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FTC's Competition Rulemaking Authority In the Post-'Chevron' Era

By Karen Hoffman Lent and Kenneth Schwartz

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For the past 40 years, one of the most important doctrines underpinning administrative law in the United States was the doctrine of *Chevron* deference. As established in its namesake case, the *Chevron* deference required courts to defer to a federal agency's reasonable interpretation of a statutory provision when the agency was exercising its rulemaking authority rather than substituting the court's own interpretation when Congress' intent on the subject was ambiguous. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

Since it was established, this doctrine of deference has given federal agencies comfort that they may draft and impose rules to further their mandates with minimal judicial interference, and it has provided courts with guidance on how to decide cases centered on agency-created rules where the statute underpinning the rule is silent or ambiguous.

However, after years of providing limitations and exceptions to *Chevron*, the Supreme Court overruled the doctrine this term in *Loper Bright Enterprises v. Raimondo*, No. 22-451, 2024 WL 3208360 (U.S. June 28, 2024) (decided together with *Relentless v. Department of Commerce*, No. 22-1219 (U.S. 2024)).

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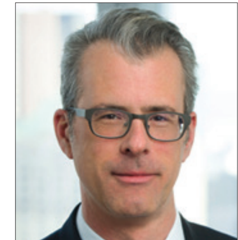

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Although widely predicted, the court's decision creates an uncertain future regarding the enforceability of hundreds of agency rules that have until now been functionally treated as law.

The Federal Trade Commission (FTC), like other federal agencies, has used its rulemaking authority to enforce its mandates and further its agenda for decades, dating back to well before *Chevron* was decided. And like other agencies, the FTC has enjoyed the benefits of *Chevron* deference where a court has found its statutory interpretation reasonable even though the court does not share the interpretation. *See, e.g.*, *National Automobile Dealers Association v. Federal Trade Commission*, 864 F. Supp. 2d 65 (D.D.C. 2012).

FTC rulemaking has historically been limited almost exclusively to consumer protection. In the competition arena, the agency's preference has been

to adjudicate under the various antitrust statutes, including the Clayton Act, the Robinson-Patman Act, and the FTC Act. The FTC Act in particular permits the FTC to bring an enforcement action against "unfair" methods of competition, a mandate recognized as applying to a broader set of practices than the practices restricted by other antitrust laws. *See FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (finding that the FTC has broad power to define unfair trade practices where such practices "conflict with the basic policies of the Sherman and Clayton Acts" without actually *violating* those laws).

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Now, just as the era of *Chevron* deference is ending, the FTC has begun to expand its focus on competition rulemaking. Less than a year before her appointment as FTC chair, Lina M. Khan made the case for the FTC to engage in competition rulemaking. *See* Rohit Chopra & Lina M. Khan, "The Case for "Unfair Methods of Competition" Rulemaking", 87 U. Chi. L. Rev. 357 (2020).

In July 2021, just after Khan was appointed, President Joe Biden signed an executive order that in part called on the FTC Chair "to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority" in a wide swath of areas. Promoting Competition in the American Economy, 86 FR 36987, Sec. 5(g)-(h). After forming a working group to explore the issue, the FTC published a policy paper in November 2022, asserting the legal bases for the agency's competition rulemaking authority. Fed. Trade Comm'n, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (2022) (2022 Policy Statement).

Two years later, the FTC issued only its second competition-based rule ever, banning most noncompete clauses in employment contracts across the United States. *See* FTC Announces Rule Banning Noncompetes, Federal Trade Commission, April 23, 2024.

The FTC's issuance of the noncompete ban has drawn multiple lawsuits challenging the agency's authority to issue such a rule, and the rule has in fact already been enjoined by one district court while litigation progresses. *Ryan v. Federal Trade Commission*, No. 3:24-CV-00986-E, slip op. at 1-2 (N.D. Tex. July 3, 2024). With the Supreme Court's recent rejection of *Chevron* deference, the FTC's competition rulemaking authority may be on shaky ground just as it was getting started. This article will consider what deference the FTC actually enjoyed under *Chevron*, what that deference might look like now that *Chevron* has been overturned, and what other legal grounds the FTC is likely to invoke to support its competition rulemaking authority moving forward.

