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CLIENT ALERT

Supreme Court Holds That Federal Agencies Need Not Use Notice-and-Comment Procedures to Change Interpretive Rules

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In a decision that could impact a wide variety of companies—particularly in regulated industries—the Supreme Court ruled unanimously on Monday that federal agencies are not required to engage in "notice-and-comment rulemaking" procedures when modifying "interpretative" rules. *Perez et al. v. Mortgage Bankers Association*, No. 13-1041, and *Nickols et al. v. Mortgage Bankers Association*, No. 13-1052, opinion available here. The Court's decision invalidates the D.C. Circuit's *Paralyzed Veterans* doctrine—a line of cases that required an agency to use the notice-and-comment procedure under the Administrative Procedure Act (APA) when it wished to issue a new and significantly different interpretation of its own regulations.

The case arose out of a challenge to an interpretation of Fair Labor Standards Act regulations that was issued by the Wage and Hour Division of the Department of Labor (DOL) (the "Administrator's Interpretation"). The Administrator's Interpretation concluded that mortgage loan officers do not qualify for an exemption under the DOL's Fair Labor Standards Act regulations. The DOL had previously determined that mortgage loan officers *were* exempt in an opinion letter issued in 2006 in response to a request for clarification by the Mortgage Bankers Association. Like previous DOL opinion letters, including the 2006 one, the new Administrator's Interpretation was issued without notice or an opportunity for comment.

The Mortgage Bankers Association brought a challenge to the new interpretation, arguing (among other things) that it was procedurally invalid because the Department "amended its rule" without notice and comment. The district court rejected the challenge and granted summary judgment to the DOL, but the D.C. Circuit reversed, citing *Paralyzed Veterans*.

The Supreme Court unanimously reversed, holding that the *Paralyzed Veterans* doctrine "is contrary to the clear text of the APA's rulemaking provisions" and "improperly imposes on agencies an obligation beyond the maximum procedural requirements specified in the APA." The Court explained that Section 4 of the APA, which establishes the notice-and-comment process, specifically exempts interpretative rules. And because an agency is not required to follow notice-and-comment procedures to issue an initial interpretive rule, it also has no obligation to use those procedures when it repeals or amends that rule.

As the Court explained, this straightforward reading of the APA harmonizes with the longstanding principle that "courts lack authority to impose upon an agency its own notion of which procedures are best or more likely to

further some vague, undefined public good." Additionally, the Court noted that *Paralyzed Veterans* improperly created a "judge-made procedural right," and that "imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts."

Turning to the Mortgage Bankers Association's attempts to defend the *Paralyzed Veterans* doctrine, the Court deemed them unpersuasive or waived. First, the Court dismissed the contention that a change to an interpretive rule changes the regulation itself, finding such a theory "odd" and irreconcilable with the "longstanding recognition that interpretive rules do not have the force and effect of law."

Second, the Court rejected the argument that the *Paralyzed Veterans* doctrine reinforces procedural fairness by preventing agencies from changing their interpretations unilaterally and unexpectedly. The Court noted that procedural fairness is protected by other safeguards, such as the "arbitrary and capricious" standard, which prohibits agencies from taking action without substantial justification. In addition, safe-harbor provisions contained in various statutes, including the Fair Labor Standards Act, protect against unfairness by sheltering regulated companies from liability when they rely upon previously issued interpretive rules.

Finally, the Court found that the Mortgage Bankers Association had waived its argument that the Administrator's Interpretation should be classified as a *legislative* rule, explaining that the action has been litigated on the understanding that the challenged agency action was an *interpretive* rule.

In three separate concurring opinions, Justices Scalia, Thomas, and Alito all raised concerns about the combination of the judge-made policy of "requiring deference to administrative interpretations of regulations" and the "effective delegation to agencies by Congress of huge swaths of lawmaking authority." Justice Scalia noted that deference to interpretative rules allows "agencies to make binding rules unhampered by notice-and-comment procedures" and called for a re-examination of judicial deference doctrines. Justice Thomas explained that such judicial deference to administrative agencies may be unconstitutional as an improper "transfer of judicial power to the Executive Branch" and "an erosion of the judicial obligation to serve as a check on the political branches." Yet, all agreed that this case was resolved correctly on the text of the APA.

This ruling has significant implications for all regulated entities, especially those regulated by agencies that engage in interpretative rulemaking, including the Department of Labor and the National Labor Relations Board. Moreover, the concurrences signal an interest by some members of the Court in revisiting the scope of judicial deference to agency interpretations—a change that could have even more dramatic implications for administrative law.

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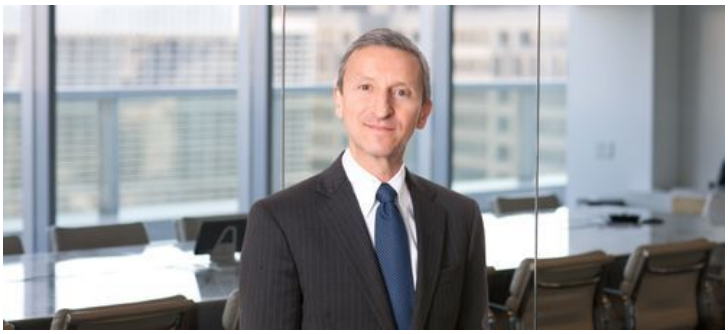

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