

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2003

5
6 (Argued March 4, 2004 Decided July 22, 2004)

7
8 Docket No. 03-7666
9

10 -----x
11
12 EVELYN COKE,

13
14 Plaintiff-Appellant,

15
16 -- v.--

17
18 LONG ISLAND CARE AT HOME, LTD., and MARYANN OSBORNE,

19
20 Defendants-Appellees.
21

22 -----x
23
24 B e f o r e : WALKER, Chief Judge, KATZMANN, Circuit Judge, and
25 GLEESON, District Judge.*

26 Appeal from the grant of defendants' motion for judgment on
27 the pleadings by the United States District Court for the Eastern
28 District of New York (Thomas C. Platt, District Judge), finding
29 two regulations promulgated by the Department of Labor defining
30 and interpreting the "companionship services" exemption in the
31 Fair Labor Standards Act, 29 U.S.C. § 213(a)(15), to be
32 enforceable, thereby precluding plaintiff's claims for minimum
33 wage and overtime compensation under the Act.

34 AFFIRMED in part; VACATED in part; and REMANDED.

* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

1
2 HAROLD CRAIG BECKER, Service
3 Employees International Union,
4 AFL-CIO, Chicago, IL (Michael
5 Shen, Constantine P. Kokkoris,
6 New York, NY, on the brief),
7 for Plaintiff-Appellant.
8

9 Arnold S. Klein, Meltzer,
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12 for Defendants-Appellees.
13

14 FORD NEWMAN, Senior Attorney,
15 United States Department of
16 Labor (Howard M. Radzely,
17 Acting Solicitor of Labor,
18 Steven J. Mandel, Associate
19 Solicitor, Paul L. Frieden,
20 Counsel for Appellate
21 Litigation, on the brief),
22 Washington, D.C., for Amicus
23 Curiae United States Secretary
24 of Labor.
25

26
27 JOHN M. WALKER, JR., Chief Judge:

28 At issue in this appeal is the enforceability of two
29 regulations promulgated by the Department of Labor ("DOL") that
30 define and interpret the "companionship services" exemption in
31 the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C.
32 § 213(a)(15). The Act generally requires minimum wage and
33 overtime compensation; the "companionship services" exemption
34 relieves employers from paying such compensation to those
35 employees who work in domestic service as babysitters and
36 companions to the elderly and infirm. The regulations at issue
37 implement the exemption with respect to companions.

1 The first regulation we consider is a regulation that
2 defines the exemption. It includes within the exemption (1)
3 those who perform household work related to the care of the
4 elderly or infirm and (2) those who also perform housework
5 incidental to their "companionship services" as long as the
6 housework accounts for less than twenty percent of the weekly
7 hours worked. See 29 C.F.R. § 552.6. The second regulation we
8 consider applies the exemption to "[e]mployees who are engaged in
9 providing companionship services, as defined in § 552.6, and who
10 are employed by an employer or agency other than the family or
11 household using their services." See 29 C.F.R. § 552.109(a).
12 The district court found both of these regulations to be entitled
13 to the highest form of deference available to agency regulations
14 and, accordingly, found them legally enforceable. See Coke v.
15 Long Island Care at Home, Ltd., 267 F. Supp. 2d 332 (E.D.N.Y.
16 2003).

17 We affirm the enforceability of the first regulation,
18 § 552.6, according it the highest level of deference available to
19 agencies pursuant to Chevron, U.S.A., Inc. v. Natural Resources
20 Defense Council, Inc., 467 U.S. 837 (1984). But we conclude that
21 the second regulation, § 552.109(a), is neither entitled to
22 Chevron deference nor enforceable; we find it to be entitled only
23 to the more limited level of deference announced in Skidmore v.
24 Swift & Co., 323 U.S. 134 (1944), and reaffirmed in United States

1 v. Mead Corp., 533 U.S. 218 (2001). Because the second
2 regulation is unpersuasive in the context of the entire statutory
3 and regulatory scheme, it fails Skidmore's test and cannot be
4 enforced. Accordingly, we AFFIRM in part, VACATE in part, and
5 REMAND for further proceedings.

7 **FACTUAL BACKGROUND**

8 Plaintiff-appellant Evelyn Coke appeals from the judgment on
9 the pleadings, entered pursuant to Federal Rule of Civil
10 Procedure 12(c), in favor of defendants-appellees Long Island
11 Care at Home, Ltd. and owner Maryann Osborne, by the United
12 States District Court for the Eastern District of New York
13 (Thomas C. Platt, District Judge). See Coke, 267 F. Supp. 2d at
14 332-41. The Secretary of Labor submitted an amicus brief arguing
15 on behalf of defendants-appellees that the district court's
16 ruling should be affirmed.

17 Unlike most, if not all, of the other courts that have
18 considered the issues in this appeal,² we review Coke's case

² We collect the full citations to such cases here in chronological order for ease of reference: McCune v. Or. Senior Servs. Div., 894 F.2d 1107 (9th Cir. 1990); Cox v. Acme Health Servs., Inc., 55 F.3d 1304 (7th Cir. 1995); Salyer v. Ohio Bureau of Workers' Comp., 83 F.3d 784 (6th Cir. 1996); Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d 1294 (N.D. Okla. 1998); Johnston v. Volunteers of Am., Inc., 213 F.3d 559 (10th Cir. 2000); Madison v. Res. for Human Dev., Inc., 233 F.3d 175 (3d Cir. 2000); Harris v. Dorothy L. Sims Registry, No. 00 C 3028, 2001 U.S. Dist. LEXIS 23263, 2001 WL 78448 (N.D. Ill. Jan. 29, 2001); Welding v. Bios Corp., 353 F.3d 1214 (10th Cir. 2004).

1 before the summary judgment stage and, thus, without any factual
2 development. All we know is that Coke filed this action under
3 the FLSA, alleging that she was employed as a "home healthcare
4 attendant" by defendants, who did not pay her minimum wage or
5 overtime compensation. While such compensation is generally
6 required under the FLSA, Coke acknowledges that the
7 "companionship services" exemption to the FLSA, as defined and
8 interpreted by the DOL regulations, applies to her employment and
9 that if the regulations at issue are enforceable, she cannot
10 prevail. Her arguments are purely legal.

