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AN EXAMINATION OF THE ADMINISTRATION'S OVERTIME RULE AND THE RISING COSTS OF DOING BUSINESS

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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AN EXAMINATION OF THE ADMINISTRATION'S OVERTIME RULE AND THE RISING COSTS OF DOING BUSINESS

WEDNESDAY, MAY 11, 2016

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS
AND ENTREPRENEURSHIP,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in Room SR–428A, Russell Senate Office Building, Hon. David Vitter, Chairman of the Committee, presiding.

Present: Senators Vitter, Rubio, Scott, Gardner, Cardin, Heitkamp, Markey, and Booker.

OPENING STATEMENT OF HON. DAVID VITTER, CHAIRMAN, AND A U.S. SENATOR FROM LOUISIANA

Chairman VITTER. Good morning, everybody, and thanks for joining us today for the Senate Small Business and Entrepreneurship Committee hearing to examine the Obama administration's proposal to more than double the current salary threshold under the Fair Labor Standards Act's overtime exemption for administrative, executive, and professional employees.

We are going to hear from a diverse panel of experts and stakeholders on the impact this proposed rule would have on small businesses and organizations around the country. And I want to thank all of our witnesses for being here today.

In previous hearings, this Committee has focused on the need for regulatory reform in light of how Federal agencies often issue new rules and regulations that cause extreme undue burden on small businesses.

As one of the most controversial labor regulations pushed by the Obama administration, the "white collar" overtime exemption from the Department of Labor certainly falls in this category.

Under current rules, most employees making up to $23,660 a year are automatically entitled to overtime pay when working more than 40 hours per week. The proposed rule we are discussing today would more than double the threshold to extend overtime requirements to anyone earning up to $50,440. Additionally, the proposal sets the minimum threshold at the 40th percentile of weekly earnings for full-time salaried workers—meaning the amount could increase every year going forward.

While President Obama's administration believes this is the correct way to increase pay for workers, it will actually have the oppo-

site effect for small businesses. It is very likely that employers will respond to higher overtime costs in several ways that will actually reduce workers' opportunity for long-term advancement and increased pay.

Many employees could see their hours cut or limited to less than 40 hours per week and lose the benefits that come with a salaried position, such as flexible work hours and health insurance. These reactive changes would have severely negative effects in the workplace.

Along with small businesses, several different types of employers are particularly vulnerable to the negative effects of this rule, including: nonprofits, charities, State and local governments, and colleges and universities.

My colleague and Chair of the Senate Health, Education, Labor, and Pensions Committee, Lamar Alexander, found that the new rule would increase operating costs for at least one Tennessee college by more than $1 million annually. The increased labor costs would ultimately have to be passed down to students in the form of an $850 tuition increase or result in job cuts for the college's employees.

Senator Alexander joined our Committee member, Senator Tim Scott, to author S. 2707, the Protecting Workplace Advancement and Opportunity Act, which would prevent the Department of Labor from finalizing President Obama's proposed rule. I strongly support these efforts to move forward with the bill and want to commend their work on this important issue.

Along with the Small Business Administration's Office of Advocacy and Members of Congress from the House and Senate, I have raised several concerns about the role and representation of small businesses throughout this rulemaking process.

I strongly believe this proposal lacks adequate economic analysis, and I was alarmed when the Office of Advocacy submitted comments that sharply criticized the manner in which the DOL crafted the proposal. Their comments stated that the DOL's initial regulatory flexibility analysis was inaccurate and severely undercounted the number of small businesses that would be affected by the rule.

I hope our conversation today will also touch on the impact the rule will have on small nonprofit organizations. Advocacy's comment letter referenced a roundtable discussion that was held in New Orleans where a small nonprofit operating Head Start programs in Louisiana stated that this proposal would result in $74,000 in first-year costs.

Since 80 percent of this organization's operating budget comes from Federal programs, which cannot be used to pay for management costs like labor, they may have to cut critical community services to reduce labor costs. This is really unacceptable, especially for rural and poor areas that rely on different services provided by nonprofits.

After hearing from many concerned workers and business owners, I urged Secretary Perez to extend the public comment period to allow small business owners and employees the opportunity to examine the proposed rule and comment carefully.

Shortly after, the Office of Advocacy wrote a similar public comment letter requesting a 90-day extension of the comment period. Unfortunately, all of these requests were denied by Secretary Perez.

I have serious concerns with President Obama's proposed changes to overtime regulations which will negatively impact the ability of small businesses and other organizations to operate effectively. While the rule is expected to become finalized within the next several weeks, it is crucial that the Administration reconsider their one-size-fits-all approach.

Now, let us get today's conversation started. Again, I would like to thank everyone for being a part of this discussion.

I am going to go ahead and introduce our entire first panel, and then each of you will have 5 minutes in the order in which you are introduced and, of course, can submit any additional written comments for the record.

Ms. Tammy McCutchen serves as the principal at Littler Mendelson, P.C., a law firm specializing in representing employment and labor law. Ms. McCutchen also serves as vice president and managing director of strategic solutions for compliance HR and previously served as the Administrator of the Wage and Hour Division at the U.S. Department of Labor.

Ms. Sarita Gupta serves as the executive director of Jobs With Justice, a union rights organization focused on workers' civil rights.

Mr. Octavio Mantilla is from my home State of Louisiana. He resides in New Orleans and is the co-owner of the Besh Restaurant Group, where he oversees the operations of more than ten restaurants across the country. In addition to his responsibilities at the Besh Group, he is a board member of the Louisiana Restaurant Association, the Louisiana Hospitality Foundation, the New Orleans Tourism and Marketing Corporation, and the John Besh Foundation.

Mr. Ross Eisenbrey has been the vice president of the Economic Policy Institute in Washington, D.C., since 2003. Mr. Eisenbrey focuses on labor and employment law, along with pension and regulatory policy.

And Ms. Nancy Duncan is the associate vice president of human resources for Operation Smile, a nonprofit medical service dedicated to providing cleft lip and palate repair surgeries to children worldwide. Ms. Duncan is based out of Virginia Beach and has more than two decades of HR experience.

So, again, welcome to all of you. Thank you for being here. And we will start with Ms. McCutchen.

STATEMENT OF TAMMY D. McCUTCHEN, PRINCIPAL, LITTLER MENDELSON, P.C.

Ms. MCCUTCHEN. Mr. Chairman and members of the Committee, thank you for giving me the opportunity to speak with you today regarding how the Department's changes to the overtime regulations will impact small businesses.

Of course, of most concern to small business is the Department's proposal to increase the minimum salary level for exemption by 113 percent, from the current $23,660 to $50,440. The purpose of setting a minimum salary level for exemption, as the Department

itself has stated since 1949, is to provide a "ready method of screening out the obviously nonexempt employees." DOL's proposed 50,440 level does exactly the opposite, excluding from the exemption many employees who obviously perform exempt duties, including employees found to be exempt by Department investigators and the Federal courts. Such a large increase is unprecedented in the FLSA's 77-year history, and using any reasonable method to set the minimum salary level yields a much lower number: $30,000, for example, the salary level if the Department used its methodology from 2004, setting the salary level to exclude from the exemption the lowest 20th percentile of salaries employees working in retail and the South; $32,000, the salary level if the Department applied increases in the Employment Cost Index since 2004; $34,000, the salary level if the Department used its methodology from 1958, setting that salary level to exclude the lowest 10 percent of employees found in DOL investigations to be exempt in the lowest wage regions, the lowest wage industries, the smallest businesses, and the smallest cities; $35,000, the minimum salary required for exemption under the laws of New York, also, by the way, the salary level if the Department looked to the historical percentage of increases from 1938 through 2004; $42,000, the minimum salary required for exemption under the laws of California, also, by the way, the starting salary for Federal Government employees with master's degrees.

Instead of using any of these reasonable methods, the Department arrived at $50,440, a number higher than either New York or California, both high-cost-of-living states with very generous labor laws, by using instead the 40th percentile of all salaries nationwide. It is irresponsible, particularly with the recent disturbing economic news, to use nationwide data that fails to distinguish salaries by region, industry, size of business, or size of city.

I am not suggesting that we adopt different salary levels for different regions or industries, which would be a compliance nightmare for employers. But I am stating that the minimum salary has to be set at a level that will work for high-income and low-income states, for high-profit/low-profit industries, for large, small, and nonprofit businesses in large cities and in small rural communities.

The purpose of the salary level is to exclude obviously nonexempt employees. The duties tests in the regulation then come into play once the obviously nonexempt have been eliminated. For 77 years, it has been the duties test that serves as the primary method of distinguishing exempt from nonexempt, of identifying who is the executive, administrative, and professional employee.

Let me close with four quick points.

First, thousands of small business owners and advocates and even more nonprofit businesses filed comments objecting to the propose rule, including the SBA's Office of Advocacy, the National Federation of Independent Businesses, and the National Association of Women Small Business Owners.

Second, both the NFIB and the SBA Office of Advocacy concluded that the Department's flexibility analysis grossly underestimates the cost of the rule to small business. I was personally shocked by the Department's low-ball estimate of the amount of time business will need to spend to comply with the rule. I would never tell my

clients, my employer clients, to spend so little time on FLSA compliance.

Third, the costs to small businesses will be even higher if the Department decides to automatically increase the salary levels every year or to make changes to the duties tests.

Finally, increasing the salary level to $50,440 or even to the $47,000 that Politico recently reported will not result in giving America a raise. Employees are unlikely to see higher paychecks. The small business owners I have talked to cannot afford to give a salary increase or pay overtime, so they must adjust in other ways: demoting management employees to hourly workers, requiring them to clock in and out, closely monitoring the hours that they work, decreasing the flexibility to take time off for family without losses in pay, taking away bonuses and other employee benefits, and depriving employees of opportunities for advancement. The one thing small businesses cannot do is redistribute money they do not have.

Thank you.

[The prepared statement of Ms. McCutchen follows:]

Testimony of

Tammy D. McCutchen, Esq.

Before the

United States Senate
Committee on Small Business & Entrepreneurship

Hearing on

"An Examination of the Administration's Overtime Rule and the Rising Costs of Doing Business"

May 11, 2016

Mr. Chairman and members of the Subcommittee:

Thank you for the opportunity to speak with you today regarding the U.S. Department of Labor's (the "Department") proposed revisions to the "white collar" overtime exemption regulations at 29 CFR Part 541.

Currently, I am a principal in the Washington D.C. office of Littler Mendelson, P.C., where my practice focuses on helping employers comply with the Fair Labor Standards Act ("FLSA"), including conducting internal audits on independent contractor status, overtime exemptions, and other pay practices. I also represent employers during wage-hour investigations by the Department and have served as an expert witness in wage-hour collective and class actions. I also serve as VP & Managing Director, Strategic Solutions for ComplianceHR, which develops compliance applications that guide employers through key employment decisions including whether to classify employees as exempt from overtime requirements.

Perhaps of most relevance to the topic of this hearing, I served as Administrator of the Department's Wage and Hour Division from 2001 to 2004. During that time, I oversaw the Department's 2004 revisions to the overtime regulations, the first major changes to the regulations in 55 years. My official biography is attached as Exhibit A.

I am appearing today on my own behalf only. However, I assisted in drafting the U.S. Chamber of Commerce's comments on the Department's Notice of Proposed Rulemaking ("NPRM") on the Part 541 regulations. I am also a member of the Small Business Legal Advisory Board of the National Federation of Independent Business, the nation's leading small business advocacy association. The Chamber's comments to the Department's NPRM are attached as Exhibit B, and the NFIB's comments are attached as Exhibit C.

Mr. Chairman, I request that the entirety of my written testimony and its attachments be entered into the record of this hearing.

I. INTRODUCTION

When Congress passed the FLSA in 1938, establishing the minimum wage and overtime requirements, it 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 position to an exempt position is the first rung on the promotional ladder.

Perhaps most important, 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 she 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.
>
> 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]

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[1] 29 C.F.R. § 541.602(a).
[2] Subject to employer paid leave policies.
[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.

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% – 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 status and will 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, as stated by many commenters on the proposed regulations with experience managing businesses, limiting an employee's work hours also limits opportunities for advancement. Exempt employees know this too, and will view the reclassification to non-exempt status necessitated by the Department's proposal as a demotion. Employee morale will suffer when 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.

Among those who will be most impacted by the change in the minimum salary level for exemption will be small businesses. Current salary levels for small business employees who clearly perform exempt job duties fall below the proposed $50,440 threshold. Small businesses cannot afford to increase salaries necessary to maintain the exemption, but also cannot afford to pay overtime – especially when this new regulatory burden is piled on top of Affordable Care Act obligations, state minimum wage increases, and state paid leave requirements. The options for small businesses are few – cut employees, cut work hours – as they do not have excess profits to cover the increased costs.

II. A BRIEF REGULATORY HISTORY

The Fair Labor Standards Act requires covered employers to pay employees at least the minimum wage for all hours worked and overtime at one and one-half times the employee's regular rate of pay for hours worked over 40 in a workweek. However, the FLSA also contains about 50 separate partial or complete exemptions from the minimum wage and/or overtime requirements. The hearing today focuses on the exemptions for executive, administrative, professional and outside sales employees, codified at 29 U.S.C. § 213(a)(1).

These exemptions, sometimes called the "white collar" exemptions, were included in the FLSA when the Act was passed by Congress in 1938. The FLSA itself includes no definitions of the terms executive, administrative, professional or outside sales. Rather, the Act provides that these terms are to be "defined and delimited from time to time by regulations of the Secretary."

The Secretary of Labor first issued such regulations to define 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.

The duties tests were significantly revised in 1949, including the addition of "special proviso[s] for high salaried" executive, administrative and professional employees – known as the "short tests." Except for revisions adopted in 1992 at the direction of Congress to allow certain computer employees to qualify for exempt status,[4] the duties tests in the Part 541 regulations remained virtually unchanged for 55 years, from 1949 until the Department significantly revised the regulations in 2004.

From 1940 to 1975, the Department raised the minimum salary level for exempt status every 5 to 10 years. The 1975 salary levels set forth below remained in effect until 2004:

- $155 per week for executive/ administrative
- $170 for professionals
- $250 for the short test

In 2004, the Department eliminated the "long" and "short" test, instead adopting one standard test with a minimum salary of $455 and a test for highly compensated employees with total annual compensation of at least $100,000.

In its Notice of Proposed Rulemaking, published in the Federal Register on July 6, 2015, the Department proposed to increase the minimum salary level for exempt status. The Department has also requested comments on possible changes to the duties tests.

III. MINIMUM SALARY LEVEL FOR EXEMPTION

The Department proposes to set the minimum salary required for exemption from the FLSA overtime requirements at the 40th percentile for all non-hourly paid employees, using data from the Bureau of Labor Statistics (BLS).[5] When the NPRM was published in July 2015, this methodology resulted in a minimum salary level of $921 per week or $47,892 annually. When a final rule is published in 2016, the Department expects that the minimum salary level based on the 40th percentile will increase to $970 per week or $50,440 annually – an increase of 113% over the current minimum salary level for exemption.

The Department's methodology and the amount of the increase are unprecedented in the FLSA's 77-year history. In my opinion, the Department cannot justify increasing the minimum salary level for exemption above $35,000.

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[4] In 1992, at the direction of Congress, the Department revised the duties tests to allow computer employees to qualify as exempt professionals. In 1996, Congress enacted a separate exemption for some computer employees in 29 U.S.C. § 213(a)(17), incorporating some, but not all, of the Department's regulations in the Act itself. Unlike the Section 13(a)(1) exemptions, however, Congress did not give the Department the authority to issue regulations on Section 13(a)(17).

[5] "Non-hourly-paid" employees include employees paid on a salary basis, but also include employees paid on a fee basis, by commission and any other arrangement that is not hourly pay.

In the past, the Department has used information regarding employee salaries to set the minimum salary levels for exemption, but has never used a salary level even close to the 40th percentile. In the 1958 rulemaking, for example, the Department used data on actual salary levels of employees that wage and hour investigators found to be exempt during investigations conducted over an eight-month period. Based on this data, the Department set the minimum salary required for exemption at a level that would exclude the lowest 10th percentile of employees in the lowest wage region, the lowest wage industries, the smallest businesses and the smallest cities. If the 1958 methodology were applied today, the resulting minimum salary level would be $657 per week or $34,167 annually (NPRM at Table 12). Similarly, in 2004, using BLS data, the Department set the minimum salary level to exclude the lowest 20th percentile of employees in the lowest wage region (South) and industry (Retail). The Department doubled the percentile used, from 10% to 20%, to account for changes to the duties test made in the 2004 final rule. According to the NPRM, if the 2004 methodology were applied today, the resulting minimum salary level would be $577 per week or $30,004 annually (NPRM at Table 12).

Thus, the Department's proposed methodology of setting the minimum salary level at the 40th percentile of all non-hourly-paid employees nationwide results in a minimum salary for exemption that is $20,000 higher than the salary level that would result if the Department applied the 2004 methodology, and $15,000 higher than the salary level that would result if the Department applied the 1958 methodology. The Department justifies the jump from the 20% of lower wage regions and industries used in 2004 to its proposed 40% of all non-hourly-paid employees nationwide by asserting it made a "mistake" in 2004 in not accounting for changes in the duties tests. But, the Department did account for those changes in 2004 by increasing the percentile from 10% to 20%. Further, even applying the 40th percentile, the Department has not explained its failure to use salary levels in the lowest wage regions, the lowest wage industries, the smallest businesses and the smallest cities – or its inclusion of earnings data for lawyers, doctors and sales employees who are not subject to the Part 541 salary requirements. The Department's data set also includes salaries of federal workers, who generally earn wages higher than employees working in the private sector.

The graphic below, from an August 2015 study by Oxford Economics (attached to the Chamber's comments on the NPRM), illustrates the significant disproportionate economic impact the Department's reliance on national salary levels will have in lower wage regions. In Massachusetts, for example, a minimum salary level of $50,440 will exclude the lowest 27.3% of salaried employees. However, in Louisiana, over 50% of salaried employees will be ineligible for the exemption. In Washington State, only 28.7% of salaried employees earn below $50,440, but in Florida, 50.3% of salaried employees are below the Department's proposed new salary threshold.

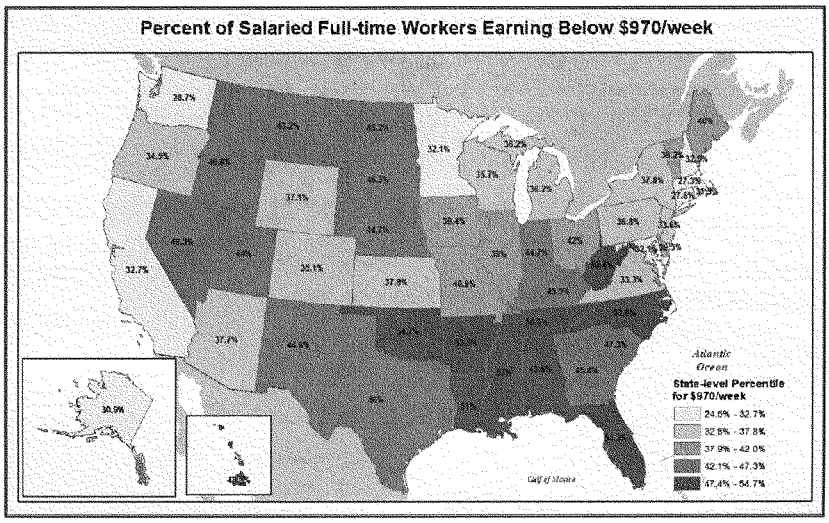

Figure 4. Percentile of salaried full-time state wage distribution that national 40th percentile wage ($970) represents.

The $50,440 wage level is also unsupported by looking to historical salary level increases. Table 1 below shows the history of salary level increases in the Part 541 regulations and calculates the percentage of increase from the prior levels. Historically, the Department has increased the salary levels at a rate of between 2.78% and 5.56% per year, with a median of 4.25%. Applying the 4.25% annual median increase for 12 years (2004 to 2016) to the current salary level of $455 per week ($23,660) would result in a salary level of $687 per week ($35,727 annually).

Table 1

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%

The Department's proposed increase to $50,440 represents an increase of 9.43% per year. Over the last decade, salaries did not increase on average by 9.43% annually. Employment Cost Index data from BLS shows that for 2004 through 2014, earnings for all wage and salary workers increased 27.1% cumulatively over the period – a 2.7% average annual change (2.2% 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%, equivalent to a 2.6% average yearly change. Applying these average 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).

Perhaps most telling, the Department's proposed minimum salary level of $970 per week, $50,440 annually, is higher than the current minimum salary levels for exemption under Alaska, California and New York law. Just like the minimum wage, states may set higher standards for exemptions from state overtime requirements. In Alaska, the minimum salary level for exemption is $40,560. In California, the minimum salary level is currently $41,600 annually. In New York, the minimum salary level is $35,100 annually. Thus, the Department's proposed salary level of $50,440 is:

- $8,840 higher than the salary level required for exemption in California;
- $9,880 higher that the salary level required in Alaska, and
- $15,340 higher than the salary level required in New York –

which are three of the five highest cost-of-living states in the country, and among the highest states for median income.

Finally, the Department's proposed $50,440 salary level is higher even than starting salaries for federal employees with Master's degrees. 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.

Although some employees holding Bachelor's degrees do not perform the duties required for the Part 541 exemptions, federal employees with Master's degrees 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 C, the salary at GS-7, Step 1, is $35,009, and federal employees with Master's degrees start in GS-9, Step 1, at $42,823.

Methodology	Salary Level
2004 Regulations	$30,004
Employment Cost Index	$32,194
1958 Methodology	$34,167
New York State Minimum	$35,100
Historical Percentage Salary Level Increases	$35,727
California State Minimum	$41,600
Federal Employees with Master's Degree, Starting Salary	$42,823

Since 1949, and in the 2015 NPRM, the Department has consistently stated the purpose of setting a minimum salary threshold is to provide a "ready method of screening out the ***obviously*** nonexempt employees." After all, in Section 13(a)(1), Congress exempted white collar employees from both the minimum wage and overtime requirements of the FLSA. Thus, to implement Congress' intent, the Department should not set the minimum salary threshold at a level that excludes many employees who ***obviously meet*** the duties tests for exemption. Or, put another way, Department should not set the level so high that it expands the number of employees eligible for overtime beyond what Congress envisioned when it created the exemptions. Yet, this is exactly what the Department proposes in this rulemaking. Particularly in the retail, restaurant, hospitality and health care industries, for small businesses and in the public sector, there are many, many employees earning below $50,440 annually who have been found exempt under the duties tests both in Department investigations and by the federal courts.

IV. IMPACT ON SMALL BUSINESS AND ORGANIZATIONS

Small businesses and their advocates uniformly agree that the Department's proposed $50,440 salary level will disproportionately and negatively impact small businesses, small non-profit organizations and small government entities. Over a thousand small business filed comments objecting to and opposing the Department's proposed $50,440 salary level. In addition, organizations representing small businesses also filed comments detailing the negative impact of the Department's proposal – including, for example, the Small Business Association Office of Advocacy, the National Federation of Independent Businesses, the National Association of Women Small Business Owners, the National Association of Women in Real Estate and the Louisiana Small Business Council.

The NFIB and the SBA Office of Advocacy, whose comments are attached as Exhibit C and Exhibit D, both raised significant issues regarding the Department's regulatory flexibility analysis. The Department claims that small business will face $750 million in new costs during the first year after the regulations are finalized -- $186.6 million in costs associated with implementing the rule and $561.5 million in additional wages that will now be paid to workers. However, all small business commenters agree that the $186.6 million in costs to implement the rule is a gross underestimate. According to the Department, an affected small establishment is expected to spend only one hour to familiarize themselves with the final rule, one hour per each affected worker in adjustment costs and five minutes each week for scheduling and monitoring each affected worker – leading to a cost per entity of only $100 to $600.

In reality, it will take far more than an hour or two – or even ten – to comply with the final rule. Since leaving the Department in 2004, I have assisted dozens and dozens of employers to reclassify employees from exempt to non-exempt. In my experience, reclassifications can take six months or more to achieve and hundreds of hours spent by business leaders, human resources professionals and outside attorneys.

Deciding who to reclassify is just the first step, but difficult enough. Small businesses will need to identify all employees earning under the new minimum salary level, and then analyze the cost of raising salaries versus the cost of reclassify the employees and paying

overtime. This analysis requires the small business to determine the number of work hours currently exempt employees are working – a challenge as employers are not required to, and most employers do not, track the hours worked by exempt employees. Thus, small businesses will need to conduct fact-finding to determine hours worked.

After the small entity determines which employees will receive salary increases and which will be reclassified, implementing the reclassification involves far more than just flipping a switch. First, the employer must redesign the compensation plan for the reclassified employees: Will the employees continue to be paid a salary or be converted to the hourly wage? If the employees will be converted to hourly, what will those hourly wages be? If the employees will continue to be paid a salary, how will the overtime be calculated – by dividing salary by 40 hours, by dividing salary by actual hours worked or by adopting the fluctuating workweek method for calculating overtime? Does the preferred method of calculating overtime comply with the state laws? Will the employer continue to pay bonuses and commissions to reclassified employees or fold such incentive pay into the base pay to off-set additional costs? If the employer decides to continue providing incentive pay, does the employer's payroll system correctly calculate the additional overtime due on bonuses, commissions, prizes, awards and other incentive pay? Are the reclassified employees currently receiving any other employee benefits available only to exempt employees? Will the employer continue to provide such benefits? If so, do the eligibility provisions in the ERISA benefit plans need to be changed?

Small businesses will need to conduct cost analysis and make dozens of decisions just on compensation alone. But, to ensure compliance with the FLSA, employers will also need to:

- Review, change and/or implement new timekeeping systems to ensure the reclassified employees can accurately track and record all hours worked;
- Review, reprogram and/or implement new payroll systems to ensure that the system correctly calculates overtime pay, especially for reclassified employees who will continue to receive bonuses, commissions and other incentive pay;
- Review, revise and or adopt new wage and hour policies – policies on timekeeping, overtime, meal and rest breaks, travel time, meeting and training time, using smart phones and lap tops outside of work hours, for example – to ensure compliance with both the FLSA and state laws regarding when the reclassified emploees must be paid for such time;
- Develop materials to communicate the changes in compensation, timekeeping practices and policies to both the reclassified employees and their managers; and
- Provide training on timekeeping and wage-hour policies to the reclassified employees and their managers who may never before had to know what activities are considered work for which the reclassified employees must track their time.

The Department may believe that compliance with the final regulations will take only a few hours, but responsible small businesses risk significant liability if they do not commit substantial

time to compliance. Frankly, I am surprised that the Department would encourage any employer to spend so little time ensuring compliance with the FLSA.

The comments filed by the SBA Office of Advocacy details the significant flaws in the Departments regulatory flexibility analysis, including:

- The Department underestimate the cost of compliance;
- The Department did not analyze the impact of the proposed rule on small non-profits organizations or small government entities;
- The Department analyzed the impact on small businesses only in the aggregate using general industry definitions (using the general 2- or 3- digit North American Industry Classification System) when more specific data are readily available thus obscuring the impact of the proposed rule on an industry-subsector basis;
- The Department applied multiple unsupported assumptions to the Census' Survey of U.S. Businesses (SUSB) data to determine the number of affected businesses and workers; and
- The Department failed to analyze the small business data to determine impact of the proposed rule on a state-by-state or regional basis.

Because of these flaws, the SBA Office of Advocacy states, the true impact of the Department's proposed $50,440 salary level cannot be known. The SBA Office of Advocacy thus recommends that the Department publish a supplemental regulatory flexibility analysis prior to publication of the final rule to provide a more accurate estimate of the impact of the proposed salary level on small entities. I urge the Committee to adopt this recommendation.

With a flexibility analysis correcting these flaws, the true impact on small organizations can only be demonstrated anecdotally, but the stories being told my owners and managers of small businesses, small non-profit organizations and small governmental entities. Such as the non-profit organization operating Head Start programs in Louisiana who will need to find an additional $74,000 in funding to cover first year costs to comply with the proposed regulations. Since 80 percent of this entity's operating budget comes from federal programs and cannot be used to pay for management costs like labor, this Louisiana Head Start program may have to cut critical community services. Small grocery stores in Kentucky who attended an SBA Office of Advocacy roundtable reported that their profit margins were under one percent and they could not pass on these extra costs to their customers – leaving the only option to reduce employees or work hours. An owner of a small restaurant in Louisville calculated that the Department's proposed regulations would cost his business $50,000, or 8% of payroll. An owner of five Dairy Queens in and around Austin, Texas with 10 exempt managers earning $30,000 per year with bonuses based on success of the business will have to demote and reclassify the managers to non-exempt – demeaning the managers by forcing them to clock in and out but also controlling their hours to fewer than 40 to avoid overtime costs. These stories and many others told in the comments to the NPRM tell the true story of the impact on small organizations – fewer jobs,

more part-time employment, less work hours, fewer benefits – all harming the very employees that the Department seeks to protect.

V. AUTOMATIC ANNUAL INCREASES TO THE SALARY LEVELS

The Department has proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile (the 40th percentile for the white collar exemptions, the 90th percentile for highly compensated employees) methodology or inflation (CPI-U).

Such annual automatic increases also would be unprecedented in the 77-year history of the FLSA. 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.

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.[6] 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[d] between amendment of these salary requirements."[7] 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

[6] 35 Fed. Reg. 883, 884 (Jan. 22, 1970).
[7] *Id.*

> 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 approaches in this rulemaking is both contrary to congressional intent and inappropriate.[8]

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.[9]

The Department also states that automatic annual increases to the salary level will "promote government efficiency by removing the need to continually revisit this issue through resource-intensive notice and comment rulemaking."[10]

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 autopilot.

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[8] 2004 Final Rule at 22171-72.
[9] 2015 NPRM at 38539.
[10] *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."[11] 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.

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.[12] 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 a 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 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 of employees who meet the salary threshold. This upward shift at the 40th percentile will continue year after year. 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.

