

MIND THE GAP: A LEGAL AND ECONOMIC ANALYSIS OF STOCKBROKER OVERTIME ELIGIBILITY UNDER THE FAIR LABOR STANDARDS ACT

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As the United States focuses on maintaining a strong middle class, determining which employees receive overtime pay under the Fair Labor Standards Act constitutes a task with substantial implications. Although the concept of a stockbroker receiving overtime pay may initially appear unusual, such an idea is no longer an absurd notion. In response to the changing notion of overtime pay, stockbrokers have recently brought class action lawsuits against the brokerage firms that employ them. This Note examines whether the letter of the law, as well as sensible policy, supports the conclusion that stockbrokers qualify for overtime pay under the Fair Labor Standards Act.

The author begins by discussing the overarching purpose of the Fair Labor Standards Act and its newly promulgated regulations, as well as the criteria of the “administrative exception” for overtime pay. The author outlines how the courts and the Department of Labor have addressed the issue of overtime pay under the Fair Labor Standards Act. To determine the validity of stockbroker wage-and-hour claims, the author explores the benefits and pitfalls of various Fair Labor Standards Act interpretations and focuses on how each interpretation affects stockbrokers and brokerage firms. To remedy the differing interpretations and promote sound economic policy, the author recommends that under the current regulations, the Fair Labor Standards Act excludes stockbrokers from its administrative exception. In addition, the author suggests alternative pay structures for brokerage firms to curtail future litigation. Finally, the author offers a number of possible solutions for the Department of Labor, including an amendment to the current regulations.

I. INTRODUCTION

The notion of an affluent stockbroker as a recipient of overtime pay is, at best, unnatural. At worst, this concept is inequitable and ludicrous. Nevertheless, such novel overtime claims have developed into a reality of modern wage-and-hour litigation. Overtime pay is often thought of as a benefit reserved solely for blue-collar workers. As an upshot of the evolving twenty-first-century workplace, however, the distinction between blue-collar and white-collar workers has partially collapsed. It is

now clear that a worker need not have hands or feet rife with calluses to qualify for overtime pay under the Fair Labor Standards Act (FLSA).

According to the United States Department of Labor (DOL), roughly 115 million employees—86 percent of the nation's workforce—are covered by federal overtime rules.¹ Currently, stockbrokers are fighting for the right to be included in this group; thus far, they have partially succeeded. In recent years, scores of embittered stockbrokers have been on the receiving end of multimillion dollar class action settlements based on unpaid overtime, paid out by the brokerage firms that employed them.² Such suits have been met with both derision and ardent defense, lambasted as frivolous byproducts of an excessively litigious society.³ But notwithstanding whether this is an accurate characterization, these suits are not subsiding anytime soon.⁴

Since 2005, Morgan Stanley, UBS Financial Services, and Merrill Lynch alone have agreed to appease broker overtime claims by paying out over \$165 million in settlement costs for suits brought under the FLSA.⁵ Despite these payouts, brokerage firms have maintained their posture, insinuating that such settlements were a necessary evil required to extinguish the nuisance and cost of litigation.⁶ Still, with an emerging spate of wage-and-hour litigation on the horizon,⁷ the salient issue—

1. Michael Orey, *Wage Wars: Workers—From Truck Drivers to Stockbrokers—Are Winning Huge Overtime Lawsuits*, BUS.WK., Oct. 1, 2007, at 50, available at http://www.businessweek.com/magazine/content/07_40/b4052001.htm.

2. See Christine Caulfield, *Employment Litigation Trends: Financial Services*, LAW360, Feb. 14, 2007, <http://employment.law360.com/Secure/ViewArticle.aspx?id=18589> (noting that Morgan Stanley, Citigroup, Wachovia, and JPMorgan were all on the receiving end of wage-and-hour claims, and that Wachovia alone faced eighteen such actions in 2006); see also Shannon Henson, *Proposed Class Sues AXA for Labor Practices*, LAW360, Aug. 27, 2007, <http://employment.law360.com/Secure/ViewArticle.aspx?id=33418>; Ben James, *Ameriprise Shorts Financial Advisors on Pay: Suit*, LAW360, Sept. 4, 2007, <http://employment.law360.com/Secure/ViewArticle.aspx?id=33899>.

3. See Halah Touryalai, *Wall Street Wage Fight*, REGISTERED REP., May 1, 2006, at 42, available at http://registeredrep.com/mag/finance_wall_street_wage/ (“The idea that stockbrokers and other financial professionals are equivalent to factory workers is ridiculous.” (quoting Philip Berkowitz)); see also Allan King, *Is the System Broke or Are Brokers Gaming the System?*, LAW.COM, Feb. 13, 2006, <http://www.law.com/jsp/article.jsp?id=1139351651620> (“Brokers who have been touting their market sophistication to their customers are now pleading ignorance of the competitive market forces that determine their own income.”). As this Note aspires to demonstrate, these quotes—while indicative of employer and commentator antipathy to broker overtime suits—miss the crux of the issue altogether.

4. Amanda Ernst, *Wage-and-Hour Class Actions Continue to Grow*, LAW360, Jan. 25, 2007, <http://employment.law360.com/Secure/ViewArticle.aspx?id=17237>. As Gerald Maatman, cochair of Seyfarth Shaw LLP's complex discrimination litigation practice group, noted regarding such claims, “We're going to see this more and more.” *Id.*

5. Touryalai, *supra* note 3. These actual payouts, however, pale in comparison to the prospect for future payouts, as such claims appear to be growing exponentially. *Id.* (noting that such claims can “quickly climb into the hundreds of millions” for a single company alone and that Mark Thierman alone has thirty-five class action suits pending (quoting Lori Bauer)); see Caulfield, *supra* note 2 (noting the sheer volume of claims against venerable brokerage firms in 2006).

6. Touryalai, *supra* note 3 (“The current wave of broker wage/hour litigation is brought by opportunistic lawyers who are attacking the way stockbrokers have been legally compensated for decades.” (quoting SIA lawyers at Morgan Lewis & Bockius)).

7. Caulfield, *supra* note 2.

whether stockbroker overtime claims are viable under the FLSA—begs for clarification.

This Note attempts to demonstrate that, although the FLSA is vulnerable to hostile interpretations pertaining to stockbroker overtime pay, there are plausible solutions to the interpretative conundrum. Part II of this Note discusses the overarching purpose of the FLSA and its newly implemented regulations, the requisite criteria of the “administrative exemption” for overtime pay, and how the DOL and various courts have weighed in on the relevant regulations. Part III explores the validity of stockbroker wage-and-hour claims. In doing so, this Part considers the benefits and pitfalls of the various FLSA interpretations, focusing on how each interpretation affects both stockbrokers and brokerage firms. Finally, in the interest of statutory interpretation, economic policy, sound client service, and an impetus for legislative refinement, Part IV recommends that courts exclude typical stockbrokers from the administrative exemption of the FLSA under the current regulations and suggests alternative pay structures for brokerage firms to avoid future litigation. Additionally, this Part offers multiple potential solutions for the DOL. If the DOL desires to deem such suits invalid, Part IV proposes an amendment to the Department’s regulations as an ad hoc solution to the problem of stockbroker overtime suits. If, however, the DOL desires to abolish wage-and-hour litigation altogether, this Part offers a more fundamental strategy to overhaul the current wage-and-hour paradigm. In other words, as the law is written today, the traditional stockbroker is eligible to bring a wage-and-hour claim against his employer for overtime pay.

II. BACKGROUND

This Part traces the evolution of the FLSA and its recently revised exemptions, and explores how both courts and the DOL have treated analogous occupations in similar wage-and-hour claims. Additionally, this Part describes the context and substance of a recent DOL opinion letter and appraises how amenable courts have been to imputing weight to DOL opinion letters. Finally, this Part examines the limited manner in which courts have already treated the issue at hand: stockbroker overtime pay eligibility.

A. *The FLSA’s Purpose and an Introduction to the White-Collar Exemptions*

The current FLSA standards and exemptions are the product of equitable ideals and a desire to reinvigorate a faltering United States economy. On June 25, 1938, Franklin D. Roosevelt signed 121 bills into law, including the landmark FLSA, effectively banning oppressive child

labor and establishing minimum wages and maximum hours.⁸ Furthermore, this New Deal statute mandated that workers receive time-and-a-half pay for every hour worked beyond forty hours a week.⁹ The purpose of the legislation was two pronged: (1) to protect menial workers from being exploited by their employers;¹⁰ and (2) to combat unemployment by making it cost effective to hire new employees rather than pay existing ones elevated wages.¹¹ More fundamentally, the FLSA established standards to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹²

Perhaps an implicit purpose of the legislation was to ensure employees a reasonable quality of life outside the workplace. As summarized by prominent labor attorney Mark Thierman, “The function of the overtime laws is to force employers to make their employees take a break from work, to go home at a decent hour, and to enjoy the fruits of their labor.”¹³ Even at the genesis of the FLSA, however, it was apparent that such legislation was not designed to apply to the presumably more affluent “white-collar” sect of society. To that end, the original enactment of the FLSA carved out exemptions to overtime pay, deeming employees in bona fide executive, administrative, professional, or local retailing capacities exempt from both the minimum wage and the overtime provisions.¹⁴

Today’s white-collar exemptions still bear a strong resemblance to their originally enacted counterparts. Presently, 29 U.S.C. § 213(a) deems “any employee employed in a bona fide executive, administrative, or professional capacity” exempt from the minimum wage and maximum hour requirements set forth in the FLSA.¹⁵ In recent years, these exemptions have been further modified. On April 20, 2004, the DOL—responsible for enforcing the FLSA—issued revised regulations governing the exemption of white-collar employees.¹⁶ The rationale for these revisions was multifaceted: “The final [white-collar exemptions] will re-

8. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 22, available at <http://www.dol.gov/oasam/programs/history/flsa1938.htm>. At the time of its enactment, the FLSA initially set the minimum hourly wage at twenty-five cents. *Id.*

9. Orey, *supra* note 1.

10. Touryalai, *supra* note 3 (“The FLSA, as it is known, was passed by Congress in 1938 to protect low-paid, unskilled workers from being abused by their employers.”).

11. Orey, *supra* note 1.

12. 29 U.S.C. § 202(a) (2006).

