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High Court Decision Could Impact Agency Rule Interpretations, Attorneys Say

The Administrative Procedure Act expressly exempts federal agencies from formal notice-and-comment rulemaking requirements when they make changes to interpretative rules, the U.S. Supreme Court unanimously ruled March 9 (*Perez v. Mortg. Bankers Ass'n*, U.S., No. 13-1041, 3/9/15).

Writing for the court, Justice Sonia Sotomayor found that the U.S. Court of Appeals for the District of Columbia Circuit's doctrine from *Paralyzed Veterans of Am. v. D.C. Arena LP*, 117 F.3d 579 (D.C. Cir. 1997)—which states that an agency cannot significantly modify a previously issued definitive interpretation of a rule without public notice and comment—is ''contrary to the clear text of the APA's rulemaking provisions.''

Richard Faulk, a partner with Hollingsworth LLP, said that ''the result in *Perez*—and the disapproval of *Paralyzed Veterans*—was based on the court's unanimous adherence to a more conservative principle, namely, giving controlling effect to the text of the Act.''

'Narrow Ruling'

''Because that narrow ruling resolved the entire case, the majority did not address any other concerns,'' Faulk said. Although the majority's textual focus permitted a unanimous result, it also allowed the concurring justices to ''stress that the proper scope of judicial review remains alive for a future case,'' he said.

''Since all members of the court agreed that the plain language of the APA did not require notice and comment for 'interpretive rules,' no other reasonable interpretation of the APA was possible. As a result, the court did nothing to 'shake the foundations' of administrative law,'' Faulk added.

Faulk told Bloomberg BNA that although the ruling clarifies federal agencies' authority to change their regulatory interpretations, it also recognizes lingering concerns related to issuance of conflicting interpretations without notice and comment that nevertheless may bind regulated entities because courts generally must defer to the agencies under existing Supreme Court precedent.

In reversing the D.C. Circuit, Sotomayor explained that Section 4 of the APA (5 U.S.C. § 553(b)(A)) provides that formal notice-and-comment requirements don't apply to ''interpretative rules, general statements of policy or rules of agency organization, procedure or practice.''

James T. O'Reilly, a professor at the University of Cincinnati College of Law, told Bloomberg BNA March 9 the Supreme Court's decision gives the Environmental Protection Agency more freedom ''to adopt interpretations and take positions, knowing that they can more rapidly change things as conditions warrant—or as administrations change.''

'Cloud of Uncertainty' Removed

Robert L. Glicksman, a professor at The George Washington University School of Law, told Bloomberg BNA March 9 that *Perez* removes a ''cloud of uncertainty by eliminating disincentives for agencies to issue interpretations.'' Now, agencies like the EPA ''can issue interpretations with the understanding that if they change the interpretation in the future they won't have to go through notice and comment,'' he said.

O'Reilly said ''the regulated community will be less willing to fall in line when an agency adopts an interpretative rule'' because *Perez* gives agencies more flexibility to issue reinterpretations.

Faulk agreed with that assessment but cautioned that agencies still must consider the impacts such interpretations may have on the regulated community.

''A lot of the matters currently before EPA—the 111(d) emissions limits, the waters of the U.S. rule, the Clean Power Plan—are going to be resolved by figuring out how the agency will apply deferential attitudes,'' he said.

In the decision, for example, Sotomayor acknowledged that there ''may be times when an agency's decision to issue an interpretive rule . . . is driven primarily by a desire to skirt notice-and-comment provisions.''

Justices Samuel Alito, Antonin Scalia and Clarence Thomas wrote separate concurring opinions questioning the court's precedent requiring deference to agency interpretation of regulations.

Each suggested that the high court's line of precedent regarding judicial deference to administrative interpretations, which stemmed from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), should be reconsidered.

''Not surprisingly,'' said Faulk, ''the three concurring justices reminded everyone that the court's decision did nothing to quell the debate regarding deference to agencies' interpretations of their own regulations.''

Deference Concerns

Although Chief Justice John Roberts didn't join the concurring justices, ''nothing in the majority opinion suggests that he's abandoned his prior concerns regarding *Auer* deference,'' Faulk said, referring to

the Supreme Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997) that ''agencies may authoritatively resolve ambiguities in regulations.''

According to Faulk, ''we're still waiting for someone to raise a direct challenge to'' *Chevron v. NRDC*, 467 U.S. 837, 21 ERC 1049 (1984), which established that ''agencies may authoritatively resolve ambiguities in statutes.'' As long as the EPA has *Chevron* and *Auer* deference justifying a rapid expansion of the agency's power, ''it's really very hard to challenge the agency,'' Faulk said.

''Insofar as the viability of *Auer* and, perhaps, *Chevron* are concerned, the opportunity to abolish or limit those doctrines still remains,'' said Faulk. ''And they may yet win the day.''

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