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EDITOR'S NOTE: TRENDING TOPICS

Steven A. Meyerowitz

SUPREME COURT'S REIMAGINING OF *AUER* DEFERENCE WEAKENS CASE FOR DEFERENCE TO FFIEC MANUAL

Pinchus D. Raice, Jeffrey Alberts, and Dustin N. Nofziger

SOFR, THE NEW LIBOR? A CRITIQUE OF SOFR AND THE USD LIBOR REPLACEMENT PROCESS

Ronald Scheinberg

FEDERAL TRADE COMMISSION CONFIRMS CURRENT TEXT OF ITS "HOLDER RULE," BUT LEAVES DOOR OPEN FOR FUTURE REGULATORY ACTIVITY IN CERTAIN AREAS

Stephen J. Newman

FIFTH CIRCUIT DENIES POST-PETITION DEFAULT INTEREST TO FULLY SECURED CREDITORS

Jeffrey R. Dutson, Sarah L. Primrose, and Nadia B. Saleem

DISTRICT COURT DECISION HIGHLIGHTS RISKS OF COOPERATING TOO CLOSELY WITH GOVERNMENT INVESTIGATIONS

Robert E. Rice, Celeste Koeleveld, Joshua Berman, and Glen Donath

A RECENT CASE HIGHLIGHTS THE IMPORTANCE OF PRECISION IN DRAFTING AND MAINTAINING UCC FINANCING STATEMENTS

Cindy J. Chernuchin

THE FUTURE OF CRYPTOCURRENCY REGULATION IN INDIA

Anirudh Gotety



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Editor's Note: Trending Topics

Steven A. Meyerowitz 435

Supreme Court's Reimagining of *Auer* Deference Weakens Case for Deference to FFIEC Manual

Pinchus D. Raice, Jeffrey Alberts, and Dustin N. Nofziger 437

SOFR, the New LIBOR? A Critique of SOFR and the USD LIBOR Replacement Process

Ronald Scheinberg 452

Federal Trade Commission Confirms Current Text of its "Holder Rule," But Leaves Door Open for Future Regulatory Activity in Certain Areas

Stephen J. Newman 461

Fifth Circuit Denies Post-Petition Default Interest to Fully Secured Creditors

Jeffrey R. Dutson, Sarah L. Primrose, and Nadia B. Saleem 468

District Court Decision Highlights Risks of Cooperating Too Closely with Government Investigations

Robert E. Rice, Celeste Koeleveld, Joshua Berman, and Glen Donath 471

A Recent Case Highlights the Importance of Precision in Drafting and Maintaining UCC Financing Statements

Cindy J. Chernuchin 476

The Future of Cryptocurrency Regulation in India

Anirudh Gotety 481

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Supreme Court’s Reimagining of *Auer* Deference Weakens Case for Deference to FFIEC Manual

*Pinchus D. Raice, Jeffrey Alberts, and Dustin N. Nofziger**

This article is a follow up on the authors’ article in the April 2019 issue of The Banking Law Journal¹ discussing the U.S. Supreme Court’s consideration of whether to overrule so-called “Auer” deference in light of the Court’s decision in Kisor v. Wilkie.

Prior to *Kisor v. Wilkie*,² “Auer” (also known as “*Seminole Rock*”) deference required the federal courts to afford controlling weight to an agency’s interpretation of its own ambiguous regulation unless that interpretation was “plainly erroneous or inconsistent with the regulation.”³ Courts—including the Supreme Court—often “applied *Auer* deference without significant analysis of the underlying regulation.”⁴ The deference doctrine as applied seemed fairly straightforward: find the regulation ambiguous because it theoretically could be interpreted in more than one way, and defer to the agency’s interpretation of it.⁵

That was the application in *California Pacific Bank v. FDIC*, an important case for financial institutions and their attorneys that we analyzed in our prior article. There, the U.S. Court of Appeals for the Ninth Circuit held that a regulation of the Federal Deposit Insurance Corporation (“FDIC”) setting

* Pinchus D. Raice is a partner at Pryor Cashman LLP and co-chair of the firm’s Financial Institutions Group, focusing on the representation of financial institutions, their boards of directors, and executive officers before federal and state banking agencies. Jeffrey Alberts is a partner at the firm, co-chair of the firm’s Financial Institutions Group, and chair of the firm’s White Collar Defense & Investigations Practice, concentrating on government investigations, prosecutions, and related regulatory proceedings. Dustin N. Nofziger is an associate in the firm’s Financial Institutions Group.

¹ Pinchus D. Raice, Jeffrey Alberts, & Dustin N. Nofziger, *Supreme Court Reconsideration of Auer v. Robbins Deference Could Significantly Impact BSA Enforcement*, *The Banking Law Journal* (Apr. 2019).