13. Mark R. Thierman, Letter to the Editor, RECORDER (Cal. Law, S.F., Cal.), Feb. 22, 2006, <http://www.laborlawyer.net/press/letter-to-editor.pdf>.

14. U.S. GEN. ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 45 (1999), <http://www.gao.gov/archive/1999/he99164.pdf>. Employees working in a “local retailing capacity,” however, are no longer considered per se exempt following a 1961 amendment to the FLSA. *Id.*

15. 29 U.S.C. § 213(a)(1).

16. Susan E. McPherson & Matthew D. Fridy, *Fair Pay Exemptions for You and Your Client*, 66 ALA. LAW. 269, 269 (2005).

store overtime protection for lower-wage workers, strengthen overtime protection for middle-income workers . . . and reduce costly and lengthy litigation.”¹⁷

Although the newly modified regulations were designed to reduce legal and human resources costs and to increase employer compliance through clarification, dissonance immediately arose over how the regulations would affect employees and employers.¹⁸ No consensus could be reached regarding which employees would be affected and how they would be affected.¹⁹ Analyzing the new regulations, the Bush administration predicted that 1.3 million new employees would gain overtime eligibility; by contrast, opposing experts forecasted losses in overtime coverage for three to five million employees.²⁰

Moreover, by crafting the new regulations, the DOL attempted to streamline the tests used to determine whether a white-collar exemption applies to a particular employee.²¹ Although the tests may have been streamlined, whether they have actually increased clarity or reduced litigation remains highly questionable. If anything, as suggested by the recent influx of stockbroker wage-and-hour litigation, the DOL’s attempt to refine the exemption tests may have further convoluted the issues at hand, particularly with regard to stockbrokers.²²

Although the tests for determining overtime eligibility have been modified, the fundamental framework for determining whether an occupation is exempt remains unchanged. The exemption tests demarcated in

17. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22,122, 22,191 (Apr. 23, 2004); *see also* Jackson Lewis, *Department of Labor Issues Final FLSA Overtime “White Collar” Exemption Regulations*, Apr. 20, 2004, <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=568>. Wage and Hour Administrator Tammy McCutchen largely echoed this sentiment, explaining, “Updating these regulations is long overdue—the types of jobs people do and the skills they need have changed but the regulations have not. The exemptions . . . have engendered considerable confusion over the years regarding who is, and who is not, exempt.” Jackson Lewis, *supra*.

18. *See, e.g.*, Steven Greenhouse, *Overtime Rules Dispute Is a Numbers Game*, N.Y. TIMES, Aug. 31, 2004, at A12.

19. *See id.* For instance, in response to the implementation of the new regulations, James Ware—a chef who would be rendered ineligible for overtime pay under the new regulations—stated, “It’s bad for workers; it seems like a step backward . . .” *Id.* By contrast, as to the implementation of those same regulations, Howard M. Radzely—Labor Department’s top lawyer—contended, “Anyone who looks at this objectively will see this is a tremendous benefit to workers and is a big benefit to businesses . . .” *Id.*

20. *Id.*; *see also* Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,191 (noting that the increase in minimum salary for an exemption, from \$155 per week to \$455 per week, will bolster overtime protection for 6.7 million employees; 1.3 million who currently are exempt will become non-exempt with the implementation of the new regulations).

21. Jackson Lewis, *supra* note 17; *see also* Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,130, 22,137, 22,148. The rationale for the new revisions is explained in the Preamble of the final regulations. “Confusing, complex and outdated regulations allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer. In addition, more and more, employees must resort to lengthy court battles to receive their overtime pay. In the Department’s view, this situation cannot be allowed to continue.” Defining and Delimiting the Exemptions, 69 Fed. Reg. at 22,122.

22. Caulfield, *supra* note 2 (“Despite interpretive guidance by the [DOL] . . . it remains to be seen how courts respond to the new breed of employee plaintiffs.”).

the new DOL regulations are still given controlling weight to establish stockbroker eligibility for overtime pay, as they are promulgated pursuant to an express delegation of legislative authority.²³ Also, the new regulations have not altered the burden of persuasion for FLSA exemptions. Employers still bear the burden of establishing that an exemption is appropriate, and exemptions are construed narrowly.²⁴ In fact, the Supreme Court has held that such exemptions shall be construed against employers seeking to assert them and that application should be “limited to those establishments plainly and unmistakably within their terms and spirit” of the statute.²⁵

B. The Administrative Exemption: Salary and Duty Tests Under the FLSA

In suits for stockbroker overtime pay, employers have consistently alleged that brokers fall into the “administrative” exemption of the FLSA—rather than the “executive” or “professional” exemptions.²⁶ A few preliminary considerations specifically pertain to this exemption. First, it is paramount to note that under the administrative exemption, an occupation’s title, classification, and description are immaterial when determining whether an employee is excluded from overtime pay.²⁷ So although a breadth of stockbroker taxonomy exists, it is wholly irrelevant whether the brokerage firm classifies its employees as financial consultants, financial advisors, investment professionals, or just brokers when determining whether they are exempt.²⁸ Otherwise, employers could simply circumvent wage-and-hour claims by shrewdly labeling job titles or cunningly crafting written job descriptions.²⁹

Next, two tests are used to ascertain whether an exemption is applicable to an employee: (1) salary and (2) primary duties tests. The employee must fulfill both tests to be rendered an exempt administrative employee.³⁰ Two subtests are intrinsic in the salary prong: salary level

23. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

24. Adam T. Klein et al., *The DOL’s New FLSA White Collar Exemption Regulations and Working with the DOL on FLSA Actions*, 10 EMP. RTS. & EMP. POL’Y J. 459, 460 (2006).

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

26. See Opinion Letter 2006-43 from U.S. Dep’t of Labor, Employment Standards Admin. Wage & Hour Div. (Nov. 27, 2006) [hereinafter November Opinion Letter], http://www.dol.gov/esa/whd/opinion/FLSA/2006/2006_11_27_43_FLSA.pdf; see also 29 C.F.R. §§ 541.200, 541.203 (2008). These regulations explicitly demarcate employees in the financial services industry as *possibly* falling under the purview of the administrative exemption as opposed to executive, professional, or outside sales capacity exemptions. 29 C.F.R. § 541.203(b).

27. 29 C.F.R. § 541.200.

28. See *id.*

29. The Supreme Court has previously admonished employers that excessively broad job descriptions are not an effective means to curtail employee rights. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) (averring that public employers may not restrict employees’ free speech rights by creating excessively broad job descriptions).

30. 29 C.F.R. § 541.200.

and salary basis.³¹ With respect to salary level, an “employee employed in a bona fide administrative capacity” must be paid at least \$455 per week.³² This criterion is concrete and uncontroversial. However, the second salary prong is more contentious, as this salary level must be paid free and clear on a “salary or fee basis,” excluding any nonmonetary forms of compensation such as “board, lodging or other facilities.”³³

In other words, an employee fulfills the salary basis test only if the employee receives a fixed amount of at least \$455 a week that comprises “all or part of the employee’s compensation” each pay period, and that amount may not be reduced because of the quantity or quality of the employee’s work.³⁴ So although an exempt employee may receive the lion’s share of his compensation from commissioned sales, the floor requirement for guaranteed pay—\$455 per week—still stands.³⁵ Thus, a broker who does not earn the minimum *guaranteed* level of \$455 per week is not administratively exempt pursuant to FLSA regulations.

In light of how potentially lucrative a stockbroker’s occupation can be, it is evident how these regulations could produce seismic results in wage-and-hour litigation. As the defendant noted in *Takacs v. A.G. Edwards & Sons*,³⁶ stockbrokers are “among the highest paid individuals in our society.”³⁷ For a snapshot of current compensation levels, a stockbroker who produces \$600,000 in commissions—by no means a wildly unattainable figure—earns \$289,000 if employed by Wachovia Securities, \$273,000 if employed by Morgan Stanley, \$268,200 if employed by Merrill Lynch, \$266,450 if employed by Smith Barney, and \$262,250 if employed by UBS Financial Services.³⁸ Certainly, if a legion of brokers sued for time-and-a-half pay for every hour worked above forty in a week, it could profoundly harm both individual brokerage firms and the financial services industry in general.

31. McPherson & Fridy, *supra* note 16, at 279.

32. 29 C.F.R. § 541.200(a)(1).

33. *Id.* To clarify, an administrative employee may be paid on a “fee basis”—distinct from a “salary basis”—which means the employee

is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a ‘fee’ is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again.

Id. § 541.605(a).

34. *Id.* § 541.602(a); see *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1107–08 (S.D. Cal. 2006).

35. 29 C.F.R. § 541.604.

36. 444 F. Supp. 2d 1100.

37. *Id.* at 1107. However, it should be noted this statement operates under the misleading assumption that the stockbroker is *successful*; it ignores the fact that an underperforming stockbroker whose pay is chiefly derived from commissions will take home a meager wage compared to his successful counterparts. There is nothing implicit in the stockbroker’s occupation that guarantees *success*.

38. See *A New Ball Game: Litigation Is in the Spotlight as Firms Decide How to Pay Their Advisors*, ON WALL STREET, Mar. 2007, at 34 [hereinafter *A New Ball Game*]. These figures operate under a few key assumptions: (1) the stockbroker’s income is derived from the following sectors of production—25 percent in individual stocks, 25 percent in individual bonds, 25 percent in mutual funds, and 25 percent in fee based sales; and (2) the length of broker service is presumed to be seven years. *Id.*

It is worth noting that some firms have found a means of circumventing the salary basis requirement of the FLSA.³⁹ These attempts, however, have largely proved unavailing when analyzed under the light of the FLSA regulations, as will be explored more critically in later sections.⁴⁰ While germane to the overarching issue of whether a stockbroker's occupation comports with the administrative exemption, it is important to note that controversy surrounding the salary criterion is brokerage firm specific.⁴¹

The more pressing, and more divisive, issue concerns the duty component of the FLSA test, which pertains to both the substance of the employee's work and the nature of the mental exertion the employee exercises in his occupation.⁴² First, in order to meet the administrative exemption, the primary duty of the broker must be "office or non-manual work directly related to the management or general business operations of the employer or the employer's customers."⁴³ The regulations further elaborate upon this description, noting that the "employee must perform work directly related to assisting with the running or servicing of the business,"⁴⁴ and that an employee who serves as an adviser or consultant to clients or customers "may be exempt."⁴⁵

Second, in order to exercise the requisite mental exertion, the primary duty of the employee must include "the exercise of discretion and independent judgment with respect to matters of significance."⁴⁶ A multitude of variables enter the calculus to determine whether the employee exercises sufficient discretion and judgment, such as

whether the employee has authority to formulate, affect, interpret, or implement management policies[;] . . . whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies . . . without prior approval; . . . whether the employee provides consultation or expert advice to

39. See *Takacs*, 444 F. Supp. 2d. at 1107–10 (denying defendant's motion for summary judgment on the salary basis prong where the defendant contended that its brokers fulfilled the administrative exemption salary basis test because the firm paid a draw against future commissions, which could be construed as tantamount to a guaranteed salary).

