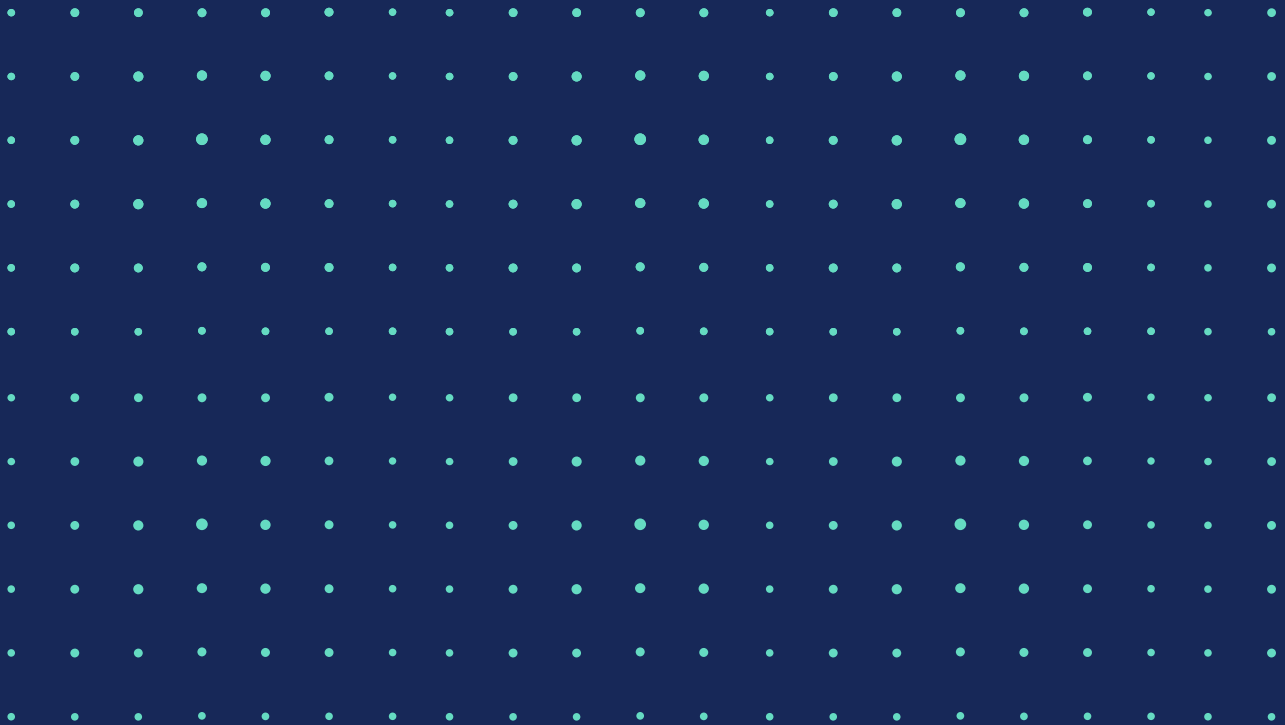


# Beyond Chevron:

## The SEC, Shareholder Activism, and Corporate Change

### Event Recap



## Event Recap | August 1, 2024

On August 1st, the Berkeley Center for Law and Business hosted its second webinar in “The Buzz w/ BCLB” series, diving into Beyond Chevron: The SEC, Shareholder Activism, and Corporate Change. The discussion examined the latest Loper Bright decision and its implications for the corporative and regulatory world.

### Overturing the Chevron Doctrine

Speaker Stavros Gadinis, Professor of Law and Faculty Director of the Berkeley Center for Law and Business, Sheila Ennis, Managing Director and Head of Investor Relations at H/Advisors Abernathy, Raquel Fox, Co-head of SEC Reporting and Compliance at Skadden and Head of the firm’s U.S. ESG practice, and Danielle Fugere, President and Chief Counsel of As You Sow, shared their insights on the possible consequences of this recent Supreme Court decision.

In setting the stage for the conversation, Gadinis explained the longstanding Chevron doctrine, which says courts should defer to administrative agencies the interpretation of ambiguous statutes if the interpretation is reasonable. The recent Loper Bright overturned the Chevron doctrine expanding the judiciary’s power to review and reject interpretations of statutes adopted by federal administrative agencies. Chief Justice Roberts reasoned that judicial deference to agency rulemaking under Chevron was incompatible with the courts; fundamental duty to interpret the law.

