ORAL ARGUMENT SCHEDULED FOR MARCH 22, 2013
No. 12-5246

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MORTGAGE BANKERS ASSOCIATION

Plaintiff–Appellant

v.

HILDA L. SOLIS, SECRETARY
OF LABOR, et al.,

Defendants–Appellees

and

JEROME NICKOLS, et al.

Intervenors-Appellees

Appeal from the United States District Court for the District of Columbia,
No. 11-cv-00073, Judge Reggie B. Walton

BRIEF FOR INTERVENORS-APPELLEES JEROME NICKOLS, ET AL.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), Intervenors-Appellees Ryan Henry, Beverly Buck, and Jerome Nickols state as follows for their Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

Plaintiff-Appellant is the Mortgage Bankers Association. Defendants-Appellees are Hilda L. Solis, in her official capacity, Nancy Leppink, in her official capacity, and the United States Department of Labor. Intervenors-Appellees are Ryan Henry, Beverly Buck and Jerome Nickols, and are mortgage loan officers seeking to be paid overtime compensation in collective lawsuits filed in federal district courts under the Fair Labor Standards Act, 29 U.S.C. § 216(b).[1]

B. Rulings Under Review

The ruling under review is the District Court's June 6, 2012 Order granting in part Defendant's Cross Motion to Dismiss or, in the alternative, for Summary Judgment and denying Plaintiff's Motion for Summary Judgment. Mortg. Bankers Assoc. v. Solis, 864 F.Supp. 2d 193 (D.D.C. 2012).

[1] Intervenor-Appellee Ryan Henry is a named and opt-in plaintiff in Henry v. Quicken Loans Inc., Court File No. 04-cv-40346 (E.D. Mich.). Intervenor-Appellee Beverly Buck is an opt-in plaintiff in Mathis v. Quicken Loans Inc., No. 07-cv-10981 (E.D. Mich.), and Intervenor-Appellee Jerome Nickols is an opt-in plaintiff in Chasteen v. Rock Financial Inc., Court No. 07-cv-10558 (E.D. Mich.).

C. Related Cases

Counsel is not aware of any other related cases currently pending in this Court or any other court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

**Authorities upon which we chiefly rely are marked with asterisks*

Statutes

Regulations and Rules

Other Authorities

GLOSSARY OF ABBREVIATIONS

Term	Abbreviation
Administrator Interpretation No. 2010-1	AI or AI 2010-1 or 2010AI
Administrative Procedure Act	APA
United States Department of Labor; Hilda L. Solis, in her official capacity as Secretary of Labor; and Nancy Leppink, in her official capacity as Deputy Administrator of the Department of Labor's Wage and Hour Division	DOL
Environmental Protection Agency	EPA
Federal Aviation Administration	FAA
Fair Labor Standards Act	FLSA
Department of Health and Human Services	HHS
Mortgage Bankers Association	MBA
Occupational Safety and Health Administration	OSHA

JURISDICTIONAL STATEMENT

Appellant Mortgage Bankers Association ("MBA") filed this action contending that the United States Department of Labor ("DOL"), violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 ("APA"), in issuing Administrator Interpretation No. 2010-1 (the "AI" or "2010AI")[1] without notice and comment. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 over MBA's cause of action under the APA. 5 U.S.C. § 702. The district court entered final judgment on June 6, 2012, granting the DOL's and Intervenors' motion for summary judgment. MBA filed a timely notice of appeal on August 2, 2012. This Court has jurisdiction over MBA's appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This lawsuit concerns the validity of the DOL's 2010AI, which determined that mortgage loan officers do not meet the requirements for the Fair Labor Standards Act's administrative exemption. In addition to concluding that the administrative exemption does not apply to mortgage loan officers, 2010AI also forcefully withdrew DOL's contrary 2006 opinion letter, which concluded that mortgage loan officers could qualify for the administrative exemption. The 2010AI concluded the 2006 letter was inconsistent with FLSA regulations, specifically citing its "misleading assumption and selective and narrow analysis," and restored

[1] DOL, Wage & Hour Div. (Mar. 24, 2010), http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf.

DOL's pre-2006 position. The MBA, a trade organization which represents companies that employ mortgage loan officers, alleges that the DOL violated the APA notice-and-comment rulemaking procedure when the DOL issued 2010AI.

More broadly, this case concerns an agency's authority under the APA to correct instances of regulatory capture by issuing restorative guidance. As Intervenors-Appellees will demonstrate, the DOL's 2006 opinion letter was issued at the behest of a private company and MBA member, Quicken Loans, Inc., seeking to change the law to improve its position in pending civil litigation. Further, as Intervenors-Appellees will also demonstrate, the 2006 letter was issued under highly irregular circumstances, with former DOL attorneys simultaneously representing both Quicken and the MBA (yet falsely warranting that the letter was not sought to affect pending litigation). These attorneys extensively negotiated the letter's factual assumptions and legal conclusions with the DOL attorneys who would eventually issue the letter, thereby assuring that Quicken and the MBA would receive the desired opinion. The result was an opinion letter so arbitrary, capricious, and transparently at odds with the governing regulations that it was doomed from the start to collapse under its own weight.

On January 12, 2011, MBA filed suit seeking an order declaring unlawful, vacating, and enjoining the implementation of the 2010AI. (App. 15.) The MBA alleged first that the DOL did not comply with the APA's notice-and-comment

rulemaking procedure in issuing the 2010AI, (App. 22, 23), and second, that the 2010AI conflicts with existing DOL regulations concerning overtime requirements (App. 23, 24).[2] The MBA brought a motion for summary judgment the same day. The DOL responded with (1) a cross motion to dismiss or, in the alternative, for summary judgment, as well as (2) a response to the DOL's motion for summary judgment, on March 10, 2011.[3]

Intervenors-Appellees are former loan officers who brought suit against Quicken Loans, Inc., seeking unpaid overtime backpay.[4] Because of their interest in this litigation, Intervenors-Appellees brought a motion to intervene in this matter, which the U.S. District Court for the District of Columbia granted. (App. 115.)

On June 6, 2012, the District Court granted DOL's motion for summary judgment and denied MBA's motion. MBA timely appealed.

[2] The MBA has not pressed the second argument on appeal.
[3] The substance of both motions was identical.
[4] Intervenor-Appellee Ryan Henry is a named and opt-in plaintiff in Henry v. Quicken Loans Inc., Court File No. 04-cv-40346 (E.D. Mich.). Intervenor-Appellee Beverly Buck is an opt-in plaintiff in Mathis v. Quicken Loans Inc., No. 07-cv-10981 (E.D. Mich.), and Intervenor-Appellee Jerome Nickols is an opt-in plaintiff in Chasteen v. Rock Financial Inc., Court No. 07-cv-10558 (E.D. Mich.).

STATEMENT OF FACTS

A. The FLSA's Overtime Provisions and the White Collar Exemptions

The Fair Labor Standards Act of 1938 (FLSA) requires employers to pay their employees one-and-one-half times their "regular rate" for each hour worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1). There are certain exemptions to the FLSA's overtime requirement. Relevant here, Congress exempted from the FLSA's overtime requirement employees "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). The employer bears the burden of proof on each element of the claimed exemption. Ale v. Tennessee Valley Auth., 269 F.3d 680, 691 n.4 (6th Cir. 2001). FLSA "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

B. The Administrative Exemption, the Development of the Governing Regulatory Framework, *Henry v. Quicken Loans*

Congress has never defined the terms "executive," "administrative," or "professional." The FLSA, however, grants the DOL broad authority to "defin[e] and delimi[t]" the scope of the exemption for executive, administrative, and professional employees. 29 U.S.C. § 213(a)(1). Because of this broad delegation of

rulemaking authority, the regulations issued by the DOL have the binding effect of law. See Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). At issue in this case is the FLSA's administrative exemption.

1. Administrative Exemption Regulations Prior to August 23, 2004

Prior to August 23, 2004, the relevant regulations stated that, in order to avail itself of the administrative exemption, an employer must prove its employee's "primary duty" consists of the "performance of office or nonmanual work directly related to management policies or general business operations of his employer or his employer's customers," and that the employee "customarily and regularly exercises discretion and independent judgment." 29 C.F.R. § 541.2(a) and (e)(2) (2003).

