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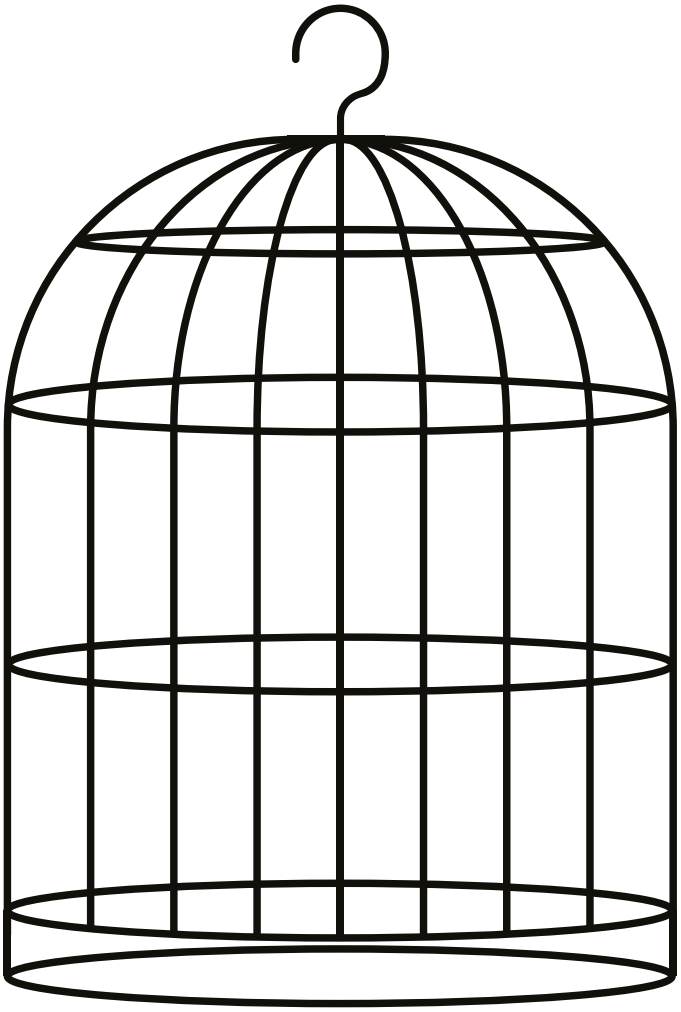

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LOPER BRIGHT AND ANTITRUST: LIMITED IMPACT ON ENFORCEMENT, BUT A CLEAR CONSTRAINT ON FTC RULEMAKING

By David Kully, Lynn Calkins & Ken Racowski

On June 28, 2024, the Supreme Court ruled in *Loper Bright Enterprises v. Raimondo* that courts, not agencies, are responsible for interpreting federal statutes and that agency interpretations of statutes are entitled to respect, but not deference. In doing so, the Court expressly overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*. The significance of the *Loper Bright* decision on the power of federal administrative agencies has appropriately received a great deal of attention since its release, with the impact of the decision on regulatory interpretations and enforcement likely to play out over the coming several years as businesses across industries mount challenges to applicable regulations.

On June 28, 2024, the Supreme Court ruled in *Loper Bright Enterprises v. Raimondo* that courts, not agencies, are responsible for interpreting federal statutes and that agency interpretations of statutes are entitled to respect, but not deference.[2] In doing so, the Court expressly overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[3] The significance of the *Loper Bright* decision on the power of federal administrative agencies has appropriately received a great deal of attention since its release,[4] with the impact of the decision on regulatory interpretations and enforcement likely to play out over the coming several years as businesses across industries mount challenges to applicable regulations.

For the antitrust enforcement agencies – the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") – *Loper Bright* will likely have a more limited impact.

Where *Loper Bright* will likely have greatest impact is over the FTC's rulemaking activities. Indeed, since *Loper Bright*, courts reviewing the FTC's proposed new rules banning employers from subjecting employees to non-compete restrictions have not deferred to the FTC's view that the rules are allowed under its authority to prevent unfair methods of competition. New regulations proposed by the FTC under the Hart-Scott-Rodino ("HSR") Act will similarly be scrutinized closely for their consistency with the HSR Act.

Otherwise, the DOJ and FTC act in the antitrust context primarily through law enforcement actions and never received *Chevron* deference for their interpretations of the statues they are charged with enforcing. Courts also were never required to grant *Chevron* deference to guidelines and policy statements the antitrust agencies issued. DOJ and FTC published guidance has often been viewed as persuasive and helpful and followed by courts in antitrust enforcement actions and *Loper Bright* expressly advises courts to pay appropriate respect to agency statutory interpretations, including in published policy statements. But *Loper Bright* also refers to interpretations "issued contemporaneously with the statute at issue, and which have remained consistent over time" as "especially useful," which could be interpreted by courts as license to ignore major recent revisions to DOJ and FTC policy positions and limit their influence.

