The Chamber's mission is to advance human progress through an economic political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.
# U.S. Chamber of Commerce

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June 30, 2003

Hon. Tammy D. McCutchen
Administrator, Wage and Hour Division
Employment Standards Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC  20210

RE: Comments on the Department’s Proposed Rule Regarding FLSA
Exemptions for Executive, Administrative, Professional, Outside Sales and
Computer Professional Employees

Dear Administrator McCutchen:

The United States Chamber of Commerce (Chamber) is pleased to submit these
comments on the Department of Labor’s (Department’s) proposed regulations defining
those employees who are covered under the overtime provisions of the Fair Labor
Standards Act (FLSA or the Act) pursuant to section 13(a)(1) of the Act. The Chamber
commends the Department for taking the first comprehensive review of the regulations
governing these coverage criteria since the 1940s. In general, the Chamber believes that
the Department’s proposal would greatly modernize and clarify the regulations.
However, we have several important suggestions as to how the proposal could be
improved that we hope you will consider.

The U.S. Chamber of Commerce is the world’s largest business federation,
representing more than three million businesses and organizations of every size, sector,
and region, with substantial membership in all 50 states. The Fair Labor Standards Act’s
minimum wage and overtime provisions apply to virtually every employer in the United
States and the Department’s proposed regulations would have a significant impact on the
vast majority of our membership.

In vetting the Department’s proposal with our membership, we consulted the
Chamber’s Labor Relations Committee and its Fair Labor Standards Act Subcommittee.
We also established a Task Force on Reform of the White Collar Regulations, which has
met regularly during the comment period to assess the Department’s proposal and offer
suggestions for reform. In addition, we have made significant outreach efforts to
members who are not always engaged in labor policy and have conducted a membership
survey on key elements of the proposal.

We hope you find these comments helpful as the Department moves forward with
the regulatory process. Again, we commend the Department for its hard work in
developing its proposal.
Executive Summary

The Fair Labor Standards Act of 1938 (FLSA) requires employers to pay overtime to certain employees for working more than 40 hours in a week. Among the employees exempted from overtime requirements are those who work in a “bona fide executive, administrative, or professional capacity” as defined by Labor Department regulations (known as the “white collar” or “part 541” regulations). The criteria for determining which employees fall into each category were first established by the Department in 1938 and were modified in the 1940s based on experience applying the early regulations to the workforce existing at the time. The workplace has continued to evolve; indeed, many jobs are not preformed the same today as they were even a few decades ago. However, the Department has only made minor modifications to the white collar regulations since 1949 and the regulations are out of date, vague, and complex, stretching well over 50 pages of confusing fine print. What should be a simple test, determining an employee’s exempt status, is in fact a very complex one with little certainty. Employers face serious challenges in trying to classify modern jobs into categories created in a different era and even the most careful, well intentioned employer amply staffed with legal counsel will often be unsure as to whether he or she has properly classified employees under the regulations. This confusion has led to a dramatic increase in litigation, with FLSA claims now the most commonly litigated employment class actions.

The white collar regulations are an important component of the FLSA. However, by failing to modernize these regulations, they are now incompatible with the modern workplace. Updating these important regulations will provide much needed clarity for employees and employers and will reduce needless, exploitive litigation.

Modernization and reform of the white collar regulations has been on the Labor Department’s regulatory agenda since the 1970s, and both Republican and Democratic administrations have recognized that the existing regulations simply do not comport with the realities of the modern workplace. On March 31, 2003, the Labor Department issued a notice of proposed rulemaking, representing the first comprehensive review of the part 541 regulations since the 1940s. The Chamber commends the Department for undertaking this difficult, but important effort that will help restore understanding to one of the most complex and heavily litigated areas in labor and employment law.

These comments address the sections of the proposed regulations in sequence, beginning with the proposed compensation level tests, then examining the various proposed duties tests in turn, followed by the Department’s proposed salary basis test. In this section, we provide an overview of the need for reform and we summarize the Chamber’s positions on major elements of the Departments proposal and areas where we believe further improvement is necessary.
Restore Intent of the FLSA

In 1938, Congress passed the FLSA to aid the unprotected, unorganized, and lowest paid of the nation’s working population; that is those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.¹

Yet today, the FLSA is being used not just as a shield to protect low wage workers, as it should be, but also as a sword by highly-paid employees and the plaintiffs’ bar seeking to exploit vague regulations.

For example, in December 2002, a federal judge approved a $4.1 million settlement of a FLSA collective action that includes payments of overtime wages to a former corporate lawyer, director of human resources, and vice president.² The employees alleged they were entitled to overtime because their employer may not have met all the technical requirements of the “salary basis” test. Likewise, in a different case, loan originators with average salaries of $65,000 to $70,000 per year have been found to be hourly employees based on their job duties.³ Similarly, specialized instructors training NASA Space Shuttle ground personnel – literally rocket scientists – were found to be hourly employees because they did not exercise enough discretion to be considered exempt.⁴

A common sense approach would suggest that Congress did not have any of these employees in mind when it created the overtime protections in the Fair Labor Standards Act. These cases are not outliers; rather, they represent just the tip of the iceberg. Unfortunately, in relation to the modern workplace, the only regulations that courts may use for guidance are now warped by age. Consequently, employee job classification is no longer intuitive or straightforward. This is largely due to the development of the workplace over the past half-century. Employers are tasked regularly with trying to classify jobs that did not exist in a workplace that could never have been conceived of 50 years ago and not contemplated by regulations. For example, trying to classify reporters and news producers can be a real challenge considering the regulations governing their classification were written 14 years before the first 30 minute network newscasts were televised.⁵

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⁵ See, e.g., Jim Rutenberg, *CBS Wants ’60 Minutes’ Chief to Hand Over Stopwatch*, THE NEW YORK TIMES (Nov. 25, 2002) (noting that CBS began the first network newscast in 1948 and was the first network to convert to an half-hour broadcast in 1963).
Structure of Regulations

Current regulations consist of three parts. Generally speaking, an employee must be paid at a least a certain compensation level, must meet certain tests based on job duties, and must be compensated in a particular manner in order to be classified as exempt. The compensation level requirement has the effect of ensuring that the lowest paid workers are automatically entitled to overtime.

Unfortunately, the confusing and hard to apply regulations have made it possible for employers to make minor or technical errors that could result in overtime eligibility for highly paid and highly responsible employees who were never intended to come within the protections of the FLSA. To restore the intent of the FLSA, the regulations should be modernized by establishing a bright line test that exempts highly paid white collar employees from the overtime requirements.

While the Department has not proposed a bright line test for highly compensated employees, it has proposed a simplified duties test for employees guaranteed to earn at least $65,000 per year. This proposal is a significant improvement over current regulations and would help clarify the classification status of many highly paid employees. Our comments request that the Department make further refinements to the test and that the Department eliminate the requirement that bonuses and other compensation be paid to employees monthly in order to meet the compensation threshold.

Compensation Level and Long Duties Tests

Under current regulations, employees cannot qualify as exempt executive or administrative employees if they earn less than $155 per week, an annual salary of about $8,000 per year. They cannot qualify as exempt professionals if they earn below $170 per week. Employees meeting these tests have their exempt status determined based on their job duties and their method of compensation. Employees earning less than $250 per week, or about $13,000 per year, have their duties examined under a longer test than those earning above $250 per week.

The Chamber recognizes that these compensation levels are not realistic in today’s workforce. We support raising the minimum compensation necessary to qualify as an exempt employee provided that such a change is made in conjunction with significant reforms of the duties and salary basis tests. The Department has proposed increasing the compensation level to $425 per week, or about $22,100 per year. The Chamber notes that a significant minority of our members feel the proposed compensation level is too high, especially those in the food and agriculture sectors. Nevertheless, the Chamber does not oppose this level, although we would oppose an increase in the compensation level unaccompanied by significant changes in the duties and salary basis tests. In addition, we would oppose any compensation level higher than $425 per week.
The Department has proposed eliminating the separate long and short duties tests and instead creating a standard test for employees meeting the minimum compensation level. As a practical matter, the long test has been unused for some time and the Chamber supports the Department’s proposal to eliminate most elements of the long test.

Executive Duties Test

Employers have great difficulty today determining whether an employee meets the duties test as an exempt executive because the current regulation over emphasizes analysis of the amount of time that employees spend performing specific tasks in order to determine whether their primary duty is management. The Department has proposed decreasing this emphasis and acknowledging that an employee can manage while performing other tasks.

We believe that the Department’s proposal is an excellent first step. Determining whether an employee has a primary duty of management should be based on the employee’s most important duty and should not require a detailed accounting of time. The Chamber has offered additional suggestions to further de-emphasize the amount of time employees spend performing specific tasks.

Administrative Duties Test

When the white collar regulations were first promulgated, the American workforce was largely based on a manufacturing economy. Yet today more workers are employed in analyzing, assessing, and processing information than in producing merchandise. One of the most obvious examples of how the regulations are out of synch with the modern economy is the application of the exemption for administrative employees. As interpreted by the Department, the administrative exemption is currently not available for employees whose primary duty is to “produce the commodity that the [employer] exists to produce or market.”

While this interpretation may have made sense in a manufacturing context, where the concept of production work was clear and was virtually synonymous with assembly-line work, it does not fit in today’s workplace. The Department has made modifications to the regulatory language, but we believe the Department has missed the mark. We strongly encourage the Department to revisit its approach, especially with regard to treatment of employees who may be involved in some aspect of sales. The Department should take this opportunity to clarify that sales work is not inherently inconsistent with exempt work.

Another current requirement to meet the administrative duties test is that the employee customarily and regularly exercise discretion. The Department has proposed replacing the current discretion test with a test requiring that employees either hold a position of substantial importance or that they possess a high level of skill or training. The Chamber does not oppose either element of this test and is generally supportive of the Department’s objective to clarify what has become a very confusing test. However,
we are concerned with possible unforeseen interpretations of the tests and would support
the Department’s retention of the discretion test as a third alternative option.

**Learned and Creative Professional Duties Test**

The current white collar regulations contain an exemption for “learned professionals” that relies heavily on the method by which the employee acquired the knowledge necessary to perform the job. Today, there are numerous avenues by which employees can acquire advanced knowledge or education and an emphasis on how knowledge is acquired is an outdated approach and is misplaced.

The Department’s proposal clarifies that employees may obtain their specialized knowledge by alternative means. While this is a good first step, we urge the Department to abandon the analysis of the method by which individuals acquire their advanced knowledge and instead focus on the employee’s knowledge and how it is used in his or her particular job.

As to the duties test for artistic or creative professionals, the Department has proposed language recognizing the exempt status of many journalists. Our comments discuss some matters that the Department may wish to clarify so that the proposed language is properly interpreted. In addition, we have suggested that the Department also explicitly state that editors and producers are typically exempt.

**Computer Professional Duties Test**

The computer professional exemption is a relatively new part of the white collar regulations and exempts certain information technology jobs as they existed in 1990, principally covering those involved in designing and programming software. Given the development of the Internet and the advent of highly sophisticated databases, these exemptions are already out of date. These regulations should be amended to include network, database and Internet administrators, individuals responsible for troubleshooting, and those responsible for training these employees. The regulations should also clarify the duties of these individuals so that with new developments in technology, employers can determine which new positions are similarly skilled and thus exempt.

The Department’s proposal makes two significant changes to the computer professional exemption, eliminating the discretion test and removing a reference that limited the exemption to those in the software field. The Chamber supports both of these proposals. In addition, we urge the Department to recognize that the exemption applies not only to analysts, programmers, and engineers, but also to those with similar skills.

**Salary Basis Test**

The white collar regulations require that employees be paid on a “salary basis” in order to be eligible for the exemptions. The test has been interpreted very broadly and
limits both employee and employer flexibility, serves as a trap for unwary employers, and can even convert entire classes of employees from exempt to nonexempt.

Under the logic of the salary basis test, deductions from an employee’s wages for portions of days not worked indicates that the employee is not being paid a salary, but on an hourly basis. The test explicitly permits some deductions from salary, but the scope of permitted deductions is very narrow.

The Department has proposed permitting deductions of a full day or more for disciplinary reasons. The Chamber supports this approach, but has offered suggestions to simplify the proposal. In addition, the Chamber has urged the Department to reconsider its opposition to partial day deductions, especially in relation to employer policies that may expand or mirror coverage provided under the Family and Medical Leave Act. Existing prohibitions creates the perverse incentive for employers to require employees to take an entire day off when the employee may need only a few hours.

The salary basis test requires employers to pay employees a salary that “is not subject to reduction because of a variation of the work performed.” Courts have interpreted this provision to mean that a class of employees has its salary subject to deduction if the employer improperly docks the pay of even a few workers. The Department has proposed regulations that would narrow the scope of the employees that would need to be reclassified to a more reasonable level. We believe that the Department’s proposal moves in the right direction, but we urge the Department to consider regulations that only require reclassification of employees who have been subjected to improper deductions.

Finally, the Department has proposed that the salary basis test should not apply to those employees meeting the simplified duties test for highly paid employees. The Chamber supports this proposal, but we would prefer a clearer bright line test as discussed above.
Compensation Level Test

The requirement that certain employees must meet a particular compensation level in order to qualify as an exempt executive employee has been included as part of the white collar regulations since their inception in 1938. The Chamber believes that, with certain exceptions described later in these comments, the compensation that an employee is paid is the best proxy for determining an employee’s exempt status and whether the employee needs the protections of the Fair Labor Standards Act.

Current regulations contain a two-tiered compensation level test for executive, administrative, and professional employees. Employees meeting the lower threshold have their duties analyzed under the appropriate long test, while those meeting the higher threshold have their duties analyzed under the appropriate short test. Current lower tier thresholds are $155 per week for executives and administrators and $170 per week for professionals. The higher tier threshold is $250 per week for executives, administrators, and professionals.

As noted above, compensation level tests were included in the first white collar regulations in 1938, when the test applied only to executive employees. The 1940 amendments to the regulation more broadly extended the test to most executive, administrative, and professional employees. As the Department has considered revising the part 541 regulations over the years, it has occasionally considered whether the compensation level test is an appropriate test of exempt status.

A more difficult question than determining coverage of the test has been selecting the appropriate compensation level. When the Department has adjusted the compensation levels in the past, it has examined the actual compensation levels being paid in the workforce rather than relying on inflation indices or similar measures. The Department has undertaken a similar analysis in setting compensation levels for its proposed regulations.

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7 Id.
10 See, e.g., Department of Labor, Report and Recommendations on Proposed Revisions of Regulations, part 541, by Harry S. Kantor, Presiding Officer, at 6 (Mar. 3, 1958).
Alternatively, various interest groups have suggested that the compensation level be indexed to inflation or another economic indicator. The compensation levels serve one purpose only: to determine who is and who is not entitled to exempt status as an executive, administrative, or professional employee. The compensation level should be set by careful examination of the salaries actually paid in the workplace and should not be linked to any economic indicator. We note that while it may be theoretically possible to index a compensation level, we can think of no way to index the duties tests to keep pace with developments in the workplace. Both compensation level and duties changes should be made through the regular administrative process, only after careful review of the reasons possibly justifying changes and their impacts, particularly on employers who (not the government) will be paying the increased wage amounts and enjoy no such automatic escalator on profit margins or government protections against increased operating costs. The Chamber supports the approach taken by the Department and strongly opposes indexing the salary level. If the compensation test is to serve as a key proxy for the determination of exempt status, then it is only proper for the Department to determine its level by examining compensation amounts used in the workplace today.

After reviewing actual compensation rates paid to employees in the workforce, the Department has proposed that the level be set at a point representing a level that 20 percent of the salaried workforce does not meet.\(^\text{12}\) This level, a dramatic increase from the 10 percent level used in years past, was chosen to account for the Department’s replacement of existing long and short duties tests with a new standard test.\(^\text{13}\) The compensation level equivalent to this percentage is $425 per week.

As part of the Chamber’s process of vetting the proposed compensation level with our membership, the Chamber conducted a membership survey about the appropriateness of the new level in conjunction with the proposed duties changes. A plurality of Chamber members felt that the proposal compensation level was about right. However, a sizeable minority (39%) felt that the test was too high. While we did not observe significant differences between our membership on this point based on business size, we did notice significant differences based on industry. In particular, for those companies describing themselves as in the agriculture or food industry, 70 percent felt that the proposed compensation level was too high, while a majority of members in the retail sector and in distribution felt the proposed level was too high.

These results are not surprising to us. While most sectors of our membership feel that an increase in the compensation level to $425 would be appropriate if accompanied by meaningful reform of duties tests, there are many businesses for which the proposed compensation level will pose problems. While we do not oppose the proposed compensation level, we would have very serious concerns regarding this level if the duties and salary basis tests are not reformed in a significant manner. Similarly, we emphasize that we would oppose any compensation level above $425 per week.

\(^{12}\) Id. at 15,571.

\(^{13}\) Id.
Summary

- The Chamber does not oppose increasing the compensation level to $425 per week provided that meaningful modifications to the proposed duties and salary basis tests are also made.
- The Chamber opposes any increase in the compensation level above $425 per week.
- The Chamber opposes indexing the compensation level to any economic indicator.
Highly Compensated Employees

The most effective way that the Department could restore clarity to the white collar regulations would be to establish a bright line test exempting highly compensated employees. As noted earlier, the FLSA was created to protect low wage workers. Without a clear exemption for highly compensated employees, enterprising plaintiffs’ lawyers will continue to exploit any vagaries within the regulations. The Department should ensure that wage and hour regulations protect those employees who truly need its protections, not be used to line the pockets of the trail lawyers.

While the Department has not proposed a bright-line test, it has proposed a simplified duties test that would determine the exempt status of certain highly paid employees on a more streamlined basis. The Chamber believes that this approach is a welcome step in the right direction and, should the Department not adopt our suggestion for a true bright-line test, we offer suggestions to improve the simplified duties test.

Finally, the Chamber questions the Department’s compensation level of $65,000 per year established to meet the simplified duties test. We believe the proposed compensation level is unreasonably high and suggest that the Department set the compensation level at $50,000 per year.

Bright Line Test

The Department has requested comments as to whether it should adopt a “salary only” test for highly compensated employees.14 Such a test would essentially create a bright line test that would exempt highly paid white-collar employees from overtime requirements. In effect, this proposal would create three compensation bands. The highest paid would be automatically exempt while the lowest paid would be automatically nonexempt. Those in the middle would have their exempt status determined by examining employee job duties and the employer’s method of compensating the employees. We support establishment of a bright line test because it will add significant clarity to the classification of highly paid employees.

