



FUTURE OF THE CFPB AND HOW RECENT SUPREME COURT RULINGS IMPACT THE REGULATORY AND COMPLIANCE LANDSCAPE

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COMPLIANCE UNIVERSITY

2024 Supreme Court Term: *CFSA v. CFPB*

- Started as a fight over payday lending rule:
 - Five-year rulemaking process culminating in 2017 final rule with two parts: (1) comprehensive underwriting requirement and (2) limits on payment collection attempts
 - Trade groups challenged the rule in Texas, asserting Administrative Procedure Act (APA) violations and other statutory and constitutional claims.
- Under new leadership, CFPB initiated new rulemaking to revoke first part of rule.
- District court in 2021 granted summary judgment for CFPB.
- Fifth Circuit panel found in 2022 that the CFPB's funding structure was unconstitutional, violating the Appropriation's Clause.

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- By 7-2 majority, Supreme Court found the CFPB’s funding structure to be constitutional and did not violate the Appropriations Clause when issuing the 2017 payday lending rule
- Justice Thomas: “Textually, the command is unmistakable—‘no money can be paid out of the Treasury unless it has been appropriated by an act of Congress,’” and that “[o]ur decisions have long given the Appropriations Clause this straightforward reading.”
- “Congress provided a clear statement of the purpose and source of the funds, which is sufficient to satisfy the Clause.”

2024 Supreme Court Term: *CFSA v. CFPB*

Implications:

- Removes possibility of unsettling a decade + of prior agency actions.
- Psychic and morale boost for leadership and staff.
 - Agency took a victory lap: “full steam ahead.”
 - But will CFPB reinvigorate institution-building efforts?
- Congressional efforts to legislate structural changes.
- But are existential challenges *really* dead?
 - New “earnings” argument.
 - Major questions doctrine?

2024 Supreme Court Term: *Loper*

- *Loper Bright Enterprises v. Raimondo*, 603 U.S. ____ (2024) - the Supreme Court held that the Administrative Procedure Act “requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority.”
 - CJ Roberts: While “careful attention to the judgment of the executive branch may help inform that inquiry,” and courts must respect when a statute delegates authority to an agency consistent with constitutional limits, “courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”
 - “*Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”

2024 Supreme Court Term: *Loper*

- Possible Impacts of the Ruling.
 - Agency Deference? Still Alive but More Muted. Still deference in policymaking and factfinding. Also *Skidmore* deference is the new normal.
 - Expect More Challenges to Agency Rulemaking. More litigation and a busy Fifth Circuit, or D.C. Circuit if administration changes. *See also Corner Post* decision which may open the floodgates.
 - More Informal Rulemaking and Regulation by Enforcement. Agencies may deemphasize traditional types of rulemaking in favor of advisory opinions, circulars, and enforcement. However, courts still will scrutinize and not defer to statutory interpretations in those agency deliverables.
 - More Measured Rulemaking. Agencies less likely to search through old statutes in an attempt to find a “creative” solution to a modern-day problem.

2024 Supreme Court Term: *Jarkesy*

- *SEC v. Jarkesy*, No. 22-859 (U.S. June 27, 2024) – Supreme Court significantly limits the categories of cases that may be tried before the SEC's in-house judges, known as administrative law judges.
 - CJ Roberts: The case “poses a straightforward question: whether the Seventh Amendment entitles a defendant to a jury trial when the SEC seeks civil penalties against him for securities fraud. ... It does. The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury.”
 - SEC is now required to bring any fraud claims seeking civil penalties in federal court, as opposed to litigating those cases in-house, unless a defendant waives their right to a jury trial.
- Possible impacts – CFPB’s push under Chopra to use administrative proceedings more aggressively is likely dead in the water.

How will this impact the Bureau's approach to Innovation?

- Background of efforts:
 - Cordray – Stood up Project Catalyst, which didn't realize potential. Some rulemakings touched on innovation issues, e.g., payday rule consideration of "wage advance products" and cash-flow underwriting
 - Kraninger – Formed Office of Innovation (OI) and, in 2019, issued new regulatory relief and sandbox policies. Tied to CFPB's approach to guidance at the time, i.e., alleviating regulatory ambiguity that chills product development
 - Chopra – Tech-skeptical? OI rebranded as OCI (Office of Competition and Innovation) and revoked most 2019 policies. Shift to providing guidance writ large. Recent statement : "We've terminated the program that handed out special legal immunities and favors to individual AI companies that they could exploit to gain an unfair advantage."
- Recent innovation related developments
 - Rulemaking:
 - FCRA rulemaking – would extend FCRA coverage to data brokers
 - 1033 rulemaking – tech understanding key to develop open banking regulations
 - Larger participant rule proposal covering digital payment apps – Big Tech companies (Apple, PayPal, etc.) would come under CFPB supervision. "Camel's nose under the tent" (supervision hook gets them access to everything)
 - Enforcement – took several enforcement actions against fintech companies (Chime, Solo Funds)
 - AI issues – no rulemaking and little guidance yet. 2019 interagency statement on alternative underwriting data. Sept. 2023 circular on Regulation B adverse action notice forms. Fair Lending lead just left agency

Questions?



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