

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MORTGAGE BANKERS)
ASSOCIATION,)
1717 Rhode Island Avenue, NW)
Suite 400)
Washington, DC 20036)
)
Plaintiff,)
v.)
)
HILDA L. SOLIS, sued in her official capacity,)
Secretary)
United States Department of Labor)
Frances Perkins Building)
200 Constitution Avenue)
Washington, D.C. 20210)
)
NANCY LEPPINK, sued in her official capacity,)
Deputy Administrator)
United States Department of Labor)
Wage and Hour Division)
Frances Perkins Building)
200 Constitution Avenue)
Washington, D.C. 20210)
)
UNITED STATES DEPARTMENT OF LABOR)
Frances Perkins Building)
200 Constitution Avenue)
Washington, D.C. 20210)

Case No. _____

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

In 2006, Defendant the United States Department of Labor (“DOL”), the agency charged with interpreting and enforcing the Fair Labor Standards Act (“FLSA”), *see* 29 U.S.C. § 204, issued an Opinion Letter by which it interpreted its own regulations defining and delimiting the administrative exemption from overtime pay as they apply to mortgage loan officers. *See* U.S. Dep’t of Labor Op. Letter, FLSA 2006-31, 2006 DOLWH LEXIS 42 (Sept. 8, 2006) (“2006 Opinion Letter”) (copy attached as Exh. A). By the Opinion Letter, DOL determined that mortgage loan officers who perform certain job duties *qualify* for the administrative exemption. *Id.* at *1.

The 2006 Opinion Letter represented DOL’s definitive and authoritative interpretation of its own regulations, as it was signed by the Administrator of the Wage and Hour Division, published on DOL’s website, and held out to employers as guidance for complying with the FLSA. The District of Columbia Court of Appeals has held that DOL Opinion Letters constitute final agency action as they are intended to be a “deliberative determination of the agency’s position at the highest available level on a question of importance” that affects an entire industry group. *See Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 701-02 (D.C. Cir. 1971).

Relying in good faith on the 2006 Administrator Opinion Letter, many members of Plaintiff, the Mortgage Bankers Association (“MBA”), have treated their mortgage loan officers as employees exempt from the overtime pay requirements of the FLSA. Thus, across the real estate finance industry, mortgage loan officers generally are *not* paid hourly or overtime wages, but are well-compensated by other means. *See* Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-11 Edition, Loan Officers, <http://www.bls.gov/oco/ocos018.htm> (noting that

loan officer compensation varies, but may include salary, bonus, and commission based pay – not hourly or overtime pay).

On March 24, 2010, DOL issued Administrative Interpretation 2010-1 (“the AI”), by which it changed its interpretation of its regulations and declared that “employees who perform the typical job duties of a mortgage loan officer . . . do not qualify as bona fide administrative employees exempt under [the FLSA].” See Admin. Interp. (“AI”) No. 2010-1 at 1 (copy attached as Exh. B) (emphasis added). The AI identifies the “typical mortgage loan officer job duties” as the very same job duties that DOL in the 2006 Administrator Opinion Letter declared to be administratively exempt duties. Yet now, in the AI, DOL declares these same job duties to be non-administrative-exempt “sales.” By the AI, DOL expressly withdraws its 2006 Opinion Letter.

Under controlling D.C. Circuit authority, “[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997); see also, e.g., *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 475 (D.C. Cir. 2007); *Montefiore Med. Ctr. v. Leavitt*, 578 F. Supp. 2d 129, 133 (D.D.C. 2008). According to DOL itself, the AI “unambiguously represents a substantive change in the Department’s interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.” Brief of the Secretary of Labor as Amicus Curiae at 27-28, *Henry v. Quicken Loans, Inc.*, No. 04-40346 (E.D. Mich.), Doc. No. 609 (hereafter, “DOL’s Amicus Brief in *Henry*”) (copy attached as Exh. C). DOL even calls the change made in the AI “substantial.” *Id.* at 26. Nevertheless, DOL changed its definitive interpretation *without* following the

Administrative Procedure Act's ("APA") notice-and-comment rulemaking procedure. Indeed, the AI was issued without any prior notice whatsoever to the affected community.

Defendants Hilda L. Solis, in her official capacity as Secretary of Labor, Nancy Leppink, in her official capacity as Deputy Administrator of the Department of Labor's Wage and Hour Division, and DOL (collectively, "Defendants" or "DOL") have violated the APA by reversing DOL's definitive interpretation of its regulations defining and delimiting the administrative exemption without following APA notice-and-comment rulemaking procedures.

DOL's new interpretation must be vacated for a second, independent reason. Agencies are bound to follow their own regulations unless and until those regulations are amended or withdrawn through the APA notice and comment procedure. In the AI, DOL refuses to follow its own regulations, including 29 C.F.R. § 541.203(b). That regulation sets forth a list of job duties which, when performed by financial services employees, generally meet the requirements for the administrative exemption. The AI declares that these same job duties, when performed by mortgage loan officers, do *not* meet the requirements for the administrative exemption. That the AI is inconsistent with DOL's own regulations is apparent from the plain language of the regulations, as well as the language of the Preamble thereto, which is evidence of DOL's contemporaneous understanding of the regulations. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (the "Preamble"). Because the AI conflicts with DOL's own regulations, it is arbitrary, capricious, and contrary to law.

For both of these reasons, the Court should set aside the AI as violative of the APA.

II. SUMMARY OF FACTS¹

A. The Parties.

1. Plaintiff Mortgage Bankers Association.

Plaintiff MBA is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. *See* <http://www.mbaa.org/AboutMBA> (last visited Jan. 11, 2011). Headquartered in Washington, D.C., the association works 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.* MBA is an organization dedicated to helping its members do their business and actively advocates for its members. *Id.* The MBA 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.*

2. Defendants The Secretary Of Labor, The United States Department Of Labor, And The Wage and Hour Administrator.

Congress has granted the Secretary of Labor, Defendant Hilda L. Solis, the power to administer the Fair Labor Standards Act. *See* 29 U.S.C. § 204. The FLSA also authorizes the creation in the Defendant DOL of a Wage and Hour Division (WHD) under the direction of an Administrator. *Id.* The position of Administrator is currently and has been for some time vacant. *See* <http://www.dol.gov/dol/contact/contact-phonekeypersonnel.htm> (last visited Jan. 11, 2011). Thus, Deputy Administrator Defendant Nancy Leppink was responsible for promulgating

¹ Because this case is governed by Local Rule 7(h)(2), such that any facts would be derived solely from the administrative record (and from judicially noticeable facts), Plaintiff is not required to submit a Local Rule 7(h)(1) Statement Of Material Facts As To Which There Is No Genuine Dispute.

the AI and continues to head the WHD. *See id.*; AI at 1 (“Issued by Deputy Administrator Nancy J. Leppink”).

B. Statutory and Regulatory Background.

1. The Fair Labor Standards Act.

The FLSA requires that employers covered by the statute pay overtime wages to employees who work more than 40 hours per week, unless they are exempted from the overtime pay requirements. *See* 29 U.S.C. § 207(a)(1). The FLSA expressly exempts from its overtime pay requirements any employee employed in a bona fide administrative capacity, as that term is “defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.]” 29 U.S.C. § 213(a)(1).