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[11] 2015 NPRM at 38537.
[12] 2015 NPRM at 38540.

An analysis by 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% higher than it was in 2015." [13] 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, 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% more than the minimum salary threshold in 2015."[14]

This upward ratcheting "becomes more pronounced if more nonhourly workers who failed the salary test are re-classified into hourly positions each year."[15] For example, if half of the reclassified employees are paid hourly, the 40th percentile "will increase by 19.9% in the first year and by 94% 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."[16]

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.

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.

VI. DUTIES TESTS

In addition to earning the minimum salary level paid on a salary basis, an employee does not qualify for an exemption unless he or she also meets one of the duties tests for exemption. The Part 541 regulations establish different duties tests for executive, administrative, learned professional, creative professional, computer and outside sales employees. Many employees

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[13] *"Indexing the White Collar Salary Test: A Look at the DOL's Proposal,"* Edgeworth Economics (Aug. 27, 2015), *available at* http://www.edgewortheconomics.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/.

[14] *Id.*

[15] *Id.*

[16] *Id.*

earn above the minimum salary level, but cannot be classified as exempt because they do not supervise employees, are not involved with managing the business or do not hold professional degrees – engineering technicians, who often earn $80,000 or even $100,000 annually depending on the industry, are a good example.

There is much confusion and concern in the business community regarding what changes the Department intends to make to the duties tests. In the NPRM, the Department stated that it "is not proposing specific regulatory changes at this time" and that the agency "seeks to determine whether, in light of our salary level proposal, changes to the duties test are also warranted."

Instead, the Department raises "issues" for discussion, thus indicating that the agency is considering some very significant and unprecedented changes:

- What, if any changes, should be made to the duties test?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum be?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and non-exempt employees? Or, should the Department reconsider our decisions to eliminate the long/short duties test structure?
- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and non-exempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping non-exempt employees into the exemption? Alternatively, should there be a limitation on the amount of non-exempt work? To what extent are lower-level executive employees performing non-exempt work?

The Department also is requesting comments regarding what additional occupational titles or categories, as well as duties, should be included as examples in the regulations, especially in the computer industry.

The NPRM contains no proposed changes to the regulatory text describing the duties that employees must perform to qualify for exemption. However, the Department's failure to propose specific changes to the regulatory text does not mean that the Department will not make any changes to the duties test in the final regulations. Traditionally, under the Administrative Procedures Act, the Department would be effectively precluded from making changes because it will not have given the public notice and the opportunity to comment. But, the Department has not foreclosed that possibility. To the contrary, in an email responding to a question from the publication Law360, the Department stated, "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."

The Department's failure to provide specific regulatory text for any of these "issues" is perhaps the most alarming aspect of the NPRM. Perhaps the Department plans to rely on the "logical outgrowth" doctrine that allows regulators to issue final regulations that are a "logical outgrowth" of the proposed regulations. But "outgrowth" implies *something* to grow out of. Words matter. Specific word choices, and even the placement of a comma, can make a significant difference in how a regulation is interpreted and applied by the Department itself and by federal courts. Yet, apparently, the Department is signaling that it plans to make changes to the specific text of the regulations, especially if the business community objects to the high $50,440 salary level, without giving the public any chance to review and comment on that language. Even if the Department has a colorable argument that it need not propose specific regulatory text, making significant changes to the Part 541 regulations without first doing so flies in the face of Congress' intent in passing the Administrative Procedure Act to allow the public a meaningful role in rulemaking, and also contradicts the Administration's promise to bring more transparency to the federal government's policy-making process.

Small businesses will be significantly and adversely impacted if the Department adopts changes to the duties tests. Small businesses rarely have access to expert employment attorneys or human resources personnel to guide them in complying with wage and hour laws. Changing the duties tests without providing a sufficient opportunity to comment on the specific changes, and imposing a short effective date, will make it difficult, if not impossible, for small business to comply with the final regulations. This is especially true if the Department's final rule moves toward the California over-50% quantitative rule for determining primary duty, eliminates the concurrent duties test for executives, or returns to the "long test" – a test effectively inoperable since the early 1980s.

This concludes my statement. I would be pleased to respond to any questions.

Exhibit A

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Focus Areas

Wage and Hour
Legislative and Regulatory Practice
Staffing and Contingent Workers
Government Contractors
Construction
Workplace Policy Institute

Overview

A former administrator of the wage and hour division at the U.S. Department of Labor, Tammy D. McCutchen is a leading authority on federal and state wage and hour laws who now represents and counsels management clients in connection with all types of labor and employment matters. She focuses her practice on:

- Compliance with the Fair Labor Standards Act and state wage-hour laws
- Conducting audits of overtime exemption classifications, non-exempt pay practices and independent contractor status
- Implementing compliance programs designed to avoid wage and hour disputes and lower potential litigation liabilities
- Representing employers being investigated by the DOL's Wage and Hour Division and similar state agencies

She also regularly serves as a consulting or testifying expert witness in wage-hour collective and class actions.

Additionally, Tammy represents and counsels clients on:

- The Family and Medical Leave Act
- The Service Contract Act
- The Davis Bacon Act

- The Migrant and Seasonal Worker Protection Act
- Worker protections in federal immigration laws
- Reasonable accommodation under the Americans with Disabilities Act
- Federal and state discrimination laws
- Affirmative action and prevailing wage requirements for government contractors

She appears before state and federal courts, the Equal Employment Opportunity Commission, the DOL, and state agencies.

A frequent speaker, Tammy has lectured about wage and hour issues before trade associations, business organizations, and human resource groups. Most frequently, she works with clients in the following industries:

- Retail
- Restaurant
- Hospitality
- Janitorial
- Security
- Manufacturing
- Insurance
- Accounting
- Health care

Tammy is co-chair of Littler Mendelson's Compliance Audit Services Practice Group and a core member of the Wage and Hour Practice Group. She also is the primary architect of the firm's AuditQB software tool for conducting employment compliance audits.

While at the DOL from 2001 to 2004, Tammy was responsible for enforcing, setting policy and preparing regulations for some of the country's most comprehensive labor laws, including:

- The Fair Labor Standards Act
- The Family and Medical Leave Act
- The Davis-Bacon Act
- The McNamara-O'Hara Service Contract Act
- The Medicare Secondary Payer Act

She managed the annual budget and 1,400 employees, represented by two unions, in more than 250 offices across the country. She was a primary architect of the first major changes to DOL overtime regulations in 50 years and, under her leadership, the DOL increased enforcement by 60% in two years, while collecting millions of dollars in back wages.

Before working at the DOL, Tammy was senior counsel at a global chocolate corporation, where she provided counseling on labor and employment matters involving employees at corporate headquarters, field sales offices, and manufacturing plants located in the United States, Canada and Mexico. She was responsible for:

- Managing employment litigation
- Advising the company on collective bargaining and labor arbitration issues
- Managing the preparation and implementation of affirmative action plans
- Providing assistance to the Diversity Council
- Conducting training for managers on recognizing and responding to discriminatory harassment

Tammy also clerked for Judge Daniel A. Manion on the United States Court of Appeals for the Seventh Circuit and practiced law in Chicago for eight years.

Professional and Community Affiliations

- Member, Labor and Employment Law Section, American Bar Association
- Member, Editorial Advisory Board - , Law360, 2013
- Chair, Labor and Employment Practice Group, Federalist Society
- Member, Small Business Legal Advisory Board, National Federation of Independent Business

Recognition

- Named, America's Leading Lawyers for Business, *Chambers USA*, 2012-2015
- Order of the Coif

Education

J.D., Northwestern University School of Law, 1990, *cum laude*
B.A., Western Illinois University, 1987, *summa cum laude*

Bar Admissions

District of Columbia
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Books & Book Chapters

- "29 C.F.R. Part 541", *U.S. Department of Labor*, 2004

Exhibit B

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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

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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.

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[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

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[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

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[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

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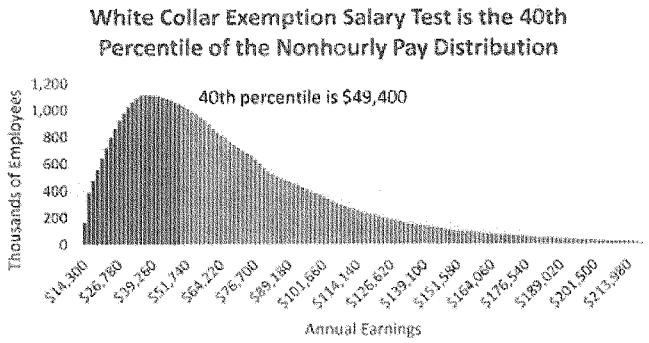
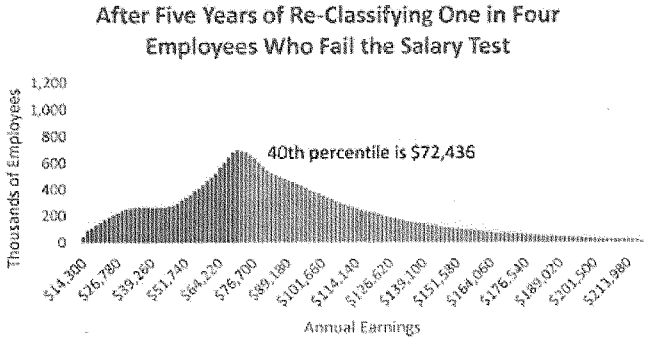
[117] *"Indexing the White Collar Salary Test: A Look at the DOL's Proposal,"* Edgeworth Economics (Aug. 27, 2015), *available at* http://www.edgewortheconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/

[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.
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> . . . [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

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[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. at* 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
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> (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

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[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

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[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]

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[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

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[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

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[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.

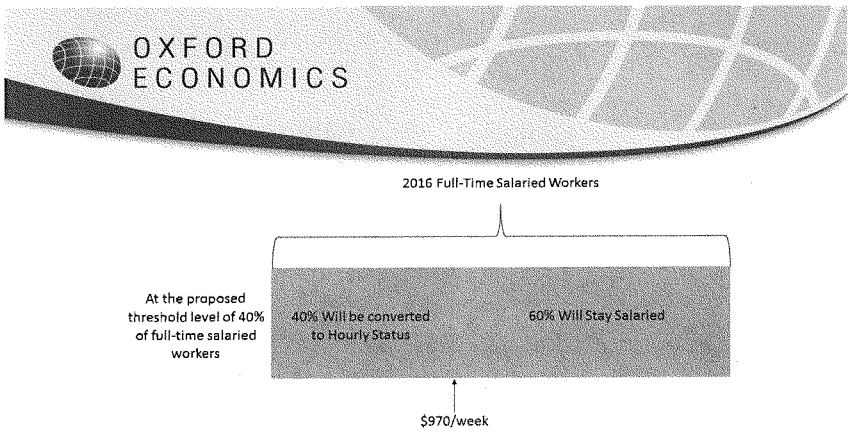


Figure 1. 40th percentile wage before the rule.

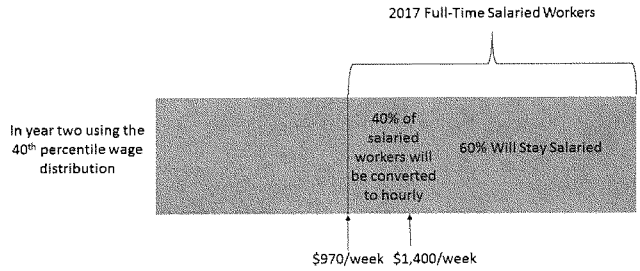


Figure 2. Hypothetical new 40th percentile cut-off of salaried wages in 2017 if all salaried workers below the 2016 cut-off were converted to hourly status.

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.

OXFORD ECONOMICS

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.

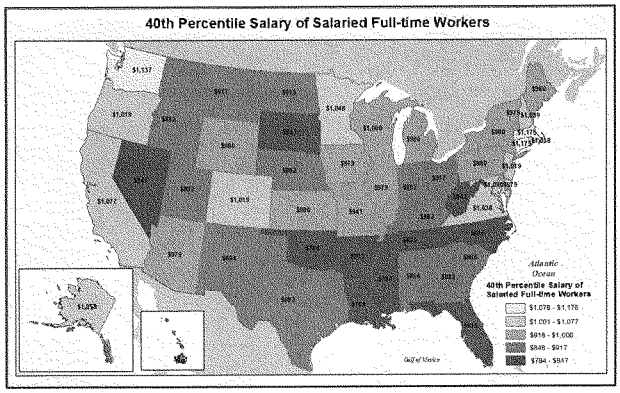


Figure 3. 40th percentile salaried full-time wage by state.

[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).

OXFORD ECONOMICS

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.

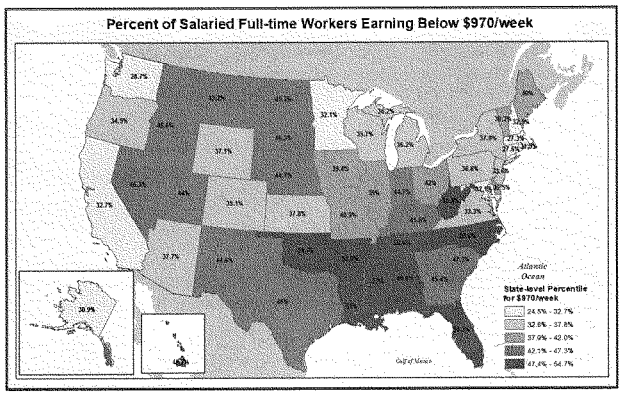
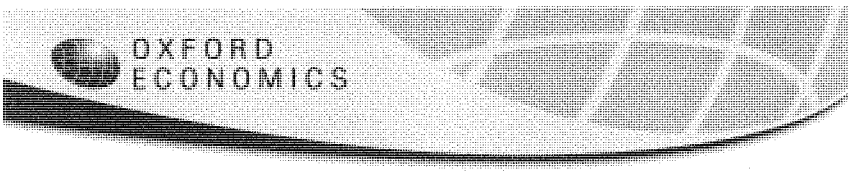


Figure 4. Percentile of salaried full-time state wage distribution that national 40th percentile wage ($970) represents.



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.

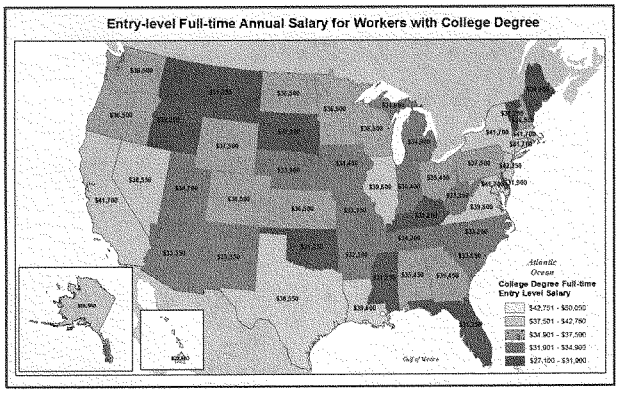


Figure 5. Median entry-level wages for full-time workers with a college degree by state.

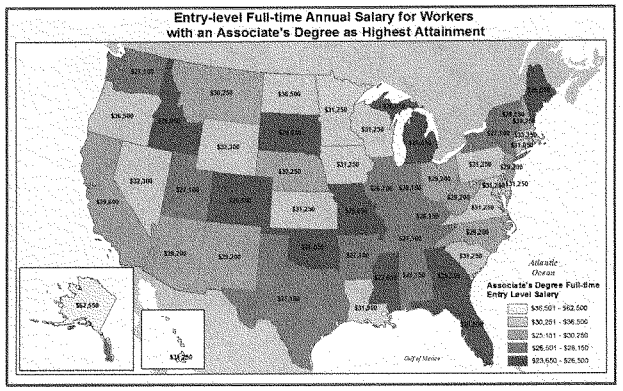


Figure 6. Median entry-level wages for full-time workers whose highest degree is an Associate's by state.

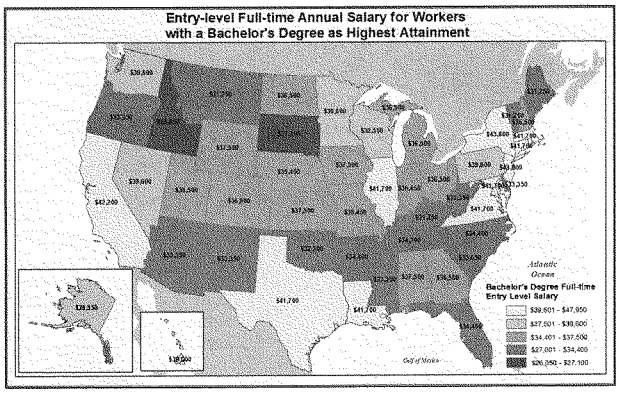
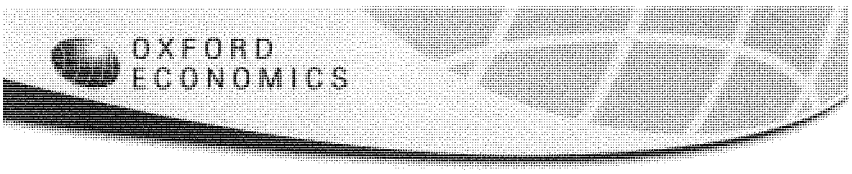


Figure 7. Median entry-level wages for full-time workers whose highest degree is a Bachelor's by state.



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
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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.

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[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.

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[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]

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[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

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	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					
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	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

Exhibit C

NFIB
The Voice of Small Business.

September 3, 2015

Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1235–AA11; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

These comments are submitted for the record to the Wage and Hour Division of the U.S. Department of Labor (DOL) on behalf of the National Federation of Independent Business (NFIB) in response to the notice of proposed rulemaking regarding "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" published in the July 6, 2015 edition of the *Federal Register*.

NFIB is the nation's leading small business advocacy association, representing members in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States.

NFIB believes that the proposed rule will have a substantial negative impact on small businesses and their employees. Accordingly, NFIB urges DOL to withdraw the proposed rules for the following reasons. First, the proposed salary threshold increase will not result in increased pay for employees of small businesses, but instead will result in the limiting of employee hours and diminished career growth opportunities. Second, while no changes to the duties test were proposed, DOL should not adopt a new duties test in the final rule based simply on feedback provided in the comment period. DOL should propose specific language on which the public can comment. The reasons are explained further below.

Summary of the proposed rule

The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees overtime premium pay of one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek. However, there are a number of exemptions from the FLSA's minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity…or in the capacity of outside salesman." The FLSA does not define the terms "executive," "administrative," "professional," or "outside salesman."

DOL has consistently used its rulemaking authority to define and clarify the section 13(a)(1) exemptions. Since 1940, the implementing regulations have generally required each of three tests to be met for the exemptions to apply. First, the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"). Second, the amount of salary paid must meet a minimum specified amount (the "salary level test"). Third, the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

In this proposed rule, DOL proposes changes only to the salary level test. Currently, the minimum salary that a worker must receive is $455 per week ($23,660 annually). The proposal seeks to more than double that amount to $970 per week ($50,440 annually). In addition, DOL seeks – for the first time – to automatically increase the salary threshold at either the 40th percentile of all salaried wage earners, or at a rate equivalent to the Consumer Price Index for All Urban Consumers (CPI-U). No timeframe for how frequently this increase will take place is proposed, however.

While DOL does not propose a specific change to the third test – the duties test – the agency seeks feedback on if it should be revised, and if so, in what manner.

Negative impacts of proposed salary threshold increase on small businesses

The proposed rule represents an unprecedented effort by DOL to vastly expand non-exempt status to workers. It is unprecedented because of its ambition to automatically make non-exempt anyone who makes less than the 40th percentile of all salaried wage earners in the United States. By comparison, the current threshold – promulgated in 2004 – was set at roughly the 20th percentile of salaried employees in the South region and in the retail industry. The 2004 rule recognized that the cost of living varies in different parts of the country and adjusted accordingly. This proposed rule makes no such effort. The proposed rule is also unprecedented because for the first time the salary threshold will automatically increase going forward.

The proposed rule has thus far been marketed by the administration as win for workers because it will ensure that employees are paid "fairly." Unfortunately, the true consequences of this proposed rule will be greater costs and burdens on small businesses and less flexibility, benefits, and even pay for most of the workers it purports to benefit. The proposed changes will have a negative impact on employee morale, which will in turn hurt the small business's quality, customer service, and reputation.

Increased labor and regulatory compliance costs

According to DOL's initial regulatory flexibility analysis (IRFA), small businesses will face nearly $750 million in new costs in the first year if the rule is finalized as proposed. These costs are made up of $186.6 million in costs associated with implementing the rule and $561.5 million in additional wages that will now be paid to workers[1]. Unfortunately, these estimates simultaneously underestimate the compliance costs to small businesses and overestimate the transfers to employees.

First, the IRFA underestimates compliance costs because it does not take into account business size when estimating the time it takes to read, comprehend and implement the proposed changes. As an example, DOL "estimates that each establishment will spend one hour of time for regulatory familiarization." This assumption erroneously disregards a basic reality of regulatory compliance – the smaller the business, the longer and more expensive it is to comply. Numerous studies have identified that federal regulatory compliance disproportionately affects small businesses. The most recent one, performed in 2014 for the National Association of Manufacturers, found that businesses with fewer than 50 employees spent 30 percent more per employee per year than their larger counterparts[2]. This study was performed by the same authors that have previously done similar studies for the U.S. Small Business Administration's Office of Advocacy.

Common sense also dictates that small businesses are impacted disproportionately from larger ones. Primarily, this is because small companies typically lack specialized compliance personnel. Typically, the duty of compliance officer falls to the business owner or the primary manager. These individuals are generally not experts in wading through regulatory text, so familiarization time is greater than for large companies. Alternatively, a small business could hire an outside expert to devise a compliance plan, but this cost will also be significantly greater than what a firm with in-house compliance staff would endure.

In this case, complying with the rule requires far more than simply looking at a salaried employee's weekly wages. This is just one piece of the puzzle. If an employee is currently salaried and makes greater than the currently threshold of $455 per week, but less than the proposed $970 per week, the small business owner must now spend a considerable amount of time calculating out varying scenarios – none of which is beneficial for anyone involved.

Proposed rule will harm relationships between small business owners and affected employees

As an example, suppose the employee in question is Geno, a manager at the small business who works an average of 50 hours per week at a weekly salary of $865 ($45,000 annually). As the administration would make it seem, Geno's new pay would increase to $951.50 per week ($49,478 annually). However, this is not a realistic projection of what would happen in a small business where margins are tight. What is more likely to happen is that the business owner, Jane, will determine that she can only afford to continue paying Geno's position $45,000 per year in order for the business to be sustainable. Therefore Jane has three options under the proposed rule when promulgated.

Option one is for Jane to make sure that Geno works no more than 40 hours under his current hourly rate of $865, and take on the ten hours of lost productivity herself. Option two is to reduce Geno's hourly rate of pay by enough so that, even with ten hours of time-and-a-half overtime pay, he still only earns $45,000 in a year. Option three is to bring in a new employee to fill the lost productivity, but to do so in a way so that Jane is only paying $45,000 per year total to Geno and the new employee. One thing is constant under these options – Jane will now have to carefully track Geno's hours worked. So automatically her compliance costs are increasing.

Under option one, whereby Geno would be best off, Jane determines that she is already spending all of her available time operating the business, generating sales, monitoring inventory, and other necessary duties. Plus, now she has to track Geno's hours. Jane simply doesn't have time to take on the ten hours lost. In addition, Jane decides that Geno is now essentially an hourly employee and is no longer suited to be given the title of manager. Geno loses access to the benefits that come along with being a manager – such as healthcare coverage and paid time off, to less obvious ones like being able to leave work early on days when he has to pick up his children from school. Geno is also offended that he now has to use a time clock like hourly employees and feels as though has been demoted.

Under option two, Jane determines that in order keep Geno working 50 hours and earning $45,000 with time-and-a-half overtime pay, she has to again make Geno an hourly employee but at an hourly rate of $15.73. In addition to losing his benefits as above, now Geno must work exactly 50 hours each week in order to earn $865. Before, if he only worked 40 hours because of an emergency at home, he was still ensured his full weekly salary. Again, Geno feels slighted by the change.

Under the third option there are several different variations Jane could choose that are all worse than the arrangement she and Geno have under the current rule. In this case, Jane hires an additional employee, Ryan, to split the 50 hours with Geno. This split could be 40 hours for Geno and ten for Ryan; it could be even at 25 hour each; or any combination in between. Regardless of what Jane decides, the hourly rate for the position will be $17.30. If she lets Geno work 40 hours, his pay is now $692 per week ($35,984 annually). Geno again not only feels slighted, but he now has to figure out where he can get a side job to make up the $9,016 difference from his pay under the current rule versus what he will get under the proposed rule. It's possible that he will have to work more than 10 additional hours at a new job to make up the difference. Geno now works two jobs at more than 50 hours plus additional time spent commuting just to earn what he makes today. Meanwhile, Ryan is not looking to stay in a ten-hours-per-week job for the long term. After a few months, he finds a better job and resigns. Jane now has to spend time and money looking for a new employee and training him or her to replace Ryan.

As these examples illustrate, DOL's assumption that $561.5 million will automatically be transferred to workers is deeply flawed because small businesses will aim to control their costs by limiting overtime. The result is greater compliance costs for small businesses by having to track hours and employees being no better off, and in many instances, worse off.

Proposed salary threshold is too high and does not take into account geographic differences

As mentioned previously, the proposed rule is a departure from the current rule because the proposed salary threshold is set at such a high level as to create severe consequences for areas of the country with lower costs of living. The current salary threshold may appear low at $455 per week, but it was purposely set low to recognize that in rural areas wages are lower than urban areas. By contrast, DOL's proposed salary threshold is higher than minimums set under any state laws, nearly $10,000 higher than that of California and nearly $15,000 higher than New York, two of the states with the highest cost of living.

The proposed rule will particularly hurt small businesses in rural areas. These businesses pay employees at wage rates they can afford. Gross revenues in rural areas are far less than those in urban areas. There is simply not extra money available to pay employees overtime under the conditions set forth in the proposed rule.

Lower salaries also go further in rural areas. As an example, a manager in Washington, D.C. currently making $55,000 annually has the same purchasing power as a manager in Enid, Okla. earning $37,121, according to the Council for Community and Economic Research's cost of living calculator[3]. Small businesses in Enid should not be forced to pay rates currently paid in cities like Washington when the cost of living does not justify such an increase.

NFIB encourages DOL to maintain the current methodology for determining the salary threshold to be fair to small businesses and employees in lower cost-of-living areas. By promulgating the proposed rule, DOL would be triggering the scenarios mentioned in the section above, and disproportionately hurting small businesses in rural areas.

Concerns with automatically updating the threshold

The proposed rule would – for the first time – establish a mechanism to automatically increase the salary threshold at specified intervals. Indexing the minimum salary threshold would likely result in instability in labor and administrative costs for small businesses in perpetuity. Though no schedule was specifically proposed, at set intervals – presumably annually – DOL would issue a new salary threshold via the *Federal Register*, and small businesses would have only 60 days to implement the changes. That means every year small businesses would be forced to reconsider the classifications given to their employees and reassess potential raises, bonuses, or promotions for those employees.

Small businesses will need to constantly review the impact the automatic increases have on salary compression, merit increases and budgets. This reconsideration of positions costs time and money and if it occurred during a downturn in the economy the increased costs would exacerbate the problems for small businesses at inopportune times.

Accordingly, NFIB believes that DOL should abandon its proposal to automatically increase the salary threshold.

Current duties test should remain in place

Though DOL has not proposed changes to the duties test, it has sought feedback on the current test. While this current test is not perfect, small businesses have had more than a decade of working with it and generally understand its application. Therefore, NFIB would not support any change of the duties test because it would require small businesses to familiarize themselves with a new set of standards and would still likely have flaws. Changes would only serve to increase compliance costs.

Specifically, NFIB strongly opposes any change to the duties test that would set a specific percentage-of-time component – akin to California's 50 percent primary duty rule – for certain

tasks in order to claim the duties exemptions. Any such requirement, *at any percentage*, would be an administrative nightmare for small businesses and their employees. Under such a scheme, a manager would have to carefully track each moment of his or her day and determine whether the task they performed was an exempt duty or a non-exempt duty. Such changes could require salaried employees to spend a specific percentage of their time performing or not performing certain duties. This means a manager who is responsible for store operations, and thus by virtue of the position is "managing," would often be prohibited from performing tasks such as attending to customers' needs, training employees in nonexempt tasks, and managing inventory. The manager would also be required to track his or her activities, undermining the discretion and flexibility that comes with being exempt.

As previously mentioned, California already applies this "quantification requirement." To be exempt under California state law, an employee must spend more than 50 percent of his or her time performing primary duties. As a result, exemptions from overtime are very difficult to implement, resulting in many managers being denied the opportunities and flexibility that come with exempt status.

Lastly, because there were no proposed changes to the test, NFIB strongly believes that if DOL intends to include changes in the final rule, it must issue a noticed of proposed rulemaking regarding that change. It is our opinion that failing to do so would violate the requirements of the Administrative Procedure Act and the Regulatory Flexibility Act (RFA). The public should be given proper notice and opportunity for comment on such a change, and DOL should also perform an IRFA since it has already recognized that a change to the overtime rules will have a significant economic impact on a substantial number of small entities.

One NFIB member's story

NFIB believes it would be illustrative to include the story of a member to demonstrate the real and negative effects likely to occur if DOL promulgates a final rule similar to what has been proposed.

Robert Mayfield owns five Dairy Queens in and around Austin, Texas and is very concerned about the impact that the proposal would have on his businesses and the individuals whom he employs. In his words, the rule would be "bad news" for both employers and employees.

