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Dr. David Weil
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U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

RE: RIN 1235-AA11, Proposed Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,* 80 FR 38516 (July 6, 2015)

Dear Dr. Weil:

The United States Chamber of Commerce (the "Chamber") submits these comments in response to the proposal of the Department of Labor (the "Department"), as published in the *Federal Register*, 80 FR 38516, on July 6, 2015, to revise the regulations at 29 C.F.R. Part 541, defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees in section 13(a)(1) of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. § 213(a)(1).

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STATEMENT OF INTEREST

The United States 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 Chamber's mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. An important function of the Chamber is to represent the interests of its members in federal employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,900 business people participate in this process. The Chamber also represents many state and local chambers of commerce and other associations who, in turn, represent many additional businesses.

The Department of Labor's proposed changes to the regulations at 29 C.F.R. Part 541 (the "Part 541" or "white collar" regulations), if finalized, will have significant impact on our members. We write to express our concerns with the Department's proposal and urge its withdrawal.

INTRODUCTION

When Congress passed the FLSA in 1938, establishing the minimum wage and overtime requirements, they excluded executive, administrative, professional and outside sales employees from those protections. Congress believed then that in exchange for not being eligible for overtime, such employees earned salaries well above the minimum wage, were provided above-average benefits and had better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. This is still true today.

Exempt white collar employees also enjoy more generous paid leave benefits. They earn bonuses, commissions, profit-sharing, stock options and other incentive pay at greater rates than non-exempt employees. Moving from a non-exempt to an exempt position is the first rung on the promotional ladder.

Perhaps most importantly, exempt employees enjoy the stability and certainty of a guaranteed salary. Exempt white collar employees must be paid on a salary basis – that is, they must receive a "predetermined" salary that "is not subject to reduction because of variations in the quality or quantity of the work performed."[1] Thus, while exempt employees do not receive overtime for working over 40 hours in a week, they also are not paid less if they work less than 40 hours in a week. If an exempt employee works as little as one hour in the week, and then takes the rest of the week off because of a family emergency, that employee will still be paid her entire weekly salary. A non-exempt employee need be paid only for the one hour he actually worked. A non-exempt employee who takes an afternoon off to attend a parent-teacher conference will not be paid for that time, but an exempt employee will be paid her full guaranteed salary.[2]

This difference provides a level of workplace flexibility that distinguishes exempt from non-exempt employees. Secretary Perez has often discussed the importance of such flexibility in his own professional life:

> Involvement in my kids' sports teams is something I have made time for over the years. I've also been able to coach all three of them in baseball and basketball, something that has strengthened our bonds and given me indescribable joy. I wouldn't trade it for anything. I lost my own father when I was 12, and I am the same age today that he was when he died suddenly of a heart attack. So when it comes to family time, I have a strong sense of the fierce urgency of now.

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[1] 29 C.F.R. § 541.602(a).

[2] Subject to employer paid leave policies.

> But I'm lucky. I've had jobs that allow me the flexibility to achieve work-life balance, to be there when one of the kids sinks a jump shot or for the parent-teacher meetings.[3]

The Department's proposal to increase the minimum salary level for exemption to the 40th percentile of all "non-hourly" workers – $50,440, an increase of 113 percent – will eliminate the workplace flexibility that Secretary Perez so values for millions of employees who currently perform exempt executive, administrative, professional, computer, and outside sales job duties. These millions will be reclassified to non-exempt and be required to start punching a time clock. They will be paid only for hours they actually work, but that is no guarantee of overtime pay – as many employers will limit their work hours to fewer than 40 in a week. Being eligible for overtime is not the same as earning overtime, even if the employee may currently be working more than 40 hours a week as an exempt employee.

Although the Department views being reclassified as non-exempt as an advantage, in fact, Chamber members with vast experience managing private sector businesses know that limiting an employee's work hours also limits opportunities for advancement. Exempt employees know this too, and will view the reclassification to non-exempt necessitated by the Department's proposal as a demotion. Employee morale will suffer as their work hours are closely monitored, they fall out of the more generous employee benefit plans, are no longer eligible for incentive pay, and must carefully consider whether they can afford to leave work to attend a child's baseball game.

In addition, because of the Department's proposal to automatically increase the salary level every year, more exempt employees will be reclassified every year and lose flexibility, benefits and opportunities for advancement every year.

Among the employers who will be most impacted by the change in the salary threshold will be those in the nonprofit and medical provider sectors. These employers are unable to increase their revenues to cover the increased costs of complying with the higher salary threshold, either because they are charitable organizations that survive on contributions, or their revenue is dictated by insurance rates that they have no opportunity to influence.

President Obama directed the Department to "modernize" the white collar regulations,[4] but the Department's proposal will return our workplaces back to the 1950s

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[3] *See, e.g.,* Secretary of Labor Thomas E. Perez, *The Most Important Family Value*, Huffington Post (May 27, 2014), *available at* http://www.huffingtonpost.com/thomas-e-perez/the-most-important-family_b_5397442.html.

[4] Shortly thereafter, Secretary Perez conducted "listening sessions" with representatives of the employer community, including the U.S. Chamber. Unfortunately, there is no evidence that these sessions had any impact on the Department's proposal.

when all but the most highly paid employees punched a time clock and managers were prevented by union contracts from pitching in and lending a hand to help supervised employees complete the job. Forcing employees back into a time-clock punching, shift work model will not be welcome when 74 percent of workers value "being able to work flexibly and still be on track for promotion," second only after competitive pay and benefits.[5]

In addition to likely triggering large-scale reclassifications to employee detriment, this proposal has inherent flaws. Procedurally, the Department creates an impression that changes to the duties test will be made based merely on questions posed in the preamble, without proposed regulatory text or any of the accompanying analysis, supporting data, or economic impact studies. Doing so would mean employers and other regulated parties will never have had a chance to review and comment on the specific changes, which would be contrary to the intent and spirit of the Administrative Procedure Act, Executive Orders 12866 and 13563 on proper rulemaking procedures, and President Obama's own Open Government Initiative.

Also, the economic data relied upon by the Department to support the new salary threshold is flawed and does not provide sufficient detail to support the claims made by the Department. Similarly, the economic impact analysis provided fails to consider many factors and severely underestimates the economic impact of the Department's proposal, even without taking into consideration transfer payments related to compliance with changing the salary threshold.

As the Chamber's comments, *infra*, will demonstrate, the Department's proposal should be withdrawn.

[5] Ernst & Young Study, *Work-Life Challenges Across Generations* (2015), *available at* http://www.ey.com/US/en/About-us/Our-people-and-culture/EY-work-life-challenges-across-generations-global-study

DISCUSSION

The Fair Labor Standards Act, enacted by Congress in 1938 during the Great Depression, generally requires covered employers to pay their employees at least the federal minimum wage (currently, $7.25 per hour) for all hours worked and overtime pay at one and one-half an employee's regular rate of pay for all hours worked over 40 in a single workweek.[6] In addition to ensuring additional pay for working over 40 hours, Congress intended the Act's overtime pay requirement to encourage employers to spread the available work among a larger number of workers and thereby reduce unemployment:

> By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work.[7]

Although the Department has described the FLSA overtime requirements as a "cornerstone of the Act,"[8] Congress never intended the overtime requirements to be applied universally. As enacted in 1938, and amended through the years since, the FLSA includes almost 50 partial or complete exemptions from the Act's overtime requirements. A listing of these exemptions is provided in *Appendix A*.

Congress included the white collar exemptions in section 13(a)(1) of the original 1938 act, which exempted from both the minimum wage and overtime requirements "any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)."[9] Congress amended section 13(a)(1) in 1961 to remove the "local retailing capacity" exemption, but also prohibited the Department from denying the exemption to retail or service employees who spend less than 40 percent of hours worked performing non-exempt tasks.[10] In 1966, Congress added academic administrative personnel and teachers to the exemption.[11] Thus, today,

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[6] 29 U.S.C. §§ 206 (minimum wage), 207 (overtime).

[7] *See Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 577-78 (1942).

[8] Notice of Proposed Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 80 FR 38516, 38510 (July 6, 2015) (hereinafter "2015 NPRM").

[9] 52 Stat. 1060, 1067 (June 25, 1938).

[10] P.L. 87-30, 74 Stat. 65 (May 5, 1961).

[11] P.L. 89-601, 80 Stat. 830 (Sept. 23, 1966).

section 13(a)(1) of the FLSA provides an exemption from both the minimum wage and overtime requirements for:

> [A]ny employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of [the Administrative Procedure Act], except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).[12]

Congress did not further define the terms "executive," "administrative," "professional" or "outside salesman" in the Act itself. However, the legislative history indicates that Congress believed that such employees generally have little need for the FLSA protections. As the Department stated in 2004:

> The legislative history indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.[13]

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[12] 29 U.S.C. § 213(a)(1).

[13] Final Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 FR 22122, 22124 (April 23, 2004) (hereinafter "2004 Final Rule), *citing* Report of the Minimum Wage Study Commission, Volume IV at 236, 240 (June 1981) ("1981 Commission Report") ("Higher base pay, greater fringe benefits, improved promotion potential and greater job security have traditionally been considered as normal compensatory benefits received by EAP employees, which set them apart from non-EAP employees."). *See also* 1981 Commission Report at 243 ("These compensatory privileges include authority over others, opportunity for advancement, paid vacation and sick leave, and security of tenure.").

The Department first issued regulations to define and delimit the white collar exemptions on October 20, 1938, at 29 C.F.R. Part 541. The original regulations, only two columns in the Federal Register, set a minimum salary level for exemption at $30 per week and established the job duties employees must perform to qualify for the exemptions.[14] Between 1940 and 1975, the Department raised the minimum salary level for exemption six times – in 1940, 1949, 1958, 1963, 1970 and 1975 – an increase every two to nine years.[15] In 1975, the Department raised the minimum salary levels for exemption to $155 per week ($8,060 annually) for executive and administrative employees and $170 per week ($8,840 annually) for professionals under the "long" duties tests, and to $250 per week ($13,000 annually) for the "short" duties tests.[16]

The duties tests for exemption changed less frequently. In 1940, the Department adopted a separate duties test for administrative employees for the first time.[17] The Department also significantly revised Part 541 in 1949, including the addition of "special proviso[s] for high salaried" executive, administrative and professional employees (often referred to as the "short tests") and publishing an interpretive bulletin.[18] Between 1949 and 2004, the Department made other occasional revisions to Part 541, but the basic structure and substance of the duties tests for executive, administrative, professional and outside sales employees remained unchanged.[19]

The last major revisions to the Part 541 regulations were made in 2004 – 29 years after the previous increases to the salary level tests and 55 years after the last significant changes to the duties tests (apart from the addition of computer employees). After a comprehensive review of legislative and regulatory history, federal court decisions interpreting Part 541, salary data and over 75,000 public comments, the Department

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[14] 3 FR 2518 (Oct. 20, 1938).

[15] 5 FR 4077 (Oct. 10, 1940); 14 FR 7705 (Dec. 24, 1949); 23 FR 8962 (Nov. 18, 1958); 29 FR 9505 (Aug. 30, 1963); 35 FR 883 (Jan. 22, 1970); 40 FR 7091 (Feb. 19, 1975).

[16] 40 FR 7091 (Feb. 19, 1975).

[17] 5 FR 4077 (Oct. 10, 1940). *See also "Executive, Administrative, Professional . . .Outside Salesman" Redefined,* Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("1940 Stein Report").

[18] 14 FR 7705 (Dec. 24, 1949) (final regulations); 14 FR 7730 (Dec. 28, 1949) (interpretive bulletin published as Subpart B of Part 541). *See also Report and Recommendations on Proposed Revisions of Regulations, Part 541,* Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("1949 Weiss Report").

[19] In 1954, the Department revised the regulatory interpretations of the "salary basis" test. 19 FR 4405 (July 17, 1954). In 1961, the Department revised Part 541 to implement FLSA amendments eliminating the exemption for employees employed in a "local retail capacity." 26 FR 8635 (Sept. 15, 1961). The Department revised Part 541 in 1967 to implement an FLSA amendment extending the exemption to academic administrative personnel and teachers. The Department revised Part 541 twice in 1992. *First*, at the direction of Congress, the Department revised the duties tests to allow certain computer employees to qualify as exempt professionals. 57 FR 46742 (Oct. 9, 1992). *Second*, the Department modified the salary basis test for public employees. 57 FR 37666 (Aug. 19, 1992).

replaced the long-inoperative "long" duties tests with new standard duties tests (with requirements intended as a middle ground between the "long" and "short" tests), and raised the minimum salary level for exemption from $155/$170 per week ($8,060/$8,840 annually) to $455 per week ($23,660 annually).[20] In addition, the Department replaced the "special proviso[s] for high salaried" employees and its "short test" salary level of $250 per week ($13,000 annually) with a highly compensated test applicable to employees with annual compensation of at least $100,000.[21]

Since 1940, the Part 541 regulations have included three tests that employees must meet before qualifying for exemption: *First*, employees must be paid at least the minimum salary level for exemption established in the regulations, currently $455 per week ($23,660 annually) as set in 2004.[22] *Second*, employees must be paid on a "salary basis." An employee is paid on a salary basis "if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."[23] *Third*, the employees must have a primary duty of performing the exempt executive, administrative, professional, computer or outside sales job duties.[24] Highly compensated employees, currently defined as employees with total annual compensation of at least $100,000, are exempt if they customarily and regularly perform at least one of the exempt duties of an executive, administrative or professional employee.[25]

On the salary level tests, the Department has proposed to set the minimum salary required for exemption at the 40th percentile of weekly earnings for full-time salaried

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[20] Although section 13(a)(1) provides exemptions from both minimum wage and overtime, as the Department recognizes, "its most significant impact is its removal of these employees from the Act's overtime protections." 2015 NPRM at 38519. In fact, because the minimum salary level for exemption of executive, administrative and professional employees has always been set well above the minimum wage, such employees *de facto* are protected by the FLSA's minimum wage requirement. *See* 1981 Commission Report at 240 ("Employees paid below the salary test level must be paid premium rates for work in excess of 40 hours per week. Since salaries of exempt employees are usually well above the minimum wage, and the employer is under no obligation to pay wages equal to the salary test level, this is, in effect, a maximum hour exemption."). However, because of the 29 years that passed between the salary level increases of 1975 and 2004, the $155/$250 salary levels for exemption under the "long" duties tests was barely above the minimum wage for a 40 hour workweek by 1980 (when minimum wage increased to $3.10 per hour) and below the minimum wage beginning in 1991 (when minimum wage increased to $4.25 per hour). Thus, in 2004, the "long" duties tests had been effectively inoperative for almost 25 years.

[21] 2004 Final Rule at 22123.

[22] 29 C.F.R. § 541.600.

[23] 29 C.F.R. § 541.602. Teacher, doctors, lawyers and outside sales employees are not subject to the salary level and salary basis tests. 29 C.F.R. § 541.303(d) (teachers); 29 C.F.R. § 541.304(d) (doctors and lawyers); 29 C.F.R. § 541.500(c) (outside sales). In addition, exempt computer employees may be paid by the hour. 29 U.S.C. § 213(a)(17); 541.29 C.F.R. § 541.400(b).

[24] 29 C.F.R. § 541.100 (executives); 29 C.F.R. § 541.200 (administrative employees); 29 C.F.R. § 541.300 (professionals); 29 C.F.R. § 541.400 (computer); 29 C.F.R. § 541.500 (outside sales).

[25] 29 C.F.R. § 541.601.

workers.[26] Currently, based on 2013 data from the Bureau of Labor Statistics (BLS), this would amount to a minimum salary of $921 per week or $47,892 annually.[27] However, the Department expects that the 40th percentile will increase to $970 per week or $50,440 annually by the time a final rule is issued in 2016.[28] The Department seeks comments on whether "to permit nondiscretionary bonuses and incentive payments to count toward partial satisfaction of the salary level test."[29] The Department also proposes to increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers, which is estimated at $122,148 annually.[30] Finally, the Department proposes to establish a mechanism for automatically updating the salary levels on an annual basis using either the 40th (standard test) and 90th (HCE test) percentiles or based on an inflationary measure (the CPI-U).[31]

Whether the Department is proposing changes to the duties tests is far from clear. In the NPRM, the Department states that it "is not proposing specific regulatory changes at this time."[32] Rather, the DOL only "seeks to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted" and "invites comments on whether adjustments to the duties tests are necessary, particularly in light of the proposed change in the salary level test."[33] The Department then requests comments on the following issues:

A. What, if any, changes should be made to the duties tests?

B. Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?

C. Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?

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[26] 2015 NPRM at 38517.
[27] *Id.*
[28] *Id.*, n.1.
[29] *Id.* at 38536.
[30] *Id.* at 38537.
[31] *Id.* at 38524, 38537-42.
[32] *Id.* at 38543.
[33] *Id.*

D. Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties tests structure?

E. Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?[34]

In addition, "the Department is also considering whether to add to the regulations examples of additional occupations to provide guidance" on "how the general executive, administrative, and professional exemption criteria may apply to specific occupations."[35] The Department also "requests comments from employer and employee stakeholders in the computer and information technology sectors as to what additional occupational titles or categories should be included as examples in the part 541 regulations."[36]

I. THE DEPARTMENT'S PROPOSAL TO SET THE MINIMUM SALARY LEVEL USING THE 40TH PERCENTILE OF WAGES EARNED BY NON-HOURLY EMPLOYEES, WILL EXCLUDE MILLIONS OF EMPLOYEES WHO MEET THE DUTIES TESTS FOR EXEMPTION, CONTRARY TO THE INTENT OF CONGRESS

A. THE DEPARTMENT HAS LONG RECOGNIZED THAT THE PURPOSE OF THE SALARY LEVEL TEST IS TO EXCLUDE ONLY "OBVIOUSLY" NON-EXEMPT EMPLOYEES

Section 13(a)(1) of the Act *exempts* executive, administrative and professional employees from the FLSA minimum wage and overtime requirements. Thus, although Congress granted the Department authority to define and delimit the white collar exemptions, the agency has long acknowledged that it "is not authorized to set wages or salaries for executive, administrative and professional employees. Consequently, *improving the conditions of such employees is not the objective of the regulations*."[37]

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[34] *Id.* at 38543.

[35] *Id.*

[36] *Id.*

[37] 1949 Weiss Report at 11 (emphasis added).

Rather, the purpose of the salary level test is "screening out the *obviously* nonexempt employees."[38] "The salary tests in the regulations are essentially guides to help in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. Any increase in the salary levels from those contained in the present regulations must, therefore, have as its primary objective the drawing of a line separating exempt from nonexempt employees rather than the improvement of the status of such employees."[39]

Thus, while the salary level selected may "deny exemption to a *few* employees who might not unreasonably be exempted," the Department ignores congressional intent to its peril by setting the minimum salary level for exemption so high as to exclude from the exemption millions of employees who would meet the duties requirements.[40] *The salary level tests should not be set at a level that would result "in defeating the exemption for any substantial number of individuals who could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees."*[41]

In addition, regulations of such "general applicability . . . must be drawn in general terms to apply to many thousands of different situations throughout the country."[42] As the Department stated in 1949: "To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary."[43] Thus, to avoid excluding millions of employees from the exemption who do perform exempt job duties, the Department has recognized that "the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States. Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries"[44] of exempt employees "in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry."[45]

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[38] *Id.* at 8 (emphasis added). *See also* 1958 Kantor Report at 2-3 ("Essentially, the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of *screening out the obviously non-exempt employee*.").

[39] 1949 Weiss Report at 11. *See also* 1958 Kantor Report at 2-3.

[40] 1940 Stein Report at 6 (emphasis added).

[41] 1949 Weiss Report at 9 (emphasis added).

[42] *Id.*

[43] *Id.* at 11.

[44] 1958 Kantor Report at 5.

[45] *Id.* at 6-7. *See also* 1940 Stein Report at 32 ("Furthermore, these figures are averages, and the Act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of

As discussed in more detail below, the Department's proposal to increase the minimum salary level for exemption based on the 40th percentile of earnings for all non-hourly workers – resulting in an estimated minimum salary of $50,440 – quotes but then ignores these accepted purposes and principals with little or no justification. In the past, the Department has used data on salaries of exempt employees. Today, the Department uses earnings data for all "non-hourly" paid employees, whether exempt or nonexempt, and including employees not covered by the Part 541 salary tests, with no reasonable basis for distinguishing salaries of exempt versus non-exempt employees. In the past, the Department has looked to salaries of exempt employees in the lowest-wage region, the smallest size establishment group, the smallest-sized city group, and the lowest-wage industry. Today, the Department uses only national data, ignoring the disproportionate impact that so doing will have for employers in these groups. In the past, the Department has looked to the 10th, 15th and 20th percentile of exempt employee salaries. Today, the Department proposes using the 40th percentile of earnings for all non-hourly paid employees based on the mistaken justification that the current standard duties tests are equivalent to the old "long" duties tests. The Department's proposed $50,440 minimum salary level, in short, is a result in search of a reasoned methodology; but, under any supportable methodology, the Department's proposal is at least $10,000 to $20,000 too high.

B. Setting The Minimum Salary Level At The 40th Percentile Of Earnings of All "Non-Hourly" Paid Employees Ignores 77 Years Of Legislative History, Regulatory History And Changes To The American Economy

With few exceptions, historically, the Department set the minimum salary level for exemption by studying the salaries actually paid to exempt employees and setting the salary at no higher than the 20th percentile in the lowest-wage regions, the smallest size establishment groups, the smallest-sized cities and the lowest-wage industries. In 1949, for example, the Department examined data on increases in salaries for exempt employees since the 1940 increases, compared that data with the earnings of nonexempt employees, and then set a salary level lower than the data indicated to account for lower-wage industries and small businesses.[46]

To set the salary level in 1958, the Department compiled salary data for employees who had been found exempt during wage-hour investigations over an

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a figure that is somewhat lower, though of the same general magnitude."); 1949 Weiss Report at 11-12 ("Any new figure recommended should also be somewhere near the lower end of the range of prevailing salaries for these employees."); 1949 Weiss Report at 14 ("Consideration must also be given to the fact that executives in many of the smaller establishments are not as well paid as executives employed by larger enterprises."); 1949 Weiss Report at 15 ("The salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments from the exemption.").

[46] 1949 Weiss Report at 12-15.

eight-month period in 1955, grouping employees "by major geographic regions, by number of employees in the establishment, by size of city, and by broad industry groups."[47] The Department's report also included published materials on how salary levels had changed since 1949 and information on starting salaries of college graduates."[48] Based on this data, the Department set the salary level so that "no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."[49]

Again, in 1963, the Department relied on a special survey by the Wage and Hour Division ("WHD') on salaries paid to exempt employees, and increased the salary level to "bear approximately the same relationship to the minimum salaries reflected in the 1961 survey data as the tests adopted in 1958."[50]

In 1970, the Department adopted a minimum salary level for executives of $125 per week, when salary data on "executive employees who were determined to be exempt in establishments investigated by the Divisions between May and October 1968 for all regions in the United States, 20 percent received less than $130 per week, whereas only 12 percent of such executives employees in the West and 14 percent in the Northeast received salaries of less than $130 per week."[51]

The rulemaking in 1975 was anomalous: The Department based the salary increase on the Consumer Price Index, rather than a percentile, but also stated that the increase was not "to be considered a precedent."[52]

In 2004, the Department considered data "showing the salary levels of the bottom 10 percent, 15 percent and 20 percent of all salaried employees, and salaried employees in the lower wage South and retail sectors."[53] The Department set the minimum salary level at $455 per week ($23,660 annually), the 20th percentile for salaried employees in the South region and retail industry, rather than at the 10th percentile as in 1958, to account for the proposed change from the "short" and "long" test structure and because the data included nonexempt salaried employees."[54]

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[47] 1958 Kantor Report at 6.

[48] *Id.*

[49] *Id.* at 7-8.

[50] 28 FR 7002, 7004 (July 9, 1963).

[51] 35 FR 883, 884 (Jan. 22, 1970).

[52] 40 FR 7091, 7092 (Feb. 19, 1975). During a private conversation in 2001 between incoming Wage & Hour Administrator Tammy D. McCutchen and Betty Southard Murphy, the Administrator in 1975, Ms. Murphy stated that the 1975 Final Rule was finalized before a wage survey could be completed so she could take up her new post as a Chair of the National Labor Relations Board.

[53] 2004 Final Rule at 22167 & Table 2.

[54] 2004 Final Rule at 22168-69 & Table 3.

Departing from the historical methodologies to use the 40th percentile of earnings for all non-hourly employees ignores the fact that most retail and service employees were exempt until 1961. As originally enacted, section 13(a)(1) of the FLSA exempted "any employee employed in a . . . local retailing capacity" from the minimum wage and overtime requirements, and section 13(a)(2) included an exemption for "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."[55] In 1949, Congress amended section 13(a)(2) to cover employees of retail establishments with more than 50 percent of sales "made within the State in which the establishment is located."[56] Because of these exemptions, during this time period, only "three percent of the retail trade workers were estimated to be subject to the wage and hour provisions of the FLSA."[57] In 1961, Congress amended the FLSA to eliminate the "local retailing capacity" exemption in section 13(a)(1) and limit the section 13(a)(2) retail exemption to establishments with less than $250,000 in annual sales.[58] After the 1961 amendments, the Department of Labor estimated that 2.2 million employees came within the scope of the Act.[59] Later amendments further restricted the retail exemption until it was repealed completely in 1989.[60]

Thus, when the Department set the salary level at the 10th percentile of exempt employee salaries in 1958, that data set did not include exempt salaries of retail employees, a lower-wage industry. Rather, the 1958 data would have included salary information in industries such as manufacturing and construction, the primary focus of the FLSA protections at the time. If data on exempt salaries in the retail industry had been included in 1958, the salary level selected certainly would have been below the 10th percentile.

In preparation for the 1963 rulemaking, the Department conducted a special survey in June 1962 to gather data "on minimum weekly salaries paid executive, administrative and professional employee in retail establishments."[61] The survey confirmed that exempt executive, administrative and professional employees in retail earned less than exempt employees in other industries: "The survey data indicate that in the type of establishment in which all employees would have qualified for the 'retail' exemption under section 13(a) (2) of the act, 29 percent of the executive and 32 percent of the administrative employees were paid less than $100 a week. Thirteen percent of the executive employees and 19 percent of the administrative employees were paid less than $80 a week." Thus, the Department established lower salary levels for the retail industry

[55] 29 U.S.C. § 213(a)(2), P.L. 718, 52 Stat. 1060, 1067 (June 25, 1938).
[56] P.L. 393, 63 Stat. 910, 916 (Oct. 26, 1949.
[57] 1981 Commission Report at 14,
[58] P.L. 87-30, 75 Stat. 65, 71 (May 5, 1961)
[59] 1981 Commission Report at 17.
[60] P.L. 101-157, 103 Stat. 939 (Nov. 17, 1989).
[61] 28 FR at 7002.

effective until September 1965: $80 per week for executive and administrative employees (instead of $100 for other industries); $95 per week for professionals (instead of $115), and $125 per week under the "short" duties test (instead of $150).[62] By 1965, the Department expected retail salaries to increase as the industry adjusted to its new coverage under the FLSA.[63] Perhaps most instructive in this regulatory history, the Department rejected salary levels for retail employees at the 29th and 32nd percentiles, instead adopting salary levels at the 13th and 19th percentile.[64]

Changes to the American economy and jobs also support a lower percentile, not a higher one. The Department makes much of the fact that the percentage of employees eligible for overtime has allegedly eroded significantly: "In 1975, 62 percent of full-time salaried workers were eligible for overtime pay; but today, only 8 percent of full-time salaried workers fall below the salary threshold and are automatically eligible for overtime pay."[65] However, these statistics ignore the revolutionary changes to our economy since the 1975 salary increases and certainly since Congress passed the FLSA in 1938. Thus, the alleged changes in the number of exempt employees cannot withstand even cursory scrutiny or provide support for the Department's proposal.

One indicator of exempt status is level of education – not only for the professional exemption, but for all of the white collar exemptions. Possession of a Bachelors, Masters or Doctoral degree is a key indicator that an employee, using that degree in his work, is performing job duties at a sufficiently high level to qualify for the exemption. According to U.S. Census data, in 1940, only 4.6 percent of Americans had completed four years of college, increasing to 11 percent by 1970. Today, 34 percent of Americans hold Bachelors, Masters or Doctoral degrees.

In addition, the American economy has steadily moved away from blue collar manufacturing jobs that could be performed by unskilled and low-skilled workers to white collar jobs in service industries which require employees to perform job duties requiring more knowledge and judgment. In 1939, the year after Congress passed the FLSA, 35.5 percent of American workers were employed in manufacturing, but by 2014, that proportion had fallen to 10.4 percent. During the same time period, the more educated workforce in the professional and business services sector grew from 7.4 percent of all jobs in 1939 to 16.3 percent of jobs in 2014, according to the BLS Current Employment Statistics surveys.

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[62] 28 FR at 7005; 28 FR 9505, 9506 (Aug. 30, 1963)

[63] 28 FR at 7005.

[64] *Id.*

[65] *5 Million Reasons Why We're Updating Overtime Protections*, Secretary Tom Perez (July 1, 2015), available at http://blog.dol.gov/2015/07/01/5-millions-reasons-why-were-updating-overtime-protections/.

These two incontrovertible facts can lead to only one conclusion: Today, more employees are performing exempt executive, administrative and professional work than ever before in the history of the United States. Thus, there is no justification for increasing the percentile used to set the salary level in an attempt to bring the same percentage of employees within the overtime protections as there were in 1975.

C. THE DEPARTMENT'S 20TH PERCENTILE METHODOLOGY IN 2004 WAS SUFFICIENT TO ACCOUNT FOR CHANGES IN THE DUTIES TESTS

The Department's sole, but oft-repeated justification for proposing a salary level at the 40th percentile – quadrupling the percentile used in 1958 – is that the 2004 salary level was too low to adequately compensate for changes in the duties tests:

- "The proposed increase to the standard salary level is also intended to address the Department's conclusion that the salary level set in 2004 was too low to efficiently screen out from the exemption overtime-protected white collar employees when paired with the standard duties test."[66]

- "The Department believes that the proposed salary compensates for the absence of a long test …."[67]

- "A standard salary threshold significantly below the 40th percentile, or the absence of a mechanism for automatically updating the salary level, however, would require a more rigorous duties test than the current standard duties test …."[68]

- "The Department set the standard salary level in 2004 equivalent to the former long test salary level, thus not adjusting the salary threshold to account for the absence of the more rigorous long duties test."[69]

- "The Department in the 2004 Final Rule based the new 'standard' duties tests on the short duties tests (which did not limit the amount of nonexempt work that could be performed), and tied them to a single salary test level that was updated from the long test salary (which historically had been paired with a cap on nonexempt work)."[70]

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[66] 2015 NPRM at 38517.
[67] *Id.*
[68] *Id.* at 38519.
[69] *Id.*
[70] *Id.* at 38526.

- "However, the higher percentile proposed here is necessary to correct for the current pairing of a salary based on the lower salary long test with a duties test based on the less rigorous short duties test, and ensure that the proposed salary is consistent with the Department's longstanding goal of finding an appropriate line of demarcation between exempt and nonexempt employees."[71]

- "The proposed percentile diverges from the percentiles adopted in both the 2004 Final Rule and the Kantor method because it more fully accounts for the Department's elimination of the long duties test."[72]

- "Based on further consideration of our analysis of the 2004 salary, the Department has now concluded that the $455 salary level did not adequately account for both the shift to a sample including all salaried workers covered by the part 541 regulations, rather than just EAP exempt workers, and the elimination of the long duties test that had historically been paired with the lower salary level. Accordingly, this proposal is intended to correct for that error by setting a salary level that fully accounts for the fact that the standard duties test is significantly less rigorous than the long duties test and, therefore, the salary threshold must play a greater role in protecting overtime-eligible employees."[73]

- "This is the first time that the Department has needed to correct for such a mismatch between the existing salary level and the applicable duties test. ... The creation of a single standard test based on the less rigorous short duties test caused new uncertainty as to what salary level is sufficient to ensure that employees intended to be overtime-protected are not subject to inappropriate classification as exempt, while minimizing the number of employees disqualified from the exemption even though their primary duty is EAP exempt work."[74]

- "However, although the Department recognized the need to make an adjustment because of the elimination of the long duties test, the amount of the increase in the required salary actually only accounted for the fact that the data set used to set the salary level included

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[71] *Id.* at 38529.
[72] *Id.*
[73] *Id.*
[74] *Id.*

nonexempt workers while the Kantor method considered only the salaries paid to exempt employees."[75]

- "Setting the standard salary level at the 40th percentile of earnings for full-time salaried workers would effectively correct for the Department's establishment in the 2004 Final Rule of a single standard duties test that was equivalent to the former short duties test without a correspondingly higher salary level."[76]

- To remedy the Department's error from 2004 of pairing the lower long test salary with the less stringent short test duties, the Department is setting the salary level within the range of the historical short test salary ratio so that it will work appropriately with the current standard duties test."[77]

Repeating the same assertion a dozen times does not make it true or justify quadrupling the Department's 10th percentile methodology from 1958 to the 40th percentile. The Department's assertion that the 2004 salary level was too low to adequately compensate for changes in the duties is problematic for several reasons.