'Chevron' Deference

Prior to *Chevron*, courts had varying and somewhat conflicting guidance on what weight to give agency-created rules. Generally speaking, the Supreme Court decisions in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and *National Labor Relations Board v. Hearst*, 322 U.S. 111 (1944), established that questions of pure legal statutory interpretation were the domain of the courts, but where a rule was created based on a mixture of law and fact, courts should defer to agencies unless the rule was unreasonable. This distinction proved difficult to make, and over time a string of cases developed calling for rationality review of an agency's purely legal interpretation. Pre-Chevron Twentieth-Century Deference, 33 Fed. Prac. & Proc. Judicial Review § 8424 (2d ed. June 2024). By the time *Chevron* was decided, the Supreme Court had ample case law to support the doctrine it was creating.

Chevron itself involved the U.S. Environmental Protection Agency's (EPA) interpretation of the term "stationary source" in the Clean Air Act Amendments of 1977. 467 U.S. at 839-40. Essentially, Congress

required states that had not met certain air quality standards to establish a permit program regulating "stationary sources" of air pollution.

The EPA issued a regulation to support the implementation of this requirement allowing a state to define "stationary source" as an entire industrial plant rather than just the pollution-emitting equipment, thereby allowing plants to install or modify equipment without going through the permit process if the total emissions of the plant were not increased. The Natural Resources Defense Council, an environmental group, successfully challenged the EPA's rule.

In an opinion written by future Supreme Court Justice Ruth Bader Ginsburg, the U.S. Court of Appeals for the District of Columbia stated that the EPA's interpretation of "stationary sources" was "inappropriate" in the context of a program designed to improve air quality. Chevron, an intervenor in the case on behalf of the EPA, appealed to the Supreme Court, which unanimously reversed the appellate court's decision, establishing what became known as *Chevron* deference:

In light of this legal controversy, the Supreme Court had already begun imposing limitations on Chevron in recent years, primarily by establishing what has become known as the "major questions" doctrine.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron deference was not particularly controversial when it was first introduced, but over time it has drawn scrutiny primarily from conservative legal observers who believed it to be an unconstitutional delegation of Congressional authority. *See* Amy Howe, "Supreme Court likely to discard Chevron", SCOTUSBlog.com.

Many also believed *Chevron* to be in direct conflict with Section 706 of the Administrative Procedure Act (APA), which reads "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U. S. C. §706.

The APA further reads that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" that are "not in accordance with law," 5 U. S. C. §706(2)(A), or that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," 5 U. S. C. §706(2)(C).

In light of this legal controversy, the Supreme Court had already begun imposing limitations on *Chevron* in recent years, primarily by establishing what has become known as the "major questions" doctrine. That doctrine essentially provides that, absent a clear grant of Congressional authority, courts should not defer to an agency's statutory interpretation if the interpretation carries exceptional economic and social significance. Jennifer Cascone Fauver, "A Chair With No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan's FTC", 14 Wm. & Mary Bus. L. Rev. 243, 298-301 (2023).

In *Loper Bright*, the Supreme Court has now eliminated that deference altogether, requiring courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." No.

22-451 at 35. While there will likely be plenty of litigation testing the boundaries of the Supreme Court's opinion in *Loper Bright*, at the outset it seems to be resetting review of administrative agency rulemaking back to the *Skidmore* standard, permitting a court to rely on agency expertise and even give special weight to agency interpretations of statutes, but ultimately not permitting the court to substitute an agency's interpretation for the court's own independent judgment.

FTC Act and History of FTC's Competition Rulemaking

The primary statute animating the FTC and underlying its rulemaking authority is the Federal Trade Commission Act (FTC Act). Signed in 1914, the FTC Act established the Commission and, in Section 6(g), empowered the Commission to "make rules and regulations for the purpose of carrying out the provisions" of the FTC Act. That includes Section 5, which prohibits "unfair methods of competition" and "unfair and deceptive trade practices."

Initially, the FTC's rulemaking authority was considered to be limited only to procedural matters. Vartan Shadarevian and Lloyd Lyall, "Modern Antitrust Meets Modern Rulemaking: Evaluating the Potential of FTC Competition Rulemaking", 72 U. Kan. L. Rev. 389, 398 (2024). In the 1960s, the FTC began issuing substantive rules, and its authority to do so was confirmed in *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672, 698 (D.C. Cir. 1973) ("We hold that under the terms of its governing statute…the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent").

Throughout its history, the FTC's substantive rulemaking has been limited almost entirely to regulating unfair and deceptive trade practices, and not unfair methods of competition. Royce Zeisler, "Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement", 2014 Colum. Bus. L. Rev. 266, 280-81 (2014).

