IN COMPLIANCE

HOLTZMAN VOGEL'S MONTHLY ROUND-UP

Supreme Court Overrules Chevron, Eliminating Deference to Agencies When Statutes Are Ambiguous

Holtzman Vogel attorneys wrote on **the Supreme Court's landmark Loper Bright decision** earlier this month. The Court overruled its 1984 decision in *Chevron v. NRDC* that introduced the so-called "Chevron deference" principle that has required courts to defer to agency interpretations of ambiguous statutes for the last 40 years. In *Loper Bright*, the Supreme Court jettisoned that deference principle and instructed courts to instead exercise independent judgment when deciding whether an agency has acted within its statutory authority.

What about the estimated 18,000 federal court decisions that relied on *Chevron*? Chief Justice Roberts explained that those cases are still good law, including the decision in the overturned *Chevron* case itself, and that courts should apply statutory stare decisis rules when considering challenges to regulations that were previously upheld under *Chevron*.

The Supreme Court's decision has significant implications for future challenges to agency actions. Because there is no longer a presumption that agency interpretations of "ambiguous" laws will bind the courts, suits challenging agency actions that test the outer bounds of their statutory authority are expected to see more success in the coming years. The Court's decision is also expected to change how Congress writes laws and how agencies engage in rulemaking.

FEC UPDATES

Trump Campaign Files FEC Complaint Against Harris Campaign for Taking Control of Biden's Campaign Funds

Shortly after President Biden announced his withdrawal from the Presidential election and his support for Vice President Harris, the "Biden For President" campaign committee was renamed "Harris For President" on FEC registration forms. With this change, Vice President Harris took control of approximately $95 million raised by the Biden For President committee.

On July 23, the Trump campaign announced it filed a complaint with the FEC, characterizing the asserted transfer of control of the campaign funds as "a brazen money grab that would constitute the single largest excessive contribution and biggest violation in the history of the Federal Election Campaign Act of 1971." (A **second complaint** was filed on July 25 by Citizens United and 17 state Republican Party organizations.)

Democrats defended the move and claim Vice President Harris is entitled to the funds. Democratic FEC Commissioner Dara Lindenbaum **lent her support**, arguing that "If Kamala Harris is the Democratic presidential nominee, she gets to use all the money in the account." The FEC's Democratic Vice Chair, Ellen Weintraub, echoed these comments: "The bottom line is it's the same committee."

FEC Chairman Sean Cooksey disagreed and **explained** that "[r]eplacing a presidential candidate and handing over his committee to someone else is unprecedented under current campaign finance law. It raises a host of open questions about whether it is legal, what limits apply, and what contributors' rights are."

The issue is now pending before the FEC, although it is unlikely that the FEC will complete its consideration of the complaints prior to election day.

Rep. Barragan Requests FEC Advisory Opinion to Use Campaign Funds to Pay for Elder Care

Representative Nanette Barragan **requested an advisory opinion from the FEC** on whether she may use campaign funds to pay for elder care expenses related to her ongoing care for her 83 year old mother. In her request, Representative Barragan explains that her mother suffers from Alzheimer's disease and has lived with her since 2021. The Congresswoman is currently paid by Los Angeles County as an in-home caregiver, but still pays substantial sums "to cover gaps in care." She seeks FEC approval to use campaign funds to pay caregiver costs during periods when she is in Washington, DC, or traveling for official business. The FEC has previously **determined** that using campaign funds to pay certain childcare costs is permissible (and not an impermissible "personal use" of campaign funds), but the Commissioners have not considered elder care costs before.

Ohio Couple Sues FEC Challenging Public Disclosure Rules for Conduit Contributions

A Toledo, Ohio couple **sued the FEC** to challenge contribution disclosure rules that require all contributions made through "conduit committees" like WinRed and ActBlue to be itemized and fully disclosed. FEC rules provide that contributors who give an aggregate of less than $200 directly to candidates are not required to be publicly disclosed and, instead, their contributions may be included in an "unitemized" sum listed on FEC reports. However, if a contributor gives any amount - even one cent - through a "conduit committee," the conduit committee must publicly disclose the donor's name, address, occupation and employer on a public FEC report. After a contribution aggregating less than $200 is routed to a candidate, the candidate is not required to "itemize" the contribution; thus, the small donor's name, address, occupation, and employer information appear only on the conduit's FEC report.

