



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*

Dear Dr. Weil:

The Food Marketing Institute (“FMI”) submits these comments in response to the proposal of the Department of Labor (the “Department”), as published in the *Federal Register* 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).

The Food Marketing Institute (FMI) proudly advocates on behalf of the food retail industry. FMI’s U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost \$770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org.

The Department of Labor’s proposed changes to the regulations at 29 C.F.R. Part 541 (the “EAP” or “white collar” regulations), if finalized, will have a significant impact on our members. FMI is very concerned about the potential impact of the Proposed Rule on supermarkets and food wholesalers, especially in terms of how it may affect associates who are currently exempt. FMI’s member companies 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. If the Department implements the rule as proposed, the revisions will dramatically impact FMI members' ability to maintain that flexibility and clarity. Additionally, the proposal will result in a large number of supermarket employees being reclassified as exempt. This will not only limit career advancement and opportunities for employees, but will also decrease employee morale, reduce employee benefits and will significantly increase administrative costs. FMI strongly urges the Department to consider the comments below.

STANDARD SALARY LEVEL

The Department has proposed to set the minimum salary required for exemption at the 40th percentile of weekly earnings for full-time salaried workers. 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. However, the DOL 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. The Department seeks comments on the "possibility of including nondiscretionary bonuses to satisfy a portion of the standard salary requirement." 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. 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).

The proposed salary level will have a disproportionate impact on the food retail industry. FMI wishes to stress that any increase in the salary threshold test will have a very measurable impact on grocery stores, distribution centers and corporate administrative offices due to the razor thin profit margins of one percent, or a mere one penny on every dollar of sales for the supermarket industry. Single store operators will be adversely affected the most by a major increase in the salary threshold test since independent grocery stores simply don't have adequate resources to absorb excessive hikes in payroll.

Further, millions of employees in retail who clearly meet the duties requirements for retail earn below \$50,000. These include store managers, assistant store managers, various department managers, such as meat, produce, bakery, seafood, deli and floral, as well as administrative personnel, IT specialists, and loss prevention among others. FMI respectfully requests that the Department significantly reduce its proposed standard salary level for exemption. Although allowing inclusion of a nondiscretionary bonus would provide some small relief, the Department's proposed limits, allowing the credit only for bonuses paid monthly or less frequently and for only up to 10 percent of salary, would be of limited utility. FMI recommends that the Department allow all forms of incentive pay (bonuses, commissions, profit-sharing, etc.) paid out at any frequency (including quarterly and annually) to count towards up to 20 percent of

the salary level. FMI also opposes the Department's proposal for annual automatic increases to the salary level. This proposal would deny the regulated community the opportunity to comment on changes to the salary level and is contrary to the 77 year history of the FLSA and Part 541. Requiring employers to reevaluate and reclassify employees on an annual basis is unduly burdensome to employers and disruptive to employees. Thus, alternatively, if the Department moves forward with its proposal for automatic increases, FMI suggests that the automatic increases be limited to once every five years.

PURPOSE OF THE SALARY LEVEL TEST

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."¹

Rather, the purpose of the salary level test is "screening out the *obviously* nonexempt employees."² "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."³

Thus, while the salary level selected may "deny exemption to a *few* employees who might not unreasonably be exempted," the Department ignores Congressional intent at 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.⁴ 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

¹ 1949 Weiss Report at 11 (emphasis added).

² *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.*").

³ 1949 Weiss Report at 11. See also 1958 Kantor Report at 2-3.

⁴ 1940 Stein Report at 6 (emphasis added).

could reasonably be classified for purposes of the Act as bona fide executive, administrative, or professional employees.”⁵

In addition, the salary level must be appropriate across the “many thousands of different situations throughout the country.”⁶ 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.”⁷ 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”⁸ 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.”⁹ 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 a minimum salary of over \$50,000 – ignores this purpose and the regulatory history. A salary level of over \$50,000 is not at the “lower end” of current salaries in the food retail industry. Rather, a substantial number of employees in the food retail industry who meet the duties requirements for exemption make under \$50,000 annually.