In fact, prior to this year, the FTC had issued only one competition rule in its history. In 1968, apparently in response to complaints from small apparel retailers, manufacturers and salesmen that others in the industry were engaging in discriminatory advertising allowances in violation of the Clayton Act, the FTC issued the following rule:

The Commission hereby promulgates as a Trade Regulation Rule its conclusions and determination that the granting or furnishing, in whole or in part, of any advertising payment or promotional allowance, service or facility, by any seller of men's, youths' and boys' suits, coats, overcoats, topcoats, jackets, dress trousers and uniforms to a customer engaged in the resale of such products, will be presumed not to have been made available on proportionally equal terms to all the seller's customers competing in the resale of such products within the purview of Sections 2 (d) and (e) of the amended Clayton Act, unless such payments or allowances, services or facilities, have been made available pursuant to and in accordance with all the terms and conditions of a written plan supplied to all such competing customers.

Trade Regulation Rule: Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. 412 (1968). The rule was eventually repealed, and there is no evidence that it was ever actually enforced. 2014 Colum. Bus. L. Rev. at 281.

Although it would be well over five decades before the FTC ventured into competition rulemaking again, the practice has not lacked support among progressives, who have pushed the agency especially hard in recent years to attempt to exercise what has otherwise been a largely theoretical power. *See* Rohit Chopra and Lina M. Khan, "The Case for "Unfair Methods of Competition" Rulemaking", 87 U. Chi. L. Rev. 357, 366 n. 39 (2020). In their article, Chopra and Khan argue that the "status quo" of antitrust enforcement in the United States is ambiguous, expensive, burdensome, and undemocratic, and that it "tend[s] to advantage incumbents and suppress market entry." The authors assert that the "[l]egislative history is clear that Congress sought to advance competition law outside the courts as well as through them" and

that competition rulemaking would provide clarity and predictability to market participants, relieve the expense of antitrust enforcement, and improve antitrust enforcement and policymaking.

Similarly, in its 2022 Policy Statement, the FTC, without relying on *Chevron*, asserted that "Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency. Over the years, courts have consistently held that FTC determinations as to what practices constitute an unfair method of competition deserve 'great weight,' recognizing that the Commission is an expert agency, rather than 'a carbon copy of the Department of Justice.'" 2022 Policy Statement at 7.

Most recently, in January 2023, the FTC proposed its rule banning most noncompete clauses in employment contracts, and in April 2024 adopted the rule by a 3-2 vote, establishing its first competition rule since 1968. Subject to some limited exceptions, the FTC's noncompete rule classifies it as "an unfair method of competition" when a person with respect to a worker (1) enters or attempts to enter into a noncompete clause; (2) enforces or attempts to enforce a noncompete clause; or (3) represents that the worker is subject to a noncompete clause. 16 C.F.R. § 910.2(a).

What Overturning 'Chevron' May Mean for the FTC's Competition Rulemaking Authority

Expectedly, the FTC's noncompete rule had already invited numerous legal challenges even before the Court's decision in *Loper Bright*, each of which question the FTC's authority to issue the rule both under the FTC Act and the major questions doctrine. Daniel Wiessner, "US Ban on Worker Noncompetes Faces Uphill Legal Battle", Reuters, Apr. 25, 2024).

Indeed, in a decision issued after *Loper Bright*, a district court in Texas enjoined the noncompete rule not on the basis that the FTC's reasonable interpretation of the FTC Act should be substituted for the court's judgment, but rather on the basis that the FTC was not reasonable in enacting the rule and that the FTC Act does not give the agency substantive competition rulemaking authority at all. *Ryan*, No. 3:24-CV-00986-E, slip op. at 23.

Inarguably, the end of *Chevron* deference will cause greater problems for the FTC in defending the noncompete rule, which will now be firmly subject to the independent review of the courts even if the FTC succeeds in arguing that it has substantive competition rulemaking authority.

That said, the FTC under Khan is unlikely to back down from further competition rulemaking. The FTC's 2022 Policy Statement does not mention *Chevron*, instead relying solely on the text and legislative history of the FTC Act in asserting its rulemaking authority.

More directly, the FTC will undoubtedly rely on *National Petroleum*, decided before *Chevron*, as the foundational bedrock of its authority to promulgate substantive rules targeted towards unfair methods of competition. As long as *National Petroleum* remains good law, the FTC can defensibly argue that it has this authority.

But, practically speaking, after *Loper Bright*, the FTC will not only have to defend its rulemaking authority, but also convince the court of the correctness of the FTC's statutory interpretation. It is hard to imagine a competition rule that the FTC might issue that would not be met with immediate challenge. The FTC's historical lack of competition rulemaking makes it difficult to say for sure how this is likely to play out, but we can expect the FTC to continue to pursue its stated goal of competition rulemaking regardless.

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