11 Coke contends that the two regulations defining and
12 interpreting "companionship services" are unreasonable and
13 impermissible in light of the statute's clear language and
14 statutory purpose. Coke candidly calls her action a test case,
15 "challenging the regulation[s] on [their] face." She does not
16 allege that the regulations are being improperly applied to a
17 subclass of employees but, rather, that they contravene
18 legislative will and are therefore unenforceable. After the
19 district court accorded the two regulations Chevron deference and
20 found them to be permissible under the statute, it granted
21 defendants' motion for judgment on the pleadings. This appeal
22 followed.

1 bears the burden of proving that its employees fall within an
2 exemption in the FLSA. See Corning Glass Works v. Brennan, 417
3 U.S. 188, 196-97 (1974); Arnold, 361 U.S. at 392; Donovan v.
4 Carls Drug Co., 703 F.2d 650, 652 (2d Cir. 1983). In sum, "[t]o
5 extend an exemption to other than those plainly and unmistakably
6 within its terms and spirit is to abuse the interpretative
7 process and to frustrate the announced will of the people." A.H.
8 Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945). Bearing
9 these guiding principles in mind, we undertake our de novo review
10 of the district court's decision upholding the two regulations at
11 issue here.

12

13 **II. Statutory Scheme**

14 The FLSA, enacted by Congress in 1938, requires that most
15 workers receive minimum wage and overtime compensation for hours
16 worked in excess of forty per week. See generally 29 U.S.C.
17 § 201 et seq. In 1974, Congress amended the FLSA to broaden its
18 coverage to a new set of workers, previously unprotected by the
19 Act: employees performing "domestic services." While the
20 statute itself did not define "domestic service employment," the
21 Senate Committee Report confirms the commonly understood meaning
22 of the term to include those employed within the home as cooks,
23 butlers, valets, maids, housekeepers, governesses, janitors,

1 laundresses, caretakers, handymen, gardeners, footmen, grooms,
2 chauffeurs, and the like. See S. Rep. No. 93-690, at 20 (1974);
3 see also H.R. Rep. No. 93-913, at 35-36 (1974). However, while
4 extending FLSA protections to employees in domestic service,
5 Congress carved out an exemption for employees engaged in
6 "babysitting services" and "companionship services." The
7 exemption withholds FLSA benefits from:

8 any employee employed on a casual basis in domestic
9 service employment to provide babysitting services or
10 any employee employed in domestic service employment to
11 provide companionship services for individuals who
12 (because of age or infirmity) are unable to care for
13 themselves (as such terms are defined and delimited by
14 regulations of the Secretary [of Labor])

15
16 29 U.S.C. § 213(a)(15). In order to more clearly delineate those
17 who are subject to the exemption, the Secretary of Labor, soon
18 after the adoption of the 1974 amendments, promulgated a series
19 of regulations, including the two that Coke challenges here.

20
21 **III. Regulatory Scheme**

22 The first regulation Coke challenges was promulgated in
23 exercise of the authority delegated by § 213(a)(15) to define
24 "companionship services." It defines "companionship services" as

25 those services which provide fellowship, care, and
26 protection for a person who, because of advanced age or
27 physical or mental infirmity, cannot care for his or
28 her own needs. Such services may include household
29 work related to the care of the aged or infirm person

1 such as meal preparation, bed making, washing of
2 clothes, and other similar services. They may also
3 include the performance of general household work:
4 Provided, however, [t]hat such work is incidental,
5 i.e., does not exceed 20 percent of the total weekly
6 hours worked.

7
8 29 C.F.R. § 552.6.

9 A related regulation (not challenged here), also promulgated
10 in clear exercise of the authority delegated by § 213(a)(15),
11 adopts the House Committee Report's definition of "domestic
12 service employment." That regulation states that domestic
13 service "refers to services of a household nature performed by an
14 employee in or about a private home . . . of the person by whom
15 he or she is employed." 29 C.F.R. § 552.3 (emphasis added); cf.
16 H.R. Rep. No. 93-913, at 35 (defining "domestic service
17 employment" to be "services of a household nature performed by an
18 employee in or about a private home of the person by whom he or
19 she is employed"); see also S. Rep. No. 93-690, at 20 (stating
20 that the House's construction of "domestic service employment" to
21 exclude third party employment is "generally accepted").

22 The second regulation Coke challenges, 29 C.F.R.
23 § 552.109(a), also promulgated soon after the 1974 amendments,
24 expressly extends the exemption by including employees "who are
25 employed by an employer or agency other than the family or
26 household using their services." Section 552.109(a) appears
27 under the "Subpart B" heading, "Interpretations," as opposed to
28 the "Subpart A" heading, "General Regulations," under which

1 §§ 552.3 and 552.6 are listed. This regulation exempted
2 employees who the DOL concedes were not exempt prior to the 1974
3 amendments. See Employment of Domestic Service Employees, 39
4 Fed. Reg. 35, 382, 35,385 (proposed Oct. 1, 1974) (finding that
5 “[e]mployees who are engaged in providing . . . companionship
6 services and who are employed by an employer other than the
7 families or households using such services” were “subject to the
8 [FLSA] prior to the 1974 Amendments”). Prior to the promulgation
9 of § 552.109(a), the DOL put out a different proposed rule for
10 notice and comment: one that specifically declined to apply the
11 “companionship services” exemption to employees of third party
12 employers. See id. Following notice and comment on that
13 proposed regulation, the agency reversed its position and offered
14 the following explanation: “On further consideration, [the
15 Secretary of Labor] ha[s] concluded that these exemptions can be
16 available to such third party employers since they apply to ‘any
17 employee’ engaged ‘in’ the enumerated services.” Application of
18 the Fair Labor Standards Act to Domestic Service, 40 Fed. Reg.
19 7404, 7405 (Feb. 20, 1975) (codified at 29 C.F.R. pts. 516, 552).
20 The statement accompanying the regulation did not explain how
21 bringing these previously covered employees of third party
22 employers within the exemption furthered the congressional
23 purpose of expanding, and not narrowing, FLSA coverage from what
24 it had been prior to 1974. The DOL did not extend the exemption

1 to apply to those employees employed by third parties that
2 provide "babysitting services." See 29 C.F.R. § 552.109(b).

