Nos. 13-1041, 13-1052

In The Supreme Court of the United States

THOMAS E. PEREZ, SUED IN HIS OFFICIAL CAPACITY, SECRETARY OF THE DEPARTMENT OF LABOR, ET AL.,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

JEROME NICKOLS, RYAN HENRY, AND BEVERLY BUCK,

Petitioners,

v.

MORTGAGE BANKERS ASSOCIATION,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* QUICKEN LOANS INC. IN SUPPORT OF RESPONDENT MORTGAGE BANKERS ASSOCIATION

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INTEREST OF *AMICUS CURIAE* QUICKEN LOANS INC.

Quicken Loans Inc. ("Quicken Loans") respectfully submits this brief as *amicus curiae* in support of Respondent Mortgage Bankers Association because Quicken Loans has an interest in the outcome of this case.[1]

Former Quicken Loans mortgage bankers are attempting to use the Department of Labor's (the "DOL") Administrator's Interpretation No. 2010-1 (Mar. 24, 2010) ("AI 2010-1"), which "represents a substantive change in the Department's interpretation of its administrative exemption regulations" (*Henry v. Quicken Loans, Inc.*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 609, pp. 27-28), to impose immediate overtime liability on Quicken Loans where none existed. No liability existed because, as a matter of law, Quicken Loans acted in good faith under Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 ("Section

[1] No counsel for a party in this case authored Quicken Loans' *amicus curiae* brief in whole or in part. No counsel or party in this case made a monetary contribution intended to fund the preparation or submission of Quicken Loans' *amicus curiae* brief. Sup. Ct. R. 37.6. Respondent Mortgage Bankers Association and Petitioners-Intervenors Jerome Nickols, Ryan Henry, and Beverly Buck filed blanket consents with the Court allowing for the filing of *amicus* briefs. Federal Petitioners, Thomas E. Perez, Secretary of Labor, the Department of Labor, and David Weil, Administrator, Wage and Hour Division, consented to the filing of Quicken Loans' *amicus* brief on October 14, 2014.

259"), in relying on the DOL's Wage and Hour Opinion Letter, FLSA2006-31 (Sept. 8, 2006) (the "2006 Opinion Letter") finding mortgage bankers are exempt employees.[2] The DOL and Intervenors' position is that the only way Quicken Loans could have avoided liability after AI 2010-1 was to implement wide-sweeping changes to its longstanding operations, policies, and procedures – ***overnight***. This simply was impossible. The DOL's abrupt and substantive change violates the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 551-559. The judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

STATEMENT OF THE CASE

The Mortgage Bankers Association's Consolidated Brief ("MBA Brief") provides historical context relating to the DOL's definitive interpretations of the FLSA's administrative exemption regulations. MBA Br., pp. 2-8. The MBA Brief also fully analyzes the APA, the *Paralyzed Veterans* doctrine (*Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C.

[2] Pursuant to Section 259, an employer is subject to no liability under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, where it "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Administrator of the Wage & Hour Division of the DOL]." 29 U.S.C. § 259(a).

Cir. 1997)), and the vital importance of protecting the reliance interests of, and ensuring procedural fairness to, regulated entities. *Id.*, pp. 16-51. Quicken Loans files this brief as *amicus curiae* in support of Respondent Mortgage Bankers Association to provide further context and perspective regarding the DOL's failure to comply with the APA's notice-and-comment rulemaking procedures when it issued AI 2010-1.

A. Quicken Loans

Founded in 1985, Quicken Loans is a mortgage banking financial institution that originates residential mortgage loans in all 50 states and then processes and closes loans.[3] *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 715, p. 38; *id.*, ECF No. 720, pp. 138, 172; *id.*, ECF No. 735, p. 165. Over the course of many years, Quicken Loans has employed thousands of mortgage bankers to provide financial services to its clients. *See Quicken Loans History – Quicken Loans Press Room*, QUICKEN LOANS INC. (Oct.

[3] Quicken Loans routinely has been recognized as an outstanding employer and for the exceptional financial services it provides to its clients. Most recently, Quicken Loans was rated the number one company in customer satisfaction by J.D. Power and among the top five companies to work for in the nation. *2013 Primary Mortgage Origination Study – Quicken Loans*, J.D. POWER (Oct. 15, 2014, 4:00 PM), http://www.jdpower.com/award/2013-primary-mortgage-origination-study-quicken-loans; *Quicken Loans – Best Companies to Work for 2014*, FORTUNE (Oct. 15, 2014, 4:00 PM), http://fortune.com/best-companies/quicken-loans-5/?iid=BC14_lp_header.

