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REGARDING PROPOSED REVISIONS OF 29 C.F.R. PART 541

(RIN 1235-AA11)

September 3, 2015

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Introduction

We offer the following presentation in response to the "Proposed rule and request for comments" published by the U.S. Labor Department ("USDOL" or "Agency") on July 6, 2015 at 80 Federal Register 38516, Regulatory Information Number (RIN) 1235–AA11.

By way of background, Fisher & Phillips LLP is a national law firm which has been engaged in the practice of labor and employment law for more than 70 years. Throughout that time, an extensive portion of our practice has included statutory and regulatory interpretation, compliance-counseling, dispute resolution, and the presentation of commentary to USDOL and others as to matters relating to the Fair Labor Standards Act.

We will use terms such as "exempt", "exemption", "exemptions", "exempt employees", "nonexempt", "nonexempt employees" and so on. These terms are used as shorthand references to the exemptions provided for at 29 U.S.C. § 213(a)(1), except where we refer specifically to a different FLSA exemption.

We will also refer to three historical USDOL documents, each of which relates to revisions of the Regulations at Part 541. These reports were produced by Harold Stein in 1940 ("Stein Report"), Harry Weiss in 1949 ("Weiss Report"), and Harry S. Kantor in 1958 ("Kantor Report"). The page numbers we cite refer the reader to the corresponding location in the actual report, rather than to any reproduction of the report.

A. The Proper Scope of These Proceedings

This rulemaking is taking place in the context of troubling statements and phrases appearing in the proposals' explanatory discussion and/or made or used by the President, the Secretary of Labor, the Wage and Hour Administrator, and others associated with the Agency that call into question whether the aims of this process are consistent with USDOL's role under Section 13(a)(1). Consider, as examples:

- ◇ "[A] fair day's pay for a fair day's work", "an issue of basic fairness", and "[a] hard day's work deserves a fair day's pay."

- ◇ "Millions of salaried workers have been left without the guarantee of time and a half pay for the extra hours they spend on the job and away from their families."

- ◇ "Today . . . President Obama announced the release of a new proposed rule that, once final, would extend overtime protections to roughly 5 million workers."

- ◇ Multiple references to "more protective", "overtime protected", "not overtime protected", "overtime ineligible."

- ◇ "The FLSA's overtime protections are a linchpin of the middle class and the failure to keep the salary level requirement for the white collar exemption up-to-date has left millions of low-paid salary workers without this basic protection."

- ◇ "[T]his proposed rulemaking will also transfer income from employers to employees in the form of higher earnings."

These formulations (and many others to similar effect) connote that this initiative's principal motivation is to increase employee compensation largely in one of two ways:

- ◇ Crafting the exemption criteria in a fashion that will cause more employees to fall within the FLSA's overtime requirements; or

- ◇ Compelling employers to increase the salaries of exempt employees, by as much as 100% (and perhaps more in the immediate future), in order to maintain their exempt status.

With all due respect, this is not a legitimate pursuit under Section 13(a)(1).

Congress made the judgment that executive, administrative, professional, and outside-sales employees would be exempt from the FLSA's minimum-wage or overtime requirements (*i.e.*, that they would not be so "protected", in USDOL's parlance). Considerations of a "fair day's pay", "a fair day's work", "basic fairness", "the middle class", "the extra hours [employees] spend on the job and away from their families", "more protective", and so on are not to be found in Section 13(a)(1). Such concerns (whatever they actually mean from one setting to another) are worthy considerations elsewhere, but they have no proper place in this rulemaking. Instead, the Agency's *sole* responsibility and *only* authority is to define and delimit the exemptions so as to carry out *Congress*' judgment by "amplifying and describing more precisely *the type of employees to whom the exemption would be applicable*." Stein Report at 2 (emphasis added). This entails nothing more or less than articulating the nature and essential qualities of, that is, the descriptive characteristics of, employees occupying executive, administrative, professional, or "outside salesman" status.

USDOL's carrying out this role will of course have an *indirect* effect upon who is and is not "protected". But endeavoring to craft the applicable criteria *for the purpose of* "protecting" more employees, "transfer[ring] income", and otherwise directly or indirectly attempting to facilitate employees' monetary betterment is a fundamentally different matter of policymaking to be addressed, if at all, by Congress. USDOL recognized this critical limitation long ago:

> The Administrator *is not authorized* to set wages or salaries for executive, administrative, and professional employees. Consequently, improving the conditions of such employees *is not the objective* of the regulations. The salary tests . . . are essentially guides in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these categories. Any increase in the salary levels . . . 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.

Weiss Report at 11 (emphasis added). By reverse extension, USDOL is "not authorized" to tailor factors defining and delimiting Section 13(a)(1) with the goal of increasing or otherwise affecting the wages received by workers who thereby will be rendered *non*exempt.

Our point is not esoteric or quibbling. USDOL's mindset in formulating these proposals and in deciding their final form has a strong, even-determinative effect. We now proceed to address the proposals' substance, but, because these proceedings might someday be at issue in other settings, we believe it important to do so expressly against the background of and subject to the foregoing observations and concerns.

B. Proposed Increase In The Minimum Salary Level

Throughout the exemptions' history, the principal purpose of the salary test has been to serve as a "guide[] to help" or as a "useful adjunct[]" in drawing the line between exempt and nonexempt employees. Weiss Report at 11, 12.[1] USDOL has concluded that this concept should include a minimum dollar threshold (a proposition that is not self-evident). But from the earliest years, it has also been a fundamental consideration that "the level selected must serve as a guide to the classification [of exempt employees] and *not as a barrier to their exemption*." Weiss Report at 15 (emphasis added).

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[1] It is not correct that the salary requirement has historically been viewed as "'the best single test' of exempt status." 80 Fed. Reg. at 38517. In the past, "best single test" was attached to such statements as "the employer's good faith in attributing importance to the employee's services" and to "the employer's good faith in claiming that the person whose exemption is desired is actually of such value to the firm that he is properly describable as" exempt. Stein Report at 19, 26. These are related but decidedly different and more-general considerations. These "best single test" references are no justification for ascribing disproportionately determinative status to the salary *level*, which is *instead* to serve as a "practical guide" in "borderline cases" for "screening out the *obviously nonexempt* employees." Kantor Report at 2-3 (emphasis added).

The reason is abundantly clear: The ultimate task in applying the exemptions is restricted to reaching the proper conclusion as to whether an employee's working circumstances are consistent with what *Congress* had in mind in including those exemptions. Not surprisingly then, it has also been long recognized that this purpose is best served "*if* the salary level[is] selected carefully and . . . approximate[s] the prevailing *minimum* salar[y] for *this type of personnel* and [is] above the generally prevailing levels for nonexempt occupations." Weiss Report at 11-12 (emphasis added). *See also* Weiss Report at 12 (recognizing that the earlier level had been "a relatively low figure" and concluding that "[a]ny new figure recommended *should also be* somewhere near the lower end of the range of prevailing salaries" for potentially exempt employees). Whether employees are paid "enough", or "need a raise", or should be "protected", or supposedly spend too many hours away from their families has nothing to do with setting the salary level (or, for that matter, with whether there should be a salary test *at all*).

USDOL must also give "appropriate consideration . . . to the fact 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." Kantor Report at 5. The salary test's history clearly shows that the regular practice (until now) in establishing dollar levels has therefore been to set them "at points near *the lower end* of the current range of salaries for each of the categories." *Id.* (emphasis added). The complexity and diversity of the nation's economy have not diminished since those words were written.

The Agency recognized as early as 1949 that "[a]ctual data showing the increases in the prevailing minimum salary levels of bona fide executive, administrative and professional employees . . . would be the best evidence of the appropriate salary increases for the revised regulations." Weiss Report at 12. If these data were available, they were used. *Id.* Data relating to wages and earnings among nonexempt employees were resorted to where "no direct evidence was available or where the available data were fragmentary . . . ." *Id.* Even then, this was done against the backdrop of an intention to establish a salary level "near the lower end" of the range so modeled. *Id.*

By 1958, these decisions were informed by figures from the Wage and Hour Division on "salaries paid to employees who qualified for exemption" which were published before rulemaking began (*i.e.*, they were "transparent"). Kantor Report at 6. They included "tabulations of salaries grouped by major geographic regions, by number of employees in the establishment, by size of city, and by broad industry groups." *Id.* This "most direct evidence of actual salaries paid", "obtained as a by-product of the Divisions' regular investigation program rather than as a special statistical survey," was seen to "reflect[] the salary patterns with reasonable accuracy." *Id.* USDOL relied upon similar information again in 1963 and in 1970. 28 Fed. Reg. 7002 (July 9, 1963); 35 Fed. Reg. 883, 884-85 (Jan. 22, 1970).