3 The DOL has enforced the two regulations at issue since
4 their promulgation in 1974 and Congress has not disturbed the
5 details of the scheme recounted here in the nearly thirty years
6 they have been in force. In early 2001, however, the agency
7 proposed amendments to the regulations pertaining to the
8 "companionship services" exemption, which were subsequently
9 abandoned. In proposing the amendments, the DOL stated:

10 Due to significant changes in the home care industry
11 over the last 25 years, workers who today provide in-
12 home care to individuals needing assistance with
13 activities of daily living are performing types of
14 duties and working in situations that were not
15 envisioned when the companionship services regulations
16 were promulgated. The number of workers providing
17 these services has also greatly increased, and most of
18 these workers are being excluded from the FLSA under
19 the companionship services exemption. The Department
20 has reevaluated the regulations and determined that -
21 as currently written - they exempt types of employees
22 far beyond those whom Congress intended to exempt when
23 it enacted section [2]13(a)(15). Therefore, the
24 Department proposes to amend the regulations to revise
25 the definition of "companionship services," which sets
26 out the duties that a companion must be employed to
27 perform in order to qualify for the exemption, to more
28 closely mirror Congressional intent.

29
30 See Application of Fair Labor Standards Act to Domestic
31 Service, 66 Fed. Reg. 5481, 5482 (proposed Jan. 19, 2001).
32 The DOL further explained what it understood to have been
33 the congressional intent in 1974:

34 [I]t clearly was Congress' intent under the 1974 FLSA

1 Amendments to cover all workers who performed domestic
2 services as a vocation, excluding casual babysitters
3 and providers of companionship services who were not
4 regular bread winners or responsible for their [own]
5 families' support. . . . Personal and home care aides
6 perform a variety of tasks in the home, including
7 household work and assistance with nutrition and
8 cleanliness. Employers have generally treated workers
9 employed as home health aides and personal and home
10 care aides as exempt companions, based upon the
11 Department's current regulations. . . . As a result,
12 the Department believes it is necessary to amend the
13 regulations to focus them on fellowship and protection
14 duties that Congress originally intended the companion
15 exemption to cover.

17 Id. at 5483. The 2001 proposed amendments to the regulations
18 would have extended FLSA protection to employees who are hired by
19 "someone other than a member of the family in whose home he or
20 she works." Id. at 5482. The DOL expressly acknowledged that
21 there exists an internal inconsistency between § 552.109(a) and
22 § 552.3 and that § 552.3 is more consistent with the
23 congressional purpose as it existed in 1974. Id. at 5485.
24 Nonetheless, without further addressing the inconsistency, the
25 DOL withdrew the proposed amendments in April 2002 because
26 "numerous comment[s] on the proposed rule, including [comments
27 offered by] multiple government agencies . . . seriously called
28 into question the Department's conclusion that there would be
29 little economic impact." Application of the Fair Labor Standards
30 Act to Domestic Service, 67 Fed. Reg. 16,668 (Apr. 8, 2002).
31 Upon withdrawing the proposed amendments, the DOL did not
32 question or otherwise comment upon its 2001 conclusion about what

1 congressional intent had been in 1974.

2
3 **IV. The Enforceability of 29 C.F.R. § 552.6**

4 **A. Degree of deference to accord to the DOL**

5 The district court accorded Chevron deference to § 552.6's
6 definition of "companionship services." Neither party in this
7 case objects to this because the statute directed the DOL to
8 promulgate legislative regulations to define the term
9 "companionship services" as it appears in 29 U.S.C. § 213(a)(15),
10 and the regulations are plainly an exercise of that authority.
11 See Mead, 533 U.S. at 226-27 (clarifying that Chevron deference
12 is appropriate when a statute clearly delegates authority to an
13 agency and the agency acts purporting to exercise that
14 authority); Chao v. Russell P. Le Frois Builder, Inc., 291 F.3d
15 219, 226 (2d Cir. 2002); 29 C.F.R. § 552.2(c) (expressly stating
16 that "[t]he definitions required by § [2]13(a)(15) are contained
17 in §§ 552.3, 552.4, 552.5 and 552.6"). Accordingly, § 552.6 is
18 binding on the courts unless procedurally defective, "arbitrary,
19 capricious, or manifestly contrary to the statute." Chevron, 467
20 U.S. at 844. Here, Coke argues that § 552.6 is unenforceable as
21 being manifestly contrary to the statute.

22 In applying Chevron deference, we follow a two-step
23 analysis: "If the intent of Congress is clear, that is the end
24 of the matter; for the court, as well as the agency, must give

1 effect to the unambiguously expressed intent of Congress.” Id.
2 at 842-43. When the terms of a statute are unambiguous, the
3 judicial inquiry is complete. However, if there is ambiguity in
4 the statute, we proceed to step two and inquire whether the
5 agency’s legislative regulation is a reasonable and permissible
6 construction of the statute. Id. at 843-44. “If the agency’s
7 reading fills a gap or defines a term in a reasonable way in
8 light of the Legislature’s design, we give that reading
9 controlling weight, even if it is not the answer the court would
10 have reached if the question initially had arisen in a judicial
11 proceeding.” Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998)
12 (internal quotation marks omitted) (citing Chevron, 467 U.S. at
13 843 n.11). We are also mindful that “a long-standing,
14 contemporaneous construction of a statute by the administering
15 agenc[y] is entitled to great weight.” Leary v. United States,
16 395 U.S. 6, 25 (1969) (internal quotation marks and citations
17 omitted).

