

# THE CHEVRON AFTERSHOCK: HOW AGENCIES ARE ADAPTING THEIR RULEMAKING STRATEGIES POST-LOPER BRIGHT

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## The Chevron aftershock: How agencies are adapting their rulemaking strategies post-Loper Bright

Six months after the Supreme Court ended Chevron deference in *Loper Bright Enterprises v. Raimondo*, federal agencies aren't retreating—they're recalibrating. While countless articles have dissected what the end of *Chevron* means in theory, the practical reality unfolding in agency conference rooms tells a more nuanced story. Agencies across the federal government are developing innovative strategies to ensure their rules survive judicial review without the safety net of automatic deference, fundamentally reshaping how administrative law operates in practice.

### The new playbook: Fortifying the administrative record

The most visible adaptation has been agencies' dramatic expansion of regulatory preambles. Before *Loper Bright*, agencies frequently issued regulatory preambles with thin statutory justifications, confident that courts would defer to their interpretations under *Chevron's* protective umbrella. The 2019 Department of Homeland Security (DHS) Public Charge Rule exemplifies this approach. Despite fundamentally redefining a century-old immigration concept, DHS offered minimal statutory analysis, prompting numerous commenters to challenge the agency's "Lack of Statutory Authority/Inconsistent With Congressional Intent," criticisms the agency dismissed with cursory responses rather than detailed legal argumentation.<sup>1</sup> Similarly threadbare was the 2018 Common Rule delay for human subjects research, where the Department of Health and Human Services provided scant statutory justification for postponing major regulatory changes, responding to authority challenges with terse assertions like "We disagree" or "We do not believe it is necessary" without substantive legal analysis.<sup>2</sup>

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Even when agencies explicitly lacked authority, they felt no need to explore alternatives or provide detailed reasoning. When the Centers for Medicare & Medicaid Services flatly rejected requests for Alaska and Hawaii cost-of-living adjustments in its 2019 skilled nursing facilities (SNF) payment rule, it stated simply that “the law specifically authorizes a COLA for Hawaii and Alaska for hospitals, it does not provide such an adjustment for SNFs” before moving on without further discussion.<sup>3</sup> The Environmental Protection Agency’s (EPA) pre-*Loper Bright* hazardous substance designations similarly revealed the agency’s expectation of deference, with preambles defending interpretations by merely noting that “EPA is taking final action...after considering the available scientific and technical information” rather than engaging in granular statutory parsing.<sup>4</sup> This pattern of brief statutory authority sections, conclusory assertions of power, dismissive responses to authority challenges, and heavy reliance on general rulemaking provisions stands in stark contrast to post-*Loper Bright* preambles, which now feature extensive statutory analysis, detailed responses to every authority challenge, and meticulous citation to specific statutory delegations—a transformation that reveals just how much agencies previously relied on *Chevron*’s presumption of deference rather than rigorous legal justification.<sup>5</sup>

After *Loper Bright*, the approach has changed, with agencies trending towards a more meticulous approach to justifying their regulations. The Department of the Treasury and the IRS, perhaps anticipating *Chevron*’s demise, had already begun including increasingly detailed preambles within their regulations, meticulously demonstrating the reasoning behind their rules and citing specific statutory authority.<sup>6</sup> What was once a trend is becoming standard operating procedure across the administrative state.

Consider the Federal Aviation Administration’s August 2025 joint rulemaking with the Transportation Safety Administration on unmanned aircraft systems (UAS). The proposed rule’s preamble methodically establishes not just the agencies’ statutory authority but also how each provision flows directly from congressional intent, explaining that the rule “is necessary to support the integration of UAS into the national airspace system” and carefully tying each requirement to specific statutory mandates.<sup>7</sup> This represents a marked departure from the more conclusory preambles of the *Chevron* era, when agencies could rely on courts deferring to any “reasonable” interpretation.

