Client Alert: Upholding a DOL Rule that Mortgage Loan Originators do not Qualify for the Administrative Exemption, a Unanimous Supreme Court Defers to Federal Agencies When Amending and Repealing Interpretative Rules

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In *Perez v. Mortgage Bankers Association*, the Supreme Court unanimously held that federal agencies do not have to engage in formal notice-and-comment rulemaking when changing their interpretative rules (even when, as in the case before the Court, those changes are significant).

In 2006, the Mortgage Bankers Association (MBA) had requested an opinion letter from the Department of Labor (DOL) on whether mortgage loan officers fell within the administrative overtime exemption. The DOL (under President George W. Bush's administration) issued an opinion letter finding that mortgage loan officers did meet the administrative exemption and, hence, were exempt from overtime. Four years later (under newly elected President Barack Obama), the DOL reversed course and withdrew that opinion letter – meaning that mortgage loan officers no longer fell within the exemption and as such were entitled to overtime. In doing so, the DOL did not seek input from the public or otherwise engage in formal rulemaking. The MBA challenged the DOL's actions in court.

The D.C. Circuit held that the DOL's flip-flopping without formal rulemaking was improper because an agency must use notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The Supreme Court disagreed and reversed the decision.

The Supreme Court explained that "interpretative rules," like the DOL's mortgage loan officer opinion letter, do not have to go through notice-and-comment procedures because interpretative rules don't have the effect of law. Instead, those rules inform the public about how an agency views the law it is charged with enforcing. "Legislative rules" on the other hand have the force of law and so must go through formal rulemaking. The Court explained that, "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it

amends or repeals that interpretive rule."

The Court's decision has ramifications beyond the wage/hour questions surrounding mortgage loan officers' entitlement to overtime pay. Indeed, the rule announced in the decision would be equally applicable, for example, to the many agencies regulating the banking industry. For now, federal agencies are free to adopt or repeal interpretative rulings (such as opinion letters) without notice-and-comment rulemaking. This means that agencies are more likely to follow the views of the president and make changes to interpretative rulings (perhaps even longstanding ones) that lean towards employees or employers.

In the future, an agency's ability to change its interpretative rulings as the administration changes may again come before the Supreme Court. While the *Perez* decision was unanimous, three Justices (Alito, Scalia, and Thomas) wrote separate concurring opinions signaling an apparent willingness to revisit the amount of deference courts owe agency interpretations. As Justice Thomas noted: "This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent."

Contact your Vorys lawyer if you have questions about the impact of the *Perez* decision on your business operations.