18 **B. Application of Chevron**

19 Coke argues that we needn’t arrive at step two of the
20 Chevron inquiry and that we should find that the statute plainly
21 and on its face prohibits the agency’s definition of
22 “companionship services.” In particular, she contends that the
23 regulation’s inclusion within the definition of both housework
24 related to the care of the elderly or infirm and housework

1 incidental to that care are violative of the statute's command to
2 fashion an exemption only for "companionship services." Coke
3 suggests that the large amount of incidental housework permitted
4 by the current regulation (twenty percent of the work) is an
5 abuse of the delegation under the statute. Indeed, she argues,
6 under a particular reading of the regulation's second sentence
7 (the one that allows work "related to" the care of the elderly or
8 infirm), "household work" would be exempt even if no
9 companionship were provided at all: "Under the regulation, an
10 elderly person unable to care for him or herself could hire a
11 full-time companion and a full-time cook, pay the cook less than
12 the minimum wage, and successfully assert that cooking is a
13 companionship service" Appellant's Br. at 16. Thus,
14 because Congress clearly indicated that "companionship services"
15 were meant to be a subset of domestic services, and the
16 regulation can be read to exempt pure domestic service without
17 companionship, Coke argues that the regulation was drawn too
18 broadly on its face. Since Congress wanted to make sure domestic
19 service employees got FLSA protection, she argues that § 552.6's
20 extension of the exemption to "meal preparation, bed making,
21 [and] washing of clothes" places too many domestic service
22 employees within the exemption, a result that Congress could not
23 have intended. The district court properly rejected these
24 arguments.

1 The statute plainly gives the DOL authority to define
2 “companionship services,” a vague term with no obvious plain
3 meaning; and the DOL did so very soon after the passage of the
4 amendments to the FLSA. On the face of the statute, we discern
5 no unambiguous congressional intent to keep all “incidental”
6 services and domestic services “related to” the care of the
7 elderly and infirm outside the exemption, especially when such
8 services would naturally follow from or be part of a reasonable
9 job description of a companion to the elderly or infirm.

10 Although the Supreme Court has issued mixed messages as to
11 whether a court may consider legislative history at this stage of
12 the analysis (step one of Chevron),³ that history plainly
13 presupposes that some incidental or other related housework would
14 accompany “companionship.” For example, Senator Quentin Burdick
15 wanted to extend FLSA coverage for “professional domestic[s]” but
16 was concerned about the potential burden on household employers

³ Compare FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 137 (2000) (effectively considering legislative history at step one of Chevron analysis), Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697-99 (1991) (same), Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 649-50 (1990) (same), and Japan Whaling Ass’n v. Am. Cetacean Soc’y, 478 U.S. 221, 233-41 (1986) (same), with K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 293 n.4 (1988) (opinion of Kennedy, J.) (noting in the first step of a Chevron inquiry that “any reference to legislative history [] is in the first instance irrelevant”), Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (finding statutory text clear enough to ignore any arguments from legislative history), and Nat’l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417 (1992) (finding only statutory text to be relevant for first-step Chevron analysis).

1 where "people who might have an aged father, an aged mother, an
2 infirm father, an infirm mother, and a neighbor comes in and sits
3 with them. This, of course, entails some work, such as perhaps
4 making lunch This would be incidental to the main
5 purpose of the employment." 119 Cong. Rec. 24,773, 24,801
6 (1973). Senator Harrison Williams explained the purpose of the
7 "companionship services" exemption through an analogy to the
8 "babysitting" exemption:

9 We use the situation in which people are in a household
10 not to do household work but are there, first, as
11 babysitters. I think we all have the full meaning in
12 mind of what a babysitter is there for - to watch the
13 youngsters.

14
15 "Companion," as we mean it, is in the same role -
16 to be there and to watch an older person, in a sense.
17

18
19 [Household work] which is purely incidental would not
20 change the category of the person being there in the
21 household.

22
23 Id. Without attaching primacy to using legislative history at
24 step one, it seems to us more likely than not that Congress
25 understood that when employees are in the home "first" to be
26 companions or babysitters, they may engage in "incidental"
27 housework without falling outside the exemption. The DOL's
28 regulatory choice of the twenty percent allowance for
29 incidental work is not clearly contravened by either the text
30 of the statute or the intent of Congress to the extent it is
31 discernable.

1 More troubling is the second sentence of the regulation,
2 which is not delimited by the twenty percent rule. It does
3 seem to allow, as Coke argues, virtually unlimited household
4 work as long as it is "related to the care of the aged or
5 infirm person." The DOL, however, in its amicus brief
6 explains:

7 Under section 552.6, an employee must "provide
8 fellowship, care, and protection" for a person
9 unable to care for himself in order to meet the
10 requirements of the "companionship services"
11 exemption. While the regulation allows for the
12 performance of some household work, it must be
13 either "related to" or "incidental" to the "care
14 of the aged or infirm person. See 29 C.F.R.
15 552.6." Thus, contrary to [Coke's] suggestion, an
16 employee hired only to perform household work or
17 as a "full-time cook" would not meet the
18 requirements of the regulation. An employee who
19 has not been hired primarily to provide
20 "fellowship, care, and protection" will not be
21 considered exempt under the Act or the
22 regulations.

23 Br. of Amicus Curiae DOL at 19 (citations omitted). The DOL's
24 explanation is adequate. At best, the regulation is ambiguous on
25 the question of whether the first sentence of the regulation must
26 be satisfied - that an employee must first provide "fellowship,
27 care, and protection" - before proceeding to the inquiry about
28 whether to exempt the "related" household work.

