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Anna Johnston*

Christopher v. SmithKline Beecham Corporation: An Unsurprising Loss for Pharmaceutical Sales Representatives and an Erosion of Power for Administrative Agencies

I. Introduction

In *Christopher v. SmithKline Beecham Corporation*,[1] the Supreme Court deliberated whether pharmaceutical sales representatives (PSRs) were exempted from the Fair Labor Standards Act's (FLSA) overtime pay requirement, and whether the Department of Labor's (Department) opinion set forth in an amicus brief on the issue was owed controlling deference.[2] The Court held that the Department was not owed controlling deference[3] and that the outside salesman exemption to overtime pay applied to PSRs.[4]

The Court's emphasis on the element of "fair warning" in determining the level of deference owed to an administrative agency's interpretation of its own regulations erodes administrative agencies' interpretative power when it matters and preserves that power when it does not. The majority opinion degrades administrative agencies' previously-recognized ability to offer controlling interpretations in legal briefs.[5] The Court effectively limited *Auer* deference[6] to only official interpretations that pre-date the challenged issue or those interpretations of

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1. 132 S. Ct. 2156 (2012).

2. *Id.* at 2165.

3. *Id.* at 2168–69 (holding that the Department was not owed controlling deference as to the regulations it validly promulgated); *see also infra* Part III.C.1.

4. *Id.* at 2174.

5. *See* Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 878 (2011) ("[W]e conclude that the text of the regulation is ambiguous, and that deference is warranted to the interpretation of that text advanced by the Board in its *amicus* brief.").

6. *See infra* Part III.C.1.

clear regulations. Accordingly, the *Christopher* decision proscribes *Auer* deference from agency interpretations in amicus briefs of ambiguous regulations that have multiple reasonable interpretations.

II. The Case

Plaintiffs Michael Shane Christopher and Frank Buchanan worked for GlaxoSmithKline (GSK) as PSRs. They were responsible for marketing and promoting GSK products to physicians and encouraging physicians to prescribe GSK products to their patients (commonly called "detailing" in the industry).[7] As PSRs employed by GSK, the Plaintiffs received extensive specialized training. The training included how to: drive sales for each promoted drug, organize sales calls to maximize results, and sell through customer-focused dialogue in order to get the best possible commitment to prescribe.[8] A PSR's salary can be as much as $100,000 a year, generally composed of seventy-five percent base salary and twenty-five percent incentive compensation.[9] While it is not possible to link a PSR's detailing activities to a particular patient filling a prescription, incentive pay in the form of commission is partly based on the number of prescriptions written by physicians in a PSR's assigned geographic region.[10]

The Plaintiffs asserted that they regularly worked over forty hours per week without receiving overtime compensation, in violation of the FLSA, 29 U.S.C. § 207.[11] The Plaintiffs contended that their job consisted of primarily promotional or educational work, not selling; the Plaintiffs cited regulations prohibiting the direct sale of prescription drugs to support their claim that they cannot conduct sales within the meaning of the FLSA, and therefore could not be exempt from overtime pay as outside salesmen.[12]

The United States District Court for the District of Arizona held that the outside salesman exemption applied and granted the pharmaceutical company's motion for

7. Christopher v. SmithKline Beecham Corp., No. CV-08-1498-PHX-FJM, 2009 U.S. Dist. LEXIS 108992, at *2 (D. Ariz. Nov. 20, 2009), *aff'd*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012). The employees spent a majority of their time away from their employer's offices because they were out meeting with physicians. *Id.* at *3.

8. *Id.* at *6.

9. *Christopher*, 635 F.3d at 388 (quoting Christopher v. SmithKline Beecham Corp., No. 08 Civ. 1498 (FJM), 2009 U.S. Dist. LEXIS 108992, at *5 (D. Ariz. Nov. 20, 2009)); Christopher v. SmithKline Beecham Corp., No. CV-08-1498-PHX-FJM, 2009 U.S. Dist. LEXIS 108992, at *6–7 (D. Ariz. Nov. 20, 2009), *aff'd*, 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012). Plaintiffs' incentive compensation ranged from twenty-six percent to forty-one percent of their total annual compensation. *Id.* at 7.

10. *Id.*

11. *Id.* at *2.

12. *Id.* at *7–8. When meeting with physicians, PSRs are confined to scripts and "core messages" that are created by the company, in order to stay within the confines of federal law regulating the drugs. Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 386 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012).

summary judgment.[13] After reviewing PSRs' duties and payment structure, the court concluded that, in such a highly regulated industry, obtaining a commitment from physicians to prescribe the marketed product is the closest PSRs can get to selling prescription drugs.[14] The court relied upon the fact that the FLSA and the Department's regulations broadly define "sale."[15] Additionally, the court noted that all of the reasons for exempting outside salesmen from overtime pay were applicable to PSRs.[16]

Three months later, the district court ruled on the Plaintiff's motion to amend the judgment. The Plaintiffs filed a copy of the Department's amicus brief from a similar case before the United States Court of Appeals for the Second Circuit[17] and contended that the position taken by the Department was owed controlling deference in the case before the district court. (Courts apply the standards set forth in *Chevron*, *Auer*, and *Skidmore* to determine what level of deference an agency's opinion is owed.[18]) The district court found that the Department was not entitled to *Chevron* deference because the opinion was in an amicus brief and not in a regulation promulgated in accordance with the notice-and-comment procedures required by the Administrative Procedure Act.[19] The district court further reasoned that the amicus brief was not owed *Auer* deference because the regulations simply restated the terms of the statute, and the court concluded that the Department had no special authority to interpret its own regulations in that instance.[20]

13. *Christopher*, 2009 U.S. Dist. LEXIS 108992, at *14.

14. *Id.* at *13–14.

15. *Id.* at *13.

16. *Id.* at *14.

17. Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, *In re* Novartis Wage & Hour Litig., 611 F.3d 141 (2d Cir. 2010) (No. 09-0437-cv). *In re Novartis Wage & Hour Litigation* considered whether either the administrative employee exemption or the outside salesman exemption apply to PSRs and was argued in the Second Circuit in February of 2010. *In re* Novartis Wage & Hour Litig., 611 F.3d 141 (2d Cir. 2010), *abrogated by* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012); *see also infra* Part III.C.

18. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); Auer v. Robbins, 519 U.S. 452 (1997); Skidmore v. Swift & Co., 323 U.S. 134 (1944). Administrative deference is of three different types: 1) *Chevron* deference is applied to agency interpretations of ambiguous statutes, and the agency interpretation of the statute in question is generally binding on the court; 2) *Auer* deference is also a controlling deference and is applied to agency interpretations of the agency's own ambiguous regulations; 3) *Skidmore* deference is a low-level, non-binding deference that simply recognizes that an agency has expertise and a policy setting role. *See infra* Part III.C.1.

19. *Christopher*, No. CV-08-1498-PHX-FJM, 2010 U.S. Dist. LEXIS 12813, at *2–3 (D. Ariz. Feb. 1, 2010).

20. *Id.* at *3; *see also* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). *But see* Auer v. Robbins, 519 U.S. 452, 461–62 (1997) (explaining that the fact that the Department's interpretation came in the form of a legal brief did not, under the circumstances of the case, make it unworthy of deference).