When the Department first established a lower compensation threshold, below which employees were not eligible for exempt status, it observed that

[A] salary qualification in the definition of the term “executive” is a valuable and easily applied index to the “bona fide” character of the employment for which exemption is claimed and which must be of a “bona fide” executive character by the terms of the statute itself. . . . Indeed, if an employer states that a particular employee is of sufficient importance to his firm to be classified as an “executive” employee and thereby exempt from the protection of the act, the best single test of

the employer’s good faith in attributing importance to the employee’s services is the amount he pays for them. 15

In other words, the Department believed that the single best proxy for determining an employee’s exempt status is his or her level of compensation. Alternative tests that examine job duties and methods of compensation are less accurate indicia of whether an employee needs or should be entitled to the protections of the FLSA’s overtime provisions.

If compensation level is the easiest applied index to determine whether an employee is a bona fide executive, administrative, or professional employee, it seems to matter little whether the compensation level test applies to the high or low end of the spectrum. There would seem to be little doubt that a top employee earning upwards of 60, 80 or 100 thousand dollars per year does not need the protections of the Fair Labor Standards Act. Yet, under existing and proposed regulations, he or she could be entitled to overtime. Such results are absurd and cause confusion among employers and employees. The Department should strive to eliminate such absurdities as it considers proposed changes to the regulations. Adopting a bright line test for highly compensated employees would be among the easiest and most effective methods by which the Department could reduce or eliminate unnecessary litigation by those who do not need the protections of the overtime provisions of the FLSA allowing the Department to focus its enforcement resources where most needed, the protection of low income employees.

Chamber members strongly support adopting a bright line test exempting highly paid white-collar employees. To assist us in determining what an appropriate compensation level should be, we conducted a membership survey. Businesses of every size responded to the survey, though most were small businesses. Every segment of private sector employers responded as well, with the most responses from manufacturing, construction, and the service sector.

According to our survey, sixty percent of Chamber members support a bright-line test that would exempt white-collar employees earning $50,000 or above. There was little variation based on company size. Likewise, these results were consistent among most sectors of industry.

The Chamber urges the Department to seriously consider adopting a bright line compensation test that would exempt all white collar employees earning over $50,000 in total compensation per year. Should the Department disagree with this compensation level, we nevertheless urge the Department’s establishment of a bright line test at some level. While reasonable people can disagree over the appropriate level, it should be clear

15 Department of Labor, Report and Recommendations on Proposed Revisions of Regulations, part 541, by Harold Stein, Presiding Officer, at 19 (Oct. 10, 1940) (hereinafter Stein Report). The Report contained similar reasoning for using a compensation level test for administrative employees and professional employees, other than those in the traditional professions. Id. at 32, 42
that at some level of compensation, employees simply do not need the protections of the Fair Labor Standards Act.

**Simplified Duties Test**

While the Department has not proposed a bright line test automatically exempting white collar employees who earn above a certain compensation level, it has proposed a simplified duties test for certain employees guaranteed to earn at least $65,000 per year.

The Chamber believes that the Department’s proposed simplified duties test for highly paid employees is a significant step in the right direction. Nevertheless, we are concerned that the duties test is not entirely clear and we have included suggested reforms. In addition, we have concerns with the types of compensation that count towards the compensation level test and the time period in which that compensation must be paid. We also question the appropriateness of the proposed level of $65,000.

**Duties Tests Unclear**

According to the preamble to the Department’s regulations, it has proposed that employees guaranteed to earn $65,000 per year should be exempt if they “have an identifiable executive, administrative, or professional function as described in the standard duties tests.”  However, the proposed regulations only exempt such an employee if he or she “performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee.”

In vetting this proposal with our members, we found significant concern regarding the preamble’s use of the phrase “identifiable [exempt] function” as compared to the proposed regulatory language’s use of the phrase “exempt duties or responsibilities.” It is unclear to us how or whether the terms “function,” “duties,” or “responsibilities” differ and to what they apply. While one possible reading would be that these terms refer to specific elements of the standard duties tests, this would render the simplified duties tests for professionals virtually meaningless. We encourage the Department to clarify this matter in final regulations. In addition, we suggest the Department clarify that an identifiable exempt duty does not necessarily mean the employee’s primary duty.

Of additional concern is the requirement that in order to meet the simplified duties test, an employee must perform office or non-manual work. As discussed later in these comments, under current regulations only administrative employees are required to perform office or non-manual work. Under the proposed regulations only administrative employees or learned or creative professional employees would be

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17 Proposed §541.601(a), 68 Fed. Reg. 15,593.
19 See 29 C.F.R. §541.2(a)(1) and discussion of the proposed exemption for learned or artistic professionals infra 47.
required to perform office or non-manual work.\textsuperscript{20} This requirement would seem to imply that under the proposed regulation, executives who do not perform office or non-manual work would not be eligible for the simplified duties test.

For the same reasons that the Chamber supports a true bright line test for highly compensated employees, we urge the Department to keep any duties test for highly paid employees simple. The inclusion of an element not required for executives under the proposed standard test adds complexity to the simplified duties test. If the Department must have some duties test for highly paid employees, the Department should only require the performance of an identifiable executive, administrative, or professional duty in order to qualify.

\textbf{Guaranteed Compensation}

The proposed simplified duties test only applies to those employees who are guaranteed a total annual compensation of $65,000 per year. “Total annual compensation” would include base salary, commissions, non-discretionary bonuses and other non-discretionary compensation, but not board, lodging, or other facilities.\textsuperscript{21} The Department’s proposal also requires that the base salary, commissions, and other non-discretionary compensation be “settled and paid out to the employee as due on at least a monthly basis.”\textsuperscript{22} If, at the end of the year, the employee’s total compensation has not reached $65,000 the proposed regulations would permit an employer to make an additional payment to make up the difference between the actual amount paid and $65,000 in order to qualify under the simplified duties test.\textsuperscript{23}

Chamber members have expressed concern with the requirement that compensation be guaranteed. Imposing this restriction seems to add significantly to the complexity of the simplified duties test. We suggest that the Department determine eligibility for the simplified duties test based on the actual total compensation paid to the employee, rather than whether it is guaranteed or over what specific interval it is paid.

Should the Department opt to keep its proposed approach, we are concerned with the requirement that compensation be paid on at least a monthly basis. It is our experience that many forms of compensation are not paid on a monthly basis, but are paid less frequently, such as quarterly or annually. Indeed, while commissions and bonuses often represent compensation for individual sales or short-term goals, they also frequently represent compensation for meeting long term goals. Requiring a monthly payout seems to be an arbitrary restriction on this form of compensation. The Chamber urges the Department to eliminate this requirement.

\textsuperscript{21} Proposed §601(b), 68 Fed. Reg. at 15,593.
\textsuperscript{22} Proposed §601(b)(1), 68 Fed. Reg. at 15,593.
\textsuperscript{23} Proposed §601(b)(2), 68 Fed. Reg. at 15,593.
Should the Department decide to retain the monthly payment requirement, the Department should consider clarifying that additional compensation above the employee’s guaranteed $65,000 annual compensation need not be payable monthly. For example, an employee making a salary of $6,000 per month should have his or her exempt status determined under the streamlined duties test regardless of whether the employee receives non-discretionary quarterly bonuses.

The Chamber appreciates the Department’s proposal to permit employers to make up any shortfall below $65,000 in the pay period immediately following the end of the year. However, we are concerned that a single pay period may not take into account the practical difficulties that such a requirement would entail. The Chamber appreciates that the Department would want to require payment of the employee’s earnings in a timely manner. However, we encourage the Department to extend the period in which such a payment could be made.

Salary Basis Test

The Department has proposed that employees meeting the simplified duties test need not be subject to the salary basis test to determine exempt status. The Chamber supports this proposal, but, as explained later, urges the Department to adopt a bright-line test exempting highly paid employees from the salary basis test regardless of whether the employee meets the requirements of the simplified duties test. While the method by which an employee is compensated may be an indication of exempt status for many employees, it is a particularly poor indication for those who are highly compensated.

Highly Compensated Employees Compensation Level

The Department has proposed that the simplified duties test be available for employees with guaranteed annual compensation of at least $65,000. In choosing this number

[T]he Department looked to points near the higher end of the current range of salaries and found that 20 percent of all salaried employees earned above $65,000 annually. This level is consistent with setting the proposed standard test salary level at the bottom 20 percent of salaried employees.24

The Chamber appreciates the Department’s explanation. However, in our view there is no compelling economic argument for using the same percentage to determine both eligibility for the simplified duties test and automatic overtime entitlement. Indeed, there are as compelling arguments for the Department to choose other compensation levels.

For example, some Chamber members have suggested that because the FLSA was designed to protect low wage workers, that the compensation level should be set not at the top 20 percent of salaried professionals, but at the median. Other Chamber members have suggested that the Department examine the types of jobs that highly compensated employees have and make a separate determination, independent of the low compensation threshold.

In support of this argument, we have examined the job duties of those earning between $55,000 per year and $65,000 according to Bureau of Labor Statistics data. According to recent data, about 60 percent of all employees with annual earnings in the range of $55,000 to $65,000 are classified as managerial and professional specialty occupations. We have examined the jobs that the Labor Department classifies in this manner and believe that in the vast majority of cases, such employees would be classified as exempt under current regulations. Lowering the compensation threshold would not have an adverse impact on an appreciable number of these workers.

There are some workers earning between $55,000 and $65,000 per year who should probably not be exempt under section 13(a)(1) of the Fair Labor Standards Act. For example, most jobs classified as precision production, craft, and repair occupations as well as those classified as operators, fabricators, and laborers should probably not be exempt executives, administrators, or professionals. However, we believe that it is highly unlikely that the jobs in these categories could be classified as exempt under the Department’s proposed simplified duties tests.

For these reasons, the Chamber encourages the Department to undertake a detailed evaluation of occupations of highly compensated employees. We believe that the Department will see that the compensation level necessary to qualify for the simplified duties test could be lowered to a more reasonable level without defeating the FLSAs protective purposes.

Summary

Bright Line Test

- The Chamber urges the Department to establish a bright line test exempting all highly paid white collar employees. We believe the level for this test should be set at an annual compensation of $50,000.

Simplified Duties Test

- The Chamber urges the Department to clarify what it means to perform an exempt “duty or responsibility.”
- The Chamber urges the Department to eliminate the requirement that work must be office or non-manual to qualify for the simplified duties test.
• The Chamber urges the Department to eliminate the requirement that guaranteed compensation be paid out on a monthly or more frequent basis.
• Should the Department retain the requirement that guaranteed compensation be paid on a monthly or more frequent basis, the Chamber urges the Department to waive that requirement for compensation earned above $65,000 per year.
• The Chamber supports the Department’s proposal to waive the salary basis test for employees meeting the simplified duties test, but we encourage the Department to consider waiving the salary basis test for all highly compensated employees regardless of whether they meet the simplified duties test.
The Department has proposed several important modifications to the duties test for executive employees. In general, the Chamber believes that the Department’s proposal is a significant step in the right direction. In the proposal, the Department recognizes that it is not appropriate to use a single framework to determine the exempt status of executives and creates a separate framework for employee-owners and for sole charge executives. The Chamber agrees that there are often more appropriate indicia of exempt status that the standard duties test and supports the Department’s proposal in this regard. However, we urge the Department to consider additional alternative approaches to its standard duties test that will account for the fact that very high-level executives typically have vastly different duties from the supervisors and managers toward which the exemption is geared. We have proposed alternative language that would embrace more employer business models yet still would meet the protective purposes of the FLSA.

We support the Department’s proposal to de-emphasize the amount of time executives spend performing specific tasks and the inclusion of language recognizing that managers in retail can qualify as exempt even though they may spend a significant amount of time performing nonexempt tasks. We also support the elimination of the discretion and percentage limitation tests. We have offered suggestions to strengthen these approaches.

While most of our comments on the executive exemption focus on the standard duties test, we have several concerns with other details in the proposal. For example, we believe the sole charge executive exemption should be updated to place more emphasis on the nature of a supervisor’s visit, rather than the frequency of visits and that the geography of the facilities managed by sole charge executives is irrelevant. We also believe the language regarding working supervisors is largely moot and should be eliminated.

**Standard Duties Test**

The current regulation consists of a long and short test to determine the exempt status of executives based on job duties, dependent upon the compensation level of the employee. The long test, for employees paid between $155 and $250 per week, consists of five prongs. The short test, for employee paid $250 per week or more, consists of the first two prongs of the long test. The prongs of the test are, very generally:

- Primary duty of management of the enterprise or a customarily recognized department or subdivision (required for long and short tests),
- Customary and regular direction of two or more other employees (required for long and short tests),
- Authority to hire or fire employees or make suggestions regarding employment status that carry particular weight (required for long test only),
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• Customary and regular exercise of discretion (required for long test only), and
• Meet percentage limitations that generally require spending less than 20 percent of time performing nonexempt tasks. The percentage limitation is raised to 40 percent for retail or service establishments (required for long test only).

The Department has proposed eliminating the long and short test and instead utilizing a new standard duties test for executives. The standard test is based on the first three prongs outlined above. The Department has also proposed removing sole charge executives and certain employee-owners from this framework.

Primary Duty of Management of the Enterprise

The proposed regulations retain the primary duty test as the first prong of the standard duties test for the executive exemption. The test consists of several important elements that are, in turn, interpreted in the regulations. These elements are (1) primary duty, (2) management, and (3) what constitutes a department or subdivision. The proposed regulations regarding management duties have not been significantly modified and, in our experience, are not frequently litigated. The Chamber supports retention of the management provision.

Department or Subdivision

The Department has proposed modest changes to the definition of a department or subdivision. For example, the proposal eliminates language currently promulgated at the end of current section 104(a) regarding whether an employee is “in charge” versus having mere “participation” in management. The Chamber believes the current language is inappropriate in describing a department or subdivision and is duplicative of the requirements imposed by the definition of “primary duty.” The Department’s proposed deletion of this language serves to eliminate unnecessary regulatory language. The Chamber supports these modifications.

We are concerned, however, that the department or subdivision requirement is outdated. More and more businesses are structured today without traditional departments or subdivisions. For example, many businesses utilize project teams rather than “departments.” Teams may exist for particular contracts, tasks, or other projects and may not be permanent. The Chamber has suggested modified language below that may help to recognize these relatively new organizational structures.

Primary Duty

Current interpretations of the primary duty test heavily emphasize the amount of time that employees spend performing specific job tasks. For example, section 103 states

25 Compare 29 C.F.R. §541.102 with proposed §541.103, 68 Fed. Reg. at 15,586.
27 See infra at 22-23.
that “it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee’s time.” While some courts have recognized that the primary duty is not solely determined by time, the very fact that time has been viewed as such a significant factor has led to a tremendous amount of litigation, especially in those instances where managerial employees spend in excess of 50 percent of their time performing tasks typically referred to as nonexempt.

The Department has proposed eliminating the “rule of thumb” articulated in current regulations and rewording the regulations in an apparent effort to de-emphasize the amount of time spent performing specific tasks. While time may still be a factor in determining an employee’s primary duty, the proposed regulations attempt to clarify that time is not the most important factor.

The Chamber believes that the current emphasis on the amount of time spent performing specific duties is misplaced. The regulations should not imply that time spent performing particular tasks is in any way more important than any other factor. Indeed, if any one factor should be emphasized in determining a “primary duty” it should be the employee’s most important duty. The Department’s proposal makes a good start toward this goal, but further clarification would be helpful. In particular, we recommend the Department eliminate from its proposal the following sentence:

However, the amount of time spent performing exempt work can be a useful guide, and employees who spend over fifty percent of the time performing exempt work will be considered to have a primary duty of performing exempt work.

We are concerned that this language could be interpreted as requiring that an employee needs to spend a majority of his or her time performing exempt tasks in order to qualify as exempt, in conflict with other portions of the proposed regulation. We are also concerned that the language may lead to an improper interpretation that the time spent by employees on particular tasks is more important than other factors that are used to determine an employee’s primary duty. Such conflict will not help reduce the amount of confusion classifying employees or needless litigation over the primary duty test in the context of the executive exemption. The Chamber urges that this language be eliminated from the proposed regulation.

The Department has also proposed language stating that detailed employer policies or procedures is not, in itself, enough to defeat exempt status. The Chamber does support this language added. While some courts have recognized this interpretation, the understanding has by no means been universal. This language is consistent with modern business practices that may require adherence to detailed policies or procedures. For example, as noted by the Second Circuit in reference to a restaurant franchise:

28 29 C.F.R. §541.103.
29 See, e.g., Donovan v. Burger King Corp., 675 F.2d 516, 521 (2d Cir. 1982).
31 Id.; Similar language is included in 29 C.F.R. §103.
We fully realize that the economic genius of the [employer] lies in providing uniform products and service economically in many locations and that adherence by Assistant Managers to a remarkably detailed routine is critical to commercial success. . . . [The employer] seeks to limit likely mistakes in judgment by issuing detailed guidelines, but judgments must still be made. In the competitive, low margin circumstances of this business, the wrong number of employees, too many or too few supplies on hand, delays in service, the preparation of food which must be thrown away, or an undirected or unsupervised work force all can make the difference between commercial success and failure.32

The proposed language would make it clear that following detailed employer policies can be consistent with exempt work. The Chamber supports adopting the language because it would add clarity, help employers classify employees, and reduce needless litigation in this area.

**Supervision and Authority to Hire or Fire**

Current regulations require, for both the short and long tests, that an employee customarily and regularly direct the work of two or more other employees in order to qualify as an exempt executive.33 In addition, the long test requires that an employee have the authority to hire or fire other employees or be one whose suggestions or recommendations as to the hiring or firing and as to the advancement and promotion or any other change of employment status be given particular weight in order to qualify as an exempt executive.34 The Department has proposed retaining both of these elements in its new standard test for the executive exemption.35

**New Framework Would Recognize Many Different Types of Executives, Business Models**

In vetting this proposal with our members, we heard significant concern that this portion of the current and proposed regulations does not properly account for the job duties of those in the most senior positions of a company, but rather the exemption appears geared towards employees who are more commonly referred to as supervisors or managers. For example, defining an executive in terms of “directing the work of two or more employees” is too narrow for those who may have very senior positions and have highly responsible positions in terms of corporate direction, but who do not actually “direct” the work of specific individuals on any regular basis. The Chamber believes that the executive exemption should clearly cover both classes of employees.