29 We note, however, that we have no occasion to limit the
30 enforcement of § 552.6 to the DOL's litigation position here
31 because Coke concedes that her challenge is to the regulation "on
32 its face," that is, in all its applications. Coke has

1 specifically refused to challenge the regulation "as applied" to
2 any particular class of employees. We do not rule out the
3 possibility of an application that would contravene the plain
4 statutory mandate, but because there are many applications of the
5 regulation that are consistent with the statute, we cannot
6 declare it invalid on its face. See generally Reno v. Flores,
7 507 U.S. 292, 301 (1993) (extending the no-set-of-circumstances
8 test for facial constitutional challenges to statutes under
9 United States v. Salerno, 481 U.S. 739 (1987), to Chevron
10 challenges). In any event, Coke presents no facts upon which we
11 could conclude that the agency has ever applied the regulation in
12 the purportedly impermissible way she envisions.

13 If we refused to consider the unequivocal legislative
14 history at step one of Chevron, the statute is at best ambiguous
15 on the question of whether incidental services and household work
16 related to the care of the individual may accompany the
17 fellowship and companionship focus of the exemption.⁴ And step

⁴ The DOL's 2001 statements do not prove that § 552.6 is unenforceable. First, the DOL's contemporaneous assessment of congressional intent is more probative: Apparently, the DOL thought § 552.6 represented congressional intent in 1974 and the enacting Congress expressed no discontent. Second, the DOL's interpretation of congressional intent, whether in 2001 or 1974, could never be dispositive for our Chevron inquiry. Of course, the entire purpose of the Chevron inquiry is to determine congressional intent quite apart from what the agency interprets that intent to be. Only if we conclude that the enacting Congress's intent is ambiguous do we defer to reasonable interpretations of the gap left by the ambiguity.

1 two of Chevron requires us to inquire if the DOL's regulation
2 "harmonizes with the language, origins, and purpose of the
3 statute." Bankers Life & Cas. Co. v. United States, 142 F.3d
4 973, 983 (7th Cir. 1998). Consideration of legislative history
5 is generally accepted at this stage of the analysis. E.g., Toibb
6 v. Radloff, 501 U.S. 157, 162 (1991); Bankers Life, 142 F.3d at
7 983.

8 Coke also argues that § 552.6 fails step two of Chevron.
9 Coke repeats the arguments she makes in connection with step one
10 and also focuses on Senator Burdick's statement in the
11 legislative history that sums up the "companionship services"
12 exemption as one targeted for "elder sitter[s]." See 119 Cong.
13 Rec. at 24,801. Coke intimates that a sitter must only sit,
14 without lifting a hand to help the elderly or infirm with
15 incidental housework. But, again, we agree with the district
16 court that § 552.6 survives the Chevron inquiry. The Senate
17 Report, cited by Coke, makes clear that some incidental household
18 work and housework related to the care of the elderly or infirm
19 does not contravene the purpose of the exemption. See 119 Cong.
20 Rec. at 24,801 (1973). The idea that a sitter merely sits is
21 belied by Senator Burdick's analogy: Sitters provide care, and
22 care entails other incidental tasks such as food preparation,
23 feeding, cleaning up messes, changing diapers, and other
24 services. Accordingly, given the deference afforded the agency

1 under Chevron, we are unable to conclude that § 552.6 is
2 arbitrary, capricious, or manifestly contrary to the statute with
3 respect to either (1) the twenty percent allowance for incidental
4 housework in the agency's legislative regulation, or (2) the
5 agency's allowance for household work related to the care of the
6 individual.

7 Every circuit to have considered the question of the
8 enforceability of § 552.6 has found the regulation enforceable on
9 its face. See, e.g., Johnston, 213 F.3d at 565; Salyer, 83 F.3d
10 at 787; McCune, 894 F.2d at 1110. Only Harris, 2001 U.S. Dist.
11 LEXIS 23263, at *17, a district court decision from the Northern
12 District of Illinois, found the regulation too broad. Harris, of
13 course, in no way binds us. Moreover, Harris was an "as applied"
14 case and its ultimate pronouncement was narrow. While it calls
15 § 552.6 "unreasonably broad" in the text of the opinion, id. at
16 *11, it is more circumspect when it announces its final holding:
17 "§ 552.6, as currently drafted, is invalid to the extent it
18 exempts homemakers from [FLSA] coverage," id. at *17 (emphasis
19 added); only the particular case of the regulation "as applied"
20 to homemakers - as the plaintiffs were in that case - was held to
21 be outside the "companionship services" exemption.

22 In the case before us, however, because Coke does not tell
23 us anything about what "home healthcare attendants" actually do,
24 it is impossible for us to pass on the question of whether the

1 particular work she did was considered by Congress to be outside
2 the exemption. Consistent with her facial challenge to § 552.6,
3 Coke refused to amend her complaint to be more specific about
4 what she does. For the foregoing reasons, the regulation
5 withstands Chevron deference on this challenge. Accordingly, we
6 AFFIRM the district court's ruling with respect to the
7 enforceability of § 552.6.

8
9 **V. The Enforceability of 29 C.F.R. § 552.109(a)**

10 We now turn to Coke's challenge to § 552.109(a), which
11 applies the exemption to "companionship services" rendered by
12 those who are employed by third parties, rather than by the
13 family of the recipient of the services.

14 **A. Degree of deference to accord to the DOL**

15 The threshold question concerning § 552.109(a)'s
16 enforceability is the degree of deference to be afforded the DOL.
17 Coke argues that the district court erred by according Chevron
18 deference to the regulations that the DOL itself calls
19 "interpretations." The DOL argues that such deference was
20 appropriate. Although the district court did not directly
21 consider the question, it is purely one of law, which we consider
22 de novo. See Ossen, 361 F.3d at 764.

