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The Honorable R. Alexander Acosta
Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation & Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

RE: RIN 1235-AA20, Request for Information, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,* 82 FR 34616 (July 26, 2017)

Dear Mr. Secretary:

The United States Chamber of Commerce (the "Chamber") submits these comments in response to the Department of Labor's (the "Department") request for information, as published in the *Federal Register*, 82 FR 34616 on July 26, 2017, regarding the regulations at 29 C.F.R. Part 541 ("Part 541 regulations"), 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).

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. 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 Chamber supports the Department's decision to review and possibly modify the Part 541 regulations. The 2016 Final Rule, making significant changes to the Part 541 regulations,[1] was found to be unlawful in *State of Nevada, et al. v. U.S. Department of Labor*.[2] The 2016 Final Rule more than doubled the minimum salary level for exemption from $455 per week ($23,660 annualized) to $913 per week ($47,476 annualized). In *Nevada*, the Chamber and more than 50 other business groups successfully challenged the 2016 Final Rule because, *inter alia*, the $913 minimum salary level was set at a level which was contrary to congressional intent and exceeded the Department's authority to define and delimit the exemption for "employees employed in a bona fide executive, administrative, or professional capacity."[3]

As the court in *Nevada* explained, "it is clear Congress defined the EAP exemption with regard to duties. In other words, Congress unambiguously intended the exemption to apply to employees who perform 'bona fide executive, administrative, or professional capacity' duties."[4] Although the FLSA gives the Department broad authority to define and delimit the exemption, that authority "is limited by the plain meaning of the words of the statute and Congress's intent."[5] The Department "does not have authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 2013(a)(1)."[6]

"While the plain meaning of Section 213(a)(1) does not provide for a salary requirement," before 2016, the Department used "a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt." [7] The Department set "the minimum salary level as a floor to 'screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.'"[8] Setting a minimum salary level "somewhere near the lower end of the range of prevailing salaries" is "consistent with Congress's intent because salary serves as a defining characteristic

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[1] 81 FR 32391 (May 23, 2016) ("2016 Final Rule").

[2] CA No. 4:16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

[3] 29 U.S.C. § 213(a)(1) (the "EAP exemptions").

[4] *Nevada*, 2017 WL 38377230 at *7.

[5] *Id.*

[6] *Id.*

[7] *Id.* at *8 (emphasis in original).

[8] *Id*. (*citing* Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949) (the "1949 Weiss Report") at 7-8.

when determining who, in good faith, performs actual executive, administrative, or professional capacity duties."[9]

The $913 weekly level adopted in the 2016 Final Rule ignored congressional intent and exceeded the Department's authority by making "overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties."[10] At $913, the minimum salary level for exemption is no longer a plausible proxy for performance of exempt job duties.

If the Department publishes a Notice of Proposed Rulemaking to adjust the minimum salary level for exemption, it should apply the same methodology used in its 2004 rulemaking to current salary data from the Bureau of Labor Statistics. As detailed below, the Chamber's calculations suggest that using the 2004 methodology would result in a minimum salary level of $612 per week ($31,824 annualized), which, consistent with the *Nevada* decision and the Department's historical practice, would function only to screen out "obviously nonexempt employees." At that level, the standard salary test is a plausible proxy for performance of exempt job duties. The Department should not make any changes to the duties tests in the Part 541 regulations.

The Department has requested information in eleven specific areas. The Chamber's responses to each of these are set forth on the following pages. In addition, we incorporate by reference and attach as Appendix A, the Chamber's comments to the Department's July 2015 Notice of Proposed Rulemaking on the Part 541 exemptions to emphasize the problems associated with an excessive increase in the salary threshold.[11]

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[9] *Id.*

[10] *Id.*

[11] 80 FR 38516 (July 6, 2015) (2015 NPRM).

1. Methodology for Determining the Standard Salary Level

> *In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?*

Applying the 2004 methodology would be appropriate if the Department decides to increase the standard salary level, and would not require changes to the standard duties test.

In the 76-year history of salary increases prior to the 2016 Final Rule, with only one exception, the Department studied available salary data and set the salary level near the lower end of current salaries in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry. The only change in this methodology over the years was the salary data available to and studied by the Department:

- In 1940, noting that a salary requirement would "affect both high and low wage areas, high and low wage industries, and large and small businesses," the Department stated that it was "desirable to retain a comparatively low salary requirement."[12] Thus, the Department studied current salary levels in different jobs (such as comparing salaries of nonexempt bookkeepers to exempt accountants) to find the "dividing line" between exempt and nonexempt employees, and then "set a figure somewhat lower" than that dividing line.[13]

- In 1949, the Department examined data on increases in salaries for exempt employees since the 1940 increases, compared that data with the earnings of

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[12] Harold Stein, *Executive, Administrative, Professional . . . Outside Salesman" Redefined,* Wage and Hour Division, U.S. Department of Labor (Oct. 10, 1940) ("1940 Stein Report") at 22.

[13] *Id.* at 46 (professional salary level); *see also id.* at 32 (administrative salary level; because the FLSA "applies to low-wage areas and industries as well as to high-wage groups … [c]aution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude.").

nonexempt employees, and then set a salary level lower than the data indicated to account for lower-wage industries and small businesses.[14]

- 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 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."[15] 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."[16]

- Again, in 1963, the Department relied on a special survey by the Wage and Hour Division 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."[17]

- 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."[18]

- In 2004, the Department considered BLS 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."[19] 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.[20]

Only in 1975 did the Department deviate from this methodology by using the Consumer Price Index (CPI) to determine the salary level increases. But 1975 was an

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[14] 1949 Weiss Report at 12-15.

[15] Harry S. Kantor, *Report and Recommendations on Proposed Revision of Regulations, Part 541*, Wage and Hour & Public Contracts Division, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report") at 6.

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

[17] 28 FR 7002, 7004 (July 9, 1963).

[18] 35 FR 883, 884 (Jan. 22, 1970).

[19] 2004 Final Rule at 22167 & Table 2.

[20] *Id.* at 22168.

anomalous rulemaking that presented special challenges for the Department: Between 1970 and 1974, the CPI had increased by 23.67 percent.[21] Such rapid inflation caused an urgent need for the Department to increase the salary level, but the Department had not completed its study of current salary levels. As the Department stated in its 1974 proposed rule:

> In order to make the salary tests in 29 CFR Part 541 realistic, interim salary tests are being proposed, pending a study in salary levels in the prescribed occupations to be made during the next six months after which further change, if necessary, upon completion of the study will be made.[22]

The Department intended to complete a salary study as it had done in all the prior rulemakings. The study was never completed, however, and the 1975 *interim* salary levels remained unchanged until 2004.

Adjusting the salary levels based on the CPI in 1975 was an expedient method for quickly setting interim salary levels when the economic conditions at the time had caused the 1970 salary levels to become obsolete. The Department intended to issue new regulations based on a salary study to be completed six months later. Even then, the Department set the interim salary levels "slightly below the rates based on the CPI."[23] The Department also stated that the 1975 rulemaking should not be considered a precedent:

> These interim rates, pending completion of the study to be made in 1975, are necessary because present economic conditions have substantially impaired the current salary tests as effective guidelines for determining the exempt status of bona fide executive, administrative and professional employees. The present rates have become obsolete and interim rates are required to protect the interests of all concerned, including employees and employers, and to enable the Wage and Hour Division to administer the Act in a proper and equitable manner. *The use of interim rates is not, however, to be considered a precedent*.[24]

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[21] 40 FR 7091, 7091, 7091 (Feb. 19, 1975).

[22] 39 FR 29603, 29603 (Aug. 16, 1974).

[23] 40 FR at 7091.

[24] *Id.* at 7092 (emphasis added).

The Department's goal in applying this historical methodology also has remained unchanged: "screening out the *obviously* nonexempt employees."[25] 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:

> The Administrator 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. 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.[26]

As the Chamber stated prophetically in its comments to the 2015 NPRM:

> 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. *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."*[27]

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[25] 1949 Weiss Report at 8 (emphasis added). *See also* 1958 Kantor Report at 2-3; 2004 Final Rule, 69 FR at 22165).

[26] *Id.* at 11. *See also* Stein Report at 6.

[27] Chamber comments to 2015 NPRM at 11 (citing the 1940 Stein Report at 6 and the 1949 Weiss Report at 9, emphasis added).

The Department acknowledged the historical goal of the salary level test in the 2016 Final Rule[28] – even while ignoring it. The 2016 Final Rule set the standard salary level "at the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region."[29] The 40th percentile was not intended, and did not function, to screen out only obviously nonexempt employees. Rather, the 2016 Final Rule was intended to expand overtime protection to millions of employees who actually performed the job duties required for exemption based on their salary alone:

> White collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, *irrespective of their job duties and responsibilities*. Employees earning this amount or more on a salary or fee basis will qualify for exemption only if they meet the standard duties test, which is unchanged by this Final Rule. As a result of this increase, 4.2 million employees *who meet the standard duties test* will no longer fall within the EAP exemption and therefore will be overtime-protected.[30]

This result is far beyond the "few employees" who, although they perform exempt work, might be denied exemption because of the minimum salary level, as envisioned by the Department since 1940,[31] and is contrary to congressional intent to exempt employees who perform executive, administrative or professional job duties.[32]

The Department made four errors when setting the $913 weekly salary level in the 2016 Final Rule, all of which should not be repeated (or corrected if the decision in *Nevada* does not remain in place for some reason) in any new rulemaking:

First, the Department erred by setting the salary level at the 40th percentile of weekly earnings of full-time salaried employees; this was four times as high as the Department set the level at one point and twice as high at other points. In 1958[33] and 1963,[34] the Department used the 10th percentile. In 1970, the Department set the salary level just below the 12th percentile of executive employees in the West region.[35] In 2004,

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[28] 2016 Final Rule, 81 FR at 32402.

[29] *Id*. at 32404.

[30] *Id.* at 32405.

[31] *See* 1940 Stein Report at 6.

[32] *Nevada,* 2017 WL 3837230 at *8.

[33] 1958 Kantor Report at 7-8.

[34] 28 FR at 7004.

[35] 35 FR at 884.

the Department used the 20th percentile of salary levels in the South region and the retail industry.[36] The Department's only and often repeated justification for quadrupling the percentile used in 1958 and 1963 was a perceived "mismatch" which occurred in 2004 when the standard salary level was set "equivalent to the historic levels of the former long test salary", but "paired with a standard duties test based on the short duties tests."[37]

The Department's characterization of a "mismatch" is misleading. The standard duties test for executives adopted by the Department in 2004 is more rigorous than the old short duties 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.[38] 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."[39] This new requirement under the standard test was taken from the pre-2004 long test.[40] Thus, the standard duties test for the executive exemption is more difficult to meet than the pre-2004 short test.[41]

The standard duties tests adopted in 2004 did eliminate the 20 percent limit on nonexempt work (40 percent in retail and service establishments) in the old long duties tests; however, by 2004, that test had been inoperative for decades. Because of the 29 years that passed between the salary level increases of 1975 and 2004, by 1980, the $155/$170 salary levels for exemption under the long duties tests were barely above the minimum wage for a 40-hour workweek (when minimum wage increased to $3.10 per hour), and were 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 being relied upon to distinguish between exempt and nonexempt employees. As the Department stated in 2004, "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

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[36] 69 FR at 22167-69 and Tables 2 & 3.

[37] 2016 Final Rule, 81 FR at 32400. *See also Id.* at 32392, 32403, 32404, 32406, 32409, 32412, 32413 and 2015 NPRM, 80 FR at 38517, 38519, 38529, 38526, 38530 and 38531. These repeated assertions are neither correct, nor sufficient justification for quadrupling the 10th percentile methodology used in 1958 and 1963.

[38] 68 FR 15560 (April 23, 2003).

[39] 29 C.F.R. § 541.100.

[40] 2004 Final Rule, 69 FR at 22127.

[41] 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.

particular employee's daily and weekly tasks in order to determine if an exemption applied."[42] Which tasks are exempt and which nonexempt? How much time did each employee spend performing exempt tasks and nonexempt tasks? Did the employee spend 19 percent of his time performing nonexempt tasks or 21 percent of his time? Only trial lawyers would benefit from resuscitating this rule that has effectively been dead for 36 years.

In addition, in 2004, the Department doubled the percentile historically used to set the minimum salary level, from 10 percent to 20 percent, to account for the elimination of the restriction on nonexempt work in the old long duties tests.[43] In actuality, the percentile increase was even more significant in 2004 because of the differences in the data used by the Department to increase the minimum salary level before 2004. From 1940 to 1970, the Department studied data on salaries paid to exempt employees. Although the documentation from the 1940 and 1949 rulemakings do not provide the source of that data, the Department conducted special surveys or pulled data from investigation records to determine salaries being paid to exempt employees.

In 2004, and continuing today, a much larger sampling of earnings data is available through the Bureau of Labor Statistics (BLS), but that data is also far less concise. Although "salary" data is used as a short-hand, BLS actually does not collect separate data on salaries. Rather, the BLS data sets include earnings for "hourly paid" and "non-hourly paid" employees. The data set used by the Department in both 2004 and 2016 is for non-hourly paid employees. The non-hourly paid data set includes employees paid on any basis other than hourly, including being paid on a piece rate, a fee basis, or by commission. The available BLS data also does not distinguish between exempt and nonexempt employees. Inclusion of piece rate and salaried nonexempt employees (e.g., secretaries and office clerks) results in lower "salary" levels generally as they are paid less than most exempt employees.

In short, in the 2016 Final Rule, the Department did not adequately explain why doubling the percentile from 10 to 20 in 2004 did not appropriately adjust for the duties tests changes or why quadrupling the percentile to 40 was necessary.

Second, in the 2016 Rule, the Department erred by using the South Census Region to determine the 40th percentile. The Department was responding to criticism that the

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[42] 2004 Final Rule, 69 FR at 22127; *see also Id.* ("Moreover, making such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks.").

[43] 2004 Final Rule, 69 FR at 22167 ("we relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, because of the proposed change from the short and long test structure and because the data included nonexempt salaried employees").

proposed level, which was based on full-time salaries nation-wide, would have had a disproportionate and adverse impact on businesses and employers in lower-wage southern states.[44] However, the Department's choice of the South Census Region was not as helpful as the Department appeared to suggest. The Census Bureau divides the country into four large regions: Northeast, Midwest, South and West. Each region is then subdivided into smaller divisions. The South Census Region is comprised of three Census Divisions: South Atlantic, East South Central, and West South Central.[45] The states included in the South Census Region, as shown in the table below, include some of the highest wage areas of the country:[46]

Table 1:
Median Weekly Earnings of Salaried FLSA Covered Workers South Region

Jurisdiction	Median Weekly Earnings	Annual Equivalent	National Ranking
District of Columbia	$1,352	$70,311	5
Maryland	$1,265	$65,782	9
Virginia	$1,233	$64,134	11
Delaware	$1,080	$56,155	28
North Carolina	$ 1,065	$55,379	34
Texas	$ 1,055	$54,835	36
Georgia	$1,038	$54,000	38
Kentucky	$1,020	$53,040	42
South Carolina	$1,007	$52,377	43
Tennessee	$1,006	$52,312	44
Alabama	$995	$51,750	45
Oklahoma	$984	$51,171	46
Louisiana	$980	$50,971	47
Florida	$978	$50,871	48
West Virginia	$969	$50,405	49
Arkansas	$955	$49,680	50
Mississippi	$949	$49,347	51

Source: Current Population Survey, Outgoing Rotation Series, pooled May 2014 to July 2017. Earnings data adjusted by CPI-W to July 2017 dollar equivalent.

[44] 2016 Final Rule, 81 FR at 32408.

[45] The South Atlantic Division is comprised of Delaware, Maryland, District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia, and Florida; the East South Central Division is comprised of Kentucky, Tennessee, Alabama and Mississippi; the West South Central Division is comprised of Arkansas, Louisiana, Oklahoma and Texas.

[46] A map of the Census regions and divisions is attached as Appendix B.

The 2016 shift to the entire South Census Region, instead of only the East and West South Central Census Divisions, as used in the 2004 Final Rule, increased the resulting 40th percentile salary level from $883 per week ($45,962 annualized) to $913 per week ($47,476 annualized).[47] Including data from three of the top income areas in the country (the District of Columbia, Maryland, and Virginia) ignores the Department's historical methodology of studying salaries paid to exempt employees in lower-wage areas, resulting in an inappropriately high salary level.

Third, the Department erred by failing to consider salary levels in other lower wage sectors, such as retail, nonprofits, or small businesses. Salary levels in retail businesses tend to be lower regardless of where they are located. The Department should also not fail to consider the impact of the minimum salary level on nonprofit employers and small businesses, where salaries also tend to be lower. Ignoring these low wage sectors is inconsistent with the historical methodology of studying salaries paid to exempt employee 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."[48]

Fourth, the Department erred by including in its data set the earnings of employees who are not subject to the FLSA salary level test. The Part 541 salary basis and salary level tests do not apply to doctors,[49] lawyers,[50] teachers,[51] and outside sales employees.[52] In addition, the Part 541 salary level test is not used to determine the exempt status of federal government employees who are covered by regulations of the Office of Personnel Management.[53] The salary level test is also irrelevant to employees not covered by the FLSA or exempted from the overtime requirements under other exemptions.[54] The Department excluded these categories from the data set when determining the salary level in 2004,[55] but inappropriately included this data in 2016.[56] Many employees in these

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[47] The shift from the 20th percentile used as the benchmark in 2004, to the 40th percentile used in 2016 also accounted for a large change in the resulting salary test. If the 20th percentile benchmark had been applied to the South Region data on which the 2016 rule relied, the result would have been a salary test of about $619 per week (equivalent to $32,188 per year) instead of the $913 per week (equivalent to $47,746 per year).

[48] 1958 Kantor Report at 7-8.

[49] 29 C.F.R. § 541.304(d).

[50] *Id.*

[51] 29 C.F.R. § 541.303(d).

[52] 29 C.F.R. § 541.500(c).

[53] 29 U.S.C. § 204(f).

[54] *See, e.g.,* 29 U.S.C. §§ 203(e), 213(b)(1) and 213(b)(12).

[55] 2004 Final Rule, 69 FR at 22168.

categories – doctors, lawyers, outside sales and federal government employees – earn wages far above the average.[57] As none of the categories are subject to the salary level test, the salary data for employees in these categories is not helpful in determining the appropriate salary level that will function to exclude only the obviously nonexempt from the EAP exemptions, and only serves to improperly inflate the standard salary level.

In the analysis attached as Appendix C, the Chamber has corrected the above errors and applied the 2004 methodology, using current and publicly available BLS data. Applying the Department's 2004 method would result in a minimum salary level for exemption of $612 per week ($31,824 annualized). At this level, about 15.3 percent of all current FLSA-covered, full-time salaried employees, including 20.1 percent of employees (about 719 thousand) in the retail sector, and 19.9 percent of employees (about 1.3 million) in eight low-wage southern states would be excluded from the exemption based on salary alone.

The Chamber also analyzed the current BLS data to determine the 20th percentile of salaries for FLSA-covered, full-time employees in the 10 states with the lowest median income: Kentucky ($1,020 per week), South Carolina ($1,007), Tennessee ($1,006), Alabama ($995), Oklahoma ($984), Louisiana ($980), Florida ($978), West Virginia ($969), Arkansas ($955), and Mississippi ($949). Under this method, we did not analyze data in the retail industry, but did exclude data for employees not subject to the salary level tests in Part 541. Using this method would result in a minimum salary level for exemption of $598 per week ($31,096 annualized). At this level, about 14.5 percent of all current FLSA-covered, full-time salaried duties test performing employees (about 5.8 million) would be excluded. These would include 19.1 percent of employees (about 685 thousand) in the retail sector, and 20.0 percent of employees (about 1.3 million) in the ten lowest-wage states who would be excluded from the exemption based on salary without regard for their duties.

The Chamber does not support using an inflationary measure to set the salary levels for the exemptions. As noted above, the Department has adjusted salary levels by inflation only once, in 1975, and stated that doing so was not to be considered a precedent. Further,

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[56] 2016 Final Rule, 81 FR at 32404.

[57] For example, Current Population Survey data for May 2014 through July 2017, adjusted by CPI-W to July 2017 equivalent dollars, shows that salaried physicians and surgeons had median earnings of $1,971 per week (equivalent to $102,496 per year) salaried lawyers had median earnings of $1,930 weekly ($100,381 per year) and federal employees had median earnings of $1,392 per week ($72,378 per year). If Federal government employees, teachers, physicians and lawyers had been excluded from the 2016 final rule calculations, the resulting 40th percentile benchmark would have been approximately $901 instead of the $913 per week amount specified in the 2016 rulemaking.

the economic conditions that caused the Department to take this extraordinary step are not present today.

If the Department applies the 2004 methodology to increase the standard salary level, no changes in the duties tests are needed. In the 2016 Final Rule, the Department cited the elimination of the 20 percent cap on nonexempt work in the pre-2004 long duties tests to justify its unlawfully high salary level. But, as noted above, the long duties tests and their restrictions on nonexempt work have been inoperable for 36 years. Bringing the tests back now would send employers and employees to the courthouse, as parties to class action litigation previously argued over whether employees spent more or less than 20 percent of their time performing nonexempt work. Because employers and employees understand the current duties tests, and the large body of case law interpreting those tests, any changes at this point would lead to litigation chaos that benefits only trial lawyers.

2. Multiple Standard Salary Levels

> *Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?*

The Department should not adopt multiple standard salary levels, as doing so adds unneeded additional complexity.

There is no need for multiple salary levels to minimize the economic impact of an increase in lower-wage regions, industries, and other sectors, if the Department adopts a standard salary level that screens out only obviously nonexempt employees. Applying the 2004 methodology to current BLS data will result in a salary level that functions as a reasonable proxy for performance of exempt job duties. At that level, a few employees performing exempt duties may be excluded from the exemption, but not a substantial number. Employees earning above the standard salary test, on the other hand, would not qualify for exemption without meeting the duties test for the executive, administrative, or professional exemption.

Adopting multiple standard salary levels to reflect real differences in actual salaries would be a very daunting task for which sufficient reliable data may not be available. Differences in salary are found based on industry; size of the employer; whether the employer is a for-profit, non-profit or a state or local government; and whether the employee is working in an urban versus rural area. Adopting different salary levels by

these categories would be difficult because of limitations on BLS data. Adjustment by employer size is not possible based on BLS data at all because the monthly survey does not include data by size; BLS would need to add new questions to the monthly survey.[58]

Multiple salary levels based on industry, geographic area, or employer size, moreover, would require the Department to establish new, and probably complicated, rules. The Department would need to define each geographic area and industry, and address questions such as what salary level would apply when the employee traveled for work (e.g., traveled from Mississippi to work in Maryland for three days) or spent time working in different operations (e.g., a retailer's store and distribution center). Adopting multiple salary levels by employer size would require the Department to define the different size categories by revenue, number of employees, or some other measure. Inevitably, questions would arise regarding where an employer fell in each category, leading to a new type of class action litigation.

The Chamber appreciates the Department's effort to think creatively with its suggestion of using a percentage-based adjustment similar to the federal government's Locality Pay Tables. However, doing so would not obviate the complexity of multiple salary levels or the need for new regulations to define each locality and how those definitions would apply to employees who travel for work. Here the new type of class action litigation would focus on whether the employer or the employee was within a locality pay area or not. The federal government has an entire agency, the Office of Personnel Management, to ensure federal agencies properly apply the 46 different locality pay percentages in the federal tables.[59] Few private-sector businesses have such resources.

Without a compelling need to guard against economic hardship and job losses, adopting multiple standard salary levels would only add to the cost and complexity of complying with the rule, with no corresponding benefit. Thus, for over 75 years, the Department has rejected repeated requests by the regulated community to adopt multiple salary levels. For example:

- In 1940, the Department rejected proposals for different salary levels based on community size because the FLSA "itself has as an objective a universal minimum wage" without "lower differential minima."[60]

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[58] See https://www.bls.gov/cps/documentation.htm for technical documentation of the Current Population Survey.

[59] The 2017 General Schedule Locality Pay Tables are available at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2017/general-schedule/. These tables are updated annually.

[60] *See* 1940 Stein Report at 5-6.

- In 1963, the Department rejected proposals that "differential rates be set on an industry, area, or regional basis."[61]

- In 1970, the Department rejected proposals that "differential rates be set on geographical bases" because the "salary tests as proposed had already taken geographical variations in salary levels into consideration" by proposing levels based on "lower wage nonmetropolitan areas in the South."[62]

- In 2004, the Department rejected proposals for multiple salary levels as administratively unfeasible and unnecessary with a salary level set using the historical methodology.[63]

- In 2016, quoting the 2004 Final Rule, the Department rejected proposals "to adopt different salary levels for different regions of the country or for different industries or sizes of businesses."[64]

The Department should not change course now, but continue its historical practice of accounting for differences in salaries by setting the salary level near the lower end of current salaries in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry.

3. Different Salary Levels by Exemption

> *Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?*

The Department should not adopt different standard salary levels for the executive, administrative, and professional exemptions. For the reasons stated above, if the Department adopts a standard salary level "somewhere near the lower end of the range of prevailing salaries" in order to exclude only obviously nonexempt employees based on salary alone, there would be no need to add the additional complexity of different salary levels for executive, administrative, and professional exemptions.

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[61] 28 FR 7002, 7002 & 7004 (July 9, 1963).

[62] 35 FR 883, 884 (Jan. 22, 1970).

[63] 2004 Final Rule, 69 FR at 22171.

