UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, individually and on behalf of similarly situated employees, Plaintiffs, v. QUICKEN LOANS, INC., *et al.*, Defendant.	Civil Case No. 04-40346 Hon. Stephen J. Murphy III

BRIEF OF THE SECRETARY OF LABOR
AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Cases -- continued

Miscellaneous:

Miscellaneous -- continued

ISSUE PRESENTED

What degree of deference is due to the Department of Labor's Administrator's Interpretation No. 2010-1 (March 24, 2010) relative to Wage and Hour's Opinion Letter FLSA2006-31 (September 8, 2006) regarding the exempt status of mortgage loan officers under the administrative exemption in section 13(a)(1) of the Fair Labor Standards Act?

LOCAL RULE 7.1(c)(2) STATEMENT OF MOST APPROPRIATE AUTHORITY

STATUTES

29 U.S.C. 213(a)(1)

REGULATIONS

29 C.F.R. Part 541

29 C.F.R. 541.200(a)

29 C.F.R. 541.203(b)

OTHER MATERIALS

69 Fed. Reg. 22122 (Apr. 23, 2004)

United States Dep't of Labor, Wage and Hour Administrator's Interpretation No. 2010-1 (Mar. 24, 2010)

United States Dep't of Labor, Wage and Hour Opinion Letter FLSA2006-31 (Sept. 8, 2006)

CASES

Auer v. Robbins
519 U.S. 452 (1997)

Long Island Care at Home, Ltd. v. Coke
551 U.S. 158 (2007)

National Cable & Telecomm. Ass'n v. Brand X Internet Servs.
545 U.S. 967 (2005)

In re Novartis Wage and Hour Litigation
611 F.3d 141 (2d Cir. 2010)

Pope v. Shalala
998 F.2d 473, 483 (7th Cir. 1993)

INTRODUCTION

On September 27, 2010, this Court invited the Department of Labor ("Department") to file a brief as *amicus curiae* on the degree of deference to be accorded the Department's interpretation of its own regulations in Administrator's Interpretation No. 2010-1 (Mar. 24, 2010) ("AI 2010-1") relative to the Department's Wage and Hour Division's ("Wage and Hour") Opinion Letter FLSA2006-31 (Sept. 8, 2006) ("2006 Opinion Letter"). This Court made clear in its order that it was not soliciting the Department's opinion regarding the substantive merits of the constructions in AI 2010-1 and the 2006 Opinion Letter and the application of these interpretations to the facts of the instant case, but rather was specifically and exclusively requesting the Department's opinion on the deference due to AI 2010-1. In response to this Court's invitation, the Secretary of Labor ("Secretary") submits this brief, which is limited to the issue identified in the September 27, 2010 order.

BACKGROUND

The Fair Labor Standards Act ("FLSA") exempts from its minimum wage and overtime provisions employees 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). In

recent years, the Department has promulgated regulations that, among other things, updated the administrative exemption regulations and has interpreted the administrative exemption regulations to determine whether mortgage loan officers are exempt administrative employees.[1]

In 1999, Wage and Hour concluded in an opinion letter that loan officers for a mortgage brokerage company whose duties included contacting prospective customers, evaluating customers' financial situation, consulting with customers to obtain the best loan package, and assisting customers in preparing loan applications, did not qualify as administrative exempt employees because they carried out the company's day-to-day activities rather than determining the overall course and policies of the business, and they did not exercise discretion and independent judgment. *See* Opinion Letter, 1999 WL 1002401 (May 17, 1999) ("1999 Opinion Letter").

In response to a request to reconsider its 1999 Opinion Letter in light of the "advisory duties" performed by the loan

[1] Other titles are sometimes used for this occupation, such as mortgage loan representative, mortgage loan consultant, or mortgage loan originator. As noted in the regulations, a job title alone does not establish exempt status. *See* 29 C.F.R. 541.2. Rather, an employee's salary and duties determine the employee's exempt or non-exempt status. In the interest of simplicity, the term "mortgage loan officers" is used throughout this brief.

officers, Wage and Hour concluded in a 2001 opinion letter that the loan officers performed work that was directly related to the management or general business operations of the employer or the employer's customers, but did not perform work that required the exercise of discretion and independent judgment because they merely applied techniques and procedures in choosing already established loan packages. *See* Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001) ("2001 Opinion Letter").

