UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, individually and on behalf of similarly situated employees,

Plaintiffs,

-vs.-

QUICKEN LOANS, INC., a Michigan corporation.

Defendant.

Civil Action No. 04-cv-40346

District Judge Stephen J. Murphy, III

Magistrate Judge Michael Hluchaniuk

MOTION OF MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER MORTGAGE COALITION, HOUSING POLICY COUNCIL, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND COMMUNITY MORTGAGE BANKING PROJECT FOR LEAVE TO FILE BRIEF AS AMICI CURIAE REGARDING THE LEVEL OF DEFERENCE TO BE ACCORDED TO ADMINISTRATOR'S INTERPRETATION NO. 2010-1

The Mortgage Bankers Association ("MBA"), the American Bankers Association ("ABA"), the American Financial Services Association ("AFSA"), the Consumer Mortgage Coalition ("CMC"), the Housing Policy Council ("HPC"), the Independent Community Bankers of America ("ICBA"), and the Community Mortgage Banking Project ("CMBP") respectfully request leave to file the attached brief as amici curiae in response to the Department of Labor's ("DOL's") amicus brief regarding the level of deference to be accorded to Administrator's Interpretation No. 2010-1 (the "AI"). In support of this motion, the proposed amici declare as follows:

1. The 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. Headquartered in Washington, D.C., the MBA works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

2. Founded in 1875, the ABA represents banks of all sizes and charters and is the recognized voice for the nation's $13 trillion banking industry and its 2 million employees. Located in each of the fifty States and the District of Columbia, ABA members hold a substantial majority of the domestic assets of the banking industry in the United States.

3. The AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers.

4. The CMC, formed in 1995, is a trade association of national mortgage lenders, servicers and service providers.

5. The HPC of The Financial Services Roundtable is a national trade association consisting of thirty-two of the leading national mortgage lenders, mortgage insurers, and mortgage service providers. HPC members originate, service, and insure mortgages**.** The HPC estimates that its member companies originate approximately 75% and service two-thirds of mortgages in the United States.

6. The ICBA represents nearly 5,000 community banks of all sizes and charter types representing more than 20,000 locations nationwide throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers they serve.

7. The CMBP is a public policy organization representing the interests of independent mortgage bankers. For decades, the community-based mortgage banker has delivered value and choice to consumers by leveraging local market expertise, quality service, and lower costs for borrowers.

8. On September 8, 2006, the Administrator of the DOL's Wage and Hour Division issued an opinion letter in response to a request by the MBA. In that opinion letter, the Administrator opined that mortgage loan officers would satisfy the administrative exemption set forth in the Fair Labor Standards Act ("FLSA"). *See* 29 U.S.C. § 213(a)(1).

9. The MBA, ABA, AFSA, CMC, HPC, ICBA, CMBP, and their members have relied on the September 8, 2006 opinion letter that the DOL issued to the MBA, as well as the 2004 regulations promulgated by the DOL and discussed in the September 8, 2006 opinion letter,

to evaluate whether to classify tens of thousands of their employees as exempt from the overtime requirements of the FLSA.

10. On March 24, 2010, the Deputy Administrator of the DOL's Wage and Hour Division issued the AI. The AI expressly withdrew the September 8, 2006 opinion letter that was issued to the MBA, as well as a second earlier opinion letter, and concluded this time that a "typical" mortgage loan officer does not qualify for the FLSA's administrative exemption.

11. At the Court's request, the DOL recently submitted an amicus brief to explain its position as to the level of deference the AI should be accorded.

12. The MBA, ABA, AFSA, CMC, HPC, ICBA, CMBP, and all of their respective members have a substantial interest in the resolution of the questions presented before this Court. Specifically, the AI, if adopted by this Court, could result in substantial unanticipated overtime liability for many of the proposed amici's 5,000-plus members who have relied on the DOL's 2004 regulations and its September 8, 2006 opinion letter issued to the MBA.

13. The DOL urges the Court to accord the AI "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997). As national associations representing the real estate finance industry, the MBA respectfully disagrees and requests an opportunity to respond to the DOL's position on behalf of its member organizations that would be affected if the Court were to grant such deference to the AI.

14. To facilitate a full consideration by the Court of the issue of deference to the AI, the MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP respectfully request leave to file a brief as amici curiae in response to the DOL's recent submission. The MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP submit their brief as amici curiae because their members have a "special interest" in the resolution of these issues, *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970),

and because they believe that their expertise in the mortgage banking and consumer loan industries contribute a unique perspective that can help the Court beyond the help that the lawyers for the parties are able to provide. *Ryan* v. *Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1063 (7th Cir. 1997).

15. If such leave is granted, the MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP request that their amicus brief be considered filed as of the date such leave is granted.

16. Additionally, if such leave is granted, the MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP also respectfully request that they be granted leave to appear at the Hearing on the Impact of Administrative Interpretation 2010-1 presently set for December 20, 2010 at 10:00 a.m. before the Court.