[64] 2016 Final Rule, 81 FR at 32411.

The regulated community has not been burdened with complying with multiple salary levels by exemption for more than two decades. Prior to 2004, the Part 541 regulations established different salary levels under the long duties test for the executive, administrative, and professional exemptions. *See* Appendix D (list of the Part 541 salary levels from 1938 to 2004). From 1940 to 1963, the Department adopted a lower salary level for the executive exemption. Beginning in 1963, the salary level for executive and administrative employees were the same, with a higher salary level for professionals. The Part 541 regulations have never included different salary levels by exemption under the short duties test. The salary level under the long duties test that was in effect from 1975 to 2004 for executive and administrative employees was $155 per week – equivalent to just $3.875 per hour for a 40-hour workweek, which was below the 1991 minimum wage of $4.25 per hour. For professionals, the salary level under the long duties test in effect from 1975 to 2004 was $170 per week – equivalent to just $4.25 per hour for a 40-hour workweek, which was equal to the 1991 minimum wage and below the 1996 minimum wage of $4.75. Thus, by 1996, few employers relied on the long duties test and salary levels, and instead used the short duties test for exemption that, until 2004, required a salary level of $250 per week ($6.25 per hour for a 40-hour workweek). In short, the Part 541 regulations have not included different and operative salary levels by exemption since 1996.

Adopting different salary levels by exemption is likely to increase litigation, as more often than not, the distinction between executive, administrative and professional employees are not clear. Many employees can qualify for two or three of the exemptions at the same time – for example, a CPA accountant (professional) who supervises five employees (executive) and has authority to negotiate and resolve matters before the IRS (administrative). On the other end of the continuum, under the "combination" exemption, an employee who cannot meet all of the job duty requirements under any single exemption is nonetheless exempt if his primary duties are to perform a combination of exempt executive, administrative, professional, outside sales or computer duties.[65]

Establishing different salary levels for different exemptions would require employers to determine which exemptions applied – which could lead to opportunistic behavior by employers. Although most employers make good faith efforts to comply with the FLSA, adopting a lower salary level for executive or administrative employees could lead some employers to shoe-horn employees into the exemptions with the lower salary level. This type of mischief would be harmful to employees who would have to rely on the limited resources of the Department or expensive and time-consuming private litigation to correct the violation. Clear and simple rules benefit both employers and employees.

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[65] 29 C.F.R. § 541.708.

4. Pre-2004 Short and Long-Test Salary Levels

> *In the 2016 Final Rule the Department discussed in detail the pre- 2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?*

If the Department begins a rulemaking to increase the standard salary level, using the 2004 methodology to set that salary level would be an effective measure for excluding obviously nonexempt employees from the exemptions.

As discussed in response to Question 1 above, the 2004 methodology fully accounted for the replacement of the long and short duties tests by more than doubling the salary level percentiles that the Department had used in prior years. The standard duties tests adopted in 2004 were more rigorous than the pre-2004 short duties test. The standard salary level was set higher than the long test salary level adjusted using the historical 10th percentile of salary levels in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry. In 2004, the Department set both the duties tests and the salary level between the pre-2004 long and short duties tests and salary levels. The Department should return to the 2004 methodology for setting the standard salary level and no changes to the duties tests are needed.

5. Salary Level as Proxy for Duties

> *Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?*

As the court found in *Nevada*, the high salary level adopted in the 2016 Final Rule unlawfully eclipsed the role of the duties test in determining exempt status. The Department admitted in the 2016 Final Rule that a $913 per week ($47,476 annualized) salary level would result in "4.2 million employees *who meet the standard duties test*" no longer qualifying for the EAP exemptions "*irrespective of their job duties and responsibilities*."[66] For those 4.2 million employees who met the duties tests but earned below $913 per week, the 2016 Final Rule totally eclipsed the duties test.

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[66] 2016 Final Rule, 81 FR at 32405 (emphasis added).

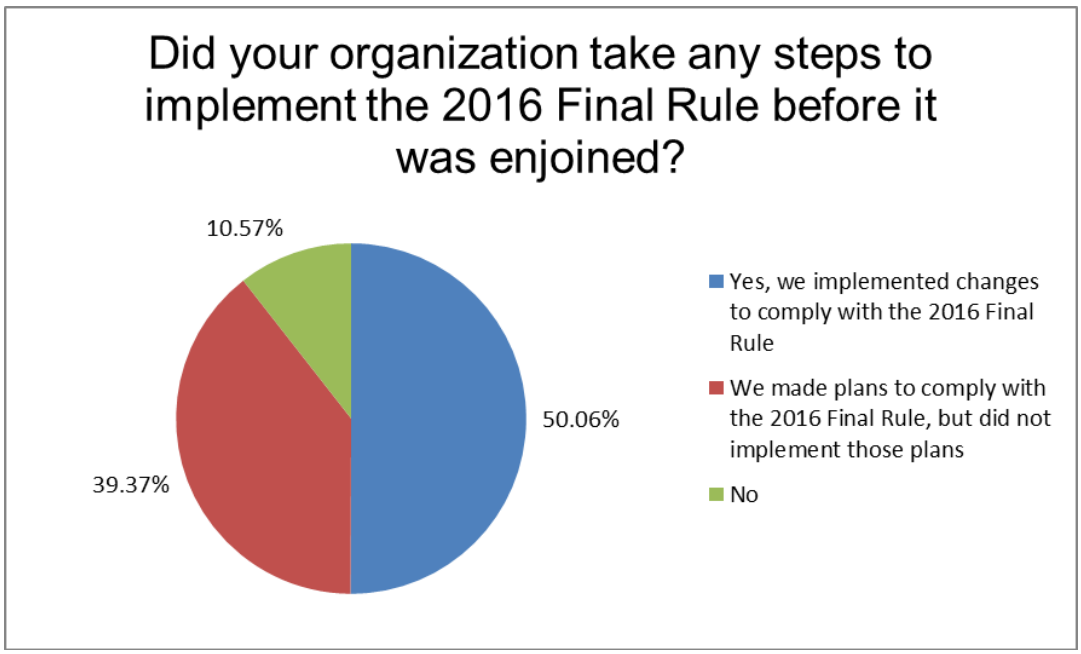
Adjusting the standard salary level using the Department's 2004 methodology would allow both salary and duties tests to fulfill their historical roles. Predicting the exact salary level that a court might view as exceeding the Department's authority would be pure speculation.

6. Implementation and Impact of 2016 Final Rule

> *To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?*

Because of the litigation challenging the 2016 Final Rule, employers reacted very differently in anticipation of the December 1, 2016 effective date – often dependent on the expected costs of providing salary increases to maintain the exemptions and additional overtime due to employees reclassified to nonexempt. Employers had a wide range of reactions: some took no steps towards implementation of the 2016 Final Rule; others prepared for changes but did not implement anything; and still others implemented either or both salary increases and reclassifications. In high wage industries, such as technology and energy, where most exempt employees earned just below or above the new $913 weekly salary level, employers were more likely to implement salary increases. In lower wage industries, such as retail, where starting salaries for lower range exempt employees average in the mid-$30,000s and employers could not afford salary increases of $10,000 or more, reclassifications not completed before the November 22 preliminary judgment were delayed. Some retailers, concerned with implementing disruptive changes during the key sales season between Thanksgiving and Christmas, chose to comply early.

To assist the Department, the Chamber and Littler Mendelson conducted a survey of employers on the actions they took towards compliance with the 2016 Final Rule and the impact those actions had on their businesses. About half of the almost 900 responding employers implemented changes to comply with the 2016 Final Rule before the preliminary injunction was issued. Of the remaining respondents, 39.4 percent had made plans to comply, but did not implement; and 10.6 percent had taken no steps to comply.



Of the employers who had implemented or made plans to implement changes to comply with the Final Rule, most used a combination of increasing salaries to maintain the exemption and reclassification of employees to nonexempt. As shown in the table below, however, employers also took other actions to comply and minimize the cost of compliance. Nearly 29.4 percent of employers reported limiting the use of email or other technologies by reclassified employees outside the workplace; 21.2 percent limited the flexibility of employees to work alternative hours or at home; 7.2 percent reduced benefits to offset the cost of the salary increases; and 6.4 percent replaced employees with automated alternatives or otherwise reduced headcount. Some employers, 11.5 percent, also reported raising prices for customers in order to offset the costs of the 2016 Final Rule.

Did your organization take or plan to take any of the following actions to comply with the 2016 Final Rule	
Increase salaries of exempt employees to retain their exempt status	76.42%
Increase salaries of exempt employees in order to retain their exempt status, but also reduce benefits, such as health care or auto or phone allowances, to minimize costs associated with the salary changes	7.21%
Reclassify employees to nonexempt (overtime eligible)	77.39%
Replace employees with automated alternatives or otherwise reduce headcount	6.38%
Raise prices for customers	11.51%
Limit the flexibility for employees to work alternative hours or at home	21.22%
Limit the use of email or other technologies by non-exempt employees outside the workplace	29.40%
Limit the ability of nonexempt employees to travel for work	15.81%

For employees reclassified to nonexempt because of the 2016 Final Rule, 73.1 percent of employers converted the employees from salaried to hourly, 34 percent decreased their work hours to 40 or less, and 19.4 percent of employers reduced benefits, bonuses, and commissions. Only 7.2 percent of employers made no changes to work hours and compensation of employees reclassified to nonexempt. Importantly, and contrary to the Obama administration's assertions, less than a third of employers (approximately 29 percent) would have allowed newly nonexempt employees to continue working enough hours to earn overtime compensation.

For employees reclassified to nonexempt, did your organization:	
Allow them to work the same number of hours and earn overtime compensation without restriction?	28.72%
Convert them from salaried to hourly pay?	73.14%
Reduce their effective hourly rate so that their total pay remained the same?	18.60%
Require them to track and record work hours?	72.31%
Decrease their work hours to 40 hours or less?	34.09%
Change their status for benefit plans, resulting in less favorable benefits (e.g., paid leave, retirement, insurance benefits)?	7.02%
Reduce bonuses or commissions?	12.40%
Change their status to be included in a collective bargaining unit?	0.21%
Make other changes	14.05%
Make no changes	7.23%

Most employers reported incurring increased payroll costs to comply with the 2016 Final Rule, including increased overtime costs, training costs, and travel time costs. Employers also reported increased cost for administering timekeeping and payroll systems, drafting or modifying policies, and supervising newly nonexempt employees.

Did your organization incur, or anticipate incurring any of the following costs:	
Increased overtime costs	72.97%
Costs associated with reclassification of employees	59.10%
Increased training costs	16.94%
Increased timekeeping and/or payroll administration costs	52.79%
Increased travel time and/or on-call time costs	24.14%
Increased managerial costs of supervising additional non-exempt employees	37.66%
Costs associated with drafting or modifying policies and procedures	52.25%
Costs associated with benefits and/or benefit plan changes	18.92%

The Chamber/Littler survey also asked for specific comments employers had regarding the 2016 regulation. Among those received were the following:

- The rule would have resulted in a number of team members having to use a time clock for the first time, as well as the administrative tasks associated with managers tracking, reviewing, and editing time for these employees. It would have also impacted how work is scheduled and performed, including but not limited to shift schedules, break schedules, travel, and time away from work such as for personal appointments. Managers would have also needed significant training on how to properly track and reduce overtime to minimize the financial impact on the company. Finally, team members in jobs that had historically been exempt felt that being converted to non-exempt status was a demotion; this would have had an impact on morale had we implemented the changes.

- As a non-profit many of our upper management jobs were below the rate proposed by the DOL. If this had remained intact along with the AZ minimum wage increases - the total cost to our organization would have been almost $2,000,000 in the first year, and additional increases as minimum wage increases annually.

- If this goes through, it will make it even harder for us stay in business. This is very hard on small businesses and will deter many people to take the risk of owning a business. Bad for our economy!

- These proposed changes had a highly negative impact on our employee morale. A number of our employees felt devalued and that this would impact their work flexibility.

- Employees being reclassified as non-exempt felt they were being demoted. They were also displeased with the change in flexibility and having to punch the time clock. It was a blow to the morale of our professional staff.

- Our employees did not want to lose the flexibility and prestige of being an exempt employee even if it meant being overtime eligible. Overall, they felt the conversion to hourly was a step back and I believe it would have led to higher management turnover and higher costs.

- Our employees that were reclassified to non-exempt felt it was a demotion, and lost vacation benefits as a result. It has been bad for morale.

- We cover a broad geographical region, including regions that simply do not warrant increasing exempt employees to the new threshold due to the wages already paid in that area. We were faced with increasing a $30,000/annual employee to the threshold or reclassifying them to non-exempt. The standard of living in most of our locations did not support such a drastic increase in exempt status wages.

- Extensive management time devoted to understanding the rule and evaluating impact, implementation decisions, then developing new plans and policies. In a small business, such regulatory changes are a burden that impairs our day to day functioning and will ultimately increase our costs which will likely lead to increased customer pricing.

- We had to delay other pertinent initiatives to comply with this pending rule. It put our business back in regards to innovation and cost saving initiatives, and we are a nonprofit who couldn't afford this cost of complying only to have it delayed.

- Our primary challenge with the changes is culture. As a nonprofit, we are upfront that salaries aren't going to be high and hours are going to be long at times, but people choose to work here because they are passionate about helping fulfill our mission. Limiting our ability to have all staff work an event, or limiting when services are delivered in order to keep to a timeclock, all works counter to our successful culture and will ultimately hurt the families we are serving.

- Had to reduce my admin employee headcount; put people out of work.

- We are a non-profit. We planned for, but did not implement any changes. Implementation of the final rule would have had a tremendous adverse impact on our ability to serve the youth of our community and the underprivileged families who depend on us. The people who work for us do so at personal sacrifice. None of us here are in it for the money and our salaries are not competitive with the for-profit world. We do this because we believe in service to the community and the importance of our mission and we are willing to make personal financial sacrifices for the sake of those who need us. As the economy improves the talent wars will take care of raising salaries in the for-profit world and donations will increase naturally allowing us to raise salaries as well. Intervention of the DOL is not what is needed and imposing such high increases will do far more harm than good.

- I have a part of my business, a café that grosses a maximum of $375,000/year. As a rule of thumb, the manager should make 10% of gross or $37,500/year. That means I can afford to pay about a $25,000 salary and allow the manager to have a chance to participate in profitability with a bonus. The new rule's $47,000 base salary would come in at around $62,000 with benefits. I would have to close the cafe and let go all of the employees if the rate was that high. I would never have the chance to cover my costs, let alone make a profit.

- We are mostly funded by Medicaid and other government agencies so the reimbursement rates did not increase but our staffing costs would go up. We cannot afford to do business under such model. We would have to cut back on services to our clients because we cannot afford to pay overtime to staff who would have to be re-classified as non-exempt. Staff did not like the changes that we were about to implement (clocking in and out for example as they had a trial period to get used to the idea).

7. Duties-Only Test

Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

The Chamber does not support a duties-only test for exemption. Moving to a duties-only test for exemption would necessarily require reworking of the definitions of the duties. Any changes to the current duties tests would be disruptive, especially reinstating the 20 percent cap on nonexempt work. The restriction on the amount of nonexempt work was an element of the pre-2004 long duties tests. But, as explained under Question 1, above, the long duties tests have been effectively dead for 36 years. As the Department

stated in 2004, "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."[67] The Department did not reinstate the 20 percent cap in the 2016 Final Rule, and should not do so now. Adopting a duties-only test and making changes to those duties tests would increase litigation – increasing costs for employers and delay payment of wages to employees.

Although the Department has the authority to adopt regulations that define and delimit the exemptions based solely on job duties, the Part 541 regulations have included a salary level test since they were first adopted in 1938. Employers, employees, courts and the Department have found the salary tests a useful tool to exclude obviously nonexempt employers from the exemption. If the Department applies the 2004 methodology to make any increase to the standard salary level, that salary level will fulfill its historical role, and no changes in the duties tests are needed. A salary level set near the lower end of current salaries in the lowest-wage region, the smallest size establishments, in the smallest-sized city group, or in the lowest-wage industry establishes a bright and reasonable line for identifying obviously nonexempt employees.

8. Impacted Occupations

> *Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?*

Because salary levels for the same occupation can vary based on the work location of the employee (e.g., geographic region, rural vs. urban), generalizations regarding occupations that would have been excluded under the 2016 Final Rule are difficult. However, based on BLS data, there are currently more than 4.2 million workers in

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[67] 2004 Final Rule, 69 FR at 22127. In the 2004 Final Rule, the Department also rejected quantitative, "bright-line" 50 percent rule for the primary duty "because of the difficulties of tracking the amount of time spent on exempt tasks." *Id.* at 22185-86. The Department stated: "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)." *Id. See also In re Family Dollar FLSA Litigation*, 637 F.3d 508, 511, 516–18 (4th Cir. 2011) (retail manager was exempt even though she ''devoted most of her time to doing . . . mundane physical activities'' such as unloading freight, stocking shelves, working the cash register, or sweeping the floors); *Soehnle v. Hess Corp., 399 Fed. App'x*, 749, 750 (3d Cir. 2010) (gas station manager who spent 85 percent of time operating a cash register was exempt).

management and professional occupations who earn between $455 and $913 per week. Based on the analysis of probabilities of exempt duties by the Wage and Hour Division that was applied by CONSAD Research Corporation in the 2004 rulemaking, most of these workers (70 percent to 95 percent) would be exempt by duties if not for the exclusionary effect of the $913 salary test applied by the 2016 rule. This means that the 2016 rule excluded between 2.9 million and 4.0 million otherwise legitimately exempt workers from exempt status. Job classifications of exempt workers who earn between $455 per week and $913 per week and who would likely be excluded from duties-based exemption determination by the 2016 salary test include 117,000 general operations managers ($748 weekly median), 113,000 financial managers (weekly median $767), 167,000 food service managers ($697 median), and 189,000 accountants and auditors (median $769).

Further, with no current requirement or imperative for employers to track the amount of time – hour by hour, day by day, week by week – that employees spend performing exempt versus nonexempt tasks, there can be no reliable data on which occupations spend more than 20 or 40 percent of their time each week performing nonexempt work. Even when some anecdotal evidence is available, such as case law on retail managers,[68] the exempt employees likely are performing both exempt and nonexempt work, which does not defeat the exemption under the concurrent duties rule.[69]

9. Bonuses and Commissions

> *The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?*

The Department should allow employers to use all non-discretionary compensation to satisfy both the standard and highly compensated salary levels, without limit.

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[68] *See, e.g.,* 2004 Final Rule, 69 FR at 22186 (*citing Jones v. Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (manager who spent 75 to 80 percent of her time on basic line-worker tasks held exempt); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618-20 (8th Cir. 1991) (manager exempt despite spending 65 to 90 percent of his time in non-management duties), *cert. denied*, 502 U.S. 1073 (1992); *Glefke v. K.F.C. Take Home Food Co.*, 1993 WL 521993, at *4-5 (E.D. Mich. 1993) (employee found exempt despite assertion that she spent less than 20 percent of time on managerial duties); *Stein v. J.C. Penney Co.*, 557 F. Supp. 398,404-05 (W.D. Tenn. 1983) (employee spending 70 to 80 percent of his time on non-managerial work held exempt).

[69] 29 C.F.R. § 541.105 ("Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption…").

Eligibility for bonuses, commissions and other incentive pay is an indicator of exempt status, as employees not meeting the duties tests for exemption are much less likely to receive such compensation. In the 2016 Final Rule, the Department recognized "the increased role bonuses play in many compensation systems."[70] Incentive pay is "an important component of employee compensation in many industries."[71] Exempt employees often perform duties, relying on independent judgment, that can impact the financial success or failure of the business, and therefore employers need to incentivize for success. But, disregarding incentive compensation in determining exempt status prevents employers from designing compensation plans that best ensure the success of the business.[72]

The restrictions imposed in the 2016 Final Rule are inconsistent with reality. Most bonuses are paid to exempt employees on an annual basis, to reward for the financial performance of the company over the prior year. The 2016 Final Rule would have only counted bonuses paid quarterly or more frequently, excluding all annual bonuses. The 10 percent limitation also does not reflect common practice, as bonus programs for exempt employees often exceed 10 percent of their total compensation. The 10 percent limitation seems to have been determined arbitrarily. The only explanation for this limit provided by the Department was a fear without foundation that "setting the limit above 10 percent could undermine the premise of the salary basis test by depriving workers of a predetermined salary that does not fluctuate because of variations in the quality or quantity of their work and thus is indicative of their exempt status."[73] This predicament is very unlikely to occur, as few exempt employees would agree to a compensation plan without a minimum income guarantee – except, of course, outside sales employees who can be paid straight commission.[74] Finally, as with the highly compensated test, the Department should allow employers to make annual "catch up" payments if salary plus incentive payments fall short of the annualized salary level.

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[70] 2016 Final Rule, 81 FR at 32432

[71] *Id.*

[72] *Id.* (incentive compensation "might be curtailed if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level").

[73] *See id.* at 32426.

[74] 29 C.F.R. § 541.500(c).

10. Treatment of Highly Compensated Employees

> *Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?*

For the reasons discussed above under Questions 2 and 3, the Department should not adopt multiple annual compensation levels for the highly compensated test.

The Department adopted the highly compensated employee test[75] in recognition that "the higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed."[76] Currently, an employee must earn $100,000 annually, with at least $455 per week paid on a salary basis. Employees who earn more than the required total annual compensation are not exempt unless: (1) their primary duty includes performing office or non-manual work; and (2) they customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee.[77]

The duties requirements in the Part 541 regulations are sufficient to ensure that only *bona fide* executive, administrative and professional employees qualify for the Section 13(a)(1) exemption under the highly compensated test. Thus, the Department should revise the Part 541 regulations to remove the requirement of a weekly salary, leaving only an annual salary requirement.

The current $100,000 total compensation level was also set in 2004, and thus warrants review and possible adjustment. However, for any proposed increase, to maintain consistency, the Department should use the same data set chosen for adjusting the standard salary threshold.

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[75] The highly compensated employee test is not a separate exemption. Rather, 29 C.F.R. § 541.600 provides a different and shorter duties *test* for highly compensated employees under Section 13(a)(1) of the FLSA. *See* 2004 Final Rule, 69 FR at 22123 ("The 'highly compensated' *test* in the final rule applies only to employees who earn at least $100,000 per year …") (emphasis added).

[76] *Id.* at 22173 (quoting the 1949 Weiss Report); *see also* 29 C.F.R. § 541.601(c).

[77] 29 C.F.R. § 541.601(a), (c) & (d).

11. Indexing

> *Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?*

The Department should not revise the Part 541 regulations to provide for automatic updates to the standard salary level or the highly compensated total annual compensation level.

An automatic annual increase mechanism to the salary levels is tremendously problematic as it would ensure the regulated community would never again be allowed to participate in a public debate regarding the salary levels. Any proposal for automatic increases also raises significant issues regarding the Department's authority and responsibility under section 13(a)(1) of the FLSA – questions that could again mire the Department in litigation.

First, there is no evidence that Congress intended that the salary level test for exemption under section 13(a)(1) be indexed. Similarly, in the 79 year history of the FLSA Congress has never indexed any of the other wage or compensation levels in the Act: the minimum wage; the minimum hourly wage for exempt computer employees under section 13(a)(17) of the Act; the tip credit wage under section 3(m) of the Act; nor any of the subminimum wages available in the Act. In contrast, Congress has provided for indexing under other statutes, such as the Social Security Act and the Patient Protection and Affordable Care Act, and is fully aware that increases to the salary levels for exemption under Section 13(a)(1) have come only sporadically and on an irregular schedule. Here, inaction by Congress demonstrates that it did not intend to allow the Department to index the salary levels.

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.[78] The Department dismissed the idea as "needing further study," although stating that the suggestion "appear[ed] to

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[78] 35 FR 883, 884 (Jan. 22, 1970).

have some merit particularly since past practice has indicated that approximately 7 years elapse between amendment of these salary requirements."[79] 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 believed that long intervals between salary adjustments are not the norm:

> [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 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

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[79] *Id.*

> approaches in this rulemaking is both contrary to congressional intent and inappropriate.[80]

Notwithstanding the absence of statutory authority, or any suggestion of congressional support, in the 2016 Final Rule, the Department reversed its position and created an automatic salary level increase process without the notice and comment rulemaking required under the Administrative Procedure Act (APA). The only justification for the Department's change on indexing seemed to be that updating the salary levels through APA rulemaking is difficult:

> 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.[81]

The Department also stated that automatic annual increases to the salary would "promote government efficiency by removing the need to continually revisit this issue through resource-intensive notice and comment rulemaking."[82]

The Department argued in the 2015 NPRM that Congress' failure to provide "guidance either supporting or prohibiting automatic updating" indicates it has authority to

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[80] 2004 Final Rule, 69 FR at 22171-72.

[81] 2015 NPRM, 80 FR at 38539.

[82] *Id.* at 38537.

do so.[83] Adoption of this reasoning—that silence from Congress is tantamount to permission—would eviscerate the traditional Constitutional doctrine of the limitations of statutory authority, and provide a *carte blanche* to any federal agency to pursue whatever policy was not explicitly prohibited by Congress.

Notice and comment rulemaking for updating the salary threshold 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 usually adjusts its proposed salary levels based on the public comments. 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. Automatic salary increases would end this public debate forever, even in periods of economic downturns when the costs of the salary increases would be particularly harmful to the economy.

Thank you for the opportunity to respond to the Request for Information and present our views before the Department begins a formal rulemaking. We look forward to working with the Department on this important issue.

