No. _____

In The
Supreme Court of the United States

Jerome Nickols, Ryan Henry and Beverly Buck,
Petitioners,

v.

Mortgage Bankers Association,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Adam W. Hansen
Counsel of Record
Nichols Kaster, LLP
One Embarcadero Center
Suite 720
San Francisco, CA 94111
(415) 277-7236
ahansen@nka.com

Paul J. Lukas
Rachhana T. Srey
Nichols Kaster, PLLP
Minneapolis, MN 55402
(612) 256-3205

Sundeep Hora
Alderman, Devorsetz & Hora PLLC
Washington, DC 20036
(202) 969-8220

QUESTION PRESENTED

The Administrative Procedure Act, 5 U.S.C. §§ 551–59, "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). Section 553 of the Act sets forth notice-and-comment rulemaking procedures, but exempts "interpretative rules," among others, from the notice-and-comment requirement. 5 U.S.C. § 553(b). The D.C. Circuit, in a line of cases descending from *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), has created a per se rule holding that although an agency may issue an *initial* interpretative rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* at 586. In this case, the D.C. Circuit invoked the *Paralyzed Veterans* doctrine—which is contrary to the plain text of the Act, numerous decisions of this Court, and the opinions of the majority of circuit courts—to invalidate a Department of Labor interpretation concluding that mortgage loan officers do not qualify for the administrative exemption under the Fair Labor Standards Act.

The question presented is:

Whether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking.

PARTIES TO THE PROCEEDINGS

Petitioners Jerome Nickols, Ryan Henry, and Beverly Buck are former mortgage loan officers seeking overtime compensation in lawsuits filed in federal district court under the Fair Labor Standards Act, 29 U.S.C. § 216(b). Petitioners intervened before the district court as a matter of right, *see* Fed. R. Civ. P. 24(a), and participated as Defendants before the district court and Appellees before the court of appeals. Respondent Mortgage Bankers Association, a financial services industry trade group, was the Plaintiff in the district court and Appellant in the court of appeals. The United States Department of Labor, Secretary of Labor, and Department of Labor Deputy Wage and Hour Administrator were Defendants in the district court case and Appellees in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Jerome Nickols, Ryan Henry, and Beverly Buck respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit reversing the district court is available at *Mortgage Bankers Association v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) and is reproduced at App. 1a. The district court's opinion granting summary judgment in favor of Petitioners and the Secretary of Labor is available at *Mortgage Bankers Association v. Solis*, 864 F. Supp. 2d 193 (D.D.C. 2012) *rev'd sub nom. Mortgage Bankers Association v. Harris*, 720 F.3d 966 (D.C. Cir. 2013) and is reproduced at App. 15a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit issued its Opinion and Final Judgment on July 2, 2013. App. 13a. The D.C. Circuit denied Petitioners' timely-filed petition for rehearing *en banc* on October 2, 2013. App. 54a. Chief Justice Roberts twice granted Petitioners' timely applications for an extension of time within which to file a petition for a writ of certiorari, extending the deadline to and including February 28, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Administrative Procedure Act are reproduced in the Appendix (at 71a).

STATEMENT

This case presents an important question at the heart of federal administrative law: whether agencies subject to the Administrative Procedure Act are categorically prohibited from revising their interpretative rules unless such revisions are made through notice-and-comment rulemaking. The question touches on the authority of all three branches of government, carries crucial implications for regulated communities, and sharply divides the courts of appeals.

Congress authorized the Department of Labor ("DOL") to issue regulations defining various statutory exemptions contained in the Fair Labor Standards Act ("FLSA"). In addition to promulgating formal regulations, the DOL—like many other federal agencies—has traditionally issued informal interpretations addressing how the regulations apply to specific factual scenarios. Over the years, the DOL had issued a series of opinion letters concluding that mortgage loan officers—bank employees who sell mortgage products to customers—do not qualify for the FLSA's administrative exemption. In 2006, however, the DOL changed its interpretation, concluding that such employees *do* qualify for the exemption. In 2010, the DOL restored its original and long-standing interpretation, concluding once again that mortgage loan officers do not qualify for the exemption.

Respondent Mortgage Bankers Association ("MBA") sued the Secretary of Labor, seeking to invalidate the DOL's 2010 interpretation. Applying a controversial circuit precedent known colloquially as the *Paralyzed Veterans* doctrine, the D.C. Circuit

vacated the DOL's 2010 interpretation. According to the D.C. Circuit's *Paralyzed Veterans* doctrine, although an agency may issue an *initial* interpretive rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

The D.C. Circuit's opinion in this case deepened an intractable split of authority among circuit courts on the question of whether notice-and-comment rulemaking is required to modify an interpretive rule. The opinion is also in plain conflict with numerous decisions of this Court, as well as the unambiguous text of the Administrative Procedure Act, which exempts "interpretative rules" from notice-and-comment rulemaking and draws no distinction between initial interpretations and subsequent interpretations, *see* 5 U.S.C. § 553(b).

A brief description of the relevant background and procedural history of this case follows.

1. In 1946, Congress enacted the Administrative Procedure Act ("APA"), 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 1001, *et seq.*), which this Court has described as a "basic and comprehensive regulation of procedures in many agencies." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 36 (1950). Section 553 of the Act sets forth various notice-and-comment rulemaking procedures, but specifically exempts "interpretative

rules," among others, from the notice-and-comment requirement. 5 U.S.C. § 553(b).

Courts and commentators refer to rules that are subject to the APA's formal rulemaking procedures as "legislative rules," "substantive rules," or simply "regulations." *See, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms, Inc.*, 550 U.S. 45, 61 (2007); Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 233 (3d ed. 1994). Legislative rules "bind[] members of the public, the agency, and even the courts, in the sense that courts must affirm a legislative rule as long as it represents a valid exercise of agency authority." Kenneth Davis & Richard Pierce, *Administrative Law Treatise* 233 (3d ed. 1994). "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. . . . Such rules have the force and effect of law.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979) (quoting U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)).

Interpretative rules (often referred to as interpretive rules—the two terms are used interchangeably in this Petition), by contrast, are rules "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* at 302, n.31; *see also Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). Interpretative rules "do not require notice and comment, although . . . they also do not have the force and effect of law and are not accorded that

weight in the adjudicatory process." *Guernsey Memorial Hospital*, 514 U.S. at 99.

2. The FLSA requires employers to pay employees both minimum wage and overtime compensation. 29 U.S.C. §§ 206–207. There are certain statutory exemptions, however, to the FLSA's minimum wage and overtime requirements. Relevant here, Congress exempted employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). FLSA "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

Congress has never defined the terms "executive," "administrative," or "professional." The FLSA, however, grants the DOL authority to "defin[e] and delimi[t]" the scope of the exemptions for executive, administrative, and professional employees. 29 U.S.C. § 213(a)(1). Because of Congress' broad delegation of rulemaking authority, the regulations issued by the DOL have the binding effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). The DOL has promulgated detailed regulations defining these white collar exemptions, *see* 29 C.F.R. § 541,[1] and

[1] The general rule for the administrative exemption states:

> The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if

"[t]he major substantive provisions of the [white collar] regulations have remained virtually unchanged for 50 years." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).

Mortgage loan officers, like Petitioners, are workers employed by banks and mortgage companies who sell loan products to customers.[2]

> employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200. Additional regulations further define and delimit the terms of the general rule. *See* 29 C.F.R. § 541.201–203.

[2] The DOL has described the typical job duties of mortgage loan officers as follows:

> Mortgage loan officers receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity. Mortgage loan officers collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history,

According to the Bureau of Labor Statistics, nearly 300,000 people—approximately 1 in every 500 workers in the United States—work as loan officers.[3]

The DOL has, on six occasions, publicly issued interpretive guidance addressing mortgage loan officers' exemption status under the FLSA. In a series of four opinion letters published between 1971 and 2001, the agency's position was clear and consistently held: although loan officers could qualify for the FLSA's "outside sales" exemption if the employees performed their job duties outside the office, loan officers do not qualify for the Act's administrative exemption.[4] As courts have

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> prior bankruptcies, judgments, and liens. They also run credit reports. Mortgage loan officers enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided. They then assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings.

App. 107a; 2010AI, 2010 WL 1822423 at *1.

[3] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook, 2014–15 Edition, Loan Officers, available at http://www.bls.gov/ooh/Business-and-Financial/Loan-officers.htm.

[4] *See* App. 72a; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, WH-115, 1971 WL 33052 (January 15, 1971) (concluding that mortgage loan officers who customarily and

recognized, by their very terms, these two exemptions are mutually exclusive—"a [loan officer] cannot be simultaneously exempt under the outside sales exemption and the administrative exemption because the former requires the employee to have a primary job duty of sales, whereas that same primary job duty disqualifies an employee from coverage under the latter." *See, e.g.*, *Swigart v. Fifth Third Bank*, 870 F. Supp. 2d 500, 511 (S.D. Ohio 2012) (citations omitted).

During the same time period, federal courts uniformly held that mortgage loan officers do not qualify for the FLSA's administrative exemption. *E.g.*, *Casas v. Conseco Fin. Corp.*, No. Civ.00-1512, 2002 WL 507059, at *6–10 (D. Minn. Mar. 31, 2002).

Following notice and comment, the DOL in 2004 issued revised regulations defining and delimiting the FLSA's white collar exemptions. *See generally* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed.

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regularly performed work outside the office meet the requirements of the FLSA's outside sales exemption); App. 75a; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1999 WL 1002401 (May 17, 1999) (holding that mortgage loan officers do not meet the requirements of the FLSA's administrative exemption); App. 79a; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001) (reaffirming that loan officers do not meet the requirements of the administrative exemption); App. 82a; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 2006 WL 1094597 (March 31, 2006) (reaffirming that loan officers who work outside the office meet the requirements of the outside sales exemption).

Reg. 22,122. The revised regulations, however, did not alter the substance of the administrative exemption. *See Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 892 n.6 (D.C. Cir. 2010) (recognizing that the most recent regulations were merely meant to "consolidate and streamline" and ultimately be "consistent with" the old regulations); 69 Fed. Reg. 22,122, 22,126 & 22,139. *Compare* 29 C.F.R. § 541.2–207 (2003) *with* 29 C.F.R. § 541.200–203.

Despite intense lobbying from the financial services industry, the DOL refused to issue regulations in 2004 concluding that loan officers qualify for the administrative exemption. On the contrary, the DOL cited and discussed federal case law holding that loan officers *do not* qualify for the administrative exemption, *see* 69 Fed. Reg. 22,145–46, and stated that the regulations were intended to be "consistent with this case law." *Id.*

On September 8, 2006, in a sharp break from its long-settled position, the DOL issued an opinion letter concluding that mortgage loan officers are exempt employees under the FLSA's administrative exemption. *See* App. 91a; U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA2006-31, 2006 WL 2792445 (Sept. 8, 2006).[5] Although the 2006 opinion letter broke with over a generation's worth of DOL guidance and federal case law, the 2006 letter did not cite—let alone discuss—the mountain of prior authority

[5] The DOL's 2006 letter was signed by then-Wage and Hour Administrator Paul DeCamp. After Congress refused to confirm Mr. DeCamp, President Bush unilaterally appointed Mr. DeCamp during a Senate intra-session recess. Whether appointments such as Mr. DeCamp's violate the Constitution is under consideration in *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).

concluding that mortgage loan officers do not qualify for the administrative exemption.

Three-and-a-half years later, on March 24, 2010, the DOL issued Administrator's Interpretation No. 2010-1 ("2010AI")[6], restoring the DOL's original and long-held agency interpretation that mortgage loan officers do not qualify for the administrative exemption. App. 107a; 2010AI, 2010 WL 1822423. The 2010 interpretation forcefully withdrew the contrary 2006 opinion letter, analyzing the 2006 letter's numerous analytical flaws in detail, citing the letter's inconsistency with the governing regulations and case law, and criticizing the 2006 letter's "misleading assumption and selective and narrow analysis." App. 127a.

3. On January 12, 2011, Respondent MBA, the financial industry trade group that solicited the 2006 letter, filed suit against the Secretary of Labor in federal district court in the District of Columbia seeking an order declaring unlawful, vacating, and enjoining the implementation of 2010AI. MBA contended that the DOL violated the APA by issuing 2010AI without notice and comment, and argued alternatively that 2010AI should be set aside as arbitrary, capricious, and contrary to law. App. 15a.

Petitioners are former mortgage loan officers who brought suit against Quicken Loans, Inc. alleging that Quicken improperly misclassified

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[6] *See* U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2010-1, 2010 WL 1822423 (Mar. 24, 2010).

them as exempt under the FLSA.[7] Petitioners intervened as defendants before the district court as a matter of right, *see* Fed. R. Civ. P. 24(a), and fully participated as parties before the district court and court of appeals.

On June 6, 2012, the district court granted Petitioners' and the DOL's motion for summary judgment, concluding that the DOL was not required to engage in notice-and-comment rulemaking before issuing 2010AI, and holding that the DOL's 2010 interpretation was not arbitrary, capricious, nor contrary to law. App. 15a; *Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 208–10.

MBA appealed,[8] and the D.C. Circuit reversed. The D.C. Circuit began by reaffirming the *Paralyzed Veterans* doctrine, which holds that although an agency may issue an *initial* interpretive rule without going through notice and comment, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and

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[7] Petitioner Ryan Henry is a plaintiff in *Henry v. Quicken Loans Inc.*, No. 04-cv-40346 (E.D. Mich.). Petitioner Beverly Buck is a plaintiff in *Mathis v. Quicken Loans Inc.*, No. 07-cv-10981 (E.D. Mich.), and Petitioner Jerome Nickols is a plaintiff in *Chasteen v. Rock Fin. Inc.*, No. 07-cv-10558 (E.D. Mich.).

[8] MBA did not appeal the district court's substantive determination that 2010AI was not arbitrary, capricious, or inconsistent with the underlying regulations. Rather, the MBA focused its appeal to the D.C. Circuit on the sole issue before this Court: whether the APA required the DOL to engage in notice-and-comment rulemaking before issuing 2010AI.

comment rulemaking." *Paralyzed Veterans of Am.*, 117 F.3d at 586. Applying the doctrine, the court concluded that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." App. 2a; *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 967 (D.C. Cir. 2013) (citing *Paralyzed Veterans of Am.*, 117 F.3d at 586, and *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999)). The D.C. Circuit candidly acknowledged the circuit split on the question of whether agencies must engage in notice-and-comment rulemaking before revising interpretive rules. *See* App. 2a.; *Mortg. Bankers Ass'n*, 720 F.3d at 969 n.3 (citing cases).

Petitioners filed a petition for rehearing en banc, which the court of appeals denied on October 2, 2013. App. 54a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT OVER WHETHER AGENCIES SUBJECT TO THE APA ARE CATEGORICALLY PROHIBITED FROM REVISING THEIR INTERPRETATIVE RULES UNLESS SUCH REVISIONS ARE MADE THROUGH NOTICE-AND-COMMENT RULEMAKING.

This case cries out for Supreme Court review for several independent and compelling reasons. First, the D.C. Circuit's opinion deepened an intractable circuit split on the Question Presented. While the First, Fourth, Sixth, Seventh, and Ninth Circuits have squarely held that agencies need not

engage in notice-and-comment rulemaking before revising their interpretive rules, the Fifth and D.C. Circuits have taken the exact opposite view. Supreme Court review is the only means to resolve the conflict.

Second, the D.C. Circuit's *Paralyzed Veterans* doctrine—which controlled the outcome in this case—is plainly wrong. The doctrine conflicts irreconcilably with the bare text of the APA, which states unambiguously that all interpretative rules are exempt from notice and comment—without reference to whether the interpretation is the first adopted or a later revision. The *Paralyzed Veterans* doctrine also conflicts with two lines of cases from this Court, which hold that (1) courts may not impose rulemaking procedures beyond those contemplated by the APA, *e.g.*, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978), and (2) an interpretation's consistency with earlier pronouncements is merely *one factor* courts must consider in evaluating the latest interpretation's persuasive value, *e.g.*, *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). Critically, the doctrine ignores the numerous firmly grounded checks—arbitrary and capricious review, statutory safe harbors, and due process, among others—protecting regulated communities from arbitrary changes in agency interpretations.

Third, the Question Presented in this case is both important and recurring. Until this Court resolves the Question Presented in this case, agencies will—in countless daily interactions with citizen and businesses—become less transparent, less predictable, and more hesitant to provide any guidance at all for fear of having their informal positions locked in.

A. The Circuits Are Intractably Divided

The Question Presented in this case has sharply divided the courts of appeals. Absent review by this Court, the conflict is likely to persist indefinitely.

In the fifty-year period between the enactment of the APA in 1946 and the issuance of the D.C. Circuit's opinion in *Paralyzed Veterans,* every court that addressed the Question Presented concluded that notice-and-comment rulemaking was not required for an agency to amend its interpretive rules. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 Admin. L. Rev. 547, 567 n.136 (2000).

After *Paralyzed Veterans*, the controversial doctrine has been applied by the D.C. Circuit, *see Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 967 (D.C. Cir. 2013); *Envtl. Integrity Project v. EPA*, 425 F.3d 992 (D.C. Cir. 2005); *Alaska Prof'l Hunters Ass'n,* 177 F.3d 1030 (D.C. Cir. 1999), and adopted by the Fifth Circuit, *see Shell Offshore Inc. v. Babbitt*, 238 F.3d 622 (5th Cir. 2001).[9]

The First, Fourth, Sixth, Seventh, and Ninth Circuits, by contrast, have explicitly rejected the D.C. Circuit's approach. *See Warder v. Shalala*, 149 F.3d 73, 79–82 (1st Cir. 1998) (rejecting the argument that a revised interpretation of a Medicare regulation was improperly issued without

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[9] The *Paralyzed Veterans* doctrine has been cited approvingly in dicta by panels in the Third and Eighth Circuits. *See SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005); *Minnesota v. Ctrs. for Medicare and Medicaid Servs.*, 495 F.3d 991, 996–97 (8th Cir. 2007).

notice and comment); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340–41 (4th Cir. 1995) (holding that the Attorney General was not required to engage in notice-and-comment rulemaking before revising its interpretation of an immigration regulation); *St. Francis Health Care Ctr. v. Shalala*, 205 F.3d 937, 947 n.11 (6th Cir. 2000) (holding that notice and comment was not required where the Secretary of Health and Human Services revised an interpretation of the department's own regulation); *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012) (concluding that the *Paralyzed Veterans* doctrine is "not persuasive" because it "conflicts with the APA's rulemaking provisions, which exempt all interpretive rules from notice and comment"); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) ("[E]ven if the DOJ's interpretation constituted a change in the understanding of its original regulations, the DOJ was not required to proceed by notice and comment because both the . . . original position . . . and the [revised position] would constitute interpretive rules."); *Erringer v. Thompson*, 371 F.3d 625, 632 (9th Cir. 2004) ("[N]o notice-and-comment rulemaking is required to amend a previous *interpretive* rule.") (emphasis in original); *Chief Prob. Officers of Cal. v. Shalala*, 118 F.3d 1327, 1334 (9th Cir. 1997) (holding that "[t]he Agency was free to change [its] interpretation" without notice and comment.).[10]

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[10] The Tenth and Eleventh Circuits have acknowledged the circuit split but declined to take sides. *See United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1139–40 (10th Cir. 2010) (acknowledging the split of authority and pointing out that "*Paralyzed Veterans* and *Alaska Hunters* have generated considerable debate" among courts and commentators);

The split of authority between the D.C. Circuit and a plurality of other circuits on the Question Presented creates a uniquely compelling justification for review: the potential for forum shopping. Because virtually any APA action can be brought in the District of Columbia, *see* 28 U.S.C. § 1391(e), sophisticated parties opposing agency action will always avail themselves of the *Paralyzed Veterans* doctrine by filing suit in the District of Columbia. Parties supporting an agency's revised position will sue in jurisdictions on the other side of the divide. The result is chaos and confusion over the validity of countless interpretations. *See, e.g.*, App. 56a*; Biggs v. Quicken Loans, Inc.*, No. 10-cv-11928, slip op. at 7–10 (E.D. Mich. Feb. 19, 2014) (concluding that courts outside the D.C. circuit are not bound by the reasoning of the D.C. Circuit's opinion in this case, but suggesting in dicta that the D.C. Circuit's mandate bars the DOL from enforcing 2010AI nationwide). As a consequence, the need for national uniformity on the Question Presented in this case is especially acute.

The divide over the validity of the DOL's interpretation at issue in this case further illustrates the pressing need for Supreme Court review. Except for the D.C. Circuit below, every court to consider the question has rejected the precise reasoning adopted by the D.C. Circuit, concluding that no notice and comment was

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Warshauer v. Solis, 577 F.3d 1330, 1338–39 (11th Cir. 2009) (acknowledging the split of authority and counting the Second Circuit, in addition to the First, Fourth, Sixth, Seventh, and Ninth, as in agreement that "changes in interpretations do not require notice and comment because both the original and current positions constitute interpretive rules").

required before the DOL issued 2010AI. *See Mortg. Bankers Ass'n*, 864 F. Supp. 2d at 193; *Swigart*, 870 F. Supp. 2d at 512–13 ("[T]he APA's notice and comment procedures are not required for an interpretive rule such as the 2010 AI that modifies a prior interpretation of the same agency regulation . . . ."); *Lewis v. Huntington Nat'l Bank*, 838 F. Supp. 2d 703, 707–13 (S.D. Ohio 2012) (concluding that notice-and-comment rulemaking was not required before issuing 2010AI); *accord Biggs v. Quicken Loans, Inc.*, No. 10-cv-11928, 2011 WL 5244819, at *6 (E.D. Mich. Mar. 21, 2011).

The split of authority on the validity of 2010AI has caused considerable confusion for the nearly 300,000 loan officers and their employers in the financial services industry. Of course, that confusion pales in comparison to the enormous shadow cast by *Paralyzed Veterans*—and its uneven application—over federal agencies and regulated communities generally.

