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VIA ELECTRONIC UPLOAD

Ms. Melissa Smith
Director, Division of Regulations, Legislation, and Interpretations
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave. NW, Room S-3502
Washington, DC 20210

Re: RIN 1235-AA20

Dear Ladies and Gentlemen:

The National Employment Law Project ("NELP") submits these comments in response to the Department of Labor's (the "Department" or the "DOL") July 26, 2017, request for information (the "RFI") about the regulations found at 29 C.F.R. part 541, which, *inter alia*, define and delimit exemptions for executive, administrative, and professional employees from the minimum wage and overtime requirements of the Fair Labor Standards Act (the "FLSA"). The Department only recently redefined these exemptions (collectively, the "EAP Exemption" or the "Exemption") in late-May 2016 (the "2016 Rule" or the "Rule"). The 2016 Rule made several changes to the previous rule that was promulgated in 2004 (the "2004 Rule").

NELP is a non-profit, non-partisan organization that for more than 45 years has sought to ensure that America upholds for all its workers the promise of opportunity and economic security through work. NELP fights for policies to create good jobs, to expand access to work, and to strengthen protections for low-wage workers and the unemployed. Robust application of the FLSA's guarantee of overtime pay has always been a top priority for NELP as it ensures that eligible workers are fairly compensated for unusually long hours that they work, and that work is spread out so as to create jobs and minimize abusively long hours that rob workers of the time they need and deserve for their personal lives and families.

Introduction

Because of the relative looseness of the Department's definition of the EAP Exemption over the past few decades, low-wage workers have been particularly vulnerable to exploitation and misclassification as executive, administrative or professional employees and thus improperly exempted from the key FLSA protections. This failure takes two forms. First, the 2004 Rule defined the Exemption such that workers who perform very few actual executive, administrative, or professional duties are nonetheless exempted. While allowed under the 2004 Rule, the exemption of these workers is not consistent with the spirit – or

arguably even the text – of the FLSA. Second, holes in the 2004 Rule made it far too easy for employers to illegally claim the exemption for overtime-eligible workers – a practice commonly referred to as "misclassification." Both categories of workers have been made to work hours far in excess of 40 per week with no extra pay at all, depriving them of the economic security that the FLSA is intended to promote and protect.

The 2016 Rule corrects the deficiencies of the prior rule by expanding automatic exclusion from the Exemption to millions of new workers. Low wage workers – especially those with minimal higher-educational attainment – are particular beneficiaries of the Rule. Workers with only a high-school diploma make up 15.5% of the salaried workforce nationwide, but are more than 25% of workers whose overtime rights are expanded or strengthened by the 2016 Rule.[1] Thus, lower-income workers will be among the workers most harmed if the Department lowers the salary level or makes other changes to the 2016 Rule that weaken overtime protections.

NELP strongly opposes any efforts to change the criteria, established in the 2016 Rule, by which employees qualify for the EAP Exemption, and specifically warns against a return to the fatally-flawed methodology used by the Department to define the Exemption in its 2004 rulemaking. As the Department is aware, prior to 2004, the traditional methodology for defining the EAP Exemption has been to pair a robust test of employee duties (the "Long Test") with a relatively low salary-level test (the "Long-Test Salary Level"), or alternatively a less-involved duties test (the "Short Test") with a significantly higher salary-level test (the "Short-Test Salary Level"). With the 2004 Rule, the Department set a "standard" duties test by reference to the Short Test, but arrived at a "standard" salary-level test that was as low as the Long-Test Salary Level. This mismatch was not adequately justified and allowed, by the Department's later estimation, well over 700,000 overtime-eligible employees to be misclassified as exempt under the EAP Exemption.[2] The Department corrected the mismatch by promulgating the 2016 Rule, which, in line with the fervent and repeated requests of the business community, retains the Short Test as the standard duties test while essentially returning to an approximation of the Short-Test Salary Level for the standard salary level.

The 2016 Rule is the product of an exhaustive rulemaking process in which the Department held dozens of stakeholder meetings before releasing a proposed rule, received over 270,000 public comments on the proposed rule,[3] and produced a detailed and sophisticated regulatory impact analysis.[4] The 2016 Rule is consistent the Department's traditional methodology, which reflects an inverse relationship between the strength of the duties test and height of the salary-level test. It effectively distinguishes those workers employed in "bona fide executive, administrative, or professional capacity"[5] from employees entitled to

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[1] Economic Policy Institute, *The New Overtime Rule Will Directly Benefit 12.5 Million Working People: Who They Are and Where They Live* (2016), http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/.

[2] In fact, the Department analyzed only those employees who earned above the 2004 Rule's salary-level threshold and *below* the 2016 salary-level threshold, *see* 2016 Overtime Rule, 81 Fed. Reg. 32391, 32463 (May 23, 2016). Thus, because some employees are likely misclassified even though they earn above the 2016 salary-level threshold, the Department's findings represent only the minimum number of misclassifications.

[3] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32397.

[4] *See id.* at 32448-32525.

[5] 29 U.S.C. § 213(a)(1).

overtime, and so is faithful to the text of the FLSA. By providing an accurate and administrable definition of the EAP Exemption very much in keeping with historical practice, the 2016 Rule furthers Congress's twin goals of improving working conditions for workers with relatively limited control over those conditions and spreading employment generally.[6] Any decision by the Department to reject this approach in favor of one that conflicts with its own prior conclusions would need to be supported by well-reasoned reasoned analysis.[7]

NELP understands that, in response to Executive Order 13777, the Department is engaged in regulatory reform exercise devoted principally to the identification of regulations that reduce employment, impose unjustified economic costs, or are otherwise ineffective.[8] These factors point directly toward retaining the 2016 Rule. The Rule is a highly effective execution of Congress's will expressed through the FLSA. As acknowledged by even some of the most stringent opponents of the 2016 Rule, the Rule is expected to increase overall employment.[9] The relatively minor administrative costs it imposes on employers are greatly outweighed by myriad benefits, such as: the elevation of an easy-to-apply, predictable, bright line test that eases compliance burdens and reduces litigation risk for businesses; increased GDP, as income is transferred from capital to labor – which is more likely to spend it; increased worker productivity; and reduced social assistance and health care expenditures. Indeed, NELP believes that, if the Department is evaluating its current regulations, it should rank the Rule among the single most effective and economically beneficial.

