

## **GOP's Swing At Dodd-Frank Could Give Banks Edge In Court**

By **Evan Weinberger**

*Law360, New York (June 7, 2016, 9:30 PM ET)* -- A sweeping rebuke of the 2010 Dodd-Frank Act unveiled Tuesday by a top House Republican has drawn attention for its proposed rewriting of capital rules and agency structures, but a small portion of the plan could also make it much easier for banks to overturn rules they don't like in court.

Tucked into a speech House Financial Services Committee Chairman Jeb Hensarling gave in New York outlining his plan to replace Dodd-Frank are two sentences that would eliminate the deference that judges give to financial regulators when they are evaluating a challenge to a regulation.

Hensarling's move to eliminate the so-called Chevron deference that courts give to government agencies is just the latest attempt by Republicans to eliminate the edge that regulators have in court. That has advocates of tough rules for Wall Street worried that Republicans are attempting to do in court what they have been unable to do at the ballot box.

"To the extent that Congress is not able to do the bidding of Wall Street in vetoing new reforms, in Congress they're increasingly looking towards the courts as a new way to veto regulations," said Public Citizen's Amit Narang.

Chevron deference has been a bedrock principle of U.S. administrative law since it was first enshrined by the U.S. Supreme Court in the 1984 *Chevron USA Inc. v. Natural Resources Defense Council Inc.* decision

Under the concept, courts defer to regulatory agencies' interpretation of statutes as long as those interpretations are considered to be reasonable.

In practice, that level of deference gives agencies an important fallback option should they face a legal challenge to one of their rules. The agencies can argue that they were charged with filling in gaps that Congress failed to fully address in legislation, said Mayer Brown LLP partner Andrew Pincus.

"Ambiguity means we win," he said, encapsulating regulators' arguments in such instances.

In a speech to the Economic Club of New York unveiling the principles of his Financial CHOICE Act, Hensarling said that his bill would go after the Chevron standard as it pertains to financial regulations .

"Next, we repeal the Chevron doctrine requiring the judiciary to give deference to financial regulatory agencies' interpretation of the law. The doctrine is unfair and an affront to due process and justice," he

said in the speech, according to prepared remarks.

The text of the legislation was not yet available Tuesday.

Hensarling is not the first Republican to take aim at the Chevron doctrine, nor is he likely to be the last.

Last month, Senate Republicans attempted to tackle courts' deference to the U.S. Department of Homeland Security with an amendment to a DHS appropriations bill, but ultimately declined to attach it to the funding legislation.

The House Judiciary Committee on Wednesday is set to engage in a markup of the Separation of Powers Restoration Act of 2016, a bill that would eliminate Chevron deference for all federal agencies and require courts to undertake a review of an agency's interpretation of law when reviewing a regulation.

Similar legislation has been introduced in the Senate, which if passed would mean that environmental, labor, financial and other regulators would have more difficulty defending their rules in court.

Backers of such moves say there are both principled as well as political reasons for attacking the Chevron standard.

"It would be silly to think there are not politics in play," said William Yeatman of the conservative Competitive Enterprise Institute.

The effort came after President Barack Obama made clear that he intended to use the regulatory agencies to advance climate, financial and other legislative agendas when he was elected to a second term in 2012, while still facing a Republican Congress, Yeatman said.

"Certainly, the very in-your-face rhetoric of President Obama after winning a second term ... I think that raised a lot of eyebrows," he said.

But there are more principled reasons for wanting to eliminate Chevron deference, Yeatman said.

Regulatory agencies have amassed more and more power over the years and have been able to work, in some cases, without effective oversight from Congress, he said.

Giving the courts more reason to be skeptical of those agencies would help keep them in check, Yeatman added.

"There are definitely constitutional concerns," he said.

However, even if the legislation proposed by Hensarling and other Republicans could get signed into law, removing the deference may not have the effect that supporters hope.

For one, there are other theories that courts could use to back regulatory agencies, said Jonathan Entin, a professor at Case Western Reserve University School of Law.

And second, because the Chevron doctrine is intended to plug gaps in legislation that regulators fill in, unless Congress actively plugs all of those gaps, courts will in some way have to defer to the agencies, Entin said.

“Chevron is a gap-filler, and it basically says where the statute doesn’t answer the question that we’re going to resolve, we’re going to ask whether the agency gave a reasonable answer,” he said.

Such a change may not be necessary to defeat agency rules.

The Supreme Court has also narrowed the Chevron deference standard, notably last year in the *King v. Burwell* decision affirming the use of tax credits under the Affordable Care Act, Pincus said.

Although the Obama administration won that case, the Supreme Court rejected its claim that it was entitled to deference under the Chevron standard and instead elected to review the merits of the case.

And Chevron deference does not mean that agency rules are impervious to challenge.

“Agencies still lose under Chevron, but a lot of the criticism these days that you see reflected in some of these congressional proposals is really about people who are very skeptical about the whole idea of government regulation in the first place,” Entin said.

With all of those factors taken into account, those who want tougher rules on Wall Street and in other areas say the push to end Chevron deference by Hensarling and others is a way to move against rules that, at least on the surface, have some level of popular support.

“Nobody wants to see Wall Street regulations gutted and more giveaways to corporations, but that’s exactly what these bills would be,” Narang said.

“What they’re trying to do here is hide the ball from the public,” he added.

--Editing by Philip Shea and Kat Laskowski.

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