

Notes
PCC Member Strategy Call
Thursday, July 25, 2024
12:00 noon ET

I. Welcome/Membership Updates

- a. Welcome, and thank you all for joining us today.
- b. We're excited to announce that the PCC has launched a [LinkedIn page](#). Please connect with us and if you see a PCC post, give it a like!

II. Briefing on impact of end of *Chevron* doctrine: Cyber Incident Reporting for Critical Infrastructure Act (CIRCI) rulemaking case study (Guest Speaker: Brian Finch, Partner, Pillsbury)

- a. CIRCI Background
 - i. When CIRCI was passed, the purpose of the law was to give the Department of Homeland Security's (DHS) Cybersecurity and Infrastructure Security Agency (CISA) more information about what was happening behind cyber-attacks via a mandatory reporting system.
 - ii. Upon passage, there were concerns that rulemaking would be overbroad with respect to the sectors affected.
- b. CIRCI Proposed Rule
 - i. In March 2024, CISA released a Notice of Proposed Rulemaking detailing how companies will have to comply with CIRCI. The draft CIRCI Rule would require virtually every owner/operator entity within one of 16 identified Critical Infrastructure sectors to report a cybersecurity incident within 72 hours and/or report within 24 hours a ransomware payment.
 - ii. DHS effectively transformed CIRCI, which was a relatively narrowly tailored statute, into a broad enforcement mechanism. Consequently, comments on the proposed rule deemed it duplicative, unreasonably burdensome, and disruptive to operations.
 - iii. There was also pushback on the procedural aspects of this rulemaking: the Biden administration was explicit about its intentions in using CIRCI as a way to creatively handle cyber-attacks – which is effectively what *Loper Bright Enterprises et al. v. Raimondo*, the Supreme Court decision overturning *Chevron*, seeks to address.
- c. Administrative Action Post-*Chevron*
 - i. For many years, the Supreme Court's *Chevron* ruling dictated that courts are to defer to agencies in how such agencies implement/carry out a statute enacted by Congress.
 - ii. Earlier this year, the Supreme Court effectively overturned *Chevron* deference to agencies, giving courts greater power to overturn agency rules that are inconsistent with the provisions of a federal law.
 - iii. From our perspective, the end of *Chevron* means a few things. To the extent that an agency is regulating our respective sectors, if the agency does so in a

way that seems to conflict with the underlying statute or is inconsistent with bounds of that statute, there may be an opportunity to challenge that action in court and there may be greater likelihood of success.

- iv. The second reason it is relevant is because it is a call to Congress to be more prescriptive in how legislation is drafted so that agencies have clear guidance as to what the rules they promulgate look like. In our *Freedom to Invest* bill, we are prescriptive in terms of types of certifications that should be covered for 529 plans, for example. We think our bill might be *Chevron*-proof, but this is something we'll always consider when drafting and proposing federal legislation for the PCC going forward.
 - v. Most of what we've focused on – laws affecting certification organization – are at the state level, so are not affected by *Chevron*. One possible exception is copyright registration rules; the copyright office has come out against AI-generated content eligibility for copyright registration. There may be implications here that will play out in this realm.
 - vi. It also leaves a little bit of uncertainty for certification organizations - might be harder to say agency says this so we can rely on this - because courts may not give deference to agency interpretations .
- d. CIRCIA Post-*Chevron*
- i. With respect to CIRCIA, in particular, many of your professions will be considered critical infrastructure, so if your executive teams haven't already looked at these requirements, now might be the time to do so.
 - ii. At the same time, we do believe that CISA's proposed rules to implement CIRCIA, if promulgated, could be a target for a *Loper Bright* challenge, with opponents of the rules arguing that CISA strayed too far from the statute in crafting its rules.