17. The proposed brief is twenty (20) pages and is being submitted within two Court days of the DOL having filed its amicus brief.

18. Pursuant to Local Rule 7.1(a), the MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP, through their counsel, sought the consent of both parties and the Department of Labor to the filing of its amicus curiae brief. Counsel for Defendant has indicated its consent. The Department of Labor has indicated that while it believes it has no standing to either grant or withhold consent, it has no objection to the filing of the proposed amicus brief. Counsel for Plaintiffs has refused to consent.

Respectfully submitted,

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Attorneys for Amici Curiae Mortgage Bankers Association, American Bankers Association, American Financial Services Association, Consumer Mortgage Coalition, Housing Policy Council, Independent Community Bankers of America, and Community Mortgage Banking Project

Dated: December 13, 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing Motion Of Mortgage Bankers Association, American Bankers Association, American Financial Services Association, Consumer Mortgage Coalition, Housing Policy Council, Independent Community Bankers Of American, And Community Mortgage Banking Project For Leave To File Brief As Amici Curiae Regarding The Level Of Deference To Be Accorded To Administrator's Interpretation No. 2010-1 was filed on December 13, 2010 with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Stephanie L. Sweitzer

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

RYAN C. HENRY, individually and on behalf of similarly situated employees, Plaintiffs, -vs.- QUICKEN LOANS, INC., a Michigan corporation. Defendant.	Civil Action No. 04-cv-40346 District Judge Stephen J. Murphy, III Magistrate Judge Michael Hluchaniuk

APPEARANCE OF COUNSEL

Stephanie L. Sweitzer of the law firm Morgan, Lewis & Bockius LLP hereby enters her appearance as counsel of record for Amici Curiae Mortgage Bankers Association, American Bankers Association, American Financial Services Association, Consumer Mortgage Coalition, Housing Policy Council, Independent Community Bankers of America, and Community Mortgage Banking Project in the above-referenced matter.

Dated: December 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing Appearance of Counsel was filed on December 13, 2010 with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

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UNITED STATES DISTRICT COURT
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RYAN C. HENRY, individually and on behalf of similarly situated employees, Plaintiffs, -vs.- QUICKEN LOANS, INC., a Michigan corporation. Defendant.	Civil Action No. 04-cv-40346 District Judge Stephen J. Murphy, III Magistrate Judge Michael Hluchaniuk

BRIEF OF AMICI CURIAE MORTGAGE BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER MORTGAGE COALITION, HOUSING POLICY COUNCIL, INDEPENDENT COMMUNITY BANKERS OF AMERICA, AND COMMUNITY MORTGAGE BANKING PROJECT REGARDING LEVEL OF DEFERENCE TO BE ACCORDED TO ADMINISTRATOR'S INTERPRETATION NO. 2010-1

CONCISE STATEMENT OF ISSUE PRESENTED

Is Administrator's Interpretation No. 2010-1 entitled to *Auer* or any other level of deference?

- Amici Curiae Mortgage Bankers Association, American Bankers Association, American Financial Services Association, Consumer Mortgage Coalition, Housing Policy Council, Independent Community Bankers of America, and Community Mortgage Banking Project say: No.

STATEMENT OF MOST APPROPRIATE AUTHORITIES

REGULATIONS

- 29 C.F.R. § 541.203(b)

CASES

- *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.*, 177 F.3d 1030 (D.C. Cir. 1999)
- *Auer v. Robbins*, 519 U.S. 452 (1997)
- *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000)
- *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 666 (6th Cir. 2005)
- *Franklin v. Kellogg Co.*, 619 F.3d 604 (6th Cir. 2010)
- *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004)
- *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007)
- *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002)

OTHER AUTHORITY

- *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122 (Apr. 23, 2004)

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<u>OTHER AUTHORITIES</u>

I. INTRODUCTION

On March 24, 2010, the Wage and Hour Division of the U.S. Department of Labor ("Department" or "DOL") issued Administrator's Interpretation No. 2010-1 (the "AI"). The AI "appli[ed]" the Fair Labor Standards Act's ("FLSA") white collar overtime exemption for administrative employees to what DOL described as "typical" mortgage loan officers. Expressly overturning two prior opinion letters addressing this exact issue, DOL concluded that the "typical" mortgage loan officer does not qualify for the administrative exemption. That this new decision marked a sudden and dramatic shift in DOL's position is confirmed not only by the express withdrawal of two prior opinion letters and DOL's acknowledgement in its amicus brief that the AI is a "substantial change" in the administrative exemption, (Dkt No. 609 ("DOL Br.") at 26), but also by the fact that the AI is inconsistent with the 2004 regulations themselves as well as DOL's contemporaneous understanding of those regulations as demonstrated by its discussion in the Preamble to those regulations. The AI, if adopted by this Court, could result in substantial unanticipated overtime liability from the date of the AI for many of the more than 5,000 members of the Mortgage Bankers Association ("MBA"), American Bankers Association ("ABA"), American Financial Services Association ("AFSA"), Consumer Mortgage Coalition ("CMC"), Housing Policy Council ("HPC"), Independent Community Bankers of America ("ICBA"), and Community Mortgage Banking Project ("CMBP"), who have relied on the 2004 regulations and subsequent DOL guidance in evaluating whether to classify tens of thousands of their employees as exempt from the FLSA's overtime requirements.

