No.

In the Supreme Court of the United States

THOMAS E. PEREZ, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

MORTGAGE BANKERS ASSOCIATION, ET AL.

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

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QUESTION PRESENTED

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, generally provides that "notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. 553(b), and, if such notice is required, the rulemaking agency must give interested persons an opportunity to submit written comments, 5 U.S.C. 553(c). The APA further provides that its notice-and-comment requirement "does not apply * * * to interpretative rules," unless notice is otherwise required by statute. 5 U.S.C. 553(b)(A). No other statute requires notice in this case. The question presented is:

Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation.

PARTIES TO THE PROCEEDING

Petitioners are Thomas E. Perez, Secretary of Labor; the Department of Labor; and Laura A. Fortman, Principal Deputy Administrator, Wage and Hour Division, Department of Labor.

Respondent Mortgage Bankers Association was plaintiff-appellant below.

Respondents Beverly Buck, Ryan Henry, and Jerome Nickols were intervenors-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Labor and the other federal petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 720 F.3d 966. The opinion of the district court (App., *infra*, 13a-48a) is reported at 864 F. Supp. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2013. A petition for rehearing was denied on October 2, 2013 (App., *infra*, 85a-86a). On December 19, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and

including January 30, 2014. On January 21, 2014, the Chief Justice further extended the time to February 28, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to the petition. App., *infra*, 87a-99a.

STATEMENT

1. a. This case concerns whether the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, requires a federal agency to follow notice-and-comment rulemaking procedures before it may alter an "interpretive" rule that articulates an interpretation of an agency regulation.

The APA defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. 551(5). The Act further defines "rule" to encompass a broad range of agency "statement[s]" serving various functions, including statements that are "designed to * * * interpret * * * law" as well as statements that are designed "to implement * * * or prescribe law." 5 U.S.C. 551(4). More specifically, the Act defines "rule" to "mean[] the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Ibid.*

Section 4 of the APA, 5 U.S.C. 553, governs the process of agency rulemaking. Section 4(a) provides that "[g]eneral notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof."

5 U.S.C. 553(b). Section 4(b) further provides that, if "notice [is] required by this section," the agency, after giving such notice, "shall give interested persons an opportunity to participate in the rule making through submission of written [comments]" and consider those comments before promulgating the rule. 5 U.S.C. 553(c).

Section 4, however, provides that the APA's notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A).

b. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to protect workers by establishing federal minimum-wage and overtime guarantees. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 706-707 & n.18 (1945); see also 29 U.S.C. 206 (minimum wage), 207 (overtime pay). The FLSA, however, exempts from its minimum-wage and overtime requirements "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, subject to the provisions of [5 U.S.C. 551-559])." 29 U.S.C. 213(a)(1).

Congress contemplated that, in the course of its administration of the FLSA, the Department of Labor (Department) would from time to time modify or rescind its administrative measures such as regulations, rulings, and interpretations. See 29 U.S.C. 259(a). The Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, accordingly provides that an employer sued for alleged FLSA violations "shall [not] be subject to any liability" for failing "to pay minimum wages or over-

time compensation" under the FLSA if the employer establishes that its "act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [the Administrator of the Department's Wage and Hour Division]," even if that agency guidance has since been "modified or rescinded." 29 U.S.C. 259(a) and (b)(1).

The Department has promulgated regulations using notice-and-comment rulemaking that define and delimit the categories of FLSA-exempt employees. See, *e.g.*, 29 C.F.R. Pt. 541 (1998); 3 Fed. Reg. 2518 (Oct. 20, 1938) (original Part 541 regulations). In 2004, the Department revised those regulations using notice-and-comment rulemaking. 29 C.F.R. Pt. 541. The current regulations provide, in pertinent part, that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 29 C.F.R. 541.203(b).