I. FTC RULEMAKING

Loper Bright has been invoked already in challenges to FTC regulations, and it likely will continue to be an impediment to aggressive exercise by the FTC of its rulemaking authority going forward. On May 7, 2024, the FTC published the final version of a rule that bans non-compete restrictions imposed by employers on their employees as an unfair method of competition under Section 5 of the FTC Act.[5] The rule was challenged immediately and enjoined on a nationwide basis on August 20, 2024 in *Ryan, LLC v. FTC*.[6] The court relied on *Loper Bright* in concluding that the FTC exceeded its statutory authority in promulgating the rule.[7]

In addition to competition-related rules under the FTC Act, the FTC also promulgates rules interpreting what information merging parties need to submit to the antitrust agencies under the Hart-Scott-Rodino (HSR) Act. Before *Loper Bright*, those rules had been granted *Chevron* deference in some cases.[8] In June 2023, the FTC proposed major revisions to its HSR rules, under which merging parties would need to submit significantly more information to the antirust agencies before commencing any transactions requiring premerger notification.[9] The FTC has not yet issued final rules, but those too will likely be subject to immediate challenge, with *Chevron* deference no longer available to the FTC in defending against any challenge.

2 144 S. Ct. 2244, 2261, 2267-68 (2024).

3 467 U.S. 837 (1984). See *Loper Bright*, 144 S. Ct. at 2273 ("*Chevron* is overruled.").

4 *See, e.g.,* Jess Bravin, "Supreme Court Pares Back Federal Regulatory Power: Justices abandon 1984 precedent giving agencies leeway to interpret their own powers," *Wall Street Journal* (June 28, 2024); Adam Liptak, "Justices Limit Power of Federal Agencies, Imperiling an Array of Regulations: A foundational 1984 decision had required courts to defer to agencies' reasonable interpretations of ambiguous statutes, underpinning regulations on health care, safety and the environment," *New York Times* (June 28, 2024).

5 "Non-Compete Clause Rule," 89 Fed. Reg. 38342 (May 7, 2024), *available at* https://www.govinfo.gov/content/pkg/FR-2024-05-07/pdf/2024-09171.pdf.

6 No. 3:23-cv-00986, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

7 *Id.* at *8, *14. A second court, post-*Loper Bright* also reviewed the FTC's non-compete rule and reached the opposition conclusion. *See ATS Tree Servs., LLC v. FTC*, No. 2:24-cv-01743, 2024 WL 3511630, at *13 & n.16, *17 (E.D. Pa. Jul. 23, 2024) (observing that *Loper Bright* required the court to exercise its independent judgment in reviewing the FTC Act and "find[ing] it clear that the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition" and that the FTC "acted within its authority under the Act in designating all non-compete clauses as 'unfair methods of competition'").

8 See *Pharm. Res. & Mfrs. of Am. v. FTC*, 44 F. Supp. 3d 95, 114-15 (D.D.C. 2014); *Mattox v. FTC*, 752 F.2d 116, 123–24 (5th Cir. 1985). But see *Lieberman v. FTC,* 771 F.2d 32, 37 (2d Cir. 1985) (denying *Chevron* deference).

9 See Notice of Proposed Rulemaking, "Premerger Notification; Reporting and Waiting Period Requirements," 88 Fed. Reg. 42178 (June 29, 2023), *available at* https://www.govinfo.gov/content/pkg/FR-2023-06-29/pdf/2023-13511.pdf.

II. ANTITRUST AGENCY GUIDELINES AND POLICY STATEMENTS

The DOJ and FTC have promulgated guidelines and policy statements that explain how they interpret the statues they are charged with enforcing and describe how they exercise their discretion in determining when to bring enforcement actions. Informal agency policy statements and enforcement guidelines lacking the "force of law" were not entitled to *Chevron* deference even before *Loper Bright*[10] and will still only receive whatever respect reviewing courts choose to afford them.[11]

As applied to the agencies' Merger Guidelines, which lay out the analytical framework under which the DOJ and FTC evaluate whether proposed mergers are likely to harm competition and violate Section 7 of the Clayton Act,[12] courts have regularly referred to the Guidelines in decisions in agency merger challenges, but without granting significant deference.[13] However, because the DOJ and FTC recently extensively revised their Merger Guidelines,[14] and the Guidelines have thus not "remained consistent over time," courts after *Loper Bright* might place even less weight on the Guidelines when evaluating whether mergers challenged by the DOJ or FTC should be blocked under Section 7 of the Clayton Act.[15]