Sincerely,

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Senior Vice President
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[83] *Id.* at 38538.

Appendix A

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OF THE
UNITED STATES OF AMERICA

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MARC D. FREEDMAN
EXEC. DIRECTOR, LABOR LAW POLICY
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

September 4, 2015

VIA ELECTRONIC FILING: www.regulations.gov

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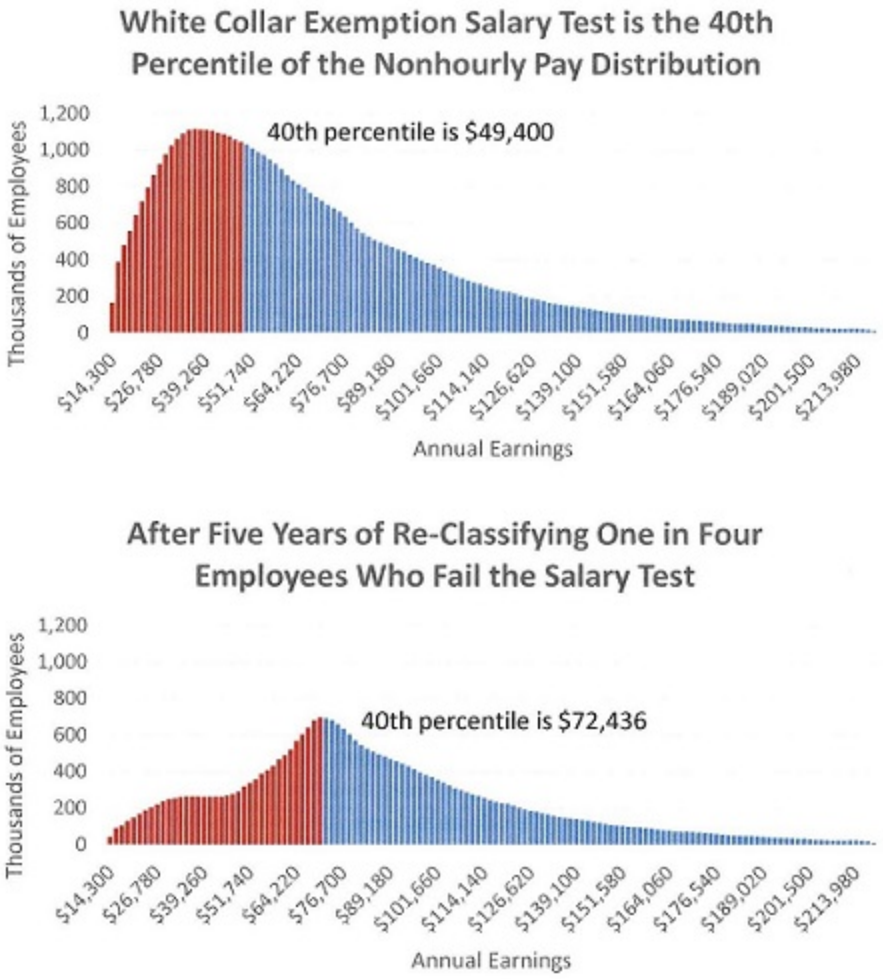
[117] *"Indexing the White Collar Salary Test: A Look at the DOL's Proposal,"* Edgeworth Economics (Aug. 27, 2015), *available at* http://www.edgeworthconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/

[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;
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> (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
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> (d) Who customarily and regularly exercises discretionary powers; and
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> (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
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> (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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Appendix A

List of FLSA Overtime Exemptions

FLSA Overtime Exemptions

1. 29 U.S.C. § 203(e)(3) (the term "employee" does not include individuals employed in agriculture by their parents).

2. 29 U.S.C. § 203(e)(4) (the term "employee" does not include individuals who volunteer to perform services for public agencies).

3. 29 U.S.C. § 207(b) (3) (overtime exemption for certain employees of an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products).

4. 29 U.S.C. § 207(i) (overtime exemption for certain commissioned employees in retail and service establishments).

5. 29 U.S.C. § 207(j) (partial overtime exemption for employees of establishments engaged in care of sick, aged or mentally ill).

6. 29 U.S.C. § 207(k) (partial overtime exemption for fire protection and law enforcement employees).

7. 29 U.S.C. § 207(m) (partial overtime exemption for certain employees stripping, grading, handling, stemming, re-drying, packing or storing tobacco).

8. 29 U.S.C. § 207(n) (partial overtime exemption for rail, trolley and bus drivers engaged in charter activities).

9. 29 U.S.C. § 207(q) (partial overtime exemption for employees receiving remedial education).

10. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide executive capacity).

11. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide administrative capacity).

12. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide professional capacity).

13. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide outside sales capacity).

14. 29 U.S.C. § 213(a)(3) (minimum wage and overtime exemption for employees of seasonable amusement or recreational establishments).

15. 29 U.S.C. § 213(a)(5) (minimum wage and overtime exemption for employees catching, harvesting, cultivating or farming fish, shellfish, crustacia, sponges, seaweeds, or other aquatic forms of animal and vegetable life).

16. 29 U.S.C. § 213(a)(6) (minimum wage and overtime exemption for certain employees of small farms).

17. 29 U.S.C. § 213(a)(8) (minimum wage and overtime exemption for employees of small newspapers).

18. 29 U.S.C. § 213(a)(10) (minimum wage and overtime exemption for switchboard operators for small telephone companies).

19. 29 U.S.C. § 213(a)(12) (minimum wage and overtime exemption for seaman on non-American vessels).

20. 29 U.S.C. § 213(a)(15) (minimum wage and overtime exemption for casual babysitters).

21. 29 U.S.C. § 213(a)(15) (minimum wage and overtime exemption for domestic service employees who provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves).

22. 29 U.S.C. § 213(a)(16) (minimum wage and overtime exemption for certain federal criminal investigators).

23. 29 U.S.C. § 213(a)(17) (minimum wage and overtime exemption for certain computer employees).

24. 29 U.S.C. § 213(b)(1) (overtime exemption for employees subject to the Motor Carrier Act).

25. 29 U.S.C. § 213(b)(2) (overtime exemption for employees of employers engaged in the operation of a rail carrier).

26. 29 U.S.C. § 213(b)(3) (overtime exemption for employees of carriers subject to the Railway Labor Act).

27. 29 U.S.C. § 213(b)(5) (overtime exemption for outside buyers of poultry, eggs, cream or milk).

28. 29 U.S.C. § 213(b)(6) (overtime exemption for seaman).

29. 29 U.S.C. § 213(b)(9) (overtime exemption for certain employees of small town radio and television stations).

30. 29 U.S.C. § 213(b)(10)(A) (overtime exemption for salesmen, partsmen and mechanics primarily engaged in selling or servicing automobiles, trucks or farm implements).

31. 29 U.S.C. § 213(b)(10)(B) (overtime exemption for trailer, boat and aircraft salesmen).

32. 29 U.S.C. § 213(b)(11) (overtime exemption for certain drivers and drivers' helpers making local deliveries and paid by the trip).

33. 29 U.S.C. § 213(b)(12) (overtime exemption for agricultural employees).

34. 29 U.S.C. § 213(b)(12) (overtime exemption for employees engaged in maintenance of ditches, canals, reservoirs or waterways used for storing water and which are operated on a non-profit or a sharecrop basis).

35. 29 U.S.C. § 213(b)(13) (overtime exemption for agricultural employees who work at livestock auctions during weekends).

36. 29 U.S.C. § 213(b)(14) (overtime exemption for small country grain elevators).

37. 29 U.S.C. § 213(b)(15) (overtime exemption for employees engaged in the processing of maple sap into sugar or syrup).

38. 29 U.S.C. § 213(b)(16) (overtime exemption for certain employees engaged in the transportation of fruits or vegetables).

39. 29 U.S.C. § 213(b)(17) (overtime exemption for taxicab drivers).

40. 29 U.S.C. § 213(b)(20) (overtime exemption for small fire and law enforcement agencies).

41. 29 U.S.C. § 213(b)(21) (overtime exemption for domestic service employees who reside in the household).

42. 29 U.S.C. § 213(b)(24) (overtime exemption for house-parents of nonprofit educational institutions).

43. 29 U.S.C. § 213(b)(27) (overtime exemption for employees of motion picture theaters).

44. 29 U.S.C. § 213(b)(28) (overtime exemption for certain forestry employees).

45. 29 U.S.C. § 213(b)(29) (overtime exemption for certain employees of amusement or recreational establishments located in a national park, national forest or on National Wildlife Refuge System land).

46. 29 U.S.C. § 213(b)(30) (overtime exemption for certain federal criminal investigators).

47. 29 U.S.C. § 213(d) (minimum wage and overtime exemption for newspaper delivery).

48. 29 U.S.C. § 214(d) (minimum wage and overtime exemption for students employed by their elementary or secondary school if such employment is an integral part of the regular education program provided by such school).

Appendix B

Oxford Economics Study

OXFORD ECONOMICS

To: The National Retail Federation
From: Oxford Economics
Date: August 18, 2015
Re: State differences in overtime thresholds.

This letter explores differences between states' prevailing wages pertinent to the Department of Labor's proposed new overtime exemption threshold.[1] It follows up on Oxford Economics' July 17, 2015 letter, which updated estimates from our paper "Rethinking Overtime: How Increasing Overtime Exemption Thresholds will Affect the Retail and Restaurant Industries" to reflect the DOL's proposal.

DOL proposes to set a new overtime threshold at the national 40th percentile of earnings for salaried full-time workers in 2016, without any accommodation for lower-wage industries or areas of the country.[2] The department has also proposed an automatic annual increase in the threshold by indexing it either to the CPI-U or the 40th percentile of nationwide full-time, salary earnings. Our previous letter raised several concerns with this proposal, including that the rule itself would drive lower-wage workers who are currently salaried to hourly status, thus affecting the distribution of salary compensation itself. In particular, indexing the threshold to the 40th percentile has the potential to lead to a vicious cycle where one year's increase in overtime thresholds drives further increases the next year, irrespective of any underlying fundamental change in prices or labor market conditions.

To illustrate this,[3] imagine that the lowest 40% of the salaried full-time wage distribution in 2016 were converted to hourly status, so that only the top 60% of the original distribution of workers continued to be salaried, as in figure 1. If the new overtime threshold were set at the 40th percentile of this new distribution of salaried workers, as in figure 2, it would now be set at the 64th percentile of the original distribution. In 2016, for example, this 64th percentile would be set at approximately $1,400, as opposed to the 40th percentile wage of $970.[4]

[1] See http://www.dol.gov/whd/overtime/NPRM2015.
[2] See http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm. "Salaried" here is used to mean, non-hourly paid workers.
[3] Clearly, this is not meant as a literal prediction of what the new rule would mean, since some non-exempt workers still report salaried status in the Current Population Survey, and since the process would be iterative.
[4] This uses our series approximating the DOL numbers, in which the 64th percentile wage in 2014 is roughly 144% of the 40th percentile wage ($933). We then scale this to DOL's forecast for the 40th percentile full-time salaried wage in 2016, $970.

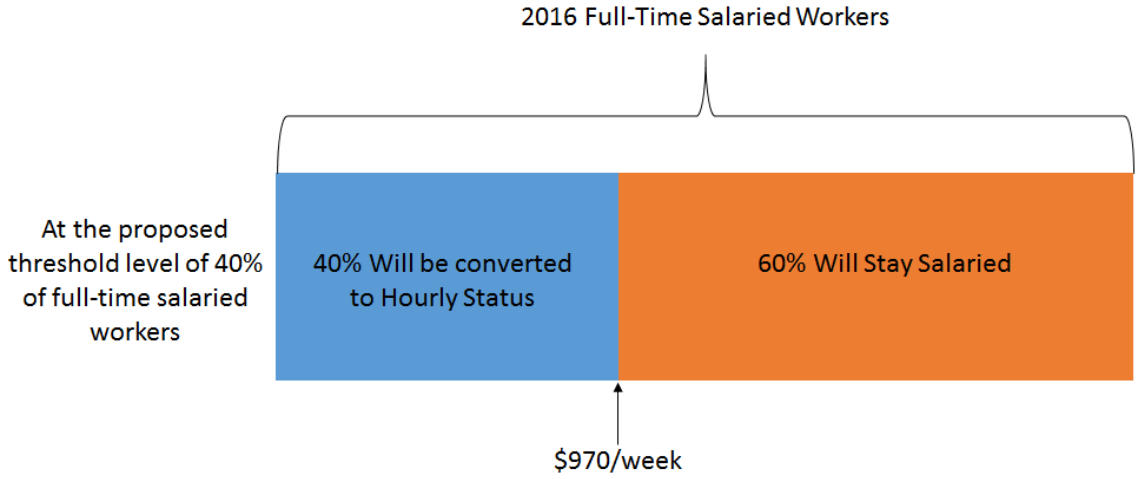

Figure 1. 40th percentile wage before the rule.

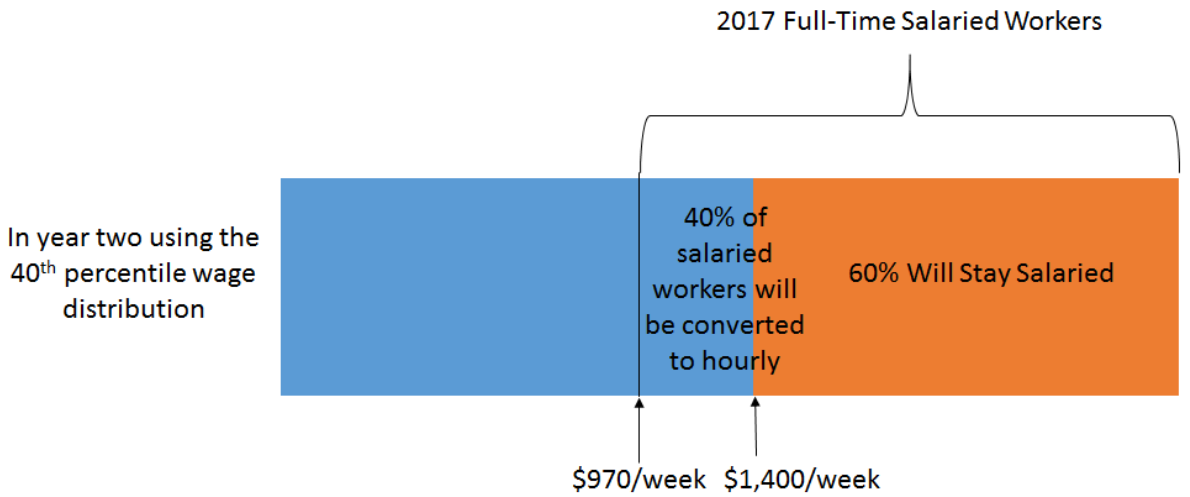

Figure 2. Hypothetical new 40th percentile cut-off of salaried wages in 2017 if all salaried workers below the 2016 cut-off were converted to hourly status.

An additional concern with the DOL's proposal is that it applies a national 40th percentile wage figure across the United States as a whole. While in some states this wage is near the 40th percentile of salaried full-time wages, in relatively lower wage (and lower cost of living) states, it is much higher in the income distribution.

In this letter, we use our best approximation of the DOL's salary full-time wage series to:

- Calculate the percentile that the national 40th percentile of weekly wages for all full-time, salaried employees ($970 in 2016) actually represents in each state – which is the percentage of full-time salaried workers in each state and DC earning below the national 40th percentile wage; and
- Calculate what the 40th percentile salary full-time wage is in each state.

In addition to this, we use data from the American Community Survey to:

- Estimate annual salaries for entry level (between ages 18 and 27 inclusive) full-time workers (who may be paid on an hourly or salary basis), who are college graduates in each state. This reflects differences in costs of living and prevailing wages across states.

I. State-level 40th percentile salaried wages

This section uses microdata from the Current Population Survey (CPS) to explore differences between states in the 40th percentile of salary full-time wages.[5] Figure 3 below[6] shows what the 40th percentile of salary full-time wages equates to in each state.[7] Relatively high-wage states are colored in yellow and relatively low-wage states in red. The red states will be most impacted by DOL's proposed increase in the salary threshold.

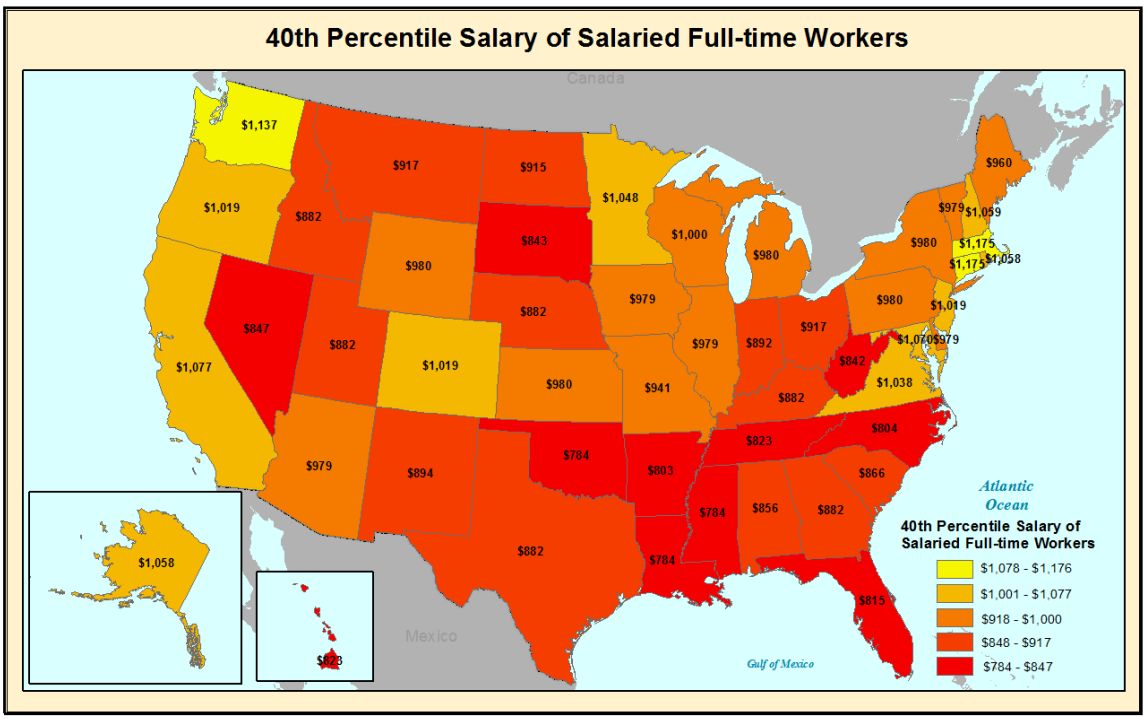

Figure 3. 40th percentile salaried full-time wage by state.

[5] The methodology for constructing the "Oxford best match" series is discussed in greater detail in our previous letter. Starting with the 2014 monthly outgoing rotation groups in the CPS, we used the restriction that peernrt = 2 to screen for non-hourly workers, and that pehrusl ≥ 35 OR (pehrusl = -4 AND pehrftpt = 1) to screen for full-time workers. Responses are weighted by pworwgt, and the small number of respondents under age 16 with wage data are excluded. The difference between data presented in this letter and those presented in that letter are that this letter takes percentiles of pooled data from all 12 months, whereas the other letter took averages of monthly percentiles. This was done to prevent small sample sizes in state-level estimates. The overall change in national estimates is minimal.

[6] The data series for all the maps are presented together in the table at the end of this letter.

[7] The raw wage for each state is scaled by the ratio of DOL's national forecast 40th percentile wage in 2016 ($970) to Oxford's best match national 40th percentile wage in 2014 ($942).

Figure 4 shows what percentile the national 40th percentile ($970 in 2016) actually represents in each state. The percentile value depicted for each state is the percentage of that state's salaried full-time workforce that earns less than $970 per week (the national 40th percentile wage for such workers in 2016). Relatively high-wage states will thus have low percentile values and will be colored in yellow, and relatively low-wage and often lower cost of living states will have high percentile values and will be colored in red. These red states will be most impacted by the new overtime rules.

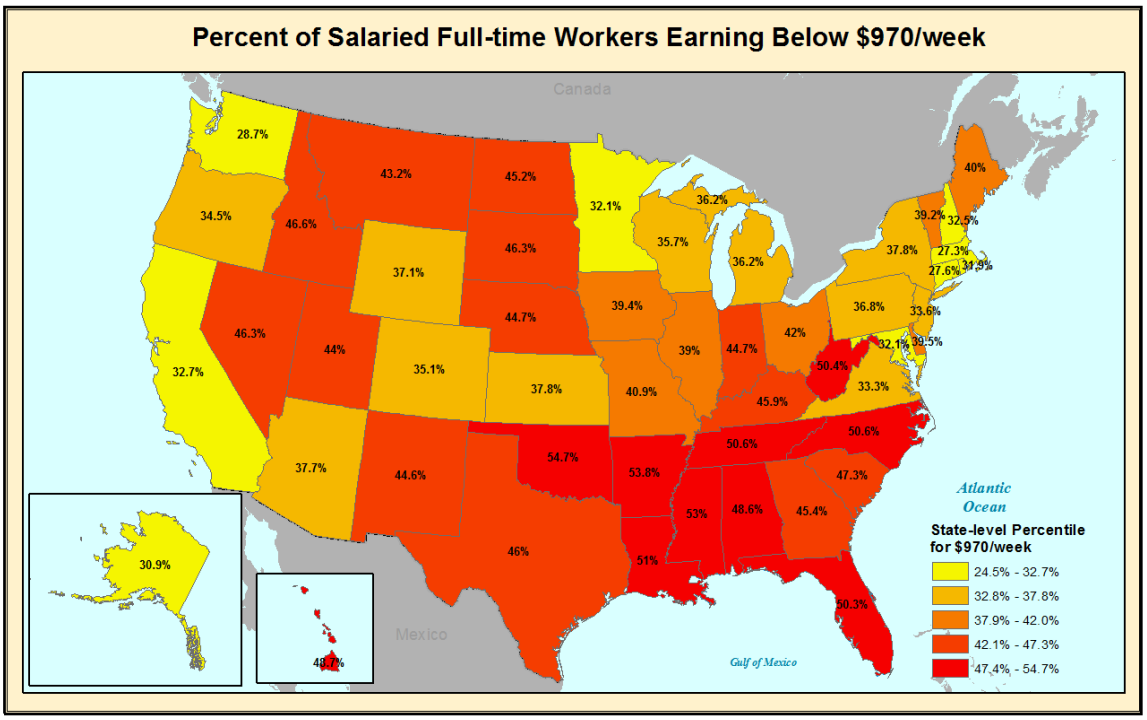

Figure 4. Percentile of salaried full-time state wage distribution that national 40th percentile wage ($970) represents.

II. Entry-level college wages

This section uses 2013 microdata from the American Community Survey[8] to estimate entry-level wages for college graduates by state in 2016.[9] Specifically, entry-level jobs are identified by focusing on younger workers, those between 18 and 27 inclusive. College graduates by default includes anyone with an Associate's Degree or above (those with some college but no degree are excluded), although we also present data for those whose highest degree is an Associate's Degree, as well as for those whose highest degree is a Bachelor's Degree. We restrict attention to those who are currently employed and at work, and who reported working 35 hours or more per week on average, and 50 or more weeks in the preceding year. Data are median annual salaries for the preceding year.[10]

Figure 5 is a map of median annual entry-level wages for all those with a college degree.[11] Relatively high-wage states are colored in yellow and relatively low-wage states in red to match the presentation in the previous section. Figure 6 is an analogous map for those whose highest degree is an Associate's. Figure 7 is an analogous map for those whose highest degree is a Bachelor's.

Generally, wages are higher for those whose highest degree is a Bachelor's than for those whose highest degree is an Associate's, but this is not necessarily the case (and is not the case in Alaska or Oregon) since workers 27 and younger with an Associate's Degree have more experience on average than workers in this same age group with a Bachelor's. In addition, in some states, especially when considering those whose highest degree is an Associate's, we run into issues with small sample sizes. This may be the case in Alaska, for example, where the median wage for such workers is $62,550. Sample sizes are generally not a problem in figure 5, which considers everyone with a college degree.

[8] ACS data was used rather than CPS data because of its larger sample size. Note the difference in reference year from the preceding section, owing to 2014 ACS data not yet being available. Public Use Microdata for 2013 was obtained from https://www.census.gov/programs-surveys/acs/data/pums.html.

[9] Because of the context of the work, the year conversion is accomplished by multiplying by the ratio of DOL's 40th percentile full-time salaried wage series forecast in 2016, $970, and DOL's calculated value in 2013, $921. To obtain original 2013 figures, multiply the presented figures by the reciprocal: 921/970.

[10] Specifically, we restrict age by (agep>=18 AND agep<=27). We restrict for full-time status by (wkhp>=35). We restrict for those who are currently employed and at work by (esr=1 OR esr=4) (1 corresponds to civilian workers and 4 to military workers). We restrict for 50 or more weeks at work in the preceding year by (wkw=1). We restrict for those with a college degree by (schl>=20), for only those whose highest degree is an Associate's by (schl=20) and for only those whose highest degree is a Bachelor's by (schl=21). Note that those with a college degree includes those with graduate degrees, but that this group is too small to report separately. The reported series, median weekly wages, is the median of (wagp/52). All observations are weighted by pwgtp.

[11] Note that figures 5-7 round annual wages to the nearest $50. The data table at the end of the document gives unrounded numbers.