40. See *infra* Part III.A. (noting that if a "draw" detracts from the guaranteed salary, then the salary is not really *guaranteed* for FLSA purposes and the employee may still be eligible for overtime pay). This is the one true wrinkle in the salary basis component.

41. See generally *A New Ball Game*, *supra* note 38, at 40–41 (displaying the diverse array of pay structures that brokerage firms have adopted in attempt to lure top stockbroker talent). However, this snapshot evaluated only some of the most prestigious brokerage firms in the industry. Presumably, when examining the entire spectrum of brokerage firms, the pay structures would be even more diverse and distinct.

42. See 29 C.F.R. § 541.200(a)(2)–(3) (2008).

43. *Id.* § 541.200(a)(2).

44. *Id.* § 541.201(a).

45. *Id.* § 541.201(c) (emphasis added). This ambivalence regarding whether those in the financial services industry are indeed exempt pervades the DOL's regulations. See, e.g., *id.* § 541.203(b).

46. *Id.* § 541.200(a)(3).

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management; [and] . . . whether the employee investigates and resolves matters of significance on behalf of management.⁴⁷

In essence, to fulfill this criterion, the employee must have the authority to make choices free of direction and supervision⁴⁸ and must do more than merely adhere to established procedures or standards described in manuals or other sources.⁴⁹

Whether a stockbroker fulfills these duty-related criteria is a topic that could be debated endlessly. Certainly, a typical broker advises clients and can perform work directly related to the financial success of his clients and, consequently, the success of his employer.⁵⁰ On the other hand, brokers are typically constrained to varying degrees by employer policies and client needs, thereby curtailing a substantial portion of their autonomy.⁵¹ Thus, it is difficult to arrive at a firm solution based on these imprecise factors; the area is too nebulous as applied to typical stockbrokers. The DOL regulations, however, have attempted to resolve this problem by taking direct aim at—or at least trying to take direct aim at—the explicit issue: whether the typical stockbroker is eligible for overtime pay. Under the “[a]dministrative exemption examples” of 29 C.F.R. § 541.203(b), the regulations state:

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.*⁵²

While the initial language of the regulation appears to indicate that the typical stockbroker falls under the administrative exemption, the final sentence undercuts the otherwise steadfast provision, potentially rendering the administrative exemption inapplicable to the typical broker. Thus, this regulation does not necessarily answer the question; it only refines it. The central question remains: is the primary duty of the typical stockbroker the sale of financial products? Or is it something more taxing and complex?

47. *Id.* § 541.202(b).

48. *Id.*

49. *Id.* § 541.202(e).

50. See Robert T. Greene, *Differential Commissions as a Material Fact*, 34 EMORY L.J. 507, 509–10 (1985).

51. See Blair H. Wallace, *A Proposal to Refine the Suitability Standard by Quantifying Recommendation Risk and Client Appropriate Risk Levels*, 1 BROOK. J. CORP. FIN. & COM. L. 231, 231 (2006).

52. 29 C.F.R. § 541.203(b) (emphasis added).

C. *The Stockbroker's Primary Duty Under Early Case Law*

This issue was touched upon, albeit tangentially, nearly thirty years ago in *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,⁵³ long before the enactment of the regulations at the center of the current stockbroker overtime debate. In *Leib*, suit was filed against a broker for abusing his client's confidence for personal gain.⁵⁴ The District Court for the Eastern District of Michigan conceded that a broker does have a duty to act in a manner attuned to client interests.⁵⁵ Still, the court went on to hold that if an account is nondiscretionary, where only the client has authority to determine whether to make a sale or purchase, then such duties to the client cease at the conclusion of the transaction.⁵⁶ Furthermore, whether the client is sophisticated or inexperienced, "[a] broker has no continuing duty to keep abreast of financial information which may affect his customer's portfolio or to inform his customer of developments which could influence his investments."⁵⁷ Thus, despite the broker's advice, information, and recommendations, he cannot be held liable for mere errant guidance while handling a nondiscretionary account,⁵⁸ a decision later affirmed by the Sixth Circuit Court of Appeals.⁵⁹

In effect, this holding signifies that—at least for nondiscretionary accounts—brokers are responsible only for the proper execution of trades; this does not necessarily entail managing investments with a special degree of acumen.⁶⁰ Though this case still leaves the current issue unsettled, it may suggest that courts have formerly been agreeable to the idea that brokers are responsible more for facilitating transactions and *making sales* than serving the client's needs under a heightened, quasi-fiduciary duty.

53. 461 F. Supp. 951 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981) (unpublished table decision).

54. *Id.* at 952. It was alleged that the stockbroker, by initiating excessive transactions incompatible with the character of the client's account and by purportedly providing the client errant investment guidance, abused the client's confidence. *Id.*

55. *Id.* at 952–53.

56. *Id.*

57. *Id.* at 953.

58. *Id.* at 956–57.

59. *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 647 F.2d 165 (6th Cir. 1981) (unpublished table decision).

60. It should be noted that limited discretion can be vested in a stockbroker who manages a nondiscretionary account, particularly with regard to price and time; nevertheless, the ultimate core investment decisions remain with the client. See Wallace, *supra* note 51, at 231–32. The stockbroker really serves only to offer advice and physically facilitate the transaction. Barkley's Comprehensive Financial Glossary, Non-Discretionary Account, <http://www.oasismanagement.com/glossary/n.html?glossary/n.html> (follow "N" hyperlink) (last visited May 31, 2009).

D. How Courts Have Applied the Administrative Exemption to Comparable Occupations

Under FLSA regulations, some courts have displayed a penchant for deeming employees administratively exempt, even where the occupational duties of the employees could be construed as sales-oriented. In *Hogan v. Allstate Insurance Co.*,⁶¹ the Court of Appeals for the Eleventh Circuit granted the defendant's motion for summary judgment in an insurance agent's suit for overtime pay.⁶² Ultimately, the court declared that insurance agents fell under the purview of the administrative exemption of the FLSA, despite the fact that a chief duty of the job involved the promotion and sale of Allstate's insurance products.⁶³ Similarly, in *Reich v. John Alden Life Insurance Co.*,⁶⁴ the Court of Appeals for the First Circuit ruled that marketing representatives for an insurance company fell within the administrative exemption for overtime pay, despite the fact that their primary duties consisted of contacting and dealing with licensed agents to increase end-purchasers.⁶⁵

While these cases serve as potential benchmarks for evaluating judicial analysis of administrative exemptions, they are by no means dispositive. Certainly, scores of other cases factually akin to those above have resulted in contrary rulings.⁶⁶ Additionally, both of the above cases were decided under anachronistic FLSA white-collar exemption regulations that did not account for the working conditions of the modern stockbroker.⁶⁷ So while previous court rulings offer some guidance, the issue whether stockbrokers fulfill the administrative exemption is still unsettled.

61. 361 F.3d 621 (11th Cir. 2004).

62. *Id.* at 628.

63. *Id.* Other chief duties of the insurance agent included advising and servicing customers and potential customers, supervising other employees, structuring assignments and work hours, and providing feedback. *Id.* at 624. Moreover, it is important to remain cognizant that the DOL regulations have been modified since this ruling. Particularly, the duty prong used in this case consisted of both a "short" and a "long" duties test. *Id.* at 626. As discussed, these regulations are now obsolete and inapplicable to the current stockbroker.

64. 126 F.3d 1 (1st Cir. 1997). This case was also disposed of under now-anachronistic DOL regulations: the "short" and "long" duty test, which was much different than the current regulations. *Id.* at 8.

65. *Id.* at 12–13. The court emphasized that the primary duties of the marketing representatives consisted of contacting and dealing with a deck of five to six hundred licensed independent insurance agents in order to increase end-purchasers and that each deck generated \$1.5 to \$3 million in annual sales on average. *Id.* at 12. While this occupation may not be customarily categorized as a *sales* job, it seems quite plausible that it could be construed as such.

66. See, e.g., *Casas v. Conseco Fin. Corp.*, No. Civ.00-1512, 2002 WL 507059, at *9 (D. Minn. Mar. 31, 2002) (deeming loan originators nonexempt under the FLSA administrative exception); *Reich v. Chi. Title Ins. Co.*, 853 F. Supp. 1325, 1327 (D. Kan. 1994) (deeming escrow closers for an insurance company non exempt under FLSA standards).

67. See *Casas*, 2002 WL 507059, at *9; *Chi. Title Ins.*, 853 F. Supp. at 1329–31.

E. The Qualifications and Duties of the Typical Broker

There is one significant principle, which has been alluded to but not explicitly stated, for determining whether an employee qualifies for the administrative exemption under the primary duty prong. Namely, it is paramount that the nature of the employee's work be examined, not how substantial the consequences of the work are.⁶⁸ As applied to stockbrokers, if the broker's primary duty is the *sale* of financial products, she does not qualify for the administrative exemption⁶⁹ regardless of her level of production.⁷⁰ To scrutinize the heart of the issue, it is important to fully understand the qualifications and nuances of the stockbroker position.

All brokers must be registered with a self-regulatory organization, such as the New York Stock Exchange.⁷¹ To become registered, the broker must pass an examination, typically the "Series 7," which necessitates a breadth of knowledge regarding federal securities law, securities products, the operation of financial markets, economic and portfolio theory, fair sales practices, types of customer accounts, and tax implications of investments.⁷² Upon successful completion of the exam—assuming passage of other relevant criteria such as background screening—the broker may give investment advice to his firm's clients who invest in securities markets.⁷³ Specifically, the DOL used this description of broker duties and qualifications to grapple with the issue of overtime eligibility.

