Submission By

Fisher & Phillips LLP

In Response To Request For Information

Regarding 29 C.F.R. Part 541

(RIN 1235-AA20)

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I. Introduction

We offer the following in response to the U.S. Department of Labor's "Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" (the "RFI") published on July 26, 2017 at 82 Fed. Reg. 34616, Regulatory Information Number (RIN) 1235–AA20.

By way of background, Fisher Phillips is a national law firm that has been engaged in the practice of labor and employment law for nearly 75 years. Throughout that time, an extensive portion of our practice has included statutory and regulatory analysis, interpretation, compliance-counseling, dispute resolution, and the presentation of commentary as to matters relating to the Fair Labor Standards Act.

For 30 years, our activities in these respects were guided by Henry A. Huettner, who, prior to joining Fisher Phillips, had been Regional Director for USDOL's Southeastern Region. He was first employed by the agency's Wage and Hour Division as an Investigator in 1941. The following remarks are significantly influenced by Mr. Huettner's substantive and historical knowledge, as well as his experiences in enforcing and interpreting the FLSA, all of which provide a current-day foundation for the views of the firm's expert practitioners.

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 a different exemption is specifically identified.

We also refer to one or more of three historical USDOL documents relating to these exemptions, each of which is entitled "Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541", and with each of which the Agency is well-familiar. 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 use refer the reader to the corresponding location in each actual report, rather than to any reproduction of the report.

The RFI invites comments regarding the 2016 revisions affecting the exemptions' compensation requirements discussed at and stated in 81 Fed. Reg. 32391-32552 (May 23, 2016). Before we address the specific questions the RFI raises, as well as some other matters of a related-but-different nature, we want to re-emphasize concerns we stated in our comments submitted in advance of those changes.[1]

[1] The legal status of the 2016 revisions (and indeed of the "salary basis" criterion itself) is of course still a subject of dispute. For present purposes, we have presumed that the form of whatever changes USDOL is considering will bear a reasonable resemblance to that of the 2016 changes.

II. Inappropriate Considerations Motivated the 2016 Revisions

In our view, troubling statements made in and phrases used in the proposed changes' explanatory discussion, as well as remarks made by President Obama, by Secretary of Labor Perez, by Administrator of the Wage and Hour Division Weil, and by others associated with USDOL, connoted that the principal motivation for the revisions was to increase employee compensation largely in one of two ways:

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

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

We said in 2015, and we again submit now, that this was not a legitimate pursuit with respect to these exemptions. With all due respect, these aims were instead inconsistent with the agency's role under Section 13(a)(1).

Congress made the legislative judgment that executive, administrative, professional, and outside-sales employees would not be subject to the FLSA's minimum-wage or overtime requirements. Considerations of such things as a "fair day's pay", "a fair day's work", "basic fairness", "a hard day's work", "transfer[ring] income from employers to employees in the form of higher earnings", "the extra hours [employees] spend on the job and away from their families", and so on (whatever they actually mean from one articulation to another) are worthy considerations in other contexts, but they have no proper place in USDOL's rulemaking under Section 13(a)(1).

Instead, the agency's *only* authority and *sole* responsibility is to define and delimit the exemption's terms so as to carry out *Congress's* 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 might of course have an *indirect* effect upon other-than-definitional matters like those described above. But endeavoring to craft the applicable criteria *for the purpose of* such things as supposedly ensuring "fair day's pay", "transfer[ring] income from employers", promoting "basic fairness", and otherwise directly or indirectly facilitating employees' monetary betterment is a fundamentally different matter of legislative policymaking to be addressed, if at all, by *Congress*.

The agency recognized this important 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 the same token, USDOL is "not authorized" to tailor factors defining and delimiting Section 13(a)(1) with the aim of "improving the conditions of" workers who are thereby rendered *non*exempt. Furthermore, many workers so affected do not see that status as being an improvement of their conditions.

The improper mindset with which the prior administration approached its revisions necessarily had a strong-if-not-determinative adverse effect upon them. We urge USDOL to take this into account as it formulates any forthcoming proposals relating to those changes. In particular, the 2016 rulemaking should not be taken at face value as any qualitative or quantitative "baseline" from which a new initiative should proceed.

III. The "Salary Basis" and Salary-Threshold Requirements Should Be Abandoned (Item Nos. 1 and 5)

We are of course aware of USDOL's position that the "salary basis" and salary-threshold requirements are within the agency's authority granted under Section 13(a)(1). We respectfully contend that this is incorrect, and that the matter bears reconsideration notwithstanding inertia provided by relatively few decades-old court decisions. Nevertheless, we leave aside questions of legal authority for now to urge instead that the agency should abandon these unnecessary exemption requirements in the interests of sound policymaking.

It is important to keep in mind from the outset that the "salary basis" and salary-threshold requirements are *separate* ones, despite their often being conflated by courts, by some at USDOL, and by many others so as to lead to unwarranted outcomes.[2] For instance, an employee would not qualify for the executive exemption under the revised regulations if she was paid $9,130 a week other than on a "salary basis". Neither would she do so even if she was paid on a "salary basis", but at a rate of $91.30 a week.

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[2] This tendency not to differentiate the two will be especially relevant to our later discussion of the 2016 limitations upon "crediting" bonuses and incentive compensation (including commissions) toward the salary-threshold.

In our experience, it is not uncommon for one or the other of these criteria, *standing alone*, to defeat exempt status for an employee who clearly meets the duties requirements. Whether taking compensation into account in some way is or is not consistent with Section 13(a)(1), without question the statute contemplates considering the nature and circumstances of the work performed in *every* instance. Maintaining compensation tests that preclude exempt status out-of-hand, that is, without any regard to the work done, is plainly in derogation of Section 13(a)(1)'s clearly-expressed intent.

A. The "Salary Basis"

Of course, the essence of this requirement is its qualitative "guarantee" component. An exempt employee must "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a).

