

CORNER POST MAGNIFIES REGULATORY UNCERTAINTY AFTER LOPER BRIGHT

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In its last opinion of this term, the US Supreme Court in [*Corner Post v. Board of Governors of the Federal Reserve System*](#) significantly extended the timeframe in which courts can review certain current and future regulations. Along with the Court's decision the prior week in [*Loper Bright Enterprises v. Raimondo*](#), *Corner Post* increases the likelihood of a regulated entity successfully challenging an agency's action.

THE DEMISE OF CHEVRON DEFERENCE

In *Loper Bright*, the Court overruled the *Chevron* doctrine that had required courts to defer to agencies' reasonable interpretations of otherwise ambiguous statutes.¹ This holding shifted power away from agencies and toward the judicial system. Courts must now always exercise their "independent judgment" in assessing the meaning of a statute, rather than deferring to agency constructions of ambiguous statutes. *Corner Post* magnifies this doctrinal change.

THE RULING IN CORNER POST

The *Corner Post* decision clarifies the time within which a party may sue an agency under the Administrative Procedure Act (APA) for harm caused by the agency's final actions. In 2021, North Dakota truck stop and convenience store Corner Post challenged the Federal Reserve Board's 2011 rule on the fees associated with using debit cards. Because the APA itself contains no statute of limitations, courts apply the default federal six-year statute of limitations in 28 U.S.C. § 2401(a) for civil actions against the United States.² The question before the Supreme Court was whether that six-year statute of limitations began to run in 2011 when the agency issued the rule, or much later when Corner Post alleged the rule actually injured it. Corner Post had not incorporated and opened until after 2017, and so it did not exist when the rule was issued in 2011 and was not injured until more than six years later. Resolving a circuit split, the Supreme Court held that the right of action for a suit brought under the APA "accrues"—that is, the clock starts ticking for limitations purposes—when the plaintiff suffers harm, not when the rule issues.

Parties had previously been able to challenge rules "as applied" to that party—for example, as a defense to an enforcement action by the agency—even beyond the six-year limitations period. *Corner Post* now extends that rule to allow a party to bring "facial" challenges to agency actions within six years of that party's injury, even if six years have passed since the rule was issued. As *Corner Post* illustrates, this decision opens the door to new APA challenges to old rules when brought by newly-formed entities (or already-existing entities that otherwise show they were harmed within six years of agency action). Indeed, as Justice Jackson's dissent points out, Corner Post

was added as a plaintiff in the case only after two trade associations that had been in existence in 2011 faced a motion to dismiss their own suit as untimely. The dissent notes that the ruling could effectively write the statute of limitations out of existence, a result “profoundly destabilizing for both Government and businesses.”

KEY TAKEAWAYS

While the full impact and interrelation of the Court's recent administrative law decisions will unfold over time, here are some key takeaways:

Revival of APA Challenges to Established Administrative Rules

The Court in *Loper Bright* expressly did not overturn prior rulings that relied on *Chevron* deference. Nonetheless, the Court has left open the possibility for an increase in challenges to existing administrative rules. *Corner Post's* expansion of the timeframe for bringing such actions will broaden the universe of rules that may be challenged and for which agencies will now not receive *Chevron* deference. A new plaintiff would not be bound by prior rulings and could potentially avoid any circuit precedent by suing in a different circuit.

Challenges to Agency Actions Brought Under Special Review Provisions Are Unaffected

The Court in *Corner Post* distinguished between what it called “statutes of limitations” and “statutes of repose.” Statutes of limitations are plaintiff-focused and begin (i.e., accrue) on the date of the plaintiff's harm to incentivize the diligent prosecution of known claims. On the other hand, statutes of repose are defendant-protective and finality-focused. They place an outside limit on challenges that is measured from the defendant's actions. The Court concluded that the six-year limitations period applicable to APA cases is a statute of limitations not a statute of repose, because it focuses on when the plaintiff has a complete and present cause of action. The Court thus made clear that its decision did not affect the timeframe for challenging government actions under various other special review statutes that operate as statutes of repose. The Court identified as an example the Administrative Orders Review Act (also known as the Hobbs Act), which provides the exclusive means of challenging orders issued by over a half-dozen federal agencies and requires suits to be brought within 60 days after entry of a final agency order. Going forward, regulated entities will need to carefully consider what legal framework and limitations period applies to the agency rules that impact them.

Increased Scrutiny Over Future Agency Actions

Loper Bright and *Corner Post* combine to increase the likelihood of a successful facial challenge to an agency's final action well into the future at effectively any time, or at least within six years of any harmed entity's formation. Thus, agencies may be more diligent in pursuing defensible rules and adjudications.

More Informal Actions by Agencies

The scope of the Court's holding in *Corner Post* encompasses APA “final agency actions” reviewable under the APA such as final rulemakings, adjudications, or other determinations like licensing decisions. Generally, such final actions must both: (1) be the culmination of the agency's decision-making process, and (2) have legal consequences sufficient to confer standing on a challenger. Interpretive rules, opinion letters, and other statements of policy are generally unreviewable and were not given *Chevron* deference even before *Loper Bright*.

Agencies may consequently expend more resources in developing these other softer administrative tools going forward because they are relatively insulated from the effects of *Loper Bright* and *Corner Post*.

Potential for Action by Congress

Although courts and agencies are now bound by the Supreme Court's new interpretation of the APA's statute of limitations, Congress may still amend either: (1) 28 U.S.C. § 2401(a) to change the length or applicability of the default six-year statute of limitations period, or (2) the APA itself to include an agency-specific limitations period or require the period to accrue at the time of agency action. As Justice Barrett acknowledges in her opinion for the Court, and as noted by Justice Jackson in dissent, "the ball is in Congress' court."

LOOKING AHEAD

Both regulated entities and administrative agencies should start reassessing their regulatory strategies, in terms of evaluating both current and future rules. Navigating this complex and evolving terrain will require the expertise of legal professionals who can help businesses, agencies, and policymakers understand and respond to the shifting legal landscape.

FOOTNOTES

¹ For a more detailed discussion on *Loper Bright*, please review our previous [article](#).

² See 28 U.S.C. § 2401(a) (providing 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").

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