F. The DOL's Opinion on Whether Brokers Fit the Administrative Exemption

Following an influx of stockbroker class action overtime suits, the DOL—apparently in an attempt to clarify the issue of stockbroker overtime pay—released what *could* be construed as its definitive opinion on the matter. On November 27, 2006, the DOL issued an opinion letter (hereinafter November Opinion Letter) addressing the question whether stockbrokers, or "registered representatives" as dubbed in the letter, are exempt under the administrative exemption of the FLSA.⁷⁴ It is important to note, however, that the DOL's opinion was a hypothetical one, prompted by a query exclusive to one organization's circumstances and was not meant to address the industry as a whole.⁷⁵

68. *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1378 (M.D. Ga. 2002) (citing *John Alden Life Ins.*, 126 F.3d at 11).

69. 29 C.F.R. § 541.203(b) (2008).

70. *John Alden Life Ins.*, 126 F.3d at 11 ("We recognize that more than one circuit has held that '[t]he financial effect of employee activity cannot alone show work of "substantial importance to the management or operation" of an employer's business.'" (quoting *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 906 (3d Cir. 1991)).

71. November Opinion Letter, *supra* note 26, at 1.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

Specifically, the letter described “registered representatives” whose primary duty consisted of investment advice, but who were also required to collect financial information, analyze this information, compare and evaluate investment options, and identify potential investment strategies based on market trends, client needs, and aversions to risk.⁷⁶ Furthermore, the hypothetical “registered representatives” met the salary requirements, as they were compensated a guaranteed \$455 per week, regardless of their quality or quantity of work, augmented by commissions.⁷⁷ Based on these theoretical job and salary descriptions, the DOL determined that such “registered representatives” fulfilled the duties and salary criteria demarcated in the FLSA regulations, and therefore, satisfied the requirements of the administrative exemption.⁷⁸ In other words, the November Opinion Letter could be construed to opine that the primary duty of the stockbroker is not the *sale* of investments, but rather the utilization of expertise and market analysis to customize advice to clients pursuant to their investment objectives. Under this analysis, the actual execution of the sale comes only as an “incident” to making investment recommendations.⁷⁹ Despite the fact that problems pervade the November Opinion Letter,⁸⁰ many analysts initially trumpeted the letter as a victory for brokerage firms.⁸¹

G. How Much Weight Should Courts and How Much Weight Do Courts Ascribe to DOL Opinion Letters?

Although the November Opinion Letter may viscerally appear momentous enough to stamp out future stockbroker overtime claims, this is

76. *Id.* at 2.

77. *Id.*

78. *Id.* at 8. The DOL lists the following as the primary duties of registered representatives: collecting and analyzing a client’s financial information, advising the client about the risks and the advantages and disadvantages of various investment opportunities in light of the client’s individual financial circumstances, and recommending to the client only those securities that are suitable for the client’s particular financial status, objectives, risk tolerance, tax exposure, and other investment needs.

Id. at 5.

79. Allen S. Bloom et al., *Federal District Courts Issue Favorable Decision Regarding the Exempt Status of Financial Advisors, Unfavorable Decision Regarding Mortgage Lenders*, STAY CURRENT (Paul, Hastings, Janofsky & Walker LLP, L.A., Cal.), Aug. 2007, at 2, 3, <http://www.paulhastings.com/assets/publications/753.pdf>. Such a contention, however, may overstate the weight of the November Opinion Letter. It did not rule on what the primary duties of stockbrokers are; it only *assumed* what they are. *See infra* Part III.D.

80. *See infra* Part III.D.

81. *See, e.g.*, Robert Buhlman & Jessica Boar, *Holiday Cheer for Broker-Dealers: Department of Labor Concludes Registered Representatives Are Not Entitled to Overtime*, BROKER-DEALER/LAB. & EMP. ALERT (Bingham McCutchen, Boston, Mass.), Dec. 2006, at 1, *available at* <http://www.bingham.com/Media.aspx?MediaID=3251> (noting that brokerage firms can now breathe a sigh of relief because of the issuance of the November Opinion Letter). This contention is speculative and probably a bit premature, as the November Opinion Letter is tailored to a narrow, unique question. Moreover, as will be demonstrated, problems inhere in the structure of the November Opinion Letter itself, as it could certainly be argued that the letter is based on an intrinsically flawed premise. *See infra* Part III.D.

not the case. Such opinion letters only describe a set of circumstances unique to the supplicant⁸² and do not apply uniformly to the brokerage industry. The DOL concedes this in the letter, including the caveat that the “[e]xistence of any other factual or historical background not contained in [the supplicant’s] letter might require a conclusion different from the one expressed herein.”⁸³ Thus, each case must still be decided on its own unique facts and merits, and the November Opinion Letter is at most an advisory guide. Furthermore, in reality, it is difficult to discern just how much weight is assigned to such opinion letters.

For instance, in its decision to grant summary judgment in a financial consultant overtime case, *Hein v. PNC Financial Services Group, Inc.*,⁸⁴ the District Court for the Eastern District of Pennsylvania—while endorsing the employer’s contentions that its brokers were not entitled to overtime pay—remained silent regarding the November Opinion Letter.⁸⁵ Although this omission is not particularly glaring, as the court ruled in a manner consistent with the November Opinion Letter, another district court case suggests that this failure to allot weight to the November Opinion Letter may not have been mere oversight.⁸⁶

On September 8, 2006, the DOL issued an opinion letter (hereinafter September Opinion Letter) deliberating whether mortgage lenders were excluded from overtime pay under the administrative exemption.⁸⁷ The DOL ultimately opined that general mortgage lenders were administratively exempt, largely basing its conclusion on the listed duties of mortgage lenders, which uncannily paralleled the duties of stockbrokers that the DOL denoted roughly two months later in its November Opinion Letter.⁸⁸ In *Pontius v. Delta Financial Corp.*,⁸⁹ the District Court for the Western District of Pennsylvania rejected the DOL’s September Opinion Letter, instead ruling that a genuine issue of material fact existed as to whether mortgage lenders fulfill the requisite criteria for the administrative exemption.⁹⁰ In doing so, the court noted that DOL opi-

82. See November Opinion Letter, *supra* note 26.

83. *Id.* at 8.

84. 511 F. Supp. 2d 563, 575–76 (E.D. Pa. 2007).

85. See Bloom et al., *supra* note 79, at 3.

86. See *Pontius v. Delta Fin. Corp.*, No. 04-1737, 2007 WL 1412034, at *1 (W.D. Pa. May 10, 2007).

87. Opinion Letter 2006-31 from U.S. Dep’t of Labor, Employment Standards Admin. Wage & Hour Div. 1 (Sept. 8, 2006), http://www.dol.gov/esa/whd/opinion/FLSA/2006/2006_09_08_31_FLSA.pdf.

88. *Id.* at 1. The parallels between the two occupations are clear. Compare *id.* at 1–2 (listing mortgage loan officers’ duties as assisting employers’ customers in selecting a mortgage loan that is commensurate with their financial circumstances, facilitating their customers’ financial goals by collecting and analyzing customer financial information, advising customers about the risks and benefits of loan alternatives, and remaining apprised of relevant market conditions), with November Opinion Letter, *supra* note 26, at 2 (listing registered representatives’ duties as providing clients investment advice, collecting and analyzing client financial information to evaluate potential investment options, advising clients about the risks and benefits of various investment opportunities, and remaining apprised of the investment vehicles available and market conditions).

89. 2007 WL 1412034.

90. *Id.* at *1.

nion letters are mere applications of regulations to hypothetical circumstances, not interpretations of the regulations, and are therefore not entitled to deference.⁹¹ Thus, not all courts follow DOL opinion letters in lockstep; though such opinion letters are certainly consultative, they are only responses tailored to narrow and assumption-filled questions.

H. Recent Court Treatment of Stockbroker Overtime Eligibility

DOL opinion letters and related court opinions are certainly connected with the issue of stockbroker overtime pay eligibility. But prior court decisions directly addressing the issue are just as, if not more, important. As touched on above,⁹² in *Hein v. PNC Financial Services Group, Inc.*,⁹³ the court granted the brokerage firm's motion for summary judgment where Hein, a highly compensated senior financial consultant, brought an overtime claim under the FLSA.⁹⁴ While Hein conceded that he met the salary test and the part of the primary duty test regarding the exercise of discretion and independent judgment for the administrative exemption,⁹⁵ he insisted that he was eligible for overtime pay because his primary duty did not include the necessary performance of office or nonmanual work directly related to the management or general business operations of the defendant's customers.⁹⁶

Through evaluating the nuances of Hein's occupation, the court deduced his six primary job duties: "researching the performance of particular financial instruments; learning his clients' assets, holdings, and investment aims; recommending investments appropriate to the individual client; implementing actual transactions; generating new sales leads; and supervising the [Licensed Financial Sales Consultants]."⁹⁷ Ultimately, the court—apparently without a hint of reluctance—determined that Hein's duties plainly and unmistakably fulfilled the administrative exemption.⁹⁸

Conversely, in *Takacs v. A.G. Edwards & Sons, Inc.*,⁹⁹ the District Court for the Southern District of California denied the defendant's mo-

91. *Id.* (noting that the November Opinion Letter was not entitled to deference because it was not an agency interpretation of an *ambiguous* regulation, and that even if it was, the letter still was not sufficiently weighty because the facts were not *undisputedly comparable*).

92. See *supra* text accompanying notes 85–86.

93. 511 F. Supp. 2d 563 (E.D. Pa. 2007).

94. *Id.* at 575–76. It should be reiterated that, technically, an employee's total compensation does not impact whether she is eligible for overtime pay; only her guaranteed salary determines eligibility. 29 C.F.R. § 541.602(a) (2008). It can only be assumed that a court would be more reluctant to award a high earning employee overtime pay as compared to her lower earning counterpart.

95. It is unclear why Hein made this concession regarding primary job duties. After all, a colorable argument certainly could have been made that Hein's primary duty was the sale of financial products, which would have rendered him nonexempt under the FLSA administrative exemption. See 29 C.F.R. § 541.203(b).

96. *Hein*, 511 F. Supp. 2d at 571.

97. *Id.* at 569.

98. *Id.* at 575.