Activities are "directly related to the management policies or general business operations" if they are "relat[ed] to the administrative operation of the business" as distinguished from "production" or "sales." 29 C.F.R. § 541.205(a) (2003). Courts typically employ the "administrative/productive work dichotomy" described in the DOL's regulations, see Martin v. Cooper Electric Supply Co., 940 F.2d 896, 901 (3d Cir. 1991) (citing 29 C.F.R. § 541.205(a) (2003)), under which the administrative duties of "running the business" are juxtaposed with "production" activities that involve "the day-to-day carrying out of the business' affairs." Bratt v. County of Los Angeles, 912 F.2d 1066, 1070 (9th Cir. 1990).

Under the administrative/production dichotomy analysis, the job of "production" employees "is to generate (i.e. 'produce') the very product or service that the employer's business offers to the public." Renfro v. Indiana Mich. Power Co., 370 F.3d 512, 517 (6th Cir. 2004). When employees engage in work that is "ancillary to an employer's principal production activity," those employees are administrative. Id.

Courts have cautioned that the concept of "production" in 29 C.F.R. § 541.205(a)'s administrative/productive work dichotomy is not to be understood as covering only work involving the manufacture of tangibles. Martin, 940 F.2d at 903; 29 C.F.R. 541.205(c)(1)-(3) (explaining that non-manufacturing employees such as bank tellers, bookkeepers and clerks are not "administrative" employees for purposes of the statutory exemption). Rather, "production" within the meaning of 29 C.F.R. § 541.205(a) includes many non-manufacturing jobs, including sales work. Martin, 940 F.2d at 904.

The "administrative operations" of a business include work performed by employees "engaged in 'servicing' a business as, for example, advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. § 541.205(b) (2003). Administrative operations are generally performed by executive and administrative assistants, staff employees (as opposed to "line employees") with

supervisory or advisory authority, and employees on special assignment. 29 C.F.R. § 541.201 (2003).

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. § 541.207(a) (2003). The term "implies that the person has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." Id. According to the regulations, "the most frequent cause of misapplication of the term 'discretion and independent judgment' is the failure to distinguish it from the use of skill in various respects." § 541.207(c)(1). Moreover, the term "has been … misunderstood and misapplied by employers and employees in cases involving … employees making decisions relating to matters of little consequence." § 541.207(b). In other words, "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." § 541.207(d)(1). The term applies to the kinds of decisions "normally made by persons who formulate or participate in the formulation of policy within their spheres of responsibility or who exercise authority within a wide range to commit their employer in substantial respects financially or otherwise." § 541.207(d)(1).

2. DOL Confirms in Two Opinion Letters that Mortgage Loan Officers Do Not Qualify for the Administrative Exemption

Applying these regulations to facts similar—indeed, in all material respects identical—to the facts involved in Intervenors-Appellees' pending claims, the DOL twice confirmed in published opinion letters that mortgage loan officers do not qualify for the FLSA's administrative exemption.

In 1999, the DOL responded to a request inquiring whether employees working as loan officers qualified for the administrative exemption. Wage and Hour Opinion Letter, 1999 WL 1002401, at *1 (May 17, 1999). The letter described the job duties of the loan officers as follows:

> [L]oan officers develop new business for the employer by contacting prospective borrowers and referral sources; evaluate the borrowers' financial situation and provide a "prequalification letter" …; consult with borrowers to obtain the best loan package available (e.g. best interest rates, lowest points and fees, maximum affordable loan amount); work with approximately ten different lenders in selecting loan programs for borrowers; consult with the borrowers regarding the desirability of "locking-in" a given interest rate; assist the borrowers in preparing a loan application for a selected loan program; present and obtain signature of the borrower on disclosures required by federal and state laws; submit loan application to the central office for processing; and consult with loan processors or the borrowers in resolving problems or in obtaining additional information regarding the loan package.

Id.

The DOL concluded that loan officers did not qualify for the administrative exemption. Id. The opinion letter reasoned that "the loan officers are engaged in

carrying out the employer's day-to-day activities rather than in determining the overall course and policies of the business." Id. The letter also rejected the application of the administrative exemption for the independent reason that loan officers' job duties "require the use of skills and experience in applying techniques, procedures, or specific standards rather than the exercising of discretion and independent judgment, within the meaning of the regulations." Id. The DOL stated flatly: "[s]uch employees must be paid in accordance with the minimum wage and overtime provisions of the FLSA." Id.

In 2001, the DOL responded to a request to "reconsider[] [the] opinion of May 17, 1999, concerning the exempt status of loan officers under [the] … FLSA …." Wage and Hour Opinion Letter, 2001 WL 1558764, at *1 (Feb. 16, 2001). The DOL refused to depart from its previous position, holding once again that the loan officers described in the letter did not qualify for the administrative exemption. Id. The letter stated that "the loan officers are using their skill and knowledge in applying techniques, procedures, and/or specific standards (such as loan-to-value ratios and debt ratios) in choosing an already established loan package that best meets the needs and financial abilities of the borrower and which comports with the specified requirements of the lender." Id. The letter concluded that the "loan officers in question are not exercising the necessary discretion and

independent judgment within the meaning of the regulations, and would not be exempt as administrative employees." Id.[5]

3. Casas v. Conseco Concludes Mortgage Loan Officers Do Not Qualify for the Administrative Exemption

One year later, in the case of Casas v. Conseco Finance Corp., No. Civ.00–1512, 2002 WL 507059 (D. Minn. Mar. 31, 2002), the court confronted directly for the first time whether mortgage loan officers fall under the coverage of the FLSA's administrative exemption.

Conseco Finance designed, created, and sold consumer lending products to the public. The plaintiffs in Conseco were mortgage loan officers who worked in Conseco's call centers. Conseco, 2002 WL 507059, at *1. The court described the loan officers' job duties as follows:

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[5] The DOL has also opined for over 40 years that loan officers who customarily and regularly work outside the office meet the requirements for the FLSA's outside sales exemption. See Wage and Hour Opinion Letter WH-115, 1971 WL 33052 (January 15, 1971) (concluding that mortgage loan officers made sales within the meaning of the FLSA's outside sales exemption); Wage and Hour Opinion Letter FLSA2006-11 at 3, available at http://www.dol.gov/WHD/opinion/FLSA/2006/2006_03_31_11_FLSA.pdf. (Mar. 31, 2006) (reiterating the DOL's long-held view that the "sale of mortgage loan packages" by mortgage loan officers "meets the definition of sales in section 3(k) of the FLSA").

These opinion letters strongly suggest that mortgage loan officers cannot qualify for the administrative exemption because it is logically impossible for an employee to meet the requirements of both the administrative exemption, which excludes employees whose primary duty is selling, see 29 C.F.R. § 541.201(a), and the outside sales exemption, which requires proof that the employees' primary duty is selling, see 29 C.F.R. § 541.500.

> Loan originators [i.e., loan officers] use internal leads provided to them by Conseco to make telephone contact with potential customers. Using Conseco's guidelines and standard operating procedures, loan originators try to match the customer's needs with one of Conseco's loan products and obtain information to complete a loan application, such as, income level, home ownership, credit history and property value. Loan originators also run a series of credit reports using credit bureaus integrated into Conseco's computer system. Once this is complete, the loan originator forwards the application information to a loan underwriter for an approval decision. Loan originators have no authority to approve a loan. If the loan is approved, the originator prepares for the closing by gathering documents from the customer, verifying information supplied by the borrower, answering questions, and ordering title work and appraisals. If the loan is denied, the originator communicates the rejection to the customer and enters it into Conseco's system. According to affidavit testimony submitted by defendants, loan originators could negotiate the number of points paid by a customer which affects the overall price of the loan and, until June 2000, could adjust interest rates within a floor and ceiling range.

Id. at *1. Conseco loan officers were paid an average annual base pay of $25,000, plus commissions based on sales production, with total compensation (including commissions) ranging on average between $65,000 to $70,000 a year. Conseco, 2002 WL 507059, at *2.

Both parties in Conseco brought motions for summary judgment on the application of the administrative exemption, and the court granted summary judgment in favor of the plaintiffs, concluding that, taking the evidence in the light most favorable to Conseco, the company's loan officers were not covered by the administrative exemption. Conseco, 2002 WL 507059, at *9-10.

The court held that Conseco loan officers did not have the primary duty consisting of "the performance of … work directly related to management policies or general business operations of his employer or his employer's customers." Id. at *6. Citing to the "administrative/production dichotomy," the court concluded that Conseco loan officers 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. As is evident from a description of plaintiff's job duties, plaintiffs are responsible for soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer's financial needs. In the Court's view, these duties establish that plaintiffs are primarily involved with "the day-to-day carrying out of the business" rather than "the running of [the] business [itself]" or determining its overall course or policies."