The RFI contains a number of specific questions related to the definition of the EAP Exemption, which NELP addresses in turn.

Question 1

The Department asks whether it would be appropriate to use the 2004 Rule's salary level as a basis for adjusting the 2016 Rule's salary level; either by simply updating the 2004 level for inflation or by applying the 2004 Rule's methodology to arrive at a new level. The answer is, no. Either approach would be *in*appropriate because the 2004 Rule's methodology was deeply flawed. As explained above, the 2004 Rule reflected a radical departure from the Department's traditional methodology, which reflects an inverse relationship between salary level and the strength of the duties test. The basis for this association is clear. The higher an employee's salary, the greater the likelihood that she holds an executive, administrative, or professional position – and enjoys the bargaining power that is inherent in such a position – and so the lighter an inquiry into her duties need be to verify that this is in fact the case.[10] But, by mismatching a very low salary level test (approximately the same as the Long-Test Salary Level) with a light duties test (essentially, the Short Test), the Department in 2004 defined the EAP Exemption so that the exempt status of the vast majority of full time salaried employees turned solely on a minimal duties test. The Department concluded in 2016 that, as a result of this mismatch, more than 700,000 white collar salaried workers earning between $455 and $913 per week were overtime-eligible and routinely worked overtime hours, but were not paid

[6] *See* 2016 Overtime Rule, 81 Fed. Reg. at 3294 (citing cases).

[7] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

[8] *See* Exec. Order No. 13777 §3(d).

[9] Nat'l Retail Fed'n, *Rethinking Overtime* 26 (n.d.), https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf.

[10] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32400.

overtime for that work because they were misclassified as exempt.[11] Additionally, the status of perhaps millions more workers was questionable because – although they earned above the salary level and passed the standard duties test – they would have failed the Long Test and so would have been overtime eligible had the Department maintained the traditional relationship between salary level and duties-test strength. Put another way, the Department's 2004 definition of the EAP Exemption was so expansive that it did not bear a reasonable relationship to the Exemption's statutory text. Congress exempted executive, administrative, and professional employees. The 2004 Rule allowed employers to classify as exempt a far greater population.

For these reasons, the 2004 Rule's salary level should not be used as the basis for any adjustment to the 2016 Rule's salary level. If the Department were to use the 2004 salary level – or its methodology – as a touchstone for revising the current salary level, however, the duties test would need to be substantially expanded to account for the greater number of non-exempt workers earning above the new salary level. Otherwise, the definition would once again allow for such a high degree of misclassification and dubious exemptions that it would cease to reflect the EAP Exemption's statutory text. The Department "has always recognized that the salary level test works in tandem with the duties requirements to identify bona fide EAP employees and protect the overtime rights of nonexempt white collar workers."[12] A salary level based on the 2004 Rule's methodology would be substantially below even the Long-Test Salary Level,[13] and so, to correct the mismatch described above, it would need to be paired with a duties test at least as rigorous the Long Test.

If the Department were to set a salary level that applied the 2004 methodology to current salary data without adjusting the duties test, it would be adopting a standard that it knows will subject hundreds of thousands of employees to misclassification as overtime exempt. The deliberate improper exemption of low-paid workers cannot be justified, but it cannot be avoided using the 2004 methodology.

Some respondents to the RFI will no doubt argue that the salary level used in the 2004 Rule was different from the Long-Test Salary Level previously in effect because the methodologies used to derive each of them were different. What matters here, however, is the product, not the inputs. And, in the RFI, the Department correctly recognizes that the salary level in the 2004 Rule was "equivalent to the lower salary level that would have resulted from methodology the Department previously used to set the lower long test salary levels."[14] This is entirely consistent with the Department's position at the time of the 2004 rulemaking, in which it concluded that its approach and the long-test approach are both "capable of reaching exactly the same endpoint."[15] Moreover, today any divergence between the 2004 and long-test approaches yields an even *lower* salary level under 2004 methodology than that which would result from application of the long-

[11] *See id.* at 32463.

[12] *Id.* at 32444.

[13] *See id.* at 32412 n.43 ("While the 2004 method and the Kantor long test method produced similar salaries in 2004, the salary levels yielded by these methods now diverge significantly. Today, the 2004 method would produce a salary level of $596 per week, while using the Kantor long test method would result in a salary level of $684 per week.").

[14] RFI, 82 Fed. Reg. 34616, 34617 (July 26, 2017).

[15] 2004 Overtime Rule, 69 Fed. Reg. 22122, 22167 (Apr. 23, 2004). Likewise, any attempt now to distinguish the 2004 Rule's duties test from the traditional Short Test may be dispelled to by reference to the 2004 Rule's preamble, in which the Department explained that the two tests were ''substantially similar,'' *id.* at 22214, and that any difference between them was "*de minimis*," *id.* at 22192-93.

test methodology.[16] Indeed, even in 2004, the result of 2004 methodology was on the low-end of the long-test salary-level range that the Department calculated that year as a comparison.[17]

Since the 2004 Rule's salary level should not inform an adjustment to the current level, the question about which measure of inflation would best serve to update it is moot. Nevertheless, we take the opportunity to remind the Department that price inflation should never be the basis for adjustments to the salary-level – either through automatic indexing or rulemaking. The Department has consistently looked to wage data, rather than price data, when adjusting its salary-level test to account for changes in employee purchasing power. Only once in 1975 did the Department use price inflation to revise the salary level, and even then it described the method as an "interim," non-precedential measure.[18] The reasons are various. As the Department recognized during the 2004 rulemaking, changes to the salary-level based on price inflation tend to disproportionately affect low-wage industries and regions.[19] The DOL similarly considered and rejected the use of price inflation as a basis for indexing automatic updates to the salary level in the 2016 Rule. As stakeholders, including employers, expressed: salary-level updates based on price inflation "'risk harming workers and businesses' because inflation and wages 'can increase at very different rates.'"[20] The better approach for updating the salary level is the fixed-percentile-of-earnings approach that the Department ultimately settled on for the 2016 Rule's automatic indexing provision. As the Department concluded, "a wage index provides the best evidence of changes in prevailing salary levels"[21] – which, after all, is the reason for updating the salary-level test.