Moreover, the Portal-to-Portal Pay Act, which amended the FLSA, provides a “safe harbor” for employers who act in reliance on written interpretations of DOL. The Act provides 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, of the [Administrator of the Wage and Hour Division of the Department of Labor]

29 U.S.C. § 259(a).

2. DOL’s Rulings On The FLSA.

For decades, DOL communicated its interpretation of the FLSA by publicly issuing written responses to private parties’ questions about the application of the FLSA via “Opinion Letters.” *See, e.g.*, U.S. Dep’t of Labor Op. Letter, FLSA 2006-31, 2006 DOLWH LEXIS 42 (Sept. 8, 2006) (finding mortgage loan officers administratively exempt),

http://www.dol.gov/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf (last visited Jan. 11, 2011). These Opinion Letters were widely disseminated via legal research tools and are posted on DOL's website under the heading "Interpretive Guidance." See <http://www.dol.gov/whd/> (last visited Jan. 11, 2011). There, the public may access various DOL "Rulings and Interpretations," including Opinion Letters from 2001 to 2009. See <http://www.dol.gov/whd/opinion/opinion.htm> (last visited Jan. 11, 2011); <http://www.dol.gov/whd/opinion/flsa.htm> (last visited Jan. 11, 2011).

DOL Opinion Letters constitute final agency action subject to judicial review. See *Shultz*, 443 F.2d at 701-02 (finding an opinion letter constituted final agency action where DOL intended the letter to be a "deliberative determination of the agency's position at the highest available level on a question of importance" that affected an entire industry group).

Beginning on March 24, 2010, with the AI challenged herein, DOL, under the current administration, dramatically changed its practice. DOL no longer issues Opinion Letters. Instead, it now issues *sua sponte* "Administrator Interpretations." See <http://www.dol.gov/whd/opinion/adminIntrprtnFLSA.htm> (last visited Jan. 11, 2011). DOL explains that:

In order to provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees, the Wage and Hour Administrator will issue Administrator Interpretations when determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations will set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees.

<http://www.dol.gov/whd/opinion/opinion.htm> (under the heading "Administrator Interpretations") (last visited Jan. 11, 2011). DOL apparently changed its practice because:

The Administrator believes that this will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome. Requests for opinion letters generally will be responded to by providing references to statutes, regulations, interpretations and cases that are relevant to the specific request but without an analysis of the specific facts presented. In addition, requests for opinion letters will be retained for purposes of the Administrator's ongoing assessment of what issues might need further interpretive guidance.

Id.

C. Procedural History.

1. DOL's Initial Efforts, Starting In 1938, To Define And Delimit The Administrative Exemption.

DOL promulgated its first set of regulations interpreting the FLSA in 1938. *See* 3 Fed. Reg. 2518 (1938). At that time, DOL defined the “administrative” exemption in conjunction with the “executive” exemption, and the definition bore little resemblance to today's administrative exemption. *Id.*

Just two years later, in 1940, DOL promulgated the regulation that is the predecessor of the current regulation defining and delimiting the administrative exemption. *See* 5 Fed. Reg. 4077 (1940). DOL defined the term “employee employed in a bona fide administrative capacity” as an employee who met various requirements, including the requirement that he or she perform work “directly related to management policies or general business operations.” 5 Fed. Reg. 4077 (1940).

In 1949, DOL further revised this requirement to provide that an administratively exempt employee is one “[w]hose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers” 14 Fed. Reg. 7705, 7706 (1949).

Thereafter, from time to time, DOL amended its regulations defining and delimiting the FLSA's overtime exemptions, but the regulations defining and delimiting the administrative exemption were amended only with respect to the salary required to meet the exemption. Thus, DOL's delineation of the job duties required to qualify for the administrative exemption remained unchanged for many years.

2. DOL's 2004 Regulations And Subsequent Interpretive Guidance Provide That Mortgage Loan Officers Perform Administratively Exempt Duties.

a. Revised 2004 DOL Regulations Confirmed The Exempt Status Of The Typical Job Duties Of A Mortgage Loan Officer.

Effective August 23, 2004, DOL promulgated revised regulations interpreting the FLSA. For the first time since 1949, DOL redefined and delimited the job duties required for an employee to qualify for the administrative exemption. The revised regulations retained the requirement that an "employee employed in a bona fide administrative capacity" has a "primary duty [that] 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." *See* 29 C.F.R. § 541.200(a)(2). DOL also added to the regulations a list of "Administrative exemption examples," one subsection of which was devoted entirely to "Employees in the financial services industry." *See* 29 C.F.R. § 541.203(b). That subsection provides:

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).

In the Preamble to the 2004 Regulations, DOL repeatedly clarified that the same duties that the AI now states are non-administrative-exempt “sales” duties are exempt *administrative* duties, *even though they are performed by employees that do some selling to consumers*. See 69 Fed. Reg. 22,122, 22,146. DOL in the Preamble cites favorably cases where “federal courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, *even though the employees also engaged in some inside sales activities*.” 69 Fed. Reg. 22,145 (emphasis added) (citing *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), and *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002)). DOL also notes that the *Hogan* court found the plaintiff insurance agents to be properly classified as exempt “even though they also *sold insurance products directly to existing and new customers*.” 69 Fed. Reg. at 22,145 (citing *Hogan*, 361 F.3d at 624) (emphasis added). DOL further explains that the *Wilshin* court found “that selling financial products to an individual, ultimate consumer – as opposed to an agent, broker or company – was not enough of a distinction to negate his exempt status.” *Id.* (describing *Wilshin*, 212 F. Supp. 2d at 1377-79 as “h[old]ing that a neighborhood insurance agent met the requirements for the administrative exemption when his responsibilities included such activities as recommending products and providing claims help to different customers, *as well as using his own personal sales techniques to promote and close transactions*. He also was required to represent his employer in the market, and be knowledgeable about the market and the needs of actual and potential customers.” (emphasis added)).

Ultimately, DOL in the Preamble concludes that:

as found by the *John Alden*, *Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, *even if they are involved in some selling to consumers*. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

69 Fed. Reg. at 22,146 (emphasis added).

b. DOL's 2006 Administrator Opinion Letter Confirmed The Exempt Status Of The Typical Job Duties Of A Mortgage Loan Officer.

On September 8, 2006, DOL issued an Administrator Opinion Letter to Plaintiff MBA in response to its inquiry regarding the status of mortgage loan officers. U.S. Dep't of Labor Op. Letter, FLSA 2006-31, 2006 DOLWH LEXIS 42 (Sept. 8, 2006).² In the 2006 Administrator Opinion Letter, DOL found that mortgage loan officers performed administratively exempt duties. *See* 2006 Opinion Letter. The 2006 Opinion Letter described the duties of the mortgage loan officers at issue as follows:

work with the employer's customers to assist them in identifying and securing a mortgage loan that is appropriate for their individual financial circumstances [,] respond to and follow up on customer inquiries (sometimes referred to as 'leads') that come from several sources [,] 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 [, and] advise the customer about the risks and benefits of the loan alternatives

2006 DOLWH LEXIS, at *4.

² Although DOL publicly issues copies of opinion letters with the recipient redacted, MBA was the recipient of 2006-31. *See, e.g., Henry v. Quicken Loans Inc.*, No. 2:04-cv-40346, 2009 WL 3199788, *12 (E.D. Mich. Sept. 30, 2009) (noting the Administrator Opinion Letter 2006-31 was issued to MBA).