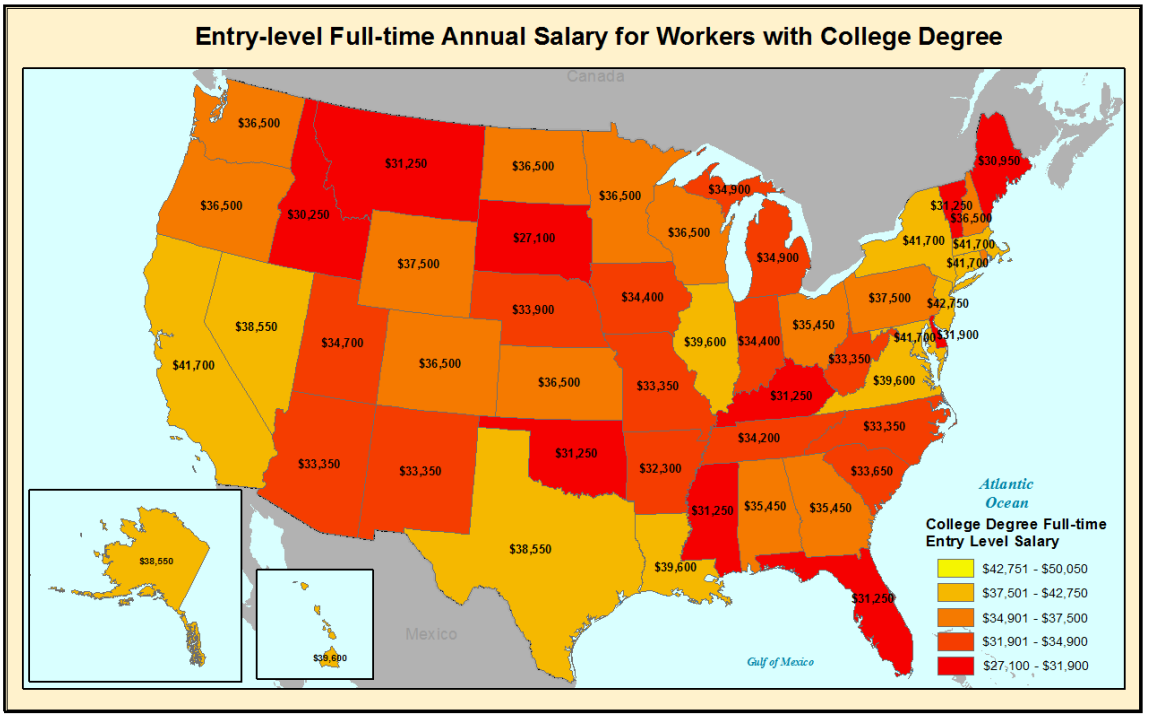

Figure 5. Median entry-level wages for full-time workers with a college degree by state.

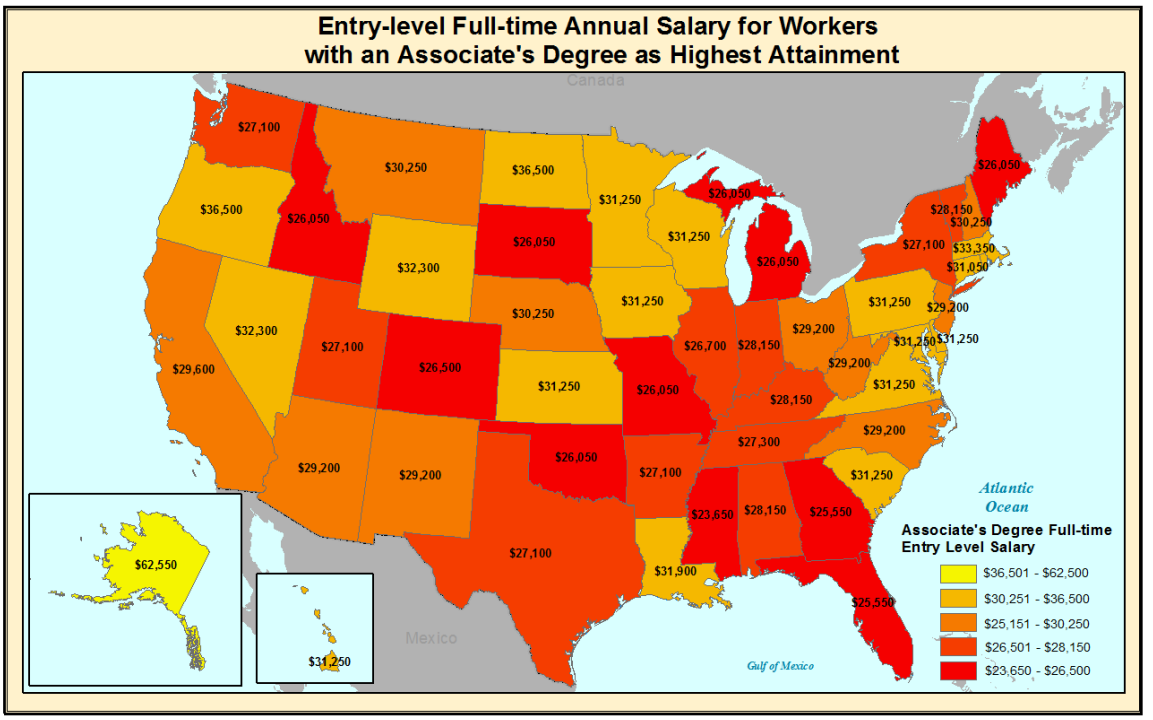

Figure 6. Median entry-level wages for full-time workers whose highest degree is an Associate's by state.

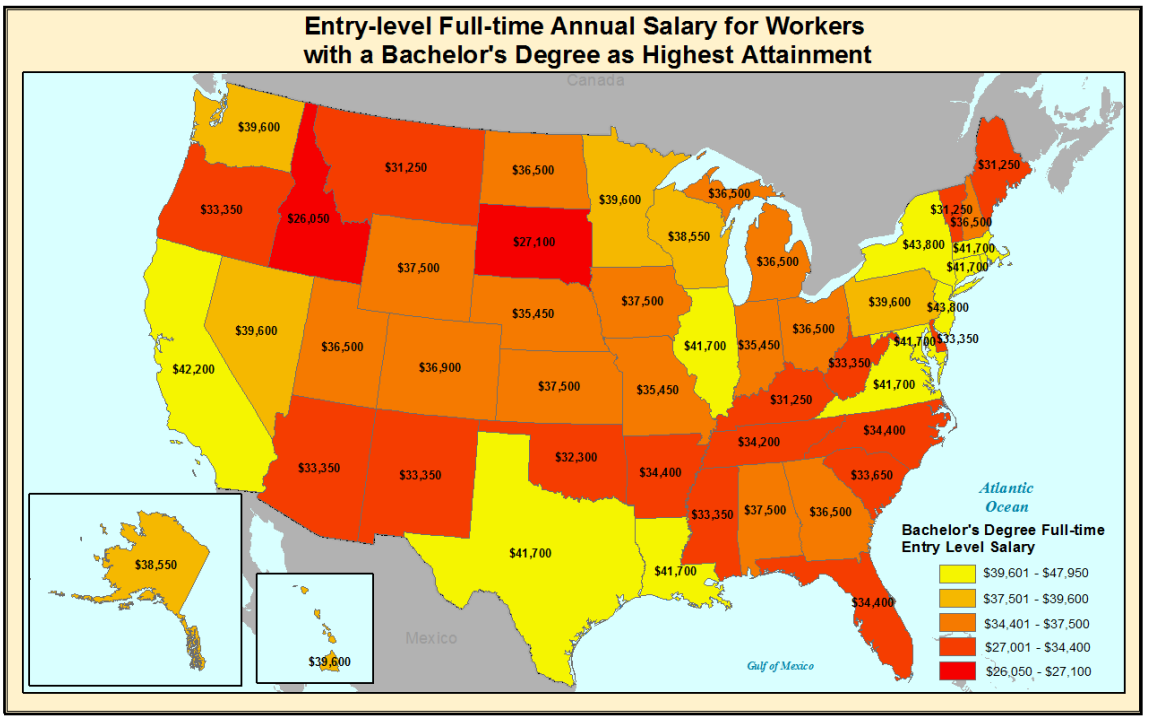

Figure 7. Median entry-level wages for full-time workers whose highest degree is a Bachelor's by state.

III. Data Table

	40th percentile salaried full-time wage	percentage of salaried full-time workforce that earns <$970 per week	College graduate entry-level wage	Associate's only entry-level wage	Bachelor's only entry-level wage
Alabama	$856	48.6%	$35,440	$28,143	$37,524
Alaska	$1,058	30.9%	$38,567	$62,541	$38,567
Arizona	$979	37.7%	$33,355	$29,186	$33,355
Arkansas	$803	53.8%	$32,313	$27,101	$34,397
California	$1,077	32.7%	$41,694	$29,603	$42,215
Colorado	$1,019	35.1%	$36,482	$26,476	$36,899
Connecticut	$1,175	27.6%	$41,694	$31,062	$41,694
Delaware	$979	39.5%	$31,896	$31,270	$33,355
District of Columbia	$1,176	24.5%	$50,033	$31,270	$47,948
Florida	$815	50.3%	$31,270	$25,537	$34,397
Georgia	$882	45.4%	$35,440	$25,329	$36,482
Hawaii	$823	48.7%	$39,609	$31,270	$39,609
Idaho	$882	46.6%	$30,228	$26,059	$26,059
Illinois	$979	39.0%	$39,609	$26,684	$41,694
Indiana	$892	44.7%	$34,397	$28,143	$35,440
Iowa	$979	39.4%	$34,397	$31,270	$37,524
Kansas	$980	37.8%	$36,482	$31,270	$37,524
Kentucky	$882	45.9%	$31,270	$28,143	$31,270
Louisiana	$784	51.0%	$39,609	$31,896	$41,694
Maine	$960	40.0%	$30,958	$26,059	$31,270
Maryland	$1,070	32.1%	$41,694	$31,270	$41,694
Massachusetts	$1,175	27.3%	$41,694	$33,355	$41,694
Michigan	$980	36.2%	$34,919	$26,059	$36,482
Minnesota	$1,048	32.1%	$36,482	$31,270	$39,609
Mississippi	$784	53.0%	$31,270	$23,661	$33,355
Missouri	$941	40.9%	$33,355	$26,059	$35,440
Montana	$917	43.2%	$31,270	$30,228	$31,270
Nebraska	$882	44.7%	$33,876	$30,228	$35,440
Nevada	$847	46.3%	$38,567	$32,313	$39,609
New Hampshire	$1,059	32.5%	$36,482	$30,228	$36,482
New Jersey	$1,019	33.6%	$42,736	$29,186	$43,779
New Mexico	$894	44.6%	$33,355	$29,186	$33,355
New York	$980	37.8%	$41,694	$27,101	$43,779
North Carolina	$804	50.6%	$33,355	$29,186	$34,397
North Dakota	$915	45.2%	$36,482	$36,482	$36,482
Ohio	$917	42.0%	$35,440	$29,186	$36,482
Oklahoma	$784	54.7%	$31,270	$26,059	$32,313
Oregon	$1,019	34.5%	$36,482	$36,482	$33,355
Pennsylvania	$980	36.8%	$37,524	$31,270	$39,609

Rhode Island	$1,058	31.9%	$37,524	$31,270	$41,694
South Carolina	$866	47.3%	$33,668	$31,270	$33,668
South Dakota	$843	46.3%	$27,101	$26,059	$27,101
Tennessee	$823	50.6%	$34,189	$27,309	$34,189
Texas	$882	46.0%	$38,567	$27,101	$41,694
Utah	$882	44.0%	$34,710	$27,101	$36,482
Vermont	$979	39.2%	$31,270	$28,143	$31,270
Virginia	$1,038	33.3%	$39,609	$31,270	$41,694
Washington	$1,137	28.7%	$36,482	$27,101	$39,609
West Virginia	$842	50.4%	$33,355	$29,186	$33,355
Wisconsin	$1,000	35.7%	$36,482	$31,270	$38,567
Wyoming	$980	37.1%	$37,524	$32,313	$37,524

Appendix C

Request for Extension of Comment Period

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE
BENEFITS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5448 · 202/463-3194 FAX

July 31, 2015

Dr. David Weil, Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., .N.W.
Washington, DC 20210

RE: Request for Extension of Comment Period for Proposed Regulation "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" under 29 CFR Part 541 (RIN1235-AA11), July 6, 2015.

Submitted via electronic transmission: www.regulations.gov

Dear Dr. Weil:

The proposed rulemaking on "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" under 29 CFR Part 541 (RIN1235-AA11 suffers from several unclear aspects regarding the data compilation and analysis that was performed in support of the regulatory proposal. For the reasons detailed below, we request that the deadline for the comment period be extended by 60 days to November 3, 2015.

To facilitate meaningful comments, the Chamber needs to be able to do the following:

- Replicate the analysis that was conducted by the Department;
- Present other relevant tabulations and analyses using data compiled on the same basis as that presented in the Department's regulatory impact analysis; and
- Understand the assumptions and calculations on which the Department bases its estimations of costs, transfers, and benefits of the proposal through obtaining more detail than is provided in the published material.

Accordingly, to get the necessary answers to our technical questions regarding these data and analysis matters, we request a meeting with the Department's technical staff who conducted the data tabulation and analysis for the *sole purpose* of hearing and answering our technical questions. We expressly do not intend for this meeting to involve the presentation of arguments, alternatives, or proposals. We are interested solely in obtaining technical information that will allow us to proceed effectively and expeditiously to draft comments. In the alternative, we request the opportunity to submit detailed questions that will be answered.

We also note that the regulatory analysis published explains that the data tabulations used in the Department's analysis were based on raw, confidential Bureau of Labor Statistics microdata files of individual responses to the monthly 2011 through 2013 Current Population Surveys, and that commenters cannot expect to replicate the results of the analysis on which the Department relied for its regulatory decisions by compiling and tabulating data from the available public use files of CPS microdata. Since this critical data is not available to the public, this represents a serious limitation on the public's right to comment on a proposed rule under the Administrative Procedure Act, and it represents a major change from past practice. In previous years, the Bureau of Labor Statistics, in order to safeguard its status as an accredited independent statistical agency, refused to conduct special data tabulations and analyses to support regulatory decision making.

Therefore, we further request that the Department provide our analysts, and other analysts representing the interested public, with access to the secret BLS data files that were used for this proposed regulation so that we can ourselves verify the results presented by the Department and perform alternative tabulations and analyses to facilitate our comments. Alternatively, we request that the Department withdraw its notice of proposed rulemaking and analysis based on secret data and publish a transparent analysis based on the public use CPS microdata file that is available to all interested parties.

Because the deficiencies in the published information provided in the regulatory docket have hindered our ability to comment on the proposal, we request that the comment period be extended by 60 days to accommodate the delay in providing us with the complete information needed prior to the time when the requested meeting occurs.

We look forward to your expeditious response.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits

Appendix D

2015 General Schedule Salary Table

SALARY TABLE 2015-GS
INCORPORATING THE 1% GENERAL SCHEDULE INCREASE
EFFECTIVE JANUARY 2015

Annual Rates by Grade and Step

Grade	Step 1	Step 2	Step 3	Step 4	Step 5	Step 6	Step 7	Step 8	Step 9	Step 10	WITHIN GRADE AMOUNTS
1	$ 18,161	$ 18,768	$ 19,372	$ 19,973	$ 20,577	$ 20,931	$ 21,528	$ 22,130	$ 22,153	$ 22,712	VARIES
2	20,419	20,905	21,581	22,153	22,403	23,062	23,721	24,380	25,039	25,698	VARIES
3	22,279	23,022	23,765	24,508	25,251	25,994	26,737	27,480	28,223	28,966	743
4	25,011	25,845	26,679	27,513	28,347	29,181	30,015	30,849	31,683	32,517	834
5	27,982	28,915	29,848	30,781	31,714	32,647	33,580	34,513	35,446	36,379	933
6	31,192	32,232	33,272	34,312	35,352	36,392	37,432	38,472	39,512	40,552	1,040
7	34,662	35,817	36,972	38,127	39,282	40,437	41,592	42,747	43,902	45,057	1,155
8	38,387	39,667	40,947	42,227	43,507	44,787	46,067	47,347	48,627	49,907	1,280
9	42,399	43,812	45,225	46,638	48,051	49,464	50,877	52,290	53,703	55,116	1,413
10	46,691	48,247	49,803	51,359	52,915	54,471	56,027	57,583	59,139	60,695	1,556
11	51,298	53,008	54,718	56,428	58,138	59,848	61,558	63,268	64,978	66,688	1,710
12	61,486	63,536	65,586	67,636	69,686	71,736	73,786	75,836	77,886	79,936	2,050
13	73,115	75,552	77,989	80,426	82,863	85,300	87,737	90,174	92,611	95,048	2,437
14	86,399	89,279	92,159	95,039	97,919	100,799	103,679	106,559	109,439	112,319	2,880
15	101,630	105,018	108,406	111,794	115,182	118,570	121,958	125,346	128,734	132,122	3,388

Appendix E

Law360 Article

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Final OT Rule May Go Beyond Salary Hike, Lawyers Say

By **Ben James**

Law360, New York (June 30, 2015, 8:38 PM ET) -- The U.S. Department of Labor's newly proposed rule to expand overtime pay protections won plaudits from worker advocates, but some management-side lawyers warned that the final version could contain changes to the duties tests for overtime eligibility that weren't pitched when the proposal was unveiled Tuesday.

The DOL's **proposed rule** called for hiking the minimum salary a worker must earn to qualify for a "white collar" exemption from the Fair Labor Standards Act's minimum wage and overtime pay requirements from $455 per week — or $23,660 annually — to $970 per week or $50,440 per year, and automatically updating the salary threshold to keep it from becoming outdated.

Business groups and congressional Republicans were quick to criticize the proposed rule. But the presidents of the AFL-CIO, SEIU and United Steelworkers all issued statements voicing support for the proposal, and employment lawyers who represent workers also said the proposal was a positive development.

"It puts millions of workers in a position where they are clearly entitled to overtime, whereas before they were forced to litigate over it," said Outten & Golden LLP partner and class action group co-chair Justin Swartz.

"The new salary level is a win for transparency and bright line rules, and spares practitioners and the courts from delving into the morass that is the duties test as frequently," added Van Kampen Law PC founder Josh Van Kampen.

After President Barack Obama directed Secretary of Labor Tom Perez to revise the DOL's regulations in March 2014, observers speculated that the DOL would increase the salary threshold and might also make changes to the duties tests that factor into overtime eligibility.

In order to qualify for a white collar FLSA exemption, a worker must be paid a fixed salary that meets the minimum threshold, and his or her primary duty must be the performance of exempt work.

The DOL said Tuesday it was not making specific proposals to modify the applicable duties tests but did ask for comment on whether the tests were working as intended, and added that the agency was concerned that the current tests might allow for exemption of employees performing a "disproportionate amount" of nonexempt work.

On Tuesday, former heads of the DOL's wage and hour division — the agency branch that issued the proposal — either expressed concern about, or were openly critical of, the way

the proposal dealt with the duties test question.

Littler Mendelson PC shareholder Tammy McCutchen, who headed the WHD from 2001 to 2004, said some employers were worried the DOL would ambush them with changes to the duties tests in the final rule.

"I have to share the concerns of the people in the business community, that I've talked to this morning, that the DOL will have changes to the duties test in the final rule that we have not had a chance to see and comment on," she said.

"I am a little concerned about what may transpire with the duties test at the end of the day," added Ogletree Deakins Nash Smoak & Stewart PC shareholder Alfred Robinson, a former acting WHD director. "I am surprised that they were not more forthcoming in submitting proposed changes in duties tests, as opposed to kind of leaving a blank page and asking people to fill it in. From my perspective, I think it would have been better to propose some changes to the duties test and have people comment."

If sweeping changes to the duties test are part of the final rule that shouldn't come as a surprise to anyone, said Paul DeCamp, former head of the WHD and current leader of Jackson Lewis PC's wage and hour practice group.

Courts typically give agencies a latitude on final regulatory language — under the "logical outgrowth" doctrine — as long as the regulated community has been kept apprised of the topics under consideration, according to DeCamp.

Here, the DOL clearly believes it has laid the groundwork to revise the duties tests because it has announced the tests are in play, he added.

"I don't think that the DOL is necessarily hiding the ball as much as being cowardly in its approach to rulemaking," DeCamp said.

DeCamp noted that 15 months had elapsed since Obama called for the regulations to be revised, and that the agency had held numerous meetings with employers, workers and other stakeholders during that time.

"This cake is not baked yet, and it is irresponsible for the department to leave so much of the regulatory landscape completely up in the air," said DeCamp. "If the department genuinely does not yet know which way it wants to go on the duties issue, the department should not have issued that NPRM. It is premature because the duties analysis is so critical to how one applies these exemptions."

Not everyone thinks changing the duties tests in the final rule is in the cards. Swartz said it was possible but unlikely, while Van Kampen said the DOL was "concentrating its fire on the new standard salary test."

However, the proposal released Tuesday asked for input on several questions related to the duties tests.

"While the department is not proposing specific regulatory changes at this time, the department is seeking additional information on the duties tests for consideration in the final rule," the proposal said.

The questions posed included what, if any, changes needed to be made, and whether the DOL should look at California's approach as a model.

In addition to meeting salary requirements, California requires workers to spend more than 50 percent of their time on tasks deemed exempt from minimum wage and overtime

requirements. Federal regulations, however, look at a worker's "primary duty" to assess if they qualify for one of the FLSA white collar exemptions.

"If the DOL moves to a California standard for the duties test, the first thing I'm going to do is go out and hire about 100 new associates to help me defend all the new litigation that our firm's clients will face," DeCamp said.

Businesses concerned about the impact of the new regulations should make their voices heard during the comment period and bring up potential changes to the duties tests, even though no specific moves have been proposed, according to attorneys.

The DOL said in an email Tuesday 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."

--Editing by John Quinn and Emily Kokoll.

Appendix F

February 11, 2015 Letter to Secretary Perez

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OF THE
UNITED STATES OF AMERICA

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February 11, 2015

The Honorable Thomas Perez
Secretary
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Secretary Perez:

We, and the Chamber members who were able to participate, appreciated the opportunity to meet with you and discuss the possible revisions to the FLSA overtime pay regulations as well as the Wage and Hour Division's enforcement and compliance efforts. With apologies for the delay, we wish to follow-up on several of these issues raised during the "listening session" meeting with Chamber members.

The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations. Weighing heavily on the minds of our members are the pending revisions to the Department of Labor's "white collar" overtime exemption regulations at 29 C.F.R. Part 541.

While we recognize DOL has statutory authority to define and delimit the Section 13(a)(1) exemptions through regulation,[1] undertaking any regulatory change should be done prudently and only after careful consideration of any potential benefits justifying the likely costs. The premise of rampant non-compliance by employers, while convenient rhetoric, is patently false. Our members – and the vast majority of employers – go to great lengths to comply with the law.

There is no dispute that prior to the 2004 white collar regulations employers (including the DOL itself) struggled to interpret the regulations and arrive at a correct determination.[2] The 2004 regulations sought to bring greater clarity to the regulations. Changing these regulations once again, just as the dust is settling, and in the ways that are apparently being contemplated will not bring greater clarity, but will, instead, unsettle years of case law and serve only to further enrich plaintiffs' class action lawyers.

[1] DOL's regulatory authority as to computer employees was limited by Congress' enactment of Section 13(a)(17) of the Act. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees ("Preamble"), Federal Register, Vol. 69, No. 79, 22158-9 (April 23, 2004).
[2] "[W]orkplace changes over the decades and federal case law developments are not reflected in the current regulations … 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." Preamble at 22122.

The following points highlight the concerns of Chamber members and provide suggestions on how the Department can move forward with changes to these regulations with the least amount of disruption, and minimize the complications. In addition, we endorse the letter sent to you by the HR Policy Association on August 20, 2014. We believe this letter does an excellent job of explaining the current FLSA landscape and suggesting constructive changes the Department could pursue to improve compliance with the law, and ultimately, employees being compensated appropriately.

I. ASSESSING THE COSTS AND BENEFITS OF REGULATORY ALTERNATIVES

Given the profound effect the contemplated changes will have, we urge the Department to adhere closely to the guidance and instructions for developing regulations contained in Executive Orders 12866 and 13563 issued by Presidents Clinton and Obama, respectively:

- "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating;"[3]
- propose a regulation "only upon a reasoned determination that its benefits justify its costs;"[4]
- "tailor its regulations to impose the least burden on society;"[5]
- "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits;"[6] and
- "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[7]

We also expect that any proposed regulation will be sent to the Office of Information and Regulatory Affairs (OIRA) for review as specified by E.O. 12866. Such a regulation would likely qualify as a "significant regulatory action" as that term is used in the Executive Order based on its economic impact and possible effect on competition and jobs.[8]

As the executive orders instruct, the Department should identify a range of distinct regulatory alternatives, including the alternative of leaving the current set of regulations in place. Regardless of the alternatives, the Department must avoid relying on mere, anecdotal reporting to justify changes and instead establish an accurate and complete picture of the current regulation baseline which includes: the numbers of employees classified as exempt or non-exempt under existing rules in each affected industry and occupation; weekly hours worked by employees in each classification category including hours worked that would qualify for overtime compensation under the various alternatives, wage rates; and annual earnings.

[3] Executive Order 12866, Section 1(a).
[4] Executive Order 13563, Section 1(b).
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid*., Section 1(c).
[8] E.O. 12866, Section 3(f).

