Mortgage Underwriters: Deciphering Exempt Status Under the FLSA's Enigmatic Administrative Exemption

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I. INTRODUCTION

The Fair Labor Standards Act (FLSA) exempts "administrative" employees from its protection.[1] Yet, ambiguity persists about who constitutes an "administrative" employee for the purposes of the exemption,[2] which has specifically led to a federal circuit split about the exempt status of mortgage underwriters.[3] This circuit split was recently extended by

1. 29 U.S.C. § 213(a)(1) (2018) (explaining the three types of white-collar exemptions).

2. Blake R. Bertagna, *The "Miscellaneous Employee": Exploring the Boundaries of the Fair Labor Standards Act's Administrative Exemption*, 29 HOFSTRA LAB. & EMP. L.J. 485, 488 (2012) (explaining how, despite "honorable intentions" of Department of Labor changes, "confusion and litigation" surround the administrative exemption).

3. *See* Christopher T. Cognato et al., *Federal Appeals Court Rules Mortgage Underwriters Owed Overtime for Work in Excess of 40 Hours in Workweek*, BALLARD SPAHR LLP (July 11, 2017), http://www.ballardspahr.com/alertspublications/legalalerts/2017-07-11-ninth-circuit-panel-rules-mortgage-

the Ninth Circuit in *McKeen-Chaplin v. Provident Savings Bank*, which ruled that mortgage underwriters should not be exempt under the FLSA administrative exemption.[4]

Overall, this Note will advocate for a new analytical tool that should resolve any ambiguity over whether an employee qualifies for administrative exemption. Thus, this Note's purpose is broad, suggesting the creation of a new analytical instrument used for each case in which ambiguity arises. Because mortgage underwriters have recently fallen victim to the administrative exemption's ambiguity, however, this Note will illustrate the exemptions ambiguity and the suggested analytical tool throughout by focusing on resolving the mortgage underwriter's situation, ultimately suggesting a non-exempt status consistent with the Ninth Circuit's ruling in *McKeen-Chaplin*. However, this same analysis has a far broader application outside of this Note.

First, this Note will provide background on the FLSA, the administrative exemption and its ambiguous nature, and what led to the circuit split. Second, this Note will analyze the specific duties of mortgage underwriters using the administrative-production dichotomy and guidance provided by the Department of Labor (DOL), ultimately concluding that their duties, though non-dispositive, fail to meet the requirements for the administrative exemption. Finally, this Note will analyze the scope of the administrative exemption, concluding that the exemption should be construed narrowly to create a presumption of non-exempt status when ambiguity is present, in part because of negative social and health consequences caused by high levels of mandatory overtime work. Confusion about the application of the administrative exemption's requirements has persisted too long, and this Note should lead to more efficient resolutions for employers and courts in all situations where this confusion arises, focusing specifically on mortgage underwriter confusion.

II. BACKGROUND

This Note's background section will first discuss the history and purpose of the FLSA, will delve into the FLSA's administrative exemption, and will finally summarize the circuit split about the exempt status of mortgage underwriters under the administrative exemption.

A. The Fair Labor Standards Act

President Franklin Delano Roosevelt delivered a message to Congress in 1937, stating that "[o]ne third of our population . . . is ill-nourished, ill-clad, and ill-housed."[5] The Great Depression was decimating America's workforce and economy, motivating President Roosevelt's demand for Congress to create legislation that would aid "those who toil in factory and on farm."[6]

On June 25, 1938, Congress complied with the President's request by enacting the FLSA.[7] The FLSA was designed to avoid "labor conditions detrimental to the maintenance

underwriters-not-exempt-from-flsa-ot-requirements.aspx (explaining the circuit split on the exempt status of mortgage underwriters).

4. *Id.*; McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847, 849 (9th Cir. 2017) (holding that mortgage underwriters are entitled to FLSA overtime protection).

5. Bertagna, *supra* note 2, at 489 (alteration in original) (quoting 81 CONG. REC. H4983 (daily ed. May 24, 1937) (statement of President Franklin Delano Roosevelt)).

6. *Id.*

7. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 464,

of the minimum standard of living necessary for health, efficiency, and general well-being of workers."[8] Congress's twin aims in enacting the FLSA were to set a federal minimum wage and maximum hour requirement for American workers.[9] The FLSA specifically contains a provision requiring employers pay "a rate not less than one and one-half times the regular rate" to an employee for each hour worked in excess of the weekly statutory maximum.[10] The Department of Labor (DOL) regards the FLSA's overtime requirements as "among the nation's most important worker protections."[11]

Although the FLSA's overtime protections are crucial for blue-collar workers, the protections were not intended to apply to white-collar workers.[12] White-collar workers had a "higher salary, potential for promotion, and greater job security," thus precluding their need for FLSA wage and overtime protection.[13] In addition, "the type of work they performed was difficult to standardize to any time frame and could not easily be spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium."[14]

Specifically, the FLSA exempts from its protections "any employee employed in a bona fide executive, administrative, or professional capacity."[15] Attempting to decipher the scope of the three white-collar exemptions has been, and continues to be, an arduous task given their ambiguous character.[16]

B. The Administrative Exemption to the FLSA

1. Who's in Charge: DOL's Wage and Hour Division

Congress originally gave the Secretary of Labor power to define the FLSA white-collar exemptions.[17] The Secretary of Labor subsequently transferred that power to the Administrator of the DOL's Wage and Hour Division.[18] Thus, the DOL's Wage and Hour

474 (1939).

8. Craig A. Cunningham, Note, *Mind the Gap: A Legal and Economic Analysis of Stockbroker Overtime Eligibility Under the Fair Labor Standards Act*, 2009 U. ILL. L. REV. 1243, 1246 (2009) (quoting 29 U.S.C. § 202(a) (2006)).

9. Kathryn S. Crouss, Note, *Employment Law—Welcome to the Jungle: Salespeople and the Administrative Exemption to the Fair Labor Standards Act*, 34 W. NEW ENG. L. REV. 205, 209 (2012).

10. 29 U.S.C. § 207(a)(l) (2012).

11. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22,122, 22,122–23 (Apr. 23, 2004) (codified at 29 C.F.R. § 541 (2004)) [hereinafter Defining and Delimiting].

12. Crouss, *supra* note 9, at 209; *see* Cunningham, *supra* note 8, at 1246 (explaining inapplicability of FLSA protection to white-collar workers).

13. Crouss, *supra* note 9, at 210.

14. Steven I. Locke, *The Fair Labor Standards Act Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 BARRY L. REV. 1, 3 (2009).

15. 29 U.S.C. § 213(a)(1) (2012).

16. *See* Bertagna, *supra* note 2, at 519 (explaining the "perplexity of the administrative exemption"). Courts struggle deciphering the white-collar exemptions primarily because of how similar the names of the exemptions are and how vague the criteria are for an employee to satisfy an exemption. *Id.*

17. 29 U.S.C. § 213(a)(1)(2012).

18. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 29 C.F.R. § 541(a) (2004); Mark J. Ricciardi & Lisa G. Sherman, *Exempt or Not Exempt Under the Administrative Exemption of the FLSA . . . That is the Question*, 11 LAB. LAW. 209, 210

Division, "created pursuant to section 4 of the FLSA, has primary responsibility for enforcing and administering" the FLSA.[19]

The DOL has defined the FLSA's white-collar exemptions by periodically issuing both "regulations" and "interpretations."[20] Regulations, unlike interpretations, "are entitled to great weight and have been held to carry the full force of law."[21] Despite their controlling force, the DOL's regulations have been unable to resolve the ambiguity behind the FLSA's white-collar exemptions, especially the administrative exemption.[22]

2. Evolution of the Administrative Exemption's Requirements

In 1940, the DOL issued its first regulation, known as the "Stein Report," defining the requirements for the FLSA's white-collar exemptions.[23] Many revisions have occurred since the initial 1940's regulation, though the primary "structural framework" has remained.[24] The requirements include:

> (1) the employee must be paid a salary, not an hourly wage (the salary-basis test); (2) the amount of the employee's salary must indicate managerial or professional status (the salary-level tests); and (3) the employee's job duties and responsibilities must involve managerial or professional skills (the duties tests).[25]

The administrative exemption's requirements reflect these general requirements.[26] Prior to 2004, the statutory "short test" for the administrative exemption required that the employee (1) receive compensation on a salary or fee basis of at least $250 per week; (2) have a primary duty that "involve[s] office or nonmanual . . . work directly related to management"; and (3) exercise "discretion and independent judgment" in their work.[27]

However, courts thought these requirements for the administrative exemption were "anachronistic, difficult to apply, and burdened employers with the threat of massive liability."[28] If an employer wrongfully treated an employee as exempt, they would be on

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(1995).

19. Ricciardi & Sherman, *supra note 18,* at 210.

20. *Id.*

21. *Id.*

22. *See* Bertagna, *supra* note 2, at 500 (discussing the consistent confusion behind the administrative exemption requirements despite updated DOL regulations). The DOL's regulations defining the white-collar exemptions have proven ineffective at diminishing ambiguity because the exemptions were created with "few definitional boundaries" from the beginning and with "little meaning to restore." *Id.*

23. *See id.* at 491–93 (explaining the initial regulation promulgated by the DOL).

24. *Id*. at 493.

25. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-99-164, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORKPLACE 2 (1999), http://www.gao.gov/archive/1999/he99164.pdf.

26. *See* Crouss, *supra* note 9, at 210–11 (discussing the requirements to qualify for the FLSA's administrative exemption).

27. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 7 tbl. 1.

28. Regan C. Rowan, Comment, *Solving the Bluish Collar Problem: An Analysis of the DOL's Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. J. LAB. & EMP. L. 119, 125 (2004) (explaining challenges posed by old administrative exemption requirements); *see* Donovan v. Kentwood Dev. Co., 549 F. Supp. 480, 488 (D. Md. 1982) ("The case . . . is problematic, as FLSA cases often are, because of the lack of precision . . . It is clear . . . this Court must simply do the best it can.").

the hook for a substantial amount of back pay and liquidated damages.[29]

Because the old administrative exemption requirements were difficult to apply,[30] the DOL promulgated new rules in 2004.[31] The DOL's 2004 regulation defined an exempt administrative employee as any employee

> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[32]

The new rule maintains the salary basis requirement, but it raises the minimum salary level to $455 per week, subjecting a greater number of people to FLSA overtime protection.[33] DOL's 2004 regulation also simplified the duties test for the administrative exemption by "defining individual responsibilities and by removing overly broad or vague requirements."[34]

Although the DOL's 2004 regulation was perceived as a step toward bolstering the effectiveness of the administrative exemption,[35] the Obama administration felt the salary level requirement was still too low.[36] DOL attempted to amend its 2004 rule by issuing another regulation in 2016 that would have increased the administrative exemption's salary level requirement from $455 to $913 per week.[37] Despite DOL efforts to increase the salary level requirement, the 2016 rule was met with an injunction blocking its implementation.[38] Thus, for now, DOL's 2004 regulation remains the controlling rule governing the FLSA's administrative exemption.[39]

3. The Administrative Exemption's Ambiguity

The administrative exemption is arduous for employers and judges to apply. Since the first DOL regulation defining the FLSA's administrative exemption was issued in 1940,

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29. Rowan, *supra* note 28, at 126.

30. *Id.* at 125.

31. *See* Defining and Delimiting, *supra* note 11, at 22,262 (listing the new, up-to-date rules for the administrative exemption found in 29 C.F.R. § 541.200 (2004)).

32. 29 C.F.R. § 541.200 (2004).

33. *Id.*

34. Rowan, *supra* note 28, at 133; *see* Defining and Delimiting, *supra* note 11, at 22,262 (listing new requirements for the administrative exemption).

35. *See, e.g.*, Rowan, *supra* note 28, at 132–38 (explaining the effectiveness of the 2004 rules).

36. *See* Martha C. White, *Obama's Overtime Law Failed, But Still Helped Thousands*, CNBC (Dec. 26, 2016), https://www.cnbc.com/2016/12/26/obamas-overtime-law-failed-but-still-helped-thousands.html (explaining purpose of DOL's 2016 regulation).

37. *See* Manatt Phelps & Phillips L.L.P., *Back to the Drawing Board for White Collar Exemption*, LEXOLOGY (Aug. 10, 2017), https://www.lexology.com/library/detail.aspx?g=b39a153d-df6f-42ac-a93a-dd0c0d12e7ba%2520 (explaining proposed changes in 2016 regulation).

38. Gary S. Batke, *Obama's Overtime Rule Struck Down; Trump's Department of Labor Starts Over*, COLUMBUS BUS. FIRST (Oct. 1, 2017), https://www.bizjournals.com/columbus/news/2017/10/01/obama-s-overtime-rule-struck-down-trump-s.html.