B. The D.C. Circuit's *Paralyzed Veterans* Doctrine Is Clearly Wrong

Even setting aside the persistent split of authority over the *Paralyzed Veterans* doctrine, the Question Presented in this case merits consideration by this Court. The doctrine conflicts irreconcilably with the APA itself, contravenes numerous decisions of this Court, and disregards the firmly-established safeguards protecting regulated communities from arbitrary shifts in agency policy.

(1) The *Paralyzed Veterans* doctrine conflicts with the plain language of the APA

This case begins and ends with the text of the APA. "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Section 553 of the APA sets forth the procedural requirements for rule making, including notice, comment, and publication of rules. 5 U.S.C. § 553. Section 553(b), however, exempts from the notice-and-comment requirement "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553. Interpretative rules are exempt from notice and comment; the APA draws no distinction whatsoever between initial rules and subsequent rules. In the absence of any contrary congressional intent, *Paralyzed Veterans*' one-bite rule cannot be reconciled with the text of the APA. *See Abraham Lincoln Mem'l Hosp.*, 698 F.3d at 560 (concluding that the *Paralyzed Veterans* doctrine is "not persuasive" because it "conflicts with the APA's rulemaking provisions, which exempt *all* interpretive rules from notice and comment" (emphasis added)).

The *Paralyzed Veterans* doctrine fares no better examined through the lens of other relevant canons of statutory construction. The familiar in pari materia canon "is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a 'later act can . . . be regarded as a legislative interpretation of (an) earlier act . . . .'" *Erlenbaugh v. United States*, 409 U.S. 239, 243–44

(1972) (quoting *United States v. Stewart*, 311 U.S. 60, 64 (1940)).

Numerous statutory provisions illustrate that Congress knew how to write the *Paralyzed Veterans* doctrine into law, and chose not to do so when it enacted the APA. For example, under the Tariff Act of 1930, the Secretary of the Treasury may not issue an interpretive ruling modifying or revoking a previous interpretive ruling without first engaging in notice and comment. 19 U.S.C. §1625(c). As a second example, the FDA Modernization Act explicitly requires opportunity for public comment before the Secretary makes "changes in interpretation" of a "statute or regulation." 21 U.S.C. § 371.

These statutes illustrate that Congress is capable of writing the *Paralyzed Veterans* doctrine into law in circumstances where it sees fit. Indeed, the *Paralyzed Veterans* doctrine makes these provisions superfluous, running afoul of the "canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010). This antisuperfluousness canon "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times." *Id.* at 3229.

The *Paralyzed Veterans* opinion itself, taken on its own terms, similarly fails to persuade. The opinion—remarkable for its atextual character—makes almost no effort to square its sweeping rule with the APA. Without citation to any statute, case, or other authority, *Paralyzed Veterans* simply declares that "[o]nce an agency gives its regulation an interpretation, it can only change that

interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am.*, 117 F.3d at 586.

In a later passage, *Paralyzed Veterans* cites Section 551(5) of the APA and this Court's opinion in *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995), but neither authority supports the court's sweeping proposition.

Citing Section 551(5), the court stated that "[u]nder the APA, agencies are obliged to engage in notice and comment before formulating regulations, which applies as well to '*repeals*' or '*amendments*.'" *Paralyzed Veterans*, 117 F.3d at 586 (emphasis in original). But Section 551(5) merely supplies the APA's definition of "rule making," stating that the term "means agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Section 553 sets forth the actual procedures required for rule making, and exempts interpretive rules from notice and comment. *See* 5 U.S.C. § 553. Reading the two sections together, it is readily apparent that when an agency "formulat[es]," "amend[s]," or "repeal[s]" a *legislative* rule—that is, a formal regulation—notice and comment is required. But by the same token, an agency remains free to issue an *interpretive* rule, whether by formulation, amendment, or repeal, without notice and comment. *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 Admin. L. Rev. 547, 567 (2000) ("When an agency issues, amends, or repeals a legislative rule, it must use the notice and comment procedure. When it issues, amends, or repeals an interpretative rule, it is not required to use the notice and comment procedure.").

Paralyzed Veterans' citation to this Court's decision in *Shalala v. Guernsey Memorial Hospital* similarly misses the mark. *Paralyzed Veterans* cites *Guernsey Memorial Hospital* for the proposition that "APA rulemaking is required where an interpretation 'adopt[s] a new position inconsistent with . . . existing regulations.' " *Paralyzed Veterans*, 117 F.3d at 586 (citing *Guernsey Mem'l Hosp.*, 514 U.S. at 100). But *Guernsey Memorial Hospital* is actually one of this Court's seminal cases reaffirming the principle that interpretive rules *need not* be the product of notice and comment. At issue in *Guernsey Memorial Hospital* was the validity of a Medicare Provider Reimbursement Manual. *Guernsey Mem'l Hosp.*, 514 U.S. at 90. The Manual, which was issued without notice and comment, interpreted various Medicare legislative rules (referred to in the opinion simply as "regulations") to mean that certain reimbursable losses must be amortized over a period of years rather than reimbursed in the year of the loss. *Id.* After assuring itself that the Manual was consistent with the regulations, *id.* at 92–95, this Court held that it was "proper for the Secretary to issue a guideline or interpretive rule," calling the Manual "a prototypical example of an interpretive rule issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* at 97, 99 (citations omitted). *Guernsey Memorial Hospital*'s language quoted in *Paralyzed Veterans*, in context, reads as follows:

> We can agree that APA rulemaking would still be required if [the Manual] adopted a new position inconsistent with any of the Secretary's existing regulations.

> As set forth in Part II, however, her regulations do not require reimbursement according to GAAP. [The Manual] does not, as the Court of Appeals concluded it does, "effec[t] a substantive change in the regulations."

Id. at 100 (citations omitted). Put in context, this Court's observation in *Guernsey Memorial Hospital* stands for the unremarkable proposition that an interpretive rule that conflicts with the *legislative rules it purports to interpret* is invalid. *Paralyzed Veterans* dramatically and improperly expands this concept to hold that an interpretive rule that is *consistent* with the legislative rules it interprets but *inconsistent* with a prior interpretive rule is procedurally invalid. Nothing in the APA or *Guernsey Memorial Hospital* supports such a result.

In the D.C. Circuit's opinion below, the court offered a novel textual defense of the *Paralyzed Veterans* doctrine, but still failed to square the doctrine with the text of the APA. The court called the Doctrine's "operative assumption" "the belief that a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter." *Mortg. Bankers Ass'n*, 720 F.3d at 969 n.3 (emphasis in original). This "operative assumption" is flat wrong. A changed interpretation leaves the formal regulations unchanged, sitting comfortably in the Code of Federal Regulations in identical form before and after the interpretive change. To the extent the D.C. Circuit now believes that any interpretation "closely intertwined" with the underlying regulations (in other words, any interpretation)

becomes a formal, legislative rule simply by virtue of appearing in an opinion letter, amicus brief, or internal guideline, the assertion finds no support in the APA (or any other authority construing the nearly seventy-year-old Act).

(2) The *Paralyzed Veterans* doctrine conflicts with numerous decisions of this Court

Although this case can be resolved by reference to the text of the APA and nothing more, review is also warranted because the *Paralyzed Veterans* doctrine fundamentally conflicts with this Court's prior cases. Two lines of cases bear mentioning here. First, in a line of cases beginning with *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 524, this Court has held that the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.* at 524. Applying *Vermont Yankee* to a revised agency interpretation in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), this Court stated that "[t]he [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 515. Second, this Court has held many times over that an agency's change in interpretation is merely *one factor* to consider in evaluating the interpretation's weight. *See, e.g.*, *Skidmore*, 323 U.S. at 140. The *Paralyzed Veterans* doctrine cannot be reconciled with these authorities.

(a) *Vermont Yankee*

In *Vermont Yankee*, this Court held that the D.C. Circuit erred in invalidating, on the grounds of

inadequate procedures, a rule issued by the Nuclear Regulatory Commission. 435 U.S. at 525, 528–30. In issuing the rule, the Commission had changed its policy by declaring that earlier decisions of its appeal board had no further effect. *Id.* at 530. This Court began with the premise that the APA was "a legislative enactment which settled 'long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.'" *Id.* at 523 (quoting *Wong Yang Sung*, 339 U.S. at 40). The Court unanimously held that the D.C. Circuit had "seriously misread or misapplied . . . statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Id.* at 525. The Court reasoned that Section 553 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures[,]" *id.* at 524, and noted that "reviewing courts are generally not free to impose" any "additional procedural rights." *Id.*

Scholars have read *Vermont Yankee* as a rebuke of the D.C. Circuit, which had aggrandized its own authority to establish procedures for agency action at the expense of Congress and the Executive branch. Then-professor Scalia authored the leading commentary on *Vermont Yankee*. *See* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345. Justice Scalia called *Vermont Yankee* a "tongue-lashing," undertaken in response to the D.C. Circuit's "progressive evisceration of the APA." *Id.* at 359, 400. He continued: "It does not go too far

to say that the D.C. Circuit was in the process of replacing the rudimentary procedural mandates of the Act . . . with a much more elaborate, 'evolving,' courtmade scheme . . . ." *Id.* at 359.

The *Paralyzed Veterans* doctrine fits comfortably within Justice Scalia's critique. Here, as in *Vermont Yankee*, the D.C. Circuit has invented a procedural rule unmoored from the text of the APA, "stray[ing] beyond the judicial province to explore the procedural format [and] impos[ing] upon the agency [the court's] own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Id.* at 369–70 (quoting *Vt. Yankee Nuclear Power Corp.*, 435 U.S. at 549).

This Court applied *Vermont Yankee* most recently in *Fox Television*, this time reaffirming the principle that courts may not impose requirements beyond those prescribed in the APA—even where, as here, the agency changes its position. In *Fox Television*, the Court upheld the FCC's changed interpretation of the ban on broadcasting "obscene, indecent, or profane language." 18 U.S.C. § 1464. *See Fox Television*, 556 U.S. at 502. The Second Circuit had rejected the FCC's changed interpretation on the ground that the APA requires "a more substantial explanation for agency action that changes prior policy." *Id.* at 514. But this Court rejected the Second Circuit's approach, pointing out that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Id.* at 515.

This case, of course, directly parallels *Fox Television*. Although *Fox Television* addressed the

APA's arbitrary and capricious standard, the *Paralyzed Veterans* doctrine achieves the exact same mistaken result—rejected in *Fox Television*—under the guise of a procedural rule. But just as *Fox Television* recognized that the arbitrary and capricious standard does not change when applied to a revised interpretation, the APA's procedural requirements do not change when an agency modifies its informal interpretations. Notice-comment-rulemaking is not required.

Paralyzed Veterans—and the D.C. Circuit's decision below—cannot be reconciled with *Vermont Yankee* or *Fox Television*. Whatever courts may think of the wisdom of agencies revising their informal interpretations, courts may not impose upon agencies additional procedural hurdles beyond those established by Congress. The APA authorizes courts to set aside agency action found to be "without observance of procedure *required by law*," and nothing more. *See* 5 U.S.C. § 706(2)(D) (emphasis added).

(b) *Skidmore v. Swift*

In another line of cases, this Court has consistently held that an agency's change in interpretation is merely *one factor* to consider in evaluating the interpretation's weight. The D.C. Circuit's per se rule conflicts irreconcilably with these opinions by making one factor—a changed interpretation—wholly dispositive of an interpretation's validity.

In the seminal case of *Skidmore v. Swift*, the Court examined a DOL "Interpretive Bulletin," which the Court described as a "practical guide to employers and employees as to how the office representing the public interest in [the Act's]

enforcement will seek to apply it." 323 U.S. at 138. Describing the weight courts should give such informal interpretations, the Court made clear that the consistency of agencies' interpretations is simply one factor among many for courts to consider:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control.

Id. at 140 (emphasis added). The Court has endorsed *Skidmore*'s formula dozens of times, most recently last term. *See Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2443 n.4 (2013).

Indeed, this Court is no stranger to cases involving shifting agency interpretations. In evaluating changed interpretations—none of which was the product of notice-and-comment rulemaking—this Court has never strayed from *Skidmore*'s multifactor, totality-of-the-circumstances analysis. *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 296 n.7 (2009) (noting that a "change in interpretation alone presents no separate ground for disregarding [the] Department's present

interpretation" (citations omitted)); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 326–27 (2008) (holding that where the agency changed its interpretation, "the degree of deference might be reduced by the fact that the agency's earlier position was different"); *id.* at 338 n.8 (Ginsburg, J., dissenting) (same); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (when confronted with a changed interpretation, instructing courts to consider "consistency" as one factor in evaluating the persuasiveness of an agency's position); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (according "considerably less deference" to a revised agency interpretation); *Watt v. Alaska*, 451 U.S. 259, 272–73 (1981) (concluding that where an agency changed its interpretation, "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference"); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 142–43 (1976) (considering conflicting EEOC interpretive guidance as one factor in the deference analysis).

The D.C. Circuit's per se rule is flatly inconsistent with these decisions and many others. Simply put, courts cannot evaluate whether to adopt a changed interpretation if such interpretations are categorically invalid, as the *Paralyzed Veterans* doctrine necessarily holds. The D.C. Circuit's rule is at war with these cases and must be cast aside.

(3) The law affords numerous checks on shifting agency positions

Paralyzed Veterans is perhaps best understood as an expression of judicial disapproval of agency flip flops. But *Paralyzed Veterans*' per se rule ignores the numerous tools in the judicial toolbox that protect regulated communities from shifting agency interpretations. Ironically, once these tools are taken into account, the *Paralyzed Veterans* doctrine, by its own force, only serves to prevent agencies from correcting their own mistakes.

First, agencies that change their interpretations "must show that there are good reasons for the new policy." *Fox Television*, 556 U.S. at 515. Absent a good reason for the shift, the APA authorizes courts to strike down the revised interpretation as "arbitrary" or "capricious." *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983). "Unexplained inconsistency is, *at most*, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the [APA]." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 46–57) (emphasis added).

To pass muster under the APA's arbitrary or capricious standard, "the agency must explain why 'it now reject[s] the considerations that led it to adopt that initial policy.'" *Fox Television*, 556 U.S. at 535 (Kennedy, J., concurring in part and concurring in the judgment). Importantly, agencies must address any reliance interests upset by the interpretive shift. *Id.* at 515 (majority opinion); *id.*

at 535 (Kennedy, J., concurring in part and concurring in the judgment).

Second, as previously discussed, courts considering changed interpretations are less likely to defer to the agency. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS*, 480 U.S. at 446 n.30. Thus, while an agency is generally free to change its interpretation, courts will review the changed interpretation carefully, using traditional interpretive tools, and will not blindly adhere to the agency's substantive conclusions.[11]

Third, an agency can only change its interpretation if the revised interpretation is consistent with the underlying regulations. Thus, while agencies may replace one reasonable interpretation with another reasonable interpretation, courts must set aside as "contrary to law" any agency's new "interpretation" that conflicts with the underlying legislative rules. *See* 5 U.S.C. § 706(2)(A); *Guernsey Mem'l Hosp.*, 514 U.S. at 100. Agencies may not, "under the guise of interpreting a regulation . . . create *de facto* a new regulation." *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 882 (2011) (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

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[11] Importantly, this Court has almost never granted deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to an agency position that has vacillated over the years. *Auer* deference is typically not warranted "when the agency's interpretation conflicts with a prior interpretation." *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)).

Fourth, Congress has created numerous safe harbors insulating regulated communities from liability when they rely on agency interpretations that are later withdrawn. Relevant here, Section 259 of the Portal-to-Portal Act of 1947 absolves employers from liability for past violations of the FLSA if employers can show they acted in "good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation." 29 U.S.C. § 259(a). Such a defense, if established, "shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative . . . interpretation . . . is modified or rescinded . . . ." *Id.* Indeed, Congress has created numerous such safe harbors, which serve to protect regulated entities that rely in good faith on informal agency guidance. *See, e.g.*, Federal Trade Commission Act, 15 U.S.C. § 57b-4(b); Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1640(f); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(e); Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1028; Civil Rights Act, 42 U.S.C. § 2000e-12(b).

Fifth, due process itself provides a baseline of protection for regulated communities. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). For example in *Fox Television*, this Court, in its second look at the FCC's new "fleeting expletives" policy, concluded that the FCC violated due process when it sought to sanction two television networks under its new interpretation for

conduct that occurred before the networks had fair notice of the FCC's new policy. *Id.* at 2230.

The *Paralyzed Veterans* doctrine must be evaluated in context with these firmly-rooted and robust protections. Once existing protections are taken into account, the D.C. Circuit's per se rule has the unfortunate effect of invalidating, by its own force, only interpretations that are consistent with the underlying regulations, thoroughly reasoned, cognizant of the reliance interests of the regulated community, worthy of respect by the courts, and imposed after fair notice—in other words, interpretations that are correct. The DOL's present interpretation that loan officers do not qualify for the FLSA's administrative exemption, which is consistent with the regulations and the DOL's long-standing position prior to 2006—and recognized by numerous courts as substantively correct—is precisely such a casualty of the D.C. Circuit's misguided doctrine.

C. The Question Presented Is Important and Recurring, and Has Far-Reaching Consequences

The Question Presented in this Petition is both critically important and perpetually recurring, warranting Supreme Court review.

As this Court has recognized, the modern administrative state "touches almost every aspect of daily life." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010). Legislative and interpretive rules both serve critical—but different—functions in the way administrative law affects those aspects of daily life. While legislative rules fill statutory gaps with binding law, interpretive rules constitute the very

dialogue between citizen and government about how the government will seek to apply that law. *Shalala*, 514 U.S. at 99. *Paralyzed Veterans* threatens that dialogue, creating a powerful incentive for agencies to remain silent.

Consider, for example, a grocer who asks the DOL for advice on whether his assistant manager is exempt under the FLSA. In a world without *Paralyzed Veterans*, the DOL responds promptly. If the DOL finds the employee exempt, the owner can be more confident in his choice. If the agency later changes its interpretation, the initial interpretation provides the owner with a powerful tool in court.

Agencies subject to the D.C. Circuit's *Paralyzed Veterans* doctrine, on the other hand, will behave entirely differently. They will become less transparent, hesitant to provide any guidance for fear of having their informal positions locked in. The DOL will remain silent (or render tentative guidance hedged with caveats, so as to avoid *Paralyzed Veterans*' sweep) rather than risk having a potentially erroneous interpretation calcified into the formal regulations, and the store owner will receive no advice. *Paralyzed Veterans* serves only to "muzzle any informal communications between agencies and their regulated communities—communications that are vital to the smooth operation of both government and business." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004) (Roberts, J.).

The dialogue between agencies and citizens—threatened by *Paralyzed Veterans*—plays out in many subtle ways thousands of times each day. Agency interpretations regularly touch on issues with important implications for citizens'

daily lives, including safety,[12] civil rights,[13] access to social benefits,[14] consumer rights,[15] immigration,[16] housing,[17] taxes,[18] and the protection of environmental resources,[19] to name a few. When administering complex regulatory regimes, agencies must resort to flexible

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[12] *Re: Tread Act Provisions Involving Defective Tires*, Nat'l Highway Traffic Safety Admin., Dep't of Transp., http://isearch.nhtsa.gov/files/12-00245._ITA_Defective_Tire_Exportation.htm (Oct. 3, 2012) (explaining the proper method for disposing of or destroying dangerous recalled auto part); *Regulations, Codes, & Code Interpretations*, U.S. Food & Drug Admin., http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/RegulationsCodesInterpretations/ (last updated Aug. 19, 2013) (providing interpretive guidance to retailers on handling and storing food in compliance with the food code).

[13] *See Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 669 (W.D. Va. 2009), *aff'd*, 639 F.3d 91 (4th Cir. 2011).

[14] *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 76 (2d Cir. 2009); *LC U-Bake, LLC v. United States*, No. 3:12-CV-0049-KI, 2012 WL 1379048 (D. Or. Apr. 20, 2012).

[15] *Chase Bank USA, N.A.*, 131 S. Ct. at 878; *FTC v. Asia Pac. Telecom, Inc.*, 802 F. Supp. 2d 925, 931 (N.D. Ill. 2011).

[16] *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 146 (1st Cir. 2007).

[17] *St. Marks Place Hous. Co., Inc. v. HUD.*, 610 F.3d 75, 78 (D.C. Cir. 2010).

[18] *Nat'l Rest. Ass'n v. Simon*, 411 F. Supp. 993, 999 (D.D.C. 1976).

[19] *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003).

interpretive rules to address the "myriad details that are not explicitly resolved by the legislative rules." *See* Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 Admin. L. Rev. 547, 553–54 (2000). "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . ." *Nat'l Cable & Telecommc'ns Assn.*, 545 U.S. at 981 (citations omitted). By chilling the interpretive process, the *Paralyzed Veterans* doctrine hinders the conversation between government and citizen on a wide range of regulatory issues. Forcing the government to speak only with the force of law or remain silent benefits no one. [20]

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[20] Further illustrating the importance of the Question Presented, the *Paralyzed Veterans* doctrine has drawn universal scorn from administrative law scholars of all stripes, who criticize the doctrine as at war with the APA, unwise, and practically unworkable. *E.g.*, William Funk, *A Primer on Legislative Rules*, 53 Admin. L. Rev. 1321, 1329–30 (2001); Sam Kalen, *The Transformation of Modern Administrative Law: Changing Administrations and Environmental Guidance Documents*, 35 Ecology L.Q. 657, 717-20 (2008); Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547 (2000); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 807–09 (2001); Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 Colum. L. Rev. 155 (2001); Brian J. Shearer, Comment, *Outfoxing Alaska Hunters: How Arbitrary and Capricious Review of Changing Regulatory Interpretations Can More Efficiently Police Agency Discretion*, 62 Am. U. L. Rev. 167 (2012); *see also* Richard W. Murphy, *Hunters for Administrative Common*

D. This Case Is the Ideal Vehicle To Review the Question Presented

This case is an excellent vehicle to consider the Question Presented. There is no dispute that the DOL changed its interpretation of its own regulations. Further, the resolution of the Question Presented is the dispositive issue in the case. Although MBA argued before the district court that 2010AI was arbitrary, capricious, and inconsistent with the governing regulations, the district court upheld the substance of 2010AI. MBA chose not to appeal that ruling to the D.C. Circuit, and the district court's substantive ruling is now final. Thus, this Court need not take a position on the substantive correctness of 2010AI.