2. This case involves the Department's interpretation of its FLSA regulations in the context of mortgage-loan officers. In 1999 and 2001, the Wage and Hour Division issued Opinion Letters in which it interpreted the then-existing regulations and concluded that mortgage-loan officers are not FLSA-exempt employees, *i.e.*, the FLSA's minimum-wage and overtime requirements apply to those employees.[1]

After the Department revised its FLSA regulations in 2004, respondent Mortgage Bankers Association (MBA or Association), a national trade association

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[1] See Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter (Feb. 16, 2001), available at 2001 WL 1558764; Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter (May 17, 1999), available at 1999 WL 1002401.

representing real-estate-finance companies, requested an opinion from the Wage and Hour Division on whether mortgage-loan officers are FLSA exempt. App., *infra*, 3a, 20a n.3. In 2006, the Division's Administrator issued a letter opining that mortgage-loan officers are exempt administrative employees under those regulations. *Id.* at 70a-84a.

In 2010, the Wage and Hour Division revisited the issue and revised its interpretation of the governing regulations in an Administrator's Interpretation. App., *infra*, 49a-69a. That Interpretation reanalyzed provisions of the 2004 regulations and considered judicial decisions addressing the administrative exemption. *Id.* at 50a-69a. The Department concluded that "employees who perform the typical job duties of a mortgage loan officer, as described" in the Interpretation, "have a primary duty of making sales for their employers and, therefore, do not qualify" for the exemption for "administrative" employees under the FLSA's implementing regulations. App., *infra*, 49a-50a, 52a, 69a. At the same time, the Department withdrew its 2006 Opinion Letter, explaining that the Letter had been based on an erroneous reading of a regulation addressing work performed incidental to, and in conjunction with, an employee's own sales or solicitations (29 C.F.R. 541.500(b)). App., *infra*, 59a & n.3. The Department did not utilize notice-and-comment rulemaking to issue its 1999, 2001, and 2006 Opinion Letters or its 2010 Administrator's Interpretation.

3. a. Respondent MBA filed this APA action in district court to vacate and set aside the 2010 Administrator's Interpretation. App., *infra*, 13a-14a, 28a. Respondents Buck, Henry, and Nickols (former mort-

gage-loan officers) intervened. 2/13/2012 Order 1-2 (Doc. 25).

MBA argued that the 2010 Administrator's Interpretation was invalid on two grounds. First, the Association argued that the interpretation was procedurally invalid because APA notice-and-comment rulemaking was required for the agency to be able to express its revised reading of its regulation in an interpretive rule. App., *infra*, 28a. Second, the Association argued that the interpretation is substantively invalid because it is inconsistent with the regulations it interprets and, thus, was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Ibid.* (citation omitted).

The government argued that, as relevant here, the Administrator's Interpretation was an "interpretive" rule and that the APA exempts such "interpretive rules" from notice-and-comment rulemaking. Gov't Cross Mot. to Dismiss 14-15 (Doc. 15) (citing 5 U.S.C. 553(b)(A)); see *id.* at 15 n.8 ("There is no dispute between the parties that the 2010 [Administrator's Interpetation] is an interpretive rule."). MBA acknowledged that the government was "correct" that the 2010 Administrator's Interpretation was an interpretative rule, but argued that its status as an interpretative rule is "of no moment" because an "'interpretative rule[] * * * still may be subject to notice-and-comment rulemaking' under *Paralyzed Veterans* [*of Am.* v. *D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), cert. denied, 523 U.S. 1003 (1998),] and its progeny." MBA Reply in Supp. of Mot. for Summ. J. 7 n.10 (Doc. 17) (quoting *Tripoli Rocketry Ass'n* v. *United States Bureau of Alcohol, Tobacco, Firearms & Explosives*, 337 F. Supp. 2d 1, 12 (D.D.C. 2004)).

b. The district court granted summary judgment to the government. App., *infra*, 13a-48a.

First, the district court concluded that the Department did not have to use notice-and-comment rulemaking to revise its prior interpretation of its regulations. App., *infra*, 32a-44a. The district court explained that the D.C. Circuit's *Paralyzed Veterans* precedents controlled, *id.* at 32a-37a, but concluded that they would require notice-and-comment rulemaking only if the affected party had "substantial[ly] and justifiabl[y] reli[ed] on a [prior] well-established agency interpretation," *id.* at 40a (quoting *MetWest Inc.* v. *Secretary of Labor*, 560 F.3d 506, 511 (D.C. Cir. 2009) (emphasis omitted)). See *id.* at 37a-41a. The court found that the Association had failed to establish such reliance. *Id.* at 41a-44a. The court stated, *inter alia*, that the Portal-to-Portal Act's defense for good-faith reliance on a prior agency interpretation undermined the Association's argument that notice-and-comment rulemaking was required to protect the reliance interests of its members. *Id.* at 43a-44a.