At the Court's request, the Department late last week submitted an amicus curiae brief to explain its position as to the level of deference the AI should be accorded. The Department urges the Court to accord the AI "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997). As national associations representing the banking and real estate finance industries, the

MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP respectfully disagree. For the reasons discussed in this amicus brief, and for the reasons cited by this Court in its prior opinion rejecting *Auer* deference to the 2006 opinion letter that the AI reverses, the Department's AI is not entitled to *Auer* deference. Indeed, the Department's AI is entitled to no deference whatsoever.[1]

II. THE AI IS NOT ENTITLED TO DEFERENCE

A. The *Auer* Deference Doctrine

DOL argues that the AI is entitled to *Auer* deference. Under *Auer*, an agency's *interpretation* of its own *ambiguous regulation* is "controlling unless plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. Although agencies frequently claim that arguments raised in policy statements, manuals, and briefs are entitled to "controlling" deference under *Auer*, *Auer* deference has a number of important limitations.

As *Auer* itself recognized, an agency is not entitled controlling deference where its interpretation of an ambiguous regulation is "plainly erroneous or inconsistent with" the regulation that the agency purports to be interpreting. *Id.* *Auer* also noted that deference is only appropriate where there was no reason to suspect that the Department's interpretation did not "reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462.

Since *Auer*, courts have noted a number of other important limitations on the applicability of *Auer* deference. First, in *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000), the Supreme

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[1] In the past year, several circuit courts have rejected DOL interpretations adopted by the new administration because they were inconsistent with the statute or regulation DOL was purporting to interpret. *See, e.g.*, *Franklin v. Kellogg Co.*, 619 F.3d 604, 613-14 (6th Cir. 2010) (refusing to defer to DOL's interpretation about the meaning of a statute in light of the Department's multiple switches of opinion about it); *Parker v. NutriSystem, Inc.*, 620 F.3d 274, 282-83 (3d Cir. 2010) (opinion letters regarding meaning of "commission" in Section 7(i) of the FLSA did not "provide sufficiently thorough reasoning, consistency, or factual similarities to the instant case to warrant deference"); *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010) (rejecting DOL's interpretation of 29 C.F.R. § 531.35 as "plainly erroneous and unworthy of any deference").

Court held that "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* at 587 (refusing to grant *Auer* deference to a DOL opinion letter where there was no ambiguity in the regulation it purported to interpret). Second, in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), the Supreme Court set forth an additional limitation on the appropriateness of *Auer* deference – the "interpretive changes" cannot create "unfair surprise." *Id.* at 170-71. Third, and related to the "unfair surprise" limitation, courts of appeal have considered the consistency with which an agency has interpreted a regulation in determining whether its interpretation has been "fair and considered" and, thus, entitled to *Auer* deference. *See, e.g., Drake v. F.A.A.*, 291 F.3d 59, 69 (D.C. Cir. 2002) (whether an interpretation is "fair and considered" turns on whether the agency has "ever adopted a different interpretation of the regulation or contradicted its position on appeal"). Courts have granted regulatory interpretations "considerably less deference" when the interpretation conflicts with a prior interpretation. *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 837 (Fed. Cir. 2006).

B. The AI, Which Reverses Two Prior Agency Pronouncements, Is Inconsistent With The Text Of The Regulation And Its Contemporaneous Interpretation By The DOL, Creates Unfair Surprise, And Does Not Interpret An Ambiguous Regulation, Is Not Entitled To *Auer* Deference.

As discussed in detail below, for at least five independent reasons, the AI is not entitled to *Auer* deference. First, the AI is inconsistent with the regulations it purports to interpret and thus is plainly erroneous. Specifically, the AI conflicts with the plain language of 29 C.F.R. § 541.203(b), which sets forth particular job duties that, when performed by "employees in the financial services industry," "generally meet the duties requirements for the administrative exemption." *Id.* The AI, however, concludes that these exact same duties, when performed by a hypothetically "typical" mortgage loan officer, are *not* administrative exempt duties, but are instead non-exempt sales activity. Nothing in the regulation supports that conclusion.

Second, the AI is inconsistent with what DOL said it intended the regulation to mean at the time the regulations were promulgated. In the Preamble to the revised regulations promulgated by the Department in 2004, DOL stated repeatedly that some of the same duties that the AI now says are non-exempt "sales" duties are exempt administrative duties even though they involve some selling to consumers. *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"). The Department's amicus brief, however, fails to address, much less come to terms with the fact that the AI takes a contrary position.