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted to review the judgment and opinion of the Court of Appeals for the D.C. Circuit. In the alternative, Petitioners respectfully request that this Court call for the views of the Solicitor General in this matter.[21]

Law, 58 Admin. L. Rev. 917, 918; William S. Jordan III, *Interpretive Rules and Statements of Policy—When Do They Constitute Legislative Rules?*, 29 Admin. & Reg. L. News, No. 1 (2003); Michael Asimow & Robert A. Anthony, *A Second Opinion? Inconsistent Interpretive Rules*, 25 Admin & Reg. L. News, No. 2 (2000).

[21] The Solicitor General's office has asked this Court to overrule *Paralyzed Veterans* on at least one prior occasion. *See* Petition for Certiorari, *Leavitt v. Baystate Health Sys.*, 547 U.S. 1054, No. 05-936, 2006 WL 207778, at *24–25 (Jan. 26, 2006). The Solicitor General should be given an opportunity, however, to express his views in this case as well.

Respectfully submitted.

Adam W. Hansen
Counsel of Record
Nichols Kaster, LLP
One Embarcadero Center
Suite 720
San Francisco, CA 94111
(415) 277-7236
ahansen@nka.com

Paul J. Lukas
Rachhana T. Srey
Nichols Kaster, PLLP
Minneapolis, MN 55402
(612) 256-3205

Sundeep Hora
Alderman, Devorsetz &
Hora PLLC
Washington, DC 20036
(202) 969-8220

February 28, 2014

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 22, 2013 Decided July 2, 2013

No. 12-5246

MORTGAGE BANKERS ASSOCIATION,

APPELLANT

v.

SETH D. HARRIS, SUED IN HIS OFFICIAL CAPACITY, ACTING SECRETARY OF UNITED STATES DEPARTMENT OF LABOR, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00073)

Michael W. Steinberg argued the cause for appellant. With him on the briefs were *Sam S. Shaulson* and *David M. Kerr*.

Anthony J. Steinmeyer, Assistant Director, U.S. Department of Justice, argued the cause for appellees. With him on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Ronald C. Machen Jr.*, U.S. Attorney, and *Douglas N. Letter*, Director.

Sundeep Hora and *Adam W. Hansen* were on the brief for intervenors-appellees Jerome Nickols, et al.

Before: TATEL and BROWN, *Circuit Judges*, and SENTELLE*, Senior Circuit Judge*.

Opinion for the Court by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: The tandem of *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) and *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999) ("*Alaska Hunters*") announced an ostensibly straightforward rule: "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Alaska Hunters*, 177 F.3d at 1034. The only question properly before this three-judge panel is a narrow one: what is the role of reliance in this analysis?[1] Is it, as the government contends, a "separate and independent requirement." Oral Arg. 10:42-10:45, or is it just one of several factors courts can look to in order to determine whether an agency's interpretation qualifies as definitive,[2] as Mortgage Bankers Association ("MBA") suggests? We find ourselves in general agreement with the industry association

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[1] Bound as we are by *Paralyzed Veterans* and *Alaska Hunters*, we decline the government's invitation to "call" for "the full Court [to]* * * lay the *Paralyzed Veterans* doctrine to rest." Letter of Clarification, No. 12-5246 (D.C. Cir. Mar. 25, 2013) (quoting Appellee Br. 47).

[2] Our case law uses the terms "definitive" and "authoritative" interchangeably. *Compare Paralyzed Veterans*, 11 F.3d at 586 ("authoritative interpretation"), *with Alaska Hunters*, 177 F.3d at 1034 ("definitive interpretation").

that there is no discrete reliance element. Reliance is just one part of the definitiveness calculus.

Fortunately, this is as far as our inquiry need go. Having conceded the existence of two definitive—and conflicting—agency interpretations, the government acknowledged at oral argument that petitioner "prevail[s] if … the only reason [courts] look to reliance is to find out if there is a definitive interpretation." Oral Arg. 10:56-11:10. So stipulated, we reverse the District Court order dismissing MBA's Motion for Summary Judgment and remand the case with instructions to vacate the 2010 Administrator Interpretation significantly revising the agency's 2006 Opinion Letter. If the Department of Labor ("DOL") wishes to readopt the later-in-time interpretation, it is free to. We take no position on the merits of their interpretation. DOL must, however, conduct the required notice and comment rulemaking.

I

Petitioner MBA is a national trade association representing over 2,200 real estate finance companies with more than 280,000 employees nationwide. *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 197 (D.D.C 2012). We focus here on the mortgage loan officers who typically assist prospective borrowers in identifying and then applying for various mortgage offerings. Though the recent financial crisis has thrust members of this profession into the forefront of the

news, our concern here is more mundane: the method and manner of their pay.

Under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., and old law DOL must adapt to new circumstances, employers are generally required to pay overtime wages to employees who work longer than 40 hours per week. *See* 29 U.S.C. § 207(a). The Act provides several exceptions to this rule. Those "employed in a bona fide executive, administrative, or professional capacity[,]… or in the capacity of outside salesman," for example, are exempt from the statute's minimum wage and maximum hour requirements. 29 U.S.C. § 213(a)(1). Whether mortgage loan officers qualify for this "administrative exemption" is a difficult and at times contentious question. So difficult, in fact, DOL has found itself on both sides of the debate. In 2006, the agency issued an opinion letter concluding on the facts presented that mortgage loan officers with archetypal job duties fell within the administrative exemption. Just four years later, in 2010, Deputy Administrator Nancy J. Leppink issued an "Administrator's Interpretation" declaring that "employees who perform the typical job duties" of the hypothetical mortgage loan officer "do not qualify as bona fide administrative employees." J.A. 259. The 2010 pronouncement "explicitly withdrew the 2006 Opinion Letter." *Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 201.

Citing *Paralyzed Veterans* and its progeny, MBA challenged DOL's decision to change their "definitive interpretation" without first undergoing

notice-and-comment rulemaking as a violation of the APA. Compl. ¶ 38. **[J.A. 22]** The District Court rejected the argument. After assuring itself that *Paralyzed Veterans* remains good law, *see Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 204-05, the court read our recent decision in *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009), to require a showing of "substantial and justifiable reliance on a well-established agency interpretation." *See id.* at 207 (internal quation marks and emphasis omitted). Although petitioner had argued reliance in the alternative, the court concluded MBA was unable to "satisfy the standard for demonstrating reliance recognized in *MetWest*." *Id.* at 208. The court then denied MBA's Motion for Summary Judgment, but not before dismissing the association's substantive challenge to the 2010 interpretation as inconsistent with the agency's 2004 regulation, 29 C.F.R. § 541.203(b). The present appeal followed.

II

On its face, the *Paralyzed Veterans* analysis contains just two elements: definitive interpretations ("definitiveness") and a significant change ("significant revision").[3] But as with most things doctrinal, the devil is in the details.

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[3] The doctrine's operative assumption—the belief that a *definitive* interpretation is so closely intertwined with the regulation that a significant change to the former constitutes a repeal or amendment of the latter—is established law in this Circuit, *see, e.g., Envtl. Integrity Project v. EPA*, 425 F.3d 992, 997-98 (D.C. Cir. 2005), but the Courts of Appeals are split on the issue. According to one recent survey, the Fifth

Despite its age, few cases discuss *Paralyzed Veterans* at length.[4] One critical question—and a dispositive one here—concerns the role of reliance. Borrowing heavily from *MetWest* and *Honeywell International, Inc. v. NRC*, 628 F.3d 568 (D.C. Cir. 2010), two recent cases that draw on our *Alaska Hunters* decision, DOL suggests that the *Paralyzed Veterans* analysis contains an independent third element: substantial and justified reliance. MBA takes a different approach to *Alaska Hunters* altogether. In its view, that case stands only for the proposition that reliance can elevate an otherwise non-definitive interpretation into a definitive interpretation; as such, it falls squarely within the existing definitiveness element. Of the two, we

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Circuit has adopted our approach and "the Eighth and Third Circuits have mentioned [it] in dicta," but "[t]he First, Second, Fourth, Sixth, Seventh, and Ninth Circuits agree that changes in interpretations do not require notice and comment because both the original and current position constitute interpretive rules." *Warshauer v. Solis*, 577 F.3d 1330, 1338 (11th Cir. 2009); *see also United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1138-39 (10th Cir. 2010) (noting a slightly different circuit split between the Third, Fifth, and Sixth Circuits on one hand, and the First and Ninth Circuit on the other).

[4] It need not reflect poorly on the doctrine that so few of our cases haven taken up *Paralyzed Veterans*'s banner—and still fewer have used its reasoning to invalidate an agency interpretation for failing to conduct notice and comment rulemaking. *See* Appellee Br. 40-41 (counting *Alaska Hunters* and arguably *Environmental Integrity Project* as the lone exceptions). *Paralyzed Veterans* may very well serve as a prophylactic that discourages agencies from attempting to circumvent notice and comment requirements in the first instance. We are unable to quantify these effects by reference to case citations alone.

believe MBA's approach better explains *Alaska Hunters*.

Alaska Hunters is an exceptional case with an otherwise straightforward premise. In 1963, the Federal Aviation Administration's Alaska office (the "Alaskan Region") began a thirty year practice of "uniformly advis[ing] all guides, lodge managers and guiding services in Alaska that they could meet their regulatory responsibilities by complying with the requirements of [14 C.F.R. Part 91] only." *Alaska Hunters*, 177 F.3d at 1035. It was not until 1997 that officials in FAA's Washington, D.C. headquarters formally pushed back against the regional office's long-standing interpretation.[5] Through a "Notice to Operators" published in the Federal Register without notice and opportunity for comment, the agency announced that certain Alaskan guides would now have to comply with other, more onerous regulations. Individuals who had "opened lodges and built up businesses dependent on aircraft" in reliance on the Alaskan Region's interpretation promptly brought suit challenging the agency's about-face. *Id.* at 1035.

In relevant part, FAA argued *Paralyzed Veterans* was "inapposite" because the Alaskan Region's interpretation was not definitive; it

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[5] It is "uncertain" whether the D.C.-based officials had knowledge of the Alaskan Region's interpretive position prior to the 1990s—that is, before FAA consolidated power in its national headquarters following a near three-decade-long experiment with a decentralized organizational structure "that transferred much authority to regional organizations." *Alaska Hunters*, 177 F.3d at 1032.

"represented simply a local enforcement omission, in conflict with the agency's policy in the rest of the country." *Id.* at 1034-35. We disagreed. Although a local office's interpretation of a regulation or provision of advice to a regulated party "will not necessarily constitute an authoritative administrative position, particularly if the interpretation or advice contradicts the view of the agency as a whole," the situation in *Alaska Hunters* was "quite different." *Id.* at 1035.

For one thing, there was no evidence in the record of any conflicting interpretation. The Alaskan Region uniformly enforced its interpretive position for thirty years and both FAA and the National Transportation Safety Board had at some point referred to it as FAA policy. *See id.* at 1035. And even if "FAA as a whole somehow had in mind an interpretation different from that of its Alaskan Region, guides and lodge operators in Alaska had no reason to know this." *Id.* All the regulated parties had before them was the formal,[6] uncontradicted, and uniformly-applied interpretation of a local office—an interpretation Alaskan guide pilots reasonably relied on for three decades. Such advice might not necessarily qualify as definitive, but here, we concluded, it "became an authoritative departmental interpretation, and administrative common law applicable to Alaskan guide pilots" that could not be rewritten without notice and comment rulemaking. *Id.*

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[6] "[T]he regional office's position was reflected in official agency adjudications holding that Alaskan guides need not comply with commercial pilot standards." *Ass'n of Am. R.R. v. DOT*, 198 F.3d 944, 949 (D.C. Cir. 1999).

Alaska Hunters's takeaway is clear: reliance is but one factor courts must consider in assessing whether an agency interpretation qualifies as definitive or authoritative. Or to put matters more precisely, because regulated entities are unlikely to substantially—and often cannot be said to justifiably—rely on agency pronouncements lacking some or all the hallmarks of a definitive interpretation, significant reliance functions as a rough proxy for definitiveness. The converse also holds true. Agency pronouncements effectively ignored by regulated entities are unlikely to bear the marks of an authoritative decision. *See Ass'n of Am. R.R.*, 198 F.3d at 949-50 (finding no definitive interpretation in part because "[n]othing in th[e] record suggests that railroads relied on the [agency statements] in any comparable way" to the Alaska guides).[7] This is more art than science. Courts must weigh the role reliance plays on a case-by-case basis to ascertain its value.

DOL pushes back against this framework by treating reliance as a separate and independent third element.[8] That, the agency claims, is exactly

[7] Obviously, this is not to suggest *any* measure of reliance will automatically render an interpretation definitive.

[8] The agency never develops the implications of its alternative vision, but we think two points obvious. First, by dissociating reliance from definitiveness and calling it an independent requirement, DOL believes courts will have to address the reliance issue in *all* cases, including cases like the present in which definitiveness has been established. Second, DOL assumes the third element would be satisfied only if the reliance is equal to or greater than that of *Alaska Hunters*, a unique case. Meaning, the *Paralyzed Veterans* doctrine would

what our *MetWest* decision did in (1) addressing reliance only in the alternative, *i.e.*, after assuming a definitive interpretation, *see MetWest*, 560 F.3d at 510-11, and (2) speaking of *Alaska Hunters'*s "substantial and justifiable reliance on a well-established agency interpretation," *id.* at 511, a phrase "most natural[ly] read[]" to distinguish definitiveness and reliance as "separate requirements," Appellee Br. 23-24; *see also Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 205-08.[9]

We do not think this characterization of *MetWest*'s dicta could possibly be correct. "Definitive" is a term of art as used in the *Paralyzed Veterans* context. Once a court has classified an agency interpretation as such, it cannot be significantly revised without notice and comment rulemaking. No intervening decision of this Court ever read *Alaska Hunters* to require

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only ever apply where the parties can demonstrate substantial and justified reliance *akin to that of the Alaska Guides*—a reliance interest the government describes as "especially strong" since affected parties uprooted their lives to move to Alaska to start businesses. Appellee Br. 19; *see also MetWest*, 628 F.3d at 511; *Mortgage Bankers Ass'n*, 864 F. Supp. 2d at 207 ("[T]his Court is convinced that *MetWest* intended to set the bar for what a plaintiff must establish to satisfy the reliance component of the *Paralyzed Veterans* doctrine."). If adopted, this position effectively renders *Paralyzed Veterans* dead letter law by limiting its application to a most extreme fact pattern—one unlikely to ever be duplicated.

[9] Because *Honeywell* unceremoniously adopts *MetWest*'s language and approach, *see Honeywell*, 568 F.3d at 579-80, we focus our discussion primarily on *MetWest*.

anything to the contrary, and that includes *Association of American Railroads*, the lone pre-*MetWest* case DOL cites as having treated "reliance and definitive interpretation as two independent requirements." Appellee Br. 24.[10] Whether reliance played a significant role in the analysis, *see, e.g., Alaska Hunters*, 177 F.3d at 1035-36; *Ass'n of Am. R.R.*, 198 F.3d at 950; or took a back seat where the definitive nature of the interpretation was treated as self-evident, *see Envtl. Integrity Project*, 425 F.3d at 998; *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 814 (D.C. Cir. 2001), we have always considered it as part of the first element. In short, we have been too consistent in our treatment of these so-called agency flip-flops to now read dictum in *MetWest* as *sub silentio* reconfiguring the doctrine in the absence of either a unanimous *Irons* footnote or a decision of the en banc court.

Finally, we disagree with the suggestion that the only way to protect agencies from inadvertently locking in disfavored, informally promulgated positions is to impose a separate and independent reliance element. Practically speaking, reliance considered as part of the definitiveness determination will more than adequately protect agencies from this ossification threat. We thus decline DOL's invitation to spin a third

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[10] *See Ass'n of Am. R.R.*, 198 F.3d at 948 ("We find nothing in these materials, individually or taken together, that comes even close to the definitive interpretation that triggered notice and comment rulemaking in *Alaska Professional Hunters*."); *see also Devon Energy Corp. v. Kempthorne*, 551 F.3d 1030, 1041 (D.C. Cir. 2008); *Air Transp. Ass'n of Am. v. FAA*, 291 F.3d 49, 56-58 (D.C. Cir. 2002); *Envtl. Integrity Project*, 425 F.3d at 997-98.

requirement from whole cloth. Emphatically, that is an issue for the full Court to take up at its discretion, not this three-judge panel.

III

In view of the government's concession that the case need go no further than this, we reverse the District Court order denying MBA's Motion for Summary Judgment and remand the case with istructions to vacate DOL's 2010 Administrator Interpretation.

So Ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed On: July 2, 2013

No. 12-5246

MORTGAGE BANKERS ASSOCIATION,

APPELLANT

v.

SETH D. HARRIS, SUED IN HIS OFFICIAL CAPACITY, ACTING SECRETARY OF UNITED STATES DEPARTMENT OF LABOR, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00073)

BEFORE: TATEL and BROWN, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the order of the District Court denying MBA's Motion for Summary Judgment appealed from in this cause is hereby reversed and the case is remanded

with instructions to vacate DOL's 2010 Administrator Interpretation, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: July 2, 2013

Opinion for the court filed by Circuit Judge Brown.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTGAGE BANKERS ASSOCIATION,

Plaintiff,

Civil Action No. 11-0073 (RBW)

v.

HILDA SOLIS, Secretary of Labor;
NANCY LEPPINK,
Acting Wage and Hour Administrator; and
THE UNITED STATES DEPARTMENT OF LABOR

Defendants.

MEMORANDUM OPINION

The plaintiff, the Mortgage Bankers Association ("Association"), seeks declaratory and injunctive relief in this civil lawsuit brought against the defendants, Hilda Solis, in her official capacity as Secretary of the United States Department of Labor ("DOL"), Nancy Leppink, in her official capacity as Deputy Administrator of the Wage and Hour Division of the DOL, and the DOL itself, under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (2006). Complaint for Declaratory and Injunctive Relief ("Compl.") ¶ 1. Specifically, the plaintiff seeks judicial review of the defendants' issuance of DOL Administrative Interpretation 2010-1 ("2010 AI"), which conflicts with a prior position taken by the DOL. *Id.* ¶¶ 2, 26-27. Currently before the Court is the

Association's Motion for Summary Judgment and the DOL's Cross Motion to Dismiss or, in the Alternative, for Summary Judgment. Upon consideration of the complaint, the parties' cross-motions, all memoranda of law and the exhibits submitted with the motions, and the administrative record,[1] the Court concludes that it must grant in part and deny in part the DOL's cross-motion and deny the Association's motion for summary judgment.

I. BACKGROUND

A. Statutory and Regulatory Framework

This case concerns the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 201–219 (2006), and the regulations promulgated by the DOL to implement the Act. *See* Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Mot.") at 1. Enacted by Congress in 1938, Compl. ¶ 14, the FLSA generally requires that covered employers pay overtime wages to their employees who work more than 40 hours per week, unless they are exempted by the Act from this requirement. 29 U.S.C. § 207(a)(1). Section

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[1] In addition to the documents already identified, the Court considered the following submissions in reaching its decision: (1) the Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Mem."), (2) the Defendants' Cross–Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Mot."), (3) the Plaintiff's Reply in Support of its Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment ("Pl.'s Reply"), and (4) the Defendants' Reply to Plaintiff's Opposition to Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Reply").

213(a)(1) of the FLSA provides for such an exemption, stating that "any employee employed in a bona fide executive, administrative, or professional capacity[,] ... or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary[,]...)" is exempt from the "[m]inimum wage and maximum hour requirements" otherwise required by the Act. 29 U.S.C. § 213(a)(1).

The Wage and Hour Division of the DOL ("Wage and Hour Division") is responsible for "administering and enforcing the FLSA, and it periodically issues regulations that define the scope of the FLSA's exemptions and interpretations of those regulations." Defs.' Mot. at 4. After the passage of the FLSA, the Wage and Hour Division "promulgated regulations defining and delimiting the FLSA's exemptions from overtime pay requirements." Compl. ¶ 14. Those regulations were most recently amended on August 23, 2004. *See* Administrative Record ("A.R.") at 8–78 (Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122–191 (Apr. 23, 2004) (codified at 29 C.F.R. § 541)). As revised, the regulations state that the administrative exemption of section 213(a)(1) of the FLSA applies to an employee:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week ...;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of

> discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200(a). The 2004 regulations were accompanied by a preamble "Summary," which explained that the administrative "exemption is intended to be limited to those employees whose duties relate to the administrative as distinguished from the production operations of a business." 69 Fed. Reg. 22122, 22141 (internal quotation marks omitted). The 2004 regulations also provide examples that illustrate how the administrative duties exemption can be applied to employees in various occupations, including the following example regarding the financial services industry:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b) (entitled "Administrative

exemption examples").

B. Factual and Procedural Background

1. *Pre–2004 Interpretation of the Administrative Exemption*

The following facts are not in dispute and are taken from either the Association's complaint or the administrative record filed in this case.

