the benefits of the Act and might decide that the employer, after learning of the decision of the higher court, knew facts which would put a reasonably prudent man upon inquiry and therefore had not provided his good faith in relying upon the Administrator's ruling after receiving this advice.

(c) In order to illustrate further the test of ''good faith,'' suppose that the X Federal Agency published a general bulletin regarding manufacturing, which contained the erroneous statement that all foremen are exempt under the Fair Labor Standards Act as employed in a ''bona fide executive * * * capacity.'' Suppose also that an employer knowing that the Administrator of the Wage and Hour Division is charged with the duties of administering the Fair Labor Standards Act and of defining the phrase ''bona fide executive * * * capacity'' in that Act, nevertheless relied upon the above bulletin without inquiring further and, inconformity with this advice, failed to compensate his nonexempt foremen in accordance with the overtime provisions of the Fair Labor Standards Act for work subject to that Act, performed before May 14, 1947. If the employer had inquired of the Administrator or had consulted the Code of Federal Regulations, he would have found that his foremen were not exempt. In a subsequent action brought by employees under section 16(b) of the Fair Labor Standards Act, the court may decide that the employer knew facts which ought to have put him as a reasonable man upon further inquiry, and, consequently, that he did not rely ''in good faith'' within the meaning of section 9, upon the bulletin published by the X Agency.[97]

(d) Insofar as the period prior to May 14, 1947, is concerned, the employer may have received an interpretation from an agency which conflicted with an interpretation of the Administrator of the Wage and Hour Division of which he was also aware. If the employer chose to reply upon the interpretation of the other agency, which interpretation worked to his advantage, considerable weight may well be given to the fact that the employer ignored the interpretation of the agency charged with the administration of the Fair Labor Standards Act and chose instead to rely upon the interpretation of an outside agency.[98] Under these circumstances ''the question could properly be considered as to whether it was a good faith reliance or whether the employer was simply choosing a course which was most favorable to him.''[99] This problem will not arise in regard to any acts or omissions by the employer occurring on or after May 14, 1947, because section 10 provides that the employer, insofar as the Fair Labor Standards Act is concerned, may rely only upon regulations, orders, rulings, approvals, interpretations, administrative practices and enforcement policies of the Administrator of the Wage and Hour Division.[100]

§ 790.16 "In reliance on."

(a) In addition to acting (or omitting to act) in good faith and in conformity with an administrative regulation,

[97] See statement of Representative Gwynne, 93 Cong. Rec. 1563, and colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4453.

[98] This view was expressed several times during the debates. See statements of Representative Keating, 93 Cong. Rec. 1512 and 4391; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; statement of Representative Walter, 93 Cong. Rep. 4389; statement of Representative MacKinnon, 93 Cong. Rec. 4391; statement of Representative Gwynne, 93 Cong. Rec. 1563; statement of Senator Cooper, 93 Cong. Rec. 4451; colloquy between Senators Connally and Donnell, 93 Cong. Rec. 4452–4453.

[99] Statement of Senator Cooper, 93 Cong. Rec. 4451. Representative Walter, a member of the Conference Committee, made the following explanatory statement to the House of Representatives (93 Cong. Rec. 4390): ''The defense of good faith is intended to apply only where an employer innocently and to his detriment, followed the law as it was laid down to him by Government agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer had knowledge of conflicting rules and chose to act in accordance with the one most favorable to him.'' Representative Gwynne made a similar statement (93 Cong. Rec. 1563).

[100] Statement of Senator Wiley explaining Conference agreement to the Senate, 93 Cong. Rec. 4270; statement of Representative Walter, 93 Cong. Rec. 4389.

order, ruling, approval, interpretation, enforcement policy or practice, the employer must also prove that he actually relied upon it.[101]

(b) Assume, for example, that an employer failed to pay his employees in accordance with the overtime provisions of the Fair Labor Standards Act. After an employee suit has been brought against him, another employer calls his attention to a letter that had been written by the Administrator of the Wage and Hour Division, in which the opinion was expressed that employees of the type employed by the defendant were exempt from the overtime provisions of the Fair Labor Standards Act. The defendant had no previous knowledge of this letter. In the pending employee suit, the court may decide that the opinion of the Administrator was erroneous and that the plaintiffs should have been paid in accordance with the overtime provisions of the Fair Labor Standards Act. Since the employer had no knowledge of the administrator's interpretation at the time of his violations, his failure to comply with the overtime provisions could not have been ''in reliance on'' that interpretation; consequently, he has no defense under section 9 or section 10 of the Portal Act.

§ 790.17 "Administrative regulation, order, ruling, approval, or interpretation."

(a) Administrative regulations, orders, rulings, approvals, and interpretations are all grouped together in sections 9 and 10, with no distinction being made in regard to their function under the ''good faith'' defense. Accordingly, no useful purpose would be served by an attempt to precisely define and distinguish each term from the others, especially since some of these terms are often employed interchangeably as having the same meaning.

(b) The terms ''regulation'' and ''order'' are variously used to connote the great variety of authoritative rules issued pursuant to statute by an administrative agency, which have the binding effect of law, unless set aside upon judicial review as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[102]

(c) The term ''interpretation'' has been used to describe a statement ''ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language.''[103] This would include bulletins, releases, and other statements issued by an agency which indicate its interpretation of the provisions of a statute.

(d) The term ''ruling'' commonly refers to an interpretation made by an agency ''as a consequence of individual requests for rulings upon particular questions.''[104] Opinion letters of an agency expressing opinions as to the application of the law to particular facts presented by specific inquiries fall within this description.

(e) The term ''approval'' includes the granting of licenses, permits, certificates or other forms of permission by an agency, pursuant to statutory authority.[105]

(f) The terms ''administrative regulation order, ruling, approval, or interpretation'' connote affirmative action on the part of an agency.[106] A failure

[101] In a colloquy between Senators Thye and Cooper (93 Cong. Rec. 4451), Senator Cooper pointed out that the purpose of section 9 was to provide a defense for an employer who pleads and proves, among other things, that his failure to bring himself under the Act ''grew out of reliance upon'' the ruling of an agency. See also statement of Representative Keating, 93 Cong. Rec. 1512; colloquy between Representatives Keating and Devitt, 93 Cong. Rec. 1515; cf. colloquy between Senators Donnell and Ball, 93 Cong. Rec. 4372.

[102] See Final Report of Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong. 1st sess. (1941) p. 27; 1 Vom Baur, Federal Administrative Law (1942) p. 486; sections 2(c), 2(d) and 10(e) of the Administrative Procedure Act, 5 U.S.C.A. section 1001.

[103] Final Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Cong., 1st sess. (1941), p. 27.

[104] Final Report of the Attorney General's Committee, page 27. To the same effect in 1 Vom Baur, Federal Administrative Law (1942), p. 492.

[105] See section 2(e) of the Administrative Procedure Act, 5 U.S.C.A. sec. 1001.

[106] See Final Report of Attorney General's Committee, p. 27; 1 Vom Baur, Federal Administrative Law, pp. 486, 492; Conference