² No. 18-15 (U.S. June 26, 2019).

³ See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))); *Cal. Pac. Bank v. FDIC*, 885 F.3d 560, 574 (9th Cir. 2018) (“Under *Auer v. Robbins*, an agency’s interpretation of its own [ambiguous] regulations is ‘controlling unless plainly erroneous or inconsistent with the regulation.’” (citations omitted)).

⁴ *Kisor*, *supra* note 2.

⁵ See, e.g., *Cal. Pac. Bank*, 885 F.3d at 574–75.

forth the so-called “four pillars” of Bank Secrecy Act compliance was ambiguous.⁶ The Ninth Circuit then concluded that the FDIC’s interpretation of that regulation—as set forth in the 442-page *Bank Secrecy Act/Anti-Money Laundering Examination Manual* of the Federal Financial Institutions Examination Council (“FFIEC Manual”)—was entitled to *Auer* deference.⁷

Auer narrowly avoided being overruled in *Kisor*. In an opinion authored by Justice Gorsuch concurring only in the judgment (*i.e.*, to reverse and remand to the U.S. Court of Appeals for the Federal Circuit, which had applied *Auer* deference below), four conservative justices opined that the deference doctrine is unlawful, and three opined that it is unwise.⁸ In an opinion authored by Justice Kagan, meanwhile, four liberal justices joined by Chief Justice Roberts upheld *Auer* solely on the basis of *stare decisis*.⁹ Chief Justice Roberts did not join in Part III-A of Justice Kagan’s opinion, which asserts that *Auer* deference complies with the Administrative Procedure Act (“APA”) and Article III, § 1 of the U.S. Constitution, nor did he join in Part II-A of Justice Kagan’s opinion, which argues that *Auer* is wise from a policy perspective.¹⁰ Both of President Trump’s nominees to the Court—Justices Gorsuch and Kavanaugh—believe that *Auer* is unlawful and unwise, and that *stare decisis* does not mandate its retention.¹¹ A future Court may yet overrule *Auer*¹²—particularly if President Trump has the opportunity to nominate a third justice to replace one of the Court’s aging liberals.¹³

⁶ *Cal. Pac. Bank*, 885 F.3d at 574 (analyzing 12 C.F.R. § 326.8(c)).

⁷ *Id.* at 575.

⁸ See *Kisor*, *supra* note 2 (Gorsuch, J., concurring in the judgment). Justices Thomas, Kavanaugh, and Alito joined Justice Gorsuch in opining that *Auer* is both unlawful and unwise. Justice Alito joined Justice Gorsuch in opining that *Auer* is unlawful.

⁹ *Id.* (Kagan, J.). Justices Ginsberg, Breyer, and Sotomayor joined in all parts of Justice Kagan’s opinion.

¹⁰ See, e.g., *id.* (Gorsuch, J., concurring in the judgment) (“[T]oday’s decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*.”).

¹¹ *Id.* (Gorsuch, J., concurring in the judgment), (Kavanaugh, J., concurring in the judgment).

¹² See *id.* (Gorsuch, J., concurring in the judgment) (“The Court’s failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last.”).

¹³ Justice Ginsburg, age 86, and Justice Breyer, age 80, both joined Justice Kagan’s majority opinion.

While *Auer* deference survived the Supreme Court's scrutiny in *Kisor*, it did not do so gracefully. Justice Kagan's majority opinion sets forth a half-dozen limiting principles to guide when *Auer* deference will *not* apply to the interpretation of regulations going forward.¹⁴ Several of these principles are drawn from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a case that concerned the deference due to agency interpretations of statutes, and its progeny.¹⁵ Henceforth, for *Auer* deference to apply:

- (1) A regulation must be “genuinely ambiguous” after exhausting “all” the “traditional tools” of construction;
- (2) The agency's interpretation must be “reasonable” in that it “come[s] within the zone of ambiguity the court has identified after employing all its interpretive tools;”
- (3) The agency's interpretation must have sufficient “character and context” to mark it as an “authoritative” or “official” position entitled to controlling weight;
- (4) The agency's interpretation must implicate its “substantive expertise”; and
- (5) The agency's interpretation must reflect its “fair and considered judgment.”¹⁶

A sixth principle, relegated to a footnote, affirms the Supreme Court's prior holding that an agency's interpretation of a regulation is not entitled to *Auer* deference when the regulation parrots or paraphrases statutory language.¹⁷

In Justice Kagan's view, the majority opinion “somewhat expand[s] on” the Court's previous limiting principles for the *Auer* doctrine.¹⁸ In Justice Gorsuch's view, the majority has adorned the *Auer* doctrine “with so many new and ambiguous limitations” that it is “debilitated,” “maimed and enfeebled—in truth, zombified.”¹⁹ In essence, Justice Gorsuch believes that Justice Kagan has created a new, less determinate deference doctrine that will provide judges with greater flexibility to conclude that *Auer* deference does not apply.²⁰ While

¹⁴ *Id.*

¹⁵ *See, e.g., id.* (citing to *Chevron* for principle now imposed on *Auer* analysis).

