

Supreme Court to Review Administrative Procedure Act's Notice and Comment Requirements in Context of Interpretative Rules

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On June 16, 2014, the Supreme Court of the United States granted certiorari in two cases to consider whether the Administrative Procedure Act's (APA) notice and comment requirements apply when an agency alters its interpretation of a regulation. This case could alter how federal agencies conduct their activities and impact regulated businesses.

The APA requires agencies to provide notice and opportunity for comment in rule making proceedings. 5 U.S.C. § 553. A "rule making" is an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." *Id.* § 551(4). However, the APA's notice and comments requirements do not apply to "interpretative rules." 5 U.S.C. § 553(b)(A).

The D.C. Circuit has held that an agency must follow notice and comment procedures before changing its interpretation of a regulation. "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *see also Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation

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itself: through the process of notice and comment rulemaking. . . . To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements.”).

The Solicitor General sought review in a case in which the D.C. Circuit vacated a Department of Labor interpretation.

The D.C. Circuit's approach, now under review, is key because the lion's share of federal agency actions are reviewed in that Circuit Court of Appeals. The Fifth Circuit has joined the D.C. Circuit in concluding that an agency must conduct notice-and-comment rulemaking to alter a prior interpretive rule construing an agency regulation. The requirement of notice and comment in this setting has been criticized by the First and Ninth Circuits, which do not require an agency to follow APA procedures when changing a regulatory interpretation.

The case has the potential to ease the federal government's ability to impact regulated businesses. As the Solicitor General argued to the Supreme Court, “[m]any complex government programs are heavily dependent upon interpretive rules to inform the public about the agency's understanding of the details of the regulatory regime.” The government is seeking reversal of the D.C. Circuit's approach so federal agencies are “free to revisit [their] interpretations expeditiously through new interpretive rules.”

The cases are *Perez v. Mortgage Bankers Association*, No. 13-1041, and *Nickols v. Mortgage Bankers Association*, No. 13-1052.