



PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

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Submitted via regulations.gov

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

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA11)

Dear Ms. Ziegler:

These comments on the proposal to change the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA) are submitted on behalf of the Partnership to Protect Workplace Opportunity (PPWO). The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of “white-collar” employees across the country in almost every industry who will be affected by the proposed changes.

The PPWO’s members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. Unfortunately, as we describe below, if implemented as proposed, the Department of Labor’s (DOL or the Department) proposal would result in large numbers of employees being reclassified as non-exempt. Reclassification will:

- harm the ability of employers to provide and employees to take advantage of flexible scheduling options;

- result in employees in the same job classification (for the same employer) being treated differently based on regional cost-of-living differences;
- limit career advancement opportunities for employees;
- decrease morale for those employees who are demoted to non-exempt status, particularly where peers in other locations remain exempt;
- reduce employee access to a variety of additional benefits, including incentive pay;
- deter employers from providing newly-reclassified employees with mobile devices and remote electronic access, further limiting employee flexibility;
- increase FLSA litigation based on off-the-clock and regular rate of pay claims; and
- introduce other legal and operational issues, such as increased administrative costs.

Moreover, given the Department's proposal to increase the salary level on an annual basis, these are not one-time issues. Rather, these issues would recur each year, as employers decide whether continued classification of an employee as exempt is worth the annual salary increase.

The Department recognizes that "the exemptions were premised on the belief that the exempted workers typically earned salaries well above the minimum wage and were presumed to enjoy other privileges to compensate them for their long hours of work, such as above-average fringe benefits, greater job security, and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay."¹ Yet, because the Department's proposal would more than double the salary level, it would have the perverse effect of forcing many employers to take away the benefits, job security, and opportunities for advancement for those employees who will lose exempt status.

The Department's proposal, in its current state, does little to promote the President's directive to "modernize" the regulations. At a time when more and more workers seek additional flexibility in their schedules and an ownership stake in their work, the Department's proposal will return us to a 1940s mentality of clock-punching for all but the most highly paid employees. This result is bad for employees, bad for employers, and bad for the economy. We urge the Department to reconsider its decision to proceed with such a disruptive rulemaking.

¹ *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule*, 80 Fed. Reg. 38,516, 38,517 (July 6, 2015).

I. The Minimum Salary Level Proposed by the Department is Exceedingly High to Satisfy its Gatekeeper Function, is Inappropriately Disruptive to Employers with National Operations, and Will Harm the Very Employees the Department Purports to Protect.

The proposed salary level, which would be higher than the exempt salary levels set under any state law (*e.g.*, it is nearly \$10,000 higher than the minimum salary for exemption in California and nearly \$15,000 higher than the standard in New York), is too high to achieve the historical purpose of the salary level, will force employers to make classification decisions that ignore regional economic differences, and will cause significant disruption in the workplace. The wage costs, administrative expenses, and intangible consequences of the Department’s proposal will be significant, particularly when considered against the fact that even if the Department’s estimate of impact is correct — which it is not — more than 75% of the employees potentially impacted by this rulemaking will see no change in compensation and no change in hours worked.²

The problems associated with an abrupt and excessive increase are well-understood by the American public. In a national February 2015 survey from the polling company, inc./WomanTrend found roughly one-in-five adults (21%) would not increase the overtime salary threshold at all. In fact, a 65%-majority preferred increasing the salary limit by no more than 50%, or \$35,490. We discuss these problems in more detail below.

A. The Department’s Proposed Minimum Salary is Too High to Achieve its Purpose.

Since at least 1940, the Department has recognized that the purpose of the salary level is to “provid[e] a ready method of screening out the obviously nonexempt employees.”³ That is, the salary level should be set at a level at which the employees below it clearly would not meet any duties test; above the level, employees would still need to meet a duties test in order to qualify for exemption. In setting the proposed level as high as it has, however, the Department has turned this analysis on its head: the Department seems to be setting the salary level at a point at which all employees above the line would be exempt, turning the salary level from its historical role as a screening device into the *de facto* sole test and a mechanism for greatly limiting the ability of employers to avail themselves of these exemptions. Indeed, built into the Department’s (erroneous) assumption that litigation will decrease as a result of this rulemaking

² See *id.* at 38,573 (3.5 million of 4.7 million potentially-impacted workers “work 40 hours per week or less and thus will not be paid an overtime premium despite their expected change in status to [nonexempt]”).

³ *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).

is the belief that employees above the line will be more clearly exempt.⁴ That has never been the Department's goal in setting the salary level.

Such a dramatic departure from the historical purpose of the salary level will have far-reaching consequences. The Department's proposed minimum salary level will force employers to reclassify positions that clearly meet the duties test where the nature of the industry (e.g., non-profit) or the regional economy cannot justify a salary increase. As noted in a recent article on the issue, the Department's analysis also fails on a more global level:

For example, the DOL placed the occupation "First Line Supervisors/Managers of Office and Administrative Support Workers" in the category corresponding to 90 to 100 percent of employees with sufficient managerial and professional duties to pass the duties test, yet 51 percent of employees in this occupation will likely fail the new salary test.⁵

Where thousands of positions that meet the duties test will need to be reclassified (or have their salaries increased) as a result of the salary level, the new salary level ceases to function as a gatekeeper.

As a result, the Department should reconsider its proposal and, to the extent that an increase to the minimum salary level is deemed to still be appropriate, that salary level should be set in accordance with the historical purpose of the salary level test — to exclude clearly non-exempt employees from further analysis.

B. The Department's Proposed Minimum Salary Level Fails to Account for Regional Economic and Market Differences.

Despite the Department's suggestion to the contrary, its methodology fails to account for regional differences.⁶ As noted above and repeatedly by numerous sources, the proposed minimum salary level exceeds the minimum salary level for exempt status in both California and New York — by significant margins.

As the Department is well aware, the federal government considers geographic variations when setting the compensation level for its own employees. Among some of the highest

⁴ See 80 Fed. Reg. at 38,578 ("Reducing the number of white collar employees for whom a duties analysis must be performed in order to determine entitlement to overtime will also reduce litigation related to the [executive, administrative, and professional] exemption.").