Question 2

The Department asks whether it should revise its definition of the EAP Exemption to contain multiple salary levels, and posits a variety of possible geographic and employment bases for dividing them. NELP believes the approach of a single salary level is best. For good reason, the Department has maintained a uniform salary level for each exemption, applicable nationwide and to all employers. To begin with, by basing the 2016 Rule's salary level on the lowest-wage Census Region (currently the South), rather than setting the salary level to national earnings, the Department already accommodated regional wage differences.[22] Moreover, segmenting the salary level adds legal risk. As the RFI itself reflects, there is a wide array of possible methods for dividing salary levels, and selection of one method over an alternative would need to be carefully reasoned and empirically justified to survive judicial review. Making this cut will create winners and losers – as some employees are subject to a more expansive exemption than others – and legal challenges are inevitable. Next, the necessary classification of employers as between the different salary levels would be administratively difficult, would require more of the Department's resources, and would invite more lawsuits

[16] *See supra* note 13.

[17] *See* 2004 Overtime Rule, 69 Fed. Reg. 22168. To defend against criticism that its selected salary level in 2004 deviated materially from what would have been Long-Test Salary Level, the Department generated comparable salary levels using the long-test methodology. *See id.* It determined that Long-Test Salary Level would have been between $450 and $475 dollars per week. *Id.* The salary level on which the Department ultimately settled in 2004 was $455 per week. *See id.* at 22123.

[18] 1975 Overtime Rule, 40 Fed. Reg. 7091, 7092 (Feb. 19, 1975).

[19] 2004 Overtime Rule, 69 Fed. Reg. at 22171-72.

[20] 2016 Overtime Rule, 81 Fed. Reg. at 32439 (quoting a comment letter from SIGMA).

[21] *Id.* at 32441.

[22] *See id.* at 32404.

as stakeholders second-guess the Department's line-drawing. Whether the levels are divided by geography or industry, there are bound to be close calls that will generate litigation. Worse, these factors play off of each other in paradoxical fashion so that, the more granular the basis for separating salary levels (and thus the more likely the mechanism is to survive a court challenge), the greater the number of different levels and the more complex their administration. As the Department explained when it rejected regional salary thresholds in the 2004 rulemaking, adopting multiple different salary levels is not administratively feasible "because of the large number of different salary levels this would require."[23]

Additionally, the use of multiple salary levels raises the risk that the Department would also need to introduce multiple duties tests. For example, if the salary level varied by industry, application of the 2016 Rule's methodology would yield salary levels below the Short-Test Salary Level in the retail industry[24] and only slightly above the *Long-Test Salary Level* in the restaurant industry.[25] For the reasons explained above, either one of these results would probably require an expansion of the duties test to avoid widespread misclassification.

Finally, the compliance burden for employers subject to different salary levels, or for whom the applicable salary level is unclear, would escalate under the multi-level regime. Corporations often operate in multiple areas of the country, transfer workers frequently, and require work to be conducted across state lines, even within a single day or workweek. Applying multiple different salary levels, or attempting to discern which single level applies, would constitute a new and unwarranted cost to the regulation.[26]

Question 3

The Department asks whether it should create different salary levels for the executive, administrative, and professional exemptions. This would be a mistake. For the same reasons that differentiating salary levels based on geography and industry creates legal risk, NELP believes efforts to divide the exemptions on a salary-level basis would invite a significant number of colorable lawsuits. The three EAP-exemption categories of employment are not always easily distinguishable. There is significant overlap between these exemptions, with workers in many occupations being potentially covered by more than one exemption.[27] Introducing different salary levels for any of the exemptions would raise the risk of worker misclassification and lead to significant compliance burdens for employers. While the Long-Test Salary Level varied between exemptions in the past, the Short-Test Salary Level – which is essentially the model for the 2016 Rule – never did. At least without a more rigorous duties test to better reveal the true

[23] 2004 Overtime Rule, 69 Fed. Reg. at 22171.

[24] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32410

[25] *See id.*

[26] Indeed, such a scenario would appear to be the exact opposite of what many employer groups have advocated. For example, according to the HR Policy Association, "It is imperative that stakeholders work with policymakers to reach agreement on which employees continue to need the law's overtime protections *and establish clear lines distinguishing between exempt and non-exempt employees*." HR Policy Association, Classification of Employees as Exempt/Nonexempt, http://www.hrpolicy.org/issues-and-advocacy/sub-issues/classification-of-employees-as-exemptnon-exempt-2201 (last visited Sept. 25, 2017) (emphasis added).

[27] *See* 2004 Overtime Rule, 69 Fed. Reg. at 22,192.

nature of an employee's job, it is difficult to see how the Department could set different salary levels in a non-arbitrary fashion.

And, again as with the proposal in Question 2, the task of classifying employees as between the executive, administrative, or professional exemptions promises to be administratively challenging for the Department and burdensome for employers. The effort would be a morass of which the Department should steer clear.

Question 4

The Department asks how its definition of the EAP Exemption should relate – if at all – to the traditional long-test, shot-test methodology. NELP believes that the Department struck an appropriate balance in the 2016 Rule by keeping a standard duties test akin to the Short Test and using a methodology to determine the salary-level that yields a result similar to the Short-Test Salary Level. Any downward diversion from the salary level – absent a corresponding strengthening of the duties test –would be vulnerable to challenge.

As previously explained, an accurate definition of the Exemption requires maintaining an inverse relationship between the height salary-level test and the strength of the duties test. To quote the Department itself:

> Because the long duties test included a limit on the amount of nonexempt work that could be performed, it could be paired with a low salary that excluded few employees performing EAP duties. In the absence of such a limitation in the duties test, it is necessary to set the salary level higher (resulting in the exclusion of more employees performing EAP duties) because the salary level must perform more of the screening function previously performed by the long duties test.[28]

Thus, as discussed in response to Question 1, there can be no return the mismatch reflected in the 2004 Rule – at least if the Department wishes for the rule to survive judicial review.