39. *See* 29 C.F.R. § 541.200 (2004) (discussing the current rules for the administrative exemption).

the "industrial profile of the American economy has shifted dramatically."[40] The American economy is primarily service-based today as opposed to manufacturing-based during the Great Depression.[41] Because of this shift, many so-called white-collar workers are likely "to share class traits typically associated with their blue-collar counterparts."[42] The Second Circuit has commented on this shift, stating that "[t]he line between administrative and production jobs is not a clear one."[43] Overall, the increasingly blurred line between white-collar and blue-collar workers has made it difficult to apply the exemptions requirement.[44]

While the DOL's 2004 regulation may have modernized the administrative exemption's requirements to a degree,[45] "confusion and complexity" persists with these requirements.[46] The difficulty in determining a worker's exempt status under the FLSA's administrative exemption is exemplified by the present circuit split about the exempt status of mortgage underwriters.[47]

C. Circuit Split: Exempt Status of Mortgage Underwriters Under the Administrative Exemption

The federal circuit courts have toiled over whether mortgage underwriters qualify for the administrative exemption to FLSA overtime protection.[48] Mortgage underwriters are bank employees who generally (1) analyze "mortgage loan applications"; (2) "evaluate[] loans in order to maximize organizational profit and minimize risk or loss"; and (3) "assesses risks to determine approval status" of mortgage loan applications.[49] An employer or court classifying mortgage underwriters as exempt or non-exempt face difficulty because of "the ambiguity of the regulatory tests which reviewing courts have struggled to apply."[50] The Sixth Circuit has held that mortgage underwriters qualify for the administrative exemption, and are thus exempt from FLSA overtime protection.[51] Conversely, the Second Circuit and Ninth Circuit have held that mortgage underwriters are non-exempt under the administrative exemption.[52]

1. Case Holding Mortgage Underwriters Exempt from FLSA Protection Under

40. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 1.

41. *Id.*

42. Rowan, *supra* note 28, at 120.

43. Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 532 (2d Cir. 2009).

44. *See* Crouss, *supra* note 9, at 211–12 ("As the industrial landscape changed, the specific white-collar exemptions . . . became more difficult to administer as well.").

45. *See* Rowan, *supra* note 28, at 138 (discussing the "increased clarity" provided by the DOL's 2004 regulation).

46. *See* Bertagna, *supra* note 2, at 500 (discussing the consistent confusion behind the administrative exemption requirements despite updated DOL regulations).

47. *See* Cognato et al., *supra* note 3 (explaining the circuit split over the exempt status of mortgage underwriters under the administrative exemption).

48. *See id.* (explaining the difficulty with determining the exempt status of mortgage underwriters).

49. *Mortgage Underwriter I*, SALARY.COM, https://swz.salary.com/salarywizard/Mortgage-Underwriter-I-Job-Description.aspx (last visited Jan. 7, 2018).

50. Crouss, *supra* note 9, at 216; *see* Bertagna, *supra* note 2, at 500 (discussing the consistent confusion behind the administrative exemption requirements).

51. Lutz v. Huntington Bancshares, Inc., 815 F.3d 988, 990 (6th Cir. 2016).

52. Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 537 (2d Cir. 2009); McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847, 849 (9th Cir. 2017).

Administrative Exemption

In *Lutz v. Huntington Bancshares, Inc.*, the Sixth Circuit held that mortgage underwriters were administrative employees exempt from FLSA protection.[53] As residential loan-underwriters, the plaintiffs' duties included ensuring the accuracy of information in loan applications and deciding "whether the customer qualifies for the desired loan."[54] The plaintiffs applied guidelines provided to them by the bank to determine whether a loan applicant qualified for a specific loan.[55] Yet, the Sixth Circuit indicated that the plaintiffs' discretion went beyond applying prescribed guidelines, such as their ability to make "counteroffers" by recommending a different type of loan if applicants fail to initially qualify.[56]

The Sixth Circuit used the "administrative-production dichotomy" to analyze whether the plaintiffs' duties qualified for the administrative exemption.[57] This dichotomy is used to distinguish between administrative employees who assist "with the running or servicing of the business" and production employees who are integral to the production activity of the business.[58] In applying the dichotomy, the Sixth Circuit concluded that mortgage underwriter's duties are administrative because they "perform work that services the Bank's business" as opposed to its principal production activity of selling loans.[59] The Sixth Circuit came to this conclusion because mortgage underwriters are not responsible for selling the loans directly.[60]

Beyond application of the administrative-production dichotomy, the Sixth Circuit supported its holding by explaining how the duties of mortgage underwriters parallel the duties of other "positions deemed administrative by the DOL regulations."[61] The Sixth Circuit also supported its holding by claiming that the discretion of mortgage underwriters reaches beyond merely applying proscribed guidelines to loan applications.[62]

2. Cases Holding Mortgage Underwriters Non-Exempt from FLSA Protection Under Administrative Exemption

In *Davis v. J.P. Morgan Chase & Co.*, the Second Circuit held that mortgage underwriters are non-exempt under the administrative exemption.[63] As in *Lutz*,[64] the plaintiffs were employed as underwriters whose main duty was to apply loan application information to standards proscribed by J.P. Morgan Chase (Chase) to determine whether

53. *Lutz*, 815 F.3d at 990.

54. *Id.*

55. *Id.* at 920–91.

56. *Id.* at 991.

57. *Id.* at 993.

58. *Lutz*, 815 F.3d at 993.

59. *Id.* at 995. "Here, while the underwriters' duties touch on Huntington's principal production activity of selling loans, the underwriters exist primarily to service the Bank by advising whether it should accept the credit risk posed by its customers." *Id.* at 993.

60. *Id.* at 994.

61. *Id.* at 994–95 ("The job duties of Huntington's underwriters also resemble those duties of administratively exempt employees in the financial-services industry.").

62. *Lutz*, 815 F.3d at 997–98.

63. Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 537 (2d Cir. 2009) (noting that the cases ruling otherwise are distinguishable).

64. Lutz v. Huntington Bancshares, Inc., 815 F.3d 988, 990 (6th Cir. 2016).

an applicant qualified for his or her desired loan.[65] The Second Circuit also used the administrative-production dichotomy test to assess the exempt status of the underwriters in *Davis* under the administrative exemption.[66]

In its analysis, the Second Circuit initially recognized "[t]he line between administrative and production jobs is not a clear one," yet the determination is based on the nature of the employee's *duties*.[67] After deducing from DOL opinion letters a distinction between administrative and production jobs based on whether the employee engaged in advisory duties or loan sales, the Second Circuit concluded that the underwriter's duties were more related to the "'production' of loans—the fundamental service provided by the bank."[68] The Second Circuit reasoned that (1) an underwriter's duties are "not related either to setting 'management policies' nor to 'general business operations'"; (2) an underwriter's productivity is quantifiable, an indication they were meant to be subject to FLSA overtime protection; and (3) an underwriter's work is "primarily functional rather than conceptual" with no involvement in the "strategy or direction of the business."[69]

The Ninth Circuit followed the Second Circuit's lead by holding mortgage underwriters non-exempt from FLSA protection under the administrative exemption in *McKeen-Chaplin v. Provident Savings Bank*.[70] The Ninth Circuit, also using the administrative-production dichotomy, looked at the duties of mortgage underwriters at Provident Savings Bank (Provident) to determine their exempt status.[71] Based on the cumulative duties of mortgage underwriters at Provident, the court concluded that they are "responsible for production, not administrators who manage, guide, and administer the business."[72]

The Ninth Circuit supported its conclusion with three core points. First, the administrative exemption should be narrowly construed.[73] Thus, ambiguity should always be resolved in favor of non-exempt classification.[74] Second, mortgage underwriters predominately deal with a bank's market offerings as opposed to dealing with "internal administration."[75] The court argued that mortgage underwriters' lacked involvement in how their bank was operated and had heavy involvement in the loan sale process.[76] Third, the Ninth Circuit distinguished mortgage underwriters from other financial employees deemed to be administrative by DOL regulations.[77] The court stated that an administrative

65. *Davis*, 587 F.3d at 530–31.