First, as noted above, the 1958 data did not include retail employees, who generally earned less than the production employees who were included in that data.[78] Thus, an expanded 1958 data set that had included retail employees would have yielded a lower dollar threshold corresponding to the 10th percentile than the dollar threshold actually recommended in 1958.

Second, as the Department noted both in 2004 and in this rulemaking, the agency historically used salary data that included exempt employees only. The CPS data includes both exempt and non-exempt data, lumped together. As discussed more fully in section VI, the only attempt by the Department has ever made to distinguish between exempt and non-exempt employees in the CPS data was in 1998 when WHD staff attempted to assign probabilities on whether employees in a CPS job title were exempt. As every wage and hour investigator learns in her basic training class, and as stated in the Part 541 regulations, a "job title alone is insufficient to establish the exempt status of an employee."[79] In fact, more often than not, investigators find job titles misleading and also refuse to credit statements about duties in job descriptions because the "exempt or nonexempt status of any particular employee must be determined on the basis of whether

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[75] *Id.* at 38530.

[76] *Id.* at 38531.

[77] *Id. See also id.* at 38532, 38534, 38560, and 38562.

[78] *See, e.g.,* 28 FR at 7005; 28 FR at 9506.

[79] 29 C.F.R. § 541.2.

the employee's salary and duties meet the requirements" for exemption.[80] As investigators know, such determinations can only be made after interviewing witnesses who are familiar with the actual job duties performed. And now, in 2015, the DOL's guesses at identifying exempt versus non-exempt employees in the CPS data set is 17 years out of date! No apparent attempt has been made to duplicate or validate the Department's 17-year-old assumptions about job duties and exempt status. Thus, the Department's conclusion that the 20th percentile used in 2004 only accounted for the difference in the data is highly suspicious or totally unsupported. And, without this foundation, the superstructure built upon it collapses.

Third, the 2004 standard duties tests are not equivalent to the old "long" tests. For example, the pre-2004 "short" test for the executive exemption required only that the employee have a primary duty of managing the enterprise (or a recognized department or subdivision thereof) and customarily and regularly direct the work of two or more other employees.[81] The 2004 regulations added a third requirement: "the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight."[82] This new requirement under the standard test was taken from the pre-2004 "long" test.[83] Thus, the standard duties test for the executive exemption is more difficult to meet than the pre-2004 "short" test.[84] The Department's methodology for increasing the salary level makes no effort to acknowledge or account for this difference.

Fourth, the Department's reliance on the 1975 "long" test salary levels is similarly misplaced. The salary levels adopted in 1975 are anomalies. The Department set these rates in a very truncated process, without the benefit of a wage survey. The Department based the salary increase on the Consumer Price Index, rather than a percentile, but also stated that the increase was not "to be considered a precedent."[85] Yet, here in 2015, the Department is doing exactly that – using 1975 as a precedent – to the exclusion of all other comparators.

While the current standard duties tests do not include a 20 percent restriction (40 percent in retail or services establishments) on work activities that are not directly related to an employee's exempt duty, this does not have the significance that the Department

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[80] *Id.*

[81] 68 FR 15560 (April 23, 2003).

[82] 29 C.F.R. § 541.100.

[83] 2004 Final Rule at 22127.

[84] Should the Department review the public comments filed in response to the 2003 Notice of Proposed Rulemaking, it will find that most employer groups objected to this change.

[85] 40 FR 7091, 7092 (Feb. 19, 1975). During a private conversation in 2001 between incoming Wage and Hour Administrator Tammy D. McCutchen and Betty Southard Murphy, the Administrator in 1975, Ms. Murphy stated that the 1975 Final Rule was finalized before a wage survey could be completed so she could take up her new post as a Chair of the National Labor Relations Board.

would give it. Because of the 29 years that passed between the salary level increases of 1975 and 2004, the $155/$170 salary levels for exemption under the "long" duties tests, on which the Department so heavily relies, were barely above the minimum wage for a 40-hour workweek by 1980 (when minimum wage increased to $3.10 per hour) and below the minimum wage beginning in 1991 (when minimum wage increased to $4.25 per hour). Thus, in 2004, the "long" duties tests had been effectively inoperative for almost 25 years and were not functioning to distinguish between exempt and non-exempt employees. The Department's reasons, then, for not returning to a 20 percent restriction, already dead for 25 years, are even more compelling today with the 20 percent restriction now 36 years dead.[86]

Even without these significant faults in its analysis, the Department has failed to adequately justify quadrupling the historical 10th percentile to set the salary level based on the 40th percentile. The Department does not appear to have seriously considered less burdensome options: some percentile greater than 10 but lower than 40; using salary levels in lower wage regions or industries; using salary levels in rural areas and small businesses. Nor did the Department adequately explore options other than the percentile method. As set forth in the following section, examining all the possible methodologies and measures reveals that the 40th percentile methodology is an outlier – reverse engineered to get a pre-determined, desired result.[87]

D. THE DEPARTMENT'S PROPOSED MINIMUM SALARY LEVEL IS TOO HIGH UNDER ANY OTHER METHODOLOGY

The application of other measures and methodologies results in salary levels thousands of dollars below the $50,440 proposed by the Department. Although these other methodologies have not been applied as often as a percentile method, many have been considered by the Department over the years as an additional data point. The Department should not give such short shrift to this information, particularly as the results appear consistent between and among the other methodologies.

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[86] 2004 Final Rule at 22126-28.

[87] *See e.g., Updating Overtime Rules Could Raise the Wages for Millions*, Ross Eisenbrey (March 12, 2014) ("We are pleased that the president is directing the Department of Labor to update overtime regulations, a policy change that I have previously proposed. About 10 million workers could benefit from a rule that makes clear that anyone earning less than $50,000 a year is not exempt from overtime requirements and must be paid time-and-a-half for any work they do past 40 hours a week."), available at http://www.epi.org/publication/updating-overtime-rules-raise-wages-millions/.

1. Lower percentiles

If it uses the CPS data set for non-hourly paid workers,[88] the Department should use a lower percentile. A salary level at the 10th, 20th and 30th percentiles would be consistent with the history of the Part 541 regulations and better reflect the actual dividing line between exempt and non-exempt employees.[89] As shown in Table 1, the 10th percentile would result in a salary level of $26,000; over 30 percent of non-exempt hourly employees in the data set earn below that level. The 20th percentile would result in a salary level of $34,996; over 50 percent of non-exempt hourly employees earn below that level. The 30th percentile would result in a salary level of $40,820; almost 70 percent of non-exempt hourly employees earn below this level.

Table 1

Weekly Earnings Deciles by Categories of Workers Workers who usually work full-time (35+ weekly hours)

Decile	Non-Hourly Workers (1)	Hourly Workers (2)	Hourly and Non-Hourly (3)	Non-Hourly South + Retail (4)	Hourly and Non-Hourly South + Retail (5)
Min	$0	$0	$0	$0	$0
10	$500	$350	$384	$462	$360
20	$673	$400	$480	$600	$440
30	$785	$480	$576	$738	$520
40	$923	$540	$673	$858	$611
50	$1,058	$600	$788	$962	$730
60	$1,250	$700	$942	$1,153	$865
70	$1,480	$803	$1,134	$1,346	$1,000
80	$1,826	$1,000	$1,385	$1,654	$1,250
90	$2,308	$1,287	$1,923	$2,212	$1,731
Max	$2,885	$2,885	$2,885	$2,885	$2,885
Mean	$1,248	$738	$978	$1,162	$909
Median	$1,058	$600	$788	$962	729.6
Mode	$2,885	$400	$2,885	$2,885	400
SE Mean	0.103	0.061	0.064	0.152	0.092338347

Source: Current Population Survey, Public Use Microdata File, Merged 12 months outgoing rotations (Earner Study) supplement.

[88] As discussed in section VI below, the Department errs by relying solely on CPS data. However, if the Department will not use alternative (and better) data sources, we suggest that the agency should consider alternative sets of CPS data in setting the salary level.

[89] 1958 Kantor Report at 6-7 (10th percentile); 1963 Final Rule, 28 FR at 7005 (13th and 17th percentile of retail employees); 2004 Final Rule at 22168-69 & Table 3 (10th, 15th and 20th percentiles).

2. Earnings in the lowest wage regions and industries and in small businesses and communities

Since 1940, the Department has considered salaries in the lowest wage regions and industries and in small businesses or rural communities.[90] As shown in Table 1, setting the salary level at the 10th percentile of earnings in the South and retail sectors would result in a salary level of $24,024; over 20 percent of non-exempt hourly employees in the data set earn below that level. The 20th percentile would result in a salary level of $31,200; almost 40 percent of non-exempt hourly employees earn below that level. The 30th percentile would result in a salary level of $38,376; over 50 percent of non-exempt hourly employees earn below this level. The 40th percentile would result in a salary level of $44,616; almost 60 percent of non-exempt hourly workers earn below this level.

The Department's proposal to set the salary level at the 40th percentile of earnings for all non-hourly paid employees nationwide would have a disproportionate impact on businesses in states such as Arkansas, Florida, Louisiana, Mississippi, North Carolina, Oklahoma, Tennessee and West Virginia where more than 50 percent of non-hourly paid workers earn less than $970 per week ($50,440 annually).[91] In fact, the 40th percentile of non-hourly paid employees is below $970 in 26 states.[92] If the Department refuses to apply a lower percentile to set the salary level, the Department should consider setting the salary level based on the 40th percentile in the three states with the lowest salaries – Louisiana, Mississippi and Oklahoma – or, at $784 per week ($40,786).[93]

Because of the Department's refusal to grant an extension of the comment period,[94] the Chamber cannot provide data on salary levels of exempt employees in small businesses and communities. However, a 2013 study found that the average annual

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[90] 1940 Stein Report at 32; 1949 Weiss Report at 14-15; 1958 Kantor Report at 5-6; 1963 Final Rule, 28 FR at 7705; 1970 Final Rule, 35 FR at 884; 2004 Final Rule at 22168-69.

[91] *See Oxford Economics Study* (Aug. 18, 2015), attached as *Appendix B*.

[92] *Id.* (Alabama, Arkansas, Florida, Georgia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah and West Virginia)

[93] *Id.*

[94] The Chamber, as well as many others, requested an extension of the comment deadline. *See Appendix C.* The Chamber's request was specifically predicated on the need to conduct more research and do the work the Department would not. Alas, despite signals that an extension would be granted, the definitive rejection of the request was not received until Monday August 31.

salary for a small business *owner* is only $68,000.[95] The Department should gather and examine such data itself before issuing a final rule.[96]

3. Relationship to the minimum wage

The Department should also consider the relationship between the minimum wage and the Part 541 salary levels. As shown in Table 2, in years when the Department has increased the Part 541 salary level, the ratio of the salary level to minimum wage spanned from a low of 1.85 in 1975 to a high of 6.25 in 1949. Applying the median of 2.38 would result in a salary level of $690.20 per week ($35,890.40 annually).

Table 2

Year	Minimum Wage		Part 541 Salary Levels				Ratio			
	Per Hour	Weekly @ 40	Exec	Admin	Prof	Short	Exec	Admin	Prof	Short
1938	$0.25	$10	$30	$30	$30		3.00	3.00	3.00	-
1940	$0.30	$12	$30	$50	$50		2.50	4.17	4.17	-
1949	$0.40	$16	$55	$75	$75	$100	3.44	4.69	4.69	6.25
1958	$1.00	$40	$80	$95	$95	$125	2.00	2.38	2.38	3.13
1963	$1.25	$50	$100	$100	$115	$150	2.00	2.00	2.30	3.00
1970	$1.60	$64	$125	$125	$140	$200	1.95	1.95	2.19	3.13
1975	$2.10	$84	$155	$155	$170	$250	1.85	1.85	2.02	2.98
2004	$5.15	$206	$455	$455	$455		2.21	2.21	2.21	-
2015	$7.25	$290	$455	$455	$455		1.57	1.57	1.57	-

4. Historical annual percentage of increases

Historically, with only two exceptions, as shown in Table 3 below, the Department has increased the salary levels at a rate of between 2.78 percent and 5.56 percent per year, with a median of 4.25 percent. The Department's proposed increase to $50,440 represents an increase of 9.43 percent per year.[97] Over the last decade, salaries did not increase on average by 9.43 percent annually. Employment Cost Index data from BLS shows that for 2004 through 2014, earnings for all wage and salary workers

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[95] "*And, the Average Entrepreneur's Salary Is . . .*", Business News Daily (Oct. 18, 2013), *available at* http://www.businessnewsdaily.com/5314-entrepreneur-salaries.html.

[96] Considering salaries paid to exempt employees in small businesses is particularly important given the $500,000 in annual gross volume of sales required for enterprise coverage under the FLSA, 29 U.S.C. § 203(s)(1)(ii), has not been amended since 1989. Today, the $500,000 standard excludes only the smallest of small business from the FLSA. The Small Business Administration, for example, defines nonmanufacturing small businesses as those with $7.5 million in average annual receipts. *See* https://www.sba.gov/content/summary-size-standards-industry-sector.

[97] This percentage rate is the average per year across the 12 year period. It is not the compound growth rate.

increased 27.1 percent cumulatively over the period – 2.7 percent average annual change (2.2 percent per year compound rate). For the subset of private sector workers in management, professional and related occupations, the cumulative earnings increase for 2004 through 2014 was 32.5 percent, equivalent to a 2.6 percent average yearly percent change. The Department has never before doubled the salary levels for exemption in a single rulemaking, let alone increasing the salary levels by 113 percent. Applying the 4.25 percent annual median increase for 12 years (2004 to 2016, when the final rule is expected to issue) results in a salary level of $687 per week ($35,727 annually).[98]

Table 3				
Year	Salary Level		Percentage Increase	
			Total	Per Year
1938	$30	All		
1940	$30	Exec	0.00%	
	$50	Admin, Prof	66.67%	33.33%
1949	$55	Exec	83.33%	9.26%
	$75	Admin, Prof	50.00%	5.56%
	$100	Short Test		
1958	$80	Exec	45.45%	5.05%
	$95	Admin, Prof	26.67%	2.96%
	$125	Short Test	25.00%	2.78%
1963	$100	Exec, Admin	25.00%	5.00%
	$115	Prof	21.05%	4.21%
	$150	Short Test	20.00%	4.00%
1970	$125	Exec, Admin	25.00%	3.57%
	$140	Prof	21.74%	3.11%
	$200	Short Test	33.33%	4.76%
1975	$155	Exec, Admin	24.00%	4.80%
	$170	Prof	21.43%	4.29%
	$250	Short Test	25.00%	5.00%
2004	$455	All	82.00%	2.83%
2016	$970	All	113.19%	9.43%

5. *Employment Cost Index*

As discussed above, the BLS Employment Cost Index data from BLS shows that for 2004 through 2014, earnings for all wage and salary workers increased at an average rate of 2.2 percent per year. Earnings for private sector workers in management, professional and related occupations increased at a 2.6 percent yearly average. Applying

[98] Calculated as an average annual change, not a compound growth rate.

these average changes growth rates for each of 12 years (2004 to 2016) to the current salary level of $455 per week ($23,660 annually) would result in an updated salary level of between $590.78 per week ($30,720.30 annually) and $619.13 per week ($32,194.60).

