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Bank Advisory

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Federal Bank Supervisory Agencies May Change Guidance Without Notice-and-Comment Rulemaking

New rulemakings to implement financial reforms leave banking organizations facing a host of uncertainties. Guidance or "interpretative rules" from the financial regulators on the intended scope and application of new rules can prove helpful in addressing those uncertainties. These "interpretative rules," however, may now present a new source of uncertainty as the result of a recent decision of the United States Supreme Court.

On March 9, 2015, the Supreme Court held in a 9-0 decision that the Administrative Procedure Act ("APA") does not mandate a federal administrative agency to seek public comment as required by APA notice-and-comment procedures when amending "interpretive rules," even when such amendment represents significant deviation from the existing interpretation.[1] The case arises from Department of Labor interpretations as to the scope of its regulations implementing federal statutory requirements on employee minimum wage and overtime payments. The DOL initially issued opinion letters concluding that mortgage loan officers were employees covered by the minimum wage and overtime requirements. The DOL later reversed that position, finding mortgage loan officers to be in a class of employees exempt from application of the requirements. Four years later, the DOL again reversed its position returning to the original view that mortgage loan officers are covered by its rules on minimum wages and overtime. The Mortgage Bankers Association brought a lawsuit to seek a finding that the DOL's ultimate reversal required the DOL to follow the APA notice-and-comment procedures before implementing the reversal. The Supreme Court disagreed. The ruling confirms that federal regulatory agencies, including banking supervisors such as the Board of Governors of the Federal Reserve System ("Federal Reserve Board"), may revise or reverse supervisory guidance without first seeking public comment.

The Supreme Court decision reverses the so-called Paralyzed Veterans doctrine adopted by the D.C. Circuit.[2] The Paralyzed Veteran Doctrine interprets the APA to require an agency to follow the APA notice-and-comment procedures when issuing a new interpretation that deviates significantly from the agency's then existing guidance. The Supreme Court held that the Paralyzed Veterans doctrine "is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum

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1 *Perez v. Mortgage Bankers Assn.* 575 U.S. ___, Slip Op. No. 13-1041 U.S. (Mar. 09, 2015).

2 *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied 523 U.S. 1003 (1998).

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procedural requirements."[3] In other words, because the APA notice-and-comment procedures expressly do not apply to "interpretive rules" when first issued, the procedures cannot be made to apply to their revision or reversal.

Agencies often issue interpretive rules to advise the public of their construction of the statutes and rules that they enforce.[4] One example in the context of financial reform are the Frequently Asked Questions ("FAQs") issued from time to time by the Federal Reserve Board and the other federal financial regulators responsible for implementing the Volcker Rule to express their collective views on the scope and application of their joint Volcker Rule regulation.[5] Another example is the leveraged lending guidance jointly issued by the Federal Reserve Board, the Comptroller of the Currency and the Federal Deposit Insurance Corporation.[6] While the federal banking agencies invited public comments on proposed leveraged lending guidance, the APA does not require notice-and-comment procedures to be followed.[7] The Supreme Court's ruling clarifies that federal agencies have no obligation to follow APA notice-and-comment procedures in establishing or in substantially revising or reversing their interpretive rules.

Neither the Volcker Rule FAQs nor the leveraged lending guidance has the force and effect of law.[8] The failure by a banking organization to follow an interpretative rule, however, could result in remedial action being required by its federal bank supervisor.

The Supreme Court ruling adds the further twist that the federal banking agencies may revise or rescind their guidance without seeking public comment. The ruling does provide a number of disincentives to the agencies doing so. The decision acknowledges that the APA requires a "more substantial justification" when new guidance unsettles substantial reliance on or is contrary to existing guidance. Further, revised guidance "is entitled to considerably less deference than a consistently held agency view."[9] Revised or rescinded guidance cannot be applied retroactively.

The Court's ruling makes clear that publication and request for public comment on federal banking agency interpretative rules is not required. That, however, would seem the preferable route. The federal bank regulatory agencies voluntarily did so in issuing their leveraged lending guidance. Perhaps they should do the same for FAQs and other interpretations of their rules. The banking regulators have requested comments on FAQs in the past.[10] Allowing for public comment on FAQs could lead to further delays on their issuance. On the other hand, the failure to solicit public comment could result in FAQs being revised at will should the federal banking regulators be swayed by unsolicited comments or other findings after a FAQ's initial issuance.[11] Either way, banking organizations should factor the potential for changes to supervisory guidance into their compliance plans.

3 *Perez v. Mortgage Bankers Assn.* supra, at 2.

4 *See, e.g.*, Federal Deposit Insurance Corporation Advisory Opinions, available at https://www.fdic.gov/regulations/laws/rules/4000-50.html.

5 Volcker Rule Frequently Asked Questions, available at http://www.federalreserve.gov/bankinforeg/volcker-rule/faq.htm.

6 Interagency Guidance on Leveraged Lending (March 21, 2103) available at http://www.federalreserve.gov/bankinforeg/srletters/sr1303a1.pdf.

7 Proposed Guidance on Leveraged Lending, 77 Fed. Reg. 19417 (Mar. 30, 2012).

8 *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995).

9 Both Justices Scalia and Thomas raised constitutional questions about judicial deference to agency interpretations. The courts have excluded interpretative rules not subject to notice-and-comment procedures from deference afforded by the courts under the so-called Chevron doctrine which permits a court to defer to the agency's interpretation of a statutory rule where the statute is silent or ambiguous as to its intent.

10 *See, e.g.*, "Agencies Request Comment on Proposed Questions and Answers Regarding Community Reinvestment," available at http://www.federalreserve.gov/newsevents/press/bcreg/20140908a.htm.

11 One bill currently before Congress would require federal agencies to follow prescribed requirements in issuing any major guidance or guidance that involves a novel legal or policy issue, including presenting alternatives to such guidance and why those alternatives were rejected. *Regulatory Accountability Act of 2015*, H.R. 185 (114th Cong., Jan. 16, 2015).

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