Thus, the Department’s proposal will inappropriately exclude many employees in the food retail industry who meet the executive, administrative and professional duties tests for exemption.

The inappropriately high salary level is a direct result of the Department departing from the historical methodologies. In the past, the Department has used data on salaries of *exempt* employees. In its proposal, however the Department uses earnings data for all “non-hourly” paid employees, whether exempt or nonexempt, and including employees not covered by the Part 541

⁵ 1949 Weiss Report at 9.

⁶ *Id.*

⁷ *Id.* at 11.

⁸ 1958 Kantor Report at 5.

⁹ *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 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.”).

salary tests (such as teachers, doctors, lawyers, outside sales and agricultural 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, usually retail. The Department's proposal uses only national data, ignoring the disproportionate impact that so doing will have for employers in these groups, including food retail. In the past, the Department has used the 10th, 15th and 20th percentile of exempt employee salaries. Today, the Department proposes using the 40th percentile.

FMI respectfully requests that the Department reconsider its methodology, and instead set the salary level at the 20th percentile of exempt employee salaries in the retail industry.

HISTORY OF THE SALARY LEVEL TEST

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, and 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.¹⁰

In 1958, the Department used salary data for employees found exempt during wage-hour investigations for a period of eight months in 1955, grouping employees “by major geographic regions, by number of employees in the establishment, by size of city, and by broad industry groups.”¹¹ 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.”¹² Further, however, 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, but most retailers were not covered by the FLSA until 1961. 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

¹⁰ 1949 Weiss Report at 12-15.

¹¹ 1958 Kantor Report at 6.

¹² *Id.* at 7-8.

on exempt salaries in the retail industry had been included in 1958, the salary level selected would have been below than the 10th percentile.

Until 1961, most retail employees were not covered by the FLSA. In 1963, the first time the agency considered a salary increase after expansion of the FLSA to retail, the Department provided lower salary levels for retailers as the industry adjusted to the new minimum wage and overtime requirements. The Department had conducted a special survey in June 1962 to gather data “on minimum weekly salaries paid executive, administrative and professional employee in retail establishments.”¹³ 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 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).¹⁴ By 1965, the Department expected retail salaries to increase as the industry adjusted to its new coverage under the FLSA.¹⁵ 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.

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, showed that 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.”¹⁶

Finally, in 2004, the Department “considered the data . . . showing the salary levels of the bottom 10 percent, 15 percent and 20 percent of . . . salaried employees in the lower wage south and

¹³ 28 FR at 7002.

¹⁴ 28 FR at 7005; 28 FR 9505, 9506 (Aug. 30, 1963)

¹⁵ 28 FR at 7705.

¹⁶ 35 FR 883, 884 (Jan. 22, 1970). 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 “is not, however, to be considered a precedent.”

retail sectors.”¹⁷ 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.”¹⁸

A SALARY LEVEL AT THE 40TH PERCENTILE OF ALL SALARIED EMPLOYEES WILL DISPROPORTIONALLY IMPACT THE FOOD RETAIL INDUSTRY

Ever since retail workers were brought under the FLSA minimum wage and overtime protections in 1961, the Department has recognized the lower salary levels in the retail industry. This is not a matter of choice – we all wish for higher salaries – but a necessity driven by the economic realities of the retail sector, especially the food retail industry. The supermarket industry is fiercely competitive, operating on a 1% profit margin.

If the Department does not alter its proposal to set the salary level at the 40th percentile for all salaried employees, FMI members will have to make some difficult choices. Employers will have to decide whether it makes economic sense to increase an employees pay to the new salary level or whether the position will be reclassified as non-exempt. Reclassifying employees as non-exempt, not only has economic consequences, but also leads to significant problems with employee morale. Reclassifications to non-exempt employees are often viewed as “demotions”. Such a result will be devastating to the morale of affected associates because employees take great pride in being part of management within their company and in their community. Being part of the management team of a company is a matter of status to them, and associates who could become disenfranchised because of the Department’s proposal will have difficulty understanding why they are being demoted from exempt to non-exempt. Impacted employees will turn to management and ask what they did to deserve being demoted to non-exempt status which means punching a clock for hours worked rather than receiving an annual salary.