The district court's decision was appealed to the Ninth Circuit Court of Appeals, where the Secretary of the Department of Labor filed a brief as amicus curiae in support of Christopher and Buchanan.[21] The Department opined that while PSRs' work might resemble selling, they do not in fact make sales because the actual sale of prescription drugs occurs "between the company and distributors (and then to the pharmacy)."[22] The Department concluded that PSRs only engage in non-exempt promotional work — work that is *incidental to* sales, not *in conjunction with* sales, because PSRs cannot "sell" drugs — and therefore PSRs cannot meet the primary duties test for the outside salesman exemption.[23]

The Ninth Circuit disagreed with the Department's opinion and affirmed the district court's decision that PSRs are not entitled to overtime pay. The Ninth Circuit determined that the Department was not owed deference and that PSRs are exempted from overtime pay as outside salesmen.[24] The court determined the Department's opinion could not be owed *Chevron* deference because the opinion was unreasonable. The court then relied on *Gonzales v. Oregon* to determine that the Department was not owed even *Auer* deference.[25] The court reasoned that when an agency merely paraphrases statutory language, instead of using its expertise and experience to formulate a regulation, the agency is not entitled to deference to interpret its own words.[26] Additionally, the court found that the Department's brief was a re-interpretation of the FLSA language.[27] Therefore, the Department's opinion was not owed even low-level *Skidmore* deference.[28]

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21. Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012); Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants, Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011) (No. 10-15257).

22. Brief for the Secretary, *supra* note 21, at 10. The relevant regulations define sales as "the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property . . . ." 29 C.F.R. § 541.501(b) (2012); Brief for the Secretary, *supra* note 21, at 8.

23. Brief for the Secretary, *supra* note 21, at 8–9; *see also* 29 C.F.R. § 541.503(a) (2012) ("Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.").

24. Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 392 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012) (holding the Department was not owed any deference); *id.* at 385 (holding the outside salesman exemption applied). The court did not address the administrative employee exemption since the issue was not raised on appeal.

25. *See id.* at 392, 395 & n.7 (finding the Department's interpretation unpersuasive); *id.* at 394–95 (citing Gonzales v. Oregon, 546 U.S. 243, 257 (2006)).

26. *Christopher*, 635 F.3d at 393–94.

27. *Id.* at 395.

28. *Id.* at 400. Not all justices believe in the merits of *Skidmore* deference. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1340 & n.6 (2011) (Scalia, J., dissenting) (commenting that the

In addition to finding the Department's opinion was not owed any deference, the Ninth Circuit also explained why the Department's position was unacceptable. The court noted that the Department's seventy years of acquiescence to the pharmaceutical industry's practice of not paying overtime wages supported a finding that PSRs are not entitled to it.[29] The court went on to hold that the outside salesman exemption applied to PSRs.[30] In support of that decision, the court recognized that the FLSA is ambiguous given that it is not an industry specific statute.[31] Therefore, the court reasoned that under the FLSA a PSR's role in obtaining commitments to prescribe was more akin to selling than promoting.[32] Additionally, the commission-based compensation scheme further supported a finding that PSRs were indeed selling.[33]

The Supreme Court of the United States granted a writ of certiorari to determine how much deference is owed to the Department's opinion and whether the outside salesman exemption applied to PSRs.[34]

III. Legal Background

A combination of statutes and regulations govern whether or not PSRs are entitled to overtime pay. The FLSA is a broad, generally applicable, remedial statute that requires overtime pay for employees who work over forty hours a week, with limited exceptions.[35] There are two FLSA exemptions that are potentially relevant to PSRs: 1) the administrative employee exemption, and 2) the outside salesman exemption.[36] Congress did not define these exemptions, but rather gave the Department the authority to define and delimit the exemptions by regulation.[37] The FLSA was drafted in a generally applicable, broad fashion that was legislatively convenient, but makes it difficult to apply to non-traditional jobs and employment

majority opinion applied "so-called Skidmore deference" and in a footnote, expounding that "this doctrine (if it can be called that) is incoherent, both linguistically and practically").

29. *Id.* at 399.

30. *Id.* at 401.

31. *Id.* at 398.

32. *See id.*

33. *Id.*

34. *See* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 760 (2011).

35. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* (2006).

36. 29 U.S.C. § 213(a)(1) (2006).

37. *Id.* (establishing the outside salesman exemption and stating that it shall be "defined and delimited from time to time by regulations of the Secretary"); 29 U.S.C. § 204 (2006) (naming the Department of Labor as the administrator of the FLSA). There is almost no legislative history related to the exemptions, which have been part of the FLSA since its enactment. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22123 (Apr. 23, 2004) ("Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant.").

schemes.[38] For example, there are many statutes regulating prescription drugs that constrain how PSRs can perform their job duties, which create legal anomalies that are not present in standard employment scenarios.[39] These abnormalities make applying the FLSA to PSRs difficult. Indeed, notwithstanding the regulations promulgated by the Department explaining these exemptions, three federal circuit courts disagreed over whether PSRs were exempt as either administrative employees or outside salesmen.[40] Furthermore, the courts disagreed about how much deference was owed to the Department's opinion about the applicability of the exemptions to PSRs.[41]

A. The FLSA Unequivocally Governs Overtime Compensation but Is Not Readily Applicable to Non-Traditional Employees

The FLSA requires employers to compensate employees who work longer than forty hours a week with time-and-a-half overtime pay.[42] There are two exemptions to the FLSA's overtime pay requirement that could apply to PSRs: (1) the outside salesman exemption, which exempts employees who primarily sell products away from their employer's place of business;[43] and (2) the administrative employee exemption, which exempts high income-earning employees who have management or business operations oriented jobs.[44] Before the Supreme Court granted certiorari in *Christopher*, there was a three-way circuit split regarding whether either of these two exemptions applied to PSRs.[45] It is important to note that only one exemption need apply to PSRs in order preclude overtime pay.

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38. *See* Christopher v. SmithKline Beecham Corp., 635 F.3d 383, 398 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012) (explaining that the FLSA is not an industry-specific statute so it is important to consider the legislative intent of the provisions).

39. *See infra* notes 46–47 and accompanying text.

40. *Christopher*, 635 F.3d at 385 (holding that PSRs are exempt as outside salesmen); *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 143–44 (2d Cir. 2010), *abrogated by* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) (holding that PSRs are not exempt as either administrative employees or outside salesmen); Smith v. Johnson & Johnson, 593 F.3d 280, 285 (3d Cir. 2010) (holding that PSRs are exempt as administrative employees).

41. *Christopher*, 635 F.3d at 393–94; *In re* Novartis Wage & Hour Litig., 611 F.3d at 153; *see also infra* notes 76–86 and accompanying text. The Department did not file a brief in the Third Circuit case Smith v. Johnson & Johnson.

42. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* (2006). The FLSA was originally enacted to protect the working class from treatment and quality of life by requiring a minimum wage and overtime pay after forty hours of work. Franklin D. Roosevelt, *Message from the President of the United States*, H.R. DOC. NO. 255, at 1–2 (1937). Congress delegated the task of defining these exemptions to the Department of Labor, which has from time to time enacted regulations defining and explaining these exemptions. The Department enforces both their regulations and the FLSA. 29 U.S.C. § 204(a) (2006).

43. *See* 29 U.S.C. § 213(a)(1) (2006); *see also* 29 C.F.R. § 541.500 (2012).

44. *See* 29 U.S.C. § 213(a)(1).

45. *See supra* notes 40–41 and accompanying text; *infra* Parts III.B–C.

The broad applicability of the FLSA makes it difficult to apply to PSRs. These employees resemble outside salesmen — the word "sales" is even included in their title — but they are explicitly prohibited by federal law from "selling" prescription drugs directly to physicians.[46] The Federal Food, Drug, and Cosmetic Act governs prescription drug sales, distribution, and advertisements, in addition to communications about prescription drugs.[47] The restrictions imposed by these laws limit the conduct of pharmaceutical companies and PSRs and complicate the analysis of whether pharmaceutical *sales* representatives *actually sell*. The FLSA, however, provides little to no guidance as to how this complex statutory and regulatory scheme affects the outside salesman exemption. The FLSA broadly defines sales as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."[48]

B. The Department of Labor Has Promulgated Rules to Explain and Expand the FLSA's Exemptions to Overtime Pay

Because the FLSA is a statute intended to have widespread applicability, the Department is charged with promulgating regulations to define and explain the exemptions to the FLSA's overtime pay requirement.[49] The Department has promulgated regulations about the outside salesman exemption[50] and the administrative employee exemption,[51] which the Department updated in 2004.[52]

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46. *See* 21 U.S.C. § 353(c) (2006) ("No person may sell, purchase, or trade or offer to sell, purchase, or trade any drug sample, . . . coupon, . . . [or prescription drug] . . . ."); § 353(d) (regulating the distribution of drug samples).

47. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* (2006); *see* 21 U.S.C. §353(c) (establishing that no person may sell, purchase, or trade or offer to sell, purchase, or trade any drug sample, coupon, or drug limited to prescriptions); *see also* 21 U.S.C. § 353(d) (regulating the distribution of drug samples); *see also Laws, Regulations, Guidances, and Enforcement Actions*, FDA (last updated Apr. 30, 2009), http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/DrugMarketingAdvertisingandCommunications/ucm081617.htm. These laws are so extensive they even regulate drug samples and coupons. 21 U.S.C. § 353(c).

48. 29 U.S.C. § 203(k) (2006).

49. 29 U.S.C. § 213(a)(1) (delegating the task of defining the exemptions to the Secretary of the Department of Labor).

50. *See* 29 C.F.R. §§ 541.500–541.504 (2012).

51. *See* 29 C.F.R. §§ 541.200–541.204 (2012).

52. Before this, the regulations have not been substantially changed in fifty years, and attempts to update them in the last twenty years have been extremely controversial. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124–25 (2004). While there were significant structural changes to the rules, in many ways the new regulations are substantively similar to the previous regulations, and do not represent a major change in overtime regulations. For example, two new alternative tests were proposed, but ultimately rejected, for the administrative positions exemption: the "position of responsibility" and "high level of skill or training" tests. The Final Rule retained the existing requirement that exempt administrative employees must exercise discretion and independent judgment. *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and*

1. Outside Salesman Exemption

The outside salesman exemption has two requirements. First, the employee must have a primary duty to either make "sales," as defined in 29 U.S.C. § 203(k), or to acquire orders or contracts for services for consideration paid by the customer.[53] Second, the employee must customarily and regularly perform work away from the employer's office.[54]

The contested requirement of this exemption is whether PSRs "sell." Both the statutory and regulatory definitions broadly define the term to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."[55] The regulations build on the statutory definition by stating: "Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property."[56] The Department's Final Rule did not clarify the definition of sales, explaining only "that the employee [must have], *in some sense*, . . . made sales."[57]

There is limited other relevant guidance to determine whether PSRs make sales. Generally, the Department has explained that if an employee has a primary duty of obtaining a commitment to *buy* from a *customer* and is credited with the sale, then the employee is selling.[58] The Department has also provided that *technological* changes in how orders are placed should not ultimately determine whether an employee is selling, but the Final Rule did not discuss how regulatory limitations on prescription drugs affect how "orders" must necessarily happen in the

Computer Employees, 69 Fed. Reg. at 22123. One significant change, however, was the adoption of a single duties test. The new regulations adopted a single standard duties test for each exemption category. 69 Fed. Reg. at 22126.

53. *See* 29 C.F.R. § 541.500(a)(1)(i)–(ii). The FLSA defines "sale" or "sell" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k) (2006).

54. 29 C.F.R. § 541.500(a)(2). This is the "outside" component of the outside salesman exemption. The proposed regulations for the 2004 Rules required the employer to perform work unrelated to outside sales for more than twenty percent of the hours worked in a workweek by nonexempt employees of the employer. 69 Fed. Reg. at 22160. The Department decided that the primary duty test was preferable to the twenty percent tolerance test. *Id.* at 22161.

55. *Compare* 29 U.S.C. § 203(k) (defining selling as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition"), *with* 29 C.F.R. § 541.501(b) ("Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.").

56. 29 C.F.R. § 541.501(b).

57. 69 Fed. Reg. at 22162 (emphasis added).

58. 69 Fed. Reg. at 22162–63. This statement was made within the context of buyer-consumers placing orders with a company directly because exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. 69 Fed. Reg. at 22162–63.

pharmaceutical industry.[59] Lastly, the regulations distinguish promotional work performed by an employee that is *incidental to* and *in conjunction with* sales or solicitations, from promotional work that is designed to stimulate sales *in general*. Work performed *incidental to* and *in conjunction with* sales *is* exempted work (and considered to be part of sales), but work designed to stimulate sales *in general* is *not* exempted work.[60]

2. The Components of the Administrative Employee Exemption and How the Third Circuit Applied the Exemption to PSRs

The administrative employee exemption applies to an "employee employed in a bona fide . . . administrative . . . capacity . . . ."[61] The regulation explaining the administrative employee exemption promulgated by the Department has three major components. First, the employee must earn more than $455 per week.[62] Second, the employee must have a primary duty of performing "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."[63] Third, the employee's primary duty from the second requirement must involve the "exercise of discretion and independent judgment with respect to matters of significance."[64] Furthermore, in order to be directly related to the management or general business operations, the work must directly relate "to assisting with the running or servicing of the business," as opposed to selling a product in a store.[65] Examples of such work include, but are not limited to, advertising, marketing, and public relations.[66]

The regulations explain what it means to exercise "discretion and independent judgment with respect to matters of significance."[67] This requirement establishes the relative importance of the employee's work, and establishes several factors that can be used to evaluate the discretionary nature of the work: whether the employee has authority to formulate, affect, interpret, or implement management policies or

59. 69 Fed. Reg. at 22162–63 ("[T]he Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales."). Pharmaceutical companies use "detailers" (or PSRs) to promote their prescription drugs by providing information to physicians about the company's drugs in hopes of persuading the physicians to write prescriptions for the products to their patients in appropriate cases. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011) (describing the process of "detailing"). Patients ultimately purchase these prescriptions at a pharmacy, which receives the drugs from the manufacturer.

60. 29 C.F.R. § 541.503 (2012).

61. 29 U.S.C. § 213(a)(1) (2006).

62. 29 C.F.R. § 541.200(a)(1) (2012).

63. 29 C.F.R. § 541.200(a)(2).

64. 29 C.F.R. § 541.200(a)(3).

65. 29 C.F.R. § 541.201(a) (2012).

66. 29 C.F.R. § 541.201(b).

67. 29 C.F.R. § 541.202 (2012).

operating practices; whether the employee carries out major assignments in conducting the operations of the business; and whether the employee has authority to waive or deviate from established policies and procedures without prior approval.[68] In summation, the employee must have the "authority to make an independent choice, free from immediate direction or supervision."[69]

The Third Circuit applied these regulations to PSRs in *Smith v. Johnson & Johnson* and held that PSRs were exempted from overtime pay as administrative employees, based on the determination that that PSRs' jobs had sufficient independent and managerial qualities to satisfy the exemption's requirements.[70] In coming to this conclusion, the court noted that the FLSA is construed broadly as a remedial statute and exemptions to it are construed narrowly against the employer.[71]

In *Smith,* the parties both agreed that Smith's salary met the minimum requirement for the administrative employee exemption, and the dispute between the parties was over the nature and execution of Smith's duties.[72] The court relied on Smith's testimony about the managerial and independent qualities of her position to conclude that her job satisfied the other two requirements. The court determined that Smith's position "directly related to the management or general business operations of the employer" because her non-manual position required her to form a strategic plan designed to maximize sales in her territory.[73] These tasks "involved a high level of planning and foresight, and the strategic plan guided the

68. 29 C.F.R. § 541.202(a) (explaining the exercise of discretion and independent judgment with respect to matters of significance). Section 541.202 clarifies the definition of discretion and independent judgment to reflect existing federal case law and to eliminate outdated and confusing language in the existing interpretive guidelines. *See* 69 Fed. Reg. at 22142; 29 C.F.R. § 541.202(b) (laying out the factors).

69. 29 C.F.R. § 541.202(c).