99. 444 F. Supp. 2d 1100 (S.D. Cal. 2006).

tion for summary judgment in a similar stockbroker overtime claim,¹⁰⁰ finding a genuine issue of material fact as to the broker's status as an administratively exempt employee.¹⁰¹ The court denied the motion on two grounds relevant to the FLSA administrative exemption. First, the court found a genuine issue of material fact regarding the salary basis test.¹⁰² In a month where brokers, paid on a commission basis, did not reach the floor guaranteed by A.G. Edwards, the firm paid a "draw" to supplement the broker's commission income in order to meet minimum pay standards to remain administratively exempt.¹⁰³ Nevertheless, because the brokerage firm deducted the draw salary, or at least portions of it, in subsequent months when the broker exceeded this guaranteed and predetermined compensation, the brokers argued that this draw pay was not guaranteed salary paid free and clear.¹⁰⁴ Ultimately, the court was not persuaded that the brokerage firm's pay structure properly conformed to FLSA regulations.¹⁰⁵

Second, the court ruled that a genuine issue of material fact existed regarding the primary duty prong of the administrative exemption.¹⁰⁶ In doing so, the court noted that the brokers did not set corporate policy, formulate business plans, set wages for the support staff, or make decisions that affected the company as a whole; rather, the brunt of the occupation entailed the *sale* of investment goods and services, including a great deal of "cold calling" for the purpose of selling securities.¹⁰⁷ Similarly, in *Glass v. UBS Financial Services, Inc.*, the District Court for the Northern District of California approved a \$45 million settlement for broker overtime claims, deeming the settlement "fair, reasonable, and adequate"¹⁰⁸ after weighing the strength of the plaintiffs' case.¹⁰⁹ Obviously, the jurisprudence surrounding stockbroker overtime claims remains unsettled and unpredictable.

100. *Id.* at 1127.

101. *See id.* at 1112.

102. *See id.* at 1110.

103. *See id.* at 1107–08.

104. *See id.* at 1109–10.

105. *See id.* at 1110 ("[T]his Court finds that Defendant has not met its initial burden of showing that Plaintiffs' salary basis comes within the administrative exemption of the FLSA.").

106. *See id.* at 1112–13 ("[T]he evidence submitted supports the conclusion that at a minimum, there exists a genuine issue of material fact regarding Plaintiffs' status as an administratively exempt employee.").

107. *See id.* at 1112 (noting "that the enterprise exists to produce and market, and it was these efforts by plaintiffs and the other Financial Consultants that generated revenue for the firm").

108. No. C-06-4068, 2007 WL 221862, at *14 (N.D. Cal. Jan. 26, 2007).

109. *Id.* This case could certainly be considered a landmark in the stockbroker overtime suit landscape, as 13,176 plaintiffs alleged that UBS misclassified them as exempt from federal and state overtime laws and did not reimburse them for business-related expenses, indicating that their salary was not paid free and clear as required under the FLSA. *Id.* at *5. It is arguable that this case represented a less than handsome result for the brokers, as the final settlement amounted to a little over \$3,400 for each individual stockbroker.

I. *Synthesis of Background*

To summarize, the FLSA regulations—although intricate and extensive—provide no concrete answer to the question of stockbroker overtime eligibility. Even worse, the regulations open the door to hostile interpretations. While pay structure issues (i.e., whether brokers are paid a guaranteed \$455 per week) may be prevalent in such suits, controversy also surrounds the duties test of the regulations. For stockbrokers, whether they fulfill the administrative exemption primarily hinges on whether their primary duty comprises *selling* investment goods and services, or whether it entails something more sophisticated.¹¹⁰

The initial determination of this issue, conveyed in *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, suggested that a broker's primary duty is merely the execution of transactions, which implied that the typical stockbroker does not fulfill the administrative exemption.¹¹¹ On the other hand, courts have been willing to deem employees administratively exempt even when their occupations seem largely predicated on sales.¹¹² Possibly in an attempt to assuage the pervading confusion, the DOL issued the November Opinion Letter that could be construed as asserting that a broker's primary duty is *advising and managing* rather than *selling*.¹¹³ The level of deference that courts award such letters, however, is unclear, as some courts apparently have no qualms about rejecting DOL opinion letters.¹¹⁴ Further, with regard to the actual issue of stockbroker overtime eligibility, the only courts that have ruled on the issue have diverged; one deemed brokers administratively exempt,¹¹⁵ while the other denied summary judgment on both a salary and duty basis.¹¹⁶ In the milieu of this regulatory morass, one fact remains clear: “[T]he bottom line is that the law in this area is sparse and the outcome of any litigation [is] far from clear, for either [defendants] or [p]laintiffs.”¹¹⁷

110. See 29 C.F.R. § 541.203(b) (2008). Presumably, the latter would entail the activities demarcated in the November Opinion Letter: collecting and analyzing client information and data in order to make investment recommendations based on the client's needs, preferences, and aversions to risk. See November Opinion Letter, *supra* note 26, at 2.

111. 461 F. Supp. 951, 956 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981) (unpublished table decision).

112. See *Hein v. PNC Fin. Servs. Group, Inc.*, 511 F. Supp. 2d 563, 575 (E.D. Pa. 2007); see also *Pontius v. Delta Fin. Corp.*, No. 04-1737, 2007 WL 1412034, at *1 (W.D. Pa. May 10, 2007).

113. November Opinion Letter, *supra* note 26.

114. See *Pontius*, 2007 WL 1412034, at *1. Additionally, opinion letters are “based exclusively on the facts and circumstances described in [the supplicant's] request,” and the “[e]xistence of any other factual or historical background not contained in [the supplicant's] letter might require a conclusion different than the one expressed herein.” November Opinion Letter, *supra* note 26, at 8.

115. See *Hein*, 511 F. Supp. 2d at 575.

116. See *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1110 (S.D. Cal. 2006).

117. *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068, 2007 WL 221862, at *3 (N.D. Cal. Jan. 26, 2007).

III. ANALYSIS

While stockbroker wage-and-hour suits may conjure notions of frivolity and avaricious strike suits, such thinking is misguided. The presumption that overtime pay is reserved only for a beleaguered proletariat is a fossil of wage-and-hour law. Undoubtedly, the modern workplace has evolved; corresponding employment law should evolve commensurately to protect and award the new, unique middle class. Decrying the fact that current wages are often incompatible with the nature of the modernized workforce, prominent labor attorney Mark Thierman—who has spearheaded multiple stockbroker wage-and-hour claims—writes, “[A] large portion of American workers who were protected by overtime laws seem to have been forgotten as inflation drove up the absolute (not the relative) amount of compensation, and the bulk of workers began wearing sport coats and processing information instead of wearing coveralls and processing widgets.”¹¹⁸

A colorable, albeit novel, argument certainly exists that stockbrokers are eligible for overtime pay under the letter of the FLSA. As such, the tide of litigation spawning from stockbroker overtime claims will not wane in the foreseeable future.¹¹⁹ Moreover, it is important to remain cognizant that such litigation may have profound consequences on brokerage firms. Thierman estimated that he *alone* could collect up to \$2 billion in back pay for his stockbroker clients.¹²⁰ In light of the hostile interpretations and the volume of high-stakes litigation, this issue needs clarification and guidance.

To fully evaluate whether such claims are valid, this Part will scrutinize the typical broker’s compensation scheme in light of the DOL regulations, and will also explore the plausibility and impact of alternative pay structures. Additionally, this Part will delve into the standard job duties of stockbrokers in light of the regulations and expose flaws inhering in the November Opinion Letter. Finally, operating under an assumption of economic rationality, a typical stockbroker’s occupational motivation will be inspected. Namely, this Part will shed light on the intertwining, and possibly perverse, relationship between broker compensation and the assurance of sound client service.¹²¹

118. Orey, *supra* note 1. This quote aptly encapsulates just how the workforce, particularly the middle class, has evolved in society, indicating that the interpretation of overtime law must be shifted commensurately in order to adapt to the more superficially esteemed jobs that now comprise the middle class.

119. See *supra* notes 2–4 and accompanying text.

120. Touryalai, *supra* note 3. For some perspective on this seemingly astronomical figure, consider this hypothetical: if Thierman had 60,000 clients who each worked sixty hours a week for fifty weeks in a single year and earned \$100,000 in that year, this would amount to the \$2 billion that Thierman has estimated.

121. See *infra* Part III.C (discussing the perverse incentives created by a commission pay structure, as the broker’s income is directly proportional to the frequency and volume of transactions). Such a pay structure seems less than ideal in a field where sound client service is paramount, as the

No. 4] STOCKBROKER OVERTIME ELIGIBILITY UNDER FLSA 1261

A. *Does the Typical Stockbroker Compensation Scheme Satisfy the Salary Basis Test?*

As previously mentioned, whether a stockbroker qualifies for overtime pay under the salary basis prong is wholly contingent on his brokerage firm's compensation structure.¹²² To meet the salary basis test for an administrative exemption, the broker must be compensated at a rate of not less than \$455 per week on a salary or fee basis.¹²³ This means that each pay period the stockbroker is required to receive "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."¹²⁴

Although this rule is superficially simple, many venerable firms—possibly as a product of oblivion—do not abide by the letter of the law in the overtime arena.¹²⁵ In many firms, guaranteed salaries are filtered out in phases over a period of time as, ideally, the broker should begin earning the brunt of his compensations in commissions.¹²⁶ Nevertheless, it seems indisputable that a stockbroker not guaranteed at least \$455 a week is still eligible to receive overtime pay, as any contrary exception would subvert the overarching purpose of the FLSA, potentially swallowing the entire rule. Simply stated, "If the stockbroker is compensated solely on a commission basis, then the exemptions probably don't apply."¹²⁷ The rationale behind this rule is sound as applied to the stockbroker: if a struggling, albeit hardworking, broker is not drumming up sufficient business, it is conceivable that his commission-intensive income would hardly produce a living wage.¹²⁸

Additionally, and maybe a bit counterintuitively, the individual stockbroker's total income (commission included) is inconsequential when determining whether he is eligible to receive overtime pay. Although the highly compensated employees provision of the FLSA exempts employees from overtime pay if their total annual compensation reaches \$100,000, this provision is only applicable to employees who earn \$455 per week on a *guaranteed* salary or fee basis.¹²⁹ Thus, no matter the

broker could conceivably prioritize his transactional volume above the absolute best interests of his client.