The complaint alleges that "the $3 digital donor is treated worse not because of the amount, or concerns of transparency, but merely because of the mechanism of the donation." The lawsuit contends the "conduit reporting requirement … is unconstitutional as applied to donations of up to $200" because it is "an unconstitutionally low threshold under the First Amendment" and "Congress already exempts from disclosure donations of up to $200 when given directly to a candidate." The plaintiffs seek to use the campaign finance law's special judicial review provisions to take their case directly to the Sixth Circuit Court of Appeals.

In December 2023, the Commissioners unanimously approved **legislative recommendations** that called on Congress to "amend FECA's reporting requirement [for conduit contributions] to establish an itemization threshold consistent with other FECA reporting requirements." The FEC now finds itself in the position of defending a law it has told Congress should be changed.

Compliance Consultant Pleads Guilty to Misappropriating $185,000 of Committee Funds, Receives Home Confinement, Community Service, and Three Years Probation

A political compliance consultant was sentenced to three years' probation, 240 days of home confinement, 100 hours of community service, and fined $100 after pleading guilty to misappropriating over $185,000 of funds from Senator Heller's campaign and leadership PAC. After stealing the funds, Ryan Phillips was found to have prepared and filed false FEC reports on behalf of Senator Heller's committees to hide his actions.

Senator Heller's campaign and leadership PAC filed a sua sponte complaint with the FEC against Phillips that detailed the theft, to which Phillips admitted. The FEC referred the matter to the Department of Justice which instituted criminal proceedings against Phillips. Phillips **pleaded guilty** to one count of making a false statement to a government agency. More details from the FEC are available **here**.

Eleventh Circuit Remands Rivera Case for Jury Trial; Decision Could Impair FEC's Ability to Pursue Knowing and Willful Charges

The 11th Circuit Court of Appeals issued an under-the-radar decision in early July that could have significant consequences for the small number of cases that the FEC is unable to settle and instead takes to court. In **FEC v. Rivera**, a panel of the 11th Circuit vacated the district court's grant of summary judgment (and final judgment) to the FEC and found that summary judgment should not have been awarded because a "genuine dispute of material fact" existed.

At issue in the *Rivera* case are allegations that former Representative Rivera "funneled $75,927.31 worth of contributions to the campaign" of Justin Lamar Sternad, a challenger in the Democratic primary. The FEC investigated the matter and found that Rivera had "knowingly and willfully" violated federal campaign finance law "by making contributions in the name of others to Justin Lamar Sternad's 2012 primary campaign." Rivera declined to enter into a settlement with the FEC, and the agency sued Rivera in federal district court and sought summary judgment to enforce its earlier findings. The district court granted the FEC's motion and issued a $456,000 civil penalty against Rivera.

Rivera filed an appeal and argued that the district court's grant of summary judgment was improper "because there was a genuine issue of material fact regarding questions that should be resolved by a jury." In particular, Rivera argued the district court "improperly discounted Rivera's competing testimony," including deposition statements and sworn affidavits in which he denied supporting Sternad's campaign "in any way" and being a source of money for contributions to Sternad's campaign. The 11th Circuit concluded that questions of witness credibility and how evidence should be weighed are jury functions and "the district court erred by discounting [Rivera's] affidavits and deposition because they were contradicted by other testimony in the record."