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32 *Burger King Corp.*, 675 F.2d at 521-22.
33 29 C.F.R. §§541.1(b), .1(f).
34 29 C.F.R. §541.1(c).
In many knowledge and service industries today, important executives are not engaged in the direct supervision of staff. The Department has apparently recognized this technical dichotomy and invited comments on whether the supervision of two or more employees should be modified to include “the customary or regular leadership, alone or in combination with others of two or more other employees.” This proposal would certainly be an improvement over the “direct the work of two or more other employees” test, but still focuses too much on authority over people rather than over corporate assets, strategy, or the business itself. Similarly, there are nonprofit organizations whose executives direct volunteers and others who are not necessarily “employees” as such. There are also consulting firms who offer to other companies the managerial services of their own employees on a contract or fee for service basis. In light of the mathematically precise hours or body counting exercises incorporated into proposed sections 105(a) and (b), the supervisory test seems particularly arcane and out of step with many of today’s business structures.

The Chamber believes that the Department should consider alternative language that would be helpful for clarifying exempt status in a number of difficult situations. The language suggested below would offer an alternative to address situations where a joint employment relationship might exist, for example in a consulting or client situation. Additional language would permit employees to be recognized as executives if they qualified in one of three ways. The first is based on proposed section 100(a)(3) but uses language that recognizes a greater variety of business models in effect today. The next proposes an alternative test that more clearly articulates the duties of supervisors. This language is borrowed National Labor Relations Act. Finally, we propose a third alternative to recognize the high level employee with authority over business assets and strategic commitment.

The Chamber suggests that the Department consider replacing proposed section 541.100(a)(2)-(4) with the following:

(2) With a primary duty of the management of (a) the enterprise in which the employee is employed or (b) an enterprise to which the employee’s management services are being provided by the employee’s employer, where the term “enterprise” includes a customarily recognized department, subdivision, project, group or functional unit; and

(3) Who directly or through others manages, directs or has substantial authority over the work performed or to be performed by other employees, volunteers, contractors, or service providers to the enterprise; or

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(4) Who has authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action; or

(5) Who has authority to commit more than minor resources or assets of the enterprise and determine the objectives to be accomplished thereby.

The Chamber’s suggested language should be read such that the requirements of either paragraphs 3, 4, or 5 are taken in conjunction with paragraph 1, the compensation test (not restated above), and paragraph 2 the primary management role.

Old Framework: Concerns with Requirement for Authority to Hire or Fire

If the Department chooses not to adopt the new framework suggested by the Chamber and instead proceed with its proposed framework, the Chamber offers these additional comments on the Department’s proposal to include a prong from the long test as part of its standard test.

As described above, the Department has proposed that in order to qualify as exempt, executive employees must have the authority to hire or fire employees or to make certain recommendations regarding change in employment status. The Department has characterized its proposal to include this long test element along with the two short test elements as representing “a middle ground between the current long and short tests.” The Department does not articulate any other reason for including this element in the new standard test.

The Chamber is puzzled by the inclusion of this element in the standard test and questions whether it is inappropriate to include it. The Chamber believes that this element is more appropriately descriptive of the requirement that an exempt executive employee supervise two or more employees. This interpretation is similar to that adopted by the Tenth Circuit in Riley v. Town of Basin. In Riley, the court was required to determine whether an employee was an exempt executive under the short test. The court observed that

... to qualify as an exempt executive employee, [the employee] must customarily and regularly supervise at least two full-time employees. . . . [I]mplicit in this evaluation is the exempt executive employee’s authority to hire or fire or to provide suggestions about job status, promotion or advancement that will be given particular weight.  

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41 Id. at *9.
In other words, the Tenth Circuit found that this element of the long test was helpful in defining what it means to supervise other employees. We question whether it would be helpful to revive this prong of the long test for use as an independent prong of the standard test. If this prong is to continue as part of the regulations, the Department should consider modifying it so that it merely helps define what it means to supervise other employees.

Should the Department decide to retain this prong, the Chamber observes that the language proposed by the Department at section 100(a)(4) is significantly clearer than current regulatory language. If this prong must be included, the Chamber supports the Department’s proposed revision.

**Discretion and Percentage Limitations**

Current regulations impose, as part of the long test, a percentage limitation on the amount of nonexempt work that executive employees may conduct. They also include a requirement that employees “customarily and regularly” exercise discretionary powers in order to qualify as exempt professionals. The Department has proposed eliminating these elements from the duties test for exempt executives and in doing so makes several important observations. First, the Department notes that, as a practical matter, the long test is largely unused today because of outdated compensation levels. The Department also indicates that the percentage limitations have posed difficult compliance problems for employers in that they are complex and require detailed time-testing of managers, who often would not otherwise be required to keep detailed track of hours spent performing specific tasks. In addition, the Department recognizes that it is indeed possible for employees to be performing exempt and nonexempt work at the same time, for example, managing while performing nonexempt work such as stocking shelves in a retail establishment. Consequently, the Department has concluded that the discretion test and percentage limitations “are not useful criteria that should be reintroduced” in the executive exemption.

The Chamber agrees with the Department’s observations. It is our members’ experience that the percentage limitations have been difficult to apply and have been of little utility. Likewise, the discretion test simply does not fit well with the modern job tasks of many executives who often rely on detailed employer policies for reasons such as quality or cost control. The Chamber supports the Department’s proposal to drop percentage limitations and the discretion test from the executive exemption.

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42 29 C.F.R. §541.1(e).
43 29 C.F.R. §541.1(d).
45 Id. at 15,565.
Other Issues with Standard Duties Test

Working Supervisors

Although the Department proposes eliminating the percentage limitation, at the same time its proposal includes a section distinguishing “working supervisors” from exempt executives that is substantially similar to the current interpretation of working foremen. The current interpretation that describes “working foremen” and “working supervisors” explains that

The primary purpose of the exclusionary language placing a limitation on the amount of nonexempt work is to distinguish between the bona fide executive and the “working” foreman or “working” supervisor who regularly performs “production” work or other work which is unrelated or only remotely related to his supervisory activities.

The interpretation then goes on to describe different types of working foremen, such as strawbosses and gang leaders, who work along with subordinate employees and carry out some supervisory functions. The interpretation also describes another type of working foreman, that of the dual-job holder who performs both exempt and nonexempt work, but whose principal duties are not supervisory or management related.

Given the elimination of the percentage limitations, the Chamber questions the need for the retention of this section. It would appear that the section merely restates what is already clear in the regulation – that those who have a primary duty of the performance of nonexempt work will be nonexempt. In other words, we do not believe language other than that used in the executive exemption’s primary duty test or in the definition of primary duty itself is necessary to ensure that those with only few management responsibilities are nonexempt. Indeed, the dual treatment could cause confusion. The Chamber urges the Department to delete this section from its proposal.

If the Department believes that retention of this section is necessary, then the Chamber recommends modification of it to eliminate superfluous and confusing language. If the section is to be retained, the Chamber recommends the following language be adopted:

§ 541.106 Working supervisors.
Employees, sometimes called “working foremen” or “working supervisors,” who have some supervisory functions, such as directing the work of other employees, but also perform work unrelated or only remotely related to the supervisory activities are not exempt executives if they do not have management as their primary duty as required in §541.100.

47 29 C.F.R. §541.115(a).
48 29 C.F.R. §541.115(b)-(c).
The suggested language deletes reference to specific types of work, such as production or sales work. As the Department knows, these terms have been the subject of excessive litigation in the context of the administrative exemption. The Chamber does not believe that such terms are at all helpful in this section, which is designed merely to ensure that those without a primary duty of management will not be found to be exempt executives. The Chamber urges the Department not to use additional language that is likely to further confuse the matter and result in additional litigation.

Trainees

Many employers provide formalized executive training programs to provide employees with the skills and knowledge they will need to perform in executive positions. Many Chamber members find such programs essential to ensure that employees with limited management experience, and perhaps with limited experience with a particular employer, receive the training necessary to prepare them for the myriad challenges that are inherent in management positions. Executive training programs typically focus on providing future managers with a thorough working knowledge of the employers’ goods and services, customer base, sales and marketing strategy, and employment structure. Trainees are exposed to various facets of the business, after rotating among various departments or divisions to obtain a broad-based knowledge of operations from the “ground up.” Trainees often spend time with major customers to learn customers’ likes and dislikes, provide service, and develop customer relationships. Although much of the work performed by executive trainees is the same as work performed by nonexempt employees, the executive trainees differ from the nonexempt employees in at least two significant respects. First, the executive trainees often earn a much higher salary than the compensation paid to the nonexempt employees. Second, the purpose of the work is substantially different. An executive trainee who spends time stocking shelves does so not to ensure that merchandise is appropriately stocked, but as an education tool to learn the details of how the business is run. After completion of executive training programs, these employees step immediately into positions in which they supervise employees performing the tasks which they themselves learned as trainees. Moreover, they are required to apply the knowledge they learned during their training to the management and advancement of the business.

Current Labor Department interpretations state that the executive exemption “does not include employees training to become executives and not actually performing the duties of an executive.”49 Likewise, the Department’s proposal states that the exemptions do not apply to employees training for employment in an exempt capacity who are not actually performing exempt duties are not eligible for exemption.50 The Chamber understands that the principle objection to including executive trainees as exempt employees is due to a 1940s era opinion by the Solicitor’s office that states

49 29 C.F.R. §541.116.
one in training who has not yet assumed the responsibilities of an executive, cannot be defined to meet the congressional standard of an employee employed in a bona fide executive capacity.\textsuperscript{51}

The Chamber urges the Department to revisit this position. While executives performing nonexempt tasks may appear to be engaged in the same tasks as nonexempt employees, their primary duty is not the carrying out of those tasks but obtaining the education and training necessary to assume executive or management functions. Treating trainees as exempt would therefore be consistent with the primary duty test.

We appreciate that the Department may have some concerns about whether a training program was bona fide and the Chamber would support reasonable restrictions on its use. For example, typically management and executive trainees receive significantly higher compensation than those performing similar nonexempt work. In addition, these programs are of limited duration, usually ranging from a few months to as long as two years. Consequently, the Chamber would not oppose a requirement that the employees be well paid, or that the program be of limited duration.

**Supervisors in Retail Establishments**

The proposed regulation includes a new section that addresses the fact that supervisors in retail establishments often spend a significant amount of time performing nonexempt work, such as stocking shelves or preparing food.\textsuperscript{52} The proposed regulation notes that provided the remainder of the executive exemption duties tests are met, a supervisor will not lose exempt status merely because he or she spends a majority of time performing nonexempt work.

The Chamber strongly supports this provision. It is our experience that this precise point is the subject of a tremendous amount of litigation due to the confusion over which particular duties of a supervisor are exempt. When a manager makes a decision to engage in tasks that nonexempt employees perform, he or she is choosing to engage in those tasks while simultaneously managing the business. The Chamber believes the language will help clarify that managers, especially in retail, continue to manage while performing nonexempt duties at the same time. This provision is especially important given the difficult history of interpreting the primary duty test.

**Framework for Business Owners**

The Department has proposed that owning one-fifth of a business should be an adequate proxy for exempt status without analysis of the employee-owner’s specific job duties. As early as 1949, the Department recognized that owner-employees should not necessarily have their exempt status determined in the same way as other executives. As

\textsuperscript{51} Weiss Report at 48 (emphasis in original).
\textsuperscript{52} Proposed §541.107, 68 Fed. Reg. at 15,586-87.
noted in the Weiss Report, a different test was necessary “to recognize the special status of an owner, or a partial owner, of an enterprise who is actively engaged in its management.” The exception applies to those owning “a bona fide 20-percent equity in the enterprise in which he is employed.”

The Department has proposed modifying the exception so that it does not only exempt 20 percent owners from the long test provision regarding percentage limitations on the amount of nonexempt work performed, but also from the rest of the duties tests for executive employees. The Chamber believes that this proposal is entirely sensible. The FLSA, after all, was not designed to protect business owners, but instead, their employees. However, the Chamber notes that the requirement that the individual own at least 20 percent of the business seems both arbitrary and unreasonably high. While the Chamber appreciates that the Department may wish to establish some bright line clarifying that an employee in a public company who merely owns a few shares of stock does not exercise the same degree of control over the business, the Chamber suggests that a lower percentage would be more appropriate.

Framework for Sole Charge Executives

The Labor Department first recognized that a different test was appropriate for sole charge executives in 1940 because the Department believed that

Due weight must be given to [the] freedom from direct supervision enjoyed by the top person at an independent establishment or in a branch establishment physically separated from the supervising office of the company.

Therefore, current regulations contain a provision that exempts those “in sole charge of an independent establishment or a physically separated branch establishment” from the long test percentage limitations on the performance of nonexempt work.

As with 20 percent owners, the Department has proposed that being in sole charge of certain establishments should be an adequate proxy for exempt status without analysis of the employee’s specific job duties. Therefore, the Department has proposed modifying the exception so that it does not only exempt sole charge executives from this particular long test provision, but also from the rest of the duties tests for executive employees.

The Chamber supports this proposal. As the Department has noted, the “senior employee with authority to make decisions regarding day to day operations” deserves

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53 Stein Report at 42.
54 29 C.F.R. §§541.1(e), .114(b).
55 The Chamber notes that the Department has specifically asked for comments as to whether 20 percent owners should be subject to the salary level or salary basis test. 68 Fed. Reg. at 15,565. The Chamber’s comments on these matters appear in our discussion of the salary basis test at page 65.
56 Stein Report at 17.
57 29 C.F.R. §541.1(e).
special status as an executive, regardless of his or her other job duties. The Chamber believes that an employee’s status as the person in charge at an establishment should be an appropriate proxy for exempt status without regard to the employee’s other job duties.

In addition to the Department’s recognition that it is most appropriate to examine the exempt status of sole charge executives differently from that of other executives, the Department has made some modification to the existing language defining which employees qualify as sole charge executives. The Chamber’s concerns with this proposal are, first, whether a supervisor’s visits to the sole charge executive’s facility defeats exempt status, and, second, the emphasis placed on the geographic location of facilities.

**Supervisor Visits**

The Department has proposed that sole charge executives will not lose exempt status based on “an occasional visit” by a supervisor. This is more appropriate language than the current interpretations, which include unhelpful examples, but nonetheless remains problematic in that exempt status may be sacrificed mainly due to supervisor visits. It may be appropriate to foreclose applicability of the sole charge exemption if the sole charge executive’s supervisor attempts to carry out day-to-day management of the facility. However, a supervisor could visit a facility for any number of reasons that should not impact the exempt status of a sole charge executive, such as to evaluate the sole charge executive’s managerial skills. The Chamber suggests that the Department modify its proposal to give greater weight to the nature of the supervisor’s visits than to the frequency of such visits.

**Geography**

The Chamber also believes that the Department should take this opportunity to update its interpretation of an “independent branch or physically separated branch establishment.” Chamber members have raised concerns regarding the application of this interpretation with respect to retail establishments that may abut a corporate office. As the Department opined in 1986, “the mere physical proximity of a ‘base’ office or a divisional or regional facility does not foreclose the applicability of the sole charge exception.” The Chamber urges the Department to take this opportunity to reaffirm this position. Likewise, the Chamber has heard concerns from businesses that often share locations, for example, a food court in which several retail establishments share a physical location or adjoining space. Proximity of the businesses could lead to confusion.

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59 As with 20 percent owners, the Department has specifically asked for comments as to whether sole charge executives should be subject to the salary level or salary basis test. 68 Fed. Reg.; 15,565. The Chamber’s comments on these matters appear in our discussion of the salary basis test at page 65.
60 Proposed §541.102(b), 68 Fed. Reg. at 15,586.
61 See 29 C.F.R. §541.113(b); Proposed §541.102(c), 68 Fed. Reg. at 15,586.
regarding the application of this provision. Indeed, the Chamber questions the need to include reference to physical proximity at all. A more appropriate test would focus on the sole charge executive’s control over the establishment rather than a rigid analysis of geographical location.

Summary

The Chamber’s comments regarding the duties tests for exempt executives can be summarized as follows:

Primary Duty of Management of the Enterprise

- The Chamber generally supports the Department’s proposed language defining a “department or subdivision,” but has suggested modifications to recognize business models based on project teams.
- The Chamber supports the Department’s proposal to de-emphasize the amount of time an employee spends performing various tasks in the context of the primary duty test and language clarifying that following detailed employer policies will not defeat an exemption. The Chamber has suggested additional modifications to further decrease the emphasis the regulations place on the amount of time employees spend carrying out tasks.

Supervision and Authority to Hire or Fire

- The Chamber has suggested that the Department consider a new regulatory framework that better addresses the many different business models and recognizes that different tests may be necessary to distinguish between high level executives and other managers or supervisors.
- Should the Department not adopt the Chamber’s suggested approach, the Chamber questions inclusion of the long test element regarding the authority to hire, fire, or make certain recommendations as an element of the standard test.

Other Issues

- The Chamber supports the Department’s proposal to eliminate the long test requirements regarding discretion and percentage limitations regarding the amount of time spent performing nonexempt duties.
- The Chamber does not support inclusion of proposed section 106 regarding working supervisors. Nevertheless, should the Department decide to retain the provision, the Chamber has suggested revised language.
- The Chamber urges the Department to exempt employees in bona fide executive training programs.
- The Chamber supports the Department’s proposed language regarding supervisors in retail establishments.
• The Chamber supports the Department’s proposal to recognize certain employee-owners as exempt executives and urges the Department to lower the ownership threshold necessary to qualify.
• The Chamber supports the Department’s proposal to recognize sole charge executives as exempt executives and has suggested modifications regarding supervisor visits and the emphasis placed on geographic location of facilities.
Administrative Duties Test

The Chamber agrees with the Department’s assertion that the “current duties test for administrative employees is the most difficult to apply of all the duties tests.” The Department has proposed several significant changes to the duties test in an effort to resolve this difficulty. These proposed changes include replacing the discretion test with a position of responsibility test, modifying the primary duty test, and eliminating items unique to the long test. While we agree that changes to the current administrative duties test are needed, we have serious concerns with some aspects of the Department’s proposals.

