

Rule Readiness: Administrative Law Essentials for the Home Furnishings Industry

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August 20, 2025

Agenda

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1. The Supreme Court remakes administrative law.
 2. New approaches to rulemaking process & agency engagement
 3. Strategies for the formaldehyde risk management rule
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The Supreme Court
remakes administrative law.

Loper Bright and Statutory Interpretation

- *Chevron* **overruled** in a 6 to 3 vote
- The court must use “the traditional tools of statutory construction” to reach its independent view of the “**best reading**” of the statute.
 - Courts will continue to use the **familiar tools**—text, structure, history, purpose, and canons—they always have to determine statutory meaning.
 - These tools will now resolve ambiguities even when an agency has spoken.
 - “It therefore makes **no sense** to speak of a ‘permissible’ interpretation that is not the one the court, after applying all relevant interpretive tools, **concludes is best**. In the business of statutory interpretation, **if it is not the best, it is not permissible**.”

Remaining Role for Agencies

- Statutes can leave gaps for agencies to fill by using:
 - **Express delegations**, e.g., directing agency to define a statutory term
 - **Express/implicit directions** to “fill up the details” of a statutory scheme through rulemaking; e.g., when an agency needs to stand-up a program.
 - **Implicit (?) delegation**: Leaving “agencies with [regulatory] flexibility” through terms like “appropriate” or “reasonable”
- *Loper Bright* provides **clear go-forward instructions**:
 - 1. Has an agency acted within **congressionally-set “boundaries”**?
 - 2. Has an agency engaged in **“reasoned decisionmaking”**? *State Farm*, etc.

Congressionally set boundaries

- **Narrow view of statutory authority (*San Francisco v. EPA*)**
 - Court cuts back on agency's ability to regulate flexibly under seemingly broad statutory language
 - EPA "end-result" provisions in permits for discharging pollutants
 - "any more stringent limitation" construed narrowly
- The **major-questions doctrine**
 - Addresses "a particular and recurring problem: agencies asserting **highly consequential power** beyond what Congress could reasonably be understood to have granted." *W. Va. v. EPA*
 - Invalidates agency action when the breadth and the "economic and political significance" of an agency's particular assertion of authority provide a "reason to hesitate".
 - Two recent invocations:
 - *West Virginia v. EPA* (2022): EPA lacked the power to issue the 2015 Clean Power Plan requiring companies to comply with "aggressive" emissions rules
 - *Biden v. Nebraska* (2023): struck down the Biden Administration's plan to forgive \$430 billion in federal student loans

Reasoned decisionmaking: “reasonable and reasonably explained”

- Agency must offer “a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.”
- Must respond to comments:
 - *Ohio v. EPA*: reinvigorates State Farm
 - Supreme Court stay of EPA’s implementation of “Good Neighbor Provision”
 - Lack of sufficiently reasoned response to comments
- Cannot rest on errors in logic or fact
- Must consider and respond to responsible alternatives
- Policy changes must be acknowledged, reasonably explained, and consider reliance interests
- Decision cannot be “so implausible”

Approaching the rulemaking process and agency engagement

New Approaches to Agency Rulemaking

- How entities **interact with agencies** should profoundly change.
 - When standing up programs (e.g., “filling in the gaps”), agencies need to do **substantial homework** to write regulations that withstand litigation.
 - Rulemakings are getting substantially longer and more complex.
 - Time to issue will likely expand.
 - **Huge opportunity** for regulated entities:
 - **When friendly**: Assist agencies with the heavy lift.
 - **When adverse**: Seed the record with land mines.

Building the Administrative Record

- It is **essential** to build a **thorough record** before the agency.
 - APA lawsuits are generally **closed record**; limited to information before agency.
- For **statutory interpretation**:
 - Agencies may attempt to offer “expert” views under *Skidmore*.
 - Provide “expert” counterpoint, to tug against any remaining claims to deference.
- For **reasoned decisionmaking**: Record evidence is often critical to success.
 - Parties may need evidence of **past practice or reliance interests**, e.g., when an agency changes positions or treats others differently.
 - Consider **economists**; e.g., cost-benefit analysis; major questions; reliance; etc.
 - Seed record with “**hard data**” comments: failure to address = arbitrary & capricious.

Litigation to Challenge Adverse Rules

- Do agency rules or actions create adverse business consequences?
 - Limit revenue; limit operational flexibility; create undue expense; disrupt proper competition; limit opportunity; etc.
 - Now is ideal **judicial climate** for challenging agency assertions of authority
- After identifying regulatory pain points, key inquiries to consider for challenge:
 - 1. **Consistent with statutory text?** Look hard at the governing text.
 - 2. Is the agency **authorized to act at all?** Longstanding assumptions may be flawed.
 - 3. Has the agency used **reasoned decision-making?**
 - Arbitrary decision, reversals from prior policy, failure to adequately weigh costs vs benefits of action are but a few factors.

Strategies for the formaldehyde risk management rule

A New Administration

- Still early—but so far has demonstrated desire to be both:
 - **aggressively deregulatory** in some areas; while also
 - claiming an **extreme version of executive power** in others.
- Potential **opportunities** for regulated parties to position their interests as coinciding with the administration's.

Readying for the Risk Management Rule

- **Engage** with the administration before a rule is proposed
- Recall the **legal boundaries**
 - Factors to help select a restriction: effects on health, effects on environment, benefits of uses, reasonably ascertainable economic consequences
 - Consider if “technically and economically feasible alternatives” could replace restricted use
 - Final decision must be “necessary to address the identified risks” to avoid “unreasonable risk”
- Develop **evidence**
 - What would help the agency reach and **justify** the right outcome?
 - Consider and prove efficacy of viable **less-restrictive alternatives**?
- Stay **informed** of regulatory developments
 - After the proposed rule issues, **submit comments**
 - After the final rule issues, does it warrant **litigation**?



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Thank you

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