In 2004, the Department revised the regulations under 29 C.F.R. Part 541 ("Part 541"), including the regulations governing the administrative exemption. As revised, the pertinent regulation states that the administrative exemption applies to an employee:

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

29 C.F.R. 541.200(a). In the preamble accompanying these revised regulations, the Department noted that, as a general matter, the "production" versus "staff" dichotomy (also referred to as the "production" versus "administrative" dichotomy) was a

relevant and useful concept in interpreting the administrative duties test. 69 Fed. Reg. 22122, 22141 (Apr. 23, 2004). The Department explained:

> [T]his [administrative] exemption is intended to be limited to those employees whose duties relate to the administrative as distinguished from the production operations of a business. Thus, it relates to employees whose work involves servicing the business itself -- employees who can be described as staff rather than line employees, or as functional rather than departmental heads.

Id. (internal quotation marks omitted).

The regulations also provide "illustrations of the application of the administrative duties test to particular occupations[,]" 69 Fed. Reg. at 22144, one of which is financial services:

> 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, the Department discussed four cases, which serve as the basis for the final language used in section

541.203(b): *Reich v. John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997); *Hogan v. Allstate Insurance Co.*, 2004 WL 362378 (11th Cir. 2004); *Wilshin v. Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002); and *Casas v. Conseco Finance Corp.*, 2002 WL 507059 (D. Minn. 2002). *See* 69 Fed. Reg. at 22145. The first three of these cases involved insurance marketing representatives and agents, whose duties were to promote sales of the employer's products generally, service existing customers, including discussing with customers how the employer's products could fit with the customers' needs, and recommend the employer's products and adapt them as necessary for the customers' needs. *See id.* In each of these three cases, the court concluded that the administrative exemption applied. *See id.* By contrast, the fourth case, *Conseco Finance*, involved loan originators, whose duties were to call potential customers identified by the employer, obtain their financial information, run credit reports, match the employer's loan products to the customers' needs, and assist with the documents for closing. *See id.* The court concluded that the administrative exemption did not apply to such employees because their primary duty was to sell the company's loan products to customers. *See id.*

The Department stated that 29 C.F.R. 541.203(b) was

"consistent with this case law[.]" *See* 69 Fed. Reg. at 22146. Thus, the portion of section 541.203(b) that outlines the duties of financial service employees who qualify for the administrative exemption (i.e., "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") parallels the duties in the three insurance agent cases. *See* 69 Fed. Reg. at 22146. The final portion of section 541.203(b) that identifies the duties of employees who do not qualify for the administrative exemption (i.e., primary duty is "selling financial products") parallels the duties of loan originators in *Conseco Finance*. *See* 69 Fed. Reg. at 22146.

In 2006, Wage and Hour again addressed mortgage loan officers in an opinion letter. *See* 2006 Opinion Letter. The duties of the mortgage loan officers at issue included contacting customers, assisting customers in identifying and securing a mortgage loan appropriate for their financial situation, collecting customers' financial information, determining which loan packages customers qualified for, and

advising customers about the risks and benefits of the various loans. *See id.* at 1-2. They also performed certain sales activities, which the employer divided into two distinct categories -- "customer-specific persuasive sales activity" and marketing the employer's company and products generally. *See id.* at 2. The employer asserted that the mortgage loan officers spent less than 50 percent of their time on customer-specific persuasive sales activity. *See id.*