Second, the district court upheld the Administrator's Interpretation on its merits. App., *infra*, 44a-47a. The court concluded that the agency's interpretation of its FLSA regulations was "persuasive," finding it "clear" on the face of the regulations that the Association's contrary position was based on a misreading of 29 C.F.R. 541.203(b). App., *infra*, 44a, 46a. The court accordingly held that the 2010 interpretation was "not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Id.* at 47a.

4. a. On appeal, MBA argued only that the 2010 Administrator's Interpretation was procedurally inva-

lid under *Paralyzed Veterans*. See MBA C.A. Br. 2, 20-21. The Association abandoned its contention that the interpretation was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. See *id.* at 1-56; MBA C.A. Reply Br. 1-29.

b. The D.C. Circuit reversed and remanded with instructions to vacate the 2010 Administrator's Interpretation. App., *infra*, 1a-12a.

The court of appeals explained that, under its *Paralyzed Veterans* cases, "[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., *infra*, 2a (quoting *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)) (brackets in original). That conclusion, the court explained, rests on the "operative assumption" 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." *Id.* at 5a n.3.

The court of appeals further concluded that the relevant analysis under *Paralyzed Veterans* "contains just two elements: definitive interpretations ('definitiveness') and a significant change ('significant revision')." App., *infra*, at 5a. The court of appeals thus rejected the government's argument that the rule of *Paralyzed Veterans* incorporates an element of reliance. *Id.* at 6a-12a. The court held that although reliance can in some contexts be relevant to whether a prior agency interpretation was sufficiently definitive, reliance is not itself a distinct requirement under *Paralyzed Veterans*. *Id.* at 9a.

The court of appeals observed that the government "conceded the existence of two definitive—and conflicting—agency interpretations." App., *infra*, 3a. The court accordingly held that, under its *Paralyzed Veterans* jurisprudence, the 2010 Administrator Interpretation, which significantly revised the agency's 2006 Opinion Letter, must be vacated. *Ibid.* The court emphasized that it took "no position on the merits of [the 2010] interpretation" and stated that the Department was entitled to "readopt" that interpretation in the future but must "conduct the required notice and comment rulemaking" before it does. *Ibid.*

Finally, the court of appeals recognized that "the Courts of Appeals are split on the issue" whether *Paralyzed Veterans* correctly requires notice-and-comment rulemaking to modify an interpretive rule. App., *infra*, 5a n.3. The court observed, however, that it was bound by its own precedent and "decline[d] the government's invitation to 'call' for 'the full Court [to] * * * lay the *Paralyzed Veterans* doctrine to rest.'" *Id.* at 2a n.1 (second brackets in original).

c. The court of appeals denied respondents Buck, Henry, and Nickols' petition for rehearing en banc. App., *infra*, 85a-86a.

REASONS FOR GRANTING THE PETITION

This case concerns an important and recurring question of administrative law: Whether a federal agency is required to conduct notice-and-comment rulemaking before it may correct or significantly revise its own interpretation of a substantive regulation. The D.C. Circuit's rule that such formal rulemaking is required is contrary to the unambiguous text of the Administrative Procedure Act and conflicts with this Court's teachings on the proper scope of

APA review. Moreover, the D.C. Circuit in this case eliminated the need for plaintiffs even to show reliance on the prior regulatory interpretation that an agency seeks to revise. An agency thus must now undertake notice-and-comment rulemaking simply to explain to the public that the agency has corrected or revised its previous legal interpretation of a regulation in some significant way—even if no one has ever relied on the prior interpretation.