6. Comparing state law minimums

The Department should also consider the minimum salary levels required for exemption under State law. Just like the minimum wage, States may set higher standards for exemptions from state overtime requirements. In New York, the minimum salary level for exemption is $34,124 (increasing to $35,100 in 2016).[99] In California, the minimum salary level is currently $37,440 annually (increasing to $41,600 in 2016).[100] Thus, the Department's proposed salary level of $50,440 is $8,840 higher than the salary level that will be required for exemption in California in 2016 and $15,340 higher than the salary level that will be required for exemption in New York in 2016.

7. Comparing salary levels for exempt federal employees

Historically, the Department has also looked to salaries paid to exempt employees of the federal government. In 1949, for example, the Department stated, "One important guide in determining at what point an employee should be considered an administrative employee rather than a clerk is to be found in the practice of the Government itself."[101] At that time (in the clerical, administrative and fiscal group), the federal government had reserved grades 1 to 6 for clerical employees, grades 7 to 14 for administrative employers, and grades 15 and 16 for executive employees.[102] In determining an appropriate salary level, the Department looked to average salary for grades 6 and 7.[103]

Not much seems to have changed in this regard. On its web page, the federal Office of Personnel Management explains:

> The General Schedule has 15 grades – GS-1 (lowest) to GS-15 (highest). Agencies establish (classify) the grade of each job based on the level of difficulty, responsibility, and qualifications required. Individuals with a high school diploma and no additional experience typically qualify for GS-2 positions; those with a Bachelor's degree for GS-5 positions; and those with a Master's degree for GS-9 positions.[104]

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[99] 12 NYCRR § 142-2.14.

[100] Cal. Lab. Code § 515(a).

[101] 1940 Stein Report at 30-31.

[102] *Id.*

[103] *Id.*

[104] *See* https://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/.

Although some employees holding Bachelor's degrees do not perform the duties required for the Part 541 exemptions, federal employees with Master's degree are unlikely to be classified as non-exempt. Thus, the dividing line between exempt and non-exempt federal employees is most likely at GS-7, the mid-point between GS-5 where some employees may perform exempt duties and GS-9 where most federal employees likely are exempt. As shown in *Appendix D*, the salary at GS-7, Step 1 for 2015 is $34,622; GS-7 Step 5 is $39,282; and GS-7 Step 6 is $40,437. Federal employees with Master's degrees start in GS-9, Step 1at $42,399.

E. THE DEPARTMENT'S PROPOSED $50,440 SALARY LEVEL IS PARTICULARLY INAPPROPRIATE FOR THE NON-PROFIT, GOVERNMENT AND HEALTHCARE SECTORS WHICH CANNOT INCREASE PRICES TO OFFSET COSTS

Employee advocates often argue that the increased costs of a higher minimum wage or paying additional overtime can be offset by simply raising prices. These advocates, and the Department, fail to consider the impact of a $50,440 salary level on sectors that cannot raise prices. Non-profits, for example, primarily rely on private donations and government grants for their revenues. State and local governments rely on taxes that can be increased only through elections or legislation (and not very easily). Many employers in the healthcare industry depend on reimbursements from Medicaid, Medicare and private insurance – which will not increase just because the Department raises the salary level for exempt employees. Thus, none of these sectors can raise prices to increase the revenue needed to absorb the costs of a 113 percent increase to the salary level. The only option for non-profit, government and healthcare employers is to reduce services by decreasing headcount and hours worked. For healthcare employers, however, reducing services often is not an option either because of laws requiring a minimum level of service. Thus, employers in these sectors will face significant hardships and the people who rely on their operations will be forced to go without these services.

As of September 2, 2015, almost 200 commenters have posted comments at www.regulations.gov expressing concerns regarding the impact of the proposed salary level increase on non-profits. Perhaps this was the motivation for Administrator David Weil's recent blog post, "*Non-Profits and the Proposed Overtime Rule,*" which attempts to assure non-profits organizations that they "are not covered enterprises under the FLSA, however, unless they engage in ordinary commercial activities that result in sales made or business" of $500,000 or more per year.[105] Few non-profit organizations are likely to be fooled into believing they need not comply with the FLSA or can ignore the Department's changes to the Part 541 regulations. As acknowledged in the blog, the FLSA minimum wage and overtime requirements also apply to any employee of a non-profit organization who makes out-of-state phone calls, mails information or conducts business via the U.S. mail, orders or receives goods from an out-of-state supplier (e.g.,

[105] *See* http://blog.dol.gov/2015/08/26/non-profits-and-the-proposed-overtime-rule/.

ordering from Amazon.com), handles credit card transactions, or performs the accounting or bookkeeping for any of these activities. The Department has stated that it "will not assert individual coverage for employees who perform this type of work only on occasion, and for an insubstantial amount of time." But that is scant protection in a modern world dominated by interstate commerce activities via the internet. Further, a commitment by the Department not to enforce does not prohibit employees from bringing private collective action lawsuits.

F. THE DEPARTMENT'S PROPOSAL TO CREDIT NON-DISCRETIONARY BONUSES TOWARDS THE SALARY REQUIREMENT IS NOTHING MORE THAN A RUSE

The Department also seeks comments on whether "to permit nondiscretionary bonuses and incentive payments to count towards partial satisfaction of the salary level test."[106] Specifically, the Department proposes to allow employers to satisfy up to 10 percent of the standard weekly salary level with nondiscretionary bonus payments paid out monthly or less frequently.[107] Although the Chamber supports allowing bonuses to count toward the salary requirements, the Department's proposal so limits when such credits could be taken that very few of our members would benefit or benefit in a manner sufficient to offset added administrative costs.

First, bonuses are generally not paid on a monthly or less frequent basis. Providing exempt employees with quarterly and annual bonuses, however, is the more common way bonuses are paid. Thus, we ask the Department to allow credit for all nondiscretionary bonuses regardless of the frequency of payment.

Second, the Department should also clarify the meaning of the term "nondiscretionary" bonus. We suggest adopting the FLSA regulation at 29 C.F.R. § 778.211(b) providing that a bonus is nondiscretionary unless the employer "retains discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid." Examination of the WHD's enforcement database will no doubt establish that many employers err when calculating the regular rate. The confusion will be exacerbated if the Department adopts different definitions of discretionary versus nondiscretionary bonuses for exempt versus non-exempt employees.

Third, the Department should allow employers to take credit for all types of compensation includable in the regular rate of pay under 29 U.S.C. § 207(e) – including commissions, *per diem* payments and car allowances that are not reimbursements for

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[106] 2015 NPRM at 38536.

[107] *Id.* at 38535-36.

business expenses, and profit-sharing payments under plans that do not meet the requirements of 29 C.F.R. Part 549.[108]

Fourth, unless the Department reconsiders its proposed $50,440 salary level, a limit of 10 percent (or, $5,044) is too low to provide any relief or make the additional administrative burdens worth the effort.

Finally, without the opportunity for make-up payments as under the highly compensated test, the Department's proposal would be very difficult to implement.

G. WITHOUT A PRO-RATA PROVISION, THE DEPARTMENT'S NEW SALARY LEVEL WILL INTERFERE WITH PART TIME PROFESSIONAL POSITIONS

The Department's proposed minimum salary level is so high that it would effectively prevent many current part time professionals from maintaining their positions. One solution to this, other than reducing the salary level significantly, would be to provide a pro-rated salary level so that part time professionals would be able to take advantage of the flexibility and benefits they have come to enjoy.

Under the current regulations, an employee who performs tasks that clearly meet one or more of the exemption duties tests can be classified as exempt so long as his or her salary exceeds $23,660 per year. Thus, a part-time employee working a 50 percent schedule can qualify as exempt so long as he or she works in a position that has a full time salary of approximately $48,000 per year. This is true not because the full-time equivalent salary is $48,000, but because the part-time salary of $24,000 is still in excess of the regulated minimum.

Under the Department's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, that employee working a 50 percent schedule would need to be working in a position earning more than $100,000 on a full-time basis. Without a pro rata provision, the number of employees who will be eligible for part-time exempt employment will be significantly limited. This limitation will have a disproportionate impact on women in the workplace, and, in particular, likely will impact mothers who may be seeking to re-enter the workplace as professionals, but not on a full-time basis. Similarly, older workers looking to pursue a phased retirement would likely be disadvantaged by the Department's increased minimum salary level.

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[108] The Department's assumption that only sales employees earn commissions, 2015 NPRM at 38536, reveals a lack of understanding regarding compensation plans in the private sector. Many exempt employees who perform little direct sales work share commissions: A branch manager in a real estate brokerage often shares the commissions for homes sold by the agents working in the branch. Commission sharing is prevalent in the insurance industry, where a manager who provides a junior agent with training and marketing consulting can be entitled to part of the commission. Also, it is common in the retail industry for store managers and assistant managers to receive compensation based on a percentage of sales or profits in the store.

If the Department permitted the salary to be pro-rated, however, employers would be far more likely to allow such arrangements. We therefore urge the Department to add a pro-rata provision to the regulations, regardless of the salary level ultimately adopted in a final rule.

H. If The Department Moves Forward With a 113 percent Increase to the Salary Level, the Department Should Provide a One-Year Effective Date and Phase in the Salary Increase Over Five Years

The Department has proposed a 113 percent increase to the standard salary level, which is unprecedented in the 77-year history of the white collar exemptions. Unless the Department lowers the salary level in the final regulations, employers will need a significant period of time to comply with the new requirements – even more time if the Department also moves forward with changes to the duties tests for exemption.

Employers will need to familiarize themselves with the final regulation, analyze their workforce, and determine how to comply. This process will require employers to identify all exempt employees earning a salary less than the new required level; evaluate whether to comply by providing a salary increase or reclassifying some or all of such employees to non-exempt; decide whether to pay reclassified employees on an hourly or salaried basis; and draft new compensation plans for reclassified employees. Employers will also need to evaluate: whether they need to limit the hours employees work; whether they can still afford to pay bonuses; what adjustments are necessary to benefit plans; and how they will set the new hourly rates or salaries. Finally, employers will need time to communicate the changes to employees and implement the changes.

Thus, the Chamber requests that regardless of what new salary level the Department chooses, it set an effective date for one year after publication of the final rule, as it did for the revisions to the companionship services exemption regulation.

Additionally, if the proposed salary level is finalized, the Department should phase in the salary increase over five years, raising the salary level by approximately 22 percent per year. This would be similar to the way minimum wage increases – involving a much lower percentage change and not requiring extensive evaluation and reclassification processes – have been implemented. By phasing in the salary increase, employers would know well in advance what the salary level would be and be able to better prepare their budgets. Even with such a phase-in, the salary increases required would be unprecedented in the private sector. According to the BLS Employment Cost Index, 12-month percent change data, private sector wages and salaries have only increased between 1.6 percent and 2.8 percent annually over the last decade.

II. THE DEPARTMENT SHOULD ABANDON ITS PROPOSAL TO INCREASE THE SALARY LEVEL FOR THE HIGHLY COMPENSATED TEST

The Department's proposal to increase the total annual compensation required under the highly compensated test at the 90th percentile of all non-hourly paid employees (estimated at about $122,000) suffers from the same flaws as described above and in section VI for the standard salary level. The Department should set the highly compensated test using actual salary levels of exempt employees working in the South and in the retail sector that would meet the highly compensated exemption requirements. Here, too, study of wages paid to federal employees who inevitably qualify for the FLSA white collar exemptions is instructive. In the 2015 federal General Schedule, only the three highest of 150 pay bands would qualify as highly compensated under the Department's proposal: grade 15, step 8 ($125,346); grade 15, step 9 ($128,734); and grade 15, step 10 ($132,122).[109]

These employees have come to expect to have the flexibility and other benefits of a salaried position. In many cases, they have college or other higher education degrees. For them to be reclassified, so that they will have no greater status or benefits than someone with far less education and experience, will be tremendously disruptive and dispiriting. Furthermore, employers may be inclined to try and reclassify these employees as exempt under one of the standard duties tests which will create enforcement and litigation risks. This is a change in search of a problem – the Department should not finalize this salary increase.

III. THE DEPARTMENT'S PROPOSAL FOR AUTOMATIC ANNUAL SALARY LEVEL INCREASES IS CONTRARY TO CONGRESSIONAL INTENT, VIOLATES THE ADMINISTRATIVE PROCEDURE ACT, IGNORES 77 YEARS OF REGULATORY HISTORY, WILL HAVE A RATCHETING EFFECT, AND WOULD IMPOSE SIGNIFICANT ADDITONAL BURDENS ON EMPLOYERS

Automatic annual increases to the salary levels is a tremendous concern as it ensures the business community will never again be allowed to participate in a public debate regarding the salary levels. The Department's proposal for automatic salary level increases raises significant issues regarding the Department's authority and responsibility under section 13(a)(1) of the FLSA – questions that could mire this rulemaking in litigation. The Chamber suggests that the Department abandon this proposal.

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[109] The federal government also provides locality pay for employees in some metropolitan areas to off-set the high cost of living in these urban areas. But as discussed above, historically, the Department has set salary levels looking to salaries earned by exempt employees in smaller communities and lower wage regions. Thus, the Department cannot justify using the 28.72 percent locality pay adjustment for New York, for example, or the 35.15 percent adjustment for San Francisco.

First, there is no evidence that Congress intended that the salary level test for exemption under section 13(a)(1) be indexed. In the 77-year history of the FLSA, Congress has never provided for automatic increases of the minimum wage, although state minimum wages are sometimes indexed. Nor has Congress indexed the minimum hourly wage for exempt computer employees under section 13(a)(17) of the Act, the tip credit wage under section 3(m) or any of the subminimum wages available in the Act. Although Congress has provided indexing under other statutes, it has never done so under the FLSA.

Second, the regulatory history of Part 541 provides no precedent for indexing. Public commenters have suggested automatic updates to the salary levels in at least two past rulemakings. In 1970, for example, a "union representative recommended an automatic salary review" based on an annual BLS survey, the National Survey of Professional, Administrative, Technical, and Clerical Pay.[110] The Department quickly dismissed the idea as "needing further study," although stating that the suggestion "appear[ed] to have some merit particularly since past practice has indicated that approximately 7 years elapse between amendment of these salary requirements."[111] However, the "further study" came in 2004, after *29 years* had elapsed between salary increases. Nonetheless, in 2004, the Department rejected indexing as contrary to congressional intent, disproportionately impacting lower-wage geographic regions and industries, and because the Department intended to do its job:

> [S]ome commenters ask the Department to provide for future automatic increases of the salary levels tied to some inflationary measure, the minimum wage or prevailing wages. Other commenters suggest that the Department provide some mechanism for regular review or updates at a fixed interval, such as every five years. Commenters who made these suggestions are concerned that the Department will let another 29 years pass before the salary levels are again increased. The Department intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur. The salary levels should be adjusted when wage survey data and other policy concerns support such a change. Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6.5 times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze

[110] 35 FR 883, 884 (Jan. 22, 1970).
[111] *Id.*

> the minimum hourly wage for the computer exemption at $27.63 (6.5 times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.[112]

Now, the Department seems to be admitting that it is incapable of doing its job:

> This history underscores the difficulty in maintaining an up-to-date and effective salary level test, despite the Department's best intentions. Competing regulatory priorities, overall agency workload, and the time-intensive nature of notice and comment rulemaking have all contributed to the Department's difficulty in updating the salary level test as frequently as necessary to reflect changes in workers' salaries. These impediments are exacerbated because unlike most regulations, which can remain both unchanged and forceful for many years if not decades, in order for the salary level test to be effective, frequent updates are imperative to keep pace with changing employee salary levels. Confronted with this regulatory landscape, the Department believes automatic updating is the most viable and efficient way to ensure that the standard salary level test and the HCE total annual compensation requirement remain current and can serve their intended function of helping differentiate between white collar workers who are overtime-eligible and those who are not.[113]

The Department also states that automatic annual increases to the salary will "promote government efficiency by removing the need to continually revisit this issue through resource-intensive notice and comment rulemaking."[114]

The Department seems to be missing the point of the Administrative Procedure Act ("APA"): Congress *intended* rulemaking to be "resource-intensive," and section 13(a)(1)'s directive to the Department to define and delimit the white collar regulations "from time to time" seems fairly unambiguous; Congress *wants* the Department to "continually revisit" the Part 541 regulations. There is no indication that Congress wanted to put these regulations on auto-pilot.

