

Kisor v. Wilkie: Auer Deference Lives On, But In What Form?

June 27, 2019 | Client Update

The Supreme Court in *Kisor v. Wilkie* has declined to overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, instead narrowing deference to a federal agency's interpretation of its own ambiguous regulations by putting in place new guideposts around its use. What this means for *Auer* remains to be seen: the concurrence remarked that the *Auer* "doctrine emerges maimed and enfeebled—in truth, zombified" and the *Kisor* decision "is more a stay of execution than a pardon." Moreover, three justices signed on to part of an opinion casting doubt on not only *Auer* but also *Chevron*. The tension between the majority and concurring opinions as to both *Auer* and *Chevron* is likely to lead to a fresh spate of litigation as well as cause some confusion in the federal agencies.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Neil H. MacBride

+1 202 962 7035
neil.macbride@davispolk.com

Paul J. Nathanson

+1 202 962 7055
+1 212 450 3133
paul.nathanson@davispolk.com

Caroline Stern

+1 212 450 4881
caroline.stern@davispolk.com

Margaret E. Tahyar

+1 212 450 4379
margaret.tahyar@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

Related materials

[2019-06-27_kisor_v_wilkie_auer_deference_lives_on_but_in_what_form.pdf](#)