Wage and Hour concluded that these mortgage loan officers were exempt administrative employees. As an initial matter, Wage and Hour concluded that, based on their work collecting and analyzing financial information and advising customers, the primary duty of these mortgage loan officers was not sales. *See* 2006 Opinion Letter at 4-5. Wage and Hour stated that these mortgage loan officers "satisfy the duties requirement under 29 C.F.R. § 541.203(b)." *Id.* at 5. It then concluded that these mortgage loan officers "also satisfy the traditional duties requirements of the administrative exemption" by performing work directly related to the management or general business operations of the employer and work that includes the exercise of discretion and independent judgment because, like the employees discussed in the 2004 preamble in the *John Alden*, *Hogan*, *and Wilshin* cases, "the employees here service their

employer's financial services business by marketing, servicing, and promoting the employer's financial products." *Id.* Wage and Hour further concluded that the use of software programs to assess risk and to narrow the scope of products available did not indicate that the mortgage loan officers lacked discretion and independent judgment because the mortgage loan officers were ultimately responsible for assessing the alternatives and making the recommendations to the customer. *See id.* at 5-6.

In 2010, Wage and Hour issued an Administrator's Interpretation on the exempt status of mortgage loan officers under the administrative exemption.[2] *See* AI 2010-1. AI 2010-1 described the typical mortgage loan officer job duties as contacting potential customers, collecting financial information from customers, running credit reports, entering financial information into a computer program that identifies loan programs for which the customers qualify, assessing and discussing the loans with customers to identify the loan that matches the customers' needs, and compiling and finalizing

[2] In 2010, Wage and Hour changed its practice from issuing opinion letters in response to individual inquiries to issuing Administrator's Interpretations. Administrator's Interpretations are designed to "set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue." Wage and Hour Division, Rulings and Interpretations, http://www.dol.gov/whd/opinion/opinion.htm (last visited December 9, 2010).

customer-documents for closings. *See id.* at 1-2. AI 2010-1 addressed only the second of the administrative duties requirements (i.e., performance of work directly related to the management or general business operations of the employer or the employer's customers); it did not address the third of the duties requirements (i.e., the exercise of discretion and independent judgment with respect to matters of significance). *See id.* at 2. Citing *Conseco Finance* and the "production" versus "administrative" dichotomy discussed in the 2004 preamble, as well as case law and regulatory support for treating work that is incidental to sales as sales work, Wage and Hour concluded that mortgage loan officers' primary duty is making sales and therefore the mortgage loan officers perform the production work of their employers. *See id.* at 3-6. Their duties thus do not relate to the internal management or general business operations of the company. *See id.* at 6. In reaching this conclusion, Wage and Hour rejected the 2006 Opinion Letter's "inappropriately narrow definition of sales as including only 'customer-specific persuasive sales activity'[.]" *Id.* at 5 n.3. Wage and Hour also concluded that a typical mortgage loan officer's primary duty is not related to the management or business operations of the employer's customers because the customers (homeowners) are individuals seeking

advice for their personal needs, and thus do not have management or general business operations. *See id.* at 7-8.

In addition, Wage and Hour explained that the example of the exempt administrative financial services employee at 29 C.F.R. 541.203(b) is merely an example, not an alternative test to the requirements set forth in section 541.200. *See* AI 2010-1 at 8. Because the 2006 Opinion Letter erroneously appeared to assume that the example in section 541.203(b) created an alternative standard, and because a mortgage loan officer's primary duty is in fact sales, which is not directly related to the management or general business operations of the employer or the employer's customers, Wage and Hour withdrew the 2006 Opinion Letter. *See id.* Similarly, Wage and Hour withdrew the 2001 Opinion Letter as inconsistent with the analysis in AI 2010-1. *See id.*

SUMMARY OF ARGUMENT

AI 2010-1 is entitled to controlling deference because it is the Department's interpretation of its own ambiguous legislative regulations on the administrative exemption as applied to mortgage loan officers. This interpretation is consistent with the regulations and reflects the Department's fair and considered judgment on the issue. The fact that AI 2010-1 changes the Department's position on this issue from that

set out in the 2006 Opinion Letter does not lessen the controlling authority to which the Department's current interpretation in AI 2010-1 is entitled. The Department is permitted to change its interpretation of its own regulations as long as the change is adequately explained and does not result in unfair surprise. AI 2010-1 explicitly identified the basis for withdrawing the prior inconsistent interpretation in the 2006 Opinion Letter. Moreover, there is no unfair surprise from the Department's interpretation in AI 2010-1 because the current interpretation applies only prospectively.