¹⁶ *Id.*

¹⁷ *Id.* (citing *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See, e.g., id.* (“The court of appeals was guilty of nothing more than faithfully following *Auer*. But the majority today invokes *stare decisis*, of all things, to vacate that judgment and tell

awaiting a future Court to overrule *Auer*, Justice Gorsuch encourages the lower courts to “take courage from today’s ruling and realize that it has transformed *Auer* into a paper tiger” or a perhaps a “tin god—officious, but ultimately powerless.”²¹

Whatever the ultimate fate of the *Auer* doctrine, it is clear that the majority opinion in *Kisor* provides attorneys for financial institutions with new and strengthened arguments that *Auer* deference should not apply to an agency’s interpretation of its own ambiguous regulation. Given Justice Kagan’s acknowledgment that she “somewhat expand[s]” on the circumstances in which *Auer* deference does *not* apply, virtually every past case applying *Auer* deference may be vulnerable to argument that it was wrongly decided.²² Of note to financial institutions and their counsel, the pantheon of cases that are now vulnerable to such challenges includes *California Pacific Bank*, wherein the Ninth Circuit held that the FFIEC Manual is entitled to *Auer* deference. It is entirely possible that a future court applying Justice Kagan’s new, more limited version of *Auer* would decide the opposite.

THE AUER DOCTRINE AS REIMAGINED BY *KISOR*

The majority, with Justice Roberts as the swing vote, upheld *Auer* based solely on *stare decisis*. But the majority did not uphold the *Auer* doctrine “as is.” Rather, Justice Kagan, writing for the majority, sought to “cabin” the application of the *Auer* doctrine,²³ to “reinforce” its limits,²⁴ to “restate, and somewhat expand on” those limits, and to “clear up some mixed messages that we have sent.”²⁵ Too often, according to Justice Kagan, the Court has “applied *Auer* deference without significant analysis of the underlying regulation,” “given

the court of appeals to try again using its newly retooled, multi-factored, and far less determinate version of *Auer*.”), (“[T]he majority . . . proceeds to vacate a lower court judgment that faithfully applied *Auer* and instruct that court to try again using the majority’s new directions.”).

²¹ *Id.*; *cf. id.* (Kavanaugh, J., concurring in the judgment) (opining that the majority’s reimagined *Auer* doctrine, “taken, seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations”).

²² *Cf. id.* (Gorsuch, J., concurring in the judgment) (“[I]f the majority is correct that abandoning *Auer* would require revisiting regulatory constructions that were upheld based on *Auer* deference, the majority’s revision of *Auer* will yield exactly the same result. There are innumerable lower court decisions that have followed this Court’s lead and applied *Auer* deference mechanically, without conducting the inquiry that the Court now holds is required.”).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

Auer deference without careful attention to the nature and context of the interpretation,” or perhaps even applied *Auer* deference “reflexive[ly].”²⁶ As a result, Justice Kagan set forth some “principles” or “especially important markers for identifying when *Auer* deference is and is not appropriate” in *Kisor*.²⁷

The first principle is that “a court must exhaust all the ‘traditional tools’ of construction” before concluding that a regulation may warrant *Auer* deference because it is “genuinely ambiguous.”²⁸ The source for this proposition is *Chevron*²⁹—a case that did not involve the interpretation of a regulation and that discussed the traditional tools of *statutory* construction.³⁰ As a result of Justice Kagan’s first principle, “a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”³¹ Instead, it must “carefully consider” the regulation’s “text, structure, history, and purpose . . . in all the ways it would if it had no agency to fall back on.”³² According to Justice Kagan, “[d]oing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.”³³

The second principle is that an agency’s reading must be “reasonable” in that it “come[s] within the zone of ambiguity the court has identified after employing all its interpretative tools.”³⁴ In other words, the traditional tools of (statutory) construction borrowed from *Chevron* “establish the outer bounds of permissible interpretation” by the agency—“even when a regulation turns out to be truly ambiguous.”³⁵ According to Justice Kagan, this “is a requirement that an agency can fail.”³⁶

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

²⁹ *See id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

³⁰ Footnote 9 of *Chevron* provides: “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing *traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” 467 U.S. at 843 n.9 (emphasis added).

³¹ *Kisor*, *supra* note 2.

