CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

GLENN SPENCER
SENIOR VICE PRESIDENT
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

MARC D. FREEDMAN
VICE PRESIDENT
WORKPLACE POLICY

May 21, 2019

The Honorable Cheryl M. Stanton
Administrator
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

VIA ELECTRONIC FILING: www.regulations.gov

Re: RIN 1235–AA20, Notice of Proposed Rulemaking, 29 CFR Part 541, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 FR 10900 (March 22, 2019)

Dear Administrator Stanton:

The U.S. Chamber of Commerce (the "Chamber") submits these comments in response to the proposal of the U.S. Department of Labor (the "Department"), as published in the Federal Register, 84 FR 10900, on March 22, 2019, to revise the regulations at 29 CFR Part 541, defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees in section 13(a)(1) of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 USC § 213(a)(1) (the "Proposed Rule").

The Chamber is very supportive of the Department's efforts to modernize the Part 541 regulations, and believes the proposed rule is generally balanced, reasonable, and far superior to the rule issued in 2016.[1] However, we do have several suggestions to make the rule more effective:

---

[1] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 81 FR 32391 (May 23, 2016) [hereinafter "2016 Final Rule"]; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Proposed Rule, 80 FR 38516 (July 6, 2015) [hereinafter "2015 Proposed Rule"]; and the Chamber's comments to the 2015 Proposed Rule and the 2017 Request for Information, 82 FR 34616 (July 26, 2017) [hereinafter "2017 RFI"]. We incorporate the Chamber's 2015 and 2017 comments here by reference.

- The Department's proposed rule uses the entire South Census Region as a baseline for the new minimum salary level. As the Department recognizes, minimum salary levels should be set toward the lower end of the salary range. The South Census Region, however, contains jurisdictions with some of the highest salaries in the U.S. (Maryland, Virginia and Washington D.C.). Instead, the Department should apply its 2004 methodology of using data only from eight southern states (Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma and Texas).

- In the past, the Department has almost always relied on real salary data. However, the proposed rule's use of estimates to project salary levels into the future departs from that practice.

- The proposed rule includes a 10% cap on crediting nondiscretionary bonuses, commissions, and other incentive payments toward the minimum salary. While the Chamber supports the concept of allowing credit for these payments, the 10% cap is artificially low, contradicts modern pay practices, and helps none of the parties it was ostensibly designed to protect.

- While the Chamber applauds the Department's commitment to notice-and-comment rulemaking in setting future salary thresholds, we see no reason to commit to a rigid schedule of every four years. Instead, the Department should pursue future overtime rules to set the salary threshold based on economic conditions.

- The Chamber believes that the Department's proposal to increase the total annual compensation level for highly compensated employees from $100,000 to $147,414 sets the level too high. The Department based the new level on the 90th percentile of national salary data, rather than the South and retail data used to set the minimum salary level. At such a high level, the highly compensated test, effectively, would be available only to large employers on the east and west coasts—a result that the Department surely did not intend. Instead, the Department should use the same data set used for the minimum salary level.

While these are significant issues, and we urge the Department to correct them in a final rule, they do not overshadow the Chamber's broad agreement with the Department's overall approach. On balance, the Chamber believes the Department has taken reasonable, measured, and thorough steps toward updating the Part 541 regulations and bringing the overtime regulations in line with the modern workforce.

1. The Department's Proposal Correctly Returns to the Historical Methodology for Setting the Minimum Salary Level.

a. The Department's use of the 2004 methodology accords with historical practice, judicial precedent, and the statutory text.

The Chamber supports the Department's decision to return to the methodology it established in 2004 for setting minimum salaries for executive, administrative, and professional employees. That methodology best serves the regulated community by providing predictable salary levels and a stable legal regime. It also accords with congressional intent and the Department's historical approach, both of which show that salary levels should always be placed toward the lower end of the spectrum.

The 2004 methodology begins by determining real salary levels.[2] It does so by looking to the most up-to-date Current Population Survey Outgoing Rotation Group (CPS) data compiled by the Bureau of Labor Statistics.[3] It then focuses on the South Census Region and the lowest-wage industry group (Retail) and sets the minimum salary at the 20th percentile.[4]

This general methodology, in place for nearly 15 years, is familiar to employers and employees.[5] It is also consistent with the Department's historical practice. Minimum salary levels have been a part of the Department's regulations since 1940;[6] and since the beginning, they have played only a narrow role. Namely, they provide a short-hand tool for identifying "obviously nonexempt" employees.[7] Through countless investigations, the Department has learned that

---

[2] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 79 Fed. Reg. 22122, 22164 (April 23, 2004) [hereinafter "2004 Final Rule"].

[3] *Id*.

[4] *Id.* at 22167.

[5] *See* Notice of Proposed Rulemaking, 29 CFR Part 541, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 10900 (March 22, 2019).

[6] *See* 2004 Final Rule, *supra* note 2, at 22166 (tracking historical development of salary levels).

[7] *See, e.g.*, U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541 UNDER THE FAIR LABOR STANDARDS ACT DEFINING THE TERMS "EXECUTIVE, ADMINISTRATIVE," "PROFESSIONAL," "LOCAL RETAILING CAPACITY," "OUTSIDE SALESMAN" 2–3 (1958) [hereinafter "KANTOR REPORT"] (stating that the salary levels "furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees"); U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541 UNDER THE FAIR LABOR STANDARDS ACT DEFINING THE TERMS "EXECUTIVE, ADMINISTRATIVE," "PROFESSIONAL," "LOCAL RETAILING CAPACITY," "OUTSIDE SALESMAN" 8 (1949) [hereinafter "WEISS REPORT"] (stating that the salary levels help prevent misclassification of "obviously nonexempt" employees); U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION

exempt employees "are unlikely to be found" at relatively low levels of compensation.[8] The minimum-salary levels therefore relieve employers and investigators from the need to apply the duties test in some cases.[9] In other words, the salary levels act as a heuristic, allowing the Department to screen out employees who almost certainly would fail to qualify for the exemptions.[10]

To serve this function well, however, the salary levels must from time to time be reexamined and updated. Before 2004, the Department did so five times—in 1949, 1958, 1963, 1970, and 1975.[11] Three lessons emerged from these efforts.[12] First, the Department recognized the value of relying on real salary data, as opposed to estimates.[13] Second, it rejected suggestions that the salary levels be updated automatically to keep pace with consumer prices or other inflationary metrics.[14] And third, it confirmed that the levels should be set at the "low end" of the salary range—lower even than the data suggested—to ensure that the levels excluded only "obviously nonexempt" employees.[15]

(1940) [hereinafter the "STEIN REPORT"] (stating that the salary test would help identify employees "who obviously should be exempt" from those who were not).

[8] *See* Proposed Rule, *supra* note 5, at 10908.