Third, as DOL concedes in its amicus brief, the AI also irreconcilably conflicts with the Department's own prior opinion letters. In particular, it expressly withdraws two Opinion Letters because they are inconsistent with DOL's current application of fact to the administrative exemption. This flip-flopping of positions demonstrates that *Auer* deference is inappropriate.

Fourth, DOL's abrupt change in position without any warning or notice creates the exact type of unfair surprise that the Supreme Court noted could present a "separate ground for disregarding the Department's present interpretation." *Coke*, 551 U.S. at 171.

Finally, *Auer* deference is only warranted when an agency is interpreting its own *ambiguous* regulations. While DOL now claims that the AI interpreted ambiguous regulations, DOL does not and cannot point to any ambiguous language that the AI was interpreting. Indeed, nowhere in the AI did DOL even purport to be interpreting an ambiguous regulation.

For all these reasons, the MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP respectfully submit that the AI should not be accorded *Auer* deference or any deference at all.

1. The AI Is Inconsistent With The Regulation It Purports To Interpret.

An agency's interpretation that is inconsistent with its regulations is not entitled to *Auer* deference. *See, e.g.*, *Michigan Bell Tele. Co. v. Covad Comm. Co.*, 597 F.3d 370, 375 n.6 (6th

Cir. 2010) (finding *Auer* deference inapplicable where interpretation was so inconsistent with the regulation that it amounted to an attempt "to create a new *de facto* regulation under the guise of interpreting the regulation"); *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010); *Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 457 (4th Cir. 2007) (refusing to give *Auer* deference to DOL's interpretation that "is inconsistent with the regulation"). Here, the AI is not entitled to *Auer* deference because it is inconsistent with the very regulations it purports to interpret.

Effective August 23, 2004, DOL promulgated revised regulations interpreting the FLSA. The revised regulations included 29 C.F.R. § 541.203(b), which sets forth a list of specific job duties that, when performed by "employees in the financial services industry," "generally meet the duties requirements for the administrative exemption." Those duties include:

> 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.

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 are instead non-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"). DOL's amicus brief fails to come to terms with this inconsistency between the AI and the text of Section 203(b).

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-exempt duty of merely "selling financial products." 29 C.F.R. § 541.203(b). Indeed, the Deputy Administrator concedes as much when she explains 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 "sales" work when performed by a "typical" mortgage loan officer. This is plainly inconsistent with 29 C.F.R. § 541.203(b).

Because the AI plainly conflicts with the regulations, it is not entitled to *Auer* deference.

2. The AI Is Inconsistent With The Preamble To The Regulations Promulgated in 2004.

Any doubt about whether the AI is inconsistent with the regulations it purports to interpret is resolved by considering the AI's inconsistency with the Preamble to the 2004 regulations. Courts have consistently held that an agency's interpretation of a regulation is not entitled to deference where it conflicts with the agency's statements made at the time the regulation was promulgated. *See, e.g., Thomas Jefferson Univ. v. Shalala,* 512 U.S. 504, 512 (1994) (explaining that deference is inappropriate if an alternative reading is compelled by "other indications of the Secretary's intent at the time of the regulation's promulgation"); *Taylor*, 493 F.3d at 461 (declining to defer to DOL's interpretation because it was "inconsistent with what DOL said it intended the regulation to mean at the time it was promulgated").

In stark contrast to the AI and DOL's position in its amicus brief, the Department'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 a case in 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 *Hogan v. Allstate Ins. Co.*, 361 F.3d 621 (11th Cir. 2004)). The Department also favorably discussed another case that 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*." 69 Fed. Reg. at 22,146 (citing *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002) (emphasis added)). DOL described *Wilshin* as having held 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 – much less explain how its new application is consistent with – the Preamble's repeated approval of the administrative exemption being applied to financial services employees whose duties involve some selling to customers.

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. The Department, in its amicus brief, attempts to distinguish *Wilshin* and *Hogan* by repeatedly referring to them as the "insurance agent cases" and contrasting them with *Casas v. Conseco Finance Corp.*, No. 00-1512, 2002 WL 507059 (D.

Minn. Mar. 31, 2002), another case discussed in the Preamble in which the court found that loan originators did not qualify for the administrative exemption because they had a primary duty of selling their employer's products. DOL Br. at 7, 8, 19. But the Department's singular focus on job titles rather than actual job duties is wholly at odds with its own regulation that provides that exempt status cannot be established by a job title alone, but must be determined by evaluating an employee's salary and actual duties. *See* 29 C.F.R. § 541.2.

Job titles aside, the duties described in *Wilshin* as being exempt administrative work are virtually indistinguishable from the facts the AI now determines are non-exempt sales work. *See Wilshin*, 212 F. Supp. 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."). Moreover, in the Preamble, DOL expressly noted that the very same duties it now claims are non-exempt sales duties were 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*.