70. Smith v. Johnson & Johnson, 593 F.3d 280, 285 (3d Cir. 2010). In *Smith*, the only issue addressed by the Third Circuit was whether the administrative employee exemption applied to pharmaceutical sales representatives. *Id.* at 286 n.4. The district court found the outside salesman exemption did not apply. Smith v. Johnson & Johnson, No. 06-4787 (JLL), 2008 U.S. Dist. LEXIS 104952 (D.N.J. Dec. 30, 2008), *order aff'd, appeal dismissed*, 593 F.3d 280 (3d Cir. 2010), at *21.

71. *Smith*, 593 F.3d at 284 (citing Lawrence v. City of Philadelphia, 527 F.3d 299, 310 (3d Cir. 2008)). This is a canon of construction for the FLSA because it is a remedial statute designed to improve wages and working conditions; therefore, its provisions are to be construed broadly in favor of coverage. Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590, 597 (1944) (explaining that portions of the FLSA are "remedial and humanitarian in purpose" and that "[s]uch a statute must not be interpreted or applied in a narrow, grudging manner").

72. *See* 29 C.F.R. § 541.200(a) (2012) (requiring for the administrative employee exemption that an employee have a minimum salary of $455 per week, have a primary duty of performing office or non-manual worked directly related to the management or general business operations of the employer or the employer's customers, and where the execution of that primary duty includes the exercise of discretion and independent judgment with respect to matters of significance).

73. *Smith*, 593 F.3d at 285.

execution of her remaining duties."[74] The court also found that Smith exercised discretion and independent judgment with respect to matters of significance in the performance of her duties because Smith worked without direct oversight and was "the manager of her own business who could run her own territory as she saw fit."[75]

C. The Second Circuit and the Department Agreed That Neither Exemption Applied to PSRs

The United States Court of Appeals for the Second Circuit was the second modern federal appellate court to address the issue of overtime pay for PSRs in *In re Novartis Wage & Hour Litigation*.[76] For the first time, the Department joined the litigation by filing a brief as amicus curiae, arguing that neither exemption applied. The Department asserted that no sale occurred between PSRs and physicians and that PSRs did not exercise enough discretion and independent judgment.[77] The Second Circuit held that the Department was owed controlling deference and that neither the administrative employee exemption nor the outside salesman exemption applied to PSRs.[78]

1. Levels of Deference Owed to the Department When Interpreting Its Regulations

There are three different kinds of administrative deference. First, *Chevron* deference applies to agency interpretations that carry out an express or implied delegation by Congress to the agency to interpret an ambiguous statute through rules carrying the force of law. Second, *Auer* deference applies to an agency interpretation of the agency's own ambiguous regulations. Third, *Skidmore* deference is a low-level, non-binding deference.

Chevron deference applies when Congress has delegated legislative authority to an administrative agency to interpret an ambiguous statute through rules carrying the force of law. When administrative action is taken as an exercise of that legislative authority, the action is entitled to binding *Chevron* deference, unless the action was procedurally defective, substantively arbitrary or capricious, or manifestly contrary to the statute.[79] In *Chevron U.S.A., Inc. v. Natural Resources*

74. *Id.*

75. *Id.*

76. *In re* Novartis Wage & Hour Litig., 611 F.3d 141 (2d Cir. 2010), *abrogated by* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).

77. Brief for the Secretary, *supra* note 17, at 5–6.

78. *In re Novartis*, 611 F.3d at 143–44.

79. Christensen v. Harris County, 529 U.S. 576, 587 (2000). Most cases where agency rules have received *Chevron* deference, those rules were subject to notice-and-comment rulemaking. United States v. Mead Corp., 533 U.S. 218, 228, 230 (2001). However, there are a number of cases where *Chevron* deference has been applied even where notice-and-comment rulemaking procedures were not followed. *See Christensen*, 529 U.S. at 590–91 (Scalia, J., concurring) (listing cases in which the Court has accorded *Chevron* deference to authoritative agency

Defense Council, Inc., the Supreme Court laid out a two-part test to determine whether an agency's interpretation is owed controlling deference.[80] If Congress's formulation of the statute clearly and directly addresses the issue, then the statute controls. However, if the statute is ambiguous, then the court must determine "whether the agency's answer is based on a permissible construction of the statute."[81] So long as the agency's interpretation is reasonable, the agency's interpretation is owed controlling deference.

Auer deference applies when an agency is interpreting its own ambiguous regulation using "the agency's fair and considered judgment . . . ."[82] Under *Auer*, an agency opinion in an amicus brief is owed controlling deference so long as the interpretation is not plainly erroneous or otherwise unreasonable.[83] The interpretation may not be a "*post hoc* rationalization" to justify past agency action.[84] Finally, in *Gonzales v. Oregon*, the Court explained that *Auer* deference does not apply when an agency merely paraphrases statutory language in a regulation instead of using its expertise and experience to formulate regulations.[85]

Agency interpretations that do not receive controlling deference under *Chevron* or *Auer* may still be "entitled to respect" under *Skidmore*. The amount of deference applied under *Skidmore* depends on the thoroughness of the agency's considerations, the validity of its reasoning, the consistency of the interpretation with past agency opinions and actions, and all other factors which give it the "power to persuade."[86]

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positions). The Court has explicitly acknowledged that notice-and-comment rulemaking procedures are not required to be awarded *Chevron* deference. *Mead Corp.*, 533 U.S. at 230–31.

80. 467 U.S. 837, 842–44 (1984).

81. *Chevron*, 467 U.S. at 843.

82. Auer v. Robbins, 519 U.S. 452, 462 (1997).

83. *Id.* at 461–62 (explaining that the fact the Department's reasonable interpretation came in the form of a legal brief did not, under the circumstances of the case, make it unworthy of controlling deference, combined with the fact it was not plainly erroneous); Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 878 (2011). *But see Christensen*, 529 U.S. at 587 (explaining that agency interpretations that lack the force of law — such as those "contained in policy statements, agency manuals, and enforcement guidelines" — "do not warrant *Chevron*-style [controlling] deference").

84. *Auer*, 519 U.S. at 462 (citing Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212 (1988)). The existence of other regulations, rulings, or administrative practices that are consistent with the interpretation weigh in favor of an interpretation meriting *Auer* deference. *See Bowen*, 488 U.S. at 212.

85. Gonzales v. Oregon, 546 U.S. 243, 257 (2006) ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.").

86. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

2. The Second Circuit Held That the Department's Opinion That Neither Exemption Applied Is Owed Controlling Deference

The Second Circuit held the Department's interpretation for both exemptions was owed *Auer* deference because an agency's interpretation of its own regulations is generally entitled to controlling deference.[87] The court reasoned that neither the outside salesman exemption nor the administrative employee exemption applied because federal law prohibits PSRs from selling prescription drugs and there was "no evidence in the record that [PSRs] have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices . . . ."[88] Additionally, the court noted that, in general, exemptions to the FLSA overtime requirement were to be narrowly construed against the employer.[89]

The Department of Labor sided with the PSRs and argued the exemptions did not apply to PSRs, thereby requiring employers to pay overtime under the FLSA. Firstly, the Department explained that the FLSA's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit."[90] Secondly, the Department argued that its opinion was owed *Auer* deference despite that it was presented in an amicus brief.[91]

The Department argued the administrative employee exemption could not apply to PSRs because the exercise of discretion and independent judgment must be more

87. *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 149 (2d Cir. 2010). In *Smith v. Johnson & Johnson*, the court acknowledged that the Secretary's regulations have controlling weight under *Chevron*, unless found to be arbitrary and capricious. 593 F.3d 280, 284 (3d Cir. 2010). However, the Department did not file an amicus brief in that case and therefore the court did not consider the Department's opinion about whether PSRs specifically are eligible for overtime pay.