23 In favor of applying Chevron deference is Chevron's own
24 broad statement and Mead's endorsement of that statement:

1 When Congress has “explicitly left a gap for an agency
2 to fill, there is an express delegation of authority to
3 the agency to elucidate a specific provision of the
4 statute by regulation,” and any ensuing regulation is
5 binding in the courts unless procedurally defective,
6 arbitrary or capricious in substance, or manifestly
7 contrary to the statute.
8

9 Mead, 533 U.S. at 227 (citation omitted) (quoting Chevron, 467
10 U.S. at 843-44). Thus, to the extent that the statute is silent
11 on the definition of a “domestic service employee” and contains
12 no reference to third party employers, such matters might be
13 understood to be appropriately delegated to the DOL. An agency
14 interpretation “qualifies for Chevron deference when it appears
15 that Congress delegated authority to the agency generally to make
16 rules carrying the force of law, and that the agency
17 interpretation claiming deference was promulgated in the exercise
18 of that authority.” Mead, 533 U.S. at 226-27 (emphasis added).
19 The statute, 29 U.S.C. § 213(a)(15), expressly delegated
20 authority to the DOL to define and delimit the terms
21 “companionship services” and “domestic service employee,” and the
22 DOL argues that Chevron deference follows accordingly.

23 Moreover, the regulation at issue is “a long-standing,
24 contemporaneous construction of a statute,” and, as such,
25 “entitled to great weight.” Leary, 395 U.S. at 25 (internal
26 quotation marks omitted). Indeed, Congress has revisited § 213
27 by amending it seven times since 1974, without expressing any
28 disapproval of the DOL regulation at issue, see Pub. L. No. 95-

1 151 (1977); Pub. L. No. 96-70 (1979); Pub. L. No. 101-157 (1989);
2 Pub. L. No. 103-329 (1994); Pub. L. No. 104-88 (1995); Pub. L.
3 No. 104-188 (1996); Pub. L. No. 105-78 (1997). Such
4 congressional acquiescence is "persuasive evidence that the
5 [agency] interpretation is the one intended by Congress."
6 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846
7 (1986).⁵

8 Finally, when an agency action is "the fruit[] of notice-
9 and-comment rulemaking or formal adjudication," courts generally
10 accord the agency Chevron deference. Chao, 291 F.3d at 227
11 (quoting Mead, 533 U.S. at 230). Here, no one contests that,
12 although the agency calls § 552.109(a) an "interpretation," it
13 was promulgated following notice and comment procedures.
14 However, it is also true (and a cause of concern) that the rule
15 the agency adopted after comments were received was the opposite

⁵ The argument from congressional acquiescence - affectionately known as the "dog didn't bark canon" - must always be qualified by the observation that evidence of what subsequent Congresses intend pales in comparison to probative evidence about what the enacting Congress intended; even Schor did not rely on what it called the "silence" rule. 478 U.S. at 846. See generally William N. Eskridge, Jr. et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy 1020-21 (3d ed. 2001) (discussing the "dog didn't bark canon"). Furthermore, because Congress, in amending § 213, never reenacted the FLSA or the relevant provisions thereof, this is not a case that implicates the "re-enactment rule" delineated in Lorillard v. Pons, 434 U.S. 575, 580 (1978), where "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without [relevant] change."

1 of the rule proposed in the original notice. There was no
2 separate notice and comment on the rule as ultimately adopted.

3 All courts that have considered § 552.109(a) have accorded
4 it Chevron deference. See, e.g., Johnston, 213 F.3d at 561-62;
5 Terwilliger v. Home of Hope, Inc., 21 F. Supp. 2d at 1299 n.2.
6 But Coke is correct that none of these prior cases carefully
7 considered the question before us now: Does Mead, which post-
8 dates the cases affording § 552.109(a) Chevron deference, require
9 a different analysis yielding a different result insofar as it
10 holds that some agency regulations should be accorded less than
11 Chevron deference?

12 Coke argues that Mead requires us to apply a lesser degree
13 of deference to § 552.109(a) as an "interpretive," rather than a
14 "legislative" regulation. Indeed, "interpretive rules . . .
15 enjoy no Chevron status as a class." Mead, 533 U.S. at 232.

16 This circuit, even before the Supreme Court's clarification
17 in Mead, contemplated that interpretive regulations should not
18 receive full Chevron deference. In Reich v. New York, 3 F.3d
19 581, 587 (2d Cir. 1993), we considered DOL regulations
20 promulgated to define and delimit the administrative exemption in
21 the FLSA at 29 U.S.C. § 213(a)(1). We held, "In contrast to the
22 controlling authority given the [DOL's] legislative rules - i.e.,
23 those promulgated pursuant to an express grant of Congressional
24 authority - the respect accorded the [DOL's] interpretive

1 regulations depends upon their persuasiveness” Id. We
2 foretold the precise distinction later drawn in Mead when that
3 Court distinguished between those regulations that are accorded
4 Chevron deference and those that are not. In Reich v. New York,
5 the interpretations from which Chevron deference was withheld
6 were classified as “interpretations” by the regulations
7 themselves. See also Freeman, 80 F.3d at 83-84 (refusing to
8 accord Chevron deference to DOL interpretations under the FLSA
9 despite their promulgation with notice and comment procedures);
10 Reich v. Gateway Press, Inc., 13 F.3d 685, 699 n.18 (3d Cir.
11 1994) (“The DOL interpretations do not have the force of law.”).

12 We find § 552.109(a) to be an interpretive rather than a
13 legislative regulation. While the rule “grants rights, imposes
14 obligations, or produces other significant effects on private
15 interests,” as legislative regulations do, White v. Shalala, 7
16 F.3d 296, 303 (2d Cir. 1993) (internal quotation marks omitted),
17 a rule can only be legislative “if the agency intended to use
18 [the legislative power delegated to it by Congress] in
19 promulgating the rule at issue,” American Postal Workers Union,
20 AFL-CIO v. United States Postal Serv., 707 F.2d 548, 558 (D.C.
21 Cir. 1983). Here, the DOL did not intend to use the legislative
22 power delegated in § 213(a)(15) when it promulgated § 552.109(a).
23 This is most apparent from its inclusion of the regulation under
24 “Subpart B-Interpretations” as opposed to “Subpart A-General

1 Regulations.” This appearance is supported by substance.

2 Congress expressly delegated to the DOL authority to define
3 terms in § 213(a)(15), and the DOL expressly states in 29 C.F.R.
4 § 552.2(c) that “[t]he definitions required by § [2]13(a)(15) are
5 contained in §§ 552.3, 552.4, 552.5 and 552.6.” Accordingly, the
6 regulation at issue, § 552.109(a), is effectively conceded by the
7 DOL not to have been promulgated pursuant to Congress’s express
8 legislative delegation in § 213(a)(15). Mead holds that
9 administrative implementation of a particular statutory provision
10 does not qualify for Chevron deference unless “it appears that
11 the agency interpretation claiming deference was promulgated in
12 the exercise of that authority.” 533 U.S. at 226-27. Thus,
13 § 552.109(a) does not qualify for Chevron deference because, by
14 the DOL’s own account, it was self-consciously not promulgated in
15 exercise of Congress’s delegated authority pursuant to
16 § 213(a)(15).