We submit that, as USDOL was in 2004 (and in any other rulemaking when it has done otherwise), the Agency would be misguided in departing from the practice of predicating the salary level to the maximum extent possible upon "a sample *limited to exempt salaried employees*." *See* 80 Fed. Reg. at 38528 (emphasis added). It must surely be beyond dispute that information bearing directly upon the question at hand is necessarily "the best evidence" upon which to base any adjustment in the salary level, just as it was over 65 years ago.

And USDOL now has at its disposal more-extensive data, more-detailed data, and more-readily-accessible data in this regard than it has ever had before. Its personnel are required to compile and report voluminous information concerning investigations and other activities. *See*, *e.g.*, Chapter 54, *Field Operations Handbook*. This information is now available electronically, unlike decades ago. Nor need we speculate about USDOL's ability to adduce and evaluate such information in connection with the present proceedings; it has already done so. For instance, the proposals' explanation says:

- ◇ "Currently, approximately 85 percent of white collar salaried workers who fail the EAP duties test earn at least $455 per week."

- ◇ "Increasing the standard salary level to the 40th percentile of weekly earnings for full-time salaried workers would reduce by 6.3 million the number of white collar employees for whom employers must perform a duties analysis."

- ◇ "Conversely, only approximately 4 percent of all white collar salaried employees who meet the duties test earn less than the current salary level."

- ◇ "The proposed increase in the standard salary level would increase the number of overtime-eligible white collar salaried employees who meet the duties test and earn less than the proposed salary level to approximately 25 percent."

- ◇ "The Department notes that currently approximately 75 percent of white collar employees who do not meet the duties test earn less than the proposed salary threshold."

- ◇ "The Department notes that currently approximately 78 percent of all exempt EAP workers — those who are paid on a salary basis of at least $455 per week and meet the duties test — earn at least $921 per week."

- ◇ "Approximately 41 percent of white collar workers who do not pass the duties test earn at least the proposed salary level ($921 per week). Conversely, approximately 25 percent of employees who pass the standard duties test (and 22 percent of employees who are currently exempt) earn less than the proposed salary level."

- ◇ "[F]or the Kantor method we further limited the population of interest by only including those workers determined as likely to be EAP exempt . . . ."

80 Fed. Reg. at 38529, 38532, 38557, 38560 n.82. These statistics are obviously derived from internal data that are directly relevant to current salary levels as they relate to the application of the exemptions by "uniquely qualified" personnel (see below).

Referring to the 2004 rulemaking, USDOL implies that employing such information now is undesirable on the premises that:

> in order to create such a pool of likely-exempt salaried employees one would have to rely upon 'uncertain assumptions regarding which employees are actually exempt.' In addition, the Department used CPS data rather than salary data from the limited pool of our own investigations because there would have been too few observations from these investigations to yield statistically meaningful results.

80 Fed. Reg. at 38528. The public is of course unable to judge whether information from USDOL's investigations "would have been" statistically significant in the absence of transparency as to any actual facts upon which that statement is based.[2] As for any "uncertain assumptions" to be made about salary-and-exemption information USDOL has accumulated internally, we note that the Agency appears to have nevertheless seen such statistics as being sufficiently reliable to support the propositions quoted on the preceding page which have played an important role in the proposed rulemaking.

Part VII of USDOL's explanation and its Appendix A reveal that the Agency has in fact conducted an elaborate evaluation of "weekly earnings" and a determination of "whether a worker met the duties test" based upon "an analysis performed by officials from the [Wage and Hour Division] in 1998 . . ." for purposes of estimating the number of employees likely to be affected by the proposed salary level. 80 Fed. Reg. at 38553. "Because WHD enforces the FLSA's overtime requirements and regularly assesses workers' exempt status, [the Wage and Hour Division's] representatives were uniquely qualified to provide the analysis", according to the Agency. *Id.* This included the assignment of "probability codes" designed to provide a likelihood that incumbents in an occupation met the duties tests for an exemption. *Id*.[3]

USDOL has also estimated (i) the number of "salaried white collar workers" whose salaries are higher than "a specific salary level" but who "do not pass" the duties tests, and (ii) the number of "salaried white collar workers" who "satisfy" the duties tests but whose salaries are lower than "a specific standard salary level." 80 Fed. Reg. at 38559. This too underscores that, not only does the Agency have the data and other information necessary to do such things, but it undertook to do precisely what was done prior to 2004.

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[2] Neither is it evident from the statement whether USDOL actually undertook to evaluate statistical significance or was instead engaging in speculation about what any such assessment "would have" revealed had one been done.

[3] USDOL inexplicably says elsewhere that applying the Kantor approach "would involve significant work to replicate since one would need to identify likely EAP exempt workers, a process which requires applying the standard duties test to determine the population of workers used in the earnings distribution." 80 Fed. Reg. at 38561. But the Agency must have done *exactly this* in developing its probability analysis.

USDOL undertook the probability analysis at least in part to comply with the directives of Executive Orders No. 12866 (58 Fed. Reg. 51735 (Oct. 4, 1993)) and 13563 (76 Fed. Reg. 3821 (Jan. 21, 2011)). The Agency expresses no concern about whether any "uncertain assumptions" the process entailed undercut this assessment as a foundation for carrying out those requirements. These statistics should therefore be at least as reliable as foundations for the salary amount, and they must certainly be superior to the data USDOL proposes to use.

And in that regard, notwithstanding repeated *main*-text formulations such as "actual *salaries* paid to employees", "all full-time *salaried* employees", "*salary* levels throughout the economy", and innumerably more to similar effect, the fact is that the data to which these sorts of statements refer, and upon which USDOL proposes to rely, are instead based upon "full-time . . . *non-hourly paid* employees." *See*, *e.g.*, 80 Fed. Reg. at 38517 n.1, 38527 n.20, 38540 n.37, 38548 n.54 (emphasis added). Even the Agency's explanatory statements say (without elaboration) that it "considers" the data underlying the proposals to be no more than "an appropriate proxy for compensation paid to salaried workers." *See*, *e.g.*, 80 Fed. Reg. at 38527 n.20, 38548 n.54. Furthermore, USDOL does not consistently specify whether or to what extent "salaried workers" and similar phrases refer in whole or in part to employees who are or might be exempt. Indeed, the meaning of these phrases seems to change at different places in the explanation, and from time-to-time they are even used to refer to different data-sets.

It is apparently necessary to point out that information about "non-hourly paid employees" is by no means self-evidently an appropriate proxy for compensation as to "salaried" employees (let alone "salaried" employees who are or might be exempt), and we respectfully decline to defer to what the Agency says it "considers" to be so. It is also inappropriate to use "salary" or "salaried" repeatedly in referring to these data in the way the Agency's explanation does (the small number of footnotes referring to their *actual* nature notwithstanding), especially given that, as the Agency knows, "salary" is not a generic term in the current context but is instead a term-of-art. 29 C.F.R. § 541.602.

These self-reported, unverified, and unverifiable data are not an adequate reflection of what is the case as to "salaried" employees generically speaking (much less as to "salaried" employees paid on a "salary basis" or "salaried" employees who are or might be exempt). The employees sampled might be paid on a commission basis, a day-rate basis, a job-rate basis, a piece-rate basis, a salary-for-40-hours basis, a fluctuating-workweek basis, via a combination of methods, or in a variety of other ways. It *is* the case, however, that the data contain *no* information identifying whether an employee is "salaried", but that they *do* include overtime pay, commissions, tips, and cash bonuses; whether other kinds of payments are included is unclear.[4] Whatever uncertainties there might be as to the above-referenced internal, so-far-unpublished evaluations made by USDOL's "uniquely qualified" personnel who made judgments as to matters in which USDOL has more than 75 years of accumulated expertise, they must surely pale in comparison to those inherent in using the data USDOL has so far selected.

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[4] U.S. Census Bureau, *Current Population Survey (CPS) – Definitions*, http://www.census.gov/cps/about/cpsdef.html# (last visited Aug. 20, 2015).

