

# WORKING WITH GOVERNMENTAL AGENCIES UNDER INCREASED JUDICIAL OVERSIGHT

After a contentious confirmation process, Brett Kavanaugh is now a Justice of the United States Supreme Court. The new composition of the Court could change one of the doctrines currently in place. Here's how that could affect your business.

By Christopher R. Hogle

**W**ith a new Justice on the United States Supreme Court, attention turns to judicial doctrines that might be impacted by the change. One of those doctrines is "Chevron Deference," named after a 1984 US Supreme Court decision: *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.

## HOW ADMINISTRATIVE AGENCIES AFFECT BUSINESSES

Contrary to the teachings of *Schoolhouse Rock!* most laws are not enacted by the legislative branches of federal and state governments, but by executive agencies, which, according to the current chief justice of the Supreme Court, "pok[e] into every nook and cranny of daily life." Agencies regulate activity within a scope of authority defined by statute, through the issuance of regulations, permits, and enforcement decisions.

Agency actions can be challenged in the courts. A business whose operations fall within an agency's scope of authority may, for example, challenge an agency's regulations or permit requirements as too onerous. Agency decisions may also be challenged as too permissive by non-governmental watchdog groups. Such challenges frequently turn on whether the agency acted within the scope of its statutorily defined authority, and often, the statute defining the scope of authority is unclear as it relates to the situation at hand.

## THE CHEVRON DEFERENCE DOCTRINE & HOW IT AFFECTS COURT CHALLENGES TO AGENCY ACTIONS

Enter Chevron Deference, which states that courts should defer to an agency's interpretation of unclear governing statutes. A spin-off of Chevron Deference is the doctrine that courts should defer to agencies' interpretations of the agencies' own regulations.

Supporters of Chevron Deference point out that, with their expertise and familiarity with regulated activity, agencies are better positioned than courts to interpret the statutes and regulations. With Chevron Deference, along with other principles of administrative law, disputes are frequently won or lost at the agency level, and the court's role is to ensure that agency decision-making does not stray beyond a wide range of discretion.

In a largely pro-industry regulatory climate, like Utah's, Chevron Deference is a benefit to business. Under current Utah law and

policy, State agency personnel generally help businesses comply with applicable requirements, and they are much more accessible to businesses, and accountable to policy-makers than judges.

But Chevron Deference has its detractors. Outgoing Justice, Anthony Kennedy questioned the doctrine, along with several sitting Supreme Court justices, including newly-appointed Justice, Neil Gorsuch. Furthermore, newly appointed Justice Brett Kavanaugh, has written critically of Chevron Deference, causing many to believe that the days of Chevron Deference are numbered.

## HOW TO COPE IN A POST-CHEVRON DEFERENCE WORLD

Chevron Deference is already a thing of the past in Utah. In recent years, the Utah Supreme Court has overturned its precedent applying Chevron Deference to decisions made by Utah agencies and municipal land use authorities. Without Chevron Deference, court challenges to agency interpretations of rules and statutes have a greater chance of success.

But there is an aspect of agency decision-making for which judicial deference remains. The courts have long deferred to agency factual findings, which are conclusions about the circumstances surrounding the situation at hand. Agency decisions are generally made in two steps: potentially applicable requirements are gleaned from governing statutes or rules, and the factual circumstances are reviewed to determine which, if any, of the requirements are applicable and satisfied or unmet.

With the demise of Chevron Deference in Utah, and if federal courts follow the Utah Supreme Court's rejection of the doctrine, businesses with good relationships with agencies should, where possible, urge agencies to assume, without adopting, restrictive interpretations of legal requirements. Business owners should then present the agency with evidence of facts that demonstrate the inapplicability of, or compliance with such requirements.

Regardless of the ultimate fate of Chevron Deference, relationships and communication with agency staff are critical to identify how the agency views the requirements. ■

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