No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A GLAXOSMITHKLINE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations.

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below. Respondent is now known as GlaxoSmithKline LLC.

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BRIEF FOR THE PETITIONERS

Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-36a) is reported at 635 F.3d 383. The opinion of the district court granting respondent's motion for summary judgment (Pet. App. 37a-47a) is unreported but available at 2009 WL 4051075. The district court's subsequent opinion denying petitioners' motion to amend or alter the judgment (Pet. App. 48a-52a) is unreported but available at 2010 WL 396300.

JURISDICTION

The petition for certiorari was timely filed on August 12, 2011 and granted on November 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced as an Appendix to this brief.

STATEMENT OF THE CASE

Petitioners were employed by respondent as "detailers" with the responsibility to promote respondent's pharmaceutical products to doctors. Petitioners were prohibited by both law and industry practice from actually selling respondent's products, and did not do so. Because detailers routinely work more than forty hours per week but respondent refuses to pay them overtime compensation,

petitioners brought this action under the Fair Labor Standards Act. Respondent countered that petitioners are exempt from overtime as "outside salesmen." Pursuant to a congressional directive, the Secretary of Labor has issued regulations interpreting the "outside salesman" exemption to exclude employees who do not consummate sales themselves but instead engage in promotional work that supports sales by other employees. On that basis, the Department of Labor has specifically concluded that pharmaceutical detailers such as petitioners are not "outside salesmen." The Ninth Circuit construed the regulations as supporting respondent. It furthermore held that the agency's own contrary interpretation of its regulations was neither controlling under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), nor persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

I. Statutory And Regulatory Background

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, generally requires employers to pay employees time-and-one-half wages for work in excess of a forty-hour workweek. 29 U.S.C. § 207(a). The statute exempts certain categories of employees including, *inter alia*, an "outside salesman." *Id.* § 213(a)(1). Instead of elaborating on the scope of these categories, the statute directs the Secretary of Labor to "define[] and delimit[]" the exemptions. *Id.*

Pursuant to that express directive, the Secretary promulgated regulations by notice-and-comment rulemaking. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer

Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004). The regulations specify that an "outside salesman" must have as his "primary duty" "making sales within the meaning of Section 3(k) of the [FLSA]," 29 C.F.R. § 541.500(a)(1)(i), which defines "sale" or "sell" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U.S.C. § 203(k).

The Secretary's regulations then specifically address the situation of employees who engage in "promotional work," which "may or may not be exempt outside sales work, depending on the circumstances." 29 C.F.R. § 541.503(a). If the promotional work is "incidental to and in conjunction with an employee's own outside sales or solicitations," it is "exempt work." *Id.* By contrast, if it is "incidental to sales made, or to be made, by someone else," *id.*, or is "designed to stimulate sales to be made by someone else," *id.* § 541.503(b), it is "not exempt outside sales work." *Id.*

The Department has also provided additional guidance on the meaning of its regulations in other contexts. It has filed multiple *amicus curiae* briefs in the lower courts concluding that detailers are not outside salesmen. It has also explained that "[e]mployees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." 69 Fed. Reg. at 22,162 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations Part 541*, at 83 (June 30, 1949) [hereinafter *Weiss Report*]). The Department's Field Operations Handbook further provides that

"[s]oliciting business through a dealer or merchant to offer a product or service to a customer is not a sale within the meaning of 29 U.S.C. § 203(k)." U.S. Department of Labor, *Field Operations Handbook* § 22f01(e) (2010), *available at* http://www.dol.gov/whd/FOH/FOH_Ch22.pdf.

II. Petitioners' Job Responsibilities As Pharmaceutical Detailers

Respondent GlaxoSmithKline (GSK) (formerly SmithKline Beecham) is a pharmaceutical company. Pharmaceutical companies do not sell their drugs to physicians. Rather, they have employees who negotiate for the sales of drugs to pharmacies (almost exclusively through wholesale distributors). Pharmacies in turn sell the drugs to individuals who have an appropriate prescription. GSK also employs account managers to sell its medicines directly to pharmacies and hospitals. J.A. 129a-30a, 161a-62a.

Petitioners do not play any of those roles. Rather, petitioners are pharmaceutical sales representatives – also known as "detailers" – who were previously employed by respondent. Their job description is evocative. These employees provide medical professionals who prescribe pharmaceuticals with the "details" of pharmaceutical products, seeking to educate the prescribers with the ultimate goal of influencing their prescribing decisions. J.A. 106a, 115a-16a, 167a. Detailers make no "sales" themselves.

Petitioners' primary responsibility was to give physicians information provided by GSK so the physicians could use their own judgment in deciding whether to prescribe a GSK product. J.A. 18a, 116a.

Physicians thus regard detailers as resources with information about the safety, efficacy, and tolerability of products. *Id.* During a typical detailing visit, petitioners spoke with a prescriber about GSK products, the benefits of those products, and the patient types for whom the products might be appropriate. *Id.* 30a-31a, 116a.

For petitioners actually to sell drugs would have been illegal, contrary to the physicians' ethical responsibilities, and in violation of the company's policy under industry guidelines. It is illegal because the Prescription Drug Marketing Act of 1987 strictly regulates the sale of pharmaceutical products, including by outlawing the sale of drug samples – the only inventory that detailers are permitted to carry. *See* 21 U.S.C. §§ 353(c), (d), (t), 333(b)(1)(B); 21 C.F.R. §§ 203.30-203.39 (setting forth regulatory restrictions on the distribution of samples by detailers and others).

Further, "physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that *they cannot make a binding commitment* . . . to prescribe a particular [company's] product." *In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 154 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *see* American Medical Association, Code of Medical Ethics § 8.06(1) ("[p]hysicians should prescribe drugs . . . solely upon medical considerations and patient need and reasonable expectations of the effectiveness of the drug").

Respondent also subscribes to a regime of industry self-regulation, which prohibits detailers from undermining a prescriber's medical judgment to

make prescribing decisions exclusively based on the needs of each individual patient. The Pharmaceutical Research and Manufacturers of America (PhRMA) has published a Code on Interactions with Healthcare Professionals (Code), to which GSK is a signatory. The Code seeks to preserve physicians' independent decision making and provides that "a healthcare professional's care of patients should be based, and should be perceived as being based, solely on each patient's medical needs and the healthcare professional's medical knowledge and experience." PhRMA, *Code on Interactions with Healthcare Professionals* 2 (2008), *available at* http://www.phrma.org/sites/default/files/108/phrma_marketing_code_2008.pdf. The Code further states that "[n]othing should be offered or provided in a manner or on conditions that would interfere with the independence of a healthcare professional's prescribing practices." *Id*. at 13.

For those reasons, petitioners' detailing visits never resulted in a transaction that even resembled a sale. Physicians never placed an order with petitioners for GSK products, and they never entered into contracts to prescribe GSK products. J.A. 107a, 116a, 138a. Likewise, petitioners never engaged in negotiations that led to a sale. *Id*.

At most, petitioners asked physicians for a commitment to do something, such as read a clinical study, write a prescription in the appropriate circumstances, or attend a convention. But these efforts at persuasion did not result in binding or enforceable commitments. Consistent with their ethical obligations, physicians instead exercised their

independent prescribing judgment in each case. J.A. 9a, 45a-46a, 49a-50a.

Indeed, it is impossible to trace the sale of a GSK product back to a detailing visit. J.A. 107a, 117a. In any given time period, multiple GSK detailers are assigned to visit the same physician. *Id.* 14a-15a, 117a. Moreover, GSK's promotional efforts are in no way limited to detailing. Rather, GSK employs a multitude of tools to disseminate its message, such as direct consumer advertising, mail advertising, articles in trade publications, and broadcast and print media advertising. *Id.* 135a-38a, 151a-52a.