As the D.C. Circuit acknowledged, the courts of appeals are divided over whether the APA ever requires an agency to use notice-and-comment rulemaking to alter its prior interpretation of a regulation. App., *infra*, 5a n.3. The adverse impact of the D.C. Circuit's doctrine from *Paralyzed Veterans of America* v. *D.C. Arena L.P.*, 117 F.3d 579 (1997), cert. denied, 523 U.S. 1003 (1998), is especially significant because nearly all federal agencies are subject to suit in the District of Columbia and because of the prominent role that the D.C. Circuit plays in federal administrative law as a result. This Court's review is warranted.

A. The Court Of Appeals Erred In Holding That An Interpretive Rule That Alters The Agency's Previous Interpretation Of A Substantive Regulation Must Be Promulgated Through Notice-And-Comment Rulemaking

This case is controlled by two fundamental rules of administrative law. First, the APA itself expressly exempts the formulation, amendment, and repeal of interpretive rules from the Act's notice-and-comment rulemaking provisions. 5 U.S.C. 553(b)(A); see 5 U.S.C. 551(5). Second, the APA "sets forth the full extent of judicial authority to review executive agency

action for procedural correctness." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 545-549 (1978)). The D.C. Circuit's *Paralyzed Veterans* doctrine, which requires agencies to engage in notice-and-comment rulemaking to revise an interpretive rule that construes a substantive agency regulation, cannot be squared with those principles.[2]

1. Section 4 of the APA generally directs that a "notice of proposed rule making shall be published in the Federal Register." 5 U.S.C. 553(b). If such notice is required, the agency must also give interested persons "an opportunity to participate in the rule making through submission of written [comments]." 5 U.S.C. 553(c). Section 4, however, specifies that, unless "notice or hearing is required by statute," the APA's notice-and-comment rulemaking requirement "does *not* apply * * * to interpretative rules." 5 U.S.C. 553(b)(A) (emphasis added).[3]

The APA's definition of "rule making" demonstrates that this exemption from the notice-and-comment rulemaking requirement applies not only when an agency formulates an interpretive rule in the

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[2] Although *Paralyzed Veterans* articulated its notice-and-comment requirement in dictum, the D.C. Circuit later elevated that requirement to a holding in *Alaska Professional Hunters Ass'n* v. *FAA*, 177 F.3d 1030 (D.C. Cir. 1999).

[3] No other statute requires notice in this case. The FLSA vests the Secretary of Labor with authority to "define[] and delimit[]" the scope of the minimum-wage and overtime exemption in Section 213(a)(1) by issuing "regulations * * * subject to the provisions of subchapter II of chapter 5 of title 5," 29 U.S.C. 213(a)(1), *i.e.*, subject to the APA's administrative-procedure provisions at 5 U.S.C. 551-559.

first instance, but also when it issues a subsequent interpretive rule that revises or supersedes the first. Because the Act defines "rule making" to be an "agency process for formulating, *amending*, or *repealing* a rule," 5 U.S.C. 551(5) (emphasis added), the statutory provisions in Section 4 that govern "rule making"—and specifically the exemption for "interpretive rules"—necessarily apply to any agency process for "formulating, amending, or repealing" (*ibid.*) any "agency statement of general or particular applicability and future effect designed to * * * interpret * * * law," 5 U.S.C. 551(4) (defining "rule"). Likewise, the APA more generally "makes no distinction * * * between initial agency action and subsequent agency action undoing or revising that action." *Fox Television Stations, Inc.*, 556 U.S. at 515.

The statutory direction that all "interpretative rules" are exempt from notice-and-comment rulemaking (unless a statute requires otherwise) is unambiguous. This Court has thus repeatedly made clear that "[i]nterpretive rules do not require notice and comment." *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995); see also, *e.g.*, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 173 (2007) ("[A]n agency need not use [notice-and-comment procedures] when producing an 'interpretive' rule."); *Lincoln* v. *Vigil*, 508 U.S. 182, 196 (1993) ("The [APA's] notice-and-comment requirements apply * * * only to so-called 'legislative' or 'substantive' rules; they do not apply to 'interpretative rules.'").

