Bloomberg Law

Federal Trade Commission Practice in Light of Chevron's Uncertain Fate

*Contributed by **Ryan Quillian** and **Jackie Fitch**, Covington & Burling LLP*

April 202

Context

The U.S. Supreme Court will issue decisions in ***Loper Bright Enterprises, Inc., et al., v. Raimondo***, **45 F.4th 359** (D.C. Cir. 2022), *cert. granted in part*, **143 S. Ct. 2429** (2023) and ***Relentless, Inc. v. United States Dep't of Commerce***, **62 F.4th 621** (1st Cir. 2023), *cert. granted in part*, **144 S. Ct. 325** (2023) before the end of June 2024. Those decisions may overturn or limit the scope of the deference that courts give agency interpretations of statutes under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, **467 U.S. 837** (1984).

The Court initially granted certiorari in *Relentless* , and subsequently consolidated it with *Loper Bright*, given that both cases present the same question for the Court to resolve: whether to overrule *Chevron* entirely or otherwise clarify the scope of *Chevron* deference. Justice Ketanji Brown Jackson is recused from *Loper Bright*—having previously served on the D.C. Circuit panel that decided that case—which means that there is the possibility of a 4-4 tie in *Loper Bright*. All nine justices will participate in the *Relentless* decision, which means the Court may make *Relentless* the lead opinion.

Introduction

The US Federal Trade Commission (FTC or Commission) is a government agency tasked with protecting the public from deceptive or unfair business practices and from unfair methods of competition. The FTC's remit includes the authority to investigate possible civil violations of the antitrust and consumer protection laws; bring civil enforcement actions related to alleged antitrust violations and unfair or deceptive acts or practices; conduct industry studies; and issue rules in certain circumstances.

This article discusses two recent actions by the FTC that appear to be efforts to expand its authority under **Section 5 of the FTC Act**, 15 U.S.C. § 45 (Section 5), and how those efforts could be affected by the Supreme Court's forthcoming decisions in *Loper Bright* and *Relentless*.

The first action involves the FTC's rulemaking authority. In January 2023, the FTC proposed its first competition-related rule in recent memory. Whether the FTC has the authority to issue rules relating to unfair methods of competition—as opposed to rules relating to unfair or deceptive acts or practices—is

an open question. The proposed rule would ban non-compete clauses in employment agreements in most circumstances as "unfair methods of competition" under Section 5.

Both the proposed non-compete ban and the FTC's ability to issue competition-related rules could be affected by the Supreme Court's *Loper Bright*/*Relentless* decisions. Those cases could also have an impact on the FTC's consumer protection rulemaking authority, which the agency has used more frequently in the past and which has been less controversial.

The second action relates to the FTC's administrative enforcement authority. In November 2022, the FTC issued an enforcement policy statement that dramatically expands the scope of what the agency considers "unfair methods of competition" under Section 5. The Commission's ability to reinterpret Section 5 could be limited if the Supreme Court overturns or restricts the scope of *Chevron* in *Loper Bright* and/or *Relentless*.

FTC Rulemaking

Chevron deference is potentially implicated whenever an agency implements a federal statute and that statute is challenged in court. Courts undertake a two-step analysis of an agency's construction of the statute it administers when applying *Chevron*: (1) they determine whether the statute is silent or ambiguous with respect to the specific issue, and, if so, (2) they analyze whether the agency's interpretation is a reasonable one. See *Chevron*, **467 U.S. at 843**-44.

The FTC has routinely used its rulemaking authority in the context of its consumer protection mission to address unfair or deceptive acts or practices, but the agency has rarely issued rules in the context of unfair methods of competition. However, the FTC recently proposed such a competition-related rule for the first time in decades. The ways in which limiting *Chevron* deference could affect each type of FTC rulemaking are discussed below.

Unfair Methods of Competition Rulemaking

The FTC has rarely issued rules under the unfair methods of competition prong of Section 5. In fact, there is considerable debate about whether the FTC has authority to issue such rules at all. See, e.g., Richard J. Pierce, Jr., ***Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?***, GWU Law School Public Law Research Paper No. 2021-42 (Sept. 30, 2021). Nevertheless, in January 2023, the FTC issued a **notice of proposed rulemaking** (NPRM) to ban most non-compete clauses in employment agreements as unfair methods of competition in violation of Section 5. The proposed rule would broadly ban non-compete agreements between employers and workers—with some limited exceptions—and would require employers to rescind any existing non-compete agreements with current and former workers.