69 Fed. Reg. at 22,146 (emphasis added); *compare, e.g.*, AI at 6 ("Work such as collecting financial information from customer . . . 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 . . . .").[2]

Indeed, the contrast between the AI and DOL's Preamble could not be starker. For example, the AI, relying on portions of a *different exemption* – the outside sales exemption – notes 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. But DOL reached the exact opposite conclusion in the Preamble discussion of the *administrative* exemption: "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." 69 Fed. Reg. at 22,146.

Case law since Section 203(b) became effective further confirms that financial services employees who engage in duties that Section 203(b) defines as exempt duties qualify for the administrative exemption even if they engage in some sales to customers. For example, in *Hein v. PNC Fin. Servs. Group, Inc.*, 511 F. Supp. 2d 563 (E.D. Pa. 2007), the court relied significantly on Section 203(b), rather than a DOL opinion letter, to conclude that a securities broker who collected client information, analyzed financial products, and recommended them to

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[2] 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. Indeed, for more than 40 years, the 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).

his clients, but who also "sold myriad financial instruments" and spent fifty percent of his time engaged in "cold-call[ing]," was an exempt administrative employee. *Id.* at 565-66, 573.

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. That reasoning is wholly inconsistent with the Preamble, in which DOL explained that 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 non-exempt, 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).

The AI's reasoning also ignores the fact that not all companies' loan officers perform the same functions or even have the same primary duties. The fact that some employers may argue that their loan officers are exempt either as outside salespersons or administrative employees is also fully consistent with general legal principles that allow parties to make alternative arguments without drawing a negative inference. *See* Fed. R. Civ. P. 8(e)(2) (expressly authorizing parties to assert alternative or inconsistent defenses); *Granus v. North Am. Philips Lighting Corp.*, 821 F.2d 1253, 1256 (6th Cir. 1987); *Detroit Tigers, Inc. v. Ignite Sports Media, LLC*, 203 F. Supp. 2d 789, 793 (E.D. Mich. 2002) ("[A] pleading does not become insufficient by reason of a party having made alternative, or even contradictory, claims.").[3]

In short, the AI is not entitled to *Auer* deference because it is inconsistent with the contemporaneous interpretation the Department gave to the regulations.

3. The AI Is Inconsistent With Other Non-Regulatory Pronouncements.

To warrant *Auer* deference, an agency's interpretation of a regulation must reflect "the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. A significant factor in evaluating whether an agency's interpretation has been "fair and considered" is the consistency with which an agency has interpreted a regulation. *See, e.g.*, *Drake*, 291 F.3d at 69 (whether an interpretation is "fair and considered" turns on whether the agency has "ever adopted a different interpretation of the regulation or contradicted its position on appeal"). For this reason, courts have held that "an agency's interpretation of a statute *or regulation* 'that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view.'" *Gose*, 451 F.3d at 837 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 515) (emphasis in original); *see also, e.g.*, *Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 264 (2d Cir. 2006) (refusing to accord deference to an agency's interpretation of a regulation where it was inconsistent with prior interpretations).[4]

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[3] It is not surprising that in response to allegations that they have improperly classified loan officers as exempt, those particular financial services firms whose loan officers customarily perform their duties outside the office would argue that the administrative exemption applies or that, if it does not, then the outside sales exemption applies.

[4] The Sixth Circuit recently applied the same reasoning in *Franklin*, 619 F.3d at 613-14, in which it refused to defer to DOL's second Administrator's Interpretation. The Sixth Circuit held that multiple switches of opinion about the meaning of a statute in four opinion letters issued prior to Administrative Interpretation No. 2010-2 militated against deferring to it. DOL argues in its amicus brief that *Franklin* is inapposite because it was addressing the Department's interpretation of a *statutory* provision of the FLSA. (DOL Br. at 24 n.9). But although *Franklin* addressed DOL's interpretation of a statute as opposed to a regulation, courts have applied the same analysis in both circumstances. *See, e.g.*, *Amer. Fed. of State, County & Municipal Employees v. Am. Int'l. Group, Inc.*, 462 F.3d 121, 129 (2d Cir. 2006) (holding, based on the

There is no question that the AI conflicts with the Department's prior pronouncements. The Department concedes this much in its amicus brief. DOL Br. at 26 ("AI 2010-1 represents a substantial change in the Department's interpretation"). Without warning or any opportunity for notice and comment, the Department now takes a position in the AI that is the exact opposite of its position in its September 2006 Opinion Letter, FLSA2006-31 (Sept. 8, 2006), as well as a February 2001 Opinion Letter, 2001 WL 1558764 (Feb. 16, 2001). After a complete flip-flop from a prior opinion letter, the AI should not be accorded *Auer* deference.