ARGUMENT

AI 2010-1 IS ENTITLED TO CONTROLLING DEFERENCE BECAUSE THE DEPARTMENT'S INTERPRETS THE DEPARTMENT'S OWN AMBIGUOUS LEGISLATIVE REGULATIONS AND IS CONSISTENT WITH THOSE REGULATIONS; SUCH DEFERENCE IS NOT LESSENED BY VIRTUE OF THE FACT THAT IT REFLECTS A CHANGE IN WAGE AND HOUR'S INTERPRETATION OF THE EXEMPT ADMINISTRATIVE STATUS OF MORTGAGE LOAN OFFICERS BECAUSE THE CHANGE IS ADEQUATELY EXPLAINED AND APPLIES ONLY PROSPECTIVELY, THEREBY CAUSING NO UNFAIR SURPRISE

A. Wage and Hour's Interpretation of the Department's Regulations Issued Pursuant to Specific Congressional Authorization and After Notice and Comment Is Entitled to Controlling Deference

1. An agency's interpretation of its own ambiguous legislative regulation (i.e., a regulation promulgated pursuant to specific congressional authorization and after notice and comment) is "controlling unless plainly erroneous or

inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted); *see Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (*Auer* deference is appropriate when the regulation is ambiguous).[3] That interpretation may come in a variety of forms, including opinion letters, internal advisory memoranda, and amicus briefs, none of which themselves require notice and comment or formal adjudication procedures, as long as the interpretation reflects "the agency's fair and considered judgment on the matter in question," and is not "a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack[.]" *Auer*, 519 U.S. at 462 (amicus brief interpreting ambiguous legislative rule entitled to controlling deference); *see Federal*

[3] In *Auer*, the Secretary interpreted the legislative regulations in Part 541 that set out the criteria for the salary requirement (i.e., the salary-basis test, which requires that an employee be paid on a salary basis in order for the executive, administrative, or professional exemption in section 13(a)(1) to be applicable). *See* 519 U.S. at 456-57. The Secretary's salary-basis regulation in effect at the time indicated that being paid on a salary basis meant that the salary must not be subject to reduction because of variations in the quality or quantity of the work performed. *See id.* at 456 (citing 29 C.F.R. 541.118 (1996)). The Secretary interpreted this regulation to mean that the salary-basis requirement was not satisfied when employees were covered by an employer policy permitting disciplinary or other deductions in pay as a practical matter. *See id.* at 461. The Supreme Court concluded that the Secretary's interpretation was neither plainly erroneous nor inconsistent with the regulation, and therefore was controlling. *See id.* at 461-62.

Express Corp. v. Holowecki, 552 U.S. 389, 404 (2008) (Equal Employment Opportunity Commission's amicus brief interpreting its own regulations entitled to controlling deference under *Auer*); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007) (internal Wage and Hour Advisory Memorandum interpreting regulations that was issued during litigation was entitled to controlling deference under *Auer*); *Beck v. City of Cleveland*, 390 F.3d 912, 920 (6th Cir. 2004) (Department's interpretation in its amicus brief and opinion letters of its own regulation entitled to controlling deference under *Auer*).[4] In fact, in *Auer*, the Secretary's interpretation was advanced for the first time in the amicus brief that the Secretary filed with the Supreme Court (the Secretary had not filed an amicus brief when

[4] Deference under *Auer* is distinct from deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, an agency's interpretation, through notice and comment rulemaking pursuant to congressional authorization or through formal adjudication, of an ambiguous statute that the agency is entrusted to administer is entitled to controlling deference. *See id.* at 843-44. By contrast, under *Auer*, an agency's interpretation, through a variety of forms as noted *supra*, of its own ambiguous legislative rule is entitled to controlling deference. *See* 519 U.S. at 588. Thus, as this Court noted in its September 27, 2010 order (order at 4 n.1), *Chevron* deference is deference to the agency's notice and comment regulation; *Auer* deference is deference to the agency's interpretation of such a regulation, regardless of the form in which the interpretation is presented. *See* p.23 n.8 for a discussion of the lesser degree of deference due for statutory interpretation when such interpretation is not contained in a legislative rule or formal adjudication.