In examining whether these duties met the administrative exemption, DOL noted that “Section 541.203 includes specific examples of occupations that would generally meet the administrative duties test, including in paragraph (b) ‘employees in the financial services industry.’” *Id.* at *9. DOL further noted that the Preamble to the 2004 regulations reviewed pertinent case law drawn from the financial services industry and concluded that “many financial services employees qualify as exempt administrative employees, *even if they are involved in some selling to customers.*” *Id.* at *10 (citing 69 Fed. Reg. 22,146) (emphasis added). DOL ultimately found that the “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.” *Id.* at *12-13 (emphasis added).

DOL specifically found that 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” *Id.* at *13. DOL reasoned 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.” *Id.* at *13-14 (citations omitted).³

³ On February 16, 2001, DOL issued an Opinion Letter – which was not signed by the Administrator but was issued by a subordinate officer – specifically considering the exempt status of loan officers under the administrative exemption regulation in effect at that time

3. Relying On DOL’s Definitive Interpretations, MBA’s Members Classify Their Mortgage Loan Officers As Exempt.

Relying on DOL’s definitive interpretation in the 2006 Administrator Opinion Letter, as well as the express text of the regulation and the definitive interpretation in the Preamble to the 2004 regulation, MBA member financial services industry employers have classified mortgage loan officers who perform the above-described job duties as exempt. Thus, mortgage loan officers are well-compensated by means other than overtime pay, such as salary, commission-based payments, and bonuses, but their work hours generally are not tracked for purposes of paying them hourly or overtime wages. *See* Bureau of Labor Statistics, Occupational Outlook Handbook, 2010-11 Edition, Loan Officers, <http://www.bls.gov/oco/ocos018.htm>. Many mortgage loan officers earn one hundred thousand dollars per year or more. *See* Bureau of Labor Statistics, Occupational Employment Statistics, Occupational Employment And Wages, May 2009, 13-2072, Loan Officers, <http://www.bls.gov/oes/current/oes132072.htm> (last visited Jan. 11, 2011).

(promulgated in 1949). *See* U.S. Dep’t of Labor Op. Letter, 2001 DOLWH LEXIS 5, at *1 (Feb. 16, 2001). There, the loan officers’ job duties similarly were “to work with the borrower to create a loan package that best meets the goals of the borrower . . . select from a wide range of loan packages in order to properly advise the client . . . [and] acquire a full understanding of the customer’s credit history and financial goals in order to advise them regarding the selection of a loan package that will fit their needs and ability.” *Id.* at *1. DOL opined that “[b]ased on the information you submitted indicating that the primary duty of a loan officer is to advise the borrower in the selection of a loan package, we agree that the primary duty of the loan officer consists of the performance of office or nonmanual work directly related to the management policies or general business operations of the employer or the employer’s customers.” *Id.* at *1-2. Nevertheless, the loan officers at issue there were determined to be non-exempt because the subordinate officer determined that the particular loan officers at issue lacked the requisite discretion and independent judgment. *Id.* at *2-3. The 2001 Opinion Letter represented DOL’s reconsideration of a prior opinion letter concerning the exempt status of the loan officers at issue in light of the advisory duties that loan officers perform on behalf of their employer’s customers. *Compare* 1999 DOLWH LEXIS 54 (May 17, 1999) (non-Administrator letter finding that loan officers were engaged in carrying out the employer’s day-to-day activities rather than in determining the overall course and policies of the business) *with* 2001 DOLWH LEXIS 5 (Feb. 16, 2001) (non-Administrator letter reconsidering May 17, 1999 opinion).

4. DOL’s March 24, 2010 AI Purports To Reverse Its Definitive Interpretation And Find That The *Same* Job Duties Previously Declared Exempt Administrative Duties Are Now *Non-Exempt* Sales Duties.

On March 24, 2010, in the first of its new “Administrative Interpretations,” DOL *sua sponte* issued an interpretation regarding the exempt status of mortgage loan officers *which expressly withdrew* its 2006 Administrator Opinion Letter (as well as a 2001 Opinion Letter), and declined to apply its own 2004 regulation, 29 C.F.R. § 541.203(b). *See* AI No. 2010-1.

DOL issued the March 24, 2010 AI without any prior public notice of its intent to reverse its long-standing interpretation of the FLSA, without providing any prior opportunity for MBA or other interested parties to comment on the new interpretation, and without conducting, or offering to conduct, any prior public hearings.

In the AI, just like the 2006 Opinion Letter, the DOL “appli[ed]” the administrative exemption to what it described as hypothetical “typical” mortgage loan officers. *Id.* at 1. And in the AI, just like in the prior Opinion Letter, those hypothetical job duties were to:

receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity . . . collect required financial information from customers they contact or who contact them, . . . 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

Id. at 1-2. But in the AI, *unlike* in its previous definitive interpretations, DOL found that these job duties did *not* constitute work “directly related to the management or general business operations of their employer or their employer’s customers.” *Id.* at 8. Rather, without addressing any of the case law cited favorably in the Preamble to its 2004 regulations or relied on in the 2006 Administrator Opinion Letter, DOL found that the “primary duty [of mortgage

loan officers] is making sales” *Id.* at 6. In a complete reversal of its prior definitive interpretations as stated in its Regulations, Preamble and Opinion Letters, DOL found that:

Work such as collecting financial information from customers, . . . 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

Id. at 6.

To reach the new conclusion that mortgage loan officers are engaged in non-administrative-exempt selling, DOL applied regulations defining and delimiting the “outside sales” exemption – as opposed to the administrative exemption *actually* at issue. Using that different exemption’s language, DOL reasoned that the job duties specifically listed in 29 C.F.R. § 541.203(b) and considered in the 2006 Administrator Opinion Letter as administratively exempt work is, when performed by mortgage loan officers, non-exempt sales work because the duties are “performed incidental to and in conjunction with the employee’s own sales or solicitations.” *Id.* at 5 n.3. For this reason, in the AI, “the Administrator rejects the September 8, 2006 Wage and Hour Opinion Letter FLSA2006-31’s inappropriately narrow definition of sales as including only ‘customer-specific persuasive sales activity’” *Id.* at 5 n.3.

Further acknowledging its complete reversal of position, DOL wrote that:

Because of its misleading assumption and selective and narrow analysis, Opinion Letter FLSA2006-31 *does not comport with this interpretive guidance and is withdrawn*. Similarly, an Opinion Letter dated February 16, 2001, 2001 WL 1558764, also is *withdrawn as inconsistent with this analysis*.

Id. at 8 (emphasis added).