In addition to directly conflicting with the September 2006 Opinion Letter, the AI also conflicts with other DOL opinion letters regarding financial services employees who, like the mortgage loan officers described in the AI and September 2006 Opinion Letter, performed duties identified in 29 C.F.R. § 541.203(b) as exempt duties and also engaged in some sales activity as part of their jobs. *See* FLSA2006-43 (opining that registered representatives in the financial services industry qualified for the administrative exemption even though their duties included a sales component); FLSA2009-28 (opining that insurance agents qualified for the administrative exemption despite engaging in some sales activities).

As the Department notes in its amicus brief, the Sixth Circuit has made clear that once an agency gives a regulation an interpretation, notice and comment will often be required before the interpretation of that regulation can be changed. *See Dismas Charities*, 401 F.3d at 682 (citing *Shell Offshore Inc. v. Babbitt,* 238 F.3d 622, 629 (5th Cir. 2001), and *Alaska Prof'l Hunters Ass'n, Inc. v. F.A.A.,* 177 F.3d 1030, 1033–34 (D.C. Cir. 1999)). The Sixth Circuit explained:

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same line of cases cited by the Sixth Circuit in *Franklin*, that an agency interpretation of a regulation "did not merit the usual deference" where it conflicted with its prior interpretation). Indeed, as noted below, the Sixth Circuit in *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), noted that there was an even stronger basis for not deferring to changes in interpretation of a regulation than to changes in interpretation of a statute.

> [O]nce an agency has promulgated its own regulation, a change in the interpretation of that regulation is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant. The determination of wise policy – unlike legal interpretation – is the kind of determination for which notice and comment procedures are particularly appropriate.

Dismas Charities, 401 F.3d at 682; *see also, e.g.*, *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*." (emphasis added)).

DOL suggests that the Sixth Circuit's rationale in *Dismas* is limited by the Supreme Court's later decision in *Coke*, which, the Department argues, did not require its changed interpretation of its regulations to be promulgated using notice and comment procedures. DOL Br. at 22. But in *Coke*, the Supreme Court specifically noted that the Department had previously resorted to notice-and-comment rulemaking in an attempt to codify its new interpretation. *Id.* at 163, 171. In contrast, and as discussed in greater detail *infra*, here, DOL gave no prior notice or opportunity for comment before issuing the first-of-its-kind AI, which marked a "substantial change in the Department's interpretation." DOL Br. at 26.

DOL also attempts to distinguish *Dismas* by arguing that the AI does not reflect DOL's "reassessment of wise policy," but rather, its reassessment of what the Department itself originally meant in its regulations. (DOL Br. at 22 n.8). But on the very next page of its amicus brief, DOL contradicts itself by arguing that an "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*." (DOL Br. at 23 (quoting *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added)). Moreover, the Department's heavy reliance on *National Cable* is misplaced because the agency there – unlike DOL here – had resorted to notice and comment to implement its interpretative changes. *See National Cable*, 545 U.S. 967, 973, 978-81 (addressing a challenge to the FCC's interpretation, as stated in a rulemaking order, of the meaning of "telecommunications service" under the Telecommunications Act); *see also Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1028-30 (9th Cir. 2007) (also cited by DOL; addressing a challenge to a Department of Health and Human Services interpretation adopted in notice and comment rulemaking). Further, not only did *National Cable* involve an interpretation of a *statute* adopted with notice and comment, but the Sixth Circuit has rejected DOL's contention in its amicus brief that the rationale of *National Cable* applies with equal force to a challenge to an agency's interpretation of a *regulation*:

> "an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of the statute" because "'[r]ule making,' as defined in the APA, includes not only the agency's process of formulating a rule, but also the agency's process of modifying a rule. Agencies in contrast cannot modify a statute, and *statutory* interpretation can therefore more easily be distinguished from legislative rulemaking."

Dismas Charities, 401 F.3d at 682 (quoting *Alaska Hunters,* 177 F.3d at 1034).

Accordingly, because the AI conflicts with prior agency pronouncements, it is not entitled to *Auer* deference.

4. The Department's Sudden And Dramatic Change In Interpretation Is Not Entitled To *Auer* Deference Because It Results In Unfair Surprise.

Since *Auer*, the Supreme Court has explained that informal agency interpretations that result in unfair surprise to affected parties should not be accorded *Auer* deference. In *Coke*, the Supreme Court held that if "interpretive changes" create "unfair surprise," the "change in interpretation alone" may present a "separate ground for disregarding the Department's present interpretation." 551 U.S. at 171. The Supreme Court found no such "unfair surprise" in *Coke* because "the Department's recourse to notice and comment rulemaking in an attempt to codify its new interpretation makes any such surprise unlikely." *Id*.