USDOL has also declined for the moment to tailor its dollar-test proposal specifically in recognition of the lower-wage characteristics of some regions or industries. *See*, *e.g.*, 80 Fed. Reg. at 38528. This departs from not only the approach taken in 2004 (as USDOL acknowledges), but also from even-earlier decades of practice in setting the salary level. The Agency contends that its proposed methodology "already accounts for" and "adequately protects low-wage industries and areas" by selecting a 40th percentile to apply to the data it has selected. *See*, *e.g.*, 80 Fed. Reg. at 38532, 38541. On the contrary, there is serious reason to question whether USDOL (i) has in fact recognized (or truly even intended to recognize) the pertinent characteristics of these regions and industries, and (ii) has actually done an adequate analysis of the matter.

For one thing, the entire discussion of the percentile selected is tainted by USDOL's repeated reliance upon data purportedly having to do with "full-time salaried employees", "full-time salaried workers", and so on. We have already pointed out that these data may not legitimately be so characterized. Consequently, the entire "already accounts for" construct rests upon a flawed foundation.

USDOL's initial "already accounts for" remarks defer to the explanation's Section VII.D. for a discussion of why the Agency "believes [its] proposal is appropriate in low-wage areas and low-wage industries." 80 Fed. Reg. at 38532. However, all that appears in Section VII.D. on this point is an assertion that employers in lower-wage industries and regions "may perceive a greater impact" from the proposed level,[5] but that, "because the vast majority of potentially affected workers reside in MSAs and do not work in low-wage industries," USDOL "believes that the proposed salary level is appropriate." 80 Fed. Reg. at 38564. Thus, the "explanation" to lower-wage industries and regions about the disproportionate exclusion from exempt status that will result from the proposal is no more than that *there are supposedly too few of them to matter*. This does not "account for" these industries and regions in any legitimate sense; it simply represents a policy determination to revoke the affected employees' exempt status.

Moreover, the reader learns elsewhere that USDOL appears to have considered only three industries to be "low-wage" ones: "Leisure and hospitality, other services, and public administration." 80 Fed. Reg. at 38557.[6] What these labels actually encompass is indefinite, but they do not include retailing. *See*, *e.g.*, 80 Fed. Reg. at 38556, Table 11. Retailing has of course been explicitly considered a low-wage category in repeated salary-level rulemakings, and the Agency's own data indicate that "Retail trade" represents 7.5% of the "potentially affected EAP workers", the second-highest percentage in the entire list. *See* 80 Fed. Reg. at 38602, Appendix B, Table B1.

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[5] Those employers and employees will do more than merely "perceive" such an impact. They will in fact *experience* such an impact.

[6] As is true in many instances throughout USDOL's presentation, these entangled discussions of and references to the current proposal, the 2004 rulemaking, and the Kantor Report in the same sentences and paragraphs, using present and past tenses indiscriminately as to each, often make it difficult for the reader to discern to which the Agency is actually referring.

The Agency "considered" non-MSA regions to be lower-wage ones in choosing the $921 level. 80 Fed. Reg. at 38557. But there is no discussion of whether this use of these statistical divisions is appropriate, whether they were correctly so used, or whether the fact that there is no urban/rural distinction might be a pertinent consideration. *See* Office of Mgmt. & Budget, OMB Bull. No. 13-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas* (2013).[7]

USDOL's "low wage" information was apparently filtered through an opaque process involving undescribed "estimated . . . distributions" of unstated "weekly *earnings*" of groups from which unspecified "alternate *salary* levels" were somehow "identified" by applying "pre-determined percentiles" (that we take for now to be those used in 1958 and 2004). 80 Fed. Reg. at 38557 (emphasis added). Whatever all of this actually refers to or consisted of, it generated weekly salary figures that were $344 lower than the proposal under one method and $264 lower under the other. 80 Fed. Reg. at 38558.

USDOL says that an analysis of "the historical relationship between the 40th percentile benchmark and the CPI-U" shows "that the data does not substantiate . . . past concerns about the likely effects on low-wage regions and industries . . . ." 80 Fed. Reg. at 38541. However, this "historical relationship" is based upon a false comparison:

- ◇ CPI-U "is designed to measure inflation for the U.S. *urban* population and thus may not accurately reflect the experience of people living in rural areas" (emphasis added).[8] While it is said to include "approximately 87 percent of the total population",[9] the statistic provides no information about the percentage of *jobs* or *workers* falling within the U.S. non-urban population, which are likely to be disproportionately lower-wage ones; and

- ◇ CPI-U fails to distinguish among *industries*, lower-wage or otherwise.

In the end, USDOL offers no reason to believe that a 40th percentile "accounts for" or "adequately protects" lower-wage industries or regions, or that choosing that level is really intended to do either. Nor is it evident that the Agency's rationale for the proposal was or would be affected by whether these things are so, "because the vast majority of potentially affected workers reside in MSAs and do not work in low-wage industries . . . ." 80 Fed. Reg. at 38564. On the contrary, categorically removing these employees from exempt status – *even though they meet the duties tests* – is apparently an acceptable outcome in USDOL's view.

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[7] http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b-13-01.pdf.

[8] Bureau of Labor Statistics, *Consumer Price Index: Frequently Asked Questions*, http://stats.bls.gov/cpi/cpifaq.htm#Question_21 (last visited Aug. 20, 2015).

[9] Bureau of Labor Statistics, *Consumer Price Index*, http://stats.bls.gov/cpi/cpiovrvw.htm#item2 (last visited Aug. 20, 2015).

USDOL says that it remains committed to a single standard rate for nationwide application. Therefore, it must weigh heavily, as have almost all of its predecessors, the fact that a one-size-fits-all level set to eliminate "obviously nonexempt employees" (Weiss Report at 18) reasonably well in high-income regions or industries, will in turn operate as a "barrier" (Weiss Report at 15) in lower-income regions or industries for disproportionately-many employees who meet the duties tests, including employees performing the same or similar work as their "exempt" counterparts.[10] In other words, such a threshold impermissibly truncates the ultimately-qualitative determination called for under the exemptions for those employees.

Some such effect is an outcome of having a single salary threshold. But then this is the product of a structure that USDOL itself formulated and embraced in the past and proposes to maintain. Because the Agency has made that choice, its responsibilities can be adequately carried out only by significantly limiting that effect, that is, by setting the salary rate near the lower end of the appropriate scale.

It is for this very reason that USDOL has set a lower-end salary in the past, and the Agency must do so again. Whatever nationwide figure is established must be set so as to, as Mr. Kantor put it, exclude only a relatively small percentage "of those in the lowest-range 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 . . . ." Kantor Report at 6-7.

We recognize, of course, that the proposed salary level is in part the result of applying the 40th percentile that USDOL alleges is appropriate. However, that percentile, and much of the articulated reasoning that has led to it, plainly evince a desire to maximize the impact of the salary test in excluding employees from exempt status without the necessity for engaging in any qualitative evaluation. Avoiding or reducing litigation, conserving administrative resources (both public and private), eliminating vague and little-described "inefficiencies", simplifying the exemptions' application, and so on might be laudable *collateral* results of this rulemaking, but they cannot push aside the essence of what must be done.

Consider, for example, how much more effectively these things could be accomplished (especially "simplification", "efficiency", and the dubious goal of "reducing the number of employees for whom employers must perform a duties analysis")(80 Fed. Reg. at 38529) by instead setting a salary of, say, $1,812.50 a week and applying an 80th percentile (*see* 80 Fed. Reg. at 38532 n.30). USDOL rejected this percentile, no doubt realizing that this would be in patent derogation of its responsibilities. However, the reasons for which this would be so, including the disproportionate, unwarranted, and unprecedented importance that this would ascribe to the salary level as a freestanding factor, illustrate that the flaws of selecting a 40th percentile in the interests of achieving those ends are simply a difference of degree, rather than of kind.

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[10] This effect is even more pernicious as to employees who work in lower-income regions *and* in lower-income industries.

In the remainder, our criticisms of USDOL's having proposed a 40th percentile are in no worthwhile respect different from those directed at the $921 dollar figure. Those criticisms also apply with equal force to the Agency's rationales relating to its minimum-compensation proposals for the highly-compensated-employee exemption.