66. *Id.* at 531–32 ("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.").

67. *Id.* at 532.

68. *Id.* at 534.

69. *Id.* at 534–35.

70. McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847, 849 (9th Cir 2017).

71. *See id.* at 851–52 (explaining administrative-production dichotomy).

72. *Id.* at 854. The Ninth Circuit's analysis focused on whether mortgage underwriters were more involved with Provident's market offerings and loan sales as opposed to running the business. *Id.* at 851.

73. *Id.* at 850 ("Exemptions are to be construed narrowly.").

74. *See id.* ("Thus, FLSA 'is to be liberally construed to apply to the furthest reaches consistent with Congressional direction' . . . .") (quoting Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1124–25 (9th Cir. 2002)).

75. *McKeen-Chaplin*, 862 F.3d at 851.

76. *See id.* at 852–53 ("They were not at the heart of . . . business operations.") (quoting Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 535 (2d Cir. 2009)).

77. *Id.* at 853.

financial employee's duties include "advising" or "promoting" financial products, tasks not within the scope of mortgage underwriters' duties.[78]

III. ANALYSIS

This Note's analysis will first explain in greater detail the administrative-production dichotomy used by each of the federal circuit courts to determine whether an employee has fulfilled the duties test, and particularly prong one, required by the administrative exemption. Next, this Note's analysis will delve into the elements of the administrative exemption's duties test, applying both to the specific duties of mortgage underwriters. Finally, this Note's analysis will review the intended scope of the administrative exemption. Ultimately, this Note's analysis will conclude that mortgage underwriters should be classified as non-exempt under the administrative exemption.

A. The Administrative-Production Dichotomy

Since the creation of the FLSA, "the DOL has indicated a clear distinction between 'production' and 'administration' work."[79] Consistent with this notion, courts have adopted the administrative-production dichotomy as a useful tool for exploiting this distinction and assessing the exempt status of employees under the administrative exemption. The administrative-production dichotomy was used as a tool by each circuit court involved in this circuit split,[80] and thus the Supreme Court is unlikely to reject its application.[81] In its 2004 regulation, DOL expressed the continued usefulness of the administrative-production dichotomy, stating "the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption."[82] Yet, the DOL has also indicated that the dichotomy should not be a dispositive test.[83] Rather, the dichotomy should be used as "one piece of the larger inquiry" in assessing an employee's exempt status under the administrative exemption.[84] Despite the dichotomy's potential for inconsistent application[85] and non-dispositive character,[86] it

78. *Id.*; Administrative Exemption Examples, 29 C.F.R. § 541.203(b)(2014).

79. Crouss, *supra* note 9, at 228 (explaining the administrative-production dichotomy's usefulness). To be an administrative employee, the employee's primary duty must involve "the running of a business, and not merely . . . the day-to-day carrying out of its affairs." Bratt v. Cty. of L.A., 912 F.2d 1066, 1070 (9th Cir. 1990). A production employee's primary duty is mostly related to the business's marketplace offerings. *McKeen-Chaplin*, 862 F.3d at 851.

80. Davis, 587 F.3d at 532; Lutz v. Huntington Bancshares, Inc., 815 F.3d 988, 993 (6th Cir. 2016); *McKeen-Chaplin*, 862 F.3d at 851–52.

81. Federal circuit courts have consistently used the dichotomy, and the DOL has consistently praised the dichotomy's utility, supporting this conclusion. *See supra* note 79; Defining and Delimiting, *supra* note 11, at 22,141 (providing support for the utility of the administrative-production dichotomy).

82. Defining and Delimiting, *supra* note 11, at 22,141 (discussing how the administrative-production dichotomy should be used).

83. *Id.* (discussing the non-dispositive character of the administrative-production dichotomy).

84. *Id.*

85. *See Lutz*, 815 F.3d at 990(2016) (explaining how mortgage underwriters are exempt based on administrative-production dichotomy analysis); *see also Davis*, 587 F.3d at 537 (explaining how mortgage underwriters are non-exempt based on administrative-production dichotomy analysis).

86. *See* Defining and Delimiting, *supra* note 11, at 22,141 (discussing the non-dispositive character of the administrative-production dichotomy).

remains effective at distinguishing between administrative and production employees.[87] Thus, the administrative-production dichotomy will be the foundational tool used in this Note's analysis to assess whether mortgage underwriters' duties fulfill the duties test required for the administrative exemption. However, this Note will almost exclusively use this tool for analyzing prong one of the duties test.[88]

B. The Duties Test

Mortgage underwriters' exempt status depends on whether they fulfill the exemption's duties test because they satisfy the salary-basis and salary-level tests for the administrative exemption.[89] The administrative exemption's duties test requires employees to (1) engage in "the performance of office or non-manual work directly related to the management or general business operations" and (2) engage in "the exercise of discretion and independent judgment with respect to matters of significance."[90]

1. Directly Related to the Management or General Business Operations

Although courts may find prong one analysis arguable, they should ultimately hold that mortgage underwriters fail to fulfill this prong. This first "direct relation" requirement is met if the employee is involved with "running or servicing of the business" as distinguished from, for example, "working on a manufacturing production line or selling a product . . . ."[91] Examples of work related to management or general business operations include tax, finance, accounting, and marketing.[92] DOL has also stated:

> 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.[93]

Mortgage underwriters are financial employees who check loan applicants' credit history, income level, and other financial information to assess the risk an applicant would

87. *See* Crouss, *supra* note 9, at 232 (explaining the "need for a distinguishing" test for employees with various duties).

88. The administrative-production dichotomy is not used to assess the second prong of the duties test because the dichotomy's function is to distinguish between the *types of duties* of administrative and production employees, not their discretion levels.

89. Mortgage underwriters are paid on a salary-basis as opposed to a wage-basis, and they are paid the requisite $455 per week required by the administrative exemption. *Mortgage Underwriter I*, SALARY.COM, https://swz.salary.com/SalaryWizard/Mortgage-Underwriter-I-Salary-Details.aspx (saying the average salary of underwriters is $53,066, clearly over the threshold) (last visited Mar. 29, 2019).