The Chamber believes the Department has taken the wrong approach in modifying the primary duty test. The Department’s approach keeps the production dichotomy largely intact and could be read to dramatically limit the use of the administrative exemption for any position related to sales. We urge the Department to carefully reconsider its position. Existing interpretations already improperly exclude many jobs related to sales. The Department should use this opportunity to recognize that sales related positions are not inherently nonexempt. In addition, the Chamber believes the Department should do its best to eliminate the production dichotomy, which has proven unworkable and is among the most difficult and out-of-date provisions within the part 541 regulations. These comments detail the development of the production dichotomy and make the case of its elimination. They also make the case for an updated treatment of sales work.

As to the Department’s proposal to replace the discretion test with a position of responsibility test, the Chamber is generally supportive of the two alternative methods the Department has proposed to meet the test. However, it is difficult to surmise how the tests will be interpreted in practice. For this reason, the Chamber supports retention of the current discretion test as a third alternative to meeting the position of responsibility test. Our comments also address some areas that could use additional clarification.

Finally, the Chamber supports the Department’s proposal to eliminate items unique to the existing long test.

Primary Duty

Current and proposed regulations contain a requirement that an employee have a primary duty of office or non-manual work related to the management or general business operations of the employer or the employer’s customers. The details of what constitutes “management or general business operations” are explained in additional

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63 68 Fed. Reg. at 15,566.
64 The only difference in the language is that current regulations apply the primary duty test to work related to “management policies” as opposed to “management.” Compare 29 C.F.R §541.(a)(1) with proposed §541.200(a)(2), 68 Fed. Reg. at 15,587.
interpretations and regulations. These details serve to illustrate the types of work that are contemplated by the exemption and distinguish that work from certain work that is not intended to be covered. These details, as embodied in the current regulations, have been the source of significant confusion and have led to the development of the so-called “administrative-production dichotomy.” Because this provision has led to significant confusion and litigation, these Comments address the development of the production dichotomy in some detail.

History of Production Dichotomy

Early Labor Department interpretations explaining the phrase “directly related to management policies or general business operations” stated that the phrase is designed to describe

those types of activities relating to the administrative operations of a business as distinguished from “production” work.

As described in the Weiss report, the interpretative language from 1949 is based on a recommendation by the Communications Workers of America (CWA). According to the report, the Department had proposed language establishing a primary duty test of performing “nonmanual field work directly related to management policies or general business operations.” The revision suggested by the CWA was to require that administrative employees “carry on . . . work directly related to the administrative rather than the production operations of the company.” The hearing examiner agreed with the CWA’s recommendation and, when the Department published interpretations of its revised regulations in 1949, included the above provision.

In 1963, the Department amended the interpretation to distinguish exempt administrative work from sales work in a retail or service establishment. The 1963 language, which is still in effect today, explains that the phrase “directly related to management policies or general business operations” describes

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67 Weiss Report at 62 & n.188.
68 Id.
69 Id.
those types of activities relating to the administrative operations of a business as distinguished from “production” or, in a retail or service establishment, “sales” work.\textsuperscript{72}

At the time, the Fair Labor Standards Act defined “a retail or service establishment” to mean

an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry.\textsuperscript{73}

This definition was added to the FLSA as part of section 13(a)(2) in 1949.\textsuperscript{74} Labor Department interpretations describe retail and service establishments as follows:

Such an establishment sells to the general public its food and drink. It sells to the public its clothing and its furniture, its automobiles, its radios and refrigerators, its coal and its lumber, and other goods, and performs incidental services on such goods when necessary.\textsuperscript{75}

Department interpretations also contain a “partial list of establishments lacking ‘retail concept.’”\textsuperscript{76} The list itemizes more than 150 types of establishments including banks, brokers, finance companies, offices of insurance brokers, agents, and claims adjustors, and loan offices.

Court decisions regarding the definition of retail or service establishments are also particularly illustrative. For example, the Supreme Court, in examining the history behind the definition, has noted that even prior to the creation of the statutory definition in 1949, the Labor Department interpreted the provision to exclude personal loan companies and other businesses in the financial sector.\textsuperscript{77} The Court also recited legislative history behind the 1949 amendments noting that there was “no concept of retail selling or servicing” in “banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, [and] telegraph companies.”\textsuperscript{78} While Congress repealed section 13(a)(2) of the FLSA in 1989,\textsuperscript{79} Labor Department interpretations defining retail or service establishments continue to be relied upon by courts.\textsuperscript{80}

\textsuperscript{72} Id.; 29 C.F.R. §541.205(a).
\textsuperscript{73} See Pub. L. No. 87-30, 75 Stat. 65, 71.
\textsuperscript{74} 63 Stat. 910, 917.
\textsuperscript{75} 29 C.F.R. §779.319(a).
\textsuperscript{76} 29 C.F.R. §779.317.
\textsuperscript{78} Id. at 295 (citing H.R. Conf. Rept., 95 Cong. Rec. 14,932).
\textsuperscript{79} Pub. L. No. 101-157, §3(c)(1).
As can be seen, the regulatory history defining retail or service establishments clearly indicates that the definition was meant to encompass traditional local retail establishments. When the Department amended the part 541 regulations in 1963, it distinguished exempt administrative work from sales work “in a retail or service establishment.” Thus, the Department was distinguishing exempt administrative work from sales in traditional retail establishments. It does not follow that the 1963 amendments sought to distinguish sales work in other types of establishments from exempt administrative work.

Broad Reach of Production Dichotomy Today

The Department’s initial language describing production work as nonexempt work may have made sense when the CWA first proposed the concept in the 1940s. At the time, the distinction may have been the clearest line the Department could have drawn between exempt and nonexempt employees in the context of the administrative exemption. However, the dramatic evolution of the workplace since adoption of the production dichotomy, including the decline in manufacturing and the rise in the service and information industries, has rendered the production dichotomy an artifact of a different age. A few examples serve to illustrate the reach of the production dichotomy:

- **Inside sales employees** of a company engaged in wholesale sales of electrical products were ruled nonexempt production workers because the employer’s primary business purpose was to produce sale of electrical products. The court found that the employees engaged in activities relating to the day-to-day ‘production’ of sales.  
  

- **Television newscast producers, station directors, and assignment reporters** were found to be nonexempt production workers because their primary duties were related to production aspects of the television station’s business.  
  
  82 Dalheim v. KDFW-TV, 918 F.2d 1220, 1229-31 (5th Cir. 1990).

- **Insurance claims investigators** were nonexempt production workers where the employer’s business was to produce information for its clients and the employees’ “duties consisted almost entirely of gathering that product.”  
  

- **Loan originators** responsible for advising customers on the variety of lending products coupled with soliciting, and selling loans, as well as identifying, modifying, and structuring loans to fit a customer’s financial need, were production workers because their employer was in the business of designing, creating, and selling home lending products.  
  
• Escrow closers responsible for managing all escrow function to ensure successful transactions in retail and commercial real estate transactions were nonexempt production workers where their employer was a title insurance company that also marketed and sold its escrow closing business.\textsuperscript{85}

As can be seen from the above cases, the administrative-production dichotomy is no longer a clear line separating exempt administrative work from nonexempt work. Perversely, many of the employees who were found to be nonexempt in the above cases would have been exempt if they performed identical job duties for different companies. This is because courts have determined that in order to analyze whether an employee is a nonexempt production worker, they should also consider the nature of the employer’s business. Consequently, one of the facts resulting in the classification of the employees described above was the fact that the employer’s primary business was to produce sales.\textsuperscript{86} If the employer had a different primary purpose, the court may have held that the employees were not production workers. For example, in \textit{Reich v. John Alden Life Insurance Co.},\textsuperscript{87} in which the court was faced with determining whether marketing representatives were exempt, the First Circuit found that the employer’s primary business was production of insurance policies, not producing sales of those policies.\textsuperscript{88} The Chamber does not believe that the strained reading of “production” that has evolved over the years was what the Department intended in adopting the Communication Workers’ proposal in 1949.

An illustration of the confusion caused by the dichotomy is in determining the exempt status of escrow officers. Escrow officers have primary responsibility for executing the transfer of real property between parties. They are typically paid a salary ranging from $30,000 per year to $120,000 per year with incentive compensation ranging from $40,000 to $130,000 per year. In other words, their total compensation ranges from $70,000 and $250,000 per year. These individuals typically are responsible for all activities entailed in successfully transferring title for real property. This work, typically performed by attorneys in the eastern United States, but by escrow officers in western parts of the country, involves work requiring a great deal of expertise and training. In addition, escrow officers need to evaluate risk elements, such as determining the effect of a lien or determining identity of the parties in the transaction, and have a great degree of discretion. The consequences of making mistakes in such a position can be very serious. However, their treatment under the administrative exemption is not crystal clear. Some could argue that the escrow officers are employed to produce real estate transactions rather than to carry out work related to the management or general business operations of the employer or the employer’s customers. Clearly, escrow officers are not the types of employees the overtime laws were designed to protect. The regulations should leave no doubt that such individuals are exempt.

\textsuperscript{86} 940 F.2d at 903.
\textsuperscript{87} 126 F.3d 1 (1st Cir. 1997).
\textsuperscript{88} \textit{Id.} at 9-10.
Proposed Regulations

In the preamble to the proposed regulations, the Department states that it has proposed changes that are needed to reflect emerging case law. Specifically, the Department states that its proposal will reduce the emphasis on the so-called ‘production versus staff’ dichotomy in distinguishing between exempt and non-exempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management or general business operations of the employer or of the employer’s customers.

To accomplish this, the Department has proposed the following new interpretation:

The phrase “related to management or general business operations” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work related to assisting with the running or servicing of a business as distinguished, for example, from working on a production line or selling a product.

In other words, the Department has proposed two significant changes to the interpretation. The first change replaces the word “production” to the phrase “manufacturing production line.” The second changed the phrase “in a retail or service establishment, ‘sales’ work” to “selling a product.”

Sales Work

The Chamber does not support the approach taken by the Department toward this definition. The proposed language distinguishing exempt work from “selling a product” is particularly unhelpful. As noted above, the addition of sales as an example of nonexempt work was made only in the context of traditional local retail establishments. The Department’s proposal deletes reference to retail and service establishments. The Department has not articulated any rationale for this change in the preamble to the proposed rule, and we hope that no change is intended. However, we are concerned that some could construe this new language as expanding the scope of nonexempt sales work. It is not clear whether the Department intended to use the phrase “selling a product” to distinguish the selling of goods from services, but given the broad interpretation courts apply to “production” in the current regulations, the use of the phrase “a product” is unlikely to narrow the interpretation at all. The proposed language could lead to a dramatic narrowing of the administrative exemption and the Chamber urges the Department to reconsider its approach.

89 68 Fed. Reg. at 15,566 (citing Piscione v. Ernst & Young, L.L.P., 171 F.3d 527 (7th Cir. 1999)).
90 68 Fed. Reg. at 15,566.
There is nothing inconsistent between exempt work and many different types of sales work. For example, before the 1949 amendments created the production dichotomy, the Department was asked to give its opinion as to the exempt status of wholesale distributors of fresh fruits and vegetables who were required to use their own discretion and judgment in arriving at agreements on prices with buyers. The wholesale distributors were not outside salespeople, as they made sales from their employer’s establishment or at receiving platforms where goods are unloaded and sold directly to buyers. In response, the Department opined that

If as a matter of probable fact and as a matter of continuing practice they exercise their own discretion and judgment with regard to prices, [these salesmen] may be classified as “administrative employees” within the definition of [the part 541 regulations] and as such be exempt from the Wage and Hour provisions of the Act.

In other words, the Department then believed that the duties of wholesale sales employees were not inconsistent with the performance of work directly related to management policies or general business operations” as required under the regulations.

Unfortunately, the production dichotomy as currently interpreted is sometimes read to preclude exempt status for many employees who have sales duties. The Chamber urges the Department to revisit this matter, especially in light of developments in the workplace. For example, today many inside salespeople have developed an in-depth knowledge of their customers or clients. Their principle duties may not be selling products off the rack, but in working with clients to design and create products that meet their needs. These products could include highly technical hardware and software for a large computer system. Alternatively, an employee’s job duties may principally consist of advising clients, such as on an array of financial products and services. While the result of the advice is often the sale of a product or service, the employee’s principal job duty is providing advice to help the client meet his or her (or its) needs. This type of work is akin to representing the company, promoting sales, and providing expert advice, all of which the Department has accepted as “servicing the business.”

As an example, consider the hospitality industry and the position of hotel sales manager. An employee in this position typically performs market research, prepares marketing plans, prepares and delivers marketing presentations and sales promotions, entertains prospective customers, and engages in contract negotiations in connection with group bookings. These employees may also plan, budget, and procure supplies for conferences, conventions, and other events and coordinate the work of other employees. They may also be responsible for monitoring customer satisfaction or resolving problems and complaints that arise during an event. Such an employee clearly performs duties that

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92 1944-45 Wage & Hour Man. (BNA), 730.
93 Id.
are administrative, regardless of the fact that part of the employee’s job is selling hospitality services. The Department should explicitly recognize the exempt nature of such work.

Manufacturing Production Line

As noted above, the Department has also proposed modifying the current language describing nonexempt “production” work to work on a “manufacturing production line.” The Chamber believes that this approach is an improvement over the current interpretations. As detailed above, numerous judicial decisions have expanded the concept of nonexempt production work to the point that it is extremely difficult for employers to know with any certainty whether they have properly classified administrative employees. The Department’s proposed language would clarify that nonexempt production work refers to work in the manufacturing context. However, the Chamber is concerned that the language may improperly classify as nonexempt those exempt administrative positions that do involve work on a production line, such as quality control managers.

Suggestions for Reform

To address both concerns regarding sales and production line work, the Chamber suggests that the Department replace proposed section 201(a) with the following:

To qualify for the administrative exemption, an employee must perform work related to the management or general business operations of the employer or the employer’s customers. The phrase “related to management or general business operations” refers to the type of work performed by the employee. To meet this requirement, an employee must perform work related to assisting with the running or servicing of a business or its customers.

This approach would effectively eliminate the production dichotomy. The effect of deleting restrictive language would mean that the primary duty prong of the exempt administrative status would be determined by reference to the list of exempt duties contained in proposed section 201(b). The Chamber believes that by effectively eliminating the production dichotomy the regulations would be significantly easier, and more intuitive, to implement. We do not believe that work on a manufacturing production line could be viewed as consistent with these exempt duties, with few rare exceptions such as quality control managers.

Should the Department not agree with our suggested approach and should the Department believe it is necessary to retain the production dichotomy, the Chamber suggests that the Department modify its proposed language in section 201(a) by striking the words “or selling a product.” This approach would represent an improvement over existing interpretations and would avoid the possibility of dramatically limiting the scope of the exemption.
If the Department does not agree with either of the above approaches and feels that some language must be included to distinguish some types of sales activity from exempt administrative work, then the Chamber urges the Department to retain current language, or use substantially similar language, that makes it clear that nonexempt sales work, in the context of the administrative exemption, only refers to traditional retail sales. The Department need not expand the notion of nonexempt sales work in the production dichotomy, as numerous other protections exist to ensure that employees will not be improperly classified as exempt. For example, there is no way that a telephone solicitor could be viewed as exempt under the primary duty prong of the administrative exemption because such work is simply inconsistent with running or servicing a business.

Examples of Exempt Work

Current interpretations include several examples of what is meant by servicing a business. The Department’s proposal also includes several examples of such work:

Work in areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations, and similar activities.

The Chamber agrees with the Department that all of the above job duties are proper illustrations of exempt administrative work. The Department has specifically invited comments as to whether any additional examples should be included. The Chamber has several suggestions of job duties that should be included. In no particular order, the Chamber urges the Department to consider addition the following as examples of exempt administrative duties:

Legal work; database and network administration; information technology; high level problem solving (such as by high level computer help desk employees); event and meeting planning; corporate education and training; employee screening, interviewing, and making hiring recommendations (as might be done by a staffing service company); counseling and advising clients as to tax, finance, and accounting products and services; security, privacy compliance and investigations; and high level technical work.

95 29 C.F.R. §541.205(b).
96 Proposed §541.201(b), 68 Fed. Reg. at 15,587.
Discretion vs. Position of Responsibility

Current regulations include a requirement, in both the long and short tests, that employees exercise some level of discretion and independent judgment. The Department has observed that this requirement “has become increasingly difficult to apply with uniformity in the 21st century workplace.” Consequently, the Department has proposed replacing the discretion prong of the administrative exemption with a requirement that employees hold a “position of responsibility.” An employee would be found to hold a position of responsibility if he or she met one of two tests. The employee would be required to either “customarily and regularly perform work of substantial importance” or “perform work requiring a high level of skill or training.” The Chamber’s comments examine these proposed alternative approaches to meeting the position of responsibility test and then examine whether it is proper to retain the current discretion test as a third alternative to meeting the position of responsibility test.

Work of Substantial Importance

The Department would define “work of substantial importance” as “work, that by its nature or consequence, affects the employer’s general business operations or finances to a significant degree.” The Department’s proposal then provides several illustrations and examples of job duties that would qualify as work of substantial importance. As the Department notes, the concept of work of substantial importance has been a part of the existing interpretations of the administrative exemption for some time. The Chamber believes that using this test, as one way to meet the position of responsibility requirement, is appropriate. However, we have some concerns regarding how courts have interpreted the phrase “work of substantial importance.” For example, some courts have required that the work “substantially affect[] the structure of an employer’s business operation and management.” This problem is illustrative of the types of improper interpretations that could occur unless the Department clearly articulates that an employee’s work may be substantially important without affecting the structure of an employer’s business operations and management. The Chamber urges the Department to make such a clarification.

In addition, we urge the Department to explicitly state that work of substantial importance also includes work affecting the general business operations or finances of the employer’s customers. This is clear in the current regulations because the phrase is

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98 The long test requires that the exercise of discretion and independent judgment be performed customarily and regularly. 29 C.F.R. §541.2(b). The short test requires work “requiring the exercise of discretion and independent judgment.” 29 C.F.R. §541.2(e)(2).
100 Proposed §541.202, 68 Fed Reg. at 15,587.
101 Id.
103 Proposed §541.203(b)-(e), 68 Fed Reg. at 15,587-88.
discussed within the context of work that is “directly related to management policies of
general business operations.” However, because the Department’s proposal relocates
the work of substantial importance test, it is not clear that the same interpretations apply.
The Department should clarify that work of substantial importance includes work relating
to the employer’s customers.

