

# THE ADMINISTRATIVE EXEMPTION IN THE FINANCIAL SERVICES INDUSTRY

September 2010

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# THE ADMINISTRATIVE EXEMPTION IN THE FINANCIAL SERVICES INDUSTRY

## I. INTRODUCTION AND OVERVIEW: SCOPE OF THE ISSUE

Two recent unsettling events have focused financial services employers on wage and hour compliance. First, on November 20, 2009, the Second Circuit Court of Appeals issued its decision in *Davis v. J.P. Morgan Chase & Co.*,<sup>1</sup> holding that J.P. Morgan's financial underwriters were nonexempt "production workers" who did not satisfy the requirements of the federal administrative exemption from overtime. In the second legal development on March 24, 2010, the Department of Labor (DOL) issued its first "Administrator's Interpretation"<sup>2</sup> and re-examined the exempt classification of mortgage loan officers, concluding that employees who "perform the typical job duties of a mortgage loan officer" are nonexempt employees whose primary duty consists of inside sales. Like the Second Circuit in *Davis*, the DOL relied heavily on what has been called the "administrative/production" or "production vs. staff" dichotomy to support its conclusion. Indeed, the Administrator's Interpretation specifically references the *Davis* decision as support for its reliance on the administrative/production dichotomy in analyzing the exempt status of mortgage loan officers.<sup>3</sup>

For reasons discussed at length below, the Second Circuit's decision in *Davis* and the DOL's Administrator's Interpretation are arguably inconsistent with the DOL regulations and the many court decisions that have considered the administrative/production dichotomy an outdated and unhelpful method for assessing exempt status, especially when considering jobs within service industries. At the very least, they demonstrate an aggressive application of the dichotomy as an analytical tool that may lead to other unexpected results. This Littler Report examines the DOL's administrative exemption regulations, including those relating to the financial services industry, the origins and application of the administrative/production dichotomy in various contexts, prior DOL opinion letters and pre-*Davis* cases, as well as a substantive critique of the *Davis* decision and the DOL's Administrator's Interpretation and an analysis of their potential impact.

## II. THE STATUTORY AND REGULATORY BASIS FOR THE ADMINISTRATIVE EXEMPTION IN THE FINANCIAL SERVICES INDUSTRY

The Fair Labor Standards Act (FLSA) requires covered employers to pay employees at one and a half times the employee's regular rate of pay for time worked in excess of 40 hours per week, unless the

employee satisfies the criteria for certain exemptions, including an exemption for those employed in a bona fide "administrative" capacity.<sup>4</sup> In general, to be employed in a "administrative capacity" an employee must be paid on a salary or fee basis at a weekly rate of not less than \$455 and meet the relevant "primary duty" test.<sup>5</sup> Most litigation addressing the scope of the administrative exemption has focused on two requirements set forth in this primary duty test: (1) the employee's primary duty must consist of "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"<sup>6</sup> and (2) the employee's primary duty must include the exercise of "discretion and independent judgment with respect to matters of significance."<sup>7</sup>

### A. DOL Regulations Regarding the Administrative Exemption in the Financial Services Industry

Specific regulations adopted by the DOL discuss the application of the administrative exemption to jobs within the financial services industry. Section 541.203(b) of the DOL exemption regulations provides:

Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.<sup>8</sup>

Although this provision was added when the DOL exemption regulations were revised in 2004, in the regulations' preamble the DOL emphasized that the provision was "consistent with existing case law."<sup>9</sup> Even more significantly, the DOL also stated that although employees whose primary duty consists of sales work cannot qualify as exempt administrative employees, it agreed with cases such as *Reich v. John Alden Life Insurance Co.*,<sup>10</sup> *Hogan v. Allstate Insurance Co.*,<sup>11</sup> and *Wilshin v. Allstate Insurance Co.*<sup>12</sup> that "have found employees who represent the employer with the public,

negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, even though the employees also engaged in some inside sales activities.”<sup>13</sup> Further, the DOL stated, “[s]ervicing existing customers, promoting the employer’s financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer’s customers, and which require the exercise of discretion and independent judgment.”<sup>14</sup>

## **B. 2006 DOL Opinion Letter Regarding the Application of the Administrative Exemption to Loan Officers**

To further clarify the application of the administrative exemption in the financial services industry, the DOL issued an Opinion Letter in September 2006<sup>15</sup> regarding the exempt status of mortgage loan officers. The loan officers in question assisted customers to identify and obtain mortgage loans appropriate for their financial circumstances and goals; followed up on customer inquiries; collected and analyzed customer financial data and assessed the customer’s qualifications for a particular loan; advised customers about risks and benefits of loan alternatives, and provided specific analysis, evaluation and advice; and stayed current on market conditions.<sup>16</sup> According to the facts presented, the loan officers engaged in “customer-specific persuasive sales activity” less than 50 percent of the time, but also marketed the mortgage bank or its products generally, promoting brand awareness, and creating demand among realtors, builders, developers, and other entities for the bank’s products.<sup>17</sup>

The DOL assessed the position under the then recently issued 2004 regulations, including Title 29 of the Code of Federal Regulations section 541.203(b) and the preamble discussing the rule, but noted that “the criteria in the duties test for the administrative exemption in the 2004 revised final regulations are substantially the same as under the prior rule, [and thus] the outcome would be essentially identical under either version of the regulations.”<sup>18</sup> Applying the regulations, the DOL found that the mortgage loan officers in question “have a primary duty other than sales, including collecting and analyzing customers’ financial information, advising customers of the risks and benefits of mortgage loan alternatives, and advising customers about avenues to obtain a more advantageous loan program.”<sup>19</sup> Accordingly, the DOL concluded, the mortgage loan officers satisfied the duties test under section 541.203(b).

The DOL also found that the loan officers exercised discretion and independent judgment. Although they used software tools or programs to assess risk and narrow the scope of loan products

offered, these programs did not select the products and were used only to enhance the loan officers’ ability to evaluate the loan products, options and variables available in order to make recommendations to the customer.<sup>20</sup>

The 2006 Opinion Letter expressly stated that it was not addressing “employees who spend the majority of their time inside the office prospecting for potential customers who have not previously expressed an interest in obtaining information about a mortgage loan (e.g., employees in a call center environment primarily selling financial products as ‘outbound telemarketers’)” or “loan processors,” who coordinate appraisals and title work and review the customers’ supporting financial documents (e.g., pay stubs, W-2s, bank statements, and tax returns for self-employed individuals) to determine whether they meet the documentation requirements associated with the mortgage loan.”<sup>21</sup>