[9] *See id.*

[10] *See, e.g.*, KANTOR REPORT, *supra* note 7, at 2–3 (explaining that the salary levels "simplify enforcement by providing a ready method of screening out the obviously nonexempt employees").

[11] *See generally id.*; WEISS REPORT, *supra* note 7; STEIN REPORT, *supra* note 7; 28 Fed. Reg. 7002 (July 9, 1963); 35 Fed. Reg. 884 (January 22, 1970); 40 Fed. Reg. 7091 (February 19, 1975).

[12] *See* 2004 Final Rule, *supra* note 2, at 22168 (drawing three conclusions from prior rulemaking).

[13] *Id.*

[14] *Id.*

[15] *Id.*

The 2004 methodology honored these principles. That year, the Department addressed two competing problems:

- First, the duties tests then in place were unnecessarily complicated.[16] The regulations split the test in two, setting out both a "long" and a "short" test.[17] While the long test included more rigid duties requirements, such as a cap on the amount of time an employee could spend on nonexempt tasks, the short test required a higher minimum salary.[18] Stakeholders complained bitterly about these tests; employers in particular found them confusing and unnecessarily rigid.[19] This confusion, in turn, led to less compliance and more litigation.[20] The Department therefore set out to streamline and modernize the tests.[21]

- Second, the salary levels had not been updated in nearly thirty years.[22] Time and inflation had eroded their value.[23] The long-test salary had fallen below the federal minimum wage, and the short-test salary hovered just $1.10 above it.[24] As a result, the levels had stopped screening out nonexempt employees.[25]

The Department addressed both problems at once. First, it merged the two duties tests, retaining elements of both while eliminating the long test's cap on nonexempt work.[26] Second, it established a new salary level.[27] In line with historical practice, it aimed to set that level toward the lower end of salary ranges for exempt employees.[28] And as it had in the past, it rejected suggestions to automatically increase the level through inflationary metrics, such as the

---

[16] *See id.* at 22124 (reviewing concerns about then-existing regulations).

[17] *See* 29 C.F.R. §§ 541.1–541.3 (2003) (setting out dual tests for executive, administrative, and professional employees).

[18] *See id.*

[19] *See* 2004 Final Rule, *supra* note 2, at 22124; GOVT. ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: WHITE COLLAR EXEMPTIONS IN THE MODERN WORKPLACE, GAO/ HEHS–99–164, at 3 (1999) [hereinafter "GAO REPORT"] (reporting results of survey of employers).

[20] *See* 2004 Final Rule, *supra* note 2, at 22125 (noting that 2004 rule aimed in part to reduce litigation costs by making classification easier).

[21] *See id.*

[22] *Id.*

[23] *Id.*

[24] *See* GAO REPORT, *supra* note 19, at 26.

[25] *See id.* at 28 (stating that 91% of full-time salaried employees earned at least as much as the short-test salary).

[26] *See* 2004 Final Rule, *supra* note 2, at 22123 (summarizing changes).

[27] *See id.*

[28] *See id.* at 22166.

Consumer Price Index.[29] These changes modernized the exemptions while remaining consistent with historical practice.

In the most recent rulemaking, 12 years later, the Department departed from that practice. In 2016, it again proposed to update the minimum salary thresholds.[30] But instead of simply applying the existing methodology, it manipulated the formula to exclude more workers from the exemptions.[31] It doubled the defining percentile from 20 to 40, which raised the minimum annual salary from $23,660 to $47,476,[32] thus making roughly 4.2 million employees newly eligible for overtime solely because of their salaries and regardless of job duties.[33]

These departures proved legally problematic. In November 2016, the U.S. District Court for the Eastern District of Texas preliminarily enjoined the regulations from taking effect.[34] And the following August, the court struck the regulations down.[35] The court recognized that the salary levels had historically played a screening function and conceded that the Department had the authority to adopt salary levels for that purpose.[36] But by raising the levels so high, the Department had allowed them to usurp the duties test for "entire categories" of employees.[37] The statute gave the Department no authority to define the exemptions by reference to salary alone.[38] It had therefore exceeded its authority.[39] The court noted, however, that if the Department had simply updated the salary levels using the 2004 methodology, its efforts would almost certainly have been lawful.[40]

As a practical matter, that rationale left the Department with only one choice: return to the 2004 methodology. Doing nothing was not an option. Salary levels had eroded and needed to

---

[29] *Id.* at 22168 (rejecting mechanical adjustment because of potential inflationary effects).

[30] 2017 Final Rule, 81 Fed. Reg. at 32391.

[31] *See id.* at 32450–51.

[32] *Id.* at 32451, 32467.

[33] *Id.* at 32451.

[34] *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016).

[35] *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 806–808 (E.D. Tex. 2017).

[36] *See id.* at 805–06.

[37] *Id.* at 806.

[38] *Id.* at 805.

[39] *See id.* at 806 (declining to defer to the Department's interpretations and striking down 2016 rule).

[40] *See id.* at 807 n.6 ("[I]f [the salary level] had been just adjusted for inflation, the 2004 figure, we wouldn't be here today . . . because [the salary level] would still be operating more the way it has . . . as more of a floor." (quoting court's statements during oral argument)).

be updated.[41] But the Department could not continue with the 2016 methodology, which had just been declared unlawful.[42] Nor could it return to its pre-2004 methodology—the "Kantor method"—which had been designed to set two salary levels, not one.[43] Stakeholders opposed a return to the two-test approach almost universally.[44] So the Department took the only rational step available: it returned the methodology it had applied for the last 15 years.[45]

b. Criticisms of the 2004 methodology oversimplify the Department's approach.

The 2004 methodology is not, of course, immune from criticism. Most commonly, critics argue that the 2004 regulations created a "mismatch" between the short and long tests. They claim that when the Department combined the two tests, it borrowed the least protective element from each: the salary from the long test and the duties from the short test. This resulted, they claim, in systematic under-coverage.[46]

That argument oversimplifies the Department's approach. In 2004, the Department did more than borrow the short duties test whole cloth; it also incorporated elements from the long test. For example, it retained the requirement that an executive employee must have the ability to hire and fire, or to make recommendations about hiring, firing, advancement, or other changes in status—a requirement not appearing in the short test.[47] It also did more than simply borrow the long-test salary level. The long test established its baseline as the 10th percentile of full-time exempt salaried workers in low-wage areas and regions.[48] The 2004 methodology, by contrast, looked to a broader set of data, which included all full-time salaried workers.[49] To account for this expansion (as well the elimination of the long duties test), it doubled the relevant percentile,

---

[41] *See* Proposed Rule, *supra* note 5, at 10917 ("Since the update in 2004, the purchasing power, or real value, of the standard-salary level test has eroded substantially, and as a result, increasingly more workers earn above the salary threshold.").

[42] *See Nevada*, 275 F. Supp. at 807.

