

Supreme Court Allows Changes to Agencies' Interpretive Rules without the Notice-and-Comment Rulemaking Process

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In March, the Supreme Court upheld an agency's reversal of its own regulatory interpretation without requiring notice-and-comment rulemaking. Regulated entities now face considerable uncertainty in relying on agencies' regulatory interpretations, even during enforcement actions. While the Court cautioned agencies from arbitrarily and capriciously changing their interpretations, particularly when the exiting interpretation is heavily relied upon, courts will likely continue to defer to the agency's new interpretation.

On March 9, 2015, in *Perez v. Mortgage Bankers Ass'n*, the Supreme Court held that the Administrative Procedures Act (APA) does not require that federal agencies follow the APA's notice-and-comment rulemaking procedures when changing an agency's interpretive rule. The opinion abrogates a line of DC Circuit precedent that formed the basis for many challenges to agency interpretation changes that many asserted were an attempt to avoid the notice-and-comment rulemaking process. Entities in any highly regulated industry may be subject to unannounced changes in agency interpretive rules and without an opportunity to provide valuable input, causing particular uncertainty when trying to comply with broad and vague agency regulations.

Perez involved the Department of Labor's (DOL) 2010 issuance of an opinion letter, without the notice-and-comment rulemaking process, holding that mortgage-loan officers do not qualify for an "administrative exemption" under the agency's regulations regarding minimum wage and overtime compensation. The opinion reversed and withdrew the DOL's 2006 opinion that applied the exemption to mortgage-loan officers.

The Court reasoned that the APA provides a "categorical" exception to the notice-and-comment rulemaking process for interpretive rules. It found that the DC Circuit's precedent, stemming from the circuit's 1997 opinion in *Paralyzed Veterans of America v. D.C. Arena, L.P.*, conflated the different APA sections defining rulemaking and providing what procedures an agency must use when it engages in

rulemaking. The Court also found that its reading of the APA in *Perez* harmonizes with “longstanding principles” of administrative law jurisprudence and aligns with the APA’s limitation on courts’ authority to review executive agency actions for procedural correctness.

The Court rejected the respondents’ argument that DOL’s changes to its interpretive rules constituted an “amendment” of DOL regulations. The Court also rejected the “functional” approach to interpreting the APA that would prevent agencies from skirting notice-and-comment provisions. The Court recognized that regulated entities are not without recourse and may rely on the arbitrary and capricious standard to challenge a change in agency interpretations, suggesting that “more substantial justification” may be needed for new interpretations that rest upon factual findings that contradict those that underlay prior policy or when the prior policy has engendered serious reliance interests.

Justices Alito, Scalia and Thomas’ concurring opinions agreed with the Court’s reading of the APA’s notice-and-comment exception for agencies’ interpretive rules, but called into question the Court’s precedent of deference to an agency’s interpretation of its own regulations that is suggested to give interpretive rules the force of law.

Regulated entities now face additional uncertainty with broad and vague regulations. Considering the courts’ deference to agencies’ regulatory interpretations, including in litigation and other agency regulations, an entity’s reliance on agency interpretations may no longer protect the entity from findings of regulatory violations. And, such violation may be found without any notice that the agency’s interpretation has changed and without an opportunity for persons relying on interpretations to influence the agency’s new interpretation.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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