This case raises important questions about how the FEC and the courts will handle enforcement cases going forward. Typically, when the FEC concludes that a respondent has "knowingly and willfully" violated the law, that finding is based on contextual factors and inferences, and that finding is almost always disputed by the respondent. (A knowing and willful violation opens a respondent to more serious criminal charges.) If courts cannot accept the FEC's "knowing and willful" conclusions when a respondent invariably disputes that conclusion, and more jury trials become necessary, it would place a new strain on the FEC's limited resources. Whether this impacts the agency's enforcement calculations, and how aggressively it chooses to pursue "knowing and willful" violations, remains to be seen.

AROUND WASHINGTON

FCC Publishes Rulemaking Proposal for New Disclosure Requirements for Political Advertising Containing AI-Generated Content

On July 25, the FCC published its long-awaited **rulemaking proposal** that would require new disclosures and disclaimers in political advertising containing AI-generated content. The Notice of Proposed Rulemaking explains that the agency proposal would require radio, television, cable, and satellite licensees "to provide an on-air announcement for all political ads that include AI-generated content disclosing the use of such content in the ad" and "include a notice in their online political files for all political ads that include AI-generated content disclosing that the ad contains such content." The proposal would not apply to digital and streaming media. The FCC approved the notice of proposed rulemaking by a 3-2 vote, with both Republican Commissioners dissenting. Commissioner Carr's dissent is **here**.

The FCC's proposed rule contains four main pieces. First, the agency proposes, and seeks public comment on, the following definition of "AI-generated content": “an image, audio, or video that has been generated using computational technology or other machine-based system that depicts an individual’s appearance, speech, or conduct, or an event, circumstance, or situation, including, in particular, AI-generated voices that sound like human voices, and AI-generated actors that appear to be human actors.”

Second, television, radio, cable, and satellite stations would be required to "inquire whether political ads scheduled to be aired on their stations contain any AI-generated content." The FCC further explains, "[s]pecifically, a broadcast station would be required to inform the person or entity requesting airtime, at the time an agreement is reached to air a political ad, that the station is required to make an on-air disclosure for any political ad that includes such AI-generated content and inquire whether the ad does in fact include such AI-generated content."

Third, if a political ad does contain AI-generated content, the FCC proposal would require the station "to make an on-air announcement disclosing that the ad contains AI-generated content ... immediately preceding or during the broadcast of any ad by or on behalf of a legally qualified candidate for public office and any issue ad that contains AI-generated content." The proposal also includes proposed disclaimer language. For radio ads, stations would be required "to provide an on-air announcement orally in a voice that is clear, conspicuous, and a speed that is understandable, stating that: “The following message contains information generated in whole or in part by artificial intelligence.” For television ads, this disclaimer could be presented either orally or via on-screen writing.

Fourth, stations would be required "to include in their online political files a notice disclosing the use of AI-generated content for each political ad that contains such content."

FCC Commissioner Carr, FEC Chairman Cooksey, and Members of Congress have **questioned** whether the FCC proposal exceeds the agency's statutory authority. If the FCC ultimately adopts this rule, it will face an uncertain future in the courts following the Supreme Court's decision in Loper Bright.

Comments on the FCC proposal are due 30 days after the notice is published in the Federal Register, likely placing the deadline in early September. Reply comments may then be submitted within 15 days. Given this timeframe, it is exceedingly unlikely that any new rules could be put in place before the November elections.

Federal District Courts Split on FTC's New Rule Banning Non-Compete Clauses in Employment Agreements

In April, we **noted** that the Federal Trade Commission voted 3-2 to adopt a final rule banning employee "noncompete" agreements. Under the FTC's rule, all noncompete agreements in employment contracts would be banned going forward and most existing noncompete agreements would be void and unenforceable.

On July 3, Judge Ada Brown of the U.S District Court for the Northern District of Texas **issued a preliminary injunction** blocking the FTC from enforcing its new rule. The district court declined to issue a nationwide injunction; instead, the FTC is only enjoined from enforcing its rule against the plaintiffs in the case.

In granting a preliminary injunction, the district court concluded that "the text, structure, and history of the FTC Act reveal that the FTC lacks substantive rulemaking authority with respect to unfair methods of competition." Rather, Judge Brown found the FTC's rulemaking authority with respect to unfair methods of competition is limited to issuing "rules of agency organization procedure or practice," and does include the power to issue substantive rules defining what constitutes an unfair method of competition, as the non-compete rule purports to do.