In addition to the language of the AI itself, DOL recently acknowledged in an amicus brief what the AI itself makes clear – “AI 2010-1 represents a *substantial* change in the

Department’s interpretation” DOL’s Amicus Brief in *Henry* at 26 (emphasis added). In its amicus brief, DOL also explained that, “AI 2010-1 *unambiguously represents a substantive change in the Department’s interpretation of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.*” *Id.* at 27-28 (emphasis added). According to DOL, AI 2010-1 is *not* “merely a clarification of a regulation rather than a substantive change.” *Id.* at 27. DOL frankly acknowledged that the AI does *not* merely “restate[] what the law according to the agency is and has always been.” *Id.* at 28 n.11 (quoting *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993)).

The regulated community now faces substantial exposure from private-party litigation alleging that well-compensated mortgage loan officers are misclassified and are entitled to collect both back overtime wages and penalties. That community also now faces increased unnecessary regulatory burden. The costs of this litigation and regulation will be borne by consumers and employees. *See Commission on the Future of Worker-Management Relations, Fact Finding Report, Chapter IV*, <http://www.dol.gov/oasam/programs/history/reich/reports/dunlop/section4.htm> (last visited Jan. 11, 2011):

[T]he Fact Finding Report detailed two distinct problems in contemporary employment law. The first is a steep rise in administrative regulation of the workplace, whose overlapping mandates (both federal and state) impose significant costs on employers and employees. The second is the explosion of litigation under laws that rely in whole or in part on individual lawsuits for enforcement. Primary examples of such privately enforced laws are the Fair Labor Standards Act

Id.

III. APPLICABLE LEGAL STANDARDS

DOL’s action is subject to review under APA Section 706. *See, e.g., U.S. Airways, Inc. v. Nat’l Mediation Bd.*, 177 F.3d 985, 989 (D.C. Cir. 1999); 5 U.S.C. § 706(2)(A). While the

standard of review under Section 706 is highly deferential, the Court may reverse DOL's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." See *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (quoting 5 U.S.C. § 706(2)(A)). The party challenging the agency's action bears the burden of proof. See *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 271 (D.C. Cir. 2002).

Whether an agency has complied with the APA's notice and comment requirements is a question of law for the court. See *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 n.4 (9th Cir. 1992). "[W]hen a party seeks review of agency action under the APA . . . [t]he 'entire case' on review is a question of law" and may be resolved on a motion for summary judgment under Rule 56. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001); see also, e.g., *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (noting that a district court reviewing an agency action under the APA's arbitrary and capricious standard acts as an appellate court resolving a legal question).

Judicial review of agency decisions "is normally confined to the full administrative record before the agency at the time the decision was made." *Env'tl. Def. Fund. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Accordingly, the standard in Rule 56(c) generally does not apply. See, e.g., *Catholic Health Initiatives v. Sebelius*, 658 F. Supp. 2d 113, 117 (D.D.C. 2009), *rev'd on other grounds*, 617 F.3d 490 (D.C. Cir. 2010). Rather, the agency is to resolve any factual issues and arrive at a decision supported by the administrative record; whereas the district court is to determine whether or not as a matter of law the evidence in the record permitted the agency's decision. See *id.*

Where a plaintiff prevails on its APA claim, vacating the agency action is the standard remedy. See, e.g., *Am. Bioscience*, 269 F.3d at 1084; *Greater Yellowstone Coal. v. Bosworth*,

209 F. Supp. 2d 156, 163 (D.D.C. 2002) (“As a general matter, an agency action that violates the APA must be set aside.”).

IV. ARGUMENT

A. **DOL Administrator’s Interpretation 2010-1 Should Be Set Aside As Unlawfully Promulgated Because It Impermissibly Reverses a Prior Definitive Interpretation In Administrator Opinion 2006-31 Without Notice And Comment Procedures.**

The Administrative Procedure Act requires federal courts to set aside federal agency action that is “not in accordance with law.” *See FCC v. Nextwave Pers. Commc’ns Inc.*, 537 U.S. 293, 300 (2003) (citing 5 U.S.C. § 706(2)(A)). The Court should set aside the AI because DOL violated the APA by promulgating the AI without following APA required notice and comment rulemaking procedures.

“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” *Paralyzed Veterans*, 117 F.3d at 586; *see also, e.g., Transp. Workers Union*, 492 F.3d at 475; *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005).⁴ Where notice and comment rulemaking applies, the agency must follow procedures that include publishing notice in the Federal Register along with certain specific information such as the “substance of the proposed rule or a description of the subjects and issues involved.” *See Montefiore*, 578 F. Supp. 2d at 133 (citing 5 U.S.C. § 553(b)(1)-(3)). “The agency must also

⁴ *See also Dismas Charities, Inc. v. U.S. Dep’t of Justice*, 401 F.3d 666, 682 (6th Cir. 2005) (observing that change in the interpretation of a regulation requires notice and comment procedures); *SBC Inc. v. FCC*, 414 F.3d 486, 498 (3d Cir. 2005) (“[I]f an agency’s present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA.”); *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 628-30 (5th Cir. 2001) (finding Interior Department’s change in interpretation of an ambiguous regulation was invalid because Interior Department failed to comply with APA notice and comment provisions).

‘give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments.’” *Id.* (citing 5 U.S.C. § 553(c)). “Only once these requirements are satisfied can an agency promulgate a new rule, regulation or *interpretation*.” *Id.* (emphasis added).

Here, DOL gave its regulation defining and delimiting the FLSA’s administrative exemption a definitive interpretation in an Opinion Letter from the Wage and Hour Administrator in 2006. *See* Opinion Letter FLSA 2006-31. The 2010 AI purporting to reverse the definitive interpretation set forth in that Opinion Letter must be set aside as contrary to law because it was promulgated *without* required notice and comment rulemaking procedures.

1. DOL’s 2006 Administrator Opinion Letter Constituted A Definitive Interpretation Of DOL’s Own Regulations.

“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 without notice and comment.” *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (*citing Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997)). In its 2006 Administrator Opinion Letter, DOL definitively interpreted the FLSA’s administrative exemption to *include* individuals performing what the AI describes as the “typical” job duties of a mortgage loan officer. The Opinion Letter was a formal, written pronouncement of DOL’s interpretation of its own regulations. DOL published the letter via legal research tools and on its website for purposes of providing compliance guidance to affected parties. *See* Section II.B.2 *supra*. Indeed, the D.C. Circuit has previously found that Opinion Letters issued by “the Administrator heading the Wage and Hour Division” are “*authoritative interpretive ruling[s]*.” *Shultz*, 443 F.2d at 701 (emphasis added); *see also id.* (finding an opinion letter constituted a “deliberative determination of the agency’s position at the highest

available level”). Accordingly, via the Opinion Letter, DOL formed a definitive and authoritative interpretation of its regulations.

Courts have held that less formal interpretive guidance than a specific written interpretation issued by an agency head is sufficient to establish a “definitive” and “authoritative” interpretation requiring notice and comment before it can be overturned. For example, in *Iyengar v. Barnhart*, a D.C. district court granted an injunction invalidating a newly promulgated policy that reversed the Social Security Administration’s (“SSA”) long-standing policy of issuing Social Security Numbers (“SSNs”) to non-work-eligible aliens. *See* 233 F. Supp. 2d 5, 7 (D.D.C. 2002). The policy was set forth in the agency’s operating manual in 1980, and reaffirmed on two subsequent occasions in 1991 and 1996. *Id.* at 14. Thus, the Agency’s 2002 issuance of a new policy in the same operating manual providing that the SSA would no longer issue SSNs in those circumstances required notice and comment. *Id.* at 14-15.