2. The reason for that principle is plain. An "interpretive rule" is a statement "'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Guernsey*

Mem'l Hosp., 514 U.S. at 99 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979)). Such statements "do not have the force and effect of law" (*ibid.*); they "merely [reflect] the agency's present belief concerning the meaning" of the statutes and legislative rules that do. *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 27 (1941) (*Final Report*); see U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947) (*APA Manual*) (citing *Final Report* for definition of interpretive rules).[4] And because those statements reflect the agencies' *own* views, not binding legislative rules that would have the force of law, Congress presumably determined that it would be an unwarranted encroachment to force agency decisionmakers to dedicate limited agency time and resources to undertake notice-and-comment rulemaking simply to inform the public about the agency's views on the meaning of relevant statutory and regulatory provisions. Cf. Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 Admin. L. Rev. 547, 571 (2000) (Pierce) ("[S]ince an interpretative rule does not have the force of law, an agency does not have to issue a rule that has the force of law in order to amend a prior interpretative rule.").

That conclusion carries particular force in the context of a case like this, where an agency has determined that one of its prior public statements about the meaning of a regulatory provision is, in fact, erroneous. Agencies should be encouraged to announce their

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[4] This Court has repeatedly found the Attorney General's manual interpreting the APA to be persuasive. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing cases).

changed views promptly and publicly, rather than allow the public to be misled by an earlier agency interpretation. It is "no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities." *Hoctor* v. *United States Dep't of Agric.*, 82 F.3d 165, 167 (7th Cir. 1996) (Posner, C.J.).

The result produced under *Paralyzed Veterans* also runs counter to this Court's teachings. The Court has held that, where an agency has concluded that its prior "interpretation of its regulation" should be modified, "the Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 517 (1994) (quoting *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993)) (citation and brackets omitted). Yet that is what the *Paralyzed Veterans* doctrine does. By requiring an agency to undertake notice-and-comment rulemaking simply to change its prior interpretation of a substantive regulation, the court of appeals has effectively required the agency to promulgate a *new* substantive regulation using notice-and-comment rulemaking.

3. The "operative assumption" behind the D.C. Circuit's *Paralyzed Veterans* doctrine is "the belief that a definitive [agency] interpretation is so closely intertwined with the [substantive] regulation [being interpreted] that a significant change to the [interpretation] constitutes a repeal or amendment of the [regulation]." App., *infra*, 5a n.3; see also *id.* at 2a (the changed interpretation "in effect amend[s]" the underlying regulation). That assumption is incorrect.

When an agency issues an interpretive rule, it issues a "statement * * * designed to * * *

interpret * * * law," 5 U.S.C. 551(4) (emphasis added), not change or amend it. This Court has thus determined that an "interpretive rule" reflects "the agency's construction of the statutes and rules which it administers" and, unlike the substantive provisions being interpreted, "do[es] not have the force and effect of law." *Guernsey Mem'l Hosp.*, 514 U.S. at 99; see *Chrysler Corp.*, 441 U.S. at 302 n.31 ("substantive rules * * * 'have the force and effect of law'" but "'interpretive rules' * * * do not") (quoting *APA Manual* 30 n.3). Accordingly, as explained above (pp. 11-12, *supra*), the APA by its terms defines "rule making" to include the "amend[ment] or repeal[]" of an interpretive rule and specifically exempts such rulemaking from mandatory notice-and-comment procedures.

The conflict between the APA and the D.C. Circuit's *Paralyzed Veterans* doctrine is also reflected in the court's extension of that doctrine to agency adjudication. The D.C. Circuit has held that if an agency adopts an interpretation of one of its regulations in an agency adjudication (rather than in an interpretive rule), the agency cannot later alter that interpretation by interpretive rule without notice-and-comment rulemaking. See *Environmental Integrity Project* v. *EPA*, 425 F.3d 992, 994-995, 997-998 (2005) (holding that EPA orders in licensing proceedings were "definitive interpretation[s]" of substantive regulations that could not be modified by a later interpretive rule absent notice-and-comment rulemaking). Yet the agency would be able to modify the same interpretation in a subsequent adjudication to which the APA's rulemaking provisions do not apply. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292, 294 (1974) (finding it

"plain" that agency may "announc[e] new principles in an adjudicative proceeding"; rejecting view that "rulemaking was required because * * * [the agency's interpretation] would be contrary to its prior decisions"); see also 5 U.S.C. 551(6) and (7) (agency "adjudication" involves matters "other than rule making"). That anomalous result underscores the artificial and nonstatutory foundation of the *Paralyzed Veterans* doctrine.