## **C. Cases Interpreting the Revised Regulations and the DOL’s 2006 Opinion Letter**

Since the 2004 regulations and the 2006 DOL Opinion Letter were issued, a few cases have applied these rules to determine the applicability of the administrative exemption to mortgage loan officers. At least one case found that the plaintiffs did not satisfy the administrative exemption because their primary duty was sales.<sup>22</sup> Other cases have “called it a draw,” denying summary judgment to plaintiffs and defendants finding genuine issues of material fact regarding the nature and extent of the particular duties and responsibilities of the mortgage loan officers at issue.<sup>23</sup> In these cases, the disputed issue has been whether the loan officers were primarily responsible for “administrative” work, or whether they were primarily sales employees, and therefore, nonexempt. Many of these cases, however, have been brought as class actions; published and unpublished judicial decisions in these cases have focused on class certification issues and have never reached the merits of the exemption issue.<sup>24</sup> Many cases challenging the exempt classification of mortgage loan officers have resulted in large settlements prior to reaching the merits of the claims and determining whether any exemptions applied.<sup>25</sup>

## **III. THE ADMINISTRATIVE/PRODUCTION DICHOTOMY**

In addition to the regulatory history and cases discussed above, before analyzing the *Davis* decision and the DOL’s new Administrator’s Interpretation it is also important to review the origins of and cases applying the administrative/production dichotomy because both *Davis* and the Administrator’s Interpretation rely heavily on that concept to support their conclusions.

## A. The Origins of the Dichotomy and the Pre-2004 DOL Regulations

The administrative/production dichotomy was first expressed in a 1949 report by Harry Weiss, the Presiding Officer of the Wage and Hour and Public Contracts Divisions of the DOL. Explaining one of the requirements for the administrative exemption — that the job duties are “directly related to management policies or general business operations” — the Weiss Report described the activities covered by the exemption as those “relating to the administrative as opposed to the ‘production’ operations of a business.”<sup>26</sup> Although the report did not explain the term “production,” in the context of the post-depression industrial and manufacturing boom of the 1940s, the term almost certainly referred to work in manufacturing, producing the goods that were offered for sale in the marketplace. The administrative/production distinction described in the Weiss Report was codified in the federal regulations: “[t]he phrase ‘directly related to management policies or general business operations of his employer or his employer’s customers’ describes those types of activities relating to the administrative operations of a business as distinguished from ‘production’ or, in a retail or service establishment, ‘sales’ work.”<sup>27</sup>

## B. The 2004 DOL Regulations De-Emphasized the Administrative/Production Dichotomy

In April 2004, the DOL revised its FLSA regulations and deleted the provision distinguishing between production and administrative work. In the preamble to the new regulations, the DOL specifically addressed what it called the “production versus staff” dichotomy, de-emphasizing its importance. The DOL pointed out that in its view the “‘production versus staff’ dichotomy has always been illustrative — but not dispositive — of exempt status[.]”<sup>28</sup> In support of this point, the DOL cited and endorsed the approach expressed by the Ninth Circuit Court of Appeals in *Bothell v. Phase Metrics, Inc.*, that “a court must construe the statutes and applicable regulations as a whole,” explaining that “the dichotomy is but one analytical tool.”<sup>29</sup> In addition, again quoting *Bothell*, the DOL stated that the administrative/production dichotomy should only be determinative “when work falls ‘squarely on the production side of the line.’”<sup>30</sup>

## C. Many Cases Have Limited the Applicability of or Disregarded the Administrative/Production Dichotomy

Following *Bothell*, the Ninth Circuit Court of Appeals as well as district courts within the Ninth Circuit continued to recognize the limitations of the administrative/production dichotomy. For example, in *Miller v. Farmers Insurance Exchange (In re Farmers*

*Ins. Exch.)*,<sup>31</sup> the Ninth Circuit determined that insurance claims handlers at Farmers Insurance Exchange (FIE) did not:

[F]all on the production side of the “administrative/production worker dichotomy.” To place them there would elevate form — corporate form, to be precise — over substance. What matters is that, because they represent FIE to the public through their handling of claims and directly impact FIE’s customer base, the adjusters’ work “affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.”<sup>32</sup>

Similarly, in *McLaughlin v. Nationwide Mutual Insurance Co.*, a federal court in Oregon refused to apply the administrative/production dichotomy to determine the classification of insurance claims representatives, finding it inapplicable to “service providers.”<sup>33</sup> Noting the DOL’s 2004 regulations had moved away from the administrative/production dichotomy in the service industry context, the court declined to analyze the duties of insurance claims adjusters under what it called “an outdated line of reasoning.”<sup>34</sup> Similarly, in *Heffelfinger v. Electronic Data Systems Corporation*, a California federal district court stated that the administrative/production dichotomy “is often of limited use outside of the manufacturing context in which it was devised.”<sup>35</sup>

In *Roe-Midgett v. CC Services, Inc.*,<sup>36</sup> the Seventh Circuit Court of Appeals also emphasized the industrial-age genesis of the term “production” and its limited applicability in the modern service-industry context.<sup>37</sup> Although *Roe-Midgett* did not apply the 2004 regulations, which took effect after the plaintiffs in the case had filed suit, the court nevertheless found the new regulations “informative on the issues before us.”<sup>38</sup> The Seventh Circuit found the new regulations suggested a more traditional definition of “production,” such as working on a manufacturing production line, and concluded that the administrative/production dichotomy was not particularly useful when applied by analogy in the “modern service industry context.”<sup>39</sup>

Most recently, in *In re RBC Dain Rauscher Overtime Litigation*,<sup>40</sup> a federal court in Minnesota examined the applicability of the administrative/production dichotomy in determining the classification of securities brokers and concluded it was “not particularly relevant or helpful.”<sup>41</sup> Although the concept was intended to clarify whether work is “directly related to the management policies or general business operations” the court agreed with the Seventh Circuit’s assessment in *Roe-Midgett* that the administrative/production dichotomy was not useful when considering modern

service industries.<sup>42</sup> The court then examined the positions at issue applying Title 29 of the Code of Federal Regulations section 541.203(b), the DOL's 2004 regulation regarding the administrative exemption in the financial services industry, making individual assessments regarding the importance of sales as compared to research, advice, and other functions performed by the brokers.