In the NPRM, the FTC stated that it has the authority to issue the proposed rule pursuant to a combination of Section 5, which declares "[u]nfair methods of competition" unlawful, and **Section 6(g) of the FTC Act**, which authorizes the Commission to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act. However, it is unclear whether Sections 5 and 6(g) give the FTC the rulemaking authority it claims.

In particular, the debate about the FTC's authority focuses on the scope of Section 6, which does not specifically mention issuing rules or regulations related to unfair methods of competition and historically has been understood to give the FTC only the authority to issue procedural rules—not substantive regulations. See, e.g., **Pierce**, *supra,* at 5-10.

Given this preexisting debate, when the FTC issues a final version of the non-compete ban, it likely will face legal challenges, and the FTC may ask courts to defer to its procedural and substantive interpretations of the FTC Act under *Chevron*. In terms of procedure, the FTC could seek *Chevron* deference for its determination that that the authorizing sections of the FTC Act—Sections 5 and 6(g)—are ambiguous and could argue that the FTC reasonably interpreted those portions of the statute in determining that it has the authority to issue rules that regulate unfair methods of competition.

The agency could also ask the court to defer to its substantive determination that the phrase "unfair methods of competition" is ambiguous, and that it is reasonable to conclude that non-compete clauses in employment agreements constitute unfair methods of competition in violation of Section 5.

A decision by the Supreme Court overturning or limiting *Chevron* could not only lead to the invalidation of the FTC's proposed non-compete ban, but also could result in a judicial decision stating that the Commission does not have authority to issue competition-related rules at all. See *City of Arlington, Tex., v. F.C.C.*, **569 U.S. 290**, **297**-301 (2013) (holding that *Chevron* applies to an agency's interpretation of a statutory ambiguity that concerns its jurisdiction, or scope of the agency's statutory authority).

Consumer Protection Rulemaking

The Supreme Court's *Loper Bright* and/or *Relentless* decisions also could change the way courts analyze the FTC's consumer protection-related rules and regulations. The FTC engages in consumer protection rulemaking under the authority of the FTC Act, which prohibits "unfair or deceptive acts or practices," as well as other statutes that authorize more specific types of rules—e.g., the Children's Online Privacy Protection Act (**COPPA**). The overturning or modification of *Chevron* may have implications for the FTC's rulemaking authority to the extent the FTC faces legal challenges to its interpretation of the FTC Act or other statues it administers.

The FTC has regularly exercised its authority to issue consumer protection rules prohibiting unfair or deceptive acts or practices, and courts frequently consider whether the agency's interpretation of the

enabling statutes should receive deference under the *Chevron* framework. Certain courts have held that the FTC is not entitled to *Chevron* deference when interpreting consumer protection statutes. For example:

- In *Miller v. Herman*, **600 F.3d 726**, **733**-34 (7th Cir. 2010), the Seventh Circuit held that FTC's interpretations of the Magnuson-Moss Warranty Act are advisory and lack the force or effect of a statutory provision entitled to full *Chevron* deference.

- The Eleventh Circuit took a different position in *Davis v. Southern Energy Homes, Inc.*, **305 F.3d 1268**, **1277**-80 (11th Cir. 2002). The court held that the FTC regulation prohibiting binding arbitration under the Magnuson-Moss Warranty Act satisfied "step one" of *Chevron* because the statute was silent on the subject matter, but it concluded that the agency's interpretation was unreasonable in light of clear federal policy in favor of arbitration.

Other courts have applied *Chevron* deference when reviewing FTC interpretations of consumer protection statutes, such as the D.C. Circuit's opinion in *National Automobile Dealers Association v. FTC*, **864 F. Supp. 2**d 65 (D.D.C. 2012). In that case, the National Automobile Dealers Association challenged the FTC's interpretation of "use" of a consumer report within the Fair and Accurate Credit Transactions Act as exceeding the FTC's statutory authority and as arbitrary and capricious in violation of the Administrative Procedure Act (APA). In applying the first step of *Chevron*, the US District Court for the District of Columbia determined that "use" was not defined in the statute and was ambiguous because it could carry several definitions.

At the second step of the *Chevron* analysis, the district court determined that the FTC reasonably interpreted "use" within the language of the statute to promote its goal of providing consumers with accurate information about their credit reports. Therefore, the district court concluded that the agency's interpretation of "use" was entitled to *Chevron* deference. To the extent *Loper Bright* and/or *Relentless* narrows or overturns *Chevron*, lower courts will not be required to provide this level of deference to the FTC's interpretations of the consumer protection statutes it administers—even where the agency satisfies both prongs of the *Chevron* framework.