88. *In re Novartis*, 611 F.3d at 156. Novartis did not show the PSRs were allowed discretion or independent judgment, since PSRs gained skills from Novartis trainings and were exercised with severe limits. *Id.* at 156–57.

89. *Id.* at 150 (quoting Bilyou v. Dutchess Beer Distributors, Inc., 300 F.3d 217, 222 (2d Cir. 2002) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)).

90. Brief for the Secretary, *supra* note 17, at 7 (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)) (alteration in the brief).

91. Brief for the Secretary, *supra* note 17, at 7 n.3 ("To the extent that the plain language of the Department's outside sales or administrative regulations are ambiguous, courts must give controlling deference to the Department's interpretation of its own regulations unless such interpretation is plainly erroneous or inconsistent with those regulations."); *see* Federal Express Corp. v. Holowecki, 128 S. Ct. 1147, 1155 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations in the first instance . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force. Under *Auer*, we accept the agency's position unless it is 'plainly erroneous or inconsistent with the regulation.'" (citations omitted)); Auer v. Robbins, 519 U.S. 452, 461 (1997). This principle holds true whether the Department's interpretation is found in a Preamble to a Final Rule published in the Federal Register, an opinion letter or other interpretive materials, or in a legal brief. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171 (2007) (controlling deference given to Department's Advisory Memorandum issued during the course of litigation); *Auer*, 519 U.S. at 462 (controlling deference given to legal brief).

than the use of skill in applying well established techniques, procedures, or specific standards set forth by the employer in manuals or other sources.[92] While PSRs work independently, determine what time of day to visit the physicians on their lists, and decide how best to execute their presentations, they do so within clearly and strictly prescribed parameters.[93] For example, when promoting the drugs to physicians, PSRs are not allowed to deviate from the "core message" found in the scripts, manuals, brochures, and other materials provided by the employer.[94] If PSRs do not have a scripted response to a physician's question, they are required to either reiterate the "core message" or refer the physician to the employer's medical experts.[95] The Department contended that an employee so tightly constrained cannot exercise discretion and independent judgment.[96]

The Department also argued PSRs do not qualify for the outside salesman exemption. The Department contended that while PSRs' work might resemble selling, they do not in fact make sales, as the actual sale of the drugs occurs between the company and distributors (and then to the pharmacy).[97] The regulations defined sales as "the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property."[98] The Department concluded that PSRs only engage in non-exempt promotional work and, therefore, do not satisfy the primary duties test for the outside salesman exemption.[99]

IV. The Court's Reasoning

Justice Alito delivered the opinion of the Court, affirming the judgment of the Ninth Circuit Court of Appeals that the "petitioners qualify as outside salesmen under the most reasonable interpretation of the [Department]'s regulations."[100]

The Court first addressed the issue of whether the Department was owed controlling deference for the opinion set forth in its amicus brief: that an employee does not make a "sale" for the purposes of the outside salesman exemption unless the employee actually transfers title to the property at issue.[101] First, the Court recognized that agency interpretations of ambiguous regulations usually receive

92. 29 C.F.R. § 541.202(e) (2012); *see also* Brief for the Secretary, *supra* note 17, at 19.

93. Brief for the Secretary, *supra* note 17, at 21.

94. Brief for the Secretary, *supra* note 17, at 6.

95. Brief for the Secretary, *supra* note 17, at 4 n.2 ("If a Rep does not have a scripted response from NPC to a physician's concerns, she must try to 'sidestep' the question by restating the 'core message' or refer the physician to medical experts and NPC." (citation omitted)).

96. Brief for the Secretary, *supra* note 17, at 6.

97. Brief for the Secretary, *supra* note 17, at 3 n.1.

98. 29 C.F.R. § 541.501(b) (2012); *see also* Brief for the Secretary, *supra* note 17, at 8–10.

99. Brief for the Secretary, *supra* note 17, at 9–10.

100. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2174 (2012).

101. *Id.* at 2166.

controlling *Auer* deference, even when advanced in a legal brief.[102] The Court, however, rejected the Department's interpretation. The Court concluded that allowing this interpretation of an ambiguous regulation to retroactively apply to conduct pre-dating that interpretation "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[103] The Court noted that the industry had treated PSRs as non-exempt employees for decades and the Department had never taken any enforcement action against any pharmaceutical company.[104] Fearing the potential for agencies to promulgate "vague and open-ended regulations that they [could] later interpret as they see fit," the Court declined to extend *Auer* deference.[105]

The Court applied *Skidmore* deference, which accords agencies a level of deference consistent with 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."[106] The Court found the Department's opinion to be "quite unpersuasive," as it "plainly lack[ed] the hallmarks of thorough consideration."[107] Explicitly, the Court took issue with the fact that the Department's reasoning for its position had changed over the course of the litigation in the Second and Ninth Circuits and then before the Court.[108] The Court determined the Department's title transfer theory was "flatly inconsistent" with the "consignment for sale" definition of "sale" within the FLSA.[109]

Finding the Department's opinion was entitled to no deference, the Court turned to traditional methods of statutory interpretation and used a textual analysis to determine that Christopher and Buchanan were indeed exempted from overtime

102. *Id.* at 2166 (citing Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011)).

103. *Id.* at 2167 (citing Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)) (alteration in Court opinion).

104. *Id.* at 2168.

105. *Id.* It is plausible that agencies are intentionally drafting "vague and open-ended regulations" as an enforcement strategy due to limited budgets.

106. *Id.* at 2168–69 (quoting United States v. Mead Corp., 533 U.S. 218, 228 (2001) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

107. *Id.* at 2169; *see also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (explaining that the factors to evaluate when determining deference owed to an administrative opinion include: "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").

108. *Christopher*, 132 S. Ct. at 2169 ("[T]he DOL first announced its view that pharmaceutical sales representatives do not qualify as outside salesmen in a series of *amicus* briefs, there was no opportunity for public comment, and the interpretation that initially emerged from the Department's internal decisionmaking process proved to be untenable. After arguing successfully in the Second Circuit and then unsuccessfully in the Ninth Circuit that a sale for present purposes simply requires a 'consummated transaction,' the DOL advanced a different interpretation in this Court.").

109. *Id.*

pay as outside salesmen.[110] The Court began by analyzing the FLSA statutory provision establishing the exemption.[111] The Court found the word "capacity" of particular importance. The intentional use of "capacity" suggested a "functional, rather than formal, inquiry."[112] The Court further noted that the Department adopted the statutory definition of "sale," which was a non-exclusive list of examples of "sales."[113] The Court emphasized that the words "any" and "other disposition" in the statutory definition demonstrated Congress's intent to include a wide range of "sales" under the exemption.[114] Finally, the Court concluded that petitioners were "selling." The Court reasoned that the petitioners made sales within the meaning of the FLSA by obtaining a commitment to prescribe, the only way "selling" can exist in the pharmaceutical industry.[115]

In support of its conclusion, the Court also noted that the petitioners bore the "external indicia" of outside salesmen, because the petitioners: (1) "were trained to close each sales call by obtaining the maximum commitment possible from the physician;" (2) "worked away from the office, with minimal supervision;" and (3) "were rewarded for their efforts with incentive compensation."[116] The Court found further support for its conclusion due to the nature of the petitioners' jobs and salaries. Specifically, their work was difficult to standardize to a particular time frame, making them unlike typical hourly workers entitled to overtime pay, and they earned salaries well above the minimum wage.[117] Overall the Court proclaimed PSRs are "hardly the kind of employees that the FLSA was intended to protect."[118]

The dissenting opinion (authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan) agreed with the majority opinion on the issue that the Department was owed no deference.[119] The dissenting opinion disagreed with the majority's conclusions that obtaining a nonbinding commitment from a physician was "selling" and that a "sale" could happen between a PSR and a

110. *Id.* at 2170–73 (analyzing the text of the FLSA and related regulations, focusing on the definition of "sale," the modifier "any" in that definition, and the use of the broad catchall phrase: "other dispositions").

