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Client Alert | Investment Management and Securities Litigation & Enforcement

Supreme Court Ruling Facilitates Challenges to Administrative Rules

The U.S. Supreme Court issued a ruling in *Corner Post v. Board of Governors of the Federal Reserve System*[1] on July 1 with significant implications for agency rulemaking, potentially allowing for long-settled rules to be challenged. Resolving a 6-1 circuit split in favor of the minority position, Justice Amy Coney Barrett delivered the majority opinion of the court, holding that the statute of limitations for challenging final agency action under the Administrative Procedure Act of 1946 (APA) commences upon the actual injury to the plaintiff bringing the action and not upon the finalization of the rule at issue.

Overview of the APA and Applicable Statute of Limitations

The court's decision in *Corner Post* focuses on the statute of limitations applicable to challenges to agency rulemaking under the APA. The case addresses the interplay between Sections 702 and 704 of the APA and the six-year statute of limitations applicable to those provisions.

Section 702 of the APA "authorizes persons injured by agency action to obtain judicial review by suing the United States or one of its agencies, officers, or employees."[2] Section 704 of the APA limits the types of agency actions that can be reviewed to only "final agency actions" that occur upon the completion of the agency's decision-making process.[3] Read together, Sections 702 and 704 allow a party injured by a final rulemaking to seek judicial review of the rule.

Such judicial review is not boundless, however. Any such action must be commenced within a six-year period pursuant to the statute of limitations contained in 28 U.S.C. § 2401, which states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[4]

Factual Background of the Case

The *Corner Post* case involves a challenge to rules governing interchange fees charged on debit card transactions. In 2010, the Durbin amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the Federal Reserve Board to set "standards for assessing whether the amount of any interchange transaction fee … is reasonable and proportional to the cost incurred by the issuer with respect to the transaction."[5] Pursuant to this authority, the Federal Reserve Board adopted a final rule in 2011, Regulation II, that set a

[1] *Corner Post v. Board of Governors of the Federal Reserve System*, No. 22–1008 (U.S. July 1, 2024).

[2] *Id.* at 4 (citing APA, 5 U.S.C. § 702).

[3] *Id.* at 5 (citing APA, 5 U.S.C. § 704).

[4] 28 U.S.C. § 2401(a).

[5] *Corner Post*, slip op. at 2 (citing 15 U.S.C. § 1693o-2(a)(3)(A)).

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"maximum interchange fee of $0.21 per transaction plus .05% of the transaction's value."[6] A group of retailers and retail industry trade associations sued to set the rule aside four months later based on an argument that the rule imposes costs not specified in the statute. The district court agreed, but the U.S. Court of Appeals for the D.C. Circuit reversed, "concluding 'that the Board's rules generally rest on reasonable constructions of the statute,'" and upholding the validity of the rule.[7]

Roughly six years after the Federal Reserve Board adopted its final rule, Corner Post Inc. commenced business in 2018 as a truck stop and convenience store in North Dakota. In 2021, frustrated with the interchange fees, it joined a suit brought against the Federal Reserve Board arguing Regulation II is unlawful because it allows payment networks to charge higher fees than the statute permits. The district court dismissed the suit as barred by the six-year statute of limitations applicable to rule challenges under the APA and the Eighth Circuit affirmed. The Eighth Circuit distinguished between "facial challenges" to a rule (such as Corner Post's challenge) and "challenges to a rule 'as-applied' to a particular party."[8] The Eighth Circuit held that the six-year statute of limitations for challenging rules under the APA commences with "'publication of the [final] regulation.'"[9]

The Supreme Court noted that in taking this position, the Eighth Circuit deepened a circuit split by taking a similar position to the Fourth, Fifth, Ninth, D.C. and Federal circuits, each of which stood in contrast with the Sixth Circuit's minority position that the limitation period begins running "when the plaintiff is injured by agency action, even if that injury did not occur until many years after the action became final."[10]

The Supreme Court's Holding

The Supreme Court began its analysis by explaining that Section 702 of the APA provides a cause of action to injured parties, while Section 704 permits judicial review only when a rule is final.[11] The court then focused on the language of the applicable statute of limitations (28 U.S.C. § 2401(a)). The court reviewed the wording of the statute of limitations: "'[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*.'"[12] Focusing on the phrase "after the right of action first accrues," the court reviewed a variety of precedential and contemporaneous understandings of what it means for an action to "accrue."[13]

The court concluded that Section 2401(a) operates as a statute of limitations (i.e., a time limit for suing in a civil case after injury) rather than a statute of repose (i.e., an outer time limit on the ability to bring a case regardless of when the plaintiff because aware of the injury).[14] "A claim accrues when the plaintiff has the right to assert it in court — and in the case of the APA, that is

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[6] *Id.*

[7] *Id.* at 2-3.