III. Procedural History

GSK expected petitioners to work well in excess of forty hours a week. In addition to time spent in the field visiting physicians during the ordinary workday, J.A. 124a, 130a-32a, GSK also required petitioners to, for example, review new clinical reprints, learn modules, prepare for new product launches, answer calls, check email, check messages, and enter and transmit data reports, *id.* 154a-55a, tasks that required a further ten to twenty hours per week, *id.* 28a, 74a-76a.

Because GSK nonetheless refused to pay its detailers overtime, petitioners filed this collective action on behalf of the company's detailers, alleging that it had failed to provide them with overtime pay in violation of the FLSA. The district court disagreed and granted respondent summary judgment on the ground that petitioners were exempt "outside salesmen." Pet. App. 46a-47a.

Petitioners moved to alter or amend the judgment on the ground that the Department of

Labor had squarely taken the position in an *amicus curiae* brief that pharmaceutical detailers are not outside salesmen. The district court denied the motion. Pet. App. 52a.

Petitioners appealed, supported by the Department of Labor as *amicus curiae*. The Ninth Circuit nonetheless affirmed. Pet. App. 2a.

The court of appeals did not consider whether the Secretary's regulations resolve this case in petitioners' favor. Instead, it addressed "what, if any, deference we must accord to her view that [detailers] do not meet the primary duties test for the outside sales exemption." Pet. App. 16a.

The court concluded that it was "unable to accord *Auer* deference" to the Department's interpretation of the Secretary's regulations because of the regulations' supposed "failure to add specificity to the statutory scheme." Pet. App. 23a. On that view, "the Secretary has used her appearance as *amicus* to draft a new interpretation of the FLSA's language" notwithstanding that "there exists no meaningful regulatory language to interpret." *Id.* 23a-24a.

The Ninth Circuit then concluded that it would not "accord even minimal *Skidmore* deference" to the Secretary's interpretation, Pet. App. 34a, because in the court's view that interpretation "is both plainly erroneous and inconsistent with [the Secretary's] own regulations and practices," *id.* 24a. The court noted that the Department had long stated that "an employee must '*in some sense* make a sale.'" *Id.* 25a (quoting 69 Fed. Reg. at 22,162). The court of appeals also relied on what it characterized as FLSA

"Section 3(k)'s open-ended use of the word 'sale,' which *includes* 'other disposition[s].'" *Id.* 28a.

In the court's view, detailers engage in a "sale" because they are "hired for their sales experience," "trained in sales methods," "encourag[e] physicians to prescribe their products," and "receiv[e] commission-based compensation." Pet. App. 25a-26a. Further, in the court's view, "the relevant 'purchasers' in the pharmaceutical industry . . . are the prescribing physicians" because "the patient is not at liberty to choose personally which prescription pharmaceutical he desires." *Id.* 26a. On this view, "the 'sale' is the exchange of non-binding commitments between the [detailer] and physician at the end of a successful call. Through such commitments, the manufacturer will provide an effective product and the doctor will appropriately prescribe; for all practical purposes, this is a sale." *Id.*

The Ninth Circuit recognized that there are "firm legal barriers" that prevent detailers from "selling" goods as that term is used in other industries. Pet. App. 27a. But it regarded that fact as supporting its decision: "[b]ecause such barriers do exist in this industry, the fact that commitments are non-binding is irrelevant." *Id.*

The Ninth Circuit also recognized that the Secretary's regulations draw a "distinction between selling and promoting," but it concluded that this distinction "is only meaningful if the employee does not engage in *any* activities that constitute 'selling' under the Act." Pet. App. 31a. On the court's view, non-exempt "promotional work" is limited to work "directed to the public at large, as opposed to a particular client." *Id.* 32a. By contrast, detailing,

"like any sales process, is *tailored* to the customer's preferences." *Id.*

Finally, the court found that its decision was "buttresse[d]" by what it perceived as "the Secretary's acquiescence in the sales practices of the drug industry for over seventy years." *Id.* 32a-33a. Although the Department had not previously opined on whether detailers are exempt outside salesmen, its "Dictionary of Occupational Titles" states that a detailer "[p]romotes use of and *sells* ethical drugs." *Id.* 34a (quoting U.S. Dep't of Labor, *Dictionary of Occupational Titles* § 262.157-010 (4th ed. 1991)) (emphasis in Pet. App.).

Both petitioners and respondent urged this Court to resolve a conflict between the Ninth Circuit's decision and the Second Circuit's decision in *Novartis*, which accepted the Department's view that detailers are not exempt outside salesmen. This Court granted certiorari. *Christopher v. SmithKline Beecham Corp.*, 80 U.S.L.W. 3098 (Nov. 28, 2011).

SUMMARY OF THE ARGUMENT

I. The Fair Labor Standards Act directs the Secretary of Labor to define and delimit the scope of the statute's "outside salesman" exemption. 29 U.S.C. § 213(a)(1). Pursuant to that directive, the Secretary promulgated notice-and-comment regulations that distinguish exempt work "making sales" from non-exempt "promotional work" that instead aids sales by others. 29 C.F.R. § 541.503. Under the Secretary's regulations, detailers are not exempt outside salesmen.

a. Detailers do not sell drugs, they promote them. Drug companies such as respondent GSK do

not sell their products to physicians. Instead, they sell to wholesalers, which sell them to pharmacies, which sell them to customers. Although detailers promote a company's products to doctors, they are prohibited from actually selling pharmaceuticals both by federal law and industry practice, as well as by physicians' ethical obligation to make prescribing decisions based on the needs of individual patients.

This Court recently recognized the promotional role of detailers in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). In that case, the state contended that limitations on pharmaceutical detailing were properly regarded as economic regulation of commercial transactions between prescribers and drug companies. But this Court agreed with the pharmaceutical industry that detailing is protected speech under the First Amendment because the role of detailers is not to enter into a commercial transaction but instead to provide information about particular products.

In the event the regulations are ambiguous, they are properly read to exclude detailers from the category of "outside salesmen." It is settled that exemptions from overtime must be construed narrowly. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

b. The Ninth Circuit's contrary reading of the regulations is unpersuasive. The court of appeals principally reasoned that under the regulations the term "sales" is defined to include any "other disposition," 29 C.F.R. § 541.500(a)(1)(i) (incorporating 29 U.S.C. § 203(k)), which the court read as "a broad catch-all category" that could

include non-binding commitments to prescribe a product in an appropriate case. That reading of the regulations has many flaws. It cannot be reconciled with the explicit provision excluding "promotional work" that aids sales consummated by other employees. 29 C.F.R. § 541.503(b). It also ignores that the regulations provide that an outside salesman is an employee with the primary duty of "*making* sales," not helping others to make sales. Petitioners, however, do not themselves cause any "disposition" of respondent's products.

The Ninth Circuit also erred in crafting a unique definition of "sales" tailored to the special circumstances of the pharmaceutical industry. That approach cannot be reconciled with the Secretary's regulations, which straightforwardly look to the employee's duties. The uncontested fact that detailers are prohibited from themselves making sales resolves this case in petitioners' favor under the regulations.

II. To the extent that the regulations are ambiguous, the Department's interpretation is controlling. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). The relevant agency guidance includes several reasoned *amicus* briefs explaining that the Department reads the Secretary's regulations to provide that detailers are not exempt outside salesmen.

For the reasons discussed above, the agency's interpretation of the regulations is by far the best one. But it is at the very least a permissible reading of the regulations. The agency's interpretation tracks the ordinary meaning of the phrase "making sales" and reasonably treats drug detailing as a form of

promotion, not selling. Manifestly, that conclusion is not precluded by the regulations.

The Ninth Circuit reasoned to the contrary that the Secretary's regulations merely parrot the FLSA, so that the regulations create no ambiguity for the Department to resolve. That is plainly wrong. The regulations elaborate substantially on the statute by distinguishing exempt work making sales from non-exempt promotional work that aids sales by others. In addition, the regulations require a sale to involve a transfer of title to the employer's goods. Those elaborations on the statute are eminently reasonable and preclude extending the exemption to the petitioners in this case.

