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Agencies Can Revise, Or Abandon, Prior Regulatory Interpretations Without Notice-And-Comment Rulemaking, Says Supreme Court

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The Administrative Procedures Act (APA) allows a federal agency to revise, amend, or repeal a prior rule interpreting its own regulations without going through the APA's lengthy notice-and-comment rulemaking process, the Supreme Court unanimously held in *Perez v. Mortgage Bankers Ass'n*, No. 13-1041, 574 U.S. ___ (Mar. 9, 2015). "[I]nterpretive rules do not have the force and effect of law," the Court explained, and so they can be revised in informal agency pronouncements rather than through the cumbersome notice-and-comment process. *Id.*, slip op. at 10. The Supreme Court's decision overturns a long-standing but controversial doctrine in the Court of Appeals for the District of Columbia Circuit that had required full notice-and-comment rulemaking whenever an agency deviated significantly from a prior "authoritative interpretation" of its own regulation.

The unanimous result in *Mortgage Bankers*, however, masks a growing disquiet on the Court over the alacrity with which courts defer to federal agencies that use ambiguities in their own regulations as a basis for setting new, and shifting, normative standards of behavior for the communities they regulate. Read together, Justice Sotomayor's opinion for the Court and the concurring opinions of Justices Scalia, Thomas, and Alito suggest the receptivity of at least the conservative members of the Court to taking some future case in which the limits of deference to agency interpretations will be confronted more directly. In *Mortgage Bankers*, however, the procedural posture of the case limited the question before the Court and thus the holding of the case: an "interpretive rule" (to be distinguished from a "legislative rule") can be revised, reversed, or eliminated altogether by the agency without adhering to the APA's notice-and-comment requirements.

Background

The Fair Labor Standards Act (FLSA) establishes federal minimum wage and overtime pay requirements, but provides a number of "exemptions" from its coverage. In 1999 and again in 2001, the Department of Labor's Wage and Hour Division (DOL) issued opinion letters interpreting the FLSA's "administrative" exemption to exclude mortgage-loan officers. Thus, the FLSA's minimum wage and overtime requirements applied generally to mortgage-loan officer positions.

In 2004, however, DOL promulgated new FLSA regulations that, *inter alia*, revised the way in which the administrative exemption is to be applied. A national trade association representing real estate finance companies, the Mortgage Bankers Association (MBA), requested a new mortgage-loan officer

interpretation from the DOL reflecting the revised regulations. Two years later, DOL issued a new opinion letter interpreting the new regulations, reversing course and concluding that mortgage-loan officers are exempt from the FLSA under the administrative exemption.

But in 2010, DOL again reversed field, issuing an Administrator's Interpretation that renounced the prior opinion letter and concluding that mortgage-loan officer positions do *not* generally qualify for the exemption. The MBA brought suit, seeking to vacate the Administrator's Interpretation as procedurally invalid under the APA.

Critically, the parties to the resulting litigation agreed that the Administrator's Interpretation was an "interpretive rule" under the APA, rather than a "legislative" rule which would have required notice-and-comment rulemaking by the APA's explicit terms. Accepting this characterization by the parties, the district court concluded that no notice-and-comment process was required, and held that the 2010 Administrator's Interpretation was supported by the text of the 2004 FLSA regulations. It accordingly granted summary judgment to DOL.

The D.C. Circuit reversed, citing binding circuit precedent for the proposition that even as to interpretive rules, an agency may not "significantly revise" a "definitive interpretation" of its own regulation without notice-and-comment rulemaking. The Court granted certiorari.

Interpretive Rules Are Categorically Exempt from Notice-And-Comment Rulemaking

The key to the unanimous Court was the threshold determination that the rule at issue was an "interpretive rule" and not a legislative one. Justice Sotomayor noted that the APA does not define the phrase, and she acknowledged that agencies had an incentive to play games with this characterization: "[t]here 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."