The EPA has also demonstrated this approach. In its September 2025 proposed revisions to chemical risk evaluation procedures under the Toxic Substances Control Act (TSCA), EPA announced it would ensure that the agency’s actions “represent the best available science and are based on the weight of the scientific evidence,” while discussing the impact of the *Loper Bright* decision, carefully considering the scope of its statutory authority, and emphasizing the need to establish thorough factual records to support its risk determinations.<sup>8</sup> Increasingly, agencies no longer merely explain what they are doing; they build comprehensive evidentiary

foundations that courts would struggle to second-guess even without deference.

### **Anchoring to express delegations**

Agencies have also become far more strategic about grounding their actions in express statutory delegations rather than general rulemaking authority. Consider the approach of the IRS. Previously, it may have relied primarily on Section 7805 of the Internal Revenue Code's general delegation to "prescribe all needful rules and regulations."<sup>9</sup> After *Loper Bright*, the IRS has leaned heavily on a variety of specific statutory delegations beyond this general grant of rulemaking authority.<sup>10</sup>

This strategy acknowledges what *Loper Bright* preserved: when Congress expressly delegates authority to an agency, courts must respect that delegation and ensure only that the agency has engaged in "reasoned decision-making" within those boundaries.<sup>11</sup> By anchoring regulations to specific congressional authorizations, agencies transform what might have been Chevron Step Two<sup>12</sup> questions into straightforward exercises of delegated authority.

The prevailing wage and apprenticeship regulations finalized by Treasury and IRS in June 2024 further illustrate this approach. The preamble extensively discusses the specific statutory provisions authorizing each requirement, carefully delineating the scope of congressional delegation and demonstrating how each regulatory provision flows directly from that authority.<sup>13</sup>

### **Procedural precision as a shield**

Agencies have also recognized that procedural perfection can compensate for the loss of substantive deference. The notice-and-comment process, once sometimes treated as a formality, has become a critical venue for building a strong record. Agencies increasingly respond to comments with extraordinary meticulousness, addressing even marginal concerns to demonstrate the "thoroughness" and "validity" that might earn Skidmore respect (where courts give weight to federal agency interpretations based on their persuasiveness, expertise, and consistency, rather than automatically deferring to them).<sup>14</sup>

The USPTO's approach to its fiscal year 2025 patent fee adjustments illustrates this evolution. Facing criticism about proposed fee increases, the agency issued a 266-page notice of proposed rulemaking that exhaustively justified each fee adjustment not through policy preferences but through detailed cost analyses and explicit statutory authority under the America Invents Act.<sup>15</sup> The final rule, published in November 2024, carefully considered and responded to all comments received during the 60-day comment period, demonstrating the kind of reasoned decision-making courts now demand.<sup>16</sup>

### Strategic enforcement in an uncertain landscape

A subtle but potentially important adaptation might be seen in enforcement strategies. Regulatory uncertainty cuts both ways. Lacking the safety net of *Chevron* deference, both regulators and regulated entities operate under greater uncertainty as to what rules will ultimately prevail if challenged in court.<sup>17</sup>

Under *Chevron*, if a court struck down an agency's interpretation of an ambiguous statute, the court would typically give the agency another shot at interpreting the statute within the bounds of reasonableness.<sup>18</sup> After *Loper Bright*, not only has the threshold for overturning an agency interpretation lowered but the result is usually that the court imposes its best view of the law—an interpretation that neither party might have anticipated or have had a hand in developing.<sup>19</sup>

Federal agencies and regulated parties both have an invested interest in regulatory predictability. After *Loper Bright*, this predictability may be achieved through closer and earlier collaboration between the regulators and the regulated. Recent EPA guidance may be a harbinger of this approach. The agency's September 2025 proposed revisions to TSCA risk evaluation procedures emphasize collaboration with stakeholders and transparent methodology, seeking to build consensus around regulatory approaches rather than imposing them unilaterally.<sup>20</sup> When the legal foundation is uncertain, agencies may find that carrots work better than sticks.

### The corner post effect

Compounding these adaptations is the Supreme Court's decision in *Corner Post, Inc. v. Board of Governors*, which held that the six-year statute of limitations for challenging agency rules runs from when a plaintiff is injured, not when the rule is promulgated.<sup>21</sup> This means agencies must now defend not just new rules but potentially decades-old regulations against fresh challenges.