Finally, the *amount* set is not and has never been the only compensation-oriented consideration or limitation. Instead, in pertinent part an exempt employee must also be paid on a "salary basis", which itself plays a role in distinguishing exempt employees from nonexempt ones. Weiss Report at 24. This too militates in favor of restraint in setting the salary level, in that the qualitative *nature* of the employee's compensation facilitates defining and delimiting exempt status.

Little purpose would be served by our further belaboring the reasons for which USDOL's proposed standard salary level is ill-founded. We submit that:

- ◇ The proposed level rests upon flawed predicates and analyses and is too high, and the entire proposal should be withdrawn;

- ◇ USDOL should conduct an entirely new evaluation and should make a different proposal on the basis of the internal, exemption-specific information (as updated, if need be) and analysis to which it has referred in the current explanation;

- ◇ USDOL should publish a detailed report on both the contents and results of the exemption-specific analysis to which the proposals refer and upon which the new proposal will presumably be based; and

- ◇ USDOL should return to the 20% guideline selected in 2004 and should apply it to the array of reasonably-current salaries paid on a "salary basis" to exempt employees in the lowest geographical and industry sectors, rather than to composite "non-hourly" figures which represent a combination of high-wage and low-wage geographical and/or industry sectors.

C. Proposed Automatic "Update"

No proposal to "modernize" the exemptions by providing for automatically "updating" the salary test (a concept raised 45 years ago) should be adopted in any Final Rule. First and foremost, USDOL "is not proposing specific regulatory text", 80 Fed. Reg. at 38539, so the adoption of any such indexing mechanism would be unlawful and without effect under the Administrative Procedure Act ("APA").

Adopting such a mechanism would also disserve some of the very interests the Agency has sought to promote. Furthermore, the other rationales articulated are unwarranted or unsupported, are outweighed by other considerations, portend entirely-foreseeable adverse results, and are fraught with the very-real potential for unforeseen and perhaps unintended consequences.

To begin with, the Agency recognizes that "the line of demarcation" provided by the salary test "cannot be reduced to a standard formula." 80 Fed. Reg. at 38527. Yet that is *precisely* what this proposal involves: Taking whatever the most-recent setting of the salary level turns out to be and then annually extrapolating it into the indefinite future based upon "a standard formula".

One articulated rationale is that "frequent updates are imperative to keep pace with changing employee salary levels." 80 Fed. Reg. at 38539. USDOL offers no insight into what it means here in using "salary" (as we discussed in Section B). Neither has it defined "frequent" (which would also bear upon the extent to which adjustment is really "imperative"), unless this is implicit in the annual timeframe, in which case USDOL has still failed to explain why such a frequency has any particular significance. Neither does the Agency provide a rationale establishing that any such imperative cannot be addressed without the automatic, arithmetical suggestion put forward.

The explanation makes multiple references to the historically-uneven and sometimes-long intervals between adjustments in the salary levels. *Id.* But this merely has to do with how USDOL has heretofore allowed this aspect of its Section 13(a)(1) responsibilities to languish. Past administrative inaction (including since January 20, 2009) is a woefully-inadequate rationale for such an extreme and unprecedented change.

More disturbingly, that USDOL expresses no commitment to undertake *substantive* salary re-evaluations regularly *in the future* provides a basis for grave concern that whatever mechanism is implemented as the result of this rulemaking will not be further considered for many *more* years. Consequently, there is reason to fear that the underlying determinations leading to the coming figure will go un-reconsidered indefinitely, thus leaving whatever the figure is in, say, 2026 completely to the cumulative impact of annually setting a level by:

- ◇ Statistically locating the 40th percentile of a data set; or
- ◇ Calculating a CPI-U-derived percentage increase in the predicate salary.

If these methods do not amount to establishing the salary level by using "a standard formula", then the phrase has no worthwhile meaning.

As supposed justification for doing so, USDOL also refers to considerations of:

- ◇ Competing regulatory priorities;
- ◇ Overall agency workload; and
- ◇ The time- and resource-intensive nature of notice-and-comment rulemaking.

80 Fed. Reg. at 38539. We acknowledge that such pressures exist, just as they always have and always will as to *every* law USDOL enforces.

But they are appropriately dealt with via properly ranking Agency priorities, effectively allocating its resources, and engaging in the proper discussions with Congress about appropriations. Sidestepping difficult choices, achieving "efficiencies" by evading substantive evaluation, superficial "simplification", and bureaucratic convenience are in no respect sufficient bases for putting such a highly-important aspect of the exemptions' application (one that the Agency clearly intends to loom far larger than most in the future) on autopilot for who knows how long. This is particularly true in light of the fact that the salary test is entirely a creature of USDOL's making in the first place, one that, in its own words, "cannot be reduced to a standard formula."

Parenthetically, whatever Congress' having "never enacted limits" curtailing the salary test might say (if anything) about USDOL's authority to adopt an indexing mechanism (80 Fed. Reg. at 38538), this sheds no light upon whether automatic "updating" of that test is *warranted*. And to the extent that Congressional *in*action is relevant to this rulemaking, a closer-to-home consideration is that Congress also "never enacted" a previously-made proposal to index the salary level. *See* The Rebuild America Act, S. 2252, 112th Cong. (2012) (which would have called for tying the salary test to "the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers.").

Implementing the indexing proposal would also mean that USDOL had effectively abandoned its responsibility for and practice of making substantive judgments about the inflationary effects of increases in the salary level, including as to lower-wage sectors such as businesses in rural areas, businesses in the retail and restaurant industries, and small businesses. *See, e.g.*, 69 Fed. Reg. 22122, 22168 (April 23, 2004); 40 Fed. Reg. 7091 (Feb. 19, 1975). The impact would be especially pronounced in a period of high inflation and could in fact contribute to a serious inflationary spiral. Nor would this effect be limited to the amount of the jump in the minimum salary itself; that move would also spark increases in:

- ◇ Salaries paid *above* the minimum level so as to avoid compression in compensation scales among exempt employees; and

- ◇ Compensation and benefits of a non-salary nature that are directly or indirectly keyed to the salaries of exempt employees.

The Agency contends that indexing would have no disproportionately harmful effect upon lower-wage regions or industries. This is supposedly so in part because USDOL selected the 40th percentile rather than a higher one "to account for low-wage regions and industries." 80 Fed. Reg. at 38541. It is an odd and unsatisfactory basis for rulemaking to suggest that some regions and industries should take comfort in knowing that things could have been worse. More generally, however, there is no reason to conclude that this percentile "adequately protects" them, as we discussed in Section B.

If there were nevertheless to be some proposed indexing procedure in the future, then it would be wise to include these features:

1. The Re-Evaluation Period

First, changes should not occur annually. Yearly revisions will seriously complicate and interfere with management's ability to formulate both short-term and longer-term budgets. This effect will be even more pronounced for public agencies, given the legal and legislative constraints upon the timing, frequency, and flexibility of appropriations.

In addition, one may not legitimately derive from 7-year or 10-year or 29-year hiatuses in re-visiting the salary test the proposition that an *annual* re-set is somehow therefore warranted. Furthermore, such a frequency would undercut USDOL's stated desire to promote the exemptions' simplicity, efficiency, consistency, and predictability, at least where employers are concerned.

We recommend that any such re-evaluation period be not less than every three years. We also recommend that the period of advance notice be extended to 180 days. Against the background of a period of at least three years, it is highly unlikely that an amount derived from the underlying statistical information would be materially affected by the difference between 60 days' notice versus 180 days' notice.

2. A Per-Revision "Cap" Or "Maximum"

USDOL states that an index approach is intended to replace "more drastic" changes with "gradual changes", but no safeguards have been proposed to protect against drastic increases (or decreases) in the salary level. 80 Fed. Reg. at 38523. We recommend that any increase or decrease in the salary level be no more than five percent of the prior salary level. This is slightly higher than the annualized increase in the salary level over the exemptions' history.

3. A "Safety Valve" For Exceptional Or Unforeseen Circumstances

There could also be times of national emergency for any number of reasons, episodes of extraordinarily high unemployment, or a host of other exigencies that would render automatic salary indexing undesirable and untenable for at least some period. The day might well come when the actual or threatened effects of the indexing mechanism, whether or not they are foreseen or foreseeable today, should not be permitted to persist or occur. For instance, there might again be a period of high inflation comparable to or even worse than that of the late 1970s, or conceivably there might someday even be a period of prolonged and exacerbated *de*flation.