[8] *Id.* at 3.

[9] *Id.* at 3-4.

[10] *Id.* at 5.

[11] *Id.* at 5 (quoting 28 U.S.C. § 2401(a)).

[12] *Id.* at 5-6.

[13] *Id.* at 1.

[14] *Id.* at 5.

when the plaintiff is injured by final agency action,"[15] the court said. As a result, a potential plaintiff has six years after being injured by final agency action to bring a challenge to that rule under the APA.

Justice Ketanji Brown Jackson penned a dissent, which Justices Elena Kagan and Sonia Sotomayor joined. The dissenting opinion argues that the majority misread the statute of limitations by interpreting "accrual" to apply to a plaintiff-specific injury.[16] The dissent reasoned that instead, cases involving a facial challenge to administrative rules, which by their nature are not linked to any one individual's specific injury, accrue when the rule purportedly first created injury (i.e., at the finalization of the rule) without regard to any particular plaintiff.[17] The dissent maintained that the majority's approach ignored Congress's policy preference, and citing to a friend-of-the-court brief, noted the majority's holding would undermine the "'[s]tability, predictability, and consistency [that] enable[s] small businesses to survive and thrive.'"[18]

The majority opinion discounted these concerns. It stated that "'pleas of administrative inconvenience … never justify departing from the statute's clear text.'"[19] "Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies. It did not."[20] Further, the majority opinion noted that:

> [T]he opportunity to challenge agency action does not mean that new plaintiffs will always win or that courts and agencies will need to expend significant resources to address each new suit. Given that major regulations are typically challenged immediately, courts entertaining later challenges often will be able to rely on binding Supreme Court or circuit precedent. If neither this Court nor the relevant court of appeals has weighed in, a court may be able to look to other circuits for persuasive authority. And if no other authority upholding the agency action is persuasive, the court may have more work to do, but there is all the more reason for it to consider the merits of the newcomer's challenge.[21]

Justice Brett Kavanaugh also wrote a concurring opinion to emphasize his view that the APA authorizes vacatur of agency rules. Noting that the U.S. government "has advanced a far-reaching argument that the APA does not allow vacatur," Justice Kavanaugh wrote to reiterate his view that if the government's argument was correct, then the APA "would supply no remedy for most other *unregulated* but adversely affected parties" such as Corner Post, "who traditionally have brought, and regularly still bring, APA suits challenging agency rules."[22] Justice Kavanaugh rejected this reading and expressed his view that the "APA authorizes vacatur of agency rules." [23]

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[15] *Id.* at 1.

[16] *Id.* at 5-6 (Jackson, J., dissenting).

[17] *Id.* at 9.

[18] *Id.* at 22.

[19] *Id.* at 20 (internal quotations omitted) (quoting *Niz-Chavez v. Garland*, 593 U.S 155, 169 (2021).

[20] *Id.*

[21] *Id.* at 21.

[22] *Id.* at 2 (Kavanaugh, J., concurring).

[23] *Id.*

Takeaways

This Decision Is a Very Powerful Complement to Loper Bright *…*

As we discussed in a previous client alert on the recent *Loper Bright Enterprises v. Raimondo* decision, the court recently overruled its prior position in *Chevron U.S.A. v. Natural Resources Defense Council* making clear that federal courts are no longer required to give deference to agency interpretations of federal statutes that are silent or ambiguous.[24] That decision provides courts with far more flexibility to evaluate whether a rule is an appropriate implementation of statutory authority. However, *Loper Bright* does not make it easier to bring such cases; *Corner Post* does.

Read plainly, *Corner Post* would allow every new commercial entity or persons that only recently have been harmed by an administrative rulemaking to bring facial challenges to pre-existing rules, regardless of when those rules were adopted. Although prior cases determining the validity of a rule would continue to control, any rule that has yet to be contested would be fair game. Although the majority discounts the impact of this implication of the opinion, *Corner Post* stands to greatly expand the ability of the public to make facial challenges to regulatory rulemakings.