³² *Id.* (internal quotation marks and citation omitted).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

The third principle is that even if an agency interpretation of a genuinely ambiguous regulation is reasonable, the “character and context” of the agency interpretation must entitle it to controlling weight.³⁷ Quoting an opinion of Justice Scalia analyzing the interpretation of a statute under *Chevron*, Justice Kagan explains: “In other words, it must be the agency’s ‘authoritative’ or ‘official position,’ rather than any more *ad hoc* statement not reflecting the agency’s views.”³⁸ Even if the interpretation does not “come[] from, [n]or is even in the name of, the [agency head] or his chief advisers,” it “must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context.”³⁹

The fourth principle is that “the agency’s interpretation must in some way implicate its substantive expertise.”⁴⁰ In other words, the subject matter must be within the scope of an agency’s ordinary duties.⁴¹ *Auer* deference will not be applied, for example, to issues that fall “more naturally into a judge’s bailwick,” such as the elucidation of a simple common-law property term.⁴² An agency must have “comparative expertise in resolving a regulatory ambiguity” for deference to be warranted.⁴³

The fifth principle is that “any agency’s reading of a rule must reflect ‘fair and considered judgment’ to receive *Auer* deference.”⁴⁴ *Auer* deference does not apply to an agency’s “convenient litigating position” or its *post hoc* rationalizations of past agency actions.⁴⁵ Nor does it apply “to a new interpretation, whether or not introduced in litigation, that creates ‘unfair surprise’ to regulated parties.”⁴⁶

The sixth principle, relegated to a footnote, is a reaffirmation of the holding from *Gonzales v. Oregon* that *Auer* deference is not due when an agency interprets a rule that “parrots” or “paraphrases” the statutory text.⁴⁷ “An agency

³⁷ *Id.*

³⁸ *Id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 257–59 & n.6 (2001) (Scalia, J., dissenting)).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *Id.* (citation omitted).

⁴⁵ *Id.*

⁴⁶ *Id.* (citation omitted).

⁴⁷ *Id.* (citing *Gonzales*, 546 U.S. at 257).

. . . gets no ‘special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.’”⁴⁸

The “upshot,” according to Justice Kagan, is that “*Auer* deference gives an agency significant leeway to say what its own rules mean”—“[w]hen it applies.”⁴⁹ Yet *Auer* deference “often doesn’t” (or perhaps more accurately, will not going forward) apply because of the limitations set forth by Justice Kagan in the majority opinion that “cabin[] *Auer*’s scope in varied and critical ways.”⁵⁰

IMPLICATIONS FOR FINANCIAL INSTITUTIONS

Three observations about Justice Kagan’s new test for the application of *Auer* deference may be particularly salient to attorneys for financial institutions.

First, the principle that “a court must exhaust all the ‘traditional tools’ of construction” before concluding that a regulation is genuinely ambiguous is a significant new limitation on the application of *Auer* deference.⁵¹

What are the “traditional tools” of construction? Although Justice Kagan mentions examination of a regulation’s “text, structure, history, and purpose,” she does not actually specify what the traditional tools of construction are.⁵² Neither, for that matter, does *Chevron*—the source of her inspiration.⁵³ That said, in the statutory context, “[j]udges . . . frequently rely[] on five types of interpretive tools: ordinary meaning, statutory context, [semantic and substantive] canons of construction, legislative history, and evidence of the way a statute is implemented.”⁵⁴ In the regulatory context post-*Kisor*, these interpretive tools might be viewed as ordinary meaning, regulatory context (*e.g.*, the use of disputed language in other regulations), semantic and substantive canons of construction, regulatory history (*e.g.*, rulemaking notices in the Federal Register), and evidence of the way a regulation is implemented (*e.g.*, prior agency interpretations in administrative rulings or a pattern of action).

⁴⁸ *Id.* (quoting *Gonzales*, 546 U.S. at 257). Alternatively, the sixth and fourth principles might be viewed as different facets of single principle that *Auer* deference does not apply “[w]hen the agency has no comparative expertise in resolving a regulatory ambiguity.” *See id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (quoting *Chevron*, 467 U.S. at 843 n.9).

⁵² *Id.*

⁵³ *See Chevron*, 467 U.S. at 843 n.9.

⁵⁴ Valerie C. Brannon, Cong. Research Serv., R45153, *Statutory Interpretation: Theories, Tools, and Trends* 18 (2018), available at <https://crsreports.congress.gov/product/pdf/R/R45153>.

