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Supreme Court to Decide Important Administrative Law Issue

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On December 1, 2014, the **United States Supreme Court will hear oral argument** in a case that will have significant **implications for federal regulatory agencies like the U.S. Food and Drug Administration (FDA) and the Alcohol and Tobacco Tax and Trade Bureau (TTB)**.

The case is *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013). In that decision, the United States Court of Appeals for the D.C. Circuit refined a line of cases involving the Administrative Procedures Act (APA). The APA governs the activities of federal agencies and, among other things, generally requires notice-and-comment rulemaking procedures, including publication in the *Federal Register* and a period of time for industry and the public to comment on proposed regulations, in order for a federal agency to adopt a new "rule." These procedural requirements aim to ensure transparency in governmental operations and a public "vetting" process before an agency adopts new regulatory requirements.

Beginning in the 1990s, the D.C. Circuit – which hears a large percentage of the cases involving challenges to federal agency actions – has held that the notice-and-comment rulemaking requirement extends to agency attempts to change a settled agency interpretation of a regulation. In other words, once an agency establishes a position on a particular issue, the D.C. Circuit has required that an agency proceed through notice-and-comment procedures to change its earlier position.

In *Mortgage Bankers*, the D.C. Circuit held that a person challenging an agency change in policy need not show any *reliance* on that policy in order to claim that an agency had violated that requirement. The court held that nothing in its prior cases required a showing of reliance.

The Supreme Court has agreed to review the case, *see Perez v. Mortgage Bankers Ass'n*, No. 13-1041, *cert. granted* 6/16/14, but on a broader issue than whether a person claiming that an agency changing its interpretation of a regulation must show reliance. Instead, the court agreed to examine whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation. The court will hear oral argument on December 1, 2014. Thus, the court may be poised to overrule the entire line of D.C. Circuit cases holding that an agency must engage in notice-and-comment rulemaking before changing definitive but un-codified interpretations of regulations.

A reversal of current D.C. Circuit precedent has troubling implications for the alcohol beverage industry. Many policies of the federal agencies that regulate the industry become established

through informal decisions never reduced to formal regulations. To take one example, TTB's policies towards the documentation of exports without payment of tax depart significantly from TTB's published regulations, and instead rely on well-recognized and followed policies published only in informal *Industry Circulars* and private letter "variances" from regulations. Consider, too, the dozens of unpublished "policies" TTB applies in the review of alcohol beverage labels, some of which go back decades and have formed the basis of entire brand propositions by the industry. Should the law allow TTB to walk away from such longstanding but informal precedent without any process to let the industry be heard?

One potential solution is to tie a reversal of existing D.C. Circuit precedent with the reversal of the so-called *Auer* doctrine. In establishing the *Auer* doctrine, the Supreme Court held that an agency's interpretation of its rules (as opposed to agency regulations adopted through notice-and-comment procedures) receive deference from the courts unless "plainly erroneous." *See Auer v. Robbins*, 519 U.S. 452 (1997). In other words, under *Auer* an administrative agency receives a substantial benefit of the doubt when its actions are challenged, even if those actions were not subject to the public scrutiny of notice-and-comment rulemaking procedures. Some organizations have argued or implied in friend of the court briefs that, because *Auer* in effect confers the force and effect of law on agency interpretations of a regulation, the interpretation may not be changed without notice-and-comment rulemaking.

The already-powerful administrative state would receive a substantial boost if, in addition to the deference extended through the *Auer* doctrine, agency actions to change prior policy positions were not subject to any notice-and-comment requirement. Indeed, such a combination would, no doubt, encourage agencies to avoid notice-and-comment rulemaking altogether, as they would receive all the benefits of such rulemaking under *Auer* yet could change their decision at will without going through notice-and-comment at all.

Regardless of the outcome, the Supreme Court's decision in *Mortgage Bankers* will substantially affect when and why federal agencies must engage in notice-and-comment rulemaking procedures. And, depending on the outcome, the final decision could hand FDA, TTB and other federal agencies far greater latitude to modify, repeal or change longstanding policies without any notice to or consultation with the industry. The stakes are high indeed.

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