Currently, Mayfield employs exempt managers at all five locations. These individuals earn on average about $30,000 per year and work between 40-50 hours per week. The managers also receive bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield's hourly employees do not. Mayfield explained that in his company, promotion to an exempt management position carries a great deal of status with employees who upon promotion to a manager position boast about no longer having to punch time clocks. In Mayfield's opinion, it would be demeaning to force 'managers' to punch a clock. He also noted that his managers have more flexibility for things like doctors' appointments and kids' activities. Since they aren't punching in and out on a time clock they are paid a weekly salary even if they're out for personal activities.

Under DOL's proposal, Mayfield predicted that he'll need to move the managers back to hourly positions as there is simply no way he can afford to pay over 10 managers $50,000 each. As a result, he predicted the skill level of his managers will decrease. Moreover, Mayfield noted that rather than giving managers overtime, he would likely hire a few more part-time employees. What he would not do would be to pay managers overtime; instead he would continue strictly enforce a no overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to absorb added labor costs.

Overall, Mayfield said the effect would be lower-skilled managers and higher turnover, which would impact the quality of service offered at his restaurants.

"I feel most sorry for the many enthusiastic people who work for me who have worked hard to advance into their dream of a salaried management position," Mayfield said. "They will have their feelings hurt and be insulted to find out that their own government considers them to not be worthy of a salaried position that is eligible for a bonus based on profits that they would have helped to plan. It is a real source of pride and prestige to be on salary and not have to punch a time clock.

"How can you be a manager and punch a time clock? The idea is to do a job, not keep track of your hours. A manager's income is based on results and profits, not hours worked. This is the antithesis of building a management mentality or in training someone to be a manager. It would also disrupt the workplace and lead to fewer management opportunities. It would hurt, not help, the people they claim to want to help."

Proposed rule is an example of the need for small business regulatory reform

NFIB believes that these proposed rules demonstrate the need to reform the RFA and its amending laws. Currently, agencies are required to perform an initial regulatory flexibility analysis prior to proposing a rule that will have a significant economic impact on a substantial number of small entities – as DOL has confirmed this proposed rule will. While these analyses are helpful for agencies to realize the cost and impact a proposed rule will have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review panel for rules of significant impact.

These panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire Department of Labor – would achieve better regulatory outcomes if required to go through such a procedure.

In this case, DOL would have benefitted from presenting the proposed salary threshold to small businesses so that those businesses could have provided DOL feedback on how the drastic increase will impact small businesses and their employees. In addition, DOL also would have been more likely to realize the harm they are doing by not proposing changes to the duties test if, as it appears, the agency has designs on ultimately tweaking the test. Small businesses could

have offered to DOL that the lack of specifics makes it difficult to comment. It is also likely that DOL would have realized that if they do in fact make changes to the duties test in the final rule, they should first issue a notice of proposed rulemaking so that the public has a sufficient opportunity to respond.

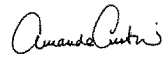
Conclusion

NFIB strongly believes that DOL should withdraw the proposed rule because it will not achieve the goals that DOL strives for. Instead of topping up wages for certain employees, the proposed rule will force small business owners to take more control of employee hours in order to keep costs in check. This control will come at a cost for small business owners, meaning that the result of the rule – if promulgated – would be that small businesses face higher costs and employees do not earn more money. In addition, employees are likely to see reduced benefits and opportunities for career growth stifled.

In addition, though no changes to the duties test were proposed, NFIB urges DOL to publish a notice of proposed rulemaking if it intends to make changes in the final rule. The public should have the ability to weigh in on such a major change.

We appreciate the opportunity to comment on the proposed rule. Should DOL require additional information, please contact the NFIB's manager of regulatory policy, Dan Bosch, at 202-314-2052.

Sincerely,



Amanda Austin
Vice President, Public Policy
NFIB

[1] *Federal Register*. Vol. 80, No. 128. July 6, 2015. Page 38606.
[2] http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Executive-Summary.pdf
[3] https://www.coli.org/

Exhibit D

Advocacy: the voice of small business in government

September 4, 2015

VIA E-MAIL

The Honorable Thomas E. Perez
Secretary, Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule

Dear Secretary Perez and Administrator Weil:

The Office of Advocacy of the U.S. Small Business Administration respectfully submits these comments to the Department of Labor (DOL) for this proposed rule, which amends the regulations under the Fair Labor Standards Act (FLSA) governing the "white collar" exemption from overtime pay for executive, administrative and professional employees.[1] The proposed rule implements a 2014 Presidential Memorandum that directed DOL to update and modernize these overtime regulations.[2] Advocacy held a number of small business listening sessions and roundtables across the country, and this letter will outline small business comments, concerns and recommendations regarding this proposal.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act

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[1] *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule,* Department of Labor, Wage and Hour Division, 80 Fed. Reg. 38516 (July 6, 2015).
[2] Presidential Memorandum, *Updating and Modernizing Overtime Regulations* (March 13, 2014).

(SBREFA), gives small entities a voice in the Federal rulemaking process.[3] For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and overtime pay of time and a half for work over 40 hours a week. While these protections extend to most workers, the FLSA does provide a number of exemptions. In March 2014, President Obama released a Memorandum directing DOL to modernize and streamline the existing overtime regulations, particularly the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees.[4] This is often referred to as the "EAP" or "white collar exemption." To be considered exempt, employees must meet certain minimum tests related to their primary job duties and be paid on a salary basis at not less than a specified minimum amount or threshold. The salary threshold for this exemption was last changed in 2004.[5]

In this proposed rule, DOL would change the salary threshold for employees who are eligible to receive overtime pay from $23,660 to $50,440, making 4.7 million workers newly eligible for overtime pay.[6] DOL estimates that 211,000 small establishments and an estimated 1.8 million of their workers will be affected by this rule.[7] DOL is also proposing to include in the regulations a mechanism to automatically update the salary thresholds on an annual basis using either a fixed percentile of wages or the Consumer Price Index for Urban Consumers (CPI-U). DOL does not propose regulatory changes to the "duties" tests, which require employees to perform certain primary duties to qualify for an overtime exemption. However, DOL is seeking feedback on whether these duties tests should be revised.[8]

Advocacy thanks DOL for attending our small business listening sessions and roundtables to obtain feedback from small entities during all stages of this important rulemaking process. After the release of the Presidential Memorandum in 2014, Advocacy held two small business listening sessions with DOL to gain initial feedback on this broad directive. Since the publication of the proposed rule, Advocacy held small business roundtables attended by DOL staff in the District of Columbia, Kentucky and Louisiana. Advocacy has also heard feedback from small entities across the country from our outreach, our Regional Advocates and from small

[3] Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. §601).
[4] Presidential Memorandum, *Updating and Modernizing Overtime Regulations* (March 13, 2014).
[5] *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*; 69 Fed. Reg. 22122 (April 23, 2004).
[6] *Initial Regulatory Flexibility Analysis*, 80 Fed. Reg. at 38605.
[7] *Id.* at 38604.
[8] *Id.*

business representatives. Small businesses have told Advocacy that this increase of the salary threshold and the numbers of workers eligible for overtime pay will add significant compliance costs and paperwork burdens on small entities, particularly to businesses in low wage regions and in industries that operate with low profit margins. Small businesses have commented that the high costs of this rule may also lead to unintended negative consequences for their employees that are counter to the goals of this rule. Based on feedback from these roundtables, Advocacy submitted a public comment letter seeking a 90-day extension of the comment period on August 20, 2015.[9]

DOL's IRFA Undercounts the Number of Small Businesses, Underestimates the Costs of the Salary Threshold, and Does Not Examine Less Burdensome Alternatives

Under the RFA, an IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities (based on the North American Industry Classification System (NAICS)); (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule. [10]

Advocacy believes that DOL's Initial Regulatory Flexibility Analysis does not properly inform the public about the impact of this rule on small entities. Advocacy questions DOL's analysis because it relies on multiple unsupported assumptions regarding the numbers of affected small businesses and workers and by extension the regulatory impact of this proposal. DOL's IRFA analyzes small entities very broadly, not fully considering how the economic impact affects various categories of small entities differently. Specifically, DOL's analysis does not appreciate the difference between many small entities in industry sub-sectors, regions, and revenue sizes. DOL's IRFA does not analyze the impact of this rule on small entities as required by the RFA that are non-profit organizations and governmental entities serving a population of less than 50,000.

Small businesses have told Advocacy that DOL's estimates for human and financial resources costs that result from this rule are extremely underestimated. Due to the problems with the IRFA, DOL cannot fully consider significant and less burdensome regulatory alternatives to the proposed rule that would meet the agency's objectives. Advocacy recommends that DOL publish a Supplemental IRFA providing additional analysis on the economic impact of this rule on small entities and consider recommended small business alternatives.

[9] Comment letter from the Office of Advocacy to the U.S. Department of Labor (August 21, 2015), available at: https://www.sba.gov/advocacy/82115-defining-and-delimiting-exemptions-executive-administrative-professional-outside.

[10] 5 U.S.C. § 603.

A. DOL's IRFA Does Not Adequately Analyze the Numbers of Small Businesses Affected by Rule

(1) Key assumptions unnecessarily obscure the numbers of affected small businesses in industry subsectors and revenue size categories.

DOL's IRFA applies multiple assumptions to the Census' Survey of U.S. Businesses (SUSB) data to determine the number of affected businesses and workers and by extension the regulatory impact of the proposal. Advocacy is concerned that DOL made assumptions to create hypothetical data points that were otherwise easily available in the SUSB data. For example, DOL chooses to analyze all industries by general 2- or 3- digit North American Industry Classification System (NAICS) industry codes when more specific data are readily available. This can be important because substantially different types of companies can be classified under the same general NAICS code (e.g., plumbing companies and civil engineering companies are both under the same 2-digit NAICS code).

Consequently, DOL may be obscuring the impact of this rule on an industry-subsector basis by only looking at small businesses in the aggregate in terms of very general industry definitions. This broad view of small business makes it difficult to determine which subsectors may face a more significant regulatory burden. Furthermore, in its economic analysis DOL asserts data points around the number of establishments belonging to an industry as well as the number of employees on a per-establishment-basis when it could find direct estimates of that information by firm-size and industry-subsector in the SUSB data. Advocacy recommends that DOL utilize these data points over general assertions to improve the transparency and accuracy of its economic analysis.

(2) DOL's IRFA Should Analyze Small Business Data to Reflect Regional Differences in the Regulatory Impact of the Proposal

DOL's proposal states that the current salary threshold is outdated, and proposes to base it on a national salary threshold of the 40th percentile of earnings for full-time salaried workers (estimated to be $50,440 or $970/week). According to DOL, this threshold should be representative of the wage for generally exempt employees. Small businesses at Advocacy's roundtables expressed concern that this salary threshold was too high to be representative of employees because DOL did not fully appreciate regional differences in wages. More specifically, DOL seemed to not fully consider the difference in purchasing power of its proposed threshold in higher- and lower-wage states and regions. In contrast, DOL's 2004 final rule adjusted this salary slightly lower than indicated by the national data because of the impact on lower wage industries such as the retail industry and in lower wages regions in the South.[11] For example, a study by the National Retail Federation and Oxford Economics utilized data from the Current Population Survey (CPS) to explore differences between states in the 40th percentile of salary full-time wages.[12] The study found wide differences in what constitutes the 40th

[11] *Defining and limiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22122, 22168 (April 23, 2004).
[12] Oxford Economics for the National Retail Federation, *State Differences in Overtime Thresholds*, Addendum to *Rethinking Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries* (August 31, 2015),

percentile in the three states that Advocacy held roundtables: Kentucky ($882/week), Louisiana ($784/week), and the District of Columbia ($1,070/week).

DOL could have also analyzed this state data by other factors, such as the impact on industry sub-sectors. The National Association of Home Builders (NAHB) completed a state-by-state breakdown of the impact of this rule to first-line supervisors in the construction industry (as defined by multiple NAICS codes), and the analysis showed a large variation in the percentage of workers who would be overtime eligible making under $50,440 depending on the state and the subsector.[13] It is clear from these examples that this proposal will have vastly different impacts in terms of the number of small entities affected and the extent of their regulatory burden. DOL should analyze these regional and industry subsector differences as well as consider them when constructing regulatory alternatives.

B. DOL's IRFA Does Not Consider Key Small Entities Affected by the Rule

Advocacy is concerned that DOL did not analyze the numbers of small entities and the economic impact of this rule on small entities required under the RFA including non-profit organizations and small governmental jurisdictions serving a population of less than 50,000.[14] Representatives from these key small entity groups who attended Advocacy's roundtables sought compliance materials to help them understand whether they were covered by this regulation. These entities expressed concern that their operations would have a difficult time complying with these regulations because they do not have the discretionary resources to pay for these extra costs.

At Advocacy's New Orleans roundtable, a small non-profit organization operating Head Start programs in southeast Louisiana stated that this proposal would result in $74,000 in first year costs. Since 80 percent of its operating budget is from federal programs, which cannot be used to pay for management costs like labor, it may have to cut critical community services to reduce labor costs. Community services may also become prohibitively costly for small local jurisdictions with limited budgets.

C. DOL's IRFA Underestimates Small Business Compliance Costs Due to Changes to the Salary Threshold

Small businesses have told Advocacy that the Department has greatly underestimated the human resource- and financial management costs that will result from this proposal. DOL estimates that on average, an affected small "establishment" is expected to incur $100 to

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available at: https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%202%20-%20State%20level%20overtime%20threshold%20analysis.pdf.

[13] National Association of Home Builders, *State by State Breakdown of First Line Supervisors of Construction Trades Workers Impacted by Changing Overtime Threshold From $23,660 to $50,440* (August 2015), available at: http://www.nahb.org/~/media/Sites/NAHB/Research/Priorities/Overtime-Wages-State-by-State-Analysis.ashx?la=en.

[14] 5 U.S.C. § 601(4) and (5). The RFA defines a "small organization" as any not-for-profit enterprise that is independently owned and operated and not dominant in its field (for example, private hospitals and educational institutions). The RFA defines a "small governmental jurisdiction" as governments of cities, counties, towns, townships, villages, school districts, or special districts, or special districts, with a population of less than fifty thousand.

$600 in direct management costs; a one hour burden for regulatory familiarization (reading and implementing the rule), a one hour burden per each affected worker in adjustment costs and a five minute burden per week scheduling and monitoring each affected worker.[15]

Advocacy is concerned that these asserted estimates of management costs may not reflect the actual experiences of small entities. Small businesses have told Advocacy that it will take them many hours and several weeks to understand and implement this rule for their small businesses. Many small businesses spend a disproportionately higher amount of time and money on compliance because they have limited to no human resources personnel, legal counsel or financial advisory or management personnel on staff. Many small businesses may adjust to these increases in time by hiring outside advisors to help them comply with these types of regulations which can cost thousands of dollars. DOL should take this disproportionate regulatory burden into account when considering the cost of this proposal on small entities.

DOL estimates that the average establishment will have $320 to $2,700 in additional payroll costs to employees in the first year of the proposed rule, which is an increase of $6.16 per week per affected worker.[16] Small businesses are concerned that DOL's estimate is neither transparent nor accurate. Small businesses have told Advocacy that their payroll costs will be in the thousands of dollars.

Small businesses have stated that one of their options is to convert salaried employees making under $50,440 to hourly employees. However, small businesses have stated that under this scenario, employers would either decrease hourly rates by an equal amount or reduce hours to avoid overtime pay. Employers could spend many hours a week scheduling and keeping track of employee work to avoid these extra costs. Employers in this scenario would also be understaffed, and may be required to hire and train new workers, creating extra costs. Under another scenario, small businesses could increase their workers' pay to over the $50,440 threshold to allow them to remain as salaried employees. These employers could then try to raise prices or reduce costs; some small businesses have stated that they may cut back on management staff or reduce benefits and bonuses. DOL should consider the costs and benefits associated with these changes in behavior when evaluating the impact of this rule on small entities.

Small businesses at Advocacy's roundtables stated that this rule will have a disproportionate impact on certain occupations with low profit margins and wages. For example, multiple small grocery stores who attended our Kentucky roundtable stated their profit margins were under one percent and they could not pass on these extra costs to their customers. An owner of a small restaurant in Louisville calculated that this overtime rule will cost his business $50,000, or 8 percent of the business' payroll. DOL should consider the differential impacts of this rule on lower wage industries and geographic areas.

D. DOL Does Not Account for Non-Financial Costs to Small Entities

Small employers have told Advocacy that their employees may lose flexibility in their work schedules if they are transferred to an hourly position, and that they may lose their employees

[15] 79 Fed. Reg. at 38605.
[16] 79 Fed. Reg. at 38605.

like millennials who expect a flexible work schedule. Employers have also stated that salaried workers often work flexible schedules by utilizing cell phones and logging onto work at computers from home; these employers could be more likely to stop allowing workers to have this type of work arrangement. Similarly, employers stated that they would try to limit travel for work and development reasons. Many roundtable participants stated that salaried employees not tied to a clock have flexibility in their work schedules, and therefore they can take off a few hours for a child's soccer game or medical appointment. After this rule is adopted, these now hourly workers would have to log in and out and would not be paid for hours "off the clock."

Small businesses at Advocacy's roundtables were also concerned that this rule may lead to lower worker morale and by extension productivity, because many employees may believe that transferring from a salaried position to an hourly position is a demotion in their career advancement. Small businesses have commented that they may not be able to hire as many entry-level management positions, and their senior managers would absorb many of these job responsibilities.

Advocacy is also concerned that DOL does not consider the costs and disruption of this proposal on non-traditional businesses that operate with non-traditional work schedules. For example, a small home builder stated that they complete 10 custom homes a year and must from time to time work long hours due to weather constraints; this rule would result in extra costs and delays in building a home. Advocacy has heard from small businesses such as banks and medical facilities that may have to cut back on their hours of service. A representative from the Outdoors Industry Association stated that this rule is particularly costly for seasonal businesses as they do not have consistent work hours for employees over the work year.

Small businesses at Advocacy's roundtable asked DOL representatives about the application of compensation time, part-time arrangements (for example for professors and college staff) and flexible work arrangements under this regulation. Small businesses are also concerned that the proposed rule does not count worker bonuses or commissions as part of the salary computation. Advocacy heard from many companies such as automobile dealerships, staffing agencies and golf courses whose employees are paid in commission or bonuses; these entities have suggested that these incentives should be added to their base salary under this rule or they may otherwise be reduced or ended, limiting their ability.

E. DOL Does Not Consider Less Burdensome Alternatives that Would Still Accomplish the Agency's Objectives

Under the RFA, the IRFA must contain a description of any significant regulatory alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.[17] DOL's IRFA is deficient because it does not analyze any regulatory alternatives that would minimize the economic impact of this rule for small businesses.

DOL states that it does not provide any differing compliance or reporting requirements for

[17] 5 U.S.C. § 603(c).

small businesses because "it appears to not be necessary given the small annualized cost of the rule, estimated to range from a minimum of $400 to a maximum of $3,300."[18] Based on feedback from small businesses as outlined in this letter, Advocacy believes that DOL's numbers of small businesses affected and cost estimates are extremely low. Advocacy recommends that DOL reassess the impact of this rule on small businesses in a Supplemental Initial Regulatory Flexibility Analysis. With more accurate information about the numbers of small businesses affected and the economic impacts of this rule to small businesses, DOL can better analyze less burdensome significant regulatory alternatives that would also meet the agency's objectives.

DOL states that the "FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees" and therefore setting differing compliance standards would "undermine this important purpose of the FLSA."[19] Advocacy believes that small businesses are disproportionately affected by this proposal, and suggests that DOL consider the significant alternatives put forward by small businesses to both better meet its regulatory goals and reduce the burden on small entities.

1. Small businesses recommend that DOL consider a salary threshold for the EAP exemption in the FLSA of the 40th percentile of earnings that is adjusted to reflect regional wages and wages in certain occupations such as the retail sector. This is similar to the methodology that DOL utilized in its 2004 rulemaking when it updated these regulations. Some small businesses have also recommended different salary thresholds by state, depending on the 40th percentile in each state.

2. Small businesses request a longer time to implement this final rule as they believe that it is unrealistic for management to comply with this regulation in four months, which is the implementation date that DOL provided employers after the agency last updated its salary threshold in 2004. Small businesses must understand this rule, evaluate and reclassify their workforce, and plan their budget and raise funding to pay for the compliance costs of this regulation. Advocacy recommends that DOL provide small businesses at least a year or 18 months to comply with this regulation.

3. Small businesses have also recommended a gradual increase in the salary threshold, similar to the implementation schedules given when a minimum wage rule comes into place so it is not such a sudden cost increase.

Recommendations

1. DOL Should Publish a Supplemental IRFA to Reanalyze Small Business Impacts

DOL's IRFA does not properly analyze the economic impact of this rule on small businesses. The Supplemental IRFA should provide a more accurate estimate of the small entities impacted by this proposal, and should include an analysis of industry sub-sectors, regional differences and revenue sizes. Additionally, this IRFA should analyze the number of small non-profit organizations and small governmental jurisdictions serving a population under 50,000 that are affected by this rule, and the economic impact of this rule on these entities.

[18] 79 Fed. Reg. at 38607.
[19] 79 Fed. Reg. at 38607.

DOL should be more transparent in its compliance cost data and utilize data provided in the comment process to accurately estimate the human resources and financial management costs of this regulation. With this important information regarding the numbers of small businesses affected by this regulation and the economic impact on small entities, DOL can effectively analyze less burdensome significant regulatory alternatives that would minimize the impact on small businesses that would also meet the agency objectives.

2. DOL Is Required to Publish a Small Business Compliance Guide

DOL is required to publish a Small Business Compliance Guide for this regulation. For each rule requiring a final regulatory flexibility analysis, section 212 of SBREFA requires the agency to publish one or more small entity compliance guides.[20] Agencies are required to publish the guides with publication of the final rule, post them to websites, distribute them to industry contacts, and report annually to Congress.[21] Advocacy is available to help DOL in the writing and dissemination of this guide.

3. DOL Should Publish a Separate NPRM for Any Specific Duties Test Revisions

DOL should issue a separate NPRM and IRFA if the agency seeks to adopt any changes to the duties tests, as the agency has not provided adequate notice to small businesses on the proposed revisions or any analysis of the economic impact of these changes in the IRFA to allow for meaningful public comment. DOL preamble states that "it is not making specific proposals to modify the standard duties tests," which require certain that workers perform primary duties to qualify for an overtime exemption. [22] The preamble lists five general questions about the duties tests, mentioning California's duties test (50 percent primary duty requirement) and the concurrent duties regulations (which allow the performance of both exempt and nonexempt duties concurrently). In its preamble, DOL suggests that adopting this proposed rule would make future revision unnecessary. When Advocacy held a Small Business Listening Session in 2014 after the Presidential Memorandum was released, small businesses cited potential changes to the duties test to be the most costly and problematic aspect of an update to the FLSA EAP exemption. Small businesses are concerned that quantification of exempt managers' duties will be extremely burdensome for operations because every task must be tracked and classified either an exempt or non-exempt action. Small operations will be disproportionately impacted by a change to the duties test because they have less staff and managers are constantly multi-tasking throughout the day.

4. **DOL Should Analyze the Impact of Annual Salary Updates on Small Businesses**

DOL is proposing to include in the regulations a mechanism to automatically update the salary and compensation thresholds on an annual basis using either a fixed percentile of wages or the CPI-U. Advocacy recommends that DOL assess the economic impact of these automatic updates on small businesses. According to a forecast by NRF and Oxford Economics, if the overtime threshold were set at $970/week in 2016 and indexed to CPI-U inflation, the 40th percentile of wages for full-time non-hourly wages would be $1,013/week

[20] Small Business Regulatory Enforcement Fairness Act, Pub. Law 104-121 § 212.
[21] The Small Business and Work Opportunity Act of 2007 added these additional requirements for agency compliance to SBREFA.
[22] 79 Fed. Reg. at 38518.

in 2018 and $1,081/week in 2021.[23] Small businesses at Advocacy's roundtable were concerned about this unprecedented requirement, and stated that it would add compliance costs every year to comply with these updates. Many businesses were concerned about missing these updates in the Federal Register and being subject to enforcement actions.

Conclusion

While small businesses support a modest increase in the salary threshold under the "white collar" FLSA exemption, DOL's proposal more than doubles this salary threshold. Based on small business feedback, Advocacy believes that these changes will add significant compliance costs and paperwork burdens on small entities, particularly businesses in low wage regions and in industries that operate with low profit margins. Small businesses at our roundtables have told Advocacy that the high costs of this rule may also lead to unintended negative consequences for their employees that are counter to the goals of this rule. Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule does not properly analyze the numbers of small businesses affected by this regulation and underestimates their compliance costs. Advocacy recommends that DOL publish a Supplemental IRFA providing additional analysis on the economic impact of this rule on small entities and consider recommended small business alternatives. DOL must also publish a small entity compliance guide with the publication of the final rule, as required by the Regulatory Flexibility Act (RFA).

Advocacy reiterates its thanks to DOL for participating in five Advocacy listening sessions and roundtables on this regulation. For additional information or assistance please contact me or Janis Reyes at (202) 619-0312 or Janis.Reyes@sba.gov.

Sincerely,

Claudia Rodgers
Acting Chief Counsel for Advocacy

Janis C. Reyes
Assistant Chief Counsel

Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

[23] Oxford Economics for the National Retail Federation, *Updated Impacts of Raising the Overtime Exemption Threshold, Addendum to Rethinking Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries*, Page 5 (July 17, 2015), available at: https://nrf.com/sites/default/files/Documents/retail%20library/Rethinking-Overtime-threshold-update_MEMO.pdf.

Chairman VITTER. Thank you very much.
And now, Ms. Gupta.

STATEMENT OF SARITA GUPTA, EXECUTIVE DIRECTOR, JOBS WITH JUSTICE

Ms. GUPTA. Chairman Vitter and members of the Committee, thank you for the opportunity to testify today about the Administration's proposed update to the overtime rules under the Fair Labor Standards Act.

My name is Sarita Gupta. I am the executive director of Jobs With Justice. Jobs With Justice is an independent nonprofit organization dedicated to advancing working people's rights and an economy that benefits all Americans. We bring together labor, community, faith, and student voices at the national and local levels through a network of coalitions across the country.

At Jobs With Justice, we believe the Fair Labor Standards Act's protections are central to ensuring that all Americans can enjoy the country's prosperity to which they contribute.

The United States Congress and President Franklin Delano Roosevelt recognized in 1938 what today's working women and men know to still be true: that economic stability can only be achieved through family-supporting wages and hours. If today's employees are to realize the law's basic promise of a reprieve from overwork in order to spend time with their families, the FLSA's overtime protections must be strengthened and protected. We believe the U.S. Department of Labor's proposal to adjust the salary test for determining overtime eligibility will do just that.

Raising the salary threshold from $23,660 in annual pay to $50,440 in 2016 will broadly benefit millions of working people, whether they are newly eligible for overtime protections or are more squarely protected against overtime misclassification that can occur under the more ambiguous duties test.

The current threshold covers only 8 percent of salaried employees today. Employers are even currently within their rights to deny overtime pay to employees who earn less than the poverty level for a family of four. Real lives will change for the better by updating the overtime rules—real people like Wanda Womack, who earned under $40,000 managing a Dollar General Store in Alabama. Wanda put in 50 to 70 hours a week, most of it spent doing nonexempt work like running the cash register and unloading merchandise from trucks.

Part-time hourly employees also stand to benefit from a higher salary threshold. Too many people who stock the shelves, sweep the floors, and service food are working fewer hours than they would like.

In our recent study of employers' scheduling practices in Washington, D.C.'s service sector, 80 percent of survey respondents told us it was very important or somewhat important that they receive more hours. Many of these individuals will likely have an opportunity to gain additional hours as employers shift assignments from overworked, low-paid salary employees who were previously exempted from overtime protections.

As a nonprofit employer, I also have had to assess the proposed update to the overtime regulations. The proposed overtime rule up-

date will require some of our local coalitions to examine and amend their employment practices. We believe this is a positive development. A higher salary threshold will require Jobs With Justice and nonprofits like us to promote practices that allow people to spend more time with their families, likely increasing employee satisfaction and lowering burnout rates along the way. This is good for our employees, for our organizations, and for the people we strive to serve.

I know some nonprofit organizations have expressed concerns about the proposed overtime rule update and the impact it could have on their budgets. I also know that much of the "concern" for nonprofits' ability to comply with updated overtime rules has been raised by Big Business lobby groups that do not typically advocate for the interests of nonprofits or the people served by them.

These concerns are vastly overstated, and, frankly, they dismiss the rights of working people. Employees of nonprofits deserve a fair return on their work.

I know firsthand that for nonprofit employees the work, while often rewarding, can be stressful, emotionally tolling, and lower paying. These conditions only further substantiate the need for nonprofit employees to have time away from work to recharge and reconnect with family and friends, just as was intended by FLSA.

Nonprofits that contract with State Medicaid departments can push the state to increase rates. Many states revisit their Medicaid budgets throughout the year, since Medicaid costs fluctuate based on the economy, enrollment, eligibility, and other factors. The State's investment will be less than many people may assume. The Federal match for Medicaid spending can range from 50 percent to 74 percent, depending on the state. Regardless, no nonprofit should condone a business model that only succeeds based on its ability to take advantage of its employees through lax overtime rules.

The FLSA was enacted with the belief that Americans should earn a fair day's pay for a fair day's work. Yet today the inverse is true for too many of America's salaried employees who are putting in more than a fair day's work for far less than a fair day's pay. The Administration's proposed update to the FLSA's overtime rules will serve as a crucial step to restoring this basic tenet of economic fairness—a tenet that should apply to all people, no matter the industry they work in or the size of their employer.

In the interest of time, I will reserve the remainder of my comments and take questions from the Committee members. Thank you.

[The prepared statement of Ms. Gupta follows:]

JOBS WITH JUSTICE

Testimony of
Sarita Gupta
Executive Director, Jobs With Justice

Hearing on
"An Examination of the Administration's Overtime Rule and the Rising Costs of Doing Business"

Before the
U.S. Senate Committee on Small Business and Entrepreneurship
10:00 a.m., Wednesday, May 11, 2016
Russell Senate Office Building, Room 428A

Chairman Vitter, Ranking Member Shaheen, and Members of the Committee:

Thank you for the opportunity to testify on the topic of the administration's proposed update to the regulations governing which people are entitled to the Fair Labor Standards Act's (FLSA) overtime pay protections.