4. Section 4 of the APA (5 U.S.C. 553) specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking" proceedings. *Vermont Yankee*, 435 U.S. at 524. That provision "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* v. *McGrath*, 339 U.S. 33, 40 (1950)); see Antonin Scalia, *Vermont Yankee*: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 359-370 (1978). The D.C. Circuit has thus disregarded a fundamental principle of administrative law by establishing notice-and-comment requirements for interpretive rules that Congress has expressly exempted. Cf. Richard W. Murphy, Hunters *for Administrative Common Law*, 58 Admin. L. Rev. 917, 918 (2006) (explaining that "[a]cademic commentary on [the *Paralyzed Veterans* doctrine] has been scathing"; citing critiques).

B. The Courts Of Appeals Are Divided On The Question Presented

As the D.C. Circuit recognized, "the Courts of Appeals are split on the [*Paralyzed Veterans*] issue." App., *infra*, 5a n.3. The Fifth Circuit has joined the

D.C. Circuit in concluding that an agency must conduct notice-and-comment rulemaking to alter a prior interpretive rule construing an agency regulation. *Shell Offshore Inc.* v. *Babbitt*, 238 F.3d 622, 629-630 (5th Cir. 2001).[5] The First and Ninth Circuits, however, have held that the APA permits agencies to modify their interpretive rules without notice and comment. That division of authority warrants this Court's review.

In *Miller* v. *California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), cert. denied, 555 U.S. 1208 (2009), the Ninth Circuit addressed a challenge to the Department of Justice's interpretation of a regulation promulgated under the Americans with Disabilities Act. The district court in *Miller* held that the Department had "fundamental[ly] modifi[ed] its previous interpretation" of that regulation and, invoking *Paralyzed Veterans*' analysis, held that the interpretive change "had to be adopted through notice-and-comment rulemaking." *Id.* at 1027. The court of appeals reversed with two alternative holdings. The court first held that the first interpretation of the regulation was not attributable to the Department and that the Department's subsequent interpretation thus did not reflect a change. *Id.* at 1031-1032. But as relevant here, the court of appeals further held that, "even if the DOJ's interpretation constituted a change in [its] understanding of [the regulation]" and that change was "unanticipated," the Department was "not required to proceed by notice and comment." *Id.* at

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[5] The Third Circuit has cited the *Paralyzed Veterans* doctrine favorably in dictum. *SBC Inc.* v. *FCC*, 414 F.3d 486, 498, 501 (3d Cir. 2005) (concluding that agency "did not modify or substantively change [its] prior interpretation of the regulation").

1033. The court explained that "an agency can modify an interpretive rule without notice and comment," and the interpretations at issue were "interpretive rules." *Ibid.* (citing and following holding in *Erringer* v. *Thompson*, 371 F.3d 625, 630 (9th Cir. 2004)).

Miller conflicts with the D.C. Circuit's decision in this case. By reversing the district court's adoption of the *Paralyzed Veterans* doctrine and broadly holding that "an agency can modify an interpretive rule without notice and comment," 536 F.3d at 1033, the Ninth Circuit has placed itself squarely on the other side of the conflict. Cf. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.").

Similarly, the First Circuit in *Warder* v. *Shalala*, 149 F.3d 73, 75-79 (1st Cir. 1998), cert. denied, 526 U.S. 1064 (1999), held that an agency was entitled to change its interpretation of Medicare regulations without notice-and-comment rulemaking. The agency's interpretive rule (HCFAR 96-1) was challenged on the ground that it "changed [the agency's] policy" governing Medicare reimbursement for a device. *Id.* at 81. The First Circuit rejected that contention "both [on] the law and the facts." *Ibid.* As relevant here, the court held that, even if the "later rule [was] inconsistent with * * * [an earlier] agency interpretation," notice-and-comment rulemaking was "[un]necessary" to promulgate that interpretive rule. *Id.* at 81 (brackets omitted); see *id.* at 79 ("The APA exempts 'interpretive rules' from its notice and comment procedures.").