15, 2014, 4:00 PM), http://www.quickenloans.com/press-room/fast-facts/ql-history/. When the DOL issued AI 2010-1 on March 24, 2010, Quicken Loans employed more than 1,500 mortgage bankers primarily in offices in Detroit, Michigan, Cleveland, Ohio, and Scottsdale, Arizona. *See Fast Facts – Quicken Loans Pressroom*, QUICKEN LOANS INC. (Oct. 15, 2014, 4:00 PM), http://www.quickenloans.com/press-room/fast-facts/.

B. Quicken Loans' Mortgage Bankers Are Exempt From the FLSA's Overtime Requirements

Throughout the years, Quicken Loans operated its business based on the exempt classification of its mortgage bankers pursuant to the FLSA's administrative exemption. 29 U.S.C. § 213(a)(1). Quicken Loans viewed its mortgage bankers as exempt financial services professionals who made significant judgments, used their own discretion, managed their interactions with clients, and structured their own workload and workday. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7; *see also id.*, ECF No. 720, p. 26; *id.*, ECF No. 733, p. 63; *id.*, ECF No. 734, pp. 39-40, 143-44. Quicken Loans did not, and had no reason to, closely monitor or track its mortgage bankers' work hours. *Id.*, ECF No. 720, p. 59.

After Quicken Loans determined that the FLSA's administrative exemption applied to its mortgage bankers, Quicken Loans developed a compensation structure that was more favorable to its employees

than if overtime compensation had been paid. *Id.*, pp. 83-84. Quicken Loans' mortgage bankers received a guaranteed base salary with the opportunity to earn substantial commissions. *See*, *e.g.*, *id.*, ECF No. 716, pp. 124-25; *id*., ECF No. 722, p. 84. Mortgage bankers also received a comprehensive benefits package commensurate with financial services employees. *See*, *e.g.*, *id.*, ECF No. 714, pp. 17-19; *id.*, ECF No. 716, p. 133; *id.*, ECF No. 719, p. 61; *id.*, ECF No. 720, p. 84; *id.*, ECF No. 722, p. 82. Many of Quicken Loans' mortgage bankers earned more than $100,000 per year under its generous compensation system. *Id.*, ECF No. 720, p. 158.

Quicken Loans' decision to classify its mortgage bankers as exempt was not imprudent. It was the result of years of thorough and reasoned analysis and constant consideration of relevant authority by its Vice President of Administration, David Carroll, who also is a lawyer by training. In making his classification decision of web mortgage bankers (and maintaining it after periodic reviews), Carroll relied on a number of sources, including: (1) "federal regulations defining the FLSA white-collar exemptions (including the versions in effect both before and after August 23, 2004)"; (2) "the relevant opinion letters of the U.S. Department of Labor . . . addressing the scope and application of those regulations"; (3) "relevant federal case law"; (4) his "periodic review of the Company's compensation policies and practices [and] mortgage

bankers' job duties"; and (5) the exempt status of similar occupations.[4] *Id.*, ECF No. 436-7, p. 4; *see also id.*, ECF No. 436-6, pp. 62-69. Carroll confirmed his understanding of these sources with in-house and outside legal counsel. *See id.*, ECF No. 436-6, p. 104.

Carroll reevaluated and reaffirmed his classification decision on several occasions, taking into account the exempt status of similar occupations and relevant legal developments. *Id.*, pp. 62-69.[5] When the DOL proposed regulations in March 2003, like any prudent employer would do, Carroll considered them. "[T]hey confirmed [his] understanding that employees may be exempt if they perform services for the clients of their

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[4] *See id.*, ECF No. 436-7, p. 4 (noting that Carroll "compared the job duties of mortgage bankers with those of other financial services professionals, including stockbrokers").