The federal court for the District of Columbia has also criticized the application of the administrative/production dichotomy outside of the manufacturing or industrial context. In *Robinson-Smith v. Government Employees Insurance Company*,<sup>43</sup> the court applied the pre-2004 DOL regulations to determine whether insurance adjusters were exempt administrative employees but declined to use the administrative/production dichotomy in its analysis. Quoting *In re Farmers Insurance Claim Representatives' Overtime Pay Litigation*, the court stated, "[t]his so-called 'administrative/production dichotomy' is used to try to force the operations of 'modern-day post-industrial service-oriented businesses into an analytical framework formulated in the industrial climate of the late 1940s.'"<sup>44</sup> The court noted that the revised language of the 2004 DOL regulations made it clear that the DOL "has moved away from this 'administrative/production dichotomy' in the context of the service industries."<sup>45</sup> The court therefore declined to analyze the position at issue under what it called "an outmoded line of reasoning" stating that "[a]ttempting to force the current situation into a production analogy makes no sense."<sup>46</sup> In this regard, the court pointed out that the 2004 Regulations also provide a more expansive view of "servicing" a business:

The August 2004 Regulations clarify the rather vague "production" language of the current regulations to say that "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." See August 2004 Regs at 22, 262-63. The current regulations then explain that "servicing" a business may include "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control." 29 C.F.R. § 541.205(a). Servicing work is not limited to those who formulate policies, but extends to those "whose responsibility it is to execute or carry ... out [the policies]." *Id.* at § 541.205(c).<sup>47</sup>

Although the Fifth Circuit Court of Appeals applied the administrative/production dichotomy in a 1990 case, *Dalheim v. KDFW-TV*,<sup>48</sup> determining that television news producers did not

satisfy the administrative exemption, more recent district court cases in the Fifth Circuit have recognized the limitations of the dichotomy to assess other types of positions, including underwriters. In *Edwards v. Audubon Insurance Group, Inc.*,<sup>49</sup> the plaintiff was employed with Audubon Insurance Group, Inc., as a commercial insurance underwriting specialist.<sup>50</sup> Among other things, plaintiff's job duties included making underwriting decisions regarding insurance coverage and potential loss, and regularly negotiating credits, debits, premiums, and exclusions to insurance policies.<sup>51</sup> Although the plaintiff negotiated within prescribed ranges, he also had discretion to negotiate within those ranges.<sup>52</sup> The *Edwards* court rejected plaintiff's claim that he was a production, not administrative, employee:

The administrative-production dichotomy is not a rule of law. Rather, this dichotomy has always been only "illustrative — but not dispositive- of exempt status;" is but "one analytical tool' that should be used 'toward answering the ultimate question [of exempt status];' and is only determinative if the work 'falls squarely on the production side of the line.'"<sup>53</sup>

Further, the court explained, "The purpose of the [administrative/production dichotomy] is to clarify the meaning of 'work directly related to the management policies or general business operations,' not to frustrate the purpose and spirit of the entire exemption."<sup>54</sup> Accordingly (in contrast to *Davis*, see below), the *Edwards* court found that the plaintiff underwriter satisfied the first prong of the administrative exemption because his duties involved general business operations and matters of substantial importance to the company and its customers.<sup>55</sup>

The *Edwards* court further concluded that the plaintiff exercised the requisite discretion and independent judgment in performing his job duties.<sup>56</sup> In support of its conclusion the court noted that:

In the insurance industry, risk is "the possibility of financial loss." Since no one can predict the future with any certainty, Edwards and his employer could only be "hopeful[] [that] you'll end up with more premium than losses and you make money." This "hope" that Edwards made good risk decisions demonstrates that his job as an underwriter inherently included the exercise of discretion and independent judgment.<sup>57</sup>

In this regard the court pointed out that the DOL regulations describe the exercise of discretion and independent judgment as "the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."<sup>58</sup>

In *Kohl v. The Woodlands Fire Department*,<sup>59</sup> a Texas court also emphasized the limitations of the administrative/production dichotomy. The court noted the:

[A]nalytic difficulty of applying the ‘production/administrative distinction has led some courts to question whether the dichotomy is analytically helpful in the context of modern service industries and to emphasize that the analogy applied in a particular case only to the extent that it elucidates the phrase “work directly related to the management policies or general business operations.”<sup>60</sup>

The court stated that “[t]he revised 2004 Department of Labor regulations have moved away from this dichotomy in the context of service industries,”<sup>61</sup> but added that even the prior regulations “[did] not set up a dichotomy under which all work must either be classified as production or administrative.”<sup>62</sup> Assessing a variety of factors, the court ultimately decided there was insufficient and conflicting information and it could not determine, as a matter of law, whether the plaintiff’s primary duties as a Fire and Life Safety Officer were administratively exempt. Accordingly, the court denied the parties’ cross-motions for summary judgment.

#### **D. Cases Relying on the Administrative/Production Dichotomy**

Despite the criticism of the administrative/production dichotomy outside of the manufacturing context, there have been other cases prior to *Davis* that have relied on the concept to determine the applicability of the administrative exemption. Most notably, in the financial services industry, a Minnesota court applied the administrative/production dichotomy in *Casas v. Conseco Finance Corporation*,<sup>63</sup> a class action by loan originators (similar to loan officers) who claimed they were production, not administrative, employees. The court agreed with the plaintiffs, based on its analysis of the undisputed duties of the loan originators. According to the court, loan originators used internal leads to make telephone contact with potential customers, used guidelines and standard operating procedures to match the customer’s needs with one of Conseco’s loan products, obtained information to complete a loan application, and ran credit reports using credit bureaus integrated into Conseco’s computer system. In support of its conclusion that Conseco’s loan originators were production employees the court emphasized that plaintiffs’ primary duty was selling loans directly to individual customers, one loan at a time, on a day-to-day basis, and their performance was “measured largely according to their sale production.”<sup>64</sup> In addition, the court found, plaintiffs were not responsible for “the broader and more policy-oriented function of

‘promoting sales’ or ‘representing the company’ within the meaning of the regulations.”<sup>65</sup> The court also found the plaintiffs did not exercise discretion and independent judgment, because the decisions they made regarding the application process were “all governed by [the employer’s] pre-existing standing operating procedures and guidelines,” and they lacked the authority to approve the loans.<sup>66</sup> After the court granted summary judgment to the plaintiffs, the case settled for a “proposed allocation” of over \$11 million.<sup>67</sup>

In many cases that have applied the administrative/production dichotomy in non-manufacturing contexts or in the financial services industry, courts have concluded that positions that service and represent the company to customers, develop business, and promote sales are administrative rather than production. For example, *Reich v. John Alden Life Insurance Company*,<sup>68</sup> a 1997 First Circuit Court of Appeals decision, applied the dichotomy to assess whether a marketing representative satisfied the administrative exemption. The case is still frequently cited for its holding that marketing representatives, whose primary function is representing the company and promoting sales, are exempt administrative employees.<sup>69</sup>

Similarly, in *Hogan v. Allstate Insurance Co.*,<sup>70</sup> the Eleventh Circuit Court of Appeals evaluated the application of the administrative exemption to employees whose primary job duties involved advising and servicing customers and potential customers, promoting and selling insurance products, and overseeing the operation of their office and staff.<sup>71</sup> The Eleventh Circuit rejected appellants’ argument that they were production rather than administrative employees. The court found that plaintiffs “spent the majority of their time servicing existing customers. Their duties included promoting sales, advising customers, adapting policies to customer’s needs, deciding on advertising budget and techniques, hiring and training staff, determining staff’s pay, and delegating routine matters and sales to said staff.”<sup>72</sup> These duties, the court concluded, “are similar to administrative, rather than production, tasks.”<sup>73</sup> Thus, the court stated, “[a]ppellants’ attempt to classify themselves along side messenger boys and machine operators must fail.”<sup>74</sup>

#### **IV. DAVIS V. J.P. MORGAN CHASE & CO.: SECOND CIRCUIT REVERSES DISTRICT COURT DECISION AND FINDS UNDERWRITERS NONEXEMPT “PRODUCTION WORKERS”**

Against this regulatory and judicial backdrop, the Second Circuit Court of Appeals in 2009 issued its opinion in *Davis*, reversing the district court’s decision in *Whalen v. J.P. Morgan Chase & Co.*,<sup>75</sup> and holding that loan underwriters were nonexempt “production” employees.