Assuming the Department will continue to define the EAP Exemption in part through use of a salary-level test and a duties test, the question then becomes whether the relatively high salary level paired with a light duties test[29] is preferable to a lower salary level and more rigorous duties test; and, if so, which methodology should be used to the arrive at that salary level. Either approach would survive legal scrutiny. However, the salary-level test is objective, easy to apply, and predictable. Therefore – as long as the test is a reasonably accurate – the more employees whose exempt status can be determined solely by reference to it, the better. A relatively high salary level eases compliance burdens, reduces litigation, and allows both employers and employees to organize their affairs with certainty. Moreover, exemptions from rights conferred under the FLSA are to be interpreted narrowly, with a presumption toward coverage.[30] To the

[28] 2016 Overtime Rule, 81 Fed. Reg. at 32408-09.

[29] Nothing expressed herein should suggest that the Department could not strengthen the duties test, while maintaining – or even raising – a relatively high salary level. It is merely NELP's position that the current standard duties test, which the business community strongly supports, provides the *minimum* protection required at the current salary level.

[30] *See Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950); *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959).

extent that any definition of the EAP Exemption will result some improper exemptions and improper exclusion from the Exemption, the Department should err on the side of improper exclusion. In NELP's view, it is better to set a salary level that results in a given number of improper exclusions than one that leads to the same number of improper exemptions.

If it can be agreed that a relatively high salary level is preferable, the only remaining issue concerns the methodology for setting that level. Given business exhortations and the desire to be responsive to all stakeholder concerns, NELP believes that the Department devised a correct and economically-sound methodology in the 2016 Rule.

It was certainly the best of the three most recently-used methodologies. First, is the so-called "Kantor" method, which was the basis of the Department's salary-level tests from 1958 through 2004.[31] It is a multi-step process that involves first calculating a Long-Test Salary Level by reference to likely improper exclusions of fulltime salaried workers and then scaling-up that figure by 130 to 180%.[32] The Kantor method sets the Long-Test Salary Level at the level that excludes 10% of salaried employees in low wage industries and regions who are likely exempt based solely on the Long Test.[33] Second, is the 2004 methodology, which is based salary distribution among fulltime salaried workers in the South and the retail industry, [34] and thus far has only been used to calculate essentially a Long-Test Salary Level.[35] The 2004 method sets a long-test-like salary level at the level that excludes the bottom 20% of southern and retail salaried employees,[36] regardless of whether they are likely exempt based on their duties.[37] The third recently-used methodology is the 2016 methodology, which is based on the salary distribution of all full-time salaried workers in the lowest wage census region[38] – today the South – and yields a result similar to, but still below, the Short-Test Salary Level under the Kantor method.[39] The 2016 method sets the salary level at the level that excludes 40% of the southern salaried employees regardless of whether they are likely exempt under the duties test.[40] The 2004 method has never been used to set a salary level like the Short-Test Salary Level, and it is not clear how it could be converted to do so. Indeed, it should be rejected out-of-hand. The Kantor method has the benefit of being based on an analysis of salaried employees' actual duties, but it is complicated to use and update – depending as it does on extensive surveying and data analysis. The best method of the three is the 2016 method, which the Department concluded approximates the results of the Kantor method when used to determine the Short-Test Salary Level. It is easy to ascertain and, barring major changes to the distribution of exempt workers across salary levels, should continue to roughly approximate the Short-Test Salary Level under the Kantor method.

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[31] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32402-03.

[32] *Id.* at 32403.

[33] *Id.* at 32402.

[34] *Id.* at 32403.

[35] *See id.* at 32404.

[36] *See* 2004 Overtime Rule, 69 Fed. Reg. at 22168.

[37] *See id.* at 22167.

[38] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32404.

[39] *See id.*

[40] *See id.* at 32393.

It is worth noting that the recent declaration that the 2016 Rule is invalid by a federal district court judge in Texas[41] should have no bearing on the Department's appraisal of the Rule at this juncture.

To begin with, the decision is facially wrong on the merits. The judge fundamentally misconstrued the Department's authority to use a salary-level test as part of its definition and delineation of the EAP Exemption, and utterly failed to consider any of the vast economic analysis prepared by the Department in support of the Rule. Independent of the question of *which* salary level is best, it is crucial that the Department's authority to use *a* salary-level test – as long as it is economically supported – be upheld.

The judge's first error was his refusal to afford the Department deference with respect its interpretation of the EAP Exemption[42] – the first step of the so-called *Chevron* analysis – which was a glaring mistake given the FLSA's express delegation to the Department of authority to "define[] and delineate[]" the contours of the Exemption.[43] Beyond this, the Department's use of a salary-level test in conjunction with its interpretation of the EAP Exemption, whether entitled to deference or not, is eminently reasonable. It is backed by nearly 80 years of precedent and has been upheld by every court of appeals to consider the question.[44]

Moreover, to the extent the judge determined that the *particular* salary level used in the 2016 Rule is inconsistent with the Exemption, he failed to support this assertion with any analysis. The judge did not even attempt to distinguish the 2016 salary level from the 2004 level, which he in a footnote suggested – in purely conclusory fashion – to be valid.[45]

To be sure, the judge noted that the 2016 salary level is more than double the 2004 level,[46] but he nowhere explained how this fact could be material given that the 2004 level was itself nearly triple the salary level previously in effect. He reasoned that workers earning below the salary level are automatically excluded from the Exemption without regard to their duties, but *that is the entire point* of a salary level test. It has been true of every salary level since just after the enactment of the FLSA in 1938, including the 2004 salary level. The judge appeared to place great weight on the fact that the Department estimated that 4.2 million workers who were subject to the Exemption under the 2004 Rule would become automatically excluded under the 2016 Rule, without any change to their duties.[47] However, the promulgation of the 2004 Rule was itself expected to lead to the automatic exclusion of 1.3 million previously exempt workers – also without any change to their duties.[48] Further, the judge failed to mention, let alone account for, the fact that the Department concluded in 2016 that there was a mismatch in the 2004 Rule between the salary level – essentially the Long-Test Salary Level – and the duties test – essentially the Short Test – and so the 2004

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[41] *See Nevada v. U.S. Dep't of Labor*, No. 16-CV-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

[42] *See id.*, Slip Op. at 11-15.