111. *Id.* at 2170; *see also* 29 U.S.C. § 213(a)(1) (2006) ("[A]ny employee employed . . . in the capacity of outside salesman . . . .").

112. *Christopher*, 132 S. Ct. at 2170.

113. *Id.* at 2170–71; 29 U.S.C. § 203(k) (defining selling as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition").

114. *Christopher*, 132 S. Ct. at 2170–71.

115. *Id.* at 2172 ("Obtaining a nonbinding commitment from a physician to prescribe one of respondent's drugs is the most that petitioners were able to do to ensure the eventual disposition of the products that respondent sells.").

116. *Id.* at 2172–73.

117. *Id.* at 2173.

118. *Id.*

119. *Id.* at 2175 (Breyer, J., dissenting).

physician.[120] The dissenters opined that the PSRs' work was more comparable to "promotional activities designed to stimulate sales" and that the PSRs' "primary duty" was to provide information, not sell.[121] The dissenting Justices would have held that PSRs are not outside salesmen, and thus entitled to overtime pay.[122]

V. Analysis

The Court in *Christopher* reached the proper conclusion about whether the outside salesman exemption applies to PSRs, but did so in a way that eroded agencies' previously-recognized ability to offer controlling administrative interpretations in legal briefs. The Court should have declined to apply controlling deference using *Gonzales* rather than emphasizing a "fair notice" standard. However, the Department's opinion that PSRs were not outside salesmen was not sound given the Department's other regulations and explanations of the exemption. Therefore, the Court's ultimate conclusion that PSRs are exempted from overtime pay as outside salesmen was well founded.

The impact of the Court's decision is that, going forward, courts will be able to dismiss agency opinions using the "fair warning" standard simply because there are one or more permissible interpretations of an ambiguous regulation, and cite lack of notice as the basis for not awarding deference. The Court has effectively limited *Auer* deference to only those interpretations that pre-date the challenged issue or those interpretations based on clearly drafted regulations. As a result, *Auer* deference will not apply to agency opinions of ambiguous regulations, which is precisely when the agency's opinion matters most.

To demonstrate, the *Christopher* Court held that the Department's opinion was not owed controlling deference regarding the applicability of the outside salesman exemption to PSRs due to lack of "fair notice" (when the Department's regulations were ambiguous and basically restated the FLSA). Contrastingly, the Court would have found that the Department's opinion as to the applicability of the administrative employee exemption would be owed *Auer* deference if it had granted review on a writ of certiorari to *In re Novartis Wage & Hour Litigation*. Because the administrative employee exemption regulations are very detailed and expand upon and explain the administrative employee exemption in the FLSA, the Department had garnered special authority to interpret them. By granting certiorari on the Ninth Circuit case as opposed to the Second Circuit decision, the Court avoided

120. *Id.* at 2176. Justice Breyer noted explained that sales in the pharmaceutical industry happened between the consumer and the pharmacist. Further, Justice Breyer noted that a patient may choose not to fill a prescription, or that a pharmacist may substitute a generic for the manufacturer's drug. *Id.*

121. *Id.* at 2177–78.

122. *Id.* at 2179. On a practical note, some would not find it surprising that the four liberal justices decided that the exemption does not apply, thus making PSRs entitled to overtime pay.

clearly demonstrating the negative impact of its decision on the power of amici briefs by administrative agencies.

A. By Limiting the Scope of Its Review the Supreme Court Hid the Deleterious Implications for Auer *Deference for Administrative Agencies' Amici Briefs*

The Court chose not to address whether PSRs qualified for the administrative employee exemption to overtime pay.[123] The petition for writ of certiorari from the Second Circuit was denied after the Ninth Circuit decision was released.[124] Therefore, it is likely that the Supreme Court was aware of the three-way circuit split on the two exemptions and the deference issue when it denied the petition from the Second Circuit.

By granting certiorari on the Ninth Circuit decision, the Court limited its review to only the issues of the outside salesman exemption and the level of deference owed to the Department on that specific exemption.[125] While the Supreme Court decision on the applicability of the outside salesman exemption to PSRs resolved the practical question of whether PSRs are entitled to overtime pay, the Court avoided addressing the administrative employee exemption portion of the circuit split and downplayed the implication of its decision for the use of *Auer* deference in the future.

B. The Department's Opinion as to the Outside Sales Employee Exemption Is Not Owed Controlling Deference, but the Department's Opinion Regarding the Administrative Employee Exemption Should Receive Auer *Deference*

The Department is the administrator of the FLSA and properly promulgated regulations to define the exemptions established by statute.[126] The regulations themselves are, therefore, at a minimum, awarded *Chevron* deference.[127] However,

123. While a decision that at least one of the exemptions applied to PSRs resolved the immediate question of overtime pay, limiting the Court's inquiry to only one exemption left the other half of the administrative deference question unanswered: what happens when the administrative regulations are clear? As the analysis section of the case note explains, the Court avoided clearly demonstrating of the impact of its decision: reducing the authority of agencies to advance interpretations of ambiguous regulations in legal briefs, exactly when agency opinion is needed most.

124. The Ninth Circuit issued their opinion on Feb. 14, 2011. Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011), *aff'd*, 132 S. Ct. 2156 (2012). The Supreme Court scheduled the Second Circuit case for conference Feb. 18, 2011 and Feb. 25, 2001, denying cert on February 28th. *Docket No. 10-460*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-460.htm (last visited Jan. 26, 2013).

125. *See* Novartis Pharmaceuticals Corp. v. Lopes, 131 S. Ct. 1568 (2011) (denying the petition for writ of certiorari); Christopher v. SmithKline Beecham Corp., 132 S. Ct. 760 (2011).

126. 29 U.S.C. § 204 (2006) (naming the Department of Labor as the administrator of the FLSA).

127. *See Christopher*, 132 S. Ct. at 2165.

the Court held the Department's opinion in the brief about the outside salesman exemption was not entitled to controlling *Auer* deference, primarily because of the lack of "fair warning."[128] The concern of "*post hoc* rationalization"[129] or contriving a "convenient litigating position"[130] is not new. The administrative rulemaking process of requiring both notice and comment was created to specifically avoid it.[131] However, the Court did not need to expand this train of thought in order to decline to apply *Auer* deference.[132]

The Court could and should have refused to apply *Auer* deference by using the reasoning set out in *Gonzales*. The regulation defining sales analyzed under the outside salesman exemption merely parrots the language of the FLSA,[133] and the latter part of the regulation actually repeats the FLSA definition of sales.[134] Because the regulation only reiterates the FLSA, rather than expanding upon what the FLSA states, the Department's opinion was owed no deference under *Gonzales*.[135] The result of the reasoning in the *Christopher* decision is that it will limit agencies' previously-recognized ability to interpret ambiguous regulations in amici briefs when the interpretations are neither formally promulgated rules nor obviously based on the regulations themselves, defeating the purpose of this recognized ability to offer interpretations in briefs. This limitation is particularly unfortunate in a time of limited enforcement budgets given that amici briefs cost less money and utilize fewer resources.

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128. *Id.* at 2167.

129. Auer v. Robbins, 519 U.S. 452, 462 (1997).

130. Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 213 (1988).

131. *Christopher*, 132 S. Ct. at 2167 (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007)). Notice-and-comment procedures not only ensure fairness for regulated parties, but also operate as a check on agency-power. *See* Elana Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2262 (2001) (explaining how the APA basically operates as a check on executive power "by subjecting [agencies'] most important lawmaking mechanisms — rulemakings and (especially) adjudications — to stringent procedural requirements").

132. *Auer* deference is determined by a number of factors, or which "adequacy of notice to the regulated parties" is but one. *Id.* at 2167 (citing Martin v. OSHRC, 499 U.S. 144, 158 (1991) (identifying "adequacy of notice to regulated parties" as one factor relevant to the reasonableness of the agency's interpretation)).