## A. The District Court Decision — What the Second Circuit Failed to Consider

The district court's decision in *Whalen* includes a decidedly different view of the undisputed facts. The plaintiff, a loan underwriter at J. P. Morgan Chase & Co. (Chase), also referred to as "credit analyst,"<sup>76</sup> filed suit on behalf of himself and other similarly situated employees claiming that Chase had improperly classified him as an exempt administrative employee. The district court examined the loan underwriters' job duties in light of the DOL regulations regarding credit-related work and exempt administrative work in the financial services industry.<sup>77</sup> Although these regulations did not become effective until 2004, and the parties had agreed that the 2003 regulations were controlling, the *Whalen* court found that there was no substantive difference between the 2003 regulations and the new 2004 regulations.<sup>78</sup> In particular the court focused on the following provision regarding employees in the financial services industry: "Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts[.]"<sup>79</sup> The court also noted that "the DOL's Interpretive Regulations specifically address the rendering of credit decisions, classifying it as exempt, administrative work."<sup>80</sup>

Examining the duties of loan underwriters at Chase, the district court concluded that the job primarily involved "collecting and analyzing information regarding the customer's income, assets, investments or debts," and making binding decisions approving or denying requests for loans or lines of credit.<sup>81</sup> Although the underwriters analyzed applicants' financial information in light of Chase's Credit Policy, they had authority to grant variances and exceptions to the Policy if they determined that denying credit "would not serve Chase's best interest."<sup>82</sup> Accordingly, the court concluded that the primary job duty of loan underwriters at Chase — "to evaluate and determine the credit-worthiness of Chase's customers, analyzing putative borrowers' financial information in light of Chase's Credit Policy" — satisfied the duties prong of the administrative exemption.<sup>83</sup> In addition, the court pointed out, "all other courts known to have examined the issue have unanimously concluded that underwriting is an administrative function."<sup>84</sup>

The court rejected the plaintiff's attempt to characterize his primary job duty as the "production" of Chase's credit products:

Although plaintiff strains to characterize [his] role as one of mere production, "helping to generate credit product after credit product for each customer," it is undisputed that plaintiff was not responsible for

developing or "selling" Chase's loan or home equity products to its customers. The crux of plaintiff's duties was the analysis and rendering of individualized decisions which committed Chase to certain financial obligations, not the slavish manufacture of "credit products" on some theoretical assembly line.<sup>85</sup>

Although ultimately irrelevant to the appellate decision in *Davis*, the district court also concluded that loan underwriters exercised discretion and independent judgment, because their job duties included "the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered[.]"<sup>86</sup> In this regard that court noted that *Whalen* had authority to bind Chase to extend loans and lines of credit of up to \$500,000 and, in exercising that authority, he used independent judgment to assess loan files and evaluate discrepancies and "derogatory credit items," and had discretion to require customers to submit additional information or waive customers' obligation to provide additional information.<sup>87</sup> "Most significantly," the court concluded,

[P]laintiff exercised the discretion and independent judgment to make the ultimate decision as to whether Chase should extend credit to a customer, including whether variances and/or exceptions to Chase's policies and guidelines should be extended, whether a counteroffer should be made and under what terms, and what disposition should be recommended to supervisors when forwarding files outside of his lending authority.<sup>88</sup>

Although Chase's Credit Policy contained guidelines for decision-making, it also contained "gray areas" within which underwriters were expected to exercise discretion and independent judgment and "reasonable underwriters applying the Credit Policy could reach different decisions when reviewing the same file."<sup>89</sup> In fact, the Credit Policy expressly instructed underwriters to make "an informed decision which has been based on an appropriate level of analytical review and the use of a considered objective judgment" noting that "credit risk analysis is perceived as an art; not as a science... [T]he underwriter must recognize that it is his/her responsibility to use sound judgment and to seek advice/expertise, when necessary, in making lending decisions."<sup>90</sup>

## B. The Second Circuit's Reliance on the Administrative/Production Dichotomy

Chase's victory was short-lived. On November 20, 2009, in *Davis v. J.P. Morgan Chase & Co.*,<sup>91</sup> the Second Circuit Court of Appeals — the only federal appeals court to address the issue to date

— applied the administrative/production dichotomy and decided that underwriters at Chase were production workers.<sup>92</sup> In reaching its conclusion, the *Davis* court examined the regulations and case law interpreting the administrative/production dichotomy selectively, ignoring contrary interpretations of the dichotomy by the DOL itself as well as other courts. Moreover, in applying the dichotomy, the court also ignored the factual findings of the district court.

At the outset, the Second Circuit cited the 2003 DOL regulation describing the distinction between administrative and production work and positioned the administrative/production dichotomy as a dispositive framework for interpreting and applying the administrative exemption. In a slight variation on the actual language of the regulation, the court stated that “[r]egulations further explain that work directly related to management policies or general business operations consists of ‘those types of activities relating to the administrative operations of a business as distinguished from ‘production’ or, in a retail or service establishment, ‘sales’ work.’”<sup>93</sup> In fact the regulation states that “[t]he phrase ‘directly related to management policies or general business operations of his employer or his employer’s customers’ describes those types of activities relating to the administrative operations of a business as distinguished from “production” or, in a retail or service establishment, “sales” work.”<sup>94</sup> Although it is a slight difference, the language used by the Second Circuit suggests that the administrative/production dichotomy is the only test for the administrative exemption, whereas the language in the actual regulation views the distinction between administrative operations and production operations as another way of describing the statutory phrase. More significantly, the court set up an either/or proposition: “Employment may thus be classified as belonging in the administrative category, which falls squarely within the administrative exception, or as production/sales work, which does not.”