90. Defining and Delimiting, *supra* note 11, at 22,262.

91. 29 C.F.R. § 541.201(a) (2004).

92. 29 C.F.R. § 541.201(b) (2004).

93. 29 C.F.R. § 541.203(b) (describing examples of employees who qualify for the administrative exemption).

pose if the applicant were approved for their desired loan.[94] Thus, a mortgage underwriter's duties include analyzing customers' financial information, a task the DOL has indicated supports exempt status under the administrative exemption.

However, beyond analyzing loan applicants' financial information, mortgage underwriters do not perform any of the other tasks listed by the DOL as typical for exempt financial employees. Mortgage underwriters do not advise applicants on the advantages and disadvantages of loan types, do not market their employer's loans, and do not determine what loan would best meet an applicant's needs. DOL's list of indicative duties of normally-exempt financial employees appears to focus on direct, advisory contact between employee and customer, an element of employment that mortgage underwriters generally lack. Because mortgage underwriters do appear to perform at least one of the tasks, however, the analysis for determining whether they are related to management or general business operations becomes ambiguous. This Note will now apply the administrative-production dichotomy to further analyze whether mortgage underwriters fulfill prong one of the duties test and to reduce this ambiguity.

Mortgage underwriters are pivotal to a bank's operations. However, DOL has indicated the distinction between administrative and production employees is based on their duties as opposed to the significance of their role in the business.[95] The tasks mortgage underwriters perform do not directly lend themselves to running or servicing the business. Rather, their duties lean toward the production side of operations. Banks do not manufacture tangible items, and thus there is no visible production line to easily discern who is an administrative or production employee. However, a primary production activity of a bank is selling loans.[96] Mortgage underwriters' duties revolve around effectively and efficiently furthering the loan sale process by determining whether an applicant should be approved for a loan.

Although not conclusive, a high-level analysis of mortgage underwriters' primary duties indicates they are more involved with assisting in the bank's production as opposed to management and general business operations. DOL has noted that conclusive classification as a production employee is not required for non-exempt status, stating that "[w]ork does not qualify as administrative simply because it does not fall squarely on the production side of the line."[97] This statement indicates that an employee who is primarily on the production side of the business can achieve non-exempt status even though administrative-production dichotomy analysis left lingering ambiguity. This is the exact situation in which mortgage underwriters find themselves.

Mortgage underwriters are also similar in nature to mortgage loan officers, a position DOL has ruled to be non-exempt because it lacks a primary duty related to management or

94. *See* Angela Colley, *What Is an Underwriter: The Unseen Approver of Your Mortgage*, REALTOR (Feb. 26, 2014), https://www.realtor.com/advice/finance/the-underwriter-unseen-approver-of-your-mortgage/ (discussing mortgage underwriter duties).

95. Defining and Delimiting, *supra* note 11, at 22, 262–63 ("The phrase 'directly related to the management or general business operations' refers to the type of work performed by the employee.") (Codified in 29 C.F.R. § 541.203 (2004)).

96. *See* Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 535 (2d Cir. 2009) (explaining how creating "loans and other financial services" for sale is a major production activity of banks).

97. Administrator's Interpretation, Docket No. 2010-13, at 3 (Dep't of Labor Mar. 24, 2010), *available at* https://www.dol.gov/whd/opinion/adminintrprtn/flsa/2010/flsaai2010_1.pdf (discussing the application of the administrative-production dichotomy and exempt status of loan officers under the administrative exemption).

general business operations.[98] Mortgage loan officers also play a major role in a bank's loan sale process, collecting financial information from potential customers and identifying "which loan products may be offered to customers based on the financial information provided."[99] DOL explained in a 2010 opinion letter that engaging in tasks "so that a sale can be made, constitutes the production work of an employer engaged in selling . . . mortgage loan products."[100] Though mortgage underwriters do not directly sell the loan products to customers like mortgage loan officers, they are still heavily involved in the loan sale process when they analyze applicants' financial information to assess whether they qualify for the loan. Essentially, mortgage underwriters are employed by banks engaged in selling mortgage loans, and the loan sale process is the production work of these banks.[101] Although the roles involve different tasks, both mortgage underwriters and non-exempt mortgage loan officers are most prominently involved in the loan sale process. Thus, the DOL, based on their 2010 opinion letter dealing with mortgage loan officers, are also likely to find that mortgage underwriters are too heavily involved with the loan sale process, the bank's production work, thereby lacking a role in management or general business operations.

Mortgage underwriters do not primarily perform management or business tasks. Despite arguably non-dispositive results following application of the administrative-production dichotomy and DOL guidance, mortgage underwriters' lack of advisory contact with loan applicants, an indicative trait of an exempt financial employee, their production-leaning duties, and their similarity with non-exempt mortgage loan officers are factors that lend themselves to this conclusion. Thus, despite awareness that this conclusion is potentially non-dispositive given an underwriters' mixture of production and administrative tasks and disagreement by the Sixth Circuit, future courts assessing fulfillment of prong one of the duties test should find that mortgage underwriters are production employees who lack a primary duty related to management or general business operations.

2. Exercise of Discretion and Independent Judgment with Respect to Matters of Significance

An underwriter's fulfillment of prong two of the duties test is likely a case-by-case factual inquiry depending on the strictness of the bank's underwriting standards. According to the code, "the exercise of discretion and independent judgment involves the comparison and the evaluation of possible course[s] of conduct, and acting or making a decision after the various possibilities have been considered."[102] The code also defines "matters of significance" as referring "to the level of importance or consequence of the work performed."[103]

Possessing discretion and independent judgment indicates an employee can make

98. *See id.* at 1 (discussing why mortgage loan officers are non-exempt under the administrative exemption).

99. *Id.* at 2.

100. *Id.* at 6.

101. *Id.*

102. 29 C.F.R. § 541.202(a) (2004) (defining what "exercise of discretion and independent judgement" means).

103. *Id.*

decisions "free from immediate direction or supervision,"[104] though an employee can possess discretion and independent judgment "even if their decisions . . . are reviewed at a higher level."[105] To fulfill the element, an employee's duties must extend beyond "the use of skill in applying well-established techniques, procedures or specific standards" provided by the employer.[106]

Mortgage underwriters generally apply credit guidelines provided by a third-party, typically either their employer or an agency (such as the Federal Housing Agency).[107] Based on DOL regulations, this core duty is not discretionary, nor does it employ independent judgment on matters of significance. It is merely the use of skill in applying well-established standards. Yet, the Sixth Circuit and others have indicated that a mortgage underwriter's discretion extends beyond application of proscribed guidelines.[108] The Sixth Circuit specifically stated that proscribed guidelines sometimes give mortgage underwriters a "choice among options," and sometimes need to "rely on personal experience or judgment to make a decision."[109] This language indicates mortgage underwriters potentially make decisions after comparing various courses of action, providing support that their discretion may fall within DOL's defined scope for this element. From this view, it appears the mortgage underwriter's discretionary power beyond prescribed guidelines, such as choosing a course of action from multiple alternatives, is a key factor in whether they fulfill this element of the duties test. The Sixth Circuit's broad conclusion that underwriters always can choose between options is misguided, however, because of stricter underwriting rules implemented by many banks following the financial crisis of the early 2000s.[110]

Pertinent to this analysis is also the list of duties delineated in the code that are indicative of having a sufficient "discretion and independent judgment with respect to matters of significance."[111] Most of the indicative duties revolve around the employee having a substantial role in operations.[112] Though mortgage underwriters are not "involved in planning . . . business objectives" and do not appear to have "authority to formulate . . . or implement management policies," an argument may be made that their "work affects

104. 29 C.F.R. § 541.202(c) (2004).