17 The DOL places emphasis on the fact that in 1974
18 § 552.109(a) was promulgated after notice and comment and,
19 indeed, Mead explicitly instructs us to consider whether a rule
20 was the product of notice and comment in assessing whether to
21 accord it Chevron deference. Mead, 533 U.S. at 230-31. However,
22 “while notice and comment are required for legislative rules,
23 they are by no means prohibited for interpretive rules.” Mejia-
24 Ruiz v. INS, 51 F.3d 358, 365 (2d Cir. 1995). Mead does nothing
25 to undermine this conclusion. See Mead, 533 U.S. at 230-31;

1 Thomas W. Merrill, The Mead Doctrine: Rules and Standards, Meta-
2 Rules and Meta-Standards, 54 Admin. L. Rev. 807, 814 (2002) (“I
3 do not think the Court was saying [in Mead] . . . that if an
4 agency adopts notice-and-comment or trial-type hearing procedures
5 on its own authority, its interpretation is presumptively
6 entitled to Chevron deference.” (emphasis removed and emphasis
7 added; citations omitted)).

8 In this case, the agency undertook a notice and comment
9 procedure for an interpretative regulation despite the fact that
10 the procedure was not required. While Mead does not offer
11 specific guidance on whether putting a proposed interpretation
12 out for notice and comment has any effect on deference, following
13 the notice and comment procedure, at most, buttresses a claim
14 that the agency gave consideration to what it did; it does not
15 alter the fact that the agency did not act pursuant to
16 legislative authority.

17 In any event, here we cannot ignore that the notice and
18 comment procedure for § 552.109(a) was at best idiosyncratic and
19 at worst insufficient. The original notice informed the public
20 that employees of third party employers were not going to be
21 exempt from the FLSA (consistent with § 552.3), see 39 Fed. Reg.
22 35,385 (proposed Oct. 1, 1974), but the final rule provided
23 exactly the opposite without a detailed explanation, see 40 Fed.
24 Reg. 7405 (Feb. 20, 1975). Because we conclude that § 552.109(a)
25 is interpretative, and thus need not have conformed with notice

1 and comment procedures, we have no occasion to decide whether
2 this regulation is invalid under the Administrative Procedure
3 Act, 5 U.S.C. § 553(b)(3)(A). Cf. Nat'l Black Media Coalition v.
4 FCC, 791 F.2d 1016, 1022 (2d Cir. 1986) (“[I]f the final rule
5 deviates too sharply from the proposal, affected parties will be
6 deprived of notice and an opportunity to respond to the
7 proposal.”) (internal quotation marks omitted). Nevertheless, we
8 decline the DOL’s invitation to bootstrap an entitlement to
9 Chevron deference for an interpretative regulation from this
10 substandard notice and comment procedure.⁶

11 While we agree with Coke that § 552.109(a) does not command
12 Chevron deference, Mead nevertheless requires us to afford the
13 agency some level of deference with the vague prescription to
14 “tailor deference to variety,” 533 U.S. at 236. We believe that
15 Skidmore deference based upon the regulation’s “power to
16 persuade” is the appropriate level of deference to be applied
17 where, as here, “the agency has some special claim to expertise
18 under the statute.” Merrill, supra, at 812. To the extent that

⁶ Merrill finds “interpretive regulations adopted after notice-and-comment procedures” to be within an “area of uncertainty” after Mead for lower courts trying to determine whether to apply Chevron deference. Merrill, supra, at 821. But see Adrian Vermeule, Introduction: Mead in the Trenches, 71 Geo. Wash. L. Rev. 347, 350 (2003) (treating notice and comment procedures as affording the agency a “safe harbor” entitlement to Chevron deference). We needn’t choose between Merrill and Vermeule here because even if Vermeule is right, special circumstances surrounding the notice and comment procedures here militate against furnishing the agency with a safe harbor.

1 the regulation represents "more specialized experience and
2 broader investigations and information" available to the agency,
3 we will defer to reasonable regulations. Skidmore, 323 U.S. at
4 139-40; see also Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 136
5 (1997) (reasonable agency interpretations carry "at least some
6 added persuasive force" where Chevron is inapplicable). In
7 determining its "power to persuade," we look to § 552.109(a)'s
8 "consisten[cy] with the congressional purpose," Morton v. Ruiz,
9 415 U.S. 199, 237 (1974); its consistency with other regulations,
10 see Skidmore, 323 U.S. at 140; the "consistency of the agency's
11 position" over time, Batterton v. Francis, 432 U.S. 416, 425 n.9
12 (1977); the "thoroughness evident in [the agency's]
13 consideration"; and the "validity of its reasoning," Skidmore,
14 323 U.S. at 140.

15 **B. Application of Skidmore**

16 Considering the regulation's persuasiveness under Skidmore's
17 less deferential standard, we agree with Coke that § 552.109(a)
18 is unenforceable. The regulation is inconsistent with Congress's
19 likely purpose in enacting the 1974 amendments; inconsistent with
20 other regulations (which themselves deserve Chevron deference);
21 and inconsistent with other agency positions over time.
22 Moreover, the agency does not proffer valid reasoning for
23 § 552.109(a)'s enforceability, evidencing a lack of thorough
24 consideration.