Recall the longstanding point-of-view that the salary test "must serve as a guide to the classification of bona fide [exempt] employees and not as a barrier to their exemption." *Weiss Report* at 15. As it stands, the "salary basis" criterion can erect *precisely* such a barrier even under circumstances in which this produces an absurd and unacceptable result. Surely, Congress had in mind a more-searching evaluation of a person's exempt status than this affords.

Perhaps the starkest illustration of the point is USDOL's own, longstanding "work-around" that is intended to deal with this impermissible impact of the "salary basis" requirement. Since at least 1975 (that is, for at least 42 years), the Wage and Hour Division has maintained a policy that implicitly recognizes the injustice presented by the preclusive criterion's excluding individuals who clearly should otherwise be exempt. Section 52L00 of the *Field Operations Handbook*, entitled "Highly paid executive, administrative, and professional employees not paid 'on a salary basis'", directs that no violations be asserted as to employees otherwise meeting the tests for one or more of those exemptions who "fail to qualify for exemption under Section 13(a)(1) . . . *solely* by reason of the fact that they are not paid 'on a salary basis' as required by Reg 541 . . .." [Emphasis in original].

Even though USDOL thereby acknowledges the inequity and unsuitableness of its own exemption requirement in such circumstances, nevertheless it has been content to leave the employer exposed to action taken by private litigants. Section 52L00 calls for management to "be advised of possible liability under Sec[tion] 16(b) and of the steps necessary to meet the "on a salary basis" requirement . . .." In all candor, this dichotomy is indefensible; the incomparably-better approach is not to impose the "salary basis" as a requirement in the first place.

It is noteworthy that the original Part 541 regulations contained no "salary basis" criterion. 3 Fed.Reg. 2518 (October 20, 1938). Since its inception in 1940, the principal rationale for the "salary basis" as a freestanding, potential preclusion of exempt status

has been that it provides "a practical guide to the investigator as well as to employers and employees *in borderline cases*, and simplif[ies] enforcement by providing a ready method for screening out the *obviously nonexempt* employees." *Kantor Report* at 2-3 (emphasis added).

The criterion as it currently stands is far more than merely some innocuous-sounding "practical guide". It is instead an independent screening mechanism having the force-and-effect of law. Moreover, the impact of its out-of-hand elimination of employees who do or might well meet the exemptions' duties requirements outweighs any alleged "bright-line" advantages, especially when one considers that "obviously nonexempt employees" will be, well, obviously nonexempt for other reasons.

Furthermore, applying "salary basis" principles is in many instances anything but "simple". Numerous USDOL opinion letters and countless court decisions have devoted rivers of ink to complex questions relating to whether one set of circumstances or another is or is not consistent with a "salary basis" of pay. It is by no means unusual for "salary basis" matters to divert attention from what should be the principal question, *i.e.*, whether the employee's work meets the duties requirements for exempt status.[3]

Finally, that courts, investigators, employers, and employees are able to judge such things without the necessity for a "salary basis" requirement is evident in the fact that several species of the exemptions have long been applied in the absence of this test. Among these varieties are:

- ◇ Employees falling within the "outside salesman" exemption;
- ◇ Employees qualifying for the "teaching professional" exemption;
- ◇ Employees authorized to practice law who are actually practicing law;

[3] To the extent that USDOL decides to maintain a "salary basis" as a factor of some kind, it should take this opportunity to narrow the far-reaching effects of improper salary deductions that, in some circumstances, could cause the "salary basis" aspect of the test to eclipse the duties analysis. Under 29 C.F.R. 541.603(b), employees "in the same job classification working for the same managers responsible for the actual improper deductions" could lose their exempt status without suffering any *actual* impermissible salary deduction. USDOL should limit the consequences to actual deductions, including limiting it to the particular employee in the particular workweek. And if USDOL continues to take the position that the mere *potential* for an impermissible salary deduction is equivalent to an actual deduction with respect to employees "in the same job classification working for the same managers responsible for the actual improper deductions", we submit that this should only be the case where the particular employee can demonstrate a subjectively and objectively reasonable belief (similar to the analysis of a retaliation claim) that such deduction would occur in specific circumstances.

- ◇ Employees authorized to practice medicine or any of its branches who are actually engaged in the relevant practice;

- ◇ Employees holding the degree required to practice medicine who are working in a medical internship or residency;

- ◇ Employees whose work meets the Part 541 computer-employee exemption requirements who are paid on an hourly basis at a rate of at least $27.63; and

- ◇ Employees in the motion-picture-producing industry who are paid a qualifying "base rate".

As current-day investigations and litigation demonstrate, there are proportionately as many "borderline cases" and "obviously nonexempt" individuals as to whom each of these provisions is asserted from time-to-time as there are with respect to other exemption categories. But USDOL, the courts, employers, and employees have found it possible to "draw[] a line separating exempt employees from nonexempt employees" in these areas (*Weiss Report* at 11) without the necessity for doing so according to the presence or absence of a "salary basis".

B. The Salary Amount

The dollar threshold for the amount that must be paid on a "salary basis" is of course the primary reason for the 2016 rulemaking and for the RFI. Throughout the exemptions' history, establishing the minimum compensation has been a major source of angst and disagreement among members of the affected public. USDOL itself has repeatedly expressed uncertainty and misgivings about various approaches to and ramifications of setting this figure, including aspects of the very amounts that it has nevertheless selected from time-to-time.

Preliminarily, it continues to be of utmost importance to bear in mind that "improving the conditions of [exempt] employees is not the objective of the regulations." *Weiss Report* at 11. USDOL should not, *and indeed is not authorized to*, consider whether the threshold amount is "enough", or "a living wage", or "a fair day's pay for a fair day's work", or "an issue of basic fairness", or adequate compensation for "the extra hours they spend on the job and away from their families", or whether it is laudable to "transfer income from employers to employees in the form of higher earnings", or any of the other descriptors to similar effect that have crept into the process, particularly in 2016.