Conseco, 2002 WL 507059, at *9.

Conseco also concluded that loan officers did not exercise discretion and independent judgment with respect to matters of significance. Conseco, 2002 WL 507059, at *9-10. The court reasoned that the decisions plaintiffs were empowered to make—"whether to proceed with an application, which lending product to suggest, negotiating pricing by adding closing points and taking other customer circumstances into account when selling the loan"—were all governed by Conseco's pre-existing established standing operating procedures and guidelines. Id. at *10. The court also found relevant that Conseco loan officers "had no

authority to approve a loan absent approval of the underwriting department." Id. The court ultimately concluded that Conseco loan officers "were using skills in applying techniques, procedures or specific standards of Conseco rather than exercising the kind of independent judgment and discretion within the meaning of the regulations …." Id.

4. Quicken Discovers the Conseco Decision and Begins Its Lobbying Efforts To Reverse the Decision, and Intervenors-Appellees Sue Quicken for Overtime Backpay

a. Quicken discovers the *Conseco* decision[6]

[6] Intervenors-Appellees will cite to materials outside the administrative record in order to apprise this Court of the circumstances leading up to the issuance of the 2006 opinion letter, which are critical to understanding the reasons justifying the DOL's issuance of 2010AI. See App. 118 (stating that Intervenors "can also 'shed light on the irony of [the plaintiff's] complaints . . . in light of the improper circumstances under which [the 2006 Opinion Letter] was obtained by [the plaintiff] in the first place, circumstances that neither [party has] shown a willingness to discuss.'").

As this Court has recognized, a party may supplement the administrative record for the benefit of the court where (1) "the agency deliberately or negligently excluded documents that may have been adverse to its decision," (2) "the district court needed to supplement the record with 'background information' in order to determine whether the agency considered all of the relevant factors," or (3) "the agency failed to explain administrative action so as to frustrate judicial review," James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (internal quotation marks and brackets omitted). Although framed around the far more common scenario where a party seeks to supplement the record in order to challenge agency action, the James Madison factors are equally applicable here, where an intervening party supports agency action, but the agency, not wanting to subject itself to embarrassment or to protect the legal rights of persons with pending claims, refuses to adequately defend agency action by fully explaining how the repudiated interpretation (in this case, the 2006 opinion letter) came to be. Intervenors will fill that void to the benefit of this Court.

On September 5, 2002, Quicken Loans, Inc.[7] discovered the Conseco decision. Angelo Vitale, Quicken's corporate counsel, [redacted] (Sealed Supp. App. 3-7.) Vitale did not mince words in explaining [redacted] (Sealed Supp. App. 3 (emphasis added).) Vitale concluded by [redacted] (Sealed Supp. App. 3.)

b. The DOL proposes amendments to the FLSA's white collar exemptions; Quicken begins its lobbying efforts with the Mortgage Bankers Association

On March 31, 2003, the DOL published proposed revisions to the white collar regulations, inviting public comment. See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and

[7] Quicken Loans is in the business of providing mortgage loans to its customers, individuals seeking mortgages for their residential homes, and has employed thousands of loan officers, including Intervenors-Appellees. See Henry v. Quicken Loans Inc., 2009 WL 3270771 at *2 (E.D. Mich. 2009).

Computer Employees, 68 Fed. Reg. 15,560 (Mar. 31, 2003). Quicken and the MBA were heavily involved in lobbying to try to change the law to include loan officers as employees classified as exempt from the FLSA's overtime requirements. (App. 130, 131.) Quicken Vice President of Administration David Carroll and Quicken Corporate Counsel Richard Chyette started working with the MBA, an industry trade group, giving the organization input on how Quicken thought the issue should be addressed. (App. 130, 131; 137.)

Also in 2003, Robert Davis, who would eventually serve as litigation counsel for Quicken, began representing the MBA in various matters relating to the FLSA. (App. 143.) Davis had served as the Solicitor of the DOL from 1989 to 1991. (App. 142.) During the time the DOL was considering amendments to the white collar regulations, Davis argued that the white collar exemptions should be broadened so that mortgage loan officers would fall under the coverage of the administrative exemption. (App. 143.)

c. Intervenor-Appellee Ryan Henry files suit against Quicken, seeking overtime backpay as a result of their misclassification under the FLSA

Relying on the governing regulations, as well as the DOL's 1999 and 2001 opinion letters, which uniformly held that mortgage loan officers do not qualify for the administrative exemption, Intervenor-Appellee Ryan Henry filed an action on May 17, 2004 in the United States District Court for the Eastern District of

Michigan. Henry, 2009 WL 3270771 at *2. Henry, a former Quicken loan officer, alleged that Quicken violated the FLSA by misclassifying him as exempt from overtime. The court conditionally certified the case as a collective action, finding Henry "similarly situated" to Quicken's other loan officers. Id. Approximately 445 individuals joined Henry as opt-in Plaintiffs. Id. [8]

5. The DOL Issues New White Collar Regulations; The MBA's and Quicken's Lobbying Efforts Fail as New Regulations Do Not Broaden the Administrative Exemption; New Section 541.203(b) Codifies the Conseco Decision and Confirms that Employees Whose Primary Duty Is Selling Financial Products Are Non-Exempt

The DOL's amendments to the white collar regulations went into effect on August 23, 2004. See generally Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004). Despite the MBA's and Quicken's lobbying, the amended regulations were not [redacted] to cover loan officers. On the contrary, the new regulations defining the scope of the administrative exemption were intended to be "as protective as the existing regulations," id. at 22,138, and "consistent with the [old] short test," id. at 22,139.[9] In addition, the

[8] Mathis v. Quicken Loans Inc., No. 07-cv-10981 (E.D. Mich.) was filed March 2, 2007, and Chasteen v. Rock Financial Inc., Court No. 07-cv-10558 (E.D. Mich.) was filed January 5, 2007.

[9] Indeed, courts have recognized that the revised regulations governing the administrative exemption are not substantively different than the regulations they replaced. See, e.g., Smith v. Government Employees Ins. Co., 590 F.3d 886, 892

revised regulations added a new section discussing the application of the administrative exemption to employees in the financial services industry, and confirmed, citing and discussing Conseco, see 69 Fed. Reg. 22,145, that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." See 29 C.F.R. 541.203(b).

a. The revised regulations

Under the revised regulations,

> The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
> …
>
> (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 phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. 29 C.F.R. 541.201(a). "To meet this requirement, an employee must perform work directly

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n.6 (D.C. Cir. 2010). In other words, the amended regulations were not meant to substantively alter the scope of the administrative exemption, but rather to "provide[] clarity while at the same time maintaining continuity with the existing regulations." 69 Fed. Reg. 22,144.

related to assisting with the running or servicing of the business," as distinguished, for example, from "production" or "selling a product." Id.

> Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. 541.201(b).

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). The term "matters of significance" refers to the level of importance or consequence of the work performed. Id. 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(c).

In addition, 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." 29 C.F.R. 541.202(e).

Finally, when determining an employee's "primary duty," the term means the "principal, main, major or most important duty that the employee performs." 29 C.F.R. 541.700(a). 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." Id. Factors to consider when determining the primary duty of an employee include, but are not limited to,

> the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id.

b. New Section 541.203(b) addresses the application of the administrative exemption to workers in the financial services industry, explicitly codifying *Conseco* into the regulatory fabric

In addition to clarifying the general duties requirements of the administrative exemption, the revised regulations incorporated a new provision, section 541.203(b), specifically addressing the application of the administrative exemption to employees working in the financial services industry. According to the new provision:

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

29 C.F.R. 541.203(b) (emphasis added).

In crafting the new section 541.203(b), the DOL explained that the provision was meant to approve of and incorporate the holdings of four recent federal cases applying the administrative exemption to employees working in the financial services industry, codifying the cases' holdings into the regulatory fabric. 69 Fed. Reg. 22,145-46 (stating that the new regulatory provision, section 541.203(b), is "consistent with this case law"). In three of the four cases, Reich v. John Alden

Life Insurance Co., 126 F.3d 1 (1st Cir. 1997), Wilshin v. Allstate Insurance Co., 212 F. Supp.2d 1360 (M.D. Ga. 2002), and Hogan v. Allstate Insurance Co., 361 F.3d 621 (11th Cir. 2004), courts concluded that employees working in the insurance industry were exempt administrative employees as a matter of law. 69 Fed. Reg. 22,145.