This approach to the administrative/production dichotomy as dispositive is contrary to the DOL’s own view as well as case law. As the DOL expressly stated in the preamble to the 2004 regulations that “[t]he Department’s view that the ‘production versus staff’ dichotomy has always been illustrative — but not dispositive — of exempt status is supported by federal case law.”<sup>95</sup> In support of its position, the DOL quoted with approval the following language from the Ninth Circuit’s 2002 decision in *Bothell v. Phase Metrics, Inc.*:

The other pertinent cases from our sister circuits similarly regard the administration/production dichotomy as but one piece of the larger inquiry, recognizing that a court “must construe the statutes and applicable regulations as a whole.” Indeed, some cases analyze the primary duty test without referencing

the § 541.205(a) dichotomy at all. This approach is sometimes appropriate because, as we have said, the dichotomy is but one analytical tool, to be used only to the extent that it clarifies the analysis. Only when work falls “squarely on the ‘production’ side of the line,” has the administration/production dichotomy been determinative.<sup>96</sup>

*Davis* ignored the DOL’s point and the quoted language from *Bothell* and instead cited a 1993 Second Circuit case, *Reich v. State of New York*,<sup>97</sup> in which the court applied the administrative versus production analysis and concluded that criminal investigators fell “squarely on the production side of the one” because their primary function was “to conduct — or ‘produce’ — its criminal investigations.”<sup>98</sup> The court also ignored the numerous cases, discussed above, that limited the application of or refused to apply the administrative/production dichotomy, and instead relied heavily on the Third Circuit’s 1991 decision in *Martin v. Cooper Electric Supply Co.*<sup>99</sup> *Cooper* involved the classification of telephone sales representative at a company whose primary business was “to produce wholesale sales.”<sup>100</sup> *Davis* failed to acknowledge, however, the limited nature of the decision in *Cooper*, which concluded that “‘production’ within the meaning of 29 C.F.R. §541.205(a) may include wholesales sales work in the context of wholesale distribution businesses like *Cooper*’s.”<sup>101</sup> It is also noteworthy that in February 2010, the Third Circuit Court of Appeals re-examined *Cooper* in *Smith v. Johnson & Johnson*,<sup>102</sup> a case deciding whether the administrative exemption should be applied to pharmaceutical sales representatives. The Third Circuit distinguished *Cooper* on its facts<sup>103</sup> and, without reference to the administrative/production dichotomy, found the duties of the position satisfied the administrative exemption because the “non-manual position required [the plaintiff sales representative] to form a strategic plan designed to maximize sales in her territory.”<sup>104</sup> As the court also noted, it “agree[d] with the District Court that changes in the Secretary’s regulations since *Cooper* make that case inapplicable here.”<sup>105</sup>

In applying the administrative/production dichotomy, *Davis* also relied on *Casas v. Conseco*.<sup>106</sup> As discussed above, *Casas* applied the administrative/production dichotomy to evaluate the application of the administrative exemption to loan originators and concluded they were production rather than administrative employees because it was “their primary duty to sell these lending products on a day-to-day basis ... soliciting, selling and processing loans as well as identifying, modifying and structuring the loan to fit a customer’s financial needs.” In citing *Casas*, however, the court ignored the factual basis for the court’s conclusion. As the *Casas* court pointed out, Conseco’s loan originators used internal leads provided by Conseco to make telephone calls to potential customers, used guidelines and standard

operating procedures to match the customer's needs with one of Conseco's loan products, obtained information to complete a loan application, and ran credit reports using credit bureaus integrated into Conseco's computer system. This was sales work.

The description of the Conseco loan originator's functions contrasts sharply with the job description of Chase's loan underwriters provided by the district court in *Whalen*. On appeal the Second Circuit re-characterized the underwriters' primary job duty as "sell[ing] loan products under the detailed direction of [Chase's] Credit Guide."<sup>107</sup> The Second Circuit found it significant that underwriters were not "expected to advise customers as to what loan products best met their needs and abilities. Underwriters were given a loan application and followed procedures specified in the Credit Guide in order to produce a yes or no decision."<sup>108</sup> Additionally, the Second Circuit emphasized that Chase's underwriters were evaluated based on productivity, not by whether the loans they approved were repaid, and their work was referred to as "production work" by Chase employees.<sup>109</sup> In addition the court pointed out, underwriters were occasionally paid what the court called "production incentives" based on factors such as the number of decisions they made.<sup>110</sup> The court concluded that Chase's underwriters performed work "that was primarily functional rather than conceptual" and "not related either to setting 'management policies' nor to 'general business operations' such as human relations or advertising, but rather concerns the 'production' of loans — the fundamental service provided by [Chase]."<sup>111</sup>

The court also distinguished the decisions in *Callahan* and *Edwards*, which had been cited by the district court in support of the application of the administrative exemption to underwriting functions, on grounds that the plaintiffs in those cases exercised managerial and administrative tasks beyond assessing credit risk, or assessed credit risk in a firm whose primary business was not the extension of credit.<sup>112</sup> As to *Havey*, also cited by the district court, the Second Circuit criticized the court's reasoning and conclusion that the plaintiffs performed non-manual work related to the company's business, and explained its affirmance of the decision by pointing out that on appeal the only issue before the court was whether the plaintiffs in the case were paid on a salary basis.<sup>113</sup>

Because it decided that the underwriters' primary duties were production rather than administrative, the *Davis* court found it unnecessary to address whether *Whalen* exercised discretion and independent judgment in performing his underwriting duties.

### C. The Potential Impact of the *Davis* Decision

The holding in *Davis* is troubling for a number of reasons. First, it likely unsettles long-established expectations regarding the nature of

underwriting work. Many of the thousands of underwriters in both the financial services and insurance industries have historically been treated as exempt employees. Many of these employees would be surprised to learn that their primary duty consists of "selling loans." In contrast with numerous recent decisions and the position of the DOL as expressed in the preamble to the 2004 regulations, the court also took a broad, either/or view of the administrative/production dichotomy. This broad application of the "production" concept could sweep in any number of related jobs within financial services that have some role or impact on the "sale" of financial products. The court expressed a very narrow view of the work of financial industry employees who have *any* sales responsibilities, giving short shrift to other significant duties performed. In this regard, the Second Circuit's impact may be tempered by cases applying the 2004 regulations, which specifically provide that financial service employees whose "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" may satisfy the administrative exemption as long as sales is not their *primary* duty.<sup>114</sup>

The likelihood that additional courts may adopt the *Davis* reasoning, however, is increased by the March 24, 2010, Administrator's Interpretation issued by the DOL.<sup>115</sup> The Interpretation specifically references the *Davis* case as support for its reliance on the administrative/production dichotomy to assess the application of the administrative exemption to loan officers and conclude that they are nonexempt production workers.<sup>116</sup>