[43] *See* KANTOR REPORT, *supra* note 7, at 10 (calculating separate salary level for short test); 2004 Final Rule, *supra* note 2, at 68 (describing method used to adapt Kantor method to accommodate a single duties test).

[44] *See* Proposed Rule, *supra* note 5, at 10909 ("Nearly all commenters opposed reinstating separate long and short tests with corresponding salary levels an duties tests.").

[45] *See id.* ("Using the 2004 salary level methodology as the basis for determining an updated salary level thus promotes familiarity and stability for the workplace, ensures workers the important wage protections contained in the Act, and minimizes the uncertainty and potential legal vulnerabilities that could accompany a novel and untested approach.").

[46] *See, e.g.*, 2016 Final Rule, *supra* note 1, at 32400 (regurgitating "mismatch" argument).

[47] *See* 29 C.F.R. § 541.100; 2004 Final Rule, *supra* note 2, at 22123.

[48] *See* KANTOR REPORT, *supra* note 7, at 6–7.

[49] *See* 2004 Final Rule, *supra* note 2, at 22167.

raising it from the 10th to the 20th.[50] These changes resulted in an entirely new test, though one that remained faithful to the salary level's function as a screening mechanism.[51] Thus, the Department was correct in rejecting the "mismatch" argument.[52]

Another common criticism is that the 2004 regulations caused misclassification. This criticism stems from the Department's statement in 2016 that many employees had been misclassified under the 2004 standards.[53] Seizing on this observation, critics have argued that a return to the 2004 methodology would increase misclassification.

That argument scrambles the line of causation. The 2004 regulations caused no misclassification; by definition, misclassification is a misapplication of the rules. Regardless of where or how the Department draws the salary line, some employees will be close calls thus giving rise to allegations of misclassification. Raising the salary levels can reduce misclassification by automatically excluding more employees.[54] Theoretically, the Department could eliminate all misclassification by raising salary levels to an unattainable point—say, $500,000 per year – but that would effectively eliminate the duties tests and make salary the sole criterion. Such a result would be inconsistent with the statutory text and run afoul of the Eastern District of Texas's reasoning in *Nevada v. U.S. Department of Labor*. In *Nevada*, the court emphasized that salary levels are lawful only when they serve as a proxy for duties.[55]

The Department cannot, therefore, eradicate misclassification by manipulating the salary levels. If misclassification remains a problem even after the Department identifies appropriate levels, it should address the issue through better education and compliance assistance.

Finally, some critics argue that the Proposed Rule would automatically classify fewer employees as nonexempt than the 2016 Final Rule would have. Again, the salary level should serve only as a sorting mechanism: it should help employers apply the duties test by screening out obviously nonexempt employees.[56] The 2016 Final Rule failed to recognize that principle,

---

[50] *Id.*

[51] *See id.*

[52] *See* Proposed Rule, *supra* note 5, at 10908.

[53] *See* 2016 Final Rule, *supra* note 1, at 32452 ("Finally, 732,000 white collar, salaried workers making between $455 and $913 who do not meet the duties test are already overtime eligible but do not receive overtime pay because they are misclassified.").

[54] *See* Proposed Rule, *supra* note 5, at 10943 (estimating that new salary levels would reduce, but not eliminate, misclassification).

[55] *See* 275 F. Supp. 3d at 806 ("While the plain meaning of Section 213(a)(1) does not provide for a salary requirement, the Department has used a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt.").

[56] *See* 2004 Final Rule, *supra* note 2, at 22168 (summarizing historical approach).

and instead tried to use the salary test as a blunt instrument to reclassify millions of employees. It effectively supplanted the duties test with the salary test. For that reason, it was struck down.[57]

c. The Department should adjust its data set to ensure that the salary level reflects the lower end of the salary range.

While the Department's proposed methodology is defensible and largely consistent with past practice, it is not without flaws.[58] Perhaps most notably, it distorts the proposed minimum salary level by including data from some of the highest-income jurisdictions in the U.S.: Maryland, Virginia, and the District of Columbia.

The Department has historically emphasized that the salary levels work best as a screening mechanism when they are placed toward the lower end.[59] It has therefore used data from the lowest-wage regions in the U.S.[60]

The Department's Proposed Rule, however, follows this practice only nominally. It bases its final salary level on the entire South Census Region.[61] While that region is technically the lowest-wage *region* in the U.S., it is hardly monolithic. It comprises three Census *divisions*: the South Atlantic Division, the East South Central Division, and the West South Central Division.[62]

---

[57] *See Nevada*, 275 F. Supp. at 807.

[58] As an initial matter, the Chamber was unable to precisely replicate the Department's calculation of either the proposed minimum salary or the highly compensated level. As part of our analysis, we attempted to replicate the edited CPS MORG data sets used by the Department and then apply its methodology of setting the minimum salary level at the 20th percentile of salaries in the South Census Region and nationwide retail industry. For the minimum salary level, we found $631 per week compared to the Department's $641 per week. For the highly compensated test, replication of the Department's approach (which excluded workers currently earning less than $455 per week from the 90th percentile calculation) resulted in $137,332 annually versus the Department's 2017 level of $139,464. The differences are attributable to instances in which the Department excluded selected CPS MORG observations from their tabulations by random selection or other means. *See* Appendix A (the Chamber's detailed analysis of the data sets and methodology to set the minimum salary level and highly compensated level. We could not replicate these exclusions because the Department failed to provide sufficient detail of its edits to the CPS MORG dataset in its published documentation. To ensure transparency, and allow the public to predict future increases, the Department should publish the actual datasets used to set the minimum salary and highly compensated levels.

[59] *See, e.g.*, KANTOR REPORT, *supra* note 7, at 5 ("I]t is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories.").

[60] *Id.*; *see also* 2004 Final Rule, *supra* note 2, at 66 ("In almost every case, the Department examined data on actual wages paid to employees and then set the salary level at an amount slightly lower than might be indicated by the data.").

[61] *See* Proposed Rule, *supra* note 5, at 10925.

[62] *Id.* at 10931.

While the latter two divisions include largely lower-wage states,[63] the South Atlantic Division includes Maryland, Virginia, and the District of Columbia.[64] These three jurisdictions include some of the highest average salaries in the U.S.[65] Using them to gauge the "lower end" of salary levels is, therefore, inappropriate.

In 2004, the Department defined the "South" to include only the lower-wage East South Central and West South Central Census Divisions, which, at that time, included only Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma and Texas and excluded the relatively higher wage South Atlantic Census Division. The Department, in other words, did not use salary data from Maryland, Virginia, and the District of Columbia. To set the minimum salary level for exemption, the Department should apply the actual 2004 methodology to the 2017 data, as it claims to do – that is, determining the 20th percentile of the salary data from these eight states. Using the 2004 methodology results in a minimum salary level of $615.42 per week (equivalent to $32,002 per year).

d. The Department should abandon its proposal to project salary levels to 2020.