John Alden involved marketing representatives working for an insurance company that designed, created and sold insurance products. John Alden, 126 F.3d at 3. The marketing representatives did not sell the company's products through direct contacts with customers; instead, marketing representatives relied on hundreds of independent insurance agents to interact directly with customers. Id. The marketing representatives, by contrast, "worked to cultivate this independent agent sales force, and, thereby, ultimately to increase sales of John Alden products." Id. The First Circuit held that the marketing representatives' contact with the independent sales agents involved 'something more than routine selling efforts focused simply on particular sales transactions.' Rather, their agent contacts were "aimed at promoting (i.e., increasing, developing, facilitating, and/or maintaining) customer sales generally," activity which is deemed administrative sales promotion work under section 541.205(b)." Id.; see also 69 Fed. Reg. 22,145 (discussing John Alden).

The court in Wilshin held that a neighborhood insurance agent met the requirements for the administrative exemption when his responsibilities included recommending products, providing claims help to different customers, underwriting policies, engaging in public relations, hiring part time employees, working with clients on initiating claims, as well as using his own personal sales techniques to promote and close transactions. Wilshin, 212 F. Supp.2d at 1377-79; see also 69 Fed. Reg. 22,145 (discussing Wilshin).

In Hogan, the Eleventh Circuit held that insurance agents who "spent the majority of their time servicing existing customers" and performed duties including "promoting sales, advising customers, adapting policies to customer's needs, deciding on advertising budget and techniques, hiring and training staff, determining staff's pay, and delegating routine matters and sales to said staff" were exempt administrative employees. Hogan, 361 F.3d at 627; see also 69 Fed. Reg. 22,145 (discussing Hogan).

The DOL contrasted John Alden, Wilshin, and Hogan with Conseco, discussed in detail above, where the court held that mortgage loan officers were not exempt because they had a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers. 2002 WL 507059, at *9. After discussing the facts, reasoning, and holding of Conseco, the DOL stated that it "agree[d] that employees whose primary duty is inside sales cannot qualify as

exempt administrative employees." 69 Fed. Reg. 22,145. Citing John Alden, Wilshin, and Hogan, the DOL acknowledged that some limited selling activity would not, standing alone, "automatically preclude[] a finding of exempt administrative status." Id. Citing Conseco, however, the DOL reaffirmed that "[a]n employee whose primary duty is inside sales is not exempt." Id.

6. Quicken and the MBA Pursue a Strategy of Regulatory Capture, Using Backroom Connections at the DOL to Obtain an Incorrect and Misleading Opinion Letter in an Attempt to Upend the Settled Regulatory Scheme

Quicken's and the MBA's lobbying efforts had failed. Rather than [redacted] the administrative exemption to cover mortgage loan officers and kill the Conseco decision, the new regulations reaffirmed that mortgage loan officers are non-exempt and must be paid overtime.

Rather than reclassifying its loan officers, however, Quicken and the MBA began pursuing a strategy of regulatory capture. Having failed to change the law under the sunshine of notice-and-comment rulemaking, Quicken and the MBA shifted gears and began a secret lobbying effort to attempt to change the law though backdoor negotiations with their connections at the DOL.

On January 31, 2005, Robert Davis noticed his appearance as counsel of record for Quicken in the Henry litigation. (App. 151, 152.) Davis also continued to represent the MBA. From around July 2005 to September 2006, while representing Quicken in the Henry litigation, Davis contacted some of the personal

connections he had developed at the DOL during his tenure as Solicitor of the DOL, and lobbied for an opinion letter addressing the application of the administrative exemption to mortgage loan officers. (App. 136, 137.) Chyette, Quicken's corporate counsel, and Robert Varnell, another member of Quicken's litigation team, also worked with Davis on the opinion letter request. (App. 155, 156; 159.) Despite Davis's, Chyette's, and Varnell's representation of Quicken in active litigation involving the classification of its loan officers, they explicitly represented to the DOL that the opinion letter was "not sought by a party to pending private litigation concerning the issue addressed herein." (App. 169.)

But Davis, Chyette, and Varnell did not simply request the DOL's impartial application of the FLSA to a hypothetical set of facts. Instead, correspondence obtained through Freedom of Information Act requests shows that Davis and DOL attorneys improperly worked hand-in-hand on the letter, behind closed doors, extensively negotiating both the factual assumptions and legal analysis on which the DOL's opinion would be based. (App. 170; 157.)

For example, on July 28, 2005, Davis submitted a memorandum to DOL attorneys containing a draft opinion letter request. (App. 170.) The draft contained proposals for the facts that would be assumed, as well as the legal analysis to be used by the DOL in reaching the requested conclusion. Davis asked the DOL to assume that the loan officers that were the subject of the opinion letter, unlike

Quicken's employees, "engage in some sales activity, but not sales activity as their primary duty[.]" (App. 173.) Rather, Davis asked the DOL to assume that the primary duties of the hypothetical loan officers consisted of various other duties—such as marketing, servicing or promoting the employer's financial products. (App. 176.) With respect to the sales activity the hypothetical loan officers did perform, Davis gave the concept an extremely narrow definition, dubbing it "customer-specific persuasive sales activity,"[10] and asked the DOL to assume, for purposes of the opinion, that it "represent[ed] less than 50% of the mortgage loan officer's working time over a representative period" and was not the primary duty. (App. 176.) Davis's draft letter concluded by outlining the proposed legal analysis to be used in concluding that the hypothetical loan officers qualified for the administrative exemption. (App. 177-179.) Following a second meeting between Davis and DOL attorneys, Davis sent a follow-up email addressing factual distinctions that Davis believed would be "appropriate" for the DOL to make in its opinion letter, as well as supplemental legal analysis to be used in the letter. (App. 157.)

[10] The term "customer-specific persuasive sales activity" appears nowhere in the regulations relating to the administrative exemption. See 29 C.F.R. § 541, Subpart C.

7. The DOL Issues an Opinion Letter in 2006 Declaring Loan Officers Covered by the Administrative Exemption, Completely Undoing the Settled Regulatory Scheme

On September 8, 2006, the DOL issued the opinion letter Davis had requested. See Wage and Hour Opinion Letter FLSA2006-31 (Sept. 8, 2006).[11] Consistent with Davis's request, the opinion letter assumed that the hypothetical loan officers did not have sales as their primary duty—in other words, the letter assumed the very conclusion Davis and his connections at the DOL sought to achieve. Id. On the application of the administrative exemption to the assumed facts, the letter concluded that "[s]imilar 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." Opinion Letter FLSA2006-31 at 5. Despite extensive discussion of John Alden, Hogan, and Wilshin, the letter did not cite—let alone discuss or attempt to distinguish—the Conseco decision, where the court concluded mortgage loan officers were non-exempt as a matter of law, or the DOL's 1999 and 2001 opinion letters, which the 2006 letter purported to overrule. Such an omission would be surprising (and somewhat embarrassing) under normal circumstances, as even a brief discussion of Conseco would have

[11] Available at http://www.dol.gov/WHD/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf.

confirmed that the 2006 letter reached the incorrect conclusion. But, of course, the omission made sense in light of what Quicken, the MBA, and their connections at the DOL hoped to achieve; after all, it was the Conseco decision itself that the 2006 letter had trained in its crosshairs.

In the candid words of the district court in Henry, "[t]he fact of the matter is, an extremely powerful trade association cause[d] a shift in federal law … effectively manipulat[ing] an agency to issue a letter that governs the outcome of federal litigation without anybody being able to address it," (App. 184-186), creating a result that is "highly unfair, highly disruptive to employees, plaintiffs and courts who have to deal with [it]." (App. 187.)

8. The DOL Issues Administrator's Interpretation 2010-1, Forcefully Withdrawing the 2006 Opinion Letter, Reaffirming that Loan Officers Do Not Qualify for the Administrative Exemption

Not surprisingly given its questionable origins, misleading assumptions, and exceptionally poorly-reasoned analysis, the DOL's 2006 opinion letter's existence was solitary, brutish, and short. On March 24, 2010, the DOL issued Administrator's Interpretation No. 2010-1, addressing the application of the administrative exemption to employees who perform the typical job duties of a mortgage loan officer. Administrator's Interpretation No. 2010-1 (Mar. 24, 2010). Consistent with every other piece of authority in existence prior to the issuance of the 2006 opinion letter, the 2010AI concluded such employees "do not qualify as

bona fide administrative employees exempt under" the FLSA. Id. The 2010AI also forcefully withdrew the contrary 2006 opinion letter, citing its "misleading assumption and selective and narrow analysis." Id.