the case was before the Eight Circuit). *See* 519 U.S. at 461. It follows, therefore, that an Administrator's Interpretation is entitled to the same controlling deference as an opinion letter or the other forms in which the Department has advanced its interpretation, such as amicus briefs and internal advisory memoranda.[5]

2. In this case, as in *Auer*, the Secretary has explicit legislative rulemaking authority under section 13(a)(1), has promulgated the regulations in Part 541 pursuant to that authority, 69 Fed. Reg. at 22125, and has interpreted those regulations. The regulations do not specify whether employees who perform the duties of mortgage loan officers are exempt administrative employees. Wage and Hour has filled the regulatory gap on this specific issue in AI 2010-1 by interpreting the administrative exemption regulations as applied to mortgage loan officers. This case is analogous to *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3246 (U.S. Oct. 4, 2010)

[5] Indeed, Administrator's Interpretations gain added force from the statutory defense they provide to employers that follow them. That statutory scheme provides an affirmative defense when an employer relies on "any written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of Wage and Hour. 29 U.S.C. 259(a) (emphasis added); *see* 29 U.S.C. 259(b)(1); 29 C.F.R. 790.13(a); 29 C.F.R. 790.19; *see also Fazekas v. Cleveland Clinic Found. Health Care Ventures, Inc.*, 204 F.3d 673, 679 n.3 (6th Cir. 2000).

(No. 10-460) ("*Novartis*"), in which the Secretary interpreted the regulations, 29 C.F.R. 541.500 *et. seq.*, setting out the criteria for the outside sales exemption in section 13(a)(1) of the FLSA, as applied to pharmaceutical sales representatives. *See id.* at 149. Specifically, the Secretary asserted in an amicus brief that a pharmaceutical sales representative who promotes pharmaceuticals to a physician, but which the physician does not and legally cannot commit to prescribing to patients for ultimate purchase at a pharmacy, does not make a sale within the meaning of the outside sales regulations, and therefore is not exempt under section 13(a)(1). *See id.* The Second Circuit concluded that "the interpretation of the regulations given by the Secretary in her position as *amicus* on this appeal is entirely consistent with the regulations[,]" and therefore warrants controlling *Auer* deference. *Id.* at 155. Thus, just as the Secretary's amicus brief in *Novartis* was an interpretation of the Department's own regulations to determine whether a specific category of employees (i.e., pharmaceutical sales representatives) is exempt under section 13(a)(1) and 29 C.F.R. Part 541, AI 2010-1 is an interpretation of the Department's own regulations to determine whether a specific category of employees (i.e., mortgage loan officers) is exempt under section

13(a)(1) and 29 C.F.R. Part 541.[6]

Like the Secretary's interpretation in the *Auer* amicus brief and in the *Novartis* brief, the Secretary's interpretation in AI 2010-1 is consistent with the regulations and is not plainly erroneous, and therefore is entitled to controlling deference. AI 2010-1 is consistent with both sections 541.200 and 541.203(b). Section 541.200 requires, in relevant part, that an exempt administrative employee perform work that is "directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. 541.200(a)(2). Section 541.203(b) provides an example of the duties test applied to employees working in financial services by listing the duties that would qualify for the exemption (e.g., advising the customer regarding the advantages and disadvantages of different financial products), and clearly identifying those that would not (primary duty of sales). As

[6] Any argument that the position taken in AI 2010-1 is an "application" rather than an "interpretation" of the Department's own regulations, and thus is not entitled to controlling *Auer* deference, *see Pontius v. Delta Fin. Group*, 2007 WL 1496692, at *9 (W.D. Penn. 2007), is without merit; this is a distinction without a difference. The Second Circuit in *Novartis* did not treat the Secretary's position as to the exempt status of pharmaceutical sales representatives under the outside sales exemption as an "application," as opposed to an "interpretation." It made no mention of such a dichotomy. It simply referred to the Secretary's position in her amicus brief as her interpretation of the regulations. *See id.* at 155.