133. The regulation actually references the statutory definition. 29 C.F.R. § 541.500(a)(1)(i) (2012) (explaining the employee must have a primary duty of "making sales within the meaning of section 3(k) of the Act").

134. *Compare* 29 U.S.C. § 203(k) (defining selling as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition"), *with* 29 C.F.R. § 541.501(b) (2012) ("Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.").

135. When an agency merely paraphrases statutory language in a regulation, instead of using its expertise and experience to formulate regulations which expand upon the statute, the agency does not acquire special authority to interpret its own words and is not owed any deference. Gonzales v. Oregon, 546 U.S. 243, 257 (2006).

In contrast, the administrative employee exemption demonstrates how an agency opinion in a legal brief might still be owed *Auer* deference after *Christopher*. An agency's opinion will still be owed controlling deference when the regulations are clear on their face. For example, the regulations defining the administrative employee exemption expand upon the FLSA's one time mention of employees "employed in a bona fide administrative capacity." From this, the Department created a three-part test analyzing salary, nature of the work, and the execution of that work.[136] The Department's regulations are very specific as to the requirements of an exempted administrative employee, demonstrating that the regulations were formulated with the Department's experience and expertise. In turn, this means the Department's opinion that PSRs are not exempt should be owed controlling deference.[137]

C. Outside Sales Employee Exemption Regulations Are Ambiguous, with Two Permissible Interpretations as Applied to PSRs, and Are Thus Inappropriate for Auer *Deference Under* Christopher

The Court properly found that the outside salesman exemption applied to PSRs. The Court noted the broad definition of "sales" and how PSRs "sell" in the only way "selling" can exist in the pharmaceutical industry.[138] The Court also noted other considerations, such as: how the nature of a PSR's work is similar to the work of a traditional outside salesman, that a PSR's salary and incentive pay do not warrant overtime pay, and that all the rationales for exempting an outside sales employee apply.[139] However, the regulations promulgated by the Department offered little guidance on these issues, making *Auer* deference inapplicable to the Department's amicus brief under *Gonzales*.[140]

1. The Court Mistakenly Denied Auer *Deference by Categorizing the Transfer of Title Interpretation as New When It Was Already Established and Reasonable Grounds Existed for Finding No Sale Occurs During PSR Detailing*

The regulations require outside salesmen to make "sales" and perform their work primarily outside the employer's place of business (both obvious from the title of the exemption set forth in the FLSA).[141] PSRs clearly meet the requirement of working primarily outside the employer's place of business, because PSRs mostly

136. *See* 29 C.F.R. § 541.200 (2012).

137. *See supra* Part III.C.

138. *Christopher*, 132 S. Ct. at 2174.

139. *Id.* at 2172–73, 2179.

140. *See supra* Part III.C.

141. *Compare* 29 U.S.C. § 213(a)(1) (2006), *with* 29 C.F.R. § 541.500(a) (2012).

work from home or are traveling to visit physicians.[142] During this time, PSRs are largely unsupervised, like a typical outside sales employee.[143] Therefore, the only issue for deliberation is whether PSRs "sell."[144]

It is not implausible to conclude that PSRs sell because selling is defined broadly by both the FLSA and regulations.[145] As the Court noted, the definitions conclude with a catch-all, "or other disposition," after a list of examples of selling.[146] However, it is a mischaracterization to say the Department's title transfer theory was new and that, therefore, companies had no notice. In fact, the title transfer theory was the only addition made to the FLSA's definition of "sales" in the regulatory definition.[147] While transfer of title may appear "flatly inconsistent" with a definition of sales that include consignment for sales, that is not the case. The Court cites *Sturm v. Boker* to support the proposition that "'consignment for sale' does not involve the transfer of title."[148] This statement oversimplifies the issue. There is ultimately a transfer of title in consignment for sale, just not between the consignor and the consignee, but between the consignor and the buyer when the purchase occurs.

A few reasons make it illogical for the Court to claim that the Department "[could] not salvage its [transfer of title] interpretation" by arguing that consignment for sale eventually results in a title transfer, because the same could be said of physician's nonbinding commitment.[149] First, this rationalization ignores the realities that a PSR's interactions with physicians are not equivalent to those interactions that occur under consignment for sale. In a consignment analogy, the most logical assignment of roles to each party would be that the manufacturer would be the consignor, the pharmacy would be the consignee, and the patient-purchaser would be the ultimate buyer. One might argue that PSRs are agents of the consignor and that physicians are consignees in the sense that the physicians operate in cooperation with pharmacists. However, the physician, the party

142. *See* 29 C.F.R. § 541.500(a)(2); 29 C.F.R. § 541.502 (2012).

143. *See* Jewel Tea Co. v. Williams, 118 F.2d 202, 207–08 (10th Cir. 1941) (explaining that a typical outside salesman works independently, receives commission as extra compensation, and "works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day").

144. *See supra* Part III.B.1.

145. *Compare* 29 U.S.C. § 203(k) (defining selling as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition"), *with* 29 C.F.R. § 541.501(b) (2012) ("Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.").

146. *Christopher*, 132 S. Ct. at 2171.

147. *See supra* notes 53–56 and accompanying text.

148. *Id.* at 2169 (citing Sturm v. Boker, 150 U.S. 312, 330 (1893)).

149. *Id.*

arguably being "sold" to by a PSR, is not involved in the title transfer. The consignees never receive title, and therefore no sale occurs between the PSR and physician under this analogy.

Second, the consignment relationship is not when the sale occurs; the sale (and title transfer) occurs when the consignee sells to the purchaser. Indeed, the *Sturm* Court specifically explained that the term of the consignment was that "the property was committed or entrusted to [the consignee from the consignor] for care or sale, and did not by any express or fair implication mean *the sale by the one or purchase by the other*."[150] In PSR detailing, prescription drugs are never "committed or entrusted" to physicians and are certainly not "sold" by physicians.[151] Put simply, pharmacies, not physicians, sell prescription drugs.

The argument that title must ultimately transfer for a "sale" to occur is not fatal to the Department's argument. In fact, this assertion *proves* the logic of the Department's argument that PSRs do not sell to physicians. (The author recognizes that this conclusion is counterintuitive given the context of the Department's other regulations and explanations of the outside salesman exemption, which appear to exempt PSRs from overtime pay.) Because the logic of the title transfer theory holds as applied to PSRs, the Court should have denied application of *Auer* deference using *Gonzales* rather than arguing the Department's opinion was a novel and erroneous interpretation.

2. The Court Accurately Concluded that PSRs Qualify as Outside Salesmen, a Permissible Result Because the Department's Regulations Were Ambiguous

The fact that the Department's title theory is neither new nor incorrect does not indicate that PSRs cannot reasonably be said to "sell" under the FLSA and the Department's ambiguous regulations. The argument set forth above merely demonstrates that the lack of "fair warning" emphasized by the Court was a misguided way to dismiss the Department's authority to interpret an ambiguous regulation. The broad statutory and regulatory definitions include "selling" as it exists in the pharmaceutical industry.

The Final Rule from the Department expansively defined sales by stating that the employer only has to prove "that the employee, *in some sense*, has made sales."[152] Furthermore, the promotional aspect of a PSR's job does not mean that a PSR is not selling. Detailing work is more than just promotional work to stimulate sales in general. Rather, detailing work is done to increase an individual PSR's personal

150. Sturm v. Boker, 150 U.S. 312, 326 (1893) (emphasis added).

151. Physicians, more correctly put, *recommend* drugs by prescribing them, at which point patients can choose to purchase or not purchase, and even if they do, pharmacist may substitute a generic version of the drug. *See supra* note 120.