105. *Id.*

106. 29 C.F.R. § 541.202(e) (2004). Some of the determining factors in whether an employee has the requisite discretion include: 1) whether the employee can "formulate . . . or implement management policies"; 2) whether the employee can "deviate from established policies . . . without prior approval"; and 3) "whether the employee is involved in planning . . . business objectives." 29 C.F.R. § 541.202(b).

107. Lutz v. Huntington Bancshares, Inc., 815 F.3d 988, 991 (6th Cir. 2016) (explaining mortgage underwriter duties); *see* Brandon Cornett, *How the Mortgage Underwriting Process Works*, HOME BUYING INST., http://www.homebuyinginstitute.com/homebuyingtips/2010/02/what-is-mortgage-underwriting-and-how.html (last visited Sept. 25, 2017) (explaining sources of underwriting guidelines).

108. *Lutz*, 815 F.3d at 991; *see* Howard M. Knee, *Are Mortgage Underwriters Exempt Employees?*, DSNEWS, http://www.dsnews.com/news/04-16-2014/mortgage-underwriters-exempt-employees (last visited Sept. 25, 2017) (explaining how underwriter discretion is much more than just applying proscribed guidelines).

109. *Lutz*, 815 F.3d at 991.

110. Jack Pritchard, *Why Many Good Mortgage Loans Are Not Being Made*, MORTGAGE PROFESSOR (Oct. 25, 2014), https://www.mtgprofessor.com/A%20-%20Qualifying/Why-Good_Loans_Are_Not_Being_Made.html (explaining the strict underwriting requirements following the financial crisis, stating that "the major role of underwriters today is to check for conformity with the rules").

111. 29 C.F.R. § 541.202(a) (2004).

112. 29 C.F.R. § 541.202(b) (2004) (discussing duties that can support the requisite discretion, most having some relation to a substantial role in operations).

business operations to a substantial degree" because of the impact underwriters may have on a bank's business by approving or denying loan disbursements.[113] Mortgage underwriters also arguably "resolves matters of significance on behalf of management,"[114] such as whether a loan applicant is worth the bank's risk. Since mortgage underwriters potentially carry out some of the duties delineated by DOL as indicating the requisite discretion, their fulfillment of this element of the duties test is ambiguous. Yet, circuit courts involved in this circuit split have consistently focused their analysis for this element on how far the plaintiff underwriters' discretion in approving mortgage applications extended beyond strictly adhering to credit guidelines provided to them by a third-party.[115] Thus, despite mortgage underwriters potentially satisfying some of the minor duties indicating requisite discretion based on DOL regulation, courts have indicated fulfillment of this element is likely contingent upon whether the individual mortgage underwriter's discretion extends far enough beyond merely applying prescribed guidelines provided by third parties. Courts will likely not be able to resolve this issue without ambiguity, however, because many banks restrict underwriter discretion and differ on the level of control they provide to underwriters following the recent financial crisis.[116] Though stabilization of the economy led several banks to loosen underwriting standards, some banks have maintained strict standards.[117]

In conclusion, because of courts' consistent lack of focus on any factor other than an underwriter's ability to deviate from guidelines when assessing discretion, fulfillment of this element is likely contingent upon the underwriter's ability to deviate. Mortgage underwriters have varying levels of ability to deviate from proscribed guidelines when deciding to approve or deny a mortgage application depending on the strictness of their bank's underwriting standards. Thus, an underwriter's fulfillment of this element is currently a case-by-case determination, though a more efficient resolution process should be used by future courts that is consistent with the congressional intent of the administrative exemption.[118] Regardless, both prongs of the administrative exemption's duties test must be satisfied to be an exempt administrative employee, and because this Note concluded that mortgage underwriters fail to satisfy prong one of the duties test, though the results are not completely dispositive, courts should find that they fail to satisfy the duties test overall.

C. Scope of the Administrative Exemption

The administrative exemption was intended to be construed narrowly.[119] Recognizing

113. *Id.* The quoted phrases are indicative of having the requisite discretion and independent judgment for exempt status.

114. *Id.* This quoted duty is also listed by the DOL as indicative of an employee with requisite discretion for exempt status.

115. *See* Lutz v. Huntington Bancshares, Inc., 815 F.3d 988, 996–98 (6th Cir. 2016) (analyzing whether the plaintiff underwriters had the ability to "waive or deviate from the Guidelines in certain instances"); *see* McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847, 853 (9th Cir. 2017) (explaining how underwriters fail the second prong of the duties test because they lack the extended ability to deviate from provided guidelines possessed by claims adjusters, an example of an exempt financial employee).

116. Pritchard, *supra* note 110.

117. Jon Prior, *Fewer Banks Tighten Mortgage Underwriting Standards*, HOUSINGWIRE (June 28, 2012), https://www.housingwire.com/articles/fewer-banks-tighten-mortgage-underwriting-standards (discussing banks' underwriting standards following the financial downturn).

118. The recommendation section of this Note proposes a more efficient resolution process.

119. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

the intended narrow scope can aid judges in resolving situations where application of the administrative exemption's requirements and the administrative-production dichotomy produces arguably non-dispositive results. Such is the case with mortgage underwriters.

In 1960, the U.S. Supreme Court stated that the FLSA "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit."[120] Essentially, construing FLSA exemptions narrowly creates a presumption, rebuttable by the employer, that the employee does *not* qualify for an exemption.[121]

The Second and Ninth Circuits followed this framework in recent decisions by interpreting FLSA exempt status ambiguity in favor of the employee.[122] Construing the FLSA exemptions narrowly would cause more employees to attain overtime protection, thus making it less likely employers will force their employees to work overtime. Yet, the narrow character of the FLSA exemptions has been "distorted" to a degree over time by the "vague and expansive character of the administrative exemption."[123] A greater number of employees are now working without overtime protection because of the trend toward an expansive view of the FLSA's white-collar exemptions.[124] This trend has negative social[125] and health[126] implications that can be mitigated by courts maintaining an extremely narrow interpretation of the FLSA exemptions.