The Chamber also encourages the Department to abandon its plan to project salary levels into the future. In the Proposed Rule, the Department proposes to inflate the salary level to account for expected growth between now and 2020, when it expects the new level to take effect.[66] The Department explained that it thought this inflation was necessary to avoid relying on two-year-old data.[67]

But that rationale ignores the Department's historical practice and stated intent to follow the 2004 rulemaking. Both historically and in 2004, the Department relied on the most recent available data on real salaries.[68] Only once, in 1975, has it used inflationary metrics and even

---

[63] The South Atlantic Division is comprised of Delaware, Maryland, District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia, and Florida; the East South Central Division is comprised of Kentucky, Tennessee, Alabama and Mississippi; the West South Central Division is comprised of Arkansas, Louisiana, Oklahoma and Texas.

[64] *Census Regions and Divisions with State FIPS Codes*, U.S. CENSUS BUREAU, https://www2.census.gov/geo/docs/maps-data/maps/reg_div.txt (last visited April 2, 2019).

[65] *See 2017 Median Household Income in the United States*, U.S. CENSUS BUREAU, https://www.census.gov/library/visualizations/2018/comm/acs-income-map.html (showing median household incomes in Virginia, Maryland, and the District of Columbia in the highest category).

[66] Proposed Rule, *supra* note 5, at 10917 (inflating figures using compound annual growth rate).

[67] *See id.*

[68] *See* 2004 Final Rule, *supra* note 2, at 22165 (surveying past adjustments an observing that each time, the Department used "actual salaries and wages paid to exempt and nonexempt employees").

then only as a temporary measure.[69] It should be apparent that inflationary conditions in 1975 bear no resemblance to today.

Further, the Department's projection of the data-derived 2017 minimum salary of $641 to a proposed January 2020 level of $679 per week is based on a flawed calculation. The compound growth rates that the Department computed by comparing the 2004 final rule minimum salary level and its calculated 2017 level are incorrect because of incomparability between the 2004 and 2017 reference cases. For the 20th percentiles of earning comparisons, for example, the two comparators were based on different groups of states.

This critique also applies to the Department's projection of the highly compensated level to $147,414 per year in January 2020 based on its 2017 calculation of $139,464. For the highly compensated level, the two comparators were derived from differently specified reference data sets – the Department's 2017 calculation was based on a more restricted, and therefore higher, earnings range.

Even if done correctly, such speculative projections are unnecessary given the ready availability of actual 2018 and 2019 data to update the proposed minimum salary and highly compensated levels before the planned date for publication of the final rule. Instead of applying speculative projections of 2017 data, the Department should follow its 2004 precedent and base the values on actual data. For the final rule, the Department should base its determinations on actual available 2018-2019 CPS MORG data. Data for all of 2018 and through March 2019 is already published and available. Data through June 2019 will be available to the Department's analysts by mid-July, providing ample time to update the analysis to reflect the latest available data by January 2020 without resort to speculative projections.[70]

2. Although Revisiting Salary Levels Periodically through Rulemaking is Appropriate, the Department Should Not Bind itself to a Rigid Schedule.

a. The Department's proposal to revisit salary levels through rulemaking is consistent with sound policy and congressional intent.

In its Proposed Rule, the Department observed that in the past, it has taken longer than expected to update the salary levels.[71] Most notably, after 1975, the levels remained unchanged

---

[69] *See* 40 Fed. Reg. 7091 (Feb. 15, 1975) (stating that proposed rates would remain in place only for an "interim" period while the Bureau of Labor Statistics completed a six-month salary study).

[70] The Chamber's detailed analysis of the data sets and methodology to set the minimum salary level and highly compensated level can be find under Appendix A.

[71] *Id.* at 10914, 10917.

for nearly 30 years.[72] The salary levels therefore eroded, and an eventual update in 2004 resulted in the single largest increase in history.[73] The Department therefore proposes to revisit the salary level every four years through notice-and-comment rulemaking.[74]

While we do not believe it is necessary to adhere to such a rigid schedule, as discussed below, the Chamber supports the commitment to notice-and-comment rulemaking. It is far superior to the approach the Department contemplated in 2016, when it proposed to automatically update the salary levels every three years.[75] Such automatic updates would have been legally invalid.

Section 13(a) gives the Department authority to define the executive, administrative, and professional exemptions "from time to time."[76] The statute says nothing about updating those definitions automatically. This silence speaks volumes. When Congress wants to reflect changing costs automatically, it knows how to do it. For example, Congress explicitly provided for cost-of-living adjustments in the Social Security Act,[77] the Patient Protection and Affordable Care Act,[78] and the Equal Access to Justice Act,[79] among others. And in each case, it painstakingly detailed how to implement these adjustments and what metrics to use.[80] Thus, there is no basis to conclude that Congress intended to empower the Department to make similar adjustments through its silence.[81]

Even more problematically, the Department's 2016 approach clashed with the Administrative Procedure Act (APA). The APA contemplates that agencies will enact major policies through notice-and-comment rulemaking.[82] Such rulemaking gives stakeholders an opportunity to weigh in and provide the Department with information.[83] That information can

---

[72] *See id.* at 10917 (reviewing history of adjustments).

[73] *See* 2004 Final Rule, *supra* note 2, at 22122 (observing that 2004 increase was the largest in the FLSA's history).

[74] Proposed Rule, *supra* note 5, at 10918.

[75] 2016 Final Rule, *supra* note 1, at 32430–31.

[76] 29 U.S.C. § 213(a)(1).

[77] 42 U.S.C.A. § 1395ww(d)(2)(H) (providing for adjustments to previously standardized payments).

[78] Pub. L. 111-148, § 1102(c)(3), 124 Stat. 119, 145 (2010) (codified at 42 U.S.C. § 18002).

[79] 28 U.S.C.A. § 2412(d)(2)(A)(ii) (providing for an increase in the amount of attorneys' fees due because of an "increase in the cost of living")

[80] *See* 42 U.S.C.A. § 1395ww(d)(2)(H); 42 U.S.C. § 18002; 28 U.S.C.A. § 2412(d)(2)(A)(ii).

[81] *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.'" (quoting *Conn. Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992))) (Scalia, J.).

[82] *See* 5 U.S.C. § 553.