The plaintiff is a national trade association that represents the real estate finance industry. Compl. ¶ 7. The Association "has over 2,200 member companies, including all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field." *Id.* These companies employ over 280,000 individuals throughout the United States. *Id.* The Association's primary goals are "to ensure the continued strength of the nation's residential and commercial real estate market, to expand home ownership and extend access to affordable housing to all Americans." *Id.*

From as early as 1964, and until March 24, 2010, the DOL announced its interpretation of the FLSA through the issuance of "[o]pinion [l]etters." *Id.* ¶ 15. These opinion letters were written in response to inquiries from private parties seeking guidance about the application of the FLSA to their business activities. *Id.* Access to the opinion letters was available through several avenues, including, in recent years, electronic legal research databases and the DOL's own website. *See id.* And as the plaintiff correctly points out, the District of Columbia Circuit has held that "DOL Opinion Letters ... constitute final agency action subject to judicial review." *Id.* ¶ 16 (citing *Nat'l Automatic*

Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701–02 (D.C.Cir.1971) (holding that although the opinion letters lack formality, they are intended as a "deliberative determination of the agency's position" and thus are subject to judicial review)).

The administrative record in this case contains two opinion letters issued by the DOL prior to the 2004 amendment of its regulations. The first, dated July 23, 1997, discussed whether a wholesale salesman is exempt from the FLSA's overtime requirements. A.R. at 1–3 (Opinion Letter, 1997 WL 970727 (DOL WAGE–HOUR)). This opinion letter concluded that "[t]he decisions of wholesale salesmen typically do not involve matters of policy or significant importance, but are limited to routine day-to-day operational matters." *Id.* at 2–3. While the Wage and Hour Division did not come to an ultimate conclusion on the exemption question, the opinion letter suggested that wholesale salesmen are not covered by the administrative exemption.[2] *Id.* The second pre–2004 opinion letter found in the administrative record, dated May 17, 1999, determined that "loan officers are engaged in carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business" and were therefore non-exempt employees entitled to

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[2] If the party does not provide the DOL with sufficient facts regarding the nature of their inquiry, the DOL will not provide an ultimate conclusion; rather, it will state what set of facts would need to exist in order for the employee to be exempt. *See generally* Defs.' Mot. at 11–12 (citing A.R. at 87–93 (Opinion Letter FLSA2006–31 ("2006 Opinion Letter"))) (providing an opinion that an employee would be exempt if the assumptions provided by the requestor and other relevant facts are true).

overtime. *See id.* at 5 (Opinion Letter, 1999 WL 1002401 (DOL WAGE–HOUR) ("1999 Opinion Letter")).

Effective August 23, 2004, the DOL amended its regulations interpreting the wage and hour requirements set forth by the FLSA. Compl. ¶ 21. As noted earlier, the amended regulations, as they pertain to the financial service industry, provide:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

Id. (citing 29 C.F.R. § 541.203(b)). And as already noted, the amended regulations included a preamble, *id.* ¶ 22, which makes it clear that "many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers." 69 Fed.Reg. at 22146.

2. *The 2006 Opinion Letter*

On September 8, 2006, the DOL issued an opinion letter to the Association ("2006 Opinion Letter"), *see* A.R. at 87–93 (Opinion Letter FLSA2006–31 ("2006 Opinion Letter")), at the Association's request. Defs.' Mot. at 11 n. 6.[3] In requesting the letter, the Association asked the DOL to assume that the mortgage loan officers who were the subject of the letter spent less than fifty percent of their working time on "customer-specific persuasive sales activity." *Id.* at 11–12 (internal quotation marks and citation omitted). The 2006 Opinion Letter began by reminding the Association that an employee's exempt status is "determined by analyzing each particular employee's actual job duties and compensation under the applicable regulations." A.R. at 87 (2006 Opinion Letter).

The Association also asked whether the DOL's analysis of the administrative exemption was altered by the 2004 regulations. *Id.* at 88–89. In response, the DOL noted that "[b]ecause the criteria in the duties test for the administrative exemption in the 2004 revised final regulations are substantially the same as under the prior rule, the outcome of this opinion would be essentially identical under either version of the regulations." *Id.* at 89 (citation omitted).

The 2006 Opinion Letter reinforced that the 2004 revised regulations made the administrative exception applicable to employees when their

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[3] Generally, the DOL does not release the name of the requestor for an opinion letter. Defs.' Mot. at 11 n. 6. However, the Association has acknowledged that it requested the 2006 opinion letter. *Id.*

employment satisfied the following three components:

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week ..., exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Id. (citation omitted). With regard to the second prong of this test, the letter defined "[w]ork that is 'directly related to the management or general business operations' of the employer ... as 'work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.' " *Id.* (citation omitted). As to the third component of the test, the term "primary duty" is defined in the letter as "the principal, main, major or most important duty that the employee performs." *Id.* (quoting 29 C.F.R. § 541.700(a)). The letter explained that the amount of time an employee spends performing exempt work is a factor to consider in assessing the applicability of the exemption, but time alone "is not the sole test." *Id.* (quoting 29 C.F.R. § 541.700(b)).

The 2006 Opinion Letter further noted that although employees whose primary duty involves sales cannot qualify for the administrative exemption, many financial services employees could and had been found to fall under this exemption. *Id.* at 90 (citing 29 C.F.R. § 541.700(b)). Accordingly, the DOL concluded that the loan officers who were the subject of the 2006 Opinion Letter

> ha[d] a primary duty other than sales, as their work include[d] collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program.

Id. at 90–91. The letter concluded that "the use of software programs or tools to assess risk and to narrow the scope of products available to the customer does not necessarily disqualify the employees from the administrative exemption for lack of discretion and independent judgment." *Id.* at 91. Finally, the letter noted that its "opinion [was] based exclusively on the facts and circumstances described in [the Association's] request and is given based on [the Association's] representation, express or implied, that [the Association] ha[d] provided a full and fair description of all the facts and circumstances that would be pertinent to [the DOL's] consideration of the question presented." *Id.* at 93.

According to the Association, relying on the

2006 Opinion Letter, many members of the financial services industry, including many of the Association's members, classified mortgage loan officers as exempt employees. Compl. ¶ 24. Thus, mortgage loan officers were not compensated with overtime pay. *Id.* ¶ 25. Rather, the members of the Association ensured that their mortgage loan officers were well compensated through other means, like competitive salaries, bonuses, and commissions. *Id.*

3. The 2010 Administrative Interpretation

On March 24, 2010, the DOL, "*sua sponte,*" issued an Administrative Interpretation, the 2010 AI, expressly withdrawing the 2006 Opinion Letter. *Id.* ¶ 26. Nancy Leppink, Acting Administrator of the Wage and Hour Division, issued the 2010 AI. *See* A.R. at 102 (U.S. Department of Labor, Administrator's Interpretation No. 2010–01 ("Administrator's Interpretation No. 2010–01")). The 2010 AI focuses on "[w]hether the primary duty of employees who perform the typical job duties of a mortgage loan officer is office or non-manual work directly related to the management or general business operations of their employer or their employer's customers." *Id.* at 103. The 2010 AI expressed that to qualify for the exemption, an employee's "[w]ork [must be] directly related to management or general business operations of an employer [, which] includes work in functional areas such as accounting, budgeting, quality control, purchasing, advertising, research, human resources, labor relations, and similar areas." *Id.* (citation omitted). In essence, the 2010 AI states that the administrative exemption was designed for "employees whose work involves servicing the business itself[.]" *Id.* at 104.

The 2010 AI relies on a District of Minnesota decision, *Casas v. Conseco Finance Corp.,* No. Civ.00–1512, 2002 WL 507059 (D.Minn. March 31, 2002) in addition to several other cases, as support for its position that mortgage loan officers are non-exempt employees. *Id.* at 105. In *Casas,* loan originators asserted they were entitled to overtime compensation from the defendants under the FLSA, requiring the court to decide whether the plaintiffs were exempt from FLSA overtime pay provisions. The court found that because "Conseco's primary business purpose [was] to design, create and sell home lending products," the mortgage loan officers' primary duty was to sell those lending products on a day-to-day basis, not " 'the running of [the] business [itself]' or determining its overall course or policies." *Casas,* 2002 WL 507059, at *9 (citation omitted) (alterations in original). Relying on the ruling in *Casas,* the 2010 AI reasons that "because Conseco's loan officers' duties were 'selling loans directly to individual customers, one loan at a time,' " the administrative exemption did not apply to them. A.R. at 105 (Administrator's Interpretation No. 2010–01) (internal citation omitted). The 2010 AI further notes that the 2004 amended regulations examined the difference between mortgage loan officers who spend the majority of their time selling mortgage products to consumers, like the *Casas* plaintiffs, as compared to those who "promot[e] the employer's financial products generally, decid[e] on an advertising budget and techniques, run[ ] an office, hir[e] staff and set [ ] their pay, service[ ] existing customers ..., and advis[e] customers." *Id.* at 105 (citing 69 Fed. Reg. at 22145–46). The 2010 AI concluded that in order for mortgage loan officers to be properly classified as exempt employees, their primary

duties must be administrative in nature. *Id.* at 105.

Relying on the facts that a significant portion of mortgage loan officers' compensation is composed of commissions from sales, that their job performance is evaluated based on their sales volume, and that much of the non-sales work performed by the officers is completed in furtherance of their sales duties, the 2010 AI concluded "that a mortgage loan officer's primary duty is making sales." *Id.* at 106–07. And because their primary duty is making sales, the 2010 AI further concludes that "mortgage loan officers perform the production[, not the administrative,] work of their employers." *Id.* at 107.

After concluding that the work of mortgage loan officers is not related to the general business operation of their employers, the 2010 AI considered another factor that could provide the basis for finding that mortgage loan officers are subject to the administrative exemption. *Id.* at 108. The AI states that "[t]he administrative exemption can also apply if the employee's primary duty is directly related to the management or general business operations of the *employer's customers*." *Id.* In making this assessment, the 2010 AI notes that "it is necessary to focus on the identity of the customer." *Id.* The 2010 AI finds that "work for an employer's customers does not qualify for the administrative exemption where the customers are individuals seeking advice for their personal needs, such as people seeking mortgages for their homes." *Id.* However, it recognizes that a mortgage loan officer "might qualify under the administrative exemption" if the customer that the officer is working with "is a business seeking advice about, for example, a mortgage to purchase land for a new

manufacturing plant, to buy a building for office space, or to acquire a warehouse for storage of finished goods." *Id.* Nevertheless, the 2010 AI concludes that the typical mortgage loan officers' "primary duty is making sales for the employer [to homeowners], and because homeowners do not have management or general business operations, a typical mortgage loan officer's primary duty is not related to the management or general business operations of the employer's customers." *Id.* at 109.

Finally, the 2010 AI took exception with the 2006 Opinion Letter's apparent assumption "that the example provided in 29 C.F.R. § 541.203(b) creates an alternative standard for the administrative exemption for employees in the financial services industry." *Id.* Rather, the 2010 AI states that 29 C.F.R. § 541.203(b) merely illustrates an example of an employee who might otherwise qualify for the exemption based on "the requirements set forth in 29 C.F.R. § 541.200." *Id.* Thus, the 2010 AI clarifies that "the administrative exemption is only applicable to employees that meet the requirements set forth in 29 C.F.R. § 541.200." *Id.* In providing this clarification, the 2010 AI states, "[t]he fact example at 29 C.F.R. § 541.203(b) is not an alternative test, and its guidance cannot result in it 'swallowing' the requirements of 29 C.F.R. § 541.200."[4] *Id.*

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[4] The 2010 AI also "expressly withdrew ... 2001 Opinion Letter." Pl.'s Mem. at 13; Defs.' Mot. at 14 ("[T]he Wage and Hour Division withdrew the 2001 Opinion Letter as inconsistent with the analysis in the 2010 AI, inasmuch as it had erroneously concluded that mortgage loan officers performed work that was directly related to the management or general business operations of the employer or the employer's customers.").

In summation, the DOL through the issuance of the 2010 AI explicitly withdrew the 2006 Opinion Letter "[b]ecause of its misleading assumption and selective and narrow analysis[.]" *Id.* Before taking this action, the DOL did not utilize the APA's notice and comment process. Compl. ¶¶ 32–33.

Following the issuance of the 2010 AI, the Association filed its Complaint in this case on January 12, 2011, asserting that the DOL violated the APA by issuing the 2010 AI. *Id.* ¶¶ 36–52. First, the Association argues that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* ¶ 36 (citing *Paralyzed Veterans of Am. v. D.C. Arena,* 117 F.3d 579, 586 (D.C. Cir. 1997)). Second, the Association argues that "[b]ecause the AI conflicts with existing DOL regulations, and because those regulations have been afforded the force of law by courts, DOL's issuance of the 2010 AI is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Id.* ¶ 50. The Association seeks to have the 2010 AI "[v]acat[ed] and set aside" and the defendants "[e]njoin[ed] and restrain[ed] ... from enforcing, applying, or implementing ... the AI." *Id.* at 12 (Prayer for Relief).[5]

The Association filed its Motion for Summary Judgment simultaneously with the

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[5] The Association also seeks an award of its litigation costs and attorney's fees. These requests are not addressed in this opinion.

Complaint. In response, the DOL has filed a Cross Motion to Dismiss, or, in the Alternative, Motion for Summary Judgment.[6]

II. STANDARD OF REVIEW

The DOL has moved for dismissal under Federal Rule of Civil Procedure Rule 12(b)(6), and alternatively moves for summary judgment under Rule 56. Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) ... matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. [And if the motion is considered under Rule 56, a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed.R.Civ.P. 12(d). Here, because both parties have presented materials outside the pleadings (namely, the administrative record) for the Court to consider in adjudicating their motions, the Court deems it appropriate to treat both submissions as motions for summary judgment. *See Marshall Cnty. Health Care. Auth. v. Shalala,* 988 F.2d 1221, 1226 & n. 5 (D.C. Cir. 1993) (noting that a district court considering a Rule 12(b)(6) motion "can consult the [administrative] record to answer the legal question[s] before the court," but that "[i]t is probably the better practice for a district court always to convert to summary judgment").

"Summary judgment is the proper mechanism for deciding, as a matter of law, whether an agency action is supported by the

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[6] In resolving these motions, the Court also considered the memorandum of law submitted on behalf of the three intervenors, Ryan Henry, Beverly Buck, and Jerome Nichols.

administrative record and consistent with the APA standard of review." *Loma Linda Univ. Med. Ctr. v. Sebelius,* 684 F. Supp. 2d 42, 52 (D.D.C. 2010) (citing *Stuttering Found. of Am. v. Springer,* 498 F. Supp. 2d 203, 207 (D.D.C. 2007)); *see also Richards v. INS,* 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977). However, due to the limited role of a court in reviewing the administrative record, the typical summary judgment standards set forth in Rule 56(c) are not applicable. *Stuttering,* 498 F. Supp. 2d at 207 (citation omitted). Rather, "[u]nder the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas 'the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.' " *Id.* (quoting *Occidental Eng'g Co. v. INS,* 753 F.2d 766, 769–70 (9th Cir.1985)).

A reviewing court will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Ludlow v. Mabus,* 793 F. Supp. 2d 352, 354 (D.D.C. 2011) (quoting 5 U.S.C. § 706(2)(A) (2006)). In *Motor Vehicle Manufacturers Ass'n of U.S. v. State Farm Mutual Automobile Insurance Co.,* the Supreme Court explained the "arbitrary and capricious" review by noting that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 463 U.S. 29, 43

(1983). However, the "standard of review is a narrow one." *Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). "The court is not empowered to substitute its judgment for that of the agency." *Id.* "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof," *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n,* 789 F.2d 26, 37 (D.C. Cir. 1986), and the APA directs a reviewing court to "review the whole record or those parts of it cited by a party" in making this assessment, 5 U.S.C. § 706.

III. ANALYSIS

The plaintiff seeks relief based on two distinct theories. First, relying on *Paralyzed Veterans,* 117 F.3d at 586, the plaintiff argues that once an agency issues an authoritative interpretation of its own regulation, it must utilize the notice and comment process if it desires to modify that interpretation. Compl. ¶ 36. Second, the plaintiff argues that the 2010 AI does not comport with the 2004 regulations and is therefore "arbitrary, capricious, an abused of discretion, and otherwise not in accordance with law." Compl. ¶ 50. The Court will analyze each argument in turn.[7]

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[7] The Court notes that the plaintiff contends, and, in fact, takes the position that the 2010 AI is an "interpretation of [the Agency's] own regulation[], as it was signed by the Administrator of the Wage and Hour Division, published on DOL's website, and held out to employees as guidance for complying with the FLSA." Pls.' Mem. at 1. The defendants do not take exception with this position, indeed, they endorse it. Specifically the defendants state, "the 2010 *interpretation* corrected a short-lived 2006 issuance," Defs.' Mem. at 1 (emphasis added), and further concedes that it cannot be construed as a legislative rule, *see id.* at 14–16, 16 n.9 (stating

A. The Paralyzed Veterans and Alaska Professional Hunters Cases

It is well established that there is "no barrier to an agency altering its initial interpretation to adopt another reasonable interpretation—even one that represents a new policy response generated by a different administration." *Paralyzed Veterans,* 117 F.3d at 586 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 863 (1984)). However, the District of Columbia Circuit has held that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Id.* at 586; *Transp. Workers Union of Am. v. Transp. Sec. Admin.,* 492 F.3d 471, 475 (D.C. Cir. 2007) ("[A]n agency cannot significantly change its position, cannot flip-flop, even between two interpretive rules, without prior notice and comment.").

The District of Columbia Circuit had the opportunity to reexamine its holding in *Paralyzed Veterans* in *Alaska Professional Hunters Ass'n v. FAA,* 177 F.3d 1030, 1033–34 (D.C. Cir. 1999). *Alaska Professional Hunters* concerned an interpretation by the Federal Aviation Administration ("FAA") that several provisions of its regulations that "applied to (among others) 'commercial operator[s]' " did not "govern guide pilots whose flights were incidental to their guiding

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that the 2010 AI is an interpretive rule as opposed to substantive rule, and therefore, notice and comment is not necessary). The Court agrees that the 2010 AI is an interpretive rule and will accordingly conduct its analysis from that perspective.

business and were not billed separately." *Id.* at 1031. The FAA's position was based on its reading of the Civil Aeronautics Board's decision in *Administrator v. Marshall,* 39 C.A.B. 948 (1963). *Id.* "Although the [agency] never set forth its interpretation of [the several regulations at issue] in a written statement," the parties "agree[d] that [the] FAA personnel in Alaska consistently followed the interpretation in official advice to guides and guide services." *Id.* at 1031–32.

In January 1998, the FAA reversed course and published a "Notice to Operators" that "required the[] guide pilots to abide by FAA regulations applicable to commercial air operations." *Id.* at 1030. Drawing on its decision in *Paralyzed Veterans,* 117 F.3d at 586, the Circuit found that this modification of the FAA's longstanding policy exempting the guide pilots from the FAA regulations mandated the use of notice and comment rulemaking. *Id.* at 1035–36. The Circuit concluded that ***204** "current doubts about the wisdom of the regulatory system followed in Alaska for more than thirty years does not justify disregarding the requisite procedures for changing that system." *Id.* at 1035.

1. *Is Paralyzed Veterans still good law?*

The defendants argue that two Supreme Court cases conflict with *Paralyzed Veterans* and *Alaska Professional Hunters.* Defs.' Mot. at 15–17. First, they argue that *Paralyzed Veterans* cannot be reconciled with the holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 524 (1978). Defs.' Mot. at 15–17. In *Vermont Yankee,* the Supreme Court reiterated its previous conclusion "that generally speaking," the APA's notice and comment

requirements "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Vermont Yankee,* 435 U.S. at 524. The Supreme Court further stated that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion, but *reviewing courts are generally not free to impose [additional procedural requirements]* if the agencies have not chosen to grant them." *Id.* (emphasis added). The defendants argue that this limitation imposed on courts by *Vermont Yankee* conflicts with the requirements imposed by *Paralyzed Veterans;* namely, the requirement that an agency must employ the notice and comment process if they wish to change a prior interpretation of their own regulations, Def's. Mot. at 16–17, since the Supreme Court observed that only in "extremely rare" circumstances may courts impose "procedures beyond those required by the statute," *Vermont Yankee,* 435 U.S. at 524; *see* Def's. Mot. At 16–17.

This Court is "obligated to follow controlling [C]ircuit precedent until either [the Circuit], sitting en banc, or the Supreme Court, overrule it." *United States v. Torres,* 115 F.3d 1033, 1036 (D.C. Cir. 1997). Thus, even if this Court "disagree[d] with circuit precedent" its "obligation" to follow such precedent would not be relieved. *Id.* Moreover, having been decided nearly twenty years before *Paralyzed Veterans,* the District of Columbia Circuit was presumably aware of the existence of *Vermont Yankee* when it authored its opinion in *Paralyzed Veterans.* And this Court is not prepared to find that the Circuit disregarded Supreme Court precedent when it decided *Paralyzed Veterans.*

The defendants are correct in stating that seven courts of appeals have held that the notice and comment provisions found in section 553 of the APA do not apply to interpretative rules. Defendants' Reply to Plaintiff's Opposition to Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defs.' Reply") at 9. However, this Circuit, in deciding *Paralyzed Veterans, Alaska Professional Hunters,* and other cases that have addressed the same subject, *see, e.g., Kelley v. EPA,* 15 F.3d 1100, 1108 (D.C. Cir. 1994); *Am. Mining Cong. v. MSHA,* 995 F.2d 1106, 1109 (D.C. Cir. 1993), has ruled that if an interpretation of a statute or rule "itself carries the force and effect of law," *Paralyzed Veterans,* 117 F.3d at 588 (quotation marks and citations omitted), the agency is required to use notice and comment procedures. And this Court had the occasion to apply *Paralyzed Veterans* in a case with similarities to this case. *See Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives,* 337 F. Supp. 2d 1, 13 (D.D.C. 2004), rev'd on other grounds, 437 F.3d 75 (D.C. Cir. 2006) (Walton, J.) ("[B]efore the [agency] could alter[] its earlier interpretation of the [regulation], it was required to undertake notice-and-comment rulemaking as required by the APA[.]"). Thus, this Court cannot, and will not, find that *Vermont Yankee* commands that it refuse to follow a Circuit case that was decided two decades later, and has remained good law in this Circuit for almost fifteen years.