III. In any event, the Ninth Circuit erred by refusing to accord substantial weight to the Department's views under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The court of appeals believed that the agency's guidance was contrary to *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941). But even assuming that it was appropriate to give a single old appellate decision such weight, the essential facts in *Jewel Tea* were that the employees in that case were "primarily employed to effect sales of the Company's merchandise" and had the responsibility to "take orders." *Id.* at 208, 205. That is of course not true of detailers.

Nor is there merit to the court of appeals' view that the Department acquiesced in the pharmaceutical industry's position that detailers are exempt outside salesmen. The Department never spoke to the status of detailers before announcing its interpretation that they do not fall within the statutory exemption. Nor does that view amount to a

reversal of its prior position. The agency's longstanding position has been that employees who engage in promotional work to support sales by others are not "outside salesmen." In any event, a pattern of agency inaction is not sufficient to avoid application of the FLSA. *See* 29 U.S.C. § 259. The responsibilities of detailers have also changed substantially. But even if that were not so, the Department would be perfectly entitled to change its views, both as a basic principle of administrative law and also in response to the congressional directive to address the scope of the overtime exemptions "from time to time." *Id.* § 213(a)(1).

The judgment accordingly should be reversed.

ARGUMENT

In deciding for itself whether detailers are "outside salesmen," the Ninth Circuit usurped the role that Congress assigned to the Department of Labor, rather than performing a court's limited role of reviewing the agency's exercise of its delegated interpretive authority. The court of appeals should have recognized that the Secretary's regulations by their terms establish that petitioners are not outside salesmen because detailers do not "mak[e] sales" but instead "promote" sales that are consummated by other GSK employees. *See* Part I, *infra*. If there is room for any doubt regarding the meaning of the regulations, the Ninth Circuit should have recognized that the Department's interpretation of its own regulations is either entitled to controlling weight, *see* Part II, *infra*, or persuasive, *see* Part III, *infra*.

I. Under *Chevron*, The Department Of Labor's Regulations Are Binding And Determine The Outcome Of This Case.

The FLSA generally requires employers to pay their employees overtime wages for time spent working beyond forty hours a week. 29 U.S.C. § 207(a). The statute exempts certain categories of employees, including an "outside salesman." *Id.* § 213(a)(1). The statute directs the Secretary of Labor to "define[] and delimit[]" those exemptions "from time to time by regulations." *Id.*

Pursuant to that congressional directive, the Secretary has adopted regulations by notice-and-comment rulemaking. The regulations specify that an "outside salesman" is an employee with the "primary duty" of "making sales within the meaning of Section 3(k) of the [FLSA]." 29 C.F.R. § 541.500(a)(1)(i). The regulations further specify that "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." *Id.* § 541.503(a). The regulations reiterate that "[p]romotional activities directed towards consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." *Id.* § 541.503(b).

The regulations clearly establish that pharmaceutical detailers are not "outside salesmen." At the very least, that is the better reading.

A. The Department's Regulations Are Valid And Establish That Detailers Are Not "Outside Salesmen" Because They Engage In Promotional Work In Support Of Sales By Other Employees.

1. As legislative rules issued pursuant to a specific congressional directive, 29 U.S.C. § 213(a)(1), the Secretary's regulations are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Respondent does not contend that the Secretary's regulations are invalid in providing that an employee is not an exempt "outside salesman" if his primary duty is "promotional work" that furthers sales by someone else. 29 C.F.R. § 541.503(a), (b). Nor does respondent contend that the Secretary lacked the authority to provide by regulation that employees like detailers are not "outside salesmen." Respondent instead disputes the meaning of the regulations.

Respondent's determination not to challenge the validity of the regulations is sound. In directing the Secretary to enact regulations "defin[ing] and delimit[ing]" the outside sales exemption, 29 U.S.C. § 213(a)(1), Congress necessarily recognized that the phrase "outside salesman" could have different meanings. Of course, the language of the exemption is not so capacious that it could carry whatever meaning the Secretary poured into it. Words have meaning, so the exemption presumably only reaches employees who play some role "outside" the business's offices and who contribute to the business's "sales." Employees who are assigned to

the office all day, every day, do not work "outside." And secretaries, seamstresses, stewardesses, sailors, stuntmen, and solicitors general are not "salesmen." So a regulation providing that, for example, an in-office secretary was an exempt "outside salesman" (and therefore ineligible to receive overtime) would be invalid as "manifestly contrary" to the FLSA. *Chevron*, 467 U.S. at 844.

But subject to the constraints imposed by the outer limits of the words' permissible meaning, the phrase "outside salesman" could be given a number of different interpretations with significant substantive consequences for the scope of the exemption. Conceivably, it might broadly reach all of the many kinds of employees who operate in some respect outside the office's physical business and contribute to the business's sales. The question is not presented here, but at the outer bounds of the word "sales," the exemption might even be stretched to reach employees who only engage in promotional efforts that contribute to later sales consummated by other employees.

That reading, however, is not the most natural interpretation of the statutory language. Far more plainly, the words of the exemption can be read more narrowly as the Secretary interpreted them: to require that the employee actually consummate the sale himself, either by entering into a contractual exchange between the employer and the customer or at a minimum by obtaining a commitment to purchase. The distinction drawn by the Secretary between "salesmen" who make sales and employees who instead engage in promotional work in support

of sales by others is a perfectly reasonable, and therefore valid, interpretation of the statute.

The decisive point in this case is that, rather than constraining the Secretary's selection between those readings of "outside salesman," Congress gave the agency wide discretion to adopt one based on its expertise and experience.

2. The deference owed to the Secretary's regulations is at its apex here, because the Department's notice-and-comment rulemaking was "the subject of extensive public commentary for two decades," producing thousands of comments from employers, employees, and others, as well as two congressional hearings and an extensive report published by the General Accounting Office. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124-25 (Apr. 23, 2004). The Secretary gave particular attention to the question at the heart of this case: whether to relax the bright line distinguishing exempt sales from non-exempt promotional work that furthers sales by others. "Several" employer groups urged the Secretary to "eliminate the emphasis upon an employee's 'own sales,'" including because of the prevalence of "team selling." *Id.* at 22,162. Employers urged the Secretary to provide instead that "promotional activities, even when they do not culminate in an individual sale are, nonetheless, an integral part of the sales process." *Id.* (position expressed by the U.S. Chamber of Commerce). But the Secretary declined to do so, explaining that "[e]xtending the outside sales exemption to include all promotion work,

whether or not connected to an employee's own sales, would contradict [the regulation's] primary duty test." *Id.* That extensive process typifies reasoned agency decision making, and thus merits deference. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

3. Under the Secretary's regulations, detailers are not outside salesmen. It is undisputed that detailers promote products sold by other employees; they never themselves arrange to transfer the title to pharmaceutical products to any purchaser or secure a commitment to purchase. Detailers do not interact with the company's purchasers. Pharmaceutical manufacturers instead have other employees who negotiate for the sale of drugs to a wholesaler, which then sells the drugs to pharmacy companies. Pharmacies, in turn, sell them to patients who have a prescription. *See In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 153-54 (2d Cir. 2010).

A detailer's job, by contrast, is to encourage physicians to prescribe particular products. *Novartis*, 611 F.3d at 154. Physicians are not customers; they are professionals who exercise their own judgment and discretion in deciding whether to prescribe a particular medicine to a specific patient. The patient then exercises an additional layer of discretion when deciding whether to fill the prescription. *See* USA Today, Kaiser Family Foundation, & Harvard School of Public Health, *The Public Perception on Prescription Drugs and Pharmaceutical Companies* 3 (2008), *available at* http://www.kff.org/kaiserpolls/upload/7748.pdf (finding 29 percent of adults have not filled a prescription within the past two years). Most

detailing visits produce no "commitment" of any kind. But any commitment that a detailer does elicit from physicians is not a commitment to buy a product. A detailer might secure the prescriber's agreement to review certain literature or attend a meeting. The most that a detailer would ever request or obtain is a nonbinding statement that the physician will consider prescribing the product in the appropriate case. For the physician to provide and the detailer to solicit more would violate both the canons of medical ethics and the industry's regime of self-regulation. *See supra* at 5-6. There is accordingly never any assurance that the physician will actually prescribe the drug, or that the patient will actually fill the prescription. In fact, "a physician might answer affirmatively just to get the [detailer] out the door." *Novartis*, 611 F.3d at 145. Even if the physician does later prescribe the promoted drug, there is no guarantee that the patient will fill the prescription. These facts expose the "nonbinding commitment" on which the Ninth Circuit relied for what it is: an oxymoron, and certainly not a "sale" for purposes of the Secretary's "outside salesman" regulation.