[43] *See* 29 U.S.C. § 213(a)(1).

[44] *See, e.g., Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966); *Walling v. Morris*, 155 F.2d 832 (6th Cir. 1946); *Walling v. Yeakley*, 140 F.2d 830 (10th Cir. 1944).

[45] *See Nevada*, 2017 WL 3837230, Slip Op. at 16 n.6.

[46] *See id.*, Slip Op. at 15, 16.

[47] *See id.*, Slip Op. at 16.

[48] *See* 2004 Overtime Rule, 69 Fed. Reg. at 22123.

salary level should have been set higher.[49] If the mismatch had not occurred, the number of newly automatically-excluded workers in 2004 would have been larger, and the number of such workers in 2016 smaller. As the Department concluded in 2016, in the absence of a long test "it is necessary to set the salary level higher (resulting in the exclusion of more employees performing EAP duties) because the salary level must perform more of the screening function previously performed by the long duties test."[50] Finally, the judge's conclusion that the salary level supplants an analysis of an employee's job duties[51] is belied by the record, which shows that there are 6.5 million white collar salaried workers who earn above the 2016 salary level and yet are expected to fail the duties test (in fact, fully 47% of the entire salaried white collar workforce that would fail the test), and therefore are overtime-eligible as a result of the application of the duties test.[52] Thus, although it appears that the judge attempted to limit his ruling to the 2016 Rule, his analysis called into question the Department's ability to use any salary-level test as part of its definition and delineation of the EAP Exemption. Under the judge's line of reasoning, the 2004 Rule – and indeed nearly sixty-five years of administrative definitions of the Exemption preceding it – are as flawed as the 2016 Rule.

The long-term institutional interest that the Department has in protecting its expressly delegated authority to regulate transcends this particular set of regulations, and we therefore urge the Department to appeal the judge's decision to the Fifth Circuit.

Question 5

The Department asks, in essence, whether the duties test in the 2016 Rule continues to serve a purpose – in other words, whether there are any non-exempt employees who earn above 2016 salary level. While it is true that, above some salary level, nearly all employees are exempt, the current salary level is nowhere near that mark. On the contrary, there are estimated to remain 6.5 million white collar salaried workers earning above the 2016 salary level of $913 per week who yet still fail the duties test (fully 47% of the salaried white collar workforce who would fail the duties test), and are therefore excluded from the EAP Exemption – that is to say, overtime-eligible.[53] By contrast, only 22% of salaried white collar workers who currently meet the standard duties test earn less than the 2016 salary level, and are automatically excluded from the Exemption.[54] In other words, the standard duties test continues to play a central role in determining overtime eligibility for white collar salaried workers. For the 6.5 million workers earning above the salary level but who fail the duties test, it is the duties test – not the salary level – that determines their exclusion. The duties test remains essential to preventing their misclassification.

Question 6

The Department has asked several questions related to the implementation of the 2016 Rule. Employers around the country and across industries either already had or were prepared to implement the Rule before it took effect, and many did so even after the Department was temporarily enjoined from implementing or enforcing the Rule in November 2016 by the judge in the case discussed above. We have no

[49] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32400.

[50] *See id.* at 32409.

[51] *See Nevada*, 2017 WL 3837230, Slip Op. at 15-16.

[52] *See* 2016 Overtime Rule, 81 Fed. Reg. at 32465 & tbl.3.

[53] *See id.*

[54] *See id.*

evidence, either anecdotal or otherwise, that employers have since reversed course *en masse* and abandoned the changes that they adopted in line with the Rule, despite the Department's recent actions undermining the current salary level. Industry groups and even some employers may continue to oppose the Rule in principle, but nothing about the Rule's actual implementation suggests that the current salary level is unworkable or otherwise in need of changes.

As the Department has acknowledged, both in this RFI and in the voluminous compliance assistance materials it released after the rule was finalized,[55] employers had a number of options to implement the rule, including: raising salaries above the threshold to retain exempt status for low-earning employees who pass the duties test; converting formerly exempt workers to hourly workers and paying them overtime for hours worked beyond 40; hiring additional workers to cover hours worked beyond 40; or converting formerly exempt workers to hourly workers and changing their implicit hourly rate so that they receive the same amount even after overtime hours. Employers can and did choose different options for different employees, depending on their prior salaries, duties, and workload, not to mention labor market demands.

Employers around the country in various industries were fully prepared to implement the Rule before it took effect – without major impacts on their businesses. Major retailers ultimately took the change in stride. Walmart made an early decision to raise its starting managerial salaries to $48,500 in advance of the Rule's effective date,[56] and later reported that the changes would remain in place.[57] Retail competitor Dollar General released a statement that it anticipated incurring a nominal expenses of 3-4 cents per share to

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[55] *See, e.g.,* U.S. Dep't of Labor, Questions and Answers, https://www.dol.gov/whd/overtime/final2016/faq.htm#E1 (last visited Sept. 25, 2017); U.S. Dep't of Labor, Comparison Table, https://www.dol.gov/whd/overtime/final2016/faq.htm#8 (last visited Sept. 25, 2017); Wage & Hour Div, U.S. Dep't of Labor, *Fact Sheet: Treatment of Bonuses for Exempt White Collar Employees* (n.d.), https://www.dol.gov/whd/overtime/fsbonus.pdf; Wage & Hour Div., U.S. Dep't of Labor, *Guidance for Private Employers on Changes to the White Collar Exemptions in the Overtime Final Rule* (2016), https://www.dol.gov/whd/overtime/final2016/general-guidance.pdf; Wage & Hour Div., U.S. Dep't of Labor, *Small Entity Compliance Guide to the Fair Labor Standards Act's "White Collar" Exemptions* (n.d.), https://www.dol.gov/whd/overtime/final2016/SmallBusinessGuide.pdf; U.S. Dep't of Labor, *Overtime Final Rule and the Non-Profit Sector* (n.d.), https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf; Wage & Hour Div., U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act* (2016), https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf; U.S. Dep't of Labor, *Overtime Final Rule and Higher Education* (n.d.), https://www.dol.gov/sites/default/files/overtime-highereducation2.pdf; Wage & Hour Div., U.S. Dep't of Labor, *Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act* (2016), https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf; U.S. Dep't of Labor, *Overtime Final Rule and State and Local Governments* (n.d.), https://www.dol.gov/sites/default/files/overtime-government.pdf.

