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WASHINGTON POLICY STRATEGY

Potomac Perspective

Recently, the U.S. Supreme Court issued several decisions that could impact tax policy and economic regulation. We take a quick look at four important cases and discuss what these rulings could mean for future policy.

Happy Independence Day and a belated Happy Canada Day to our clients and colleagues up north!

Clarity on Wealth Tax is Unrealized

The Tax Cuts and Jobs Act of 2017 (TCJA) included a mandatory foreign profit repatriation tax that attributed an entity's realized and undistributed income to the entity's shareholders or partners, and then taxed the shareholders or partners on their portions of the repatriated profits. A married couple who were shareholders in a foreign company sued the U.S. government when they were taxed on their profits as part of the TCJA. Since some profits that were taxed under the mandatory repatriation provision were not necessarily realized, there was some speculation that the Supreme Court might rule on the issue of realization which, in turn, could impact the debate regarding a wealth tax which could also tax unrealized gains. In its decision, the Court emphasized it was not ruling on the issue of realization and was, instead, only ruling on the separate issue of taxing pass-throughs.

We continue to believe a wealth tax would violate the U.S. Constitution, but the Court did not provide any clarity on this issue through its decision in *Moore v. United States*.

Limits on the Administrative State

During the most recent term, the Supreme Court continued a trend of placing limits on the administrative state. While the knee-jerk reaction is that these decisions are "pro-business," some of the decisions might present future challenges for businesses.

- The End of *Chevron* Deference – In *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled the *Chevron* deference doctrine, under which courts have deferred to an administrative agency's reasonable interpretation of an ambiguous statute that the agency was responsible with implementing. In *Loper*, the Court ruled that courts must exercise their independent judgment in determining the meaning of a statute and whether an agency has acted within its statutory authority. Some companies and investors see *Loper* as a win for businesses, but we do not think the outcome is that cut and dried. First, courts exercising their independent judgement could rule in certain cases in ways that do not favor business. Relatedly, while *Chevron* could be used to defer to agencies in ways that were not pro-business, the original *Chevron* case benefitted a business litigant. In that case, decided during the Reagan administration, the Environmental Protection Agency (EPA) interpreted the Clean Air Act of 1977 in a business-friendly manner, and the courts deferred to the EPA. *Loper* ends that deference. Agencies could now find themselves being sued if they try to water down congressional mandates in a business-friendly manner. Some might applaud the end of *Chevron* deference and the re-establishment of congressional authority over federal agencies, but investors should recognize that the gate can swing both ways, and the *Loper* decision is not as clear cut a "win" for business as some might think.

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- Durbin Case Revived – On Monday, the Court issued a decision in a case involving the Durbin amendment, which opens to door to litigation regarding the Federal Reserve (Fed)'s original debit interchange fee rule. This situation helps illustrate our earlier comments on *Chevron*. In *Corner Post v. the Board of Governors of the Federal Reserve System*, the Court ruled that the plaintiff could sue the Fed over its Regulation II despite the fact that the statute of limitations had expired. The Court ruled the six-year statute of limitations to sue the Fed should did not apply to *Corner Post* because the company opened for business in 2018 – after the statute of limitations expired. The Court ruled the statute of limitations should start ticking when *Corner Post* first suffered a harm. Therefore, *Corner Post's* lawsuit against the Fed may proceed. Because the *Chevron* doctrine no longer exists, federal courts will now exercise their own judgement in determining whether debit interchange fees established by the Fed comply with Congress's mandate that such fees be reasonable and proportional to the cost incurred by the issuer with respect to the transaction. In a *Chevron* world, we would have been confident that the Fed would prevail in this litigation. Now, we are unsure.
- Seventh Amendment Right to Jury and Administrative Agencies – Last week, in *Securities and Exchange Commission v. Jarkesy*, the Supreme Court ruled that unless a defendant waives their right to a jury trial, the SEC must bring securities fraud actions which seek civil penalties into a federal court rather than before the SEC's administrative law judges (ALJs). The SEC has not brought such cases before its own ALJs since 2016, so the impact of the decision might be limited, at least in terms of the SEC. However, it remains to be seen how the Court's ruling might be applied to other agencies that seek civil penalties against defendants. We think the ruling could be applied broadly, and other agencies will now be forced to bring some actions in federal court rather than rely on their internal administrative judges.

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