⁵ *Flawed Logic in DOL's Proposed White Collar Salary Test*, S. Bronars, D. Foster, and N. Woods, Employment Law 360 (Aug. 25, 2015).

⁶ See 80 Fed. Reg. at 38,560.

compensation levels set by the federal government are those in California and New York.⁷ Setting a salary level that exceeds the minimum level determined by those states' own legislatures to be appropriate demonstrates just how far removed from the historical role of the salary level test the Department's proposed salary level is. If it will have a significant impact in California and New York, imagine what the impact will be in Mississippi and Iowa.

There are substantial pay differences based on geographical region and pay differences between larger and smaller cities that are unlikely to be related to differences in job duties. For example, the median pay of "First Line Supervisors/Managers of Retail Sales Workers" is 50 percent higher in New York City than in Little Rock, Arkansas.⁸ In some parts of the country, up to 100 percent of the employees in similar positions fall below the Department's proposed salary level. Again, the salary threshold ceases to operate as a gatekeeper; in some cases, the proposed increase all but eliminates the ability to implement the exemption.

This effective elimination of the exemption for certain low-cost-of-living areas of the country raises the possibility of the Department exceeding its statutory authority. Congress directed the Department to define and delimit the terms in the statute; it cannot possibly have meant that the Department should effectively eliminate the exemption in certain regions. But because the minimum salary has been proposed at such a high level based on a national survey that does not account for regional differences in any meaningful way, that is precisely what the Department is doing. The South and Midwest will be placed at a competitive disadvantage to other regions; employers in urban areas will be able to maintain exempt employees at a rate that far exceeds rural areas.

The impact of the proposed salary level, however, will not simply be limited to employers in the lower-cost-of-living regions in the country. Many employers with national operations will be impacted as well. Because the cost of living varies greatly throughout the country, employers often have different salaries for the same job position depending on where the employee works, similar to how the federal government operates. The job duties are precisely the same. The only thing that differs is location.

For example, an employee in New York City will have a higher cost of living than an employee working in Knoxville, Tennessee. Accordingly, the employer may provide the employee in New York with a higher salary than the employee with the same job title and job responsibilities in

⁷ For example, the federal government provides a locality pay differential of 28.72% for employees in the New York metropolitan areas and 35.15% for employees in the San Francisco area.

⁸ *Flawed Logic in DOL's Proposed White Collar Salary Test*, S. Bronars, D. Foster, and N. Woods, Employment Law 360 (Aug. 25, 2015).

Knoxville. With the Department's proposed increase to the minimum salary level, that employer may now need to decide whether the economics of the Knoxville location justify an increase to the new salary level or whether the Knoxville position will need to be reclassified as non-exempt.⁹

Intuitively, employers and employees understand that different locations require different pay levels. In the inc./WomanTrend survey discussed above, approximately 63 percent of adults agreed that "one size fits all" overtime rules should not be required throughout industries and geographies. In proposing a salary level in excess of even the levels in the highest-cost-of-living states in the country, the Department simply does not account for these regional and industrial variations.

C. The Department's Proposed Minimum Salary Will Negatively Impact the Ability of Employees to Work in Part-Time Capacities.

The Department's proposed increase to the minimum salary level would negatively impact the ability of employers to provide part-time exempt positions. Although the current regulatory scheme does not permit part-time exempt employees on a *pro rata* basis, the PPWO believes that such an adjustment is necessary under the proposed salary level to ensure that these types of positions can remain exempt and, therefore, continue to be offered.

Because it is not clear from the Department's statements in the preamble that it fully understands this issue, we provide the following example. Under the current regulations, an employee who performs tasks that clearly meet one or more of the exemption duties tests can be classified as exempt so long as his or her salary exceeds \$23,660 per year. Thus, a part-time employee working a 50% schedule can qualify as exempt so long as he or she works in a position that has a full time salary of approximately \$48,000 per year. This is true not because the full-time equivalent salary is \$48,000, but because the part-time salary of \$24,000 is still in excess of the regulatory minimum.

Under the Department's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, in the first year under the Department's proposal, an employee working a 50% schedule would need to be working in a position earning more than \$100,000 on a full-time basis. Obviously, without a *pro rata* provision, the number of employees who will be eligible for part-time exempt employment will be significantly limited. This limitation will have a disproportionate impact on women in the workplace, and, in particular, likely will impact mothers who may be seeking to re-enter the workplace as professionals, but not on a full-time

⁹ This again demonstrates the Department's significant departure from the traditional role of the salary test. Salary, rather than job duties, will determine exempt status.

basis. Similarly, older workers looking to pursue a phased retirement would likely be disadvantaged by the Department's increased minimum salary level.

If the Department fails to implement a *pro rata* provision, the proposed increase to the minimum salary level will create two classes of employees performing the same work: full-time exempt employees and part-time non-exempt employees. Employers would be unable (for practical purposes) to take a consistent approach to a job because it simply is not feasible to reclassify entire positions as non-exempt due to the issues related to part-time employees. As a result, however, individuals working side-by-side would be subject to different rules and obligations simply because one is a full-time employee and one is a part-time employee. Although fairness should dictate that such colleagues be treated the same, the Department's proposed salary level would all but require the part-time employee to be treated differently. Teamwork and morale will undoubtedly suffer.

In addition to the likely stigma associated with the different classification decisions based on full-time vs. part-time, the Department's proposed salary level would deprive employers of the ability to offer the types of flexible work and scheduling opportunities that are crucial to meeting the demands of the modern workplace. Punching a clock is not conducive to allowing employees to build their schedules around their personal or family needs and preferences. Many job-sharing and part-time opportunities, as well as seasonal positions, will be diminished if an employer cannot classify those positions as exempt.

If the Department, permitted the salary to be prorated, however, employers would be far more likely to allow such arrangements. We therefore urge the Department to add a *pro rata* provision to the regulations, regardless of the salary level ultimately adopted in a final rule.

