

Fall Forum 2023
Bracing For Significant Regulatory Changes

LESS DEFERENCE TO AGENCY GUIDANCE?

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1

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THRESHOLD QUESTION:

What guidance is legally binding?

- Statute
- Regulation
- Agency Memoranda?
- Dear Colleague Letter?
- Email?


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2

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ISSUE "ONLY" GOES BACK 236 YEARS

- Constitution – 1787
- No Administrative Agencies




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TRIPARTITE SYSTEM OF GOVERNMENT

- Congress – Passes Laws
- Courts – Interprets Laws
- President – Implements Laws



The diagram shows the Constitution at the top, with arrows pointing down to three branches: the President, Congress, and the Courts. The text 'The President of the United States' is written above the President icon, and 'Constitution' is written above the Constitution icon.

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TRIPARTITE SYSTEM OF GOVERNMENT

- With rise of the modern administrative state, federal agencies came to be seen as an independent 4th branch of government


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TRIPARTITE SYSTEM OF GOVERNMENT

- Congress assigned authority to agencies to issue regulations and interpret often ambiguous laws passed by Congress



The illustration shows a person in a red robe standing in a classical architectural setting, possibly a courtroom or a government building.

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GEPA

- 20 USC 1232
- "A regulation means any generally applicable rule, regulation, guideline, interpretation, or requirement prescribed by the secretary and has legally binding effect."

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What latitude does the Secretary have to issue regulations and other guidance?



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Chevron V. Natural Resources Defense Council - 1984



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CHEVRON V. NRDC - 1984

- Court held – If a statute is ambiguous, courts should defer to the relevant agencies' interpretation, provided it is reasonable

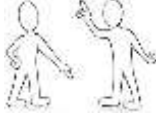
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RESULTING DOCTRINE

- Chevron Deference



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COURT THIS TERM CONSIDERING 2 CASES TO OVERTURN CHEVRON

- Loper Bright Enterprises v. Raimondo
- Relentless v. Department of Commerce
- Argument – If the courts have the constitutional responsibility to say what the law is, why give that responsibility to agencies?
- Counterargument – Congress intended court to defer to agencies whenever it passed an ambiguous statute

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LAST TERM THE SUPREME COURT RULED IN:

- Axon Enterprise v. FTC
- Statutory review scheme (appealing agency action to U.S. Court of Appeals) do not extend to all claims
- Similar to GEPA enforcement

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- Parties may proceed directly to federal district court if claim is outside ALJ expertise or if precluding district court jurisdiction forecloses meaningful judicial review

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How will these developments impact ED Guidance???




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- Congress enacted 4 broad statutes in the 1960's:
 1. ESEA – 1965
 2. VEA – 1963
 3. HEA - 1965
 4. IDEA - 1966



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- Congress assigned HEW the responsibility to issue regulations and administer the programs

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RESULT:

- HEW issued voluminous and detailed regulations, often unrelated to statutory language


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EDUCATION AMENDMENTS OF 1972(PUBLIC LAW 92-318):

- Reissue All regulations with statutory citation (Section 503)
- Submit all final regulations to the House/Senate 60 days prior to effective date (now part of GEPA 20 USC 1232)



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NIXON, FORD, CARTER, REAGAN, BUSH I, CLINTON, BUSH II, OBAMA, TRUMP, BIDEN ADMINISTRATIONS:

- All issue regulatory simplification initiatives



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MOST SIGNIFICANT INITIATIVES



1. "Reinventing Government" – 1994
2. UGG - 2014

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"REINVENTING GOVERNMENT"

1. Eliminated Approximately 90% of ED regulations
2. Shifted burden to grantees to interpret statutes

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Does ED comply with GEPA requirements on Legally Binding Guidance?

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No


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INFORMAL GUIDANCE

- Dear Colleague Letter
- Agency Memoranda
- Email
- Phone Calls



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Does Informal Guidance constitute a "safe harbor" for Audit Purposes?

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WHEN IN DOUBT, USE:

GEPA – Mitigating Circumstance 34 CFR Part 81.33:

90-Day Letter

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Continued issuance of Informal Guidance resulted in:

- "Bulletin for Agency Good Guidance Practices"
- 1.25.2007

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“Good Guidance” v. “Bad Guidance”

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SEVEN YEARS LATER IN 2014:

OMB attempted to bring coherence/consistency/simplification to agency rules on administrative/ cost/ audit functions

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UGG

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2020 AMENDMENTS TO UGG

- 2 CFR 200.105(b)

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IMPOSITION OF REQUIREMENTS ON RECIPIENTS


- Agencies may impose legally binding requirements through notice and public comments through an approved agency process

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Does OESE practice of asking the public to comment on draft Guidance satisfy this rule?



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Does ED Guidance on food purchases satisfy OMB Guidance?


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TAKEAWAYS

1. Informal Guidance is not a safe harbor
2. Absent a 90-Day Letter reliance on Informal Guidance may lead to Audit Exposure
3. Chevron Deference?



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35



Save The Date!!!
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APRIL 30 - MAY 2, 2024
BALTIMORE, MD

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36