Second, the DOL argues that *Paralyzed Veterans* and *Alaska Professional Hunters* were overturned by the recent Supreme Court decision in *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502 (2009). The DOL relies on language from *Fox*

Television, stating that the APA "makes no distinction ... between initial agency action and subsequent agency action undoing or revising that action." Defs.' Mot. at 15 (quoting *Fox Television,* 556 U.S. at 515). *Fox Television* concerned two television live broadcasts during which expletives were used, resulting in the Federal Communication Commission's ("FCC") issuance of two "[n]otices of [a]pparent [l]iability" based on the FCC's finding that the two occurrences were "actionably indecent." 556 U.S. at 508–512. Prior to the commission of these two incidents, the FCC had permitted networks to broadcast "fleeting" expletives without punishment. *Id.* The FCC reversed course with regard to the two incidents in question, finding that the broadcasts were indecent, even though both contained only "fleeting" expletives. *Id.* at 512, 530. The Second Circuit found that the FCC's decision changing its policy was not in compliance with the APA due, in part, to its failure to provide an adequate reason for the change. *Id.* at 513–514; *see* 5 U.S.C. § 706(2)(A). On review of that ruling, the Supreme Court rejected the Second Circuit's position, "find[ing] no basis in the [APA] or in [its] opinions for a requirement that all agency change be subjected to more searching review." *Fox Television,* 556 U.S. at 514.

The language in *Fox Television* which the defendants contend invalidates *Paralyzed Veterans,* when considered in conjunction with the entire majority opinion in *Fox Television,* implicates the APA's arbitrary and capricious review, not its notice and comment process. In fact, the Supreme Court made perfectly clear the question it was addressing, holding that "we find the [FCC's] orders neither arbitrary nor capricious." *Id.* at 530.

So what the defendants are seeking to do is have this Court expand the reach of *Fox Television* beyond the question the Supreme Court actually addressed. That, this Court cannot do, as the *Fox Television* decision has no bearing on whether an agency must employ the notice and comment process before changing its policies. The answer to that question requires this Court to look to *Paralyzed Veterans* and its progeny, in the absence of en banc Circuit authority or Supreme Court repudiation of those decisions. *Torres,* 115 F.3d at 1036. Neither has occurred, so *Paralyzed Veterans* and its line of cases remains controlling authority in this Circuit.

2. *The Paralyzed Veterans Doctrine and Alaska Professional Hunters Rationale*

Having determined that *Paralyzed Veterans* remains controlling authority in this Circuit, the Court must now turn its attention to the exceptions to *Paralyzed Veterans,* which the defendants contend have been recognized by the Circuit and are relied upon by the defendants in this litigation. As the alternative position to their argument that this Court should not follow *Paralyzed Veterans,* the defendants argue that these two purported exceptions to the applicability of *Paralyzed Veterans* weigh in favor of granting them summary judgment. First, they contend that *MetWest Inc. v. Secretary of Labor,* 560 F.3d 506 (D.C.Cir.2009), alleviates the requirement of utilizing notice and comment when a party did not "substantially and justifiably" rely upon an earlier agency interpretation. Defs.' Mot. at 22–26. Second, the defendants argue that the "invalid prior interpretation" exception purportedly recognized in *Monmouth Med. Ctr. v. Thompson,* 257 F.3d 807

(D.C. Cir. 2001), applies here. *Id.* at 18–22.

The *MetWest* case raised the question of whether MetWest could "be held liable for violating a regulation governing the removal of needles from equipment used to extract blood." 560 F.3d at 507–508. Dating back to 1991 when the needle removal regulation was adopted, the Occupation, Safety and Health Administration ("OSHA") "declined to enforce [the regulation] against employers who supplied their employees with reusable blood tube holders." *Id.* at 508–09. In October 2003, OSHA changed its policy through the issuance of a "guidance document," which stated that the use of reusable blood holders "likely violated" the regulation. *Id.* at 509. MetWest brought suit following the change, arguing that the agency was required to employ notice and comment rulemaking before altering its interpretation of the needle removal regulation. *Id.*

The Circuit in *MetWest* reiterated that its holding in *Alaska Professional Hunters* was "that an agency's practice of advising affected entities—in a prior agency adjudication and the consistent advice of agency officials over a 30–year period—that a regulation did not apply to them established 'an authoritative departmental interpretation' that could not be changed without notice and comment." *Id.* at 511 (citation omitted).[8] The *MetWest* court emphasized that "[a] fundamental rationale of *Alaska Professional Hunters* was the affected parties' *substantial and justifiable reliance* on a *well-established* agency interpretation." *Id.*

[8] The *MetWest* opinion was authored by Judge Raymond Randolph, who also authored the *Alaska Professional Hunters* opinion.

(emphasis added). The Circuit noted that "[t]his is a crucial part of the analysis" and that "[t]o ignore it is to misunderstand *Alaska Professional Hunters* to mean that an agency's initial interpretation, once informally adopted, freezes the state of agency law, which cannot subsequently be altered without notice-and-comment rule-making." *Id.* at 511 n.4 (citations and internal quotation marks omitted). And in *Alaska Professional Hunters,* notice and comment rulemaking was deemed necessary before an interpretation of a regulation could be changed, because, in that case, people had moved to Alaska and started businesses with the understanding that an agency's regulations did not apply to an essential component of their operations due to the position the agency had taken over a 30–year period. *Id.* at 511 (citing *Alaska Professional Hunters,* 177 F.3d at 1035 (alterations in original)). Concluding that "[t]he situation [in *MetWest* was] not comparable" to the situation in *Alaska Professional Hunters,* MetWest's challenge to the Agency action was rejected because "OSHA never established an authoritative interpretation of its regulation on which MetWest justifiably relied to its detriment." *Id.*

The plaintiff takes exception to the defendants' claim that *MetWest* limits the applicability of *Paralyzed Veterans* to cases where a "party's reliance upon a prior interpretation [of an agency's regulation] was both substantial and justifiable." Plaintiff's Reply in Support of its Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment ("Pl.'s Reply") at 15 (internal quotation marks omitted). The plaintiff argues that "some new reliance exception to *Paralyzed Veterans* " was not created by *MetWest*

because "*MetWest*'s discussion of substantial and justifiable reliance was in the content of assessing whether an *informal* interpretation by [OSHA] could even be an authoritative departmental interpretation" *Id.* (internal quotation marks omitted).

While it is true that the court in *MetWest* noted that the agency "never established an authoritative interpretation of its regulation on which MetWest justifiably relied to its detriment," the court's holding was not grounded solely on that fact. *MetWest,* 560 F.3d at 511. Rather, the ruling of the circuit was also based on the assessment of whether there had been "*substantial and justifiable reliance* on a *well-established* agency interpretation" by MetWest, which was essential to imposing the notice and comment obligation on the agency. *Id.* (emphasis added). So regardless of whether *MetWest* carved out an exception to *Paralyzed Veterans* or just clarified what the court intended to convey when it said in *Alaska Professional Hunters* that the plaintiffs there had "relied" on the agency's initial interpretation, 177 F.3d at 1035, this Court is convinced that *MetWest* intended to set the bar for what a plaintiff must establish to satisfy the reliance component of the *Paralyzed Veterans* doctrine.

The plaintiff argues alternatively that even if *MetWest* did add a substantial and justifiable reliance component to the *Paralyzed Veterans* doctrine, they "quite plainly relied, substantially and justifiably so, on the 2006 Opinion Letter." Pl.'s Reply at 17. The Association relies in part upon the Portal–to–Portal Act of 1947 for this position, *id.* at 17–25, which gives employers a complete defense to liability if they rely in good faith on the opinion of

the Administrator of the Wage and Hour Division. This Act states that

> "no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay ... overtime compensation under the [FLSA], if he 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...."

29 U.S.C. § 259(a) (2006). In a footnote, the plaintiff points to a number of other trade associations that have been sued since the issuance of the 2010 AI, and purportedly relied upon the 2006 Opinion Letter as a defense under 29 U.S.C. § 259(a). Pl.'s Reply at 19 n. 26. And the plaintiff takes exception to what it claims is the defendants' position that reliance must equate to circumstances analogous to those in *Alaska Professional Hunters,* opining that "[i]t would thus be quite odd to read the APA as requiring notice and comment only where an industry can demonstrate it will be put out of business." *Id.* at 20. In opposition, the defendants argue that "[t]he contrast between *Alaska Professional Hunters* and the present matter is stark." Defs.' Reply at 5. They note that in *Alaska Professional Hunters,* "people uprooted their lives, moved across the country, and spent 30 years building up an entire industry in particularly substantial and justifiable reliance on an agency interpretation." *Id.* They further posit that it was precisely this reliance that "stirred the [District of

Columbia] Circuit to act." *Id.* The defendants opine that "at most [the Association] and its members operated under the misapprehension that mortgage loan officers were administratively exempt for four years, and structured their pay systems accordingly, before [the] DOL corrected th[e] error." *Id.*

The Court agrees with the defendants. As noted above, the *MetWest* court stressed that a core tenant of the *Alaska Professional Hunters* decision was "substantial and justifiable reliance on a well-established agency interpretation." *MetWest,* 560 F.3d at 511. The interpretation allegedly relied upon by the Association and its members here was only in effect for a period of four years, from 2006 to 2010. *See* A.R. 87–93 (2006 Opinion Letter). Prior to that, the DOL had taken the position that mortgage loan officers were not exempt employees, and were therefore entitled to overtime pay. *See, e.g.,* A.R. 4–5 (1999 Opinion Letter). Unlike the plaintiffs in *Alaska Professional Hunters,* here the Association does not allege that any of its members uprooted their families and moved to a new location in search of business opportunities. Pl.'s Reply at 23. Rather, in the words of the Association itself, employees of financial service firms have merely "become accustomed to the freedom to control their own hours and breaks." *Id.* While the Court appreciates that having to keep accurate time records may impose an additional burden on the Association's members and their employees, the loss of the freedom to control one's work hours and break times is not the kind of "substantial and justifiable reliance" that *Alaska Professional Hunters* had in mind, especially when such reliance was short lived given the *many* years that the parties had previously relied upon the

interpretation that mortgage loan officers were not covered by the administrative exemption.

Further, the argument that the Association makes under the Portal–to–Portal Act actually weakens its overall position. *See* Pl.'s Reply at 17–18. As the Association points out, the Portal–to–Portal Act provides that, if the employer "proves that the [failure to pay overtime] was in good faith in conformity with and in reliance on any written administrative ... interpretation," then the employer "shall [not] be subject to any liability or punishment." 29 U.S.C. § 259(a). Thus, assuming this provision applies, the plaintiff could not be said to have relied upon the prior interpretation to its *detriment,* as its members will not be liable for any damages resulting from the prior interpretation due to their good faith reliance. *Id.* While the Court need not reach that conclusion, it is at least worth nothing that the Association's invocation of the Portal–to–Portal Act undermines its position that it "substantial[ly] and justifiabl[ly]" relied upon the 2006 Opinion Letter to the level required by the Circuit in *MetWest,* 560 F.3d at 511.

Having concluded that the association has failed to satisfy the standard for demonstrating reliance recognized in *MetWest,* the Court need not address the defendants' additional argument that notice and comment was not required for the 2010 AI based on the Circuit's decision in *Monmouth,* 257 F.3d at 807.

B. Is the 2010 AI Inconsistent with the DOL's 2004 Regulations?

The plaintiff argues that even if the 2010 AI was lawfully adopted, it is "inconsistent with the plain language of 29 C.F.R. § 541.203(b),"

Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Mem.") at 26, and thus "it is arbitrary, capricious, and contrary to law," *id.* at 3. In essence, the plaintiff argues that the work performed by mortgage loan officers discussed in the 2010 AI are identical to the job duties discussed in 29 C.F.R. § 541.203(b), which provides examples of job duties that are exempt from the FLSA's overtime pay requirement. Pl.'s Mem. at 26–27. 29 C.F.R. § 541.203(b) contemplates that an employee who "collect[s] and analyz[es] information regarding the customer's income, assets, investments or debts," "determin[es] which financial products best meet the customer's needs and financial circumstances," and "advis[es] the customer regarding the advantages and disadvantages of different financial products" might be found exempt under the administrative exemption. In its memorandum submitted in support of its motion, the plaintiff notes that very similar language was used in the 2010 AI, but that in the 2010 AI, the DOL reached a different result in finding mortgage loan officers non-exempt from the FLSA's overtime requirement. Pl.'s Mem. at 26–27.

The DOL does not dispute that the language found in the two documents is similar. Defs.' Reply at 15. However, it contends that the job duties found in 29 C.F.R. § 541.203(b) are merely intended to provide examples of when a financial services employee might be exempt under the administrative exception. *Id.* The defendants argue that by "[a]pplying the general administrative duties test in § 541.200(a), in conjunction with the financial services example in § 541.203(b)," the 2010 AI came to the conclusion that the mortgage loan officers in question were not exempt from the

FLSA's overtime pay requirement. *Id.* (citing A.R. 105–108 (Administrator's Interpretation No. 2010–01)).[9]

The Court finds the DOL's argument persuasive. The administrative exemption of 29 C.F.R. § 541.200, entitled "General rule for administrative employees," provides in part that an "employee employed in a bona fide administrative capacity" is one "[w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). The language relied upon by the plaintiff is found in 29 C.F.R. § 541.203(b), which is entitled "Administrative exemption examples," and it provides, in part, that "[e]mployees in the financial services industry *generally meet* the duties requirements for the administrative exemption.... However, an employee whose *primary duty* is selling financial products *does not qualify* for the administrative exemption." 29 C.F.R. § 541.203(b) (emphasis added). On its face, and considering the title of the provision, it is

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[9] The defendants have offered supplemental authority—*Lewis v. Huntington National Bank,* No. C211CV0058, 2012 WL 765077 (S.D.Ohio Mar. 12, 2012)—as additional support for their position that the 2010 AI is not arbitrary and capricious. *See* Defendants' Notice of Supplemental Authority. Although the case is distinguishable from this case for a variety of reasons, the Southern District of Ohio did find that "because the [2010 AI] applies the test set forth in § 541.200(a), consistently with the example contained in § 541.203(b), there can be no serious argument that [the 2010 AI] was either erroneous or inconsistent with the 2004 revised regulations." *Lewis,* No. C211CV0058, 2012 WL 765077 at 32 (S.D.Ohio Mar. 12, 2012).

clear that § 541.203(b) was intended to provide examples, not an alternative test for the applicability of the administrative exception. *Id.* Thus, while financial services employees who perform the duties listed in § 541.203(b) are "generally" able to qualify for the administrative exemption, the DOL is still tasked with determining whether specific employees' "primary duty is selling financial products." *Id.* If so, the employee "does not qualify for the administrative exemption." *Id.* Given the DOL's reasoning for why the exemption does not apply here, the Court must find that the 2010 AI is not inconsistent with the 2004 regulations; thus, the 2010 AI is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[10]

IV. CONCLUSION

The Association has failed to satisfy the *Paralyzed Veterans* doctrine of substantial and justifiable reliance, which was also recognized in *MetWest;* thus, both their arguments as to reliance

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[10] The Court is aware that there is currently a dispute between the defendants and the intervenors as to whether the 2010 AI applies both prospectively and retroactively. In resolving this case, however, the Court need not reach a conclusion on that issue, as the intervenors, the plaintiff, and the defendants acknowledge. *See* Intervenors' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion to Dismiss at 31–32 n.12; Defendants' Reply to Intervenors' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion to Dismiss at 1; Plaintiff's Reply in Support of its Motion for Summary Judgment (Response to Intervenors filed on March 14, 2012) at 3. The Court agrees with the parties and, therefore, declines to address the issue.

and as to notice and comment procedures must fail. Further, § 541.203(b) was not intended to serve as an alternative test for the applicability of the administrative exception. As such, the 2010 AI is not inconsistent with the 2004 regulations and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Accordingly, the Court must grant in part and deny in part the Defendants' Cross-motion to Dismiss or, in the Alternative for Summary Judgment and deny the Plaintiff's Motion for Summary Judgment.

SO ORDERED.[11]

REGGIE B. WALTON
United States District Judge

[DATE: June 6, 2012]

[11] The Court will issue an Order contemporaneously with this Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTGAGE BANKERS ASSOCIATION,

Plaintiff,

Civil Action No. 11-0073 (RBW)

v.

HILDA SOLIS, Secretary of Labor;
NANCY LEPPINK,
Acting Wage and Hour Administrator; and
THE UNITED STATES DEPARTMENT OF LABOR

Defendants.

ORDER

In accordance with the memorandum Opinion issued contemporaneously with this Order, it is hereby

ORDERED that the Defendants' Cross Motion to Dismiss or, in the Alternative, for Summary Judgment is **GRANTED** in part and **DENIED** in part. It is further

ORDERED that the defendants' motion for dismissal is **DENIED** and the defendants' motion for summary judgment is **GRANTED**. It is further

ORDERED that the Plaintiff's Motion for Summary Judgment is **DENIED**. It is further

ORDERED that this case is **CLOSED**.

SO ORDERED this 6th day of June, 2012.

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REGGIE B. WALTON

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTGAGE BANKERS ASSOCIATION,
Plaintiff, and

Civil Action No. 11-0073 (RBW)

JEROME NICKOLS, *et al.*,
Intervenor-Plaintiffs,

v.

THOMAS E. PEREZ,[1]
Sued in his official capacity, Secretary of United States Department of Labor, *et al.*,
Defendants.

ORDER

This matter is before the Court on remand from the United States Court of Appeals for the District of Columbia Circuit. The case was brought by plaintiff Mortgage bankers Association against United States Department of Labor ("DOL") Secretary Thomas E. Perez in his official capacity, Deputy Administrator of the DOL Wage and Hour

[1] The plaintiff filed suit against Hilda L. Solis, then Secretary of the United States Department of Labor, in her official capacity. While this case was pending on appeal, Seth D. Harris succeeded Solis as Secretary. Pursuant to Federal Rule of Civil Procedure 25(d), the Court substitutes Thomas E. Perez, who has now succeeded Harris as Secretary.

Division Laura A. Fortman[2] in her official capacity, and the DOL, challenging the DOL's issuance of DOL Administrator Interpretation 2010-1 as a violation of the notice and comment rulemaking procedures required by the Administrative Procedure Act ("APA"), 5 U.S.C. § 553 (2012), and as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, also in violation of the APA, 5 U.S.C. § 706(2)(A). Complaint for Declaratory and Injunctive Relief ¶¶ 35-52. On June 6, 2012, this Court granted the defendants' motion for summary judgment and denied the plaintiff's motion for summary judgment, holding that the DOL was not required to employ notice and comment rulemaking procedures prior to issuing its 2010 interpretation, and that its interpretation was not inconsistent with DOL regulations. *See Mortg. Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 207-10 (D.D.C. 2012); ECF No. 43. The plaintiff subsequently appealed the Court's decision.

On July 2, 2013, the Circuit issued an opinion and judgment reversing this Court's order and remanding the case "with instructions to vacate DOL's 2010 Administrator Interpretation." *See Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 972 (D.C. Cir. 2013). On October 16, 2013, the Court received the mandate with this directive. *See* ECF No. 47. Accordingly, for the reasons stated by the Circuit in its opinion, it is hereby

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[2] The plaintiff filed suit against Nancy Leppink, then Deputy Administrator of the Wage and Hour Division. The Court substitutes Laura A. Fortman, current Deputy Administrator of the Wage and Hour Division. *See* Fed. R. Civ. P. 25(d)

ORDERED that this Court's June 6, 2012 memorandum opinion and order are hereby **VACATED**. It is further

ORDERED that the plaintiff's motion for summary judgment is **GRANTED**, and the defendants' motion to dismiss or, in the alternative, for summary judgment is **DENIED**. It is further

ORDERED that the DOL's Administrator Interpretation 2010-1 is **VACATED** and **SET ASIDE** as in violation of § 553 of the APA.[3] Accordingly, the defendants are prohibited from enforcing, applying, or implementing, or requiring others to enforce, apply, or implement Administrator Interpretation 2010-1.

SO ORDERED this 23rd day of October, 2013

REGGIE B. WALTON

United States District Judge

[3] Because the DOL's 2010 interpretation is vacated due to the agency's failure to follow the notice and comment procedures required by § 553, the Court does not reach the plaintiff's argument that the 2010 interpretation is arbitrary and capricious in violation of the APA and expresses no opinion on this issue.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed On: October 2, 2013

No. 12-5246

MORTGAGE BANKERS ASSOCIATION,

APPELLANT

v.

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

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-00073-RBW)

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, and Srinivasan, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of the petition of appellees Jerome Nickols, Ryan Henry, and Beverly Buck for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ERIK W. BIGGS, individually and on behalf of all other similarly situated employees

Plaintiffs,

Case No. 10c-v-11928

v.

Hon. Stephen J. Murphy, III

QUICKEN LOANS, INC., DAVID CARROLL, and DANIEL GILBERT,

Defendants.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT (document no. 141)

This is the fourth of four separate actions under the Fair Labor Standards Act ("FLSA") challenging Defendant Quicken Loans' failure to pay allegedly required overtime benefits to Plaintiffs Erik Biggs and several dozen other current and former employees. Defendants now move for summary judgment, arguing that the recent vacation of agency opinion AI 2010-1, warrants granting them summary judgment under Section 10 of the Portal-to-Portal Act for any claims arising after the issuance of AI 2010-1. The Court,

having reviewed the papers, concludes that a hearing is not necessary to resolve the motion. *See* E.D. Mich. LR 7.1(f)(2). For the reasons stated below, the Court will deny the motion without prejudice.