[56] *Wal-Mart Ups Entry-Level Manager Salaries Ahead of Overtime Rule*, CNBC.com, Oct. 12, 2016, https://www.cnbc.com/2016/10/12/wal-mart-ups-entry-level-manager-salaries-ahead-of-overtime-rule.html.

[57] Lydia DePillis, *Last-Minute Injunction Creates a Patchwork of Compliance with Overtime Rule that's Now Likely Dead: Raises, Once Granted, Are Hard to Take Away*, Houston Chron., Nov. 30, 2016 (updated Dec. 2, 2016), http://www.houstonchronicle.com/business/texasnomics/article/Last-minute-injunction-creates-a-patchwork-of-10644275.php.

implement the rule.[58] Fast food chain Bojangles planned to keep unit directors on salary and convert assistant managers at 295 corporate-owned restaurants to hourly employees, and to track their overtime, with a total cost of 0.25-0.3% of sales.[59]

Other retailers were expected to implement the rule "without incurring any added costs."[60] Likewise, a company with more than 700 Burger King franchises suggested that their implementation of the rule would not add costs as they could convert salaried workers to hourly and pay them in line with prior salaries, including overtime.[61] Other fast food employers suggested similar plans.

Smaller businesses were ready for the change, too, and in fact reported certain benefits. Walker Sands, a Chicago-based public relations and digital marketing firm, started taking steps to comply last September, and supported implementation: "The majority of good businesses are ready for the change . . .. We should reward those who properly prepared."[62] One Off, a Chicago restaurant company, planned to convert its assistant managers to hourly workers who work 40 hours per week; in order to cover additional duties, it would raise wages for other workers like restaurant hosts, who could take over some supervisory duties.[63] The company reported even after the preliminary injunction that it planned to go forward with these changes, which would create a pipeline for new managers, boost pay, and improve work-life balance: "We firmly believe if it will help take better care of our team, we are all-in."[64] Likewise, Champlain College in Vermont supported the increase, which it calculated to cost $450,000 per year, hoping that the rule would "prompt a cultural shift" for those asked to work more for no extra pay.[65]

Indeed, many other companies reported plans to move forward with their implementation plans, indicating directly or indirectly that the added costs were not substantial. In addition to Walmart, Kroger, the third-largest retailer in the world[66] and second-largest private employer in the United States,[67] raised the pay

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[58] Jed Graham, *How Overtime Pay Ruling Affects Wal-Mart, Dollar Tree, Fast Food*, Investor's Bus. Daily, Nov. 23, 2016, http://www.investors.com/politics/how-overtime-ruling-effects-wal-mart-dollar-tree-fast-food/.

[59] Jed Graham, *Overtime Rule Fallout: Fast Food Managers Told to Punch Clock*, Investor's Bus. Daily, Aug. 11, 2016, http://www.investors.com/news/fast-food-firms-say-managers-must-now-punch-clock/.

[60] Ben Penn, *Retailers Follow Wal-Mart's Lead on Overtime Rule Compliance*, Bloomberg BNA, Oct. 28, 2016, https://www.bna.com/retailers-follow-walmarts-n57982079272/.

[61] Graham, *supra* note 59.

[62] Alexia Elejalde-Ruiz, *Chicago Employers in Limbo after Court Blocks Obama's Overtime Pay Rule*, Chi. Trib., Nov. 23, 2016, http://www.chicagotribune.com/business/ct-overtime-rule-employers-adapt-1127-biz-2-20161123-story.html.

[63] *Id.*

[64] *Id.*

[65] Alicia Freese, *About Time? New Overtime Rule Worries Vermont Employers*, Seven Days (Vt.), Nov. 6, 2016, https://www.sevendaysvt.com/vermont/about-time-new-overtime-rule-worries-vermont-employers/Content?oid=3811138.

[66] Alexander Coolidge, *Kroger Named the World's Third-Largest Retailer*, Cincinnati.com, Jan. 20, 2016, http://www.cincinnati.com/story/money/2016/01/20/kroger-named-worlds-third-largest-retailer/79072302/ .

[67] Fortune 500, Biggest Employers, http://fortune.com/fortune500/list/filtered?sortBy=employees&first500 (last visited Sept. 25, 2017).

of 4500 staff, and kept the new pay in place after the preliminary injunction, reporting that it would affect earnings by "less than a penny per share next quarter."[68] Starbucks implemented the rule in May 2016 and kept those changes in place,[69] and Randall's, a Texas grocery chain, also expected to keep changes in place.[70] TJX – the parent company of T.J. Maxx and Marshalls – did the same.[71]

This decision was not limited to the retail sector. Even in the lower-margin fast food industry, Wendy's elected to keep the new rule in place in its company-owned restaurants,[72] as did White Castle[73] and Shake Shack.[74] Family restaurants like Bob Evans Farm,[75] New Jersey's Doherty Enterprises restaurant group,[76] and the Seattle-based chain Ivar's did the same, using a mix of the various methods for getting into compliance.[77] A small, Denver-based architectural firm, 2WR+Partners, pledged to keep the salary increases in place.[78] The Mountain States Employers Council polled members across Arizona, Utah, Colorado, and Wyoming, and found that 57% of their members implemented the change before entry of the now-dissolved preliminary injunction, and 78% planned to keep the changes that they had already made.[79]

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[68] Ruth Simon & Rachel Emma Silverman, *Some Employers Stick With Raises Despite Uncertainty on Overtime Rule*, Wall St. J., Dec. 20, 2016, https://www.wsj.com/articles/some-employers-stick-with-raises-despite-uncertainty-on-overtime-rule-1482242402.

[69] DePillis, *supra* note 57.