25 **(1) Congressional purpose**

1 When Congress sought to amend the FLSA in 1974, it desired
2 to expand FLSA coverage to "domestic service employees," and to
3 exempt from coverage only those "domestic service employees"
4 engaged in "companionship services." At the time, persons who
5 were employed by a third party were outside the category of
6 "domestic service employees" and were protected by the FLSA
7 before the 1974 amendments. See Homemakers Home & Health Care
8 Servs., Inc. v. Carden, 538 F.2d 98 (6th Cir. 1976); 39 Fed. Reg.
9 35,385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are
10 engaged in providing . . . companionship services and who are
11 employed by an employer other than the families or households
12 using such services . . . [were] subject to the [FLSA] prior to
13 the 1974 Amendments"); 66 Fed. Reg. 5485 (Jan. 19, 2001). See
14 generally Molly Biklen, Note, Healthcare in the Home: Reexamining
15 the Companionship Services Exemption to the Fair Labor Standards
16 Act, 35 Colum. Hum. Rts. L. Rev. 113, 117 (2003). It is
17 implausible, to say the least, that Congress, in wishing to
18 expand FLSA coverage, would have wanted the DOL to eliminate
19 coverage for employees of third party employers who had
20 previously been covered.

21 **(2) Consistency with other regulations and through**
22 **time**
23

24 Section 552.109(a) is also jarringly inconsistent with other
25 regulations the DOL itself promulgated under the FLSA immediately
26 following the 1974 amendments. In 29 C.F.R. § 552.3, the DOL

1 defined the term "domestic service employment" to refer "to
2 services of a household nature performed by an employee in or
3 about a private home (permanent or temporary) of the person by
4 whom he or she is employed." 29 C.F.R. § 552.3 (emphasis added).
5 Unlike § 552.109(a), this regulation was legislative, issued
6 pursuant to § 213(a)(15) and, thus, entitled to Chevron
7 deference. See 29 C.F.R. § 552.2(c) ("[t]he definitions required
8 by [§ 213(a)(15)] are contained in [§ 552.3]"). Plainly, under
9 § 552.3, employees employed by third parties do not qualify for
10 the exemption. Indeed, § 552.3 tracks the relevant legislative
11 history that the DOL would have reasonably taken as its guidance.
12 See H.R. Rep. No. 93-913, at 35 ("the generally accepted meaning
13 of domestic service relates to services of a household nature
14 performed by an employee in or about a private home of the person
15 by whom he or she is employed" (emphasis added)). Thus, the
16 stark internal inconsistency between § 552.109(a) and § 552.3,
17 when coupled with the latter's entitlement to greater deference
18 and its greater consistency with congressional purpose, strongly
19 counsels against enforcement of § 552.109(a).

20 Moreover, the agency's position with regard to FLSA coverage
21 through time has hardly been a model of consistency. We have
22 recounted above how, in 1974, the agency proposed a regulation
23 that would have afforded FLSA coverage to employees of third
24 party employers only to reverse itself with the promulgation of
25 § 552.109(a). In 2001, the DOL again proposed that employees of

1 third party employers get FLSA coverage (contrary to the view it
2 endorses in this litigation), only to withdraw the proposal
3 shortly thereafter based on economic considerations that have no
4 bearing on the more relevant question of what Congress intended
5 in 1974.

6 (3) Validity of the DOL's reasoning

7 Finally, the DOL's inadequate reasoning in support of the
8 regulation is matched by its failure to exhibit thoroughness in
9 its consideration. Two omissions are particularly notable.
10 First, the DOL offered virtually no explanation for the direct
11 inconsistency between § 552.109(a) and § 552.3. Second, the DOL
12 has not adequately explained - either in the Federal Register or
13 in its submissions to this court - what accounted for the about-
14 face after putting the regulations out for notice and comment in
15 1974, resulting in third party employers, for the first time,
16 being entitled to claim the exemption. Compare 39 Fed. Reg.
17 35,385 (proposing a regulation on October 1, 1974 that retained
18 the FLSA coverage of employees of third party employers), with 40
19 Fed. Reg. 7405 (adopting a regulation on Feb. 20, 1975 allowing
20 such employees to be subject to the exemption). While the
21 Federal Register recited that "[o]n further consideration, [the
22 Secretary of Labor] ha[s] concluded that the ['companionship
23 services'] exemption can be available to such third party
24 employers since they apply to 'any employee' engaged 'in' the
25 enumerated services," 40 Fed. Reg. 7404, the DOL ignored the

1 plain language of the statute, which precluded an interpretation
2 that the exemption could apply to "any" employee; on its face, it
3 may apply only to employees in "domestic service employment." 29
4 U.S.C. § 213(a)(15); see also 29 C.F.R. § 552.3 (defining
5 "domestic service employment" to preclude employees of third
6 party employers).

7 The agency's reasoning has not improved with time.
8 Acknowledging the internal contradiction between § 552.109(a) and
9 § 552.3 in its brief, the DOL today is reduced to asserting that
10 we should uphold the regulation because other courts have done
11 so. This is hardly an argument. As we have explained, the
12 decisions relied upon by the DOL were all prior to the Supreme
13 Court's Mead decision, based on which we hold that Chevron
14 deference is inapplicable to § 552.109(a). Thus, no other court
15 has considered § 552.109(a) under the proper Skidmore level of
16 deference and carefully analyzed the regulation's "power to
17 persuade" in accordance with the factors appropriate to
18 Skidmore's inquiry.

19 Accordingly, finding that § 552.109(a) cannot survive
20 Skidmore analysis, we decline to enforce it. We hereby VACATE
21 the judgment of the district court upholding it, and REMAND the
22 case for further consideration consistent with this opinion.

24 CONCLUSION

25 _____For all the foregoing reasons, we AFFIRM the district

1 court's ruling that 29 C.F.R. § 552.6 is enforceable on its face;
2 VACATE the district court's ruling that 29 C.F.R. § 552.109(a) is
3 enforceable; and REMAND the case for further proceedings.