… But Corner Post *Will Likely Not Have an Immediate Effect on SEC Rulemaking …*

Even so, *Corner Post* may not have any immediate effect on the ability of regulated entities to challenge the U.S. Securities and Exchange Commission's (SEC) prior rulemakings. The Investment Advisers Act of 1940 (Advisers Act) has a "direct review" provision that allows for circuit court review of "orders" issued by the SEC. For example, Section 213(a) states:

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the court of appeals of the United States within any circuit wherein such person resides or has his principal office or place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part.[25]

The D.C. Circuit has held that this provision not only encompasses challenges to SEC orders under the Advisers Act but also to rulemakings under the act.[26] Citing to earlier binding precedent dealing with a similar provision of the Bank Holding Company Act,[27] the D.C. Circuit has noted that the term "order" as used in Section 213(a) should be read as also encompassing "rules" as well, even though these are very different concepts under the APA.[28] The D.C. Circuit has also held that this is the exclusive review provision for SEC rules adopted under the Advisers Act, which means that direct challenge under the APA is not available.[29]

Furthermore, because the Securities Act of 1933 (Securities Act) and the Investment Company Act of 1940 (Company Act) each contain a similarly worded provision,[30] there is a likelihood that

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[24] *Loper Bright Enterprises v. Raimondo*, No. 22–451 (U.S. June 28, 2024).

[25] Section 213(a), Advisers Act.

[26] *New York Republican State Commission v. SEC*, 799 F.3d 1126, 1134 (D.C. Cir. 2015).

[27] See *Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977).

[28] *New York Republican State Commission*, 799 F.3d at 1132.

[29] *Id.* at 1134.

[30] See Section 9 of the Securities Act and Section 43(a) of the Company Act.

those provisions will be interpreted consistently by the D.C. Circuit. A standard tool of statutory construction is the canon of "in pari materia" (Latin for "in the same matter"). This canon of construction holds that statutes that govern similar subject matter and use similar statutory wording should be interpreted in a harmonious manner. The federal securities laws are generally viewed as "sister statutes" that should be interpreted in a harmonious manner pursuant to this canon.[31]

As a result, it is likely that the D.C. Circuit would read these statutes similarly, and thus *Corner Post* would unlikely affect the limited review available under these statutes.[32] In the D.C. Circuit, at least, these direct review provisions would likely be held to be the exclusive route for challenging SEC rules, such that the APA (and by extension, *Corner Post*) would not come into play.

… However, Corner Post *Could Still Affect Challenges to SEC Rulemaking*

Certain of the direct review provisions interpreted by the D.C. Circuit refer only to "orders." If "orders" were defined differently to exclude "rules," the APA would be available, and *Corner Post* would have relevancy to challenges to SEC rules.

Such a change in the D.C. Circuit is highly unlikely because the court's position is established, bedrock precedent the court is unlikely to change.[33] However, other circuits are not bound by the decisions of their sister circuit courts, and thus a different result may be possible in the absence of precedent in a different circuit.

The D.C. Circuit's position in *Investment Company Institute v. Board of Governors of the Federal Reserve System* that an "order" includes a "rule" does not appear to have been addressed by all of the other circuits, and at least one other circuit appears to have taken a contrary interpretation.[34] As a result, the stage is set for a plaintiff to argue that the direct review provisions of the federal securities laws — contrary to the D.C. Circuit's view — relate solely to orders and not to rules. This view, if adopted, would remove any impediment in that circuit to challenging federal securities law rules under the APA and *Corner Post*.

Such an argument will likely find an open-minded audience in other courts (including the Supreme Court). The underlying reasoning of the D.C. Circuit that "order" includes "rulemaking" is based, in essence, on the view that "order" is subject to competing meanings, and "the purposes underlying [the provision] will best be served if 'order' is interpreted to mean any

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[31] See, e.g., *National Association of Private Fund Managers v. SEC*, 103 F.4th 1097, 1111 (5th Cir. 2024) (Advisers Act and Company Act should be read harmoniously); *Axelrod & Co. v. Kordich, Victor & Neufeld*, 451 F.2d 838, 843 (2d Cir. 1971) (the 1933 Act and Securities Exchange Act of 1934 (1934 Act) should be read in pari materia).