[70] *Id.*

[71] Jonnelle Marte, *Millions of Workers in Limbo after Rule Expanding Overtime Pay Eligibility Is Put on Hold*, Wash. Post, Dec. 1, 2016, https://www.washingtonpost.com/news/get-there/wp/2016/11/30/workers-paychecks-in-limbo-because-of-a-delay-in-overtime-rules/?utm_term=.8e4cfadbc39d ("Many employers said after the ruling that they would move ahead with changes even though the future of the rule is murky. TJX, the parent company for T.J. Maxx and Marshalls, said this week that it would 'move forward as planned' on the new rule, without elaborating on what those changes would be. Walmart in September raised the salaries of its entry-level managers to $48,500 from $45,000 to bring them above the threshold for overtime pay and said this week it has no plans to change course.")

[72] JD Malone, *Ohio-Based Restaurant Chains Still Following Obama Overtime Rule that Was Put on Hold*, Columbus Dispatch, Dec. 28, 2016, http://www.dispatch.com/content/stories/business/2016/12/29/1-stay-of-higher-salary-theshold-rule-for-ot-came-too-late-for-many-businesses.html

[73] *Id.*

[74] Ryan Sutton, *Shake Shack Hikes Burger Prices to Increase Worker Wages*, Eater, Jan. 5, 2017, https://www.eater.com/2017/1/5/14162804/shake-shack-raises-prices.

[75] Malone, *supra* note 72.

[76] Linda Moss, *N.J. Businesses Remain in Limbo Over New OT Rules*, NorthJersey.com, Dec. 1, 2016, http://www.northjersey.com/story/news/2016/12/01/nj-businesses-remain-limbo-over-new-ot-rules/94345202/.

[77] Lisa Jennings, *Overtime Rule Freeze Likely Too Late for Restaurants*, Nation's Restaurant News, Nov. 28, 2016, http://www.nrn.com/workforce/overtime-rule-freeze-likely-too-late-restaurants.

[78] Kumasi Aaron, *Stalled Overtime Law Still Having Impact*, NBC26.com (Green Bay), Dec. 28, 2016, http://www.nbc26.com/news/national/stalled-overtime-law-still-having-impact.

[79] *Id.*

Nor was this limited to large businesses; many small businesses implemented the Rule – and often quite willingly and strategically.[80] A Chicago-based restaurant company, Boka Restaurant Group, planned to keep the new threshold in place as a minimum salary, calling it "a positive thing for the culture of cooking" to help close the gap between restaurant worker salaries.[81] California public relations firm InkHouse took the opportunity to embrace the values behind the overtime rule:

> PR has a bad reputation for being a stressful industry, having a high turnover rate and blindly accepting the expectation of being available around the clock. Maybe now, as we've taken a step back, hit pause and think about how to best spend our days, we will go back to valuing more good ideas, not more emails.[82]

Houston-based Mattress Firm planned to keep the changes, saying: "The modifications we made are positive for our employees, so we will move forward as planned."[83] Mid-Atlantic convenience store chain Sheetz also signaled that it would more forward to implement the Rule while the preliminary injunction was in effect, noting that their decision "represents our constant efforts toward attracting and retaining the best talent and being a great place to work."[84]

In higher education, Future of Research tracked 73 institutions that originally planned to raise salaries for postdocs, of which 53 – well over 70% -- have implemented those changes.[85] A number of other universities even announced raises for postdocs after the Department was temporarily enjoined from enforcing the Rule.[86]

There are, of course, employers who elected not to implement after the preliminary injunction was issued,[87] or who did so with only a portion of their workforce.[88] They did so at their peril. The preliminary

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[80] For example, Brand Value Accelerator LLC, an e-commerce marketing company in San Diego, planned to raise the wages of 13 of its 59 employees or to convert them to hourly pay despite the court's ruling. *See* Simon & Silverman, *supra* note 68.

[81] Elejalde-Ruiz, *supra* note 62.

[82] Beth Monaghan, *Why InkHouse (Still) Supports The Overtime Law*, InkHouse Inklings Blog, Dec. 1, 2016, http://blog.inkhouse.com/why-inkhouse-still-supports-the-overtime-law.

[83] DePillis, *supra* note 57.

[84] *Sheetz to Raise the Minimum Salary of Employees Despite Judge's FLSA Injunction*, Fox43.com (Central Pa.), Nov. 30, 2016, http://fox43.com/2016/11/30/sheetz-to-raise-the-minimum-salary-of-employees-despite-judges-flsa-injunction/.

[85] Future of Research, FLSA and Postdocs, http://futureofresearch.org/flsa-and-postdocs/ (last visited Sept. 25, 2017).

[86] *Id.*

[87] Jack Smith IV, *Employers Nationwide Gave Raises to Avoid Paying Overtime. Now They're Taking Them Back*, Payoff, Dec. 16, 2016, https://mic.com/articles/162196/employers-nationwide-gave-raises-to-avoid-paying-overtime-now-they-re-taking-them-back?.gJ1BAaU06#.AmYasfPQh; Mitchell Hartman, *Employers Figuring Out The Latest Twist in New Overtime Rule: An Injunction to Halt It*, Marketplace, Nov. 23, 2016, http://www.marketplace.org/2016/11/23/economy/employers-figuring-out-latest-twist-new-overtime-rule-injunction-halt-it.

[88] Joel Brown & Rich Barlow, *Scheduled Pay Raises Survive Federal Overtime Rules Challenge. BU Puts Other Changes on Hold Pending Judge's Ruling*, BU Today, Nov. 29, 2016, https://www.bu.edu/today/2016/scheduled-pay-raises-survive-federal-overtime-rules-challenge/.

injunction in the Texas case never prevented private enforcement of the overtime rights as delineated by the Rule. Indeed, at least one private lawsuit has already been instituted against an employer who unwisely reneged on its commitment to comply with the Rule.[89]

It is important to note that many of the employers who have reported the most difficult implementation were potentially out of compliance with duties test even under the 2004 Rule. As one Chicago nonprofit noted publicly, the final rule pushed them to make a "rigorous internal review" of their salaried exempt employees and whether they met the duties test, and they found that some employees had been improperly classified as exempt before.[90] An electrical distributor with 75 workers in New Jersey found that a handful of its workers were not performing duties to be classified as administrative or executive, so they were reclassified as hourly workers.[91] These employers may have incurred significant costs, but those costs accrue more because their potentially exempt workers fail the duties test under both the new and prior laws.