D. The Department's Proposed Salary Level Will Negatively Impact Employee Compensation, Flexibility, and Morale.

In creating conditions in which employees must be reclassified to non-exempt status, the Department's proposed salary level will negatively impact many employees' ability to earn incentive compensation. When employees are converted to non-exempt status, they often find that they have lost their ability to earn incentive pay. Under the existing rules for calculating overtime rates for hourly workers, many incentive payments must be included in a non-exempt employee's "regular rate" (*i.e.*, overtime rate) of pay. Faced with the difficult calculation (and recalculation) of these overtime rates—sometimes looking back over every pay period in a year—employers often simply forgo these types of incentive payments to non-exempt employees rather than attempt to perform the required calculations.

Although reclassification as a non-exempt employee often has such economic consequences for an employee, reclassification is not limited to those economic consequences. The change to non-exempt status means that many employees also will lose the ability to structure their time to address needs such as attending their child's school activities or scheduling doctors' appointments. Many other employees will lose the opportunity to work from home or remotely, as it can be difficult for employers to track employees' hours in those situations. Employers may also cease providing employees with mobile devices, as any time spent checking them would now have to be accounted for.

In addition, employees often view reclassifications to non-exempt status as "demotions." Particularly where other employees within the same organization will continue to be exempt (due to regional economic variations or full-time status), it is easy to see why. The non-exempt employee will now need to account for his or her time in a way he or she has not had to previously. In addition, because of the increased attention that must be paid to the hours worked by the non-exempt employee, he or she is likely to be at a competitive disadvantage to the exempt employee in the same role. Many training opportunities will now become compensable time under the FLSA and where those opportunities would put the non-exempt employee into an overtime situation, his or her access to those opportunities may be limited; the same is not so for his or her exempt colleague.

Similarly, the non-exempt employee may be limited in his or her ability to "get it done" now that he or she must record and account for all hours worked. These types of intangibles — being known as someone who "just gets the job done" — are often considered in whether an employee receives a promotion, bonus, or training opportunity. As a result of the Department's dramatically increased proposed minimum salary level, career advancement may become more a function of where an employee sits than what he or she does.

The importance of this issue is worth repeating here: the Department fails to sufficiently acknowledge the reality that many workers view their exempt status as a symbol of their success within the company. In fact, even when all other aspects of the work remain the same and even when their overall compensation increases with the addition of overtime pay, employees frequently view the transition from exempt to non-exempt as a demotion. Far from being enthusiastic, members of the PPWO have described reclassified employees as feeling like they were being disciplined and distraught over being reclassified.

E. Bonuses and Commissions are Critical Components of an Employee's Total Compensation and Should Count Towards the Minimum Salary Level.

The Department asks whether it should count towards the minimum salary level nondiscretionary bonuses and incentive payments, such as “nondiscretionary incentive bonuses tied to productivity and profitability.”¹⁰ It then significantly limits the viability of using such payments to satisfy the salary level test by suggesting that such payments should be limited to 10% of the weekly salary level and that payments must be made at least monthly, with no ability to make an annual “catch up” payment.¹¹

The PPWO believes that all forms of compensation should be used to determine whether the salary level has been met. It should make no difference to an exemption analysis whether someone earns \$45,000 per year in base salary with \$45,000 in bonus potential or \$50,000 per year in base salary with \$40,000 in bonus potential. As far as the employee is concerned, at the end of the year, the total compensation is the same. In a similar vein, this is how employers value compensation — in terms of total compensation, rather than the individual components — and the regulatory scheme should reflect that reality, rather than attempt to change it.

The majority of employees who receive incentive payments are those who would otherwise qualify for an exemption.¹² Those employees are most likely to have the ownership mentality — the “sense of ownership” that the Department claims it is trying to assist through this regulatory suggestion.¹³

Unfortunately, the Department’s suggestion that the bonus inclusion would be limited to payment intervals more frequent than monthly undoes much of what its original suggestion seems to put into place. Bonus payments are typically made less often than monthly because they are tied to productivity, revenue generation, profitability, and other larger and longer-term business results that can fluctuate significantly on a month-to-month basis. We urge the Department to consider inclusion of bonuses paid quarterly, semi-annually, or annually to reflect how these incentive payments are made by employers.

Similarly, the Department’s suggested limitation on the application of these payments to 10% of the salary level does not adequately reflect how these payments are made by employers. Under this limitation, in Year 1, the Department would allow \$97 per week to be satisfied by a

¹⁰ 80 Fed. Reg. at 38,535.

¹¹ Such catch up payments currently are permitted for the Highly Compensated Employee (HCE) exemption. See 29 CFR 641.601(a)(2).

¹² Indeed, as noted elsewhere, non-exempt employees often are not eligible for incentive-type payments due to the regular rate calculation issues associated with providing them.

¹³ See 80 Fed. Reg. at 38,535 (recognizing employers’ understanding that a shift from bonuses to increased salary “would undermine managers’ sense of ‘ownership’ in their organizations.”).

bonus that could be hundreds or thousands of dollars. As noted elsewhere in these comments, the point of the salary level is to assist the Department in screening out non-exempt employees. Where someone is performing duties that qualify for exemption, is paid a substantial amount of money for doing so, and is paid a salary, it is difficult to see why the precise manner in which the employer attributes the payments should make a difference as to whether that employee is non-exempt.¹⁴

We also believe that the Department should allow “catch up” payments in the event that the metrics for an incentive payment were not met for a given employee. Would the employee thus become non-exempt for the time period covered by the bonus? For all time? It makes far more sense to allow a catch up payment in lieu of any bonus that might be due.

Perhaps the most troubling of the Department’s suggestions, however, relates to the exclusion of “commissions” from satisfying the salary level. The Department suggests that it will not count commissions toward the requisite salary.

This explanation seems to be an effort to change regulatory standards without specifically proposing to do so. The current regulation specifically states that commission payments, made in addition to the minimum salary amount, are permissible and do not violate the salary basis requirement.¹⁵ There simply is no reason why those same commissions should not be permitted to be used to satisfy the salary level.