STANDARD OF REVIEW

Summary judgment is warranted "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute over material facts is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To show that a fact is, or is not, genuinely disputed, both parties are required to either "cite[] to particular parts of materials in the record" or "show[] that the materials cited do not estaboish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). In considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences in a light most favorable to the nonmoving party. *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). The Court must take care, in evaluating the motion, not to make judgments on the quality of the evidence, because the purpose of summary judgment is to determine whether a triable claim exists. *Doe v. Metro. Nashville Public Schools*, 133 F.3d 384, 387 (6th Cir. 1998) ("[W]eigh[ing] the evidence…is never appropriate at the summary judgment stage.").

BACKGROUND

Plaintiffs are current and former mortgage bankers that work for Quicken Loans, who assert that Quicken Loans owes them back overtime payments for hours worked in excess of forty per week as required by the FLSA. Quicken Loans' business model includes two types of mortgage bankers: "web loan consultants," who work out of Quicken Loans' centralized web call center, and "branch loan consultants," who work out of Rock Financial's traditional branch offices. Defendants assert Plaintiffs were not entitled to overtime compensation because they fell under the "administrative exemption" to the FLSA because of the nature of their jobs as mortgage bankers. The first case, *Henry v. Quicken Loans*, No. 04-40346, on behalf of a set of web loan consultants, proceeded to trial in March of 2011, resulting in a jury verdict for Quicken Loans which was affirmed on appeal. *See Henry v. Quicken Loans*, 698 F.3d 897 (6th Cir. 2012).

Here, Plaintiffs are web loan consultants working for Quicken Loans, who argue they were denied overtime pay as required by the FLSA for a period between the U.S. Department of Labor's promulgation of an Administrator's Interpretation opining that mortgage bankers were not administratively exempt and were due overtime, and the period Quicken Loans reclassified their loan consultants and began paying them overtime – a time period between March 24, 2010 and May 31, 2010.

I. Legal Standards, FLSA 2006-31 and AI 2010-1, and Procedural History

The FLSA requires employers to pay employees who work more than forty hours per workweek overtime wages. Several categories of employees are exempt from this rule, including those "employeed in a bona fide executive, administrative, or professional capacity…or in the capacity of an outside salesman[.]" 29 U.S.C. § 213(a)(1). The U.S. Department of Labor subsequently promulgated regulations outlining the scope of the "administrative" exemption. *See generally* 29 C.F.R. §§ 541.200, *et seq*.; 29 C.F.R. §§ 541.2(a)(1), (e)(2) (2004). A significant part of the proceedings in *Henry* addressed the proper interpretation of this statute and regulation with respect to the mortgage loan officer plaintiffs.

Although *Henry* ultimately turned on a jury's determination of facts, the Court also examined the history of the Department of Labor's own interpretation of the statute and regulations. Briefly, prior to 2006, there was no single authoritative interpretation of the administrative exemption with respect to mortgage bankers. The Department of Labor had issued two unsigned opinion letters, and district court cases split on the question. *Compare Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997), with *Casas v. Conseco Finance Corp.*, No. Civ. 00-1512, 2002 WL 507059 (D. Minn. Mar. 31, 2002). The Department of Labor then concluded that mortgage loan officers were administratively exempt in an signed, authoritative opinion letter issued by the Wage and Hour Division ("WHD") on September 8, 2006. Wage & Hour Div. U.S. Dept. of Labor, Opinion Letter FLSA 2006-31, Sept. 8, 2006 ("FLSA 2006-

31"). Subsequently, in 2010, the Department issued an "Administrator's Interpretation" of the same regulations, in which it concluded that mortgage bankers did *not* fall within the administrative exemption and were eligible for overtime. Wage & Hour Div., U.S. Dept. of Labor, Administrator's Interpretation 2010-1 (Mar. 24, 2010) ("AI 2010-1"). AI 2010-1 also withdrew FLSA 2006-31.

In *Henry* and the instant cases, the Court concluded that after the issuance of FLSA 2006-31, Quicken Loans' reliance on the letter in classifying Plaintiffs as administratively exempt from overtime constituted the basis for good faith reliance for the purposes of Section 10 of the Portal-to-Portal Act, which served as a full defense to the FLSA overtime action for the period after the letter's issuance on September 8, 2006. *Henry*, Order Overruling Objections, ECF No. 571 (adopting Report and Recommendation ("Report"), ECF No. 555).[1] The Court noted that it was objectively reasonable for Quicken Loans to rely on a WHD opinion letter, that Quicken Loans evaluated the text of the letter carefully compared to other Department of Labor guidelines and other laws and cases, and that Quicken Loans acted in

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[1] The Portal-to-Portal Act states in relevant part, at 29 U.S.C. § 259:

> no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay…overtime compensation under the Fair Labor Standards Act…if he 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 [relevant federal agency].

conformity with the letter. As such, no reasonable jury could conclude that Quicken Loans did not act in good faith reliance on FLSA 2006-31. Report at 24-33.

The Court also initially chose to award FLSA 2006-31 a controlling degree of deference. *Henry*, Report and Recommendation 39, July 16, 2009, ECF No. 556 (citing *Auer v. Robbins*, 519 U.S. 452, 461-62 (1997); *Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673, 676-79 (6th Cir. 2000)). Once AI 2010-1 issued, the Court considered the matter anew with additional briefing by the parties, and an amicus brief from the U.S. Department of Labor regarding what, if any, level of deference the Court owed AI 2010-1 in interpreting the relevant regulations. After a hearing, the Court ultimately denied Defendants' motion for reconsideration of the legal conclusion on January 27, 2011, finding that, based on a revised assessment of the administrative exemption regulation and the interpretative guidance, first, although the parties agreed that AI 2010-1 rescinded FLSA 2006-31, the rescission did not have retroactive effect; and second, that FLSA 2006-31 was not entitled to deference by the Court. But even so, the Court concluded the change in deference would not affect the Court's prior rulings in the case, and accordingly the Court denied the motion for reconsideration. *Henry*, Order Denying Mot. for Reconsideration 27, ECF No. 666 ("the Court reaffirms its conclusion that summary judgment for Quicken on the issue of good faith reliance was proper").

In the instant case, the Court again granted Defendants' motion for summary judgment for the same period as to the instant plaintiffs, adopting the reasoning of its ruling in *Henry* after concluding that because "[t]here is no dispute that the factual and legal issues" in Defendants' motion for summary judgment are "identical to the issues" in *Henry*, *stare decisis* required an identical result. Order Granting Mot. for Summ. J. on Good Faith Defenses 4, ECF No. 113 (citing *Rutherford v. Columbia Gas*, 575 F.3d 616, 617 (6th Cir. 2009)).

II. The D.C. Circuit's Opinion Vacating AI 2010-1

In *Mortgage Bankers Ass'n and Jerome Nickols, et al. v. Thomas Perez*, No. 11-0073 (D.D.C.), plaintiffs Mortgage Bankers Association ("MBA") and intervenors Jerome Nickols, et al., challenged the validity of AI 2010-1. The MBA brought the action under Section 702 of the Administrative Procedures Act ("APA"), *see* 5 U.S.C. § 702. The MBA argued that the Department of Labor violated the APA when it issued AI 2010-1 without first engaging in notice-and-comment rulemaking procedures. The district court initially dismissed the challenge in *Mortgage Bankers Ass'n v. Solis*, 864 F. Supp. 2d 193, 195 (D.D.C. 2012).

But the D.C. Circuit heard the appeal in *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966 (2013), and reversed. The D.C. Circuit first noted its prior precedent holding the "ostensibly" straightforward rule, enunciated in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) and *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir.

1999), that "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish [under the APA] without notice and comment." *Id.* at 967. The question in *Mortgage Bankers Ass'n* was whether, to consider an agency action such an amendment, there existed a "substantial and justifiable reliance on" the interpretation. *Id.* at 968 (quoting *MetWest Inc. v. Secretary of Labor*, 560 F.3d 506 (D.C. Cir. 2009)).

The D.C. Circuit concluded that, contrary to the assertion that the *MetWest Inc.* case created a "substantial and justified reliance prong" necessary to require notice-and-comment rulemaking for "significant" revision of an interpretation, *Alaska Hunters* actually stood for the proposition that in certain circumstances, "substantial and justifiable reliance" could effectively "elevate" a non-definitive interpretation into a definitive one. *Id.* at 969. When an agency interpretation was definitive, in contrast, there was no "substantial and justified reliance" requirement as long as the agency significantly revised the rule. *Id.* at 971. Applying that conclusion, the D.C. Circuit concluded the Department of Labor had revised a definitive interpretation without notice-and-comment, reversed the district court, and instructed the district court to vacate AI 2010-1. *Id.* at 972. The court issued its mandate on October 11, 2013, and the district court ordered the Depeartment of Labor to cease enforcement of AI 2010-1. *Mortgage Bankers Ass'n v. Perez*, ECF No. 48 (D.D.C. Oct. 23, 2013).

DISCUSSION

In light of *Mortgage Bankers Ass'n*, Defendants move for summary judgment under Section 10 of the Portal-to-Portal Act for the period between March 24, 2010, and May 31, 2010. Defendants argue that with AI 2010-1's vacation, FLSA 2006-31 now is "back" in effect, and more accurately, was always in effect any time after its issuance in 2006—and after March 24, 2010—because it was never validly rescinded. Thus, Defendants argue, since the Court concluded that Quicken Loans met the good faith defense in Section 10 for the period after FLSA 2006-31 issued, and FLSA 2006-31 is in effect, they should be granted summary judgment for the time period at issue here, and on the entire case.

Defendants' motion relies on the fundamental assumption that the D.C. Circuit's decision in *Mortgage Bankers Ass'n* vacating AI 2010-1, and the district court's subsequent injunction of the Department of Labor, applies on a national basis and vacates the interpretation in this circuit. *See* Mot. for Summ. J. 11, ECF No. 141 ("The D.C. Circuit Court Definitively Held That [AI 2010-1 is invalid]" and "The 2006 Opinion Letter Has Been Restored").

The question, however, of whether the D.C. Circuit's decision vacating AI 2010-1 applies "across the board" is not as clear-cut as it may initially seem. In fact, the precedent and practice of federal judicial review of agency action strongly suggests that such review proceeds on a circuit-by-circuit basis, just as judicial review of an ordinary statute would. Notably, in *Cumberland Med Ctr. v.*

Secretary of Health & Human Servs., 781 F.2d 536 (6th Cir. 1986), the Sixth Circuit joined seven other circuits in striking down an agency rule deemed to have been issued in contravention of the APA. *Id.* at 538. But, although the challenges to the regulation in question, like the one here, concluded that the regulation was invalid, the Sixth Circuit—and the other Circuits—independently determined that the regulation was invalid for their own circuits, rather than simply holding that the first circuit to strike the rule had done so on a national basis. *See, e.g., St. James Hosp. v. Heckler*, 760 F.2d 1460, 1473 (7th Cir. 1985) (examining circuit opinions and concluding "we must set aside the Rule").

Judicial review of agency regulations or agency action more broadly is also consistent with a circuit-by-circuit basis for action. *See Davidson v. U.S. Dep't of Energy*, 838 F.2d 850, 856 (6th Cir. 1988) (independently concluding agency regulation was properly promulgated under APA and comparing Ninth Circuit's upholding of the same regulations);[2] *compare Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618 (8th Cir. 1991) *with Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1981) (circuits will independently interpret the meaning of federal regulations); *see also Bhd. of Locomotive Engineers v. Atchinson, Topeka & Santa Fe R. Co.*, 516 U.S. 152, 162 (1996) (resolving circuit split where two circuits reached opposite

[2] The corollary of the power to enjoin a regulation as invalid may be conceived of as the power to uphold a regulation as valid; *Davidson* stands for the proposition that circuits will independently uphold regulations.

conclusions about a federal agency's interpretation of applicable statute). Thus, precedent actually suggests that a court's decision reviewing an agency action is like any other judicial action, and that an agency action is not necessarily authoritatively invalid on a national basis, but only within the judicial circuit that issued the opinion.

Defendants cite *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998) for the proposition that regulations stricken as invalid are stricken on a national, not circuit-wide basis. But *National Mining Ass'n* does not go so far. *National Mining Ass'n* stands for the unremarkable, narrower proposition that an injunction issued by the district court in the case was valid against the agency on a national basis, not merely within the geographic jurisdiction of the court. *Id.* at 1409. The Court agrees that federal district courts have broad power to issue injunctive relief, and may enjoin parties' actions beyond the district in which it sits. *See, e.g., Ave Maria Found. v. Sebelius*, 13-cv-15198, 2014 WL 117425 (E.D. Mich. Jan. 13, 2014) (Murphy, J.) (enjoining enforcement of agency regulation against party located outside the Eastern District of Michigan). And, thus, if the Department of Labor were to try and enforce AI 2010-1 on a prospective basis in this district, the question would be much different, and the Court would likely declare the Department of Labor in violation of the D.C. district court's proper order.

But the broader point as to whether—and *why*—AI 2010-1 is invalid or invalid on a retrospective basis, is not answered by *National*

Mining Ass'n.[3] The proposition that a district court may issue injunctions that bind parties outside its geographic jurisdiction is distinct from whether *this* Court *must*, as a matter of binding order or precedent, adopt the D.C. Circuit's conclusion that AI 2010-1 is void *ab initio*. As discussed above, *Cumberland Med Ctr.* clearly demonstrates the Sixth Circuit has previously acted under the rule that agency regulations like the on in *National Mining Ass'n* may be stricken on a circuit-by-circuit basis, and independently by each circuit. The fact that the Department of Labor has been enjoined from enforcing AI 2010-1 on a prospective basis does not necessarily lead to the conclusion that the rule was void *ab initio* for the relevant time period in 2010, and for the same reasoning, with respect to courts of the Sixth Circuit. Accordingly, the Court concludes that the D.C. Circuit's decision and order to strike AI 2010-1 does not automatically invalidate the rule on a retrospective basis for courts in the Sixth Circuit or the instant case.

More generally, as a decision by a Circuit outside of the Sixth, *Mortgage Bankers Ass'n* is not binding appellate precedent that this Court must follow. *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D.Mich. 1987); *see generally Berryhill v. United States*, 199 F.2d 217, 219 (6th Cir. 1952). The Court is not required to conclude

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[3] The Tenth Circuit in *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012), noted that although it joined multiple other circuit in invalidating an agency regulation, the circuits split on the reasoning the regulation was invalid. *Id.* at 816 (comparing the disparate reasoning in *Prestol Espinal v. Att'y Gen.*, 653 F.3d 213, 217-24 (3d Cir. 2011) with *Pruidze v. Holder*, 632 F.3d 234, 240 (6th Cir. 2011)).

that, solely under *Mortgage Bankers Ass'n*, AI 2010-1 is invalid.[4]

Stepping back, the immediate question at hand is whether Defendants are entitled to summary judgment under Section 10 of the Portal-to-Portal Act. To reach the ultimate question as to whether Defendants acted in good faith between March 24, 2010 and May 31, 2010, Defendants assume that AI 2010-1 is invalid. But the Court must independently decide whether AI 2010-1 is invalid.[5] The Court concludes it will not grant summary judgment that requires it to answer an implicit question that is not specifically before this Court, has already been initially decided, and has not been fully briefed.

Finally, although the Court did grant Defendants' motion for summary judgment for good faith under the Portal-to-Portal Act for the period between FLSA 2006-31 and March 24, 2010, it is not beyond dispute here that Defendants may rely on a defense asserting their own good faith actions after March 24, 2010. Because Defendants' instant

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[4] And, the *Alaska Hunters* rule that the D.C. Circuit relies on itself has not been adopted by every circuit, as the court in *Mortgage Bankers Ass'n* noted. *Mortgage Bankers Ass'n v. Harris*, 720 F.3d 966, 969 n.3 (D.C. Cir. 2013) ("the Courts of Appeals are split on the issue"). *Mortgage Bankers Ass'n* also notes a difference in opinion regarding the scope of the circuit split on the *Alaska Hunters* rule, with one court concluding the Sixth Circuit followed the rule, and one court concluding it did not. *Id.* The Court will not conclude the Sixth Circuit would necessarily strike AI 2010-1 on identical grounds.

[5] The Court must also decide the corollary question as to the proper effect of AI 2010-1's vacating and the reinstatement of FLSA 2006-31 on a retrospective, rather than prospective, basis.

motion is premised on the extension of an administrative and legal ruling, they have understandably not attached discovery or other evidence attesting to this fact. With the lifting of the stay in this case, the Court will consider such evidence if and when it is produced.[6]

CONCLUSION

The D.C. Circuit's vacating of AI 2010-1 does not apply nationally, its decision is not a binding appellate decision on courts of the Sixth Circuit, and the Court is therefore not required to accept the conclusion that AI 2010-1 is invalid. The Court will not decide the question on an implied basis without further argument or hearing. Accordingly, the Court will deny the motion for summary judgment without prejudice.

ORDER

WHEREFORE, it is hereby **ORDERED** that Defendant's motion for summary judgment (document no. 141) is **DENIED WITHOUT PREJUDICE.**

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: February 19, 2014

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[6] The distinction between relying on the Court's findings of fact with respect to conditional certification on one hand, and declining to do so with respect to summary judgment on the other, is clear: while the first is only conditional, and may be challenged at a later date with proper evidence, the second is dispositive and final.

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on February 19, 2014, by electronic and/or ordinary mail.

s/Carol Cohron
Case Manager

EXCERPTS OF STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 551:

For the purpose of this subchapter—

(5) "rule making" means agency process for formulating, amending, or repealing a rule . . . .

5 U.S.C. § 553:

(b) General notice of proposed rule making shall be published in the Federal Register . . . .

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .

5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . .
>
> (D) without observance of procedure required by law . . . .

1971 WL 33052 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion Letter Fair Labor Standards Act (FLSA)

WH-115

January 15, 1971

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This is in further reply to your letter of October 26, 1970, in which you present three situations involving bank employees classified as salesmen who sell the bank's services, e.g., checking accounts, savings accounts, loans, bonds, and credit card business. You ask if these employees can be exempt as outside salesmen under section 13(a)(1) of the Fair Labor Standards Act as defined in Regulations, Part 541.5.

An employee who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place of business in making sales within the meaning of section 3(k) of the Act or in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid and whose hours of work of a nature other than sales work do not exceed 20 percent of the hours worked in the workweek by the nonexempt employees of his employer will qualify for exemption as an outside salesman.

In determining whether the employees in the three

situations you describe qualify for this exemption it is first necessary to ascertain what would be exempt type work within the meaning of this exemption.

We would consider that an employee who actually obtains an application for a bond on the payroll savings plan, a checking account, or a loan would be engaged in exempt type work; the consideration in each of these cases being the payment or deduction for the bond, the charges made or the deposit of the minimum amount required for the checking account, and the interest paid for the amount loaned.

The credit card representative would also be considered engaged in exempt work because he is in effect "selling" the bank's services for which a consideration will be paid by the retail merchant or his customers.

However, if the employee does not obtain the order or the agreement but merely leaves instructions or application blanks which are submitted to the bank he would not be engaged in exempt work. Also, obtaining agreements for payroll deductions for savings accounts would not be exempt type work as this is actually the reverse of "selling". He is asking for the potential depositors to give the bank something for which it in turn will pay interest or dividends.

Accordingly, if the employees concerned are engaged in exempt type work and do not exceed the

20 percent tolerance permitted for nonexempt work they would qualify for exemption under Regulations, Part 541.5.

Sincerely,

Robert D. Moran
Administrator

Enclosure

1999 WL 1002401 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion Letter Fair Labor Standards Act (FLSA)

May 17, 1999

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This is in response to your letter requesting an opinion regarding the exempt status of loan officers under section 13(a)(1) of the Fair Labor Standards Act (FLSA).

You state that the loan officers are employed by your client, a mortgage brokerage company. These loan officers develop new business for the employer by contacting prospective borrowers and referral sources; evaluate the borrowers' financial situation and provide a "prequalification letter" that is used by the borrower, real estate agents, and potential sellers in negotiating the sale; consult with borrowers to obtain the best loan package available (e.g. best interest rates, lowest points and fees, maximum affordable loan amount); work with approximately ten different lenders in selecting loan programs for borrowers; consult with the borrowers regarding the desirability of "locking-in" a given interest rate; assist the borrowers in preparing a loan application for a selected loan program; present and obtain signature of the borrower on disclosures required by federal and state laws; submit loan application to the central

office for processing; and consult with loan processors or the borrowers in resolving problems or in obtaining additional information regarding the loan package.

You state that loan officers report to branch managers, and are subject to very little supervision. The branch managers do not participate in the selection of a particular loan program or review the loan program prepared for the borrowers.

Section 13(a)(1) of the FLSA provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as those terms are defined in the enclosed Regulations, 29 CFR Part 541. An employee may qualify for exemption if all the pertinent tests relating to duties, responsibilities and salary, as discussed in the appropriate sections of the regulations, are met.

An employee who is paid on a salary or fee basis of at least $250 per week may qualify for exemption as a bona fide administrative employee if the employee's primary duty is office or nonmanual work directly related to management policies or general business operations of his/her employer or his/her employer's customers, and the employee's work requires the exercise of discretion and independent judgment.

Activities contemplated by the regulations as being "directly related to management policies or general

business operations" of an employer are those related to the administrative operations of a business, as distinguished from the basic tasks of the employer's business, that is, the "production" work of the business. The administrative exemption is limited to persons who perform work of substantial importance to the business of their employer or the employer's customers, and include "white collar" employees engaged in "servicing" a business. Examples of such activity include personnel administration, labor relations, research, planning, or assisting a management official to carry out the executive or administrative functions of that official. In general "administrative employee" means a person who is engaged in staff functions as opposed to the line functions of an employer.

From the information submitted, it appears that the loan officers are engaged in carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business. These activities also appear to require the use of skills and experience in applying techniques, procedures, or specific standards rather than the exercising of discretion and independent judgment, within the meaning of the regulations. It is, therefore, our opinion that the loan officers would not qualify as bona fide administrative employees within the meaning of section 541.2 of the regulations. Such employees must be paid in accordance with the minimum wage and overtime provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed therein.