Relying on the "production versus administrative" dichotomy, the 2010AI concluded that mortgage loan officers engage in production, rather than administrative work. 2010AI at 3-4. The 2010AI also examined a number of factors cited in the regulations and apposite caselaw, including the employee's job description, the employer's qualifications for hire, sales training, method of payment, and proportion of earnings directly attributable to sales, determining that "[a]pplying these factors to the job duties mortgage loan officers typically perform leads to the conclusion that they have a primary duty of making sales." 2010AI at 8.

The 2010AI concluded by reasoning that,

> [w]ork such as collecting financial information from customers, entering it into the computer program to determine what particular loan products might be available to that customer, and explaining the terms of the available options and the pros and cons of each option, so that a sale can be made, constitutes the production work of an employer engaged in selling or brokering mortgage loan products. Such duties do not relate to the internal management or general business operations of the company; they do not involve servicing the business itself by providing advice regarding internal operations…. 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.

2010AI at 6-7.

Addressing two other flaws in the 2006 opinion letter, the 2010AI clarified the definition of "employer's customers" in § 541.200 does not cover individuals seeking mortgages. The 2010AI stated:

> [W]ork 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.

Id. at 7 (emphasis added).

Finally, the 2010AI clarified that the description of the job duties in the first sentence of § 541.203(b), which outline the duties of employees who "generally meet the duties requirements for the administrative exemption" is merely an example, and cannot trump the elements of the administrative exemption under 29 C.F.R. § 541.200(a). Id. at 8 ("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.").

9. The Henry Trial and Appeal

The DOL's focus on prospective Auer deference, and hesitance to address the impact of 2010AI on claims that accrued before March 24, 2010 has already adversely affected litigation concerning the administrative exemption's application

to mortgage loan officers. In Henry, the district court refused to modify its previous orders in light of the 2010AI, and the jury determined that Henry, along with Quicken's other "sales force" mortgage loan officers, were administratively exempt, in part because the jury instructions and special verdict form were contrary to law and 2010AI. Henry was recently affirmed by the Sixth Circuit. Henry v. Quicken Loans, Inc., 698 F. 3d 897 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

The MBA asserts that the 2010AI is an improperly-promulgated "rulemaking" under the Administrative Procedures Act ("APA"). But the APA creates an explicit exemption from the typical formal rulemaking procedures for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). As this Court has recognized, interpretative rules construe an agency's substantive regulation, and there is no dispute in this case that 2010AI qualifies as an interpretive rule. See Syncor Int'l. Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997). Despite this seemingly clear statutory language, this Court adopted a rule (referred to herein as the Paralyzed Veterans doctrine) in Alaska Professional Hunters Association, Inc. v. FAA, 177 F.3d 1030 (D.C. Cir. 1999) (citing Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1977)), stating that an agency can issue one interpretive rule construing a legislative regulation without going through notice

and comment, but "[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 1033-34.

There are four compelling arguments refuting the MBA's contention that the APA required the DOL to go through notice and comment in order to correct the erroneous 2006 opinion letter. First, the plain language of the APA does not require notice and comment for interpretive rules, regardless of whether a given rule is the "first" interpretive rule or a subsequent interpretive rule. As a consequence, Intervenors-Appellees urge this Court to revisit the Paralyzed Veterans doctrine, which has been undermined by recent Supreme Court cases. Second, notice and comment are not required for a new regulatory interpretation when the original interpretation was itself invalid. See Monmouth Med. Ctr. v. Thompson, 257 F.3d 807, 813-14 (D.C. Cir. 2001). And because the 2006 opinion letter rested its conclusions on a series of false assumptions and misinterpretations of the governing regulations, the 2006 letter was invalid. Third, the Paralyzed Veterans doctrine (assuming it is still good law) applies only if an affected party's reliance upon a prior interpretation was both "substantial and justifiable." See MetWest Inc. v. Sec'y of Labor, 560 F.3d 506, 511 (D.C. Cir. 2009). And as the district court concluded, because the 2010AI requires regulated entities merely to begin once again to pay overtime to loan officers (which they were required to pay

prior to the issuance of the erroneous 2006 letter), no substantial or justifiable reliance is present here. Fourth, assuming the Paralyzed Veterans doctrine governs this case, the 2006 letter itself is invalid under the same rule, as the 2006 letter the MBA seeks to resuscitate itself abandoned a body of administrative guidance without notice and comment.

ARGUMENT

A. 2010AI Did Not Run Afoul of the APA

1. The Plain Language of the APA Does Not Require Notice and Comment for Interpretive Rules and the Paralyzed Veterans Doctrine Is No Longer Good Law in Light of Intervening Supreme Court Caselaw

Intervenors-Appellees respectfully ask this Court to overrule the Paralyzed Veterans doctrine, which is contrary to the plain language of the APA, and has been undermined by numerous exceptions and intervening Supreme Court cases.

The APA creates an explicit exemption from the typical formal rulemaking procedures for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). There is no dispute that the 2010AI qualifies as an interpretive rule, rather than a legislative regulation.

In accordance with the text of the APA, the majority of circuits have explicitly held that changes in interpretation do not require notice and comment. See, e.g., Miller v. Cal. Speedway Corp., 536 F.3d 1020, 1033 (9th Cir. 2008);

Paralyzed Veterans of Am. v. West, 138 F.3d 1434, 1436 (Fed. Cir. 1998); Warder v. Shalala, 149 F.3d 73, 81 (1st Cir. 1998); Hoctor v. USDA, 82 F.3d 165, 170 (7th Cir. 1996); Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1341 (4th Cir. 1995), superseded on other grounds by statute, 8 U.S.C. § 1101(a)(42)(B), as recognized in Li v. Gonzales, 405 F.3d 171, 176 (4th Cir. 2005); White v. Shalala, 7 F.3d 296, 304 (2d Cir. 1993); St. Francis Health Care Ctr. v. Shalala, 205 F.3d 937, 947 (6th Cir. 2000). In addition, other courts around the country have uniformly rejected the precise argument the MBA makes here, concluding that no notice and comment was required before issuing the 2010AI. See Swigart, v. Fifth Third Bank, No 1:11-cv-88, 2012 WL 1598752 (S.D. Ohio 2012); Lewis v. Huntington Nat'l Bank, 838 F.Supp.2d 703, 707–13 (S.D. Ohio 2012); Biggs v. Quicken Loans, Inc., No. 10–cv–11928, 2011 WL 5244819, at *6 (E.D. Mich. 2011).

Although stare decisis is essential to the respect accorded to judgments and to the stability of the law, it is not an inexorable command. See Lawrence v. Texas, 539 U.S. 558, 577 (2003). The role of stare decisis is somewhat reduced in the case of a procedural rule, which does not serve as a guide to lawful behavior. See Hohn v. United States, 524 U.S. 236, 251 (1998). When a court reexamines a prior holding, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of

reaffirming and overruling a prior case." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854 (1992).

> Thus, for example, [courts] may ask whether the rule has proven to be intolerable simply in defying practical workability, Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, e. g., United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924); [or] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, see Patterson v. McLean Credit Union, 491 U.S. 164, 173-174 (1989) . . . .

Id. at 854-55.

These factors weigh in favor of overruling the Paralyzed Veterans doctrine.[12] The doctrine is practically unworkable. Numerous exceptions to the doctrine (discussed below as applied to the facts of this case), have demonstrated the doctrine is rarely applied in practice. In addition, there is no meaningful reliance on the doctrine, as most other circuits do not follow the rule, and the doctrine's application within the D.C. Circuit is difficult to predict. Although parties may, in certain cases, rely on interpretations before they are withdrawn, any such reliance is tempered by other means, for three reasons. First, as the district court recognized, when a company that proves it relies in good faith on guidance that is

[12] This Court does have a method—the Irons footnote—which allows the full court to endorse such a reversal of course without full en banc rehearing. See Irons v. Diamond, 670 F.2d 265, 268 n. 11 (D.C.Cir.1981). However, as explained below, use of the Irons procedure is unnecessary where, as here, a prior panel decision has been fatally undermined by one or more intervening Supreme Court decisions.

later withdrawn, it is immunized from liability under the Portal-to-Portal Act's good faith defense. See 29 U.S.C. § 259(a). In addition, "[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n. 30 (1987). Finally, a change of position by an agency is one factor militating in favor of finding an action or interpretation arbitrary and capricious. E.g., Rapoport v. S.E.C., 682 F.3d 98 (D.C. Cir. 2012). Each of these points protects reliance interests in a manner consistent with the APA, undermining any argument that the Paralyzed Veterans doctrine has resulted in significant reliance.