My name is Sarita Gupta, and I am the executive director of Jobs With Justice, an independent nonprofit organization dedicated to advancing working people's rights and an economy that benefits all Americans. Jobs With Justice brings together labor, community, faith and student voices at the national and local levels through a network of coalitions across the country. With research, analysis, organizing, and public advocacy, Jobs With Justice creates innovative solutions to the problems working people face today.

At Jobs With Justice, we believe FLSA protections are central to ensuring that all Americans can enjoy the country's prosperity to which they contribute. In passing and signing the FLSA into law, the U.S. Congress and President Roosevelt recognized in 1938 what today's working women and men know to still be true: economic stability can only be achieved through family-sustaining wages *and* hours.

Jobs With Justice supports the administration's proposed update of regulations implementing the FLSA's overtime provisions. If today's employees are to realize the law's basic promise of a reprieve from overwork in order to spend time with their families, the FLSA's overtime protections must be strengthened and protected. We believe the proposed rule will do just that.

Raising the Salary Threshold Will Broadly Benefit Working People

The U.S. Department of Labor (DOL) has proposed adjusting the "salary test," the more objective method for determining overtime eligibility, by increasing the salary threshold from $23,660 in annual pay to $50,440 in 2016.[1]

[1] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 FR 38515 (July 6, 2015)

The working people I talk to say adjusting the salary threshold is long overdue. The current threshold covers only eight percent of salaried employees today. Individuals that Congress never intended to be exempt from overtime protections have fallen out of the law's coverage. Employers are currently within their rights to deny overtime pay to employees earning less than the poverty level for a family of four.

Raising the salary threshold to $50,440 in 2016 will benefit a significant number of employees. The DOL itself estimates that the proposed salary threshold would extend overtime protections to nearly 5 million employees. The Economic Policy Institute projects 13.5 million people will directly benefit from the proposed update to the overtime rules, most of who will newly gain overtime pay eligibility.[2]

At the same time, 10 million salaried employees presently paid between the current and proposed salary thresholds stand to gain greater protections against overtime misclassification.[3] These women and men are currently eligible for overtime protections based only on their job duties. The proposed salary threshold will establish their overtime eligibility solely by the salary test, making it difficult for unscrupulous employers to manipulate the duties test to misclassify them as exempt from overtime protections.

Access to overtime eligibility will have a meaningful impact on the lives of Americans who qualify under either scenario. Quite simply, their time will become more valuable. Assigning them more than 40 hours of work per week will be more expensive for their employers – and, as an employer myself, I say that is a good thing.

I have mentioned a number of statistics, but I urge us to consider the real lives that will change for the better by changing the rules. Wanda Womack managed a Dollar General store in Alabama for 11 years. In 2004, her last year with the company, Wanda earned about $37,000 working 50 to 70 hours each week. Wanda was accountable for the type of responsibilities we typically expect of a store manager, but she spent most of her time performing non-managerial work, like running the cash register, unloading merchandise from trucks and performing inventory.[4]

Scott Wilson worked for Walmart as an asset protection manager between December 2011 and February 2014, earning $46,000 by the end of his tenure with the company. Scott's job description said he was supposed to keep Walmart's alarm equipment in working order, catch and process shoplifters, monitor store surveillance footage, train store associates on the proper use of theft-prevention equipment and attend weekly continuing education meetings on theft-prevention techniques. Upon taking over a new job at his store, Walmart regularly assigned Scott basic tasks that should have been outside normal managerial duties, such as making repairs in various departments, unloading merchandise from trucks, corralling shopping carts and assembling promotional displays. These non-managerial, non-exempt tasks ended up taking most of Scott's day. Scott often needed to stay late to

[2] Eisenbrey, R. & Mishel, L. (2015, Aug. 3). The New Overtime Salary Threshold Would Directly Benefit 13.5 Million Workers. Washington, DC: Economic Policy Institute. Retrieved from: http://www.epi.org/publication/overtime-threshold-would-benefit-13-5-million/.
[3] 80 FR 38546 (July 6, 2015)
[4] Conti, J. (2014, Dec.) The Case for Reforming Federal Overtime Rules: Stories from America's Middle Class. New York, NY: National Employment Law Project. Retrieved from: http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf.

get the work in his job description done. That meant Scott was working 60- to 70-hour weeks, which negatively impacted Scott and his family.[5]

"When everything over 40 hours is free to the employer, the temptation to demand more is almost irresistible," consultant Fran Sussner Rodgers observed in a June 2015 *New York Times* column.[6] Currently, exempt employees like Wanda and Scott, working jobs with little pay and long hours, know this to be true. Under the proposed update to the salary threshold, these women and men will either get a pay raise or many hours of their lives back from their employers.

Part-time, hourly employees also stand to benefit from a higher salary threshold. We know that too many people who stock the shelves, sweep the floors and serve us food are working fewer hours than they would like. In our recent study of employers' scheduling practices in the service sector in Washington, D.C., 80 percent of survey respondents told us it was very important or somewhat important that they receive more hours.[7] Many of these individuals will likely have an opportunity to gain additional hours as employers shift assignments from overworked, low-paid salary employees who were previously exempted from overtime protections.

As a Nonprofit Executive, I Know the Proposed Overtime Update Is the Right Thing to Do

In my role as the executive director of Jobs With Justice, I also have had to assess the proposed update to the overtime regulations from the perspective of a nonprofit employer. At Jobs With Justice local coalitions across the country, we have organizers who are currently under the proposed updated salary threshold. The proposed overtime rule update will require our coalitions to examine and amend their employment practices.

We think this is a positive development. A higher salary threshold will require us, and nonprofit groups like us, to promote practices that allow people to spend more time with their families, likely increasing employee satisfaction and lowering burnout rates along the way. That is good for our employees, for our organizations and for the people we strive to serve.

I know some nonprofit organizations have expressed concerns about the proposed overtime rule update and the impact it could have on their budgets. I also know that much of the "concern" for nonprofits' ability to comply with updated overtime rules have been raised by the Chamber of Commerce, the Society for Human Resource Management and other Big Business lobby groups that do not typically advocate for the interests of nonprofits or the people served by them.

These concerns are vastly overstated, and they dismiss the rights of working people. Overtime pay was instituted to protect employees from difficult and, with the onset of fatigue, potentially dangerous working conditions, and to ensure that there is not an incentive for employers to hire just one person to

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[5] *Ibid.*

[6] Sussner Rodgers, F. (2015, June 22). Who Owns Your Overtime? *The New York Times*. Retrieved from: http://www.nytimes.com/2015/06/22/opinion/who-owns-your-overtime.html?ref=opinion.

[7] Schwartz, A., Wasser, M., Gillard, M., & Paarlberg, M. (2015). Unpredictable, Unsustainable: The Impact of Employers' Scheduling Practices in D.C. Washington, DC: DC Jobs With Justice. Retrieved from: http://www.dcjwj.org/wp-content/uploads/2015/06/DCJWJ_Scheduling_Report_2015.pdf.

do the work of two people. People who work for nonprofit organizations deserve a fair return on their work. I know first-hand that for some nonprofit employees, the work, while often rewarding, can be stressful, emotionally tolling and lower paying. These conditions only further substantiate the need for nonprofit employees to have time away from work to recharge and to reconnect with family and friends, just as was intended by the FLSA.

Non-profits that contract with state Medicaid departments can push the state to increase rates. Many states revisit their Medicaid budgets throughout the year, since Medicaid costs fluctuate based on the economy, enrollment, eligibility and other factors. The state's investment will be less than many people may assume. The federal match for Medicaid spending can range from 50 to 74 percent, depending on the state.[8] States that wisely invest in increasing their rates will put more money in the pockets of working people and, as a result, into their state and local economies.

In January 2015, rules took effect that provided nearly 2 million home-care workers with overtime protections for the first time.[9] As with these home-care rules, I believe the DOL is committed to providing technical support and guidance for nonprofit employers, and to working with the Centers for Medicare and Medicaid Services to address Medicare- and Medicaid-funded impacts.

Regardless, no nonprofit employer should condone a business model that only succeeds based on its ability to take advantage of its employees through lax overtime rules. Overtime protections ensure that people are paid for the long hours they work, and that employers hire more employers when additional hours are required. It is the right thing to do.

The FLSA was enacted with the belief that Americans should earn a fair day's pay for a fair day's work. Yet today the inverse is true for too many of our country's salaried employees who are putting in more than a fair day's work for far less than a fair day's pay. That is true for employees of big businesses, small businesses, and nonprofits. The administration's proposed update to the FLSA's overtime regulations will serve as a crucial step to restoring this basic tenet of economic fairness – a tenant that should apply to all people, no matter the industry they work in or the size of their employer.

[8] See the Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier, Timeframe: FY 2017. (2016). Kaiser Family Foundation. Retrieved from: http://kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier/.
[9] Application of the Fair Labor Standards Act to Domestic Service,78 FR 60453 (October 1, 2013).

Chairman VITTER. Thank you very much.
And now, Mr. Mantilla, welcome.

STATEMENT OF OCTAVIO MANTILLA, CO-OWNER, BESH RESTAURANT GROUP, ON BEHALF OF THE NATIONAL RESTAURANT ASSOCIATION AND THE BESH RESTAURANT GROUP

Mr. MANTILLA. Thank you, Chairman. Good morning, Chairman Vitter and distinguished members of the Committee. Thank you for the opportunity to testify today on the impact that the proposed overtime regulations would have on restaurants like mine and the concerns we have with some of the ideas floated by the Department of Labor for the final regulation.

My name is Octavio Mantilla. I am co-owner of the Besh Restaurant Group. I am honored to share the perspective of my company.

Today my testimony will focus on some of the issues that my company and the industry have been struggling with in preparing for potential changes to the current overtime regulations. At the end of the day, I need to ensure that the Besh Restaurant Group is fully compliant with the law, while remaining economically healthy and vibrant.

The three main issues that I would like to address today include: adjustments to the duties test being considered, the proposed salary level, and the proposed automatic increases.

I would also like to point out that the overall overtime regulatory proposal is adding to the tremendous amount of uncertainty created by the level of Federal regulations from the last 5 years.

I was born in Nicaragua and moved to New Orleans as a child. At the age of 16, I got my first job in a restaurant as a dishwasher and later waiting tables. I continued to work my way up and eventually moved through all managerial levels.

While working in the industry, I earned a bachelor's degree from Tulane University and an MBA from the University of New Orleans. I would not have been able to achieve these milestones without the flexibility that being a manager provided me. As a manager, while making less than many waiters, I had more flexibility to manage my work schedule and attend classes. The flexibility of being on salary was a big help to me. I would not be where I am today without that opportunity.

After graduating, I helped open Harrah's Casino & Hotel in New Orleans and then worked in St. Louis, Missouri, as Harrah's director of operations. I have opened numerous restaurants for Harrah's nationwide. My story is repeated in our industry over and over.

In fact, nine in ten restaurant managers started in entry-level positions, and eight in ten restaurant owners also began in our industry with an entry-level position. Doing away with the flexibility entry-level salaried managers have to, among other things, go back and forth from work to school would diminish professional growth opportunities in our industry.

I returned to New Orleans to be reunited with my friend Chef John Besh. John and I became partners in the Besh Restaurant Group. Since becoming John's partner, the Besh Restaurant Group has expanded to include several additional restaurants, one of

them being Shaya, which was voted Best New Restaurant in America last week by the James Beard Foundation, a modern Israeli cuisine restaurant, with my partner Israeli-born Alon Shaya, who also was an entry-level manager.

As to the duties test, it is clear to operators in the industry that any reduction in litigation that the Department seeks to obtain with the proposed rule's increase in the salary threshold would be lost if the changes being considered to the duties test become final. A long duties test would mandate a percentage limitation on nonexempt work that a manager can perform. The problems with the long duties test structure are well known and also acknowledged by the Department of Labor in the 2004 Overtime Rule. In 2004, the Department stated that the strict percentage limitations on nonexempt work in the long duties test would impose significant monitoring requirements and recordkeeping burdens.

In our industry, managers need to have a hands-on approach to ensure that operations run smoothly. Any attempt to artificially cap the amount of time exempt employees can spend on nonexempt work would place significant burdens on restaurants, increase labor costs, cause customer service to suffer, and result in an increase in wage and hour litigation. Just imagine a manager in a restaurant not being able to fill up a glass of water for you or having to write it down during a service period. It is just not possible.

As to the minimum salary threshold, the Department believes its proposed salary level does not exclude from exemption an unacceptably high number of employees who meet the duties test. However, when applied to my industry, the contrary is true.

Even before adjusting for regional economic differences, most managers and crew supervisors in our industry do not meet the proposed salary level of $970 per week. Some of these employees would qualify as exempt under the new proposed salary level only if the Department allowed bonuses to be used to calculate the employee's salary level. Furthermore, the median annual salary paid to crew and shift supervisors in our industry is $38,000.

It is clear that, at least in reference to the restaurant industry, the proposed salary level does exclude from exemption an unacceptably high number of employees.

I think I will stop there for the purpose of time.

[The prepared statement of Mr. Mantilla follows:]

Statement
On behalf of the
National Restaurant Association
&
Besh Restaurant Group

ON: AN EXAMINATION OF THE ADMINISTRATION'S OVERTIME RULE AND THE RISING COSTS OF DOING BUSINESS

TO: U.S. SENATE COMMITTEE ON SMALL BUSINESS AND ENTREPRENEURSHIP

BY: OCTAVIO MANTILLA, CO-OWNER, BESH RESTAURANT GROUP

DATE: MAY 11, 2016

Statement on: "An Examination of the Administration's Overtime Rule and the Rising Costs of Doing Business"

By: Mr. Octavio Mantilla

On Behalf of the National Restaurant Association & the Besh Restaurant Group

Senate Committee on Small Business and Entrepreneurship
428A Russell Senate Office Building
Washington, DC 20510

May 11, 2016 at 10:00am

Good Morning Chairman Vitter, Ranking Member Shaheen, and distinguished members of the Committee. Thank you for the opportunity to testify today on the impact that the proposed overtime regulations would have on restaurants like mine and the concerns we have with some of the ideas floated by the Department of Labor ("Department") for the final regulation.

My name is Octavio Mantilla and I am a Co-Owner of the Besh Restaurant Group. I'm honored to share the perspective of my company and the National Restaurant Association.

Today, my testimony will focus on some of the issues that my company and the industry have been struggling with in preparing for potential changes to the current overtime regulations. At the end of the day, I need to ensure that Besh Restaurant Group is fully compliant with the law, while remaining economically healthy and vibrant. Some of the issues I would like to address today include:

1. The adjustments to the duties test being considered;
2. The proposed salary level; and,
3. The proposed automatic increases.

I would also like to point out that the overall overtime regulatory proposal is adding to the tremendous amount of uncertainty created by the level of federal regulations from the last five years.

Besh Restaurant Group

I was born in Nicaragua and moved to New Orleans as a child. At sixteen, I got my first job in a restaurant as a dishwasher and later waiting tables. I continued to work my way up and eventually moved through all managerial levels.

While working in the industry, I earned a bachelor's degree from Tulane University and an MBA from the University of New Orleans. I would not have been able to achieve these

milestones without the flexibility that being a manager provided me. As a manager, while making less than many waiters, I had more flexibility to manage my work schedule and attend classes. I could not take a six hour or eight hour shift and go to school, as required from full-time hourly employees. The flexibility of being on salary was a big help to me. I would not be where I am today without that opportunity.

After graduating, I helped open Harrah's Casino & Hotel in New Orleans and then worked in St. Louis as Harrah's Director of Food Operations. I have opened numerous fine dining restaurants for Harrah's nationwide. My story is repeated in our industry over and over. In fact, nine in ten restaurant managers started in entry-level positions and eight in ten restaurant owners also began in our industry with an entry-level position. Doing away with the flexibility entry-level salaried managers have to, among other things, go back-and-forth from work to school would diminish professional growth opportunities in our industry.

I returned to New Orleans to be reunited with my old friend Chef John Besh at Besh Steakhouse at Harrah's. John and I became partners in the Besh Restaurant Group, combining his vast experience in restaurant operations with my passion for customer service. Since becoming John's partner, the Besh Restaurant Group has expanded to include the restaurants of La Provence, Lüke New Orleans, Domenica, Lüke San Antonio, Borgne, Pizza Domenica, Johnny Sanchez Baltimore, Johnny Sanchez New Orleans, Shaya and Willa Jean.

Earlier this year, the Besh Restaurant Group acquired a space in New Orleans to house a new private events venue, dubbed Pigeon & Prince. Executive Chef Erick Loos of La Provence is helming the culinary development for the space.

The Restaurant and Foodservice Industry

The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Its mission is to help members like me establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of one million restaurant and foodservice outlets employing over 14 million people. Restaurants are job-creators.

While small businesses comprise the majority of restaurants—more than nine in ten restaurants have fewer than 50 employees—the industry as a whole is the nation's second-largest private-sector employer, employing about ten percent of the U.S. workforce. In addition, more than seven out of ten eating and drinking establishments are single-unit operators. However, the restaurant business model produces relatively low profit margins of only four to six percent before taxes, with labor costs being one of the most significant line items for a restaurant. The restaurant industry is highly labor-intensive and combined with the low profit margins it creates low profits per employee.

Adjustments to the duties test are not necessary and should be avoided.

It is clear to operators in the industry that any reduction in litigation that the Department seeks to obtain with the proposed rule's increase in the salary threshold would be lost if the

changes being considered to the duties test became final. In particular, the industry is extremely troubled by the notion that the Department is looking at California's over-50% quantitative requirement, also known as a "long" duties test structure, for an exempt employee's primary duty.

A long duties test would mandate a percentage limitation on non-exempt work that a manager can perform. The problems with the long duties test structure are well known and also acknowledged by the Department of Labor in the 2004 Overtime Rule. In 2004, the Department stated that the strict percentage limitations on nonexempt work in the long duties test would impose significant monitoring requirements and recordkeeping burdens. It also acknowledged that employers would have to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if the exemption applied. Finally, distinguishing which specific activities are inherently a part of an employee's exempt work has proven to be a subjective and difficult evaluative task that is prompting contentious disputes and increased litigation in California.

If the Department of Labor now decides to enact changes to the duties test based only on answers to the general questions asked in the proposed regulation, rather than on the basis of comments on any specific proposal, the requirements of the Administrative Procedure Act ("APA"), the Regulatory Flexibility Act, and the various Executive Orders related to regulatory activity would not have been followed. I should not be expected to know how labor law works in California. The Department should not seek input based on hypotheticals and, instead, should explain in an actual regulatory proposal that the regulated community can consider, evaluate, and comment upon. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA.

Moreover, the Department optimized the duties test in 2004 to reflect the realities of the modern economy, a move that recognized the unique roles and responsibilities restaurant managers have. In our industry, managers need to have a "hands-on" approach to ensure that operations run smoothly. Any attempt to artificially cap the amount of time exempt employees can spend on nonexempt work would place significant administrative burdens on restaurant owners, increase labor costs, cause customer service to suffer and result in an increase in wage-and-hour litigation.

I am also extremely concerned that the Department expresses throughout the proposed regulation its belief that any amount below its proposed salary level would necessitate a more rigorous and restrictive long duties test. The realities associated with a more rigorous and restrictive long duties test exist regardless of the salary level chosen by the Department. Even if the salary level did not increase at all, a more rigorous and restrictive long duties test would still place significant administrative burdens on restaurant owners.

Thus, the Department should leave the concurrent duties rule in place and untouched. The concurrent duties test rule recognizes that front-line managers in restaurants play a multi-faceted role in which they often perform nonexempt tasks at the same time as they carry out their exempt, managerial function. It recognizes that exempt and nonexempt work are not mutually exclusive.

The Department's own Field Operations Handbook highlights that "performing work such as serving customers or cooking food during peak customer periods" does not preclude exempt status. Exempt supervisors make these decisions while remaining responsible for the success or failure of business operations under their management and can both supervise subordinate employees and serve customers at the same time.

The Department's proposed minimum salary level is inadequate for our industry and makes the exemption inoperative in my part of the country.

The Department believes its proposed salary level does not exclude from exemption an unacceptably high number of employees who meet the duties test. However, when applied to my industry, the contrary is true.

Even before adjusting for regional economic and market differences, most managers and crew supervisors in our industry do not meet the proposed salary level of $970 per week. Some of these employees would qualify as exempt under the new proposed salary level only if the Department allowed bonuses to be used to calculate the employee's salary level.

The purpose of setting a salary level, historically, has been to "provid[e] a ready method of screening out the obviously nonexempt employees." In other words, the salary level should be set at a level at which the employees below it would clearly not meet any duties test. With its proposed changes, however, the Department is upending this historic rationale and setting the salary level at a point at which all employees above the line would be exempt. This would greatly limit employers in the restaurant industry from availing themselves of the exemption.

For example, the median annual base salary paid to crew and shift supervisors in our industry is $38,000. Even those in the upper quartile at $47,000 would not qualify as exempt under the Department's proposed $50,440 salary level for 2016. Likewise, the median base salary for restaurant managers is $47,000, while the lower quartile stands at $39,000.

These are employees who would meet the duties test but who would become non-exempt under the proposed salary level. It is clear that, at least in reference to the restaurant industry, the proposed salary level does exclude from exemption an unacceptably high number of employees who meet the duties test. The impact would be magnified in many regions of the country.

In my own region, the proposed minimum salary level of $50,440 per year would represent an outsized income for entry-level managers. These would be the managers entering our Managers Training Program at a salary of about $35,000. Generally, these are employees that are being promoted, while learning how to perform their new duties. The proposed threshold increase (and the lower $47,000 now reported in newspapers) would be too large for us to absorb, so those positions would end up being moved back to an hourly rate, which I can assure you they would all view as a demotion.

While this would be an easy transition to make from a management and bookkeeping standpoint, it does remove the certainty of a fixed paycheck that they currently have. More

problematic is that we use salaried versus non-salaried to set eligibility for extra paid vacation, currently as well as management investment/ownership pool and annual profit-sharing bonuses. Probably the biggest benefit is the flexibility that we are able to extend to our salaried employees, paying full wages while they get to accommodate college schedules—as I once did.

The ability to delineate programs and perks by salaried versus non-salaried has been a great tool for upper management as well as a great benefit for our employees. Setting a minimum rate that is inappropriate for entry-level managers will end up reducing the benefits of our managers, not because we want to, but because of secondary consequences of the proposed changes.

The National Restaurant Association suggested at least three alternatives considered by the Department that would be better options:

1) "Alternative 1" calculated a new salary level by adjusting the 2004 salary level of $455 for inflation from 2004 to 2013, as measured by the CPI–U, and results in a salary level of $561 per week ($29,250 per year).
2) "Alternative 2" used the 2004 method to set the salary level at $577 per week ($30,085 per year).
3) Understanding that the Department now finds the salary level it set in 2004 as too low, the industry is also willing to support "Alternative 3," which would set the salary level at $657 per week ($34,255 per year).

I would like to point out that the Department estimated that 75 percent of newly overtime-protected employees would see no change in compensation and no change in hours worked based on the proposed regulations. However, in the restaurant industry salaried employees enjoy a number of benefits not available to hourly employees, as shown by my own example. Thus, in addition to getting paid a salary regardless of the fact that they may not be working over 40 hours a week, these newly overtime-protected employees could lose flexibility as well as benefits, including substantive bonuses, paid vacation, and flex time.

Finally, throughout the proposed regulation, the Department created the impression that salaried employees feel they are being taken advantage of by virtue of their exempt status. In reality, employees often view reclassifications to non-exempt status as demotions, particularly where other employees within the same restaurant continue to be exempt. Most employees view their exempt status as a symbol of their success within my company. It will be demoralizing for people who are working as entry-level managers and want to continue to move up to now be treated as hourly employees.

Automatic salary level increases will only perpetuate bad policy.

Putting aside legal objections to the Department's attempt to permanently index the salary level, at $47,000 or $50,440, an automatic yearly increase tied to CPI-U would make the exemption perpetually unusable for large portions of our industry.

The Department's other proposed alternative of indexing the salary level to the 40th percentile of non-hourly employees is a non-starter. Preliminary research points to it resulting in a death spiral that would render the exemption obsolete in just a few years. The relevant data used to determine the 40th percentile of full-time salaried workers is found in the Current Population Survey from the Bureau of Labor Statistics (BLS). The data consists of the total weekly earnings for all full-time non-hourly paid employees.

As the new salary level becomes effective, the number of workers who report to the BLS that they are paid on a non-hourly basis will decrease as workers who fail the salary test in year one (and subsequent years) are reclassified as non-exempt. This will result in a dramatic upward skewing of compensation levels for non-hourly employees. If the 40th percentile test is adopted, in the years following the proposal, the salary level required for exempt status would be so high as to effectively eradicate the availability of the exemptions in our industry.

For example, the Department predicts that the initial salary level increase will impact 4.6 million currently exempt workers. Employers must then choose to:

1) Reclassify such workers as nonexempt and convert them to an hourly rate of pay;
2) Reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked; or,
3) Increase the salaries of such workers to the new salary threshold to maintain their exempt status.

The Department estimates that only 67,000 of currently exempt workers will see an increase in their salaries to bring them up to the new salary threshold in order to maintain their exempt status. The overwhelming majority of affected employees would be reclassified as non-exempt. In our industry, particularly under the proposed $970 per week salary level, most of these employees will be converted to an hourly method of payment.

One economic analysis that the Association was able to review states that if just one quarter of the full-time, non-hourly workers earning less than the proposed 40th percentile were reclassified as hourly workers each year, in five years the new 40th percentile salary level would be $1,393 per week ($72,436 per year). The more likely scenario is that an even greater percentage of employees would be reclassified from salaried to hourly. If just half of full-time, non-hourly employees are converted to hourly positions, the 40th percentile salary level would increase to $1,843 per week ($95,836 per year) by 2020.

In the current proposed rulemaking, the Department proposes to announce a new salary level each year in the Federal Register without notice-and-comment, without a Regulatory Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders.

Conclusion

The Department should have granted at least as much time as it did in 2004 for the regulated community to comment on the proposed regulation, particularly given the proposal's

complexity and unusual new theories and mandates. Above all, the restaurant industry would find the use of a long duties test to be the wrong approach. The Department says it is attempting to "modernize" and "simplify" the applicability of the exemption, but a return to a long duties test would absolutely nullify any efforts to modify and simplify the rules. However, if the Department is inclined to mandate a new duties test, it should comply with all regulatory requirements and allow for notice and comment on any specific new duties test proposal.

In closing, I would like to state that I am not against increasing the salary threshold for exempt status, but it has to be a reasonable level so entry-level managers in my restaurant can still benefit. I am both proud and grateful for the responsibility of serving America's communities—creating jobs, boosting the economy, and serving our customers. My industry is committed to working with Congress to find solutions that foster job growth and truly benefit our communities. It is part of the Besh Restaurant Group's mission "to encourage growth from within and find like-minded partners to take the helm at our restaurants." The proposed overtime regulations may end up making it harder for these like-minded partners to move up in my company.

Thank you again for the opportunity to testify before you today regarding my industry's concerns with the proposed overtime regulations. I look forward to your questions.

Chairman VITTER. Okay. Thank you very much, Mr. Mantilla.
And next we will hear from Mr. Eisenbrey.

STATEMENT OF ROSS EISENBREY, VICE PRESIDENT, ECONOMIC POLICY INSTITUTE

Mr. EISENBREY. Thank you for inviting me today, Mr. Chairman and Committee members. In my 5 minutes, I will make five points.

First, America's middle class has suffered through decades of wage stagnation and rising inequality that cannot be corrected without changes in a range of Federal policies that have worked against them. Those changes include: restoring appropriate tax rates on high incomes and inheritances, raising the minimum wage, fixing overtime rules, enacting paid leave and fair scheduling legislation, ending unfair trade practices, and giving employees the right to bargain collectively.

Two, the Department's updated salary threshold will help. It is long overdue and much needed. The rule will raise wages for some employees, reduce excessive work hours for others, and create jobs. No one paid less than $50,000 a year should work more than 40 hours a week without additional compensation.

Three, indexing the salary threshold for exemption as wages and prices increase is critically important and well within the Department's authority.

Four, employers will adjust to the rule, as they did to the original Fair Labor Standards Act and every improvement in the law and regulations since then. California, it is important to note, the State with the highest State overtime standards, including a 50-percent primary duty test, has outpaced the rest of the Nation in employment growth for the last 5 years, and in that period of time, Louisiana's employment has actually fallen.

Five, small business employees need time with their families just as much as employees of larger businesses, if not more. They tend to be paid less and, therefore, to be less able to pay for time-saving help with children, chores, and home maintenance. They suffer from the same stress and health effects as anyone else.

So, point one, from 1979 to 2013, inflation-adjusted wages rose only 15 percent for the bottom 90 percent of Americans, less than one-half of 1 percent per year, while wages for the top 1 percent increased 137 percent. The economy and total national income grew, but most Americans were left out. CEOs and top executives take an oversized share of income. CEO pay for the 350 largest corporations grew almost 1,000 percent since 1978 while the pay of typical workers increased only 11 percent.

Corporations have relentlessly squeezed labor costs to the detriment of their employees while increasing profits for shareholders and executives with stock options. Profits have been at all-time highs while tens of millions of workers struggle to get by.

The Federal policies that have reduced employee bargaining power, lowered labor standards, and offshored jobs should all be reversed. Overtime is one part of the solution.

The current salary threshold, as Sarita said, is less than the poverty line for a family of four. It does not begin to reflect the status and financial reward that characterized executives, administrators, or professionals. The salary covered 12.6 million employees, sala-

ried employees, in 1979. Today it covers 3.5 million in a workforce that is 50 percent bigger.