High Level of Skill or Training

The Department’s proposed second method of meeting the proposed “position of
responsibility test” would be by having a “high level of skill or training.” To meet this
test, an employee would need to perform “administrative work requiring specialized
knowledge or abilities, or advanced training.” The proposal then explains that the high
level of skill or training need not be obtained in any particular way and provides several
examples of work requiring a high level of skill or training. Also included is clarification that the
exemption will not be defeated merely because an employee uses a reference manual, if the manual contains “highly technical, scientific, legal, financial, or
other similarly complex information that can be interpreted properly only by those with
advanced training or specialized knowledge or skills.”

The Chamber generally believes that possessing a high level of skill or training is
an appropriate way to demonstrate that an employee has a position of responsibility. We
appreciate the Department’s clarification that utilizing a reference manual or equivalent
source will not necessarily defeat the exemption. We are concerned, however, how the
requirement concerning the use of reference manuals may be interpreted. A common
theme for administrative employees seems to be that they evaluate several courses of
action and decide on the best option. This could well involve reliance on employer
policies to help influence such a decision or manuals that help identify proper approaches
or ensure that mistakes are not made. The following are examples of job classifications
that have involved a high level of discretion and independent judgment even though they
rely on reference manuals or detailed policies.

- Auditors, not necessarily financial, who often follow detailed checklists.
- Underwriters utilizing detailed manuals.
- Securities firms, operating in a heavily regulated industry may have detailed manuals
to help with compliance, especially for positions such as derivatives operatives or
floor specialists.
- Many human resource functions require following detailed reference manuals, such
  as for determining how performance issues should be addressed or in responding to
discrimination complaints.

105 See 29 C.F.R. §541.205.
106 Proposed §541.204(a), 68 Fed. Reg. at 15,588.
107 Id.
108 Proposed §541.204(b), 68 Fed. Reg. at 15,588.
Reliance on technical manuals is often a requirement in government contracting, especially for major defense contracts. Technical manuals are required for various technical positions, such as high level help desk employees or troubleshooters.

Clearly, these types of employees do perform work requiring the requisite level of skill and training to qualify as exempt employees, even though their work is guided by manuals or policies. The Chamber urges the Department to clarify that use of the types of materials that these employees rely on will not defeat an employee’s exempt status under the Department’s proposal.

Discretion as a Third Prong

As noted above, the Department has proposed eliminating the existing test requiring the use of discretion or independent judgment. However, the Department has sought comments as to whether the discretion test should be retained as a third alternative way to meet the position of responsibility requirement. The Chamber has vetted several alternatives with our members, including retaining the existing discretion test, or a modified version, adopting the Department’s proposed position of responsibility test, and the proposal to include the existing discretion test as a third alternative prong of meeting the position of responsibility test.

Chamber members have mixed feelings about the interpretations of the discretion test by the Department and by the courts. In addition, many members are uncertain of how the new position of responsibility test will be applied in practice. For this reason, the majority of Chamber members support retaining the discretion test as a third alternative way of meeting the position of responsibility test. This would ensure that those employees who currently meet the discretion test would not lose exempt status based on an unforeseen interpretation regarding the “substantial importance” test or “high level of skill or training” test. It is important to emphasize that the Chamber only supports retention of the current discretion test as an alternative way to meet the position of responsibility test because we have significant concerns regarding poor interpretations of the existing discretion requirement.

Elements of the Long Test

Current regulations include, as part of the long test, a requirement that the employee

1. regularly and directly assist a proprietor, or an employee employed in a bona fide executive capacity,
2. perform, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) execute under only general supervision special assignments and tasks.\textsuperscript{110}

These elements originally served to describe the three types of administrative employees: executive and administrative employees; staff employees; and those who perform special assignments.\textsuperscript{111}

The current regulations also include a percentage limitation on the amount of time an employee may spend performing nonexempt work.\textsuperscript{112} The Department has proposed eliminating these long test requirements and has not included them in its proposed standard test. The Chamber supports this proposal. The elements unique to the long test have largely been dormant for some time due to the compensation levels. As noted elsewhere in these comments, focusing on the specific amount of time exempt employees spend on specific tasks is inconsistent with the very nature of exempt work. Furthermore, the Chamber believes that a properly crafted primary duty test could accomplish the same purpose as these elements and ensure that nonexempt employees are not improperly classified as exempt.

Summary

The Chamber’s comments regarding proposed changes to the exemption for administrative employees can be summarized as follows.

Primary Duty Test

- The Chamber does not support the Department’s proposed regulation, as currently written, articulating the difference between exempt administrative work and production work. The Chamber believes the Department’s proposal dramatically limits the scope of the exemption and urges the Department to delete the production dichotomy language.
- Should the Department retain the production dichotomy, the Chamber generally supports the proposed change from “production” to “manufacturing production line” as a description of nonexempt work, but we strongly oppose inclusion of the phrase “selling a product” and urge the Department to strike the new sales language.
- The Chamber supports the examples of exempt administrative work proposed by the Department and has suggested several additional examples.

Discretion vs. Position of Responsibility Test

- The Chamber generally supports the Department’s proposed test to determine whether an employee performs work of substantial importance.

\textsuperscript{110} 29 C.F.R. §541.2(c).
\textsuperscript{111} Weiss Report at 27-28.
\textsuperscript{112} 29 C.F.R §541.2(d).
• The Chamber generally supports the Department’s test to determine whether an employee has a high level of skill or training, though we encourage the Department to clarify the exempt status of several job categories that typically rely on reference manuals or similar tools.

• The Chamber supports retaining the current discretion test as a third alternative way for meeting the position of responsibility test.

Elimination of Long Test

• The Chamber supports the Department’s proposal to eliminate the requirements unique to the long test.
Learned and Creative Professional Duties Tests

The existing professional exemption has not been among the most litigated sections of the part 541 regulations. Nevertheless, comprehensive regulatory reform of the exemption is necessary for several reasons. While the exemption is not heavily litigated, it is our experience that the exemption has posed significant difficulties that often arise in classifying particular employees or in Labor Department enforcement actions. In addition, the regulations delimiting the exemption have not kept pace with the development of the workforce in several important respects. The learned professional exemption continues to improperly focus on the method by which advanced knowledge is acquired rather than the knowledge necessary to perform a particular job. Secondly, the discretion test for learned professionals has failed to account for developments in the workplace that often require reliance on manuals, policies, or co-workers. The artistic professional exemption, meanwhile, has failed to adequately encompass fields such as journalism, in which employees regularly exercise creativity.

The Chamber supports many of the proposed changes in the duties tests for learned and creative professionals. In particular, the Chamber supports the Department’s proposal to eliminate the discretion test for learned professionals and the recognition that experience can substitute for the way in which professional knowledge is acquired. The Chamber also supports elimination of long test provisions that have been effectively unused for years.

The Chamber is concerned by the proposed new requirement that learned and creative professionals perform office or non-manual work. The Chamber also urges the Department to further decrease the emphasis on the method by which knowledge is acquired. Finally, the Chamber urges the Department to provide additional clarity to the creative professional exemption by including additional job classifications as well as language clarifying that its proposed coverage of journalists not be limited by current, outdated interpretations.

Concerns Common to Learned and Creative Professional Duties Tests

Elimination of Long Test

As with the Executive and Administrative duties tests, the Chamber also supports the Department’s proposed elimination of the long test in the context of learned and creative professionals. The Chamber agrees with the Department’s observation that, historically, the long test elements have been difficult to apply uniformly.\textsuperscript{113} We also note that we are not aware of any recent cases involving the long test for learned or artistic professionals. In our experience, the vast majority of employers do not employ individuals who are arguably exempt learned or creative professionals with weekly earnings between $170 and $250. In other words, the long test for professional

\textsuperscript{113} 68 Fed. Reg. at 15,567.
employees has been dormant for some time and the Chamber supports the Department’s proposal to remove it.

**Office or Non-Manual Work**

The Department’s proposal would add a new requirement that, in order to qualify as a learned or creative professional, the employee’s primary duty must involve performing office or non-manual work.\textsuperscript{114} The Department’s rationale for including this new provision in not explained in the preamble.

The current regulations do require the performance of office or non-manual work, but only in the context of the administrative exemption, not in the context of the professional exemption.\textsuperscript{115} While the requirement may be appropriate to help distinguish the qualifications of administrative employees, it does not appear to be helpful in the context of professional employees. We fail to see how the inclusion of the new requirement will add clarity to the regulation. In fact, it appears as if it will only add confusion. For example, some of our members have questioned whether this modification will mean that exempt professionals who work with their hands might lose their current exemptions. Such professionals include athletic trainers, designers who frequently manually construct models, and those who use computers as tools in order to perform their work.

The Chamber urges the Department to eliminate this new requirement from its proposal.

**Learned Professionals**

Under the current short test, professional employees must meet two duties test in order to qualify as exempt. First, they must meet the primary duty test requiring performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. Second, they must perform work requiring the consistent exercise of discretion and judgment. The Department has proposed modifications to the first prong and proposed eliminating the second prong. The Chamber appreciates the steps taken by the Department, especially in eliminating the discretion requirement, but believes an alternative approach toward the primary duty test would be more appropriate.

**Primary Duty of Knowledge of an Advanced Type in a Field of Science or Learning**

The current regulation requires an exempt learned professional to have a primary duty consisting of the performance of “work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized

\textsuperscript{114} Proposed §541.300(a)(2), 68 Fed. Reg. at 15,589.

\textsuperscript{115} 29 C.F.R §§541.2(a)(1), .203.
intellectual instruction and study.”¹¹⁶ This requirement, which is elaborated on in additional interpretations,¹¹⁷ has led to an improper emphasis on the method by which an employee’s knowledge is acquired.

When the Department adopted the existing interpretation in 1940, it was faced with a workplace where it was comparatively easy to draw lines between exempt and nonexempt professionals. The job classifications considered by the Department included the traditional professions, such as law, medicine, and theology, as well as newer professions such as “accountancy, actuarial computation, engineering, architecture, various types of physical, chemical, and biological sciences, [and] teaching.”¹¹⁸ The Department sought to create a test that would separate those job classifications from jobs that it did not believe should be exempt learned professions, including those in the mechanical arts and “such quasiprofessions as journalism.”¹¹⁹

Given the job classifications that the Department was faced with, it is not surprising that it crafted a definition that focused on the method by which the employees acquired their advanced knowledge. As the Department noted,

The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in [the jobs the Department sought to exempt] an academic degree is a standard (if not absolutely universal) prerequisite.¹²⁰

Thus, acquiring knowledge in a particular manner was an easy way for the Department, in 1940, to distinguish exempt professionals from nonprofessionals.

The Department did envision that more professions would arise over time.¹²¹ However, it did not envision the dramatic developments in education, communications, and information delivery that have touched virtually every aspect of American society over the past 60 years. It is more common today that two people performing the same job duties will have acquired the necessary specialized knowledge to perform those duties in vastly different ways. In addition, education is much more sophisticated today than it was six decades ago. As employers have a greater need for specialized knowledge, nontraditional educational programs have flourished. Indeed, while it may still be rare for an individual to become an attorney without possessing a law degree, it is far less rare for an individual to acquire the requisite knowledge by alternative means in other professions. For example, specialized education as an engineer may have been obtained through years of service in the military. We have also seen the rise of numerous education programs that do not lead to advanced degrees, but may lead to certification or

¹¹⁶ 29 C.F.R. §541.3(a)(1).
¹¹⁷ 29 C.F.R. §541.301.
¹¹⁸ Stein Report at 39.
¹¹⁹ Id. at 38-39.
¹²⁰ Id. at 39.
¹²¹ Id. at 35.
licensing necessary to practice in a particular profession. Likewise, with the advent of distance learning and the Internet, individuals can learn much more through home study than was ever conceived possible 60 years ago. It is incumbent upon the Department to recognize this shift and abandon its focus on the method by which knowledge is acquired.

The Department’s treatment of pilots is illustrative of the problems raised by the inflexible framework of the current regulations. The Wage and Hour Division has argued forcefully that the knowledge that pilots must acquire in order to practice their profession does not meet the bar set by current regulations. In one recent decision by the Department’s Administrative Review Board, the Board was faced with determining whether certain pilots of 727s and DC-9s were exempt as learned professionals. 122 In that case, the Wage and Hour Division argued, “flying an aircraft simply ‘is not the type of work required by the regulations for exemption as a professional employee.’” 123

The Board emphasized that the regulations require an analysis not of the knowledge necessary to carry out the pilots’ jobs, but of the method by which the knowledge has been acquired, finding that the regulations clearly require “an examination of how members of an asserted profession typically acquire their ‘advanced knowledge in a field of science or learning.’” 124

The argument by the Division was especially interesting, given that it has issued opinion letters observing that “certain pilots come ‘within the spirit’ of the FLSA’s . . . exemptions, and that the Division therefore would not attempt to enforce FLSA requirements so long as the pilots met certain salary requirements.” 125 In other words, the Department recognizes that some pilots should be exempt employees, but cannot qualify under the existing regulations’ improper focus on a specialized degree as indica of exempt status.

The Department’s focus on the method by which knowledge is acquired is not only inconsistent with the evolution in education and communication over the past 60 years, but has also failed to keep pace with discrimination laws. The 1940 regulations were adopted well before the Civil Rights Act of 1964 was enacted. Under Supreme Court interpretations of that law, employer practices that have a disparate impact against groups that have been historically discriminated against may be unlawful. 126 For this reason, unless a clear business necessity can be shown for a particular educational requirement, employers typically do not make employment decisions solely on educational attainment but consider alternative ways in which an employee may have attained equivalent knowledge.

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122 In Re: U.S. Postal Service ANET and WNET Contracts, 6 Wage & Hour Cas. 2d (BNA) 521 (2000).
123 Id.
124 Id. (emphasis in original).
125 Id.
The Department should acknowledge that the approach it adopted in 1940 is not suitable today. The Chamber recommends that the Department adopt a primary duty test requiring the application of intellectual ability and specialized knowledge to job tasks.

In the preamble to the proposal, the Department stated its intent to focus on the employee’s knowledge and how that knowledge is used in everyday work.\(^\text{127}\) The Department has proposed clarifying that individuals can meet the primary duty test based on “alternative means such as an equivalent combination of intellectual instruction and work experience.”\(^\text{128}\) The Chamber supports the Department’s intentions as stated in the preamble and believes the Department’s proposed regulatory language is a modest improvement in this regard. However, the Chamber is concerned that the language relies too heavily on the construct adopted in 1940.

While the Department’s new language makes it clear that individuals may qualify for exempt status if they have not attained a degree or other appropriate credential in the customary way, it still focuses on the customary method in which members of the profession attain their knowledge. We believe this point needs further clarification to ensure that the language is not interpreted to require that individuals in a particular profession customarily acquire their education in a specific manner.

Again, the Department’s Administrative Review Board decision regarding pilots is illustrative of this concern:

Although the regulations recognize that some individuals working in a professional occupation occasionally may acquire their knowledge through learning outside a formal academic environment, or may not achieve the academic degree that is customary in their field, it is evident that formal specialized academic training in a field of science or learning is a threshold prerequisite for recognizing an occupational category as a profession under the FLSA regulations.\(^\text{129}\)

It is hard to see how this interpretation would be changed under the proposed regulations. The Chamber urges the Department to adopt an approach consistent with its stated intent to focus on the employee’s knowledge and how it is used in his or her work and modify the regulations so that it is clear that knowledge need to be acquired in a customary way.

**Equivalent Experience**

Because the Department has proposed a regulation that could provide for the substitution of work experience for some education, it has requested comments as to whether the regulations should specify an equivalent amount of experience that should be

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\(^{128}\) Proposed §541.301(a), 68 Fed. Reg. at 15,589.

\(^{129}\) 6 Wage & Hour Cas. 2d (2000).
acceptable in lieu of education. The Chamber does not believe that establishing a specific equivalency in regulations will be helpful. Equivalent experience is likely to be something that differs among the various professions and could be problematic in applying to the numerous methods by which people attain advanced knowledge today. In addition, the concept that there can be a formula for substituting experience for education improperly focuses on the method by which knowledge is acquired. As noted above, the Chamber believes a more appropriate approach would focus on the employee’s knowledge and application of that knowledge to particular job skills.

**Discretion**

The current regulations require that, in order to qualify as an exempt professional, an employee must perform work requiring the consistent exercise of discretion and judgment.\(^{130}\) This test does not fit with today’s workforce as is evidenced in the case of *Hasop v. Rockwell Space Operations Company*.\(^{131}\) In *Hasop*, the question before the court was whether those employees responsible for training NASA Space Shuttle ground control personnel were exempt employees. The court found that the trainers did not exercise the requisite discretion to qualify as exempt professionals because they relied on technical manuals and made decisions in groups.\(^{132}\) Under this analysis, it is hard to see how even the astronauts themselves would qualify as exempt.

The Department has proposed eliminating the discretion requirement for professionals. The Chamber fully supports this proposal.

**Creative Professionals**

In order for an employee to qualify as an exempt artistic professional under the current short test, an individual must have a primary duty consisting of work that is original and creative in character in a recognized field of artistic endeavor, the result of which depends primarily on the invention, imagination, or talent of the employee.\(^{133}\) While this test has not been difficult to apply for many creative professionals, it has been extremely difficult to apply to journalists and others in news and media professions. This is perhaps not surprising, given that the regulations were promulgated in 1949, just one year after the first television newscast and a full 14 years before televised newscasts expanded to half-hour formats.\(^{134}\)

Courts have also questioned the continuing validity of the regulations and existing interpretations in light of developments in journalism. For example, the First Circuit has

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\(^{130}\) 29 C.F.R. §541.3(b), .3(e).
\(^{131}\) 867 F. Supp. 1287 (S.D. Tx. 1994).
\(^{132}\) Id. at 1297-98.
\(^{133}\) 29 C.F.R. §541.3(a)(2), .3(e).
\(^{134}\) See, e.g., Jim Rutenberg, *CBS Wants ’60 Minutes’ Chief to Hand Over Stopwatch*, THE NEW YORK TIMES (Nov. 25, 2002) (noting that CBS began the first network newscast in 1948 and was the first network to convert to an half-hour broadcast in 1963).
noted that the “journalism interpretations have not have not changed in any material respect since 1949, long before the newspaper industry evolved into its current form.”

Similarly, the Second Circuit has observed that the persuasive power of the existing interpretations

is considerably weakened by its questionable continuing validity in light of the changing landscape of major, modern news organizations. Dizzying technological advances and the sophisticated demands of the news consumer have resulted in changes in the news industry over the past half-century. This is particularly true of television news where the same news may be communicated by a variety of combined audio and visual presentations in which creativity is at a premium.