Finally, numerous recent Supreme Court cases undermine the doctrine, calling into question its continuing validity. See Dellums v. United States Nuclear Regulatory Comm'n, 863 F.2d 968, 978 n. 11 (D.C. Cir. 1988) (rejecting the notion that en banc review is required to "formally bur[y]" circuit precedent that is "out of step" with intervening Supreme Court precedent because "it is black letter law that a circuit precedent eviscerated by subsequent Supreme Court cases is no longer binding on a court of appeals") (citing City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 435 (5th Cir.1976) ("It is settled that the rule against inconsistent panel decisions has no application when intervening Supreme Court precedent dictates a departure from a prior panel's holding.")).

The Supreme Court interprets the APA in accord with its plain language: "Interpretive rules do not require notice and comment." Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995); see also Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 173 (2007) ("[U]nder the Administrative Procedure Act an agency need not use [notice and comment] when producing an 'interpretive' rule.").[13]

[13] Intervenors-Appellees disagree with the DOL's argument, articulated in its summary judgment brief in footnote 17, that the 2010 AI applies only prospectively, and further disagree that the Supreme Court's dicta from Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) bears any relationship to the validity of the 2010AI under the APA.

The question presented in Coke was whether home care nurses employed by third parties were exempt from the FLSA's overtime requirements. Id. at 2344. In that case, the DOL issued, without notice and comment, an "Advisory Memorandum," which interpreted two conflicting regulations and concluded that such home care nurses were exempt under the FLSA. Id. at 2344-45. The issue in Coke was not the validity of the "Advisory Memorandum" under the APA, an issue that apparently was not raised, but rather the degree of deference the Court would afford the DOL's position. The Court conceded that "the Department may have interpreted these regulations differently at different times in their history," id. at 2349, but concluded that "as long as interpretive changes create no unfair surprise . . . the change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." Id. The Court ultimately deferred to the DOL's interpretation under Auer v. Robbins, 519 U.S. 452, 462 (1997) (reiterating the familiar principle that an agency's interpretation of its own regulations is "controlling" unless "plainly erroneous or inconsistent with" the regulations being interpreted). Thus, Coke stands for the unremarkable proposition that a well-reasoned interpretation that creates no unfair surprise is entitled to Auer deference. And although Coke could perhaps be read to imply that the "Advisory Memorandum" at issue was valid, Coke does not speak to the issue presented here: whether an agency's interpretive guidance revoking earlier interpretive guidance must go through the notice and comment procedures outlined in the APA. Although the DOL is plainly sensitive to the degree of deference courts will afford

The Supreme Court upheld in 2009 the FCC's changed interpretation of the ban on broadcasting "obscene, indecent, or profane language," 18 U.S.C. § 1464. See Fox Television, 129 S. Ct. at 1819. The Second Circuit had reversed the FCC's interpretation on the ground that the APA requires "a more substantial explanation for agency action that changes prior policy." Id. at 1810. The Supreme Court rejected the Second Circuit's reasoning, holding that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." Id. at 1811. The Court added that "there is no basis for incorporating all of the Administrative Procedure Act's notice-and-comment

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the 2010AI moving forward, the issue is simply not before this Court, Coke provides no answer to the issue raised by the MBA, and the DOL is incorrect to assume that a factor identified by the Supreme Court as relevant to the degree of deference owed to an interpretation has any bearing on the interpretation's validity under the APA.

Further, as discussed in more detail below, the DOL is incorrect in its assertion that the 2010AI applies only prospectively, and also incorrect in its assumption that the retroactive application of the 2010AI would amount to an unfair surprise as contemplated by Coke. Even assuming that Coke's "unfair surprise" language bears any relationship to the validity of the 2010AI under the APA (it does not), the application of the 2010AI to Intervenors-Appellees' pending claims, as discussed more thoroughly below, would not work an unfair surprise on the regulated community. This is so because the 2010AI merely clarifies employers' obligations under the governing regulations—creating no liability that did not already exist—, and because financial institutions that can prove they actually relied on the erroneous 2006 opinion letter in good faith and conformed their conduct to match the letter's hypothetical facts are shielded from retroactive liability under the Portal-to-Portal Act's good faith defense, 29 U.S.C. § 259(a).

In short, Coke's dicta does not speak to the validity of interpretive rules, and even if it did, the application of the 2010AI to Intervenors-Appellees' pending claims would not amount to an unfair surprise as contemplated by Coke.

procedural requirements into arbitrary-and-capricious review of adjudicatory decisions." Id. at 1819 n.8 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 545-49 (1978)).

The Paralyzed Veterans doctrine also conflicts with the Supreme Court's decision in Vermont Yankee. There, the Supreme Court held that this Court had erred in invalidating on the grounds of inadequate procedures a rule issued by the Nuclear Regulatory Commission. 435 U.S. at 525, 528-530. In issuing the rule, the Commission changed its prior agency policy by declaring that prior decisions of its appeal board had no further effect. Id. at 530. The Supreme Court unanimously held that the D.C. Circuit had "seriously misread or misapplied . . . statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." Id. at 525. The Supreme Court reasoned that "generally speaking" Section 553 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." Id. at 524. Thus, the Supreme Court added, "reviewing courts are generally not free to impose" any "additional procedural rights." Id. Exceptions "if they exist, are extremely rare." Id. The Court concluded: "Absent constitutional constraints or extremely compelling circumstances," it is a "very

basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." Id. at 543, 544.

Accordingly, because the Paralyzed Veterans doctrine cannot be reconciled with the APA or Supreme Court precedent, the doctrine should be laid to rest, and consequently notice and comment were not required before the Secretary issued the 2010AI.

2. Even if the Paralyzed Veterans Doctrine Is Still Good Law, It Does not Apply in this Case Because the 2006 Letter Was Erroneous and Invalid

As this Court has recognized, the Paralyzed Veterans doctrine does not apply where, as here, the original interpretation was itself invalid.

In Monmouth Med. Ctr. v. Thompson, 257 F.3d 807, 813-14 (D.C. Cir. 2001), this Court considered a Department of Health and Human Services (HHS) interpretation which changed an existing authoritative interpretation and concluded that, pursuant to Paralyzed Veterans, the new interpretation would be "unlawful absent notice and comment rulemaking, unless the original interpretation was itself invalid." Id. at 814. The Court found the new interpretation constituted a notice of previous inconsistency, deemed the original interpretation invalid, and approved of the new interpretation without requiring notice and comment. Id.

Here, the DOL frankly acknowledged in the 2010AI that the 2006 opinion letter was wrong, stating that it "d[id] not comport" with the 2004 regulations,

given that it both endorsed a definition of sales that was "inappropriately narrow" and also contained the "misleading assumption" that § 541.203(b) was an alternative test to the requirements set forth in § 541.200(a). See 2010AI at 5, n.3 and 8, AR at 106, 109.

As explained in the 2010AI, the 2006 opinion letter was inconsistent with the 2004 regulations because it inappropriately limited the definition of sales to "customer-specific persuasive sales activity,"—a phrase found nowhere in the regulations but contained in the MBA's draft opinion letter submitted to the DOL. Id. at 5, n.3, AR at 106. This "inappropriately narrow" definition artificially presumed that duties performed in furtherance of sales work (such as compiling and analyzing customers' data to evaluate their qualifications for a loan) should not be considered "sales," which allowed DOL to reach the erroneous conclusion that the lion's share of a mortgage loan officer's duties should not be counted as sales work, when in fact that is exactly what they are. In so doing, the 2006 opinion letter ignored the regulatory directive to determine an employee's primary duty "with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a).

Similarly, the 2006 opinion letter totally ignored Conseco, despite the fact that Conseco, which concluded that loan officers were non-exempt, was featured prominently in the preamble to the 2004 regulations as a counterexample to the

three insurance agent cases (which the 2006 opinion letter did cite) and contributed a key component of § 541.203(b). As previously discussed, the MBA, Quicken, and the DOL were acutely aware of Conseco and wanted to eviscerate the decision.

The 2006 opinion letter was additionally inconsistent with the 2004 regulations because it assumed that § 541.203(b) provided an alternative test to that set forth in § 541.200(a). See 2010AI at 8, AR at 109; see also 2010AI (concluding that the 2006 opinion letter is inconsistent with the regulations insofar as it treated § 541.203(b) as an alternative test to that set out in §541.200(a)).