This Court adopted precisely this understanding of the role of detailers last Term in No. 10-79, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). In that case, the state of Vermont argued that a restriction on the use of prescription-history records for detailing did not implicate the First Amendment because detailers effectively engage in a commercial transaction with physicians. The pharmaceutical trade association (PhRMA), a respondent in the case, argued to the contrary that the role of detailers was instead to provide "a fair balance between

information about the drug's efficacy and about its safety." Br. for Respondent PhRMA at 10, *Sorrell*, 131 S. Ct. 2653 (No. 10-779) (internal quotation marks omitted). With regard to sales, PhRMA stressed that "[p]harmaceutical representatives do not haggle with doctors over price, and the doctor does not consume the drug but instead receives medical information relevant to courses of treatment for her patients. Representatives convey scientific and medical information about life-saving and life-enhancing drugs . . . ." *Id.* at 46. PhRMA explained that a variety of other factors completely external to a pharmaceutical company's promotion also influence prescribing decisions: physicians are influenced by *Consumer Reports* and other periodicals; opposition groups; and counter-detailers and registered pharmacists who aggressively promote generic drugs. *Id.* at 40-44. Moreover, physicians' prescribing patterns are affected by patient idiosyncrasies, a lack of medicinal alternatives, generic substitution laws, and the limitations imposed by insurance formularies. *Id*. at 52-54.

This Court agreed. Rejecting the state's view that the statute was "mere commercial regulation," 131 S. Ct. at 2664-65, the Court ruled that detailers' "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment," *id.* at 2659. The state's regulation, the Court explained, "disfavors marketing" and indeed "specific speakers, namely pharmaceutical manufacturers." *Id.* at 2663. The fact that "the burdened speech results from an economic motive" did not convert it into "conduct"

that could be regulated as a commercial transaction. *Id.* at 2664-65.

4. To the extent that ambiguity remains, the Secretary's regulations are properly construed to limit the scope of the statutory exemption from overtime. Given Congress's intention to limit excessive work burdens and to spread available employment across the workforce, exemptions from overtime pay are to be "narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). "To extend an exemption to anyone other than those plainly and unmistakably within its terms, is to abuse the interpretative process and frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The narrower reading of the Secretary's regulations under which petitioners are not exempt "outside salesmen" is thus the correct one.

It is therefore not surprising that the Ninth Circuit's decision is contrary to the reasoning of every circuit court that has construed the Secretary's promotion regulation and its predecessors. *See Novartis*, 611 F.3d at 153-55; *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227-28 (10th Cir. 2008) (according deference to DOL regulations under which college recruiters who promoted enrollment but did not obtain commitments to enroll were deemed not exempt as outside salesmen); *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1310 (11th Cir. 2009) (exemption applied where employee "did not 'pave the way' for another salesperson to consummate the sale,

but rather obtained the orders herself. And once the orders were obtained, the sale was complete."); *Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 253, 260-61 (5th Cir. 1969) ("student salesmen" were not exempt outside sales employees where their promotional activities facilitated others taking orders).

B. The Ninth Circuit Erred In Failing To Recognize That The Secretary's Regulations Establish That Detailers Are Not "Outside Salesmen."

The court of appeals did not explicitly consider whether the Secretary's regulations determine the outcome of this case. Instead, it erroneously proceeded directly to consider "what, if any, deference we must accord" to "the Secretary's current interpretation of the regulations." Pet. App. 16a. The court did recognize that the Secretary's regulations draw a "distinction between selling and promoting." *Id.* 31a. But it concluded that this distinction "is only meaningful if the employee does not engage in *any* activities that constitute 'selling' under the Act." *Id.* The court reasoned that detailers in fact do engage in "sales" as that term is used in the regulations. That rationale is insupportable.

1. The Ninth Circuit erred in adopting a "broad" reading of "sale" that encompassed the promotional work of detailers.

a. The Ninth Circuit found it significant that the Secretary's regulations provide, *inter alia*, that an employee may be an outside salesman if his primary duty is "making sales within the meaning of section 3(k)" of the FLSA. 29 C.F.R. § 541.500(a)(1). In turn,

Section 3(k) of the Act states that "'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). Applying these provisions, the Ninth Circuit accepted respondent's argument that it should adopt a "commonsensical" and "permissive" reading under which "the phrase 'other disposition' in Section 3(k)'s definition of 'sale' is a broad catch-all category." Pet. App. 52a.

The Ninth Circuit erred in multiple respects. The court considered only the meaning of "sales" in isolation, ignoring the other provisions of the Secretary's regulations that preclude the court's interpretation of Section 3(k). Most important, the regulations explicitly distinguish "making sales" from "promotional work" that is "incidental to sales made or to be made by someone else." 29 C.F.R. §§ 541.503(a), (b). The activities of a detailer are much more naturally characterized as non-exempt "promotional work" under the regulations.

The court of appeals disagreed only by characterizing "promotional work" as being limited to marketing that is "directed to the public at large, as opposed to a particular client." Pet. App. 32a. But that limitation appears nowhere in the regulations. An employee obviously can "promote" a product to just one individual, rather than only the public at large. And the Secretary's regulations contemplate just that meaning, by providing that promotional work is "exempt" if it supports the "employee's own outside sales" but is "not exempt" if it is instead "incidental to sales made, or to be made, by someone else." 29 C.F.R. § 541.503(a). By their terms, the regulations thus contemplate one-on-one "promotion"

by both exempt outside salesmen and non-exempt employees, but limit the exemption to employees who consummate sales.

No less important, the Secretary's regulations provide that an employee is an outside salesman if his primary occupation is "*making* sales." 29 C.F.R. § 541.501(a)(1) (emphasis added). Although the court of appeals considered the statutory definition of "sales" in Section 3(k), it ignored the regulatory requirement that the employee himself "mak[e]" the sale in question. To "make" is "[t]o cause (something) to exist." Black's Law Dictionary 967 (7th ed. 1999). The "disposition" of GSK's products is "made" by other employees – not by detailers, who merely provide information and seek non-binding commitments.

Relatedly, in elaborating on the requirement that exempt employees have the primary duty of making sales, the regulations provide: "Sales within the meaning of section 3(k) include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). Detailers fall outside this definition because they are not directly involved in any part of the "transfer of title" to the pharmaceutical company's property.

Further, the Ninth Circuit's reading is unpersuasive because the phrase "other disposition" is not as "open-ended" as the court of appeals thought. A "disposition" involves a transfer of the right to a good or service. *See* Black's Law Dictionary 484 (7th ed. 1999) (a disposition is "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of

property"). The court of appeals was therefore wrong to conclude that this phrase might encompass a "non-binding commitment," Pet. App. 26a, a concept that is a contradiction in terms, and certainly not a "transfer" of property.

