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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

[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).

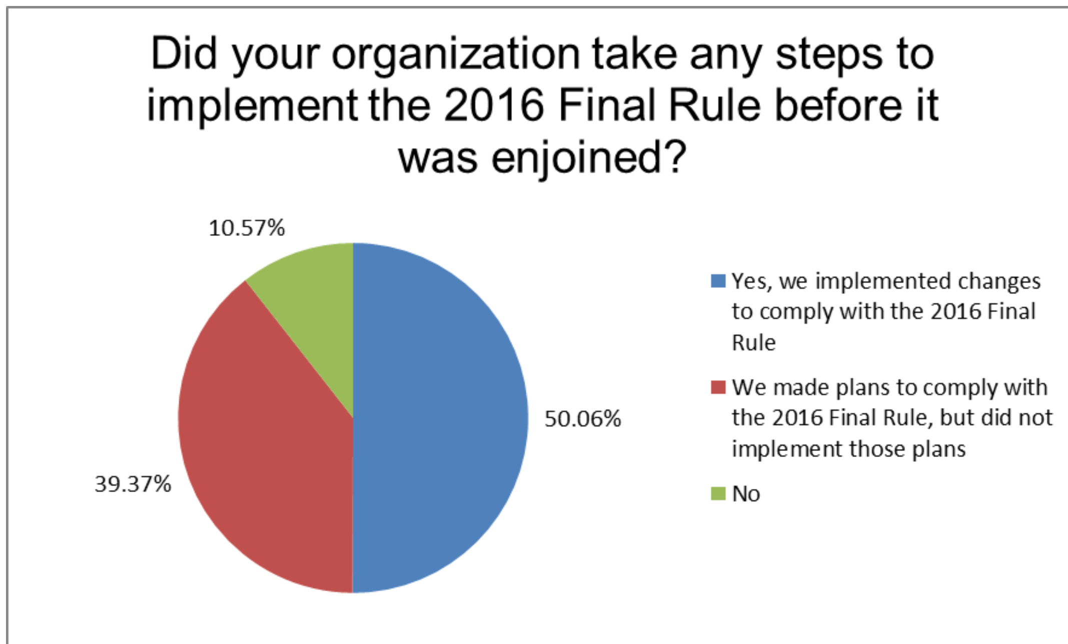
Adjusting the standard salary level using the Department's 2004 methodology would allow both salary and duties tests to fulfill their historical roles. Predicting the exact salary level that a court might view as exceeding the Department's authority would be pure speculation.

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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[83] *Id.* at 38538.