The Department, however, goes much further, explaining its apparent belief that “commissions” are paid only to sales employees, and, thus, employees who earn commissions would not meet any duties test (except for potentially the outside sales test). This effort to undermine the application of the duties tests with respect to an employee due to the employee’s receipt of certain payments is improper. Employees either meet the duties tests or they do not. If an employee does not meet the duties test, he or she will not be exempt, no matter how much he or she is paid. If that employee, meets the test, however, there is no reason why the receipt of commissions should change that analysis.

¹⁴ To the extent that the Department considers this more of a salary basis issue, rather than a salary level issue, the fact of the matter is that it has long been the position of the Department that additional payments, such as non-discretionary bonuses and commissions, do not impact the analysis of whether an employee is paid on a salary basis. Thus, it would be acceptable for an employee to earn the regulatory minimum in salary, even if his or her total compensation was two, three, or ten times that amount — and subject to meeting certain metrics. It is hard to see why it would not be acceptable for an employee to earn less than the minimum, if the total compensation earned exceeded it.

¹⁵ 29 C.F.R. 541.604(a).

For support that commissions are (1) consistent with exempt status and (2) actually paid to employees who are otherwise exempt, the Department need look no further than its own opinion letters. In a November 27, 2006 Opinion Letter, which is still in effect, the Wage and Hour Administrator concluded that registered representatives in the financial services industry qualified for the administrative exemption.¹⁶ The registered representatives were paid in part by commissions, and the Administrator confirmed the Department's position that the commission payments to the registered representatives were permissible and did not violate the salary basis test, stating

*that the salary basis test would be met if "the employee receives no less than the weekly-required amount as a guaranteed salary constituting all or part of total compensation, which amount is not subject to reduction due to the quality or quantity of the work performed, and that the employee is never required to repay any portion of that salary even if the employee fails to earn sufficient commissions or fees."*¹⁷

Notably, neither the letter nor any other guidance from the Department indicates why commissions should be treated any differently than non-discretionary bonuses. Thus, to the extent that the Department will treat non-discretionary bonuses as satisfying the salary level, there is no logical reason for the Department to treat commissions differently.

Indeed, failure to do so will almost certainly result in litigation over whether a specific payment is a "commission" or whether it is a "non-discretionary bonus." Many managerial employees who are clearly covered by the executive or administrative exemption receive "commissions" that are based not on their own sales, but on the sales performance of their company, division, product line, branch office, store, or other portion of their business. With no definition of "commission" for these purposes, litigation will inevitably follow. Even with a definition, however, it is unlikely that the Department will be able to provide guidance on all of the variations of bonus/commission plans used by employers, which will necessarily mean additional litigation. As a result, we urge the Department to treat commissions in a manner similar to non-discretionary bonuses and allow them to be used to satisfy the salary level. In addition, we believe that the Department should withdraw its suggestion in the preamble that commissions are inconsistent with exempt status; should it decide that it wants to make such a dramatic change to the regulatory landscape, we suggest that the Department engage in notice-and-comment rulemaking in which it actually makes a proposal to do so.

¹⁶ See WH Op. Ltr. FLSA2006-43 (Nov. 27, 2006).

¹⁷ *Id.*

Finally, we urge the Department to apply discretionary bonuses toward the minimum salary level. Such payments are in many ways even more reflective of an individual employee's efforts and contributions than nondiscretionary bonuses. Thus, they too help effectuate the laudable business objectives the Department recognized ("sense of ownership" and the like) and often represent a substantial portion of an employee's earnings for a given time period.

F. The Department Should Phase Any Salary Increase in Over Time.

Despite the numerous negative impacts that would result from increasing the salary to the Department's suggested level, should it nevertheless decide to increase the salary, some members of the PPWO believe the Department should do so incrementally. Specifically-identified interim levels, spread out over the course of several years, will ensure a smooth and compliant transition and will allow employers the necessary time to adjust their budgets, revenues, and work flows to minimize disruption. As currently proposed, the Department's minimum salary level would increase approximately 113% in an extraordinarily short amount of time.

In addition, due to the rapid nature of the required increase, employers may make classification decisions today that they would not make if the increase was phased in over multiple years. A gradual and previously-specified increase would allow employers the ability to prepare for the changes in a way that makes more economic sense. It also would allow employers to determine with additional certainty how many overtime hours are actually being worked by employees in the \$23,660 to \$50,440 range. Currently, because many of these exempt employees do not record their time, employers are faced with an information deficit. Without information regarding these hours, employers will need to guess at how many hours are worked; those guesses will almost certainly account for more overtime than will actually be worked, resulting in a net loss of income to impacted employees.¹⁸

By allowing a gradual increase, the employer can begin gathering the necessary data to ensure as smooth a transition as possible and to therefore minimize the monetary impact on both the employee and the business. Although many of the same issues will exist with respect to morale, flexibility, and opportunity, a gradual, phased-in implementation of the new minimum salary would limit the financial disruption experienced by both employers and employees.

¹⁸ Assuming that an employer attempts to compensate a reclassified employee at approximately the same level as prior to the reclassification, any new salary will be based on an understanding of how many overtime hours will be worked. Should that understanding be higher than the actual number of overtime hours worked after reclassification, the affected employee will earn less than he or she did prior to reclassification.

G. The Department Should Not Increase the Minimum Required Salary for Application of the Highly Compensated Employee Exemption.

For many of the same reasons discussed above with respect to the standard salary level, the Department should not increase the minimum salary required for application of the HCE exemption. Although the sample size is significantly smaller, the issues remain the same: for example, regional variations within the same business may result in different employees in the same classification being treated differently from an exemption perspective based almost entirely on the location in which they work. In addition, when HCE employees must be reclassified as non-exempt, the issues associated with that reclassification are compounded by the increased compensation level and status of such positions within the business.

