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Four Considerations for Challenging Alleged 'Interpretive Rules' By Federal Agencies

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An agency's new "interpretation" of its rules often puts business clients in a difficult position: On the turn of a dime, what seemed to be legal yesterday could become illegal tomorrow. Without notice, longstanding activities can be at risk of sudden enforcement.

Further, *Perez v. Mortgage Bankers Association*, 135 S. Ct. 1199 (2015), seemed to foreclose many challenges to so-called "interpretive rules" issued by federal agencies. However, a recent decision by the D.C. Circuit presents four strategic considerations for developing successful litigation against ostensibly "interpretive" agency guidance that, in effect, changes the law.

On Sept. 23, 2016, the D.C. Circuit[1] issued an opinion vacating an Occupational Safety and Health Administration Memorandum[2] that sought to reinterpret the scope of the "retail facilities" exemption set forth in OSHA's process safety management (PSM) standard[3]. The court concluded that the Memorandum, issued over 23 years after OSHA's promulgation of the PSM standard, was an occupational safety and health "standard," as defined in Section 3 of the Occupational Safety and Health Act.[4]

As such, the court ruled that the Memorandum violated the procedures for "promulgation, modification, or revocation of standards" in the OSH Act, despite OSHA's position that it merely was an "interpretive rule" shielded from judicial review.[5] The Memorandum would have subjected over 3,800 agricultural retailers to the PSM standard for the first time, with compliance costs in excess of $100 million.

This case highlights successful strategies that trade associations and companies can consider when challenging purportedly "interpretive" guidance, or countering an agency's maneuvers to avoid judicial review in light of the 2015 U.S. Supreme Court's decision in *Mortgage Bankers*.[6]

What You Should Know

- OSHA cannot modify, revoke, or issue new standards through ostensible "interpretations"
- Working with counsel, timely legal challenges can vacate unlawful "interpretations" before they can be enforced
- Agency-specific procedural statutes and the Administrative Procedure Act should be considered separately
- Litigation strategies should focus on the most relevant statute, and call out "red herrings" in the agency's position
- Litigants should persistently challenge the agency's claim of deference

History of the PSM Standard

In 1992, OSHA promulgated its PSM standard in an effort to "provide safe and healthful employment and places of employment for employees in industries which have processes involving highly hazardous chemicals."[7] The PSM standard "contains requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals."[8]

OSHA's PSM standard categorically exempts all "retail facilities" (such as gas stations) even if they store or handle large volumes of hazardous chemicals.[9] OSHA's rationale for this exemption was OSHA's belief that "such facilities did not present the same degree of hazard to employees as other workplaces covered [by the PSM standard]," even though "highly hazardous chemicals may be present" at such facilities.[10]

Contemporaneous with OSHA's promulgation of the PSM standard, The Fertilizer Institute (TFI), one of the petitioners in the recent D.C. Circuit litigation and represented by the authors, asked OSHA to confirm that agricultural retailers handling anhydrous ammonia (a valuable crop nutrient and a PSM standard-designated "highly hazardous chemical") were covered by the "retail facilities" exemption.[11] In response, OSHA confirmed that such facilities selling directly to end users (i.e., farmers) were "retail facilities" and covered by the "retail facilities" exemption.[12] OSHA confirmed this conclusion for every agricultural retailer that asked until it quietly posted the July 2015 Memorandum on its website specifically to target those retailers.

West Fertilizer, the Executive Order and OSHA's Memorandum

On April 17, 2013, an ammonium nitrate explosion at the West Fertilizer Company storage and distribution facility in West, Texas, killed 15 people and injured more. In response, on Aug. 1, 2013, the president issued an executive order directing OSHA and other agencies to "further improve chemical facility safety and security" by addressing the lingering hazards made manifest by recent disasters.[13]

