

Courts Not Hesitating to Reject Federal Agencies' Faulty Regulatory Interpretations Since *Kisor v. Wilkie*

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Key Points

- Federal agencies' regulatory interpretations falling short of the standards laid out in *Kisor* are not surviving judicial review.
- Courts are closely scrutinizing regulations to determine if they are genuinely ambiguous.
- Courts are deferring to agency interpretations only if regulations are genuinely ambiguous and the interpretation meets the Supreme Court's criteria for deference.

Last June, the Supreme Court issued *Kisor v. Wilkie*¹ and upheld "Auer deference," i.e., deference to an agency's reasonable interpretation of its own regulations.² There's plenty of scholarly debate about how much impact *Kisor* actually had on administrative law. From a practical standpoint, however, it is apparent that since *Kisor*, litigants have been finding success in challenging agency decisions and other administrative actions that are based on regulatory interpretations.

In fact, quite a large number of federal court rulings have rejected agencies' interpretations of their regulations and cited *Kisor* in so doing. As of the end of February, over 110 federal court decisions have cited it. Of the 114 decisions we examined, 49 considered whether to defer to federal agencies' regulatory interpretations. (Many decisions cited *Kisor* only in passing.) The results are striking.

Under *Kisor*, before even considering whether deference to an agency's regulatory interpretation could be warranted, courts must examine whether the regulation is "genuinely ambiguous" by employing "all the standard tools of interpretation." Only if a regulation is genuinely ambiguous does a court assess whether to defer.

Drawing on precedent, Justice Elena Kagan explained in the lead opinion that a court determines whether *Auer* (*Auer v. Robbins*) deference is warranted by considering:

1. whether the agency interpretation is reasonable;

Contact Information

If you have any questions regarding this alert, please contact:

Caroline L. Wolverton

Senior Counsel

cwolverton@akingump.com

Washington, D.C.

+1 202.887.4107

Anthony T. Pierce

Partner

apierce@akingump.com

Washington, D.C.

+1 202.887.4411

2. whether its “character and context” entitles it to controlling weight, including whether it is the agency’s authoritative or official position and implicates the agency’s substantive expertise; and
3. whether the interpretation reflects a “fair and considered judgment,” including whether it accounts for reliance interests and does not unfairly surprise regulated parties.

Rejecting Agency Interpretations

Since *Kisor*, more federal court decisions rejected agency interpretations than upheld them. Specifically, 26 decisions withheld deference, while 23 decisions accepted the agency interpretation. Of the 23 decisions in the agency’s favor, just 14 deferred to the interpretation; the other nine found that the agency had followed the regulation’s plain meaning.

These decisions applied *Kisor* to regulatory interpretations emanating from across the federal government, including the Departments of Commerce, Treasury, Labor, Health and Human Services, Homeland Security, the Internal Revenue Service, the Environmental Protection Agency, and the Commodity Futures Trading Commission. The interpretations had been presented in a variety of forms such as administrative adjudications and other decisions, enforcement actions, guidance documents, opinion letters, answers to frequently asked questions, and amicus briefs.

The decisions that rejected agency interpretations relied on the reasons for withholding deference that Kagan identified in *Kisor*. The most frequent reason given for declining to defer—cited by 13 of those 26 decisions—was that the underlying regulation is not genuinely ambiguous.

For example, *Amazon.com v. Commissioner of Internal Revenue* (9th Cir. 2019) concluded that, although the IRS regulation defining “intangible” (for purposes of valuing certain business assets) was ambiguous on its face, its meaning was not “genuinely ambiguous” once its drafting history and the regulatory framework were examined. After applying those “standard tools of interpretation,” the decision rejected the interpretation the IRS had employed to assess Amazon with substantial income tax deficiencies.

Of the 13 decisions rejecting agency interpretations of genuinely ambiguous regulations, several found the interpretation unreasonable. *O’Neal v. Denn-Ohio LLC* (N.D. Ohio Jan. 14, 2020), as one example, rejected the Department of Labor’s interpretation of an ambiguous regulation establishing the criteria for “dual jobs” (jobs with tipping and non-tipping components and thus differing minimum wage requirements) as inconsistent with the regulation’s purpose.

Another common rationale for rejecting an agency interpretation was that the agency had changed its interpretation without making a fair and considered judgment. *CFTC v. Byrnes* (S.D.N.Y. Sept. 19, 2019), for instance, withheld deference from the CFTC’s interpretation of its regulation defining “material” (for purposes of restrictions on disclosure of material nonpublic information). The decision found that the interpretation conflicted with the commission’s prior interpretation on which regulated parties had relied for over 20 years.

More than one decision concluded that the agency's interpretation fell outside the scope of its expertise. As an example, *Hymes v. Bank of America* (E.D.N.Y. 2019) declined to defer to a regulatory interpretation that the Office of the Comptroller of the Currency advanced in an amicus brief based on its interpretation of case law. "Analysis of case law, as a general rule, falls squarely within the expertise of the federal courts, not agencies," the decision explained.

We cannot know how the courts in these cases would have ruled before *Kisor*, of course. They may well have rejected the agencies' regulatory interpretations based on the precedent upon which Kagan drew.

It seems significant, however, that in the eight months following *Kisor*, 13 federal court decisions rejected agency interpretations because the underlying regulations were not in fact "genuinely ambiguous" and the other 13 refused to defer to the agency's interpretation despite having found the regulation ambiguous. It seems fair to conclude that those decisions were, to some degree, influenced by *Kisor*.

Kagan's lead opinion in *Kisor* emphasized "a strong judicial role in interpreting rules." Judging from the opinions issued since last summer, the courts are taking their role seriously.

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¹ 139 S.Ct. 2400 (2019).

² See *Auer v. Robbins*, 519 U.S. 452 (1997).

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