[83] *See, e.g.*, *Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985) ("The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping

make a difference. For example, in 2004, the Department responded to feedback from employee groups by raising the salary level from $425 to $455 per week.[84] The Department's 2016 automatic indexing approach, by contrast, would have made significant policy changes without any feedback from stakeholders. That is not how Congress intended the process to work.[85]

The Department's current approach solves these problems. It addresses salary levels in the way Congress intended: through notice-and-comment rulemaking. That approach is both fundamentally sound and legally unassailable.

b. Anchoring the Department's plan to revisit salary levels every four years in the regulations would serve no purpose.[86]

The Department requests comments on whether it should adopt a regulation committing itself to revisit the salary levels every four years.[87] It is unclear why such a commitment is needed. The Department can engage in rulemaking without a regulation; it has statutory authority for that.[88] The regulation would therefore serve only to expose the Department to legal challenges—for example, if it failed to adopt a new salary level on schedule.[89] The Department might try to mitigate this risk by wording the regulation to retain discretion over the rulemaking

---

to ensure informed agency decision making."); *Nat'l Retired Teachers Ass'n v. U. S. Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979) ("One of the central purposes of the notice and comment requirements is to allow public participation in the promulgation of rules which have a substantial impact on those regulated.").

[84] *See* 2004 Final Rule, *supra* note 2, at 22168 (increasing minimum salary from $425 to $455). The Department also responded to public comments by raising the highly compensated minimum salary from $65,000 to $100,000. *See id.* at 22174.

[85] *See Brown Exp., Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("Congress realized that an agency's judgment would be only as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject of the rulemaking at hand.").

[86] The Chamber has no objection to including the methodology for determining the salary levels in the regulations as doing so would ensure transparency and stability of the methodology.

[87] Proposed Rule, *supra* note 5, at 10915 n.140.

[88] *See* 29 U.S.C. § 213(a)(1) (authorizing the Secretary of Labor to define the terms "executive," "administrative," and "professional"); *Auer v. Robbins*, 519 U.S. 452, 456 (1997) ("The FLSA grants the Secretary broad authority to "defin[e] and delimi[t]" the scope of the exemption for executive, administrative, and professional employees." (quoting § 213(a)(1))).

[89] *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (finding that delay in mandatory rulemaking may be a final reviewable action under the APA) ("[A]gency inaction may represent effectively final agency action that the agency has not frankly acknowledged . . . .").

process.[90] But the Department already has that discretion.[91] If the regulation does nothing but retain the authority the Department already has, it serves no purpose.[92] Moreover, whether such a schedule would be binding on future Departmental leadership is highly questionable.

Finally, committing to a specific schedule for rulemakings will create some of the same problems the previous administration's automatic indexing feature would have created: (1) frequent increases will mean employers will have to perform time-consuming and costly classification analyses more often; and (2) at some point a prescheduled increase will take effect during an economic downturn—exactly when labor costs should not be increased.[93]

3. The Department's Proposal to Allow Credit for Commissions, Bonuses, and Other Nondiscretionary Incentive Payments, Although Welcome, is Flawed.

a. The Department's proposal to allow credit for nondiscretionary incentive payments accords with modern pay practices and the FLSA's goals.

In its Proposed Rule, the Department proposes to allow employers to use commissions, bonuses, and other nondiscretionary incentive payments to satisfy part of the minimum salary level requirement.[94] The Chamber generally supports this proposal, as it recognizes that nondiscretionary incentive payments now make up a large part of compensation packages for many exempt employees.[95] Incentive payments also encourage positive behaviors by linking the employee's compensation to the business's success.[96] The Department correctly recognizes that giving employers the flexibility to structure compensation packages this way is both good for American business and consistent with the FLSA's goals.[97]

---

[90] *See* Proposed Rule, *supra* note 5, at 10915 n.140 (proposing that the Secretary could forgo rulemaking "in his or her sole discretion" for "economic or other" reasons).

[91] *See Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 613 n.6 (1944) (finding that the Secretary of Labor has authority to define the white-collar exemptions); *Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996) (same); *Dalheim v. KDFW–TV*, 918 F.2d 1220, 1224 (5th Cir. 1990) (same).

[92] *Cf.* Weiss Report, *supra* note 7, at 9 (acknowledging that if the salary levels need adjusting, the Department can always revisit them).

[93] *See* Chamber Comments to the 2015 Proposed Rule, at 30-36.

[94] Proposed Rule, *supra* note 5, at 10912.

[95] *See* 2016 Final Rule, *supra* note 1, at 32424 (recounting feedback from employers and industry groups that as many as 93% used some form of bonus or incentive-payment plan).

[96] *See id.* (recounting comments from employers that bonus payments give managers a "sense of ownership" in the enterprise's success).

[97] *See id.* (recognizing that nondiscretionary incentive payments "have become associated with EAP skills, such as the exercise of independent judgment and management skills").

Although the Chamber supports the Department's decision to allow employers to use bonuses and incentive payments paid annually or less frequently, rather than only quarterly,[98] we question its decision to limit the credit to 10%. In addition, the Chamber requests that the Department provide employers with one month to make up any shortfalls and address the consequences of shortfalls to ensure employers do not lose the exemption for minor or inadvertent errors.

b. The Department should eliminate the 10% cap.

The Chamber objects to the Department's 10% cap. The Department borrowed that cap from the 2016 Final Rule,[99] which itself failed to explain how the Department settled on 10%.[100] It reasoned that some cap was necessary to ensure that exempt employees continued to receive a fixed annual salary.[101] But nowhere did it explain how it came up with the 10% figure.[102] The number is out of step with real compensation plans, many of which now pay exempt employees far more than 10% of their total compensation through incentive payments. In fact, some exempt employees receive as much from those payments as they do from traditional salary.[103]

The Chamber continues to believe that no cap is necessary.[104] Employees need no "protection" from incentive-based compensation, and there is no reason for the Department to create disincentives for this type of compensation. They receive the same guaranteed minimum compensation either way – the proposed credit must come from "non-discretionary" incentives, after all; the only difference is that incentive payments encourage success-oriented behavior.[105]

Some commenters, however, suggest that the 10% cap is necessary to protect government and nonprofit employers.[106] They argue that a higher cap would put these employers at a

---

[98] Proposed Rule, *supra* note 5, at 10912.

[99] *See* Proposed Rule, *supra* note 5, at 10912 (citing 2016 Final Rule).

[100] *See* 2016 Final Rule, *supra* note 1, at 32425–26.

[101] *Id.* at 32426.

[102] *See id.*

[103] *See id.* at 32424 (recounting feedback from employers).

[104] *See* Chamber Comments to the 2017 RFI, at 26.

[105] *See* 2016 Final Rule, *supra* note 1, at 32424 (quoting employer comments suggesting that incentive payments link the employee's compensation and the business's success); Sanghee Park & Michael C. Sturman, *The Relative Effects of Merit Pay, Bonuses, and Long-Term Incentives on Future Job Performance*, No. CRI 2009-009 (Cornell Univ. IRL Sch. 2009) (reporting on the different effects different compensation schemes produce and noting that in "general, research has found that pay-for-performance plans do help achieve desired results").