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[112] 2004 Final Rule at 22171-72.

[113] 2015 NPRM at 38539.

[114] *Id.* at 38537.

The Department argues that Congress' failure to provide "guidance either supporting or prohibiting automatic updating" indicates it has authority to do so. However, equally plausible is the assumption that Congress felt no need to act because: (1) the Department, in the 77-year history of the FLSA, has never seriously considered indexing the salary level; (2) in 2004, the Department concluded that indexing would violate congressional intent; and (3) Congress' failure to ever index anything under the FLSA is sufficient guidance.

The Department also now states that the 2004 Final Rule "did not discuss the Department's authority to promulgate such an approach through notice and comment rulemaking."[115] In 2004, the Department concluded that indexing the salary level is "contrary to congressional intent." Once concluding that Congress did not give the Department authority to provide automatic increases to the salary level, the subject was closed; the Department could not then proceed to adopt indexing through the regulatory process. The Department provides no explanation of why its views on congressional intent have changed, and the Chamber is unaware of any legislative or legal development that would justify such a reversal.

Notice and comment rulemaking has achieved the purpose of the APA by ensuring vigorous public debate about the salary levels, including submission of salary information in public comments. The regulatory history shows that the Department has adjusted its proposals based on public comment. Proposed salary levels have been increased and decreased in the final regulations. For example, in 2004, in response to the public comments, the Department increased its proposed standard salary level from $425 per week to $455 per week, and the annual compensation for the highly compensated test from $65,000 to $100,000. The Department's proposal for automatic salary increases would end this public debate forever.

Similarly, the Department's proposed methodology for determining the amount of the annual increase is not well thought out. Particularly troubling is the proposal to reset the salary level every year using a "fixed percentile" – pulling the flawed CPS data, year-after-year, to determine the 40th percentile of full-time, non-hourly paid earnings.[116] The Department seems to favor this approach, but has apparently missed a huge problem: An index that recalibrates the 40th percentile, each year, based on salaries of non-hourly paid employees will be relying on an ever shrinking pool of such employees, causing an never ending, upward ratcheting effect. In response to the final rule, employers may give a salary increase to some exempt employees already near $50,440. However, employers will need to reclassify millions of other employees to non-exempt status. Although non-exempt employees may be paid on a salary, a significant percentage of reclassified employees will be converted to hourly pay. Consequently, the lowest paid salary

[115] 2015 NPRM at 38537.
[116] 2015 NPRM at 38540.

employees are likely to leave those ranks. As a result, the 40th percentile of employees remaining in the data set will correspond to a higher salary level, which will further reduce the number who meet the salary threshold. The following year that will increase even further the salary corresponding to the 40th percentile, etc. The result will be that tomorrow's 40th percentile and its salary level will be an even poorer proxy for the actual work performed by exempt employees because the measure itself will drive the outcome.

In a recent analysis, Edgeworth Economics illustrates how quickly the minimum salary level for exemption will increase: "If just *one quarter* of the full-time nonhourly workers earning less than $49,400 per year ($950 per week) were re-classified as hourly workers, the pay distribution among the remaining nonhourly workers would shift so that the 40th percentile of the 2016 pay distribution would be $54,184 ($1,042 per week), about 9.6 percent higher than it was in 2015." [117] This process would repeat each year as the lowest paid nonhourly workers fail the salary test and are re-classified as non-exempt hourly workers. After five years, as shown in the following charts from Edgeworth Economics, even in the absence of inflation, "the new 40th percentile of the nonhourly pay distribution would be $72,436 ($1,393 per week), which is about 46.6 percent more than the minimum salary threshold in 2015.[118]

This upward ratcheting "becomes more pronounced if more nonhourly workers who failed the salary test are re-classified into hourly positions each year."[119] For example, if half of the reclassified employees are paid hourly, the 40th percentile "will increase by 19.9 percent in the first year and by 94 percent over a five year period. This means that a salary threshold of $49,400 ($950 per week) in 2015 would increase to $95,836 ($1,843 per week) by 2020, even in the absence of inflation."[120]

In addition to the rulemaking and precedential issues, adopting the consumer price index as the measure for increasing the salary threshold would also be problematic as prices and salaries are related only in the long run. Year-to-year there have been wide differences in their rates of increase and shifts in job duties are more closely correlated with wages than prices.

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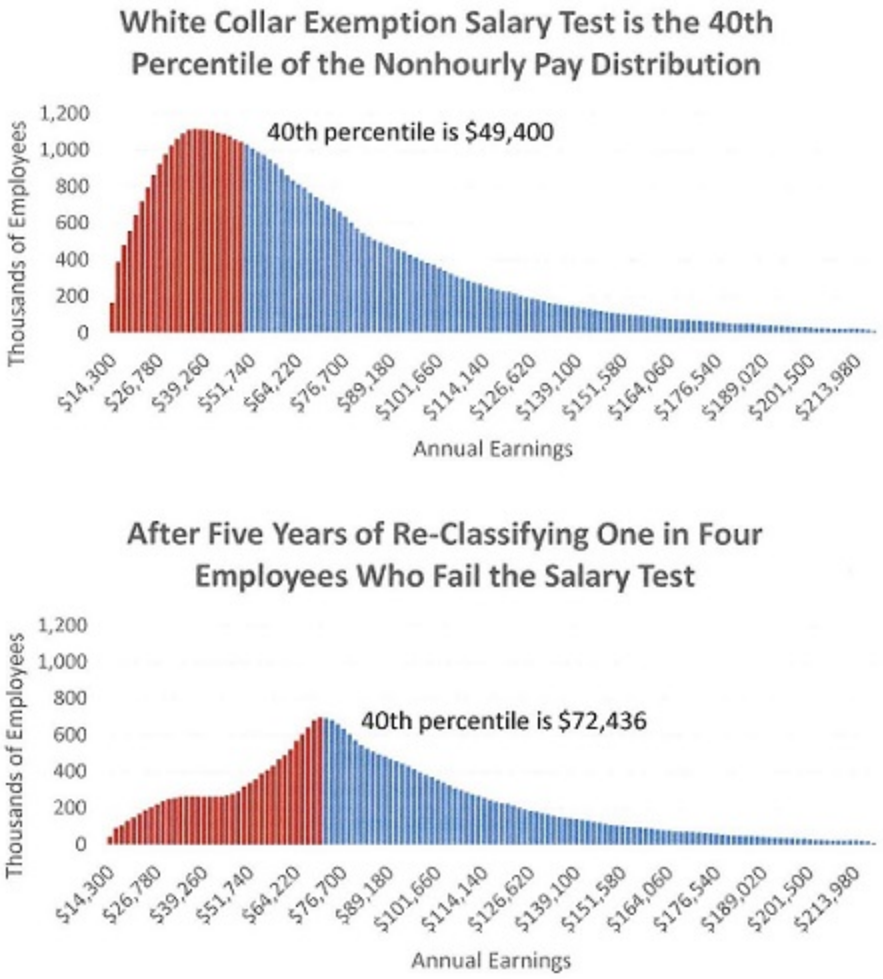
[117] *"Indexing the White Collar Salary Test: A Look at the DOL's Proposal,"* Edgeworth Economics (Aug. 27, 2015), *available at* http://www.edgeworthconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/

[118] *Id.*

[119] *Id.*

[120] *Id.*



The Department also fails to consider the impact of automatic increases during a future economic downturn. Employers will be denied the option of lowering salaries to quickly respond to decreased revenue experienced in bad economic times. Both of the proposed methodologies for setting the new salary levels will be slow to reflect actual economic conditions. Implementing automatic increases in the salary threshold, by whichever methodology, will guarantee increases at precisely the wrong times for employers and employees. If the Department wishes to cement a legacy of negatively impacting future employers, there could hardly be a better way.

Annual increases to the salary level would impose significant additional burdens on employers for no better reason than the Department's view that notice-and-comment rulemaking is difficult. The Department proposes automatic increases annually, providing employers only 60 days' notice of the new salary level. Employers need much more lead time to adjust to an increased salary level. First of all, unlike the federal government, private employers operate on any number of different fiscal years. Budgeting for the next fiscal year can begin six months or more before year end. For most companies, labor costs are a large component of the budget. The inability to

determine increases in labor costs until the Department issues a notice, which may or may not be timely for a company's budget cycle, could cause financial chaos. Businesses will have to escrow funds, delay capital expenditures, implement hiring freezes, etc., until the Department's notice is released and they can determine the impact of the salary increase.

Also, Chamber members have reported that reclassifying employees from exempt to non-exempt can take up to six months. The annual salary increase proposed by the Department will require an employer to: Analyze whether business conditions allow a salary increase or whether they need to reclassify employees as non-exempt; prepare new compensation plans for reclassified employees; develop materials to explain the reclassification to employees; review timekeeping and payroll systems to ensure compliance with the FLSA recordkeeping requirements and compliant overtime calculations; review or adopt new policies for the reclassified employees, including policies prohibiting off-the-clock work, when employees will be permitted to work overtime, payment for waiting time, training time and travel time, etc.; train the reclassified employees, and the managers who supervise them on recording time and other wage-hour topics. If the salary change is implemented as proposed, a large number of workers will have to be added to timekeeping systems. This may require server and system upgrades to account for the additional users. Best practices take time.

The Department contends that employers can increase their lead time by simply accessing a quarterly publication issue by BLS of the deciles of weekly wages of full-time salaried workers. This assumes the employer is familiar with the white collar regulations, knows how to get to the correct publication on the BLS website and, indeed, is familiar enough with the Department's process to know the level that will be chosen. Indeed even if all these conditions are met, there may still be differences between the level identified in a given BLS quarterly publication because of internal company requirements and the level used by DOL several months later.

IV. THE DEPARTMENT SHOULD NOT MAKE ANY CHANGES TO THE DUTIES TESTS

A. THE DEPARTMENT IS PRECLUDED BY THE ADMINISTRATIVE PROCEDURE ACT FROM MAKING ANY CHANGES TO THE DUTIES TESTS

While we accept that some increase to the salary level will ultimately result from this rulemaking, based upon the NPRM, changes to the duties test are unsupportable. Despite the Department's decision to focus solely on the salary level in its NPRM, it has not foreclosed the possibility of changes to the duties test. Indeed, without identifying any changes to the regulatory text or a specific proposal, the Department indicates modifications to the duties test remain under consideration. However, by declining to make "specific proposals to modify the standard duties test," the Department has wholly failed to provide commenters with adequate notice of any changes that may be made.

The expansive list of questions posed by the Department on the current duties test – which range from the broad "[w]hat, if any, changes should be made to the duties test?," to the specific "[s]hould the the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model?" – is insufficient to allow stakeholders a meaningful opportunity to comment on proposed regulatory changes. Simply inviting comment on a series of questions in the preamble appears to be a deliberate attempt to avoid the Department's obligations set forth by the Administrative Procedure Act, and certainly violates the spirit of the APA. The public should not be left to guess at an agency's intentions, particularly on a subject that has such widespread impact upon America's workforce – such as any change to the "white collar" exemption duties requirements.[121] Put differently, stakeholders cannot be asked to "divine" the agency's "unspoken thoughts."[122] However, that is precisely what the Department now asks us to do. Indeed, in an email to the publication Law360, the Department flouted its intentions to construe its obligations under the APA in the narrowest way possible:

> The DOL said in an email . . . that "while no specific changes are proposed for the duties tests, the NPRM contains a detailed discussion of concerns with the current duties tests and seeks comments on specific questions regarding possible changes. The Administrative Procedure Act does not require agencies to include proposed regulatory text and permits a discussion of issues instead."[123]

The Department's questions – without corresponding regulatory text – have utterly deprived the public of a meaningful role in this rulemaking. Any changes to the well-entrenched duties test will result in the upheaval of the past decade of case law and agency opinions and would be done without providing any substantive notice to the regulated community.[124] While the Department may attempt to bootstrap any changes to the duties test to cherry-picked comments, this would not shield the final rule from challenge. As the D.C. Circuit has held, the "fact that some commenters actually submitted comments" addressing the final rule "is of little significance," because "[c]ommenting parties cannot be expected to monitor all other comments submitted to an

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[121] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (finding that commenters could not have anticipated which "particular aspects of [the agency's] proposal [were] open for consideration.").

[122] *Arizona Public Serv. Co. v. EPA,* 211 F.3d 1280 (D.C. Cir. 2000) (citation omitted).

[123] *"Final OT Rule May Go Beyond Salary Hike, Lawyers Say,"* Law360 (June 30, 2015), *attached as Appendix E.*

[124] *See, e.g., Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (holding that final rule was not a logical outgrowth of "open-ended" questions that failed to describe what the agency was "considering or why").

agency."[125] Instead, the Department must "itself provide notice of a regulatory proposal," but has failed to do so.[126]

Should any changes to the duties test result from this rulemaking, the final rule also would fail to comply with Executive Orders 12866 and 13563, which require agencies, in promulgating regulations, to assess all costs and benefits of available regulatory alternatives.[127] In particular, an agency must consider the costs of enforcement and compliance prior to implementing regulations.[128] Because the Department has declined to proffer any specific proposal, the Department has not made any attempt to identify or quantify the costs that the regulated community will most certainly face. Stakeholders are left without the opportunity to evaluate the Department's estimates of the costs and benefits of any changes to the duties tests – as no such costs and benefits have been discussed. Thus, the requirements as set forth in Executive Orders 12866 and 13563 have not been met.

Executive Order 13563 also requires that regulations be adopted through a process that sufficiently involves public participation.[129] Specifically, Executive Order 13563 requires that an agency afford the public a "*meaningful opportunity* to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[130] In addition, Executive Order 13563 requires an agency, before issuing a notice of proposed rulemaking, to seek the views of those who are likely to be affected by such rulemaking.[131] The amorphous topics upon which the Department seeks comments through the current NPRM deprive stakeholders of this meaningful opportunity to express their views. The Chamber believes that should the Department seek changes to the Part 541 duties requirements, it would necessarily have to first notice the specific proposals being considered – and the costs and benefits associated with the changes – and then provide the public with a meaningful opportunity to comment.

The importance of allowing the public to comment on specific changes to regulatory text can be found in the regulatory history of Part 541 itself. In the 2004 rulemaking, for example, the AFL-CIO objected to the Department's proposal to change the word from "whose" to "a" as significantly expanding the scope of the exemptions. Because that was not the intended result, the Department did not implement the change:

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[125] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (an agency cannot "bootstrap notice from a comment") (citations omitted).

[126] *Id.*

[127] 58 FR 51735 (Oct. 4, 1993); 76 FR 3821-23 (Jan. 21, 2011).

[128] 58 FR 51735 (Oct. 4, 1993).

[129] 76 FR 3821-22 (Jan. 21, 2011).

[130] 76 FR 3821-22 (Jan. 21, 2011) (emphasis supplied).

[131] *Id.* at 3822.

> This change was made in response to several commenters, such as the AFL-CIO, who felt that the change from "whose" primary duty as written in the existing regulations to "a" primary duty as written in the proposal weakened this prong of the test by allowing for more than one primary duty and not requiring that the most important duty be management. As the Department did not intend any substantive change to the concept that an employee can only have one primary duty, the final rule uses the introductory.[132]

Thus, as the AFL-CIO acknowledged in 2004, words matter and even minor changes to seemingly innocuous words can have a significant, even if inadvertent, impact on the scope of the exemption.

Finally, if *any* changes to the regulatory text of the Part 541 duties tests are adopted in a final rule, the Department will be ignoring President Obama's "Open Government Initiative" issued on January 21, 2009, just one day after his inauguration, stated:

> My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establishment of a system of transparency, public participation, and collaboration.[133]

Refusing to allow public comment on specific changes to the regulatory text contradicts President Obama's commitment to transparency, public participation and collaboration. Before making any changes to the duties tests (similarly, before finalizing the methodology for any automatic salary increases), the Department should publish the specific changes to the regulatory text in a Notice of Proposed Rulemaking, and thus provide the public with a meaningful opportunity to participate and collaborate by filing comments on the proposed text.