We recommend that the Secretary of Labor or the Wage and Hour Administrator be expressly authorized to modify or suspend any "update" procedure for such reasons, in such ways, and for such periods as are justified under the circumstances and are explicitly articulated. Of course, the fact that such an exception should be provided for is yet another illustration of why the mechanism is ill-advised in the first place.

4. CPI-U Or Percentage-of-Earnings?

The Agency proposes that any such "update" be based upon either:

- ◇ The 40th percentile of what it erroneously refers to as "all full-time salaried workers"; or

- ◇ Percentage changes in the CPI-U as applied to a predicate salary level.

80 Fed. Reg. at 38540. USDOL seeks comments on both methods, including as to which is "better suited" to the undertaking. 80 Fed. Reg. at 38541. The choice is a false one: *Neither* method is an appropriate way to index future salary levels.

We have earlier discussed the infirmities of selecting a 40th percentile and will not repeat those points here. What the percentile would be *applied to* is ambiguous; USDOL refers without citation to "[t]he chosen population – all full-time salaried workers" and to "the BLS data for this pool . . . ." 80 Fed. Reg. at 38540. It says that the "pool" would purportedly "be based upon actual salaries that employers are currently paying", but we have already pointed out that actual citations are only to information about "non-hourly paid employees". Whatever else those data do or do not represent, they are in no relevant way representative of "actual salaries that employers are currently paying" on a "salary basis" to employees who do or might also meet the exemptions' duties tests.

The only data set USDOL specifically cites and appears to intend to use has to do with a Bureau of Labor Statistics "table of deciles of the weekly wages of full-time salaried workers, calculated using CPS data . . . ." 80 Fed. Reg. at 38540 n.37.[11] But, again, neither do these data "specifically identify salaried workers" and certainly not employees paid on a "salary basis". They instead include unverified, unverifiable, and unspecified "usual weekly earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received" as given by "workers who do not report being paid an hourly rate."[12] What else these "earnings" might consist of is unstated and probably unknown and unknowable. *Id.* And whereas USDOL refers elsewhere to a sample of 60,000 "households", these data represent a sub-sample of only "one-fourth of the CPS monthly sample", or presumably as few as 15,000 "households". *Id.*

Furthermore, by initially increasing the minimum salary level to the 40th percentile of the "salaried workers" data set, USDOL will also skew those very data in favor of substantial increases when future adjustments are made. For example, assuming for the moment that the 40th percentile of "salaried workers" in 2016 is the projected $970 per workweek, employers will overwhelmingly (1) convert employees who are currently paid on a salary basis at a lower rate to nonexempt, hourly-paid ones; and/or (2) increase the

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[11] BLS only began to tabulate these data in January 2015, and it did so "in response to a request by the Office of the Chief Economist of the Department of Labor." Bureau of Labor Statistics, *Research series on deciles of usual weekly earnings of nonhourly full-time workers from the Current Population Survey*, http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm (last updated July 21, 2015). Notably, a year ago USDOL's Chief Economist advocated a drastic increase in the salary level to $984 per week. Heidi Shierholz, *Workers in Lower-Paid White-Collar Occupations Need Overtime Protections*, Economic Policy Institute (Sept. 2, 2014) http://www.epi.org/publication/workers-paid-white-collar-occupations-overtime.

[12] http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.

salaries of employees who will remain exempt to at least $970 per workweek, along with raising the salaries of more-highly-paid employees to prevent or mitigate compression. The first option will necessarily reduce the amount of exempt employees in the data pool USDOL proposes to use, and the second will substantially increase the amount which that remaining pool is paid. In sum, USDOL's proposal will result in a smaller group of "salaried workers" who will in turn be paid at higher salary levels, thereby artificially and unduly influencing the "prevailing minimum salary levels" used to compute the new minimum salary for exempt status.

As for the CPI-U approach, we have said earlier why CPI-U is an unsatisfactory reference. More to the point, however, is that, as USDOL itself recognizes, "inflation has been used as a method for setting the precise salary level *only in the breach* . . . ." 80 Fed. Reg. at 38533 (emphasis added). The Agency summarizes some of the "prior concern[s]" among its predecessors with an inflation-based approach, and it "acknowledges these concerns". 80 Fed. Reg. at 38540. However, it apparently believes that these difficulties are overcome by applying the CPI-U to the salary level to be proposed, because (i) this will be done only prospectively; and (ii) the salary level will be set "using current data on *wages* being paid to full-time *salaried* workers . . . ." *Id.* (emphasis added). On the contrary, this simply layers one ill-founded proposition upon another, including that those "current data" do not reveal specific information about "salaries" generally speaking, employees paid on a "salary basis", or exempt employees. Setting the salary level based upon some nebulous composite of "wages" is not proper.[13]

For largely the same reasons given in Section B, USDOL should instead make a different proposal to conduct an "update" via the use of internal, exemption-specific information of the sort to which it has referred in the current explanation. Of course, if the Agency rigorously maintains a contemporaneous database of such information, then this would dispense with the need to set the salary level according to any measure other than the amounts of actual salaries paid on a "salary basis" to employees who are or are likely to be exempt, taking into account lower-wage regions and industries.

D. Crediting Nondiscretionary Payments

USDOL has invited comments regarding the possibility that nondiscretionary bonuses and incentive payments could count toward a portion of the standard salary level. The Agency has not described how it envisions that such a mechanism would actually work. Depending upon what USDOL means, it might well be that this is *already* "permitted". In any event, in response we recommend that:

- ◇ The salary test *should* explicitly "permit" this crediting;
- ◇ The proportion of such payments that could be credited *should not be* limited to any particular percentage;

[13] USDOL's formulation about "whether the CPI-U will accurately track the actual salaries *and incomes* . . ." reveals a similar flaw in its reasoning. *Id.* (emphasis added).

◇ "Commissions" *should be* included in such a provision; and

◇ The crediting *should not be* limited to any particular timeframe.

If an employee is paid on a "salary *basis*" (a freestanding indicator of exempt status *in itself*), the *source* of the dollars comprising the predetermined amount is irrelevant.[14] An employer's ensuring payment of a predetermined amount at the requisite dollar level still serves as "the best single test of the employer's good faith in attributing importance to the employee's services" (Stein Report at 21), even if that amount consists in whole or in part of nondiscretionary sums ultimately derived from elsewhere.

Moreover, crediting these payments could at least reduce to some limited extent the impact of USDOL's doubling *both* the current salary level *and* the percentile that was last used as a benchmark, and its doing so without specifically adjusting the dollar amount in consideration of particular industries. This would be especially true with respect to retail and service industries, for which the proposed level will be, bluntly, a catastrophe, but in which the payment of incentives and bonuses of various kinds is common.

But the positive impact would go beyond just those industries. Bonuses and incentive payments are ubiquitous throughout many organizations, both profit and not-for-profit, and many such payments are based upon an entity's financial performance and/or an employee's performance over a calendar quarter or a calendar or fiscal year.

The Agency "believes it is important to strictly limit the amount of the salary requirement that could be satisfied" in this way and is "considering whether" to restrict the offset to 10 percent. 80 Fed. Reg. at 38535. There is no discussion of specifically *why* USDOL believes this. Neither is there any explanation whatsoever for why 10 percent would be a proper proportion to consider, as opposed to, say, 15 percent, 30 percent, 60 percent, or any other specific percentage; nothing suggests that USDOL's 10-percent figure is anything but completely arbitrary.

It has long been the case that an incentive-based pay plan including the payment of a predetermined amount on a properly-maintained "salary basis" meets the exemption's requirements without regard to the fact that incentive compensation might ultimately make up *the entirety of* the employee's pay. USDOL has done so without expressing any concern whatsoever that there might be an alleged need to impose a percentage limit upon the extent to which this was done. As Mr. Stein observed in 1940:

> In some instances persons . . . are paid in part *or in full* by methods of compensation which include commissions, drawing accounts, and other items. In such instances *the salary requirement will be met* if the employee is guaranteed a net compensation of not less than $30 a week 'free and clear'.

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[14] This might not be so if a motivation for constraining the source(s) was to "transfer income from employers to employees in the form of higher earnings". 80 Fed. Reg. at 38518. Of course, any such purpose in this rulemaking would be an illegitimate one.