The same conclusion follows from the fact that, as the Second Circuit has recognized, each of the other items in Section 3(k)'s definition of "sale" – "a sale, exchange, contract to sell, consignment for sale, [and] shipment for sale" – involves an agreement to transfer the good's title. *See Novartis*, 611 F.3d at 153. The phrase "other disposition" therefore is naturally read to carry the same requirement. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."); *Udall v. Tallman*, 380 U.S. 1, 19 (1965) (where terms in a list including the phrase "or other disposition" all "contemplate[d] transfer of title," Secretary's reading of the phrase "or other disposition" as encompassing dispositions conveying or leading to conveyance of title was reasonable); *Weisbart & Co. v. First Nat. Bank of Dalhart, Tex.*, 568 F.2d 391, 395 (5th Cir. 1978) ("other disposition" requires transaction involving transfer of property). Indeed, the Ninth Circuit's sweeping reading of "disposition" leaves all of the other words in the list provided by Congress with no role to play.

b. The Ninth Circuit also believed that it was appropriate to adopt a broad reading of "making sales" in the regulations in light of the Department's interpretive statement in the regulatory preamble

that an outside salesman must "*in some sense* make a sale." Pet. App. 25a (quoting 69 Fed. Reg. at 22,162 (quoting, in turn, Wage and Hour Division, U.S. Dep't of Labor, *"Executive, Administrative, Professional * * * Outside Salesman" Redefined*, *Report & Recs. of Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 46 (Oct. 10, 1940) [hereinafter *Stein Report*])). That reasoning is obviously flawed, because it fails to account for *all* of the agency's guidance. A court cannot embrace the interpretive guidance with which it agrees while otherwise ignoring the agency's views. Here, the Department has specifically rejected the court of appeals' interpretation of its regulations. The agency has explained that making sales requires the salesman, at a minimum, to secure a "commitment to buy" from the purchaser, 69 Fed. Reg. at 22,162, and that efforts to persuade an intermediary (such as a prescriber) to facilitate purchases by others are insufficient, U.S. Department of Labor, *Field Operations Handbook* § 22f01(e). On that basis, it has specifically concluded that pharmaceutical detailers are not "outside salesmen."

But in any event, the operative language in the guidance the Ninth Circuit did discuss is not "in some sense" but "*making sales*," which as noted requires the employee to produce a disposition in legal title and excludes promotion. In denying that result, the court of appeals took a snippet from the regulatory preamble out of context. The Department actually stated:

> An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales.

> [*S*]*ee* 1940 *Stein Report* at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

69 Fed. Reg. at 22,162. The *Stein Report* in which the "in some sense" language originally appeared further specifies (at 47) that "sales promotion and missionary men" are excluded from the category of "outside salesmen."

2. The characteristics of the pharmaceutical industry do not justify the conclusion that detailers "make sales" under the Secretary's regulations.

Applying its "broad" reading of "sell," the Ninth Circuit opined that, because "federal law prohibits pharmaceutical manufacturers from directly selling prescription medications to patients" and because "the patient is not at liberty to choose personally which prescription pharmaceutical he desires," the relevant "'sale' is the exchange of non-binding commitments between the [detailer] and physician at the end of a successful call." Pet. App. 25-26a.

It is uncontested that pharmaceutical companies do have employees who engage in sales to pharmaceutical wholesalers; the job of detailers is different. The dispositive fact is thus that the Secretary's regulations look to the "primary duty" of the employee, not the vagaries of each industry. *See* 29 C.F.R. § 541.500(b); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Relatedly, in

applying the FLSA, this Court has held that industry custom and practice do not circumscribe employees' rights under the FLSA. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981) ("The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts. . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act") (alterations in original) (citation omitted); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (noting "Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto") *id.* at 710 n.25 ("There are to be no differentials . . . between industries, or between employers.") (quoting H.R. Rep. No. 75-2182, at 6-7 (1938) (internal quotation marks omitted)); *cf. United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (*Skidmore* deference may be warranted "given the value of uniformity in [agency's] administrative and judicial understandings of what a national law requires") (citations omitted); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132 (1943) ("The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities").

The Ninth Circuit also erred in concluding that its decision was supported by the fact that a portion of some detailers' pay resembles "commissions." Pet. App. 36a. That is not a relevant consideration under the Secretary's regulations. The regulations exempt those "outside salesmen" who do not receive

commissions; conversely, non-salesmen remain non-exempt even to the extent that they do receive commissions.

Moreover, the incentive pay that GSK at one time offered to detailers based on the number of prescriptions for a particular drug in that detailer's assigned territory was not a "commission" as that term is ordinarily understood. A "commission" is a "percentage of the money received from a total paid to the agent responsible for business." Webster's New Collegiate Dictionary 224 (1979). Detailers never received payments directly tied to their success in persuading the physicians they visited. Instead, the additional payments were measured by the total prescriptions filled in the territory covered by the detailer, irrespective of whether a prescription resulted from an interaction between the detailer and a physician. Any company might decide to pay its marketing staff in the same fashion, yet that fact would not convert those employees into exempt "outside salesmen." Furthermore, GSK has altered its compensation policy to drop prescriptions from compensation evaluations and replace them with a measure of how well detailers adhere "to the company values of transparency, integrity, respect and patient-focus." Matthew Arnold, *GSK Revamps Rep Pay*, Medical Marketing & Media, July 5, 2011, http://www.mmm-online.com/GSK-revamps-rep-pay/article/206820/.

The Ninth Circuit's contrary position is not materially supported by its citation to the Department's *Dictionary of Occupational Titles*, which stated that a pharmaceutical detailer, *inter alia*, "[p]romotes use of and sells ethical drugs and

other pharmaceutical products" and "[p]romotes and sells other drugs and medicines manufactured by company." U.S. Dep't of Labor, *Dictionary of Occupational Titles* § 262.157-010 (4th ed. 1991). The *Dictionary* – which was last updated two decades ago and has since been superseded by the Department's "O*Net," *available at* http://www.bls.gov/opub/ooq/1999/Spring/art01.pdf – does not purport to use the word "sell" in the same manner as the Secretary's "outside salesman" regulations. To the contrary, it specifies that "the occupational information in this edition cannot be regarded as determining standards for any aspect of the employer-employee relationship," and "should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements." *Dictionary of Occupational Titles* at xiii.

In sum, the Secretary's regulations by their terms establish that detailers are not exempt "outside salesmen" because their primary duty is not "making sales" but instead promotional work that aids sales by others.

II. Under *Auer*, The Agency's Interpretation Of Its Regulations As Providing That Detailers Are Not Exempt Outside Salesmen Is Controlling.

Even if the Secretary's regulations do not unambiguously resolve this case in petitioners' favor, the Department of Labor has interpreted the regulations to do so. The Department has filed five *amicus curiae* briefs in the lower courts concluding on the basis of its regulations and prior guidance that pharmaceutical detailers are not exempt "outside

salesmen." In this case, the Department explained that the regulations "represent the considered judgment of the Secretary that promotional work which does not involve any actual sales does not qualify for the outside sales exemption." DOL C.A. Br. in Sup't of En Banc Review 8. As applied to this case, the Secretary found it dispositive that detailers "do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe GSK drugs to their patients when appropriate." DOL C.A. *Amicus* Br. 9. "Insofar as the Reps' work increases GSK sales, it is non-exempt promotional work 'designed to stimulate sales that will be made by someone else.'" *Id.* at 10 (quoting 29 C.F.R. § 541.503(b)). *See also* Br. for the Secretary of Labor as *Amicus-Curiae* in Support of Plaintiffs-Appellants, *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. July 6, 2010) (No. 09-0437) (arguing that the district court erred in ruling detailers exempt as outside salesperson contrary to the Department's regulations); Br. for the Secretary of Labor as *Amicus-Curiae* in Support of Plaintiff-Appellant, *Schaefer-LaRose v. Eli Lilly and Co.*, No. 10-3855 (7th Cir. May 31, 2011) (same); Br. for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellee, *Harris v. Auxilium Pharm. Inc.*, No. 11-20151 (5th Cir. July 18, 2011) (arguing that district court was correct to conclude that detailer was not an exempt outside salesperson).

The *amicus* briefs do not rely solely on the Secretary's regulations, but also on other interpretive guidance provided by the Department. The preamble to the regulations specifies that a "sale" requires a "*commitment*" from the purchaser: "Employees have

a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (quoting *Weiss Report* at 83); *see also id.* at 22,162-63 ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." (quoting *Weiss Report* at 83)).