High levels of overtime work have negative social implications not only for workers, but for their families and communities as well.[127] Families "burdened by longer work hours" experience "reduced parenting and family time," and must make sacrifices that can lead to "chronic fatigue, stress, and related diseases."[128] The negative social implications are particularly great when the high levels of overtime work are mandatory.[129] Mandatory overtime poses "a serious public policy concern, yet current law does not address it."[130]Although mandatory overtime has likely increased, in part, due to the broadened interpretation of the FLSA's white-collar exemptions, responsibilities for the worker once "at home have not decreased much."[131] Thus, the social toll increased overtime work has on workers and their families is likely not being compensated for in other areas of their

120. *Id.*

121. Crouss, *supra* note 9, at 237 ("Construing the exemptions to the FLSA narrowly creates a presumption against the exemption. To rebut the presumption, an employer seeking to apply the exemption has the burden to prove an employee qualifies for the exemption.").

122. Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 537 (2d Cir. 2009); McKeen-Chaplin v. Provident Sav. Bank, 862 F.3d 847, 849 (9th Cir. 2017).

123. Bertagna, *supra* note 2, at 545.

124. *See* LONNIE GOLDEN & HELENE JORGENSEN, TIME AFTER TIME: MANDATORY OVERTIME IN THE U.S. ECONOMY 2 (2002), http://www.epi.org/publication/briefingpapers_bp120/ (explaining that "the share of the workforce exempted from the FLSA has been growing slightly over time").

125. *Id.* (discussing the ill social effects of mandatory overtime).

126. Allard Dembe et al., *The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States*, 62 OCCUPATIONAL & ENV'T MED. 588, 588 (2005), http://oem.bmj.com/content/oemed/62/9/588.full.pdf ("A growing body of evidence suggests that long working hours adversely affect the health and wellbeing of workers.").

127. GOLDEN & JORGENSEN, *supra* note 124, at 1.

128. *Id.*

129. *Id.* at 2 (describing the definition of mandatory overtime work and its negative effects).

130. *Id.*

131. *Id.* at 3–4 (discussing how workers who are forced into overtime are not able to alleviate stress once off the job).

lives.

Additionally, high levels of overtime work can spell danger for a worker's health.[132] According to a study, overtime work is associated with "an increased risk of hypertension, cardiovascular disease, fatigue, stress, depression, musculoskeletal disorders, chronic infections, diabetes, general health complaints, and all-cause mortality."[133] Job stress, leading to "absenteeism, . . . diminished productivity, . . . and direct medical costs," costs industry an estimated $150 billion per year.[134] High mandatory overtime hours also force workers to diminish the amount they sleep, which in turn can harm their performance while at work.[135] Hence, the negative health effects experienced by workers may negatively affect employers collaterally if the worker is less efficient and effective on the job.[136]

Although this Note has established the drawbacks of mandatory overtime work, mandatory overtime carries potential benefits that could come along with a broader interpretation of the administrative exemption.[137] Greater overtime can allow employers to "be flexible and responsive to unexpected changes, adding temporary capacity without incurring the long-term costs and obligations of additional employees."[138] Promising consistent overtime may also attract potential employees interested in working hours exceeding forty per week.[139] However, despite these advantages, high levels of mandatory overtime are simply too detrimental to the physical and mental well-being of American workers. The advantages of mandatory overtime work are based primarily on benefits experienced by employers, but courts should focus on moving public policy in a direction that is best suited to benefit employees given that the FLSA was designed to protect the American worker.

As stated previously, broad interpretation of the FLSA exemptions will lead to more employees exempt from overtime protection. This, in turn, will likely lead to employers forcing their employees to work more mandatory overtime hours. Employers may argue that greater mandatory overtime hours for workers will benefit them financially by increasing productivity, but public policy demands otherwise. Since the creation of the FLSA, the Supreme Court has established that the FLSA exemptions should be narrowly construed,[140] thereby creating a presumption of non-exempt status that controls when ambiguity exists. Maintaining this narrow interpretation and presumption in favor of non-exempt status will: reduce the number of workers who are exempt from FLSA overtime protection, reduce the number of mandatory hours workers are forced to work, and will thus help alleviate workers, and their families, of the many social and health consequences

132. *See* GOLDEN & JORGENSEN, *supra* note 124, at 3 ("[L]ong workdays can be a major cause of the stress and chronic fatigue reported by many workers, as well as the ensuing occupational burnout or serious health conditions."); *see* Dembe, *supra* note 126, at 588 (expressing the negative health implications of high levels of overtime work).

133. Dembe, *supra* note 126, at 588.

134. GOLDEN & JORGENSEN *supra* note 124, at 4.

135. *Id.* ("When workers cut back on sleep, their work performance suffers.").

136. *Id.* at 3–4 (discussing "decreasing quality" and "increasing mistakes" that mandatory overtime can cause).

137. Zachary Farrington, *Overtime and Productivity: Finding the Right Balance*, SALTMARSH, CLEAVELAND & GUND (July 2, 2015), http://www.saltmarshcpa.com/cpa-news/blog/overtime-and-productivity58-finding-the-right-balance.asp.

138. *Id.*

139. *Id.*

140. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

that typically result from high levels of mandatory overtime work. In this context, deferring to the intended narrow scope of the administrative exemption should result in courts resolving any remaining ambiguity about the exempt status of mortgage underwriters following application of the exemption's requirements in favor of non-exempt status.

IV. RECOMMENDATION

Since the FLSA was enacted, there has been a dramatic shift in the United States from a manufacturing-based economy to a service-based economy.[141] As a result, the FLSA's administrative exemption has become increasingly difficult to apply because of its focus on the duties of a worker.[142] The increased ambiguity of the administrative exemption has led to a broader interpretation of the exemption, and consequently, more workers exempted from overtime protection provided by the FLSA.[143] The ambiguity surrounding the administrative exemption has also led to a high degree of employer confusion and a multitude of circuit splits in need of resolution, including the mortgage underwriter question.[144] This Note essentially recommends a two-part test to resolving this circuit split and any other situation where classification of an employee as exempt or non-exempt under the administrative exemption is in question:

> (1) Apply the exemption's requirements and the administrative-production framework to the duties of the employee, and in this case, mortgage underwriters; and (2) if application of the requirements and the framework still creates ambiguity, interpret the exemption itself narrowly, thereby creating a rebuttable presumption in favor of non-exempt status.

Although application of the exemption's requirements and administrative-production dichotomy led to this Note's conclusion that mortgage underwriters do not fulfill both prongs of the duties test, courts, like the Sixth Circuit, may continue to produce non-dispositive results. The second prong of this Note's recommended two-part resolution process calls for deferring to the narrow scope of the administrative exemption, and it should ultimately result in mortgage underwriters being classified as non-exempt even if these non-dispositive results are produced following application of the exemption's requirements. This two-part test allows courts to efficiently classify an employee as exempt or non-exempt even when confusion exists following application of the outdated administrative exemption requirements.