Stein Report at 23 (emphasis added). *See also Opinion Letter of Acting Wage-Hour Administrator FLSA2006-43* (Nov. 27, 2006); *Opinion Letter of Wage-Hour Administrator No. 999*, CCH Administrative Opinions ¶ 30,546 (June 6, 1969); *Opinion Letter of Wage-Hour Administrator of March 3, 1964* (WHD Index Nos. 21 BA 203, 21 BA 205); *Opinion Letter of Director, Division of Minimum Wage and Hour Standards, of March 15, 1976*. This is not distinguishable in any relevant way from an employer's crediting 100% of the nondiscretionary payments made to an otherwise-exempt employee, provided only that the employer ensures that the "salary basis" is maintained and that the employee's compensation be not less than the amount prescribed in the regulations.

Furthermore, USDOL has also long recognized that these principles are just as applicable to "commissions" (whatever the Agency means in its undefined use of that term) as they are to any other kind of nondiscretionary bonuses or incentive compensation. *See*, *e.g.*, Stein Report at 23; *Opinion Letter of Acting Wage-Hour Administrator FLSA2006-43*, *supra*; *Opinion Letter of Wage-Hour Administrator No. 999*, *supra*; *Opinion Letter of Wage-Hour Administrator of March 3, 1964*, *supra.* There is no reason to regard "commission" payments differently from bonuses or other nondiscretionary payments, and USDOL has offered none. The Agency articulates only its unsupported concern that "commission" recipients "are generally unable to satisfy the standard duties test . . . ." 80 Fed. Reg. at 38536.

Leaving aside the questionable nature of USDOL's broad-brush assertion about the alleged nature of the work performed by "commission" recipients, the "standard duties test" and the salary test are of course different and freestanding requirements calling for independent and unrelated analyses. If an employee for whom the employer takes a commission-against-salary credit does not meet the duties requirements for exempt status, then the employee is nonexempt *without regard to* any credit. What is supposedly the case as to the "standard duties test" for exempt status *overall* does not and should not have anything to do with how *the salary test* is constructed.

In a different vein, the Agency claims that "the time period over which such compensation should be considered must be limited[,]" because otherwise this supposedly would "undermine the crucial protection provided by the salary basis requirement, which ensures that exempt workers receive a minimum level of compensation on a consistent basis." 80 Fed. Reg. at 38536. Such matters have no role in this rulemaking.[15] Moreover, these premises are erroneous in any case.

As the foregoing authorities demonstrate, the qualitative requirements of the "salary basis", including the necessity that a "predetermined amount" be paid *each pay*

[15] The salary basis has nothing whatsoever to do with "crucial protection" or with protection of any other variety. USDOL is not authorized to "protect" exempt employees, including that it has no authority to predicate exemption-related action or inaction upon such a consideration. The sole relevance of the salary test, and the only one on the basis of which the Agency is authorized to engage in rulemaking, is as a purely-definitional component serving to distinguish exempt employees from nonexempt ones. For the same reason (and so long as the salary test is met), neither is whether the salary basis happens to "ensure that exempt workers receive a minimum level of compensation on a consistent basis" a legitimate consideration. This is an apt illustration of the reasons for our criticisms in Section A.

period, obviate any need to restrict the counting of nondiscretionary bonuses, incentive payments, or "commissions" to a month or to any other timeframe.[16] Nevertheless, if some such maximum period is adopted, then we recommend that it be either:

- ◇ A "representative period" along the lines of what has been used under the FLSA's Section 7(i) exemption for decades (*see*, *e.g.,* 29 C.F.R. §§ 779.415-418); or

- ◇ As long as a calendar quarter, which experience suggests is a not-uncommon frequency for the payment of such amounts.

E. Computer-Employee Exemption

We are troubled by this passage in USDOL's prefatory remarks:

> Hourly computer employees who earn at least $27.63 per hour and perform certain duties are exempt under section 13(a)(17) of the FLSA. These workers are considered part of the EAP exemptions but were excluded from the analysis because they are paid hourly and will not be affected by this proposed rulemaking (these workers were similarly excluded in the 2004 analysis). Salaried computer workers are exempt if they meet the salary and duties tests applicable to the EAP exemptions . . . .

80 Fed. Reg. at 38553. Taken in conjunction with language in 29 C.F.R. § 541.400, these statements:

- ◇ Perpetuate the erroneous impression that USDOL's Section 13(a)(1) rulemaking supposedly has some effect upon the construction and application of Section 13(a)(17), a state of affairs to which we objected in 2003; and

- ◇ Incorrectly imply that Section 13(a)(17) is applicable only where a computer employee performing the necessary duties is paid on an hourly basis at not less than the $27.63 rate.

As we pointed out in 2003, in Section 13(a)(17) Congress granted no authority whatsoever to the Secretary of Labor to define or delimit that exemption. Thus, notwithstanding that Section 541.400 refers to Section 13(a)(17), the regulation did not, does not, and will not govern the scope or meaning of Section 13(a)(17) in any way. *See*, *e.g.*, 29 U.S.C. § 213(a)(17); 69 Fed. Reg. at 22159 (Section 13(a)(17) "included no delegation of rulemaking authority to the Department of Labor to further interpret or define the scope of the exemption . . . .").

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[16] In the case of "commissions", experience suggests that payments usually so described *are* typically computed on a monthly basis. However, this is no reason to impose such a limit as a matter of regulation.

In particular, the Section 13(a)(17) exemption is *not* limited to computer employees who are paid on an hourly basis or whose compensation equates to "$27.63 an hour":

- ◇ This is clear on the face of the statute;
- ◇ USDOL has no regulatory authority to impose such a requirement; and
- ◇ There are no "gaps" to fill via agency "interpretation".

The rate requirement governs only "*in the case of* an employee who is compensated on an hourly basis . . . ." 29 U.S.C. § 213(a)(17) (emphasis added). This plainly contemplates other "cases" in which computer employees are paid in different ways, and that, "in the case of" such employees, the minimum-rate requirement does not apply. *Cf.* 57 Fed. Reg. 46742, 46743 (Oct. 9, 1992)(in which USDOL acknowledged that the phrase "if such employees are paid on an hourly basis" in Public Law 101-583, 104 Stat. 2871, meant that the compensation requirement applied only to computer professionals *paid on an hourly basis*).

USDOL should clearly state that references to Section 13(a)(17) are illustrative only and are not to be taken as affecting the scope or application of that exemption in any respect. It should further remove any implication that Section 13(a)(17) is limited to computer employees paid on an hourly basis, or that there is any minimum-compensation requirement for those who are paid on another basis. Otherwise, it is likely that USDOL's statements will provoke unwarranted litigation in this regard, whereas elsewhere the Agency has repeatedly expressed a desire to *reduce* FLSA litigation.

F. Hypothetical Changes In The Duties Tests

USDOL says that, while "it is not proposing specific regulatory changes *at this time*, [it] is seeking additional information on the duties tests *for consideration in the Final Rule*." 80 Fed. Reg. at 38543 (emphasis added). Whether or not the Agency intended such an implication, this sentence may fairly be read (and *is* widely being read) to insinuate that in the Final Rule it will purport to make actual changes in those portions of Part 541 relating to these requirements. We are aware of Administrator Weil's "no mischief here" comment in a July interview, but none of his remarks we have seen explicitly disclaimed the potential for any such outcome.

Both to put USDOL on notice and for purposes of any necessary future citation, we state explicitly that making such regulatory changes as an outgrowth of the current rulemaking will plainly and unmistakably be in contravention of the APA and will be without legal effect. Moreover, the unlawful and illegitimate nature of any such undertaking would not be ameliorated in any measure by resorting to a specious contention that doing so was somehow justified as the result of or as an alleged extension of the comments the Agency received. The "regulated community's" opportunity to study and comment specifically upon the *actual content* of any proposed modification(s), including but not limited to the specific words, syntax, and structure used in any such provision(s), is an indispensable prerequisite to any lawful duties-related rulemaking under the APA. Commenting upon generalized concepts is in no respect a sufficient proxy or substitute for what the APA requires.

Against the background of and expressly subject to the foregoing, we will provide some "additional information" relating to the Agency's requests.

1. Minimum-Percentage Requirements

USDOL's Questions B and C deal with largely the same consideration: Whether there should there be a requirement that an employee spend a minimum amount of time in the requisite primary duty in order to be exempt. 80 Fed. Reg. at 38543. We submit that there should *not* be such a minimum.