noted *supra*, section 541.203(b) paralleled the three insurance agent cases cited in the 2004 preamble (*John Alden, Hogan*, and *Wilshin*) in describing the duties of financial services employees who would qualify for the administrative exemption, and the loan originator case cited in the 2004 preamble (*Conseco Finance*) in describing the duties of financial services employees who would not qualify for the administrative exemption. AI 2010-1, relying on the distinction made in the 2004 regulations and preamble, concluded that the duties of the typical mortgage loan officer consist primarily of sales. *See* AI 2010-1 at 4-5. And, in determining that such sales duties constituted "production" work, which is not work related to the management or general business operations of the employer, Wage and Hour similarly relied on the statement in the 2004 preamble that the "production" versus "administrative" dichotomy is a relevant and useful concept in determining whether the employee was performing work directly related to the management or general business operations of the employer or the employer's customers. *See* 69 Fed. Reg. at 22141. Thus, not only is AI 2010-1 consistent with the 2004 regulations and preamble, it reflects the Department's fair and thoroughly considered judgment on the matter. As such, it is entitled to controlling *Auer* deference. *See Thornton v. Graphic Commc'ns Conference of*

Int'l Bhd. of Teamsters Supplemental Ret. & Disability Fund, 566 F.3d 597, 611 (6th Cir. 2009) ("The deference accorded to an agency's interpretation of its own ambiguous regulation is substantial and afforded even greater consideration than the *Chevron* deference accorded to an interpretation of an ambiguous statute."); *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836-37 (Fed. Cir. 2006) ("We defer even more broadly to an agency's interpretations of its own regulations than to its interpretation of statutes, because the agency, as the promulgator of the regulation, is particularly well suited to speak to its original intent in adopting the regulation").

B. The Department's Change in Interpretation of Its Own Regulations as Applied to Mortgage Loan Officers Does Not Preclude Deference under *Auer*

1. The fact that the Department has changed its interpretation of its own ambiguous legislative regulations on this subject over the years does not negate the controlling deference that its current interpretation is due. An agency may change its interpretation of its own regulations, and the interpretation is still entitled to controlling deference, as long as the agency explains its change in position and the changed interpretation does not create unfair surprise. *See Long Island Care at Home*, 551 U.S. at 170-71 (Department's varied interpretations of legislative regulations is no reason

to deny *Auer* deference to the current interpretation because it did not create any unfair surprise); *cf. National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005) ("*National Cable*") (agency's declaratory rulings changing the agency's interpretation of an ambiguous statute does not preclude deference under *Chevron*, as long as the agency adequately explains the reasons for the reversal of policy).[7] A "change in interpretation alone presents no separate ground for disregarding the Department's present interpretation." *Long Island Care at Home*, 551 U.S. at 171.

While there is Sixth Circuit case law suggesting that once an agency has interpreted its own regulation, notice and comment procedures may, in certain circumstances, be required pursuant

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[7] Thus, despite the Supreme Court's comment in an earlier case that "[a]n agency interpretation of a relevant [statutory] provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view[,]" *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), *National Cable* made clear that the agency's new interpretation is entitled to controlling deference as long the agency adequately explains its change in position. *See National Cable*, 545 U.S. at 981; *see also Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1036 (9th Cir. 2007) (despite *Cardoza-Fonseca*, an agency's new position is "entitled to deference so long as the agency acknowledges and explains the departure from its prior views") (internal quotation marks omitted); *cf. Lands Council v. Martin*, 529 F.3d 1219, 1225 (9th Cir. 2008) (changing the definition of a term used in a Forest Service forest policy plan does not violate the Administrative Procedure Act because the agency sufficiently explained the reason for the change).

to the Administrative Procedures Act, *see* 5 U.S.C. 553(b), before the agency can change that interpretation, *see Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), the present case should be viewed through the prism of the Supreme Court's subsequent decision in *Long Island Care at Home*. In *Long Island Care at Home*, the Supreme Court did not require the Department's changed interpretation of its legislative regulations to be promulgated using notice and comment procedures; rather, without even addressing this issue, the Court concluded that the Department's revised interpretation of the regulations was entitled to controlling *Auer* deference. *See* 551 U.S. at 170-71.[8] This case presents a similar course of