The most significant modifications proposed by the Department address these professions. In particular, the Department has clarified in proposed section 302(d) that “journalists may qualify as creative professionals if their work generally requires invention, imagination, originality, or talent.” The Chamber supports the addition of this language. The Chamber would also support additional language clarifying that editors and producers are typically exempt professionals.

We are concerned that the preamble to the proposal notes that the Department’s proposal in not intended to make “material changes,” but rather clarify the standard used in several landmark cases. The Chamber is concerned that this statement could be viewed by some as limiting proposed sections 302(c) and 302(d) if viewed in conjunction with existing section 302. To clarify this matter, the Department may wish to note that, as stated by the Second Circuit, current section 302 does not apply to the short test, but only the long test, and therefore nothing in current section 302 should be seen as limiting the effect of proposed section 302 in light of the Department’s stated intent not to materially change the regulations.

Summary

The Chamber’s major concerns with the Department’s proposed modifications to the duties tests for learned and creative professionals may be summarized as follows.

Elements Common to Learned and Creative Professionals

- The Chamber supports the Department’s proposal to eliminate elements unique to the long test.

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138 Freeman, 80 F.3d at 83.
• The Chamber does not support the Department’s proposal to require that learned and creative professionals perform “office or non-manual work” and urges the Department to remove the requirement.

Learned Professionals

• The Chamber supports the Department’s stated intent to focus on an employee’s knowledge and how it is used in the employee’s work. The Chamber has concerns that the Department’s proposal does not adequately shift the focus from the manner in which knowledge is obtained to the type of knowledge used.
• The Chamber does not support regulating education and experience equivalencies.
• The Chamber supports the Department’s proposal to eliminate the discretion test.

Creative Professionals

• The Chamber supports the Department’s proposed regulatory language recognizing the exempt status of many journalists and we encourage the Department to also clarify that editors and producers typically are also exempt.
• The Chamber is concerned that language in the preamble stating the Department’s intent not to materially change the creative professional regulation could be read by some as limiting the effect of the proposal. Additional clarifying language may be helpful when the final rule is published.
Computer Professional Duties Test

Computer professionals may be exempt from the overtime requirements of the Fair Labor Standards Act (FLSA) in three different manners. First, they may be exempt under section 13(a)(1) if they meet the definition of exempt executive, administrative, or professional employees. Secondly, they may be exempt under section 13(a)(1) if they qualify as exempt computer professionals, pursuant to regulations the Labor Department adopted in 1992 or may further adopt under a statutory directive enacted in 1990. Finally, they may be exempt under section 13(a)(17), a provision Congress enacted in 1996.

The Department’s proposal obviously cannot modify any statutory provisions. However, the Department does have the ability to modify the regulations it has enacted under section 13(a)(1) exempting certain computer professionals from the FLSA’s overtime provisions provided it is not inconsistent with the FLSA or Congress’s 1990 regulatory directive as embodied in Public Law 101-583.

Although promulgated more recently than many other portions of the part 541 regulations, the regulations concerning computer professionals are already out of date. Indeed, when the regulations were drafted, the Internet was in its infancy. The remarkable technological advancements over the last decade coupled with the narrow and rigid approach taken by the Department toward the 1992 rule warrant revisiting the computer professional exemption.

The Labor Department’s proposed regulations make two significant substantive modifications to the existing regulations, elimination of the requirement that computer professionals consistently exercise discretion and judgment and deletion of language limiting the exemption to software functions. The Chamber supports these proposed changes. However, we believe the Department should update the regulations to reflect the status of the many new job classifications that have arisen since the computer professional regulations were first promulgated.

The Department’s reluctance to recognize computer professionals as exempt employees under section 13(a)(1) is well documented and serves as an important backdrop for the existing legislative framework.

Legislative History and Authority

Prior to the 1990 Congressional action in passing Public Law 101-583, the Labor Department and courts found comparatively few computer-related job classifications exempt under the then-existing part 541 regulations. In 1971 the Department conducted hearings on whether data processors and systems analysts should come within the professional exemption. The Department concluded that exempt treatment was not warranted because:
at the present time the computer sciences are not generally recognized by colleges and universities as a bona fide academic discipline with standard licensing, certification, or registration procedures. There is too much variation in standards and academic achievement to conclude logically that data processing employees are a part of a true profession of the type contemplated by the regulations.

To consider a period of technical training, on-the-job training, or years of experience as an alternative to a prolonged course of intellectual instruction and study would seriously weaken the professional exemption . . . .

The Department’s analysis of computer professionals was consistent with its interpretation of the exemption for learned professionals in that it focused too narrowly on the method by which knowledge was acquired. This narrow focus, in conjunction with the Department’s resistance to amending the regulations, led the Congress to consider legislation requiring that the Department modify the regulations. In April 1989, Senators David Durenberger (R-MN), John Kerry (D-MA), and Ted Kennedy (D-MA) introduced such an amendment. Upon introducing the amendment, Sen. Durenberger criticized the Department’s approach toward computer professionals as outdated. Sen. Kerry elaborated on this point and stated that

In Massachusetts, these technical workers are highly educated, highly skilled, and highly paid. They are the backbone of many of the high-technology industries that fuel our growing economy. It is imperative that they be exempted from [overtime] provisions so that they are able to provide services as efficiently and productively as possible. . . . The Department of Labor must recognize that the economy has changed in the past 16 years, and that our computer programmers, systems analysts, software engineers, and other similarly skilled technical workers are, indeed, professionals.

While the Senate adopted Sen. Durenberger’s amendment, former President Bush ultimately vetoed the legislative vehicle to which it was attached. Nevertheless, Congress passed substantively similar language later in the legislative session that was signed into law on November 15, 1990. That law required the Secretary to promulgate regulations permitting “computer systems analysts, computer programmers, software engineers, and other similarly skilled professional workers as defined in such regulations to qualify as exempt executive, administrative, or professional employees under section 13(a)(1) of the

141 Id. at S3,742.
Fair Labor Standards Act.” The law further required that computer professionals could be exempt even though compensated on an hourly basis provided that they were paid at least 6.5 times the minimum wage. Pursuant to this law, the Department issued an interim final rule on February 27, 1991, and final regulations on October 9, 1992.

The interim final rule, enacted in 1991, did not place computer professionals within any of the other professional exemptions, but instead created a new section consisting of three parts. The first part described the scope of the exemption as applicable to “computer systems analysts, computer programmers, software engineers, and other similarly skilled employees” who meet certain compensation levels and duties tests. The second part described the compensation tests and the third part outlined the duties test, which required meeting a primary duties test.

The final regulations took a different approach. Rather than establishing a new class of exempt employees, the final regulations included the computer professional exemption in the framework established by the professional exemption that already included three classes of professionals: learned professionals, artistic professionals, and teachers. In this framework, computer professionals were subject to many of the same duties tests as other professionals. Those compensated on a salary basis and earning between $170 and $250 per week would need to pass all of the elements of the long test, which those earning over $250 per week on a salary basis, along with those earning at least 6.5 times the minimum wage and not paid on a salary basis would need to meet short test requirements. The short test for computer professionals would include the same discretion test for other professional employees and a primary duty test.

The final regulations are significantly narrower than the directive enacted by Congress in that the Department expressly limited the exemption to “employees in computer systems analysis, programming, software engineering, or related work in software functions.” The regulations do not provide for exempt status for those employees who may be similarly skilled, except in certain software functions.

As noted above, Congress again addressed the computer professional exemption in 1996 in conjunction with legislation to increase the minimum wage. At the time, some Members of Congress supported a minimum wage increase, but were concerned about the impact that an increase would have on computer professionals since the hourly salary level for those not paid on a salary basis was linked to the minimum wage. Consequently, Representative Bill Goodling proposed an amendment designed to exempt

143 Id. §2.
144 Id.
146 Defining and Delimiting the Terms “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,” 57 Fed. Reg. 46,742.
147 Id.
highly paid computer professionals without regard to the method by which they were compensated and without a link to the minimum wage rate that was ultimately signed into law by former President Clinton. The amendment was unusual in that it did not amend Congress’s 1990 enactment directly. Rather, the amendment created a new section 13(a)(17) that exempted certain computer professionals who were paid at least $27.63 per hour (6.5 times the minimum wage when the amendment was enacted). Employees eligible for exemption under section 13(a)(17) are those who pass a primary duty test. The language of the primary duty test is virtually identical to that in the regulations promulgated by the Department in 1992 pursuant to the 1990 directive from Congress.

Eliminate Discretion Test

The Department has proposed removing the requirement that computer professionals utilize the consistent exercise of discretion and judgment. This proposal is consistent both with removing the computer professional exemption from the exemption for other professionals and with the elimination of the discretion test for learned and creative professionals. We note also that the discretion test has been difficult to apply for computer professionals who may follow technical procedures and manuals in their job duties. The Chamber supports the Department’s proposal to eliminate the discretion requirement for computer professionals.

High Level of Skill and Expertise

Current and proposed regulations contains a subsection clarifying that the computer professional exemption only applies to “highly skilled employees who have achieved a level of proficiency in the theoretical and practical application of a body of highly-specialized knowledge in computer systems analysis, programming, and software engineering.” The Chamber has two concerns with this language in that it improperly narrows the scope of the computer professional exemption.

First, the Chamber urges that the Department delete the phrase “theoretical and practical” from this requirement. The Chamber notes that neither the legislative nor regulatory history behind the computer professionals exemption discussed why this phrase is necessary. The Chamber believes that workers who are properly classified as nonexempt will be protected if the phrase is rewritten to require “proficiency in the application of a body of highly-specialized knowledge . . . .” Instead, the current and proposed regulations requiring proficiency both with theoretical and practical application of highly specialized knowledge seem to place unnecessary restrictions on employees.

148 See 142 Cong. Rec. H5,535 (statement of Representative Goodling). Rep. Goodling was responding to criticism that his amendment would deny overtime to computer professionals by observing that his amendment restated current law but de-linked the hourly salary threshold from the minimum wage so that an increase in the minimum wage did not increase the hourly salary level. Id.
150 29 C.F.R. §541.303(c); Proposed §541.401, 68 Fed. Reg. at 15,591.
who could qualify as exempt computer professionals. The Chamber also believes that elimination of the phrase will result in clearer regulations that are more in line with the expectations of employees and employers.

The Chamber is also concerned that the current and proposed regulations require “highly-specialized knowledge in computer systems analysis, programming, and software engineering.”\textsuperscript{151} As noted above, the Public Law 101-583 not only directed the Department to exempt analysts, programmers, and engineers, but also similarly skilled workers.\textsuperscript{152} The 1996 amendments creating the exemption in section (a)(17) contain similar language.\textsuperscript{153} The Chamber believes that limitation of the computer professional exemption to analysts, programmers, and engineers is much too narrow and urges the Department to amend the proposed language by modifying the language to apply to “systems analysis, programming, software engineering, and similar skills.” Such language will help restore the computer professionals exemption to its intended purpose.

**Updating Remaining Duties Tests**

The Department states in the preamble to the proposed regulations that it has not proposed significant changes to the remaining job duties tests.\textsuperscript{154} In explaining this decision, the Department states that “the key regulatory language that resulted from the 1990 enactment is now substantially codified in section 13(a)(17) of the Act, and thus no substantive changes have been made.”\textsuperscript{155} However, as detailed above, while Congress did choose to codify the primary duties tests that the Department originally promulgated in response to Congress’s 1990 directive, it in no way repealed the regulatory authority that the Department has pursuant to other laws. In other words, the fact that Congress adopted some of the Department’s regulatory language when it chose to add a new regulation to the list of enumerated exemptions in section 13(a) simply has no effect on the regulatory authority Congress granted in creating section 13(a)(1) or when it ordered the Department to promulgate regulations exempting certain computer professionals under section 13(a)(1) in 1990.

The Chamber believes that the Department should exercise its regulatory authority under section 13(a)(1) and Public Law 101-583 to revisit the computer professional exemption. In particular, the Department should reconsider its approach toward exempting “other similarly skilled professional workers” under the 1990 enactment. When the Department implemented its 1992 final regulations, it chose a narrow approach, focusing on the software industry.

The Chamber notes that the Department has proposed one significant change in this regard. Proposed section 400 removes limiting language that is contained in current

\textsuperscript{151} Id.
\textsuperscript{152} Pub. L. No. 101-583, §2.
\textsuperscript{153} 29 U.S.C. §213(a)(17).
\textsuperscript{154} See 68 Fed. Reg. at 15,569.
\textsuperscript{155} Id.
section 303 limiting the exemption to “analysis, programming, or related work in software functions.” The Chamber agrees with the decision to delete this improper limitation that is inconsistent with the intent of the computer professional exemption to also extend to employees with similar skills.

The Department has the full authority to expand its approach to clearly exempt workers with similar skills as analysts, programmers, and engineers. The Department should exercise that authority and take into account the changes that have occurred in technology related jobs since the regulations were first promulgated. The Chamber recommends that the Department modify its regulations to clarify that the following types of employees generally perform exempt work:

- Network, LAN, PC and database analysts and developers
- Network managers
- Those primarily responsible for installing hardware and software
- Those who manage or train exempt computer professional employees, and
- Network, software, or database troubleshooters

The Chamber appreciates that the Department may, for simplicity and clarity, desire consistency between its regulations promulgated pursuant to section 13(a)(1) and Public Law 101-583 to mirror the exemption in section 13(a)(17). The Chamber suggests that the Department could achieve much needed clarification by adding regulatory language explaining that “computer systems” include computer networks, whether connected locally or through global networks such as the Internet or World Wide Web. In addition, the reference to programming or analysis should clearly include high-level work on a database or the World Wide Web.

Summary

The Chamber’s major concerns with the Department’s proposed duties test for computer professionals can be summarized as follows.

- The Chamber supports the Department’s proposal to eliminate the discretion test for computer professionals.
- The Chamber urges the Department to delete language limiting the exemption to those with proficiency in both theoretical and practical application of highly specialized knowledge.
- The Chamber supports the Department’s proposal to remove language limiting the scope of the exemption to those in the software field.
- The Chamber urges the Department to recognize that the computer professionals exemption does not only extend to analysts, programmers, and engineers, but also to those with similar skills, such as network and database administrators.

156 29 C.F.R. §541.303(a).
Outside Sales Exemption

The Chamber has two principal concerns with the proposed regulations concerning the exemption for outside sales employees. First, we urge the Department to reconsider language it has included regarding inside sales employees, which we believe is overbroad and may conflict with other provisions of the part 541 regulations. Second, we urge the Department to revisit its criteria for exempting promotion work in the context of the outside sales exemption to recognize developments in the way sales are conducted today.

Inside Sales

Current Labor Department interpretations of the outside sales exemption include language asserting that the exemption for outside sales employees does not include inside sales employees. Specifically, the interpretations state:

It would obviously lie beyond the scope of the Administrator’s authority that “outside salesman” should be construed to include inside salesmen. Inside sales and other inside work (except such as is directly in conjunction with and incidental to outside sales and solicitation . . . ) is nonexempt.\(^\text{157}\)

The Department’s current interpretations were first published in 1949, and appear to be adapted from the 1940 Stein Report.\(^\text{158}\) However, while the first sentence reproduced above does accurately reflect the Stein Report, the second does not. In fact, the Stein Report specifically notes that

Inside salesmen, like a number of other types of employees who do not qualify for exemption as outside salesmen under the present or proposed definition, may in some instances qualify as administrative employees under the proposed definition of that term . . . .\(^\text{159}\)

This observation was consistent with Labor Department interpretations of the time. For example, as discussed in the context of the administrative exemption, the Department issued an opinion letter in the early 1940s regarding wholesale sellers of fruits and vegetables who sold products either at the employer’s premises or at various receiving platforms.\(^\text{160}\) The Department opined that these employees were exempt administrative employees, provided they exercised a proper level of discretion.\(^\text{161}\)

In other words, the current regulations’ assertion that inside sales work is nonexempt is simply too broad. While the Department may believe that inside sales work cannot qualify as outside sales work, it does not follow that all inside sales work is

\(^{157}\) 29 C.F.R. §541.502(a).
\(^{158}\) Stein Report at 44.
\(^{159}\) Id. n.136.
\(^{160}\) Supra at 38; 1944-45 Wage & Hour Man. (BNA) 730.
\(^{161}\) Id.
nonexempt (unless performed directly and in conjunction with outside sales).
Furthermore, reading the Department’s current interpretations literally would result in the
absurd result of rendering all inside work exempt, whether in the sales context or not.

The Department’s proposed regulations contains similar, but stronger, language:

The Administrator does not have the authority to define this exemption for
“outside” sales under section 13(a)(1) of the Act as including inside sales work.
Section 13(a)(1) does not exempt inside sales and other inside work (except work
performed incidental to and in conjunction with outside sales and solicitations).162

In other words, the Department’s proposal would not merely state the
Department’s position that inside sales work (and inside work) is nonexempt. Rather, the
language could be interpreted to imply that such work is not exempt under any part of
section 13(a)(1).

The Department’s proposal also apparently conflicts with the proposed simplified
duties test for highly paid employees. For example, an inside sales employee who
supervises a team of employees and earns a guaranteed salary of $100,000 per year might
be exempt under the simplified duties test in proposed section 601. However, the
proposed language seems to imply that such an employee can never be exempt.

The Chamber disagrees with the current Labor Department interpretation
regarding inside sales employees and we do not support the Department’s proposed regulator
guidance regarding inside sales employees. The Chamber urges the
Department to delete reference to inside sales employees in this section. Should the
Department insist on distinguishing between inside and outside sales employees for the
purposes of the outside sales exemption, the Chamber urges the Department not to use
expansive language that could be read to render all inside sales employees nonexempt,
even if they meet the exempt duties test of executive, administrative, or professional
employees.