In addition, the FTC could face other challenges to its consumer protection rulemaking if *Loper Bright* and/or *Relentless* limits *Chevron*. For example, the FTC recently postponed the effective date of a final rule, the **Combating Auto Retail Scams Trade Regulation Rule**, which is intended to regulate unfair or deceptive acts or practices under the authority of the **Dodd-Frank Act**, the FTC Act, and the APA.

This delay followed a challenge to the rule in the Fifth Circuit on grounds that the new rule was arbitrary, capricious, and an abuse of discretion. See Petition for Review, Nat'l Auto. Dealers Ass'n v. FTC, **No. 24-60013**, Doc. 1-1 (5th Cir. Jan. 5, 2024). The forthcoming *Loper Bright/Relentless* decisions could provide

additional fodder to the challenging parties by allowing them to argue that the Fifth Circuit is not obligated to defer to the FTC's interpretation of the authorizing statutes.

More broadly, a narrowing or overturning in *Chevron* could result in a patchwork implementation of FTC rules, because individual courts would have more authority to determine the validity of agency regulations. To the extent that courts take varying approaches to upholding the validity of the FTC's rules, this variation could introduce significant confusion for parties tasked with nationwide consumer protection compliance—at least until a higher court resolves any conflicting approaches in the lower courts.

FTC Administrative Enforcement Actions

The framework that appellate courts have historically used to review the factual and legal conclusions in final FTC orders has not been based on *Chevron*. See **15 U.S.C. § 21(c)**; *FTC v. Indiana Fed'n of Dentists*, **476 U.S. 447**, **454** (1986). The FTC could, but rarely does, invoke *Chevron* to support its interpretation in an enforcement context. See, e.g., *U.S. v. Mead Corp.*, **533 U.S. 218**, **226**-27 (2001) (holding that administrative implementation of a statute that carries the force of law (i.e., a rulemaking or an adjudication) qualifies for *Chevron* deference when it appears that Congress delegated that authority to the agency generally, and that the agency interpretation claiming deference was promulgated in the exercise of that authority).

A final decision issued by the FTC can be appealed to a federal appellate court, which determines whether the FTC's findings of fact were supported by "substantial evidence." See **15 U.S.C. § 21(c)**; *ProMedica Health Sys., Inc. v. FTC*, **749 F.3d 559**, **564** (6th Cir. 2014). This is a statutory standard of review of Commission orders, rather than deference under *Chevron*. See **15 U.S.C. § 21(c)**; *Indiana Fed'n of Dentists*, **476 U.S. at 454**. The legal issues addressed by the Commission—identification of governing legal standards and their application to facts found—are reviewed by courts *de novo*, although appellate courts may give "some" deference to the Commission's informed judgment given the agency's expertise. See, e.g., *Indiana Fed'n of Dentists*, **476 U.S. at 454**; *ProMedica*, **749 F.3d at 564**; *North Carolina State Bd. of Dental Examiners v. FTC*, **717 F.3d 359**, **370** (4th Cir. 2013).

Thus, *Loper Bright/Relentless* may have only a minimal impact on the FTC's existing practice. However, the Supreme Court's decisions in those cases may affect the FTC's efforts to expand its enforcement authority under Section 5, particularly if the agency were to seek *Chevron* deference for its interpretation of the breadth of conduct that falls under the phrase "unfair methods of competition."

The FTC's recent **Section 5 enforcement policy statement** dramatically **expands** the scope of what the agency historically considered "unfair methods of competition" under Section 5. Most of the agency's interpretation of Section 5 likely will focus on what is "unfair," which the policy statement defines as conduct that goes "beyond competition on the merits." To determine whether the alleged conduct is unfair, the FTC says that it will evaluate two criteria: (1) whether the conduct may be "coercive,

exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature [and i]t may also be otherwise restrictive or exclusionary," and (2) whether the conduct "tend[s] to negatively affect competitive conditions."

The policy statement says that the FTC intends to evaluate those two criteria on a sliding scale—i.e., the more evidence of one, the less the Commission believes that there is need for evidence of the other. Notably, the Commission will not evaluate these two criteria pursuant to a traditional antitrust rule-of-reason analysis, but will instead focus on whether the conduct "has a tendency to generate negative consequences."

There is very little case law on how *Chevron* would apply to the FTC's interpretation of Section 5 in the context of an enforcement action. The FTC often alleges Section 5 violations along with violations of other antitrust laws—e.g., the Sherman Act or the Clayton Act. The agency has rarely brought "standalone" Section 5 enforcement actions alleging unfair methods of competition. As a result, it is not entirely clear how the agency may seek to use *Chevron* in interpreting its unfair methods of competition enforcement authority.