II. The Department Should Not Adopt Its Proposal To Automatically Increase the Salary Level.

The PPWO strongly objects to the Department's proposal to automatically increase the salary level. These automatic increases would require annual speculation on the part of employers to determine the proper salary level for the next year, essentially revisiting the process above on an annual basis.

Although the proposed automatic increases are a bad idea for a variety of reasons, as an initial matter, the Department lacks the authority to mandate them. Furthermore, the Department's proposal would not properly account for changes in economic conditions, would not permit notice-and-comment on subsequent salary levels, would dramatically increase the administrative burden as classification decisions would need to be revisited on an annual basis, and has the potential to increase the minimum salary level at such a dramatic rate as to render the duties tests wholly superfluous.

For these reasons, as discussed below, we urge the Department to abandon its proposal to automatically increase the salary level.

A. The Department Lacks the Authority To Automatically Increase the Salary Level.

In the NPRM, the Department states that it seeks "to 'modernize' the EAP exemptions by establishing a mechanism for automatically updating the standard salary test."¹⁹ The Department suggests that automatic updates would "promote government efficiency by

¹⁹ See 80 Fed. Reg. at 38,537.

removing the need to continually revisit the issue through resource-intensive notice and comment rulemaking.”²⁰

The Department, however, cannot avoid its obligations to engage in notice-and-comment rulemaking simply because notice-and-comment rulemaking takes time and resources; a federal agency cannot exceed the limits of its authority or otherwise “exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law’” no matter how difficult an issue it seeks to address.²¹

At no point since Congress authorized the Department to issue regulations on the FLSA’s section 13(a)(1) exemption has Congress granted the Department the authority to index its salary test. Congress could have provided such authority if it desired the Department to have it; Congress has permitted indexing expressly in other statutes, including the Social Security Act (which preceded the passage of the FLSA) and the Patient Protection and Affordable Care Act (which was passed subsequent to the most recent revision to the Part 541 regulations). Yet Congress, despite full knowledge of the fact that the Department has increased the salary level required for exemption on an irregular schedule, has never amended the FLSA to permit the Department to index the salary level.²² Congress’s actions in the face of regulatory history demonstrate a clear intent that the salary level be revisited as conditions warrant, allowing the Department, and the regulated community, the opportunity to provide input into the appropriate level.

The Department’s own actions in reaching out to the regulated community before publication of the NPRM, as well as soliciting input on the salary level in the NPRM itself, demonstrate the importance of notice-and-comment on the salary level. In 2004, the comment process resulted in increases to both the proposed salary level and the proposed highly compensated employee salary level. The Department is not omniscient on these issues, and automatic increases to the salary level are inconsistent with both the Department’s statutory authority and with the Department’s long-held understanding of the salary level’s purpose. A gate need not be moved on an annual basis to ensure that it functions properly; only when it approaches the end of its usefulness does it need to be “fixed.”²³

²⁰ *Id.*

²¹ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (internal citations omitted).

²² Similarly, when Congress has amended the FLSA to increase the minimum wage, it has not indexed that amount.

²³ Indeed, an annual revision to the salary level is inconsistent with the salary level’s gatekeeper function. How can it be the case that an employee is “clearly exempt” on December 31 and “clearly non-exempt” on January 1 of the following year because of the rate of inflation?

The Department recognized its lack of authority to index the salary level in its 2004 rulemaking. And it acknowledges as much in the current NPRM, noting that it determined “nothing in the legislative or regulatory history . . . would support indexing or automatic increases.”²⁴ The Department was correct in 2004, and nothing has occurred since that time to justify a different conclusion.

When the Department has increased the salary level in the past, it has done so by stating what the new salary level would be and by leaving adjustments to that level to the Administrative Procedure Act’s required notice-and-comment rulemaking process. The current regulatory process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. In the current rulemaking, however, the Department proposes to announce a new salary level each year in the Federal Register without notice-and-comment, without a Regulatory Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders. Each of those regulatory requirements is intended to force the agency to consider the consequences of its proposed actions and to ensure that the regulatory actions are carefully crafted and well-supported before being implemented. The current proposal operates as a “super-proposal,” deciding once and for all what (in the Department’s belief) is best without consideration of its impact now or in the future. In fact, it would not be possible for the Department to accurately estimate the impact of the automatic increases in future years as the workforce and the economy are always changing.

The Department should therefore abandon its proposal to automatically increase the salary level based on an index for these reasons alone.

B. The Proposal to Automatically Index the Salary Level Fails to Adequately Consider Its Economic and Practical Impacts.

The Department proposes to determine the new salary level each year by indexing it to certain data sets collected by the Bureau of Labor Statistics (BLS). Under either indexing method the Department suggests, it will be difficult, if not impossible, for employers and employees to determine with precision each year’s new salary level in advance of the Department’s pronouncement in the Federal Register. As a result, indexing the salary level will not make compliance with the exemption requirements easier; instead, the indexing proposal creates uncertainty and administrative and compliance difficulties, as employers likely will need to conduct an annual reconsideration of the classification for employees whose status will depend

²⁴ See 80 Fed. Reg. at 38,537.

upon (potentially) the responses to a survey conducted several years prior that now are reflected in a BLS data set.

1. Indexing to the 40th Percentile Results in an Endless Spiral of Dramatic but Unpredictable Increases.

Both suggested methods of indexing are improper exercises of the Department's regulatory authority and would result in the administrative and compliance difficulties discussed in these comments, as well as the resulting economic impact. The "40th percentile test," however, is particularly problematic.

The objective of the salary level test is "to differentiate exempt and nonexempt white collar employees" by setting a salary level at an amount that is slightly lower than the dividing line between exempt and nonexempt employees.²⁵ That is, the salary level is intended to be set at a level that is over-inclusive of potentially non-exempt employees. Indeed, in setting the proposed salary level at the 40th percentile, the Department notes that it chose that level because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the [executive, administrative, and professional] exemptions for employees who have bona fide executive, administrative, or professional duties as their primary duty."²⁶ As explained above in our salary level comments, however, the Department does not adequately establish why the 40th percentile meets these standards.