In fact, an interpretation need not even be in writing to be “definitive” and “authoritative.” For example, in *Alaska Prof’l Hunters*, 177 F.3d at 1031-32, 1035-36, the D.C. Circuit held that an unwritten enforcement policy applied over many years constituted a definitive interpretation requiring notice and comment before it could be revised. Similarly, in *Ball Memorial Hospital v. Leavitt*, hospitals brought an action challenging the Secretary of the Department of Health and Human Services’ (“HHS”) new interpretation of regulations governing reimbursement for services under Medicare. *See* No. 04-2254 (RMC), 2006 U.S. Dist. LEXIS 68226, at *25-26 (D.D.C. Sept. 22, 2006). The Secretary had previously adopted an interpretation of the agency’s own regulation under which reimbursements were always calculated in a certain manner, by virtue of the forms that the agency required the hospitals to use when submitting cost reports. *Id.* at *27. Thereafter, the Secretary issued a Program

Memorandum (“PM”) to “provide guidance” regarding how to compute reimbursements. *Id.* at *14-15. The court ruled that the disavowed interpretation was “quite clearly authoritative . . . [t]hough perhaps not committed to a formal memorandum, it was not the mere opinion of a mid-level bureaucrat; indeed, the Government ha[d] taken to calling it the Secretary’s position.” *Id.* at *28 (*distinguishing Paralyzed Veterans*, 117 F.3d at 587 (an interpretation coming from a speech given by a mid-level official was not an authoritative departmental position)). Accordingly, HHS’s prior interpretation could not be altered without notice and comment procedures. *See id.* at *28-29; *see also, e.g., Montefiore*, 578 F. Supp. 2d at 133-34 (defendant violated APA by failing to engage in notice and comment before promulgating internal guidance on reimbursement of costs, where such costs had for years always been reimbursed).

Here, DOL published its interpretation of the administrative exemption to mortgage loan officers in a written Administrator Opinion Letter to the MBA. The Opinion Letter represented the official interpretation of the agency, as it was signed by the Administrator of the Wage and Hour Division – the highest ranking officer in the division of DOL charged with interpreting and enforcing the FLSA. DOL itself asserts that its “interpretation [which] may come in a variety of forms, including opinion letters” is “controlling.” *See* DOL’s Amicus Brief in *Henry* at 13-14. Plaintiff MBA’s members relied on this definitive and authoritative interpretive guidance in classifying their loan officers as exempt and in structuring their compensation in ways other than hourly wages including overtime pay. *See* Section II.C.3 *supra*.

Yet, under DOL’s view, MBA members who established policies and structured compensation systems in reliance on the DOL’s September 2006 Opinion Letter were acting in compliance with the law on March 24, 2010, but were violating the law on March 25, 2010 unless they implemented, literally overnight, brand new policies and practices. Such practices

would require these employers to instantaneously manage and track the hours that employees, whose time had never been tracked before, were working, instantaneously manage meal and rest periods, and instantaneously revise complex compensation systems to account for the payment of overtime, including factoring the substantial incentive compensation that many loan officers receive into the computation of overtime pay.⁵

“Those regulated by an administrative agency are entitled to ‘know the rules by which the game will be played.’” *Alaska Prof'l Hunters*, 177 F.3d at 1035 (quoting Holmes, *Holdsworth's English Law*, 25 Law Quarterly Rev. 414 (1909)). Because DOL definitively and authoritatively interpreted the administrative exemption as including the job duties typically performed by mortgage loan officers, it cannot change that interpretation to find the same job duties non-exempt without first following APA rulemaking procedures.

2. The AI Undisputedly Substantially Changed DOL's Definitive Interpretation Of Its Regulations.

An agency's action violates the APA where it “constitutes a change” in the agency's definitive interpretation made without notice and comment rulemaking procedures. *See, e.g., Montefiore*, 578 F. Supp. 2d at 133 (citing *Mercy Med. Skilled Nursing Facility v. Thompson*, Nos. 99-2765 (TPJ), 01-2014 (TPJ), 02-2252 (TPJ), 02-2253 (TPJ), 2004 U.S. Dist. LEXIS

⁵ Moreover, had DOL followed the required procedures, it would have, under the APA, had to provide employers with at least 30 days to implement the new interpretation. 5 U.S.C. § 553(d); *see also, e.g., Omnipoint Corp. v. FCC*, 78 F.3d 620, 630-631 (D.C. Cir. 1996) (purpose of the 30-day waiting period is to give affected parties a reasonable time to adjust their behavior before a final rule takes effect). In fact, although the final regulations promulgated by DOL in 2004 did not impose the drastic new requirements on the mortgage banking industry that the new AI seeks to impose, DOL provided employers 120 days to implement the new rules even after the notice and comment process had provided employers with an indication that possible changes were forthcoming. *See* 69 Fed. Reg. at 22,126. Here, by contrast, without any warning or notice, DOL simply issued the AI and announced that its previous interpretation, on which industry employers had relied in establishing complex practices and compensation systems, was immediately reversed and withdrawn.

27365, at *2 (D.D.C. May 14, 2004)). Here, the AI undisputedly constitutes a “change” in DOL’s definitive interpretation of the administrative exemption.

That the AI represents a complete reversal of DOL’s former definitive legal interpretation is apparent from the fact that the AI expressly “withdraw[s]” DOL’s former guidance, the 2006 Administrator Opinion Letter, as well as the 2001 Opinion Letter interpreting prior regulations, because they “do[] not comport with” and are “inconsistent with” the new AI. *See* AI at 8; *see also* AI at 5, n.3 (“Because the work performed incidental to and in conjunction with the employee’s own sales or solicitations is considered exempt sales work, *the Administrator rejects the September 8, 2006 Wage and Hour Opinion Letter FLSA2006-31’s* inappropriately narrow definition of sales as including only ‘customer-specific persuasive sales activity,’ which is the time that a loan officer spends directly engaged in selling mortgage loan products to customers.” (emphasis added)).

Moreover, DOL has expressly admitted that “AI 2010-1 unambiguously represents a *substantive change in the Department’s interpretation* of its administrative exemption regulations in determining whether mortgage loan officers are exempt administrative employees.” DOL’s Amicus Brief in *Henry* at 27-28 (emphasis added). DOL has further described the change as “substantial” and explicitly stated that the position taken in the AI is *not* a mere clarification of existing rules, or a restatement of what the law according to the agency is and has always been. *Id.* at 26, 27, 28, n.11. Rather, by DOL’s own admission, the AI “represents a *substantial change in the Department’s interpretation.*” *Id.* at 26 (emphasis added).