In our view, the $913-per-week figure established in the 2016 Final Rule will indeed "eclipse" the role of the exemptions' duties tests with respect to an appreciable and largely-unpredictable percentage of the workforce. In fact, we believe that multiple statements made by the prior administration demonstrate that the figure was *intended* to do so.

For example, one disingenuous goal the administration expressly articulated was that of "reducing the number of employees for whom employers must perform a duties analysis." 80 Fed. Reg. 38529 (July 6, 2015). One may reasonably see in this an unstated, ancillary goal to reduce the number of employees for whom *USDOL itself* "must perform a duties analysis." In any event, the responsibility of an employer or USDOL to perform a "duties analysis" arises from an indispensable aspect of Section 13(a)(1) itself; it is not proper to set a salary threshold in the interests of *avoiding* this evaluation.

The ultimate difficulty presented in choosing the salary-threshold has always been, and always will be, that the rate set inevitably denies exempt status to some number of employees paid below that level who otherwise meet an exemption's duties requirements. *See*, *e.g.*, *Stein Report* at 6.[4] As an illustration, accepting for discussion's sake the prior administration's methodology and estimates, more than four million employees who qualified for exempt status at 11:59 p.m. on November 30, 2016 were to become nonexempt at 12:00 a.m. on December 1, 2016 *simply by virtue of the changed threshold*. As prior analyses have recognized over the decades, maintaining the salary threshold as an exemption test necessarily means that this effect cannot be eliminated; the impact will simply be one of *degree*.

Furthermore, the prior administration appeared to accept that, instead of being distributed evenly across the relevant national workforce, this impact would fall disproportionately upon both lower-wage geographical areas and lower-wage industries. *See* 80 Fed. Reg. 38564 (July 6, 2015). Of course, the anticipated effects of the salary threshold upon both of these segments have historically (and properly) been of great concern to USDOL in setting the figure. *See*, *e.g.*, *Kantor Report* at 4-6. Moreover, as comments submitted in connection with the 2015 proposed rulemaking made abundantly clear, in today's economy these effects are especially devastating to non-profit entities, schools, retailers, eldercare and home-care businesses, and state and local governments, which tend to pay comparatively lower wages due to the financial constraints that typically apply to them.

In any event, as with the "salary basis" concept, a salary-threshold requirement serves as a barrier to the exempt status of at least some employees who meet an exemption's duties criteria. History has shown repeatedly that it is a fool's errand to try to resolve the irresolvable question of whether the level is "too high", or "too low", or "just right", or should be set by region, by census area, with reference to employer size, and so on.

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[4] Mr. Stein also claimed that "in other instances [the rate] will undoubtedly permit the exemption of some persons who should properly be entitled to the benefits of the act." *Stein Report* at 6. But this was and is simply not so. An employee paid at or above the threshold still must meet the duties requirements in order to be exempt. Failing to satisfy them would in itself preclude exempt status *without regard to* the amount of the employee's pay. The salary-amount component operates only to *narrow* the exemptions — *not* to expand them.

Aside from whether this state of affairs is inconsistent with Section 13(a)(1) as a matter of law, as a matter of policy the preclusion imposed by the threshold does not effectuate Congress's patent intent that the nature of an employee's work should play a determinative (if not exclusive) role in the assessment of exempt status. It will be wiser and administratively more workable to eliminate this effect altogether.

C. Duties-Only Definitions Are Preferable (Item Nos. 7 and 8)

The RFI asks:

> Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of the salary paid by the employer be preferable to the current standard test?

Item No. 7, 82 Fed.Reg. at 34618. As the foregoing Subsections A and B suggest would be the case, our answer to the question is, "Yes, such a test is preferable," provided that it would consist of the current duties requirements unadorned by any purported percentage-based or otherwise-quantified "examination of the amount of non-exempt work" an employee performs.

This approach is at the very least consistent with the Congressional intent embodied by Section 13(a)(1).[5] And even assuming for the moment that a "salary basis" criterion and a salary-threshold requirement might be permissible as adjuncts to a duties-based evaluation, (i) neither of them is by any means indispensable to such an approach, and (ii) both of them introduce intractable complications. Finally, as we have already pointed out, courts, investigators, employers, and employees have long made duties-only-based judgments in applying several species of the exemptions (as well as under other FLSA exemptions). We stand upon our prior discussions in these respects.

The RFI further asks:

> If [a duties-only test is preferable], what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

Item No. 7, 82 Fed.Reg. at 34618. Our response to the first portion of this question is that the necessary elements *already exist* in the duties-related criteria for each exemption, as supplemented by the more-general, duties-related principles found at 29 C.F.R. Part 541, Subpart H. These elements have a long history, and their general meanings and parameters are already known. A duties-only approach would simply call for applying those definitions and related elaborations in the same ways that this has

[5] Indeed, we believe that this is the approach *compelled* by Section 13(a)(1), but we continue to set that matter aside for purposes of responding to the RFI.

been done for many decades (and which, for that matter, would continue to be carried-out in that way even if the "salary basis" and the salary-threshold were to be retained).

As for whether an "examination of the amount of non-exempt work performed [would] be required" under a duties-only approach, our response is that no such separate or freestanding examination would be or should be required or is even desirable. The role of any "non-exempt work" should not be expanded beyond, at most, the subordinate standing of this concept as a part of the existing, qualitative "primary duty" analysis.

Presumably, some different "examination of the amount of non-exempt work" would amount to imposing some percentage limitation upon "non-exempt work". While this had and would have a superficial appearance of a rigorous numerical standard, in truth any such impression would be no more than a misleading illusion. Simply stating such a percentage accomplishes nothing in itself; the relevant question remains, "To *what* is the percentage to be applied?" Answering "non-exempt work" is unavailing; this simply moves the uncertainty to a different realm and reveals why a similar approach was ineffectual in the past and would continue to be so if it was adopted again.