122. *See supra* notes 39, 41 and accompanying text.

123. 29 C.F.R. § 541.200(a)(1) (2008).

124. *Id.* § 541.602(a).

125. *See* Touryalai, *supra* note 3 (noting that wage-and-hour suits are currently pending against firms that were some of the most venerable organizations in the financial services industry, including: A.G. Edwards, Bear Stearns, Merrill Lynch, Morgan Stanley, Smith Barney, Edward Jones, Wachovia Securities, and Raymond James & Associates).

126. *See id.*

127. *Id.* (quoting Philip Berkowitz, an employment lawyer at Nixon Peabody).

128. For instance, imagine a stockbroker who amasses \$75,000 in production and, pursuant to his pay structure, takes home only 20 percent of his production. This broker, regardless of hours worked, would earn only \$15,000 in the year. It would be very difficult to dispute that a similarly situated worker in a different industry deserves overtime for his toil.

129. 29 C.F.R. § 541.601(b)(1).

enormity of the stockbroker's final take-home pay, if he does not earn \$455 per week on a guaranteed basis, then he is entitled to time-and-a-half pay—which is calculated by prorating his weekly commission earnings—for every hour worked over 40 hours in the week.¹³⁰

Obviously, this could have a prodigious impact on a stockbroker's compensation. For instance, imagine “a broker who earned \$400,000 last year, putting in 60-hour work weeks, made \$200 per hour for a 40-hour work week (assuming 50 weeks per year). At time and a half for overtime, the employer owes this broker \$300,000 per year.”¹³¹ Undoubtedly, the magnitude of such overtime payout implications has induced brokerage firms to seriously reevaluate their pay structures. In fact, amid the flurry of wage-and-hour suits, some firms have already opted to fundamentally change the way their brokers are compensated to conform to the governing regulations.¹³²

While the salary basis component of the administrative exemption test is largely self-explanatory, brokerage firm compensation tactics have engendered a few wrinkles in the otherwise straightforward test. Specifically, the salary basis test clearly implies that an employer is not permitted to reduce an employee's compensation on account of quality or quantity of the employee's work.¹³³ Thus, questions arise when brokerage firms bend these contours; whether the salary is indeed paid free and clear as required under the administrative exemption becomes questionable.¹³⁴

For instance, as previously mentioned, in *Takacs v. A.G. Edwards & Sons*, the court denied the defendant's motion for summary judgment based on a compensation scheme in which a broker's income was supplemented with a draw provided by A.G. Edwards when the broker's commission income did not reach a predetermined guaranteed amount.¹³⁵ The court recognized that this draw was hardly *guaranteed*, as it was subsequently deducted from the broker's pay in months where commissions exceeded the predetermined compensation floor, essentially forcing the employee to reimburse the employer for his past production deficiency.¹³⁶

130. See generally *id.* See also King, *supra* note 3.

131. King, *supra* note 3. Realistically, this estimation may be a bit overstated. Mark Thierman, who has spearheaded a multitude of broker wage-and-hour claims, estimates that a typical overtime-entitled stockbroker is due \$30,000, although this varies significantly based on the individual broker's transactional volume. Touryalai, *supra* note 3.

132. See James J. Eccleston, *Are Brokers Entitled to Overtime Pay?*, RESEARCH, Mar. 2007, at 61, available at <http://www.researchmag.com/Issues/2007/3/Pages/Are-Brokers-Entitled-to-Overtime-Pay.aspx> (noting that Smith Barney announced it will institute a minimum monthly salary for brokers and will discontinue pay deductions for errors incurred in the trading process, thus ensuring that the salary is paid free and clear).

133. 29 C.F.R. § 541.602.

134. See *id.* § 541.200.

135. *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1107–08. (S.D. Cal. 2006) (“If the commission did not rise above at least \$1,150 per month, Defendant would supplement Plaintiff's salary with a ‘draw’ amount. The guaranteed draw provides a compensation floor.”).

136. *Id.* at 1107–10.

While echoing this sentiment, the DOL in its November Opinion Letter appeared to add another consideration. The November Opinion Letter stated that a stockbroker's compensation for a transaction may "take into account certain adjustments for cancelled trades, trade errors, expenses, and other trading-related losses."¹³⁷ Nevertheless, "[t]hese adjustments do not affect the payment of the guaranteed minimum amount of . . . \$455 per week."¹³⁸

In light of these rulings and stipulations, the salary basis test increases in complexity.¹³⁹ Still, one central, superseding tenet remains dispositive: to fall under the purview of the administrative exemption and be rendered ineligible for overtime pay, a stockbroker must be guaranteed a minimum of \$455 per week on a salary or fee basis, paid free and clear, regardless of the commission amount earned by the broker.¹⁴⁰ Thus, if an employer manipulates a broker's salary in a way that compromises his guaranteed \$455 per week, then the administrative exemption will not apply, and the broker is eligible to receive overtime pay.¹⁴¹ The employer may still take deductions from commissions based on incurred expenses, but these deductions cannot disturb the \$455 guarantee.

B. Compensation Options for Brokerage Firms

How brokerage firms devise their compensation structures for employees is a subjective determination based on the preferences of the individual firm. If a firm's fundamental goal is to deter wage-and-hour litigation, it can follow in the footsteps of firms such as Smith Barney, which recently altered its compensation structure to create the requisite FLSA floor.¹⁴² A firm needs only to guarantee its employees a free and clear \$455 per week paid on a salary or fee basis to avoid litigation on salary basis grounds.

Essentially, there are two simple and plausible strategies to bring this conformance to fruition. First, the firm could altogether retool the stockbroker compensation structure, enabling brokers to bargain for their own annual salaries. Conceivably, this could benefit brokerage firms financially, as employees—many of whom are risk-averse—may be amenable to bargaining away a fraction of their typical compensation for the security of a guaranteed salary.¹⁴³ Second, the other logical option is

137. November Opinion Letter, *supra* note 26, at 2.

138. *Id.* at 2–3.

139. Although absent from this analysis, another nuance in the "free and clear" analysis occurs when deductions are extracted from the stockbrokers pay based on the salary of their sales assistant. For a more thorough discussion of this variable, see Touryalai, *supra* note 3.

140. 29 C.F.R. § 541.200 (2008)

141. *Id.*

142. Eccleston, *supra* note 132.

143. This proposition operates under the assumption that the stockbroker is economically rational and prefers risk aversion to risk neutrality. As such, he might be willing to forgo a more volatile, albeit potentially more lucrative, commission-laden occupation for a slightly less lucrative occupation in which salary is guaranteed.

an amalgam of strict salary versus solely commission—incentive-laden contracts with a base salary above the requisite FLSA floor.

Yet if a firm rejects the above pay structure options and the current proliferation of stockbroker wage-and-hour claims persists or emerges victorious, brokerage firms may encounter immense difficulty in adapting appropriately. If firms are forced to pay overtime, then it is conceivable that brokers would need to be treated like hourly employees. “Stockbrokers would be required to keep records of the time they work, including all of their breaks, and be paid by the hour for each overtime hour worked.”¹⁴⁴ This implies that brokerage firms would exercise dominion over their brokers, possibly controlling and limiting hours.¹⁴⁵ Doing so, however, would shrivel the flexibility of the broker position, one of the chief advantages of the job.¹⁴⁶

Currently, stockbrokers exercise control over their own hours; the prospect of their brokerage firms diminishing this control runs contrary to the very reason many brokers entered the business. As one Smith Barney broker suggested, working long hours is a rite of passage inherent in the occupation: “Working 60 hours is not all that unusual. It’s just the way things are. New guys are doing cold calls and working 60 or 70 hours a week, and the established brokers are working 10 hours and vacationing in Jamaica. It’s an accepted thing.”¹⁴⁷ Nevertheless, the FLSA remains clear: if an employee is not guaranteed at least \$455 a week and is instead paid strictly on a commission basis, then unpleasant ramifications and broker desires are irrelevant.¹⁴⁸ Thus, absent a change in pay structure or a revision to the FLSA, stockbrokers who are not guaranteed \$455 free and clear on a fee or salary basis must be eligible for overtime; in turn, brokerage firms that do not guarantee such pay will remain susceptible to broker overtime suits.

C. Is the Common Stockbroker a Mere Polished Salesman, or Something More?

Although salary issues are prevalent in stockbroker overtime claims, whether a stockbroker’s *primary duties* qualify him for an administrative exemption is the more perplexing and discordant matter. Instinctively, the prospect of overtime pay in such a lucrative and complex

144. Touryalai, *supra* note 3 (quoting lawyers representing the Securities Industry Association). This statement is operating under the assumption that brokerage firms who are susceptible to wage-and-hour litigation would retain their current commission-intensive pay structures, which seems highly unlikely if a tide of litigation proved successful for broker plaintiffs.

145. *Id.*

146. Intuitively, one of the chief advantages of a stockbroker’s occupation is the volition associated with the job: the broker, as an individual, is the lone determinant of whether she succeeds or fails. Logically, success or failure will be predicated on how hard the individual works, which is effectively gauged by sheer volume (i.e., the number of hours she works). If her hours are constrained by the employer, she no longer has that same volition to determine whether she will succeed.

147. Touryalai, *supra* note 3.

148. *Id.*

industry is disconcerting. Concurring with this logic, Philip Berkowitz—an employment attorney with Nixon Peabody—writes, “The idea that stockbrokers and other financial professionals are equivalent to factory workers is ridiculous.”¹⁴⁹ Still, there is more to the issue than visceral reactions.¹⁵⁰

As discussed, many of the applicable regulations that determine whether the primary duty of an employee comports with the administrative exemption are unwieldy as applied to the typical stockbroker.¹⁵¹ Nevertheless, under 29 C.F.R. § 541.203(b), an employee in the financial services industry meets the primary duty requirements for the administrative exemption if his *primary duties* entail dispensing *advice* by analyzing and using client information and data to match the client’s circumstances to his needs.¹⁵² By contrast, an employee in the financial services industry does not qualify for the administrative exemption if his *primary duty* is the *sale* of financial products.¹⁵³ The distinction between analyzing client circumstances to make a recommendation as compared to the sale of the product is a blurry one, as these duties are inextricably linked. Consequently, this issue has spurred much debate on each side of the aisle.