DOL’s repeated, frank acknowledgement that the AI represents a complete departure from its prior interpretation is further demonstrated by comparing the AI with the 2006 definitive

interpretation. DOL’s 2006 Administrator Opinion Letter examined the job duties performed by mortgage loan officers and found those to be *exempt* administrative duties.⁶ The AI examines the *very same* job duties, but finds that they now constitute non-administrative-exempt “selling” when performed by mortgage loan officers – which disqualifies mortgage loan officers from the administrative exemption. In each of the conflicting interpretations, DOL examined the administrative exempt status of loan officers who:

- follow up on “leads” and contact potential customers;⁷
- collect and analyze customers’ financial information;⁸
- use technological tools to help identify available loan products for which the customer qualifies;⁹

⁶ In addition to conflicting with the September 2006 Administrator Opinion Letter, the AI also conflicts with other DOL Administrator Opinion Letters regarding financial services employees who, like the mortgage loan officers described in the AI and 2006 Administrator Opinion Letter, and the employees in the cases described in the preamble to the 2004 regulations, performed duties identified in 29 C.F.R. § 541.203(b) as exempt duties and also engage in some sales activity as part of their job duties. *See* U.S. Dep’t of Labor Op. Letter, FLSA 2006-43, 2006 DOLWH LEXIS 57(Nov. 27, 2006) (http://www.dol.gov/whd/opinion/FLSA/2006/2006_11_27_43_FLSA.pdf) (opining that registered representatives in the financial services industry qualified for the administrative exemption although their duties included a sales component); U.S. Dep’t of Labor Op. Letter, FLSA 2009-28, 2009 DOLWH LEXIS 32 (Jan. 16, 2009) (http://www.dol.gov/whd/opinion/FLSA/2009/2009_01_16_28_FLSA.pdf) (opining that insurance agents qualified for the administrative exemption despite engaging in some sales activities).

⁷ *Compare* 2006 Administrator Opinion Letter at 4 (“respond to and follow up on customer inquiries (sometimes referred to as ‘leads’) that come from several sources”) *with* AI at 1 (“receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity”).

⁸ *Compare* 2006 Administrator Opinion Letter at 4 (“collect and analyze the customer’s financial information and assess the customer’s financial circumstances”) *with* AI at 1 (“collect required financial information from customers”).

⁹ *Compare* 2006 Administrator Opinion Letter at 5 (“use technological tools to help them serve their customer’s needs” and “use computer software to assist in the underwriting process”) *with* AI at 2 (“enter the collected financial information into a computer program that identifies which loan products may be offered to customers”).

- select from a wide range of available loan packages;¹⁰
- advise customers regarding the selection of an appropriate loan to meet their needs;¹¹ and
- engage in customer specific persuasive sales activity.¹²

And yet, while the 2006 Administrator Opinion Letter concluded that mortgage loan officers were administratively *exempt*; the AI concludes that mortgage loan officers do not qualify for the administrative exemption because all of the administrative job duties that they perform are merely “incidental” to their non-administrative-exempt “sales” duties. *See* section II.C.4 *supra*.

Courts in similar cases – where an agency first ruled that something was “exempt” under regulations, and then later retracted the exemption – have held that APA notice and comment rulemaking procedures were required before they could retract the exemption. For example, in *Creosote Council v. Johnson*, both a 1998 letter of an EPA official to the Chemical Manufacturers Association, and the EPA’s written instructions for submission of toxic chemical release reports *exempted* certain chemical releases from reporting. *See* 555 F. Supp. 2d 36, 38-39 (D.D.C. 2008). The EPA then promulgated a new interpretation, via a 2007 letter from an EPA director to the Treated Wood Coalition, stating that the same chemical releases *were not exempt*. *Id.* at 38. The court granted the plaintiffs’ motion for a preliminary injunction relieving

¹⁰ *Compare* 2006 Administrator Opinion Letter at 4-5 (“hundreds of loans to choose from, requiring specific analysis, evaluation, and advice from the loan officer.”) *with* AI at 2 (“assess the loan products identified and discuss with the customers the terms and conditions of particular loans”).

¹¹ *Compare* 2006 Administrator Opinion Letter at 4 (“advise the customer about the risks and benefits of the loan alternatives, including the options and variables involved”) *with* AI at 2 (“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”).

¹² *See, e.g.*, 2006 Administrator Opinion Letter at 5 (“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”).

them from compliance with the EPA’s new interpretation. *Id.* at 40. The court found that the prior letter and instructions gave the “exemption a definitive interpretation which was later abandoned when the Agency took the position in the [] letter that [certain] emissions must be reported under [the regulation].” *Id.* The court reasoned that, “[t]he authoritative nature of the instruction [was] made clear by its appearance in an official agency publication informing regulated entities of the scope of their reporting obligations.” *Id.* at 39. Thus, the court held, “[b]ecause the [new] letter marked a significant change in the agency’s understanding of the scope and applicability of the articles exemption, plaintiffs have made a strong showing that they are likely to prevail on their notice and comment challenge.” *Id.* at 40; *see also, e.g., Tripoli Rocketry Ass’n, Inc. v. ATF*, 337 F. Supp. 2d 1, 2, 13 (D.D.C. 2004) (granting summary judgment to plaintiff on the validity of the ATF’s pronouncement where it failed to comply with notice-and-comment rulemaking; noting that, like in *Alaska*, “an agency sought to reverse the applicability of an exemption without notice and comment”).

In its 2006 Administrator Opinion Letter, DOL definitively and authoritatively interpreted its regulations defining and delimiting the administrative exemption as *including* individuals who perform the typical job duties of a mortgage loan officer. The AI undisputedly constituted a “substantive” and “substantial” change in DOL’s definitive interpretation of the administrative exemption. DOL cannot lawfully change its 2006 definitive interpretation without first engaging in notice and comment rulemaking as required by the APA. Accordingly, the AI should be declared invalid.

B. The AI Should Be Set Aside For The Additional Reason That It Conflicts With DOL’s Own Regulations And Therefore Is Contrary To Law.

“[I]t is well established that agency regulations have the force of law and an agency is not free to disregard its regulations at will.” *Action on Smoking & Health v. DOL*, 107 F.3d 901, 902

(D.C. Cir. 1997) (citing *United States v. Nixon*, 418 U.S. 683, 695 (1974) (concurring opinion on denial of rehearing *en banc*)). Rather, “an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.” *Nat’l Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) (citing *Nixon*, 418 U.S. at 695-96); *see also, e.g.*, 2 KENNETH C. DAVIS ADMINISTRATIVE LAW TREATISE § 7.21 at 99 (2d ed. 1979) (“Since legislative rules when valid have the effect of a statute, the proposition that they bind the agency that issues them is hardly surprising.”).¹³

Here, DOL has promulgated an interpretation that is inconsistent with the plain language of 29 C.F.R. § 541.203(b). That regulation sets forth a list of specific job duties that, when performed by “[e]mployees in the financial services industry,” “generally meet the duties requirements for the administrative exemption.” 29 C.F.R. § 541.203(b). Those duties include:

- “collecting and analyzing information regarding the customer’s income, assets, investments or debts”;¹⁴
- “determining which financial products best meet the customer’s needs and financial circumstances”;¹⁵
- “advising the customer regarding the advantages and disadvantages of different financial products”;¹⁶ and

¹³ *See also, e.g., Stainback v. Mabus*, 671 F. Supp. 2d 126, 130 (D.D.C. 2009) (“It is a fundamental principle of administrative law that an agency is bound to adhere to its own regulations.”) (citing *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008) (citation omitted)); *Via Christi Reg’l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (noting that the APA requires agencies, “on pain of being found to have acted arbitrarily and capriciously, to comply with their own regulations”) (citation omitted).