Three, Goldman Sachs, the National Retail Federation, and the Department of Labor all agree: The rule will lead to job creation, wage increases for some employees, and reduced hours for others. The history of this rule tells us that employees will be better off, and as Lonnie Golden's research using the General Social Survey shows, it is not true that employees who make less than $50,000 a year have more flexibility if they are salaried than if they are hourly. This survey showed without a doubt that they are no better off in terms of flexibility, so they have nothing to lose when the salary level is raised, even if their employer changes from salaried to hourly.

To prevent the kind of neglect that led to a 29-year decline in the real value of the threshold, it has to be indexed, preferably to growth in compensation of salaried employees. The Labor Department for decades failed to carry out its statutory mandate to update the rules, and indexing will prevent that kind of failure in the future.

Finally, employers, including small businesses like mine—we have 40 employees—will have no trouble adjusting to the rule because our competitors all face the same requirements, and, in fact, this is the easiest rule ever promulgated to comply with. You are already making determinations about whether employees are covered. Now for people making less than $50,000, it is simple. They are entitled to overtime pay. That is the end of the issue. You do not have to worry about the complicated duties test that you have heard about.

The home builders are a perfect example of how much hype and phony melodrama surrounds the opposition to this rule. They did a survey that shows that only one home builder in 25 is even thinking about reclassifying salaried workers as hourly. Far more will raise their salaries, but most will have to do nothing at all to comply because they are already in compliance.

Thank you.

[The prepared statement of Mr. Eisenbrey follows:]

Economic
Policy
Institute

Testimony Before the U.S. Senate Committee on Small Business and Entrepreneurship

Ross Eisenbrey
Vice President, Economic Policy Institute
Russell Senate Office Building
10:00 a.m., Wednesday, May 11, 2016

Thank you for inviting me to testify today.

My name is Ross Eisenbrey, and I am the vice president of the Economic Policy Institute, a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions. EPI believes every working person deserves a good job with fair pay, affordable health care, retirement security, and work–life balance.

Work–life balance is a fundamental goal of the Fair Labor Standards Act (FLSA). Because of its requirement that employers pay many employees a premium for time worked beyond 40 hours in a week, the FLSA is the single most important family-friendly law ever passed in the United States. Everyone claims to care about work–life or work–family balance, but for many employers, it's just talk, just as it was 75 years ago. If not for the law's overtime rules, tens of millions more workers would be working 50, 60, or 70 hours a week for no additional pay, just as millions of Americans did before the FLSA was enacted in 1938.

An uninformed person might think the 40-hour workweek most Americans have is part of the natural order, but of course it isn't. It exists in the United States because President Roosevelt persuaded Congress to pass the FLSA, which—by imposing the duty to pay time-and-a-half for overtime—makes it expensive for a business to work employees more than 40 hours a week. (Similarly, the weekend was not a given for most Americans before passage of the FLSA.) If the FLSA's regulations are not updated from time to time, as the law intends, the 40-hour workweek could become a thing of the past.

It's critical to remember that there's no inherent difference between an hourly worker and a salaried worker. How they are paid is entirely up to the boss. And **salaried employees need time with their families and time for themselves just as much as hourly workers do.** Congress recognized this in 1938 and made no distinction: Hourly workers and salaried workers alike were entitled to overtime pay, whether they were blue collar or white collar, whether they worked in a factory or an office. In fact, some of the most exploited workers at the time were women working 12-hour days, six days a week, as typists in giant office pools for $6 or $7 a week.

It's equally critical to remember that the **employees who work in small businesses are no different from those who work in medium-sized and large businesses; they too need time with their families and for themselves.** There is no good reason for small businesses to exploit their employees, work them excessive hours, or deny them time with their families.

For all of these reasons, the Department of Labor (DOL) should promptly issue its final rule to raise the threshold salary, below which all workers are automatically eligible for overtime, to $50,440. This would be the most important improvement in the labor standards of America's working families in many years.

Work–life balance, family responsibilities, and personal health

Having a decent work–life balance, which means having enough time outside of work for family and friends, for oneself, and for civic participation, is one of the two key goals of the FLSA's overtime requirements. But large percentages of managers and other white-collar employees say that increasingly, the law is failing to protect them, that they don't have enough time for their families. Alarmingly, parents' hours are increasing more than those of non-parents:

- An Ernst & Young survey found that too little pay and excessive overtime are among the three most common reasons employees quit.
- Approximately half (46 percent) of managers work more than 40 hours per week, and four in 10 say their hours have increased over the past five years.
- Younger generations have seen their hours increase the most in the last five years, at a time when many are moving into management and starting families (47 percent of millennial managers reported an increase in hours, versus 38 percent for Gen X managers and 28 percent for boomer managers).
- Of managers, a larger share of full-time working parents (41 percent) have seen their hours increase in the last five years than non-parents (37 percent).[1]

The implications of this overwork are obvious in terms of work–life conflict. Who will take care of the kids? Who will go to their ballgames, school plays, or counseling meetings? The conflict is especially intense because children increasingly have two parents working at least 35 hours per week. Ernst & Young finds that "over half (57%) of full-time employees in the US indicate that their spouse/partner works 35 hours or more a week, but for millennials and Gen X, the likelihood that their partner works full-time is much higher than for Boomers. Also, parents (70%) are much more likely than non-parents (57%) to have a partner that works at least full-time."[2]

Specifically:

- "Millennials (78%) are almost twice as likely to have a spouse/partner working at least full-time than Boomers (47%).
- Millennials (64%) and Gen X (68%) were also much more likely to have a spouse/partner working 35 hours or more a week than Boomers (44%).
- Over a quarter of Boomers (27%) said their spouse/partner does not work outside the home or works part-time flexible hours (10%).
- Millennials (13%) and Gen X (14%) were much less likely to have a spouse/partner who did not work outside the home or who worked part-time but flexible hours (5% and 4% for millennials and Gen X, respectively).

- 'Finding time for me' is the most prevalent challenge faced by millennial parents who are managers in the US (76%) followed by 'getting enough sleep' and 'managing personal and professional life' (67%)."[3]

It's not just work–family conflict, stress, or lack of sleep that's at stake; it's also the physical health of the workers. Overwork kills. People who work 55 hours or more per week have a 33 percent greater risk of stroke and a 13 percent greater risk of coronary heart disease than those working standard hours.[4] When employers don't have to pay for overtime, they schedule much more of it, leading to the many stories among the rulemaking comments of managers working 60-hour weeks and longer until their health was destroyed, leaving them disabled.

As currently enforced, the FLSA is failing salaried workers

Properly enforced, the Fair Labor Standards Act would prevent a great deal of this overwork and stress on families, but the law has been allowed to become almost a dead letter with respect to salaried employees. The single biggest reason for this failure is the low level of the salary threshold that determines whether workers are automatically eligible for overtime pay. As shown in the graph, in 1979 more than 12 million salaried workers earned less than the salary threshold and were therefore automatically guaranteed the right to overtime pay, regardless of their duties. Today, with a 50 percent bigger workforce, only 3.5 million salaried employees are automatically protected.[5]

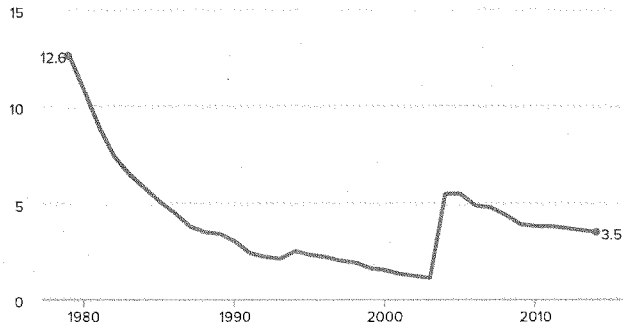
In an excellent comment submitted to the rulemaking record, 57 legal scholars remind us that the basic rule is that all employees are entitled to time-and-a-half overtime pay, while the exemptions were meant to be very limited and narrow. For the most part, only relatively highly paid employees may be denied overtime pay:

> "Congress' intent was to allow exemptions from the Fair Labor Standards Act's overtime and minimum wage protections for a relatively small group of high-paid employees who were effectively already being compensated for the extra hours that they worked by their high level of compensation. Congress understood that these workers had sufficient individual bargaining power in the labor market and workplace to protect themselves, and so did not need the government to intervene to protect them from employers who might impose low wages and excessive overwork. One very strong indication of a worker's individual bargaining power is the salary that he or she can negotiate with an employer. More individual bargaining power generally produces a higher salary. Bona fide executive, administrative, and professional employees are able to negotiate high salaries because of their skills, knowledge, close association with powerful corporate leaders and, in many cases, limited availability in the labor market. For this reason, we agree with the Wage & Hour Division that an employee's salary level should be the most important factor in determining whether he or she is an exempt bona fide executive, administrative, or professional employee."[6]

Figure A

The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979

Number of salaried workers* covered by overtime salary threshold, 1979–2014 (in millions)



* The sample included salaried (nonhourly), full-time workers who are 18 years or older. It excluded teachers (pre-K through college) and religious workers who are automatically exempt from overtime protections.

Note: The nominal threshold was set at $250 per week from 1975 until 2004 when it was increased to $455 per week.

Source: EPI analysis of Current Population Survey Outgoing Rotation Group microdata

Economic Policy Institute

The other purpose of the overtime rules was to reduce unemployment by reducing the average number of hours worked in certain jobs, thereby freeing up positions for additional workers. To maximize employment, it's obviously better to have three employees working 40 hours per week than just two working 60 hours each while the third is unemployed. U.S. underemployment is still almost 10 percent seven years after the end of the Great Recession—that's over 15 million Americans who want a job or more hours but have not been able to find them. The black unemployment rate is a recession-like 8.8 percent.

The arguments against raising the overtime salary threshold don't hold water

Many businesses are unhappy that the Labor Department is proposing to restore overtime coverage almost to where it stood in the Nixon and Ford administrations. Businesses have become accustomed to working low-level salaried employees long hours for no extra

compensation, but the pendulum has swung too far, and it's time to restore some balance. The arguments they make against the rule are uniformly without merit.

Let's examine the four most prevalent of these arguments.

1. "Regulatory compliance costs will be excessive."

    a. DOL probably overestimated these costs. Every firm that has an obligation to comply with the FLSA has already made a determination about the duties of its current employees and whether they can be exempted under the law's provisions for executive, administrative, and professional employees (known as "EAP exemptions"). The proposed rule makes this process much simpler for employees earning below the threshold. Here's the new test: "Does the employee make less than $970 per week?" If yes, pay overtime.

    b. DOL said becoming familiar with the new rules would take an hour, but in reality, it takes a few seconds, and anyone with ADP payroll processing software can make the necessary change in payroll in a few minutes. Even the National Restaurant Association's witness at last October's House Small Business Committee hearing on the rule admitted that "this would be an easy transition to make from a management and bookkeeping standpoint."

    c. Going forward, it is beyond argument that millions of the decisions employers make about applying the exemption to employees earning above the current threshold but below the new threshold level ($23,660 to $50,440) will be made simpler: The complex duties tests that apply above the threshold will be irrelevant for those employees, and the only question will be, "Does the employee earn a salary less than $970 per week?"

    d. Converting employees to hourly status is entirely a decision of the employer. Overtime can be easily tracked for salaried employees. Many employers, including small businesses, track the time of salaried employees. At the House Small Business Committee hearing on the overtime rule last October, Terry Shea, representing the National Retail Federation, revealed that she routinely and closely tracks the time of her salaried employees:

        > "Furthermore, our store managers and assistant managers averaged a 40 hour work week last year. Management closes the stores two days a week, and on those days they come in at 10am and leave between 6:15pm and 6:30pm. They also work one Saturday a month, for which they are given a day off during the week. During 'crunch time' weeks, a manager will work more than 40 hours.

"However, when any salaried associate works in excess of 46 hours in a week, they are compensated with a day off of their choosing.

"This day off may be used the following week or 'banked' and taken later in the year."

2. "The regulation will harm relationships between owners and affected employees."

a. The National Federation of Independent Business (NFIB), for example, claims that employee morale will be hurt because employers will not just reclassify some managers as hourly but will also demote them, take away the manager title, take away their paid time off and their health benefits, and stop letting them leave early to pick up their kids from school. All of that is pure nonsense. Nothing in the rule makes an employer change a manager's title or take away benefits, and it would be poor management to do so if it were going to harm morale.

b. NFIB assumes that businesses will insist that employees continue to work long hours and will refuse to pay anything additional for overtime. NFIB says employers will cut wages by as much as $5 per hour in order to keep their total wage bill unchanged. That has not been the history of the FLSA. We know that hourly workers are less likely to work long hours than salaried employees, and we have found no evidence that employees' wages were ever cut this way in the past.

3. "The rule will take flexibility and opportunities from employees who are converted to hourly status."

a. Research by Lonnie Golden at Penn State shows that employees paid a salary less than $50,000 a year generally have no more flexibility than hourly workers.[7]

b. The opportunity argument is indefensible. If my business promotes employees paid a salary of $25,000 to $50,000 into management but the rule leads me to reclassify them all as hourly, they're still the same employees I would look to for promotion. Where else would I look? If not them, then to whom?

4. "The salary level is set too high for rural areas."

a. The salary level is meant to do one thing: prevent employers from denying a 40-hour workweek and overtime pay to people who aren't really executives and professionals. It doesn't set salaries; it reflects what bona fide executives, administrators, and professionals are paid.

b. The $921 weekly level in the DOL's notice of proposed rulemaking (NPRM) is not high; it is so low that it isn't sufficient to provide a two-parent, two-child family with an income necessary to live adequately yet

modestly.[8] This is not truly an executive-level salary if an employee in 2014 could not support a family in a modest way on that salary.

c. The salary levels since 1938 have been set nationally, without exception.

d. In inflation-adjusted terms, the equivalent salary level in 1975 would be $57,462, according to the U.S. Chamber of Commerce. That level took account of regional and urban/rural differences because it was an inflation adjustment of earlier levels that took them into account. Regional pay differences are much smaller today than in 1975, so the salary level in the NPRM actually overcorrects for regional differences. Moreover, the fact that the NPRM applies the 1975 level despite decades of productivity growth and accelerating income growth for executives means the salary level is more likely too low than too high.

e. The HR Policy Association (HRPA) says that one in seven rural and small city CEOs earns less than $940 per week. It's a very misleading portrait of their income, if not totally meaningless, because it's based on the Current Population Survey report of weekly wage data, which leaves out a lot of income—perhaps most of it for CEOs. Here's what's left out: non-production bonuses, perquisites, profit-sharing payments, stock bonuses, and year-end bonuses. Taking into account their various bonuses and perks, it might be that none of them earns less than $75,000 a year—but we don't know.

CEOs are either the business owner, in which case they set their own salary and their own schedule, or they are employees of someone else. If the business owner isn't willing to pay its CEO more than $50,000, it will have to pay overtime. This will affect very few businesses.

f. The HRPA figure of one-seventh of rural and small city CEOs totals fewer than 18,000 CEOs, of whom 3,000 are public employees. In a nation with more than 7 million businesses, that represents 0.2 percent of firms.

g. Managers paid less than the level necessary for a two-parent, two-child family to make ends meet anywhere in the country, whether they live in rural or urban areas, should not be treated as exempt executives; they should be paid for their overtime.

The Secretary of Labor has done precisely what the law requires in resetting the salary test to a level that better reflects the compensation of bona fide executives, administrators, and professionals. In doing so, he is making the most important improvement in the labor standards of America's working families—particularly middle-class families—in many years. The proposed rule should be applauded and supported, and the Secretary should make it final.

Biography

Ross Eisenbrey has been vice president of EPI since 2003. He is a lawyer and former commissioner of the U.S. Occupational Safety and Health Review Commission. Prior to joining EPI, Eisenbrey worked for many years as a staff attorney and legislative director in the U.S. House of Representatives, and as a committee counsel in the U.S. Senate. He served as policy director of the Occupational Safety and Health Administration from 1999 to 2001. Eisenbrey has testified numerous times in the House of Representatives and the Senate, and has written scores of articles, issue briefs, and policy memos on a wide range of labor issues. He holds a J.D. from the University of Michigan.

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5. Ross Eisenbrey, "The Number of Salaried Workers Guaranteed Overtime Pay Has Plummeted Since 1979," Economic Policy Institute Economic Snapshot, June 11, 2015.

6. L. Camille Hébert, et al., "Law Professor Comments Regarding 'Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," submitted to U.S. Department of Labor September 4, 2015.

7. Lonnie Golden, *Flexibility and Overtime Among Hourly and Salaried Workers: When You Have Little Flexibility, You Have Little To Lose*, Economic Policy Institute Briefing Paper #385, September 30, 2014.

8. Elise Gould, Tanyell Cooke, and Will Kimball, *What Families Need to Get By: EPI's 2015 Family Budget Calculator*, Economic Policy Institute Issue Brief #403, August 26, 2015.

Chairman VITTER. Thank you.

And, Ms. Duncan, you are going to wrap us up. Thank you.

STATEMENT OF NANCY DUNCAN, ASSOCIATE VICE PRESIDENT OF HUMAN RESOURCES, OPERATION SMILE

Ms. DUNCAN. I would like to thank the Committee for the invitation to speak with you today. Operation Smile is an international medical charity that has provided hundreds of thousands of free surgeries for children and young adults in developing countries who are born with a cleft lip, cleft palate, or other facial deformities.

I am here today to express the concerns of our leadership team over the Department of Labor's proposed changes to overtime exemption regulations, specifically, the drastic increase to the threshold salary level of $50,400.

While all employers will feel the impact of such a drastic change, there will be a tremendous negative impact on the nonprofit organizations, especially taking into account the unique challenges of an organization operating globally. We have made tremendous efforts over the last years to align our salaries to be more competitive with the for-profit space. Yet still, this proposed update will increase our payroll cost nearly $1 million annually, affecting over 50 percent of our workforce. This is not a financial cost we can absorb. Considering that a cleft surgery costs an average of $240, this would mean nearly 4,200 fewer surgeries provided globally each year.

Let me take a moment to provide a very specific impact of the proposed increase to the salary threshold. The largest group of our professionals affected is our program coordinators. These individuals are responsible for planning and executing our international medical missions. They travel to low- and middle-income countries where we conduct medical missions, and they have responsibility to manage our medical teams. Our program coordinators are often working in mission countries with the ministers of health, leaders in the local hospitals, and even high-level government officials who support our cause. The program coordinator position at Operation Smile has served as a training ground for many young professionals with a career goal to continue on to law school, medical school, and many other professional careers. The experience they receive at Operation Smile is unprecedented and highly valued.

Annually, we receive approximately 700 applicants for these positions. Their qualifications are incredible, many graduate degrees, multiple languages, leadership positions throughout their academic life, and thousands of volunteer hours. If this new policy is implemented, we fear we will have to look to other resources such as hiring in our mission countries. This change would unfortunately reduce the employment opportunities for recent college graduates. It would be a shame to take this opportunity away.

Less measurable is the impact this change will have on our support staff for a global organization that operates 24/7. Many of our exempt positions have enjoyed schedule flexibility and need the ability to work with partner countries remotely at hours often outside our normal office schedule. If we have to convert these employees to nonexempt status, we will have to impose policies such as

strict core working hours and restrictions on email and phone usage after hours. The result would be a negative impact on both our responsiveness and effectiveness. Our focus needs to be on managing programs not overtime.

There are additional obvious flaws to the proposed 102-percent increase to the minimum salary level. At Operation Smile, we offer employees a rich medical and dental plan with their employee premiums covered at 100 percent. In addition, we provide a 401(k) plan with up to a 9-percent employer contribution. These are all areas we will have to turn to and evaluate cuts to offset increased salary expenses.

Another flaw is the lack of consideration of geographic location. Regional economies play a part in starting salaries. According to a website source, a salary of $50,400 in Washington, D.C., equates to an approximate salary of $34,000 in Virginia Beach.

Finally, we are extremely concerned about the impact this will have on our donations. Donors evaluate the percentage of resources spent on administrative versus programmatic activity. An increase in administrative cost will have a negative impact on our revenues from donors who want their donations spent on surgeries not salaries.

We strongly urge the DOL to re-examine the newly proposed salary threshold, taking into consideration the many negative impacts such a change will present. These changes should be adjusted to reflect a better balance between employer and employee needs, a nonprofit's charitable mission, and donor expectations. At the very least, we request the DOL pursue adopting special provisions similar to those found for teachers by allowing nonprofits to remain exempt from these salary thresholds and to be better able to focus on their charitable missions.

Thank you for allowing me to be here today to speak to you in regard to the nonprofit community.

[The prepared statement of Ms. Duncan follows:]

Operation Smile

Nancy Duncan
Associate Vice President of Human Resources
Operation Smile
May 11, 2016 Written Testimony

I would like to thank the Committee on Small Business and Entrepreneurship and Senator Vitter for the invitation so speak to you today.

Operation Smile is an international medical charity that has provided hundreds of thousands of free surgeries for children and young adults in developing countries who are born with cleft lip, cleft palate or other facial deformities. It is one of the oldest and largest volunteer-based organizations dedicated to improving the health and lives of children worldwide through access to surgical care. Since 1982, Operation Smile has developed expertise in mobilizing volunteer medical teams to conduct surgical missions in resource-poor environments while adhering to the highest standards of care and safety. Operation Smile helps to fill the gap in providing access to safe, well-timed surgeries by partnering with hospitals, governments and ministries of health, training local medical personnel, and donating much-needed supplies and equipment to surgical sites around the world. Founded and based in Virginia, Operation Smile has extended its global reach to more than 60 countries through its network of credentialed surgeons, pediatricians, doctors, nurses, and student volunteers.
I am here today to express the concerns of our leadership team over the Department of Labor's proposed changes to overtime exemption regulations. Specifically, the drastic increase to the threshold test to a salary level of $50,400.

While all employers will feel the impact of such a drastic change, there will be a tremendous negative impact on non-profit organizations, especially taking into account the unique challenges of an organization operating globally. We have made tremendous efforts over the years to align our salaries to be more competitive with the for-profit space. Yet still, this proposed update will increase our payroll cost by nearly $1 million annually affecting over 50 percent of our workforce. This is not a financial cost we can absorb. Considering that a cleft lip surgery costs an average of $240, this would mean nearly 4,200 fewer surgeries provided globally each year.

Let me take a moment to provide a very specific impact of the proposed increase to the salary threshold. The largest group (about thirty) of our professionals affected is our Program Coordinators. These individuals are responsible for planning and executing our international medical missions. They travel to low-and middle-income countries where we-conduct medical missions and they have responsibility to manage our medical teams. Our Program Coordinators are often working in mission countries with Ministers of Health, leaders in the local hospitals and even high level government

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officials who support our cause. The Program Coordinator position at Operation Smile has served as a training ground for many young professionals with a career goal to continue on to law school, medical school and many other professional careers. The experience they receive at Operation Smile is unprecedented and highly valued. Annually we receive approximately 700 applicants for these positions. Their qualifications are incredible including many graduate degrees, multiple languages, leadership positions throughout academic life, and thousands of volunteer hours. If this new policy is implemented, we fear we will have to look to other resources such as hiring in our mission countries. This change would unfortunately reduce the employment opportunities for recent college graduates. It would be a shame to take away this opportunity.

Less measurable is the impact this change will have on our support staff for a global organization that operates 24/7. Many of our exempt positions have enjoyed schedule flexibility and need the ability to work with partner countries remotely at hours outside of the normal office schedule. If we have to convert these employees to a nonexempt status, we will have to impose policies such as strict core working hours and restrictions on email and phone usage after hours. The result would be a negative impact on both our responsiveness and effectiveness. Our focus needs to be on managing programs not overtime.

Think about it, when disaster struck Haiti in 2010_, our employees said "we can help, we can put together a surgical mission. They need our help." They didn't ask "are you going to pay me extra?" The unintended consequences of these proposed regulations would crush our ability to respond.

There are additional obvious flaws to the proposed 102% increase to the minimum salary level. At Operation Smile, we offer our employees a rich medical and dental plan with their employee premiums covered at 100%. In addition, we provide a 401(k) plan with up to a 9% employer contribution. These are all areas we will have to turn to and evaluate cuts to offset increased salary expenses. Another flaw is the lack of consideration of geographic location. Regional economies play a huge part in starting salaries. According to a website source, a salary of $50,400 in Washington, D.C. equates to an approximate salary of $34,000 in Virginia Beach.

Finally, we are extremely concerned about the impact this will have on our donations. Donors evaluate the percentage of resources spent on administration versus programmatic activity. An increase in administrative cost will have a negative impact on our revenues from donors who want their donations spent on surgeries not salaries. We strongly urge the DOL to re-examine the newly proposed salary threshold, taking into consideration the many negative impacts such a change will present. These changes should be adjusted to reflect a better balance between employer and employee needs, a non-profits' charitable mission and donor expectations.

Operation Smile

At the very least, we request the DOL pursue adopting special provisions similar to those found for teachers by allowing non-profits to remain exempt from these salary thresholds and to be better able to focus on their charitable missions.
Thank you for allowing me to be here today as the voice of the nonprofit community.

Chairman VITTER. Thank you very much, and thanks to all of you. I will start our discussion with 5 minutes of comments and questions.

Ms. McCutchen, you were Wage and Hour Administrator at the Department of Labor previously. If at that time SBA's Office of Advocacy had sent you a letter similar to the one sent to Secretary Perez that was critical of the proposed rule and that asked for more comment time, what would your reaction have been?

Ms. MCCUTCHEN. We would have sent our economists back to work. The flexibility regulatory impact analysis is particularly important to the small business community. It has to be accurate. You have to be able to accurately estimate the cost, both in the cost of compliance and in wage transfers. And so we would have gone completely back to the board. And I think if you compare the economic analysis from our regulation in 2004 to what the Department of Labor has put out today, you will see that we did a much better job.

Chairman VITTER. And also specifically with regard to a request for an extension of the comment period, what was your experience at the Department of Labor?

Ms. MCCUTCHEN. We did grant an extension, and we gave more time to begin with. These rules are complex. There is a lot of time and study that needs to go into determining what the impact is going to be on your business or your industry. So a 90-day comment period, which is all the Department of Labor gave us, was incredibly inadequate, and there were over—from my reading of the public record, there were over 3,000 requests to extend the time for comment, and they were all ignored.

Chairman VITTER. Okay. Thank you.

If we can put up the chart we have somewhere, do we have that handy? Ms. McCutchen, you touched on one thing that I am really concerned about, representing the State of Louisiana, which is a relatively low-wage State, and that is sort of disparate impact on lower-wage areas. Could you comment a little bit more on that? And as background, I want to point out that, according to a study by Oxford Economics, Louisiana would have nearly 51 percent of full-time salaried workers below this dollar level proposed. So what effect do you think this rule would have on potential growth for small businesses specifically located in a State like that which tend to be in the red?

Ms. MCCUTCHEN. I think it is going to stifle growth, job growth, in an economy that is already sluggish, and jobs, and in particular, full-time good jobs, right? We might see growth in part-time jobs and jobs without health care, but not in good jobs. And just that report from Oxford, what you see in the percentages of that report is states like Louisiana, you are right, it is about 51 percent of salaried workers who will be impacted. Contrast that to a higher-wage State like Massachusetts, where only 27.3 percent of salaried employees are below that $50,440. So it is not 40 percent—right?—if you look at state by state. It is 27 percent in some states, 52 percent in others, depending upon whether they are rural or more urban states. And so I think that every business owner, every representative of employers and employees in states like Louisiana, Arkansas, and Mississippi have to be incredibly concerned that

their states are going to be disproportionately impacted in a way that is going to really freeze job growth.

Chairman VITTER. All right. Okay. Thank you.

Mr. Mantilla, thank you for your testimony. Obviously, the restaurant and hospitality industry is enormously important in Louisiana, as in other places. Do you believe these proposed changes to the overtime threshold would make it harder to attract and train new managers in your restaurants?

Mr. MANTILLA. Yes, I do. A company like myself and most of the restaurant industry, for entry-level managers it is an opportunity that we seek when we are hourly employees. By increasing that salary level so high, it forces our restaurants to put a lot more people in hourly positions, so we lose the opportunity for people that want to grow to move into salaried. That is what we look for. When I was waiting tables, I wanted to be a manager. It will be demoralizing for my entry-level positions to move them back into hourly positions. That is what we want. And we are in our industry because we have a passion for it, not because we are doing it for the sake of doing it.

You see the growth especially in New Orleans, from pre-Katrina number of restaurants and the opportunities. We had 800 restaurants in New Orleans, to 1,400 now, and it is people like myself that were young, eager, and wanted to take the opportunity. The restaurant industry is very similar—it is just like the United States. It is an industry opportunity. And we want to take the chance to become entry level, and a restaurant cannot afford to pay $50,445.

Chairman VITTER. And to take you yourself as an example, you went from a very entry level hourly position to manager to owner of a group. Do you think this sort of proposal, had it been in place at the time, would effectively have been a much bigger barrier to that sort of progression?

Mr. MANTILLA. Yeah. Being a salaried employee, it gave me the flexibility to attend school, to attend college, to further my education. I could not go to work 8 hours a day, you know, all the time. I woke up in the morning at 6:00 a.m., took classes at 8:00 a.m., went to work at a restaurant, managed a shift, went back to school, studied, took more classes, or worked Friday, Saturday, and Sunday so that I can further my education, which allowed me to take the risk and be an entrepreneur, which was my dream. And we started one restaurant, and everybody in my company has developed from within. We have given the same opportunities that I took when I was a young boy to be part of a restaurant. And every restaurant we own, we have people that were entry-level that are now part owners in our business. A perfect example is Alon Shaya.

Chairman VITTER. Thank you very much, and, again, congratulations on that recognition for Shaya.

Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

To start out, I just want to kind of make it clear. I, too, am concerned that the small business advocacy group did not get a chance to provide comment. I think that with further debate we might have gotten more clarification on the need for this rule.

But, Ms. McCutchen, right now the rule sets at, I think, $11.38 an hour. In North Dakota, the extension agency at NDSU does a study. They do a study that involves a single mom, two kids, living in a very modest apartment with a very small car, spending only, I think, $50 a week on clothing. How much do you think they calculate in Fargo she needs to earn to make ends meet in a 40-hour work week?