[106] *See* 2016 Final Rule, *supra* note 1, at 32426 (recounting comments from state- and local-government employers); Proposed Rule, *supra* note 5, at 10912 (citing comments the Department received in 2016).

competitive disadvantage.[107] As a threshold matter, however, government and nonprofit employers do not typically "compete" with for-profit employers in the marketplace. Additionally, to the extent they compete for talent, any competitive disadvantage already exists. Indeed, the FLSA has never required for-profit employers to pay their employees in the same manner or amounts that government and nonprofit employees pay their employees. Such policy objectives are not only unwise, but beyond the Department's proper purview. Furthermore, most for-profit employers already offer incentive payments.[108] Lifting the cap would not change that reality; it would merely reflect it.[109]

If the Department still insists on using a cap, a more realistic number would be 25%. That number more closely approaches real-world practice. Recent survey data suggests that incentive payments commonly range from 10% to 40% of an exempt employee's total compensation, depending on the employee's level of responsibility and the employer's compensation plan.[110] More and more employers are adopting such plans.[111] In fact, surveys suggest that as many as eight out of ten now use them.[112] A 25% cap would accommodate these practices far better than an artificially low 10%.

The higher cap would also be consistent with the salary level's purpose: to help screen out obviously non-exempt employees.[113] The Department itself has recognized that incentive payments increasingly correlate with exempt duties.[114] Large incentive payments therefore are consistent with an employee satisfying the duties tests.[115] This is precisely the sort of short-hand inquiry the salary level was designed to answer.[116] So allowing a higher cap would in fact

---

[107] *See* 2016 Final Rule, *supra* note 1, at 32426.

[108] *See id.* (reciting feedback from employers suggesting that the overwhelming majority already use incentive payments of some kind).

[109] *See id.*

[110] *See* WORLD AT WORK, INCENTIVE PAY PRACTICES: NONPROFIT/GOVERNMENT ORGANIZATIONS 7 (2018) (reporting that median annual incentive payments among respondent employers ranged from 10% to 40% of a management employee's salary).

[111] See id. at 4.

[112] *See id.* (reporting that eight of ten survey respondents used some type of short-term incentive plan).

[113] *See* KANTOR REPORT, *supra* note 7, at 2–3 (observing that the salary test 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 of screening out the obviously nonexempt employees").

[114] *See* 2016 Final Rule, *supra* note 1, at 10912 (stating that "such payments have become associated with EAP duties, such as the exercise of independent judgment and management skills").

[115] *See id.*; 2016 Final Rule, *supra* note 1, at 32426 (recognizing that bonuses and other incentive payments had become "sufficiently correlated with exempt status").

[116] *See* KANTOR Report, *supra* note 7, at 2–3.

strengthen the minimum-salary test and help it better serve its original—and only proper—function.

c. The Department should adopt a longer window of correction.

The Chamber also is concerned that minor or unintentional errors by employers attempting to implement the incentive pay credit could lead to the loss of the exemption and spawn an entirely new class of collective action litigation. The Department proposes to allow employers to cover any shortfall in an employee's annual incentive pay by paying employees a one-time "make-up" payment.[117] The proposal requires, however, that employers make this payment within one pay period after the end of the year.[118]

This window is far too short and inexplicably inconsistent with the window of correction under the highly compensated test.[119] The highly compensated test currently requires that the employee receive total annual compensation of at least $100,000. That annual compensation must include at least the minimum salary required for exemption, currently $455 per week, paid on a salary or fee basis, but the additional required compensation "may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period."[120]

The Department's proposal to allow bonuses to count towards the minimum salary level mirrors the highly compensated test, which gives employees up to one month to correct any shortfalls:

> If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period *or within one month after* the end of the 52-week period, make one final payment sufficient to achieve the required level.[121]

The Department rejected a one-month window of correction in 2016 because, at the time, its proposal contemplated that employers could only credit incentives paid quarterly or less

---

[117] Proposed Rule, *supra* note 5, at 10912–13.

[118] *See id.*

[119] *Cf.* 2004 Final Rule, *supra* note 2, at 22175 (recounting feedback from commenters that it "takes some time after the close of the year to compute the amounts of any commissions or bonuses that are due, such as those based on total sales or profits").

[120] 29 CFR §§ 541.601(a), (b)(1)

[121] 29 CFR § 541.601(b)(2) (emphasis added).

frequently.[122] But now, with its proposal to allow employers to credit non-discretionary incentives paid annually, the Department's reason for rejecting a one-month window has fallen away.

d. The Department should address the consequences of shortfalls.

The Department's proposal also fails to address the consequences of shortfalls. This silence allows an interpretation that an employer whose bonuses fall even a penny short could lose the exemption for the *entire prior year* – and thus owe many thousands in overtime pay to employees who have not been tracking their hours worked (as all thought they were exempt).

In 2004, the Department recognized the importance of preventing such disproportionate penalties when it revised section 541.603 regarding the effect of improper deductions from salary. That section provides that employers shall lose the exemption only "if the facts demonstrate that the employer did not intend to pay employees on a salary basis."[123] Employers do not lose the exemption due to "isolated or inadvertent" improper deductions.[124] The Department provided a safe harbor against losing the exemption in 541.603(d) for employers who adopted and clearly communicated a policy that prohibits improper deductions and includes a complaint mechanism if the employer "reimburses employees for any improper deductions and makes a good faith commitment to comply in the future."

The Chamber requests that the Department take a similar approach to the incentive pay credit by revising the proposed language to provide that the exemption is not lost if the facts demonstrate that the employer did not intend to pay employees less than the required minimum salary or if the shortfalls are small, isolated or inadvertent. In addition, the Department should adopt a safe harbor for shortfalls similar to the safe harbor in 541.603(d) for salary basis violations.

4. The Department's Proposed Total Compensation Level for Highly Compensated Employees is Too High.

In the Proposed Rule, the Department proposes to raise the minimum salary for highly compensated employees from $100,000 to $147,414.[125] The Chamber disagrees with both the proposed highly compensated level and the methodology used to calculate it. The proposed level

---

[122] The Department rejected a one-month window of correction in 2016 because, at the time, its proposal contemplated that employers could only credit incentives paid quarterly or less frequently. *See* 2016 Final Rule, supra note 1, at 32427. But now, the Department proposes to allow employers to pay the incentives annually. The reason for rejecting a one-month window has therefore fallen away.

[123] 29 CFR § 541.603(a).

[124] 29 CFR § 541.603(c).

[125] Proposed Rule, *supra* note 5, at 10914.

is so high that employers in lower-wage regions and industries would be excluded from the shorter duties test, even for their most highly compensated employees. The underlying methodology also departs from the Department's historical and current approach to setting the minimum salary level. The Department should correct both problems by using the same dataset for the minimum salary and highly compensated levels.

a. The Department set the total compensation level for highly compensated employees so high that employers in lower-wage regions cannot access the test on equal terms.