We trust the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Enclosure

2001 WL 1558764 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion Letter Fair Labor Standards Act (FLSA)

February 16, 2001

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This is in response to your letter requesting a reconsideration of our opinion of May 17, 1999, concerning the exempt status of loan officers under section 13(a)(1) of the Fair Labor Standards Act (FLSA). You ask that we consider the loan officers' exempt status in light of the advisory duties they perform on behalf of their employer's customers.

You state, among other things, that the loan officer's job is to work with the borrower to create a loan package that best meets the goals of the borrower while still complying with the varied and complicated lender requirements. The loan officer must select from a wide range of loan packages in order to properly advise the client, and supervise the processing of the transaction to closing. The loan officer must also acquire a full understanding of the customer's credit history and financial goals in order to advise them regarding the selection of a loan package that will fit their needs and ability.

Based on the information you submitted indicating that the primary duty of a loan officer is to advise a borrower in the selection of a loan package, we

agree that the primary duty of the loan officer consists of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or the employer's customers. However, in order for the exemption to apply, the loan officer must also customarily and regularly exercise discretion and independent judgment as required by Regulations, 29 CFR Part 541. The regulations in section 541.207 indicate that confusion exists between "the exercise of discretion and independent judgment" and "the use of skills in applying techniques, procedures, or specific standards", and these terms are most frequently misunderstood and misapplied by employers and employees. An employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow, or who determines whether specific standards are met or whether an object falls into one or another of a number of definite grades, classes, or other categories is not exercising discretion and independent judgment within the meaning of section 541.2 of the regulations.

From the information you submitted, it appears the loan officers are using their skill and knowledge in applying techniques, procedures, and/or specific standards (such as loan-to-value ratios and debt ratios) in choosing an already established loan package that best meets the needs and financial abilities of the borrower and which comports with the specified requirements of the lender. We, therefore, conclude that the loan officers in question are not exercising the necessary discretion

and independent judgment within the meaning of the regulations, and would not be exempt as administrative employees.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed therein.

We trust the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Office of Enforcement Policy
Fair Labor Standards Team

2006 WL 1094597 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion Letter Fair Labor Standards Act (FLSA)

FLSA2006-11
March 31, 2006

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***[a1]

This is in response to your request for an opinion regarding whether certain "sales force" mortgage loan officers qualify for the minimum wage and overtime exemption for outside sales employees set forth in section 13(a)(1) of the Fair Labor Standards Act (FLSA) (copy enclosed). It is our opinion that the "sales force" loan officers you describe qualify as exempt outside sales employees.

Your request involves mortgage loan officers, also referred to as loan originators, who perform their work primarily outside the employer's offices; you expressly exclude from the request loan officers who "perform their work mainly within the office." The mortgage loan officers at issue meet with customers to sell mortgage loan packages. These "sales force" loan officers are responsible for originating their own sales by contacting prospective clients and by developing and maintaining referral sources. The "sales force" loan officers spend a significant amount of time away from their employer's place of business in

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[a1] *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7)*

performing their principal duty of selling the loan products offered by their employer. The "sales force" loan officers meet with prospective clients at locations other than the employer's business, such as a client's home or other locations away from the employer's place of business. They meet with clients in person to sell mortgage loan packages; their contact with clients by telephone, mail, and e-mail is adjunct to these in-person contacts. The "sales force" loan officers also obtain credit information and other necessary documentation for the loan application process. They make in-person calls on real estate agents and brokers, financial advisors, and other potential referral sources to develop borrower leads. The "sales force" loan officers also engage in marketing and promotional activities in support of their own sales. The "sales force" loan officers have considerable flexibility to set their working hours and to schedule the tasks they perform during the workday.

You state that the "sales force" loan officers are "customarily and regularly" engaged away from the employer's place of business and offices in their homes. The "sales force" loan officers spend some time in their employer's office taking loan applications, attending meetings, completing paperwork, and preparing marketing and sales materials in support of their own sales efforts. Additional activities that may be performed at the employer's place of business or the employees' home offices include: checking and bringing databases of loan products for sale and referral services up to date; calling, writing to, or

communicating by e-mail with clients or prospects with whom the "sales force" loan officers have been dealing during their outside sales activities; talking to such clients or prospects in the office about their particular loan transactions; calling, writing to, or communicating by e-mail with lists of prospective clients, loan product vendors, and referral sources with whom the "sales force" loan officers may not have had prior contact; and preparing loan applications and other forms for loan sales initiated or negotiated by the "sales force" loan officers during outside sales activities.

Section 13(a)(1) of the FLSA provides an exemption from the minimum wage and overtime requirements of the Act for "any employee employed . . . in the capacity of outside salesman." The Department's regulations define that statutory phrase as including "any employee":

> (1) Whose primary duty is:
> (i) making sales within the meaning of section 3(k) of the Act, or
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500 (copy enclosed). "Primary duty"

means "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. § 541.700 (copy enclosed). FLSA section 3(k) defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *See also* 29 C.F.R. § 541.501 (copy enclosed).

Under 29 C.F.R. § 541.701 (copy enclosed), "[t]he phrase 'customarily and regularly' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks."

The regulations provide further guidance regarding what it means to be "engaged away from the employer's place of business" for purposes of 29 C.F.R. § 541.500. "The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls." 29 C.F.R. § 541.502 (copy enclosed). Outside sales employees may perform promotional work as an exempt outside sales activity if it "is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." 29 C.F.R. § 541.503 (copy enclosed). Whether promotional work is to be considered exempt is determined on a case-by-case basis. *Id.*

It is the position of the Wage and Hour Division that employees of finance companies who obtain and solicit mortgages may be exempt outside sales employees if they are "customarily and regularly engaged away from their employer's place of business in obtaining mortgages from brokers and individuals." Field Operations Handbook (FOH) § 22e02 (copy enclosed). "Work incidental to the employee's obtaining the mortgage, such as obtaining credit information from the mortgagor, before and after the sale would qualify as exempt work if done with respect to [the employee's] own sales." *Id.*

Your letter also refers to FOH § 22e06 (copy enclosed), which lists several activities that real estate sales employees may perform at the employer's place of business in conjunction with outside sales work without losing the outside sales exemption. These activities include:

> 1. Bringing a multiple listing book up to date;
>
> 2. Calling prospects with whom the sales employee has been dealing during outside sales activities;
>
> 3. Dictating or writing letters to such prospects;
>
> 4. Talking to such prospects in the office about their particular transactions;

> 5. Calling a list of prospective buyers or sellers of homes with whom the sales employee has had no prior contact;
>
> 6. Preparing a contract and other forms required for a sale negotiated during the sales employee's outside sales activity; and
>
> 7. Talking to a "walk-in" prospect with whom the employee has had no prior contact and showing photographs and discussing terms on specific houses, if such activity results in subsequent outside sales activity with the prospect.

Id. You suggest that these duties are analogous to the tasks performed by the "sales force" loan officers while at their employer's place of business or their home office. For purposes of this letter, "employer's place of business" includes the employee's home office, because "any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property." 29 C.F.R. § 541.502.

Based on the information you have provided, the "sales force" loan officers appear to meet the requirements for the outside sales exemption. First,

the "sales force" loan officers fulfill the sales requirement of the exemption. Their principal duty is the sale of mortgage loan packages. According to WH Opinion Letter January 15, 1971 (copy enclosed), "an employee who actually obtains an application for . . . a loan would be engaged in exempt work; the consideration . . . being the . . . interest paid for the amount loaned." Therefore, the sale of mortgage loan packages meets the definition of sales in section 3(k) of the FLSA. *See* FOH § 22e02.

Second, whether "sales force" loan officers are "customarily and regularly engaged away from the employer's place of business" depends on the extent to which they engage in sales or solicitations, or related activities, outside of the employer's place or places of business. By meeting clients outside of the employer's place of business in order to initiate sales, such as at the clients' homes, the "sales force" loan officers fulfill the "outside" requirement of the outside sales exemption. Activities employees perform that are incidental to their outside sales or solicitations also qualify as exempt outside sales work, but only if the incidental activity is in support of their own sales and not just generally "directed towards stimulating the sales of [the] company." 69 Fed. Reg. 22,160, 22,163 (Apr. 23, 2004) (copy enclosed). *See also* 29 C.F.R. §§ 541.500(b) and 541.503. In addition, the frequency of performing qualifying exempt outside sales activities must "normally and recurrently [be] performed every workweek; it does not include isolated or one-time tasks." 29 C.F.R. § 541.701.

This type and frequency of exempt outside sales activity is implicit in your representation that "sales force" loan officers "perform their work primarily outside the office." Of course, "sales force" loan officers who do not engage in outside sales activity as a normal and recurrent part of their workweek fail to meet the exemption's requirements.

Finally, the "sales force" loan officers may qualify for the outside sales exemption even though they may perform some activities at their employer's place of business, so long as the inside sales activity is incidental to and in conjunction with qualifying outside sales activity. *See Olivo v. GMAC Mortgage Co.,* 374 F. Supp. 2d 545, 551 (E.D. Mich. 2004). The performance of activities related to the sales of mortgage loan packages made outside the employer's place of business does not disqualify the "sales force" loan officer from the exemption. Activities such as making phone calls, sending e-mails, and meeting with clients in the office are considered exempt if performed incidental to or in conjunction with the "sales force" loan officer's own outside sales activities. 29 C.F.R. § 541.503; FOH § 22e02.

Therefore, although each "sales force" loan officer must be evaluated on an individual basis to determine whether he or she qualifies for the outside sales exemption, those employees whose job duties match the duties described above would be exempt from the minimum wage and overtime requirements of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.
Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

Enclosures:

29 C.F.R. §§ 541.500-.503

29 C.F.R. § 541.700-.701

69 Fed. Reg. 22,160, 22,163 (Apr.23, 2004)

FOH §§ 22e02, 22e06

WH Opinion Letter January 15, 1971

2006 WL 2792445 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion Letter Fair Labor Standards Act (FLSA)

FLSA2006-31
September 8, 2006

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***[a1]

This is in response to your request for an opinion concerning the application of the administrative exemption under section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(1) (copy enclosed), and the implementing regulations at 29 C.F.R. Part 541 (copy enclosed), to certain employees employed as mortgage loan officers. Based on the analysis below, it is our opinion that the mortgage loan officers you describe are exempt administrative employees.

You state that, in the industry, other job titles for referring to mortgage loan officers include "mortgage loan representatives," "mortgage loan consultants," "mortgage loan originators," "mortgage bankers," and similar titles. Our response collectively refers to all such employees as "mortgage loan officers." Please note, however, that an employee's exempt status is not determined based on job title or job classification; rather, it is determined by analyzing each particular

[a1] Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).

employee's actual job duties and compensation under the applicable regulations. "The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part." 29 C.F.R. § 541.2.

You indicate that mortgage loan officers work under various business models and their duties vary accordingly. The particular mortgage loan officers in your request spend the majority of their working time inside their employer's place of business (or inside the employees' offices located in their homes), although some also may meet with customers or referral sources such as realtors or builders away from the office. Your request specifically does not address mortgage loan officers who are customarily and regularly engaged away from their employer's place(s) of business (or away from their home offices) who may be considered for possible exemption under the outside sales exemption defined at 29 C.F.R. § 541.500.[1] In addition, employees who spend the majority of their time inside the office prospecting for potential customers who have not previously expressed an interest in obtaining information about a mortgage loan (*e.g.*, employees in a call center environment primarily selling financial products as "outbound

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[1] *See* *Opinion Letter FLSA2006-11* (March 31, 2006) (mortgage loan officers who customarily and regularly engage in making sales away from their employer's place of business qualify for the outside sales exemption because "[t]heir principal duty is the sale of mortgage loan packages").

telemarketers") are outside the scope of your request. Further, "loan processors," who coordinate appraisals and title work and review the customers' supporting financial documents (*e.g.*, pay stubs, W-2s, bank statements, and tax returns for self-employed individuals) to determine whether they meet the documentation requirements associated with the mortgage loan, are also specifically outside the scope of your request.

You describe the primary duties of the mortgage loan officers as follows. Mortgage loan officers work with the employer's customers to assist them in identifying and securing a mortgage loan that is appropriate for their individual financial circumstances and is designed to help them achieve their financial goals, including home ownership. Mortgage loan officers respond to and follow up on customer inquiries (sometimes referred to as "leads") that come from several sources. The loan officer will collect and analyze the customer's financial information and assess the customer's financial circumstances to determine whether the customer and the property qualify for a particular loan. This involves inquiries into the customer's income, assets, investments, debt, credit history, prior bankruptcies, judgments, and liens, as well as characteristics of the property and similar information. The loan officer will also advise the customer about the risks and benefits of the loan alternatives, including the options and variables involved. Many mortgage banking companies offer multiple mortgage products, resulting in hundreds of loans to choose from, requiring specific analysis,

evaluation, and advice from the loan officers. Loan officers must also stay up-to-date on changes in market conditions.

Additionally, some loan officers use technological tools to help them serve their customer's needs. For example, loan officers may use computer software to assist in the underwriting process by helping evaluate whether the customer qualifies for the loan. These products assist the loan officer in communicating a loan prequalification, loan pre-approval, or qualified loan approval. You emphasize, however, that these tools do not substitute for the discretion and judgment required of the loan officer; and the loan officer is responsible for recommending the best products for the customer.

You describe the sales component of the mortgage loan officer's duties, *i.e.*, when he or she spends time selling mortgage loan products to customers, as "customer-specific persuasive sales activity, such as encouraging an individual potential customer to do business with his or her employer's mortgage banking company rather than a competitor, or to consider the possibility of a mortgage loan if they have not expressed prior interest." You contrast this sales activity with "marketing, servicing or promoting the employer's financial products," which you describe as the marketing of the employer's mortgage banking company or products generally, as well as the promotion of brand awareness and the creation of demand among realtors, builders, developers, and other entities.

You state that both the customer-specific persuasive sales activity and the more general marketing or promoting activities may take place during the same discussion with the customer. You ask that we assume for purposes of responding to your request that less than 50 percent of the mortgage loan officer's working time over a representative period is spent on customer-specific persuasive sales activity.

You acknowledge in your request that the administrative exemption requires payment on a salary or fee basis at a rate of not less than $455 per week. While you do not specify the particular compensation arrangements for the mortgage loan officers in question, you ask that we assume in responding to your request that they are paid on a salary basis at a rate of at least $455 per week.

You seek an opinion on three questions: (1) whether the principles for determining whether employees in the financial services industry are administratively exempt under the new regulations also apply under the prior regulations; (2) whether the mortgage loan officers described above meet the administrative duties test set forth for employees in the financial services industry as an example of the administrative exemption in 29 C.F.R. § 541.203(b); and (3) whether employees in the financial services industry who meet the duties requirements as described in section 541.203(b) exercise sufficient discretion and independent judgment even though they may use certain underwriting software programs or tools.

In response to your first question, FLSA section 13(a)(1) provides an exemption from the minimum wage and overtime provisions for "any employee employed in a bona fide executive, administrative, or professional capacity," as those terms are defined in 29 C.F.R. Part 541. An employee may qualify for exemption if all the regulatory tests relating to duties and salary are met. The regulations were revised effective August 23, 2004 (69 Fed. Reg. 22,122 (Apr. 23, 2004)). Because the criteria in the duties test for the administrative exemption in the 2004 revised final regulations are substantially the same as under the prior rule, the outcome of this opinion would be essentially identical under either version of the regulations. *See Robinson-Smith v. Gov't Employees Ins. Co.*, 323 F. Supp. 2d 12 (D.D.C. 2004); *McLaughlin v. Nationwide Mut. Ins. Co.*, No. Civ. 02-6205-TC, 2004 WL 1857112 (D. Or. 2004).

Regarding your second question, under 29 C.F.R. § 541.200(a), "[t]he term 'employee employed in a bona fide administrative capacity' in section 13(a)(1) of the Act" means "any employee":
(1) Compensated on a salary or fee basis at a rate of not less than $455 per week . . . , exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of

discretion and independent judgment with respect to matters of significance.

Id.

Work that is "directly related to the management or general business operations" of the employer is defined as "work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a).

"The term 'primary duty' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a). "The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee," but time alone "is not the sole test." 29 C.F.R. § 541.700(b).

Section 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) "[e]mployees in the financial services industry." Such employees are ordinarily considered to meet the duties requirements for the administrative exemption if their duties include:

> work such as collecting and

> analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

29 C.F.R. § 541.203(b).[2] The preamble to the 2004 regulations reviewed the pertinent case law drawn from the financial services industry and concluded:

> The Department agrees that employees whose primary duty is

[2] The preamble also recognizes that some selling activity may occur without causing loss of the administrative exemption for employees in the financial services industry, as long as selling financial products is not the employee's primary duty. You ask in your request that we assume that less than 50 percent of the mortgage loan officer's working time over a representative period is spent on "customer-specific persuasive sales activity." As noted earlier, an employee's primary duty is defined in 29 C.F.R. § 541.700 as "the principal, main, major or most important duty the employee performs" based on all the facts in a particular case, with the major emphasis on "the character of the job as a whole," and the amount of time spent performing particular tasks is not the sole test.

> inside sales cannot qualify as exempt administrative employees. However, as found by the *John Alden*, *Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

69 Fed. Reg. at 22,146 (copy enclosed). *See Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997); *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002).

You describe the duties of mortgage loan officers here as collecting and analyzing the customer's financial information and assessing the customer's financial circumstances to determine whether the customer and the property qualify for a particular loan. This involves inquiries into the customer's income, assets, investments, debt, credit history, prior bankruptcies, judgments, and liens, as well as characteristics of the property and similar

information. The loan officer will also advise the customer about the risks and benefits of the loan alternatives, including the options and variables involved. The mortgage loan officer must analyze the information provided by the customer and advise on an array of options and variables, all of which make up the various components of the loan.

Your description of the duties of these mortgage loan officers suggests that they have a primary duty other than sales, as their work includes collecting and analyzing a customer's financial information, advising the customer about the risks and benefits of various mortgage loan alternatives in light of their individual financial circumstances, and advising the customer about avenues to obtain a more advantageous loan program. Based upon the foregoing, we conclude that these mortgage loan officers satisfy the duties requirement under 29 C.F.R. § 541.203(b).[3]

The mortgage loan officers also satisfy the traditional duties requirements of the administrative exemption by performing office or non-manual work directly related to the management or general business operations of the employer, and by performing duties that include the exercise of discretion and independent judgment with respect to matters of significance.

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[3] Of course if, based on all the facts in a particular case, a mortgage loan officer's primary duty is selling mortgage loans, the mortgage loan officer will not qualify for the administrative exemption. 29 C.F.R. § 541.203(b).

See 29 C.F.R. § 541.200(a)(2)-(3). Similar to the employees discussed in the 2004 preamble in the *John Alden*, *Hogan*, and *Wilshin* cases--all of whom were found to satisfy the duties requirements of the administrative exemption--the employees here service their employer's financial services business by marketing, servicing, and promoting the employer's financial products. *See John Alden*, 126 F.3d at 8-14 (administrative exemption applied to insurance marketing representatives who represented the company to third party agents, promoted sales, and kept informed about the market to help match products with customer needs); *Hogan*, 361 F.3d at 626-28 (insurance agents administratively exempt who serviced and advised existing customers, adapted customer's policies to their needs, promoted sales, and hired and trained staff among other duties); *Wilshin*, 212 F. Supp. 2d at 1376-79 (administrative exemption applied to insurance agent who stayed knowledgeable about the market and needs of customers, recommended products to clients, provided claims help, promoted the company, and directed the day-to-day affairs of the office).

With regard to your third question, the use of software programs or tools to assess risk and to narrow the scope of products available to the customer does not necessarily disqualify the employees from the administrative exemption for lack of discretion and independent judgment. The regulations describe the requirement of discretion and independent judgment as follows:

> To qualify for the administrative

> exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

29 C.F.R. § 541.202(a).

As provided in section 541.202(b):

> The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee

> carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. § 541.202(b).

Section 541.202(c) describes an employee's exercise of discretion and independent judgment as

including the authority to make an independent choice that is free from immediate direction or supervision. However, "[t]he fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." *Id.* Section 541.202(e) further clarifies that the "exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." The regulations note that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly." 29 C.F.R. § 541.202(f). Further, "[t]he use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act." 29 C.F.R. § 541.704. The use of "well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances," however, does not meet the "exercise of discretion and independent judgment" requirement. *Id.*

In general, the exercise of discretion and

independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. 29 C.F.R. § 541.202(a). In your letter, you stated that some software programs display available products along with their qualification requirements, terms, and prices, many of which change on a daily or even more frequent basis. These programs enhance the mortgage loan officer's ability to evaluate the products, options, and variables available to determine which mortgage products might serve the customer's needs. So long as these programs do not select the mortgage loan product for the mortgage loan officer and the mortgage loan officer is still responsible for assessing the alternatives and making recommendations to the customer, the use of technological tools would not mean that the mortgage loan officer does not exercise the necessary discretion and independent judgment.

Based on the foregoing analysis, we conclude that the mortgage loan officers described above satisfy the duties requirements of the administrative exemption.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your

letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Paul DeCamp
Administrator

2010 WL 1822423 (DOL WAGE-HOUR)

Wage and Hour Division

United States Department of Labor
Opinion Letter Fair Labor Standards Act (FLSA)

FLSA2010-1
March 24, 2010

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Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

SUBJECT: Application of the Administrative Exemption under Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1), to Employees who Perform the Typical Job Duties of a Mortgage Loan Officer.

Based on the Wage and Hour Division's significant enforcement experience in the application of the administrative exemption, a careful analysis of the applicable statutory and regulatory provisions and a thorough review of the case law that has continued to develop on the exemption, the Administrator is issuing this interpretation to provide needed guidance on this important and frequently litigated area of the law. Based on the following analysis it is the Administrator's interpretation that employees who perform the typical job duties of a mortgage loan officer, as described below, do not qualify as bona fide administrative employees exempt under section

13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1).