[8] Even if this Court were to look to *Dismas Charities* for guidance, the circumstances in the instant case do not require the Department to have promulgated AI 2010-1 using notice and comment procedures. In *Dismas Charities*, the Sixth Circuit noted that notice and comment may be required before an agency changes its interpretation of its own regulation in situations in which the change in interpretation reflects "the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant." 401 F.3d at 682 (concluding that notice and comment was not required before the Bureau of Prisons could revise its interpretation of a statute). In the present case, AI 2010-1 does not reflect a reassessment of policy. Rather, AI 2010-1 reflects Wage and Hour's reassessment of what was originally meant in the administrative exemption regulations; based on that reassessment, Wage and Hour concluded that the correct interpretation of those regulations in the case of mortgage loan officers is that they are not exempt administrative employees. As the court noted in *Dismas Charities*, "[n]otice and comment rulemaking procedures are simply not designed as a means for agencies to improve their

agency action, and therefore *Auer* deference is equally warranted here. *See Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 872 n.7 (2009) (the fact that an agency's interpretation of its regulations has "fluctuated" does not make it unworthy of *Auer* deference).

Moreover, an agency must be able to change its interpretation of its own ambiguous legislative regulation. "An initial agency interpretation is not instantly carved in stone. . . . On the contrary, the agency must consider varying interpretations and the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *National Cable*, 545 U.S. at 981 (internal quotation marks omitted). The agency is tasked with promulgating legally binding rules under a particular statute, and with this authority comes the responsibility to "consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* While *National Cable* involved a change in the agency's interpretation of an ambiguous statute, the rationale underlying the Supreme Court's conclusion applies equally to an agency's interpretation

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legal analysis." 401 F.3d at 680. Thus, Wage and Hour was not required to revise its interpretation of the administrative exemption in the case of mortgage loan officers using notice and comment procedures.

of its own ambiguous legislative rule. It would be illogical to delegate to an agency legislative rulemaking authority based on the agency's expertise and to permit the agency to change course (if deemed necessary) in exercising that authority, but to deny the agency the ability to modify its interpretation of those regulations in response, for example, "to changed factual circumstances, or a change in administrations." *Id.; see Butler v. Merrill Lynch Bus. Fin. Servs., Inc.*, 570 F. Supp. 2d 1047, 1051 (N.D. Ill. 2008) (rejecting argument that Department's changed interpretation of ambiguous legislative regulation under the Family Medical Leave Act lessened the deference due under *Auer*).[9] The court in *Butler* viewed the change in interpretation

[9] The Sixth Circuit's recent decision in *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010), is inapposite. In *Franklin*, the Department had interpreted a statutory provision of the FLSA, 29 U.S.C. 203(o), in opinion letters and, most recently, an Administrator's Interpretation (the Department's interpretation had varied over the years). *See id.* at 612-13. The court concluded that the Administrator's Interpretation was not persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See id.* at 614-15. According to that standard, the agency's interpretation of an ambiguity or gap in a statutory provision under which the agency lacks rulemaking authority is entitled to deference based on its persuasive effect. *See Skidmore*, 323 U.S. at 140; *see also Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006) (distinguishing controlling deference under *Chevron* and *Auer*, which applies to an agency's interpretation of an ambiguous statute and an agency's interpretation of its own ambiguous legislative regulation, respectively, from deference under *Skidmore*, which is entitled to respect to the extent it has the power to persuade). Since AI 2010-1 interprets an ambiguous legislative regulation, it is entitled to controlling

of the Department's regulation "as an enlightened view based upon experience, analysis, and expertise in carrying out the [Department's] congressional mandate." *Id.*

In AI 2010-1, Wage and Hour reconsidered the exempt status of mortgage loan officers under the administrative exemption with the benefit of years of analyzing the issue and of numerous court decisions on the issue. AI 2010-1 reflects a broader and more comprehensive perspective than previously considered in the opinion letters.[10] Therefore, the fact that the Department's interpretation of the administrative exemption regulations in the case of mortgage loan officers has changed does not affect the otherwise controlling authority that AI 2010-1 should receive under *Auer*.