Judge Brown also questioned the FTC's "reasoned basis" for "impos[ing] such a sweeping prohibition" when "no state has ever enacted a non-compete rule as broad as the FTC's Non-Compete Rule." The district court concluded that "the Rule is based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of non-compete agreements, and disregards the substantial body of evidence supporting these agreements." Judge Brown indicated she would issue a full ruling on the merits by August 30, just days before the non-compete rule is scheduled to go into effect on September 4.

Meanwhile, on July 23, Judge Kelley Hodge of the U.S. District Court for the Eastern District of Pennsylvania **denied a motion for preliminary injunction** and held that the plaintiff in **ATS Tree Services, LLC v. FTC** had failed to establish a likelihood of success on the merits. First, Judge Hodge found that the plaintiff had not made the required showing of irreparable harm required for a preliminary injunction. Second, and directly contrary to Judge Brown's decision, Judge Hodge concluded that "the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition" and rejected arguments that the FTC may only "utiliz[e] adjudications as the exclusive means of preventing unfair methods of competition." Finally, Judge Hodge concluded that "the FTC acted within its authority under the Act in designating all non-compete clauses as 'unfair methods of competition.'"

The two decisions reach essentially polar opposite conclusions regarding the FTC's authority to engage in rulemaking with respect to policing unfair methods of competition, and the soundness of the agency's conclusions. Once final judgments are issued in the two cases, appeals to the Fifth and Third Circuit Courts of Appeals are expected. A third case challenging the FTC's rule, Properties of the Villages, Inc. v. FTC, is pending in the U.S. District Court for the Middle District of Florida.

FinCEN: Terminated Entities Must Still File Beneficial Ownership Reports

The Financial Crimes Enforcement Network, or FinCEN, recently published an **updated FAQ** on its beneficial ownership information reporting rule. Perhaps most significantly, FinCEN clarified that an entity that existed for any portion of 2024, even if it has since terminated or dissolved, **is required to file** a beneficial ownership report. This includes entities that are established in 2024, but never begin operations and quickly terminate. In other words, terminating does not extinguish a reporting obligation and is not a way to avoid filing.

IN THE STATES

Wisconsin Supreme Court Reverses Itself to Bring Back Absentee Ballot Drop Boxes in Time for November Election

Following a change in personnel, the **Wisconsin Supreme Court reversed itself** and has now upheld the permissibility of the state's unattended ballot drop boxes. In 2020, officials from the Wisconsin Elections Commission issued memos authorizing local election officials to use ballot drop boxes and specifying that a third person could deposit a ballot on behalf of a voter. At least 528 drop boxes were used in Wisconsin during the November 2020 election.

The relevant Wisconsin statute regarding the return of absentee ballots provides: "The envelope shall be mailed by the elector, or delivered in person, to the municipal clerk issuing the ballot or ballots." In 2022, the 4-3 conservative majority on the Wisconsin Supreme Court **held** that the Wisconsin Elections Commission's guidelines were "invalid because ballot drop boxes are illegal under Wisconsin statutes" and that "dropping a ballot into an unattended drop box is not delivery 'to the municipal clerk.'" The majority noted that another statutory provision allowed localities to establish alternate absentee ballot return sites, although the law required those alternate sites to be "staffed by the municipal clerk or the executive director of the board of election commissioners, or employees of the clerk or the board of election commissioners." According to the majority, "drop boxes are a novel creation of executive branch officials, not the legislature. The legislature enacted a detailed statutory construct for alternate sites. In contrast, the details of the drop box scheme are found nowhere in the statutes, but only in memos prepared by WEC staff, who did not cite any statutes whatsoever to support their invention." From July 8, 2022 to July 5, 2024, unattended ballot drop boxes were illegal in Wisconsin.