In addition, the Seventh Circuit has stated that the *Paralyzed Veterans* doctrine "conflicts with the APA's

rulemaking provisions * * * and with [Seventh Circuit] precedent." *Abraham Lincoln Mem'l Hosp.* v. *Sebelius*, 698 F.3d 536, 560 (7th Cir. 2012). The court explained that although the D.C. Circuit holds that "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation * * * through the process of notice and comment rulemaking," *ibid.* (quoting *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1033-1034 (D.C. Cir. 1999)) (brackets in original), the APA "exempt[s] *all* interpretive rules from notice and comment." *Ibid.* (emphasis added).[6]

C. Review Is Warranted To Resolve An Important And Recurring Question Of Administrative Law

This case raises a fundamental and recurring question about the structure and meaning of the APA and the obligations that Congress elected to impose on administrative agencies. As noted above, this Court has recognized that the APA's rulemaking provision (5 U.S.C. 553) is "a formula upon which opposing social and political forces * * * c[a]me to rest." *Vermont Yankee*, 435 U.S. at 523. That provision—including its unqualified exemption for interpretive rules—thus specifies the "maximum procedural requirements which Congress was willing to have the courts impose upon agencies" for rulemaking. *Id.* at 524. Yet the D.C. Circuit has held, in its *Paralyzed*

[6] The Seventh Circuit's *Paralyzed Veterans* discussion followed its conclusion that the challenged agency decision "did not constitute a departure from a previous position" but, "[e]ven if" it did, "the Decision properly qualifies as an adjudication" that did not require notice and comment. *Abraham Lincoln Mem'l Hosp.*, 698 F.3d at 558. It is therefore not clear that the court's *Paralyzed Veterans* discussion was necessary to its decision.

Veterans doctrine, that an agency, before it can issue a statement to "advise the public of the agency's [current] construction of" its own regulations, *Guernsey Mem'l Hosp.*, 514 U.S. at 99 (citation omitted), must first ask the public for its views using notice-and-comment rulemaking. And in this case, the D.C. Circuit has now further held that the doctrine requires notice-and-comment rulemaking even if no one has meaningfully relied on the interpretive rule that an agency seeks to modify.[7]

The adverse impact of that ruling is particularly significant because venue lies in the District of Columbia over APA actions against most federal agencies. See 28 U.S.C. 1391(e)(1); 14D Charles Alan Wright et al., *Federal Practice and Procedure* §§ 3815-3816, at 331-334, 344-348 (4th ed. 2013); see also, *e.g.*, 28 U.S.C. 2343. Because of that ever-present potential for challenge in the D.C. Circuit, that court's fundamentally misguided *Paralyzed Veterans* doctrine can present a formidable *in terrorem* barrier for agencies seeking to correct or revise their

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[7] The government previously argued that the *Paralyzed Veterans* doctrine was erroneous in a certiorari petition presenting a different question on which the Court denied a writ of certiorari. See Pet. at I, 24-25, *Leavitt* v. *Baystate Health Sys.*, 547 U.S. 1054 (2006) (No. 05-936). The government made that argument in *Baystate* because the court of appeals had rested its conclusion that the government ruling at issue in *Baystate* had implicitly conceded that a prior interpretive rule was invalid in part on the court's view that, if the prior rule had been valid, then the subsequent ruling in *Baystate* would have been invalid under *Paralyzed Veterans*. See *id.* at 5-6, 18-19, 24-25. *Baystate*, however, did not involve an actual application of the *Paralyzed Veterans* doctrine, and it thus did not present the question that is now presented for the Court's review. See *id.* at I (question presented).

interpretations of regulations. Many complex government programs are heavily dependent upon interpretive rules to inform the public about the agency's understanding of the details of the regulatory regime. The Medicare program, for instance, has "thousands of pages of interpretative rules that address myriad details that are not explicitly resolved by the legislative" regulations. Pierce, 52 Admin. L. Rev. at 553; see, *e.g.*, *Guernsey Mem'l Hosp.*, 514 U.S. at 97-99, 101-102. Under the provisions of the APA that Congress enacted, the agency should be free to revisit its intepretations expeditiously through new interpretive rules. Notice-and-comment rulemaking, by contrast, is a "long and costly" process that "often requires many years and tens of thousands of person hours to complete." Pierce, 52 Admin. L. Rev. at 550-551; see U.S. Gov't Accountability Office, GAO-09-205, *Federal Rulemaking* 5, 19 (Apr. 2009) (case study finding average of over four years to complete notice-and-comment rulemaking and that some "rules that were not major took nearly as long or longer to be published").