Like the district court, however, the Supreme Court accepted without further inquiry the agreement of the parties before the court of appeals that the Administrator's Interpretation qualified as an "interpretive rule" for APA purposes. Proceeding from this understanding, the Court unanimously rejected the D.C. Circuit's precedent imposing a judge-made requirement for notice-and-comment rulemaking for such rules. All nine justices agreed that courts reviewing agency actions are generally not free to impose on agencies rulemaking procedures beyond those specified in the text of the APA. Because the D.C. Circuit attempted to do just that — to extend the notice-and-comment requirement to interpretive rules where the APA does not explicitly require it — that precedent was irreconcilable with the statute.

The Court reasoned that an "interpretive rule" has no "force of law," but rather is merely a pronouncement "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." Unless some other statute requires it, the APA's notice-and-comment requirement does not apply to such an informal pronouncement. In enacting the APA, the Court noted, Congress weighed the costs and benefits of requiring federal agencies to submit to more rigorous rulemaking procedures, such as notice-and-comment, and in the end, Congress chose to allow agencies to make such pronouncements without notice-and-comment, even if those pronouncements may be inconsistent with earlier statements. The text of the APA, the Court reiterated, "sets forth the full extent of judicial authority to review executive agency action for procedural correctness."

A Holding On Procedural Obligations, But A Tipped Hand On Questions of Deference?

Although all nine justices agreed that courts cannot require notice-and-comment rulemaking except where Congress specified, all four opinions in the case acknowledged a larger, more difficult issue that was not within the question presented: when, if ever (and if so, to what extent), a reviewing court must give deference to an agency's interpretive rule. It is an issue the Court has nibbled at in prior opinions — most recently in *Christopher v. SmithKlineBeecham Corp.*, 567 U.S. ___ (2012).

Justice Sotomayor's opinion for the Court, for example, took pains to point out that "interpretive rules do not have the force and effect of law," that "it is the court that ultimately decides whether a given regulation means what the agency says," and that "deference is not an inexorable command in all cases." Justice Alito sympathized with the D.C. Circuit's "understandable concern about the aggrandizement of the power of administrative agencies as a result of the combined effect of . . . the effective delegation to agencies by Congress of huge swaths of lawmaking authority [and] the exploitation by agencies of the uncertain boundary between legislative and interpretive rules," and signaled a willingness to reconsider the Court's deference precedents.

Justices Scalia and Thomas were even more pointed. Justice Scalia suggested that he would abandon deference to agency interpretations of their own regulations, but would maintain deference to agency interpretations of statutes under *Chevron v. NRDC*. Justice Thomas indicated that he would adopt a categorical separation-of-powers rule against any judicial deference to agency interpretation of laws, which would seem to preclude even *Chevron* deference. That line of authority, Justice Thomas argued, "raises constitutional concerns" by "undermin[ing] [the Court's] obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."

With three justices expressing interest in reconsidering at least the narrower question of judicial deference to agency interpretation of regulations, and the Supreme Court's practice of granting certiorari if there are four votes in favor, it seems quite likely that the question will be confronted by the Court in the future.

Although the result in *Mortgage Bankers* appeared to be an easy one for the Court, the four opinions suggest varying degrees of willingness to address, and perhaps sharply curtail, the practice of judicial deference to agency opinions about their own regulations, especially when they are announced through processes less rigorous than notice-and-comment.

Practical Implications

The most direct, and most immediate, impact of *Mortgage Bankers*, of course, will be felt in the financial services industry. The Court noted the Solicitor General's concession at argument that DOL's "ability to pursue enforcement actions against regulated entities for conduct in conformance with prior agency interpretations may be limited by principles of retroactivity," at least prospectively, and in the absence of peculiar facts suggesting a different outcome in applying the exemption to specific individuals, mortgage-loan officers will have to be treated as non-exempt employees. It remains possible, of course, that an employer could challenge in future litigation the notion that DOL's interpretation of its own regulation is entitled to deference.

It will also mean that the D.C. Circuit is no longer as welcoming a venue as it has been for entities dissatisfied with revisions to a federal regulation. Notice-and-comment rulemaking is no longer in the cards for such "interpretive rules."

But the broader, and longer-term, implications of *Mortgage Bankers* on administrative law will not be clear for some time. The Court's decision is in full harmony with a line of recent cases that nibble at the edges of judicial discretion for certain agency actions, but it is still unclear as to when, or whether, the Court will attack that question frontally.

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