In April 2023, following the retirement of the one of the Wisconsin Supreme Court's conservative justices, Janet Protasiewicz won election to the Supreme Court. Her election created a new 4-3 liberal majority on the court.

In 2024, the court took up the ballot drop box issue again and a new majority consisting of the three dissenters in 2022 plus Justice Protasiewicz reversed the court's 2022 decision. The new majority concluded that "delivery to a drop box constitutes delivery 'to the municipal clerk,'" explaining that "the statute does not specify a location to which a ballot must be returned and requires only that the ballot be delivered to a location the municipal clerk, within his or her discretion, designates. "Thus, the phrase 'to the municipal clerk' now means any location the municipal clerk designates, including an unattended ballot box drop.

North Carolina Eases State Registration and Reporting Requirement for Federal PACs

North Carolina legislators voted to override the Governor's veto to enact **H.B. 237** into law. While the legislation included subjects not related to election law, one section amends state law to allow political committees that are registered with the FEC to make contributions to North Carolina candidates and committees, subject to North Carolina's contribution limits, without having to register and file state reports with the State Board of Elections. The new law specifies that federal committees may instead file a copy of their FEC registration and applicable FEC reports with the State Board. Section 527 organizations that are registered with the IRS may now comply with North Carolina's reporting requirements by submitting copies of their Form 8871 and 8872 filings. In addition, federal committees and political organizations that accept contributions from sources that are prohibited under North Carolina law (such as corporations and labor unions) may now make contributions to North Carolina candidates and committees so long as they do so from a segregated account that excludes any impermissible funds.

HV Making the Rounds

- Steve Roberts and Oliver Roberts byline a weekly article for *The Federalist*: **"Last Week in Lawfare Land: What to Know About Each Legal Crusade Against Trump."**

- Holtzman Vogel will sponsor the annual **RNLA Election Law Seminar**, where Jessica Furst Johnson, Mo Jazil and Andy Gould will be speakers. Jessica will speak on campaign finance, Mo will speak on redistricting matters, and Andy will discuss election litigation.

- Christine Fort and Jessica Furst Johnson presented a **Lawline CLE on non-profits and political activities during an election year**.

- Steve Roberts and Jonathan Fahey appeared on **Fox News' Mornings with Maria** to discuss campaign finance and Vice President Harris' access to President Biden's campaign funds. Jonathan is a regular on Mornings with Maria.

- Nicole Kelly was quoted by ***Las Vegas Review-Journal*** on whether President Biden could be replaced on Nevada's ballot.

- Holtzman Vogel along with the National Jewish Advocacy Center filed a **federal lawsuit on behalf of StandWithUs Center against organizers of an antisemitic riot in Los Angeles.** Jason Torchinsky, Erielle Davidson, Ed Wenger and John Cycon are counsel in this matter.

- Steve Roberts quoted by ***The Hill, Washington Examiner, Bloomberg,*** and others on campaign finance and access to Biden campaign funds.

- Jill Vogel appeared on the **Vicki McKenna Show** during the Republican National Convention to discuss politics and law.

- Jan Baran spoke with Josh Gerstein, POLITICO's Senior Legal Affairs Reporter, on his Early Returns podcast. They discussed **"SCOTUS, the Presidential Immunity Caw Fallout, and the Dobbs Case Leak Investigation."**

- Mo Jazil was a panelist on **"Florida Supreme Court Round-Up"** panel at the Federalist Society's 2024 Florida Young Lawyers Summit

- Kent Safriet, Robert Volpe and Darrin Taylor spoke at the **38th Annual Environmental Permitting School** in Florida on trending land use and environmental issues.

- Andy Gould appeared on **Fox News to discuss the border issues** as it relates to the 2024 election.

- Steve Roberts appeared on **Vivek Ramaswamy's "Truth" podcast.**

- As the election draws closer, stay tuned for announcements on timely webinars and other pertinent information.

This update is for informational purposes only and should not be considered legal advice. Entities should confer with competent legal counsel concerning the specifics of their situation before taking any action.

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