But the FTC might argue in a future legal challenge that cases involving other federal agencies suggest that the FTC is entitled to deference under *Chevron*—depending on the Supreme Court's decisions in *Loper Bright* and *Relentless*. Whether courts would be receptive to a request from the FTC for *Chevron* deference is an open question. But courts have denied such requests in the past. For example, in Davis v. Southern Energy Homes, Inc., the court held that the FTC's statutory interpretation was not entitled to *Chevron* deference—even though the court held that the statutory language was ambiguous—because the agency's interpretation of the relevant statute was unreasonable.

In *Wilson v. Commodity Futures Trading Commission*, **322 F.3d 555** (8th Cir. 2003), the Eighth Circuit applied the *Chevron* framework and upheld as reasonable a determination by the Commodity Futures Trading Commission (CFTC) in an enforcement action alleging that an individual had violated the **Commodity Exchange Act** (CEA). Specifically, the court reviewed a challenge to the CFTC's interpretation of the CEA's prohibition against "wash sale" transactions, a term not defined in the CEA. A wash sale refers to a transaction in which an investor sells or trades a security at a loss, then purchases the same or substantially similar security within a short period of time.

The court explained that, under the *Chevron* standard of deference, the CFTC's interpretation of what constituted participating in a "wash sale" would "be given controlling weight unless it is 'arbitrary, capricious, or manifestly contrary' to the CEA." In deference to the agency, the court in *Wilson* held that the CFTC's findings that: (1) the transactions at issue constituted a "wash sale" and (2) the individual knowingly participated in these transactions were supported by the weight of the evidence, thus the agency had reasonably interpreted the conduct to constitute a "wash sale" under the CEA.

In a future challenge to an FTC action, the agency may argue that the court should apply *Chevron* deference to the agency's interpretation of what conduct constitutes an "unfair method of competition"—which, similar to "wash sale" in the CEA, could be considered an undefined term in the FTC Act—and therefore a violation of Section 5. To qualify for *Chevron* deference, the FTC would need to demonstrate that (1) Section 5 is either silent or ambiguous on what constitutes an unfair method of competition; and (2) the FTC's interpretation of the conduct as an unfair method of competition is not unreasonable. If the agency met those two prongs—and it is not clear that it could, particularly if the challengers made strong arguments that the FTC failed to meet one or both of the prongs—it is conceivable, but far from clear, that courts would uphold the FTC's interpretation of Section 5 after applying *Chevron* deference.

But if the Supreme Court overturns or limits the scope of *Chevron* deference, the FTC's expansive interpretation of Section 5 is less likely to withstand judicial scrutiny. For example, courts would not be required to defer to the FTC's view—as expressed in its enforcement policy statement—that Section 5 prohibits the myriad forms of conduct that the agency now claims are illegal because they violate "the spirit of the antitrust laws."

As a result, *Loper Bright* and *Relentless* have the potential to negatively affect the FTC's attempt to expand its enforcement authority under Section 5, particularly with respect to conduct that the FTC's Section 5 enforcement policy statement says "may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a 'gap' in those laws." An outcome limiting the FTC's attempt to fill in a "gap" in the law would be consistent with the theme from other recent decisions by the Supreme Court that Congress—not an agency—has primary responsibility for setting policy if there is a perceived gap in the laws, especially where the gap is on an important and contested issue. See, e.g., *West Virginia v. Env't Prot. Agency*, **597 U.S. 697**, **723** (2022).

Practical Considerations

Even if the court overturns *Chevron* entirely, agencies' statutory interpretations may still be afforded some deference under the *Skidmore* doctrine, which permits, but does not require, courts to defer to an agency's statutory interpretation. See *Skidmore v. Swift & Co.*, **323 U.S. 134**, **140** (1944). Under *Skidmore*, "rulings, interpretations and opinions" of agencies are not controlling on the courts, but they do constitute a body of "informed judgment" that courts can resort to for guidance given the agency's experience and expertise.

Skidmore is a more flexible doctrine than *Chevron,* and it allows courts to take more or less deferential approaches to agency interpretations based on a broad variety of factors that together reflect the agency interpretation's "power to persuade." However, it is unclear how uniformly *Skidmore* deference would be applied, and indeed *Skidmore* has often led to inconsistent results in prior cases where it has come into play. As a result, even with *Skidmore* as a backstop, the FTC may face headwinds in defending its proposed non-compete ban and its attempt to expand the definition of "unfair methods of competition."