Certiorari is warranted for this Court to review the D.C. Circuit's *Paralyzed Veterans* doctrine, resolve the circuit conflict on the issue, and restore the freedom and procedural framework that Congress incorporated in the APA for agencies to interpret the regulatory programs they have adopted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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)

Argued: Mar. 22, 2013
Decided: July 2, 2013

OPINION

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

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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").

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.*, an 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)(l). 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 quotation 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 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,

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

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 Veteran'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.

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 "represented

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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.

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

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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).

interpretation, an administrative common law applicable to Alaskan guide pilots" that could not be rewritten without notice and comment rulemaking. *Id.*

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

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

third element.[8] That, the agency claims, is exactly 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.

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[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 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.

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 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

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[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*.

[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.

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 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 instructions to vacate DOL's 2010 Administrator Interpretation.

So Ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 11-0073 (RBW)

MORTGAGE BANKERS ASSOCIATION, PLAINTIFF

v.

HILDA SOLIS, SECRETARY OF LABOR; NANCY LEPPINK, ACTING WAGE AND HOUR ADMINISTRATOR; AND THE UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS

[June 6, 2012]

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.

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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").

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 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 ques-

tion, 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 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

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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).

> 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

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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.*

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 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] represenation, 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 Interpre-

tation 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 exam-

ple 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.*

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,

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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.").

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

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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.

[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.

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 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 [*sic*] 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 that the 2010 AI is an interpretive rule as opposed to [*sic*] substantive rule, and therefore, notice and comment is not necessary). The

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 business

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Court agrees that the 2010 AI is an interpretive rule and will accordingly conduct its analysis from that perspective.

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 "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 previ-

ous 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, Defs.' 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* Defs.' 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 Victims*, 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 Victims*.

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 Victims*, 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 with-

out 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.* (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.*

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

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 *Alaskan 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 *Alaskan 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 [*sic*] 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 memo-

randum 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]

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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).

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 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 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.

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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.

SO ORDERED.[11]

REGGIE B. WALTON
United States District Judge

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

APPENDIX C

U.S. Department of Labor [LOGO OMITTED]
Wage and Hour Division
Washington, DC 20210

Administrator's Interpretation No. 2010-1

March 24, 2010

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 administra-

tive 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 receive internal leads and contact potential customers or receive contacts

[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.

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 compen-

sated 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 [sic] 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.") (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

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

[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

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. 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

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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.

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

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[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.*, 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

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 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

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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.

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] *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]

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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.

[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

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 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*

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the management or general business operations of the employer's customers).

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

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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).

guidance and is withdrawn. Similarly, an Opinion Letter dated February 16, 2001, 2001 WL 1558764, also is withdrawn as 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).

APPENDIX D

[SEAL OMITTED]

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2006-31

September 8, 2006

Dear **Name***:

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 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 telemarketers") are outside the

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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").

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 cus-

tomer. 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 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

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[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.

> 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. *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

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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).

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 investiga-

tion or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,

Paul DeCamp
Administrator

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

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

No. 1:11-cv-00073-RBW

Filed: Oct. 2, 2013

ORDER

Before: GARLAND, Chief Judge; HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, and SRINIVASAN, Circuit Judges; SENTELLE, Senior Circuit Judge

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

APPENDIX F

1. 5 U.S.C. 551 provides:

Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

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

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration,

charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

2. 5 U.S.C. 553 provides:

Rule Making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or

otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

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; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an

agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

3. 5 U.S.C. 554 provides:

Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

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[1] So in original.

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

4. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5. 5 U.S.C. 706 provides:

Scope of review

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—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(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;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

6. 29 U.S.C. 259 provides:

Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act,1 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 agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.]—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.