Though the Department has recognized some type of short-form duties test for well-compensated employees since the 1940s,[126] it was not until 2004 that the Department adopted the highly compensated exemption in its current form.[127] In doing so, the Department explained that the exemption is not intended to exclude employees from overtime pay merely because they are well paid.[128] Instead, it recognizes that a high salary strongly correlates with exempt duties.[129] It is therefore appropriate to apply a streamlined duties test to an employee who earns a large salary.[130]

The Department's current proposal ignores this principle. If the purpose of the highly compensated test is to provide a short-hand for identifying highly valued employees (and therefore employees likely to perform exempt duties),[131] then the test should be available to any employer. The current proposal, however, puts the highly compensated level out of reach for employers in many regions and industries. For example, in 29 states, fewer than ten percent of all *households* earn $150,000 per year.[132] Given that households increasingly consist of multiple earners,[133] even fewer employees than that will qualify as highly compensated under the

---

[126] *See* WEISS REPORT, *supra* note 7, at 22–23 (discussing "special provisos" for "high salaried" exempt employees).

[127] 2004 Final Rule, *supra* note 2, at 22173–74.

[128] *See id.* at 22174.

[129] *See id.*

[130] *See id.*

[131] *See id.* (justifying exemption as a short-hand); STEIN REPORT, *supra* note 7, at 19 (explaining that the single best indicator of how much an employer values the position is how much the employer pays).

[132] *See* Jeff Desjardins, *How Many People make More than $150,000 in Every U.S. State*, Business Insider (Nov. 7, 2017), https://www.businessinsider.com/how-many-people-make-more-than-150000-in-every-us-state-2017-11 (compiling figures from U.S. Census Bureau); *see also Current Population Survey, Annual Social and Economic Supplements*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-income-households/h08.xls (last visited April 4, 2019) [hereinafter "Census Population Survey"] (showing median income by state).

[133] *See The Rise in Dual Income Households*, Pew Research Center (June 18, 2015), https://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ (reporting that percentage of dual-income households rose from 25% in 1960 to 60% in 2012).

Department's proposal. So outside a few exceptional cases, the highly compensated test will become available as a practical matter only in certain states—predominately those on the coasts and with large urban population centers.[134] Whether an employee qualifies for exemption under the highly compensated test would depend more on where the employee works than how much the employer values the employee's duties.[135]

That result would be inconsistent with the purpose of the highly compensated test, which, again, is simply to provide a short-hand for identifying highly valued employees likely to perform exempt work.[136] Such employees can work in any region or industry. Yet the Department's proposal effectively blocks out certain regions and industries.

b. The Department's methodology for setting the highly compensated level is inconsistent with its methodology for setting the minimum salary level.

To set the new highly compensated salary level, the Department examined national CPS data instead of regional data.[137] That choice skewed the final number and clashed with the Department's traditional approach to minimum salary levels.

Historically, the Department has set minimum salary levels at the lower end of the relevant range.[138] This has been true even for tests applicable only to well-compensated employees.[139] For example, when setting salary levels for early forms of the "short test," the Department relied on salary data from low-wage regions and industry groups.[140] It did so in part to avoid penalizing employers in these regions and industries.[141]

The Chamber hopes the Department did not intend to depart from this practice and penalize employers in lower-wage regions and industries – or to transform the highly compensated test into a tool available only to large, urban employers. The Department should

---

[134] *See* Desjardins, *supra* note 131 (reporting that the states with the highest percentage of households earning over $150,000 were California, Connecticut, Massachusetts, Maryland, and New Jersey).

[135] *See id.*

[136] 2004 Final Rule, *supra* note 2, at 22173–74.

[137] Proposed Rule, *supra* note 5, at 10913.

[138] *See* 2004 Final Rule, *supra* note 2, at 22166 ("Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories." (quoting KANTOR REPORT)).

[139] *See* Kantor REPORT, *supra* note 7, at 10 (using same lower-wage baseline to calculate salary levels for ordinary exempt employees and "high salaried" employees).

[140] *See id.*

[141] *See* 2004 Final Rule, *supra* note 2, at 22166 (reviewing regulatory history and noting that Department has always used lower-wage regions because the salary level will apply uniformly across the U.S.).

correct this error by simply using the same data set it uses to set the minimum salary levels. That is, instead of national data, it should use data from the same eight southern states used in 2004 to set the minimum salary level (Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma and Texas). By using this same data, the Department would ensure that employers in other regions and industries have equal access to the highly compensated test. It would also harmonize its proposal with historical practice, which has always taken extra caution to avoid harming employers in these groups.[142]

The Department also erred in excluding from its data set employees earning below the current minimum salary level of $455 per week. Without explanation, the Department's exclusion of employees based on salary level is inconsistent with its methodology for setting the minimum salary level, which included these employees. The Department's error artificially inflates the 90th percentile of the salaries in the data set by at least $6,136 per year. The exclusion of employees earning less than the previous minimum salary test ($455 in this case) has an unexpectedly pernicious impact. If the same methodology is repeated in subsequent updates of the highly compensated level (that is, excluding employees earning below the minimum salary level), this approach will force the highly compensated level higher and higher at an accelerating rate, and render it meaningless.

In sum, the Department should set the highly compensated test at the 90th percentile of a data set including all salaried employees, regardless of salary level, in the retail industry and the eight southern states (Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Arkansas, Oklahoma and Texas) – and without an inappropriate and error-filled projection to 2020. This methodology would result in a highly compensated level around $122,000.

---

[142] *See* 2004 Final Rule, *supra* note 2, at 22166 (reviewing regulatory history).

5. Conclusion

Overall, the U.S. Chamber of Commerce is very supportive of the proposed rule. We also support the Department's commitment to formally rescind the 2016 Final Rule. We believe that the changes suggested above would make it an even stronger and more effective rule.

Sincerely,

Glenn Spencer
Senior Vice President
Employment Policy Division
U.S. Chamber of Commerce

Marc Freedman
Vice President
Workplace Policy
U.S. Chamber of Commerce

Of Counsel:
Tammy D. McCutchen
Alexander T. MacDonald
Littler Mendelson, P.C.
815 Connecticut Avenue NW, Suite 400
Washington, DC 20006

Consulting Economist:
Ronald Bird, Ph.D.
Senior Economist
Regulatory Analysis
U.S. Chamber of Commerce

Appendix A

U. S. Chamber analysts replicated each step of compilation of the 2015 through 2017 CPS MORG data as described by the Department in its notice of proposed rulemaking and in the "Exhibit A" supplementary document that the Department posted on the regulations.gov website. The Chamber compiled Current Populations Survey Monthly Outgoing Rotation Group data from public use files provided by IPUMS USA, University of Minnesota, www.ipums.org.[143] The following steps summarize the process:

