D.C. Circuit Court finds OSHA's Change to Process Safety Management Standard's Retail Exemption is Unlawful

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Following the explosion at a fertilizer facility in West, Texas on April 17, 2013, which killed fifteen people, the Occupational Safety and Health Administration ("OSHA") took measures to address how to avoid similar catastrophes. OSHA issued a guidance memorandum revising the retail exemption to the Process Safety Management ("PSM") Standard, which had not previously applied to the fertilizer facility in West, Texas. Prior to the memorandum, the Retail Exemption related to "an establishment . . . at which more than half of the income is obtained from direct sales to end users."[1] This was the Agency's position since it issued the memorandum in 1992 explaining the Retail Exemption. This definition included facilities like the fertilizer facility in West, Texas, which although it stored mass quantities, sold the fertilizer to farmers who are the end users.

In response to the West, Texas explosion, OSHA issued the new guidance to apply the PSM Standard to facilities "organized to sell merchandise in small quantities to the general public." The memorandum replaced all previous letters of interpretation, memoranda, or policy documents regarding the retail exemption.

The D.C. Circuit Court of Appeals found that the change in the definition was a new standard and, thus, should have gone through notice and comment procedures. In making this finding, the D.C. Circuit disregarded OSHA's argument under the Administrative Procedure Act ("APA"), which allows agencies to issue interpretations of rules without notice and comment procedures. OSHA has previously relied on the APA's interpretive rule procedure – indeed, according to OSHA, the initial memorandum setting forth the fifty-percent retail exemption definition was an "interpretive memorandum." In making its decision, the Court of Appeals relied on the Occupational Safety and Health Act's own definition of a "standard" and the related case law. The OSH Act defines an occupational safety and health standard as "a standard which 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." *Agricultural Retailers Ass'n & Fertilizer Inst. v. United States Department of Labor*, No. 15-1326 (D.C. Cir. Sept. 23, 2016). The case law has further explained that information-gathering measures, enforcement measure or detection procedures are not standards.[2] Based on the OSH Act's own definition and the case law, the D.C. Circuit decided that the new definition of the retail exemption is a standard, designed to address the particular risk associated with sorting large quantities of highly hazardous chemicals for distribution. Because the OSH Act addressed the issue of whether the new definition was a standard, the D.C. Circuit declined to decide whether the rule would constitute an interpretive rule under the APA. This is because a standard under the OSH Act must be subject to notice and current rulemaking. This is statutory, such that the APA becomes irrelevant.

If the new definition had been implemented, up to 4,800 currently exempt facilities would be subject to the PSM standard. This decision is interesting both because of its impact on retail facilities subject to the previous exemption and also because the decision could prevent OSHA from using

the APA's permissible interpretive rules to avoid notice and comment rulemaking when OSHA guidance is disguised as a standard; in other words, when OSHA attempts to correct a hazard, it cannot do so through guidance but must instead invoke formal rulemaking.

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[1] See OSHA Archive of Interim Memo dated October 20, 2015.

[2] *Agricultural Retailers Ass'n & Fertilizer Inst. v. United States Department of Labor*, No. 15-1326 (D.C. Cir. Sept. 23, 2016) (*citing Workplace Health & Safety Council v. Reich*, 56 F.3d 1465 (D.C. Cir. 1995) and *Chamber of Commerce of the United States v. U.S. Dept. of Labor*, 174 F.3d 206 (D.C. Cir. 1999)).