The impact of this change is expected to be significant. “We’re going to see an increase in the number of challenges, as well as the likelihood of success of those challenges. And what does it mean for agencies?... It means that agencies are going to be under more scrutiny. They’re going to be looked at more closely, particularly where they are working within these bounds,” Fox said.

In the notice and comment period of agencies’ rules, comment letters will need to include solid legal arguments to convince an agency of the reading of the statute, according to Fox. Additionally, interested parties will need to provide more data-supported guidance to agencies regarding how they should use their power. The once internal process in which the agency determined how a piece of legislation was to be interpreted now has a second audience: The court that will decide whether an agency has moved beyond its mandate.

### The Impact on Climate Reporting

The conversation then delved into Loper Bright’s impact on the SEC’s recent initiatives, especially the climate disclosure rules, which have been challenged in court even before the new Supreme Court ruling. The agency will have to convince the court that it acted within its mandate as it goes through the appeals process and then, potentially, the Supreme Court.



While the case is pending, companies must deal with uncertainty. During this interim, speakers noted, companies should also consider their other stakeholders when making their decisions, as disclosures are a part of a credibility-building exercise. "Quite honestly, the advice here is not so different from day one of the pandemic. Do we have to report? We don't even know. So, decidewhat you can know, decide what's relevant to your business, articulate the rationale for all of that upfront, don't keep that under your wing, and then find ways to be consistent," Ennis said.

### Investor Demands Continue

Even if the court struck down the SEC's climate rule, it would not mean that companies would be relieved of their reporting obligations. The SEC's climate regulation was the result of decade-long investor activism, Fugere said. Investors want companies to disclose relevant climate information before making investment decisions.

"If the climate disclosure rule is found to be invalid, shareholders will continue doing what they were doing before, which is working with companies individually," Fugere explained. "If we can have all of the companies operating under a single disclosure standard, that is helpful to investors, it's helpful to companies, and is also important for consistency and comparability."

In addition, other legislative and regulatory frameworks impose disclosure requirements, such as those from California and the European Union, to which many American corporations will have to comply. "What can be characterized as a step backward is a false step backward, because you have got California and you have got the EU. So, regardless of this noise in the market of 'woke' versus 'anti-woke', it's going to be really hard to get that genie back in the bottle," Ennis said.

### Implications for Other SEC Rules

The webinar also discussed the implications of Loper Bright for other SEC rules. Mandatory climate disclosures might be the most highly anticipated SEC rulemaking, but it is hardly alone, as areas such as cybersecurity, cryptocurrency, and diversity and human capital management also drive attention.

A greater need for interpretation of statutes will likely arise in the future, as many of them were drafted decades before the most recent technological developments. Fox shared that for more public topics, such as crypto, the major questions doctrine will apply. This doctrine states that courts will presume that Congress does not delegate to executive agencies issues of major political or economic significance. Nevertheless, the question will remain as to whether agencies should act on their own or if Congress should act to provide more guidance and legislate what they think the agencies should do in these areas. Especially when the Congressional wheel turns slowly, it is crucial for agencies to obtain sufficient autonomy to act when necessary.



Ennis echoed that companies are not anti-regulation. She went on to explain that “companies want to understand what the rules of the game are” to then work with them. “The problem is when it is a moving target, and this is very costly, both in terms of financial resources but also attention, and it really can be a challenge.”

### **The Future Under Loper Bright**

Finally, the conversation moved on to discuss the future under Loper Bright. One argument is that Loper Bright might provide more stability in the very long run because it makes regulations less likely to change. Agencies will be constrained by the exact wording of their statutes, and it will be hard to override those for political motivations, said Fox. On the other hand, Fugere said that this vision was yet to come true. In practice, companies forum shopping to find judges favorable to their causes. As a result, no consistent pattern has yet taken shape for companies to follow in terms of their compliance practices.

In a time of change and unpredictability, it is important to keep in mind that rulemaking is not dead, but that there is just more need for reasoned rulemaking. Companies must work with the SEC through comment letters and explain why they approach disclosure the way they do. In addition, companies need to keep in touch with investors and shareholders all year round to produce meaningful disclosures the latter can easily use to compare across companies. The SEC may also issue guidance documents to help companies navigate through the process.

