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Supreme Court Empowers Federal Agencies to Upset the Settled Expectations of Regulated Industries

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In a move that could impact a variety of regulated industries, the Supreme Court held yesterday that the Administrative Procedure Act's ("APA") notice and comment requirements do not apply when a federal administrative agency alters its interpretation of a regulation. *Perez v. Mortgage Bankers Ass'n*, No. 13-1041 (March 9, 2015). The Court's decision overturned a contrary line of cases in the D.C. Circuit, which reviews more challenges to federal agency actions than any other court.

The *Perez* case highlighted the distinction in the APA between "legislative rules," which require notice and comment rulemaking, and "interpretive rules," which do not. The Court concluded that because the APA does not require agencies to follow notice and comment procedures in initially making interpretive rules, agencies do not run afoul of the APA when they change those interpretations without notice and comment. The Court grounded its decision in the "clear text" of the APA. *Id.* at 6-7. The Court observed that the APA categorically exempts "interpretive rules" from notice and comment procedures, and found this exemption "fatal to the rule announced" by the D.C. Circuit. *Id.* at 7. The Court explained that its decision "harmonizes with longstanding principles of our administrative law jurisprudence" that prevent the courts from imposing on administrative agencies their "'own notion of which procedures are "best" or most likely to further some vague, undefined public good.'" *Id.* at 8 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U. S. 519, 549 (1978)).

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The Court acknowledged regulated entities' concerns about the stability of regulatory policy, and the unfairness of shifting agency expectations buried in interpretations, rather than made clear in notice and comment rulemaking proceedings. Nonetheless, the Court found their arguments unpersuasive. The Court explained that "regulated entities are not without recourse" because the APA "contains a variety of constraints on agency decision making" including arbitrary and capricious review of substantive policy choices. *Id.* at 12-13. The Court noted that "Congress is aware that agencies sometimes alter their views in ways that upset settled reliance interests," and observed that "Congress sometimes includes in the statutes it drafts safe-harbor provisions that shelter regulated entities." *Id.* at 13.

In practical effect, the Court's ruling in *Perez* will encourage federal agencies to rely even more heavily on interpretive rules, and to more freely change those interpretive rules for political and policy reasons. Many agencies already rely heavily on interpretive rules to administer various regulatory regimes. Yesterday's decision encourages even more reliance on interpretive rules because it reduces the likelihood of having a changed interpretive rule thrown out as procedurally defective. Although agency interpretations do not formally carry "the force and effect of law"—which in theory means they are "not accorded that weight in the adjudicatory process," *id.* at 3—in practice, courts routinely defer to an agency's interpretation of its own regulations. *See Auer v. Robbins*, 519 U.S. 452 (1997).