[5] Carroll even "carefully stud[ied]" opinions by subordinate DOL employees, finding in his "reasoned estimation" that Quicken Loans' mortgage bankers were readily distinguishable from the loan officers described in those letters. *Id.*, ECF No. 436-7, p. 5. Specifically, he studied a 1999 letter by a subordinate DOL employee that concluded, based on the limited facts before the DOL at that time, the subject loan officers did not satisfy either the "primary duty" or the "discretion and independent judgment" tests of the administrative exemption. *See id.* He also studied a 2001 letter by another subordinate DOL employee, which was issued in response to a request for reconsideration of the 1999 opinion. *See id.* The 2001 letter modified the earlier letter, finding that the hypothetical loan officers satisfied the primary duty test. The 2001 letter still maintained, however, that the subject loan officers did not exercise discretion and independent judgment and were therefore non-exempt. *See id.*

employer, which mortgage bankers do." *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, p. 6.

When the DOL promulgated its final regulations in April 2004 (analyzed in the MBA Brief at pages 3-5), he "examin[ed]" them, including the "financial services" provision at 29 C.F.R. § 541.203(b), which "further solidified [his] earlier conclusion that the FLSA administrative exemption was all along the correct classification for [Quicken Loans'] mortgage bankers." *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, pp. 6-7. Carroll "took particular note" of the preamble to the 2004 regulations,[6] and its recognition that "some selling to consumers" would not defeat application of the administrative exemption to "financial services" employees. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, p. 7.

Carroll "revisit[ed his] classification decision" following the DOL's issuance of the 2006 Opinion Letter on September 8, 2006, which he became aware of "immediately after it was released." *Id*. The 2006 Opinion Letter (described in the MBA Brief at pages 5-6) found that mortgage bankers satisfy the administrative exemption. *See generally* 2006 Opinion Letter. He "closely reviewed the 2006 DOL Letter and compared its description of the job duties of the

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[6] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22,122, 22,146 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).

'mortgage loan officers' . . . with the job duties of [Quicken Loans'] mortgage bankers," determining that they were "substantially the same." *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 436-7, p. 7. Accordingly, Carroll concluded that "[Quicken Loans] should maintain the exempt classification for [its] mortgage bankers." *Id*. According to Carroll, "[n]ot only did the 2006 DOL Letter not contradict [his] decision to use the exempt administrative classification, it made it absolutely clear that the exempt classification was the right call all along." *Id.*, p. 8.

Carroll made the classification decision "based on a fair and honest reading and interpretation of relevant authorities" and "in good faith." *Id.*; *see also id.*, ECF No. 436-6, pp. 62-69. Carroll believed he relied in good faith on the 2006 Opinion Letter when he maintained the exempt classification of Quicken Loans' mortgage bankers. *Id.*, ECF No. 436-7, pp. 7-8.

C. Intervenors' Counsel Files Multiple Lawsuits Against Quicken Loans Attacking the Exempt Classification of Its Mortgage Bankers

Notwithstanding its painstaking analysis supporting the decision to classify its mortgage bankers as exempt from receiving overtime, Quicken Loans was required to vigorously defend against multiple overtime lawsuits filed by Intervenors' counsel during the six years prior to AI 2010-1. This was the first time Quicken Loans' classification of its mortgage

bankers and compensation structure had been challenged.

Intervenors' counsel initially filed three collective actions in the United States District Court for the Eastern District of Michigan. The first case, *Henry v. Quicken Loans, Inc.*, E.D. Mich. No. 2:04-cv-40346 (the "*Henry* litigation"), was filed on May 17, 2004, by Intervenor Henry on behalf of web mortgage bankers. The second case, *Chasteen v. Rock Financial*, E.D. Mich. No. 2:07-cv-10558 (the "*Chasteen* litigation"), was filed on February 6, 2007 by branch mortgage bankers, including Intervenor Nickols, who worked in Quicken Loans' Rock Financial division. The third case, *Mathis v. Quicken Loans, Inc.*, No. 2:07-cv-10981 (the "*Mathis* litigation"), was filed on March 7, 2007, by web mortgage bankers, including Intervenor Buck, who failed to timely opt into the *Henry* litigation.