The FTC might also struggle after *Loper Bright* with achieving court acceptance of its reinterpretation of what constitutes unfair methods of competition under Section 5 of the FTC Act, which the FTC published in a 2022 policy statement that purports to "supersede[] all prior FTC statements and advisory guidance" on the subject.[16] A dissenting FTC Commissioner characterized the FTC's policy statement as "a radical departure from the Commission's recent enforcement efforts, and a dramatic expansion of the agency's purported authority."[17] Not only will the FTC be unable to seek *Chevron* deference for its views as to the proper interpretation of Section 5 of the FTC Act, courts might view the FTC's "radical departure" from past interpretations as a reason to pay little respect to the FTC's recent views if it challenges as an unfair method of competition conduct not previously found to be within the reach of Section 5 of the FTC Act. Although *Loper Bright* might constrain the FTC in pushing the envelope in its interpretation of Section 5 of the FTC Act, the practical implications might be limited because the FTC has not yet tested its reinterpretation in a contested "standalone" Section 5 case – challenging conduct under Section 5 that would not also violate the Sherman Act or Clayton Act – and such standalone Section 5 cases have generally been rare.

III. ANTITRUST AGENCY ENFORCEMENT ACTIONS

In the 40 years during which *Chevron* set the standard for court review of agency interpretations of their governing statutes, the DOJ and FTC did not receive *Chevron* deference for their statutory interpretations of the Sherman Act, Clayton Act, or FTC Act in the context of antitrust enforcement actions.

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10 See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference.").

11 See *United States v. Mead Corp.*, 533 U.S. 218, 235, 237-39 (2001) (observing that *Chevron* did not overrule *Skidmore* and remanding for consideration whether agency opinion warranted respect under *Skidmore*).

12 U.S. Department of Justice and Federal Trade Commission, Merger Guidelines (2023), at 1 ("These Merger Guidelines identify the procedures and enforcement practices the Department of Justice and the Federal Trade Commission . . . most often use to investigate whether mergers violate the antitrust laws."), *available at* https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

13 See e.g. *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) ("[T]he court is not bound by, and owes no particular deference to the [Merger] Guidelines, [but] this court considers them a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers."); *St. Alphonsus Med. Ctr. Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 784 n.9 (9th Cir. 2015) ("Although the Merger Guidelines are 'not binding on the courts,' . . . they are often used as persuasive authority.'" (citations omitted)); *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 232 (S.D.N.Y. 2020) ("The Court recognizes that the Merger Guidelines are undoubtedly helpful in analyzing the competitive impact of mergers, and therefore has endeavored to give them due consideration throughout this analysis. The Merger [G]uidelines, however, are not ultimately binding on the courts.").

14 See Press Release, "Justice Department and Federal Trade Commission Release 2023 Merger Guidelines" (Dec. 18, 2023) (announcing overhaul of 2010 Merger Guidelines to "reflect modern market realties, advances in economics and law, and the lived experiences of a diverse array of market participants"), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines.

15 See *Loper Bright*, 144 S. Ct. at 2262 ("[C]ourts may . . . seek aid from the interpretations of those responsible for implementing particular statutes. . . . [I]nterpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning.").

16 See "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the [FTC] Act" (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

17 See "Dissenting Statement of Commissioner Christine S. Wilson Regarding the 'Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf.

The Supreme Court, however, observed independently in *FTC v. Indiana Federation of Dentists* that the FTC's view of what "commercial practice[s] are to be condemned as 'unfair'" under Section 5 of the FTC Act was entitled to "some deference" from courts.[18] The contours of the Supreme Court's "some deference" directive has not subsequently been explored in any depth and it is unlikely to be implicated by *Loper Bright*, which itself suggested that reviewing courts "seek aid from" agency statutory interpretations, particularly interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time,"[19] a standard that, as a practical matter, likely does not deviate substantially from the vague "some deference" standard.

Loper Bright also likely will not change the standards appellate courts apply going forward when reviewing findings by the FTC following an adjudicated enforcement action. Those are established by statute, with FTC findings of fact "conclusive" if supported by "substantial evidence."[20]

IV. CONCLUSION

Loper Bright will undoubtedly have a major impact on federal administrative rulemaking, but a more limited impact on antitrust enforcement, where the DOJ and FTC do most of their work through actions to enforce the Sherman Act, Clayton Act, and FTC Act. The FTC's rulemaking ambitions might be curtailed, and new, more-expansive interpretations of the antitrust statutes less likely to be adopted by the courts, but business will remain largely as usual post-*Loper Bright* in the antitrust world.

18 476 U.S. 447, 454 (1986).

19 *Loper Bright*, 144 S. Ct. at 2262 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

20 See 15 U.S.C. § 21(c).

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