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A Unanimous Supreme Court Rules that Federal Agencies Do Not Have to Go through Rulemaking to Change Regulatory Interpretations

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In the last 10 years or so, many federal agencies have adopted changes to long-standing interpretations of the regulations the agencies enforce by issuing new or "clarifying" interpretations without going through the process of formal rulemaking. The Supreme Court's recent decision in *Perez v. Mortgage Bankers Association* allows them to keep doing so.

One such re-interpretation was by the U.S. Department of Labor's Wage and Hour Division ("Division") in 2010. There, the Division took the position that mortgage loan officers do not fall under the administrative exemption from minimum wage and overtime requirements provided for by the Fair Labor Standards Act. The re-interpretation reversed a 2006 Bush Administration opinion, which had concluded that mortgage loan officers did fit the administrative exemption. The 2006 interpretation, in turn, had contradicted 1999 and 2001 opinion letters by the Division.

The Mortgage Bankers Association sued the Division, claiming that the agency had not followed the rulemaking requirements of the federal ***Administrative Procedures Act*** ("APA"). The APA provides, among other things, that a federal agency need not follow the APA's "notice-and comment" procedures in the case of interpretive rules, unless notice is otherwise required by statute. But the U.S. Court of Appeals for the District of Columbia Circuit had held since 1997 that "material changes" to an agency's earlier interpretations were subject to the APA's notice-and-comment requirements. The U.S. Court of Appeals for the Fifth Circuit had adopted that same conclusion, while two other Circuits, the First and Ninth, had taken the opposite position, creating a "split" in the circuits on the issue. Because the Court of Appeals for the D.C. Circuit is generally viewed as the expert on administrative law, however, its opinion generally was viewed as the more authoritative.

The Supreme Court in Mortgage Bankers Association saw things differently from the way the D.C. Circuit had. In an unusual 9-0 decision, the Court held that federal agencies are not required to go through formal rule-making to make even significant changes to rules interpreting the regulations they are authorized to enforce. Justice Sotomayor, writing for the majority, rested the Court's opinion primarily on the section of the APA that "specifically exempts interpretative rules from the notice-and-comment requirements that apply to legislative rules".

The Supreme Court's decision most immediately impacts the banking industry and its wage-hour

treatment of mortgage loan officers, but the implications of the decision are far-reaching. Dr. David Michels, head of the U.S. Occupational Safety and Health Administration, said in December of 2014, for example, that he was watching theMortgage Bankers Association case closely. He, we are sure, was not the only agency head doing so.

The practical result of the Supreme Court's decision, beyond the banking industry, is that federal agencies are far likely now to feel the freedom to issue interpretations that significantly change, even reverse, earlier interpretations … for good reasons or for political reasons. The APA's notice-and-comment procedures are designed to require agencies to "do" rule-making transparently and to justify the positions they are taking, with opportunity for all affected constituents to have input. The decision in Mortgage Bankers Association allows agencies to take such positions "behind the curtain" and without substantial justification or the input of any constituents.

That decision, as a policy matter, is not a good development for anyone. Parties in business, no matter who they are, need to be able to know today what the rules will be tomorrow without having to guess which view of a regulation's meaning will be the prevailing one when that time comes. When parties are unable to do so, they reasonably are less likely to invest and to take risks. The theme of an old Volkswagen commercial you might remember was, "The lines are our friend." We all need to know where the lines of the law are and, at least generally, where they predictably are going to be down the road (pun intended) if we are going to be able to imagine tomorrow and are going to be willing to take business risks in getting there.

In his January 2015 State of the Union address, President Obama said that during the remainder of his second term, he will do whatever he can within his authority, with or without the cooperation of Congress, to advance his agenda. We reasonably can expect to see agencies in his Executive Branch over the next two years – and especially after the next presidential election – to take full advantage of the Supreme Court's decision in Mortgage Bankers Association and re-interpret or "clarify" positions they traditionally have taken to align better with positions they would prefer to take.

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