Currently available, routinely collected data sources, such as the Current Population Survey and the BLS Current Employment Statistics program do not provide adequate information regarding the actual FLSA overtime classification practices of employers, actual duties of employees within broad occupational titles, or hours and earnings information (particularly on a regionalized and local basis). Instead, to fulfill the Executive Order directions to "use the best available techniques to quantify benefits and costs", the Department should utilize scientific statistical sampling, employer surveys, controlled experiments, empirical interview techniques, and relevant administrative records to establish an accurate baseline from which to measure current classifications, hours, and earnings practices from which it can estimate the likely impacts of various alternative proposals. All efforts should be made to utilize the best and most accurate data, not just the anecdotal examples that create the best sound bite.

The Part 541 regulations were significantly updated just over 10 years ago. Thus, the cost of the uncertainty created by any drastic changes to human resources policies which are still stabilizing from the implementation of the current regulations must be considered. Settlements of FLSA lawsuits should not be used to support findings of misclassification or justify revisions to the existing regulations. In fact, an increase in litigation – and particularly in settlements – may be considered an element of the expected economic impact of regulatory change. Additional economic costs are endured by the entire labor market as both employers and employees learn new rules, analyze existing compensation practices, measure time spent in different types of work activities, restructure work places and compensation practices, adjust budgets, undergo additional training, experience temporary slowing of hiring processes and work flows, and are subject to increased recordkeeping requirements.

Given these significant and complex considerations, we ask that before undertaking a new rulemaking the Department first examine the experience and costs associated with the prior changes to develop a more accurate estimate of the likely costs, detriments and benefits of any proposed new changes to the regulations. While the President has directed DOL to issue proposed regulations, the potential scope and impact of those regulations are entirely left to the discretion of the Department.[9] We are convinced that after an objective and thorough review of the burdens and complications associated with radical changes to the Section 541 regulations, the Department will favor a modest and limited approach to these regulations.

II. REVISING THE PART 541 OVERTIME EXEMPTION REGULATIONS

As an initial matter, the Chamber requests that the Department allow the public no less than 120 days to file comments to any Notice of Proposed Rulemaking. Any proposed changes to the Part 541 regulations will impact a vast cross section of employers. The Department will be best served by public comments that examine obvious and not obvious consequences of the proposed changes thoroughly. Employers will need to provide facts and data on current business practices, compensation practices and how both employees and employers will be impacted.

[9] The Presidential Memorandum to the Secretary of Labor of March 13, 2014 merely directs him to "propose revisions to modernize and streamline the existing regulations," and to "consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply."

Business groups like the Chamber will need to work with their memberships to develop this information. A comprehensive and vigorous public comment process cannot be accomplished in less than 120 days.

If a final regulation is issued, the Chamber also requests that the Department provide–at a minimum–an implementation period of at least one year. This is less than was provided for the final companionship exemption rule, which impacted just a small subset of the employers expected to be touched by any proposed Part 541 revisions.[10] Although more than the four-month effective date for the 2004 Part 541 revisions, employers have reported that implementation in 2004 actually took much longer. Employers will need to evaluate whether each individual employee meets the changed exemption requirements. As DOL well knows, depending on a job title or job description is not sufficient in evaluating exemption status. Rather, employers need to determine actual and specific job duties performed by each currently exempt employee, individually, which requires interviewing employees and their supervisors. Even after that evaluation, months of additional work will be required to transition an employee from exempt to non-exempt, which includes: determining changes to wages (same salary, lower salary, hourly), incentive compensation and benefits; ensuring payroll systems are ready to properly calculate the regular rate; implementing new timekeeping systems and policies for employees who may have never tracked their work time before; training of newly non-exempt employees and their supervisors on what is "work" that they must track; and implementing new systems to replace employees' use of mobile devices that will no longer be allowed due to the inability to track work activities out of the workplace.

Moreover, we request that following the implementation period, the Department institute a time-limited non-enforcement policy while undertaking a substantial and substantive compliance assistance program focused on teaching *employers* – both on the new legal requirements for exemption and how those requirements apply to real jobs in the real world. Such a compliance assistance program must include the Wage and Hour Division restoring the Opinion Letter process to respond to requests from employers regarding whether particular jobs and tasks continue to meet the tests for exemption under the revised regulations.

Finally, we request proposing a safe harbor mechanism, to provide relief to ethical employers who unwittingly commit a wage or hour violation under a good-faith belief that they were complying with the law.

A. *Salary Level*

In determining the appropriate salary level, the DOL should be mindful that the purpose of the salary level test is to simplify "enforcement by providing a ready method of screening out the *obviously* nonexempt employees", the addition of which "furnishes a completely objective and precise measure which is not subject to differences of opinion or variations in judgment."[11]

[10] The Department suspended enforcement until July 1, 2015 and indicated that it would exercise prosecutorial discretion for an additional six months after that. In the interim the regulation has been vacated by the U.S. District Court for the District of Columbia in *Home Care Association of America v. Weil* which the Department has indicated it is appealing.

[11] *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("1949 Weiss Report") at 8-9.

Salary requirements also furnish[] a practical guide to the inspector as well as to employers and employees in borderline cases."[12]

Therefore, a salary level sufficient to screen out the "obviously" non-exempt employees must not be set at a bar so high as to exclude employees who comfortably meet the duties test for an exemption. Instead, "[r]egulations of general applicability such as these must be drawn in general terms to apply to many thousands of different situations throughout the country."[13] However, it has long been recognized that "such a dividing line cannot be drawn with great precision but can at best be only approximate."[14]

The Department should, therefore, consider the impact of any increase the salary level will have in low-cost living areas such as the South and Mid-West, as well as rural areas. Moreover, DOL should not depart from the long established precedent of exemptions for certain positions. Retail managers and those in the service sector have long been regarded as exempt employees as evidenced by the fact that there was even a higher tolerance for non-exempt work for managers in the retail sector. Profit margins, salary levels, and staffing patterns vary widely across industries and different parts of the country. DOL needs to study these variations carefully. To accomplish this, the Department should study the best available salary data–by using scientific statistical samplings, employer surveys, and relevant administrative records to establish the accurate baseline for current classification and earnings practices. This analysis should consider industry, job, geographical location, and rural versus urban areas. Upon completion, the salary level should then be set *below* the average salary dividing line between those obviously non-exempt and obviously exempt positions. This is the methodology used by the Department when setting the salary-basis level in 1940, 1949, 1958, 1963 and 2004.

Finally, the Department should not adopt automatic increases to the salary level based on an inflationary index. Metropolitan statistics – which are what inflation measures are tied to – wholly fail to account for differences in the cost of living and salary levels between metropolitan versus rural areas. Neither the minimum wage nor the Part 541 salary level has ever been tied to automatic increases, despite many proposals to do so, and there is no foundation for establishing one now. Nor does the FLSA, itself, provide authority for adopting an inflation index. Indeed, in an analogous context, one feature of the proposals to increase the minimum wage endorsed by the President and many Congressional Democrats is to index the minimum wage to inflation which suggests that even if the Secretary has the authority to "define and delimit" the statutory exemptions, this authority does not go so far as to include indexing the salary threshold to inflation.

B. *Duties Tests*

In discussing possible revisions to the current regulatory scheme, the idea of replacing the Part 541 qualitative "primary duty" test with a quantitative test is a continuing theme. The

[12] *Ibid.*; *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report") at 2-3 (salary levels "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 nonexempt employees").
[13] 1949 Weiss Report at 8-9.
[14] 1949 Weiss Report at 11.

Chamber strongly urges the Department *not to* adopt such a quantitative test. Doing so would not solve any of the perceived problems, but would instead create tremendous burdens upon the regulated community. As we have seen in jurisdictions that have adopted quantitative tests, such measures do not decrease litigation or uncertainty over classifications.[15] In its place, regardless of any effort to regulate around such ambiguities, the central issue will always remain what is – and is not – exempt work. This will incentivize the plaintiffs' bar to systematically attack an employee's classification. Employers will be required to wade through the hour-by-hour – and in some cases – minute-by-minute tasks of their employees, in defending their classification decisions. Such a measure represents the wholesale abandonment of 70 years of case law, setting up potential challenges and further litigation.

Equally troubling are the additional costs that will be borne by every employer as they attempt to time-test employees for time spent in activities. In order to ensure the proper classification, employers would need to put into place systems or other reporting or monitoring measures for all of their employees. These systems would have to track not just hours worked, but the specific quantity of time spent performing exempt versus non-exempt tasks. Additionally, at a minimum, each category of employee and each employee would have to be evaluated separately. Time studies of this kind, which would be necessary to defend against litigation, can easily cost up to $100,000 which would be a significant burden for many employers. Such time testing may require new technology and systems that are not readily available. It also may require periodic retesting, thereby creating a recurring –as opposed to a one-time- cost. Adopting such a measure is imprudent and would prove unduly burdensome and ineffective, and merely create more confusion.

1. ***Executive Exemption***

During our meeting, you expressed concerns with the current "concurrent duties" test and asked our view on possible revisions to the test. We are predisposed to leaving it untouched. However, to the extent you are committed to making changes, we have a few suggestions which, in whole or in part, may address your stated concerns:

1. The current concurrent duties test set forth in 29 C.F.R. § 541.106 can be revised to delineate additional specific managerial duties that the manager, supervisor or assistant manager must also be performing before the rule would apply.

2. The Department could consider reinstituting a version of the pre-2004 "sole-charge" test, which permitted employers to classify one manager (who otherwise meets the duties test for the executive exemption) as exempt during each shift. This test is premised upon the commonsense notion that *someone* must be in charge, and therefore responsible for all management duties, during the entire time a store or business is open regardless of what other duties they may from time to time have to perform. Inclusion of the "sole-charge"

[15] The obvious example is California. We have heard from our members in California that this provision has created uncertainty about what an employer expected an employee to be doing and whether the employee was doing the specific job assigned. What sounds like a straightforward concept quickly becomes impractical when seen in the context of these expectations. Furthermore this provision, as predicted, has become a major source of class action litigation further draining employer resources and undermining the ability of employers to avail themselves of these statutory exemptions with confidence.

test could be used in addition to any other employees at the facility that otherwise meet the executive exemption test.

2. ***Administrative Exemption***

The Chamber appreciates the need for clarity; however we do not believe that regulations are a forum to re-litigate old arguments. We urge 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 representatives, loan officers, and claims adjusters have been adjudicated. To attempt to overturn court decisions achieved in litigation through regulations would create massive uncertainty and instability, in direct contradiction to what the stated goal of this rulemaking.

3. ***Computer Employee Exemption***

As noted in the 2004 Preamble, the Department's authority to revise the primary duties that must be performed by exempt computer employees is limited by the language of Section 13(a)(17) of the Act. However, the Chamber would welcome the opportunity to work with the Department and Congress to develop a legislative solution to the statutory language that has not kept pace with developments in the computer industry.

III. ENFORCEMENT AND COMPLIANCE

The Chamber recognizes that to have effective regulations, the Department must—at the same time—have effective enforcement and mechanisms to drive compliance. The Chamber believes that the Department can improve its efforts in both arenas.

The Wage and Hour Division's (WHD) approach to FLSA enforcement has become increasingly focused on merely punishing the employer rather than seeking balanced resolutions—regardless of whether the agency is investigating an employer with a long history of violations, or an employer with no prior violations; and regardless of whether there is a clear violation or ambiguity in allegations. In order to achieve and maintain regulatory compliance, WHD must be willing to provide employers with meaningful compliance assistance and to support those employers who evaluate their wage and hour practices and seek to correct any mistakes with DOL supervision of any back wage payments. Instead, WHD's current practice is to offer negligible compliance assistance, refuse to supervise voluntary back wage payments, and to aggressively pursue maximum penalties regardless of the employer's compliance history. This position helps no one, least of all the employees.

Further, utilizing certain investigatory tactics – conducting unannounced investigations, threatening subpoena actions if overbroad documents requests are not responded to within 72 hours, and imposing civil money penalties and liquidated damages in almost every case – have impeded resolution and hindered cooperation. In many cases this has forced employers to contest these actions which only delays employees receiving their compensation. While the WHD should punish bad-faith employers who willfully and/or repeatedly violate the law, not every employer with a wage and hour violation should be handled the same way. Such an approach is counter-productive for good-faith employers who express a willingness to take corrective measures or redress mistakes. Without incentives for voluntary remediation, and

given WHD's limited investigation resources, an all-stick-no-carrot approach cannot effectively accomplish the agency's key mission to ensure our nation's employees are paid in compliance with the FLSA.

To have an effective enforcement program, an agency must have an effective compliance assistance program that provides employers with meaningful assistance regarding the compliance challenges posed by the FLSA in an era of rapidly changing technology. Recently, WHD's compliance assistance efforts appear focused primarily upon assisting employees and their advocacy groups in pursuing litigation against employers rather than helping employers achieve compliance through voluntary means short of litigation.

WHD should develop programs to recognize and reward good faith employers seeking to improve their compliance with the FLSA. We recommend:

- A Voluntary Settlement Program where employers who self-disclose a violation to WHD can agree to pay 100% 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;

- Awards for developing and implementing best practice compliance programs.

At the same time, the regulated community would be best served by the WHD reinstituting the 50-year practice of issuing Opinion Letters, providing an analysis of the specific facts present. Other agencies provide this level of guidance to employers and the agency will be fulfilling its mission by continuing the practice. Such efforts provide an invaluable resource to employers in assisting them to comply with the law.

IV. CONCLUSION

The anticipated Department of Labor regulations altering how the statutory exemptions to overtime compensation are applied threaten to upend years of settled law, create tremendous confusion, and have a significantly disruptive effect on millions of workplaces. Such a rulemaking should only be undertaken, if at all, after a thorough examination of the data describing the number of employees and workplaces that would be impacted, and the true nature and breadth of that impact. It should not be undertaken based on isolated or anecdotal examples of violations under the current regulatory regime. Included in the costs that must be accounted for ought to be those associated with the increase in litigation that such new regulations will inevitably create.

As we made clear during our meeting with you, there will also be significant negative impacts on employees who are forced to be reclassified from exempt to non-exempt. The Department must quantify and examine these closely before moving forward with any proposed regulation.

Finally, the WHD's approach to enforcement and compliance assistance must be revised. Any changes in these regulations must be accompanied by comprehensive compliance assistance including restoring the practice of issuing Opinion Letters to help employers understand how these regulations will apply to specific fact patterns. Similarly, the Wage and Hour Division's

approach to enforcement should be reexamined to distinguish those cases with egregious violations from those where the employer has made a good-faith error. Any changes to the Section 541 regulations will undoubtedly generate many of the latter cases.

We appreciate your consideration of these matters and the opportunity we had to meet with you. If we can provide you with any additional information or resources, please do not hesitate to contact me.

Sincerely,

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Appendix G

Additional Tables from CPS Survey Data

Table 4				
Weekly Earning Deciles Excluding Physicians, Lawyers, Teachers & Federal Employees				
Decile	Non-Hourly Workers	Hourly and Non-Hourly Workers	Non-Hourly South + Retail	Hourly and Non-Hourly South + Retail
Min	$0	$0	$0	$0
10	$500	$380	$461	$360
20	$654	$475	$600	$438
30	$769	$560	$731	$515
40	$923	$670	$846	$600
50	$1,058	$769	$962	$715
60	$1,250	$923	$1,153	$840
70	$1,461	$1,115	$1,346	$1,000
80	$1,789	$1,384	$1,634	$1,250
90	$2,308	$1,900	$2,173	$1,730
Max	$2,885	$2,885	$2,885	$2,885
Mean	$1,241	$969	$1,147	$894
Median	$1,058	$769	$962	$715
Mode	$2,885	$2,885	$2,885	$400
SE Mean	0.105	0.064	0.154	0.093
N each decile	4,472,458	9,551,000	1,915,979	4,131,164
Source: Current Population Survey, Public Use Microdata File, Merged 12 months outgoing rotations (Earner Study) supplement.				

Table 5					
Deciles of weekly earnings of non-hourly workers who usually work full time (35+hours per week)					
Decile	All 35 + Hours	Over 40 Hours	35 - 40 Hours	Difference	Percent Difference
Min	0	0	0	0	
10	$500	$673	$462	$211	45.8%
20	$673	$865	$600	$265	44.2%
30	$785	$1,000	$731	$269	36.8%
40	$923	$1,154	$846	$308	36.4%
50	$1,058	$1,350	$962	$388	40.4%
60	$1,250	$1,577	$1,153	$424	36.8%
70	$1,480	$1,923	$1,346	$577	42.9%
80	$1,826	$2,308	$1,558	$750	48.1%
90	$2,308	$2,885	$2,000	$885	44.2%
Max	$2,885	$2,885	$2,885		
Mean Weekly Earnings	$1,248	$1,537	$1,123	$414	36.9%
Source: Current Population Survey, Public Use Microdata File, Merged 12 months outgoing rotations (Earner Study) supplement.					

Table 6				
Proportions usually working over 40 hours per week by earnings deciles for non-hourly workers with usual hours full time (35+ hours) - 2013				
Decile	Usually over 40 hours percent	Number usually over 40 hours	Total number usually full time (35+ hours)	Mean total hours for the over 40 hours group
10	14.8%	756,043	5,108,988	53.7
20	16.9%	936,016	5,551,544	52.3
30	20.0%	637,435	3,181,224	51.7
40	25.3%	1,179,637	4,656,889	51.7
50	28.9%	1,360,210	4,702,797	52.0
60	31.2%	1,598,696	5,121,017	52.1
70	34.1%	1,398,610	4,097,593	52.1
80	36.5%	1,714,936	4,697,245	52.3
90	43.1%	1,967,304	4,567,403	52.8
Top Earners	58.0%	2,681,816	4,627,008	54.3
All	30.7%	14,230,703	46,311,707	52.7
Source: Current Population Survey, Public Use Microdata File, Merged 12 months outgoing rotations (Earner Study) supplement.				