Since 1938, USDOL has deemed it appropriate and entirely workable to view the primary-duty test as being an ultimately-qualitative one. Whether an employee spends more than 50% of his or her time in work of the requisite kind has been no more than a "good rule of thumb" or a "useful guide", but did not "seem reasonable in all situations." Weiss Report at 51. As a result, this consideration has always been only *one* of a number of factors to consider.

And in 2004, USDOL recognized this long history and properly rejected the idea that there should be a minimum percentage. It did so with reference to a proposal that the threshold be 50%, but the same reasoning would apply to *any* particular percentage:

> 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. * * * 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).

69 Fed. Reg. at 22186. USDOL's remarks were in part based upon its earlier observation that there was no timekeeping requirement for exempt employees (69 Fed. Reg. at 22126) and of course that remains the case today. 29 C.F.R. § 516.3.

In light of the decades-long practice of evaluating "primary duty" on a *qualitative* basis, USDOL, the courts, and other interested members of the public have become familiar with these principles and have developed approaches to applying them. But the Agency now questions whether this 75-year period of policy and practice should be abandoned because it is "concerned" that some employees might be "spending a significant amount of their work time performing non-exempt work" and that, "at some point, a disproportionate amount of time spent on nonexempt duties may call into question whether an employee is, in fact, a bona fide EAP employee." 80 Fed. Reg. at 38543.[17] Another apparent Agency "concern" is that these and similar matters "can lead to varying results." *Id.*

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[17] It is also true that, while the concept of "primary duty" and the impact of nonexempt work are of course related, they are nevertheless *different* considerations entailing *separate* analysis and evaluation. *Compare*, *e.g.*, 29 C.F.R. § 541.700 *with* 29 C.F.R. § 541.702. USDOL's having improperly conflated these principles has led to its misplaced concerns.

Whether and to what extent some employees are or are not in fact spending "a significant amount" of time or "a disproportionate amount" of time on nonexempt work so as to "call into question" their exempt status are matters that were no more or less perplexing in 1938, or in 1940, or in 1949, or in 2004 than they are today. Similarly, the fact that "varying results" might flow from the assessment of these issues is just as true of many other duties tests, that is, it is an inescapable aspect of applying Section 13(a)(1)'s ambiguous terms to an endless variety of inherently-uncertain facts and circumstances. *No* set of regulations that is faithful to USDOL's responsibilities in defining and delimiting the exemptions will ever avoid "varying results". Frankly, substantially more than the Agency's amorphous "concerns" expressed so far would be necessary to warrant upending the historical and current approach to the concept of primary duty.

As for whether USDOL should "look to the State of California's law" to adopt a 50% threshold, obviously our answer is "no." California caselaw illustrates the difficulties of applying a strict time test to situations where employees classified as exempt are performing both exempt and nonexempt tasks concurrently. Moreover, California courts have ultimately resolved the issue, albeit awkwardly, by reverting to *qualitative* primary-duty concepts. *See e.g., Heyen v. Safeway, Inc*. 216 Cal. App. 4th 795, 808 (2013) ("If a party claims that an employee is engaged in concurrent performance of an [sic] exempt and non-exempt work, [the jury] must consider that time to be either an exempt or a non-exempt activity depending on the primary purpose for which the employee undertook the activity at that time. The nature of the activity can change from time to time.") And, as under the FLSA, there is no timekeeping requirement for exempt employees (*See*, *e.g*., Cal. Indus. Welfare Comm'n, Order No. 1-2001, Section 1(A)) such that employers cannot realistically apply a *quantitative* time test.

California has also resorted to qualitative factors in evaluating whether employees are misperforming or deviating from a job's realistic requirements that exempt duties be performed more than 50% of the employee's working time. *See*, *e.g*., Cal. Indus. Welfare Comm'n, Order No. 1-2001, Section 1(A)(1)(e) (promulgated under Cal. Code of Regs, tit. 8, § 11010(1)(A)(1)(e)); *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 801–802 (1999) ("On the other hand, an employee who . . . falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption."). Had a qualitative primary duty test remained intact in California, none of this twisted analysis would be necessary. For all of these reasons, defining "primary duty" on a *qualitative* basis, with any percentage-of-time test serving only as a rough "rule of thumb," is a better gauge of whether a job's essential nature is exempt.

In any event, were the Agency to adopt California's *quantitative* test, then we submit that it must also "look to" and incorporate that portion of the California test requiring consideration of "the employer's realistic expectations and the realistic requirements of the job" in determining whether the requirement is met. Otherwise, USDOL would be imposing exemption standards that are *more stringent* than California's.

2. "Concurrent Duties" Concept

USDOL asks whether 29 C.F.R. § 541.106 "is working appropriately" or instead "needs to be modified". 80 Fed. Reg. at 38543. Our comments relating to "primary duty" are also apt here.

The current Section 541.106 was adopted in 2004 but did nothing more than incorporate a longstanding concept. *See*, *e.g.*, 69 Fed. Reg. 22136-37; *Opinion Letter of Deputy Wage-Hour Administrator* FLSA2005-19 (Aug. 2, 2005)(section was "not a change in the Department's position"). Indeed, such considerations were embraced at least as long ago as 1949. Weiss Report at 35. Thus, it is not the case that the regulation was somehow conceived, designed, and implemented in recent times, such that whether it is "working appropriately" is nothing more than some regulatory check-up on a recent development. As we said in the preceding discussion, USDOL, the courts, and other interested parties who are actually familiar with the concept's parameters have become accustomed to it over many decades and have long experience with applying it. More than the Agency's generalized disquiet is required before the principle is abandoned.

Furthermore, the concurrent performance of exempt and nonexempt work has to do with whether an employee meets the "primary duty" requirement – *not* whether the employee is supposedly performing "too much" nonexempt work. 29 C.F.R. § 541.106(a)("Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is . . . based on the factors *set forth in §541.700*." (emphasis added)). Therefore, the principle is not an exemption requirement in itself, and it simply has a bearing upon the evaluation of a requirement that is, as we have said, well-suited as it stands. This in itself "avoid[s] sweeping nonexempt employees into the exemption." 80 Fed. Reg. at 38543.

USDOL's formulation of Section 541.106 further "avoid[s] sweeping nonexempt employees into the exemption" by articulating qualitative ways to distinguish between instances in which nonexempt work is performed concurrently with exempt work from those in which it is not:

> 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. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

29 C.F.R. § 541.106(a). Taken along with the illustrations that follow this passage, the character and impact of concurrent performance can be evaluated with certainly no more difficulty than is presented by other duties requirements.

And once again, that the application of the regulation might be "difficult" and might "lead to varying results" can be said of most if not all of the other duties-related tests for exempt status in a multitude of situations. If these are to become the standards for changing the duties tests, then there is a great deal more work to be done indeed. Moreover, we repeat that difficulty and "varying results" cannot be eliminated by *any* set of regulations that will also be consistent with USDOL's responsibilities in defining and delimiting the exemptions. At some point, further pursuing "simplification" of the exemptions and a uniformity-of-result in their application becomes an abdication of the obligation to define and delimit them.

Finally, the Agency has asked "[t]o what extent . . . exempt lower-level executive employees [are] performing nonexempt work." 80 Fed. Reg. at 38543. Of course, if these hypothetical employees are exempt, then how much nonexempt work they are doing is irrelevant. As for the extent to which lower-level executive employees who might or might not be exempt are doing nonexempt work, it is certain that no information USDOL receives in response to such a vague question will be an adequate or legitimate predicate for rulemaking.

3. A Return To The Long-Test/Short-Test Dichotomy?

USDOL says repeatedly that its charge includes modernizing and simplifying the regulations, making them easier to understand, increasing vague "efficiencies" in their application, and reducing the frequency and amount of FLSA litigation. One may therefore be forgiven for questioning how these aims square with the possible re-introduction of a more-complicated "long/short duties test structure" that was formulated nearly 75 years ago and was dispensed with more than ten years ago. Stein Report at 14-15; 80 Fed. Reg. at 38543.

Presumably, this would amount to adopting something along the lines of the pre-2004 exemption structure so as to impose a "long test" percentage limitation upon nonexempt work. While this had and would have a *superficial* appearance of a rigorous numerical standard, in truth any such impression was and would be only a misleading illusion. Stating such a percentage accomplishes nothing in itself; this simply moves the uncertainty to a different realm and reveals why this approach was, and again would be, ineffectual.