Typical Job Duties of Mortgage Loan Officers

The financial services industry assigns a variety of job titles to employees who perform the typical job duties of a mortgage loan officer. Those job titles include mortgage loan representative, mortgage loan consultant, and mortgage loan originator. For purposes of this interpretation the job title of mortgage loan officer will be used. However, as the regulations make clear, a job title does not determine whether an employee is exempt. The employee's actual job duties and compensation determine whether the employee is exempt or nonexempt. 29 C.F.R. § 541.2.[1]

Facts found during Wage and Hour Division investigations and the facts set out in the case law establish that the following are typical mortgage loan officer job duties: Mortgage loan officers

[1] This Administrator's Interpretation applies to employees who spend the majority of their time working inside their employer's place of business, including employees who work in offices located in their homes, rather than mortgage loan officers who are customarily and regularly engaged away from their employer's place of business. It also applies to employees who do not spend the majority of their time engaging in "cold-calling", contacting potential customers who have not in some manner expressed an interest in obtaining information about a mortgage loan. However, because many of the duties of all mortgage loan officers are similar, cases arising in these other contexts are referred to for guidance and cited in this interpretation.

receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity. Mortgage loan officers collect required financial information from customers they contact or who contact them, including information about income, employment history, assets, investments, home ownership, debts, credit history, prior bankruptcies, judgments, and liens. They also run credit reports. Mortgage loan officers enter the collected financial information into a computer program that identifies which loan products may be offered to customers based on the financial information provided. They then assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers' needs with one of the company's loan products. Mortgage loan officers also compile customer documents for forwarding to an underwriter or loan processor, and may finalize documents for closings. *See, e.g., Yanni v. Red Brick Mortgage*, 2008 WL 4619772, at *1 (S.D. Ohio 2008); *Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *2 (W.D. Pa. 2007); *Geer v. Challenge Financial Investors Corp.*, 2007 WL 2010957 (D. Kan. 2007), at *2; *Chao v. First National Lending Corp.*, 516 F. Supp. 2d 895, 904 (N.D. Ohio 2006), *aff'd*, 249 Fed.App. 441 (6th Cir. 2007); *Epps v. Oak Street Mortgage LLC*, 2006 WL 1460273, at *4 (M.D. Fla. 2006); *Rogers v. Savings First Mortgage, LLC*, 362 F. Supp. 2d 624, 627 (D. Md. 2005); *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *1 (D. Minn. 2002).

Exemptions from minimum wage and overtime requirements under the FLSA "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). To fall within the meaning of an "employee employed in a bona fide administrative capacity" an employee's job duties and compensation must meet all of the following tests:

1. The employee must be compensated on a salary or fee basis as defined in the regulations at a rate not less than $455 per week;

2. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

3. The employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200.

This interpretation focuses on the application of the second test to employees who perform the typical jobs duties of a mortgage loan officer:

> Whether the primary duty of employees who perform the typical job duties of a mortgage loan officer is office or non-manual work directly related to the management or

> general business operations of their employer or their employer's customers.

Primary Duty is Work Directly Related to the Management and General Business Operations of the Employer.

An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). To be exempt, a mortgage loan officer's primary duty must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). In turn, to be work directly related to the management or general business operations of the employer, the work must be "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Work directly related to management or general business operations of an employer includes work in functional areas such as accounting, budgeting, quality control, purchasing, advertising, research, human resources, labor relations, and similar areas. 29 C.F.R. § 541.201(b).

Thus, the administrative exemption is "limited to those employees whose primary duty relates 'to the administrative as distinguished from the production operations of a business.'" 69 Fed. Reg.

22122, 22141 (April 23, 2004), quoting the 1949 Weiss Report. In other words, "it relates to employees whose work involves servicing the business itself -- employees who 'can be described as staff rather than line employees.'" *Id.*, quoting the 1940 Stein Report.

This "production versus administrative" dichotomy is intended to distinguish "between work related to the goods and services which constitute the business' marketplace offerings and work which contributes to 'running the business itself.'" *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002), quoting *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1070 (9th Cir. 1990); *see Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 535 (2nd Cir. 2009) ("[W]e have drawn an important distinction between employees directly producing the good or service that is the primary output of a business and employees performing general administrative work applicable to the running of any business."); *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990) (the dichotomy distinguishes between "those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market"); Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005) (same). Thus, the dichotomy is "a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption." 69 Fed. Reg. at 22141. Moreover, the dichotomy is "determinative if the work 'falls

squarely on the production side of the line.'" *Id.*, quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d at 1127; *see* Wage and Hour Opinion Letter FLSA2006-45 (Dec. 21, 2006) (copy editors working for a marketing firm that promotes the sale of books, who read and correct the firm's marketing promotional materials, fall squarely on the production side of the line and, therefore, are not exempt); Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005) (background investigators working for a company that contracts with the government to conduct security clearance investigations of potential government employees perform the day-to-day production work of their employer and, therefore, are not exempt).

Work does not qualify as administrative simply because it does not fall squarely on the production side of the line. As the court stated in *Martin v. Indiana Michigan Power Co.*, 381 F.3d 574, 582 (6th Cir. 2004), while production work cannot be administrative, there is no "absolute dichotomy under which all work must either be classified as production or administrative." The court rejected the company's argument that its information technology support specialists were administrative employees because they performed troubleshooting on computers on individual employees' desks and were not directly involved with the nuclear power plant equipment that "produced" electricity. Otherwise, the court asserted, employees such as "the janitorial staff, the security guards, the cooks in the cafeteria, and various other workers" would be viewed as doing administrative work. *Id.*; *see*

Schaefer v. Indiana Michigan Power Co., 358 F.3d 394, 402-03 (6th Cir. 2004) (employee who was primarily responsible for shipments of radioactive materials and waste away from the plant, setting up shipments with the transporter and waste management facility, determining the type of packaging to be used, preparing manifests, inspecting containers, etc., is not engaged in administrative work simply because he is engaged in an activity collateral to the principal business purpose of producing electricity; duties must be related to servicing the business itself to be administrative).

The decision in *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896 (3d Cir. 1991), *cert. denied*, 503 U.S. 936 (1992), in which the Third Circuit evaluated the status of inside salespersons who sold electrical products for their employer, is instructive. The court found that such inside salespersons were production workers who did not qualify for the administrative exemption because the company's primary business purpose was to sell electrical products. The court concluded that the salespersons did not "service" the business simply because they engaged in negotiations and represented the employer in their sales efforts, because such negotiations over the price and other terms of the sale "are 'part and parcel' of the activity of 'producing sales'." *Id.* at 904. Accordingly, any such duties undertaken "in the course of ordinary selling do not constitute administrative-type 'servicing' of Cooper's wholesale business . . . These activities are only

routine aspects of sales *production*." *Id.* at 905 (emphasis in original); *see* Wage and Hour Opinion Letter of July 23, 1997, 1997 WL 970727 (although "marketing activity geared to furthering a company's overall sales effort," such as performing public relations or advertising or designing a company's overall sales campaign, is administrative work, engaging in "ordinary day-in-day-out selling activity directed at making specific sales" is not).

The court in *Casas v. Conseco* applied these principles to mortgage loan officers and held that they were "production rather than administrative employees. Conseco's primary business purpose is to design, create and sell home lending products. As loan originators making direct contact with customers, it is plaintiffs' primary duty to sell these lending products on a day-to-day basis." 2002 WL 507059, at *9. The court concluded that the loan officers were unlike the exempt marketing representatives in *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1 (1st Cir. 1997). The representatives in *John Alden* were engaged in more than routine selling efforts focused on particular sales transactions; their marketing efforts were aimed at independent insurance agents and were directed more broadly toward promoting and increasing the company's sales generally. However, because Conseco's loan officers' duties were "selling loans directly to individual customers, one loan at a time," 2002 WL 507059, at *9, the court held that the administrative exemption did not apply. *Accord Wong v. HSBC Mortgage Corp.*, 2008 WL 753889,

at *7 (N.D. Cal. 2008) (granting summary judgment to plaintiffs with regard to the administrative exemption because "defendants have not identified any evidence to support a finding that plaintiffs' primary duty is something other than sales"). The preamble to the 2004 Final Rule distinguished between *Casas* and *John Alden* (and other insurance industry cases), emphasizing the difference between employees who have a primary duty of sales and employees who spend the majority of their time on a variety of duties such as promoting the employer's financial products generally, deciding on an advertising budget and techniques, running an office, hiring staff and setting their pay, servicing existing customers (by providing insurance claims service), and advising customers. 69 Fed. Reg. at 22145-46; *see Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *8 (denying defendant's motion for summary judgment on the administrative exemption, stating that plaintiff's evidence indicated that the loan officers' primary duty is to generate loan sales, rather than assisting in the administrative operations, and that they have duties "flatly distinguishable from those of the insurance industry employees" in the cases discussed in the preamble).

The case law and regulatory distinction between servicing the business and routine sales work requires an examination of whether an employee who performs the typical job duties of a mortgage loan officer has the primary duty of making sales. The regulations implementing the section 13(a)(1) exemption for "outside" sales employees identify

some of the factors that should be considered in determining whether an employee's primary duty is making sales. The regulations state that among the factors to be considered in determining whether an employee has a primary duty of making outside sales are: the employee's job description; the employer's qualifications for hire; sales training; method of payment; and proportion of earnings directly attributable to sales. 29 C.F.R. § 541.504(b); *see Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004) (relevant factors in evaluating whether an employee has a primary duty of outside sales include whether the employee solicits customers, receives sales training, is compensated by commission, is labeled a salesman, is held to a production standard, and has freedom from supervision); *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489, at *2 (W.D. Mo. 2006) (similar factors).[2] Moreover, in determining whether an employee's primary duty is making sales, the work performed incidental to sales should be also be considered sales work. *See Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *9 and n.20 (loan officers compile and analyze potential customers' financial data because "doing so is necessary to evaluate the customers' qualifications for a loan, *i.e.*, to make a sale." They are not analyzing the information to provide advice to the customer, which the customer could take and use elsewhere. Rather, the loan officers are performing "*screening* for the benefit of the employer, rather than *servicing* for the benefit of the customer.")

[2] Of course, section 13(a)(1) only exempts "outside" salesmen.

(emphasis in original); *see also* 29 C.F.R. § 541.500(b) ("work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences").[3] Applying these factors to the job duties mortgage loan officers typically perform leads to the conclusion that they have a primary duty of making sales.

Further, in addition to the job duties described above, the facts set out in the case law demonstrate that historically mortgage loan officers were often compensated entirely by commissions, and that today many mortgage loan officers continue to be paid primarily by commissions, sometimes with a base wage, salary, or draw against the commissions. The commissions are based upon sales that are completed (*i.e.*, loans that actually close), with the commission amount typically based upon the value of the loan. *See, e.g., Underwood v.*

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[3] Because work performed incidental to and in conjunction with the employee's own sales or solicitations is considered exempt sales work, the Administrator rejects the September 8, 2006 Wage and Hour Opinion Letter FLSA2006-31's inappropriately narrow definition of sales as including only "customer-specific persuasive sales activity," which is the time that a loan officer spends directly engaged in selling mortgage loan products to customers.

NMC Mortgage Corp., 2009 WL 1269465, at *1 (D. Kan. 2009) (repayable draw against commissions of $1,400 per month until early 2005; afterwards a minimum salary of $1,000 per month plus commissions); *Henry v. Quicken Loans Inc.*, 2009 WL 596180, at *10 (E.D. Mich. 2009) (minimum base salary plus commissions); *McCaffrey v. Mortgage Sources Corp.*, 2009 WL 2778085, at **2-3 (D. Kan. 2009) (commissions only); *Yanni v. Red Brick Mortgage*, 2008 WL 4619772, at **1-3 (commissions only, based on loans that closed); *Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *2 (base salary plus commissions, with commissions earned subject to off-set for failure to meet a minimum sales goal in a prior pay period); *Saunders v. Ace Mortgage Funding, Inc.*, 2007 WL 1190985, at **2-3 (D. Minn. 2007) (commissions only until June 2005, with a minimum guarantee treated as a draw against future commissions after that); *Chao v. First National Lending Corp.*, 516 F. Supp. 2d 895, 904-05 (commissions only, based on loans that closed). Such payment methods support the conclusion that a mortgage loan officer's primary duty is sales.

In addition, employers often train their mortgage loan officers in sales techniques and evaluate their performance on the basis of their sales volume, factors that also are relevant to the analysis of mortgage loan officers' primary duty. For example, in *Epps v. Oak Street Mortgage LLC*, 2006 WL 1460273, at *5, loan officers were required to meet a production goal of closing three loans per month, and were evaluated using a form that focused in

part on whether they met their sales requirements. They were required to work on Saturday if they did not meet their sales requirements, and numerous loan officers were disciplined or terminated for failing to meet their sales requirements, as were their managers. *See Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *2 (such employees "are hired, trained, earn commissions, and are otherwise successful in their positions, on the basis of their sales performance"); *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489, at *1 (employees "were trained as salespeople in order to learn the mortgage business and to increase their individual sales efforts"); *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *9 (numerous separation notices showed that their "performance was measured largely according to their sale production"). These factors also support the conclusion that a mortgage loan officer's primary duty is making sales.

Moreover, many employers defending against FLSA lawsuits brought by mortgage loan officers argue that the employees are exempt under section 13(a)(1) as outside sales employees. In these cases, the issue is whether the mortgage loan officers are *outside* salespeople or *inside* salespeople, but the employer concedes their primary duty is sales (a required element of this exemption).[4] Thus,

[4] *See McCaffrey v. Mortgage Sources Corp.*, 2009 WL 2778085, at *4; *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 527 F. Supp. 2d 1053, 1066 (N.D. Cal. 2007); *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 640 (S.D. Cal. 2007); *Chao v. First National Lending Corp.*, 516 F. Supp. 2d at 900; *Geer v. Challenge Financial Investors Corp.*,

mortgage companies' own defenses are consistent with the conclusion that a loan officer's primary duty is sales.[5]

Finally, courts have repeatedly found that mortgage loan officers who work inside their employer's place of business have a primary duty of sales. *See Chao v. First National Lending Corp.*, 516 F. Supp. 2d at 901 ("[t]here is no question that the primary purpose of loan officers employed by FNL is to make sales or obtain orders or contract for services."); *Barnett v. Washington Mutual Bank*, 2004 WL 1753400, at *7 (N.D. Cal. 2004) (mortgage loan officers working at a nationwide call center "were engaged primarily in selling a product, namely, home mortgages"); *Casas v. Conseco*

2005 WL 2648054, at **2-3; *Belton v. Premium Mortgage, Inc.*, 2006 WL 561489, at *1; *Olivo v. GMAC Mortgage Corp.*, 374 F. Supp. 2d at 549-50; *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at **10-11.

[5] Some employers have argued that loan officers are exempt under section 7(i), 29 U.S.C. § 207(i), as commissioned employees of a retail or service establishment who receive more than half their earnings from commissions. In these cases, the primary issue is whether the employer qualifies as a retail or service establishment. *See Underwood v. NMC Mortgage Corp.*, 2009 WL 1269465, at **2-3; *Wong v. HSBC Mortgage Corp.*, 2008 WL 753889, at **7-8; *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 527 F. Supp. 2d at 1066; *Pontius v. Delta Financial Corp.*, 2007 WL 1496692, at *3; *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. at 640; *Gatto v. Mortgage Specialists of Illinois, Inc.*, 442 F. Supp. 2d at 536-42; *Barnett v. Washington Mutual Bank*, 2004 WL 1753400, at **2-6; *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at **3-5. This defense also is consistent with an employee having a primary duty of sales.

Finance Corp., 2002 WL 507059, at *9 ("[a]s loan originators making direct contact with customers, it is plaintiffs' primary duty to sell these lending products on a day-to-day basis."). Indeed, the Administrator is not aware of any court that has found that mortgage loan officers -- working either inside or outside -- have a primary duty other than sales.

Thus, a careful examination of the law as applied to the mortgage loan officers' duties demonstrates that their primary duty is making sales and, therefore, mortgage loan officers perform the production work of their employers. Work such as collecting financial information from customers, entering it into the computer program to determine what particular loan products might be available to that customer, and explaining the terms of the available options and the pros and cons of each option, so that a sale can be made, constitutes the production work of an employer engaged in selling or brokering mortgage loan products. Such duties do not relate to the internal management or general business operations of the company; they do not involve servicing the business itself by providing advice regarding internal operations, unlike the duties of employees working in, for example, a firm's human resources department, accounting department, or research department. The typical job duties of a mortgage loan officer comprise a financial services business' marketplace offerings, the selling of loan products. Their duties involve the day-to-day carrying out of the employer's business and, thus, fall squarely on the

production side of the business.

Work Related to the Management or General Business Operations of the Employer's Customers

The administrative exemption can also apply if the employee's primary duty is directly related to the management or general business operations of the *employer's customers*. "Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt." 29 C.F.R. § 541.201(c).

To determine whether a mortgage loan officer's duties are directly related to the management or general business operations of the employer's customers, it is necessary to focus on the identity of the customer. As the preamble to the final rule explained in addressing the provision that advisers and consultants could qualify for the administrative exemption based upon their work for the employer's customers:

> Nothing in the existing or final regulations precludes the exemption because the customer is an individual, rather than a business, as long as the work relates to management or general business operations. As stated by commenter Smith, the exemption does not apply when the individual's 'business' is purely personal, but providing expert advice to a small business owner or a

> sole proprietor regarding management and general business operations, for example, is an administrative function. . . This provision is meant to place work done for a client or customer on the same footing as work done for the employer directly, regardless of whether the client is a sole proprietor or a Fortune 500 company, as long as the work relates to 'management or general business operations.'

69 Fed. Reg. at 22142.

Thus, work for an employer's customers does not qualify for the administrative exemption where the customers are individuals seeking advice for their personal needs, such as people seeking mortgages for their homes. Individuals acting in a purely personal capacity do not have "management or general business operations" within the meaning of this exemption. However, if the customer is a business seeking advice about, for example, a mortgage to purchase land for a new manufacturing plant, to buy a building for office space, or to acquire a warehouse for storage of finished goods, the advice regarding such decisions might qualify under the administrative exemption.[6]

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[6] Of course the salary test and the test that the primary duty requires the exercise of discretion and independent judgment with respect to matters of significance must also be met.

See Bratt v. County of Los Angeles, 912 F.2d at 1070 (stating, with regard to employees like stock brokers and insurance claims agents, "[t]o the extent that these employees primarily serve as general financial advisors or as consultants on the proper way to conduct a business, *e.g.*, advising businesses how to increase financial productivity or reduce insured risks, these employees properly would qualify for exemption under this regulation."); *Talbott v. Lakeview Center, Inc.*, 2008 WL 4525012, at *5, n.5 (N.D. Fla. 2008) (in context of firm that provides foster care and child protective services, provision pertaining to the employer's customers is not "relevant because even if Lakeview's foster clients are 'customers,' they do not have 'general business operations.'").[7]

Based on the above analysis of the typical mortgage loan officer's duties and conclusion that his or her primary duty is making sales for the employer, and because homeowners do not have management or

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[7] *See also* Wage and Hour Opinion Letter FLSA2007-7 (Feb. 8, 2007) (case managers working for a service provider for individuals with disabilities are performing the day-to-day production work of their employer and are not "providing administrative services to the employer's customers as contemplated in 29 C.F.R. § 541.201(c)"); Wage and Hour Opinion Letter FLSA2005-30 (Aug. 29, 2005) (same); Wage and Hour Opinion Letter FLSA2005-21 (Aug. 19, 2005) (background investigators of private firm that conducts security clearance investigations of potential hires for government agencies could be viewed as performing work related to the management or general business operations of the employer's customers).

general business operations, a typical mortgage loan officer's primary duty is not related to the management or general business operations of the employer's customers.

Application of 29 C.F.R. § 541.203(b)

Wage and Hour Opinion Letter FLSA2006-31 (Sept. 8, 2006) appears to assume that the example provided in 29 C.F.R. § 541.203(b) creates an alternative standard for the administrative exemption for employees in the financial services industry. That regulation states:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the *customer's* income, assets, investments or debts; determining which financial products best meet the *customer's* needs and financial circumstances; advising the *customer* regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. *However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.*

29 C.F.R. § 541.203(b) (emphasis added).[8] Contrary to the assumption in Opinion Letter FLSA 2006-31, the administrative exemption is only applicable to employees that meet the requirements set forth in 29 C.F.R. § 541.200. The regulation at 29 C.F.R. § 541.203(b) merely provides an example to help distinguish between those employees in the financial services industry whose primary duty is related to the management or general operations of the employer's customers and those whose primary duty is selling the employer's financial products. The fact example at 29 C.F.R. § 541.203(b) is not an alternative test, and its guidance cannot result in it "swallowing" the requirements of 29 C.F.R. § 541.200.

As discussed above, mortgage loan officers typically have the primary duty of making sales on behalf of their employer; as such, their primary duty is not directly related to the management or general business operations of their employer or their employer's customers. Because of its misleading assumption and selective and narrow analysis, Opinion Letter FLSA2006-31 does not comport with this interpretive guidance and is withdrawn. Similarly, an Opinion Letter dated February 16, 2001, 2001 WL 1558764, also is withdrawn as

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[8] The case law and the Department's enforcement experience indicate that the duty listed last, pertaining to general promotion work for the employer, is a minor aspect of a typical loan officer's job. Moreover, to the extent that such promotion work is performed incidental to and in conjunction with an employee's own sales or solicitations, it is sales work. *See* 29 C.F.R. § 541.503(a).

inconsistent with this analysis.

Conclusion

Based upon a thorough analysis of the relevant factors, the Administrator has determined that mortgage loan officers who perform the typical duties described above have a primary duty of making sales for their employers and, therefore, do not qualify as bona fide administrative employees exempt under section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 213(a)(1).