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
1	Chief executives	87,417	1,018,180	1,105,597	92.1%
2	General and operations managers	139,889	840,908	980,797	85.7%
3	Advertising and promotions managers	6,289	46,904	53,193	88.2%
4	Marketing and sales managers	132,919	726,934	859,853	84.5%
5	Public relations managers	9,178	45,511	54,689	83.2%
6	Administrative services managers	36,697	80,650	117,347	68.7%
7	Computer and information systems managers	83,224	498,323	581,547	85.7%
8	Financial managers	229,744	935,797	1,165,541	80.3%
9	Compensation and benefits managers	3,426	8,609	12,035	71.5%
10	Human resources managers	36,343	185,174	221,517	83.6%
11	Training and development managers	9,810	23,739	33,549	70.8%
12	Industrial production managers	44,599	214,101	258,700	82.8%
13	Purchasing managers	41,735	142,239	183,974	77.3%
14	Transportation, storage, and distribution managers	85,747	172,799	258,546	66.8%
15	Farmers, ranchers, and other agricultural managers	32,519	74,489	107,008	69.6%
16	Construction managers	116,304	308,663	424,967	72.6%
17	Education administrators	105,086	641,015	746,101	85.9%
18	Engineering managers	18,024	99,096	117,120	84.6%
19	Food service managers	368,971	445,561	814,532	54.7%
20	Gaming managers	7,032	11,895	18,927	62.8%
21	Lodging managers	30,299	73,688	103,987	70.9%
22	Medical and health services managers	165,894	400,150	566,044	70.7%
23	Natural sciences managers	1,900	11,736	13,636	86.1%
24	Property, real estate, and community association managers	131,263	284,120	415,383	68.4%
25	Social and community service managers	80,599	238,029	318,628	74.7%
26	Emergency management directors	1,712	7,624	9,336	81.7%
27	Managers, all other	653,357	1,968,821	2,622,178	75.1%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
28	Agents and business managers of artists, performers, and athletes	16,779	29,293	46,072	63.6%
29	Purchasing agents and buyers, farm products	9,372	7,554	16,926	44.6%
30	Wholesale and retail buyers, except farm products	96,850	109,343	206,193	53.0%
31	Purchasing agents, except wholesale, retail, and farm products	114,997	171,883	286,880	59.9%
32	Claims adjusters, appraisers, examiners, and investigators	131,868	177,898	309,766	57.4%
33	Compliance officers	60,127	128,690	188,817	68.2%
34	Cost estimators	30,748	85,554	116,302	73.6%
35	Human resource workers	205,488	338,677	544,165	62.2%
36	Compensation, benefits, and job analysis specialists	33,592	43,709	77,301	56.5%
37	Training and development specialists	42,159	76,159	118,318	64.4%
38	Logisticians	38,097	58,671	96,768	60.6%
39	Management analysts	122,563	458,878	581,441	78.9%
40	Meeting, convention, and event planners	50,278	66,621	116,899	57.0%
41	Fundraisers	17,121	80,434	97,555	82.4%
42	Market research analysts and marketing specialists	46,125	165,327	211,452	78.2%
43	Business operations specialists, all other	82,862	109,718	192,580	57.0%
44	Accountants and auditors	512,594	1,157,577	1,670,171	69.3%
45	Appraisers and assessors of real estate	20,450	40,613	61,063	66.5%
46	Budget analysts	17,755	42,718	60,473	70.6%
47	Credit analysts	9,546	21,280	30,826	69.0%
48	Financial analysts	16,780	75,013	91,793	81.7%
49	Personal financial advisors	51,632	250,896	302,528	82.9%
50	Insurance underwriters	27,074	75,061	102,135	73.5%
51	Financial examiners	1,886	9,652	11,538	83.7%
52	Loan counselors and officers	136,210	238,861	375,071	63.7%
53	Tax examiners, collectors, and revenue agents	22,439	40,900	63,339	64.6%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
54	Tax prepares	35,212	45,463	80,675	56.4%
55	Financial specialists, all other	35,078	61,325	96,403	63.6%
56	Computer and information research scientists	3,237	12,888	16,125	79.9%
57	Computer systems analysts	100,276	360,735	461,011	78.2%
58	Information security analysts	13,665	39,654	53,319	74.4%
59	Computer programmers	104,191	347,816	452,007	76.9%
60	Software developers, applications and systems software	169,761	906,453	1,076,214	84.2%
61	Web developers	45,268	110,049	155,317	70.9%
62	Computer support specialists	237,730	267,543	505,273	53.0%
63	Database administrators	20,824	78,092	98,916	78.9%
64	Network and computer systems administrators	57,699	153,380	211,079	72.7%
65	Computer network architects	21,539	110,106	131,645	83.6%
66	Computer occupations, all other	119,956	263,953	383,909	68.8%
67	Actuaries	4,703	24,810	29,513	84.1%
68	Operations research analysts	35,500	86,131	121,631	70.8%
69	Mathematicians, statisticians and miscellaneous mathematical science occupations	17,948	54,916	72,864	75.4%
70	Architects, except naval	27,034	97,696	124,730	78.3%
71	Surveyors, cartographers, and photogrammetrists	18,521	17,037	35,558	47.9%
72	Aerospace engineers	30,778	109,387	140,165	78.0%
73	Agricultural and biomedical engineers	2,388	7,716	10,104	76.4%
74	Chemical engineers	12,839	45,970	58,809	78.2%
75	Civil engineers	87,199	252,474	339,673	74.3%
76	Computer hardware engineers	24,752	73,499	98,251	74.8%
77	Electrical and electronic engineers	67,785	216,193	283,978	76.1%
78	Environmental engineers	15,518	15,812	31,330	50.5%
79	Industrial engineers, including health and safety	39,822	147,136	186,958	78.7%
80	Marine engineers and naval architects	3,170	9,305	12,475	74.6%
81	Materials engineers	12,608	31,248	43,856	71.3%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
82	Mechanical engineers	62,278	239,739	302,017	79.4%
83	Mining and geological engineers, including mining safety engineers	4,035	11,692	15,727	74.3%
84	Nuclear engineers	697	3,842	4,539	84.6%
85	Petroleum engineers	2,014	32,821	34,835	94.2%
86	Engineers, all other	75,735	312,190	387,925	80.5%
87	Drafters	67,501	46,754	114,255	40.9%
88	Engineering technicians, except drafters	250,696	136,017	386,713	35.2%
89	Surveying and mapping technicians	30,240	21,334	51,574	41.4%
90	Agricultural and food scientists	12,452	22,228	34,680	64.1%
91	Biological scientists	27,113	85,205	112,318	75.9%
92	Conservation scientists and foresters	9,832	19,567	29,399	66.6%
93	Medical scientists and life scientists, all other	22,080	116,632	138,712	84.1%
94	Astronomers and physicists	5,028	8,511	13,539	62.9%
95	Atmospheric and space scientists	4,720	6,368	11,088	57.4%
96	Chemists and materials scientists	28,927	83,998	112,925	74.4%
97	Environmental scientists and geoscientists	31,488	52,199	83,687	62.4%
98	Physical scientists, all other	31,375	117,687	149,062	79.0%
99	Economists	2,408	26,796	29,204	91.8%
100	Psychologists	27,045	87,875	114,920	76.5%
101	Urban and regional planners	3,394	17,126	20,520	83.5%
102	Miscellaneous social scientists, including survey researchers and sociologists	17,584	38,159	55,743	68.5%
103	Agricultural and food science technicians	18,077	9,415	27,492	34.2%
104	Biological technicians	10,054	7,874	17,928	43.9%
105	Chemical technicians	41,929	24,139	66,068	36.5%
106	Geological and petroleum technicians	12,969	11,285	24,254	46.5%
107	Miscellaneous life, physical, and social science technicians	81,998	54,486	136,484	39.9%
108	Counselors	279,406	392,720	672,126	58.4%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
109	Social workers	293,463	412,006	705,469	58.4%
110	Probation officers and correctional treatment specialists	43,788	62,781	106,569	58.9%
111	Social and human service assistants	81,876	49,616	131,492	37.7%
112	Miscellaneous community and social service specialists, including health educators and community health workers	55,546	49,661	105,207	47.2%
113	Clergy	36,905	371,535	408,440	91.0%
114	Directors, religious activities and education	11,505	49,514	61,019	81.1%
115	Religious workers, all other	29,265	41,461	70,726	58.6%
116	Lawyers, Judges, magistrates, and other judicial workers	98,856	705,318	804,174	87.7%
117	Judicial law clerks	7,324	5,600	12,924	43.3%
118	Paralegals and legal assistants	180,666	206,179	386,845	53.3%
119	Miscellaneous legal support workers	102,680	116,100	218,780	53.1%
120	Postsecondary teachers	212,277	1,103,877	1,316,154	83.9%
121	Preschool and kindergarten teachers	372,642	297,747	670,389	44.4%
122	Elementary and middle school teachers	475,494	2,572,544	3,048,038	84.4%
123	Secondary school teachers	118,520	948,967	1,067,487	88.9%
124	Special education teachers	87,930	296,872	384,802	77.1%
125	Other teachers and instructors	359,203	235,408	594,611	39.6%
126	Archivists, curators, and museum technicians	15,302	28,093	43,395	64.7%
127	Librarians	73,416	116,124	189,540	61.3%
128	Library technicians	35,177	7,130	42,307	16.9%
129	Teacher assistants	630,591	293,632	924,223	31.8%
130	Other education, training, and library workers	61,679	108,481	170,160	63.8%
131	Artists and related workers	30,348	50,071	80,419	62.3%
132	Designers	293,735	316,719	610,454	51.9%
133	Actors	13,348	23,632	36,980	63.9%
134	Producers and directors	29,119	87,914	117,033	75.1%
135	Athletes, coaches, umpires, and related workers	123,165	125,676	248,841	50.5%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
136	Dancers and choreographers	2,119	9,509	11,628	81.8%
137	Musicians, singers, and related workers	29,707	77,158	106,865	72.2%
138	Entertainers and performers, sports and related workers, all other	8,038	10,465	18,503	56.6%
139	Announcers	14,437	20,034	34,471	58.1%
140	News analysts, reporters and correspondents	30,775	47,529	78,304	60.7%
141	Public relations specialists	31,981	93,727	125,708	74.6%
142	Editors	30,371	99,165	129,536	76.6%
143	Technical writers	13,173	50,201	63,374	79.2%
144	Writers and authors	28,008	74,296	102,304	72.6%
145	Miscellaneous media and communication workers	38,818	21,014	59,832	35.1%
146	Broadcast and sound engineering technicians and radio operators, ...	50,198	38,097	88,295	43.1%
147	Photographers	45,602	28,484	74,086	38.4%
148	Television, video, and motion picture camera operators and editors	27,144	30,092	57,236	52.6%
149	Chiropractors	762	15,010	15,772	95.2%
150	Dentists	13,428	61,862	75,290	82.2%
151	Dietitians and nutritionists	52,126	50,599	102,725	49.3%
152	Optometrists	9,690	10,451	20,141	51.9%
153	Pharmacists	129,346	140,266	269,612	52.0%
154	Physicians and surgeons	117,195	622,881	740,076	84.2%
155	Physician assistants	62,360	62,344	124,704	50.0%
156	Audiologists	1,227	8,903	10,130	87.9%
157	Occupational therapists	63,026	41,346	104,372	39.6%
158	Physical therapists	120,642	83,657	204,299	40.9%
159	Radiation therapists	12,991	2,367	15,358	15.4%
160	Recreational therapists	8,804	3,619	12,423	29.1%
161	Respiratory therapists	94,166	18,054	112,220	16.1%
162	Speech-language pathologists	37,273	86,594	123,867	69.9%
163	Exercise physiologists and therapists, all other	62,200	67,986	130,186	52.2%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
164	Veterinarians	14,674	39,078	53,752	72.7%
165	Registered nurses	1,994,629	835,355	2,829,984	29.5%
166	Nurse anesthetists	10,962	12,848	23,810	54.0%
167	Nurse midwives and nurse practitioners	52,327	72,660	124,987	58.1%
168	Health diagnosing and treating practitioners, all other	5,399	3,130	8,529	36.7%
169	Clinical laboratory technologists and technicians	258,391	92,932	351,323	26.5%
170	Dental hygienists	123,255	56,263	179,518	31.3%
171	Diagnostic related technologists and technicians	279,553	85,405	364,958	23.4%
172	Emergency medical technicians and paramedics	123,311	40,878	164,189	24.9%
173	Health diagnosing and treating practitioner support technicians	453,271	85,985	539,256	15.9%
174	Licensed practical and licensed vocational nurses	447,328	99,072	546,400	18.1%
175	Medical records and health information technicians	65,047	19,490	84,537	23.1%
176	Opticians, dispensing	32,750	13,426	46,176	29.1%
177	Miscellaneous health technologists and technicians	91,531	38,422	129,953	29.6%
178	Other healthcare practitioners and technical occupations, including podiatrists	31,421	46,337	77,758	59.6%
179	Nursing, psychiatric, and home health aides	1,792,402	257,107	2,049,509	12.5%
180	Occupational therapist assistants and aides	14,597	1,457	16,054	9.1%
181	Physical therapist assistants and aides	58,643	9,993	68,636	14.6%
182	Massage therapists	61,669	35,223	96,892	36.4%
183	Dental assistants	240,402	41,390	281,792	14.7%
184	Medical assistants	394,971	67,990	462,961	14.7%
185	Medical transcriptionists	30,716	12,040	42,756	28.2%
186	Pharmacy aides	27,426	5,681	33,107	17.2%
187	Veterinary assistants and laboratory animal caretakers	39,506	2,974	42,480	7.0%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
188	Phlebotomists	99,325	17,371	116,696	14.9%
189	Miscellaneous healthcare support occupations, including medical equipment preparers	131,240	25,260	156,500	16.1%
190	First-line supervisors/managers of correctional officers	15,936	17,839	33,775	52.8%
191	First-line supervisors/managers of police and detectives	51,361	61,911	113,272	54.7%
192	First-line supervisors/managers of fire fighting and prevention workers	28,295	32,432	60,727	53.4%
193	Supervisors, protective service workers, all other	44,853	48,120	92,973	51.8%
194	Fire fighters	160,694	145,264	305,958	47.5%
195	Fire inspectors	10,422	8,316	18,738	44.4%
196	Bailiffs, correctional officers, and jailers	258,798	162,498	421,296	38.6%
197	Detectives and criminal investigators	72,099	91,772	163,871	56.0%
198	Miscellaneous law enforcement workers	6,630	2,340	8,970	26.1%
199	Police officers	364,180	336,910	701,090	48.1%
200	Animal control workers	8,919	2,629	11,548	22.8%
201	Private detectives and investigators	34,574	40,010	74,584	53.6%
202	Security guards and gaming surveillance officers (33-9030)	646,604	182,518	829,122	22.0%
203	Crossing guards	45,401	10,696	56,097	19.1%
204	Transportation security screeners	20,824	7,380	28,204	26.2%
205	Lifeguards and other recreational and all other protective service workers	170,577	18,545	189,122	9.8%
206	Chefs and head cooks	256,560	154,892	411,452	37.6%
207	First-line supervisors/managers of food preparation and serving workers	377,837	150,962	528,799	28.5%
208	Cooks	1,763,904	178,962	1,942,866	9.2%
209	Food preparation workers	819,483	55,341	874,824	6.3%
210	Bartenders	333,916	57,469	391,385	14.7%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
211	Combined food preparation and serving workers, including fast food	368,921	16,593	385,514	4.3%
212	Counter attendants, cafeteria, food concession, and coffee shop	217,354	6,688	224,042	3.0%
213	Waiters and waitresses	1,907,994	205,363	2,113,357	9.7%
214	Food servers, nonrestaurant	196,970	30,062	227,032	13.2%
215	Food preparation and serving related workers, ...	325,626	39,752	365,378	10.9%
216	Dishwashers	280,604	16,324	296,928	5.5%
217	Hosts and hostesses, restaurant, lounge, and coffee shop	288,673	14,340	303,013	4.7%
218	First-line supervisors/managers of housekeeping and janitorial workers	124,203	75,332	199,535	37.8%
219	First-line supervisors/managers of landscaping, lawn service, and groundskeeping workers	59,055	48,121	107,176	44.9%
220	Janitors and building cleaners	1,771,953	377,199	2,149,152	17.6%
221	Maids and housekeeping cleaners	988,746	206,811	1,195,557	17.3%
222	Pest control workers	40,482	21,935	62,417	35.1%
223	Grounds maintenance workers	814,203	176,565	990,768	17.8%
224	First-line supervisors/managers of gaming workers	57,788	53,250	111,038	48.0%
225	First-line supervisors/managers of personal service workers	48,541	39,437	87,978	44.8%
226	Animal trainers	10,657	7,559	18,216	41.5%
227	Nonfarm animal caretakers	93,319	34,822	128,141	27.2%
228	Gaming services workers	85,588	20,616	106,204	19.4%
229	Motion picture projectionists	2,575	0	2,575	0.0%
230	Ushers, lobby attendants, and ticket takers	43,565	108	43,673	0.2%
231	Miscellaneous entertainment attendants and related workers	142,451	29,542	171,993	17.2%
232	Embalmers and funeral attendants	12,583	1,850	14,433	12.8%
233	Morticians, undertakers, and funeral directors	14,283	19,085	33,368	57.2%
234	Barbers	26,872	49,760	76,632	64.9%
235	Hairdressers, hairstylists, and cosmetologists	218,265	286,128	504,393	56.7%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
236	Miscellaneous personal appearance workers	105,018	137,673	242,691	56.7%
237	Baggage porters, bellhops, and concierges	63,514	28,047	91,561	30.6%
238	Tour and travel guides	31,817	10,677	42,494	25.1%
239	Child care workers	654,654	201,537	856,191	23.5%
240	Personal and home care aides	933,598	210,303	1,143,901	18.4%
241	Recreation and fitness workers	270,620	118,154	388,774	30.4%
242	Residential advisors	26,038	21,085	47,123	44.7%
243	Personal care and service workers, all other	44,257	21,759	66,016	33.0%
244	First-line supervisors/managers of retail sales workers	1,251,891	1,272,617	2,524,508	50.4%
245	First-line supervisors/managers of non-retail sales workers	210,920	569,898	780,818	73.0%
246	Cashiers	2,983,121	288,553	3,271,674	8.8%
247	Counter and rental clerks	57,290	34,772	92,062	37.8%
248	Parts salespersons	59,876	35,143	95,019	37.0%
249	Retail salespersons	2,205,672	883,335	3,089,007	28.6%
250	Advertising sales agents	84,124	150,653	234,777	64.2%
251	Insurance sales agents	145,499	323,111	468,610	69.0%
252	Securities, commodities, and financial services sales agents	51,463	181,105	232,568	77.9%
253	Travel agents	29,058	25,932	54,990	47.2%
254	Sales representatives, services, all other	132,546	261,473	394,019	66.4%
255	Sales representatives, wholesale and manufacturing	314,107	854,398	1,168,505	73.1%
256	Models, demonstrators, and product promoters	58,489	11,678	70,167	16.6%
257	Real estate brokers and sales agents	94,408	365,015	459,423	79.5%
258	Sales engineers	454	32,897	33,351	98.6%
259	Telemarketers	62,430	14,574	77,004	18.9%
260	Door-to-door sales workers, news and street vendors, and related workers	30,273	56,965	87,238	65.3%
261	Sales and related workers, all other	97,113	107,023	204,136	52.4%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
262	First-line supervisors/managers of office and administrative support workers	646,792	705,768	1,352,560	52.2%
263	Switchboard operators, including answering service	23,699	3,651	27,350	13.3%
264	Telephone operators	20,078	8,251	28,329	29.1%
265	Communications equipment operators, all other	803	1,665	2,468	67.5%
266	Bill and account collectors	120,415	44,646	165,061	27.0%
267	Billing and posting clerks and machine operators	360,436	123,000	483,436	25.4%
268	Bookkeeping, accounting, and auditing clerks	680,398	393,239	1,073,637	36.6%
269	Gaming cage workers	12,543	1,718	14,261	12.0%
270	Payroll and timekeeping clerks	96,853	49,608	146,461	33.9%
271	Procurement clerks	15,993	14,978	30,971	48.4%
272	Tellers	274,772	80,949	355,721	22.8%
273	Financial clerks, all other	28,155	28,643	56,798	50.4%
274	Brokerage clerks	1,282	1,584	2,866	55.3%
275	Court, municipal, and license clerks	45,098	35,277	80,375	43.9%
276	Credit authorizers, checkers, and clerks	23,191	20,532	43,723	47.0%
277	Customer service representatives	1,537,204	554,888	2,092,092	26.5%
278	Eligibility interviewers, government programs	43,023	32,441	75,464	43.0%
279	File Clerks	190,311	63,661	253,972	25.1%
280	Hotel, motel, and resort desk clerks	96,561	12,862	109,423	11.8%
281	Interviewers, except eligibility and loan	106,419	38,962	145,381	26.8%
282	Library assistants, clerical	78,970	13,493	92,463	14.6%
283	Loan interviewers and clerks	89,763	72,301	162,064	44.6%
284	New accounts clerks	18,858	9,779	28,637	34.1%
285	Correspondence clerks and order clerks	79,894	28,894	108,788	26.6%
286	Human resources assistants, except payroll and timekeeping	62,048	80,286	142,334	56.4%
287	Receptionists and information clerks	1,080,567	221,518	1,302,085	17.0%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
288	Reservation and transportation ticket agents and travel clerks	87,654	33,605	121,259	27.7%
289	Information and record clerks, all other	71,508	30,607	102,115	30.0%
290	Cargo and freight agents	15,368	12,330	27,698	44.5%
291	Couriers and messengers	116,025	42,509	158,534	26.8%
292	Dispatchers	179,984	91,152	271,136	33.6%
293	Meter readers, utilities	25,790	2,988	28,778	10.4%
294	Postal service clerks	71,137	28,279	99,416	28.4%
295	Postal service mail carriers	220,654	92,471	313,125	29.5%
296	Postal service mail sorters, processors, and processing machine operators	62,240	18,217	80,457	22.6%
297	Production, planning, and expediting clerks	183,611	115,608	299,219	38.6%
298	Shipping, receiving, and traffic clerks	479,279	79,607	558,886	14.2%
299	Stock clerks and order fillers	1,334,463	153,368	1,487,831	10.3%
300	Weighers, measurers, checkers, and samplers, recordkeeping	63,684	16,893	80,577	21.0%
301	Secretaries and administrative assistants	1,674,789	1,075,226	2,750,015	39.1%
302	Computer operators	59,990	34,655	94,645	36.6%
303	Data entry keyers	224,115	71,364	295,479	24.2%
304	Word processors and typists	68,135	40,381	108,516	37.2%
305	Insurance claims and policy processing clerks	181,777	93,708	275,485	34.0%
306	Mail clerks and mail machine operators, except postal service	63,515	8,483	71,998	11.8%
307	Office clerks, general	822,094	321,851	1,143,945	28.1%
308	Office machine operators, except computer	34,835	11,138	45,973	24.2%
309	Proofreaders and copy markers	2,219	1,670	3,889	42.9%
310	Statistical assistants	11,598	10,842	22,440	48.3%
311	Office and administrative support workers, including desktop publishers	305,477	198,621	504,098	39.4%
312	First-line supervisors of farming, fishing, and forestry workers	17,560	17,015	34,575	49.2%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
Occupational Title		Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
313	Agricultural inspectors	7,291	5,551	12,842	43.2%
314	Graders and sorters, agricultural products	84,573	12,554	97,127	12.9%
315	Miscellaneous agricultural workers, including animal breeders	488,759	156,341	645,100	24.2%
316	Fishing and hunting workers	7,236	10,698	17,934	59.7%
317	Forest and conservation workers	8,124	5,760	13,884	41.5%
318	Logging workers	31,185	9,547	40,732	23.4%
319	First-line supervisors/managers of construction trades and extraction workers	327,249	198,524	525,773	37.8%
320	Boilermakers	12,810	3,428	16,238	21.1%
321	Brickmasons, blockmasons, and stonemasons	94,489	20,552	115,041	17.9%
322	Carpenters	604,647	179,497	784,144	22.9%
323	Carpet, floor, and tile installers and finishers	63,591	23,450	87,041	26.9%
324	Cement masons, concrete finishers, and terrazzo workers	36,732	10,407	47,139	22.1%
325	Construction laborers	1,032,653	236,793	1,269,446	18.7%
326	Paving, surfacing, and tamping equipment operators	16,117	3,189	19,306	16.5%
327	Construction equipment operators, except Paving, surfacing, and tamping equipment operators	279,300	51,556	330,856	15.6%
328	Drywall installers, ceiling tile installers, and tapers	62,891	25,920	88,811	29.2%
329	Electricians	530,322	134,204	664,526	20.2%
330	Glaziers	26,865	7,038	33,903	20.8%
331	Insulation workers	40,577	9,753	50,330	19.4%
332	Painters, construction and maintenance and paperhangers	292,437	79,675	372,112	21.4%
333	Pipelayers, plumbers, pipefitters, and steamfitters	355,072	107,005	462,077	23.2%
334	Plasterers and stucco masons	21,798	5,612	27,410	20.5%
335	Reinforcing iron and rebar workers	6,316	2,744	9,060	30.3%
336	Roofers	119,160	40,745	159,905	25.5%
337	Sheet metal workers	81,953	20,467	102,420	20.0%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
338	Structural iron and steel workers	36,411	5,449	41,860	13.0%
339	Helpers, construction trades	47,937	9,288	57,225	16.2%
340	Construction and building inspectors	44,178	32,555	76,733	42.4%
341	Elevator installers and repairers	20,931	6,236	27,167	23.0%
342	Fence erectors	20,712	4,662	25,374	18.4%
343	Hazardous materials removal workers	23,859	5,264	29,123	18.1%
344	Highway maintenance workers	66,055	30,074	96,129	31.3%
345	Rail-track laying and maintenance equipment operators	10,781	4,989	15,770	31.6%
346	Septic tank servicers and sewer pipe cleaners	4,421	2,278	6,699	34.0%
347	Miscellaneous construction and related workers, including photovoltaic installers	23,868	4,546	28,414	16.0%
348	Derrick, rotary drill, and service unit operators, oil, gas, and mining	28,573	9,931	38,504	25.8%
349	Earth drillers, except oil and gas	18,773	7,367	26,140	28.2%
350	Explosives workers, ordnance handling experts, and blasters	6,808	2,205	9,013	24.5%
351	Mining machine operators	45,095	15,201	60,296	25.2%
352	Roustabouts, oil and gas	10,394	1,448	11,842	12.2%
353	Other extraction workers, including roof bolters and helpers	72,316	23,412	95,728	24.5%
354	First-line supervisors/managers of mechanics, installers, and repairers	117,991	146,816	264,807	55.4%
355	Computer, automated teller, and office machine repairers	154,940	108,558	263,498	41.2%
356	Radio and telecommunications equipment installers and repairers	88,902	34,211	123,113	27.8%
357	Avionics technicians	8,691	1,229	9,920	12.4%
358	Electric motor, power tool, and related repairers	20,538	8,728	29,266	29.8%
359	Electrical and electronics repairers, transportation equipment, industrial and utility	14,432	5,219	19,651	26.6%
360	Electronic equipment installers and repairers, motor vehicles	19,857	4,591	24,448	18.8%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
361	Electronic home entertainment equipment installers and repairers	31,473	11,043	42,516	26.0%
362	Security and fire alarm systems installers	46,997	16,315	63,312	25.8%
363	Aircraft mechanics and service technicians	121,841	37,086	158,927	23.3%
364	Automotive body and related repairers	92,546	42,379	134,925	31.4%
365	Automotive glass installers and repairers	16,803	5,729	22,532	25.4%
366	Automotive service technicians and mechanics	509,722	213,287	723,009	29.5%
367	Bus and truck mechanics and diesel engine specialists	247,144	60,820	307,964	19.7%
368	Heavy vehicle and mobile equipment service technicians and mechanics	166,149	31,932	198,081	16.1%
369	Small engine mechanics	26,892	10,154	37,046	27.4%
370	Miscellaneous vehicle and mobile equipment mechanics, installers, and repairers	71,554	20,210	91,764	22.0%
371	Control and valve installers and repairers	17,611	7,420	25,031	29.6%
372	Heating, air conditioning, and refrigeration mechanics and installers	256,880	75,631	332,511	22.7%
373	Home appliance repairers	28,589	11,373	39,962	28.5%
374	Industrial and refractory machinery mechanics	370,588	74,539	445,127	16.7%
375	Maintenance and repair workers, general	341,979	95,670	437,649	21.9%
376	Maintenance workers, machinery	31,214	5,526	36,740	15.0%
377	Millwrights	60,222	4,635	64,857	7.1%
378	Electrical power-line installers and repairers	93,808	21,050	114,858	18.3%
379	Telecommunications line installers and repairers	133,499	47,174	180,673	26.1%
380	Precision instrument and equipment repairers	37,386	25,179	62,565	40.2%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
381	Coin, vending, and amusement machine servicers and repairers	23,080	12,600	35,680	35.3%
382	Locksmiths and safe repairers	9,758	6,806	16,564	41.1%
383	Manufactured building and mobile home installers	6,894	3,547	10,441	34.0%
384	Riggers	12,073	1,939	14,012	13.8%
385	Helpers--installation, maintenance, and repair workers	20,443	3,997	24,440	16.4%
386	Other installation, maintenance, and repair workers, ...	118,390	47,718	166,108	28.7%
387	First-line supervisors/managers of production and operating workers	414,385	280,964	695,349	40.4%
388	Aircraft structure, surfaces, rigging, and systems assemblers	14,767	1,150	15,917	7.2%
389	Electrical, electronics, and electromechanical assemblers	121,185	10,327	131,512	7.9%
390	Engine and other machine assemblers	15,547	4,393	19,940	22.0%
391	Structural metal fabricators and fitters	18,043	3,877	21,920	17.7%
392	Miscellaneous assemblers and fabricators	867,750	124,104	991,854	12.5%
393	Bakers	157,118	18,280	175,398	10.4%
394	Butchers and other meat, poultry, and fish processing workers	297,535	26,920	324,455	8.3%
395	Food and tobacco roasting, baking, and drying machine operators and tenders	7,191	1,034	8,225	12.6%
396	Food batchmakers	80,164	5,426	85,590	6.3%
397	Food cooking machine operators and tenders	6,652	1,157	7,809	14.8%
398	Food processing workers, all other	112,658	9,148	121,806	7.5%
399	Computer control programmers and operators	63,738	8,823	72,561	12.2%
400	Extruding and drawing machine setters, operators, and tenders, metal and plastic	14,933	956	15,889	6.0%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
Occupational Title		Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
401	Rolling machine setters, operators, and tenders and forging machine setters, operators, and tenders, metal and plastic	11,913	0	11,913	0.0%
402	Cutting, punching, and press machine setters, operators, and tenders, metal and plastic	63,779	8,153	71,932	11.3%
403	Grinding, lapping, polishing, and buffing machine tool setters, operators, and tenders, metal and plastic	48,503	2,117	50,620	4.2%
404	Lathe and turning machine tool setters, operators, and tenders, metal and plastic	11,090	107	11,197	1.0%
405	Machinists	348,184	50,183	398,367	12.6%
406	Metal furnace and kiln operators and tenders	19,671	2,924	22,595	12.9%
407	Molders and molding machine setters, operators, and tenders, metal and plastic	49,168	3,592	52,760	6.8%
408	Tool and die makers	48,794	5,920	54,714	10.8%
409	Welding, soldering, and brazing workers	463,579	78,485	542,064	14.5%
410	Plating and coating machine setters, operators, and tenders, metal and plastic	14,122	1,985	16,107	12.3%
411	Tool grinders, filers, and sharpeners	3,246	708	3,954	17.9%
412	Metalworkers and plastic workers, all other	333,291	33,032	366,323	9.0%
413	Prepress technicians and workers	20,006	6,903	26,909	25.7%
414	Printing press operators	165,184	20,509	185,693	11.0%
415	Print binding and finishing workers	19,965	2,231	22,196	10.1%
416	Laundry and dry-cleaning workers	121,766	23,121	144,887	16.0%
417	Pressers, textile, garment, and related materials	36,745	8,559	45,304	18.9%
418	Sewing machine operators	108,470	40,294	148,764	27.1%
419	Shoe and leather workers and repairers	5,719	1,050	6,769	15.5%
420	Tailors, dressmakers, and sewers	43,957	10,506	54,463	19.3%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
421	Textile cutting machine setters, operators, and tenders	4,903	2,029	6,932	29.3%
422	Textile knitting and weaving machine setters, operators, and tenders	3,263	0	3,263	0.0%
423	Textile winding, twisting, and drawing out machine setters, operators, and tenders (51-6064)	12,798	0	12,798	0.0%
424	Upholsterers	17,675	5,343	23,018	23.2%
425	Miscellaneous textile, apparel, and furnishings workers, except upholsterers	17,138	1,685	18,823	9.0%
426	Cabinetmakers and bench carpenters	30,771	2,856	33,627	8.5%
427	Furniture finishers	6,280	1,102	7,382	14.9%
428	Sawing machine setters, operators, and tenders, wood	24,452	3,907	28,359	13.8%
429	Woodworking machine setters, operators, and tenders, except sawing	17,847	2,038	19,885	10.2%
430	Miscellaneous woodworkers, including model makers and pattern makers	7,849	2,683	10,532	25.5%
431	Power plant operators, distributors, and dispatchers	30,819	9,749	40,568	24.0%
432	Stationary engineers and boiler operators	67,865	23,379	91,244	25.6%
433	Water and liquid waste treatment plant and system operators	57,282	11,576	68,858	16.8%
434	Miscellaneous plant and system operators	28,909	12,302	41,211	29.9%
435	Chemical processing machine setters, operators, and tenders	41,880	8,128	50,008	16.3%
436	Crushing, grinding, polishing, mixing, and blending workers	77,499	15,148	92,647	16.4%
437	Cutting workers	47,224	4,359	51,583	8.5%
438	Extruding, forming, pressing, and compacting machine setters, operators, and tenders	33,621	0	33,621	0.0%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
439	Furnace, kiln, oven, drier, and kettle operators and tenders	8,845	1,292	10,137	12.7%
440	Inspectors, testers, sorters, samplers, and weighers	519,624	163,745	683,369	24.0%
441	Jewelers and precious stone and metal workers	20,662	7,925	28,587	27.7%
442	Medical, dental, and ophthalmic laboratory technicians	58,344	14,747	73,091	20.2%
443	Packaging and filling machine operators and tenders	308,725	15,667	324,392	4.8%
444	Painting workers	104,695	26,908	131,603	20.4%
445	Photographic process workers and processing machine operators	34,130	7,173	41,303	17.4%
446	Cementing and gluing machine operators and tenders	9,862	1,070	10,932	9.8%
447	Cleaning, washing, and metal pickling equipment operators and tenders	4,382	0	4,382	0.0%
448	Etchers and engravers	3,769	1,113	4,882	22.8%
449	Molders, shapers, and casters, except metal and plastic	27,758	7,401	35,159	21.1%
450	Paper goods machine setters, operators, and tenders	22,092	294	22,386	1.3%
451	Tire builders	24,646	787	25,433	3.1%
452	Helpers--production workers	32,243	1,829	34,072	5.4%
453	Production workers, including semiconductor processors and cooling and freezing equipment operators	805,540	135,596	941,136	14.4%
454	Supervisors, transportation and material moving workers	106,871	74,139	181,010	41.0%
455	Aircraft pilots and flight engineers	49,959	74,992	124,951	60.0%
456	Air traffic controllers and airfield operations specialists	23,205	18,044	41,249	43.7%
457	Flight attendants (53-2031)	61,801	31,479	93,280	33.7%
458	Ambulance drivers and attendants, except emergency medical technicians	13,048	3,658	16,706	21.9%
459	Bus drivers	443,760	121,741	565,501	21.5%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
460	Driver/sales workers and truck drivers	1,890,373	1,040,154	2,930,527	35.5%
461	Taxi drivers and chauffeurs	153,194	111,294	264,488	42.1%
462	Motor vehicle operators, all other	53,842	18,236	72,078	25.3%
463	Locomotive engineers and operators	28,472	23,002	51,474	44.7%
464	Railroad brake, signal, switch operators, conductors and yardmasters	34,443	25,665	60,108	42.7%
465	Subway, streetcar, and other rail transportation workers	1,918	2,822	4,740	59.5%
466	Sailors and marine oilers, and ship engineers	17,997	18,940	36,937	51.3%
467	Ship and boat captains and operators	14,091	19,464	33,555	58.0%
468	Parking lot attendants	76,692	11,634	88,326	13.2%
469	Service station attendants	92,335	9,603	101,938	9.4%
470	Transportation inspectors	27,901	15,276	43,177	35.4%
471	Transportation attendants, except flight attendants	31,146	9,492	40,638	23.4%
472	Other transportation workers, including bridge and lock tenders	17,450	7,618	25,068	30.4%
473	Crane and tower operators	61,266	9,640	70,906	13.6%
474	Dredge, excavating, and loading machine operators	23,862	5,022	28,884	17.4%
475	Hoist and winch operators, and conveyor operators and tenders	9,589	1,114	10,703	10.4%
476	Industrial truck and tractor operators	506,185	66,008	572,193	11.5%
477	Cleaners of vehicles and equipment	268,247	49,487	317,734	15.6%
478	Laborers and freight, stock, and material movers, hand	1,574,064	183,326	1,757,390	10.4%
479	Machine feeders and offbearers	21,410	843	22,253	3.8%
480	Packers and packagers, hand	454,706	36,106	490,812	7.4%
481	Pumping station operators	15,322	12,883	28,205	45.7%
482	Refuse and recyclable material collectors	78,012	15,057	93,069	16.2%