¹⁴ *Compare* AI at 1 (“collect required financial information from customers they contact or who contact them”).

¹⁵ *Compare* AI at 2 (“assess the loan products identified and discuss with the customers the terms and conditions of particular loans, trying to match the customers’ need with one of the company’s loan products”).

¹⁶ *Compare* AI at 2 (“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”).

- “marketing, servicing or promoting the employer’s financial products.”¹⁷

Id.

In stark contrast to the regulation, the AI concludes that the very same duties performed by mortgage loan officers are *not* administrative exempt duties, but instead are non-administrative-exempt sales activity. AI at 1-2 (“collect[ing] required financial information from customers . . . , including information about income, . . . assets, investments . . . debts . . .”; “assess[ing] the loan products identified and discuss[ing] with the customers the terms and conditions of particular loans, trying to match the customers’ needs with one of the company’s loan products”).

In addition to providing that various duties, when performed by employees in the financial services industry, are exempt administrative duties, the regulation provides that “an employee whose primary duty is selling financial products does not qualify for the administrative exemption.” 29 C.F.R. § 541.203(b). Thus, the regulation itself draws a clear distinction between duties it identifies as exempt administrative duties and the non-administrative-exempt duty of merely “selling financial products.” *Id.* Indeed, the AI concedes as much in explaining that Section 203(b) “provides an example *to help to 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.” AI at 8 (emphasis added). And yet, the AI ignores the very distinction set forth in the regulation by concluding that the same duties that “generally meet the duties requirements for the administrative exemption” cease to be exempt duties and instead become

¹⁷ Compare AI at 1 (“receive internal leads and contact potential customers or receive contacts from customers generated by direct mail or other marketing activity”).

“sales” work when performed by a “typical” mortgage loan officer. This is plainly inconsistent with 29 C.F.R. § 541.203(b).

Any doubt about whether the AI is inconsistent with the regulations is resolved by considering the AI’s inconsistency with the Preamble to the 2004 regulations. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (the “Preamble”). In determining whether the AI conflicts with the regulations in violation of the APA, it is appropriate for this Court to consider any “indications of the [DOL’s] intent at the time of the regulation’s promulgation.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).¹⁸

In stark contrast to the AI, DOL’s discussion of Section 203(b) in the Preamble clearly establishes that “many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers.” 69 Fed. Reg. at 22,146 (emphasis added). Indeed, in the Preamble, DOL approvingly cited *Hogan v. Allstate Ins. Co.*, in

¹⁸ The D.C. Circuit often has recognized that the preamble to a regulation is evidence of an agency’s contemporaneous understanding of its proposed rules. *See Howmet Corp. v. EPA*, 614 F.3d 544, 550-51 (D.C. Cir. 2010) (noting that a preamble, while not necessarily binding in itself, is informative with respect to how the agency intended its regulation to operate); *see, also, e.g., id.* at 555-56 (dissenting opinion noting that the EPA wanted to read its regulations to allow it to regulate “precisely what the preamble said it could not regulate” and as such, the interpretation should be rejected as contrary to the clear language of the regulations); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461 (4th Cir. 2007) (rejecting DOL’s interpretation because it was “inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated”).

which employees were properly classified as exempt “even though they also *sold insurance products directly to existing and new customers.*” *Id.* at 22,145 (citing 361 F.3d 621, 624 (11th Cir. 2004) (emphasis added)). DOL in the Preamble also favorably discussed *Wilshin v. Allstate Ins. Co.*, which found “that selling financial products to an individual, ultimate consumer – as opposed to an agent, broker or company – *was not enough of a distinction to negate his exempt status.*” *Id.* (citing 212 F. Supp. 2d 1360, 1377-79 (M.D. Ga. 2002) (emphasis added)). DOL described *Wilshin* as holding that a “neighborhood insurance agent met the requirements for the administrative exemption when his responsibilities included such activities as recommending products and providing claims help to different customers, *as well as using his own personal sales techniques to promote and close transactions.*” *Id.* (emphasis added). While the AI selectively cites the Preamble a few times, it fails to acknowledge the Preamble’s repeated statement that the administrative exemption *may apply* to financial services employees whose duties involve some selling to customers.

In fact, job titles aside, the duties described in *Wilshin* as administratively exempt work are virtually indistinguishable from job duties the AI now declares are non-administrative-exempt “sales.” *See Wilshin*, 212 F. Supp. 2d at 1377 (“Whatever was . . . required to do as an agent to build a . . . profitable book of business, I tried to do”; “As an agent, I would have to sell myself. I would sell Allstate as a company, and then would make a decision, based on what their current coverages were, if they thought they could do business with me and Allstate.” (alterations in original; quoting plaintiff’s deposition testimony)); *id.* at 1378 (“Plaintiff advised customers on Allstate’s products based on their needs and used his knowledge of Allstate’s products *to promote and close transactions.*” (emphasis added)). Moreover, in the Preamble, DOL

expressly noted that the very same duties it now claims in the AI are non-administrative-exempt sales duties were in fact exempt administrative duties:

However, as found by the *John Alden*, *Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees even if they are involved in some selling to consumers. *Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers.*

69 Fed. Reg. at 22,146 (emphasis added); *compare, e.g.,* AI at 6 (“Work such as collecting financial information from customers . . . and explaining the terms of the available options and the pros and cons of each . . . constitutes the production work . . . Such duties do not relate to the internal management or general business operations of the company . . .”).¹⁹

Not surprisingly, the AI fails to even cite, much less address, *Wilshin*, *Hogan*, or the Preamble’s favorable discussion of these cases, perhaps in recognition that it cannot be reconciled with DOL’s new position. Whereas the 2006 Administrator Opinion letter specifically *referenced* the Preamble to the administrative exemption and *followed* its guidance that “some selling activity may occur without causing loss of the administrative exemption for

¹⁹ Although the plaintiffs in *Hogan* and *Wilshin* serviced and sold products directly to individual customers, they were found to be engaged in exempt administrative duties, directly related to their *employers’* general business operations, such as representing the employer with the public, negotiating on behalf of the company, and marketing the employers’ products. *See Hogan*, 361 F.3d at 627; *Wilshin*, 212 F. Supp. 2d at 1376-77. These cases, as well as the Preamble that favorably cites them, demonstrate that the fact that an employee sells to or services individual customers does not affect the analysis with respect to whether his or her primary duty directly relates to the employer’s general business operations. As DOL explained in the Preamble, “[c]onsistent with *Hogan*, the final rule *rejects the view that selling products directly to a consumer precludes a finding of exempt administrative status.*” 69 Fed. Reg. at 22,146 (emphasis added). Indeed, for more than 40 years, DOL’s consistent view has been that a “customers’ man in a brokerage house,” who services individual customers, qualifies for the administrative exemption. *See* 29 C.F.R. § 541.207(d)(2) (pre-2004 regulation); *see also* 69 Fed. Reg. at 22,146 (explaining that DOL’s approach in the 2004 regulations is consistent with the former “customers’ man in a brokerage house” regulation).

employees in the financial services industry,” *see* FLSA2006-31 at *11, n.2, the AI purports to completely reverse the Preamble’s interpretation of the regulations.

