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CLIENT ALERT

Supreme Court Removes a Major Hurdle for Administrative Agency Rulemaking

Will Affect Health Care, Labor, and Other Regulated Industries

March 11, 2015

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On March 9, 2015, the Supreme Court ruled unanimously that when a federal administrative agency wants to amend or repeal an "interpretive rule," it does not have to follow the notice-and-comment procedures set forth in the Administrative Procedure Act ("APA").[1]

The Supreme Court's *Perez* decision reversed what had been a widely-followed, though sometimes criticized, holding of the United States Court of Appeals for the District of Columbia Circuit that had required agencies to engage in formal rulemaking when they sought to reverse or substantially revise an existing interpretive rule.[2] Under the Supreme Court's *Perez* ruling, any federal agency is free to amend, modify, reverse, or withdraw an interpretation in a manual or other sub-regulatory publication without first allowing for prior notice or public comment. The rationale for this change is that because an agency does not have to engage in notice-and-comment rulemaking before promulgating an interpretive rule in the first instance, nothing in the APA requires that federal agency to do so when altering or withdrawing such a rule.

Even though the affected party in *Perez* was a business subject to regulation by the Department of Labor, because the APA sets the framework for all agency activity, the impact of the decision extends to all regulatory agencies and thus to all regulated industries and companies. The regulatory risk may vary depending on a particular agency's preferences for publishing sub-regulatory manuals, circulars, guidance documents, and other similar agency publications. For those agencies that do rely on this class of publications for communicating to the public, such as the Centers for

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[1] *Perez v. Mortgage Bankers Assn.,* Nos. 13-1041 and 13-1052 (U.S. Mar. 9, 2015).
[2] *See, e.g., Paralyzed Veterans of Am. v. D.C. Arena L.P.,* 117 F.3d 579 (D.C. Cir. 1997); *see also* Richard J. Pierce, Administrative Law Treatise § 6.4 (2010).

Medicare and Medicaid Services, affected parties should be more aware of the need to communicate early and often with those agencies, which now have a much freer hand in changing their policies without the need for either prior notice or offering stakeholders an opportunity to participate or to be heard at all.

The Court's holding is consistent with the structure and intent of the APA (though there are several concurring opinions). Nevertheless, the impact on entities regulated by federal administrative agencies may be substantial. Regulated businesses are often required to comply with a mix of statutes, regulations, and sub-regulatory publications in order to avoid criminal, civil, or administrative penalties. A recurring problem for those businesses is knowing when a federal agency intends to change an interpretation of a statute or regulation, and then having an opportunity to be heard before the agency makes a decision. In the wake of *Perez*, that opportunity will be substantially lessened.

The Court's decision in *Perez* may empower federal agencies if they want to change their policies and enhance their regulatory sweep. The decision will likely provide a strong incentive for agencies to increase their labeling of rules as "interpretive" in order to avoid review, and it will speed up the publication of these rules, even where there is vocal opposition in affected industries and elsewhere. This effect will be most pronounced in matters before the federal courts in the District of Columbia, which review a higher percentage of cases involving agency interpretive rules and the APA than all other federal courts.[3]

The underlying dispute in *Perez* involved whether or not mortgage loan officers employed by financial institutions are subject to minimum wage and overtime rules established by the Wage and Hour Division of the Department of Labor. Although the Department had initially concluded informally that these employees were not exempt, after the agency amended its regulations in 2004 it issued a new opinion letter in 2006 concluding that these employees were exempt. However, in 2010, the Department again reversed its position in a sub-regulatory interpretative letter. The MRA contended that the 2010 letter was inconsistent with the 2004 regulation and argued that in order to make the change, the agency was required to follow notice-and-comment procedures. The district court granted summary judgment to the Department of Labor, but the D.C. Circuit reversed, only itself to be reversed by the Supreme Court.

The *Perez* case highlights the differences between substantive regulations and interpretive rules. Substantive regulations require public notice, an opportunity for comment, and publication of a final version in the Federal Register with an explanation of the basis and purpose of the final regulation.[4] Final regulations are deemed to be binding on the agency and interested parties, and are treated by courts as having the force and effect of law. Interpretive rules are sub-regulatory publications intended to advise the public of the agency's interpretation of the statutes and regulations it administers, but are exempt from the requirement that the agency provide prior public

[3] Fraser, Eric, et al., *The Jurisdiction of the D.C. Circuit,* 23 Cornell J. Law & Pub. Policy 131 (2013)
[4] 5 U.S.C. § 553

notice and an opportunity to comment.[5] As a result, interpretive rules do not have the force of law and are not binding.

In reaching its decision in *Perez*, the Court relied on a 1978 case that held that courts cannot require agencies to adopt rulemaking procedures that are stricter than the rulemaking procedures set out in a statute, an existing agency regulation, or in the Constitution.[6] Without expressing an opinion on the wisdom of the judicially-crafted procedures that the D.C. Circuit sought to impose, the Court concluded that the responsibility for creating additional rulemaking procedures rests with Congress and the Executive Branch, but not with the judiciary.[7]

Although the *Perez* decision clarifies the procedures that all federal agencies must follow when they amend or repeal interpretive rules, the decision did not address the still unsettled distinction between substantive regulations and interpretive rules.

Epstein Becker & Green works frequently with clients that are participants in the health care and labor and employment areas of the economy. We note that the regulatory agencies that regulate in these areas are among the most active and prolific in issuing what they argue are "interpretive" rules, many of which change status quo policies. Now that the Supreme Court has freed these agencies from the strictures of notice-and-comment rulemaking when they attempt to undertake such activities, it is incumbent upon those affected to challenge that classification where they can and otherwise to seek active participation in the process.

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[5] 5 U.S.C. § 553(b)(A)

[6] *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519 (1978).

[7] Although each member of the Court concurred in the judgment, Justices Scalia, Thomas, and Alito each wrote separate concurrences that expressed concerns over the potential expansion of the power of administrative agencies to rely on interpretive rules that are insulated from public participation and judicial review except in egregious cases. In particular, the concurrences warned that the broad scope of deference given to administrative agencies through the APA and through caselaw had significantly eroded any meaningful check on excessive administrative action.

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