In response, agencies have begun conducting systematic reviews of existing regulations, identifying vulnerabilities and either bolstering their justifications or proposing updates that would reset the litigation clock with stronger legal foundations. The Treasury Department's 2025–2026 Priority Guidance Plan reveals numerous projects to update and clarify existing regulations, many explicitly designed to strengthen their legal foundations in the post-*Loper Bright* landscape.<sup>22</sup>

### Innovation within constraints: The path forward

The post-*Loper Bright* landscape doesn't spell doom for the administrative state, it demands its evolution. The detailed Federal Register notices, comprehensive administrative records, and careful statutory analysis emerging in agency rulemaking demonstrate a sophisticated adaptation to the new legal environment. The FAA's rule regulating operation of drones beyond the visual line of sight, for instance, received over

44,000 comments during its notice period, with the agency meticulously addressing concerns and building a record that anticipates judicial scrutiny.<sup>23</sup>

For regulated industries, this new world presents both opportunities and challenges. While challenging agency actions may be easier without Chevron deference, predicting which interpretations courts will adopt has become exponentially more difficult. The variation in judicial approaches means that a regulation struck down in one circuit might be upheld in another, creating a patchwork of requirements that multi-state businesses must navigate carefully.

### **Conclusion**

The death of *Chevron* has not paralyzed the administrative state, it has forced its sophistication. Agencies are writing more detailed rules, building stronger records, and engaging more thoughtfully with statutory text. While this may slow the regulatory process and increase litigation in the short term, it may ultimately produce a more robust and legally defensible regulatory framework.

The Chevron aftershock continues to reverberate, but agencies are learning to build on more solid ground. For practitioners and regulated entities alike, understanding these evolving strategies isn't just academic—it's essential to navigating the new administrative law landscape where every regulation must stand on its own merits, justified by thorough analysis and clear statutory authority.

Footnotes

1. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,293, 41,311–13 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).
2. Federal Policy for the Protection of Human Subjects: Six Month Delay of the General Compliance Date, 83 Fed. Reg. 28,497, 28,498-99 (June 19, 2018) (codified at 7 C.F.R. pt. 1c et al.).
3. Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities, 84 Fed. Reg. 38,728, 38,734 (Aug. 7, 2019) (codified at 42 C.F.R. pts. 409, 411, 413, 424, 483, 488, 489) (stating that “section 1888(e)(4)(A) of the Act requires” use of 1995 cost data and “we do not have the statutory authority” to make requested changes without exploring alternative authorities or providing detailed analysis).
4. Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances, 89 Fed. Reg. 39,124, 39,125 (May 8, 2024) (codified at 40 C.F.R. pt. 302).
5. Compare Definition of “Waters of the United States”— Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,631–32 (Oct. 22, 2019) (providing only general assertions of authority), with Clean Electricity Production and Investment Tax Credits, 89 Fed. Reg. 53,184, 53,186–87 (June 25, 2024) (containing extensive specific statutory delegation citations).
6. Internal Revenue Bulletin: 2025-12, IRS (Mar. 17, 2025), [https://www.irs.gov/irb/2025-12\\_IRB](https://www.irs.gov/irb/2025-12_IRB) (discussing Treasury and IRS’s increasingly detailed preambles in regulations).
7. Normalizing Unmanned Aircraft Systems Beyond Visual Line of Sight Operations, 90 Fed. Reg. \_\_ (proposed Aug. 7, 2025) (to be codified at 14 C.F.R. pts. 107, 108), <https://www.federalregister.gov/documents/2025/08/07/2025-14992/normalizing-unmanned-aircraft-systems-beyond-visual-line-of-sight-operations>.
8. See Procedures for Chemical Risk Evaluation Under the Toxic Substances Control Act, 90 Fed. Reg. \_\_ (proposed Sept. 23, 2025), <https://www.federalregister.gov/documents/2025/09/23/2025-18431/procedures-for-chemical-risk-evaluation-under-the-toxic-substances-control-act-tsca> (stating that “EPA believes certain provision of the 2024 final rule are not based on the best reading of TSCA and are thus impermissible under the Court’s decision in *Loper Bright*,” restoring to the rule a definition of “weight of scientific evidence;” proposing that EPA make a separate “determination of unreasonable risk for each condition of use instead of a single risk determination on the chemical alone;” and broadening the conditions under which EPA may revise or