From the beginning, USDOL, the courts, and the public faced irresolvable difficulties in trying to discern what "non-exempt work" actually consisted of. *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, in truth, this formulation moved the inquiry back to what counted as "exempt" work to start with. It only affected the issue of what work was "nonexempt" by negative implication, and it had more to do with "primary duty" than with percentage limitations.

USDOL wisely and appropriately eliminated any percentage limitations in 2004. It did so in significant part in recognition of the fact that long experience had shown the factor not to contribute in any appreciable or effective way to distinguishing between exempt employees and nonexempt ones. *See*, *e.g.*, 69 Fed.Reg. 22122, 22126-27 (April 23, 2004). At the same time, the principle of work that is "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. Determinations of exempt status would not be served by superimposing some kind of "examination" having to do with "non-exempt work".

Moreover, 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. 69 Fed.Reg. at 22126-7. For one thing, there is no requirement to maintain any records of the amount of such work, and there is serious reason to doubt that any attempted quantification could be done in any useful and reliable way, if at all. Furthermore, if a percentage limitation were re-imposed on a *workweek* basis, as it applied prior to 2004 (but had largely fallen into irrelevance by that time), the

exacerbated practical burdens imposed by trying to measure these things and (even if that can be done) by dealing with possible exempt-one-workweek/nonexempt-the-next-workweek scenarios are too obvious to warrant more discussion.

It is also appropriate in this context to address a question the RFI asks as to employees in occupations that the 2016 salary-threshold effectively excluded from exempt status. Specifically, the inquiry is whether these employees "perform more than 20 percent or 40 percent non-exempt work per week?" This is a remarkably broad and amorphous question that at the same time seeks specific, quantitative information relating to unidentified groups of employees with respect to exemptions that apply on an individualized basis. In any event, this request aptly illustrates the points we have made above.

To begin with, the fact is that there is no *affirmative* regulatory definition of "non-exempt work" in the first place. On the contrary, "non-exempt work" is said to encompass everything that is neither exempt work in itself nor directly-and-closely-related to exempt work. 29 C.F.R. § 541.702. In other words, the meaning (such as it is) of "non-exempt work" is left to a vague, negative implication that in truth simply avoids the issue: "A is everything that is not B or C." Given the historical hand-wringing that has long plagued efforts to articulate what "non-exempt work" *really is*, perhaps one can understand the motivations that led to this.

Whether or not those motivations are understandable, this state of affairs reveals that the far-superior approach is to focus instead upon what is *exempt* work and what is *directly and closely related* work, and then to determine whether the combination of these activities meets the relevant exemption's current "primary duty" test. Preoccupation with "non-exempt work" is an unwarranted and unjustifiable diversion from that fundamental task, a task that is based upon the most-specific-achievable descriptions of what kind of work is *actually or constructively exempt*. If an employee's work does not meet the "primary duty" test in light of an evaluation of these factors, for example, then he or she is not exempt; what kind or amount of "non-exempt work" (whatever that means) the employee performs is *irrelevant*.

Insofar as purported "20 percent" or "40 percent" considerations are concerned, we repeat what we have already said: The idea that any such determinations are meaningful or even achievable is predicated upon an ultimately-fruitless attempt to quantify an ill-defined *qualitative* concept in a way that calls for information that will not be and cannot be reliably accumulated. And again, trying to do this on a workweek basis will lead to frankly-absurd exempt-this-workweek-but-nonexempt-another-workweek outcomes and disputes.

Finally, we are certain that no allegedly-specific information USDOL receives in response to this eye-of-the-beholder question will produce any adequate or legitimate predicate for rulemaking.

In summary, there is no reason to examine "non-exempt work" separately from doing so in the context of current "primary duty" principles. It is doubtful that this could even be done in any rigorous or useful way. Such an examination would accomplish nothing that cannot be achieved by a competent evaluation of the existing "primary duty" requirements.

D. Our Proposals Will Enhance The Exemptions' Application

In the end, we submit that the current "salary basis" and salary-threshold requirements:

- ◇ Are of at least reasonably-debatable legal fidelity to Congressional intent to the extent that the pay component becomes the *only* exemption test and thereby dispenses with any consideration of the nature of an employee's work for even one employee meeting the duties;

- ◇ Have taken on disproportionately determinative status and will do so to an even-greater extent at the threshold enshrined in the 2016 rulemaking;

- ◇ Have not been necessary to the application of certain exemption subsets;

- ◇ Frustrate administrative enforcement efforts and necessitate an agency enforcement exception to deal with the complications it creates;

- ◇ Have very likely *shaped* the current landscape of compensation for the executive, administrative, and professional employees to whom they are relevant, rather than taking a definitional lead from a compensation landscape that over the decades would have continued to develop organically for executive, administrative, and professional employees; and

- ◇ Have brought about the states of uncertainty, misunderstanding, dislocation, and confusion that now exist (and that have long existed) in the regulated community regarding the nature and effect of the salary components.

Furthermore, at what point the salary-threshold no longer fulfills its historical role in (as USDOL revealingly puts it) "determining" exempt status is not a proper question. *Item No. 5*, 82 Fed. Reg. 34618. Even *asking* this presumes a function for the figure that, as we have said, should be viewed as being inconsistent with Section 13(a)(1). In addition, the matter never has been – and never will be – satisfactorily resolved; *no* approach to setting such a level, or even to setting different levels, will fail to exclude at least some employees from exempt status who clearly meet the duties tests. Even if only from the standpoint of appropriate administrative restraint, whether there is a proportion of such employees who may acceptably be eliminated from exempt status by the threshold *standing alone* (that is, irrespective of their performing work that is clearly executive, administrative, or professional) should be deferred to Congress.

It will be incomparably preferable for USDOL to eliminate all of the aforementioned undesirable and/or impermissible outcomes by (i) rescinding both criteria insofar as they serve as freestanding elements that "determine" exempt status, and (ii) relying simply upon the application of the existing duties-related factors. This is especially true in light of the fact that, as we will now suggest, compensation may be taken into account in a different and effective way that does not entail these difficulties.