Instead, to justify its rejection of the relevant law cited in the Preamble – and that law’s holding that employees may be administratively exempt even if they engage in selling – DOL relies on portions of a *different exemption*: the outside sales exemption. *See* 29 C.F.R. § 541.500 & 503 (Outside Sales Exemption). DOL reasons that analyzing and compiling potential customers’ financial data and advising customers on the best product for the customer “is considered exempt sales work” “[b]ecause work performed incidental to and in conjunction with the employee’s own sales or solicitations is considered exempt sales work” *under the outside sales exemption*. AI at 4-5 & n.3 (citing outside sales exemption in Section 13(a)(1) of the FLSA and the outside sales exemption regulations in 29 C.F.R. § 541.500 & 503). But, as discussed above in this section, DOL reached the exact opposite conclusion in the regulations and the Preamble discussion of the *administrative* exemption. 69 Fed. Reg. at 22,145-46; *id.* at 22,146 (“[A] financial services employee whose primary duty is gathering and analyzing facts and providing consulting advice to assist customers in choosing among many complex financial products may be an exempt administrative employee” if they can meet the other parts of the administrative exemption).

The AI also opines that the fact that some companies have argued that their loan officers are exempt outside sales employees is further evidence that all loan officers have a primary duty of selling financial products. AI at 6. That reasoning is wholly inconsistent with the Preamble, in which DOL explained that in drafting the final rule it removed language from the proposed regulations specifically to avoid any suggestion that all inside sales employees are non-exempt,

even if they meet the requirements of the administrative exemption. In the Preamble, DOL explained that it was:

urge[d] not to use expansive language that could be read to render all inside sales employees nonexempt, even if they meet the requirements of the executive, administrative or professional exemptions. The Department has decided to make the changes requested by these commenters, not due to any inaccuracy in the sentence, but because we agree that this language might imply that sales employees, inside or outside, can only have exempt status by meeting the requirements for the section 13(a)(1) “outside sales” exemption. . . . The Department is deleting this language to avoid any misunderstanding that the outside sales exemption is the only exemption available for sales employees. *Other exemptions in the statute, including the . . . administrative . . . exemptions, are also available for sales employees who can meet all the requirements for any of those exemptions.*

69 Fed. Reg. at 22,161-62 (emphasis added).

In short, in an effort to avoid the plain language of the regulation, the Preamble, and the cases relied upon by DOL in 2004 for DOL’s interpretation of the administrative exemption, DOL in the AI relies on portions of its regulations defining and delimiting the *outside sales* exemption (29 C.F.R. § 541.500 *et seq.*) to reach its new rule regarding the *administrative* exemption (29 C.F.R. § 541.200 *et seq.*). *See* AI at 4-5 & n.3 (relying on the outside sale exemption regulation at 29 C.F.R. § 541.500(b) to find that job duties performed by loan officers that are specifically described in 29 C.F.R. § 541.203(b) as exempt administrative work are instead non-exempt “selling” because the job duties are “incidental” to mortgage loan officers’ sales duties). While DOL could have regulated the outside sales and administrative exemptions

in the same manner, it plainly did not do so in the 2004 regulations, as further explained in the Preamble.²⁰

DOL's own regulation 29 C.F.R. § 541.203(b) provides that certain specific job duties, when performed by financial services employees, meet the requirements of the administrative exemption. The AI, nevertheless, finds that those very same job duties, when performed by mortgage loan officers, do not meet the requirements of the administrative exemption, but rather are non-administrative-exempt "selling." By the AI, DOL purports to disregard its own regulation, and issue a new interpretation in conflict with that regulation. Any doubt that the Regulation and the AI are in conflict is resolved by the regulation Preamble, in which DOL clarified at length that the administrative exemption includes employees who perform administratively exempt duties, *notwithstanding* their engaging in some selling.

DOL may not disregard and act contrary to its own regulations. Because the AI directly conflicts with DOL's own regulations, it is arbitrary, capricious and contrary to law, and should be set aside as violating the APA.²¹

²⁰ The Preamble also makes clear that the regulations are organized by particular exemption, and regulations that are relevant to multiple exemptions are placed in special, unified sections. *See* 69 Fed. Reg. at 22,126. As DOL explained in the Preamble: "The proposed rule also reorganized the subparts according to each category of exemption . . . and consolidated provisions relevant to several or all of the exemption categories into unified, common sections to eliminate unnecessary repetition (*e.g.*, a number of sections pertaining to salary issues were proposed to be consolidated into a new Subpart G, Salary Requirements . . .)" 69 Fed. Reg. at 22,126. Thus, Subpart F regulations (29 C.F.R. § 541.500 et seq.) are relevant *only* to "Outside Sales Employees;" Subpart C regulations (29 C.F.R. § 200 et seq.) are relevant *only* to "Administrative Employees;" and Subparts A ("General Regulations"), G ("Salary Regulations"), and H ("Definitions and Miscellaneous Provisions") contain the *only* regulations that are relevant to multiple exemptions.

²¹ Because the AI is inconsistent with DOL's regulations, in addition to being arbitrary, capricious, and contrary to law, it is unlawful because it purports to amend those regulations without APA notice and comment rulemaking. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) ("APA rulemaking would still be required if [a new interpretation] adopted a new position inconsistent with any of the Secretary's existing regulations."); *Nat'l Family Planning*

V. CONCLUSION

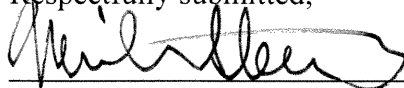
The AI reverses DOL's definitive and authoritative interpretation of the FLSA's administrative exemption as set forth in its 2006 Opinion Letter. Because DOL promulgated the AI without following the notice-and-comment procedures that are required to reverse an agency's definitive interpretation of its own regulation, the AI must be set aside. Additionally, because the AI clearly conflicts with DOL's existing regulations and also clearly conflicts with the Preamble definitively interpreting those regulations, the AI must be set aside as arbitrary, capricious, and contrary to law.

For all of the foregoing reasons, Plaintiff Mortgage Bankers Association respectfully submits that the Court should grant its motion for summary judgment, set aside the AI and enjoin its enforcement.

& Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 228-29 (D.C. Cir. 1992) (holding that agency's announcement of a new interpretation effectively amended the regulation's meaning, and therefore required notice and comment). In fact, notice and comment were required to lawfully promulgate the AI because of its inconsistency with the Preamble *alone* (notwithstanding the AI's inconsistency with the regulations). Even were the regulation not unmistakably clear, the Preamble *itself* is a definitive and authoritative interpretation of the regulation requiring notice and comment to change. *See supra* Section IV.A.

Dated: January 12, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2011, a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment was served upon the following by registered or certified mail:

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