Further, the Department's Field Operations Handbook – the "operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance," U.S. Department of Labor, *Field Operations Handbook*, http://www.dol.gov/whd/FOH (last revised Mar. 9, 2011) – provides that "[s]oliciting business through a dealer or merchant to offer a product or service to a customer is not a sale within the meaning of 29 U.S.C. § 203(k)." U.S. Department of Labor, *Field Operations Handbook* § 22f01(e) (2010); *see also Weiss Report* at 83 ("[P]romotional activities designed to stimulate sales which will be made by someone else" are "non-exempt"; if a manufacturer sells through a wholesaler, promotion directly to a retailer "is not incidental to sales by himself and is non-exempt work," no matter how essential to the retailer's purchasing decision).

The Department's interpretation easily resolves this case.

A. This Is A Classic Case For Deference Under *Auer*.

The Department's interpretation of its own regulations is binding unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *see also, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2009) (where "an agency's course of action indicates that the interpretation of its own regulation reflects its considered views . . . [the Court has] accepted that interpretation as the agency's own, even if the agency set those views forth in a legal brief"). The agency's interpretation easily satisfies that lenient standard.

1. The Department of Labor's view – that the distinction between exempt work "making sales" and non-exempt promotion requires that an outside salesman actually effect, or at least initiate, a transfer of title over the product – is manifestly valid. It tracks the ordinary meaning of "sale." *See, e.g.*, *Comm'r of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965) ("[a] sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent . . . it is a contract to pass rights of property for money, –which the buyer pays or promises to pay to the seller") (citations and internal quotations marks omitted); *Bus. Edge Grp. v. Champion Mortg. Co.*, 519 F.3d 150, 155 (3d Cir. 2008); *MacDonald v. Comm'r*, 76 F.2d 513, 514 (2d Cir. 1935); Opinion Letter from the Wage & Hour

Div., U.S. Dep't of Labor, 2005 WL 330605 at *2 (Jan. 7, 2005) ("Though the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.") (internal quotation marks omitted) (construing 29 U.S.C. § 203(k)).

GSK's own repeated claims that detailers do not engage in "sales" establish that the Secretary's interpretation is, at the very least, reasonable. In a motion to dismiss a products liability action, GSK stated that, "[a]s a GSK sales representative, [the detailer's] primary job responsibility was to provide information regarding the risks and benefits of select pharmaceutical products to health care providers in his assigned geographic territory. . . . During the course of his employment with GSK, [the detailer] never designed, tested, manufactured, marketed, sold, distributed, or supplied [any GSK product]." Def.'s Mot. to Dismiss at 5, *Faulk v. SmithKline Beecham Corp.*, No. 2:05CV85-F (M.D. Ala. Sept. 7, 2005).

Although its job description for detailers sometimes references "sales," GSK explained that "all the job description does is show that GSK seeks to hire qualified, well-educated individuals." J.A. 157a. GSK reaffirmed this position in a motion filed in a separate products liability case, in which it argued that "[t]here is no possibility that Plaintiffs could prevail on their warranty claims against [the detailer] because she is not a supplier or seller of [GSK products]." Def.'s Br. in Opp'n to Pls.' Mot. to Remand to State Ct. at 9, *Martinez v. SmithKline*

Beecham Corp., No. 2:08-cv-05847 (E.D. Pa. July 28, 2009).

To the extent the question is at all close, the Department's position is faithful to the principle that exemptions should be "narrowly construed," *Ben Kanowsky*, 361 U.S. at 392, and applied only when they are "plainly and unmistakably" implicated, *A.H. Phillips*, 324 U.S. at 493.

2. This is a classic context for deferring to the judgment of an administrative agency, as *Auer* (which involved the Department's interpretation of the FLSA) illustrates. Congress created the Department of Labor precisely in order to administer the nation's labor laws, particularly the FLSA. The United States is a vast, complicated labor market with more than six million employers, and a workforce that exceeds 125 million people in many thousands of different job categories. Tasked with the depth and breadth of such a daunting assignment, the agency itself employs thousands of individuals who work full time to collectively assess the labor market, including with respect to questions of overtime eligibility.

Having created the Department to do this job, Congress expected the agency to develop and apply at least three relevant forms of expertise. First, Congress recognized that the Department would develop a considerable body of knowledge about the many different kinds of job categories that might be regarded as "outside salesmen." Because so many jobs involve some form of promotional work and bear some relationship to the employer's "sales," there can be hundreds of jobs that approach the margins of the statutory exemption. Pharmaceutical detailer is just

one of many. In everyday experience, we encounter individuals who hand out flyers on the street about ongoing sales, representatives of cosmetic companies who offer to spray samples of perfume in department stores, and employees of producers who visit stores to offer samples of, for example, wines. Congress necessarily understood that this body of experience would put the agency in the best position to determine which job categories merit exemption from overtime pay.

Second, and relatedly, Congress understood that the Department could account for changing labor conditions and job responsibilities. It thus directed the Secretary to promulgate regulations interpreting the outside salesman exemption not just once, but "from time to time." 29 U.S.C. § 213(a)(1). Many new industries have been created and others have disappeared outright in the more than seven decades since Congress enacted the FLSA. In some instances, Congress has amended the statute directly to address its reach. But in this instance, it has entrusted to the Secretary the responsibility of adopting and interpreting rules that best account for changed circumstances.

Third, and more broadly, the agency has considerable experience with the benefits and disadvantages of certain kinds of rules. Here, for example, there are significant implications to the choice between a single bright-line definition of "outside salesman" and an alternative approach that provides that the term should be adapted to the circumstances of particular industries. The former provides clarity, allows the parties to the employment relationship to negotiate the terms and conditions of

employment in advance, and reduces the amount of litigation over the rule's meaning. Congress thus granted the Secretary authority to define the overtime exemptions to "enable persons to know definitely whether or not they are to be subject to the law," given that "[r]easonable men may differ as to whether a particular employee is included or excluded." 83 Cong. Rec. 7281 (1938) (statement of Cong. Norton). The latter may have the benefit of more completely encompassing the employees that the employer regards as part of its "sales force." Having implemented, interpreted, and enforced hundreds of regulations relating to wages, the Department would be well positioned to make a judgment regarding what type of rule best effectuates the FLSA's purposes.

The Department was properly guided by the principle that the determination whether work triggers the FLSA's overtime pay requirements requires a clear, administrable standard. The Department cannot possibly police every industry and every application of the outside sales exemption across this country. Instead, it must announce generally applicable principles. Any bright-line rule can be argued to be over- or underinclusive when applied to some subsets of the innumerable types of diverse American workplaces. But that presents no substantial problem because a clear rule permits employers and employees *ex ante* to confidently establish job duties and negotiate an appropriate wage and workweek.

After extensive public input, the Secretary thus wisely chose to adopt a reasonable, simple, and administrable interpretation of "outside salesman."

In the notice-and-comment process, employers complained that the Department's previous standards were "confusing and applied inconsistently by the Wage and Hour Division," and that "the traditional limits of the exemptions have blurred in the modern workplace." 69 Fed. Reg. at 22,124-25. The General Accounting Office therefore urged the Secretary to be attentive to "employers' desires for clear and unambiguous regulatory standards." *Id.* at 22,125. The Secretary's regulations accordingly draw a bright line between making sales and promotion that aids sales made by others. Under that standard, pharmaceutical detailers are subject to the ordinary rule that they receive overtime compensation for work beyond forty hours a week. 29 U.S.C. § 207(a). To the extent that employers such as respondent believe that petitioners' wages are too high, they can and will limit the hours in detailers' workweeks and/or seek to negotiate a lower base wage.