FMI member companies know for a fact that exempt employees from management cherish and appreciate the predictability of their salary along with the flexibility of their work schedule that hourly workers do not have. Flexibility in a work schedule is an invaluable benefit as it allows exempt associates to structure their time to address various personal and family issues, such as doctor’s appointments or attending a child’s school or after school activities. Moreover, exempt employees also enjoy certain other more tangible benefits that hourly workers do not receive. These include life insurance, disability coverage, tuition assistance, continuing education, paid sick leave, paid vacation, retirement benefits, and performance incentives.

¹⁷ 2004 Final Rule at 22167 & Table 2.

¹⁸ 2004 Final Rule at 22168-69 & Table 3.

Reclassifying employees will also result in less workplace autonomy and fewer opportunities for career advancement. Exempt associates consider their positions a career while hourly non-exempt workers are more likely to view their employment as a job. Employers will be forced to decide whether to increase the salary of certain exempt positions to reflect a higher salary test threshold as called for in the Department's proposal or to reclassify exempt associates to non-exempt status. Other employer options include eliminating certain positions or hiring more part-time workers to compensate for a reduction in hours worked by full-time associates.

To understand the consequences of its proposed salary level, the Department need only review the testimony of Eric Williams, Chief Operating Officer of CKE Restaurants and owner of seven Hardee's franchises, at the July 23, 2015 hearing on the Department's proposal before the House Education and the Workforce Committee. His testimony applies equally to the food retail industry:

The salaries of four of my ten managers would be impacted by the proposed change to the Department's regulations. These four managers earn about \$45,000 per year. Keep in mind that these salaries are competitive, and these managers are subject to the previously mentioned performance bonuses and also receive generous fringe benefits. To comply with the Department's proposal, these restaurants would take an estimated 6% reduction to the already thin margins that exist in the restaurant industry.

The question then becomes how to offset that increased cost to keep our restaurants financially solvent. The additional overtime cost is likely to negatively impact the rest of our hard-working workforce by reducing hours, reducing salaries, or reducing bonuses and equity incentives. I would be forced to eliminate three salaried Assistant Manager positions and put them back on the clock. I can assure you that a demotion is the last thing these employees want since it would block their career path to General Manager. I would be forced to limit their hours to 40 hours per week and to schedule them on the busier shifts, which would allow for little development time to grow their careers. Additionally, I would have to eliminate or greatly reduce our bonus program, thus limiting the entire management team's earning potential.

* * *

Under the new rule, we will need to rethink how we staff and schedule our management employees. Overtime pay is a penalty employers pay for requiring employees to work extended hours, it does not increase productivity nor does it increase revenue, it simply requires employers to pay time and a half for routine work, which reduces earnings.

This is why we manage overtime very closely. Rather than staff our restaurants with salaried managers with performance based bonuses who can earn higher pay, we would be forced to operate the business with fewer managers (reduction of management coverage during a shift) who would be paid less (due to a reduction in hours and bonus) and who would be limited to a 40 hour work week (to tightly control overtime expense). Unfortunately, operating with fewer management positions would limit the advancement of crew employees into those positions and stifle their personal growth. Young workers who could have progressed through their career as I did, would see their future success threatened by this proposal.

* * *

We would first look for ways to increase existing employee productivity at the current wage, eliminate non-essential tasks altogether and utilize technology such as pre-portioned or precut prep items and customer self-order stations to reduce hourly positions. While we may find the need to increase our minimum staffing levels to maintain high levels of guest service, we would primarily utilize part time employees for limited shifts during the busiest hours of our operations.