There are numerous arguments buttressing the idea that a stockbroker does not fulfill the primary duty prong of the administrative exemption and is, therefore, eligible for overtime pay. First, it is clear from the regulations that the DOL at least conceives of a position where the primary duty is the *sale* of financial products because that occupation is explicitly delineated in 29 C.F.R. § 541.203(b).¹⁵⁴ Thus, a question arises: if this delineation does not point to the stockbroker—the person responsible for the facilitation of the trade—then what sort of position did the

149. *Id.*

150. The reality is that a vast number of brokers abandon the industry because of the commission-laden pay structure that can engender meager incomes. Michael Hayes, *The Salaried Stockbroker*, REGISTERED REP., May 2001, at 5, available at http://registeredrep.com/mag/finance_salaried_stockbroker/ (“Facing shrunken paychecks, more [brokers] are showing interest in positions that offer at least a minimum guaranteed salary . . .”). Simply stated, many brokers fail. That the moniker of the occupation connotes wealth and prestige is not a sufficient reason to exempt such workers from overtime pay.

151. *See supra* Part II.B.

152. 29 C.F.R. § 541.203(b) (2008).

153. *Id.*

154. As the regulations state, “[A]n employee whose primary duty is selling financial products does not qualify for the administrative exemption.” *Id.* After all, whether their primary duty is the sale of financial products, it seems almost indisputable that, for any brokerage firm, stockbrokers are the *primary party* involved in the sale of financial products. Moreover, for other occupations, the regulations seem to give more concrete guidance. *See generally id.* § 541.203. For instance, “[h]uman resource managers who formulate, interpret or implement employment policies” generally meet the administrative duties requirements. *Id.* § 541.203(e). Additionally, “purchasing agents with authority to bind the company on significant purchases generally meet the [administrative] duties requirements . . . even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.” *Id.* § 541.203(f). In other words, the duty description for employees in the financial services industry appears uniquely vulnerable to contrasting interpretations as compared to many of the other occupations addressed expressly by the regulations.

DOL have in mind? Logically, it seems that by providing this caveat in the regulations, the DOL at least alludes to the notion that ordinary stockbrokers do not fall under the umbrella of the administrative exemption.

Second, a viable argument exists that the stockbroker—though involved in an intricately complex and sophisticated industry—is, at his core, nothing more than a salesman. Rational people work for many reasons, but economic compensation is typically paramount. Accordingly, because a stockbroker is compensated in direct proportion to his transactional volume,¹⁵⁵ it seems undeniable that a rational broker will—within the parameters of certain ethical considerations—attempt to maximize his transactional volume in pursuit of greater compensation. Though a stockbroker may tweak his investment recommendation based on a host of variables provided by the client, the culmination of his efforts will, inexorably, result in a recommendation to invest in a financial product that will boost the broker's own income.¹⁵⁶ In a way, the stockbroker profession is a paradigmatic example of a sales position.

This is by no means a denigration of the modern stockbroker, as his occupation certainly encounters complexity, but in no sense should complexity automatically negate or alter the nature of a profession for purposes of overtime eligibility. Moreover, the fact that client portfolio evaluation and data analysis inhere in the stockbroker's occupation should not detract from the fact that the primary duty of the job is sales oriented. After all, although a shoe salesman accounts for the patron's rationale behind visiting the shoe store, aversion to brands, individual style, shoe size, and need for longevity and resiliency in a shoe, it is rather difficult to contend that the employee's primary duty is not the sale of footwear. This analogy may be a bit hyperbolic, but it helps clarify the issue. As Mark Thierman—the chief pacesetter of stockbroker wage-and-hour claims—opines, “Calling a broker, who earns most of his pay from commission on sales, administratively exempt is like calling a person who sells clothing at Men's Warehouse a fashion textile consultant.”¹⁵⁷ Additionally, exemptions must be construed narrowly by courts, and employers bear the burden of proving that an employee is exempt.¹⁵⁸ These factors bolster the typical stockbroker's claim for overtime eligibility.

155. See *A New Ball Game*, *supra* note 38, at 35. For a basic snapshot of the vast potential for pay disparities, a stockbroker who produces \$1,000,000 in commissions for Wachovia Securities will earn a total of \$499,000; by contrast, if that same broker amasses only \$200,000 in production, he will earn only \$64,000. *Id.*

156. Halah Touryalai, *Department of Labor to Brokers: No Overtime Pay for You*, REGISTERED REP., Dec. 1, 2006, <http://registeredrep.com/news/dol-overtime-response/> (noting that stockbrokers, just like typical salesmen, are driven by commissions).

157. *Id.*

158. See *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1106 (S.D. Cal. 2006); see also *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (noting that exemptions shall be construed narrowly against employers seeking to assert them and that application should be “limited to those establishments plainly and unmistakably within [the] terms and spirit” of the law).

D. Overcoming the November Opinion Letter

There are numerous reasons why the November Opinion Letter, which could be construed to assert that stockbrokers are exempt under the administrative exemption of the FLSA,¹⁵⁹ is not dispositive. Such DOL opinion letters only describe a narrow set of circumstances unique to the supplicant, and courts are not required—and have chosen not to—mechanically adhere to such opinion letters.¹⁶⁰ But even more importantly, upon further examination, it becomes dubious whether the November Opinion Letter in fact bolsters a brokerage firm’s defense against stockbroker wage-and-hour claims. The November Opinion Letter discusses, in meticulous detail, the job duties of a hypothetical “registered representative,” and then notes that the *sale* of financial services comes as a mere incident to the primary duty of *advising*.¹⁶¹ The opinion letter further recognizes, as a background assumption, “that registered representatives engage in some sales activities, [but] making sales is not their primary duty.”¹⁶²

In other words, instead of examining the heart of the issue—whether the primary duty of a typical stockbroker is the sale of financial products—the DOL wrote its November Opinion Letter premised on the assumption that the primary duty of the stockbroker is *not* the duty of *selling*. In doing so, the opinion letter answer was effectively *bootstrapped* in place, locking stockbrokers into the administrative exemption per 29 C.F.R. § 541.203(b), the provision creating the selling and advising dichotomy.¹⁶³ Through its November Opinion Letter, the DOL maintains that the primary duty of brokers is to “advise their clients on the advantages and disadvantages of various investment opportunities.”¹⁶⁴ This is undoubtedly a key element of the stockbroker’s occupation, but it is a bit of a cognitive leap to suggest that *advising* is the primary duty of the stockbroker.

In reality, advising appears to be only a veneer describing the stockbroker’s duty of making the sale; after all, *selling* is the sphere where the stockbroker makes her livelihood, and what she does prior to a sale is typically preparation or legwork leading to the sale. The fact that a stockbroker conducts research and analyzes data in hopes of recommending a profitable investment to her client should not negate the fact that the stockbroker’s chief goal is to compel clients to enter into financial transactions. Although the November Opinion Letter may certainly

159. This is what many critics of stockbroker wage-and-hour overtime suits have contended. See Touryalai, *supra* note 156.

160. See *supra* notes 82–91 and accompanying text.

161. November Opinion Letter, *supra* note 26, at 2 (“As an incident to providing their clients investment advice, registered representatives also bring about the purchase or sale of such investments for their clients . . .”).

162. *Id.*

163. See *id.* at 4–5.

164. *Id.* at 5.

be used as ammunition in a brokerage firm's defense against wage-and-hour litigation, it is questionable how useful this letter is to the analysis, as it is based on an intrinsically flawed premise.

E. Would Overtime Suits Improve the Brokerage Industry?

Whether the primary duty of a stockbroker is the sale of financial products may be debatable, but regardless, it is indisputable that selling financial investments is a key facet of the occupation. As discussed, a rational broker will attempt to maximize her compensation by maximizing his transactional volume, and such incentives will affect the broker's recommendations to his clients. Ideally, the broker's recommendation will be mutually beneficial (i.e., the investment will also prove lucrative for the client, making him more likely to seek out the broker's recommendations for future transactions). But it is easy to imagine circumstances where a stockbroker, whether overtly or subconsciously, is more focused on facilitating the transaction for personal gain than on making a recommendation that is in the best interest of the client.¹⁶⁵

This conception is not an insult; it is merely meant to emphasize that most stockbroker positions are sales intensive, and pushing recommendations is an inescapable ingredient of any such position. Thus, if wage-and-hour claims continue to proliferate and brokerage firms are forced to alter their pay structure or the duties of the stockbroker so that the position falls under the purview of the administrative exemption, then these changes could plausibly have a positive impact on the broker's relationship with clients. Mark Thierman encapsulates this possibility aptly, recognizing:

By forcing employers to switch the emphasis of stockbroker compensation away from a "salesman" type of reward system in favor of a true "administrative" adviser system, the stockbrokers are no longer encouraged to "churn" the client with needless trades or to invest in risky portfolios with high commission rates for the broker but little added benefit over lower-cost alternatives to the customer.¹⁶⁶

He continues, maybe a bit bombastically, "If the stock brokerage industry wants to exempt its employees from overtime, it had better start listening to its own commercials about being a trusted adviser rather than a shark attacking an unsuspecting client."¹⁶⁷

One plausible solution to this purported problem—which would quell the debate about whether a broker's primary duty is sales and

165. See Thierman, *supra* note 13 (noting that stockbrokers are subject to a salesman-type reward system that is conducive to churning, which presumably occurs when the broker recommends an investment opportunity that produces a higher commission than similar investment opportunities that are actually better suited to the client's distinct needs and desires).

166. *Id.*

167. *Id.*

would extinguish any concerns over a broker's ulterior motives—is to pay brokers based on *advice* rather than actual sales. Though difficulties with quantification may arise, this option seems like a real safeguard that ensures that the broker is acting wholly pursuant to the client's best interests.¹⁶⁸ Although such a novel alteration of pay structure sounds unorthodox, and there are certainly questions as to its administrative feasibility, such a change would undoubtedly ensure that the primary duty of the stockbroker is *advising* rather than *selling* under the FLSA administrative exemption. This would mitigate the distortion of interests and incentives in the broker-client relationship.