By contrast, a rule that the meaning of "making sales" varies according to the conditions of particular industries would create uncertainty and unnecessarily embroil the Department and the courts in still more cases like this one over the FLSA's application to innumerable individual workplaces. The decision below aptly illustrates the point. The Ninth Circuit dismissed the Department's interpretation as "a rigid, formalistic interpretation," Pet. App. 28a, preferring a rule under which employees who "lack some hallmarks of the classic salesman" are nevertheless "outside salesmen" so long as "the great bulk of their activities are the same," *id.* 30a-31a. But the court of appeals offered no guidance on how the tens of thousands of

businesses that employ millions of workers in some sales-related capacity could possibly know in advance how its "great bulk" standard would be applied by the Department of Labor in an enforcement action or by a court in a FLSA suit for overtime wages. The standard adopted by the Ninth Circuit would inevitably breed great uncertainty and confusion.

3. Courts lack each of the three characteristics that led Congress to give the Department of Labor the authority to define and delimit the meaning of "outside salesman." No member of the Ninth Circuit spent a career studying the labor markets and developing rules for their orderly administration, much less a career undertaken on the basis of a congressional assignment to develop a special expertise in that field. And the court of appeals announced a rule that would apply for time immemorial, ejecting the Department from its assigned role as the expert agency tasked with responding to changes in labor conditions. In rejecting the Department's categorical interpretation of "outside salesman" in favor of a special rule applicable only to the pharmaceutical industry, the Ninth Circuit also disrupted a regime under which employers and employees can confidently use the existence of a bright-line rule to establish job responsibilities, and negotiate salaries and work hours, all in advance.

Congress trusted the Department to make this choice because it is good at its job, not just because of the agency's expertise but also because of its accountability. If the Secretary of Labor interprets "outside salesman" in a manner that the President finds objectionable, he can replace the Secretary. The

President is elected by the public; if the public disagrees with the President's choice, it can decline to re-elect him. The Department is also subject to a thorough process of congressional oversight, as is perfectly illustrated by the congressional hearings relating to these very regulations. The Secretary has every incentive to apply her expertise in the light of the experience and judgment of the agency staff to get the question right.

By determining that it preferred a broad reading of "outside salesman" that it claimed accounted for the peculiar characteristics of the pharmaceutical industry and enacting that preference into law, the Ninth Circuit was accountable to no one (absent review in this Court). Despite the fact that the people elected Congress, which in turn assigned this responsibility to an expert agency within the politically accountable executive branch, the court of appeals took upon itself the role of making a policy judgment about how many kinds of employees should be exempt from overtime.

The point is not, of course, that the public selects members of Congress or the President based solely on their views on the outside sales exemption. For most of the country, there are more pressing issues. But the principle of administrative law at stake in this case is just as applicable to thousands of other regulations issued by dozens of agencies, which collectively play a significant role in defining our polity. If agency judgments are overridden with regularity by generalist courts, then there will be little reason for the public to hold the executive accountable and less reason for agencies to take their responsibilities so seriously.

In this respect, the Ninth Circuit's decision also fails to recognize the trajectory of this Court's jurisprudence discouraging regulation through litigation. In many cases, plaintiffs are the parties who seek to have disputes resolved by courts rather than expert agencies. But here it is the reverse. Petitioners respect the judgment of the Department of Labor. Respondent, by contrast, imagines a regime in which employers and employees will call on the federal courts to resolve their disputes over the proper categorization of innumerable jobs.

B. The Ninth Circuit Erred In Refusing To Defer To The Department's Interpretation On The Ground That The Regulations Merely Parrot The Statutory Text.

The Ninth Circuit held that the Secretary's regulations are not binding on the ground that the Secretary's regulation "clarifies nothing about the meaning of Section 3(k)" because it "cross-references back to the language of Section 3(k)." Pet. App. 22a. On that view, this case is governed by the holding of *Gonzales v. Oregon* that the Attorney General's interpretation of a regulation was not binding because "'the underlying regulation does little more than restate the terms of the statute itself.'" *Id.* 23a (quoting 546 U.S. 243, 256-57 (2006)).

The Ninth Circuit erred because the Secretary's regulations do substantially more than "restate" the terms of Section 3(k). As noted, the regulations provide that the outside salesman must "mak[e]" the sale. They also clarify the meaning of Section 3(k) by providing that a "sale" involves the "transfer of title"

of property. The regulation thus properly clarifies that the exemption focuses on actual sales transactions consummated by the employee in question, as opposed to some other more tangential part of the process that one might characterize as "making sales" on the broadest possible reading. No less important, the Secretary distinguished "making sales" from "promotional work" that aids made sales by others. 29 C.F.R. § 541.503(a). That regulation "delimit[s]" the category of "outside salesman," 29 U.S.C. § 213(a)(1), and does so without parroting the text of the FLSA.

This case is accordingly easily distinguished from *Gonzales v. Oregon*, in which this Court rejected the Attorney General's claim that he could issue a legally binding interpretation of a regulation under *Auer* despite the absence of any relevant "difference between the statutory and regulatory language." 546 U.S. at 257. "Since the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now cannot be considered an interpretation of the regulation." *Id.*

The relevant part of *Gonzales* is instead its reiteration of *Auer*'s holding, which governs this case. Courts must give binding effect to the Department of Labor's interpretation of regulations that provide "specificity to a statutory scheme the Secretary [is] charged with enforcing and reflected the considerable experience and expertise the Department of Labor ha[s] acquired over time with respect to the complexities of the Fair Labor Standards Act." *Gonzales*, 546 U.S. at 256-57.

Gonzales is also distinguishable on the ground that the "agency" in that case (the United States

Attorney General) had no delegated authority from Congress to issue the rule in question. That rule moreover was an interpretive rule, not one issued pursuant to notice and comment (unlike the Secretary's regulations interpreting the outside salesman exemption). *Id.* at 253-54, 258-68.

The Department was accordingly empowered to reasonably interpret the distinction between "promotional work" and "making sales" – which was entirely a "creature of the Secretary's own regulations," *Auer*, 519 U.S. at 461 – to provide that pharmaceutical detailers are not outside salesmen because they engage in non-exempt promotion.

III. Under *Skidmore*, The Ninth Circuit Erred In Finding The Secretary's Interpretation Of The "Outside Salesman" Exemption Unpersuasive.

Even assuming that neither the Secretary's regulations nor the Department's interpretation of those regulations binds the courts in the disposition of this case, the agency's interpretation should be accorded deference on the ground that it is persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). However, having concluded that it was not bound by the "agency-determined result" that pharmaceutical detailers are not "outside salesmen," the Ninth Circuit concluded that the Secretary's interpretation was not persuasive and on that basis refused to "accord [it] even minimal *Skidmore* deference." Pet. App. 34a. The Ninth Circuit gave two reasons for deeming the Department's reasoning unpersuasive and for refusing to give any weight to

the views of the expert agency charged by Congress with administering the FLSA. Both were mistaken.

1. The court of appeals mistakenly believed that its contrary holding was supported by *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941), which it regarded as "the paradigm 'outside salesman' case." Pet. App. 28a. In *Jewel Tea*, the court held that salesmen who also performed deliveries were "outside salesmen" because they were "primarily employed to effect sales of the Company's merchandise," and several indicia (including the fact that they spent most of their time selling, and that their earnings were based on commission) suggested that they were salesmen, not merely delivery men. 118 F.2d at 208.

Assuming that a single appellate ruling from seventy years ago should play such a prominent role, the relevant point is that the employees in *Jewel Tea* (unlike pharmaceutical detailers) were not limited to promoting their employer's products but instead had the responsibility to "take orders." *Id.* at 203. The essential feature of a "sale" is a transfer of title or property; it was present in *Jewel Tea*, but it is missing here. Not surprisingly, the court that decided *Jewel Tea* has since twice reaffirmed that the exemption does not apply to employees with a primary duty that involves something less than consummating sales or obtaining concrete commitments to purchase. *See Clements v. Serco, Inc.*, 530 F.3d 1224, 1227-29 (10th Cir. 2008) (exemption inapplicable where "no 'order or contract' [or commitments to purchase] had been obtained," and employee merely paved way for another to make sale); *Ackerman v. Coca-Cola Enter., Inc.*, 179 F.3d

1260, 1267-68 (10th Cir. 1999) ("key inquiry" is whether employee "actually consummates" sales).