It should be clear by now that the very people this overtime proposal is intended to help will unfortunately be the biggest losers. Their pay will be limited, performance bonuses will be reduced or abandoned. However, the biggest cost will be all the talented people who, like me, could have advanced from a cook to COO or Franchise Owner. They may never reach their potential or realize their career dreams because of this change.¹⁹

We understand that the Department believes that setting the salary level at the 40th percentile is necessary because the 2004 salary level did not adequately off-set the changes to the duties tests in 2004, including elimination of some requirements in the pre-2004 “long” duties test. However, the 2004 changes to the duties requirements for executive employees were no boon to the food retail industry. By 2004, because the salary levels had not been increased since 1975, FMI members rarely needed to use the “long” duties test for exemption; even in retail, most exempt employees already earned over \$250 per week

Even if the Department feels compelled to adopt some percentile above the 20th as in 2004, we do not believe the Department has justified quadrupling the 10th percentile used in 1958 2004 – especially when the 1958 data did not include retail employees – or doubling the 20th percentile from 2004.

¹⁹ Mr. Williams full testimony is available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=399162>

Based on the BLS Current Population Survey, and as set forth in the comments of the U.S. Chamber of Commerce, which we adopt and endorse, the salary percentiles in the south and in retail are as follows:

Decile	Weekly Earnings, All	Annual Earnings, All	Weekly Earnings, South & Retail	Annual Earnings, South & Retail
10	\$500	\$26,000	\$462	\$24,024
20	\$673	\$34,996	\$600	\$31,200
30	\$785	\$40,820	\$738	\$38,376
40	\$923	\$47,996	\$858	\$44,616

This data underscores the disproportionate impact a salary level based on the 40th percentile of all salaried employees will have on the retail industry, as the earnings for employees in the south and retail are significantly less for salaried employees overall. Most FMI members should not see significant business disruption or need to reduce head count at salary levels up to \$38,376. Any salary level over \$40,000 would have significant negative impacts in the food retail industry.

Perhaps the strongest evidence that the Department’s proposed salary level of \$50,440 is too high is found by comparing 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). In California, the minimum salary level is currently \$37,440 annually, although the level will increase to \$41,600 in 2016.²⁰ Thus, the Department’s proposed salary level of \$50,440 is \$8,840 and \$15,340 higher than the salary level that will required for exemption under California and New York in 2016, respectfully. California and New York are among the highest cost of living states. A salary level above what state legislators in California and New York deemed sufficient will not work in low cost of living states like Louisiana, Mississippi and Oklahoma, where the 40th percentile of salaried employees is only \$784 per week (\$40,786, annually).²¹ The standards for exemption under section 13(a)(1) need to work throughout the country, and a \$50,440 level will negatively impact both employers and employees in states with lower cost of living and lower wages.

²⁰ 12 NYCRR §142-2.14; Cal. Lab. Code § 515(a).

²¹ *Oxford Economics Study* (Aug. 18, 2015), attached as Appendix A

COUNTING BONUSES TOWARD THE SALARY LEVEL REQUIREMENT

The Department has proposed “including nondiscretionary bonuses to satisfy a portion of the standard salary requirement.” Under the Department proposal, employers would be allowed to satisfy up to 10 percent of the standard weekly salary level with nondiscretionary bonus payments paid out monthly or less frequently.²² Although FMI 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 sufficiently to offset added administrative costs. Thus, FMI recommends the following changes to the Department’s proposal:

First, few of our members pay bonuses on a monthly or less frequent basis. Providing exempt employees with quarterly and annual bonuses, however, is common. Thus, we ask the Department to allow credit for all nondiscretionary bonuses regardless of the frequency of payment. Likewise, because most bonuses are earned conditioned on future performance, quarterly or annual bonuses included in income should be based on prior year rather than prospective bonuses.