After five years of discovery and motion practice, on September 30, 2009, the district court in the *Henry* litigation correctly entered summary judgment in favor of Quicken Loans on its Section 259 good faith defenses. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 571, pp. 21-26. The district court held that all claims after September 8, 2006 (*i.e.*, the date of the 2006 Opinion Letter) were barred as a matter of law because Quicken Loans acted in good faith under Section 259 in relying on the 2006 Opinion Letter

finding that mortgage loan officers are exempt administrative employees. *Id.*, p. 24.[7]

The district court also found a genuine issue of material fact regarding the overtime claims arising prior to September 8, 2006. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 571, pp. 15-18, 29-30. The *Henry* litigation proceeded to trial and the jury found in Quicken Loans' favor on all counts. *Id.*, ECF Nos. 707, 708.[8] That jury verdict was unanimously affirmed by the United States Court of Appeals for the Sixth Circuit. *Henry v. Quicken Loans, Inc.*, 698 F.3d 897 (6th Cir. 2012).[9]

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[7] On February 16, 2012, after granting Quicken Loans summary judgment on its Section 259 good faith defenses once again, the district court entered orders dismissing plaintiffs whose claims arose solely after September 8, 2006. *Mathis v. Quicken Loans, Inc.*, No. 2:07-cv-10981 (E.D. Mich.), ECF No. 324; *Chasteen v. Rock Financial*, No. 2:07-cv-10558 (E.D. Mich.), ECF No. 229; *Biggs v. Quicken Loans, Inc.*, No. 2:10-cv-11928 (E.D. Mich.), ECF No. 113. Thus, Intervenor Buck's claims were dismissed with prejudice. *Mathis*, No. 2:07-cv-10981 (E.D. Mich.), ECF No. 328, p. 3.

[8] The *Henry* litigation was the first, and currently is the only, mortgage banker exemption case to be tried by a jury.

[9] AI 2010-1 cannot apply to Intervenors' claims because their claims arose prior to AI 2010-1. Even the DOL concedes that AI 2010-1 cannot apply retroactively. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 609, pp. 13, 26-28, n.11. Further, Intervenors Henry and Buck have litigated all of their claims to conclusion – and lost. *See generally Henry*, 698 F.3d 897; *Mathis*, No. 2:07-cv-10981 (E.D. Mich.), ECF No. 328, p. 3.

D. The DOL Issues AI 2010-1

Unbeknownst to the district court and Quicken Loans, Intervenors' counsel contacted the DOL in 2009, following the summary judgment rulings in the *Henry* litigation. They requested that the DOL "immediately" and "quickly" withdraw the 2006 Opinion Letter (*Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 586-2, pp. 1-4), clearly to attempt to gain a tactical advantage in pending litigation.[10]

In 2010, the DOL dutifully responded to Intervenors' counsel with a private letter notifying them that the 2006 Opinion Letter purportedly had been withdrawn and enclosing a copy of AI 2010-1. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 588-1, p. 1. According to the DOL, AI 2010-1 "unambiguously represents a ***substantive*** change in the Department's interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees." *Id.*, ECF No.

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[10] Intervenors have impugned the Mortgage Bankers Association, Quicken Loans, and Attorney Robert Davis for years, claiming the 2006 Opinion Letter constitutes "regulatory capture." *See*, *e.g.*, Intervenors' Br., pp. 4-5; *see also Mortg. Bankers Ass'n v. Solis*, No. 12-5246 (D.C. Cir.), Doc. No. 1416138, pp. 2, 23-27. Intervenors' argument has been rejected repeatedly. *See*, *e.g.*, *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF Nos. 555, 556, 571. Even the DOL confirmed there was nothing improper or inappropriate in the DOL's issuance of the 2006 Opinion Letter. *Id.*, ECF No. 616, p. 6 (DOL stating the 2006 Opinion Letter was not arbitrary or capricious); *see also id.*, pp. 12-13.

609, pp. 27-28 (emphasis added). Through AI 2010-1, the DOL now purports to find that all mortgage loan officers do not satisfy the administrative exemption.

E. The Havoc Wreaked by the DOL's AI 2010-1

Six weeks after the DOL issued AI 2010-1, Intervenors' counsel filed a fourth case against Quicken Loans – *Biggs v. Quicken Loans, Inc.*, E.D. Mich. No. 2:10-cv-11928 (the "*Biggs* litigation"). The *Biggs* litigation was filed on the premise that AI 2010-1 imposes immediate liability on Quicken Loans. *Biggs*, No. 2:10-cv-11928 (E.D. Mich.), ECF No. 1, p. 2.

