt out of receiving such messages.[19] But the FDCPA, enacted in 1977, does not have any communication rules specifically for these mediums. Other provisions of Regulation F were an apparent attempt to resolve circuit splits that had arisen over the FDCPA's interpretation. For example, the FDCPA forbids debt collectors from using any language or symbol, other than the debt collector's business name or address, on the envelope of a debt collection letter.[20] A circuit split had arisen over whether there was a "benign

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[15] Id. at *62.

[16] 12 C.F.R. § 1006.6(b).

[17] Id. § 1006.14(b).

[18] Id. § 1006.30(a).

[19] Id. § 1006.6(d), (e).

[20] 15 U.S.C. § 1692f(8).

language" exception to this rule.[21] Regulation F, and its Official Interpretation, attempted to resolve the circuit split.[22]

These aspects of Regulation F go far beyond adding detail within the boundaries set by the FDCPA. And without *Chevron*, it cannot be argued that these rules are entitled to deference because the Consumer Financial Protection Bureau has rulemaking authority.

Post-*Loper Bright*, judges may rely on Regulation F as informative, but the authoritative language ends with the FDCPA's statutory language. As the Supreme Court surmised, the "question that matters" is: "Does the statute authorize the challenged agency action?"[23] It is uncertain how judges will treat the various aspects of Regulation F going forward – they are not bound by the regulation, but may find it persuasive as an interpretation of the FDCPA.

REGULATION F WILL LIKELY REMAIN THE AUTHORITY FOR THE CFPB'S IN-HOUSE ENFORCEMENT ACTIONS

Notably, the demise of *Chevron* impacts judges and their treatment of agency regulations such as Regulation F. The CFPB will most likely view Regulation F as its legal standard when deciding enforcement actions. However, its ability to impose civil penalties in those enforcement actions is uncertain in light of another recent Supreme Court decision, *SEC v. Jarkesy*.[24]

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[21] See, e.g., Preston v. Midland Credit Mgmt., 948 F.3d 772, 779 (7th Cir. 2020).

[22] 12 C.F.R. § 1006.22(f).

[23] Loper Bright Enterprises, 2024 U.S. LEXIS 2882, at *53.

[24] No. 22-859, 2024 U.S. LEXIS 2847 (Sup. Ct. June 27, 2024).