Second, 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 and car allowances that are not reimbursements for business expenses, and profit-sharing payments under plans which do not meet the requirements of 29 C.F.R. Part 549. Under 29 C.F.R. § 541.604(a), employers may pay employees these and other types of compensation without violating the salary basis test.

An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least \$455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least \$455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least \$455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any

²² 2015 NPRM at 38535-36

basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

Thus, if the Department allows a credit for bonuses, there seems little reason to exclude other types of compensation paid to exempt employees.²³

Third, unless the Department reconsiders its proposed \$50,000 salary level, a limit of 10% (or, \$5,000) is too low to provide any relief or make the additional administrative burdens worth the effort.

Fourth, without out the opportunity for make-up payments as under the highly compensated test, the Department's proposal would be very difficult to implement and for that reason we recommend use of retrospective bonus payments made over the prior year.

THE DEPARTMENT SHOULD PROVIDE A ONE-YEAR EFFECTIVE DATE

The Department has proposed a 113 percent increase to the standard salary level, over 10% per year since the last increase in 2004, which is unprecedented in the 77 year history of the white collar exemptions. Unless the Department lowers the salary level significantly in the final regulations, FMI members will need a significant period of time to comply with the new requirements – even more time if the Department also moves forward with any changes to the duties tests for exemption.

FMI members will need to familiarize themselves with the final regulation, analyze their workforce, and determine how to comply. This process will require FMI members to identify all exempt employees earning a salary less than \$50,440; evaluate whether to comply by providing a salary increase or reclassifying some or all of the employees to non-exempt; decide whether to pay reclassified employees on an hourly or salaried basis; and draft new compensation plans for reclassified employee: Will we need to limit the hours employees work over 40? Can we still afford to pay a bonus or do the bonus payments need to go towards overtime? How will we set the new hourly rates or salaries? Finally, FMI members will need additional time to communicate the changes to employees and implement the changes.

²³ 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 also prevalent in the insurance industry, where a manger who provides a junior agent with training and marketing consulting can be entitled to part of the commission. Finally, it is common in the retail industry for store managers and assistant managers to receive compensation based on percentage of sales or profits in the store.

Thus, on behalf of our members, FMI respectfully requests at least a one-year effective date, as the Department of Labor provided in its changes to the companionship services exemption regulation.

THE DEPARTMENT SHOULD NOT IMPOSE AUTOMATIC ANNUAL SALARY INCREASES

FMI members have expressed significant concerns with the Department's proposal to adopt a mechanism to automatically increase the salary levels every year. We strongly urge the Department to abandon this proposal for the following reasons:

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. Neither has Congress indexed the minimum hourly wage for exempt computer employees under section 13(a)(17) of the Act, the tip credit provided indexing under other statutes, but never under the FLSA.

Second, there is no precedent for indexing in the regulatory history of Part 541. 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.²⁴ The Department quickly dismissed the idea as "needing further study," although stating that the suggestion "appears to have some merit particularly since past practice has indicated that approximately 7 years elapse between amendment of these salary requirements."²⁵ However, the "further study" came in 2004, after 29 years had elapsed between salary increases. Nonetheless, the Department rejected indexing as contrary to congressional intent, disproportionately impacting lower-wage geographic regions and industries, and because the Department intended to review the salary level more frequently:

[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

²⁴ 35 FR 883, 884 (Jan. 22, 1970).

²⁵ *Id.*

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 61/2 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 (61/2 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.²⁶

Third, automatic salary increases likely would violate the Administrative Procedure Act (“APA”). In section 13(a)(1) of the FLSA, Congress gave the Department the authority – and the duty – to “define[] and delimit[] *from time to time by regulations* of the Secretary, *subject to* the provisions of subchapter II of chapter 5 of title 5 [the Administrative Procedure Act].”²⁷ This language does not give the Department the authority to change the requirements for exemption in a process which is outside of the APA, such as that proposed. Congress intended the public to have an opportunity to comment on any proposed changes to the white collar regulations. The Department’s indexing proposal would eliminate that opportunity forever.