To illustrate the sea change worked by *Kisor*, consider *Kisor* itself. *Kisor* was denied retroactive disability compensation benefits for post-traumatic stress disorder by the Department of Veterans Affairs (“VA”).⁵⁵ The legal issue presented was (and is, on remand) the interpretation of the VA’s regulation requiring the reopening of denied claims for disability compensation benefits in light of new, “relevant” service department records.⁵⁶ In concluding that the regulation was ambiguous, warranting deference to the VA’s interpretation under *Auer*, the Federal Circuit considered potential definitions of “relevant” and gave lip service to consideration of unspecified “canons of construction.”⁵⁷ As such, it does not appear that the Federal Circuit utilized “all” the available tools of construction, including the regulation’s context, semantic and substantive canons of construction, regulatory history, and evidence of the way the regulation is implemented.⁵⁸

Notably, one canon of substantive construction that was not discussed by the Federal Circuit panel below is the canon that “provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.”⁵⁹ This “pro-veteran canon of construction” was highlighted by three Federal Circuit judges who dissented from the Federal Circuit’s decision to deny *Kisor*’s petition for a rehearing *en banc*.⁶⁰ The dissenters opined that a regulation concerning veterans’ benefits “cannot be so ambiguous as to require *Auer* deference if a pro-veteran interpretation of the regulation is possible.”⁶¹ Required to utilize “all” of the tools of construction on remand—including, presumably, any applicable substantive canons of construction—the Federal Circuit may well conclude that the seeming ambiguity it identified below is not

⁵⁵ *Kisor*, *supra* note 2.

⁵⁶ *See id.*; 38 C.F.R. § 3.156(c)(1) (2013) (“[I]f VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim . . .”).

⁵⁷ *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017), *cert. granted in part sub nom. Kisor v. Wilkie*, 139 S. Ct. 657, 202 L. Ed. 2d 491 (2018), and *vacated and remanded sub nom. Kisor v. Wilkie*, No. 18-15 (U.S. June 26, 2019).

⁵⁸ *Cf. Kisor*, *supra* note 2 (Kagan, J.) (“[T]he Federal Circuit jumped the gun in declaring the regulation ambiguous. . . . [T]he court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning.”).

⁵⁹ *Kisor v. Shulkin*, 880 F.3d 1378, 1380 (Fed. Cir. 2018) (O’Malley, J., dissenting from denial of petition for reh’g *en banc*) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011)).

⁶⁰ *Id.* at 1380-82.

⁶¹ *Id.* at 1381.

actually a “genuine ambiguity” triggering *Auer* deference. If this is the result, it would be in keeping with Justice Gorsuch’s observation that because the traditional tools of construction “include all sorts of tie-breaking rules for resolving ambiguity even in the closest cases,” the courts applying Justice Kagan’s “reengineered” *Auer* doctrine will, hopefully, “hardly ever find [the traditional tools of construction to be] inadequate.”⁶²

Second, the principle that an agency’s reading must be “reasonable” in that it “come[s] within the zone of ambiguity the court has identified after employing all its interpretative tools” is also a new and significant limitation on the application of *Auer* deference.⁶³ If the Federal Circuit does not determine on remand in *Kisor* that the use of “all” of the traditional tools of construction resolves any seeming ambiguity concerning the word “relevant,” it will have to consider whether the VA’s preferred interpretation of the regulation falls within the “outer bounds of permissible interpretation” established by those tools.

Third, the principle that the agency’s interpretation must have sufficient “character and context” to mark it as an “authoritative” or “official” position entitled to controlling weight will in many cases provide regulatory attorneys with arguments that particular agency interpretations are not sufficiently authoritative to warrant deference.⁶⁴ Justice Kagan freely admits that this new principle “does not reduce to any exhaustive test.”⁶⁵ Rather than setting forth a clear and understandable test for “character and context,” Justice Kagan provides guideposts in the form of a single Supreme Court case where *Auer* deference was applied to official staff memoranda, as well as three circuit court cases where *Auer* deference was not applied to less authoritative interpretations.⁶⁶

The case cited by Justice Kagan as an example of appropriate application of *Auer* deference involved “‘official staff memoranda’ that were ‘published in the Federal Register.’”⁶⁷ Yet examination of the case itself reveals that these were not

⁶² *Kisor*, *supra* note 2; *cf. id.* (Kavanaugh, J.) (“If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency’s contrary interpretation. In other words, the [*Chevron*] footnote 9 principle, taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations.”).

