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March 11, 2015

# The Supreme Court Sides with the Department of Labor in "Rulemaking" Challenge

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The U.S. Supreme Court handed the U.S. Department of Labor (DOL) a victory in a battle over whether the agency's reversal of its stance on the exempt status of mortgage loan officers was subject to public notice and comment. In *Perez v. Mortgage Bankers Association*, the Court held that the DOL's 2010 Administrator's Interpretation concluding that mortgage loan officers do not qualify for the Fair Labor Standards Act (FLSA) administrative exemption was not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA). The decision has implications far beyond the question of whether mortgage loan officers are exempt from the overtime requirements of the FLSA. In rejecting the argument that a federal agency must use the APA's notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation, the Court removed a significant potential impediment to an agency making important policy changes through so-called "sub-regulatory" guidance.

Those looking to the Supreme Court to rein in federal agency "rulemaking" were no doubt disappointed by the decision. At issue in the case was the scope of the APA and its application to "interpretative" as opposed to "legislative" rules by an agency. Under the APA, legislative rules, which have the force and effect of law, are subject to traditional notice-and-comment periods, during which the agency publishes a notice of proposed rulemaking in the *Federal Register*, and stakeholders are invited to provide input on the proposal. Agencies are required to take all comments into consideration in formulating the final rule, and any amendments to the rule are similarly subject to notice-and-comment requirements. In contrast, the *Court in Perez v. Mortgage Bankers Association* noted that "Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement 'does not apply' to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'" In an opinion written by Justice Sonia Sotomayor, the Court acknowledged that the term "interpretive rule" is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate.

Interpretive rules are considered to be the agencies' explanations of their own rules or laws they are charged with implementing and enforcing. These rules often take the form of enforcement guidance, FAQs, agency manuals, opinion letters and interpretive bulletins. The absence of a notice-and-comment requirement makes the process of issuing interpretive rules comparatively

easier for agencies than issuing legislative rules. Critics of such interpretive rules claim that the lines between legislative and interpretive rules are often blurred, and that agencies improperly issue interpretive guidance to avoid notice-and-comment requirements.

In *Mortgage Bankers Association*, the DOL's Wage and Hour Division in 1999, and again in 2001, issued opinion letters stating that mortgage loan officers do not qualify for the FLSA administrative exemption. When the DOL promulgated revised FLSA regulations in 2004, the Mortgage Bankers Association (MBA) requested a new opinion interpreting the revised regulations. In 2006, the DOL issued an opinion letter finding that mortgage loan officers fell within the administrative exemption under the 2004 regulations. Four years later, the Wage and Hour Division again altered its interpretation of the FLSA's administrative exemption as it applied to mortgage loan officers. The Division's 2010 Administrator's Interpretation concluded that mortgage loan officers "have a primary duty of making sales for their employers, and, therefore, do not qualify" for the administrative exemption. These DOL interpretations were all issued without notice and comment.

The MBA filed a complaint in federal district court challenging the 2010 Administrator's Interpretation, arguing that it was procedurally invalid in light of the D. C. Circuit's decision in *Paralyzed Veterans of America v. D.C. Arena L.P*, 117 F. 3d 579 (D.C. Cir. 1997). Under the *Paralyzed Veterans* doctrine, if "an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish" under the APA "without notice and comment." The D.C. district court granted summary judgment in favor of the DOL, but the D.C. Circuit reversed the lower court's decision. Rejecting the government's call to abandon the *Paralyzed Veterans* doctrine, the D.C. Circuit concluded that the 2010 Administrator's Interpretation had to be vacated.

The Supreme Court sided with the DOL, holding that the *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the "maximum procedural requirements" specified in the APA. The Court concluded that because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule. Beyond the APA's minimum requirements, courts lack authority "to impose upon [an] agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." According to the Court, the *Paralyzed Veterans* doctrine "creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces." Regardless of whether that requirement is wise policy or not, the Supreme Court held that it is the responsibility of Congress or the administrative agencies, not the courts, to impose such an obligation.

The Supreme Court was not persuaded by MBA's argument that the *Paralyzed Veterans* doctrine "simply acknowledges" the fact that when an agency significantly alters a prior, definitive interpretation of a regulation, it is effectively amending the regulations. The Court refused to equate an interpretation of regulation with an amendment to the regulation. Moreover, the Court held that the MBA waived its alternative argument that the 2010 Administrator's Interpretation should be classified as a legislative rule. However, the Court did acknowledge that there may be times when an agency's decision to issue an interpretive rule, rather than a legislative rule, is driven primarily by a desire to skirt notice-and-comment provisions.

What recourse then do regulated entities have to challenge agency action that comes in the form of an interpretative rule? The Court opined that the APA contains a variety of constraints on agency decision-making—the arbitrary and capricious standard being among the most notable.

Though regulated entities may not be without recourse to challenge agency interpretations, the *Mortgage Bankers* decision gives agencies greater rein to alter policy outside of the constraints of the notice-and-comment process. Those calling for more transparency and public input into agency decision-making may find these goals more difficult to achieve in light of the decision. However, another avenue to challenge agency action may be opening as concurring opinions by Justices Alito, Scalia and Thomas called for reexamination of whether courts should defer to an agency's interpretations of its own regulations.

In his short concurring opinion, Justice Alito sympathized with the concerns that may have prompted the *Paralyzed Veterans* doctrine, which he characterized as: "the aggrandizement of the power of administrative agencies as a result of the combined effect of (1) the effective delegation to agencies by Congress of huge swaths of lawmaking authority, (2) the exploitation by agencies of the uncertain boundary between legislative and interpretive rules, and (3) this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations."

Justice Scalia wrote that while the APA exempts interpretive rules from notice-and-comment requirements, "this concession to agencies was meant to be more modest in its effects than it is today." By supplementing the APA with judge-made doctrines of deference, Justice Scalia concludes "we have revolutionized the import of interpretive rules' exemption from notice-and-comment rule-making . . . . Interpretive rules that command deference do have the force of law." Justice Thomas similarly called into question a line of precedents, beginning with *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410 (1945) requiring judges to defer to agency interpretations of regulations.

Whether this line of cases and judicial deference to agency interpretations will be reexamined in the future by the Supreme Court remains to be seen. In the wake of the *Mortgage Bankers* decision, this much is clear: Executive agencies are not required to use notice-and-comment procedures when it changes its interpretation of its own regulations. This may pave the way for even more policy changes from the DOL and other federal agencies outside of the notice-and-comment "rulemaking" process.

For lenders, the impact of the decision is even more immediate and significant. Lenders relying on the DOL's 2006 opinion letter that mortgage loan officers fall under the FLSA's administrative exemption after the DOL's 2010 Administrator's interpretation was vacated by the D.C. Circuit may now be at risk. Other employers that rely on outdated guidance from federal agencies may also find themselves at risk. Tracking policy changes made through both the public rulemaking process as well as through sub-regulatory guidance becomes even more important for employers.

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