Around the same time, Intervenors' counsel requested that the district court reverse all of its earlier rulings in the *Henry* litigation, including its ruling on Quicken Loans' good faith defenses. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 618. Intervenors' counsel maintained that the district court must grant summary judgment as a matter of law in favor of the plaintiffs (including Intervenor *Henry*). *Id.*; *see also id.*, ECF No. 583. They claimed that AI 2010-1 "should be considered ***dispositive of the issue*** [*i.e.*, the exempt status of mortgage bankers] under any of the legal standards for deference described by the United States Supreme Court." *Id.*, ECF No. 585, p. 11 (emphasis added).

The district court issued an order to show cause requiring the DOL to explain the effect of AI 2010-1.

Id., ECF No. 596. In response to the order to show cause, the DOL filed an *amicus curiae* brief in the *Henry* litigation. *Id.*, ECF No. 609. The DOL urged the district court to give prospective deference to AI 2010-1. *Id.*, pp. 12-20. The district court ultimately denied Intervenors' counsel's attempt to reverse all of the court's prior rulings in the *Henry* litigation, which only involved claims accruing well before AI 2010-1 was issued by the DOL. *Id.*, ECF No. 666. The district court, however, refused to use or reference the 2006 Opinion Letter in connection with the trial in the *Henry* litigation, as AI 2010-1 purported to withdraw the DOL's prior definitive interpretation. *Id.*, ECF No. 669, p. 20. Further, in a subsequent ruling in the *Biggs* litigation, the district court also preliminarily indicated that AI 2010-1 is entitled to controlling deference prospectively. *See Biggs*, No. 2:10-cv-11928 (E.D. Mich.), ECF 80, pp. 11-12.

Quicken Loans maintains that the exempt classification of its mortgage bankers was, and always has been, correct. It agrees with the Mortgage Bankers Association that the DOL violated the APA when it issued AI 2010-1 without regard to the APA's notice-and-comment procedures. Quicken Loans maintains that AI 2010-1 is a legal nullity and that it may continue to rely on the 2006 Opinion Letter. *See id.*, ECF Nos. 141, 143. Nevertheless, Quicken Loans could not ignore the uncertainty and the allegations that liability was created immediately by the DOL's substantive change in its interpretation of the FLSA's administrative exemption regulations.

Quicken Loans immediately began the process of reviewing and ultimately changing the exempt classification of more than 1,500 mortgage bankers. The change became effective May 31, 2010 – nine weeks after the DOL issued AI 2010-1. The extensive process of changing the exempt classification of Quicken Loans' mortgage bankers entailed:

- Analyzing and attempting (unsuccessfully) to understand the authority that provided the basis for the DOL's abrupt and 180-degree change in its interpretation relating to the exempt classification of mortgage bankers;
- Determining whether it was feasible to reclassify Quicken Loans' mortgage bankers, in light of its business model and longstanding operations;
- Identifying the systems, processes, policies, and procedures that needed to be changed or created to convert 1,500 exempt mortgage bankers into non-exempt employees;
- Analyzing the effects of overtime compensation on mortgage banker commission structure and pay arrangements;
- Developing a new compensation plan, including new commission structures and pay arrangements to take into account that overtime now may be earned;
- Devising systems, processes, policies, and procedures regarding log-in/log-out and

other time tracking mechanisms necessary to accurately capture the number of hours actually worked by 1,500 mortgage bankers across the entire company;

- Formulating a plan to ensure mortgage bankers would be properly compensated for work outside the office;
- Devising and implementing a plan to address the effects of payroll changes (*e.g.*, payment in arrears, which takes into account hours worked, replaced payment in advance, which did not depend on the number of hours worked);
- Revising coverage schedules to account for the reduction of flexible working hours in favor of more controlled working times (*e.g.*, beginning and ending times, break periods, and lunch periods);
- Developing systems, processes, policies, and procedures for controlling hours worked and overtime earned;
- Providing ongoing training to mortgage bankers and leaders on the many changes associated with new systems, processes, policies, and procedures;
- Creating proper and effective acknowledgements and summaries regarding the changes to the way mortgage bankers are compensated and perform their job; and

- Devising and implementing an effective communications plan to attempt to explain to exempt financial services employees that they would now be treated as non-exempt employees.