In response, OSHA issued the 2015 Memorandum that "rescind[ed] all prior policy documents, letters of interpretation and memoranda related to the retail exemption and the 50 percent test."[14] OSHA asserted that its prior guidance discussing the "retail facilities" exemption was "directly contrary to OSHA's original intent" because it allowed facilities "that handle large, bulk quantities of materials" to be eligible for the exemption.[15] As a result, OSHA decided to redefine the exemption to apply only to "retail facilities" in a narrow range of U.S. Department of Commerce business codes.[16] Under this new definition, agricultural "retail facilities" no longer were eligible for the exemption, and became subject to the full brunt of the PSM standard.[17]

The Litigation by TFI and ARA

As estimated by TFI and the Agricultural Retailers Association (ARA), OSHA's Memorandum subjected approximately 3,800 agricultural retail facilities to the PSM standard, with estimated compliance costs of over $100 million. Many of these facilities are small businesses, and could not absorb the compliance costs or bear the penalties for noncompliance. As a result, they likely would go out of business, consolidate operations, switch to other less effective nutrients, or attempt to implement the costly PSM standard requirements and pass the costs on to farmers.

TFI, ARA and individual agricultural retailers challenged OSHA's Memorandum in the D.C. Circuit, which has direct subject matter jurisdiction over challenges to OSH Act "standards."[18] The petitioners asserted that the "basic function" of the Memorandum was to create a new "standard" because it required "conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment" — namely, compliance with the PSM standard for the first time.[19]

Further, by effectively eliminating the PSM exemption for "retail facilities" solely within the agricultural sector, and thereby picking and choosing who the regulation governed, OSHA's Memorandum was quintessentially "legislative." Because it functioned as a "standard," petitioners asserted that OSHA's issuance of the Memorandum violated the OSH Act procedures for the promulgation of "standards."[20]

Relying on the Supreme Court's 2015 decision in *Mortgage Bankers*[21] and other Administrative Procedure Act (APA) authorities, OSHA asserted that the Memorandum merely was an "interpretative rule," so OSH Act promulgation procedures did not apply and the D.C. Circuit lacked subject matter jurisdiction to hear the case. In *Mortgage Bankers*, the Supreme Court rejected a 1997 decision by the D.C. Circuit[22] requiring, under the APA, that a long-standing agency interpretation may only be revised through adherence to the APA's notice and comment rulemaking procedures.[23]

In its opinion, the D.C. Circuit concluded that "nothing in the OSH Act or APA establishes that the standard/nonstandard distinction under the OSH Act must directly track the legislative/interpretive rule distinction under the APA."[24] Next, analyzing the "basic function" of the Memorandum, the court observed that it plainly was intended "to address a 'particular significant risk'" — namely, "the risk associated with storing large quantities of highly hazardous chemicals for distribution to end users in bulk quantities, as had been the case at the West, Texas, fertilizer company."[25]

Because the OSH Act sets forth "standard" promulgation procedures that are distinct from the APA's for "legislative rules," the court agreed that the critical inquiry was whether OSHA's Memorandum constituted a new "standard." Although the Memorandum did not prescribe new preventative measures on its own because they flowed from the PSM standard, itself, the court determined that "the *essential effect and object* of the Memorandum is to expand the substantive reach of the PSM standard by narrowing an exemption from that standard,"[26] and subjecting thousands of agricultural retail facilities for the first time to the PSM standard. As such, the D.C. Circuit ruled that the Memorandum qualified as a new "standard," and vacated it because OSHA failed to adhere to the OSH Act's "standard" promulgation requirements.[27]

The Significance of the D.C. Circuit's Opinion

The D.C. Circuit's opinion has potentially far reaching implications for OSHA. First, the decision should limit OSHA's ability through guidance or "interpretations" to change the applicability of existing OSHA "standards" (e.g., by changing clear exemptions). Further, the decision should limit OSHA's ability to impose additional obligations on regulated entities beyond those explicitly prescribed in its standards. However, the decision presents four strategic considerations for future challenges to agency actions generally, especially in light of the Supreme Court's 2015 *Mortgage Bankers* decision.