Promotion Work

Current interpretations describe promotion work that may or may not be exempt,
depending on the circumstances under which it is performed. In order for promotion
work to qualify as exempt work under the outside sales exemption, it must be performed
“incidental to and in conjunction with an employee’s own outside sales or
solicitations.”163 Other promotion work may be exempt under the administrative
exemption, but not under the outside sales exemption. The Department has not proposed
substantial changes to these provisions.164

163 29 C.F.R. §541.504(a).
The Chamber urges the Department to take a fresh look at this framework to consider the modern role of the salesperson in today’s workplace. Due to advances in areas such as computerized tracking of inventory and product shipment, the sales of manufactured goods are increasingly driven by computerized recognition of decreases in customers’ inventory, rather than specific face-to-face solicitations by outside salespersons. Indeed, customers are better able to track inventory and anticipate their needs for specific products than ever before. This has shifted the business model to one where orders are increasingly generated by a computer and called into (or sent electronically to) the manufacturer’s warehouse, shipping department, or some other centralized location. Based upon such computerized or centralized ordering, the role of the outside salesperson has, in many instances, changed to one of facilitation of sales.

Under such a business model, the activities currently characterized as “promotional activities” are not simply “incidental to” manufacturers’ outside sales efforts. Instead, these “promotional activities” are an integral part of the sales process. Requiring outside sales personnel to take orders directly from customers in order to qualify for the exemption creates inefficiencies in the ordering and shipping process, as customers will receive products much more quickly by ordering them directly from the manufacturer when the need arises. Most importantly, the modern outside salesperson often assists the customer to expand its own market and sell more goods. In turn, the customer orders more goods from the outside salesperson. It is a symbiotic relationship. The outside salesperson engages in promotional activities such as putting up displays and rearranging stock to increase the customer’s sales, speaks with the customer’s customer base, trains the customer’s sales staff to promote sales of the outside salesperson’s product and handles the return of merchandise. These activities all assist manufacturers in maintaining their relationships with customers. Indeed, a manufacturer’s ability to maintain and increase sales is far more dependent on (1) its ability to sustain long-term relationships with current customers and (2) broad-based marketing efforts to attract new business for current customers than on the efforts of an individual employee to attract new customers.

For these reasons, the Chamber urges the Department to reexamine promotion work and the modern role of the outside salesperson. While we appreciate that promotion of sales can be an exempt task under the administrative exemption, there should be some recognition that promotional activities such as those described above that may not meet the current exempt criteria may nevertheless warrant exempt treatment given developments in the workforce.

Summary

- The Chamber urges the Department to delete reference to inside sales employees in the outside sales employee exemption. Should the Department feel it is necessary to distinguish inside and outside sales, it should not use broad language that could be read to foreclose employees who perform any outside sales work from qualifying as exempt under the executive, administrative, or professional exemptions.
• The Chamber urges the Department to revisit its criteria for determining when promotion work is exempt to recognize that given changes in the workforce, it is often less efficient for outside salespeople to take orders directly from customers, and current focus on work “incidental to and in conjunction with” an employee’s actual sales may be too narrow.
The Salary Basis Test

The salary basis test is among the most complicated provisions of the part 541 regulations. The Labor Department’s existing interpretation of the test has generated a significant amount of confusion among employees, employers, and even the federal judiciary, where it is not uncommon for federal circuit courts to disagree over various provisions of the test.\(^{165}\) This confusion has in turn led to needless litigation, in many cases involving employees who clearly were never intended to come within the protections of the Fair Labor Standards Act (FLSA).\(^{166}\)

The Department’s proposed regulations make several improvements to the salary basis test. The Chamber welcomes and supports the Department’s proposal to exempt highly compensated employees from the salary basis test and the proposal to permit deductions pursuant to bona fide disciplinary policies. However, the proposed regulations include several opportunities for further improvement. For example, additional clarity would be helpful in determining whether an employee’s salary has been improperly subject to deduction and when employers may avail themselves of the safe harbor for correcting improper deductions. In addition, the Chamber urges the Department to consider partial day deductions.

A more detailed explanation of these issues follows.

Application to Highly Compensated Employees

The Chamber supports the Department’s proposal to exclude from the salary basis test those employees who meet the proposed simplified duties tests for highly compensated employees. However, the Chamber believes that the Department’s proposal does not go far enough. As explained elsewhere in these comments, the Chamber believes that a high level of compensation is the best proxy for determining exempt status. Employees paid above a certain level should be subject neither to duties tests nor the salary basis test. In other words, the regulations should contain a true bright-line test exempting highly compensated white collar employees. Even if the regulations do not adopt this approach, the Chamber urges that the Department not apply the salary basis test to highly compensated employees because the method by which employees are compensated is a less relevant proxy of exempt status the more an employee is paid. For very well paid employees, the method of compensation hardly seems a relevant factor.

\(^{165}\) Compare, e.g., Moore v. Hannon Food Serv. Inc., 317 F.3d 489 (5th Cir. 2003) (holding the window of correction was available to correct an improper deduction made pursuant to an employer policy) with Klem v. County of Santa Clara, 208 F.3d 1085 (9th Cir. 2000) (finding the window of correction was not available for correcting deductions made pursuant to an employer policy).

\(^{166}\) See Shannon P. Duffy, $4.1 M Settlement OK’ed in Overtime Pay Litigation, THE LEGAL INTELLIGENCER, Jan. 8, 2003 (awarding payment to a former corporate vice president, former in-house lawyer, and former director of human resources based on alleged violations of the salary basis test).
The Chamber also notes that the Department’s proposed carve out for highly compensated employees who meet the simplified duties test does not apply to computer professionals under Subpart E of the proposed regulations.\(^{167}\) Even though computer professionals may also be exempt if paid at least $27.63 per hour, the Chamber believes that there should be no doubt that highly compensated computer professionals need not meet the salary basis test. A simple modification to proposed subsection 601(a) should address this concern.

**Owners and Sole Charge Executives**

Section 101 of the proposed regulations would exempt those individuals owning a 20 percent interest in a business as executive employees without regard to the manner in which they are compensated.\(^ {168}\) Section 102 of the proposed regulation would exempt sole charge executives as executive employees, but only if they meet the appropriate compensation level and salary basis tests.\(^ {169}\) The Department explicitly seeks comments on whether the salary basis test should apply to owners or sole charge executives.\(^ {170}\)

The Department has always recognized that it is not appropriate to apply the salary basis test to certain categories of employees because there may be other, more appropriate proxies for determining their exempt status. For example, the version of the regulations adopted in 1940 did not apply the salary basis test to any “employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.”\(^ {171}\) The 1940 Stein Report noted that these professionals were exempt from both the salary basis and compensation level tests because there was a more appropriate proxy for exempt status: state licensure.\(^ {172}\)

The Chamber fully supports carving out business owners and sole charge executives from the salary basis test. There should be no doubt that ownership of a business is a better proxy of exempt status than the method by which an employee is compensated. Indeed, it is hard to see how the salary basis test could make any sense in the context of an employee-owner. Likewise, sole charge executives should be exempt from the salary basis test. The Chamber believes that being in sole charge of a business establishment is an appropriate proxy for determining exempt status without regard to the method of compensation. The Chamber urges the Department to amend proposed subsection 102(a) by striking the words “on a salary basis.”

\(^{167}\) See proposed section 541.601(a), 68 Fed. Reg. at 15,592-93.
\(^{168}\) Proposed §541.101, 68 Fed. Reg. at 15,585-86.
\(^{169}\) Proposed § 541.102, 68 Fed. Reg. at 15,586.
\(^{171}\) 5 Fed. Reg. at 4,077-78.
\(^{172}\) See Stein Report at 42.
Subject To Deduction

One of the most complicated and frequently confused areas of the salary basis test is determining whether employer pay practices, with respect to particular employees, are consistent with the salary basis test. The current interpretations state the general rule:

An employee will be considered to be paid “on a salary basis” within the meaning of the regulations if under his employment agreement he regularly receives each pay period … a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. ¹⁷³

The general rule was first announced by the Department in an interpretation issued during World War II, known as Release A-9, that articulated the Department’s position with respect to whether certain deductions from an employee’s pay were consistent with the salary basis test. ¹⁷⁴ In particular, Release A-9 permitted certain disciplinary deductions that employers had been making to discourage absenteeism among executive and administrative employees. The release then distinguished the permissible deductions from impermissible deductions, such as when an employee leaves to go home early or takes a day off. ¹⁷⁵

When the Department next amended the regulations, the Department changed its policy and determined that given the post-war change in employer pay practices, disciplinary deductions would be inconsistent with payment on a salary basis. ¹⁷⁶ However, it retained the other language from Release A-9, including the language requiring that compensation not be “subject to reduction.”¹⁷⁷

It is only relatively recently that disputes over the interpretation of this language have arisen. For the first 40 or more years of the life of the “subject to” language, the Department consistently found that employees would not fail the salary basis test unless their pay had actually been reduced for an impermissible reason. ¹⁷⁸ Indeed, as recently as 1986, a Wage and Hour Division opinion letter indicated that only employees who actually had their salary improperly reduced would be viewed as having their compensation “subject to” deduction. The opinion letter was written in response to an individual who queried whether certain public employers “are compensating their salaried employees ‘on a salary basis’ that is in accordance with the salary requirement”

¹⁷³ 29 C.F.R. §541.118.
¹⁷⁴ Release A-9, August 24, 1944, Payment on ‘Salary Basis’ for Executive Administrative, and Professional Employees Clarified, 1944-45 Wage & Hour man. (BNA) 719.
¹⁷⁵ Id.
contained in the regulations if the employees’ pay were reduced for a particular reason. The Administrator noted that the specific deduction at issue was inconsistent with payment on a salary basis. The Administrator described the effect of the improper deduction as follows:

Where an occasional deduction that is not permitted by section 541.118 is made from the salary of an otherwise exempt employee, the exemption would be lost in that workweek when the deduction is made. However, if such deductions are regular and recurring, we would question whether the employee is actually paid “on a salary basis” and the exemption may be denied in all workweeks in which it is claimed, including those weeks when no deductions are made.

In other words, when faced with employer practices of making improper deductions, the Department believed the proper analysis was whether an individual employee’s pay had been improperly reduced and how often such deductions had been made. The Department did not suggest that employees whose pay had not actually been improperly reduced could be subject to reclassification as nonexempt employees.

The consistent interpretation of this portion of the salary basis test began to change in 1987, when a federal district court in California ruled that an employer policy that theoretically could result in an improper deduction was enough to destroy the exempt status of employees covered by the policy. While this reasoning was inconsistent with prior Labor Department interpretations of the provision, some federal district courts followed the decision while others adhered to the original interpretation.

The first circuit court to address the issue was the Ninth Circuit in Abshire v. County of Kern, where the court held the possibility of improper deductions could be enough to violate the salary basis test. At about this time, the Labor Department appears to have changed its enforcement position regarding the salary basis test and began seeking reclassification of employees as nonexempt even though no actual improper deductions had been made.

The Supreme Court weighed in and addressed the developing inconsistent interpretations in Auer v. Robbins. In Auer, the Labor Department announced, in an amicus curae brief, that its interpretation of the “subject to” language was a practical test that would deny exempt status “if there is either an actual practice of making [improper] deductions or an employment policy that creates a ‘significant likelihood’ of such

179 Wage and Hour Administrator, Opinion Letter (Jan. 15, 1986).
180 Id. (emphasis added).
185 519 U.S. 452 (1997).
deductions. “The Court, noting that it could not overturn the Labor Department’s interpretation unless plainly erroneous or inconsistent with statute, upheld the interpretation.  

Not only is the Department’s modern interpretation of the test inconsistent with its long history, but it has led to a dramatic increase in litigation and is responsible for sweeping reclassifications and significant legal exposure. Two cases are illustrative of the impact of the Department’s new interpretation: Klem v. County of Santa Clara and Takacs v. Hahn Automotive.

In Klem, the Ninth Circuit was faced with an employer of 14,000 employees who classified 5,300 as exempt. The employer maintained a policy that permitted it to place employees on unpaid disciplinary suspensions and during a six-year period, the employer made 53 disciplinary suspensions of employees that it classified as exempt. The suspensions were found to be inconsistent with the salary basis test. However, the court found that even though 99 percent of the employer’s exempt employees had never actually experienced improper deductions, the reclassification of all 5300 employees was required. The effect of this decision was that during the time period in question, the employer was viewed as having no exempt employees, thus requiring the calculation of overtime payments for all 5,300 employees, a very serious unplanned liability to the employer.

Similarly, in Takacs, the Sixth Circuit was faced with an employer who operated 159 automotive retail stores. The employer imposed improper deductions on seven of its store managers over an 18-month period. The court found these few deductions enough to reclassify all 159 store managers as nonexempt.

As can be seen, the Labor Department’s 1990s interpretation of which employees are subject to improper deduction has created a significant opening for needless litigation, which is being exploited by the plaintiffs’ bar. In one recent case, an employer agreed to settle a collective action for $4.1 million that resulted in payments to a former in-house counsel, a former corporate vice president, and a former human resources manager because they were “subject to” improper deductions. As so aptly put by the Second Circuit, “The FLSA is properly considered a shield to protect unwary workers; it is not a sword by which [employees] at the pinnacle of [their careers] may obtain a benefit from their employer for which they did not bargain.” It is therefore incumbent upon the

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186 Id. at 461.
187 Id.
188 208 F.3d 1085 (9th Cir. 2000).
189 246 F.3d 776 (6th Cir. 2001).
189 Takacs, 208 F.3d at 1088.
191 Id.
192 Id at 1093.
193 Klem, 246 F.3d at 778.
194 Id. at 780-81.
Labor Department to restore a reasoned approach to determining when employees will be reclassified as nonexempt for violations of the salary basis test.

The Department has proposed a new section 603 to address the effect of improper deductions from salary.\(^{196}\) In general, the Chamber believes that this section is an improvement over existing regulations, although we have several important suggestions for further improvement.

**When Exemption Lost**

In general, proposed subsection 603(a) states that an employer with a pattern and practice of improper deductions will lose the exemption, while isolated or inadvertent improper deductions will not result in a loss of the exemption. Initially, it is important to note that the language in this section and the preamble\(^{197}\) refers to exempt status as something gained or lost by the employer. This language seems somewhat out of place since traditionally the exemption applies to individual employees, not an employer. The Chamber suggests that the language be rephrased to reflect the application of exempt status independently based on employee job duties, salary level, and method of compensation.

While the Chamber supports the Department’s recognition that employees should not lose exemption based on isolated or inadvertent improper deductions, we are concerned by the Department’s proposal that could reclassify employees based on a “pattern or practice” of violations. The phrase “pattern or practice” is a term of art used in civil rights law, and the Chamber is concerned that this phrase might be improperly understood to take its meaning from other contexts and thus have unintended consequences. The Chamber also is concerned that there is no intent requirement for finding a pattern or practice of improper deductions. While the Chamber supports the proposed language that inadvertent, and thus unintentional, deductions do not in and of themselves destroy an employee’s exemption, we believe it would be more appropriate to add an element of intent to the “pattern or practice” language. For example, an alternative that would be more appropriate would be substituting “consistent practice of intentionally not paying employees on a salary basis” for the phrase “pattern or practice of not paying employees on a salary basis.”

**Effect of Failure to Pay on Salary Basis**

In proposed subsection 603(b), the Department has proposed new rules for determining the consequences of an employer’s failure to pay employees on a salary basis. Under the proposal, the exemption would be lost.


\(^{197}\) *Id.* at 15,572.
during the time period in which improper deductions were made for employees in
the same job classification working for the same managers responsible for the
improper deductions.\footnote{198}{Proposed §541.603, 68 Fed. Reg. at 15,594.}

The Chamber believes this provision is a significant improvement over the
Department’s existing post-\textit{Abshire} interpretation. However, the Chamber believes that
an employee should not fail the salary basis test based on a possibility of a deduction or
because another employee’s pay was improperly deducted. It would be possible to
accomplish this, even in the framework of the current regulations, by changing the phrase
“subject to” to “subjected to.” This modification would be in line with the first forty-five
years of interpretation under the FLSA and would clarify that the mere possibility of
deduction is not enough to destroy an employee’s exempt status.

Such an approach would be clearer than the Department’s approach, because
trying to create a class of employees to reclassify inevitably will be a difficult proposition
when some members of the class have had their pay improperly reduced while others
have not. While the Chamber appreciates the Department’s efforts to keep such a class
narrow, such as by including only those employees working for the manager responsible
for the improper deductions, these efforts may have little practical effect in many cases.
For example, it is not clear whether this language would effectively limit the scope of a
potential class where an improper deduction is pursuant to an employer policy or made
not just by a line manager, but by a manager in consultation with an employee from the
company’s human resources or legal department.

\textbf{Safe Harbor / Window of Correction}

As with the “subject to” language, the interpretation of the window of correction
has become muddled only in recent years. The Department recognizes that it has had a
difficult time administering the provision and that it has been the source of “considerable
litigation.”\footnote{199}{68 Fed. Reg. at 15,572.} However, much of this confusion and litigation is due to the Department’s
own strained interpretations.

Current regulations state that

\begin{quote}
where a deduction not permitted by these interpretations is inadvertent, or is made
for reasons other than a lack of work, the exemption will not be considered to
have been lost if the employer reimburses the employee for such deductions and
promises to comply in the future.\footnote{200}{29 C.F.R. §541.118(a)(6).}
\end{quote}

Thus, as a threshold matter, the window of correction is only available when an
impermissible deduction is “inadvertent, or is made for reasons other than a lack of

200 29 C.F.R. §541.118(a)(6).
work.” While the Supreme Court’s decision in Auer\textsuperscript{201} clearly noted that “inadvertence” and “reasons other than a lack of work” were alternative grounds under which employers could seek to avail themselves of the window of correction, the Department has maintained that the window is not available in many such cases.

For example, the Department has opined that the window is not available if an employer has a policy that could lead to improper deductions. In those cases, the Department has argued that the employer must first demonstrate an objective intention to pay employees on a salary basis before it may avail itself of the window of correction.\textsuperscript{202} It further argues that an employer cannot have an objective intention of paying its employees on a salary basis if it maintains a policy inconsistent with those regulations.\textsuperscript{203}

In other words, under the Department’s reasoning, the window of correction is not available if the employer maintains a policy that is at odds with the salary basis test even if the employer intends to comply with the overtime requirements of the FLSA, but may not be familiar with the intricacies of the Department’s regulations.

The Chamber does not believe this is a reasonable interpretation of the window of correction. Instead, the Chamber fully supports the position articulated by the Fifth Circuit earlier this year in Moore v. Hannon Food Services.\textsuperscript{204} In Moore, the Fifth Circuit rejected the Department’s reasoning and found that the fact that the employer may have had a policy at odds with the salary basis test was immaterial because the regulations clearly permit employers to use the window of correction if the improper deductions they have made from employees’ salary is either inadvertent or made for reasons other than a lack of work. The Chamber believes that the Department should use this approach as it considers revisions to the part 541 regulations.