This comprehensive overhaul of the mortgage banking business model was challenging, time-consuming, and costly. The extensive and complex changes could not be completed overnight. To the contrary, it took nine weeks. Many, if not all, of these changes could have been accomplished to avoid purported immediate liability if the DOL had complied with the APA's notice-and-comment procedures.

SUMMARY OF THE ARGUMENT

The APA's notice-and-comment rulemaking procedures ensure that affected parties are afforded the opportunity to comment on proposed rule changes and conform their behavior before a final rule becomes effective. The *Paralyzed Veterans* doctrine further protects interests of regulated entities by requiring administrative agencies – like the DOL – to comply with the APA before substantively changing a prior definitive interpretation. AI 2010-1 is a "substantive change" in the DOL's interpretation of the FLSA's administrative exemption regulations as they relate to mortgage bankers. *Henry*, No. 2:04-cv-40346 (E.D. Mich.), ECF No. 609, pp. 27-28. The DOL's abrupt and substantive change violates the APA, particularly in light of the actual effect on regulated entities like

Quicken Loans who relied on the DOL's previous interpretation that mortgage bankers satisfy the administrative exemption.

ARGUMENT

The APA commands that agencies follow certain statutorily prescribed procedures before issuing a "rule."[11] 5 U.S.C. § 553. When an agency engages in "rule making,"[12] it must: (1) publish a general notice of proposed rulemaking in the Federal Register that includes "the terms or substance of the proposed rule or a description of the subjects and issues involved"; (2) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) "[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. §§ 553(b), (c).[13]

[11] Under the APA, "rule" is defined in relevant part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4).

[12] "Rule making" is the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5).

[13] Executive Order No. 12866, 58 Fed. Reg. 51735, 1993 WL 388305 (Sept. 30, 1993), provides that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a

(Continued on following page)

The APA's rulemaking procedures are intended to "assure fairness and mature consideration of rules of general application." *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (plurality opinion); *see also Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) ("Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." (citation omitted)). The APA's notice-and-comment procedures also afford regulated parties a reasonable opportunity to conform their behavior before a final rule takes effect. *See Am. Fed'n of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) ("Both the requirement of 553(b) that notice of proposed rulemaking be published in the Federal Register and the requirement of 553(d) that publication of a rule be made at least thirty days prior to its effective date serve the laudable purpose of informing affected parties and affording them a reasonable time to adjust to the new regulation.").

As the Mortgage Bankers Association aptly noted (MBA Brief at page 18), "[t]hose regulated by an

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comment period of not less than 60 days." *Id.* at Sec. 6(a)(1). Further, publication of a substantive rule "shall be made not less than 30 days before its effective date. . . ." 5 U.S.C. § 553(d).

administrative agency are entitled to 'know the rules by which the game will be played.'" *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) (quoting Oliver Wendell Holmes, *Holdsworth's English Law*, 25 L. QUARTERLY REV. 414 (1909)). To that end, the *Paralyzed Veterans* doctrine serves the vital purpose of protecting reliance interests of regulated entities by requiring administrative agencies to comply with the APA's notice-and-comment procedures before issuing substantive changes to a definitive interpretation. As administrations change in Washington, D.C., administrative fiat must not be permitted to replace the open and deliberative process required by the APA. Quicken Loans does not suggest that an administrative agency may never change the rules of the game. But when the rules are changed, regulated entities such as Quicken Loans must be given an opportunity – in advance – to plan for, and ensure compliance with, whatever new rules are properly promulgated. Quicken Loans was denied any such opportunity despite years of scrupulous consideration of relevant authority and reliance on the 2006 Opinion Letter.

Had the DOL complied with the APA's notice-and-comment procedures prior to issuing AI 2010-1, Quicken Loans would have been given the opportunity to provide comments regarding the exempt classification of mortgage bankers. It is unclear whether such "real life" experiences would have resulted in a different outcome. However, compliance with notice-and-comment procedures would have provided notice

of a potential substantive change in the DOL's prior definitive interpretation and time for Quicken Loans to devise (and implement, if necessary) a contingency plan. As demonstrated above, the need for compliance with the APA is all the more apparent where, as here, Intervenors are using the DOL's 180-degree reversal in an attempt to impose immediate liability where no liability previously existed. Agencies like the DOL are not permitted to make such drastic and unanticipated changes without complying with the APA.

CONCLUSION

For the foregoing reasons and those in the MBA Brief, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

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