Unfortunately, the Department's proposal to permanently tie the salary level to the 40th percentile of full-time salaried workers will compound the Department's error. The BLS data upon which the deciles are based is found in the Current Population Survey. The relevant data consists of the total weekly earnings for all full-time, non-hourly paid employees, based on workers who respond to the survey.²⁷ According to BLS, "total weekly earnings" includes overtime pay, commissions, and tips.²⁸ The respondents are asked whether they are paid hourly; they are not asked whether they are paid a salary, earn commissions, or are paid another way. In other words, the data is based upon a worker's response that he or she is not

²⁵ 80 Fed. Reg. at 38,527.

²⁶ 80 Fed. Reg. at 38,532.

²⁷ See 80 Fed. Reg. at 38,527 at n.20.

²⁸ See http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.

paid hourly and includes in the “salary” threshold elements of compensation that are not salary.²⁹

The number of workers who respond that they are not paid hourly will decrease as workers who fail the salary test in year one (and subsequent years) are reclassified as non-exempt. If the 40th percentile test is adopted, in the years following the proposal, the salary level required for exempt status likely will be so high as to effectively eradicate the availability of the exemptions in low-wage regions and industries.

This is due to the fact that the regulatory actions of the Department will change the parameters of the data set. As noted previously, the Department predicts that the initial salary level increase will impact 4.6 million currently exempt workers. Employers may choose to (i) reclassify such workers as nonexempt and convert them to an hourly rate of pay, (ii) reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked, or (iii) increase the salaries of such workers to the new salary threshold to maintain their exempt status. In the Department’s estimate, however, only 71,000 workers will fall into category (iii).³⁰

The overwhelming majority of affected employees, in the Department’s estimate, will be reclassified as non-exempt. Most of these employees will be converted to an hourly method of payment, although some will undoubtedly become “salaried, non-exempt” employees. Because the workers who will be converted to an hourly method of payment will no longer respond to the Current Population Survey question as being paid “non-hourly,” they will drop out of that BLS data set.

The effect of the regulation on the data set is significant. As one economic analysis states:

The 40th percentile of this distribution is \$950 per week. If just one quarter of the full-time nonhourly workers earning less than \$49,400 per year (\$950 per week) were re-classified as hourly workers, the pay distribution among the remaining nonhourly workers would shift so that the 40th percentile of the 2016 pay distribution would be \$54,184 (\$1,042 per week), about 9.6 percent higher than it was in 2015. This process will continue each year as the lowest paid nonhourly workers fail the salary test and many are re-classified as non-exempt

²⁹ This would be particularly inappropriate if the Department does not allow employers to include commissions and other types of earnings towards satisfying the salary test.

³⁰ 80 Fed. Reg. at 38,574.

hourly workers. [After five years,] the new 40th percentile of the nonhourly pay distribution would be \$72,436 (\$1,393 per week).³¹

Of course, reclassification to hourly of only one-quarter of potentially affected salaried employees seems low, even by the Department's own estimate. In all likelihood, a far greater percentage of employees who would have to be reclassified to non-exempt will be paid on an hourly basis. If only half of those employees are converted to hourly positions, the minimum salary would increase to \$95,836 per year by 2020.³²

Instead of expressing the consequences of indexing in the future, the Department instead discusses a 2.6% average annual growth rate for the 40th percentile between 2003 and 2013.³³ With the significantly higher rate of salary increase discussed above, in several years, the duties tests would be virtually eliminated, because very few employees would receive a high enough salary level to qualify for exempt status, regardless of their duties. In low-wage regions and industries, the duties tests would become superfluous even more quickly.

For all of these reasons, if the Department enacts a final rule that includes automatic updates to the salary level based on indexing, the indexing should not be to the 40th percentile of all full-time, non-hourly paid employees. For the same reasons that indexing the salary level to the 40th percentile would frustrate the Department's goals, indexing the total compensation of the highly-compensated employee exemption to the 90th percentile of all full-time, non-hourly paid employees would be unworkable as well.

2. Annual Updating Will Require Employers to Incur Costs to Evaluate Otherwise Exempt Positions on an Annual Basis, with the Resulting Uncertainty.

Rather than simplifying the regulations, as President Obama directed, the automatic increases proposed by the Department instead will create a cycle of annual uncertainty. After the new salary threshold is announced, employers will engage in an unavoidable last-minute rush to identify which employees will get a salary increase and remain exempt, and which employees will be reclassified to non-exempt status. In other words, the efforts of Year 1 implementation

³¹ See <http://www.edgeworthetheconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/>

³² *Id.*

³³ See 80 FR at 38,587.

would have to be repeated year after year after year. These cost and time obligations are dramatically understated in the required economic analysis accompanying the proposal.

The financial impact, however, is enormous—including not only the costs of increased salaries or potential overtime pay, but also employer’s costs in conducting the classification analysis, the decision-making process, and implementation of any changes in response to the new salary level when it is announced each year. Beyond these financial impacts, as is discussed elsewhere in this comment, transitioning employees from exempt to non-exempt status requires careful planning and implementation to avoid undermining employee morale.

3. The Department’s Suggestion of 60 Days’ Notice is Insufficient and Compounds the Problems Described Above.

The Department has suggested that it will provide employers with 60 days’ notice of the new salary level each year. Such short notice of the automatic annual increases to the salary level would compound the problems described above. Because employers will be operating for most of the year without knowledge of what the new salary level will be, even with advanced planning, the uncertainty regarding the salary level threshold and the likely impact on labor costs and employee headcount will make accurate advanced budgeting and business operations planning extraordinarily difficult.

Sixty days is not nearly enough time for employers to evaluate the impact of the salary levels on labor costs and make appropriate decisions to ensure compliance with the rule. This uncertainty undoubtedly will cause economic harm to employees as employers implement hours reductions or salary freezes to ensure sufficient funds for labor costs necessary to cover increased payroll and administrative expenses created by the changes to the salary levels.