## V. THE DOL ADMINISTRATOR'S INTERPRETATION

As an initial matter, the Interpretation is significant because it is the first document of its kind issued by the DOL. DOL Opinion Letters (which will no longer be issued, according to the DOL) had always been issued in response to specific inquiries submitted to the DOL, and gave an opinion based on the specific facts presented. In contrast, the DOL's Wage and Hour website now advises that the Wage and Hour Administrator will issue Administrator Interpretations on its own initiative when it is determined:

[I]n the Administrator's discretion, that further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations will set forth a general interpretation of the law and regulations, applicable across-the-board

to all those affected by the provision in issue. Guidance in this form will be useful in clarifying the law as it relates to an entire industry, a category of employees, or to all employees.<sup>117</sup>

Second, the Interpretation is significant in its emphasis on the administrative/production dichotomy as a determining factor in assessing the administrative exemption, in contrast to the more limited view of the dichotomy expressed by the DOL's preamble to the 2004 regulations and the regulations themselves, discussed above. In this regard, the Interpretation, like the *Davis* opinion, places heavy emphasis on both *Casas v. Conseco*<sup>118</sup> and *Martin v. Cooper Electric Supply Co.*,<sup>119</sup> which used the administrative/production dichotomy to determine the applicability of the administrative exemption, and ignores the many other cases that have criticized its use.

Third, and most surprisingly, the Interpretation avoids a reasoned analysis of section 541.203(b) of the DOL's own regulations which sets out express guidance — by administrative rule — on the application of the administrative exemption to financial services employees. Although it quotes the regulation in its entirety, the Interpretation essentially ignores the portion of the provision that identifies as exempt administrative duties “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.”<sup>120</sup> Instead, the Interpretation highlights the last sentence of the regulation and focuses only on whether “an employee who performs the typical duties of a mortgage loan officer has the primary duty of making sales.”<sup>121</sup>

In making this determination, the Interpretation applies the regulations for the *outside sales exemption*, focusing particularly on the two factors used to determine the application of the outside sales exemption: whether the employees are paid by commission based on sales, and whether they received sales training.<sup>122</sup> Indeed, in support of its assertion that “courts have repeatedly found that mortgage loan officers who work inside their employer’s place of business have a primary duty of sales,” the Interpretation cites *Chao v. First National Lending Corporation*,<sup>123</sup> which considered *only* whether the plaintiff loan officers were employees, not independent contractors, and, if so, whether they satisfied the criteria for the outside sales exemption.<sup>124</sup>

The Interpretation also relies on *Barnett v. Washington Mutual Bank*,<sup>125</sup> for the proposition that “mortgage loan officers working at a nationwide call center ‘were engaged primarily in selling a product,

namely, home mortgages.” The finding in *Barnett*, however, is limited to the particular facts and circumstances in the case, which involved employees in a call center who “answered incoming calls from people responding to mail solicitations and also called existing customers to inquire about refinancing.”<sup>126</sup> This is a very different position than that described in *Davis*, and many other cases addressing the application of the administrative exemption to employees in the financial services industry.

The final “loan officer” case on which the Interpretation relies is, of course, *Casas*, which is one of the only cases to actually address the application of the administrative exemption to employees in these types of positions, finding that the loan originators in that case were nonexempt production employees.

Based on these cases the Interpretation concluded that “a careful examination of the law as applied to the mortgage loan officers’ duties demonstrates that their primary duty is making sales and, therefore, mortgage loan officers perform the production work of their employers.”<sup>127</sup> As such, the Interpretation concluded, mortgage loan officers’ “primary duty is not directly related to the management or general business operations of their employer or their employer’s customers.”<sup>128</sup> As to the relationship of the employee’s work to the general business operations of the employer’s customers, the Interpretation focused on the identification of the customer. Noting the section of the Preamble to the 2004 Regulations discussing Title 29 of the Code of Federal Regulations section 541.201(c), the provision regarding work related to an employer’s customers, the Interpretation concluded that work for an employer’s customers does not satisfy the administrative exemption if “the customers are individuals seeking advice for their personal needs, such as people seeking mortgages for their homes.”<sup>129</sup> The Interpretation left open the possibility that loan officers, including mortgage loan officers, providing advice to a business might qualify for the administrative exemption.<sup>130</sup>

As a final matter, the Interpretation announced that, because of “its misleading assumption and selective and narrow analysis,” the DOL was withdrawing its 2006 Opinion Letter, which had concluded that mortgage loan officers who sell mortgage loans, collect and analyze financial information, advise customers about risks and benefits of loan alternatives and options, and determine whether a customer qualifies for a loan, satisfy the administrative exemption.<sup>131</sup> Ironically, it seems that the analysis of the new Administrator’s Interpretation is the more narrow and selective of the two opinions, focusing almost exclusively on the administrative/production dichotomy and the sales activities of a fictional “typical loan officer,” while basically disregarding all of the other activities

of loan officers and other financial services employees described as exempt in DOL's regulations. In addition, it may be argued, in its Administrator's Interpretation the DOL has also narrowly and selectively focused on cases, most of which do not even address the administrative exemption, and ignored the case law discussed in this Littler Report, which does not support its revised position.

## **VI. CONCLUSION**

As discussed in this Littler Report, the *Davis* case and the DOL's new Administrator's Interpretation advocate an expanded role for the administrative/production dichotomy, beyond its original intent, using it as a determinative factor in assessing whether an employee or position satisfies the requirements for the administrative exemption. Moreover, and perhaps more significantly, the *Davis* case and the new Administrator's Interpretation have changed the legal landscape regarding the application of the administrative exemption to financial service employees, particularly mortgage loan officers and underwriters, which will almost certainly foster increased litigation. To prepare for this reality, companies in the insurance and financial industries are well-advised to carefully assess the classification of their employees in jobs involving loan origination and underwriting, and evaluate potential risk.