B. DEFINITION OF PRIMARY DUTY

The Chamber opposes any revision to the duties test that introduces a quantitative requirement – whether made in reversion to a long/short duties test or otherwise. Such a change would upend the regulated community, adding substantial unjustified (and unexplored) costs and burdens on employers, and only serve to increase litigation. In its NPRM, the Department now looks to potentially nullify the established primary duties requirements contained in Part 541 by inquiring whether employees should be required to spend a specified minimum amount of time exclusively performing their primary duty in

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[132] 2004 Final Rule at 22131.

[133] *See* https://www.whitehouse.gov/open.

order to qualify as exempt, citing California's 50 percent primary duty requirement as an example.[134]

The Department's reference to California's 50 percent primary duty rule is particularly troubling because that state has realized the unintended effect of its so-called "bright-line" rule. Rather than decreasing litigation and uncertainty over classifications, California's rule has had the opposite effect – substantial litigation, as members of the California plaintiffs' bar have come to realize (and capitalize on) the extreme difficulty employers face in proving the amount of time employees spend on exempt versus non-exempt tasks. Indeed, such a rule places an enormous burden on employers to engage in extensive analysis and time testing, wading through the hour-by-hour – and in some cases minute-by-minute – tasks of their employees in order to defend their classification decisions. In addition, how is an employer (and even the Department) supposed to accurately measure the amount of time that an employee spends thinking about a problem and creating a strategy for the solution? Unlike most non-exempt tasks, exempt responsibilities often occur outside of the workplace at any hour of the day. Regardless of any effort to regulate around such ambiguities, the central issue will always remain what is – and what is not – exempt work?

The Department has already acknowledged that these precise concerns render quantitative testing impracticable. In 2004, responding to commenters who requested the addition of a quantitative test, the Department reasoned that such analysis unnecessarily adds complexity and burdens to exemption testing by, for example, requiring employers to "time-test managers for the duties they perform, hour-by-hour in a typical workweek".[135] Requiring employers to "distinguish[] which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes."[136] Establishing quantitative requirements needlessly muddles a process the Department asserts through its NPRM should be streamlined. As the Department noted in 2004, "[i]t serves no productive interest if a complicated regulatory structure implementing a statutory directive means that few people can arrive at a correct conclusion, or that many people arrive at different conclusions, when trying to apply the standards to widely varying and diverse employment settings."[137]

The Preamble to the 2004 Final Rule identified further concerns with requiring a strict delineation of time spent on exempt and non-exempt duties:

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[134] 2015 NPRM at 38543.

[135] 2004 Final Rule at 22126.

[136] *Id.* at 22127.

[137] *Id.*

> For example, employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees (see 29 CFR 516.3), nor are they required to perform a moment-by-moment examination of an exempt employee's specific duties to establish that that an exemption is available. Yet reactivating the former strict percentage limitations on nonexempt work in the existing 'long' duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied.[138]

Rather than solve any of the perceived problems with the primary duty test, a quantitative requirement would only create tremendous recordkeeping burdens on employers and add to employers' uncertainty over classifications. Such a quantitative requirement merely serves to incentivize plaintiffs' attorneys to systematically attack an employee's classification. The only people who would benefit from adding such a provision would be the plaintiffs' attorneys and the attorneys defending the employers.

The Chamber reminds the Department that, as part of its 2004 rulemaking, the Department evaluated – and rejected – prior proposals for a quantitative "bright-line" test such that California employs. Indeed, the Department warned:

> Adopting a strict 50-percent rule for the first time would not be appropriate . . . because of the difficulties of tracking the amount of time spent on exempt tasks. An inflexible 50-percent rule has the same flaws as an inflexible 20-percent rule. Such a rule would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens).[139]

The Department's reasoned analysis conducted in 2004 still holds true in 2015. Rather than focusing on a quantitative test, the 2004 Final Rule instead chose to focus on four nonexclusive factors for determining the primary duty of the employee:

> (1) The relative importance of the exempt duties as compared with other types of duties;
>
> (2) The amount of time spent performing exempt work;

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[138] *Id.* at 22126-27.

[139] *Id.* at 22186.

> (3) The employee's relative freedom from direct supervision; and
>
> (4) The relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.[140]

Under these factors, the amount of time spent may be considered, but is not indicative alone of an exempt status. Indeed, the 2004 Final Rule emphasized that:

> The time spent performing exempt work has always been, and will continue to be, just one factor for determining primary duty. Spending more than 50 percent of the time performing exempt work has been, and will continue to be, indicative of exempt status. Spending less than 50 percent of the time performing exempt work has never been, and will not be, dispositive of nonexempt status.
>
> . . . [T]he search for an employee's primary duty is a search for the "character of the employee's job as a whole." Thus, both the current and final regulations "call for a holistic approach to determining an employee's primary duty," not "day-by-day scrutiny of the tasks of managerial or administrative employees." *Counts v. South Carolina Electric & Gas Co*., 317 F.3d 453, 456 (4th Cir. 2003) ("Nothing in the FLSA compels any particular time frame for determining an employee's primary duty").[141]

The Chamber urges the Department to continue its application of the holistic approach developed in 2004 and summarily reject any requirement that duties must be measured.

C. CONCURRENT DUTIES PROVISION SHOULD BE MAINTAINED

The Department's proposal to eliminate or modify the "concurrent duties" provision (that lets an exempt employee perform both exempt and non-exempt tasks without jeopardizing the executive exemption) also gives the Chamber great cause for concern. Currently, the regulations provide:

> Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an

[140] 29 C.F.R. § 541.700.

[141] 2004 Final Rule at 22126-27.

> employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700 [related to primary duty test]. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work.[142]

Section 541.106 allows exempt employees such as store or restaurant managers to perform duties that are non-exempt in nature while simultaneously acting in a managerial capacity. If this "concurrent duties" provision is eliminated, it could mean the wholesale loss of the executive exemption for both assistant store managers and store managers, particularly in smaller establishments. Indeed, the Department has already noted in the NPRM that it has heard from concerned stakeholders in the retail and hospitality industry who stressed that "the ability of a store or restaurant manager or assistant manager to 'pitch in' and help line employees when needed" is a crucial aspect of their organizations' management culture and "necessary to enhancing the customer experience."[143]

Moreover, as it did with the primary duties test, the Department has already evaluated and resolved this issue in its 2004 rulemaking:

> The Department believes that the proposed and final regulations are consistent with current case law which makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption. Numerous courts have determined that an employee can have a primary duty of management while concurrently performing nonexempt duties. *See, e.g., Jones v. Virginia Oil Co*., 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks"); *Murray v. Stuckey's, Inc*., 939 F.2d 614, 617–20 (8th Cir. 1991) (store managers who spend 65 to 90 percent of their time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves" were exempt executives); *Donovan v. Burger King Corp*., 672 F.2d 221, 226 (1st

[142] 29 C.F.R. 541.106.

[143] 2015 NPRM at 38521.

> Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that his primary duty is management"); *Horne v. Crown Central Petroleum, Inc*., 775 F. Supp. 189, 190 (D.S.C. 1991) (convenience store manager held exempt even though she performed management duties "simultaneously with assisting the store clerks in waiting on customers"). Moreover, courts have noted that exempt executives generally remain responsible for the success or failure of business operations under their management while performing the nonexempt work. *See Jones v. Virginia Oil Co*., 2003 WL 21699882, at *4 ("Jones" managerial functions were critical to the success' of the business); *Donovan v. Burger King Corp*., 675 F.2d 516, 521 (2nd Cir. 1982) (the employees' managerial responsibilities were "most important or critical to the success of the restaurant"); *Horne v. Crown Central Petroleum, Inc.*, 775 F. Supp. at 191 (nonexempt tasks were "not nearly as crucial to the store's success as were the management functions'').[144]

In 2004, the Department reviewed the case law cited above and stated that it believed these cases accurately reflected the appropriate test of exempt executive status and was a "practical approach that could be realistically applied in the modern workforce, particularly in restaurant and retail settings."[145] Nothing has changed since 2004 to disturb the conclusion that the regulation "has sufficient safeguards to protect nonexempt workers."[146] Accordingly, no changes to the concurrent duties provision are necessary or warranted.

D. LONG/SHORT DUTIES TEST STRUCTURE

While no proposals have been proffered inviting specific comment, the Chamber opposes the general concept of a return to a "long/short" test or to the insertion of a quantitative requirement – California-derived or otherwise – to the duties test.

The Department suggests that it may return "to the more detailed long duties test" should, in its estimation, the minimum salary level not sufficiently succeed in demarcating between exempt executives and nonexempt employees. However, reversion to any iteration of the previously abandoned "long/short" test would entirely undermine

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[144] 2014 Final Rule at 22136-37.

[145] *Id. a*t 22137.

[146] *Id.*

President Barack Obama's direction that the Secretary "modernize and simplify the regulations."[147] This goal is plainly not met should the Department incorporate any form of the old quantitative prong contained in the prior long duties test. Nor is the goal furthered by returning to two tests instead of one standard test.[148]

Complicating the duties test by creating a tiered system – requiring employers to test multiple requirements under different scenarios – represents neither a modernization nor simplification of the analysis. Indeed, when the Department proposed merging the long/short test into a single duties test in its 2003 NPRM, the Department concluded:

> The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption.[149]

In eliminating the long/short duties test in favor of the current "primary duty" tests through the 2004 Final Rule, the Department advanced its goal to reform and simplify the regulations. Returning to two tests would reinsert just the issues already resolved by the 2004 updates. In particular, two tests would make it more difficult to determine the application of the duties test and it would create instability and uncertainty amongst the regulated community. In issuing the 2004 Final Rule, and crafting the primary duty tests, the Department reached a calibrated balance between the long/short

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[147] 2015 NPRM at 38517.

[148] For example, the pre-2004 regulations defined the term "bona fide executive" in the following manner:

> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
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> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent ... of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section ...; and
>
> (f) Who is compensated for his services on a salary basis at a rate not less than $155 per week ..., exclusive of board, lodging, or other facilities: Provided, that an employee who is compensated on a salary basis at a rate of not less than $250 per week ..., exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section. 29 C.F.R. § 541.1(a)-(f). The requirements outlined in section 541.1(a) through (e) were referred to as the "long" test, while the requirements outlined in the second sentence of section 541.1(f) were referred to as the "short" test.

[149] 2003 NPRM at 15563.

tests. For example, in addressing the executive exemption, the 2004 Final Rule retained the requirement that an exempt executive must have authority to "hire or fire" other employees or must make recommendations as to the "hiring, firing, advancement, promotion, or any other change of status," thus expanding the requirements beyond those previously found in the then existing "short" duties test.[150]

Indeed, as the Department recognizes in its NPRM, any increase in the salary level will have the result that "more employees performing bona fide EAP duties will become entitled to overtime because they are paid a salary below the salary threshold."[151] The resulting reduction in the number of employees who will qualify for an exemption to the FLSA's overtime requirements will impact the business community substantially. Such changes will only further be complicated by adding new requirements employers must contend with – just as having to address new varying exemption tests.

E. NEW JOB CLASSIFICATION EXAMPLES

The Department has invited commentary concerning what, if any, additional occupational titles or categories should be included as examples in the regulations, particularly with respect to positions in the computer industry. For instance, in the NPRM the Department expressed the view that a help desk operator whose responses to routine computer inquiries (such as requests to reset a user's password or address a system lock-out) are largely scripted or dictated by a manual that sets forth well-established techniques or procedures, would not possess the discretion and independent judgment necessary for the administrative exemption, nor would that individual likely qualify for any other Part 541 exemption.

The Chamber does not recommend the inclusion of any new job classification examples at this time because of the inability to review and comment on any such examples. For the Department to insert such examples in a final rule poses the same problems as noted above concerning the possibility of the Department inserting new regulatory text without proposing it.[152] However, to the extent that the Department includes additional examples of non-exempt positions, the Chamber alternatively requests

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[150] The Department balanced concerns raised by both the employee and employer communities in finalizing the current primary duties test contained in its 2004 Final Rule. For example, in response to the Department's proposed regulation revising the test to determine an executive exempt employee, the AFL-CIO commented, among others, that the proposed phraseology "*a* primary duty" weakened the test by allowing for more than one primary duty and not requiring that the most important duty be management. The Department agreed, replacing the word "a" with "whose", reinforcing its intent that an employee can only have one primary duty. 2004 Final Rule at 22131. Any attempt to undo the Department's fully vetted test – particularly in the absence of proposed regulatory text upon which the public can comment – may result in similarly unintended consequences. It further undermines the professed goal of simplifying the current regulations.

[151] 2015 NPRM at 38531.

[152] The Department seems to be evoking the now-abandoned opinion letter concept with this suggestion, however without the most important part: the fact-specific inquiry driven by a regulated party.

that the Department also provide examples of exempt versions of any added positions. For instance, if the Department follows through on its suggestion to include as an example the non-exempt "routine help desk operator," the Chamber would request that the Department simultaneously include an example of an exempt elevated help desk analyst, (*i.e*., one who receives computer inquiries that are not routine and require advanced troubleshooting techniques not dictated by a manual or help desk "script"). Only through such comparison of the job duties are the examples instructive to employers.

Additionally, the Chamber urges the Department not to revisit positions on which hundreds of millions of dollars in litigation costs have already been spent and which are well-settled by the courts. Positions such as pharmaceutical sales representatives and insurance claims adjusters have already been thoroughly adjudicated and found exempt.[153]

Revisiting such positions through regulation in an attempt to overturn court decisions would create massive uncertainty and instability, in direct contradiction to the stated goal of this rulemaking, not to mention effectively undoing the results of countless hours and hundreds of millions of dollars spent in litigation. Accordingly, the Chamber urges the Department to avoid disrupting years of precedent.[154]

V. COMPLIANCE ASSISTANCE AND ENFORCEMENT

Given the widespread effect of the proposed salary increases and the necessary compliance measures employers will have to undergo, the Chamber advocates a graduated implementation period of at least three years and an initial implementation period of at least one year. The one-year period is less than that provided for the final companionship exemption rule, which impacted just a small subset of the employers who will be impacted by the proposed Part 541 revisions. Once the final rule is published, employers must commence the time-consuming process of determining the impact upon individual organizations, which will undoubtedly include the reclassification of a subset of the workforce. Businesses must conduct a cost/benefit analysis with regard to all exempt employees currently earning less than the new minimum salary. The resulting

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[153] *See Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156 (2012) (holding pharmaceutical sales reps exempt under the outside sales exemption). *See also In re Farmers Ins. Exchange Claims Representatives' Overtime Pay Litigation,* 481 F.3d 1119 (9th Cir. 2007) (holding claims adjusters administratively exempt); *Robinson-Smith v. Gov't Employees Ins. Co*., 590 F.3d 886 (D.C. Cir. 2010) (same); *Talbert v. Am. Risk Ins.Co. Inc*., 405 Fed. Appx. 848 (5th Cir. Dec. 20, 2010) (same).

[154] We note that the Department has included computer employees as one category of exemption covered by this rulemaking, but has only adjusted the salary level for these under sec. 541-400 (b). The Chamber maintains its unequivocal objection to making any changes to the duties tests through final regulatory language, but urges the Department to pursue a *de novo* rulemaking that would propose more comprehensive changes so that, in addition to the professional exemption, computer employees could also be exempted under the administrative exemption.

increases in labor costs must be planned for and included in operating budgets, the timing and frequency of which varies from organization to organization. Therefore, the Chamber urges the Department to realistically assess the time in which the business community will need to implement any changes effectuated by the final rule.

Moreover, with any change comes opportunity. As we stated in our February 9, 2015 letter to Secretary Perez,[155] we would be remiss not to address the improvements in compliance assistance the Department should institute in combination with the final rule. In order to achieve and maintain effective regulatory compliance, the Wage and Hour Division must be willing to provide employers with meaningful compliance assistance and to support those employers who seek to self-correct identified concerns which will certainly result from any regulatory changes. A safe harbor should be extended for a reasonable period following the final rule to afford businesses the opportunity to fully assess their operations and ensure regulatory compliance. We also recommend instituting a Voluntary Settlement Program – similar to that utilized by the Internal Revenue Service – where employers who self-disclose a violation to the WHD can agree to pay 100 percent of back wages, but are not subject to a third year of willfulness back wages, liquidated damages or civil money penalties, and are issued WH-58 forms to obtain employee waivers.