FMI recognizes the Department’s concern that notice and comment rulemaking is a difficult and time-consuming process: “[D]espite 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.”²⁸ However, the fact that the process is “resource intensive,”²⁹ is not sufficient grounds for ignoring the requirements of the FLSA and the APA. Congress wants the Department to “continually revisit” the Part 541 regulations.

²⁶ 2004 Final Rule at 22171-72.

²⁷ 29 U.S.C. § 213(a)(1) (emphasis added).

²⁸ 2015 NPRM at 38539.

²⁹ *Id.* at 38537.

Fourth, notice and comment rulemaking on the salary levels has been clearly positive. Over the 77-year history of the Part 541 exemptions, the Department's regulatory proposals to revise the regulations have sparked vigorous public debate both about the duties tests and the salary levels. The regulatory history evidences that the Department has adjusted its proposals based on public comment. Proposed salary levels have been increased and decreased in the final regulations in response to public feedback. For example, in 2004, 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.

Fifth, the Department's proposed methodology for determining the amount of the annual increase is also not well thought out. Particularly troubling is the proposal to reset the salary level every year using a "fixed percentile" approach. That is, pulling the flawed CPS data, year-after-year, to determine the 40th percentile of full-time, non-hourly paid earnings.³⁰ We will not repeat here our objections to using national data without consideration for lower wage regions and industries, but they apply equally here. There is another significant difficulty which the Department did not address in its proposal: The salary level increases and employers' reactions to them will create an upward skyrocketing effect in the CPS data. Because the Department has proposed such a high salary level, many employers may reclassify employees and pay them on an hourly basis. Such employees, more likely among the lowest paid of today's exempt workforce, will drop out of the CPS "non-hourly" data set. Employers will provide salary increases to other employees to meet the increased salary level. With lower-wage employees leaving the salaried ranks and other employees receiving wage increases, the 40th percentile of those remaining will correspond to a higher salary level than that which is being proposed. Thus, next year, the 40th percentile likely will increase significantly more than the two percent growth predicted by the Department.³¹ In each successive year, the automatic salary increase will cause this ratcheting effect until classifying any employees as exempt will be difficult, especially in the food retail industry. This may be what the Department intends but is not what Congress envisioned when it included the white collar exemptions in the FLSA.³²

With regard to the alternative CPI measure for increases, the Department has rejected suggestions in the past to tie salary levels to the CPI, and specifically stated in 1975 that its use of the CPI that year should not be used as a precedent. Prices and salaries are correlated only over long periods of time. Year-to-year there have been wide differences in the rates of increase of the cost of living and salary. Shifts in job duties are more closely correlated with wages than prices. Accordingly, an index based upon average earnings, as opposed to the general level of prices, would better reflect shifts in the underlying distribution of job duties.

³⁰ 2015 NPRM at 38540.

³¹ *Id.* at 38517.

³²

Finally, annual increases to the salary level would impose significant additional burdens on employers. As noted above, adjusting to changes in the Part 541 regulations to ensure compliance with the FLSA is a complicated and time consuming process. Adjusting to an increased minimum wage only requires adjusting hourly rates in a payroll system. But adjusting to changes in the white collar regulations would require FMI members to identify all exempt employees earning a salary less than \$50,440; evaluate whether to comply by providing a salary increase or reclassifying some or all of the employees to non-exempt; decide whether to pay reclassified employees on an hourly or salaried basis, and how much; draft new compensation plans for reclassified employees; communicate the changes to employees; and, finally, implement the changes. According to our members, reclassification can take many months. 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. Planning for the salary increase will be even more difficult for FMI members whose fiscal year is not the calendar year (or otherwise does not coincide with the timing of the Department's notice). Such employers will not be able to plan for the increased labor costs during the normal budget process. The specter of unexpected cost increases provides disincentives for businesses to engage in capital spending and increase hiring and thereby grow the economy.