From practically the very beginning, USDOL, the courts, and the relevant public faced intractable difficulties in discerning what "nonexempt work" consisted of in the first place. *See*, *e.g.*, Weiss Report at 29-31. The concept of work that is "directly and closely related" to exempt duties evolved from an effort to provide more clarity. Weiss Report at 32. Note that this formulation moved the inquiry back to what counted as "exempt" work, only affected the issue of what work was "nonexempt" by negative implication, and had much more to do with "primary duty" than with percentage limitations.

The long test persisted for a while thereafter largely by virtue of historical inertia (including that it had largely ceased to have any practical function for probably more than two decades) until it was wisely and appropriately eliminated in 2004. This was in significant part a recognition that years of experience (including the 20-year hiatus) had shown the long test not to contribute more than the short test in any appreciable or effective way to distinguishing between exempt employees and nonexempt ones. At the same time, the principle of identifying activities that are "directly and closely related" to exempt work was preserved and remains in effect; it is incorporated into the meaning of "exempt work"; and both are integral parts of "primary duty", where the inquiry properly belongs. *Compare* 29 C.F.R. § 541.700 *with* § 541.702 *and* § 541.703. This arrangement is historically well-founded and analytically elegant, and the exercise of determining exempt status will not be served by superimposing another layer upon it.

And as USDOL rightly recognized in 2004, a *qualitative* discernment of "nonexempt work" is one thing; undertaking to measure *quantitatively* how much of it is done from hour-to-hour, workday-to-workday, and workweek-to-workweek is quite another altogether. 69 Fed. Reg. at 22126-27. There is currently no requirement to maintain any records of the amount of such work,[18] and there is serious reason to doubt that the quantification could be done in any useful and reliable way. Furthermore, if a percentage limitation were re-imposed on a *workweek* basis as it applied previously (*see* 29 C.F.R. §§ 541.1(e), 541.2(d), 541.3(d), 541.5(b) (2003)), the exacerbated practical burdens imposed by trying to measure these things (even if that can be done) and by dealing with possible exempt-one-workweek/nonexempt-the-next-workweek scenarios are too obvious to warrant more discussion.

There is no reason to re-impose the long-test/short-test dichotomy; there is every reason *not* to do so. Such a requirement would accomplish nothing that a competent evaluation of the existing principles cannot achieve. Instead, any such step:

- ◇ Would *complicate* rather than "simplify" the exemptions' application;
- ◇ Would "modernize" nothing but would instead revive a requirement that time has shown to be unnecessary and unworkable;
- ◇ Would make the requirements *harder* to understand;
- ◇ Would introduce *in*efficiencies that do not exist today, including with respect to USDOL's investigative efforts;
- ◇ Would increase *un*certainty in the exemptions' application;
- ◇ Would produce "varying results" to a *greater* extent; and
- ◇ Would *increase* the frequency and volume of litigation.

4. Managers At Individual Retail Or Service Establishments

USDOL has declined to give any specific consideration to the adverse impact that increasing and indexing the salary level will have upon the retail and service industries. Therefore, in response to the Agency's invitation to propose other changes in the duties tests, we recommend that the executive exemption be modified in future rulemaking to recognize the likelihood that the role and circumstances of the manager of an individual retail or service establishment support exempt status.

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[18] Interestingly, no such requirement was imposed even in the days when a "long test" existed. This might well have been in part a result of USDOL's having implicitly recognized the difficulties we describe.

This could be accomplished by redesignating the current 29 C.F.R. § 541.100(b) to 29 C.F.R. § 541.100(c) and then substituting the following as a new Subsection (b):

> The highest-ranking employee at a retail or service establishment who is customarily assigned the principal on-site responsibility for the daily operations of the establishment is deemed to have management as his or her primary duty.

Note that this addition would not pronounce such a manager to *be* exempt, because the salary test and the other duties requirements would also have to be met. In addition, the provision would not, of course, preclude the exemption's application to other, lower-ranking employees in the establishment if they too satisfied the exemption's tests.

USDOL's adoption of such a provision would clearly be justified and appropriate. As Mr. Stein recognized nearly 75 years ago as to an employee who is in charge of an establishment:

> [c]learly, if such an employee [has] at least two other employees to supervise and is not himself supervised at the location where he works, he possesses a degree of executive freedom that would not be the case if he had a job of comparable importance in charge of a department inside a plant. Due weight must be given to this freedom from direct supervision enjoyed by the top person in an independent establishment or in a branch establishment physically separated from the supervising office of the company.

Stein Report at 17. Mr. Stein also took note of "the comparatively high degree of freedom" and the "consequent weight of the executive responsibility involved" in such an employee's work. Stein Report at 18.

Finally, a provision specifically relating to these industries is indisputably consistent with Congressional intent and will in fact advance this intent. After all, Section 13(a)(1)'s still-existing amendment dealing explicitly with "an employee of a retail or service establishment" demonstrates the solicitude with which Congress has viewed the executive exemption (and for that matter the administrative exemption) where the retail and service industries are concerned. That Congress included this reference with respect to the now-defunct percentage limitation upon nonexempt work does not diminish the fact that Congress regarded the retail and service industries with particular deference where the relevant exemptions are concerned.

G. Possible Added "Examples"

We also wish to address USDOL's suggestion that it is inclined to adopt additional "examples" for the "regulated community" of how the exemptions apply. 80 Fed. Reg. at 38543. We submit that this will be an ill-advised undertaking.

As we pointed out in discussing the anticipated impact of the elimination of Part 541, Subpart B in connection with the proposed 2003 rulemaking, Part 541 now consists entirely of *regulations*. Attaching the innocuous-sounding descriptor "examples" to some of its contents does not change this. Neither does it change the fact that USDOL's issuing "examples" (otherwise known in this context as "regulations") as a final outgrowth of the current rulemaking will therefore run afoul of the APA, just as surely as will adopting purported changes in the duties tests (or anything else as to which the Agency has not proposed specific regulatory changes). Indeed, such regulatory "examples" might well end up having the effect of changing those tests in an indirect way, even if that is not the intent of including these "examples".

Therefore, if the Agency proposes to add "examples" based upon comments it receives in connection with the current invitation, then it must pursue this in a separate rulemaking procedure undertaken in the future. Adding them in the absence of such separate rulemaking will be unlawful and without legal effect.

Moreover, there is serious reason to believe that including regulatory "examples" was unwise and misguided in 2004, and that expanding them now will also be. The past ten years have shown that these "examples" tend to take on a life of their own and can yield unintended consequences. As an illustration, "examples" having to do with "[e]mployees in the financial services industry" apparently contributed to the perceived need to issue Administrator Interpretation 2010-1 (March 24, 2010) relating to mortgage loan officers.

Without regard to whether stakeholders said that they would find further guidance helpful or useful, "examples" may not and should not be added to Part 541 as an outcome of this rulemaking.

H. The Effective Date

We also wish to address one final matter of importance: Any final revision's effective date. If the current proposal to increase the salary level substantially is not withdrawn, then we submit that employers will need considerable time to evaluate alternatives and to make and implement important business decisions about how to arrange their affairs in light of the revisions.

As just a selection of illustrations, employers will find it necessary to:

- ◇ Evaluate how the changes will affect their workforces in the near- and intermediate terms, including determining who will continue to be treated as exempt and what the resulting cost will be of salary increases (both those increases for at-the-new-threshold employees and those necessitated by the need to avoid compensation compression);

- ◇ Design new pay plans, reduce the straight-time compensation, and/or revise benefits plans relating to employees who will thereafter be treated as nonexempt;

- ◇ Determine to what extent to reduce or eliminate benefits and other emoluments of employment (such as paid-leave allotments, tuition reimbursement, on-premises meals, transportation supplements, or child-care paid for or provided, as just a few illustrations) to offset composite increases in labor costs;

- ◇ Determine what immediate workforce reductions might be required;

- ◇ Determine what hiring freezes or delayed or canceled promotions are called for;

- ◇ Determine whether or to what extent to close establishments or facilities or to postpone or cancel expansion plans;

- ◇ Determine whether and to what extent to move work offshore or across borders; and/or

- ◇ Develop communication plans to explain to employees (especially adversely-affected ones) that these changes are the result of USDOL's revisions.

A substantial adjustment period is certainly justified. We recommend that the delay be not less than (but preferably considerably more than) 120 days after the revisions are published in their final form, as was the case in 2004. *See* 69 Fed. Reg. at 22122.