Thus, to the extent that the Ninth Circuit was correct in believing that *Jewel Tea* applied a "multi-factor review of an employee's functions," Pet. App. 35a, the most important factor in that test is whether the employee made sales. 118 F.2d at 208. Indeed, where courts have applied a multi-factor test in construing the exemption, they have done so in examining whether, under a regulation not applicable here, the employee's "primary duty" (as opposed to an ancillary duty) is making sales – but that issue is not before this Court. *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 471-72 (S.D.N.Y. 2008) (multi-factor test was "developed to assist in the adjudication of 'mixed duties' cases" under 29 C.F.R. § 541.504(b), which governs "driver salesmen" who engage in both sales and non-sales work); *Kuzinski v. Schering Corp*, 604 F. Supp. 2d 385, 394 (D. Conn. 2009) (same), *aff'd*, 384 F. App'x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011).

2. The Ninth Circuit equally erred in believing that its position was "buttresse[d]" by the Secretary's supposed "acquiescence in the sales practices of the drug industry for over seventy years." Pet. App. 32a-33a. According to the court of appeals, until its recent *amicus* briefs, "the DOL did not challenge the conventional wisdom that detailing is the functional equivalent of selling pharmaceutical products." *Id.* 33a.

But the acquiescence imagined by the Ninth Circuit was a mirage. There is no indication that the Department of Labor previously was aware of and

considered whether pharmaceutical detailers are outside salesmen.

To the extent that the Department said anything relevant, the regulations at issue in this case were enacted in 2004. Even before that, the agency's position has long been clear that employees who engage in promotional efforts are not exempt from overtime pay. Since at least 1949, the Department has taken the position that the FLSA requires an outside salesman to "obtain a commitment to buy" the product. *Weiss Report* at 83. Similarly, the Department's 1965 Field Operations Handbook provided that "[a]n employee whose duty is to convince a dealer of the value of his employer's services to the dealer's customers and who does not, in fact, obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Section 3(k)." U.S. Department of Labor, *Field Operations Handbook* § 22e04 (1965).

When asked to explain his contrary claim that detailers' promotional activities include sales, GSK's Regional Vice President conceded that detailers do not, in fact, contract for the sale of GSK's products. The most he was able to say was that "[w]hat is sold is the information – or what is promoted is the information around our product. What is sold is the notion that the physician will find it useful, that medicine, for his or her patients." J.A. 142. But it has long been settled that selling a "notion," such as donating to charity, educational recruiting, or organ donation, is not a "sale" under the exemption. *See* Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 2006 DOLWH LEXIS 65, at *5 (May 22, 2006) ("Soliciting promises of future charitable

donations or 'selling the concept' of donating to charity does not constitute 'sales' for purposes of the outside sales exemption."); Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 1998 DOLWH LEXIS 17, at *7 (Feb. 19, 1998) (college recruiter not an outside salesperson where he is engaged in identifying qualified potential students, but the college decides "whether to make a contractual offer of its educational services to the applicant"); Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 1994 DOLWH LEXIS 65, at *3 (Aug. 19, 1994) ("The selling of a concept," such as donating human tissues to hospitals, "does not constitute 'sales' within the meaning of the regulations"); Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 1982 DOLWH LEXIS 28, at *4 (Oct. 4, 1982) (employment recruiter was not an outside salesperson where he arranged meetings between prospective employees and employers but employer made the ultimate decision whether to hire).

Just as important, in promulgating the Secretary's current regulations, the Department explained that "[a]s the workplace and structure of our economy has evolved, so, too, must [the regulations] be modernized to remain current and relevant." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). The Department recognized that it was charged with "utilizing record evidence submitted in 2003 * * * not in the 1940s or 1950s * * * in exercising its discretion to update the terms of this Part." *Id.* It is thus significant that the

responsibilities of detailers and the regulatory restrictions on their ability to "sell" pharmaceutical products have changed substantially over the past several decades. The agency's position corresponds to the current responsibilities of detailers, including the petitioners in this case.

Fifty years ago, many detailers *were* also salesmen. These old-line "detail men" were often doctors or pharmacists, or at least had a background in science. They sold drugs to pharmacies and "physician supply houses," carried order forms, and discussed prices with buyers. Arthur F. Peterson, *Pharmaceutical Selling, 'Detailing' and Sales Training* 26-27, 31-33, 36, 94, 166-67, 189 (2d ed. 1959). Now, detailers are generally recent college graduates who, while they may have some science background, also may have as a principal qualification experience in "cheerleading." *See* Stephanie Saul, *Give Me an Rx! Cheerleaders Pep Up Drug Sales*, N.Y. Times, Nov. 28, 2005, at A1.

Moreover, even in years past, detailers recognized a clear distinction between their two roles; detailing was regarded as a form of "promotion," while "sales" were separate. George R. Cain, the president of Abbott Laboratories and a leading pharmaceutical figure of the 1960s, discussed this sales/promotion dichotomy:

> Most pharmaceutical sales representatives have a "detailing assignment" where they call upon physicians to detail products, and also a "sales assignment" where they call upon buying accounts such as drugstores and hospitals. The usual pattern for the detail man is to call upon

> his drugstores and hospital in the morning and detail his physicians in the afternoon.

George R. Cain, *The Detail Man – What the Pharmaceutical Industry Expects of Him*, 38 Bull. N.Y. Acad. Med., No. 2, Feb. 1962, at 129, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1804767/pdf/bullnyacadmed00311-0064.pdf.

But even then, many detailers of the era recognized that in their role as detailers, their job was to promote sales, not make them. *See* Thomas H. Jones, *Detailing the Physician: Sales Promotion by Personal Contact with the Medical and Allied Professions* 17 (1940) ("Detailing is in reality, sales promotion and every detail man should keep that fact constantly in mind."); Rufus L. McQuillan, *Is the Doctor In? The Story of a Drug Detail Man's 50 Years of Public Relations with Doctors and Druggists* 140 (1963) ("Every detail man is a potential missionary or a potential public relations man, as well as a professional service representative."). Courts have likewise recognized that detailers who called upon physicians were not engaged in sales. *See, e.g.*, *Kress & Owen Co. v. Comm'r of Internal Revenue*, 12 BTA 991, 992 (1928) ("The detail men who called on the profession were usually physicians themselves, they were not salesmen, but merely did missionary work to introduce and popularize the product.").

But even accepting the Ninth Circuit's premise that the Department at an earlier time acquiesced to the view that detailers were salespersons, and moreover that the responsibilities of detailers remain unchanged, the Department is fully entitled to change its views, so long as its position remains reasoned. Congress specifically contemplated that

the Secretary would adopt revised regulations from "time to time." 29 U.S.C. § 213(a)(1). Even if an agency advances "a novel interpretation of its longstanding . . . regulations, novelty alone is not a reason to refuse deference." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263-64 (2011). In the absence of a definitive and authoritative DOL pronouncement that detailers are exempt outside salesmen, it is not precluded from interpreting the exemption as excluding them. *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008) ("agency nonenforcement of a federal statute is not the same as a policy of approval").

Prior acquiescence by the Department thus does not defeat the deference due to its current interpretation. The FLSA specifically provides that employers may rely on "any written administrative regulation, order, ruling, approval, or interpretation" by the Department of Labor; inaction by the agency is insufficient. 29 U.S.C. § 259(a). The agency's regulations accordingly advise employers that "before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency." 29 C.F.R. § 790.18(h).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Relevant Statutory and Regulatory Provisions

29 U.S.C. § 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 203(k) provides:

> "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 213(a)(1) provides:

> Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—
>
> > (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or

> secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)[.]

29 U.S.C. § 259(a) provides:

> Reliance in future on administrative rulings
>
> (a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any

> administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 C.F.R. § 541.500 provides:

> General rule for outside sales employees.
>
> (a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
>
> (b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections,

shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

29 C.F.R. § 541.501 provides:

Making sales or obtaining orders.

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on

radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

29 C.F.R. § 541.503 provides:

Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if

the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.