⁶³ *See id.*

⁶⁴ *See id.* (quoting *Mead*, 533 U.S. at 257–59 & n.6 (Scalia, J., dissenting)).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9 & 567 n.10 (1980)).

run-of-the-mill staff memoranda. Rather, they were Federal Reserve staff opinions construing the Truth in Lending Act (“TILA”) and Regulation Z upon which Congress had conferred “special status” in the form of a statute providing a defense to liability for lenders who complied with those interpretations.⁶⁸ Moreover, the Board of Governors of the Federal Reserve had promulgated a regulation authorizing its staff to issue official interpretations of TILA that would trigger the statutory safe harbor.⁶⁹

Justice Kagan cites to three circuit court cases as examples where deference was not warranted because interpretations were insufficiently authoritative.⁷⁰ The first case involved a speech of a mid-level official;⁷¹ the second involved an informal memorandum recounting a telephone conversation between mid-level

⁶⁸ See *Ford Motor Credit*, 444 U.S. at 567-68 (“In 1974, TILA was amended to provide creditors with a defense from liability based upon good-faith compliance with a ‘rule, regulation, or interpretation’ of the Federal Reserve Board itself. § 406, 88 Stat. 1518, codified at 15 U.S.C. § 1640(f) The enactment and expansion of § 1640(f) has significance beyond the express creation of a good-faith immunity. That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative.” (citation omitted)), 566 n.9 (“[I]t is unnecessary to explore the Board/staff difference at length, because Congress has conferred special status upon official staff interpretations. See 15 U.S.C. § 1640(f); 12 CFR § 226.1(d) (1979).”), 567 n.10 (“Title 12 CFR § 226.1(d) (1979) authorizes the issuance of official staff interpretations that trigger the application of § 1640(f). Official interpretations are published in the Federal Register, and opportunity for public comment may be requested. 12 CFR § 226.1(d). Unofficial interpretations have no special status under § 1640(f).”); *An Act to extend the State Taxation of Depositories Act*, Pub. L. No. 94–222, 90 Stat. 197 (1976) (“(b) Section 130(f) of the Truth in Lending Act (15 U.S.C. 1640 (f)) is amended to read as follows: ‘(f) // 15 USC 1611. // No provision of this section or section 112 imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.’”).

⁶⁹ See *Ford Motor Credit*, 444 U.S. at 567 n.10 (“Title 12 CFR § 226.1(d) (1979) authorizes the issuance of official staff interpretations that trigger the application of § 1640(f).”); 12 CFR § 226.1(d)(2)(i) (1979) (“Official staff interpretations will be issued at the discretion of designated officials.”) & (d)(4) (“Pursuant to section 130(f) of the [Truth in Lending] Act, the Board has designated the Director and other officials of the Division of Consumer Affairs as officials ‘duly authorized’ to issue, at their discretion, official staff interpretations of this Part.”)

⁷⁰ See *Kisor*, *supra* note 2.

⁷¹ *Id.* (citing *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997), *abrogated by Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199 (2015)).

agency employees;⁷² and the third involved a regulatory guide of an agency that had “disclaimed the use of regulatory guides as authoritative.”⁷³

These four exemplars do not provide a clear rule that can be applied to the multitude of agency interpretations that are potentially subject to *Auer* deference. The uniqueness of the cases cited and their lack of general applicability will provide attorneys for financial institutions with grounds to make arguments that particular agency interpretations are insufficiently authoritative to warrant deference. In particular, Justice Kagan’s lone example of an interpretation that warranted *Auer* deference may be distinguishable because of the unique statute giving “special status” to such interpretations and the regulation authorizing their issuance.

The Court’s reimagining of the *Auer* doctrine in *Kisor* is a gift to financial institutions and their counsel that greatly increases the chances that *Auer* deference does *not* apply to an agency interpretation. If “all” of the tools of construction can be utilized to resolve a seeming ambiguity, or to demonstrate that an agency’s interpretation falls outside a reasonable “zone of ambiguity,” *Auer* deference will not apply. Nor will an agency’s interpretation entitle it to controlling weight if it is insufficiently authoritative considering the “character and context” of its issuance—a nebulous standard that will allow regulatory attorneys to make new arguments against the application of *Auer* deference.

IMPLICATIONS FOR DEFERENCE TO THE FFIEC MANUAL

The Ninth Circuit did not have the benefit of Judge Kagan’s opinion reimagining the *Auer* doctrine when it decided in *California Pacific Bank* that the FFIEC Manual is entitled to *Auer* deference. As such, it did not consider—and for the most part could not have considered—the limitations on the *Auer* doctrine that Justice Kagan sets forth in *Kisor*. There are several reasons to think that *Kisor* could point the Ninth Circuit to a different decision today, and that other courts should not view the Ninth Circuit’s opinion to have much if any persuasive value.

First, the Ninth Circuit did not consider “all” of the tools of statutory construction when it decided that the FDIC’s “four pillars” regulation was

⁷² *Id.* (citing *New York State Dep’t of Soc. Servs. v. Bowen*, 835 F.2d 360, 365–66 (D.C. Cir. 1987)).