In the alternative to annual automatic salary adjustments, but still objecting to any automatic increase without allowance for comment rulemaking, FMI recommends that the Department instead, after notice and comment, adopt a process for updating the salary levels every five years.

THE DUTIES TESTS

In the NPRM, the Department states that it "is not proposing specific regulatory changes at this time." 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% 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

³³ 2015 NPRM at 38543.

than 50% of an employee's time worked a better indicator of the realities of the workplace today?

- 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

While FMI can accept that some increase to the salary level will ultimately result from the current rulemaking process, based upon the NPRM, FMI strongly objects to any changes to the duties tests because the Department has failed to provide the public 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% 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 range of unspecific, unfocused questions flies in the face of the Department’s obligations set forth by the Administrative Procedures Act. 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. *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076,

³⁴ *Id.* at 38543.

³⁵ *Id.*

³⁶ *Id.*

1082 (D.C. Cir. 2009) (finding that commenters could not have anticipated which “particular aspects of [the agency’s] proposal [were] open for consideration.”). Put differently, stakeholders cannot be asked to “divine” the agency’s “unspoken thoughts.” *Arizona Public Serv. Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (citation omitted). However, that is precisely what the Department now asks us to do.

The Department’s questions – without corresponding regulatory text – have deprived the public 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. *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”). While the Department may attempt to bootstrap any changes to the duties test based on cherry picked comments, this does 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 agency.” *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (an agency cannot “bootstrap notice from a comment”) (citations omitted). Instead, the Department must “itself provide notice of a regulatory proposal”, but has failed to do so. *See id.*

Should any changes to the duties test result from this notice of proposed rulemaking, the final rule would fail to comply with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 require agencies, in promulgating regulations, to assess all costs and benefits of available regulatory alternatives. 58 Fed. Reg. 51735 (Oct. 4, 1993); 76 Fed. Reg. 3821-23 (Jan. 21, 2011). In particular, an agency must consider the costs of enforcement and compliance prior to implementing regulations. 58 Fed. Reg. 51735 (Oct. 4, 1993). Because the Department has declined to proffer any specific proposal, the enormity of the costs that the regulated community will ineludibly face have not been explored. Stakeholders are left without the opportunity to address the potential costs and benefits the Department has identified in making any changes to the EAP duties test – 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. 76 Fed. Reg. 3821-22 (Jan. 21, 2011). 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.” 76 Fed. Reg. 3821-22 (Jan. 21, 2011) (emphasis supplied). 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. *Id.* at 3822. The amorphous topics upon which the Department seeks comments through the current NPRM utterly deprive stakeholders of this meaningful opportunity to express its views. It is

therefore FMI's view that should the Department seek changes to the duties requirements contained in 29 C.F.R. Part 541 it would necessarily have to first provide notice on the specific proposals being considered – and costs and benefits associated with the same –and then afford the public the appropriate opportunity to comment.

The importance of allowing the public to comment on specific changes to regulatory test can be found in the regulatory history of Part 541 itself.

By adopting *any* changes to the regulatory text of the Part 541 duties tests in a Final Rule, the Department would be ignoring President Obama's directive to provide the public with a "*meaningful opportunity*" to comment on proposed regulations.

DEFINITION OF PRIMARY DUTY

FMI opposes any revision to the duties test which 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 would only serve to increase litigation. In its NPRM, the Department now looks to potentially nullify the established primary duties requirements contained in 29 C.F.R. Part 541 by inquiring whether employees should be required to spend a specified minimum amount of time exclusively performing their primary duty in order to qualify as exempt, citing California's 50% primary duty requirement as an example.

The Department's reference to California's 50% primary duty rule is particularly troubling because, like other jurisdictions that have adopted such quantitative tests, California 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 employees in order to defend their classification decisions. 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". 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." 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.”

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

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.