Without corresponding compliance assistance, any changes instituted by the Department will punitively impact an employers, benefiting no one. Accordingly, the Chamber seeks a flexible and reasoned approach from the WHD to ensure that employers who seek to comply are given the assistance and support to do so.

VI. THE DEPARTMENT'S FUNDAMENTLY FLAWED ECONOMIC ANALYSIS GROSSLY UNDERESTIMATES THE COSTS OF THIS RULEMAKING

The Department has failed to apply seriously the principles of a thorough and objective regulatory economic cost/benefit analysis envisioned in Executive Orders 12866 (September 30, 1993) and Executive Order 13563 (July 11, 2011). As President Obama stated in Executive Order 13563, regulations "must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[156] Regulations should "promote predictability and reduce uncertainty," "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends," and "must take into account benefits and costs, both quantitative and qualitative."[157] To achieve these principles, President Obama reaffirmed

[155] A copy of the February 9, 2015 correspondence is attached under *Appendix F* for further consideration.

[156] E.O. 13563 at § 1(a).

[157] *Id.*

that each agency, including the Department of Labor, must "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs," "tailor its regulations to impose the least burden on society," and "quantify anticipated present and future benefits and costs as accurately as possible."[158]

These principles provide a framework for reasoned rulemaking against which the Department's economic analysis in this rulemaking must be judged. The Executive Orders reflect the purpose of the Administrative Procedure Act to provide for public participation in a structured, analytic rulemaking process. The framework provided by the Executive Orders helps to ensure that rulemaking decisions are made on the basis of demonstrated evidence and that the reasoning underlying a decision was documented and could be replicated. Rather than adding a burden to regulators, the requirements of the Executive Orders should be seen as a means of protecting the agency from charges of arbitrary and capricious action. If an agency diligently follows the requirements and intent of E.O.s 12866 and 13563 by making regulatory decisions based on rigorous regulatory impact analysis, the risk of costly litigation and attendant delay of needed action is reduced.

Four fundamental flaws in its economic analysis demonstrate that the Department has not complied with the Executive Orders, and thus, brings into question whether the Department's proposal will pass scrutiny under the Administrative Procedure Act:

1. Reliance on the Current Population Survey as the sole source of salary data.

2. Inadequate assessment of compliance costs, transfers, benefits, regulatory flexibility analysis and unfunded mandate impacts.

3. Inadequate analysis of the full costs and benefits of available alternatives; and

4. Inattention to the regulatory risks inherent in a sudden change in regulatory requirements and salary test adjustment procedures.

Each of these flaws is examined and discussed below.

A. THE DEPARTMENT'S RELIANCE ON THE CURRENT POPULATION SURVEY AS THE SOLE SOURCE OF SALARY DATA IS INAPPROPRIATE

In addition to proposing the unjustifiably high 40th percentile, the Department's proposal is further flawed because the agency relied solely on inappropriate Current Population Survey ("CPS") data. The Department's reliance on the CPS data is

[158] E.O. 13563 at § 1(b) & (c).

inappropriate on two levels: *First*, the CPS data is generally inappropriate because it does not provide information on key questions that need to be answered to determine reasonably the minimum salary for exemption. The Department could have obtained additional and more relevant data. *Second*, the Department has chosen to rely on a subset of the available CPS data that is particularly inappropriate. Other tabulations of the CPS data should have been considered by the Department to inform its salary test level determination. Consideration of the full range of alternative data tabulations necessarily leads to a different and lower minimum salary level.

The Current Population Survey data has been compiled, tabulated and analyzed monthly since 1948 by the Bureau of the Census and the Bureau of Labor Statistics. CPS data is a valuable national statistical resource which serves many useful purposes, and the purposes it serves best are those for which it was designed. The Current Population Survey was never intended or designed to serve as a basis to inform regulatory decisions regarding the salary level for the FLSA white collar exemptions, and thus, the CPS data is inappropriate as the sole or primary data source to rely upon to inform a regulatory decision on the minimum salary threshold for the white collar exemptions. The CPS data fails to provide complete and precise answers to the key questions that face the FLSA regulatory decision maker: How many employees perform bona fide executive, administrative or professional duties? What fixed salary amounts are bona fide exempt employees paid and what weekly hours do they work? What are the salaries or hourly rates of non-exempt employees supervised by bona fide exempt employees, and what hours do they work? How prevalent is it that employees are misclassified as exempt?

1. How many workers perform bona fide executive, administrative or professional duties required by Part 541

The actual total count of bona fide executive, administrative or professional workers is less important than the identification of actual workers who satisfy the duties test. Identification of bona fide exempt workers is the essential first step leading to a description of the range of salaries and the range of duties. The CPS only provides occupational titles, there are no questions about duties, authority, or other factors critical to the statutory definition of exempt workers.

The current regulation makes it clear that job title alone is insufficient to determine exempt status, and the rule proposed by the Department does not contemplate changing that:

> Sec. 541.2 Job titles insufficient. A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

This shortcoming of the CPS data is complicated by the fact that the job title and other information may be incomplete or erroneous for several reasons. The survey is based on brief, limited individual verbal responses. There is little follow up, so the interview record of Benjamin Franklin, for example, would miss important detail if his initial response was modestly to describe his occupation as "printer." The CPS interviews are brief and provide no opportunity for in-depth inquiry about job functions, duties and other details that are relevant to FLSA exempt status determination.

Another complication is that the individual subject is not always the direct respondent to CPS questions. The survey collects data about everyone in a household from a single respondent who tells what he or she knows about the occupation, earnings, hours worked, how they are paid and other characteristics of each household member. These responses, especially about other household members may be inaccurate, and there is little or no follow-up in the survey procedure to verify responses.

Since the CPS data only includes this imprecise and potentially incomplete or erroneous job title information, it totally fails to identify whether a person performs the duties of exempt executives, administrators or professionals as set forth in Part 541:

- For executives, the definition in the current regulation includes the requirement that the individual "customarily directs the work of two or more other employees," but the CPS data on which the Department relied for its analysis contains no information about whether a worker supervises the work of any other employee and, therefore, no information regarding putative numbers supervised.[159]

- For executives, the current regulation includes the requirement that an exempt executive must have the authority to hire or fire, promote or otherwise change the status of other employees or to make recommendations that are given particular weight in such decisions. Nothing in the CPS data relied upon by the Department provides any information about whether or not this requirement is met by any survey respondent.[160]

- Regardless of primary duties and other factors listed, any employee who owns at least a 20 percent equity share in the business and who is "active" in its management is exempt as a business owner. Nothing in the CPS data provides information on ownership at this level of detail.[161]

[159] 29 C.F.R. § 541.100.
[160] *Id.*
[161] 29 C.F.R. § 541.101.

- Exempt administrative employees must perform work requiring the "exercise of discretion and independent judgment with respect to matters of significance."[162] Nothing in the CPS data addresses the discretion or independent judgment exercised by any employee.

- For professional employees, the exemption requirement states that the job requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction."[163] The CPS data does contain information regarding the highest level of educational attainment of each respondent, but there is no indication of whether the education attained is relevant to the job in which the person is employed.

2. What fixed salary amounts are bona fide exempt employees paid and what weekly hours do they work

The current white collar regulations also require that an employee be paid a minimum amount on a salary basis, defined as "a predetermined amount" which "is not subject to reduction because of variations in the quality or quantity of the work performed."[164] The FLSA statute does not include any provision for the salary level and salary basis tests, but the Part 541 regulations establishing these tests have been recognized over the years as an exercise of agency discretion to facilitate easier administration and enforcement. It has been recognized consistently since the first salary test regulation was issued in 1938 that it is important to know how many legitimately exempt employees are excluded by any contemplated salary test line and to select a line that balances the joint objectives of minimizing the number of legitimately exempt individuals and of meeting the intent of the law to ensure that employees entitled to the FLSA overtime premium pay are provided that protection.

The CPS data does not address the details required to determine whether or not employees are paid a fixed and guaranteed salary (or fees), regardless of hours worked. The CPS data relied upon by the Department distinguishes only workers paid on an hourly basis (implying that weekly earnings vary with the hours worked) and categorizes all others as "non-hourly." All salary or fee based wages are included in non-hourly CPS data, but an unknown number of other non-qualifying wage payment methods are also included. For example, the "non-hourly" CPS data would include non-exempt inside sales employees paid 100 percent on commission and non-exempt employees paid on a piece rate. The CPS non-hourly worker category is at best a rough and imprecise measure of workers paid on the basis required for exempt status. No known evaluation

[162] 29 C.F.R. § 541.200.
[163] 29 C.F.R. § 541.300.
[164] 29 C.F.R. § 541.602.

studies or interviews have ever been conducted to determine what proportion of non-hourly workers represented in the CPS data actually are paid on a true salary or fee basis as required in the Part 541 regulations.

The CPS only provides a rough delineation of workers paid on an hourly basis versus those paid on all other bases, of which a fixed salary is a subset. The data collected in the CPS survey on hours worked – usual weekly hours and hours actually worked during the survey reference week – provide only a limited glimpse of the dimensions and context of employees work schedules which may vary significantly over the course of a year.

The 2013 CPS data that was relied upon by the Department includes numerous respondent records where the weekly earnings amount for non-hourly workers is obviously inconsistent with the number of actual hours of work reported.

Being paid on a salary or fee basis is a long recognized component of white collar regulations. Employees not paid on a salary or fee basis (other than doctors, lawyers and teachers) cannot qualify for the executive, administrative or professional exemptions even if paid far above the minimum salary level and performing exempt duties at the highest level. However, being paid on a salary basis is not sufficient to establish exempt status. Many non-exempt employees are paid on a salary basis – secretaries, payroll clerks, bookkeepers, paralegals (just to name a few) as an administrative convenience to the employer and as a benefit to the employee. Knowing with some certitude the proportions of the employees in the "non-hourly" CPS data set who are paid on a salary basis and perform exempt job duties, and knowing the variation of weekly earnings of such employees in comparison to the weekly earnings of "non-hourly" employees who do not meet the requirements for exemption is necessary for both setting the salary test level and for estimating the economic impact of a proposed change in the salary test level. The CPS data does not provide information necessary to make these determinations and distinctions.

3. What are the earnings and work hours of non-exempt employees supervised by bona fide exempt employees

The 1940 Stein report and successive reports examining the salary test have taken note of the wide variation across industries, across sizes and types of organizations within industries and across. The relationship between the salaries of supervisors, while generally higher than earnings of the hourly employees they supervise, varies widely and is often only a small proportion greater than the weekly earnings of those they supervise. Earlier salary test rulemakings took note of the context of exempt supervisors' earnings in relation to the earnings of the non-exempt workers whom they supervised. Generally, previous salary test determinations have considered that setting the national benchmark too high could interfere with the ability of executives in low salary regions or industries

to effectively supervise and manage because non-exempt status could constrain their hours relative to the hours of the workers they supervise.

The CPS data includes information on the earnings, hours and occupations of hourly workers and non-hourly workers, but the data lacks in many cases the detailed information needed to delineate the supervisors from the supervised necessary to analyze the relative earnings of the connected groups. Only a few of the occupation groupings contain distinct coding to distinguish supervisory and line workers, and even in those cases, the CPS data lacks the duties information needed to distinguish validly exempt supervisors from non-exempt working foremen and team leaders.

4. How prevalent is it that persons are misclassified as performing exempt duties

Balancing the effect of a salary test between excluding workers from an exempt status that they are entitled to have versus the effect of a salary test to guarantee FLSA protection to workers who are entitled to that protection has always been an important consideration for setting the salary test. To accomplish the necessary analysis, the regulatory decision maker needs accurate and timely information about the incidence of misclassification of workers who should properly be assigned non-exempt status. In particular this information is needed at the detailed occupation and industry levels of identification, and it needs to be analyzed in relation to weekly earnings amounts.

The general principle that the likelihood of valid exempt status rises with earnings and that the incidence of misclassification as exempt falls with earnings has been long recognized, but operationalizing those correlations into a practical framework that the salary test regulatory decision maker can use is beyond the scope of the CPS data resource. The CPS provides no definitive information regarding how persons are classified or whether their classification is correct or not. One may presume that CPS respondents who report being paid on an hourly basis are classified as non-exempt, but the pay basis report by the employee on the CPS may be subject to an unknown degree of reporting error.

Also, for potentially misclassified persons, even if one could hypothesize that a CPS respondent of certain characteristics should be classified as non-exempt and paid on an hourly basis, it is not clear whether the non-hourly earnings variable in the CPS data reflects a "salary" in the sense required by the FLSA or some other compensation method which is permissible under FLSA for non-exempt workers.

Even if a worker is paid on a true fixed salary basis, the question of FLSA misclassification would not arise unless the respondent actually reported having worked over 40 hours. Since the CPS data provides information about actual weekly hours and earnings for only a single week during the year, the CPS does not provide the necessary information. The employee in question may actually be paid on an hourly basis with

overtime premium for hours beyond 40, but the proxy respondent to the CPS interview may be ignorant of the fact. Only a fraction of the individuals represented in the CPS data are directly interviewed. Many responses are provided by another household member on the subject's behalf

B. BECAUSE OF THE WEAKNESSES IN THE CPS DATA, THE DEPARTMENT SHOULD CONSIDER OTHER DATA ALTERNATIVES BEFORE SETTING THE SALARY LEVEL OR, IN THE ALTERNATIVE, SHOULD CORRECT FOR THE WEAKNESS BY SELECTING A MUCH LOWER PERCENTILE

The CPS is not the only data alternative, as some have claimed. The alternative of conducting original field research is always available, has been used successfully in past FLSA exemption salary test determinations, especially in the 1958 Kantor report, and also, to some extent in the 1940 and 1949 determinations. Collecting original data through field surveys, interviews, and systematic compilation of enforcement investigation reports provides the advantage of having been collected with the intended use in mind. Reliance on CPS data attempts to fit to the present use data that was collected for a completely different purpose.

The better course was indicated by the 1958 Kantor report, which is well described in the history section of the Department's present NPRM.[165] The Kantor analysis to set FLSA overtime exemption salary thresholds was primarily based on the analysis of detailed records of individual worker duties and salary information in the context of actual, documented exemption classification determinations. The data used was the product of intensive field research by the Department.

The field research exemplified by the Kantor project to collect appropriate and accurate data regarding the earnings and working contexts of individuals who actually do perform the executive, administrative and professional statutorily exempt duties defined in the FLSA is the model that the Department should have followed.

The 1998 "Delphi" process for estimating correct classification probabilities for certain occupations based on the experiences of WHD enforcement officers was a step in that right direction, but it did not go far enough toward the detailed field work that could be and should be done, and the fact that the 1998 analysis effort is now 17 years out of date, renders the Department's current reliance on it in the present regulatory analysis highly questionable. Below, the Department's reliance on the 1998 estimates of exemption probability is discussed as a significant source of potential error in the estimates of the administrative costs, income transfers and monetized benefits of the proposed rule.

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[165] 2015 NPRM at 38525.

The Department had the opportunity over the past six years to have taken a more deliberative approach informed by systematic compilation of appropriate data focused on these key questions and other important related ones. Instead, the Department has attempted to obtain from the Current Population Survey answers to questions that the CPS does not ask.

C. THE NON-HOURLY WORKERS' DATA USED WAS SPECIFICALLY INAPPROPRIATE

The Department's selection of the proposed new salary test minimum threshold for the Part 541 exemptions is based on a published BLS table showing deciles of weekly earnings of non-hourly workers based on pooling of 12 months of CPS Outgoing Rotations Supplement (Earner Study) data for 2013. This is a new "research series" that BLS began publishing in January 2015 at the request of the Department's Chief Economist. It reported that the 40th percentile cut point (the value at or near the 40th cumulative percent of observations ranked from lowest to highest) as $921 per week. The replication file matched this result closely: $923 per week as shown in column 1, non-hourly workers, in Table 1, *supra*. The other decile values also closely matched the BLS table published in the NPRM.