IV. A "Salary Basis" And A Salary-Threshold Should Serve As No More Than Primary-Duty "Factors To Consider" (Item No. 12)

If USDOL concludes that the method and amount of an employee's compensation should retain some relevance to an evaluation of exempt status, then this can be accomplished without perpetuating the problems and legal questions discussed in Section III. Specifically, the separate "salary basis" and salary-amount requirements could be eliminated in favor of revising 29 C.F.R. § 541.700(a) to add two, additional pertinent factors in evaluating the "primary duty" requirement:

- ◇ Whether the employee is paid on a "salary basis", and

- ◇ The amount of compensation the employee receives on a "salary basis" as compared to the wages regularly received each workweek or pay period by employees whom the employer treats as being nonexempt.

If this is done, then we further recommend that the final factor in Section 541.700(a) be revised to refer to "the relationship between the employee's compensation and the wages paid to other employees whom the employer treats as nonexempt." Doing so would serve the broader purpose of taking into account the possibility that an employer might pay an exempt employee non-salary compensation (such as bonuses, commissions, or other incentive pay) that by type or amount is distinguishable from the compensation received by workers whom the employer treats as nonexempt.

The form and level of compensation could thereby still be taken into account along with other important considerations with respect to an employee whose status is "borderline" or otherwise unclear, whereas these factors would no longer automatically screen-out an employee who clearly meets the duties tests. They would also properly be irrelevant with respect to an employee who is "obviously nonexempt" as the result of his or her not meeting an exemption's work-related requirements.

This approach would also serve several other desirable ends, including that:

- ◇ These factors would still bear upon the employer's good-faith in attributing importance to the employee's services and in asserting that an employee is properly viewed as being exempt, considerations that could be important in "borderline cases" (*See*, *e.g.*, *Stein Report* at 19, 26);

- ◇ They would do so in the context of that *particular* employer's *own* compensation context that has been shaped in response to considerations relevant to the industry, to the geographical area, and to the competitive environment (including for employees) in which *that* employer operates;

- ◇ There would be no need for USDOL to pursue the complicated, burdensome, largely-speculative, and ultimately-unachievable goal of somehow divining the "right" one-size-fits-all level or even multiple levels;

- ◇ USDOL would not have to consider, establish, or maintain elaborate mechanisms for "updates" (automatic or otherwise) or for "crediting" various kinds of compensation;

- ◇ There would be no need to consider, establish, or maintain either different, exemption-specific salary amounts or "short" and "long" tests;

- ◇ This would eliminate the current legal questions relating to the validity of the present-day "salary basis" and salary-threshold requirements.[6]

These recommendations would also permit USDOL to accomplish the goals of keeping faith with its responsibilities under Section 13(a)(1), with its practical enforcement considerations, and with its legitimate concerns expressed in the past.

V. Other Matters Pertinent To The RFI

This portion of our response proceeds as if the "salary basis" and salary-threshold requirements are to be retained in some manner.

A. Salary-Threshold Methodologies and Predicate Data (Item Nos. 1, 4, and 5)

As we did in our 2015 Comments, we again submit that any salary threshold set, and any mechanism for changing that threshold in the future, should be predicated in the first instance upon data regarding the actual salaries of employees who are likely to be exempt and who are paid on a "salary basis". Portions of the prior administration's 2016 explanations make it clear that USDOL already possesses information making this possible, and the Agency could of course accumulate such information in the future.

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[6] We say this on the assumption that USDOL investigators and lawyers would not thereafter simply continue to apply these considerations as *de facto* exemption requirements.

The prior administration devoted much discussion to what percentile should be used in establishing a threshold[7] but (i) was vague about what the percentile would be *applied to*, and (ii) appeared to have selected data that were at best inapposite. USDOL referred 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. The Agency also said that the "pool" would purportedly "be based upon actual salaries that employers are currently paying", but the 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.

USDOL did specifically cite 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. But, again, neither did these data "specifically identify salaried workers" and certainly not employees paid on a "salary basis". They instead included 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."[8] What else these "earnings" might have consisted of is unstated and probably unknowable. *Id.* Moreover, whereas USDOL referred elsewhere to a sample of 60,000 "households", these data represented a sub-sample of only "one-fourth of the CPS monthly sample", or presumably as few as 15,000 "households". *Id.*

With respect to the proposition that future threshold adjustments should be based upon changes in the CPI-U, USDOL itself recognized that "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 summarized some of the "prior concern[s]" among its predecessors with an inflation-based approach, and it "acknowledge[d] these concerns". 80 Fed. Reg. at 38540. USDOL should instead propose to use internal, exemption-specific information of the sort which it summarily dismissed in drafting the 2016 Final Rule. 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 based on their actual duties, taking into account lower-wage regions and industries.

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[7] To the extent that the Agency considers adopting a percentile (or dollar amount) for a standard salary level based in some way on the "historical range" of pre-2004 salary levels, we would propose that the Agency look to the long-test salary level, while retaining the current duties test, to best effectuate Congress' intent as discussed in Section III.

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

B. Multiple Salary Thresholds (Item Nos. 2, 3, and 10)

The RFI suggests that USDOL might be willing to establish different levels based on one or more of the following factors:

- ◇ Size of the employer (the RFI offers no proposed criteria for measuring this)
- ◇ Geographic (census region, census division, state, metropolitan statistical area)
- ◇ Executive, administrative, professional designation
- ◇ "Long" and "short" tests.

We submit that it will be undesirable to establish multiple levels on any basis. For one thing, attempting to do so would simply compound the difficulties we have already discussed in Subsection III.B., both as to (i) the complexity and ultimate unachievability of attempting to establish "right" figures, and (ii) the many problems that even a single threshold presents. Furthermore, this would reverse the advance made in 2004, when USDOL moved away from the essentially four thresholds that existed prior to that time (a long-test amount executive and administrative, a separate long-test amount for professional, plus a short test for all three). It would also run counter to the Agency's in-some-respects legitimate 2015 goal of streamlining the exemptions.