IV. RECOMMENDATION

There is a strong argument to be made that stockbroker overtime claims are not opportunistic sham suits. Rather, it can be argued that such claims are viable, backed by both the letter of the law and sound policy. Moreover, without modifications by either brokerage firms or the DOL, such claims will continue to proliferate, possibly serving as a harbinger for wage-and-hour litigation in other occupations. Nevertheless, if stockbroker overtime eligibility is a problem that warrants a remedy, there are both piecemeal and more fundamental solutions. The following recommendation addresses potential solutions to deter stockbroker wage-and-hour litigation for two separate target camps: brokerage firms and the DOL.

A. Recommendations to Brokerage Firms

There are a few key principles to keep in mind when devising plausible solutions for individual brokerage firms. First, a stockbroker is eligible for overtime pay unless guaranteed \$455 per week free and clear.¹⁶⁹ Second, a colorable argument can be forged that the primary duty of the typical stockbroker is the sale of financial products, making the broker eligible for overtime pay.¹⁷⁰

1. Recommendations to Avoid Claims Arising out of the Salary Basis Prong

With regard to the salary prong of the FLSA regulations, if a brokerage firm hopes to avoid future claims and costly settlements, it must be willing to alter its pay structure. But momentous problems would arise if a brokerage firm treated its brokers like hourly employees; con-

168. *Id.* In fact, Thierman theorizes that such a policy could “do more than all the SEC investigations and regulations together to produce a consumer-friendly market where those who know the market are truly on the side of the small investor.” *Id.*

169. 29 C.F.R. § 541.200 (2008).

170. See *supra* notes 154–56 and accompanying text.

trolling the broker's hours would subvert the broker's own capacity to build a client base, thereby hindering her ability to flourish financially. This would injure the health of individual brokerage firms and the financial services industry in general.

Simply stated, more innovative approaches are required. To mitigate claims arising out of the salary basis prong of the FLSA administrative exemption, brokers must be guaranteed \$455 a week, which can be done in two plausible ways. First, individual brokers could be permitted to bargain for salaries based on past performance and future production potential. This could be a cost-effective alternative for brokerage firms, as stockbrokers may be willing to sacrifice a portion of their past mean annual incomes, derived almost solely from commission, for the assurance of a guaranteed salary. Second, brokerage firms could simply guarantee a \$455 base salary per week that is not subject to deductions and buttress it with commissions. Such an incentive-laden employment contract ensures that the broker's production incentives remain intact; realistically, for most brokers, salary would still be primarily predicated on the same "eat what you kill" basis it is today.¹⁷¹

2. *Recommendations to Avoid Claims Arising out of the Primary Duty Prong*

The primary duty prong of the administrative exemption is more problematic. To avoid claims grounded in this prong, brokerage firms must intrinsically alter the nature of the broker position so that the primary duty of the occupation is not the sale of financial products. One possible solution, which would extinguish any possibility of broker ulterior motives superseding the best interests of the client, is to craft a pay structure in which the broker's compensation is contingent on the *advice* given to the client rather than the actual facilitation of transactions. Such a solution is, however, replete with administrative concerns and pitfalls. Specifically, questions arise as to what constitutes *advice* in this context. Likewise, it is conceivable that such a pay structure would distort broker incentives; brokers would prioritize garnering artificial meetings with clients over dispensing real and valuable investment advice. Finally, such a structure would, absurdly and unrealistically, signify that broker pay would be predicated on the amount of time spent at the office with clients rather than sheer profitability. Admittedly, this system would need to be refined significantly. *Advice* would have to be tethered to an objective criterion, such as actual client return on investment or total volume of transactions, to more appropriately determine total compensation.

171. In other words, most stockbrokers would still earn the brunt of their total income from commission-based sales rather than guaranteed salaried compensation.

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While such considerations are more appropriate for an altogether different discussion, these difficulties strongly suggest that bargaining for a guaranteed salary is the most practical medium to combat both salary and duty concerns. Nevertheless, a pay structure predicated on *advice* need not be abandoned. After all, such a system is important to consider because it would serve as an effective prophylactic structure, preventing a stockbroker from sacrificing his client's best interests to maximize his own financial gain.

B. Recommendations to the DOL

1. An Ad Hoc Solution: Modifying the Regulations

If stockbroker wage-and-hour suits do indeed run contrary to the intentions of the DOL, the regulations should be modified to preclude future claims. Currently (and as discussed extensively above) the regulations (particularly 29 C.F.R. §541.203(b)) are open to hostile interpretations as to whether a stockbroker's primary duty is the sale of financial products or whether it is something more analytical and taxing.¹⁷² A simple amendment to the regulations, however, could quell further controversy regarding this now-divisive issue. This could be accomplished through the following italicized addition to § 541.203(b): “[A]n employee whose primary duty is selling financial products does not qualify for the administrative exemption.”¹⁷³ *Nevertheless, financial services employees who analyze client information, accounting for a host of the client's individual variables, for the joint purposes of making optimal investment recommendations to the client and facilitating the sale of financial products, are deemed exempt.*¹⁷⁴ Such an amendment would eliminate the current controversy, settling once and for all that the administrative exemption applies to typical stockbrokers, and that, barring salary basis considerations, overtime pay is not appropriate for such occupations. This amendment does so by accurately defining what the stockbroker position actually entails: not only analysis and advice, but also selling and facilitating transactions. Doing so effectively insulates the regulations from combative interpretations, thereby deeming the broker exempt. Nevertheless, until the current ambiguous regulations are clarified one way or the other, stockbroker wage-and-hour claims will likely pervade.

172. See *supra* text accompanying notes 50–52.

173. 29 C.F.R. § 541.203(b).

174. This proposed amendment, while certainly susceptible to further refinement, attempts to fully capture the idea that the typical stockbroker's primary duties entail both advising and selling. Hence, if the DOL adopted this language, it seems probable that this debate, at least with regard to the primary duty issue, would be put to rest. Still, overtime claims spawning out of the salary basis prong would persist.

2. *A More Fundamental Solution: Overhauling the Wage-and-Hour System*

Another more fundamental, and certainly more drastic, option for the DOL could effectively transform wage-and-hour litigation into a relic of the past. Currently, 86 percent of the United States workforce is covered by federal overtime rules.¹⁷⁵ As proposed by employment law scholar and practitioner Mark Thierman, in lieu of allowing salary and duties tests to dictate whether a given employee is exempt from overtime pay, the DOL could eliminate significant bureaucratic red tape by allowing employers to define the positions that are exempt from overtime pay.¹⁷⁶ Based on the type of industry and the makeup of the employer's workforce, the DOL could apportion the employer a designated quota of its workforce to deem exempt from overtime pay.¹⁷⁷ After doing so, the employer would have unfettered discretion in allocating these exemptions. Uniformly, the percentage of exempt employees would average out to roughly 14 percent, preserving the current number of employees in the national workforce who are deemed exempt from overtime pay eligibility.¹⁷⁸

Undoubtedly, such a thorough overhaul of the overtime system would require rigorous research into industry norms and scores of employer judgment calls; likewise, it would require the DOL to meticulously scrutinize an employer's makeup and distribute overtime exemptions accordingly.¹⁷⁹ Undoubtedly, this implementation would encounter cumbersome obstacles and headaches. Nevertheless, if the DOL were looking for a medium to permanently inter wage-and-hour litigation, such a system would do so successfully.

Additionally, such a fundamental retooling of the FLSA framework would instill much transparency into the system. Whether an occupation qualifies for overtime pay would be patently obvious to both employers and employees. For employers, receiving overtime-eligibility allocations would eradicate employment wage-and-hour litigation. Likewise, employees, equipped with more accurate information pertaining to the earning capacity of their occupation, could plausibly bargain more effec-

175. Orey, *supra* note 1.

176. See E-mail from Mark R. Thierman, Labor Attorney, Thierman Law Firm, to author (Jan. 28, 2008, 12:38 CST) (on file with the University of Illinois Law Review) ("My proposal is that every employer of 10 or more people get[s] to pick 12 percent of the workforce as exempt, if they are paid a minimum salary, no matter what they do. Not a floating 12 percent, but once a person is designated exempt, that's it.")

177. For instance, a labor-intensive industry (e.g., a steel factory) might be given a lower percentage of exemption assignments, whereas a more sophisticated industry (e.g., an investment bank) may be given a much higher percentage. Certainly, there is an entire spectrum of industries between these two bookends, but such an example is emblematic.

178. Orey, *supra* note 1.

179. See E-mail from Mark R. Thierman, *supra* note 176. Thierman notes that occupational names would be submitted to some agency, presumably the retooled DOL. *Id.* In Thierman's opinion, such an overhaul would prove effective in striking the balance that the FLSA originally intended. *Id.*

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tively for suitable guaranteed salaries or hourly wages. After ironing out the inevitable logistical glitches flowing from the installation of this new paradigm,¹⁸⁰ such a system could truly streamline and elucidate the overtime issue in a comprehensive, efficient manner.

V. CONCLUSION

In a nation fixated on the maintenance of a robust middle class, overtime pay under the FLSA has substantial implications. Likewise, in our modern, technologically intensive society, occupations warranting overtime pay are no longer limited to the menial, monotonous, or physically strenuous jobs. Hence, although it may be instinctively illogical, a stockbroker as the recipient of overtime pay may no longer be an absurd or inequitable notion. As this Note demonstrates, both the letter of the law and sensible policy support the idea that stockbrokers may indeed qualify for time-and-a-half pay for every hour worked over forty in a week. Undoubtedly, the prevalence of such claims could alter the way countless other occupations are scrutinized in the context of labor and employment law, plausibly leading to scores of other uncharted claims. Nevertheless, if the DOL determines that such stockbroker overtime claims are ultimately unsound, then such suits should serve as an impetus for either refining the now ambiguous regulations or retooling the overtime paradigm as a whole. Either way, the debate is far from settled, and billions of dollars hang in the balance.

180. An especially difficult implementation obstacle would be the profound overhaul of the overtime-related duties of the DOL. Instead of fashioning tests and issuing opinion letters regarding overtime eligibility, the DOL would be responsible for determining the ideal percentage of employees in a given industry that should be deemed exempt. Additionally, the DOL would be responsible for processing and defining specific employer exemption quotas. In order to do so, the DOL would be required to compare the makeup of the specific employer in the industry with the makeup of the industry in general. It remains unclear how the DOL would have to alter its workforce to accommodate these substantially different demands, but such a topic is far outside the contours of this discussion.