152. 69 Fed. Reg. at 22162 (emphasis added).

success in obtaining a commitment to prescribe. Under the regulations, promotional work done in order to consummate an employee's *own* "sales" are exempt from overtime pay.[153]

The critical inquiry to determine if a PSR's promotional work is exempt depends upon whether the promotional work involves obtaining a commitment to prescribe, which impacts a PSR's commission. A physician's lack of participation in the transfer is irrelevant to the issue. The determinative factor under the Department's regulations is that PSRs are paid bonuses and commission based on their apparent success rates for obtaining commitments to prescribe in their respective regions. The Court also recognized PSRs received incentive compensation like traditional outside salesmen.[154]

PSRs are also not the type of employee the FLSA sought to protect because of their salary and bonus compensation structure.[155] Most PSRs earn sizeable incomes — as much as $100,000 a year — and are not "hourly workers" who work only forty hours a week.[156] The regulations explicitly state that a highly compensated employee is more likely to be exempt from overtime pay.[157] Furthermore, PSRs do not need overtime pay to fairly compensate them for their work. PSRs receive fair compensation for extra efforts through bonuses or commissions.[158] Instead of receiving overtime pay, a PSR receives commission for good job performance or for extra work rendered, determined by the level of drug sales in their respective region.[159]

153. *See* 29 C.F.R. § 541.503 (2012) ("Promotional work that is actually performed *incidental to* and *in conjunction with* an employee's own outside sales or solicitations is exempt work." (emphasis added)).

154. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2173 (2012).

155. *Id.*

156. *Christopher*, 635 F.3d at 388 (quoting Christopher v. SmithKline Beecham Corp., No. 08 Civ. 1498 (FJM), 2009 U.S. Dist. LEXIS 108992, at *5 (D. Ariz. Nov. 20, 2009)).

157. "A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties." 29 C.F.R. § 541.601 (c) (2012). While this is quote from the part of the regulations for a separate highly compensated employee exemption (and exemption that is related to the administrative employee exemption), the logic nonetheless applies to all exemptions. The FLSA was enacted in order to protect underpaid and overworked working class. *See* Roosevelt, *supra* note 40 (explaining how the FLSA will prevent "chiseling workers' wagers [and] stretching workers' hours"). If an employee is already being paid a large amount of money, that employees does not need overtime. PSRs earn an average of $91,500 a year, far above minimum wage. *In re Novartis*, 593 F. Supp. 2d at 642.

158. PSRs earn an average of $91,500, where generally fifteen percent to twenty-five percent of that consists of "incentive pay." *In re* Novartis Wage & Hour Litig., 593 F. Supp. 2d 637, 642 (S.D.N.Y 2009), *vacated and remanded by* 611 F.3d 141 (2d Cir. 2010), *abrogated by* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012).

159. Bonuses are based on subscriptions generated within a PSR's given region, but the data is not 100% accurate. It is impossible to track which physicians are responsible for the prescriptions and the employing pharmaceutical company only gets data from pharmacies which choose to report to them. *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 146 (2d Cir. 2010).

While the Court appropriately found that PSRs are outside salesmen for the purpose of the exemption, the Court dismissed the Department's authority with damaging consequences. Courts will now be able to easily dismiss agency opinion by merely pointing to the "fair warning" standard developed in *Christopher* simply because there are one or more permissible interpretations, and cite lack of notice as the basis for not granting controlling deference.

D. The Administrative Employee Exemption Is Not Ambiguous, Does Not Apply To PSRs, and Is Appropriate for Auer *Deference Under* Christopher

The administrative employee exemption, in most cases, will not apply to PSRs because most PSRs do not exercise sufficient autonomy as required by the regulations. Employers usually strictly confine a PSR's discretion in order to comply with the Federal Food, Drug, and Cosmetic Act.[160] Given the clear and unambiguous nature of the Department's regulations (and the resulting obvious "fair warning"), the *Christopher* Court would likely find the Department's interpretation deserving of *Auer* deference. However, granting controlling deference when an agency already has clear regulations is not important because the regulations already clearly set forth the agency's opinion.

1. Typical PSRs Do Not Meet All the Components of the Administrative Employee Exemption Clearly Defined by the Regulations

The regulations set out three components to the exemption: (1) a minimum salary of $455 per week, or $23,751 a year; (2) a primary duty existing of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, where the execution of the duty requires the employee to exercise discretion; and (3) independent judgment.[161] PSRs meet the minimum salary requirement, but are unlikely to satisfy the last two requirements.

To meet the primary duty requirement an employee must perform work directly related to assisting the running or servicing of the business, as opposed to manufacturing or production.[162] The regulations explicitly include work in functional areas such as advertising, marketing, and public relations.[163] The detailing work performed by PSRs can be categorized in one, if not all, of those categories. In fact, the Third Circuit found this requirement easily met, noting that PSRs are

160. 21 U.S.C. §§ 301 *et seq.* (2006).

161. 29 C.F.R. § 541.200 (2012).

162. 29 C.F.R. § 541.201(a) (2012).

163. 29 C.F.R. § 541.201(b).

required to form strategic plans designed to maximize sales in each PSRs' respective territory.[164]

The final requirement of discretion and independent judgment is more controversial. Employers restrain PSRs by limiting them to "scripts," "core messages," and pre-approved materials. Employers must limit the latitude of their employees because of limitations placed on the industry by federal law.[165] For this reason, PSRs are not allowed to deviate from the script given to them by employers.

Ultimately, whether a PSR exercises independent judgment is a fact-specific determination that needs to be made on a case-by-case basis. PSRs have discretion to determine which style and strategies to use with each physician, but it is not unusual for PSRs to go through extensive training provided by employers in order to learn many different kinds of skills and techniques.[166] The regulations stipulate that merely applying varying well-established skills does not constitute exercising independent judgment.[167] PSRs do have discretion about which physicians they meet with, how often, when, and where, but employers usually set minimum outreach requirements for which and how often physicians must be contacted.[168]

In conclusion, because the regulations set forth a clear and obvious test for the administrative employee exemption, the *Christopher* Court would likely find "fair warning" of the obvious outcome of the Department's interpretation and find *Auer* deference appropriate. However, such deference would be effectively meaningless because the Department's opinion is already clearly articulated by the regulations.

VI. Conclusion

By holding the outside salesman exemption applied to PSRs, the Supreme Court of the United States held in *Christopher v. SmithKline Beecham Corporation* that PSRs are not entitled to overtime pay.[169] While this is a permissible finding under the

164. Smith v. Johnson & Johnson, 593 F.3d 280, 285 (3d Cir. 2010) (explaining that the requirement was met because the business strategies developed by a PSR involve a high level of planning and foresight, and the strategic plan that Smith developed guided the execution of her remaining duties).

165. *See* Brief for the Secretary, *supra* note 17, at 3–4; *supra* notes 46–47.

166. *In re* Novartis Wage & Hour Litig., 611 F.3d 141, 145 (2d. Cir. 2010), *abrogated by* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) ("In the training program, a Rep is taught how to question physicians to determine why they may be hesitant about prescribing Novartis products and then to offer arguments to overcome their reluctance. Novartis instructs the Reps on four 'social styles' that a given individual may have in interacting with others and teaches the Reps how to tailor their presentations to a physician's particular social style. Novartis has also hired consultants to observe its most successful Reps and incorporate their techniques into the training program.").

167. 29 C.F.R. § 541.202(e) (2012) (mere "use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources" does not constitute an employee's exercise discretion or independent judgment).

168. *See, e.g.*, Brief for the Secretary, *supra* note 17, at 4–5.

169. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2174 (2012).

existing laws, there is a danger in the Court's reasoning for denying *Auer* deference. Courts may now use the "fair warning" standard as grounds for denying controlling deference to an agency for a reasonable interpretation of an ambiguous statute simply because there is more than one permissible interpretation, and ignore the opinion for "lack of notice." As a result, *Christopher* has the potential to degrade administrative agencies' previously-recognized ability to interpret ambiguous regulations in legal briefs.