Putting aside the daunting undertaking that this would involve for USDOL, a geographic approach could entail irresolvable complications with respect to an employee who works at more than one location, and it could lead to significant morale problems where, for instance, salary thresholds are different for employees who work within a ten-mile radius of one another. One could easily foresee situations in which employers would feel compelled to observe the highest salary threshold that might arguably apply, such that this would screen out employees who meet the duties tests.

Similarly, everyone concerned would face similar difficulties to the extent that multiple levels are incorporated into the highly-compensated-employee exemption.

C. Crediting Non-Discretionary Payments (Item No. 9)

USDOL has invited comments regarding the 2016 Final Rule's permitting, allegedly for the "first time", the crediting of non-discretionary compensation and incentive payments (including commissions) toward meeting some of the salary threshold. As we said in 2015, it has *always* been the case that the threshold salary *amount* could be satisfied *entirely* through non-discretionary compensation. In our view, the proposition that this feature materially changes or advances anything arises from USDOL's conflating the salary *threshold* with the *"salary basis" concept*. The influence of this error plainly pervades the provision USDOL adopted.

If an employee is paid on a "salary basis", then the *source* of the dollars comprising the predetermined amount is irrelevant. An employer's ensuring payment of a predetermined amount each pay period 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 other sums. The essential element is the *predetermined* nature of the amount paid each pay period.

The prior administration expressed a belief that "it is important to strictly limit the amount of the salary requirement that could be satisfied" in this way, which led it to restrict the "credit" to 10 percent. 80 Fed. Reg. at 38535. There was no discussion of specifically *why* USDOL believed this, and neither was there any explanation of or rationale for why 10 percent was a proper limitation as opposed to, say, 30 percent, or 50 percent, or 80 percent, or any other specific percentage.

USDOL has recognized for decades 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. The Agency 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'.

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. 99*9, 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 net compensation be not less than the amount prescribed in the regulations.

The prior administration also said that "the time period over which such compensation should be considered must be limited." 80 Fed. Reg. at 38536. It selected a maximum timeframe of "13 weeks" and/or a "quarter". 29 C.F.R. § 541.602(a)(3). But, as the foregoing authorities demonstrate, the *qualitative* requirements of the "salary basis", including the necessity that a "predetermined amount" be paid *each pay period*, eliminate any need to restrict the counting of nondiscretionary sums to "13 weeks", to a "quarter", or to any other interval.

Moreover, the Agency apparently gave no thought whatsoever to the practicalities of how this aspect of the "credit" would actually work. For instance, many employers must take into account state wage-payment laws that conflict with, as a practical matter negate, or at the very least seriously complicate the use of the mechanism.[9]

We submit that this "crediting" feature was unnecessary in the first place, and also that it is seriously flawed in its current form. We first recommend that USDOL make clear in the regulations that "crediting" the entirety of a bonus, incentive payment, commission, and/or every other kind of nondiscretionary compensation is consistent with the salary requirements, provided only that the employee is paid on a "salary basis". If the "crediting" mechanism is to be retained even in light of that confirmation, then we further recommend that it be modified so as to eliminate both (i) the percentage limitation upon such "crediting", and (ii) any reference to a maximum period of time over which such payments can be earned.

D. Automatic Salary-Threshold "Updates" (Item No. 11)

Various aspects of the RFI relate to this portion of the 2016 rulemaking. As we said in 2015 and continue to believe, USDOL should not automatically "update" the threshold. Doing so would disserve some of the very interests the Agency has historically sought to promote. In addition, other rationales that were articulated in favor of this concept were and are unwarranted or unsupported; were and are outweighed by other considerations; did and do threaten entirely-foreseeable adverse results; and were and are fraught with the very-real potential for unforeseen and perhaps unintended consequences.[10]

The prior administration recognized the Agency's longstanding view that "the line of demarcation" provided by the salary test "cannot be reduced to a standard formula." 80 Fed.Reg. 38527. Yet that is precisely what the "update" mechanism involves: Extrapolating the 2016 salary threshold or any substitute figure (however they are established) into the indefinite future based upon "a standard formula".

One rationale the prior administration offered was that "frequent updates are imperative to keep pace with changing employee salary levels." 80 Fed.Reg. 38539. USDOL offered no rationale establishing that any such imperative cannot be addressed without resorting to the rote, arithmetical approach it adopted.

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[9] We repeatedly posed questions highlighting these matters during the Agency's post-publication webinars, but our efforts to secure clarification were unavailing. Purported "guidance" later provided on USDOL's website was little more than a restatement of the regulation.

[10] Doing so would also be impermissible under the Administrative Procedure Act, as many have already contended in other comments and in litigation. However, for the moment we elect to focus upon the *policy* reasons for which USDOL should not adopt any such mechanism.

The explanation made multiple references to the historically-uneven and sometimes-long intervals between adjustments in the salary levels. *Id.* But this merely had to do with how USDOL has heretofore allowed this aspect of its Section 13(a)(1) responsibilities to languish. To put it charitably, past administrative inaction is no adequate justification for such a historically-unprecedented change that goes well beyond simply assessing more frequently whether it is, in fact, time to undertake an evaluation.

More disturbingly, that USDOL expressed no intention to undertake substantive salary-threshold re-evaluations regularly *in the future* gives rise to a grave concern that the 2016 salary-threshold will not *truly* be re-evaluated for many *more* years. Consequently, there is currently a fear that the underlying determinations leading to the $913-per-week figure (or any substitute figure) will go un-reconsidered indefinitely, thus leaving whatever the figure is in, say, 2037 completely to the cumulative impact of applying "a standard formula" at the Final Rule's current tri-annual frequency.

USDOL also referred to considerations of:

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

80 Fed.Reg. 38539. We realize that such pressures exist, just as they always have and always will as to *every* law the Agency enforces.