In short, the DOL issued the 2010AI—a notice of prior inconsistency—to replace the invalid interpretation of the administrative exemption regulations in the 2006 opinion letter. And just as the Monmouth court found the Paralyzed Veterans doctrine therefore did not apply in that case, this Court should find it does not apply here either.

3. Even if the Paralyzed Veterans Doctrine Is Still Good Law, It Does not Apply in this Case Because Any Reliance on the Letter Was Neither Substantial nor Justifiable

Assuming the Paralyzed Veterans is still valid, this Court has recognized that the doctrine applies only if an affected party's reliance upon a prior interpretation was both "substantial and justifiable." MetWest, 560 F.3d at 511. In Alaska Professional Hunters, for example, this Court concluded that notice and comment were required before the Federal Aviation Administration (FAA) could

reverse a three decades-old practice by the agency's regional office of exempting guide pilots from commercial flight regulations. See 177 F.3d at 1035-36. In the MetWest case, this Court explained the extent of the substantial reliance by the regulated parties in Alaska Professional Hunters: "[p]eople in the lower 48 states had pulled up stakes and moved to Alaska. They and others within Alaska had opened hunting and fishing lodges and built up businesses dependent on aircraft" based on the agency's interpretation. 560 F.3d at 511. Such actions went well beyond ordinary reliance, and protecting such a substantial reliance was a "fundamental rationale of Alaska Professional Hunters" and "a crucial part of [its] analysis." Id. at 511 & n.4. This Court pointed out that the reliance was particularly justifiable, as the FAA had given "longstanding, uniform, and unambiguous" advice for "approximately thirty years." Ass'n of Am. R.R. v. DOT, 198 F.3d 944, 947 (D.C. Cir. 1999).

By contrast, in MetWest, the regulated entity could not show similar substantial and justifiable reliance. The Occupational Safety and Health Administration (OSHA) had promulgated safety standards in 1993 regulating the removal of needles after blood has been drawn from patients. See MetWest, 560 F.3d at 508. In 2003, it issued new guidance arguably changing OSHA's interpretation of these safety standards. See id. at 508-09. This Court concluded that even if the new guidance were a change from a prior interpretation, the

Paralyzed Veterans doctrine would not apply because MetWest had not substantially and justifiably relied on a contrary interpretation from the agency. See id. at 509-11. The court contrasted the parties' justifiable reliance in Alaska Professional Hunters, in which people had moved their families thousands of miles to establish businesses based on the prior agency interpretation, with the facts of MetWest. Id. at 511. The court noted that switching the procedures and materials used for removal of needles after drawing blood was feasible, as evidenced by the fact that some of MetWest's centers were already using the requisite procedures and materials. See id. Therefore, Paralyzed Veterans did not apply. See id.[14]

As the district court correctly concluded, the MBA has not established that its members placed any reliance on the 2006 opinion letter sufficient to invoke Paralyzed Veterans. In contrast to the regulated parties in Alaska Professional Hunters, MBA cannot claim that its members made long-term capital expenditures or significantly altered their business practices in reliance upon the 2006 letter. Rather, MBA members, all of which employ non-exempt employees in various capacities, have simply amended their payment systems to once again pay

[14] Similarly, in Association of American Railroads, this Court declined to apply the Paralyzed Veterans doctrine in part because "[n]othing in this record suggests that [plaintiffs] relied on [agency guidance] . . . in any comparable way" to the petitioners in Alaska Professional Hunters because they had not "made large capital expenditures based on their interpretation . . . or altered their business practices in any significant manner." 198 F.3d at 950.

overtime. Before September 2006, employers of mortgage loan officers were required under the FLSA to track hours worked for overtime purposes. Therefore, when the AI was published in March 2010, employers simply needed to reinstitute the payment structure they had in place three and a half years beforehand.

In addition, it was not justifiable for MBA or its members to expect that mortgage loan officers would be characterized by the DOL as exempt from FLSA overtime requirements forever. The FLSA establishes the employees who are exempt from its minimum wage and overtime provisions are those who are employed in a bona fide executive, administrative, or professional capacity "as such terms are defined and delimited from time to time by regulations of the Secretary[.]" 29 U.S.C. § 213(a)(1) (emphasis added). Before issuing the 2006 opinion letter on September 8, 2006, the Wage and Hour Division had consistently interpreted its administrative exemption regulations to mean that mortgage loan officers were not exempt from overtime compensation requirements. See 1999 and 2001 opinion letters. The 2006 opinion letter provided no guarantee that mortgage loan officers would forever be considered exempt or that the Secretary would not return to her earlier interpretation.

Finally, as the district court recognized, employers who can prove that they made a good faith effort to conform their conduct to the 2006 opinion letter will be shielded from liability under Section 259 of the Portal-to-Portal Act. Section 259

absolves employers from liability for past overtime violations. De Luna-Guerrero v. N.C. Grower's Ass'n., Inc., 370 F. Supp.2d 386, 391 (E.D.N.C. 2005). To be insulated from liability under Section 259, an employer must "show it acted in (1) good faith, (2) conformity with, and (3) reliance on [a written administrative regulation, order, ruling, approval, or interpretation]." 29 U.S.C. § 259(a). Importantly here, such a defense, if established, "shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative . . . interpretation, practice is . . . rescinded . . . ." 29 U.S.C. § 259(a). Thus, MBA members who made a good faith reliance on the 2006 letter will be shielded from liability.

Accordingly, even if the Paralyzed Veterans doctrine could be reconciled with the APA and Supreme Court precedent, MBA members cannot show substantial and justifiable reliance necessary to invoke the doctrine.

4. If the Paralyzed Veterans Doctrine Controls This Case, Then the 2006 Letter Itself Is Invalid Because it Was Not Issued Following Notice and Comment

The concept of "chutzpah" is defined by the paradigmatic example of the child who murders his parents and then begs the court for mercy because he is an orphan. See Alex Kozinski & Eugene Volokh, "Lawsuit, Shmawsuit," 103 Yale L.J. 463, 467 (1993). This example might set the gold standard for insolence, but the MBA's argument in this case is surely a close second. The 2006 opinion letter

quite literally broke with over a generation's worth of guidance from the DOL—all uniformly holding that mortgage loan officers do not qualify for the administrative exemption. If this Court finds that the Paralyzed Veterans doctrine applies to this case, then the MBA's argument is inherently self-defeating; the 2006 opinion letter did not follow notice and comment, and is therefore invalid.

As Intervenors-Appellees have explained, the DOL began issuing guidance as early as 1971 suggesting that mortgage loan officers do not qualify for the administrative exemption. See Wage and Hour Opinion Letter WH-115, 1971 WL 33052 (January 15, 1971) (concluding that mortgage loan officers made sales within the meaning of the FLSA's outside sales exemption). See Swigart v. Fifth Third Bank, 870 F.Supp.2d 500, 511 (S.D. Ohio 2012) ("[B]y their very terms, these two exemptions [the administrative and outside sales exemptions] are mutually exclusive—a [loan officer] cannot be simultaneously exempt under the outside sales exemption and the administrative exemption because the former requires the employee to have a primary job duty of sales, whereas that same primary job duty disqualifies an employee from coverage under the latter. Compare 29 C.F.R. § 541.500 with 29 C.F.R. § 541.203(b)."). The DOL issued guidance in 1999 explicitly holding that mortgage loan brokers do not qualify for the administrative exemption. See Wage and Hour Opinion Letter, 1999 WL 1002401, at *1 (May 17, 1999). Perhaps hoping the change in administration

would bring about a change in the DOL's opinion, the MBA asked the DOL to reconsider in 2001. The DOL refused, opining once again that mortgage loan officers do not qualify for the administrative exemption. See Wage and Hour Opinion Letter, 2001 WL 1558764, at *1 (Feb. 16, 2001). Relying on these authorities and others, the court in Casas v. Conseco Finance Corp., No. Civ.00–1512, 2002 WL 507059 (D. Minn. Mar. 31, 2002), concluded the following year that mortgage loan officers do not qualify for the administrative exemption. Id. at *6. The following year, the MBA and Quicken began lobbying the DOL during the notice and comment period, urging the DOL to change [redacted] the administrative exemption to cover loan officers. See Facts supra § A(4). Under the sunshine of notice and comment, the MBA, Quicken, and the financial services industry generally failed once again to change the law to their benefit, as the new regulations promulgated in 2004 were intended to be "as protective as the existing regulations," id. at 22,138, and "consistent with the [old] short test," 69 Fed. Reg. 22,139. Moreover, the revised regulations added a new section discussing the application of the administrative exemption to employees in the financial services industry, and confirmed, citing and discussing Conseco, see 69 Fed. Reg. 22,145, that "an employee whose primary duty is selling financial products does not qualify for the administrative exemption." See 29 C.F.R. 541.203(b). See 69 Fed. Reg. 22,145-46 (stating that the new regulatory provision, section 541.203(b), is

based on John Alden, Hogan, Wilshin, and Conseco, and is "consistent with this case law").