Ms. MCCUTCHEN. I am not aware of that study, so I do not know.

Senator HEITKAMP. Okay. Well, I will tell you. It is $24 an hour just to make ends meet. So what do you think the number should be?

Ms. MCCUTCHEN. I think the number should be $35,000, but let me——

Senator HEITKAMP. How do you calculate that?

Ms. MCCUTCHEN. Based on past methodologies and the data that we have about wages and lower-income states and small businesses. I will point out, please, that North Dakota under their State law, if it makes sense in the economy in North Dakota, can adopt a higher salary level, as has New York and California, New York at $35,100 and California at $41,600. And so if that works in North Dakota at that level—it probably will not work in Louisiana, and that is why the Federal level has always been set at a lower level to exclude only——

Senator HEITKAMP. But I am telling you that economists in North Dakota have looked at what would be, in fact, a 40-hour living wage for a single mom, and they have calculated it at $24 an hour. And that is the challenge that we have here. We have got a process problem with this rule. But we have an economic problem for middle-class families in this country who struggle every day to make ends meet.

And think about this: That same mom, if she works in a salaried position, she cannot get a second job if she is working 60 hours a week. So she is stuck. In fact, she is worse off.

And I think the other point that we need to make is that no one is telling anyone that they have to go on an hourly wage. No one is saying that. They are just saying if they are a salaried employee making less than this, they can only work 40 hours a week, right? Is that a correct analysis?

Ms. MCCUTCHEN. Correct.

Mr. EISENBREY. Well, we can actually pay overtime to salaried workers.

Senator HEITKAMP. Right. My point is that I do not think that we have enough information, and so I am a little disturbed by the process here because I do not think that we really know how many people will be impacted by this and what the consequences will be. I am concerned about what happens in universities. That is who I have heard from the most. I am concerned about what happens in nonprofits where people have to be on call, people who work with the homeless, people where it is very difficult to calculate what, in fact, would be their hourly wage.

So I think we have got some issues with this rule. But I think we have to acknowledge that what we have here is a dramatic problem with people not working as hard as they know how to work, getting up every morning and doing a great job, and getting

further and further behind. And you do not have to look any further than this Presidential campaign to understand the challenges and, I think, the insecurity that American families feel in these kinds of situations.

And so where I share the concern and I think Senator Scott has expressed some concern about process, I share the concern about process. I think this is a pretty dramatic increase to do it in a way that does not allow full analysis and full response. But I am concerned about maybe the general overall attitude of, "Suck it up, workers, just work harder," and you will get further behind. And, oh, by the way, if you work in a nonprofit where you do tremendous benefit for society, you should even get paid less.

So it is a real challenge that we have here. I think that we need to put this in the perspective of what this hourly wage is and what it means for an American family. And I think $24 an hour for somebody who works 40 hours a week and is struggling—you know, maybe they should have an opportunity to get a second job, and that is not exactly possible when you are working 60 hours a week.

Chairman VITTER. Senator Scott.

Senator SCOTT. Thank you, Mr. Chairman. Thank you for holding this very important hearing. And, Senator Heitkamp, I am looking forward to continuing our discussion on this legislation that I have sponsored. I look forward to you being one of our cosponsors in the near future. We have 36, but we could use 37. You could be the one.

Thank you to the panelists for being here this morning as well as we discuss such an important issue, and I will tell you that having listened to the comments of some of the panelists, I wonder where the real world is because the comments are so far apart. And the reality of it is having been a small business owner, having been a business owner with 5 employees in one company and 7 or 8 in another and then 15 or so, the fact of the matter is that when you think about the impact of this rule on the average person, not on the nonprofits specifically, not on the universities, not on small businesses, but on employment opportunities, they are going to go down, not up. What we will see is more part-time employees.

If you think about the current state of affairs for small businesses to digest, the ACA pushes wages down, pushes hours down. If you think about Dodd-Frank and the ability to have access to capital so that there are more small businesses in distressed communities, not growing. I think in 2015 we saw fewer businesses, not more businesses, much in part because of the impact of the regulatory environment.

As I have thought about some of the comments I have heard, the only word that keeps coming to my mind is, "Hogwash." I am not sure if they have ever actually been in the real world working. It appears to me that perhaps you have not.

Ms. McCutchen, a couple questions for you, one on the impact of geography. I think the fact of the matter is that thinking of this from a Federal perspective, having a low point where states can figure out what is best for their states based on their geography, based on their wages, is an important consideration.

The second question I have is one on the flexibility. I heard someone mention the fact that salaried employees have just as much flexibility as folks who are hourly, or the hourly workers have as much flexibility as ones that are salaried. In my business where I had salaried employees, they had a whole lot more flexibility than the hourly folks.

Ms. MCCUTCHEN. You are exactly right, and that is because of what we call the "salary basis test," which is one of the tests from exemptions. If you are an exempt employee, you have to be paid a guaranteed salary, regardless of the number of hours you work a week. So the quid pro quo here is that an exempt employee does not receive overtime for working over 40, but they also do not receive less pay for working under 30. So unlike an hourly employee who is only paid for the hours you work, if you need to go home early to deal with a family issue, to go to a child's sporting event, you can leave, and your employer cannot dock your salary. You are going to get that same guarantee week in and week out, and that is very valuable and valued by exempt employees.

Senator SCOTT. The assignment of duties concerns me as well because when you look at a small business owner like I was, five employees, my managers had to do some work that perhaps they would not have had to do if we were—in our busy season, everyone worked a little harder. When it was slower, you had more flexibility. And you went to more soccer games, you went to more dental appointments, and you still got paid the same amount.

I think that when you look at the impact of the assignment of duties and the impact this rule will have on the classification, you will really have many people making the decision it is just not worth it. So the reclassification process will be expensive. The employers will have to bear more costs. The employees will have fewer dollars to take home because they will be working fewer hours.

Ms. MCCUTCHEN. Absolutely. In fact, some of our panelists in their written comments basically said reclassification is like flipping a switch; it takes only minutes. And I say that is hogwash. And those people have never actually helped an employer reclassify. I have—dozens and dozens and dozens. It is at least a 6-month process, and it requires a tremendous amount of decisions. You do not just flip a switch and say, hey, somebody is going to be hourly. You have to figure out: Are they going to be hourly or salaried? How much is the hourly rate going to be? Am I going to continue to pay benefits or not? Do I have to change my benefit plans because their eligibility provisions say only exempt employees?

Then you have to think about are you going to give people—changing your policies, right? All of a sudden, you have to pay these people for travel time, for time they spend on their emails and on their smartphones after work. So you have to look at all of your policies. You might have to reprogram your timekeeping systems and your payroll system.

It is a huge and complex process, which the Department of Labor thinks is going to take an hour.

Senator SCOTT. Hogwash?

Ms. MCCUTCHEN. Hogwash.

Senator SCOTT. There has been some confusion from listening to all of the comments on the impact that this rule will have on nonprofits. On the one hand, you hear from Ms. Duncan's organization, you hear from the Red Cross, the YMCA, expressing very serious concerns about a drastic and abrupt increase in the threshold.

At the same time, on the other hand, there have been some reports that many nonprofits are not covered by the FLSA and will not be impacted by the change. I was hoping, as a former Wage and Hour Administrator, you might be able to provide some clarity on this issue.

Ms. MCCUTCHEN. Well, the challenge for nonprofits is they do not generate revenue from selling, right? So you hear about people from the Fight For $15 and other things. Do not worry. For-profit companies, all they have to do is raise their prices. But, unfortunately, with nonprofits, they do not have that option. They operate on Government funding and donations.

I was talking to Ms. Duncan earlier today, and she said, you know, their 2017 budget is already done. They have no more money. And that is why she is contemplating cutting benefits.

And in Ms. Gupta's written comments, and what she said today, well, we just ask states for higher reimbursement rates for Medicaid. Really? Is that going to happen? What is the reality that nonprofit disability service providers are going to get increased reimbursement rates in order to increase the money they have to pay their employees? It is not going to happen.

Senator SCOTT. I am out of time.

Chairman VITTER. Okay. Thank you.

As I turn to Senator Cardin, I am going to ask Senator Scott to take the chair so I can vote relatively early on the floor and come back immediately so we do not have to interrupt this hearing for the floor vote.

Senator Cardin.

Senator CARDIN. Well, thank you, Mr. Chairman. And I just really wanted to come by to show my support for this hearing. I think it is important that the Small Business Committee is holding a hearing on the impact of regulations, particularly as it relates to small companies. I know that we have gotten a little bit of drift from just small companies, but I think there is—I was listening to Senator Heitkamp, and I agree with much of what she said.

Here is the challenge. The challenge is that we have a growing economy, but not everyone has been able to benefit by the growing economy. And Congress has taken little initiative to deal with some of the fundamental issues that would allow for the mobility that you were referring to from the restaurant work that you did. You need to have access to affordable higher education. You need to have protection as far as being able to work the hours that allow you to be able to do that. You have got to deal with potential abuses within the workforce. And those are some of the issues that we need to deal with. We need a Tax Code that provides an incentive for you to be able to benefit from your own skills.

And I do not begrudge the Administration trying to deal with these issues, and the overtime rule is one of those examples to try to deal with it. And, yes, we can talk about how they draw the line and whether it is done right or wrong. And I agree with Senator

Heitkamp that we need to have an open process, and I very much welcome the comments that have been made here today.

But the bottom line is that Congress has not really been as definitive as they need to be in some of these workforce issues. We are the legislative branch of Government. We are the ones who should be trying to come to a consensus here. But instead it looks like we are not working towards that type of consensus. And, Senator Scott, I applaud your efforts trying to reach out across party lines to get some of these issues resolved.

Senator SCOTT. Yes, Senator.

Senator CARDIN. So I look forward to the discussion. I do think, though, that we have to deal with some of the points that Senator Heitkamp mentioned, and that is the general frustration that is out there. We see that is very evident in this campaign cycle, and it is an area that I think this Congress needs to deal with.

I thank you all for being here.

Mr. EISENBREY. Senator, could I just answer a couple of things that have been said to try and correct the record on a couple of things?

Senator CARDIN. I would be glad to let you do that. I have 2 minutes left.

Mr. EISENBREY. Okay. The notion that somehow this is a change in how we deal with local areas, Senator Heitkamp is exactly right. We looked all across the country, including Louisiana. There is no place where you can earn an executive salary at less than the level that the Department of Labor suggested because a basic family budget is, as she said, close to $50,000 everywhere in the country.

But the fact is that all the Department did was try to restore what we used to have in this country, which was a rule that said most salaried workers are entitled to overtime pay, and that was the rule from 1938 until 1975, and we lost sight of that. That 50 percent, big deal that 50 percent of salaried employees would be covered by the rule in Louisiana. It used to be 60 percent nationwide.

So we are just trying to get back—the Department is moving us not all the way back to where we were. This is not even a full inflation adjustment.

Senator CARDIN. I agree with that point. The point I was trying to raise is that if Congress through the Tax Code, the Earned Income Tax Credit, through the Child Tax Credit, we could strengthen the ability of families to be able to have the budget they need. So it is not just working through the executive branch. Congress also needs to be paying attention.

Mr. EISENBREY. Absolutely.

Senator SCOTT [presiding]. Senator Rubio.

Senator RUBIO. Thank you.

Ms. Duncan, one of the overlooked downsides of this regulation is the effect that it is having on nonprofits. In Florida I have had a number of important communities—we have an important community of nonprofits, and I have had a number of them, care providers for children and adults with developmental disorders, that are telling us they would be forced to relocate current patients and would have to reduce the number of the disabled that they take in

their doors. This rule is most disruptive for the patients that depend on these services.

So in your testimony, you state that the flexibility of your employees is key to your ability to help the population you serve. In the nonprofit sector, rigid corporate schedules do not always apply to people who choose to work for your organization out of their desire to help people, not just for a salary.

How key is pay flexibility to the kinds of people that you employ? And, therefore, what impact will this have?

Ms. DUNCAN. For pay flexibility or hour flexibility?

Senator RUBIO. Both, but hours especially.

Ms. DUNCAN. We are a global organization in over 60 countries around the world, and many of our employees are working with individuals at these foundations, and so the ability to have a conference call with China, almost 12 hours ahead of us, is key to be responsive to the needs they have at the time instead of waiting 12—by the time we have come in to work 12 hours later. And while we could still consider that time and pay overtime, it certainly provides quite a burden to constantly have to figure out how we do that, how we clock in, how we count those hours.

So I think that flexibility—I think most of our employees are professionals. I would say over 90 percent have college degrees and are on a professional track. And really even the motivation or the desire to be in that more professional position, I think it would be very de-motivating if they had to turn around and now all of a sudden be considered either nonexempt or the impact of us meeting the salary requirements.

As I stated, we have come a long way. I think traditionally there was an idea that, hey, we are doing great work so you should feel good at the end of the day and we can pay you nothing. We have come a long way since then, and many nonprofits are very competitive salary-wise. And the responsibility that our folks have is huge, and they need the flexibility to get that work done without asking permission.

Senator RUBIO. But just based on what you said, the implementation of this rule as currently anticipated would be deeply disruptive to work schedules and the ability to provide services. At least that has been the testimony we have gotten from multiple nonprofits throughout Florida, and I would imagine—from your testimony, I gather you are saying that would be as well.

Ms. DUNCAN. Yes, because we would have to, you know, from a financial standpoint look at how we cover the cost of any increases if we increase salaries, so that is fewer surgeries because our fiscal year budget is already done, and unless a donor comes up and says, "Okay, here, I am going to fund your changes," which is most likely not going to happen in the next month, so we would have to reduce the number of surgeries that we are providing. Or we would have to look at, alternatively from offering the jobs in-country, coming up with a way to hire in-country candidates, which would not be the level of—we like the training and the corporate environment of having people here at our headquarters.

Senator SCOTT. Thanks, Senator Rubio.

One more question, from me at least, for Ms. McCutchen. Can you talk about the practical implications of the automatic increases?

Ms. MCCUTCHEN. Well, the practical application is in the past there have been changes to these regulations, salary increases generally every 5 to 9 years, duties test changes less often. But every time there is a change, an employer has to do an analysis. Which employees can still be exempt? And which one of them do I need to reclassify? And then for the ones they are going to reclassify, they go through what in my experience is a 6-month process to implement that reclassification.

Imagine having to do that every single year. No employer today—actually, one employer that I know of today does—reviews on an annual basis their exemptions. So that is something totally new. It is going to have a lot of costs and a lot of time, and costs, by the way, which the Department of Labor has not analyzed whatsoever in their proposal. They only analyzed first-year costs, not taking into account that this is—with the annual increases, this is going to happen every single year. You are going to have the same problems, the same decisions, the same issues with: Do I reduce my employees? Do I reduce my surgeries? How am I going to pay for it?

Senator SCOTT. Thank you.

Mr. Mantilla, businesses in South Carolina, certainly restaurant businesses in South Carolina, the goal is always to move from where you start, perhaps washing dishes and cleaning tables, to being in a position where you are in management and then perhaps ownership one day. It appears to me that the pipeline of opportunities starts to vanish as we see more and more red tape from the Federal Government. Your competition no longer is simply other businesses, other restaurants, but the oppression sometimes it feels like that comes from the red tape in Government also creates a competitive disadvantage from my perspective.

Mr. MANTILLA. It does.

Senator SCOTT. Could you talk about that a little bit?

Mr. MANTILLA. Yeah, especially in our industry, entry-level jobs, management jobs, when you go from—and, remember, the restaurant industry is an industry where you do not even have to have advanced degrees to be an owner, to be an entrepreneur, to reach the American Dream. You can be a waiter and take that entry-level position, which probably pays less while you are waiting tables at $38,000 a year on average, and get on-the-job training on managing, on timekeeping, on labor costs, on food costs. And you are doing that. You do that because you want the opportunity to be able to move on.

Once you increase the level to a point that restaurants cannot afford to pay $50,000 a year for entry level, what happens is we have less of those jobs. That is what is going to happen to my restaurants. We cannot bring in an entry-level, which that person wants the opportunity to come in at $38,000 a year and do on-the-job training so that they can own their own restaurant or they can move into management or they can move up to a managing partner or it can be a profit-sharing manager, and it leads to further

growth. Well, if that opportunity, that middle level, is gone, then, yes, there are no more opportunities.

Senator SCOTT. Yes. Thank you very much. There is one thing for certain. Our economy is growing at an anemic rate. I think it was 0.5 for the first quarter. There are at least 6 million people who are involuntarily working part-time because of the absolute oppressive environment that we have in this country from Government red tape.

I think this has been a fairly informative hearing. Thank you all for your participation, and we look forward to working with Committee members to find additional ways to protect small businesses and ensure their voice is heard in the Federal rulemaking process.

This hearing is now adjourned. Thank you.

[Whereupon, at 10:40 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

Opening Statement by Senator Jeanne Shaheen:
"An Examination of the Administration's Overtime Rule and the Rising Costs of Doing Business"
Senate Committee on Small Business and Entrepreneurship
May 11, 2016

Thank you, Chairman Vitter. I want to start by noting that in the Senate Armed Services Committee, of which I am a Member, we are debating and voting on the National Defense Authorization Act all day. As a result, I am unable to stay at this hearing. But I do want to thank all of our witnesses for participating this morning.

The Fair Labor Standards Act was enacted in the midst of the Great Depression to provide greater protections for workers and to prevent unfair employment practices that could have a stifling economic effect on the economy. This law established the standard 40-hour American workweek, and ensured that employees receive overtime compensation for hours worked in excess of that standard.

However, the strength of the rules that govern which workers are eligible for overtime pay have eroded over the last forty years, and as a result, far too many Americans are working harder and harder for less and less pay. In fact, in the mid-1970s, 62 percent of salaried workers were eligible for overtime pay. In 2013, that number had fallen to just 8 percent.

The Fair Labor Standards Act's overtime protections are a linchpin of the middle class. The failure to keep the salary level requirement up-to-date has left millions of salaried workers without this basic protection. In America, we pride ourselves on the principle that hard work pays off, and I think we can all agree that when workers put in extra time on the job, they should be paid fairly for it.

The Department of Labor's proposal to strengthen overtime protections will increase wages and economic security for nearly 5 million workers across the country in its first year of implementation. In my home state of New Hampshire alone, it is expected to help 20,000 workers. This wide-reaching effect will in turn strengthen our economy by increasing consumer spending and encouraging employers to create additional jobs.

Despite, the potential positive economic gains of this rule, there is concern about its impact on a number industries and the compliance costs on small businesses in particular. I am confident that this hearing will help us gauge the true costs of the rule on small businesses and determine how the Administration can best move forward with its implementation.

I appreciate the time and expertise of all our witnesses today. I would particularly like to welcome Ms. Sarita Gupta, the Executive Director of Jobs with Justice. Ms. Gupta is a nationally recognized expert on the economic, labor and political issues affecting working people across all industries, particularly women and those employed in low-wage sectors. We are grateful that she is able to bring the voice of the millions of affected of workers to this discussion.

I'd also like to welcome Mr. Ross Eisenbrey, the Vice-President of the Economic Policy Institute. Mr. Eisenbrey is a lawyer specializing in labor and employment law and is also a former commissioner of the U.S. Occupational Safety and Health Review Commission. Prior to joining EPI, he worked for many years in the U.S. House of Representatives and served as policy director of the Occupational Safety and Health Administration from 1999 until 2001.

I want to thank them both for joining us today and I look forward to hearing from all of our witnesses. Thank you, Mr. Chairman.

American Bankers Association
Building Success. Together.

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May 10, 2016

Chairman David Vitter
Committee on Small Business & Entrepreneurship
U.S. Senate
428A Russell Senate Office Building
Washington, DC 20510

Ranking Member Jeanne Shaheen
Committee on Small Business & Entrepreneurship
U.S. Senate
428A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Vitter and Ranking Member Shaheen:

The American Bankers Association (ABA) writes to thank you for holding today's hearing on the Department of Labor's (DOL) proposed regulation amending the exemptions for executive, administrative, professional, outside sales, and computer employees (the "EAP exemptions" or "white collar exemptions"). ABA's members, many of whom are community banks, believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

On June 30, 2015, DOL proposed increasing the overtime threshold to $50,440 per year, a 113 percent increase that would occur all at once in 2016, and in all areas of the country regardless of significant regional economic differences. The Department also proposed automatically increasing the salary threshold on an annual basis. While DOL did not offer a specific proposal to modify the standard duties tests, the Department suggested it is considering adding a requirement to quantify how much time employees spend performing their primary duties.

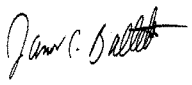
Because, contrary to past practice, DOL did not calculate its proposed salary threshold (or attendant annual increases) to address the dramatic differences in the cost of living through the country, our members that provide banking services in such areas will be significantly impacted by this "one-size-fits-all" rule. In our comment letter to DOL on the proposal, ABA cited a number of instances in southern states where, for example, the annual per capita income ranges from approximately $13,945 annually to $33,170. While bank employees generally earn good salaries based on their local cost of living, these statistics demonstrate the drastic impact of the proposed salary thresholds on banks serving these communities. ABA and a number of our members participated in Roundtables held by the Small Business Administration Office of Advocacy with DOL staff to provide input on the impact of the proposal and the need to consider less harmful alternatives. We further met with OMB to again detail our concerns with the proposal and the need to lower the proposed salary threshold.

The Secretary of Labor has responded to questions posed by Members of Congress about these concerns by stating that the Department met with these stakeholders and heard their concerns prior to issuing the proposed rule; however, the proposed regulation does not reflect that input with respect to the salary threshold level and automatic annual updates. Recent press reports that the Department is considering lowering the overtime threshold from $50,440 to $47,000 confirm that DOL is not taking seriously the public's concerns with its proposal. This is still a 99 percent increase in the salary threshold and represents a token reduction that will not alleviate the harm this rule will do to community banks and their employees. Based on this information and statements made by Department officials, it is clear the Secretary is not willing to reconsider the rule in a meaningful way without Congressional action.

Accordingly, we urge all the members of the Small Business and Entrepreneurship Committee to support S. 2707, the *Protecting Workplace Advancement and Opportunity Act.* S. 2707 would nullify the proposed rule and require the Labor Department to conduct a detailed economic analysis before making dramatic changes to federal overtime pay requirements.

Thank you for convening today's hearing and for the opportunity to submit this letter for the record.

Sincerely,



James C. Ballentine

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May 11, 2016

The Honorable David Vitter
Committee on Small Business and Entrepreneurship
516 Hart Senate Office Building
Washington, DC 20510

The Honorable Jeanne Shaheen
Committee on Small Business and Entrepreneurship
506 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Vitter and Ranking Member Shaheen:

On behalf of the Credit Union National Association (CUNA), I am writing to thank you for holding today's hearing, "An Examination of the Administration's Overtime Rule and the Rising Cost of Doing Business." CUNA represents America's state and federal credit unions and their more than 100 million members.

CUNA has continually expressed concerns with the Department of Labor's (DOL) proposed changes to the Fair Labor Standards Act (FLSA) to increase the threshold to be eligible for overtime pay by more than twice the current rate, since it was proposed last summer. The proposed changes would disproportionately impact credit unions in rural and underserved areas, as well as small credit unions. Additionally, the rule has the potential to negatively impact credit union members if credit unions are forced to limit services as a result of changed employment situations, or the inability to hire full-time employees.

The DOL's rule as proposed will magnify the challenges credit unions are already facing as a result of an unprecedented amount of regulatory burden. In the United States, there are approximately 2,700 credit unions with five or fewer employers, nearly 3,000 with less than $20 million in assets, and approximately 4,000 with less than $50 million in assets. Notably, 35 percent of all credit unions have no employees making salaries over the DOL's proposed threshold. In certain areas, and at credit unions with smaller asset sizes, even Chief Executive Officers (CEO) can make below the proposed threshold or $50,000. To illustrate the massive impact this rule will have on credit union operations it is important to understand that among credit unions with less than $10 million in assets, almost all CEOs make less than $50,000 and among those with $10 to $20 million in assets, roughly half of CEOs make less than $50,000. Approximately, 46% of all credit union CEOs work at credit unions with $20 million or less in total assets.

CUNA has supported S. 2707, the "Protecting Workplace Advancement and Opportunity Act," which we believe takes proper steps to require additional analysis about the rule's impact on businesses and consumers before moving forward with a final rule. This legislation would appropriately require the DOL to more fully assess the severe impact of this rule, particularly on small credit unions.

We are greatly concerned about the detrimental consequences the DOL's rule could have for small credit unions, as well as for larger credit unions, who also are more susceptible to suffer as a result of regulatory burdens than the largest financial institutions. Attached please find CUNA's comment letter, which further outlines our concerns with the DOL's proposed rule concerning overtime pay, as it pertains to credit unions.

On behalf of America's credit unions, thank you again for holding this hearing. We look forward to continuing to work with you as this legislation moves forward, and appreciate your efforts to find meaningful regulatory relief for credit unions and their members.

Sincerely,

Jim Nussle
President & CEO

Attachment

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Credit Union National Association

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Submitted via: Regulations.gov

September 1, 2015

Ms. Mary Ziegler
Director
Division of Regulations, Legislation, and Interpretation, Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

RE: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees - RIN 1235-AA11

Dear Ms. Ziegler:

The Credit Union National Association (CUNA) appreciates the opportunity to comment on the U.S. Department of Labor's (DOL) proposed rule, which amends the Fair Labor Standards Act (FLSA) to increase the threshold salary level for "white collar" employees to the 40th percentile of earnings for full-time salaried workers to receive overtime pay. While the intent of the proposed rule is understandable, CUNA has several concerns about the changes to raise the salary threshold from $455 a week ($23,660 a year) to a projected level of $970 a week ($50,440 a year) in 2016 and to establish a mechanism for automatically updating the minimum salary and compensation levels.

CUNA represents America's credit unions and their more than 100 million members. Credit unions are member-owned, not-for-profit financial cooperatives that operate for the purpose of promoting thrift, providing credit at competitive rates, and providing other financial services to their member-owners. As the only consumer-owned cooperatives in the financial marketplace, credit unions have a tradition of protecting the interests of American middle-class families. This includes empowering middle-class families with opportunities, increased chances for financial success, and the ability to improve their economic well-being. Additionally, as consumer-owned cooperatives, credit unions are unique in that personnel and other factors affecting a credit union's bottom line can affect credit union members directly as well. This can be particularly true in the case of smaller credit unions.

CUNA supports the DOL's concept that employees should be fairly compensated, and works to provide programs and education to help credit unions develop a positive culture that ensures opportunities for growth and development among their employees. Despite good intentions, we believe the DOL's proposed changes for the exemption threshold for overtime pay are too extreme and will ultimately not achieve a better situation for many employees. Increasing the threshold for overtime pay by more than twice the previous threshold does not accurately reflect the proportional change in salaries since the last rulemaking. Furthermore, in the case of credit

unions, the rule does not consider the difficult regulatory environment that has increased costs in other areas exponentially over the past few years. Accordingly, it would be extremely difficult for credit unions to find the extra resources to come into compliance with this rule, as opposed to if the DOL took a more incremental and measured approach to modifying the standards.

CUNA also has concerns that this overly broad proposed rule, which sweeps in nearly 5 million more people and thousands of credit union employees, will have unintended consequences. Ultimately, it could negatively affect many credit unions, their members, and their employees—even those within the salary range the increase aims to help. Particularly, it could cause problems for credit unions outside of large metropolitan areas where the average salary is significantly different from the average salary at the national level, which the DOL has relied on.

A Disproportionate Percentage of Credit Union Jobs Fall within the Threshold

A substantial percentage of credit union employees, specifically employees of smaller credit unions and those in rural or underserved areas fall into the salary threshold to be eligible for overtime pay under the new proposed rule. Some CUNA member credit unions have commented that approximately 80 percent of their employees' salaries will fall within the threshold. According to CUNA's Staff Salary Report from 2015 to 2016, in certain areas and at credit unions with smaller asset sizes even Chief Executive Officers (CEO) can make below $50,000.[1] Among credit unions with less than $10 million in assets, almost all CEOs make less than $50,000. Among those with $10 to $20 million in assets, roughly half of CEOs make less than $50,000. **Importantly 46% of all credit union CEOs work at credit unions with $20 million or less in total assets.** *See chart below from the report.*

Table 1-1
President/CEO/Manager Salaries

		N	Average	25th percentile	Median	75th percentile	90th percentile
Overall		809	$108,933	$55,800	$78,551	$120,000	$225,000
By asset size	$1M-$2M	11	$37,355	$28,800	$35,040	$48,000	$52,432
	$2M to $5M	61	$40,388	$35,000	$39,552	$45,000	$52,395
	$5M to $10M	98	$52,604	$45,000	$51,500	$60,000	$68,000
	$10M to $20M	114	$60,952	$52,581	$60,000	$68,000	$78,000
	$20M to $50M	160	$82,335	$68,879	$81,850	$94,840	$108,081
	$50M to $100M	111	$109,560	$91,960	$107,000	$124,582	$146,000
	$100M to $200M	86	$144,277	$122,000	$141,750	$160,000	$189,747
	$200M to $500M	67	$226,217	$189,068	$224,047	$267,020	$298,998
	$500M to $1B	40	$331,567	$280,000	$325,047	$350,500	$435,810
	$1B to $3B	34	$420,867	$375,000	$444,560	$480,000	$500,000
	$3B+	7	$501,002	$445,004	$528,047	$539,976	$571,215

[1] Haller, J., Dey-Marcos, C., Malla, B., *CUNA Staff Salary Report 2014-2015*, available at http://www.cuna.org/Research-And-Strategy/Products/2015-2016-CUNA-Staff-Salary-Report-(PDF) (March 5, 2015).