But they are appropriately dealt with via the proper ranking of Agency priorities, effectively allocating its resources, and engaging in the necessary discussions with Congress as appropriations are under consideration. The prior administration apparently placed a higher value upon realizing "efficiencies", superficial "simplification", and bureaucratic convenience than substantive evaluation. But these were and are in no respect sufficient bases for putting such a highly-important aspect of the exemptions' application (one that the Agency intended to loom far larger than most at the level established) on autopilot for who knows how long. This was and remains particularly true in light of the fact that the salary-related requirements are entirely creatures of USDOL's making in the first place, and that they "cannot be reduced to a standard formula."

The prior administration also took comfort in this regard in Congress's having "never enacted limits" curtailing the salary tests. 80 Fed.Reg. 38538. Of course, this had and has nothing to do with whether automatic "updating" of the salary-threshold is *desirable* or is consistent with Congress's original intent in enacting Section 13(a)(1). Furthermore, if and to the extent that Congressional inaction is relevant, a closer-to-home consideration is that Congress also "never enacted" a previously-made proposal to index the salary level. *See*, *e.g.*, S. 2252 (112th Cong., 2d Sess.)(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.").

Perpetuating the indexing approach would also mean that USDOL has abandoned its responsibility for and practice of making substantive judgments about the inflationary effects of threshold increases, including as to lower-wage areas and economic sectors. *See, e.g*., 69 Fed.Reg. 22168 (April 23, 2004); 40 Fed.Reg. 7091 (February 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 to other employees 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.

Furthermore, an automatic update assumes that whatever method is used to devise a minimum salary that effectively "identifies exempt employees" in 2017 will remain an accurate indicator of exempt status for the rest of time. But even USDOL admits that its "method for calculating the salary level has evolved" since 1940. 80 Fed. Reg. 38524. Over the last 75 years, USDOL has had to revise its methodology to, among other things, "exclude approximately the lowest-paid 10 percent of exempt salaried employees in low-wage regions, employment size groups, city size, and industry sectors"; "eliminate . . . potential inflationary impact"; and, most recently, "eliminate[] the short and long duties requirements in favor of a standard duties test for each exemption and a single salary level for executive, administrative, and professional employees". Given this history, it would be a considerable act of hubris to assume that USDOL has found the perfect method for calculating the minimum salary level this time, and that no further revision (or "evolution") will be necessary.

In fact, any percentile method of the sort used in 2016 will itself skew the data upon which it relies to "identify exempt employees" when it establishes a new minimum salary level. For example, assume that USDOL sets the minimum salary level as the 40th percentile of "salaried workers", or $913 per workweek in 2017, as it last proposed. In our experience, employers will (and in the last several months did) respond by overwhelmingly (1) converting employees who have been paid on a salary basis at less than the minimum threshold to nonexempt, hourly-paid ones; and/or (2) increasing the salaries of employees who will remain exempt to at least the minimum threshold, along with raising the salaries of more-highly-paid employees to prevent or mitigate compensation-compression.

The first option will necessarily reduce the proportion of exempt employees paid on a "salary basis" in the "salaried workers" data pool USDOL uses to "identify exempt employees". The second will substantially increase the amount which that remaining pool is paid. USDOL's approach will thus result in a smaller group of "salaried workers" (even if the data are restricted to an appropriate pool) who are in turn paid at higher salary levels, thereby artificially and unduly influencing the minimum salary levels used to compute the new minimum salary for exempt status.

If USDOL nevertheless maintains the procedure adopted in 2016, then we again tender the following further recommendations.

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

The prior administration said that an indexing 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. 38523. We recommend that the change in 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.

2. A "Safety Valve" For Exceptional Or Unforeseen Situations

As the RFI seems to contemplate, the day might well come when the actual or threatened effects of the "update" 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 deflation. 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 the salary index untenable for at least some time.

We recommend that the Secretary of Labor or the Wage and Hour Administrator be expressly authorized to modify or suspend the procedure for such reasons, in such ways, and for such periods as appear to be justified under the circumstances. Of course, the fact that such an exception should be provided for is yet another illustration of why the mechanism should be abandoned.

3. "Updates" Should Include The Possibility Of *Reductions*

We were dismayed to see the RFI ask whether "automatic updates [should] be *delayed* during periods of negative economic growth" without also entertaining the prospects for a potential *reduction*. 82 Fed.Reg. 34619, *Item No. 11* (emphasis added). This appears to perpetuate the unstated-but-obvious intention of the prior administration that "update" was a euphemism for "increase". No doubt this objective grew out of a basic misconception that the salary-threshold had something to do with ensuring a "fair day's pay", "transfer[ring] income from employers", promoting "basic fairness", and otherwise directly or indirectly facilitating exempt employees' monetary well-being.

As we have said, the object of any compensation requirements must be limited to defining the exemptions. If those tests have *any* proper purpose under Section 13(a)(1), that purpose may not be broader than the definitional line-drawing that is committed to the Agency. It is illegitimate to set *or to preserve* a salary-threshold in the interests of maintaining or otherwise "protecting" exempt employees' income levels.

Viewed in that light, any automatic "update" must encompass the possibility that a salary-threshold will *decrease* "during periods of negative economic growth" in order to serve its definitional purpose. This is not a new or unprecedented concept. Nearly 70 years ago, USDOL recognized that "[t]here is no reason why the salary tests may not be revised again, either upward *or downward*, in line with any future economic changes which may warrant such action." *Weiss Report* at 9 (emphasis added).

4. Frequency

First, changes should not occur so frequently to seriously complicate and interfere with management's ability to formulate short-term and longer-term budgets or to administer or revise compensation plans. This is even more important as to public agencies, given the constraints upon the timing, frequency, and flexibility of appropriations and possible legal restrictions relating to changes in employee pay.