Table 7					
Hourly and Non-Hourly Workers by Occupation (includes both full-time and part-time workers 2013)					
	Occupational Title	Hourly Worker	Non-hourly worker	All Workers	Percent non-hourly
483	Material moving workers, including mine shuttle operators and tank car, truck, and ship loaders	53,794	11,201	64,995	17.2%
	TOTALS	76,007,943	53,128,658	129,136,601	41.1%

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
1	Chief executives	$1,290	$2,099	44.4	48.5
2	General and operations managers	$1,047	$1,590	42.2	47.3
3	Advertising and promotions managers	$628	$1,744	38.9	44.4
4	Marketing and sales managers	$940	$1,623	41.6	45.8
5	Public relations managers	$1,529	$1,456	41.7	43.6
6	Administrative services managers	$1,009	$1,456	41.6	44.2
7	Computer and information systems managers	$1,308	$1,818	40.7	44.7
8	Financial managers	$856	$1,561	40.6	44.6
9	Compensation and benefits managers	$1,339	$1,416	40.0	41.0
10	Human resources managers	$1,027	$1,539	40.7	44.3
11	Training and development managers	$1,129	$1,488	41.8	44.9
12	Industrial production managers	$1,022	$1,499	43.0	46.0
13	Purchasing managers	$1,149	$1,536	41.3	43.5
14	Transportation, storage, and distribution managers	$822	$1,283	41.4	44.1
15	Farmers, ranchers, and other agricultural managers	$673	$1,073	44.7	51.3
16	Construction managers	$1,204	$1,474	43.2	45.9
17	Education administrators	$859	$1,449	41.0	44.9
18	Engineering managers	$1,523	$2,002	43.8	46.2
19	Food service managers	$583	$1,045	41.2	48.9
20	Gaming managers	$749	$1,610	39.8	43.4
21	Lodging managers	$858	$1,230	42.4	48.5
22	Medical and health services managers	$1,103	$1,522	41.5	44.3
23	Natural sciences managers	$960	$1,856	40.0	47.1

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
24	Property, real estate, and community association managers	$761	$1,226	40.8	42.6
25	Social and community service managers	$1,014	$1,282	40.5	44.2
26	Emergency management directors	$1,241	$1,684	40.0	41.2
27	Managers, all other	$1,060	$1,541	41.5	44.7
28	Agents and business managers of artists, performers, and athletes	$650	$1,635	40.0	46.3
29	Purchasing agents and buyers, farm products	$545	$2,025	40.0	50.2
30	Wholesale and retail buyers, except farm products	$772	$1,153	40.2	43.9
31	Purchasing agents, except wholesale, retail, and farm products	$839	$1,323	40.9	42.5
32	Claims adjusters, appraisers, examiners, and investigators	$878	$1,229	40.1	41.6
33	Compliance officers	$956	$1,479	40.3	43.3
34	Cost estimators	$841	$1,219	40.8	43.4
35	Human resource workers	$876	$1,305	40.7	42.5
36	Compensation, benefits, and job analysis specialists	$960	$1,328	40.0	41.8
37	Training and development specialists	$760	$1,423	40.5	42.2
38	Logisticians	$1,007	$1,271	41.8	42.6
39	Management analysts	$1,161	$1,682	41.2	44.1
40	Meeting, convention, and event planners	$849	$1,251	40.2	43.9
41	Fundraisers	$688	$1,282	39.8	42.9

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
42	Market research analysts and marketing specialists	$862	$1,417	40.7	43.9
43	Business operations specialists, all other	$867	$1,403	41.0	41.7
44	Accountants and auditors	$925	$1,409	40.2	42.8
45	Appraisers and assessors of real estate	$890	$1,383	40.6	42.4
46	Budget analysts	$1,092	$1,562	40.7	40.5
47	Credit analysts	$836	$1,343	41.5	43.0
48	Financial analysts	$973	$1,793	40.8	48.5
49	Personal financial advisors	$1,005	$1,699	40.5	45.0
50	Insurance underwriters	$1,020	$1,242	40.9	41.7
51	Financial examiners	$992	$1,474	42.1	42.2
52	Loan counselors and officers	$885	$1,328	40.9	42.4
53	Tax examiners, collectors, and revenue agents	$1,107	$1,170	40.0	40.4
54	Tax prepares	$590	$1,425	40.1	44.3
55	Financial specialists, all other	$682	$1,536	39.5	43.2
56	Computer and information research scientists	$1,227	$1,775	40.0	42.3
57	Computer systems analysts	$1,229	$1,524	41.1	42.8
58	Information security analysts	$1,291	$1,564	40.0	42.5
59	Computer programmers	$1,175	$1,512	40.8	42.1
60	Software developers, applications and systems software	$1,415	$1,729	40.4	42.7
61	Web developers	$952	$1,311	39.3	42.9
62	Computer support specialists	$925	$1,289	40.2	41.3
63	Database administrators	$977	$1,535	45.5	42.1
64	Network and computer systems administrators	$1,052	$1,447	40.2	42.3
65	Computer network architects	$1,349	$1,763	41.8	44.6

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
66	Computer occupations, all other	$1,000	$1,353	40.7	42.6
67	Actuaries	$2,448	$1,992	47.3	42.3
68	Operations research analysts	$1,274	$1,591	40.6	42.0
69	Mathematicians, statisticians and miscellaneous mathematical science occupations	$1,563	$1,549	40.4	42.1
70	Architects, except naval	$1,070	$1,398	40.6	44.2
71	Surveyors, cartographers, and photogrammetrists	$1,051	$1,307	42.0	40.3
72	Aerospace engineers	$1,746	$1,841	44.5	42.5
73	Agricultural and biomedical engineers	$925	$1,697	40.0	43.2
74	Chemical engineers	$1,132	$1,862	42.6	45.3
75	Civil engineers	$1,279	$1,552	41.1	43.0
76	Computer hardware engineers	$1,330	$1,650	41.3	43.5
77	Electrical and electronic engineers	$1,307	$1,655	41.3	43.9
78	Environmental engineers	$1,351	$1,602	39.6	41.8
79	Industrial engineers, including health and safety	$1,172	$1,493	41.3	42.8
80	Marine engineers and naval architects	$1,195	$1,491	40.9	41.9
81	Materials engineers	$1,333	$1,678	40.0	42.8
82	Mechanical engineers	$1,312	$1,654	41.3	43.4
83	Mining and geological engineers, including mining safety engineers	$1,676	$1,757	42.7	49.9
84	Nuclear engineers	$2,372	$1,701	40.0	40.0
85	Petroleum engineers	$1,686	$1,861	53.5	45.5
86	Engineers, all other	$1,323	$1,677	41.8	43.3
87	Drafters	$1,045	$1,090	41.6	42.4

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
88	Engineering technicians, except drafters	$1,012	$1,209	41.7	41.8
89	Surveying and mapping technicians	$912	$1,234	42.3	44.8
90	Agricultural and food scientists	$841	$1,395	41.3	41.9
91	Biological scientists	$1,148	$1,313	40.7	44.6
92	Conservation scientists and foresters	$1,150	$1,004	40.0	40.9
93	Medical scientists and life scientists, all other	$1,137	$1,495	40.7	43.8
94	Astronomers and physicists	$2,247	$1,722	40.0	44.9
95	Atmospheric and space scientists	$1,425	$1,448	40.0	42.6
96	Chemists and materials scientists	$1,065	$1,376	42.2	42.3
97	Environmental scientists and geoscientists	$1,100	$1,584	40.6	42.1
98	Physical scientists, all other	$1,151	$1,659	40.6	43.8
99	Economists	$1,757	$1,979	40.3	43.0
100	Psychologists	$1,214	$1,340	40.7	41.7
101	Urban and regional planners	$1,196	$1,396	39.8	43.0
102	Miscellaneous social scientists, including survey researchers and sociologists	$950	$1,399	39.8	43.4
103	Agricultural and food science technicians	$719	$985	41.0	40.4
104	Biological technicians	$811	$905	43.0	41.2
105	Chemical technicians	$995	$813	41.7	42.4
106	Geological and petroleum technicians	$1,162	$1,663	51.4	41.2
107	Miscellaneous life, physical, and social science technicians	$861	$1,043	40.8	42.1

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
108	Counselors	$822	$1,076	39.9	41.4
109	Social workers	$878	$1,045	40.1	40.8
110	Probation officers and correctional treatment specialists	$952	$1,031	40.4	40.1
111	Social and human service assistants	$732	$920	40.2	41.3
112	Miscellaneous community and social service specialists, including health educators and community health workers	$707	$1,081	40.5	41.6
113	Clergy	$1,135	$1,114	41.3	47.1
114	Directors, religious activities and education	$830	$1,011	41.2	43.8
115	Religious workers, all other	$501	$833	38.5	49.7
116	Lawyers, Judges, magistrates, and other judicial workers	$1,521	$1,933	43.5	46.3
117	Judicial law clerks	$906	$1,505	38.7	40.9
118	Paralegals and legal assistants	$846	$998	40.2	40.5
119	Miscellaneous legal support workers	$819	$1,117	39.8	41.5
120	Postsecondary teachers	$922	$1,365	40.9	44.2
121	Preschool and kindergarten teachers	$577	$948	39.5	41.1
122	Elementary and middle school teachers	$932	$1,099	40.5	42.8
123	Secondary school teachers	$1,097	$1,165	39.9	43.7
124	Special education teachers	$688	$1,132	38.5	41.9
125	Other teachers and instructors	$807	$1,237	40.0	42.2
126	Archivists, curators, and museum technicians	$1,050	$1,174	40.2	41.3
127	Librarians	$893	$1,059	39.0	40.8

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
128	Library technicians	$691	$966	38.6	39.5
129	Teacher assistants	$582	$624	38.3	39.0
130	Other education, training, and library workers	$910	$1,267	40.1	42.8
131	Artists and related workers	$1,010	$1,322	42.0	42.8
132	Designers	$911	$1,243	40.8	42.6
133	Actors	$0	$795	0.0	40.2
134	Producers and directors	$870	$1,436	43.2	43.2
135	Athletes, coaches, umpires, and related workers	$658	$1,251	40.3	47.2
136	Dancers and choreographers	$1,818	$706	40.0	35.5
137	Musicians, singers, and related workers	$1,109	$1,071	52.1	44.1
138	Entertainers and performers, sports and related workers, all other	$541	$1,015	38.7	42.0
139	Announcers	$775	$1,083	40.2	43.2
140	News analysts, reporters and correspondents	$1,042	$1,383	40.6	42.8
141	Public relations specialists	$857	$1,473	40.7	44.4
142	Editors	$719	$1,289	39.7	43.2
143	Technical writers	$1,280	$1,539	40.7	41.4
144	Writers and authors	$765	$1,330	39.3	42.4
145	Miscellaneous media and communication workers	$872	$852	39.4	39.4
146	Broadcast and sound engineering technicians and radio operators, ...	$1,070	$1,139	42.1	42.6
147	Photographers	$881	$1,198	39.9	41.5
148	Television, video, and motion picture camera operators and editors	$1,126	$1,349	43.2	44.5

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
149	Chiropractors	$1,215	$1,528	40.0	42.1
150	Dentists	$1,008	$1,891	39.0	43.3
151	Dietitians and nutritionists	$897	$1,079	39.2	40.2
152	Optometrists	$1,543	$1,928	38.7	49.5
153	Pharmacists	$1,741	$1,831	40.0	41.9
154	Physicians and surgeons	$1,575	$1,992	44.7	53.3
155	Physician assistants	$1,265	$1,601	41.4	46.8
156	Audiologists	$985	$1,395	40.0	42.8
157	Occupational therapists	$1,325	$1,384	39.6	40.5
158	Physical therapists	$1,306	$1,442	39.7	41.6
159	Radiation therapists	$1,096	$1,678	39.6	40.0
160	Recreational therapists	$903	$1,188	38.8	40.0
161	Respiratory therapists	$1,084	$1,261	38.8	39.5
162	Speech-language pathologists	$1,141	$1,323	39.3	40.8
163	Exercise physiologists and therapists, all other	$956	$932	39.2	43.0
164	Veterinarians	$1,342	$1,610	42.0	46.7
165	Registered nurses	$1,146	$1,264	39.5	41.1
166	Nurse anesthetists	$2,020	$2,368	40.4	44.0
167	Nurse midwives and nurse practitioners	$1,501	$1,661	41.0	42.2
168	Health diagnosing and treating practitioners, all other	$606	$1,766	40.0	45.9
169	Clinical laboratory technologists and technicians	$904	$1,104	40.2	40.3
170	Dental hygienists	$1,010	$1,264	38.1	41.2
171	Diagnostic related technologists and technicians	$984	$1,053	40.3	41.1
172	Emergency medical technicians and paramedics	$835	$1,153	44.4	47.7
173	Health diagnosing and treating practitioner support technicians	$668	$906	39.4	40.3

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
174	Licensed practical and licensed vocational nurses	$796	$1,034	40.0	41.1
175	Medical records and health information technicians	$720	$1,037	40.2	39.8
176	Opticians, dispensing	$667	$1,089	39.2	43.3
177	Miscellaneous health technologists and technicians	$839	$1,493	40.2	41.2
178	Other healthcare practitioners and technical occupations, including podiatrists	$1,076	$1,218	41.0	42.1
179	Nursing, psychiatric, and home health aides	$505	$667	40.2	41.1
180	Occupational therapist assistants and aides	$925	$615	39.5	40.0
181	Physical therapist assistants and aides	$742	$850	40.4	40.0
182	Massage therapists	$621	$722	38.6	39.7
183	Dental assistants	$576	$683	39.1	39.1
184	Medical assistants	$571	$697	39.7	39.8
185	Medical transcriptionists	$650	$618	40.0	40.7
186	Pharmacy aides	$696	$630	39.4	40.3
187	Veterinary assistants and laboratory animal caretakers	$444	$709	39.6	42.0
188	Phlebotomists	$602	$806	40.3	43.9
189	Miscellaneous healthcare support occupations, including medical equipment preparers	$528	$808	39.6	41.7
190	First-line supervisors/managers of correctional officers	$957	$1,139	41.9	44.8
191	First-line supervisors/managers of police and detectives	$1,178	$1,267	43.3	42.4

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
192	First-line supervisors/managers of fire fighting and prevention workers	$1,357	$1,200	49.5	47.5
193	Supervisors, protective service workers, all other	$781	$1,125	41.2	45.2
194	Fire fighters	$1,114	$1,215	49.7	51.6
195	Fire inspectors	$857	$1,044	40.9	40.7
196	Bailiffs, correctional officers, and jailers	$790	$842	41.2	41.7
197	Detectives and criminal investigators	$1,107	$1,379	41.9	44.0
198	Miscellaneous law enforcement workers	$699	$732	39.5	40.5
199	Police officers	$1,074	$1,166	42.2	41.7
200	Animal control workers	$742	$490	39.9	38.4
201	Private detectives and investigators	$900	$1,223	41.0	45.4
202	Security guards and gaming surveillance officers (33-9030)	$599	$840	40.6	41.0
203	Crossing guards	$788	$676	39.8	42.0
204	Transportation security screeners	$846	$854	40.5	40.4
205	Lifeguards and other recreational and all other protective service workers	$564	$767	39.0	39.5
206	Chefs and head cooks	$565	$832	40.8	48.2
207	First-line supervisors/managers of food preparation and serving workers	$513	$778	40.3	45.6
208	Cooks	$453	$575	39.5	44.0
209	Food preparation workers	$428	$612	39.6	41.2
210	Bartenders	$593	$638	40.1	40.1

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
211	Combined food preparation and serving workers, including fast food	$454	$502	39.2	39.7
212	Counter attendants, cafeteria, food concession, and coffee shop	$359	$635	38.4	41.8
213	Waiters and waitresses	$484	$597	39.3	42.2
214	Food servers, nonrestaurant	$594	$802	39.4	40.7
215	Food preparation and serving related workers, ...	$467	$494	38.9	38.6
216	Dishwashers	$412	$420	41.2	45.8
217	Hosts and hostesses, restaurant, lounge, and coffee shop	$423	$532	40.3	40.1
218	First-line supervisors/managers of housekeeping and janitorial workers	$641	$972	41.4	43.8
219	First-line supervisors/managers of landscaping, lawn service, and groundskeeping workers	$833	$981	41.4	44.6
220	Janitors and building cleaners	$543	$659	40.0	40.8
221	Maids and housekeeping cleaners	$465	$484	39.6	39.9
222	Pest control workers	$717	$758	41.8	41.3
223	Grounds maintenance workers	$508	$617	40.5	41.5
224	First-line supervisors/managers of gaming workers	$675	$1,042	40.5	45.1
225	First-line supervisors/managers of personal service workers	$690	$766	39.8	44.5
226	Animal trainers	$837	$1,132	40.2	49.9
227	Nonfarm animal caretakers	$462	$530	39.4	40.9
228	Gaming services workers	$704	$889	39.9	41.6
229	Motion picture projectionists	$621	$0	38.8	0.0

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
230	Ushers, lobby attendants, and ticket takers	$515	$0	44.0	0.0
231	Miscellaneous entertainment attendants and related workers	$506	$882	39.1	42.2
232	Embalmers and funeral attendants	$685	$845	44.0	40.0
233	Morticians, undertakers, and funeral directors	$1,196	$860	43.1	44.3
234	Barbers	$598	$501	39.1	41.8
235	Hairdressers, hairstylists, and cosmetologists	$522	$574	39.8	39.5
236	Miscellaneous personal appearance workers	$577	$586	40.9	43.4
237	Baggage porters, bellhops, and concierges	$481	$802	39.7	41.3
238	Tour and travel guides	$534	$1,158	39.1	45.4
239	Child care workers	$451	$509	40.0	44.4
240	Personal and home care aides	$492	$616	41.6	47.1
241	Recreation and fitness workers	$539	$678	40.7	42.3
242	Residential advisors	$470	$806	39.5	45.9
243	Personal care and service workers, all other	$714	$691	42.6	43.5
244	First-line supervisors/managers of retail sales workers	$610	$1,081	40.6	46.6
245	First-line supervisors/managers of non-retail sales workers	$734	$1,339	42.4	45.5
246	Cashiers	$446	$771	39.2	41.9
247	Counter and rental clerks	$567	$891	40.3	43.8
248	Parts salespersons	$629	$887	42.5	42.8
249	Retail salespersons	$562	$1,026	40.2	43.8
250	Advertising sales agents	$760	$1,235	41.2	43.2
251	Insurance sales agents	$680	$1,178	40.0	42.3

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
252	Securities, commodities, and financial services sales agents	$781	$1,548	40.4	45.1
253	Travel agents	$810	$836	40.0	40.7
254	Sales representatives, services, all other	$773	$1,339	40.7	44.3
255	Sales representatives, wholesale and manufacturing	$715	$1,409	41.7	45.2
256	Models, demonstrators, and product promoters	$654	$951	40.0	45.8
257	Real estate brokers and sales agents	$647	$1,148	40.6	44.4
258	Sales engineers	$1,000	$1,898	40.0	44.0
259	Telemarketers	$560	$687	39.8	41.4
260	Door-to-door sales workers, news and street vendors, and related workers	$663	$818	40.9	43.1
261	Sales and related workers, all other	$671	$1,360	39.7	45.1
262	First-line supervisors/managers of office and administrative support workers	$742	$1,068	40.9	42.6
263	Switchboard operators, including answering service	$650	$679	39.7	51.1
264	Telephone operators	$554	$683	38.5	40.0
265	Communications equipment operators, all other	$493	$481	40.0	40.0
266	Bill and account collectors	$576	$810	40.1	40.9
267	Billing and posting clerks and machine operators	$646	$864	40.3	40.5
268	Bookkeeping, accounting, and auditing clerks	$692	$881	40.2	40.8
269	Gaming cage workers	$597	$1,250	40.0	40.0

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
270	Payroll and timekeeping clerks	$713	$936	40.4	41.2
271	Procurement clerks	$818	$1,624	40.0	46.6
272	Tellers	$514	$698	39.2	39.7
273	Financial clerks, all other	$597	$1,021	41.1	42.8
274	Brokerage clerks	$769	$1,167	40.3	40.0
275	Court, municipal, and license clerks	$666	$806	40.0	39.9
276	Credit authorizers, checkers, and clerks	$684	$1,110	40.3	41.9
277	Customer service representatives	$625	$979	40.2	41.9
278	Eligibility interviewers, government programs	$825	$880	40.0	39.7
279	File Clerks	$658	$818	39.7	40.4
280	Hotel, motel, and resort desk clerks	$487	$533	40.5	46.5
281	Interviewers, except eligibility and loan	$626	$925	39.5	42.5
282	Library assistants, clerical	$583	$970	39.5	40.6
283	Loan interviewers and clerks	$735	$960	40.7	41.7
284	New accounts clerks	$607	$860	40.3	41.9
285	Correspondence clerks and order clerks	$586	$847	40.3	41.4
286	Human resources assistants, except payroll and timekeeping	$766	$1,145	40.3	41.9
287	Receptionists and information clerks	$563	$709	39.7	40.5
288	Reservation and transportation ticket agents and travel clerks	$663	$1,261	40.4	46.1
289	Information and record clerks, all other	$710	$975	40.1	41.4
290	Cargo and freight agents	$671	$862	40.7	41.3