Auer deference.

[10] Administrator's interpretations will be issued "when [it is] determined, in the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate." Wage and Hour Division, Rulings and Interpretations, http://www.dol.gov/whd/opinion/opinion.htm (last visited December 9, 2010).

2. Without delving into the merits of the interpretation in AI 2010-1 (which this Court specifically said the Secretary should not do), the Secretary notes that it contains a lengthy discussion of the reasons for its changed position. In concluding that mortgage loan officers perform sales, which is production work for the company, Wage and Hour explained that it disagreed with the narrow definition of sales in the 2006 Opinion Letter and concluded that work that is incidental to sales should be considered sales work in determining whether an employee's primary duty is making sales. *See* AI 2010-1 at 4-5. AI 2010-1 also explained that the 2006 Opinion Letter appeared to assume (erroneously) that section 541.203(b) provided an alternative duties test to that laid out in section 541.200. *See id.* at 8. Thus, there is no basis to deny *Auer* deference to AI 2010-1 on the ground of a lack of reasoning.

3. Finally, as noted *supra*, *Long Island Care at Home* indicated that an agency's changed interpretation of its own regulation is entitled to *Auer* deference as long as the changed interpretation presents no unfair surprise. *See* 551 U.S. at 170-71. Because AI 2010-1 represents a substantial change in the Department's interpretation, it applies only prospectively. Thus, AI 2010-1 presents no unfair surprise to employers and employees because it does not apply retroactively.

If an agency's interpretation of its own regulation is a substantive change from a prior interpretation, the revised interpretation does not apply retroactively. *See Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993), *overruled on other grounds by Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999); *McPhillips v. Gold Key Lease, Inc.*, 38 F. Supp. 2d 975, 980 (M.D. Ala. 1999) (citing *Pope* and concluding that Federal Reserve Board's interpretation of regulation was a substantive change and therefore did not apply retroactively). By contrast, if the interpretation is merely a clarification of a regulation rather than a substantive change, the interpretation governs past as well as future conduct. An interpretation "simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been: 'It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand.'" *Pope*, 998 F.2d at 483 (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 135 (1936)); *cf. Orr v.* Hawk, 156 F.3d 651, 654 (6th Cir. 1998) (citing *Pope* and concluding that agency's revised interpretation of statute did not announce a new rule, but was merely a clarification of existing policy, and therefore it applied retroactively). Here, 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. As such, AI 2010-1 applies only prospectively, and therefore creates no unfair surprise.[11]

[11] It is important to note, however, that when the Department issues interpretations (via Administrator's Interpretations, amicus briefs, etc.) that do not result in a substantive change in the law, those interpretations, which "restate[] what the law according to the agency is and has always been[,]" govern all conduct, both before and after the interpretation is set forth. *Pope*, 998 F.2d at 483.

It is also worth noting that, as discussed *supra*, the Department concluded in the 2001 Opinion Letter that mortgage loan officers performed work that directly related to management or general business operations, but did not perform work that required the exercise of discretion and independent judgment, and therefore were not exempt administrative employees. The Department stated in the 2006 Opinion Letter that mortgage loan officers performed work that not only directly related to management or general business operations, but that also included the exercise of discretion and independent judgment, and therefore were exempt administrative employees. Thus, because the administrative exemption applies only when all of the prongs set out in 29 C.F.R. 541.200 are satisfied, it was possible for mortgage loan officers to be non-exempt during the 2001 to 2006 period (i.e., until the 2006 Opinion Letter interpreted the regulations to include mortgage loan officers as exempt administrative employees).

CONCLUSION

For the foregoing reasons, AI 2010-1 is entitled to controlling deference under *Auer*.

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CERTIFICATE OF SERVICE

I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this _9th_ day of December, 2010:

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