⁷³ *Id.* (citing and quoting *Exelon Generation Co. v. Local 15, Int’l Brotherhood of Elec. Workers, AFL-CIO*, 676 F.3d 566, 576–78 (7th Cir. 2012)); see also *Exelon Generation Co.*, 676 F.3d at 577 (“[T]he Commission itself has disclaimed the use of regulatory guides as authoritative or binding interpretations of its own rules.”).

ambiguous. *Kisor* requires “careful[] consider[ation]” of “all” such tools—including, at a minimum, careful consideration of the “text, structure, history, and purpose” of the regulation.⁷⁴

It is not clear that the Ninth Circuit truly considered any of these factors in its three-sentence analysis of the regulation’s purported ambiguity.⁷⁵ Consideration of the regulation’s text, for example, was lacking.⁷⁶ The Ninth Circuit did not analyze the text of each of the four pillars to consider whether, in light of “all” of the tools of construction, a genuine ambiguity existed with respect to the interpretation of each pillar.⁷⁷ In light of *Kisor*’s requirement to “carefully consider[]” a regulation’s “text, structure, history, and purpose,” the Ninth Circuit’s analysis was deficient.⁷⁸

Second, and relatedly, the Ninth Circuit did not consider whether the various interpretations of the four pillars set forth in the FFIEC Manual that were at issue in *California Pacific Bank* fell within the regulation’s “zone of ambiguity”—as defined by “all” of the tools of construction.⁷⁹

Third, the Ninth Circuit did not consider whether the FFIEC Manual has sufficient “character and context” to mark it as an authoritative or official position of the FDIC entitled to controlling weight.⁸⁰ There may be reasons to conclude that the FFIEC Manual lacks the character and context to entitle it to controlling weight.

For one thing, the FFIEC Manual is arguably unlike the “official staff memoranda” that Justice Kagan held up as an example of an authoritative interpretation in *Kisor*.⁸¹ Unlike those memoranda, the FFIEC Manual is not directly published by the FDIC, is not published in the Federal Register, is not

⁷⁴ *Kisor*, *supra* note 2.

⁷⁵ See *Cal. Pac. Bank*, 885 F.3d at 574 (“The FDIC’s four pillars regulation is ambiguous. The four pillars are not entirely ‘free from doubt,’ given the complexity of BSA compliance and the need for FDIC officials to conduct administrative examinations of bank BSA programs. That banks can design different compliance programs further demonstrates that the four pillars are ‘susceptible to different interpretations.’” (citations omitted)). The brevity of the Ninth Circuit’s analysis may have been due in part to the fact it was *sua sponte*. See Answering Br. of Resp’t FDIC, *Cal. Pac. Bank v. FDIC*, 885 F.3d 560 (9th Cir. 2018) (No. 16-70725) (failing to make deference argument based on *Auer/Seminole Rock*).

⁷⁶ See *Cal. Pac. Bank*, 885 F.3d at 574.

⁷⁷ See *id.*

⁷⁸ See *id.* (internal quotation marks and citation omitted).

⁷⁹ See *id.*

⁸⁰ See *id.* at 574–75.

⁸¹ See *Kisor*, *supra* note 2.

the subject of a law entitling it to “special status,” and is not (as far as the authors are aware) authorized by regulation as an official interpretation of the FDIC.

For another, the FDIC has arguably “disclaimed the use of [the FFIEC Manual] as [an] authoritative” interpretation of its “four pillars” regulation.⁸² This is because the FDIC recently acknowledged in an interagency statement that supervisory guidance is not law or regulation, and that the FDIC does not take enforcement action based on it.⁸³ The FFIEC Manual is neither law nor regulation, and is at most supervisory guidance. The FDIC’s recent acknowledgement of the nonbinding nature of supervisory guidance in the interagency statement may mean that FDIC supervisory guidance—including the supervisory guidance contained within the FFIEC Manual—is insufficiently authoritative to warrant *Auer* deference. If the FDIC will not base an enforcement action on the interpretations of its “four pillars” regulation set forth in the FFIEC Manual, should the courts credit the FFIEC Manual as setting forth authoritative interpretations of the “four pillars” regulation that are entitled to controlling weight?⁸⁴

Fourth, the Ninth Circuit did not consider the prior Supreme Court case law, reaffirmed by *Auer*, holding that an agency’s interpretation of a regulation is not entitled to *Auer* deference when the regulation parrots or paraphrases statutory language.⁸⁵ The FDIC’s “four pillars” regulation arguably parrots or paraphrases the four pillars set forth in the BSA itself.⁸⁶ While the BSA requires

⁸² *Id.* (quoting *Exelon* 676 F.3d at 576–78).

⁸³ CFPB, Federal Reserve Board, FDIC, NCUA, OCC, *Interagency Statement Clarifying the Role of Supervisory Guidance* 1-2 (Sept. 11, 2018) (“Unlike a law or regulation, supervisory guidance does not have the force and effect of law, and the agencies do not take enforcement actions based on supervisory guidance. . . . Examiners will not criticize a supervised financial institution for a ‘violation’ of supervisory guidance.”), *available at* <https://www.fdic.gov/news/news/press/2018/pr18059a.pdf>.