It is against this backdrop that Quicken and the MBA shifted gears and went back to the DOL in pursuit of an opinion letter holding that mortgage loan officers are exempt administrative employees. The 2006 opinion letter, as previously discussed, was carefully negotiated between attorneys simultaneously representing both the MBA and Quicken (who falsely represented to the DOL that the letter was not sought to affect the outcome of pending litigation), and attorneys for the DOL. And, of course, the final 2006 letter neither cited nor discussed any of the authority mentioned above holding that mortgage loan officers do not qualify for the administrative exemption. As the district court in Henry aptly stated, "[t]he fact of the matter is, an extremely powerful trade association cause[d] a shift in federal law … effectively manipulat[ing] an agency to issue a letter that governs the outcome of federal litigation without anybody being able to address it," (App. 184-186), creating a result that is "highly unfair, highly disruptive to employees, plaintiffs and courts who have to deal with [it]." (App. 187.)

If this Court concludes the Paralyzed Veterans doctrine applies in this case, then the 2006 letter itself is invalid pursuant to the same doctrine. The DOL squarely held in 1999, 2001, and 2004 (citing and adopting Conseco) that mortgage loan officers are non-exempt. If the DOL was in fact required to go

through notice and comment to change its position, then the 2006 letter is invalid for want of notice and comment.

B. The 2010AI Applies To Claims That Accrued Prior to the Issuance of the 2010AI

The DOL has taken the position, without any supporting analysis, that the 2010AI only applies prospectively. (See App. 73.) This position may be consistent with the present interests of the DOL, which wants to maximize the level of deference the 2010AI will receive by courts moving forward, but it is inconsistent with the settled principles governing the retroactive application of interpretive guidance. Where, as here, interpretive guidance merely clarifies the scope of the already existing law or regulation, without creating any new substantive rights, obligations, or liabilities, the guidance applies retroactively. The DOL's position that the 2010AI's reasoning does not apply to claims that accrued prior to the issuance of the 2006 opinion letter (as did most of Intervenors-Appellees' claims) is particularly indefensible, but the same is true for claims that accrued between the issuance of the 2006 opinion letter and the issuance of the 2010AI: innocent financial institutions that read the 2006 opinion letter, acted in conformity with, and relied on it in good faith in classifying its loan officers as administratively

exempt will be shielded from liability under Section 259 of the Portal-to-Portal Act.[15]

Courts have consistently held that interpretive guidance can be applied to facts arising prior to the issuance of the guidance because the guidance does not impose new duties. I Pierce, Administrative Law Treatise, § 6.7 at 367 (citing Farmers Tel. Co. v. Fed. Communications Comm'n, 184 F.3d 1241 (10th Cir. 1999); Appalachian States Low-Level Radioactive Waste Comm'n v. O'Leary, 93 F.3d 103 (3d Cir. 1996); Cowen v. Bank United of Tex., 70 F.3d 937 (7th Cir. 1995)). See K. C. Davis, Administrative Law Treatise § 5.09, p. 347 (1958) ("If an interpretive rule is merely an interpretation of a statute … then no problem of a retroactive interpretive rule can arise, for … the interpretive rule expresses the true meaning of … what the statute has always meant and the rule has not changed the law retroactively …."). Indeed, "there has emerged [a] basic distinction ... between (1) new applications of law, clarifications, and additions, and (2) substitution of new law for old law that was reasonably clear." Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (internal quotation marks omitted). "[R]etroactivity in the former case is natural, normal, and necessary, a

[15] Although the issue of retroactivity is bound up in some of the arguments relevant to this case, it is not strictly necessary for this Court to resolve the issue of whether the 2010AI applies only prospectively. Intervenors-Appellees respectfully suggest that the prudent course of action would be for this Court, as did the district court, to acknowledge the dispute between Intervenors-Appellees and the DOL, but explicitly decline to resolve the issue.

corollary of an agency's authority to develop policy through case-by-case adjudication ...." Id. And as courts have recognized, "deference is due even if the adoption of the agency's interpretation postdates the events to which the interpretation is applied." See Motorola, Inc. v. United States, 436 F.3d 1357, 1366 (Fed. Cir. 2006) (citing Smiley v. Citibank, N.A., 517 U.S. 735, 741 (1996)).

The 2010AI did not change the law. Rather, the interpretive guidance merely interpreted existing law, and reiterated the DOL's long held position, unbroken but for the repudiated 2006 opinion letter, that mortgage loan officers do not qualify for the administrative exemption. There can especially be no serious argument that 2010AI changed the law with respect to claims that accrued prior to the issuance of the 2006 opinion letter. The DOL's pre-2006 guidance, embodied in the 1999 and 2001 opinion letters as well as the 2004 revisions adopting Conseco, was perfectly consistent with 2010AI, all holding that loan officers must receive overtime. Thus, with respect to pre-2006 opinion letter claims, AI-2010-1 merely clarified existing obligations under Sections 541.200 and 203(b). It did not create any rights, obligations, or liabilities that did not fully exist at the time.

The 2010AI also applies fully to claims that accrued after the DOL issued the 2006 opinion letter, for the same reasons stated above. Because the 2006 opinion letter was erroneous, not entitled to deference, and contrary to the controlling regulations, it never had any legal effect. See Monmouth Med. Ctr. v.

Thompson, 257 F.3d 807, 813-14 (D.C. Cir. 2001). And further, the invalidation of the 2006 opinion letter did not render it a total nullity. Employers who can prove that they made a good faith effort to conform their conduct to the 2006 opinion letter will be shielded from liability under Section 259 of the Portal-to-Portal Act. Thus, employers (unlike Quicken) who actually conformed to and relied on the 2006 opinion letter will not face liability for claims that accrued after the 2006 opinion letter was issued, even though the letter was revoked. With employers' Section 259 defense in mind, the relevant question is whether 2010AI should apply to claims that were never covered by the 2006 opinion letter. The answer is yes: application of 2010AI to claims that accrued after the issuance of the 2006 opinion letter (but, by hypothesis, not covered by the letter's terms) would not "change[] the legal landscape." See National Min. Ass'n v. U.S. Dept. of Interior, 177 F.3d 1, 8 (D.C. Cir. 1999). Those claims would be governed only by the administrative exemption itself, under which, as 2010AI reiterates and numerous other authorities confirm, loan officers are non-exempt.

A trio of Supreme Court cases amply demonstrates the faultiness of the DOL's position on retroactivity. In United States v. Morton, 467 U.S. 822 (1984), the Supreme Court rejected the precise argument the DOL makes here, rejecting the contention that a piece of administrative guidance was "not entitled to deference because it was not promulgated by the Office of Personnel Management

until after this suit was brought," describing that fact as of "no consequence." Id. at 835 n.21. See also Auer v. Robbins, 519 U.S. 452, 461-63 (affording controlling deference to the DOL's position articulated in a Supreme Court amicus brief, submitted years after the facts of the case occurred); Long Island Care at Home, Ltd. v. Coke, 127 S. Ct. 2339 (2007) (affording controlling deference to a DOL "Advisory Memorandum" issued years after the facts giving rise to the dispute). Compare Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 215 (1988) (discussing context where new legislative rules, as opposed to interpretive guidance, are not entitled to retroactive application).

CONCLUSION

The 2010AI properly restored the DOL's unbroken position that existed prior to the issuance of the repudiated 2006 opinion letter. That the agency took such an action does not offend the Administrative Procedures Act. The district court's order must be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), I certify that the foregoing Appellees' Brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and typeface requirements of FRAP 32(a)(5) and 32(a)(6). I certify that this brief was prepared in Microsoft Word, using Times New Roman 14-point font and according to the word count function, the word count, including footnotes and headings, and excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii) is 12,890 words.

/s/Adam W. Hansen
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CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2013, a copy of the foregoing Appellees' Brief – Public Copy document was filed electronically on the Court's CM/ECF system. I understand that by operation of the Court's electronic filing system, notice of this filing will be sent to all registered parties. Parties may access this filing through the Court's system.

I further certify that on February 15, 2013, two copies of the Appellees' Brief – Under Seal were served via hand delivery to each of the following:

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