We recommended in 2015 that such re-evaluation period be not less than every three years, which in the end was the period adopted. We continue to believe that no shorter period would be appropriate, with one exception. Specifically, our experience with employers' efforts to respond to the 2016 increase leads us to propose that any threshold change provoked by the RFI itself be phased-in over a three-year period in one-third increments. As an illustration, if USDOL set a new threshold of $605 per week, the $150 increase over $455 per week would be implemented in $50 increments for each of the first three years. Such a stepwise approach has historical precedent. *See* 46 Fed. Reg. 3010 (January 13, 1981)(calling for two-year phase-in of threshold increase).

5. Notice

Whether the salary threshold is reconsidered every three years or at longer intervals, providing sufficient notice of the revised figure is a matter of comparable importance. As the experiences of 2016 reveal, employers need an appreciable amount of time to determine which employees are actually or potentially affected; to analyze those varying circumstances; to formulate alternative approaches; and to consider all the ramifications of, and to devise measures to ameliorate, the impact of actions taken. In many instances, all of this will have to occur before management can set an operating budget for the next fiscal year. We now submit that no less than twelve months' notice would be necessary.

E. Employer Impact, Efforts, Responses (Item No. 6)

The RFI seeks information relating to actions by and impacts upon employers arising from the Final Rule. *Item No. 6*, 82 Fed.Reg. at 34618. Of course, the Final Rule was not published until May 18, 2016, with a slated effective date of December 1, 2016. In the interim, we assisted numerous employers in their efforts to review their pay practices for compliance with the 2016 changes, and we also provided a number of webinars and seminars on the topic. As we had anticipated, these experiences showed that employers had to:

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

- ◇ Design new pay plans and reduce the units of compensation for employees who would 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 would be required;

- ◇ Determine what hiring freezes or delayed or canceled promotions were 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;

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

- ◇ Deal with substantial, pervasive, adverse morale effects with regard to employees who were no longer treated as exempt and/or those who remained exempt but experienced wage-compression as the result of increased salaries among lower-paid exempt workers, and

- ◇ Bear the substantial quantitative and qualitative costs that working-through all of these considerations entailed, including, for instance, the diversion of management's time and attention from those things that the employer existed to do.

Not surprisingly, the ways in which employers responded varied. However, some more-common steps are illustrated by the following scenarios:

- ◇ Some employers who abandoned Section 13(a)(1) exempt status for employees sought to minimize the effect in other ways. A number of them adopted overtime-only FLSA exemptions, fluctuating-workweeks pay plans, day-rate pay plans, or "9/80" pay plans.

- ◇ Many employers were unable or unwilling to increase pay without ensuring that the overall costs of employee labor remained relatively constant, which led to the reduction or elimination of incentive payments, certain benefits, or other compensation elements (such as those mentioned above). Based upon an analysis of the hours worked by their affected employees (typically those whose salaries were at least $455 per week but less than $913 per week), many employers simply abandoned exempt status for these workers and substituted a compensation plan under which FLSA-compliant pay approximated what the employees had earned when they were treated as exempt.

- ◇ Employers who *increased* the salaries for one or more exempt employees often (1) combined or eliminated one or more positions and placed greater levels of responsibility and work upon the remaining, more-highly-paid ones; and/or (2) reduced the compensation of nonexempt employees to offset exempt-employee increases. As one illustration, a hospitality-industry employer had previously treated three managers as exempt at each of its locations. Management terminated one such manager at each location, raised the salaries of the remaining two, and increased its workload expectations as to those managers.

Our first-hand experiences after May 18, 2016 demonstrated that the adverse effects of the Final Rule did in fact play-out as we and others foresaw, as well as in ways that had not been anticipated. The Final Rule's financial costs and psychological harm experienced by both employers and employees have been real. The situation further deteriorated following the November 2016 preliminary injunction, causing consternation especially among those employers that had spent time and resources preparing for the December 1 effective date and had already made, or at least announced, anticipatory changes. In particular, many employers that were to implement changes on or just prior to the scheduled effective date took a "wait-and-see" approach, which has created trepidation among management and affected employees.

USDOL must understand that, other policy considerations aside, most employers cannot implement the kinds of changes that the Final Rule necessitated (both directly and indirectly), at least not without taking steps that are ultimately detrimental to employee interests. Any suggestions to the contrary simply do not adequately account for the realities facing almost all affected employers.

VI. An Interim Final Rule Is Called For

The RFI provides only the most-general indication of what this information-gathering exercise will lead to; it gives no hint as to *when* something might be done. The most it says is that this process will aid in "the development of an NPRM", and that rulemaking will occur in an unspecified "timely manner". 82 Fed. Reg. 34617.

USDOL must appreciate that the uncertainty, dislocation, confusion, distortion, and disruption provoked by the Final Rule (a state of affairs which one of our practitioners characterized as perhaps "the biggest mess of its kind I've seen in my nearly 40 years of dealing with" the FLSA) have now prevailed for more than 16 months. In part, of course, these effects have been exacerbated in the meantime by litigation (including *but not limited to* that to which USDOL is a party). In any event, at this point the situation has become intolerable, and it would be inexcusable to permit matters to drag-on in this way for yet many *more* months.

We submit that USDOL should expedite its review of the public's responses to the RFI and should then quickly formulate and publish a remedial Interim Final Rule (i) having immediate effect, but (ii) which is also subject to a shortened notice-and-comment period. In light of the current circumstances, this would be authorized by the Administrative Procedure Act's "good cause" exception provided for at 5 U.S.C. §553(b)(3)(B), particularly given that the Interim Final Rule could be temporary and of relatively-short duration.

The Agency has resorted to such a procedure in the past where pressing "salary basis" matters were concerned. *See* 56 Fed.Reg. 45824 (September 6, 1991)(IFR issued with immediate effect as to certain public-agency pay practices; IFR also provided for 30-day comment period); 57 Fed. Reg. 37677 (August 19, 1992)(Final Rule issued after notice-and-comment). The present situation implicates the far-broader effects of a prior USDOL action that has a substantial impact upon an incomparably-higher number of employers and employees than was the case with respect to the issue addressed in 1991.

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