First, when available, a challenge should be developed through a direct attack under a more specific agency-authorizing statute, instead of under the APA, to avoid a claim by the agency that the action in question is merely an "interpretative rule" that need not go through notice and comment rulemaking. Several agency-authorizing statutes set forth such procedures with more specific definitions and procedural steps than the generally applicable terms of the APA.

Second, the argument that the challenged agency action qualifies as a "legislative rule" should be preserved. In the *Mortgage Bankers* litigation, the questions before the court were limited to whether the agency action, as a concededly "interpretive rule," should be subject to the APA's notice and comment rulemaking procedures.[28] The parties did not challenge the agency's interpretation as a "legislative rule" (and, in fact, waived those arguments), so they could not raise them before the Supreme Court.[29] Thus, *Mortgage Bankers* does not necessarily preclude challenges to the often self-serving efforts by agencies to label substantive guidances as mere "interpretive rules" that are beyond judicial review.

Third, parties should steadfastly refuse attempts by agencies to frame these issues. In the litigation by "retail facilities" in the agricultural sector, OSHA insisted that its Memorandum be analyzed as an "interpretative rule" under the APA. Further, OSHA's chief authorities and citations focused on the APA, rather than cases applying the OSH Act and analyzing the legal definition of a "standard." Petitioners therefore confronted OSHA's attempt to recast the nature of the litigation head on, and asserted that the court should not give any deference to the agency's classification.

Fourth, for the same reasons, parties should carefully challenge the specific level of deference claimed for the "label" that a particular agency ascribes to its own actions. OSHA made every effort to label the Memorandum an "interpretative rule" before the legal challenge even materialized. Ultimately, the D.C. Circuit declined OSHA's invitation to analyze the Memorandum as either an "interpretive rule" or a "legislative rule."[30] By focusing on the relevant question of whether the Memorandum constituted a new "standard" under the OSH Act, the petitioners avoided an intensive discussion of deference (and myriad cases on that subject). Further, the petitioners simplified the relevant jurisdictional inquiry for the court.

References

1. *Agric. Retailers Ass'n and The Fertilizer Inst. v. U.S. Dep't of Labor and Occupational Safety and Health Admin.*, No. 15-1326, Dkts. 1637295, 1637299 (Sept. 23 2015) (D.C. Cir. Sept. 23, 2016).
2. OSHA, "Process Safety Management of Highly Hazardous Chemicals and Application of the Retail Exemption (29 C.F.R. § 1910.119(a)(2)(i))" (July 22, 2015) (hereinafter, the "Memorandum").
3. 57 Fed. Reg. 6,356 (Feb. 24, 1992), *codified at* 29 C.F.R. § 1910.119.
4. 29 U.S.C. § 652(8).
5. *Id.* § 655(b).
6. 135 S. Ct. 1199.
7. 57 Fed. Reg. at 6,359.
8. 29 C.F.R. § 1910.119.
9. 57 Fed. Reg. at 6,369.
10. *Id.*
11. Letter from Gary Myers, President, TFI, to Ms. Dorothy Strunk, Acting Administrator, OSHA (March 27, 1992).
12. Letter from Ms. Patricia K. Clark, OSHA Director of Enforcement Programs, to Mr. Gary Myers, President, TFI (June 19, 1992).
13. Executive Order No. 13650 §§ 1, 6, 78 Fed. Reg. 48,029, 48,031-32 (Aug. 1, 2013).
14. *See* Memorandum.
15. *Id.*
16. *Id.*
17. *Id.*
18. 29 U.S.C. § 655(f).
19. 29 U.S.C. § 652(8).
20. *Id.* § 655(b).
21. 135 S. Ct. 1199.
22. *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579 (D.C. Cir. 1997).
23. 135 S. Ct. at 1210.
24. *Agric. Retailers Ass'n*, Dkt. 1637299 at 9.
25. *Id.* at 8.
26. *Id.* (emphasis added).
27. *Id.* at 11.
28. 135 S. Ct. at 1210.
29. *Id.*
30. *Agric. Retailers Ass'n*, Dkt. 1637299 at 10.

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