⁸⁴ *Cf. Exelon*, 676 F.3d at 577 (citing acknowledgement of agency that regulatory “guides are not substitutes for regulations and compliance with them is not required” as support for non-application of *Auer* deference).

⁸⁵ *See Cal. Pac. Bank v. FDIC*, 885 F.3d at 574–75.

⁸⁶ *Compare* 12 C.F.R. § 326.8(c) (“The compliance program shall, at a minimum: (1) Provide for a system of internal controls to assure ongoing compliance; (2) Provide for independent testing for compliance to be conducted by bank personnel or by an outside party; (3) Designate an individual or individuals responsible for coordinating and monitoring day-to-day compliance; and (4) Provide training for appropriate personnel.”), *with* 31 U.S.C. § 5318(h)(1) (“In order to guard against money laundering through financial institutions, each financial institution shall establish anti-money laundering programs, including, at a minimum—(A)

“an ongoing employee training program,” for example, the FDIC’s “four pillars” regulation requires “[p]rovid[ing] training for appropriate personnel.”⁸⁷ It is in the FFIEC Manual that the FDIC adds substantive “requirements” to the BSA’s training pillar, such as the requirement that “training should be tailored to [a] person’s specific responsibilities.”⁸⁸ While the FDIC could have chosen to invoke its substantive expertise by including these substantive additions in its “four pillars” regulation, it chose instead to include its substantive additions in a 442-page examination manual. As *Kisor* reiterates, “[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.”⁸⁹

These above examples are intended to provide attorneys for financial institutions with some initial ideas for arguments that the FFIEC Manual is not entitled to *Auer* deference. Doubtless, financial institution counsel will develop other and fuller arguments in time. Given that *California Pacific Bank* preceded *Kisor* and did not consider the limitations on *Auer* deference that the Court has now set forth, its holding that the FFIEC Manual is entitled to *Auer* deference is highly suspect.

CONCLUSION

Kisor ushers in exciting times for attorneys for financial institutions. No longer, perhaps, will the courts blindly defer to agency interpretations of seemingly ambiguous regulations based on superficial analyses. Instead, *Kisor* demands that the courts carefully analyze whether a “genuine ambiguity” exists and whether the agency’s interpretation falls within a reasonable “zone of ambiguity” using “all” of the tools of construction. In addition, the courts must consider whether *Auer* deference is unwarranted in light of all of the other principles for non-application set forth in Justice Kagan’s opinion—such as whether the “character and context” of the interpretation is insufficient to entitle it to controlling weight.

While the lower courts puzzle out *Kisor*’s full meaning, uncertainty will abound. This uncertainty will increase the power of attorneys for financial

the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs.”).

⁸⁷ Compare 12 C.F.R. § 326.8(c)(4), with 31 U.S.C. § 5318(h)(1)(C).

⁸⁸ See *Cal. Pac. Bank*, 885 F.3d at 579 (quoting FFIEC Manual).

⁸⁹ *Kisor*, *supra* note 2 (quoting *Gonzales*, 546 U.S. at 257).

institutions to oppose the application of *Auer* deference to agency interpretations of ambiguous or potentially ambiguous regulations. If the lower courts take up Justice Gorsuch’s invitation to view the *Auer* doctrine as a “zombified” “paper tiger,” the power of attorneys for financial institutions to oppose unjustified agency interpretations will increase further, and the banking agencies will be strongly incentivized to write non-ambiguous regulations that put financial institutions on notice of required conduct.

With respect to the FFIEC Manual, attorneys for financial institutions and their clients know well that the FDIC and the other banking agencies have long treated the FFIEC Manual’s recommendations and requirements as legally binding.⁹⁰ So did the Ninth Circuit in *California Pacific Bank*.⁹¹ But the Ninth Circuit did not have the benefit of *Kisor* when it decided *California Pacific Bank*, and its analysis is insufficient under Justice Kagan’s reimagining of the *Auer* doctrine. *Kisor* thus gives hope to financial institutions and their counsel that a future court will conclude that the FFIEC Manual is not entitled to *Auer* deference.

⁹⁰ *Cf., e.g., Cal. Pac. Bank*, 885 F.3d 560, 573–74 (“The FDIC Board adopted in full the ALJ’s findings, which looked to the FFIEC Manual as an authority on compliance with the FDIC’s four pillars regulation The FDIC [contends] that an agency may properly rely on, and clarify regulations with, an instructional manual promulgated to provide guidance on what is required by the regulation it administers.”).

⁹¹ *See id.* at 575–80.