The average/mean base salaries for all of the following positions in CUNA's report fall around or below the threshold level:

> *Teller Manager/Supervisor; Share Draft Manager; Member Service Representative; Member Service Representative; Head Teller; Teller; Share Draft Clerk; EFT/ACH Clerk; Executive Secretary/Admin. Asst.; Secretary; Receptionist; New Accounts Clerk; General Office Clerk; IRA/Certificate Specialist; Small Credit Union Generalist; Loan Officer; Loan Processor; Loan Clerk; Consumer Loan Officer; Consumer Loan Processor/Clerk; Mortgage Loan Officer; Mortgage Loan Processor; Collector; Collection Clerk; Plastic Card Clerk; ATM Specialist; Technology Specialist; Data Entry Specialist; Marketing Specialist; Marketing/Communications Coordinator; Marketing Assistant; Business Development Representative; Risk Management Officer/Specialist; Non-Management Accountant; Accounting Clerk; Assistant Branch Manager; and Call Center Representative.*

Furthermore, approximately 35% of all credit unions in the United States have no employees that make over $50,000. It is clear that a sizeable number of credit union employees' salary ranges fall right within the new threshold, which will magnify the cost burdens and time constraints credit unions are already facing for compliance. Ultimately, this rule could create the dichotomy that credit unions whose mission it is to serve the same segment of workers included in this rule, could be disproportionally burdened by the rule and unable to maintain the equivalent level of service to this same part of the American workforce.

The Proposed Rule Does Not Account for Credit Unions with Different Asset Sizes and Regional Differences

Credit union employee salaries vary greatly depending on their asset size, the region of the country they are located in, the number of employees, the number of services offered, the number of members, and the number of branches. Setting one salary threshold for the entire country overlooks the fact that the cost of living throughout the country varies, and salaries in different regions vary to reflect that. The federal government appears to understand this in many other situations, but overlooks this reality in the DOL's proposed rule. For example, the pay table for federal employees' salaries vary depending on what state the job is located in and what the cost of living is in that area according to the General Schedule pay scale. Yet, the proposed rule has a single threshold as a floor for the entire country.

The average salary in rural and underserved areas is considerably lower than the national average. In fact, the Administration has made this observation itself in a report from the Council of Economic Advisers entitled, "Strengthening the Rural Economy - The Current State of Rural America."[2] This report states that, "On average, rural residents have notably lower incomes than urban residents . . . while the rural poverty rate decreased sizably between 1979 and 1999, the

[2] The Council of Economic Advisers, *Strengthening the Rural Economy - The Current State of Rural America*, available at https://www.whitehouse.gov/administration/eop/cea/factsheets-reports/strengthening-the-rural-economy/the-current-state-of-rural-america (2010).

average rural county posts poverty rates at least several percentage points above those observed in urban counties. Note that the cost of living is higher in urban areas and ideal measures of income and poverty would adjust for these differences."[3] As such, even the Administration who has supported the DOL's proposed rule must understand that this rule will have a disproportional impact on credit unions serving rural areas.

Notably, other federal agencies have recognized the need to make exceptions during rulemaking for financial institutions in rural or underserved areas. For example, as part of section 1022 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, when prescribing a rule under the federal consumer financial laws, the Consumer Financial Protection Bureau (CFPB) must consider the impact of proposed rules on consumers in rural areas. An example of modifications made for small creditors in rural and underserved areas can be found in a recent proposal from the CFPB concerning mortgage-lending rules released in January 2015.[4]

There is also precedent for exempting smaller businesses from federal rules that will have a disproportionate impact on them. For example, the mandatory leave provisions of the Family and Medical Leave Act of 1993 do not apply to employers with under 50 employees. As of March 2015, there are approximately 2,700 credit unions with five or fewer employers, nearly 3,000 with less than $20 million in assets, and approximately 4,000 with less than $50 million in assets.

Another law, the Regulatory Flexibility Act of 1980 (RFA) requires federal agencies to evaluate the impacts of their proposed regulations on small entities, analyze effective alternatives that minimize impacts on small businesses, and make these assessments available for public comment. The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, which amended the RFA, requires the CFPB to convene a Small Business Review panel if it engages in a rulemaking that will affect a substantial number of small entities. The CFPB has held several SBREFA panels that included participation from credit unions with under $550 million in assets. During these panels, credit unions have made persuasive arguments about why sweeping new federal rules are often inappropriate for smaller credit unions. CUNA encourages the DOL to engage in a similar analysis of the impact their rule may have on credit unions with under $550 million in assets.

It is clear that credit unions and other businesses in non-metropolitan areas would be unfairly burdened by the proposed rule, and would have to pay overtime to a much larger percentage, or maybe even all, of their workforce. Similarly, smaller credit unions who may have fewer members and less revenue may not be in the same position to pay the same salaries as larger financial institutions. CUNA asks that the DOL consider these distinctions and reevaluate its proposed salary threshold for overtime, which arguably is not appropriate for credit union employees in general, but may be particularly inappropriate for small credit unions and those in rural and underserved areas.

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[3] *Id.*

[4] The Consumer Financial Protection Bureau, "CFPB Issues Proposal To Facilitate Access To Credit In Rural And Underserved Areas," available at http://www.consumerfinance.gov/newsroom/cfpb-issues-proposal-to-facilitate-access-to-credit-in-rural-and-underserved-areas/ (January 29, 2015).

Credit Union Employees Could Be Negatively Impacted by Unintended Consequences of the Rule

If a credit union cannot afford to increase salaries, some employees even at the management level might have to change their employment status from exempt to non-exempt. Since those in management often work over 40 hours a week this could make overtime costs increase exponentially. One credit union commented to CUNA that it might have to raise the salaries of some employees, even some at the management level, by as much as $10,000 in order for the employees to remain exempt. Employees particularly at the management level could see a change in status to non-exempt as a demotion, and this could create bad morale. Additionally, if for example, one level of employees received a $10,000 increase in salary to remain exempt, and the level of employees right above them received no increase in compensation because they are already at the exempt level, this could allow for an uneven playing field by creating similar salaries for jobs with different levels of responsibility and difficulty.

There are also several other likely results of this proposed rule, which could negatively affect credit union employees that may not be as readily apparent. If employees change to a non-exempt status, scheduling for time off and other purposes could be less flexible. Employees may have to make specific arrangements for leave, or potentially take unpaid leave, as opposed to a more flexible current situation for time off as described by some credit unions. Employers may also be forced to create strict rules for overtime pay, and lower-income employees who currently rely on it may not have as many opportunities to receive it.

Employee benefits may also be subject to negative change if it is necessary to realign costs. If credit unions are forced to increase salaries or pay significantly more in overtime hours, this could force them to reconsider some of the benefits or "perks" that they currently offer. Moreover, some beneficial opportunities are only available during off work hours, which may require overtime under the new rules. For example, networking events, conferences, and other opportunities for employees to meet people in their industry or managers might fall outside of normal work hours. If employers have to pay employees overtime for these work events, they may be forced to not be as inclusive in these activities. Employers who have unexpected expenses as a result of this rule, and who have to pay employees more, may also be unable to hire new employees, or they may convert full-time positions to part-time.

Credit unions are currently facing substantial regulatory burdens from several other agencies as well, and their time and resources dedicated to complying with new rules and regulations are not unlimited. Squeezing resources from entities that simply have nothing left to squeeze is not the answer to creating growth and opportunity for employees. Instead, such policies will likely cause credit unions and other businesses to make cuts in other equally important areas to find the resources to pay overtime expenses.

Credit Union Members May Also Be Negatively Impacted

Changes to the number of hours that employees work or the size of a credit union staff would ultimately affect credit union members as well. It is not always easy for credit union members to visit a branch during regular business hours when they are at their own jobs. Limiting credit

union employees to only working 40 hours a week may make it more difficult to keep branches open during convenient times for working families. If credit unions have to close on weekends or have shorter hours, this could affect the ability of members to receive service.

Credit unions that have to limit work hours for their employees may offer fewer products and services, and focus only on the basic needs of members. This may impede efforts to expand credit union products or service offerings, and inhibit innovation. Credit unions may be stuck navigating how to operate in the same way at a higher cost, without adding any additional value to members.

The Duties Test Should Not Be Changed Without Providing Additional Details for Public Comment

In the proposed rule, the DOL states it is considering whether revisions to the duties tests are necessary in order to ensure these tests fully reflect the purpose of the exemption. However, the proposed rule includes no information about what changes the DOL is considering. In the absence of providing specific information for the public to consider and comment on, the DOL should not make any unilateral changes to the duties test.

Automatically Updating the Salary Level Is Problematic

CUNA opposes automatically updating the salary level at the 40th, or any, fixed percentile range. If the proposed rule is finalized in its current form, there is a concern that a number of employees in the $20,000 to $35,000 salary range could unfortunately be moved to part-time status at businesses throughout the country. As such, the average yearly salary could drastically increase, at least on paper, and the 40th percentile, not including all of the part-time workers, may end up much higher than the $50,000 range. As highlighted in our comments, there are already many concerns with this proposed range and an artificially inflated increased threshold would only compound the challenges CUNA has outlined.

In general, we believe the changing economy should be revaluated each year in a more analytical way than merely looking at a fixed percentile of the entire country to determine a threshold. An arbitrary threshold could be extremely problematic if it does not account for all of the other factors that contribute to changes to the economy and workforce each year. Furthermore, as previously noted, we believe any threshold must include a further analysis that examines the impact on rural and underserved areas, and small businesses.

Finally, we are concerned that employers will have inadequate notice about what the new threshold is each year if the salary level is automatically updated. The proposal states that the new threshold would be published annually giving the public 60 days-notice. This short time frame would be very difficult for credit unions to comply with, and would likely not provide enough notice to make appropriate changes.

Conclusion

CUNA appreciates the DOL's attempt to take steps to improve the livelihood of American middle-class families, a cause that credit unions have long supported. However, we believe the DOL's proposed rule overlooks a number of important factors such as a disproportionate impact on credit unions, particularly in non-metropolitan areas, and small credit unions. Furthermore, the DOL's proposal does not account for unintended negative consequences on employees both within and outside the salary range to receive overtime pay. In addition, it has the potential to negatively impact credit union members.

As a result of these insufficiencies, we believe it is necessary for the DOL to engage in further analysis about the likely impacts of its proposed rule, and to more narrowly tailor its proposal for overtime pay to include a more reasonable percentage of the workforce that does not include entire industries or entire regions of the country.

Thank you for the opportunity to comment on this proposed rule. If you have any questions concerning our letter, please feel free to contact me.

Sincerely,

Leah Dempsey
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PARTNERSHIP TO PROTECT

WORKPLACE OPPORTUNITY

May 11, 2016

Chairman David Vitter
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Ranking Member Jeanne Shaheen
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Washington, DC 20510

Dear Chairman Vitter and Ranking Member Shaheen:

On behalf of the Partnership to Protect Workplace Opportunity (the Partnership), we thank you for holding today's hearing on the Department of Labor's proposed regulation amending the exemptions for executive, administrative, professional, outside sales, and computer employees (the "EAP exemptions" or "white collar exemptions"). The Partnership consists of a diverse group of associations and companies, representing employers with millions of employees across the country in almost every industry (see http://protectingopportunity.org/about-ppwo/). The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

On June 30, 2015, DOL proposed increasing the overtime threshold to $50,440 per year, a 113% increase that would occur all at once in 2016, and in all areas of the country regardless of significant regional economic differences. The Department also proposed automatically increasing the salary threshold on an annual basis. While DOL did not offer a specific proposal to modify the standard duties tests, the Department suggested it is considering adding an unworkable requirement to quantify how much time employees spend performing their primary duties.

While an increase to the salary threshold is due, DOL's proposed rule has been met with widespread opposition from tens of thousands small and large businesses, nonprofits, local governments, academic institutions, and President Obama's own Small Business Administration Office of Advocacy – all of which have asked the Labor Department to examine more closely the impact of the drastic and immediate increase and consider less harmful alternatives. Comments and letters have been sent from organizations around the county asking the Department, the Administration and Members of Congress to rethink this rule (we provide samples in the attached document, which includes comments from those in committee member's states).

The Secretary of Labor has responded to questions posed by Members of Congress about these concerns by stating that the Department met with these stakeholders and heard their input prior to issuing the proposed rule; however, the proposed regulation clearly does not reflect that input with respect to the salary threshold or automatic updates.

Recent press reports that the Department is considering lowering the overtime threshold from $50,440 to $47,000 confirm that the DOL is not taking seriously the public's concerns with its proposal. This is still a 99% increase in the salary threshold and represents a token reduction that will not alleviate the harm this rule will do to nonprofits, colleges, and small businesses and their employees. Moreover, the fact that this reported reduction was leaked after OMB held more than 40 listening sessions with concerned stakeholders requesting that the rule be comprehensively reevaluated makes clear that the Secretary is not willing to reconsider the rule in a meaningful way without Congressional action.

Accordingly, we urge all the members of the Small Business and Entrepreneurship Committee to cosponsor S. 2707, the *Protecting Workplace Advancement and Opportunity Act,* which would require the Labor Department to conduct a detailed economic analysis before making dramatic changes to federal overtime pay requirements. In essence, the bill requires the Department to move forward in a responsible rather than reckless manner. The legislation is supported by 340 national, regional, state, and local organizations representing nonprofits, institutions of higher education, schools, cities, counties and small and large businesses across the country (please see attached letter of support).

Thank you for convening today's hearing and for the opportunity to submit this letter for the record.

Sincerely,

The Partnership to Protect Workplace Opportunity

Protectingopportunity.org

PARTNERSHIP TO PROTECT

WORKPLACE OPPORTUNITY

April 18, 2016

Dear Senator:

On behalf of the Partnership to Protect Workplace Opportunity (the Partnership) and the undersigned 340 local and national organizations representing small and large businesses, nonprofits, institutions of higher education, schools, cities and counties, we write to ask that you cosponsor S. 2707, the *Protecting Workplace Advancement and Opportunity Act*. This important and reasonable legislation would require the U.S. Department of Labor to perform a detailed impact analysis prior to implementing changes to the exemptions for executive, administrative, and professional employees (the "white collar exemptions") under the Fair Labor Standard Act's overtime pay requirements.

The Partnership consists of a diverse group of associations, representing employers with millions of employees across the country in almost every industry (see http://protectingopportunity.org). The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees.

Currently, under the Fair Labor Standards Act (FLSA) regulations, a person must satisfy three criteria to qualify as exempt from federal overtime pay requirements: first, they must be paid on a salaried basis; second, that salary must be more than $455/week ($23,660 annually); and third, their "primary duties" must be consistent with managerial, professional or administrative positions as defined by the Department of Labor (DOL).

On June 30, 2015, DOL proposed increasing the salary threshold to $50,440 per year, a 113% increase that would occur all at once in 2016, and in all areas of the country regardless of significant regional economic differences. The Department also proposed automatically increasing the salary threshold on an annual basis. While DOL did not offer a specific proposal to modify the standard duties tests, the Department suggested it is considering adding an unworkable requirement to quantify how much time employees spend performing their primary duties.

While an increase to the salary threshold is due, DOL's proposed rule has been met with widespread opposition from small and large businesses, nonprofits, local governments, academic institutions, and President Obama's own Small Business Administration Office of Advocacy – all of which have asked the Labor Department to examine more closely the impact of the drastic and immediate increase and consider less harmful alternatives. The Secretary of Labor has responded to questions posed by Members of Congress about these concerns by stating that the Department met with these stakeholders and heard their concerns prior to issuing the rule; however, the proposed salary threshold clearly does not reflect that input. Based on these statements and others made by Department officials, it is clear the Secretary is not willing to reconsider the rule in a meaningful way without Congressional action.

S. 2707, the *Protecting Workplace Advancement and Opportunity Act,* would block the current proposed regulation from taking effect and require the Department of Labor to perform a deeper analysis on the impact of the proposed changes on small businesses, nonprofits, regional economies, local governments, Medicare and Medicaid dependent health care providers, and academic institutions, as well as employee flexibility and career advancement before proceeding with a new rule.

The *Protecting Workplace Advancement and Opportunity Act* is consistent with comments submitted by the Small Business Administration's Office of Advocacy, which noted that DOL's economic analysis severely underestimated the impact the proposed rule would have on small businesses, nonprofits, and small governmental jurisdictions. The comments also criticized the Department's analysis for not considering the impact the proposal would have on various regions of the country with different costs of living.

The bill does not prevent an increase in the salary threshold; it merely requires the Department of Labor to more closely examine the impact of possible changes before proceeding with a final rule. Accordingly, we urge you to cosponsor S. 2707, the *Protecting Workplace Advancement and Opportunity Act.*

Sincerely,

The Partnership to Protect Workplace Opportunity and the following organizations:

National Organizations
ACPA-College Student Educators International
Aeronautical Repair Station Association
Agricultural Retailers Association
American Apparel & Footwear Association
American Association of Advertising Agencies (4A's)
American Association of Collegiate Registrars and Admissions Officers
American Bakers Association
American Bankers Association
American Car Rental Association
American Concrete Pressure Pipe Association
American Council of Engineering Companies
American Frozen Food Institute
American Hotel & Lodging Association
American Institute of CPAs
American Insurance Association
American Moving & Storage Association
American Rental Association
American Society of Association Executives
American Society of Travel Agents
American Staffing Association
American Subcontractors Association, Inc.
American Supply Association
American Veterinary Distributors Association (AVDA)
AmericanHort
Argentum (formerly the Assisted Living Federation of America)
Asian American Hotel Owners Association

Associated Builders and Contractors
Associated Equipment Distributors
Association for Student Conduct Administration
Associated General Contractors
Association of American Veterinary Medical Colleges
Association of College and University Housing Officers-International
Association of School Business Officials International (ASBO)
Auto Care Association
Blue Roof Franchisee Association
Building Service Contractors Association International (BSCAI)
CAWA – Representing the Automotive Parts Industry
Coalition of Franchisee Associations
College and University Professional Association for Human Resources
Consumer Technologies Association
Convenience Distribution Association
Door Security and Safety Professionals
Electronic Transactions Association
Equipment Dealers Association (formerly the North American Equipment Dealers Association)
Financial Services Institute
Food Marketing Institute
Franchise Business Services
Gases and Welding Distributors Association
Global Cold Chain Alliance
Heating, Air-conditioning & Refrigeration Distributors International (HARDI)
HR Policy Association
INDA, Association of the Nonwoven Fabrics Industry
Independent Electrical Contractors
Independent Insurance Agents & Brokers of America
Independent Office Products and Furniture Dealers Association
Information Technology Alliance for Public Sector
International Association of Amusement Parks & Attractions
International Association of Refrigerated Warehouses
International Bottled Water Association
International Dairy Foods Association
International Foodservice Distributors Association
International Franchise Association
International Public Management Association for Human Resources
International Warehouse Logistics Association
IPC Association Connecting Electronics Industries
ISSA, the Worldwide Cleaning Industry Association
Metals Service Center Institute
Motor & Equipment Manufacturers Association
NAHAD – The Association for Hose & Accessories Distribution
NASPA – Student Affairs Administrators in Higher Education
National Apartment Association
National Association of Chemical Distributors
National Association of College and University Business Officers
National Association of College Stores
National Association of Convenience Stores
National Association of Development Organizations

National Association of Electrical Distributors
National Association of Home Builders
National Association of Landscape Professionals
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Professional Insurance Agents
National Association of Sporting Goods Wholesalers
National Association of Wholesaler-Distributors
National Beer Wholesalers Association
National Christmas Tree Association
National Club Association
National Council of Chain Restaurants
National Council of Farmer Cooperatives
National Fastener Distributors Association
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Insulation Association
National Lumber and Building Material Dealers Association
National Marine Distributors Association
National Multifamily Housing Council
National Newspaper Association
National Office Products Alliance
National Pest Management Association
National Public Employer Labor Relations Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National RV Dealers Association
National School Transportation Association
National Small Business Association
National Tooling and Machining Association
NATSO, Representing America's Travel Plazas and Truckstops
Newspaper Association of America
NIRSA: Leaders in Collegiate Recreation
North American Die Casting Association
NPES The Association for Suppliers of Printing, Publishing and Converting Technologies
Office Furniture Dealers Alliance
Outdoor Power Equipment and Engine Service Association
Pet Industry Distributors Association
Precision Machined Products Association
Precision Metalforming Association
Promotional Products Association International
Retail Industry Leaders Association
Secondary Materials and Recycled Textiles Association (SMART)
Selected Independent Funeral Homes
Service Station Dealers of America and Allied Trades
Small Business & Entrepreneurship Council
SNAC International

Society for Human Resource Management
Society of American Florists
Society of Independent Gasoline Marketers of America
SPI: The Plastics Industry Trade Association
Textile Care Allied Trades Association
Textile Rental Services Association
The Latino Coalition
Tire Industry Association
Truck Renting and Leasing Association
U.S. Chamber of Commerce
Water & Sewer Distributors of America
Wine & Spirits Wholesalers of America
WorldatWork

Regional, State, and Local Organizations
Alabama Chapter (CUPA-HR)
Alabama Restaurant & Hospitality Alliance
Alabama SHRM State Council
Alaska Hotel & Lodging Association
Alaska SHRM State Council
Alliance of Automotive Service Providers of Pennsylvania
American Society of Employers
Arizona Lodging & Tourism Association
Arizona SHRM State Council
Arkansas Hospitality Association
Arkansas SHRM State Council
Associated Builders & Contractors, Rocky Mountain Chapter
Associated Builders and Contractors - Virginia Chapter
Associated Builders and Contractors Heart of America Chapter
Associated Oregon Industries
Automotive Aftermarket Association of the Carolinas and Tennessee, Inc
Automotive Aftermarket Association Southeast
Automotive Parts & Services Association-Texas
Building Industry Association of Washington
California Hotel & Lodging Association
California Retailers Association
California State Council of SHRM
California, Nevada, Arizona Automotive Wholesalers Association
Capital Associated Industries (NC)
Carolinas Food Industry Council
Chesapeake Automotive Business Association
Colorado Hotel & Lodging Association
Colorado Retail Council
Colorado SHRM State Council
Connecticut Lodging Association
Connecticut Retail Merchants Association
Connecticut SHRM State Council
Delaware SHRM State Council, Inc.
Employers Coalition of North Carolina
Far West Equipment Dealers Association

Florida Building Material Association
Florida Chapter (CUPA-HR)
Florida Restaurant & Lodging Association
Florida Retail Federation
Garden State Council SHRM, Inc.
Georgia Hotel & Lodging Association
Georgia Retail Association
Georgia SHRM State Council
Hawaii Lodging & Tourism Association
Hotel Association of New York City, Inc.
Hotel Association of Washington DC
HR Florida SHRM State Council, Inc.
HR State Council of New Hampshire
Idaho Retailers Association, Inc.
Idaho SHRM State Council
Illinois Chapter (CUPA-HR)
Illinois Hotel & Lodging Association
Illinois Retail Merchants Association
Illinois SHRM State Council
Indiana Restaurant & Lodging Association
Indiana Retail Council, Inc.
Indiana SHRM State Council
Iowa Retail Federation
Iowa SHRM State Council
Kansas Chapter (CUPA-HR)
Kansas State Council of SHRM, Inc.
Kentucky Chapter (CUPA-HR)
Kentucky Retail Federation, Inc.
Kentucky SHRM State Council
Kentucky-Indiana Automotive Wholesalers Association
Louisiana Hotel & Lodging Association
Louisiana Retailers Association
Louisiana SHRM State Council
Maine Innkeepers Association
Maine SHRM State Council
Manufacturer & Business Association
Maryland Association of CPAs
Maryland Chapter (CUPA-HR)
Maryland Hotel & Lodging Association
Maryland Retailers Association
Maryland SHRM State Council
Massachusetts Lodging Association
Massachusetts State Council of SHRM
Michigan Chapter (CUPA-HR)
Michigan Lodging and Tourism Association
Michigan Retailers Association
Michigan SHRM State Council
Midwest Automotive Parts & Service Association
Minnesota Chapter (CUPA-HR)
Minnesota Grocers Association

Minnesota Lodging Association
Minnesota Retailers Association
Minnesota SHRM State Council
Mississippi State Council of SHRM
Missouri Retailers Association
Missouri State Council of SHRM, Inc.
Missouri Tire Industry Association
Montana Chamber of Commerce
Montana Equipment Dealers Association
Montana Lodging & Hospitality Association
Montana Restaurant Association
Montana Retail Association
Montana SHRM State Council
Montana Tire Dealers Association
Nebraska Chamber of Commerce & Industry
Nebraska Hotel & Motel Association
Nebraska Retail Federation
Nebraska SHRM State Council
Nevada Chapter of (CUPA-HR)
Nevada Hotel & Lodging Association
Nevada SHRM State Council
New England Tire & Service Association
New Hampshire Lodging & Restaurant Association
New Hampshire Retail Association
New Jersey Chapter (CUPA-HR)
New Jersey Gasoline, C-Store, Automotive Association
New Jersey Hotel & Lodging Association
New Jersey Retail Merchants Association
New Mexico Retail Association
New Mexico SHRM State Council
New York Metro Chapter (CUPA-HR)
New York State Association of Service Stations and Repair Shops, Inc.
New York State Hospitality & Tourism Association
New York State SHRM, Inc.
North Carolina Chapter (CUPA-HR)
North Carolina Restaurant & Lodging Association
North Carolina Retail Merchants Association
North Carolina SHRM State Council
North Dakota SHRM State Council
Northeastern Retail Lumber Association
Ohio Chapter (CUPA-HR)
Ohio Council of Retail Merchants
Ohio Equipment Distributors Association
Ohio Hotel & Lodging Association
Ohio SHRM State Council
Oklahoma Hotel & Lodging Association
Oklahoma Retail Merchants Association
Oklahoma SHRM State Council
Oregon Restaurant & Lodging Association
Oregon Retail Council

Oregon SHRM State Council
Pelican Chapter, Associated Builders and Contractors, Inc.
Pennsylvania Association of Automotive Trades
Pennsylvania Food Merchants Association
Pennsylvania Institute of Certified Public Accountants
Pennsylvania Restaurant & Lodging Association
Pennsylvania Retailers Association
Pennsylvania SHRM State Council
Public Employer Labor Relations Association of California
Public Employer Labor Relations Association of Maryland
Public Employer Labor Relations Association of Ohio
Retail Association of Maine
Retail Association of Nevada
Retail Council of New York State
Retailers Association of Massachusetts
Rhode Island Hospitality Association
Rhode Island Retail Federation
Rhode Island SHRM State Chapter
SHRM Hawaii State Council
SHRM Pacific Council
Rocky Mountain Chapter (CUPA-HR)
South Carolina Chapter (CUPA-HR)
South Carolina Restaurant & Lodging Association
South Carolina Retail Association c/o NCRMA
South Carolina SHRM State Council
South Dakota CPA Society
South Dakota Retailers Association
South Dakota SHRM State Council
Southwest Car Wash Association
Southwestern Pennsylvania Chapter (CUPA-HR)
Tennessee Hospitality & Tourism Association
Tennessee SHRM State Council
Texas Hotel & Lodging Association
Texas Independent Automotive Association
Texas Retailers Association
Texas SHRM State Council
Texas Tire Dealers Association
United Equipment Dealers Association
Utah Chapter (CUPA-HR)
Utah Food Industry Association
Utah Hotel & Lodging Association
Utah Human Resource State Council
Utah Retail Merchants Association
Vermont Chamber of Commerce
Vermont Retail & Grocers Association
Vermont SHRM State Council
Virginia Hospitality & Travel Association
Virginia Retail Merchants Association
Virginia SHRM State Council
Washington Lodging Association

Washington Maryland Delaware Service Station and Automotive Repair Association
Washington Retail Association
Washington State Chapter (CUPA-HR)
Washington State Human Resources Council
West Virginia Chapter (CUPA-HR)
West Virginia Hospitality & Travel Association
West Virginia Retailers Association
West Virginia SHRM State Council
Western Equipment Dealers Association
Western Suppliers Association
Wholesalers Association of the North East, Inc.
Wisconsin Hotel & Lodging Association
Wisconsin Manufacturers and Commerce
Wisconsin SHRM State Council
Wyoming Lodging & Restaurant Association
Wyoming SHRM State Council

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Sampling of Higher Education Impacts from the Register and Media Stories:

Florida:

- **Comments of the State University System of Florida** "At this point, a review of the raw data costs alone for all twelve (12) state of Florida universities' employees currently meeting the exempt tests would be in excess of $62,000,000.00 of annual recurring salary costs if salaries were to be increased to the new proposed minimum salary threshold of $50,440 in 2016." http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242

Iowa:

- **Comments of the University of Iowa** "The over 2,700 individuals we employ and whose status would immediately change from exempt salaried to non-exempt hourly" and "the alternative of paying overtime would generally be cost prohibitive; the annual cost of one hour of overtime per week for each of our 2,700 impacted employees would increase University payroll costs by over $4 million." http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316

- **Comments of the Iowa Community College Trustees** "The NPRM mandate impacts Iowa Community Colleges by $12,648,786 in the first quarter of 2016 alone in salary and benefit expense." http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398

Kentucky:

- **March 30, 2016 Inside Higher Ed OpEd** "As president of Thomas More College, a small faith-based college in Kentucky, I worry that the changes would take a grave toll on institutions like mine that are enrollment and tuition driven... [W]e project our budget would increase by $1.4 million each year... that is more than a 12 percent annual increase... An increase of that magnitude could potentially have catastrophic effects on us and other small institutions nationwide." https://www.insidehighered.com/views/2016/03/29/proposed-new-overtime-pay-regulations-could-negatively-impact-colleges-and-their

- **Kentucky Community and Technical College System** "...we have estimated we could potentially be subject to ***additional wages of at least $2.5 million for a fiscal yeor, and it could impact approximately 863 of our administrative and staff employees...*** more than doubling the threshold will significantly impact employers and employees and requires a more thorough analysis for the economic consequences... The wages and cost of living in small towns in Kentucky is astronomically different than San Francisco and New York City

and this should be considered... There is also a perception of demotion for employees who have a change in status."