III. The Department Should Not Make Revisions to the Duties Tests.

For a variety of procedural, substantive, and practical reasons, the Department should not change the duties tests at this time. As an initial matter, the Department’s decision to avoid a specific proposal with respect to the duties tests, yet nevertheless consider substantial changes to the duties test, is wholly inappropriate and violates at least the spirit of the Administrative Procedure Act. Like the Department’s proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act, and the various Executive Orders related to regulatory activity. Asking questions—questions that the Department has considered and requested input on for more than a year—is simply no substitute for an actual regulatory proposal that the regulated community can consider and comment upon. Furthermore, if these changes are included in a final rule without being proposed, employers will have only the time

before the effective date to become familiar with them—a wholly inadequate window for such significant changes.

This is particularly true because the changes being contemplated by the Department are significant and deserve a full regulatory vetting. The changes suggested by the Department's questions could result in having to monitor and track if and how often exempt employees are performing non-managerial, or nonexempt, work for the business. They would dramatically impact the cost of implementing the proposal.

Changing the duties test based on the questions asked in the NPRM's preamble frustrates the intent of the APA—a purpose of which is to ensure that interested parties have a meaningful opportunity to comment on regulatory actions that will affect them. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA. Before any changes to the duties tests are finalized, the Department should provide the public an opportunity to review and comment on a specific proposal and related cost estimates.

Moreover, as a general matter, combining revisions to the primary duty test with the Department's proposed annual salary increases is a recipe for disaster. As employers and employees begin to learn any new requirements for the exemption, an entirely new group of employees would be subject to review as a result of the increased salary. The combined proposal would require near constant review of job classifications, with the concomitant cost. None of this is accounted for in the Department's proposal.

Despite the wholly insufficient nature of the "notice" provided to the regulated community with respect to these issues, we provide the following comments in response to the Department's questions.

A. The Department Should Not Adopt California Law or Any Other Percentage-of-Time Requirement.

The Department asks whether it should adopt a percentage-of-time rule for purposes of the exemptions' primary duty test, and, specifically, whether it should adopt California's 50% rule. It should not. As the Department has recognized previously, a percentage-of-time rule would result in burdensome recordkeeping requirements, increased litigation costs, and would further complicate the exempt status analysis, contrary to President Obama's directive.

Monitoring compliance with the rule results in an administrative nightmare. The Department recognized this in 2004, when it explained that a time-based 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).³⁴ In many ways, the recordkeeping obligations for exempt employees, which are presently relaxed, would become more onerous than they are for non-exempt employees.³⁵ In addition to simply tracking hours worked, employers would have to monitor the duties each exempt employee performs, and for what increments of time, during those hours.

A percentage-of-time rule would increase FLSA litigation at a time when such litigation is already exploding. Even for employers that attempt to track their exempt employees' work hours with precision and to build contemporaneous records supporting how that time is spent, costly litigation would eventually follow concerning fact-sensitive issues around each aspect that goes into a percentage of time rule (*e.g.*, the hours worked, the breakdown of those hours, and the exempt character of each duty within that breakdown). This would particularly be the case if the Department rejected the concurrent duties rule, which is discussed below.

Rather than serving as a model for the federal standard, California's standard should be viewed as a cautionary tale. As the Department notes, California's primary duty requirement is quantitative: any duty to which an employee does not devote at least half of her time is not her "primary" duty, which is dramatically different from the federal regulations. California requires identifying work tasks as either exempt or nonexempt.³⁶ In other words, there are no concurrent duties, and employers must ascertain the type of work the employee is actually doing, count the time spent on each task, and characterize that time as exempt or non-exempt. Not surprisingly, California leads the way for wage and hour litigation, as plaintiff's lawyers and employers fight over the percentage of time spent on various tasks and whether those tasks are appropriately classified as exempt or non-exempt.

Ultimately, the ease of administration of a percentage-based test is a myth, complicated by the realities of today's global workplace, where employees work remotely without constant supervision and are often performing multiple different duties at the same time. The modern workplace, and the exemptions from the law that employers are entitled to use, simply do not lend themselves to a percentage-based test. Adding such a test would undermine Congress's

³⁴ 69 Fed. Reg. at 22,186.

³⁵ Indeed, it is difficult to see how the Department could achieve compliance in this area without significant revisions to the recordkeeping regulations, complete with notice-and-comment rulemaking and a detailed regulatory flexibility analysis.

³⁶ See *Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795, 826-827 (2013).

expressed intent in having these exemptions because employers likely would cease using them except in limited cases.

B. The Department Should Not Re-Implement the Short and Long Test Model.

The Department's consideration of returning to an antiquated short and long test is misplaced. As noted in the preamble to the 2004 Final Rule, the Department acknowledged the problems with the long test—the test that implemented a percentage limitation on non-exempt work—and, unsurprisingly, placed those problems squarely at the feet of that limitation:

Yet reactivating the former strict percentage limitations on nonexempt work in the existing “long” duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee’s daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the “long” test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee’s exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes.³⁷

For these reasons, and as more specifically described above, the Department should not return to the short and long test model.

C. The Department Should Not Make Revisions to the Concurrent Duties Rule.

The concurrent duties rule recognizes that front-line managers (and other exempt supervisory employees) in many industries (*e.g.*, retail, hospitality, restaurant) may routinely perform non-exempt tasks while nevertheless at all times carrying out their exempt, managerial function. As the Department described in 2004, the concurrent duties rule is consistent with case law that “makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption.”³⁸ The Department should not change the rule.

The concurrent duties rule understands the practical reality that exempt and non-exempt work are not mutually exclusive. The current regulation provides an example: an assistant manager can stock the shelves while at the same time overseeing the work of her subordinates.³⁹

³⁷ 69 Fed. Reg. at 22,127.

³⁸ *Id.* at 22,186.

³⁹ See 29 CFR § 541.106(b).

Similarly, a hotel manager can work the checkout desk while observing how the concierge interacts with a guest; a restaurant manager can seat a party while monitoring the kitchen for safety issues; and a retail manager can help to unpack a vendor's delivery while also considering what items to order for the next shipment and in what quantity.