1. Compile all 36 monthly CPS MORG observations for 2015 through 2017.
2. Adjust sample weights applicable to each observation from a monthly population imputation basis to a single year basis (e.g., divide each weight by 36).
3. Adjust 2015 and 2016 usual weekly earnings amounts to 2017 dollar equivalent based on the CPI-U price index published at www.bls.gov.
4. Set reported earnings of zero as missing values – excluded from analysis procedures.
5. Exclude from the analysis set the small number of observations (about 5% of the total) for which "usual hours worked at main job" is listed as "varies," and adjust the weights applied to the remaining observations to compensate for the deleted observations (maintaining the imputed population benchmark).
6. Delete all "paid hourly" observations, leaving only non-hourly paid individuals; the remaining observations are assumed to be paid on the salary basis required for potential qualification for FLSA exemptions at 29 U.S.C § 213(a)(1) exemptions (EAP exemptions), although some unknown (but presumably small) proportion may be paid on a piecework, commission or other basis not specified in the data.
7. Delete observations for workers in the "class" identified as federal government employees, except federal postal, TVA and Library of Congress workers.
8. Delete observations for individuals whose occupation, industry, or occupation and industry in combination identify them as not covered by the FLSA, not covered by the EAP exemptions salary requirements, or exempt under another, non-EAP exemption; where the Department documentation indicated specific industry and occupation combinations, those specifications were followed.
    a. Excluded observations included workers in named occupations (e.g., teachers, lawyers/judges, and physicians), workers in statutorily exempt computer occupations, agricultural workers, fishermen, small local newspapers,

---

[143] *Steven Ruggles, Sarah Flood, Ronald Goeken, Josiah Grover, Erin Meyer, Jose Pacas, and Matthew Sobek. IPUMS USA: Version 9.0 [dataset]. Minneapolis, MN: IPUMS, 2019. https://doi.org/10.18128/D010.V9.0*

companions, computer workers, motor carrier employees, rail carrier employees, air carrier employees, seamen, and salesmen, partsmen or mechanics under auto dealers and other motor vehicle dealers industrial classifications

b. It was not possible to replicate the Department's exclusion of outside sales workers, seamen on foreign vessels, and seasonal amusement/recreation workers because the Department excluded only a fraction of workers in the specified industry/occupation groups who were selected by the Department randomly. Random selection processes generally select different observations with each iteration of the process. The Department did not provide information to identify the observations deleted as a result of their random selection.

c. In its NPRM, 84 FR at 10922, the Department states that "several other groups of workers were identified and excluded from further analysis since this proposed rule is unlikely to affect them" and includes reference to "blue collar" workers. This suggests that DOL may have excluded some non-hourly workers in occupations identified as "blue collar" in some unspecified way. Insufficient information was provided to replicate what observations in the data may have been excluded under this statement.

d. The relatively small discrepancies between the estimated numbers of potentially affected workers and the earnings percentile benchmarks identified by the Department versus the Chamber's analysis are likely accounted for by the non-replicable exclusions described under (b) and (c).

Table 1 below compares the actual benchmarks calculated by the Department, and the Department's projections of them to 2020, to the corrected benchmarks based on the tabulations of the relevant CPS MORG data by U.S. Chamber analysts. The corrected values shown reflect application of only the East South Central and West South Central Census Divisions states observations plus retail industry observations nationwide to the calculation of the 20th percentile benchmark. For the highly compensated employee benchmark, the corrections, first, show the result of restoring the observations with weekly earnings less than $455 with a tabulation of all workers nationwide. Secondly, it shows the results of modifying the tabulation basis to the same East and West South Central Census Division states' salary workers plus retail industry salary workers nationwide.

Table 2 below shows the variation in results across selected variations in the geographic basis of the tabulations of salary benchmarks at a selected earnings percentile levels.

Table 1

Comparison of DOL 2019 NPRM Calculated and Projected Minimum Salary and Highly Compensated Levels to Chamber Calculations Based on 2004 DOL Methods

	DOL 2017 Calculated	DOL 2020 Projections	Chamber Corrected (2017 data)[144]
Minimum salary test based on 20th percentile weekly earnings percentile of full-time covered workers in retail or the "South"			
Weekly	$641	$679	$615.42
Annual	$33,332	$35,308	$32,002
HCE salary test based on 90th percentile weekly earnings percentile of covered workers nationwide			
Weekly basis	$2,682	$2,835	$2,564.24
Annual	$139,464	$147,414	$133,340
HCE salary test based on 90th percentile weekly earnings percentile of covered workers in the eight South-central states plus retail nationwide			
Weekly basis	N/A	N/A	$2,347.57
Annual	N/A	N/A	$122,073
The corrected 2017 20th percentile benchmark reflects the change in the definition of South from the 16 States and DC applied by DOL in 2015 and 2019 to the eight states applied by DOL in 2004. The corrected 90th percentile (nationwide) reflects expansion of the potentially affected observations to include full-time salaried at all weekly earnings amounts.			

[144] For the final regulations, the Department should use actual CPS MORG data for 2018 (12 months) and January to June 2019 to calculate updates of the Chamber's corrected minimum salary and highly compensated salary levels, without any speculative projections.

Table 2

Weekly Earnings of Full-time Non-Hourly Workers Potentially Covered by FLSA Part 541 EAP Exemptions

	Nationwide	South + Retail	South-Central + Retail	Ten Lowest States
Number of employees in tabulation group	39,509,544	17,117,942	9,599,832	6,066,471
Mean	$ 1,325.43	$ 1,238.25	$ 1,215.57	$ 1,177.49
Median	$ 1,153.84	$ 1,036.61	$ 1,017.28	$ 985.69
Minimum	$ 0.01	$ 0.01	$ 0.01	$ 0.01
Maximum	$ 2,958.73	$ 2,958.73	$ 2,958.73	$ 2,958.73
Percentile cut points: The indicated percentage of workers have weekly earnings less or equal to --				
10th	$ 512.85	$ 487.20	$ 480.00	$ 461.56
20th	$ 692.30	$ 630.80	$ 615.42	$ 600.00
40th	$ 985.69	$ 903.00	$ 887.23	$ 865.00
75th	$ 1,759.89	$ 1,577.99	$ 1,564.58	$ 1,500.00
80th	$ 1,956.23	$ 1,799.57	$ 1,760.67	$ 1,675.98
Annual equivalent	$ 101,723.93	$ 93,577.55	$ 91,554.71	$ 87,151.17
90th	$ 2,564.24	$ 2,406.25	$ 2,347.57	$ 2,307.00
Annual equivalent	$ 133,340.22	$ 125,125.20	$ 122,073.48	$ 119,964.00
2015-2017 CPS MORG data, earning adjusted to 2017 dollars. Weighting adjusted to 2017 U.S. population benchmark. Workers paid on an hourly rate basis, workers not covered by FLSA, and workers subject to possible exemption under another FLSA regulation or in a named occupation exemption were removed.				