Other courts have followed *Coke* in recognizing that *Auer* deference is only appropriate in circumstances that do not result in "unfair surprise." *See, e.g., Boose v. Tri-Cnty. Metro. Trans. Dist. of Or.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009) (explaining that an agency's change of views about a regulation did not result in "unfair surprise" because the agency had attempted to codify its new interpretation through notice and comment rulemaking); *Haas v. Peake*, 525 F.3d 1168, 1190 (Fed. Cir. 2008) (deferring to agency's position that had been consistent for more than a decade and, thus, did not cause "unfair surprise"); *cf. Miami-Dade County v. E.P.A.*, 529 F.3d 1049, 1066 n.12 (11th Cir. 2008) (noting that even if there was an interpretive change, multiple periods of notice and comment avoided any "unfair surprise" to invalidate a final rule).

The Department – as it must – concedes that the AI represents a "substantial change in its interpretation." (DOL Br. at 26.) However, DOL tries to escape the necessary implication of its concession – that the "substantial change" runs afoul of *Coke* and is not entitled to deference – by contending that the surprise presented by the AI is not "unfair" because it "applies only prospectively" and "does not apply retroactively." *Id.* That argument, however, plainly misses the mark by conflating unfair surprise with retroactivity. Whether an agency is entitled to deference under *Auer* and *Coke* is a completely separate question from whether DOL is seeking to apply its new interpretation only prospectively. Indeed, the Supreme Court's analysis of "unfair surprise" in *Coke* would have been wholly unnecessary if unfair surprise were limited to circumstances where an interpretation is applied retroactively. Section 259 of the FLSA already prohibits DOL from applying changes retroactively by providing a complete defense to liability for "good faith . . . reliance on any written administrative regulation, order, ruling approval, or interpretation" of the DOL. 29 U.S.C. § 259. Moreover, the Supreme Court in *Coke* clearly explained that unfair surprise is an "entirely separate ground for *disregarding*" an agency's changed interpretation, not a basis for applying the interpretation only prospectively. *See Coke*, 551 U.S. at 171. The issue is not whether a new interpretation that causes unfair surprise could be applied retroactively, but whether such an interpretation is entitled to any deference at all.

DOL does not cite any authority for the proposition there can be no unfair surprise to the regulated community when an agency's substantial change in interpretation applies only prospectively. In fact, had the Department promulgated this new mandate by notice and comment rulemaking, it could not have immediately implemented its changed interpretation on March 24, 2010, as it purports to do with the AI. Rather, under the Administrative Procedure Act, DOL would have had to provide employers with at least 30 days to implement the new rule. 5 U.S.C. § 553(d); *see also Omnipoint Corp. v. F.C.C.*, 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). Moreover, 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 – until August 2004 – to implement the new rules even after the notice and comment process had provided employers with an indication that change was 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 withdrawn.

DOL argues that any unfairness surrounding the sudden and unannounced issuance of the AI, which "substantial[ly] changed" the legal landscape, is eliminated because the new interpretation cannot be applied retroactively. However, employers in the mortgage banking industry had established personnel practices and compensation schemes for the tens of thousands of loan officers based on the 2004 regulation, the preamble to the regulation, and subsequent opinion letters. Under DOL's view, MBA, ABA, AFSA, CMC, HPC, ICBA, and CMBP members who established policies and structured compensation systems in reliance on the Department'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, manage meal and rest periods, and revise complex compensation systems to account for the payment of overtime, including factoring substantial incentive compensation that many loan officers receive into the computation of overtime pay. Indeed, there could hardly be a more appropriate case for the application of the Supreme Court's decision in *Coke* that agency interpretations that create unfair surprise are entitled to no deference.

Such sudden changes in interpretation, which result in unfair surprise and have the potential to result in substantial and unanticipated overtime liability to the regulated community, are precisely why courts, including the Sixth Circuit, have found notice and comment necessary before an agency changes how it interprets a regulation. *See* Section II.B.3, *supra* (citing *Dismas Charities*, 401 F.3d at 682; *Shell Offshore,* 238 F.3d at 629; and *Alaska Prof'l Hunters Ass'n,* 177 F.3d at 1033-34). *Cf. Auer*, 519 U.S. at 461 (noting, in its approval of DOL's interpretation of the salary basis test, that the Department's position "avoids the imposition of massive and unanticipated overtime liability"). Consequently, for the independent reason that the AI runs afoul of the rule laid out by the Supreme Court in *Coke*, the AI is not entitled to *Auer* deference.

5. The AI Does Not Interpret An Ambiguous Regulation.

In addition to all the independent reasons set forth above, the AI is not entitled to *Auer* deference because it is does not interpret an *ambiguous* regulation. The Supreme Court has explained that *Auer* deference is only warranted when an agency is interpreting its own ambiguous regulations. *See, e.g.*, *Christensen*, 529 U.S. at 588 (refusing to grant *Auer* deference to a DOL opinion letter where there was no ambiguity in the regulation it purported to interpret). Otherwise, the Court reasoned, "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id.*; *see also, e.g.*, *Coeur Alaska, Inc. v. Southeast Alaska Conserv. Council*, 129 S. Ct. 2458, 2479 (2009) (Scalia, J., concurring) (noting that *Auer* "stands only for the principle that we defer to an agency's interpretation *of its own ambiguous regulation*" (emphasis in original)). DOL in the AI does not even claim that it is interpreting an ambiguous regulation.