As the Department stated in 2004: "exempt executives generally remain responsible for the success or failure of business operations under their management while performing [any] nonexempt work."⁴⁰ The modern manager is trained, financially incentivized, and evaluated for his or her ability to manage, not to perform the routine tasks that sometimes are necessary to ensure quality customer service and efficiency of operation. The management function is constant.

The Department's suggestion that a percentage-of-time limitation in the concurrent duties rule might be appropriate would eliminate any benefits associated with the rule. A concern about time spent on non-exempt tasks instead of exempt work conflicts with the underlying idea of the rule: that managers can simultaneously perform non-exempt tasks while still carrying out their exempt role. It is unclear how the Department could layer a percentage-of-time limitation on top. To be clear, it should not.

The DOL embraced this underlying idea in 2004. The DOL explained then that the concurrent duties rule was consistent with a body of federal case law which accepts "that an employee can have a primary duty of management while concurrently performing nonexempt duties" and has held that retail managers who spend 80% or 90% of their time on non-management tasks could be exempt.⁴¹ Endorsing this framework, the Department announced that "this case law accurately reflects the appropriate test of exempt executive status and is a practical approach that can be realistically applied in the modern workforce . . ."⁴² It makes little sense to reject the rule and the underlying principles that were considered modernized and practical eleven years ago in favor of an antiquated and robotic understanding of work.

The Department should not change the concurrent duties rule, whether to add a percentage-of-time requirement or in any other manner.

D. The Department Did Not Propose Any Examples and Should Not Add to the List of Examples.

⁴⁰ 69 Fed. Reg. at 22,137.

⁴¹ See 69 Fed. Reg. at 22,136-137.

⁴² *Id.*

Although the Department invites comments on whether it should add job-specific examples for additional guidance in administering the exemptions, it does not provide any specific proposals in the regulatory text. In 2004, the regulated community had the ability to review the specific examples proposed by the Department and provide comment on the Department's conclusions. Here, rather than propose specific examples on which to comment, the Department simply asks whether additional examples should be added. The types of positions, the Department's conclusion, and even the Department's analysis of the exemption's applications will remain completely unknown until the final rule. Much like it did when it abandoned opinion letters in which a regulated entity provided the facts in favor of Administrator Interpretations in which the Department described its own facts, the manner in which the Department seeks to address the "examples" issue leaves no opportunity for meaningful comment.⁴³

Because any examples undoubtedly will be used to influence litigation—including pending litigation—the Department should not develop them in a vacuum. This is precisely the reason why notice-and-comment rulemaking exists. Yet, the Department's solicitation of comments on any and all possible examples makes it impossible for any entity to comment properly. If the Department wishes to include examples, it should engage in a supplementary rulemaking and provide an opportunity to provide comment on those examples.

VI. The Department's Economic Analysis is Flawed.

As an initial matter, because the Department did not actually "propose" changes to the duties tests, it does not include in the NPRM any assessment of the costs and benefits associated with any proposed changes related to the duties tests. That is, for what has the potential to be the most significantly impactful portion of a final rule, the Department has avoided preparation of an analysis of that impact by asking questions instead of proposing regulatory text. As we have noted elsewhere, should the Department decide to proceed with revisions to the duties tests, it should do so through a full and transparent application of the regulatory process—making specific regulatory proposals, preparing a comprehensive analysis of the anticipated impact of those proposals, and allowing the regulated community the opportunity to comment both on any proposal and on the Department's assessment of such a proposal.

Even with respect to the proposals the Department has made, however, the Department dramatically underestimates the economic impact of its proposals. For example, the

⁴³ See <http://www.dol.gov/whd/opinion/opinion.htm> ("The Administrator believes that this [across-the-board approach] will be a much more efficient and productive use of resources than attempting to provide definitive opinion letters in response to fact-specific requests submitted by individuals and organizations, where a slight difference in the assumed facts may result in a different outcome.").

Department's analysis fails to adequately consider the economic cost of avoiding salary compression for those employees who are already paid more than the proposed minimum salary level. Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed.

Higher levels of education, skill, experience, responsibility, and seniority should (and currently do) correspond to increased compensation. Employers thus attempt to avoid actual or perceived disparity between job titles and comparative compensation. Employees with higher positions, more job responsibility, and better qualifications than others expect to be paid accordingly. If an employer fails to do so, the salary compression will negatively impact employee morale in the workplace.

Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn \$700 per week and their supervisors earn \$1,000 per week, the decision to raise the employees' salary to \$970 per week to continue their exempt classification does not simply impact those employees. Their supervisors—although not legally required to be paid more to be treated as exempt—nevertheless will need to be paid more to maintain morale and avoid salary compression.

The increased costs to employers to avoid salary compression are not considered in the Department's economic analysis. Similarly, the Department fails to address the difficulty of addressing the salary compression issue, as well as its impact on the determination on whether to reclassify a position to non-exempt as a result of the increased minimum salary level. These are real administrative expenses. The decision on classification cannot be made in a vacuum; it must consider the impact on other positions from a salary compression standpoint. The Department's proposal, however, does not adequately account for any of these significant costs.

Likewise, the Department underestimates the costs of the rulemaking with respect to compliance efforts. Regulatory familiarization, adjustment, and managerial costs are all dramatically understated. Contrary to the Department's suggestions, compliance with the proposed rule would not be as simple as reviewing the salary level and making a decision. Due to the many, varied issues identified within these comments, the time and effort associated with complying with the proposed rule will be immense as employers determine which positions will remain exempt, which will be reclassified as non-exempt, and how the employer will implement the conversion to non-exempt status, including adjustments to time and attendance systems and associated administrative issues.

Finally, the Department similarly fails to account for these costs on a recurring basis. As noted above, the same compliance review activities that take place in Year 1 will be repeated on an annual basis, for different groups of employees that fall below the new salary minimum.

VII. Conclusion.

For all of the reasons discussed above, the Department should withdraw this proposal.