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
291	Couriers and messengers	$799	$814	42.6	41.7
292	Dispatchers	$676	$873	41.0	42.6
293	Meter readers, utilities	$613	$1,074	40.1	40.0
294	Postal service clerks	$966	$950	41.4	40.8
295	Postal service mail carriers	$928	$995	41.6	41.4
296	Postal service mail sorters, processors, and processing machine operators	$836	$976	40.1	42.1
297	Production, planning, and expediting clerks	$765	$1,034	40.9	43.1
298	Shipping, receiving, and traffic clerks	$617	$719	40.7	40.4
299	Stock clerks and order fillers	$549	$741	40.0	40.9
300	Weighers, measurers, checkers, and samplers, recordkeeping	$692	$972	40.9	41.8
301	Secretaries and administrative assistants	$691	$873	40.1	40.8
302	Computer operators	$744	$986	40.0	39.9
303	Data entry keyers	$645	$833	40.0	40.2
304	Word processors and typists	$631	$818	39.4	39.9
305	Insurance claims and policy processing clerks	$638	$889	39.9	41.1
306	Mail clerks and mail machine operators, except postal service	$621	$694	39.4	39.7
307	Office clerks, general	$612	$800	40.0	40.2
308	Office machine operators, except computer	$554	$767	40.0	40.4
309	Proofreaders and copy markers	$627	$741	40.0	44.2
310	Statistical assistants	$855	$964	39.8	40.5
311	Office and administrative support workers, including desktop publishers	$713	$987	40.0	41.1

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
312	First-line supervisors of farming, fishing, and forestry workers	$508	$1,087	43.7	56.1
313	Agricultural inspectors	$712	$1,575	40.1	44.7
314	Graders and sorters, agricultural products	$450	$617	41.5	40.4
315	Miscellaneous agricultural workers, including animal breeders	$483	$547	44.1	47.5
316	Fishing and hunting workers	$513	$1,004	41.5	74.9
317	Forest and conservation workers	$597	$1,091	40.7	44.5
318	Logging workers	$572	$722	43.6	45.0
319	First-line supervisors/managers of construction trades and extraction workers	$1,095	$1,213	43.7	46.2
320	Boilermakers	$1,137	$1,058	42.8	54.0
321	Brickmasons, blockmasons, and stonemasons	$852	$986	40.8	43.9
322	Carpenters	$804	$706	41.0	41.6
323	Carpet, floor, and tile installers and finishers	$732	$537	40.6	41.4
324	Cement masons, concrete finishers, and terrazzo workers	$757	$846	41.0	41.0
325	Construction laborers	$709	$792	41.0	42.4
326	Paving, surfacing, and tamping equipment operators	$813	$593	45.1	40.0
327	Construction equipment operators, except Paving, surfacing, and tamping equipment operators	$941	$999	43.3	43.8
328	Drywall installers, ceiling tile installers, and tapers	$679	$603	40.5	41.2

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
329	Electricians	$1,018	$1,101	41.6	42.1
330	Glaziers	$652	$737	39.9	41.7
331	Insulation workers	$822	$633	40.5	42.1
332	Painters, construction and maintenance and paperhangers	$662	$736	40.4	42.2
333	Pipelayers, plumbers, pipefitters, and steamfitters	$1,047	$1,021	41.7	41.7
334	Plasterers and stucco masons	$653	$1,161	39.7	42.5
335	Reinforcing iron and rebar workers	$1,084	$515	42.4	40.0
336	Roofers	$702	$622	41.4	41.2
337	Sheet metal workers	$874	$813	41.5	45.0
338	Structural iron and steel workers	$914	$1,019	41.6	40.0
339	Helpers, construction trades	$636	$380	40.9	42.1
340	Construction and building inspectors	$1,017	$1,058	41.0	42.9
341	Elevator installers and repairers	$1,282	$1,410	40.4	40.4
342	Fence erectors	$730	$602	39.9	38.0
343	Hazardous materials removal workers	$703	$863	42.0	45.6
344	Highway maintenance workers	$832	$775	40.2	40.3
345	Rail-track laying and maintenance equipment operators	$941	$735	40.4	39.7
346	Septic tank servicers and sewer pipe cleaners	$659	$1,154	40.0	44.4
347	Miscellaneous construction and related workers, including photovoltaic installers	$741	$636	40.1	54.9

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
348	Derrick, rotary drill, and service unit operators, oil, gas, and mining	$1,059	$1,626	52.4	59.9
349	Earth drillers, except oil and gas	$1,137	$944	53.0	50.3
350	Explosives workers, ordnance handling experts, and blasters	$1,185	$839	51.2	44.6
351	Mining machine operators	$1,231	$1,335	49.4	55.2
352	Roustabouts, oil and gas	$732	$875	48.5	62.4
353	Other extraction workers, including roof bolters and helpers	$1,052	$1,299	50.8	58.7
354	First-line supervisors/managers of mechanics, installers, and repairers	$983	$1,237	42.8	46.4
355	Computer, automated teller, and office machine repairers	$824	$1,122	40.5	41.4
356	Radio and telecommunications equipment installers and repairers	$1,031	$1,077	41.4	41.3
357	Avionics technicians	$1,042	$807	40.8	40.0
358	Electric motor, power tool, and related repairers	$908	$940	40.9	44.4
359	Electrical and electronics repairers, transportation equipment, industrial and utility	$986	$1,031	40.6	47.7
360	Electronic equipment installers and repairers, motor vehicles	$1,062	$1,306	42.1	49.7
361	Electronic home entertainment equipment installers and repairers	$774	$918	41.8	41.8
362	Security and fire alarm systems installers	$850	$990	40.7	42.3

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
363	Aircraft mechanics and service technicians	$987	$1,134	40.8	41.1
364	Automotive body and related repairers	$700	$810	40.4	42.0
365	Automotive glass installers and repairers	$794	$801	40.1	40.9
366	Automotive service technicians and mechanics	$782	$806	41.4	43.1
367	Bus and truck mechanics and diesel engine specialists	$875	$851	41.9	42.6
368	Heavy vehicle and mobile equipment service technicians and mechanics	$967	$1,226	43.6	48.4
369	Small engine mechanics	$699	$885	44.1	44.5
370	Miscellaneous vehicle and mobile equipment mechanics, installers, and repairers	$549	$628	41.2	47.7
371	Control and valve installers and repairers	$1,144	$946	41.7	42.7
372	Heating, air conditioning, and refrigeration mechanics and installers	$901	$953	41.7	41.5
373	Home appliance repairers	$805	$911	40.1	46.7
374	Industrial and refractory machinery mechanics	$960	$1,032	42.9	42.8
375	Maintenance and repair workers, general	$879	$795	41.5	41.4
376	Maintenance workers, machinery	$760	$750	41.1	40.0
377	Millwrights	$1,172	$1,103	45.4	41.6
378	Electrical power-line installers and repairers	$1,040	$1,039	42.0	42.3

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
379	Telecommunications line installers and repairers	$988	$993	41.2	42.7
380	Precision instrument and equipment repairers	$957	$1,009	40.7	42.4
381	Coin, vending, and amusement machine servicers and repairers	$718	$908	41.3	40.2
382	Locksmiths and safe repairers	$833	$711	40.6	39.7
383	Manufactured building and mobile home installers	$1,110	$636	41.8	42.0
384	Riggers	$1,217	$800	51.1	45.7
385	Helpers--installation, maintenance, and repair workers	$713	$300	40.4	40.0
386	Other installation, maintenance, and repair workers, ...	$788	$1,132	41.5	44.0
387	First-line supervisors/managers of production and operating workers	$866	$1,161	42.2	44.4
388	Aircraft structure, surfaces, rigging, and systems assemblers	$720	$1,050	41.8	40.0
389	Electrical, electronics, and electromechanical assemblers	$559	$681	41.2	41.6
390	Engine and other machine assemblers	$1,092	$1,275	44.9	42.3
391	Structural metal fabricators and fitters	$758	$1,665	42.0	50.0
392	Miscellaneous assemblers and fabricators	$630	$773	41.0	41.3
393	Bakers	$581	$610	41.2	40.0
394	Butchers and other meat, poultry, and fish processing workers	$575	$833	40.6	43.7

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
395	Food and tobacco roasting, baking, and drying machine operators and tenders	$552	$1,423	39.9	40.0
396	Food batchmakers	$562	$1,039	40.5	40.8
397	Food cooking machine operators and tenders	$400	$250	42.7	47.8
398	Food processing workers, all other	$632	$886	41.0	47.2
399	Computer control programmers and operators	$844	$1,205	42.1	43.3
400	Extruding and drawing machine setters, operators, and tenders, metal and plastic	$649	$184	43.5	38.0
401	Rolling machine setters, operators, and tenders and forging machine setters, operators, and tenders, metal and plastic	$798	$0	40.7	0.0
402	Cutting, punching, and press machine setters, operators, and tenders, metal and plastic	$587	$987	41.9	41.4
403	Grinding, lapping, polishing, and buffing machine tool setters, operators, and tenders, metal and plastic	$692	$1,113	42.0	40.0
404	Lathe and turning machine tool setters, operators, and tenders, metal and plastic	$781	$1,442	44.4	40.0
405	Machinists	$835	$964	42.7	43.2
406	Metal furnace and kiln operators and tenders	$818	$1,324	42.0	41.9

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
407	Molders and molding machine setters, operators, and tenders, metal and plastic	$762	$881	41.7	40.8
408	Tool and die makers	$911	$702	42.6	42.5
409	Welding, soldering, and brazing workers	$789	$883	42.2	42.7
410	Plating and coating machine setters, operators, and tenders, metal and plastic	$665	$1,092	40.6	47.6
411	Tool grinders, filers, and sharpeners	$1,004	$1,153	43.0	55.0
412	Metalworkers and plastic workers, all other	$646	$823	41.6	41.8
413	Prepress technicians and workers	$619	$827	40.0	48.3
414	Printing press operators	$708	$718	40.6	41.4
415	Print binding and finishing workers	$475	$916	39.6	41.2
416	Laundry and dry-cleaning workers	$427	$564	39.5	41.4
417	Pressers, textile, garment, and related materials	$467	$404	39.3	43.9
418	Sewing machine operators	$451	$520	39.9	41.2
419	Shoe and leather workers and repairers	$602	$0	40.0	0.0
420	Tailors, dressmakers, and sewers	$500	$575	39.1	43.0
421	Textile cutting machine setters, operators, and tenders	$558	$981	42.7	40.0
422	Textile knitting and weaving machine setters, operators, and tenders	$485	$0	40.0	0.0

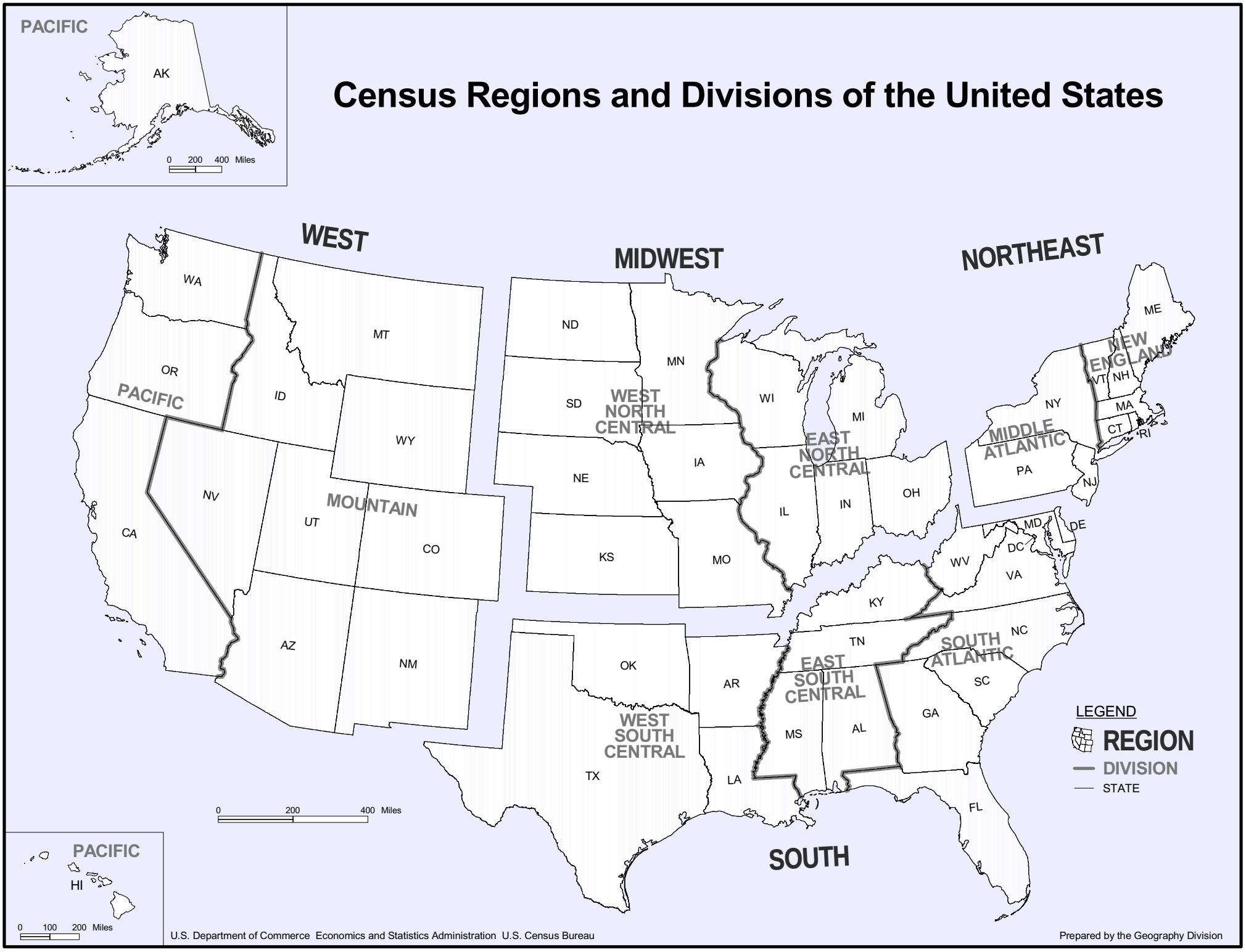
Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
423	Textile winding, twisting, and drawing out machine setters, operators, and tenders (51-6064)	$532	$0	39.7	0.0
424	Upholsterers	$616	$662	40.3	41.8
425	Miscellaneous textile, apparel, and furnishings workers, except upholsterers	$495	$1,426	40.3	40.0
426	Cabinetmakers and bench carpenters	$552	$0	39.8	0.0
427	Furniture finishers	$672	$0	41.4	0.0
428	Sawing machine setters, operators, and tenders, wood	$634	$584	43.0	40.0
429	Woodworking machine setters, operators, and tenders, except sawing	$582	$753	41.2	40.0
430	Miscellaneous woodworkers, including model makers and pattern makers	$643	$467	40.1	41.8
431	Power plant operators, distributors, and dispatchers	$1,227	$1,491	42.8	43.1
432	Stationary engineers and boiler operators	$921	$1,209	40.9	44.3
433	Water and liquid waste treatment plant and system operators	$852	$942	41.1	46.3
434	Miscellaneous plant and system operators	$1,014	$1,050	43.1	43.4
435	Chemical processing machine setters, operators, and tenders	$882	$720	40.8	41.9
436	Crushing, grinding, polishing, mixing, and blending workers	$784	$1,232	41.6	43.1
437	Cutting workers	$585	$441	40.3	40.0

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
438	Extruding, forming, pressing, and compacting machine setters, operators, and tenders	$630	$0	40.2	0.0
439	Furnace, kiln, oven, drier, and kettle operators and tenders	$844	$1,250	45.3	52.0
440	Inspectors, testers, sorters, samplers, and weighers	$784	$1,093	41.8	44.8
441	Jewelers and precious stone and metal workers	$642	$678	40.6	41.5
442	Medical, dental, and ophthalmic laboratory technicians	$717	$1,169	40.3	41.5
443	Packaging and filling machine operators and tenders	$545	$636	40.5	41.5
444	Painting workers	$689	$815	41.3	41.4
445	Photographic process workers and processing machine operators	$558	$877	40.3	39.7
446	Cementing and gluing machine operators and tenders	$560	$400	41.6	37.0
447	Cleaning, washing, and metal pickling equipment operators and tenders	$481	$0	40.0	0.0
448	Etchers and engravers	$880	$852	40.0	40.0
449	Molders, shapers, and casters, except metal and plastic	$591	$629	40.6	44.8
450	Paper goods machine setters, operators, and tenders	$827	$0	40.3	0.0
451	Tire builders	$669	$1,442	40.3	40.0
452	Helpers--production workers	$527	$0	40.4	0.0

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
453	Production workers, including semiconductor processors and cooling and freezing equipment operators	$655	$826	40.9	42.4
454	Supervisors, transportation and material moving workers	$789	$1,124	42.0	46.1
455	Aircraft pilots and flight engineers	$1,129	$1,976	41.7	44.7
456	Air traffic controllers and airfield operations specialists	$1,874	$1,620	40.0	40.5
457	Flight attendants (53-2031)	$1,068	$942	41.1	45.4
458	Ambulance drivers and attendants, except emergency medical technicians	$688	$725	40.3	40.0
459	Bus drivers	$649	$727	39.7	41.0
460	Driver/sales workers and truck drivers	$767	$921	43.2	48.4
461	Taxi drivers and chauffeurs	$692	$658	42.4	46.3
462	Motor vehicle operators, all other	$525	$854	40.0	49.2
463	Locomotive engineers and operators	$1,275	$1,506	52.8	46.4
464	Railroad brake, signal, switch operators, conductors and yardmasters	$1,098	$1,323	45.6	48.3
465	Subway, streetcar, and other rail transportation workers	$1,104	$1,276	41.2	57.3
466	Sailors and marine oilers, and ship engineers	$1,220	$1,579	58.8	68.0
467	Ship and boat captains and operators	$1,389	$1,602	60.3	51.5
468	Parking lot attendants	$472	$730	40.0	51.7

Table 8					
Hourly and Usual Full-time Non-Hourly Workers by Occupation, Mean Weekly Earnings and Mean Weekly Usual Hours					
	Occupation Title	Full-Time Hourly Workers Weekly Earnings (Mean)	Full-Time Non-Hourly Workers Earnings (Mean	Full-Time Hourly Workers Usual Weekly Hours	Full-Time Non-Hourly Workers Usual Weekly Hours
469	Service station attendants	$516	$752	40.3	48.5
470	Transportation inspectors	$968	$1,324	44.3	40.2
471	Transportation attendants, except flight attendants	$764	$942	41.5	40.5
472	Other transportation workers, including bridge and lock tenders	$722	$928	39.8	40.0
473	Crane and tower operators	$993	$1,635	46.0	44.0
474	Dredge, excavating, and loading machine operators	$859	$848	45.3	49.0
475	Hoist and winch operators, and conveyor operators and tenders	$1,168	$0	46.7	0.0
476	Industrial truck and tractor operators	$629	$718	41.5	41.8
477	Cleaners of vehicles and equipment	$494	$540	40.4	41.1
478	Laborers and freight, stock, and material movers, hand	$583	$724	41.0	42.2
479	Machine feeders and offbearers	$534	$385	40.8	40.0
480	Packers and packagers, hand	$511	$443	40.5	40.2
481	Pumping station operators	$1,041	$908	43.1	47.9
482	Refuse and recyclable material collectors	$691	$659	41.4	44.0
483	Material moving workers, including mine shuttle operators and tank car, truck, and ship loaders	$774	$925	42.9	42.3
484	All Occupations	$738	$1,250	40.8	43.7

Appendix B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Census Regions and Divisions of the United States
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LEGEND
REGION
DIVISION
STATE
U.S. Department of Commerce Economics and Statistics Administration U.S. Census Bureau
Prepared by the Geography Division

U.S. Census Bureau

Census Bureau Regions and Divisions with State FIPS Codes

Region 1: Northeast

Division 1: New England

Connecticut (09)
Maine (23)
Massachusetts (25)
New Hampshire (33)
Rhode Island (44)
Vermont (50)

Division 2: Middle Atlantic

New Jersey (34)
New York (36)
Pennsylvania (42)

Region 2: Midwest*

Division 3: East North Central

Indiana (18)
Illinois (17)
Michigan (26)
Ohio (39)
Wisconsin (55)

Division 4: West North Central

Iowa (19)
Kansas (20)
Minnesota (27)
Missouri (29)
Nebraska (31)
North Dakota (38)
South Dakota (46)

Region 3: South

Division 5: South Atlantic

Delaware (10)
District of Columbia (11)
Florida (12)
Georgia (13)
Maryland (24)
North Carolina (37)
South Carolina (45)
Virginia (51)
West Virginia (54)

Division 6: East South Central

Alabama (01)
Kentucky (21)
Mississippi (28)
Tennessee (47)

Division 7: West South Central

Arkansas (05)
Louisiana (22)
Oklahoma (40)
Texas (48)

Region 4: West

Division 8: Mountain

Arizona (04)
Colorado (08)
Idaho (16)
New Mexico (35)
Montana (30)
Utah (49)
Nevada (32)
Wyoming (56)

Division 9: Pacific

Alaska (02)
California (06)
Hawaii (15)
Oregon (41)
Washington (53)

**Prior to June 1984, the Midwest Region was designated as the North Central Region.*

Appendix C

Appendix C

Alternative Calculations of FLSA Salary Test Thresholds and Number of Potentially Exempt Workers Excluded By Each

The results below were derived from Current Population Survey Outgoing Rotation Series salaried (non-hourly) worker observations. The analysis excluded data for employees who are not subject to the FLSA salary level test:

- Doctors, lawyers and teachers, who are not required to meet the salary level test for exemption under 29 C.F.R. §§ 541.304(d) and 541.303(d);
- Federal government employees who are covered by regulations of the Office of Personnel Management under 29 U.S.C. § 204(f); and
- Employees who either are not covered by the FLSA or exempted from the overtime requirements under other exemptions (e.g., agriculture, interstate truck drivers, railroad, air transport).

Two subsets of the remaining observations were examined:

(1) The Department's 2004 method: FLSA covered full-time salary workers in the East and West South Central Census Divisions (Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma, and Texas), plus all full-time salary workers nationwide in the Retail Trade industry sector.

(2) Ten lowest median earnings States: All FLSA covered full time salary workers in the ten states with the lowest median earnings for these workers. The ten States are: Kentucky ($1,020 per week), South Carolina ($1,007), Tennessee ($1,006), Alabama ($995), Oklahoma ($984), Louisiana ($980), Florida ($978), West Virginia ($969), Arkansas ($955), and Mississippi ($949). For each of these States the weekly earnings median amount was less than the nationwide median of $1,163.

For each of these data sets, the 20th percentiles of earnings were calculated. These two potential salary tests were examined in relation to full-time FLSA covered salary workers' earnings nationwide to estimate the proportion of potentially exempt-by-duties workers who would be excluded by the salary test alternative from use of the duties test to determine their exempt status.

Salary Test Alternative	Weekly Salary	Annual Equivalent	Additional Number Excluded By Raising Salary Test	Total Exempt Duties Performing Employees Excluded By Salary Test	Percent Of Employees Performing Exempt Duties Excluded By Salary Test
Current[1]	$455	$23,660	N/A	2,755,034	6.8%
10-States at the 20th Percentile[2]	$598	$31,096	3,096,410	5,851,444	14.5%
2004 Methodology at the 20th Percentile[3]	$612	$31,824	3,409,902	6,164,936	15.3%
2016 Final Rule Methodology[4]	$913	$47,476	11,225,624	13,980,658	34.6%
Source: Current Population Survey, Monthly Outgoing Rotation Series: Pooled data May 2014 to July 2016 for full-time (at least 35 hours per week) Salaried FLSA covered workers. Weekly earnings adjusted by CPI-W to July 2017 equivalent dollars.					

[1] Currently applicable salary test set in 2004 based on 20th percentile of weekly earnings of FLSA covered full-time salary workers in South Central Census Region States plus others nationwide in the Retail Trade Industry based on 2003 CPS data and dollars.

[2] 20th percentile of weekly earnings of FLSA covered full-time salary workers in the ten states with lowest median weekly earnings (July 2014 dollars) derived from latest CPS data (39 months ending July 2017).

[3] Replication of 2004 method: 20th percentile of full-time salaried FLSA covered workers in East and West South Central States plus Retail Industry workers nationwide.

[4] Salary test amount set by DOL 2016 final rule based on 40th percentile of full-time workers in 17 South Census Region States, which was overturned by recent court decision.

Appendix D

Appendix D
Part 541 Historical Salary Levels

Year Set	Exemption	Salary Level
1938	All	$30
1940	Executive	$30
	Administrative & Professional	$50
1949	Executive	$55
	Administrative & Professional	$75
	Short Test	$100
1958	Executive	$80
	Administrative & Professional	$95
	Short Test	$125
1963	Executive & Administrative	$100
	Professsional	$115
	Short Test	$150
1970	Executive & Administrative	$125
	Professsional	$140
	Short Test	$200
1975	Executive & Administrative	$155
	Professsional	$170
	Short Test	$250
2004	All	$455