The Department in its amicus brief now argues that this case is analogous to *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir.), *petition for cert. filed*, 79 U.S.L.W. 3246 (U.S. Oct. 4, 2010) (No. 10-460), in which the Second Circuit held that pharmaceutical sales representatives did not qualify for the administrative or outside sales exemptions. *Novartis*, however, is wholly distinguishable from this case. In *Novartis*, the Second Circuit accorded controlling deference to DOL's interpretation of what it means to make a "sale" within the meaning of its regulations where the employees at issue never directly dealt with the customer. *Id.* at 149. In contrast, DOL does not even purport to be interpreting an ambiguous regulation in the AI. Indeed, there is nothing ambiguous about 29 C.F.R. § 541.203(b), which expressly applies to financial services industry employees who perform particular duties set forth therein. Likewise, despite stating several times in its amicus brief that the AI represents its interpretation of its own ambiguous regulations, DOL fails to cite any ambiguous regulatory language and failed to do so in the AI itself.[5]

Novartis is further distinguishable from this case because, there, the Department was not interpreting its regulations in a manner that was inconsistent with how it had interpreted them in the past. Here, on the other hand, the Department readily concedes that the AI represents a substantial change in its position. DOL Br. at 26.[6]

In sum, the AI is also not entitled to *Auer* deference for the independent reason that it does not even purport to be interpreting an *ambiguous* regulations.

III. CONCLUSION

The AI conflicts with the very regulations it purports to interpret, conflicts with the Preamble to the 2004 regulations, and conflicts with the Department's own earlier pronouncements on the very same subject. Moreover, the Department issued the AI without any

[5] The closest the Department comes in its amicus brief to citing an ambiguity is its statement that "[t]he regulations do not specify whether employees who perform the duties of mortgage loan officers are exempt administrative employees." (DOL Br. at 16.) But that is not correct. As discussed, at Section II.B.1, *supra*, Section 203(b) *does* specify that the duties performed by what the AI calls "typical" loan officers (*e.g.*, collecting required financial information from customers, etc.) are exempt administrative duties. 29 C.F.R. § 541.203(b). Moreover, the AI does not interpret or clarify arguably ambiguous regulations as DOL did in *Novartis*, but merely applies regulations "across-the-board" to a specific category of employees. Notably, in his July 16, 2009 Report & Recommendation, Magistrate Judge Pepe explained that "where the application takes various sections from the regulations and applies them to a given set of facts, this straightforward decision process involves lesser expertise of an administrative agency than when the agency provides a new interpretation or clarification of an ambiguous regulation as occurred in *Auer*." Dkt No. 556 at 34.

[6] Moreover, even if *Novartis* were not so clearly distinguishable from the instant matter, it still would be of limited value on the issue of deference because the Second Circuit simply deferred to DOL's interpretation without any analysis of the deference issue *Novartis* also is inconsistent with a Third Circuit decision finding pharmaceutical sales representatives exempt administrative employees notwithstanding DOL's amicus brief, *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010), and with other cases that have refused to give *Auer* deference to DOL's amicus arguments concerning pharmaceutical sales representatives. *See, e.g.*, *Schaefer-Larose v. Eli Lilly and Co.*, No. 07-1133, 2010 WL 3892464 (S.D. Ind. Sept. 29, 2010); *Christopher v. SmithKlein Beecham Corp.*, No. 08-1498, 2010 WL 396300 (D. Ariz. Feb. 1, 2010).

warning or attempt at notice and comment rulemaking, causing unfair surprise to the regulated community. Finally, the AI is not an interpretation of an ambiguous regulation. For all these reasons, the AI does not warrant *Auer* deference.[7]

Respectfully submitted,

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[7] The AI is not entitled to *Skidmore* deference, which as this Court previously recognized was akin to the "power to persuade, akin to that which might be accorded to a district court opinion in a different jurisdiction." (Dkt No. 571 at 17-18.) *Skidmore* deference "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added). For the same reasons the AI is not entitled to *Auer* deference, and for the reasons set forth in the briefing Quicken submitted regarding the impact of the AI, Dkt Nos. 584, 587, DOL's new position articulated in the AI lacks the power to persuade and should not be accorded any deference under *Skidmore*. *See, e.g.*, *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citing *United States v. Mead*, 533 U.S. 218, 228 (2001) and *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)); *General Elec. Co. v. Gilbert,* 429 U.S. 125, 143 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency. In short, while we do not wholly discount the weight to be given the 1972 guideline, it does not receive high marks when enunciated in *Skidmore*." (internal citations omitted)).