## VII. ENDNOTES

- 1 587 F.3d 529 (2d Cir. 2009), *cert denied*, 130 S. Ct. 2416 (2010).
- 2 Administrator's Interpretation No. 2010-1 (Mar. 24, 2010).
- 3 *Id.* at 3.
- 4 29 U.S.C. §§207(a)(2) and 213(a)(1).
- 5 29 C.F.R. § 541.200(a)(1).
- 6 *Id.* § 541.200(a)(2).
- 7 *Id.* § 541.200(a)(3).
- 8 *Id.* § 541.203(b).
- 9 69 Fed. Reg. 22122, 22145–46.
- 10 126 F.3d 1 (1st Cir. 1997).
- 11 361 F.3d 621, 627 (11th Cir. 2004).
- 12 212 F. Supp. 2d 1360 (M.D. Ga. 2002).
- 13 69 Fed. Reg. 22122, 22145 (emphasis added).
- 14 *Id.*
- 15 DOL Opinion Letter, FLSA 2006-31, 2006 DOLWH LEXIS 42 (Sept. 8, 2006). The DOL had previously issued opinion letters regarding the application of the administrative exemption to mortgage loan officers. In its 1999 Opinion Letter, 1999 DOLWH LEXIS 54 (Mar. 17, 1999), DOL found that the loan offers at issue were not exempt from the overtime requirements of the FLSA, because they were carrying out the employer's day-to-day activities rather than determining the overall course and policies of the business and they applied "techniques, procedures, or specific standards rather than exercising discretion and independent judgment. In 2001, following a request to reconsider its 1999 Opinion Letter, the DOL issued another Opinion Letter, 2001 DOLWH LEXIS 5 (Feb. 16, 2001) reversing its prior opinion based on the employer's explanation that its loan officers also worked with borrowers to create loan packages, selecting from a wide range of options while at the same time ensuring compliance with varied and complicated lender requirements. In addition, its loan officers were required to have a full understanding of customers' credit history and financial goals in order to select a loan package that fit their needs. However, the DOL still concluded that these loan officers were nonexempt because they were "using their skill and knowledge in applying techniques, procedures, and/or specific standards (such as loan-to-value ratios and debt ratios) in choosing an already established loan package that best me[et] the needs and financial abilities of the borrower and which comport[ed] with the specified requirements of the lender," and therefore were not exercising the requisite discretion and independent judgment.
- 16 DOL Opinion Letter, FLSA 2006-31, 2006 DOLWH LEXIS 42 at \*4-5.
- 17 *Id.* at \*5-6.
- 18 *Id.* at \*7-8.
- 19 *Id.* at \*12-13.
- 20 *Id.* at \*18-19.
- 21 *Id.* at \*3.
- 22 *E.g.*, *Wong v. HSBC Mtg. Corp.*, 2008 U.S. Dist. LEXIS 78216 (N.D. Cal. Aug. 8, 2008) (finding that plaintiffs' primary duty was selling mortgage loans "[b]ecause defendants have not identified any evidence to support a finding that plaintiffs' primary duty is something other than sales").
- 23 *E.g.*, *Henry v. Quicken Loans, Inc.*, 2009 U.S. Dist. LEXIS 90126 (E.D. Mich. Sept. 30, 2009); *Pontius v. Delta Fin. Corp.*, 2007 U.S. Dist. LEXIS 90268 (W.D. Pa. Dec. 7, 2007).
- 24 *E.g.*, *Garcia v. Freedom Mtg. Corp.*, 2009 U.S. Dist. LEXIS 103147 (D.N.J. Nov. 2, 2009) (granting conditional certification to a class of loan officers challenging their exempt classification); *Searson v. Concord Mtg. Corp.*, 2009 U.S. Dist. LEXIS 88926 (E.D.N.Y. Aug. 31, 2009) (granting conditional certification to class of full-time and part-time mortgage consultants claiming they were improperly classified as exempt outside sales or administrative employees); *Oetinger v. First Residential Mtg. Network, Inc.*, 2009 U.S. Dist. LEXIS 61877 (W.D. Ky. July 15, 2009) (decertifying FLSA collective action and denying certification of state law class action claiming that "Mortgage Bankers" were improperly classified as exempt administrative employees").
- 25 *E.g.*, *Raikos v. JP Morgan Chase*, No. 08-1274 (S.D.N.Y. Jan. 4, 2010), Dkt. No. 34, Order Granting Preliminary Approval of Settlement (\$2.5 million); *Westerfield v. Washington Mutual*, 2009 U.S. Dist. LEXIS 94544 (E.D.N.Y. Oct. 2, 2009) (settlement of approximately \$38 million to 4,000 loan consultants claiming misclassification under the FLSA and asserting other state law claims); *Hernandez v. Texas Capital Bank, N.A.*, No. 4:07-cv-00726, Dkt. No. 107 (W.D. Mo. July 14, 2009) (approving settlement of \$935,000); *Chemi v. Champion Mtg.*, 2009 U.S. Dist. LEXIS 44860 (D.N.J. May 26, 2009) (approving \$1.2 million settlement); *Mallin v. National City Mtg.*, 2007 U.S. Dist. LEXIS 87213 (N.D. Cal. Nov. 26, 2007) (approving \$5 million settlement); *Stanfield v. First NLC Servs.*, 2006 U.S. 98267 (N.D. Cal. Nov. 1, 2006) (collective action for misclassification of loan officers, loan processors, and account managers under FLSA, certified and ultimately settled for approximately \$14 million); *Mousai v. E-Loan*, No. 3:06-cv-01993 (N.D. Cal. Mar. 15, 2006) (approximately 500 "loan consultants" filed a collective and class action under federal and California law alleging they were misclassified as "exempt" from overtime).
- 26 69 Fed. Reg. 22141.
- 27 29 C.F.R. § 541.205 (2003).
- 28 69 Fed. Reg. 22122, 22141.
- 29 *Id.* (quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3 1120, 1126-27 (2002)).
- 30 *Id.*
- 31 481 F.3d 1119 (9th Cir. 2007).
- 32 *In re Farmers Ins. Exch.*, 481 F.3d at 1132 (internal citations omitted).
- 33 2004 U.S. Dist. LEXIS 21841, at \*13-14 (D. Ore., Aug. 18, 2004).
- 34 *Id.* at \*15.
- 35 *Heffelfinger v. Electronic Data Sys. Corp.*, 580 F. Supp. 2d 933, 956 (C.D. Cal. 2008) (evaluating the concept under both federal and California state law).
- 36 512 F.3d 865 (7th Cir. 2008).
- 37 *Id.* at 870.
- 38 *Id.*
- 39 *Id.* at 872.
- 40 2010 U.S. Dist. LEXIS 32413 (D. Minn. Mar. 31, 2010).
- 41 *Id.* at \*62.
- 42 *Id.*
- 43 323 F. Supp. 2d 12 (D.D.C. 2004). The district court ultimately decided that the adjusters were nonexempt because they did not exercise sufficient discretion and independent judgment. This decision was reversed on appeal by *Robinson-Smith v. Gov't Employees. Ins. Co.*, 590 F.3d 886 (D.C. Cir. 2010).
- 44 *Robinson-Smith*, 323 F. Supp. at 23, n.6 (quoting *In re Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig.*, 300 F. Supp. 2d 1020, 1032-33 (D. Ore. 2003)).
- 45 *Robinson-Smith*, 323 F. Supp. at 23, n.6.
- 46 *Id.*
- 47 *Id.* at 19.
- 48 918 F.2d 1220 (5th Cir. 1990).
- 49 2004 U.S. Dist. LEXIS 27562 (S.D. Miss. Aug. 31, 2004).
- 50 2004 U.S. Dist. LEXIS 27562 at \*3.
- 51 *Id.* at \*15, 21-22.
- 52 *Id.* at \*22.
- 53 *Id.* at \*17 (citing 29 C.F.R. § 541 (preamble to the new DOL regulations) (quoting *Bothell v. Phase Metrics*, 299 F.3d 1120 (9th Cir. 2002))).
- 54 *Id.* at \*18.
- 55 2004 U.S. Dist. LEXIS 27562 at \*19.
- 56 *Id.* at \*19-24 Indeed, the *Edwards* court proclaimed that "[i]nsurance underwriting clearly involves the exercise of discretion and independent judgment." *Id.* at \*22.
- 57 *Id.* at \*22.
- 58 *Id.* (quoting 29 C.F.R. § 541.207(a)).
- 59 440 F. Supp. 2d 626 (S. D. Tex. 2006).
- 60 *Id.* at 636.
- 61 *Id.*
- 62 *Id.* at 634.

