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Supreme Court to Determine Whether Agencies Must Undergo Notice and Comment Prior to Changing an Interpretation

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The Supreme Court has agreed to hear a case that could have far-ranging implications for agency proclamations that impact the business community. On Monday, June 16, 2014, the Supreme Court granted certiorari in **Nickols v. Mortgage Bankers Assoc.**, No. 13-1052. The Supreme Court will address "[w]hether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking."

Interpretative rules (also called interpretive rules) are those that "simply state[] what the administrative agency thinks the statute means, and only "'remind[] affected parties of existing duties **Fertilizer Inst. v. EPA,** 935 F.2d 1303, 1307 (D.C. Cir. 1991) (citations omitted). Interpretive rules are exempt from the rulemaking provisions of the APA "[e]xcept when notice or hearing is required by statute…." 5 U.S.C. §553.

Interpretive rules often have a direct impact on the regulated community. For example, EPA's determination that greenhouse gases (GHG) became a "regulated NSR pollutant" upon adoption of the mobile sources GHG rule was first presented in what the agency described as an interpretive rule. Johnson Memo, Dec. 18, 2008. EPA also recently issued an "interpretive rule" addressing whether Section 404 of the Clean Water Act exempts certain agricultural conservation practices. Stoner/Darcy Memo, Mar. 25 2014. Agencies can also issue "interpretations" that meaningfully impact industry simply by changing the agency webpage. See IPAA v. EPA, No. 10-1233 (D.C. Cir. 2010) (challenge to EPA website statement regarding UIC permitting requirements).

Even though the APA could be read to exclude interpretive rules from notice and comment, the D.C. Circuit court has a line of cases suggesting that once an agency issues an interpretation they may not change it unless they do so through notice and comment rulemaking. For example, the D.C. Circuit vacated a "notice to operators" that changed a prior agency interpretation. Alaska Professional Hunters Ass'n v. FAA, 177 F.3d 1030 (D.C. Cir. 1999). Some recent cases suggested that the doctrine applied primarily when the regulated community has had "substantial and justifiable reliance" on an agency interpretation. MetWest Inc. v. DOL, 560 F.3d 506, 511 (D.C. Cir. 2009). However, in Mortgage Bankers Assoc. v. Harris, 720 F.3d 966 (D.C. Cir. 2013), the D.C. Circuit gave further support to the doctrine, noting that "[o]nce a court has classified an agency interpretation as

[definitive], it cannot be significantly revised without notice and comment rulemaking." 720 F.3d at 971.

The Supreme Court is expected to address this doctrine head-on, and the decision could have important results. If the Supreme Court upholds the doctrine, agencies may hesitate to issue broad proclamations for fear of locking themselves into a position. The recent D.C. Circuit opinion on aggregation could add to this hesitation. The regulated community may be left guessing what EPA might do in any particular situation. If the Supreme Court rejects the doctrine, agencies will more confidently issue interpretations. However, argument over whether those interpretations are instead rules disguised as guidance will continue and the regulated community may not have the opportunity to comment on the interpretations before they are applied.

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