III. Federal Legislative Updates

- a. *Freedom to Invest in Tomorrow's Workforce Act*
 - i. H.R. 1477
 - 1. Our cosponsor number is up to 147, with continuing, remarkably bipartisan support.
 - 2. Due to the success of our advocacy efforts, the House Ways & Means Committee in early July decided to advance a version of our bill.
 - a. In an effort to move our language, our bill language was combined with another bill, to collectively comprise the *Education and Workforce Freedom Act* (H.R. 8915). H.R. 8915 seeks to amend the Internal Revenue Code to expand the expenses treated as qualified higher education expenses for purposes of 529 accounts to include additional elementary and secondary school expenses, including expenses associated with homeschooling, as well as certain postsecondary expenses, as we have proposed.
 - b. This is a testament to the Committee's interest in moving our bill, but unfortunately this also creates obstacles for us, as Democrats uniformly oppose any bill that would permit

individuals to use funds in 529 plans to cover the costs associated with homeschooling and/or private elementary/secondary schools. As such, we are continuing our efforts to build support for H.R. 1477, which remains wholly bipartisan

- c. While further movement on either H.R. 8915 or H.R. 1477 this session is unlikely, we've met and surpassed a major benchmark in the policy-making process.
 - d. We have clear momentum, which we will continue to grow into next session, when tax legislation is almost certain to be considered by Congress, given the pending expiration of certain provisions of the tax code.
- ii. S. 722
 - 1. 24 cosponsors on the Senate side. Note that the Senate version of the bill has *not* been combined with the 529-for-homeschooling bill and has not yet been considered in committee.
 - 2. Our strategy for that legislation remains to recruit as many cosponsors as possible, with a particular focus on recruiting Senate Finance Committee members to cosponsor the bill.
 - b. *Appropriations Report Language: GAO Report on Prevalence of High-Quality Credentials for Veterans*
 - i. We have another piece of encouraging news related to the report language we've been working on.
 - ii. In mid-July, the Senate Appropriations Committee approved its version of the FY2025 Military Construction, Veterans Affairs, and Related Agencies Appropriation Act (MILCON-VA), and released its accompanying report which includes the language that the PCC and ASAE requested.
 - iii. Our report language orders the Government Accountability Office (GAO), which is the audit and investigative arm of Congress, to report on credentials.
 - iv. This language articulates standards for high-quality post-secondary credentials, which we can point to and leverage in other settings.
 - v. Additionally, the data that the GAO is directed to gather with respect to an earnings comparison between veterans with and without such credentials who are working in similar industries and occupations could be cited by certification organizations to make the case for the value of certification

IV. DOJ Antitrust Division Healthy Competition Task Force – Update

- a. The last time we met, we mentioned our letter to the DOJ Antitrust Healthy Competition Task Force, which calls out recertification requirements as an example of “conduct that can harm competition in healthcare.”
- b. Although the focus of the task force is on the healthcare sector, there is no reason why this argument couldn't be applied more broadly – so we want to make sure this specious argument, which is contrary to legal precedent, does not gain momentum. We submitted a letter, which details the importance of certification across sectors, and includes caselaw, much of which supports our position that certification actually promotes competition and promotes consumer decision-making.

- c. The letter includes two requests: 1) remove the recertification requirements from the list of examples of conduct that can harm competition in healthcare; and 2) a request for a meeting to discuss.
- d. We hope to make progress on both fronts, and will keep you updated as we do!

V. State Legislative Update

- a. We're in the state legislative summer lull. Only one high priority bill remains standing, Ohio HB 238, which provides that no licensing agency can have continuing education requirements/courses that include prohibited concepts such as implicit bias. As a reminder, we've proposed amendments to confirm that this wouldn't prohibit any licensing agency from recognizing private certifications if those organizations provide continuing education related to DEI-type concepts or implicit bias.

VI. Fearless Fund 11th Circuit Decision

- a.
- b. In June, the Eleventh Circuit issued a decision in *American Alliance for Equal Rights vs. Fearless Fund Management, LLC*, that has potentially far-reaching implications.
- c. An advocacy group, run by the same person who brought the Supreme Court SFFA case, sued Fearless Fund Management, LLC, the nonprofit foundation of an Atlanta-based venture capital firm which issues grants to small businesses owned by Black women.
- d. The court found that Fearless Fund's grant contest was "substantially likely" to violate the federal prohibition against race discrimination in making an enforcement of contracts, under 42 U.S.C. § 1981. The grant contest was deemed an unlawful act of discrimination, regardless of whether it intends to remedy a manifest racial disparity.
- e. We wanted to bring this to your attention because we're aware that there are a number of certification orgs that have built pipelines programs that offers benefits to underrepresented populations, and may have eligibility rules that include race as part of eligibility. We would now call this a legally risky strategy.

VII. Closing

- a. Thanks to all of you for joining. Our next meeting will be in early September. We look forward to speaking with you then.