- supplement risk evaluations so that there is “confidence [that] EPA’s risk evaluations...represent the best available science”).
9. 26 U.S.C. § 7805(a); see also, e.g., T.D. 9207, 70 Fed. Reg. 30,334, 30,342 (May 26, 2005) (only “[a]uthority” provided is “26 U.S.C. 7805” without reference to any specific delegations within the relevant S corporation provisions); T.D. 9100, 68 Fed. Reg. 70,701, 70,704 (Dec. 19, 2003) (stating general applicability of regulations while “authority” citation lists only “26 U.S.C. 7805” without elaboration); T.D. 8882, 65 Fed. Reg. 31,078, 31,079 (May 16, 2000) (providing no specific delegation citation beyond general section 7805 authority).
  10. See, e.g., T.D. 9998, 89 Fed. Reg. 53,184, 53,186–87 (June 25, 2024) (prevailing wage and apprenticeship final regulations extensively citing specific statutory delegations).
  11. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 381 (2024).
  12. Under Chevron Step Two, courts analyzed whether an agency’s interpretation of an ambiguous statute the agency administers is reasonable or permissible, even if it is not the interpretation the court would have reached independently. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); see also *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (agency interpretations prevail at Step Two unless they are “arbitrary, capricious, or manifestly contrary to the statute”). This deference applied only after a court determined at Step One that Congress had not directly spoken to the precise question at issue, leaving a gap for the agency to fill. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).
  13. See *supra* note 10 and accompanying text.
  14. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).
  15. *Setting and Adjusting Patent Fees During Fiscal Year 2025*, 89 Fed. Reg. 23226 (proposed Apr. 3, 2024).
  16. *Setting and Adjusting Patent Fees During Fiscal Year 2025*, 89 Fed. Reg. 91898 (Nov. 20, 2024) (final rule).
  17. *Loper Bright*, 144 S. Ct. at 2262–63, 2273, (acknowledging that without Chevron deference, courts rather than agencies will determine statutory meaning and holding that “courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority”).
  18. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (holding that when a statute is ambiguous, “the agency remains the authoritative interpreter (within the limits of reason) of such statutes” and may adopt different reasonable interpretations over time); *Chevron*, 467 U.S. at 863–64 (stating

that agencies “must consider varying interpretations and the wisdom of its policy on a continuing basis”).

19. *Loper Bright*, 144 S. Ct. at 2273 (requiring courts to determine “the best reading of the statute” rather than deferring to reasonable agency interpretations); see also *id.* at 2262 (noting that *Brand X*’s allowance for agencies to revise interpretations is incompatible with the Court’s holding).
20. *Procedures for Chemical Risk Evaluation Under the Toxic Substances Control Act (TSCA)*, 90 Fed. Reg. \_\_ (proposed Sept. 23, 2025) (proposing amendments to “ensure that the procedural framework rule does not impede the timely completion of risk evaluations or impair the effective and efficient protection of health and the environment”); See also *Risk Management for Existing Chemicals Under TSCA*, EPA, <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-existing-chemicals-under-tsca> (last updated Mar. 17, 2025) (describing “public comment periods, required consultations with certain groups, public meetings/webinars, and one-on-one meetings with stakeholders” as part of the risk management process).
21. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsv. Sys.*, 603 U.S. \_\_ (2024).
22. *2025-2026 Priority Guidance Plan*, IRS (Sept. 30, 2025), <https://www.irs.gov/pub/irs-counsel/2025-2026-initial-pgp.pdf>.
23. *Normalizing Unmanned Aircraft Systems Beyond Visual Line of Sight Operations; Denial of Extension of Comment Period*, 90 Fed. Reg. \_\_ (Sept. 29, 2025), <https://www.federalregister.gov/documents/2025/09/29/2025-18873/normalizing-unmanned-aircraft-systems-beyond-visual-line-of-sight-operations-denial-of-extension-of>.