Instead, the Department has proposed a new safe harbor provision in proposed subsection 603(c). Under the proposed safe harbor, an employer would need to meet two threshold questions in order to try to correct an improper deduction. First, the employer would need to have established a written policy against improper deductions. Second, the policy would need to be communicated to employees. If these conditions were met, the employer could reimburse employees for improper deductions unless the employer “repeatedly and willfully violates the policy or continues to make improper deductions after receiving employee complaints.”\textsuperscript{205}

The Chamber has several concerns with the proposed safe harbor and disagrees with the approach the Department has taken in crafting the provision. The provision should be drafted in such a way as to incentivize employers to correct improper

\textsuperscript{201}519 U.S. 452.
\textsuperscript{202}Moore v. Hannon Food Serv. Inc., 317 F.3d 489, 493-94 (5th Cir. 2003) (citing Klem v. County of Santa Clara, 208 F.3d 1085 (9th Cir. 2000)).
\textsuperscript{203}Id.
\textsuperscript{204}Id.
\textsuperscript{205}Proposed §603(c), 68 Fed. Reg. at 15,594.
deductions. The existing window of correction, as interpreted by the Fifth Circuit, has that effect. If an employer realizes it has made an improper deduction it has every incentive to reimburse employees to guard against further liability and litigation. Instead, the approach taken by the Department would not provide an incentive to take corrective action, only an incentive to adopt a policy to prohibit improper deductions. An employer who does not understand the intricacies of the salary basis test therefore is unlikely to have a sufficient policy and would thus never qualify for the safe harbor or have incentive to correct improper deductions.

The Chamber is also concerned about the application of the safe harbor to small businesses and others who may be less savvy in the minutiae of the regulations. In particular, we have heard concern from our small business members that the requirement for a written policy would be impractical. While employers seek to comply with the law, the safe harbor seems geared to those already sufficiently versed in the law and is likely to be of little effect to less sophisticated employers.

The Chamber also has concerns about how the proposed provision that forbids improper deductions after the receipt of employee complaints would be implemented. Currently, of course, the employer may avail itself of the window of correction at any time, regardless of when complaints have been received. It is perhaps understandable for the Department to encourage employers to remedy improper deductions in a timely manner; however, the language prohibiting use of the safe harbor after receipt of complaints is too restrictive. Both practical and legal concerns could make compliance with this provision difficult. For example, an employee is likely to complain to a supervisor or lower level manager. Should the manager fail to relay the concern, the employer could not utilize the safe harbor. Similarly, upon receiving notice of an improper deduction, the employer may wish to conduct an investigation to determine whether the deduction was improper and the extent to which such deductions have been made throughout the company. If improper deductions are found, it may take time to implement a corrective policy.

For these reasons, the Chamber suggests elimination of the provision denying use of the safe harbor to employers that make improper deductions after receiving employee complaints. Should the Department believe such a provision is necessary, the Chamber urges it to account for the time necessary to investigate complaints and implement a new policy.

The Chamber is also concerned with the proposal’s provision to deny the safe harbor to employer who “repeatedly and willfully violate” the policy. In particular, the Chamber is concerned that the term “repeatedly” may be too vague. For example, isolated violations may happen more than once, perhaps separated by long periods of time. Alternatively, an employer could make several improper deductions at the same

Disciplinary Deductions

Current interpretations permit employers to make disciplinary deductions if the penalty is “imposed in good faith for infractions of safety rules of major significance.”207 This provision has been part of the regulations since the 1954 amendments.208 However, as noted earlier, between 1944 and 1949 the Department held a less restrictive view and interpreted the 1940 regulations as permitting disciplinary deductions for “unreasonable absences” from work.209

Under the existing interpretations, employers cannot suspend employees for disciplinary reasons unless the employee has violated a safety rule of major significance or the employer suspends the employee in weekly increments, since no compensation need be paid for any week in which the employee does not perform any work for the employer.210 The current regulations serve as a disincentive to employers who may seek to implement a graduated disciplinary policy that could call for unpaid suspensions of a few days for a transgression that might not justify termination or a weekly suspension. Chamber members would like the flexibility to design disciplinary policies that will meet the needs of their workforce and their business and current regulations are a needless impediment to achieving that flexibility.

In proposed paragraph 602(b)(5) the Department would expand the scope of disciplinary deductions that do not run afoul of the salary basis test. The proposal would permit deductions made for unpaid disciplinary suspensions of a full day or more. In order to qualify for the deduction, it would need to be:

1. imposed in good faith;
2. for an infraction of workplace conduct rules; and
3. be imposed pursuant to a written policy applied uniformly to all workers.211

The Chamber supports the Department’s proposal to expand the scope of disciplinary deductions consistent with the salary basis test. However, the Chamber has several concerns with the conditions that a disciplinary deduction would need to meet in order to qualify. While we understand the Department’s desire to prevent deductions based on sham disciplinary policies, we believe the conditions are too restrictive.

207 29 C.F.R. §541.118(a)(5).
209 Release A-9, August 24, 1944, Payment on ‘Salary Basis’ for Executive Administrative, and Professional Employees Clarified, 1944-45 Wage & Hour man. (BNA) 719.
210 29 C.F.R. §118(a).
Workplace Conduct

The Department’s proposed condition limiting disciplinary deductions to violations of workplace conduct rules appears to be too narrow and not reflective of employer disciplinary policies. The Chamber is concerned that the language proposed by the Department might limit the disciplinary policy to infractions that actually occur on the employer’s premises and on working time. Employer disciplinary policies typically apply to a wide range of employee conduct that may take place away from the employer’s place of business and may involve an employee’s conduct while off duty.

Employers may have good reason for constructing disciplinary policies that cover employee conduct off-duty and off-site. For example, employers can be liable for off-site sexual harassment by employees. In one recent case, the Second Circuit ruled that an employer-airline could be liable for sexual harassment between co-worker flight attendants even though the alleged harassment took place off-site and when the employees were off-duty.212 While the facts of this case are much more egregious than most, employers will often have policies to address inappropriate conduct that may occur off site, for example while at a business convention or on other travel. Indeed, model sexual harassment policies often explicitly include off-duty employee conduct.213

Employer policies also often address other conduct that occurs off-site or off-duty. For example, off-site and off-duty conduct is often covered by employer policies designed to prevent workplace violence. Likewise, employers may have policies designed to discourage employee conduct that would do damage to the employer’s reputation or where such conduct might impact the employee’s job or the employer’s customers or clients.

For these reasons, the Chamber urges the Department to revise the proposal to cover employer policies covering acceptable employee conduct, without use of language that appears to limit the application to conduct that occurs on the employer’s premises and while the employee is on duty.

Uniform Written Policy

The Chamber has two principal concerns with the Department’s proposed condition requiring that disciplinary suspensions be made pursuant to a written policy applied uniformly to all workers. The requirement that the policy be in writing could pose significant problems, especially for small employers. Similarly, the requirement that a disciplinary policy be uniformly applied could be impractical to implement.

The Chamber believes that the requirement to have a written policy will effectively exclude many small businesses from use of disciplinary suspensions. As

noted earlier, many smaller businesses are not familiar with the intricacies of the salary basis test. The Department’s requirement will make it more difficult for employers who do not have the regular assistance of employment counsel to suspend employees for disciplinary reasons.

We also would like to emphasize that no written disciplinary policy can cover every conceivable offense. The requirement of a written policy could be construed to require coverage of specific transgressions and the Department should clarify that it does not envision such expansive policies. If the Department is to require a written policy, then it should be sufficient to place the employee on notice that he or she could be subject to unpaid disciplinary suspension for inappropriate conduct without requiring further explanation.

Finally, the Chamber is concerned that the Department has proposed requiring that the policy be uniformly applied to all employees, which, on its face, allows for no variance in treatment among employees subject to the policy. This requirement is impractical in that discipline by its very nature depends on the facts of a particular case. It is also not always appropriate to discipline employees uniformly. Employers may hold some employees to a higher standard. For example, it is reasonable for an employer to hold its executives to a higher standard than its line employees. In addition, we believe use of the term “uniform” could be a trap that will lead to needless litigation.

It seems to us that the Department’s conditions are designed to prevent employers from using sham disciplinary policies to justify any sort of deduction for a day or more. The Chamber appreciates this goal, but believes the conditions imposed by the Department are too restrictive. Instead, the Department should simply require that the deduction be pursuant to a bona fide disciplinary policy. This is similar to language used for deductions for employee absences due to sickness or disability and would be more appropriate.214

Other Permissible Deductions

Partial Day Deductions

The Department has not proposed permitting partial day deductions, except for absences caused by utilizing leave under the Family and Medical Leave Act.215 The Chamber has long supported partial day deductions and urges the Department to reconsider its position.

In the preamble to the proposed rule, the Department notes that it considered proposing an amendment to the regulations to permit partial day deductions in certain circumstances, but rejected the idea because “allowing such ‘pay-docking’ for partial-day absences would breach the quid pro quo and blur the line between exempt and non-

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exempt employees.” The Department describes the quid pro quo in the context of its decision to retain the salary basis test:

We . . . concluded that the underlying concept of the test “guaranteed pay, not subject to reduction because of variations in the quality or quantity of the work performed” should be retained. The nearly universal practice of paying employees with the requisite status to be bona fide executive, administrative, or professional employees on a salary basis, as the 1949 hearings on the exemption revealed, reflected the understanding that such employees have discretion to manage their time and are not answerable for the number of hours worked or the number of tasks performed. Such employees are not paid by the hour or task, but for the general value of services performed. The salary basis test also describes the quid pro quo enjoyed by exempt employees, which distinguishes them from non-exempt workers. Exempt employees are not paid overtime for working over 40 hours in a week. In exchange, the employer must provide a guaranteed salary that cannot be reduced when an employee works less than 40 hours.

However, these tenets were not found in the Department’s initial salary basis regulations. Rather, they were created during World War II after employer pay practices had changed. As noted earlier, employer pay practices had changed to discourage excessive absenteeism among executive and administrative employees. The Department thus created the quid pro quo as a model that it would apply to help it distinguish between permitted disciplinary deductions and impermissible deductions.

The Department retained this model in the two significant modifications made to the regulations since World War II, in 1949 and 1954, even though it dispensed with the disciplinary deductions that it permitted during World War II. However, the Department’s initial salary basis regulations had different roots. The Department’s earliest justification for compensation on a salary basis was simply because, at the time, payment on a salary basis was a good proxy for exempt status.

The original intent of the salary basis test is reflected in early Labor Department documents implementing the FLSA exemptions. The first regulations promulgated under the FLSA in 1938, required administrative employees to be paid “not less than $30 . . . for a workweek.” However, the regulations did not specifically require payment on a “salary basis” until 1940. The rationale behind the salary basis language was articulated in the Stein Report. As to executive employees, the report noted:

The shortest pay period which can properly be understood to be appropriate for a person employed in an executive capacity is obviously a weekly pay period and hourly paid employees should not be entitled to the exemption. The executive

217 Id. (emphasis in original).
status in and of itself connotes at least the tenure implied by a weekly pay period as the very minimum.\textsuperscript{220}

As to administrative employees, the report stated:

Clearely the week is the shortest pay period which can be appropriate for a salaried employee employed in a supposedly important capacity.\textsuperscript{221}

As can be seen, when the Labor Department created the salary basis test, it viewed a weekly pay period as a good proxy for an employee’s status. It did not address whether employees with exempt status were accountable for hours worked. While the Department may find the notion of accountability for hours worked an easy test to apply, it is not necessarily consistent with the purpose of the salary basis test or consistent with today’s workplace.

Indeed, a significant number of employees covered by the Fair Labor Standards Act are not subject to the quid pro quo that the Department describes. Federal employees covered by the FLSA, for example, are not subject to anything resembling the salary basis test at all, much less the quid pro quo on which the Department relies.\textsuperscript{222} Likewise, the Department has established different rules for public employees within its jurisdiction that explicitly permit partial day deductions in many instances.

The Department’s disparate treatment between public and private sector employees with respect to partial day deductions is worthy of closer examination. It was not until the Supreme Court’s decision in \textit{Garcia v. San Antonio Metropolitan Transit Authority}\textsuperscript{223} that most state and local government employees came within the FLSA’s scope of coverage. However, in 1987, after numerous public employees had filed suit against local and state government employers for unpaid overtime, the Labor Department adopted a new enforcement policy towards public employers with regards to the salary basis test. Specifically, the Department decided that it would not enforce the pay-docking prohibitions against public employers if the public employer was required by law to pay employees only for time worked.\textsuperscript{224}

In 1991, the Department went a step further and issued an Interim Final Rule providing that a practice of partial day deductions for public employees was not in and of itself inconsistent with the salary basis test. In the preamble to the Interim Final Rule, the Department described public compensation systems developed on the “principles of public accountability – that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of

\textsuperscript{220} Stein Report at 23.
\textsuperscript{221} Id. at 32-33.
\textsuperscript{222} See 5 C.F.R. pt. 551.
\textsuperscript{223} 469 U.S. 528 (1985).
public funds.” The preamble also noted that many of the employees who experienced such deductions “would clearly be exempt if duties and amount of compensation alone were examined.”

The history of the Fair Labor Standards Act clearly does not show a universal reliance on the quid pro quo on which the Department’s position is based. Instead, the Office of Personnel Management has found other tests to use in determining whether covered federal employees are exempt and even the Labor Department has found partial day deductions consistent with the salary basis test and the FLSA with respect to some covered employees. There is no reason why the Department must adhere to its quid pro quo standard when private sector employers may wish to implement compensation practices based on similar notions of accountability as their public sector counterparts.

Indeed, it is not hard to find examples of how the prohibition against partial day deductions creates inappropriate incentives in the workplace. Under the existing regulations, employers may require employees to take more time off then they actually need in order to attend to personal needs. For example, an employee wishing to take an afternoon off for a medical appointment or simply to get a head start on the weekend might be required to take a full day off by his or her employer. Likewise, an employee may seek to take classes during the workday, perhaps toward an advanced degree, and seek an arrangement with the employer providing for deductions for time not actually worked. Another example might be an employee who has taken a day or more for sick or personal time who seeks to return to work for a partial day. Because the employer is compelled to pay the employee for the entire day in which any work is performed, the employer is less likely to permit the employee to return until he or she is able to work a full day. As can be seen, current regulations can have perverse incentives and the Chamber urges the Department to revisit its position on partial day deductions.

Family and Medical Leave

The one exception that the Department has proposed to the prohibition against partial day deductions is in relation to leave taken under the Family and Medical Leave Act (FMLA). The Chamber appreciates the inclusion of the family and medical leave language in this section. However, we recommend that the language clarify that deductions may be made for employee absences occasioned by use of an employer’s family or medical leave policy regardless of whether that leave is taken under the FMLA. The Chamber makes this recommendation because many employers have policies that are more expansive than the FMLA. For example, a small employer not covered by the Act may choose to offer FMLA-type leave to its employees even though it is not required by statute. Likewise, employers may choose to offer leave for more reasons than required by the FMLA, such as to care for people not covered by the Act, to provide additional leave when FMLA leave is exhausted, to allow leave for employees not eligible for the

225 Id.
226 Id.
FMLA, or to comply with other legal obligations such as to comply with slate laws and laws requiring an employer to provide a medical accommodation. If the Department decides not to permit partial day deductions, it should at least consider partial day deductions for employer policies that mirror or expand leave guaranteed by the FMLA.

**Technical Construction**

Proposed subsection 603(d) of the regulation provides that with respect to section 603 (regarding the effect of improper deductions from salary) “this section shall not be construed in an unduly technical manner so as to defeat the exemption.”228 The Chamber fully supports this provision and believes that the Labor Department should adopt it with respect to the entirety of the part 541 regulations, not just section 603. Indeed, the Chamber is concerned that by only including this provision as part of section 603, some may interpret the absence of a similar provision elsewhere in the regulations as implying that the Department intended for the regulation to be applied in a technical manner. The Department could address this concern by explicitly applying this provision to the entirety of part 541.

**Summary**

The Chamber’s major concerns with the Department’s proposed modifications to the salary basis test can be summarized as follows.

**Employees covered by the salary basis test**

- The Chamber supports the Department’s proposal to exempt those highly compensated employees passing the simplified duties test from the salary basis test but urges the Department to abandon the salary basis test for all highly compensated employees.
- The Chamber supports the Department’s proposal to remove employee-owners from the salary basis test.
- The Chamber encourages the Department to exclude sole charge executives from the salary basis test.

**Compensation practices consistent with the test**

- The Chamber supports the Department’s proposal to find certain disciplinary deductions consistent with the salary basis test, but recommends the proposal be simplified by abandoning proposed conditions and permitting deductions based on a bona fide disciplinary policy.
- The Chamber urges the Department to reconsider its position opposing most partial day deductions, especially in relation to employer policies that may expand or mirror coverage provided under the Family and Medical Leave Act.
- The Chamber urges the Department to adopt a safe harbor that encourages employers to correct improper deductions consistent with the Fifth Circuit’s interpretation of the existing window of correction.

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Consequences of inconsistent practices

- The Chamber supports the Department’s effort to narrow the class of individuals who might be reclassified based on improper practices, but urges the Department to adopt a policy of only reclassifying those who have actually experienced improper deductions from compensation.
Conclusion

The U.S. Chamber of Commerce commends the Department of Labor for its leadership in modernizing regulations governing overtime eligibility. These regulations are so vague, complex, and out-of-date that their purpose of protecting low-wage workers has been corrupted and they are now being exploited by the plaintiffs’ bar. Employees and employers alike need to be able to determine an employee’s exempt status with certainty. The Labor Department’s proposed regulations take an important first step toward providing that certainty while furthering the protective purposes of the Act.

Chamber members believe that the Department has correctly made reform of these overtime regulations a priority. While the Chamber supports much of the Department’s proposal, there remain important areas which need refinement to clarify criteria and to recognize developments that have occurred in the workforce over the past half-century. These comments have detailed our recommendations and we hope you find them of help as you move forward with the regulatory process. Please do not hesitate to call on us if the Chamber can provide additional assistance in this matter.

Thank you again for the Department’s leadership on this important issue and thank you for your consideration of these comments.

Sincerely yours,

Randel K. Johnson                     Michael J. Eastman
Vice President                        Director
Labor, Immigration and Employee Benefits   Labor Law Policy
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