Because mortgage underwriters clear the salary-basis and salary-level tests of the administrative exemption, their exempt status is based on their fulfillment of the exemption's two-part duties test. Yet, the first part of the duties test, requiring an exempt employee to have a primary duty of "office or non-manual work directly related to the management or general business operations,"[145] is a prong that courts should find mortgage

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141. U.S. GEN. ACCOUNTING OFFICE, *supra* note 25, at 1.

142. *See* Crouss, *supra* note 9, at 211–12 ("As the industrial landscape changed, the specific white-collar exemptions . . . became more difficult to administer as well.").

143. Bertagna, *supra* note 2, at 545 (explaining how the narrow character of the FLSA exemptions has been "distorted" to a degree over time by the "vague and expansive character of the administrative exemption").

144. *See* McKeen-Chaplin v. Provident Savs. Bank, 862 F.3d 847, 851–52 (9th Cir. 2017) (discussing the ruling that deepened the circuit split about the exempt status of mortgage underwriters under the administrative exemption).

145. 29 C.F.R. § 541.200(a)(2) (2004).

underwriters fail to satisfy. This conclusion is based in part on mortgage underwriters' lack of advisory contact with loan applicants, an indicative characteristic, based on DOL regulation, of an employee with a primary duty related to management or general business operations. This conclusion is also supported by application of the administrative-production dichotomy. DOL regulation recognizes the dichotomy as a useful tool for assessing the exempt status of employees,[146] and is effective at distinguishing between employees, such as mortgage underwriters, who arguably carry out both production and administrative duties.[147] After application of the dichotomy, it is clear that mortgage underwriters possess duties of a production employee. Mortgage underwriters hold an essential role in a bank's primary production activity: selling loans. Alternatively, they do not have any apparent duties that lend themselves to running the business, an indicative trait of an administrative employee.[148] Though mortgage underwriters arguably carry out some administrative tasks, the DOL has indicated that an employee who is primarily on the production side of the business can achieve non-exempt status.[149] Although their tasks differ to a degree, mortgage underwriters' role is primarily in the loan sale process, similar to that of mortgage loan officers, a position the DOL has ruled to be non-exempt under the administrative exemption because they lack a duty in management or general business operations. Thus, though the results are arguably non-dispositive, courts applying the exemption's requirements and administrative-production dichotomy in compliance with DOL regulations should find that mortgage underwriters are production employees that lack a primary duty related to management or general business operations.

The outcome of part two of the duties test, requiring the employee have a primary duty of exercising "discretion and independent judgment with respect to matters of significance,"[150] is somewhat ambiguous. This Note recommends that courts create a presumption, rebuttable by the employer, that mortgage underwriters lack the discretion required for the administrative exemption to resolve this ambiguity. Mortgage underwriters commonly apply guidelines proscribed by third-parties to loan applicants to determine whether they qualify for a desired loan, a task the DOL says does not fulfill this element.[151] Yet, some mortgage underwriters may have further reaching discretion.[152]

It is impractical to make this determination on a broad basis, however, given the various levels of discretion different banks provide to mortgage underwriters.[153] A rebuttable presumption in favor of mortgage underwriters' lack of discretion and lack of fulfillment of this element is consistent with the intended narrow scope of the exemption and a more efficient way to resolve this issue rather than allowing it to be a case-by-case factual inquiry.

Mortgage underwriters likely do not satisfy the administrative exemption's duties test,

146. Defining and Delimiting, *supra* note 11, at 22,141.

147. *See* Crouss, *supra* note 9, at 232 (explaining the "need for a distinguishing" test for employees with various duties).

148. 29 C.F.R. § 541.201(a).

149. *See* Administrator's Interpretation, Docket No. 2010–1 (Dept. of Lab. Mar. 24, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2010/FLSAAI2010_1.pdf (discussing the application of the administrative-production dichotomy and exempt status of loan officers under the administrative exemption).

150. 29 C.F.R. § 541.202.

151. *Id.* (defining what "exercise of discretion and independent judgement" means).

152. Lutz v. Huntington Bancshares, Inc., 815 F.3d 988, 990 (6th Cir. 2016).

153. Pritchard, *supra* note 110.

yet the results leading to this conclusion are arguably non-dispositive, a major reason for the present circuit split. Ambiguity upon application of the administrative exemption's requirements arises all too frequently because the requirements promulgated by the DOL have not been amended to catch up with America's shift to a service-based economy.

To resolve lingering ambiguity when assessing the exempt status of a worker such as mortgage underwriters in this case, courts should defer to the proper scope of the administrative exemption. The administrative exemption was intended to be interpreted narrowly, creating a presumption in favor of non-exempt status.[154] In the absence of updated DOL regulations paralleling the administrative exemption's requirements with the current state of the American economy, courts should use a narrow interpretation and deference toward non-exempt status to resolve arduous cases in a more efficient and effective manner. Courts adhering to a narrow scope and presumption in favor of non-exempt status would also diminish the level of workers exempt from FLSA overtime protection. As a result, employers would likely impose less mandatory overtime hours, leading to positive effects on both the social and physical well-being of American workers. Thus, in addition to Supreme Court precedent calling for a narrow interpretation of the administrative exemption, public policy demands courts adhere to this scope as a tool to resolving ambiguity.

Ultimately, courts should find that mortgage underwriters are non-exempt under the administrative exemption. Though this Note concludes that mortgage underwriters do not satisfy the administrative exemption's duties test, deciding courts may continue to produce non-dispositive results following their application. If so, courts should use the intended narrow scope of the administrative exemption as a tool in this case—and any other case where ambiguity exists—to resolve ambiguity in favor of non-exempt status thereby entitling mortgage underwriters and many other types of workers to FLSA protection.

V. CONCLUSION

This Note recommends that courts resolve the circuit split about the FLSA exempt status of mortgage underwriters under the administrative exemption in favor of non-exempt status. This conclusion was reached after properly applying the administrative exemption's requirements and administrative-production dichotomy to the duties of mortgage underwriters, and subsequently resolving any potential ambiguity by deferring to the intended narrow scope of the administrative exemption. Ultimately, relying heavily on the intended narrow scope of the administrative exemption, thereby creating a presumption of non-exempt status in the case of mortgage underwriters and all others, is consistent with Supreme Court precedent and policy in favor of the physical and mental well-being of American workers.

154. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960); Crouss, *supra* note 9, at 237 ("Construing the exemptions to the FLSA narrowly creates a presumption against the exemption. To rebut the presumption, an employer seeking to apply the exemption has the burden to prove an employee qualifies for the exemption.").