[32] With one exception, however: The D.C. Circuit has held that the 1934 Act provides for circuit court review of a limited number of rules due to the provisions of Section 25(b)(1) of that act, which is a provision that is not present in the other federal securities laws. See *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013).

[33] See *New York Republican State Commission*, 799 F.3d at 1133 (upholding the application of *Investment Company Institute* and noting, "To the extent the plaintiffs ask that we overturn an earlier decision because we disagree with it, that we cannot do. We are obliged to follow the law of the circuit … and *Investment Company* is the law of the circuit. We are bound to follow it." (citations omitted)).

[34] *PBW Stock Exchange v. SEC*, 485 F.2d 718, 722 (3d Cir. 1973) ("Rather, § 25(a) allows review here only when an order has been entered by the Commission.").

agency action capable of review on the basis of the administrative record."[35] In taking this position, the court did not engage in a rigorous analysis of what Congress likely meant by the word "order," nor did it use any of the analytical tools used by the courts today to ascertain the meaning of the term. *Corner Post* itself contains an inkling of how the D.C. Circuit's historic analytical approach would fare today: "'[P]leas of administrative inconvenience … never justify departing from the statute's clear text.'"[36] "Congress could have chosen different language in §2401(a) or created a general statute of repose for agencies. It did not."[37] Some judges have already taken note of this weakness of the D.C. Circuit's position.[38]

Another open question is whether the direct review provisions of the federal securities laws previously addressed by the D.C. Circuit would apply to plaintiffs that are not directly affected by SEC rulemaking. If they do not, then unregulated persons would likely bypass such limits and would be able to challenge rulemakings under the APA, as facilitated by *Corner Post*.

Challenges to Older Rules Pose Unique Challenges Not Addressed by the Court

Corner Post creates an interesting tension between past and present: Today's courts may be called upon to evaluate yesterday's administrative actions. A plaintiff in 2024 could challenge a rule that was implemented decades earlier. Which legal rules would the court be required to apply to such a review? The rules and interpretations in effect at the time the rule was adopted, or today's rules and interpretations? If the latter, decades-old rulemakings that might have passed muster when adopted might not have the level of support expected of rules today.

While today's rules are accompanied by releases with hundreds of pages of support and analysis, older rules may be accompanied by final releases that are comprised literally of three or four pages (or less). In addition, an agency's rulemaking files may be significantly limited or lost to the march of time, which may make defending a decades-old rule that much more challenging. How the courts will deal with this remains to be seen.

Regulatory Enforcement Actions Could Also Raise Challenges to Older Rules

Corner Post, in particular its reliance on Section 2401, specifically addresses the limitation period applicable to parties when bringing affirmative claims of facial invalidity against the government. It does not, however, affect the availability of legitimate defenses that may be asserted against the government in response to civil actions brought by administrative agencies or the U.S. Department of Justice on rules and regulations in existence for some time.

There, the Supreme Court stated that "[r]egulated parties 'may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them.'"[39] Hence, "'a federal regulation that makes it six years without being contested does not enter a promised

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[35] *ICI*, 551 F.2d at 1278.

[36] *Corner Post,* slip op. at 20 (internal quotations omitted) (quoting *Niz-Chavez v. Garland*, 593 U.S 155, 169 (2021).

[37] *Id.*

[38] *Magassa v. Mayorkas*, 52 F.4th 1156, 1170 (9th Cir. 2022), cert. denied, 144 S. Ct. 279, 217 L. Ed. 2d 126 (2023) (Nelson, J., concurring) (expressing discomfort with the D.C. Circuit's "purposivist reasoning" and noting that "[a]n order, properly understood, should not include agency rules, policies, or procedures.").

[39] *Corner Post*, slip op. at 20 (quoting *Herr v. United States Forest Service*, 803 F.3d 809, 821-22 (6th Cir. 2015)).

land free from legal challenge.'"[40] This is important as, in many cases, the impropriety of a rule may not be fully recognized until it is enforced by the government. Hence, parties facing enforcement actions based upon new rules or that target new conduct or fact patterns using old rules should carefully analyze such applications under accepted methods of statutory construction and court precedent.

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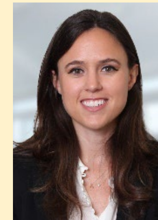

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[40] *Id.*

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