***Maryland*:**

- **University of Maryland Extension** "These changes proposed by the Wage and Hour Division, DOL, would substantially impact the fiscal operations of Extension and our College of Agriculture and Natural Resources (AGNR). These rule changes would cost AGNR approximately $117,446 in base funding and effect 22 persons within our institution. Because of this projected increase in base funding our College may not be able to retain our current number of FTEs or employed exempt positions, thus potentially impacting the personal livelihoods of our employees." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5668

- **February 11, 2016 Letter by Public Sector Employers to Congress:** "The University System of Maryland's preliminary estimate is an increase in costs between $16 million and $40 million in just the first year."

Michigan:

- **March 29, 2016 Hearing before House Workforce Protections Subcommittee:** "For the University of Michigan, the largest higher education employer in the state, the changes would affect more than 3,100 people in roles critical to our missions, including research fellows and lab staff, student housing officers, admissions recruiters, academic advisors, financial aid administrators, social workers, clinical dietitians, 2 clinical research coordinators and fundraisers. The projected cost at U-M to implement the change is as high as $34 million; early statewide estimates from The Michigan Association of State Universities peg the cost at more than $60 million for 11 of the 15 total member institutions reporting." http://edworkforce.house.gov/uploadedfiles/thomas.pdf

Nebraska:

- **Nebraska State College System** "While I support the concept of providing appropriate salary levels and classifications for our employees, the proposed salary threshold increase would alter the status of a great number of our employees who are currently exempt. As three small colleges in rural Nebraska, the State Colleges have a significant economic impact in the regions that we serve, primarily in salaries and the purchase of goods from vendors in our service areas. The proposed rules as written would drastically change how we conduct business and provide service to our students and our communities. Having such a drastic one time increase puts the State Colleges at risk of

having to reduce the number of employees to offset the increased financial costs of overtime pay." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2111

South Carolina:

- **South Carolina Independent Colleges and Universities** "The SCICU membership includes 5 Historically Black Colleges and Universities (HBCU), 2 Women's colleges, and a 2-year college. Many of our members are church-related and faith-based...employ 7,000 throughout the State...would be significantly affected by the changes in the NPRM. Our members agree...the proposed minimum salary threshold, however, is simply too high." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5569

- **ECOP, South Carolina State University** "The mission of Cooperative Extension is to extend the research knowledge of the university to people where they live and work, encouraging changed behavior, and increasing quality of life, business effectiveness, and community vitality...Extension programs have estimated financial effects of this ruling anywhere from $400,000 annually at a smaller university to $3.5 million in a larger one." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-3880

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Sampling of Non-profit comments from the Federal Register:

National:

- **Operation Smile** "The leadership team at Operation Smile is opposed to the proposed changes to the salary threshold tests, specifically the drastic increase to a salary level of $50,400... Since its founding in 1982, Operation Smile has provided more than 220,000 free surgical procedures for children and young adults born with cleft lip, cleft palate and other facial deformities...Yet still, this proposed update will ***increase our payroll cost by nearly $1 million annually affecting over 50 percent of our workforce***. Considering that a cleft lip surgery performed somewhere in the world costs an average of $240, ***this would mean 4,166 fewer surgeries provided by Operation Smile globally each year***... Our focus needs to be on managing programs not overtime."
  https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5060

- **Habitat for Humanity** "Habitat for Humanity (Habitat) and other charitable organizations will be disproportionately impacted by the proposed rule and unable to comply without reducing access to products and services... it is estimated ***that 65 percent of Habitat affiliates employing paid staff will be impocted by the proposal... The nearly $27,000 increase in the minimum salary to qualify for the overtime exemptian, far example, represents one-third to one-quarter of the cast of building a typical Habitat home.*** For a smaller, rural affiliate... it may be impossible to absorb the increased cost... Such an affiliate may have no choice but to cease operations, even if it is the only affordable housing provider in the community it serves."
  https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5647

- **The Salvation Army National Headquarters** "We respectfully urge the Wage and Hour Division to reconsider the substantial increase in the minimum salary threshold for "exempt" employees that is contemplated by the Proposed Regulations... the proposed increase in the minimum salary for "exempt"' employees would substantially increase the cost of delivering our services, most of which are provided free of charge. Based on information that has been collected to date, it appears that 50% or more of our employees nationwide who are currently classified as "exempt" would become "non-exempt"... The significance of the effect of this change to our organization cannot be over-stated... We anticipate that staff cuts would therefore become necessary and that we would be required to reduce the religious and charitable programming that we provide nationally."
  https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2789

- **National Council for Behavioral Health** "The National Council is a non-profit association representing 2,350 community-based mental health and addiction treatment providers... we strongly regret that we are unable to support the proposed rule in its current form. As written, the rule would have a potentially devastating effect on health care organizations

serving low-income individuals with serious and persistent mental illnesses and addictions, resulting in the need for service cutbacks and program closures... The untenable financial pressure resulting from the proposed changes would force provider organizations into disastrous service reductions and program closures."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2514

- **National Head Start Association (NHSA)** "NHSA is the national voice of the more than a million children in Head Start and Early Head Start programs in the United States... Our concerns on the regulatory change are driven entirely by the potential negative impacts on Head Start and Early Head Start agencies... In addition to the potential direct negative impacts on staff, we remain concerned that the proposed NPRM will negatively impact the quality of services we provide to children and families as well... Without additional funding, these programs may be forced to reduce the working hours of essential staff, causing a reduction in the hours and days of operation of some programs. This development would undermine and diminish the ability for programs to meet the needs of the children and families they are trying to serve as well as pose a significant adverse impact on working parents, their employers, and the nation's broader economy."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5194

- **Catholic Charities USA** "We feel compelled to share what we believe could be substantially negative, and in many cases disproportionate impacts on our agencies as nonprofits. Our overriding concern is that these negative operational impacts will ultimately result in a decline in services, or quality of services, to the most vulnerable members of society who our agencies serve... Specifically, agencies shared that they may need to reduce weekend and evening service hours, close certain program sites, cut back on community outreach activities, or limit staff from "going the extra mile"... The greatest impact would be felt by emergency services programs...These include drop-in centers, domestic violence shelters, crisis pregnancy services, and refugee resettlement programs... the regulations as proposed could place significant burdens on our agencies and ultimately negatively impact their ability to serve in their communities, resulting in a net negative, rather than positive, impact for the most vulnerable in our communities."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5320

- **Special Olympics** "As the rulemaking stands, it could substantially impair Special Olympics leading role in providing much-needed services to those with intellectual and developmental disabilities. Higher thresholds of overtime compensation for our staff, if realized, would have a negative impact on our ability to advance our mission, serve people with intellectual disabilities, raise money, and perform adequately under current government partnerships in providing health and educational opportunities for millions of people." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5149

- **America's Blood Centers** "America's Blood Centers (ABC) represents North America's largest network of non-profit community blood centers... As non-profit and community-

based institutions, our concern stems from the significant impact to community blood centers across the country that such broad, sweeping change would have on our ability to continue to serve our communities... The ***cost impact associated with the proposed overtime threshold [$1.5 million]*** will be associated with negative consequences for maintaining the infrastructure needed for a robust blood supply..."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4601

Colorado:

- **Colorado Youth Corps Association** "Paying overtime rates for staff members who operate residential programs would decimate program budgets and likely force many corps programs to either close or eliminate all camping/residential programs, ultimately hurting the low income corps members the regulations were meant to help. In addition, corps staff members typically work long hours in the field season and much shorter hours in the off season. Paying overtime in the field season would have a dramatic effect on these non-profits' ability to operate on their slim budgets."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5298

- **Colorado Behavioral Healthcare Council** "Our member organizations serve low-income and uninsured populations whose cost of care is covered primarily by Medicaid or state and local general funds. Medicaid reimbursement rates and grant funding levels are set by states, counties, or other third party entities. Thus, provider organizations like ours have limited ability to raise new revenue in response to increased costs of doing business. DOL's proposal to double the overtime pay exemption threshold would place a massive new burden on organizations already struggling to stay in business. Moreover, linking the threshold to inflation would force employers into perennially chasing a rising salary target without any ability to raise state-determined payment rates or otherwise ensure revenue increases to offset these changes."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2454

- **Young House Family Services** "The proposed rule to increase the salary threshold to $50,440 per year for exempt employees would have a devastating financial impact on our agency and ability to continue to provide needed services to children and families in our area. This change would affect at least 45% of our current employees, including direct care professionals. Many of our caseworkers spend several hours each week just driving to clients' rural homes to provide services, which adds to their work time. If this rule passes, for financial reasons we expect we would have to prohibit caseworkers from working more than 40 hours per week, which would unfortunately ultimately impact the direct services they provide to families... In our "business" we are not able to raise our fees, since those are established by the contractors chosen by the State of Iowa. This system is also currently undergoing major changes and we will now have to contract with 4 different managed care entities; we could be facing lower reimbursement rates in the future, which would also have

profoundly damaging effects on our agency revenue.
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5000

Delaware:

- **Kent Sussex Community Services** Since we depend on public funds to provide these services our contract re-imbursement rates and subsequent salary/wages are at the bottom of the scale. An increase in our costs without an increase in capacity for revenue would severely impair our ability to maintain work scope and quality standards expected in our state contracts and licensure. We have a disproportionate number of persons in supervisory, management or professional clinical roles who are paid well below 50,000 per year. We would like nothing better than to increase the salary/wage range for everyone but this would require a major overhaul of State and Federal budgets related to Behavioral Health public services.

- **Mosaic (also in Colorado, Iowa, and Nebraska)** "Mosaic has received minimal provider rate increases in most of the states where we operate. Drastically increasing the overtime threshold will place an additional unfunded mandate on our organization. If states do not increase reimbursement rates, Mosaic and other providers would be put in a difficult position, which is compounded by stagnant and declining revenues and increased demand for services. Inevitably, increasing unfunded mandates without appropriate funding will lead to reduced hours for DSPs, increased turnover, and a potential disruption of services for people with intellectual disabilities."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5068

Florida:

- **Sunrise Community, Inc (also in Maryland)** "Sunrise currently provides many disability services at a net loss. Without a federal mandate for Parity of Home and Community Based waiver services as well as ICF/IDD services, the federal mandate to increase the wage threshold for exempt employees is too high for viable operations and the regional economies in which we operate. Regrettably, an unintended consequence of this Proposed Rule would be two-fold and include the destruction of much needed infrastructure for inclusive, community-based services as well as failure to transition people from institutional settings as mandated by the Olmstead Act of 1999. Adequate funding levels and parity of services across states are absolutely essential to meet the Proposed Rule. Without adequate funding, the Proposed Rule will force large scale closure of disability service providers on a national basis." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2278

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Idaho:

- **Development Workshop, Inc.** "Currently, the state sets the service fee rate for rehabilitation services for people with disabilities and those who are underprivileged. The fee for service would not cover the increased costs associated with the proposed ruling and would hinder the ability of community rehabilitation providers to provide services. Its implementation would result in a reduction in necessary services aimed at helping individuals with disabilities, or who are disadvantaged, to gain and maintain their employment and greater independence." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5483

Iowa:

- **Riverview Center (also in Illinois)** "Riverview Center is a non-profit organization serving survivors of sexual and domestic violence in Iowa and Illinois. Our nearly 40 staff would greatly be impacted negatively by this change...These new guidelines negatively impact Riverview Center clients as well. Survivors of domestic and sexual violence would have less access to advocates/therapists as their hours of work would be limited to reduce salary payments." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1889

Kentucky:

- **ANCOR commissioned research from Avalere Health:**
  - **Snapshot:** http://cqrcengage.com/ancor/file/c3KOL6GjGYH/By%20the%20Numbers%20One%20Pager.pdf
  - **Full report:** http://cqrcengage.com/ancor/file/usmhoUJ4DDK/ANCOR%20Cost%20Impact%205coring%20Memo_final.pdf
  - **Kentucky data:** http://cqrcengage.com/ancor/file/3zTOhlgQ5md/Kentucky%20IDD%20Services%20Snapshot.pdf

- **The Bair Foundation (also in South Carolina)** "In assessing the proposed FLSA overtime change, The Bair Foundation believes the impact on children in foster care will be unconscionable. The Bair Foundation is a therapeutic foster care organization that provides foster homes for children who are abused and neglected... With salaries and benefits being 40% of our budget, and a good percentage of our staff being affected by the change, our Company cannot withstand this huge and drastic change... Services would be severely impacted and the continuous support of children in foster homes would be interrupted, which is a devastating occurrence in the life of a child. With over 400,000 children placed in the foster care system and 100,000 children available for adoption each year, if non-profits cannot take care of these children, who will?" https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1675

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Louisiana:

- **Gulf Coast Social Services** "Gulf Coast Social Services serves low-income and uninsured populations whose cost of care is covered primarily by Medicaid or state and local general funds. Medicaid reimbursement rates and grant funding levels are set by states, counties, or other third party entities—often at levels so low, we are forced to cobble together funding from multiple sources simply to keep our doors open and continue serving community members in need... In addition to the impact on our behavioral health services, our services for persons with developmental disabilities would be severely impacted. Medicaid reimbursement rates for these services can only support management salaries in the $30,000 to $40,000 range. These managers are available to the consumers and Direct Care Companions while on call. By redefining the exemptions, management of the daily operations will be compromised and additional financial burdens will be added to an already marginal budget." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4592

Maryland:

- **Community Behavioral Health Association of MD** "(CBH) is the professional association for Maryland's network of community providers serving the majority of 160,000 children and adults who use our state's public mental health system... We do not support the proposed rule in its current form... CBH members provide front-line treatment, rehabilitation, housing and related services to low-income and uninsured populations whose cost of care is covered primarily by Medicaid or state general funds. Medicaid reimbursement rates and grant funding levels are set by states, counties, or other third party entities... Provider organizations such as ours have limited ability to raise new revenue in response to increased costs of doing business. DOL's proposal to double the overtime pay exemption threshold would place a massive new burden on organizations already struggling to stay in business. Moreover, linking the threshold to inflation would force employers into perennially chasing a rising salary target... many will be forced to close programs and lay off staff, resulting in fewer clients served and reduced access to critical mental health and addiction services for individuals in need... The untenable financial pressure resulting from the proposed changes would force us into disastrous service reductions and program closures." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2448

Massachusetts:

- **Nonprofit Human Services Organization** "The majority of the funding that we receive is through contracts with the Commonwealth of Massachusetts. These contracts are supposed to be reviewed bi-annually... While some of our contracts have been reviewed, others have not been addressed in over five years and are substantially under funded by antiquated rates... Our current lower level professional staff and managers are paid between $35,000

and $47,000 per year. An increase to the $50,440 would cause us to incur expenses in excess of $50,000 per year." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1187

Michigan:

- **Michigan Federation for Children and Families** "Wage expenses for the vast majority of nonprofit organizations would increase dramatically, with our members estimating an average increase of between 10 and 20 percent, as they adapt to the new thresholds that guide exempt and nonexempt classifications. In most cases, nonprofit child welfare organizations contract with government and other entities to provide critical services; those contracts are multi-year commitments and do not have the flexibility to cover increased costs. The financial viability of thousands of nonprofit organizations—both small and large—would be threatened if not destroyed. Overnight, facing 20 percent increases in personnel costs, many of our organizations would be forced to close their doors, hurting many of the very people that increased wages are supposed to help. The ripple effect of human service organizations going out of business or having their services seriously limited would extend to thousands of vulnerable children and families who had come to them for assistance." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2515

Nebraska:

- **CenterPointe** "This change would have devastating financial impacts on our organization, costing over $200,000 per year over what we currently pay, based on very conservative numbers. As a non-profit, we do not have significant cash reserves, nor can we afford to provide care outside of the 8-5 work day at this cost. Limiting work hours to control costs will compromise the care provided to an already fragile and underserved population." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5190

New Hampshire:

- **Monadnock Worksource** "...established in 1971 by a group of parents of teens and young adults with developmental disabilities. We employ an average of 23 full time staff...given the rural nature and small size of our local towns, we are an employer of significant size... I urge you to limit raising the salary threshold to no more than the 15th percentile...so that our agency, and similar agencies, can sustain the workforce we need to provide these services essential to the well-being and increasing independence of the people we serve with disabilities and to their families. The proposed rule, if enacted as it stands, will erode our ability to provide the degree of supervision, training, and oversight necessary to

maintain a high quality of care within the constraints of our budget." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5591

- **Genesis Behavioral Health** "Genesis employs 165 people, most of whom are full-time employees. Most of our exempt employees— managers and professionals—are currently paid less than $50,000, and under the Administration's proposal would become eligible for overtime. As a nonprofit organization with limited flexibility in the budget, I have serious concerns about how I will cover potential overtime expenses while still aiming to provide high quality services for our clients." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4248

New Jersey:

- **Foster Family-based Treatment Association** "I write on behalf of the Foster Family-based Treatment Association, the only national association of providers of therapeutic/treatment foster care (TFC)... Given that agencies are limited to public funds, the proposed minimum salary for exempt employees will result in numerous agencies closing down due to inability to meet the new salary requirements. As a result, the major advances in child welfare reform achieved by this Administration...will be severely impacted and likely reversed forcing more youth into congregate care settings where staff hours/limits can be controlled, yet whose costs are significantly higher than community based care and whose outcomes are less favorable." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1908

South Carolina:

- **Habit for Humanity Grenville County, SC** "We are the largest Habitat affiliate in the State of South Carolina with 33 full-time employees. We help families with an area median income between 30 and 60 percent obtain affordable, sustainable homes through homeownership...the proposed changes will greatly impact the finances of our organization...in order for us to keep these 13 employees in exempt status, we would have to increase salaries an additional $139,500 per year...increase our overall salaries budget by approximately 11%." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4541

Washington:

- **Service Alternatives Inc.** "...we are a large employer in Washington State, with over 500 employees...our budget is dictated by the reimbursement rate set in our contracts by the state of Washington. When face with an increase in costs, we do not have the option of

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"raising prices" or otherwise passing on the costs...impact on employees...positions may be cut...some benefits may be cut...impact on clients and communities...increased risk to health and safety...can pose a direct threat to our ability to consistently ensure health and safety." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5504

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Sampling of Public Sector Comments from the Federal Register:

Colorado:

- **RE-1 Valley School District** "The Impact on a school district's budget will be hard hitting...Our non-teaching staff are dedicated to our role in supporting students; that very often means we're working long hours...You might think, as one of the staff who would be affected by the new minimum salary standard, that I would welcome the possibility of an increase, but I'm more concerned that a requirement such as this will force layoffs or lower hourly salaries if forced to move staff to non-exempt status." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-3618

Florida:

- **William Fritz, Indian River Schools, Florida** "I serve as the Assistant Superintendent for Human Resources for a mid-size Public School District in Florida. The proposed changes to the salary basis test would extend overtime to approximately 35 of our employees. Given that we are one of 14,000 school districts in the United States, this change will create an undue burden on our Nation's schools. The State of Florida will not provide fiscal resources to remunerate the School Board, so this amounts to an unfunded mandate. The only way a school system can adjust for this change is to reduce services to students, given that our industry operates with low-overhead. Please maintain the salary basis test at its current level." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1885

- **Marion County Board of Commissioners, Florida** "Marion County is concerned that DOL's proposed rule would more than double the overtime pay minimum salary level for an employee to qualify as "exempt" from overtime pay. This is a substantial increase over a one-year period. In Marion County, 129 of the current 238 exempt employees would be eligible for overtime pay. Marion County has estimated that the additional financial burden would cost the County as much as ***$1,773,587 in Gross Overtime Solaries in the first year alone, in addition to other expenses, such as increased payroll taxes ond benefit costs.***" https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5087

- **Florida Department of Economic Opportunity (DEO)** "DEO compared the results of its analysis with the estimates provided by the White House and U5DOL for the affected workers and the costs associated with the Overtime Mandate. DEO's analysis shows the White House and USDOL overestimate by 195,000 the number of Florida workers who will qualify for overtime, while seriously underestimating—by billions of dollars—the high cost to Florida businesses. DEO estimates that the Overtime Mandate ***will cost Florida businesses approximately $1.7 billion***. DEO's Florida estimated cost, by itself, is 82.7% of USDOL's entire National Estimate of $2.08 billion." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5473

- **Small County Coalition in Florida** "Many of our small counties and school districts are fiscally constrained and operate on limited revenues. Many of our small local governments feel that these impacts could result in a reduction of services or increasing taxes." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4486

Iowa:

- **Iowa State Association of Counties** "For example, in Clay County, Iowa, providing additional overtime to one employee would cost approximately $7,250 in the first year. Black Hawk County, Iowa has 87 employees that are currently exempt from overtime and 14 of those employees could become eligible for overtime under the proposed rules. Increased costs could easily outpace the ability of a county to bring in additional dollars through its taxing authority." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5448

Michigan:

- **Detroit Housing Commission** "...the vast majority of [public housing authorities] operate on thin, fixed budgets without sufficient reserves to meet what will constitute more than a doubling of the current salary requirements for exempt employees. PHAs, as a whole, are not revenue-generating entities. Unlike local units of government, PHAs do not have the power to impose taxes to raise funds. Unlike a private employer, PHAs cannot make more "widgets" or increase the cost of its "widgets" to generate revenue. PHAs must accomplish their mission within the limited funds available to them... Since PHA funding is finite, there will have to be some trade-offs. Either customer service would be negatively affected because overtime is limited or there would be fewer employees to do the work because PHAs will be required to leave positions unfilled for lack of funding. PHAs will yet again be requiring their employees to do more with less. There is, however, a point at which the needs of the customer cannot be met with limited staff resources so the PHAs' low and moderate income residents will suffer." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4324

New Hampshire:

- **City of Claremont** "The City of Claremont, NH is opposed to these suggested changes. We are limited on funds and the employees receive very generous benefit packages and because they are unionized, we would be in a position that we would have to lay off workers." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-0924

South Carolina:

- **Georgetown County Board on Disabilities and Special Needs** "While our agency has always tried to thoughtfully abide by DOL rules and compensate its employees, we still will have a $60,000 per year impact to our budget in order to implement a salary threshold of this magnitude. Many workers who fall under these exemptions in our field started out as DSPs, and advanced into supervisory or administrative positions that require independent judgement and flexibility. We encourage their exempt employees to take part in various career and education enhancement and training programs in order to advance in their career paths. Placing restrictions on overtime for these employees would take away options for workers to pursue career-advancing extra activities, including participation in committee work and professional organizations that are foster career growth and professional development of workers." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4750

Washington:

- **Jamestown S'Klallam Tribe** "The use of a single national salary threshold would adversely affect already limited revenues, especially for tribes in rural areas...the average salary offered by many tribal governments and enterprises is substantially lower than the national average...even though the proposed rule will directly and disproportionately affect Tribal governments, there has been no consultation on this rule-making." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5627

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Sampling of Small Business comments from the Federal Register

Delaware:

- **Washington, Maryland, Delaware Service Station and Automotive Repair Association** "We have heard the following from our membership on what business decisions this proposed rule may cause them to make: raising the prices of goods and services to pass on the cost to consumers; layoffs; changing employees from salary to hourly, which could impact benefits or mean reduced pay for weeks where less hours are worked; reducing base pay to account for overtime pay; turning full time employees into part time employees; reclassifying job duties; inability to expand the size of the business (slowing or stopping job creation); and providing less flexibility in hours worked." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-3900

Florida:

- **Southeastern Alliance of Child Care Associations** "Based on informal surveys of some of its centers' members, SACCA estimates that up to 80% of child care directors in the Southeast are paid less than USDOL's proposed projected minimum salary level of $50,440 per year, and that more than half of child care directors in the Southeast are paid less than $35,000 per year." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4275

- **Florida Farm Bureau Federation** "The proposed rule will reduce entry-level management positions in agriculture particularly. Advancing from a picking crew member to crew leader or from a packing house shipper to supervisor is an achievement many workers aspire to. These low-level managers frequently lack advanced degrees and experience which would command high salaries. Still, increasing the employee's wages from hourly to salary can be significant in agriculture but fall well short of $970 per week. This is especially true when hourly wages are exempt from overtime pay due to the agriculture worker exemption. Instead of developing these early managers with training classes and greater responsibility, employers expressed that they would be more likely to limit their duties and hours and place more responsibility on their upper management or themselves." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2811

Idaho:

- **Boise Metro Chamber of Commerce** "Studies have shown that while a few workers will experience pay raises, millions will either see their hours reduced, or will see their salary reduced in anticipation of potential over-time." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-3930

Iowa:

- **Iowa Bankers Association** "On average, 8 percent of Iowa bank employees would be affected by the changes. Based on a survey we conducted of our member banks, the cost to bring current exempt employees to the proposed salary level could cost each bank, on average, $156,000 annually." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4746

Louisiana:

- **Small Business Advisory Council of Louisiana** "The cost estimates made by the DOL/WHO are wholly inadequate and inaccurate. Our members have given us much higher estimates for the cost of understanding the impact of the changes in their specific workplaces, determining new administrative measures to limit overtime penalties while still accomplishing the mission of the business, setting up revised recordkeeping and payroll systems, and paying employees any overtime penalties they are due. https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5746

- **Baton Rouge Area Chamber** "Here in the Greater Baton Rouge Area, small businesses make up over 99% of local establishments and provide over 80% of all jobs in the region. A new and potentially dramatic increase in labor costs to these businesses is a real threat to the livelihood of Capital Region workers, and to the well-being of our communities. The proposed rules, if implemented, will have direct and severe impacts on business throughout the region - an area recognized by the Investing in Manufacturing Communities Partnership as one of the nation's most important manufacturing corridors - while having few if any positive effects on payrolls." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5293

- **First Heritage Credit** " Sixty-two of our 74 Branch Managers make under $51,000.00 base salary. Eighty-one percent (62 of 74) of our Branch Managers would be reclassified to nonexempt under changes to the salary test. If there is a change in the duties test, 100% of our Branch Managers could possibly be reclassified, as the nature of our business necessarily requires them to do some "clerical" work." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5621

Nebraska:

- **Nebraska Furniture Mart** "is a home furnishings retail store that sells furniture, appliances, electronics and flooring...about 400 staff members will be affected by this change...the minimum salary in place for exempt staff at Nebraska Furniture Mart per our compensation plan is $30,295.72...is market based, meaning we research what other companies in our markets pay for similar jobs. We classify each job into a pay grade with minimum compensation for each job at or above the market pay rate. Each year, we review the market pay for every job in our company, and make adjustments to pay in the case the

market dictates higher wages... already offering staff competitive salaries. This significant of an increase in the minimum threshold for salaried staff will have a tremendous impact, especially for Midwest companies... There are many actions that must take place prior to making large scale changes involving staff moving from salaried to hourly pay, some of which include:

- Changing staff status in both our HRIS and Payroll systems
- Changing compensation in both our HRIS and Payroll systems
- Making changes to benefits as hourly and salaried staff are eligible for different benefits
- Training salaried staff who move to hourly on using various time clocks throughout the building, time clocks on their computers and managing their time
- Training salaried staff who move to hourly how to use and input PTO requests as this process varies for hourly and salaried staff
- Training managers who currently supervise only salaried staff on proper timekeeping for hourly staff

https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2827

New Hampshire:

- **Kennebunk Savings** "Kennebunk Savings is a mid-sized community financial institution...which operates throughout...seacoast New Hampshire...employ over 300 people...support our community, and when we thrive they thrive. This year we'll give back 10% of our earnings—over $790,000—to nonprofit organizations...detrimental impacts will be: cut backs in employees or hours...fewer new job opportunities...our employee base is more than 85% female and many of our employees face demands as caregivers for children or aging parents...our ability as an employer to offer flexible schedules means a great deal to their overall well-being and engagement with the company. The proposed rules will have a detrimental effect on allowing flexible schedules for our employees" https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-5312

- **Seacoast Mental Health Center, Inc.** "For too many years we have tried to absorb costs on the backs of employees to mitigate the erosion of services for consumers in need. We can no longer do that. Should these rules go into effect, particularly when paired with our current funding environment, we will have fewer staff providing fewer services to fewer clients. The untenable financial pressure resulting from the proposed changes would force us into disastrous service reductions and program closures." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2569

New Jersey:

- **Atlantic Stewardship Bank** "is a full service commercial bank with 12 branches and employ 151 associates and feel strongly this new rule will negatively impact the bank's employees

and future consideration for their advancement...at our bank we are already addressing changes to associates and their career path in order to accommodate this proposal. Several Associates will not be promoted which will negatively affect their salary and responsibilities...the proposal will cause a significant decrease in morale among exempt employees who become nonexempt"
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-3901

South Carolina:

- **Famous Toastery, in WSJ Article** "a restaurant chain with six locations in North Carolina and South Carolina, some jobs are changing to ensure the company doesn't face runaway labor costs. The chain is moving managers from salaried to hourly pay and asking employees to perform new duties...the company is installing fingerprint scanners to be used for punching in and out of shifts, so that workers cannot clock in for a co-worker who is late. Company leaders will also receive alerts if any employee is nearing 40 hours and still has more shifts left that week, allowing management to intervene before overtime kicks in."
http://www.wsj.com/articles/overtime-rules-send-bosses-scrambling-1437472801

Washington:

- **Building Industry Association of Washington** "...is the champion of affordable housing in Washington State and represents nearly 8,000 member companies engaged in all aspects of new home construction and remodeling...reconsider the proposed rule as changes to the current overtime standard will reduce job advancement opportunities...leads to construction delays, increased costs and fewer affordable housing options for consumers...this new rule will negatively impact over 3,500 employees in the residential construction trade." https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2897

Wyoming:

- **21st Century Equipment LLC. (also in Colorado and Nebraska)** "My Company, 21st Century Equipment, LLC is a John Deere Agricultural Equipment dealer. As a small business owner, we currently employ approximately 400 full-time employees, of which 68 would potentially be affected by this proposed change...Should we convert everyone affected by the rule change to non-exempt, overtime would cost us up to $700,000 per year...Employees in my company earn income far in excess of the proposed salary levels, however, that level is reached through base salary (which does not meet the minimum salary proposal) plus commission and incentives that are in place to insure optimal job performance."
https://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-4752