The data represented by column 1 includes workers listed in 477 of the 483 distinct occupation titles associated with hourly-paid workers, many of which seem on the face to be unrelated to exempt white collar work. Table 7 comprises a list of all occupational titles represented in the 2013 CPS data and shows tabulation of the numbers of hourly and non-hourly workers estimated by the survey under each occupational title, and the proportion of each occupation represented by non-hourly workers.[166]

The Department explicitly justifies the inclusion in its weekly earnings data replicated in column 1 of workers in occupations presumably not covered by the FLSA Part 541 regulations by stating that their "salaries may shed light" on the earnings of exempt workers and so are useful for the consideration of salary test level regulatory decisions.

Since most occupations, including those occupations that might possibly involve exempt executive, administrative or professional duties, are represented in the hourly category well as the non-hourly category, it is arguable that the earnings of hourly workers similarly may shed light on the rulemaking decisions. Accordingly, Table 1, column 2, Hourly Workers, shows a tabulation of weekly earnings by decile for workers who are paid on an hourly basis, and presumably may be classified as non-exempt under FLSA, i.e. entitled to overtime premium pay if they work more than 40 hours during the week. It should be noted, however, that the hourly-paid workers represented by the

[166] Tables 1, 2 and 3 appear *supra* in these comments. The remaining tables (Tables 4 to 8) are attached under *Appendix G.*

wages shown by decile in Table 4, column 2, like the non-hourly workers represented in Table 4, column 1, include persons in occupations or industries not covered by the overtime provisions of the FLSA statute or exempt under other regulations besides the Part 541 regulations that are the subject of the proposed regulation.

Table 1, column 3, shows the weekly earnings by decile for the combined group of hourly and non-hourly workers. This combined group of hourly and non-hourly workers, like the group of only non-hourly workers presented by the Department, includes in addition to workers whose occupations suggest the possibility of coverage by the FLSA Part 541 regulations, other workers in named occupations that are explicitly not covered, i.e., physicians, lawyers, teachers and most federal employees. The inclusion of this broader group of non-hourly occupations, according to the Department, usefully "sheds light" on the earnings of potentially covered workers and thus the Department asserts is appropriate to include in the database used to analyze salary test questions. Since the hourly-paid workers data includes all 477 of distinct occupation titles included in the non-hourly data relied upon by the Department, and only 6 occupations (motion picture projectionist, rolling machine setters, textile knitting machine setters, textile winding and twisting machine setters, extruding machine setters, and metal pickling machine tenders) of hourly-paid workers are not duplicated among non-hourly workers, the Department should have also considered that the earnings of the two groups combined may similarly "shed light" on the salary test decision. Note that when both are tabulated together, the 40th percentile that the Department is proposing as a particularly notable benchmark corresponds to a weekly earnings amount of $673 in column 3 representing the combined group of all workers regardless of how they report being paid. The median (50th percentile) for the combined group in 2013 had weekly earnings of $788, and the amount corresponding approximately to the $923 per week 40th percentile in column 1 (non-hourly only) is near the 60th percentile ($962 per week) for the combined group.

Table 1, column 4, shows deciles of weekly earnings for a subset of non-hourly workers who usually work full time schedules who either reside in the South Census Region or who are employed in the retail trade industry sector nationwide. This subset approximates the approach used to set the salary test in the 2004 rulemaking, referencing a low wage region and a low wage industry sector, except that in accordance with the approach proposed now by the Department, the data set includes the full range of occupations, including ones not actually covered by the Part 541 regulations. As with the other data tabulations shown in Table 1, no attempt has been made to differentiate workers who may be eligible for exemption based on duties from those not eligble based on duties, and the underlying data includes workers whose weekly earnings are below the current $455 salary threshold (slightly under 10 percent of all non-hourly workers). For this subset, the weekly earnings corresponding to the proposed 40th percentile is $858. The 2004 rulemaking used a 20th percentile benchmark in relation to the low-wage industry/region combination, to arrive at the $455 salary test benchmark set in 2004. For

the comparable 2013 data, the 20th percentile benchmark corresponds to a weekly earnings amount of $600 under column 4.

Table 1, column 5, shows deciles of weekly earnings for similar South Region plus Retail Industry subsector of workers who usually work full-time (35+ hours per week) for the combined set of hourly and non-hourly workers, but not those not covered by Part 541, i.e. a better data set for determining the salary threshold. The 40th percentile benchmark for this group is $600 per week ($31,200 annually) and the 20th percentile is $440 per week ($22,800 annually—actually less than the current salary threshold) weekly earnings for all hourly and non-hourly workers combined.

The Department has presented the idea that the 40th percentile of weekly earnings is a significant benchmark to consider in the context of the Part 541 salary test determination, but the question remains "40th percentile of what group of workers?" The variety of tabulations shown in Table 1 illustrate the variability of answers that can be obtained from 2013 CPS data depending on how the relevant group of workers to examine is defined, notwithstanding the qualitative limitations of CPS data as noted previously. The answers vary even more when one considers that the proposed 40th percentile is a higher percentile benchmark than has been used in previous salary test rulemakings. The variations that are illustrated in Table 1 are roughly similar to the variations shown in the Department's NPRM Table 13, but without the problematic and questionable pooling of data across years and attempt at finding definitive exempt/non-exempt duties in CPS data that provides no such information that characterizes the Department's analyses for the 2004 and Kantor alternatives analyses.

D. Inadequate Assessment of Compliance Costs, Transfers and Benefits

The Department estimates that the proposed revision of the salary level will impose $592.1 million in direct compliance costs on affected businesses (including non-profit organizations) and state and local governments in the initial compliance year, largely composed of $254.5 million in familiarization costs of learning about the revised salary level by business owners and managers and of assessing whether or not the affected establishment has workers affected by the revised threshold. The Department's cost estimates assume that the familiarization cost element will occur only the first year of implementation of the new salary test, based on the presumptions that the salary test value will remain fixed thereafter. This assumption is in direct contradiction to the Department's stated plan to implement annual changes in the salary test, increasing it either to maintain the 40th percentile value despite wage growth or to adjust the value in relation to price inflation. With automatic adjustment, familiarization costs would repeat with every annual revision of the salary test. In addition to familiarization costs, the Department also estimates first year (1) administrative costs of identifying affected employees (those earning weekly salaries under the revised salary threshold) and adjusting their pay and/or payroll status ($160.1 million), and (2) managerial costs of

increased supervision of the work schedules of those added to the overtime eligible category ($178.1 million). The adjustment and managerial costs decrease, according to the Department's estimates, in the second and subsequent years, ranging from $170.1 million in the second year to $93.2 million in the 10th year. Each of these cost estimates is flawed by inaccurate assumptions about the labor costs activities and the labor-time parameters of compliance activities. Each of the elements of direct compliance costs is discussed in detail below.

1. Familiarization Costs

The Department assumes that each of 7.44 million affected establishments will expend on average one hour of labor time to learn about and to assess whether the rule includes any provisions that affect any workers of the establishment. The Department assumes that the cost to the establishment will be $34.19 per labor hour. Across 7.44 million affected establishments the total is estimated by the Department to be $254.5 million.

The estimate of one hour familiarization time is not based on any presented empirical evidence, surveys, experiments, or opinions of documented experts. The proposed regulatory text plus accompanying discussions and explanations would take the average reader several hours for a first review, and full comprehension would likely require several reviews and other research. It is unrealistic to assume that only one person in each potentially affected establishment will be sufficient to read and assess the regulation.

For larger establishments the labor time requirement for the familiarization stage will likely increase exponentially as both the number of employees and the numbers of managers involved increases. Conferences with inside and outside legal counsel will be necessary for larger organizations.

Unionized workplaces will need to consult with labor representatives to assess the need and complexities of potential reclassifications of workers. Employees classified as "exempt" may currently be excluded from a collective bargaining unit as a manager or supervisor. Reclassification to non-exempt may put an "employee" – no longer a "supervisor" – under the collective bargaining unit. Such an issue may be subject to a bargaining obligation at a minimum or raise an issue to be resolved through grievance and arbitration. If reclassified employees become subject to the CBA, the employer will need to determine what terms and conditions are applicable; can the employer unilaterally set the employee's pay rate or must the employee be slotted into ranges and pay grades already established; and how benefit entitlements and contributions will be calculated? The reclassified employee may have enjoyed a more robust benefit package than the non-exempt employees and may have even made a contribution for insurance coverage that was different than those for bargaining unit employees. If the employer takes the position that the reclassified employees are outside of the bargaining unit, the union may

file a unit clarification petition or argue an accretion to the existing unit. The proposed rule does not consider the resources necessary to resolve any of these issues.

For the very smallest establishments a familiarization time of one to two hours may be possible, but for larger establishments the number of labor hours may amount to hundreds or more.

The potential familiarization cost based on the labor time and establishment numbers parameters assumed by the Department would increase to $1.5 billion if the average establishment time were just 6 hours. This illustration makes obvious the need for the Department to research carefully the question of compliance time by conducting empirical research. Retrospective studies of familiarization cost experience of employers affected by recent regulations in other contexts would be one source of information. For example, the Department could easily conduct a survey of employers affected by recent Office of Federal Contract Compliance Programs regulations regarding affirmative action programs for Veterans and Persons with Disabilities to assess actual time expended for regulatory familiarization. The results of such a survey could be scaled to account for differences in complexity of the subject regulations and provide familiarization time parameters that could be applied to other rulemakings. Alternatively, the Department could conduct an internal experiment in which offices within the Department or other Federal agencies were designated as proxy "establishments" and tasked to review and assess the proposed rule with an imagined perspective of assessing its applicability to their unit. By selecting experiment units of various sizes and requiring each to record the labor times and activities involved in the exercise a credible estimate of familiarization time as it varies by establishment size could be developed.

In addition, challenges to improperly classifying employees as exempt can be defended by raising the "good faith" defense the FLSA provides. That defense frequently is established by documenting the legal advice and fact-gathering that supported the determination. The efforts a prudent employer must engage in to prevail on that defense is likely to far exceed the 15 minutes assumed by the Department.

The unit labor cost parameter, $34.19 per hour is clearly inaccurate. The Department has used a compensation amount (wages plus fringe benefits) for a human resources office administrative clerk, a position that is itself clearly not exempt under the FLSA rules. It should be obvious that the assessment of the implications of this rule on an organization will be the duty of an exempt executive or administrator, earning compensation at the $60 per hour range published by BLS for managers. In addition, the Department has failed to fully account for the economic opportunity cost of redirecting labor for productive activity to the regulatory compliance activity. Our previous study of Federal management services contracts found that the government routinely pays private contractors a fully-loaded rate of $200 per hour for the services of a project manager whose basic compensation (wages plus fringe benefits) is $60 per hour, amounting to a markup of 3.3 times direct compensation to cover indirect overhead and support services

cost. Adjusting the per hour cost accordingly, the cost of the Department's estimated one hour per establishment for familiarization cost increases from the published $254.5 million to a total of $1.49 billion.

At an average of 6 hours familiarization time and the revised opportunity cost of $200 per hour, total familiarization costs total $8.9 billion per year.

If the Department implements an automatic annual adjustment to the salary test every year, the $8.9 billion calculated as a first year cost would recur every year.

These calculations are illustrative, and they show the need for the Department to conduct research to produce credible estimates of the labor time required and for the unit labor opportunity cost, including reasonable overhead allowances, which may vary by establishment size and industry for the critical estimation of cost for the familiarization step of regulatory compliance.

2. Adjustment Costs

The Department estimates that firms will incur initial and on-going costs to re-determine the exemption status of each affected employee, to update and revise overtime policies, to notify employees of policy changes and to adjust payroll systems to accommodate reclassified employees. Given the large number of employees who will be impacted by this change, it would be impossible for large employers to properly assess the impact without the assistance of third-party consultants or law firms.

The Department estimates that it will require one hour per each of 4.682 million affected exempt employees whose current weekly earnings are below the proposed salary threshold and will be converted to non-exempt status (hourly or salaried with monitored/managed schedule). The Department admits that it has no basis for this estimate and requests the public to offer data suggestions. The available public comment period is too short for public commenters to undertake meaningful experiments or assessment of this question. The Department had the time and resources to develop a scientifically credible research-based estimate of these costs, varied by establishment size and industry. The estimate of one hour per affected employee has no basis in reality. Considering that each employee adjustment will involve management time at several levels of authority and discussions, the time per employee for all labor effort involved in the process could range from at least 4 hours to several days depending on the complexity of the case. As an illustration, an average of just 4 hours per affected employee (probably the minimum) would raise the adjustment cost from the Department's estimate of $160.1 million to $640.4 million, using the $34.19 per hour labor rate assumed.

As discussed previously, the Department's estimated per hour labor rate is an inaccurate estimate of full labor opportunity cost. Using the alternative $200 per hour rate based on Federal government contract procurement of project management services, $3.75 billion per year may be a more likely conservative estimate of the adjustment cost.

The Department estimates that adjustment costs will fall significantly after the first year when most of the adjustment will occur, but that decline ignores the proposed annual automatic adjustment of the salary threshold. With annual adjustment of the salary threshold as proposed by the Department a more significant annual adjustment cost will continue. Even if the subsequent adjustments involve only 10 percent of the number of workers initially affected, the annual adjustment cost going forward could be $375 million per year.

The adjustment cost example, again, illustrates the need for the Department to conduct careful empirical research to understand the potentially costly implications of its proposal.

3. Management Costs

Conversion of currently exempt salaried employees to non-exempt hourly or non-exempt salaried status under the proposed salary test threshold will require closer management monitoring and supervision of the schedules of affected employees. The Department estimates $178.1 million per year in additional management costs.

The Department assumes that only 1.022 million of the 4.682 million affected exempt employees who will be converted from exempt to nonexempt status will require additional management of their schedules. The Department bases this on the CPS data for 2013 that shows 1.022 million currently exempt workers usually work over 40 hours per week now and will require management time to contain or approve their future schedules. This is an unrealistic assumption because even those who usually work only 40 hours will require additional management schedule monitoring to ensure that their hours do not go higher. In many companies, hourly time is reviewed and approved daily to ensure accurate reporting of time. Therefore, management time will increase regardless of overtime consideration and approval. Applying the Department's 5 minutes per employee per week management effort and estimated $40.20 cost per hour of management time, the Department's estimate of $178.1 million per year increases to $815.6 million per year. Moreover, even those who work overtime only intermittently will require their overtime hours to be managed.

The Department's estimate of 5 minutes of management time per year is not based on any empirical evidence. The Department admits this and asks for public comment to provide data. Again, the Department could have conducted field research or experiments to obtain credible estimates. Five minutes per week is *de minimus*. As an illustration 30 minutes per day would increase the management cost to $4.9 billion per year.

The Department's per unit labor cost estimate of $40.20 per hour for a manager is a median not a mean. The mean is about $60 per hour ($124,000 per year) and adjusting

for correct overhead cost load, a more likely correct figure is $200 per hour on average. This changes the total cost, along with the previous adjustments to $24.3 billion per year.

Combined adjusted cost estimates total $36.95 billion for the initial year and $33.52 billion for each subsequent year. The Department calculated decreases in subsequent yearly costs in future years as wage inflation pushes workers above the salary threshold, but that calculation ignores the planned annual adjustments of the salary threshold. With annual adjustments occurring, it is possible that the ten year cumulative cost of the proposed rule will be $338.5 billion.

CONCLUSION

For the foregoing reasons, the Chamber believes the Department should abandon its proposed rulemaking in its entirety. Finalizing this proposal will create significant disruptions to employers, and most importantly will not achieve the administration's goal of increasing income for employees.

In the alternative, the Department should adopt only a modest increase in the minimum salary level required for exemption consistent with ranges previously adopted as described in these comments, supported by data reflecting actual employees and respecting regional economies with low costs of living and economic sectors with low wages. If the Department does not significantly reduce its proposed minimum salary level, it should phase in the increase over a five year period. Neither congressional intent nor the regulatory history of Part 541 support automatic increases to the salary levels and, accordingly, this approach should not be finalized. Finally, no changes to the duties tests for exemption should be implemented without a full Notice of Proposed Rulemaking outlining the specific changes proposed to the regulatory text and providing the public with the opportunity to comment on those proposed changes along with the required economic and regulatory impact analyses.

Sincerely,

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