- 63 2002 U.S. Dist. LEXIS 5775, \*1-2 (D. Minn. Mar. 31, 2002).
- 64 *Id.* at \*28-29.
- 65 *Id.* at \*29.
- 66 *Id.* at \*30.
- 67 See *Casas v. Conseco Fin. Corp.*, No. 00-cv-01512 (D. Minn. June 21, 2000), Dkt. No. 395.
- 68 126 F.3d 1 (1st Cir. 1997).
- 69 *Id.* at 10.
- 70 361 F.3d 621, 627 (11th Cir. 2004).
- 71 *Id.* at 624.
- 72 *Id.*
- 73 *Id.*
- 74 *Id.*
- 75 *Whalen v. J.P. Morgan Chase & Co.*, 569 F. Supp. 2d 327 (W.D.N.Y. 2008). On appeal in the Second Circuit the case was captioned *Davis v. J.P. Morgan Chase & Co.* Michael J. Davis was the original named plaintiff in the case.
- 76 *Id.* at 329.
- 77 29 C.F.R. § 541.703(b)(7) and § 541.203(b), respectively.
- 78 *Whalen*, 569 F. Supp. 2d at 330, n.3.
- 79 29 C.F.R. § 541.203(b).
- 80 *Whalen*, 569 F. Supp. 2d at 330 (quoting 29 C.F.R. § 541.703(b)(7) : “A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis, and writing letters giving credit data and experience to other employers or credit agencies”).
- 81 *Id.* at 330.
- 82 *Id.*
- 83 *Id.*
- 84 *Id.* (citing *Havey v. Homebound Mtg., Inc.*, 2005 U.S. Dist. LEXIS 27036 (D. Vt. July 21, 2005), *aff’d*, 547 F.3d 158 (2d Cir. 2008) (mortgage underwriter whose primary duties were reviewing income, credit, assets and appraisals documentation met Investor guidelines; determining the degree of risk for each mortgage application by ensuring the proper programs had been selected, and making counter-offers if necessary was administratively exempt); *Edwards v. Audubon Ins. Group, Inc.*, 2004 U.S. Dist. LEXIS 27562 (S.D. Miss. 2004) (commercial insurance underwriter whose job duties included making underwriting decisions regarding millions of dollars in coverage and potential loss, and regularly negotiating credits, debits, premiums, and exclusions to insurance policies within prescribed ranges satisfied administrative exemption); *Callahan v. Bancorpsouth Ins. Servs.*, 244 F. Supp. 2d 678, 687 (S.D. Miss. 2002) (manager of a workers’ compensation fund whose duties included marketing, administration, underwriting, billing and collecting was an exempt administrative employee); *Creese v. Washington Mutual Bank*, 2008 Cal. Ct. App. LEXIS 2060 (Mar. 12, 2008) (unpublished order regarding class certification did not reach the merits)).
- 85 *Whalen*, 569 F. Supp. 2d at 331.
- 86 *Id.* at 333 (quoting 29 C.F.R. § 541.202).
- 87 *Id.* at 332.
- 88 *Id.*
- 89 *Id.* at 332.
- 90 *Whalen*, 569 F. Supp. 2d at 333.
- 91 *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2416 (2010).
- 92 *Id.* at 535.
- 93 *Id.* at 531.
- 94 29 C.F.R. § 541.205(a).
- 95 69 Fed. Reg. 22122, 22141.
- 96 *Id.* (quoting *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002) (internal citations omitted)).
- 97 3 F. 3d 581 (2d Cir. 1993).
- 98 *Davis*, 587 F.3d at 532.
- 99 940 F.2d 896 (3d Cir. 1991).
- 100 *Davis*, 587 F.3d at 536 (quoting *Cooper*, 940 F.2d at 903 (emphasis in the original)).
- 101 *Id.* at 904.
- 102 593 F.3d 280 (2010).
- 103 *Id.* at 286.
- 104 *Id.* at 285.
- 105 *Id.* at 286.
- 106 2002 U.S. Dist. LEXIS 5775 (D. Minn. Mar. 31, 2002).
- 107 *Id.* at 534.
- 108 *Davis*, 587 F.3d at 534.
- 109 *Id.*
- 110 *Id.* at 534-35.
- 111 *Id.* (internal citation omitted).
- 112 *Id.* at 537.
- 113 *Davis*, 587 F.3d at 532.
- 114 29 C.F.R. § 541.203(b).
- 115 Administrator’s Interpretation No. 2010-1 (Mar. 24, 2010).
- 116 *Id.* at 1, 3.
- 117 DOL Wage and Hour website at <http://www.dol.gov/whd/opinion/opinion.htm>. The website also announces that the Department may “from time to time ... update our interpretations in response to new information, such as court decisions, and may withdraw a ruling or interpretation in whole or in part.”
- 118 2002 U.S. Dist. LEXIS 5775 (D. Minn. Mar. 31, 2002).
- 119 940 F.2d 896 (3d Cir. 1991).
- 120 29 C.F.R. § 541.203(b).
- 121 Administrator’s Interpretation No. 2010-1 at 4.
- 122 *Id.* at 4–6.
- 123 516 F. Supp. 2d 895 (N.D. Ohio 2006).
- 124 Administrator’s Interpretation No. 2010-1 at 6; *Chao*, 516 F. Supp.2d at 898-99, 900 (“the only exemption the Defendants are claiming is the ‘outside sales exception’ established in 29 C.F.R. § 541.500(e).”)
- 125 Administrator’s Interpretation No. 2010-1 at 6 (quoting *Barnett v. Wash. Mutual Bank*, 2004 U.S. Dist. LEXIS 15661 at \*23 (N.D. Cal. Aug. 5, 2004)).
- 126 *Barnett*, 2004 U.S. Dist. LEXIS 15661 at \*2.
- 127 Administrator’s Interpretation No. 2010-1 at 6.
- 128 *Id.* at 8.
- 129 *Id.* at 7.
- 130 *Id.*
- 131 *Id.*

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