Rather than solve any of the perceived problems with the primary duty test, a quantitative requirement only creates unmanageable recordkeeping burdens on employers and adds to employers’ uncertainty over classifications. Such a quantitative requirement merely serves to incentivize plaintiffs’ attorneys to systematically attack an employee’s classification and further drain the courts’ limited resources. Aside from the boondoggle for the plaintiffs’ bar, there is no benefit to be derived from now injecting a quantitative requirement to the well settled qualitative approach. FMI 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).

See Preamble to Final Rule, 69 Fed. Reg. at 22186 (April 23, 2004). The Department’s reasoned analysis conducted in 2004 still holds true in 2015. Rather than focusing on a quantitative test, the 2004 Final Rule instead chose to focus on four nonexclusive factors for determining the primary duty of the employee:

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

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

The time spent performing exempt work has always been, and will continue to be, just one factor for determining primary duty. Spending more than 50 percent of the time performing exempt work has been, and will continue to be, indicative of exempt status. Spending less than 50 percent of the time performing exempt work has never been, and will not be, dispositive of nonexempt status.

. . . [T]he search for an employee's primary duty is a search for the "character of the employee's job as a whole." Thus, both the current and final regulations "call for a holistic approach to determining an employee's primary duty," not "day-by-day scrutiny of the tasks of managerial or administrative employees." *Counts v. South Carolina Electric & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003) ("Nothing in the FLSA compels any particular time frame for determining an employee's primary duty").

See Preamble at 22186. FMI urges the Department to continue in the application of the holistic approach developed in 2004 and summarily reject any requirement that duties must be measured.

CONCURRENT DUTIES PROVISION

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 FMI 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 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.

29 CFR 541.106. 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 even some 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.”

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 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”).

Preamble 22186. 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.” Since all of the prongs of the executive test need to be met to classify an employee as an exempt executive, FMI plans to take the Department at its word when it claimed in 2004 that the regulation “has sufficient safeguards to protect nonexempt workers.” Accordingly, no changes to the concurrent duties provision are necessary or warranted.

LONG/SHORT DUTIES TEST STRUCTURE

While no proposals have been proffered inviting specific comment, FMI 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 President Barack Obama’s direction that the Secretary “modernize and streamline the existing overtime regulations for executive, administrative, and professional employees.” 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.³⁷

³⁷ 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
- (b) Who customarily and regularly directs the work of two or more other employees therein; and
- (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

Complicating the duties test by creating a tiered system, requiring employers to test multiple requirements under different scenarios, represents neither a modernization or streamlining 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.

In eliminating the short/long 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 tests. For example, in addressing the executive exemption, the 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.³⁸

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent ... of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section ...; and

(f) Who is compensated for his services on a salary basis at a rate not less than \$155 per week ..., exclusive of board, lodging, or other facilities: Provided, that an employee who is compensated on a salary basis at a rate of not less than \$250 per week ..., exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section. 29 C.F.R. § 541.1(a)-(f). The requirements outlined in Section 541.1(a) through (e) were referred to as the “long” test, while the requirements outlined in the second sentence of Section 541.1(f) were referred to as the “short” test.

³⁸ 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. 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.

Indeed, as the Department recognizes in its NPRM, with 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.” 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.

A. NEW JOB CLASSIFICATION EXAMPLES

Finally, 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 EAP exemption.

FMI does not recommend the inclusion of any new job classification examples at this time. However, to the extent that the Department includes additional examples of non-exempt positions, FMI alternatively requests 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,” FMI would request that the Department simultaneously include an example of an exempt escalated help desk analyst, (*i.e.*, one who receives computer inquiries which are not routine and which 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.

CONCLUSION

In summary, FMI objects to any changes in the white collar exemption other than a modest increase to the standard salary level for exemption. We hope that the Department will seriously consider our views and the views of others in the business community.

We appreciate your consideration of these comments. Please do not hesitate to contact me at sbarnes@fmi.org or (202) 220-0614 if you have any questions.

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Sincerely,

Stephanie K. Barnes

Regulatory Counsel