Question 7

The Department asks whether a definition of the EAP Exemption that relied exclusively on a duties test would be preferable to the 2016 Rule. It would not be. The Department has always relied on salary level as the "best single test"[92] for the Exemption. As the Department has recognized the salary-level test furnishes a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment.'[93] And, indeed, the Department concluded in 2016 that "[t]he fact that an employee satisfies the duties test, especially the more lenient standard duties test, does not alone indicate that he or she is a bona fide executive, administrative, or professional employee."[94]

If the Department were to jettison the salary-level test in favor of a unitary duties test, the inverse relationship between salary level and strength of the duties test discussed above would require a total reworking of the duties test. Essentially, in this scenario, the salary level would be zero and so to prevent massive misclassification and thus complete abandonment of the EAP Exemption's statutory text, the Department would need to formulate a highly-rigorous fact-intensive duties test and greatly expand its investigative program to ensure compliance with it. California's duties test, which caps the amount of non-exempt work at 50% of hours worked,[95] could be a start, but even that test works in conjunction with a salary level test and would be too lenient operating in isolation.

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[89] *See* Compl., *Alvarez v. Chipotle Mex'n Grill Inc.*, No. 17-CV-4095(D.N.J. June 7, 2017).

[90] Elejalde-Ruiz, *supra* note 62.

[91] Moss, *supra* note 76.

[92] 2016 Overtime Rule, 81 Fed. Reg. at 32400 (quoting Wage & Hour Div., U.S. Dep't of Labor, *Executive, Administrative, Professional . . . Outside Salesman Redefined*, *Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 19, 42 (Oct. 10, 1940)).

[93] *Id.* (quoting Wage & Hour and Pub Contracts Divs., U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer* 8-9 (June 30, 1949)).

[94] *Id.* at 32413.

[95] *See* Cal. Code Regs. tit. 8 § 11040.

Question 8

The Department asks whether the 2016 Rule excludes from the EAP Exemption any traditionally exempt occupations. The answer to this question is no. According to analysis performed by the Economic Policy Institute ("EPI"), the 2016 Rule did not lead to the wholesale exclusion from the Exemption of any traditionally covered occupations. Indeed, the only major category of occupations that appears to go from majority-exempt to 20%-or-fewer exempt is actors – a relatively miniscule occupational category in terms of numbers.

To determine whether the 2016 Rule effectively creates any new exclusions of traditionally covered occupations, EPI analyzed the share of salaried workers across occupations who earn a salary above the 2016 Rule's salary level and who would pass the duties test – *i.e.* the share of exempt employees across occupations. In performing this analysis, EPI used the same 250-plus detailed occupations that the Department analyzed in both its 2004 and 2016 rulemaking to determine the probability that a worker of any particular occupation passed or failed the duties test, focusing on occupations where fewer than 1 in 5 workers qualified for the exemption under the 2016 rule – setting an extremely conservative 20% cutoff rate for exemption. As it turns out, the occupations that were least likely to be exempt under the 2016 Rule, 20% exempt or less, also had the lowest exemption rates under the 2004 Rule. EPI found highly statistically significant correlation, r =.977, between the exempt rates of the occupations under the 2004 Rule, and those under the 2016 Rule. Indeed, actors were the only occupation where more than half of workers are exempt under the 2004 Rule but less than 20% are exempt under the 2016 Rule. And even for actors and other occupations which were more likely than not to be exempt under the 2004 Rule, the context is important: as discussed above, the 2004 Rule contained a mismatch between salary level and duties test, leading to an unusually large number of exemptions. Thus, the 2004 exemption rate cannot be properly considered a "traditional" rate, and much of the decline in exemption rates between 2004 and 2016 should be attributed to the Department's correction of the mismatch.

In all, EPI's analysis shows the 94 occupations representing 7.45 million workers where fewer than 20% of salaried workers are likely exempt under the 2016 Rule. (An appendix reflecting the analysis follows.) To be sure, many of those workers (5.86 million) are in 81 occupations for which 6% or fewer of salaried workers are likely exempt under the 2016 rule. But this is not a major change, as in each those 81 occupations, only 7% percent or fewer of those workers were exempt under the 2004 Rule. Further, of the 13 remaining occupations, only actors had more than 50% of workers likely exempt under the 2004 Rule. Actors represent a total of 11,400 of 36.1 million salaried white collar workers – or well under one-tenth of one percent of this population. And, with respect to the Department's question, 15% of actors are still likely exempt under the 2016 Rule, and so the occupation as a whole is not being excluded from exemption.

Question 9

The Department asks whether non-discretionary bonuses and commissions ought to be credited toward more than the current maximum of 10% of an employee's salary. NELP believes that until this new allowance can be observed in practice, the current ten-percent cap is appropriate. It is, as yet, unclear to what extent this non-salary income tracks to employees' job duties, or whether treatment of it as akin to salary provides employers an opportunity for misclassification.

Question 10

NELP take no position with respect to Question 10.

Question 11

The Department asks whether the automatic indexing provision of the 2016 Rule should be retained, and, if not, whether a different indexing mechanism would be appropriate. NELP continues to strongly support the 2016 Rule's automatic indexing provision. As we explained in our comments during the 2016 rulemaking process, indexing the best mechanism to prevent the Department's definition of the EAP Exemption from becoming outdated:

> Indexing . . . the FLSA's overarching goals and is consistent with courts' admonitions that the FLSA must be interpreted to extend coverage broadly and apply exemptions narrowly. DOL has the statutory authority to update the scope of the EAP exemptions . . .. As indexing is simply a means to ensure the threshold will remain current rather than continuously erode, DOL is acting entirely reasonably and within its statutory authority to adopt indexing as a means to "define and delimit" the EAP exemptions.
>
> The Department's goals in proposing to index the salary threshold are appropriate and make good policy sense. History has shown that the current method of setting fixed levels results in outdated thresholds and ballooning numbers of workers improperly subject to employer classification as exempt. Today's poverty-level salary threshold is a potent example of this problem. And because the thresholds have been updated only eight times in 75 years, and only once since 1975, there is no reason to expect that the time-consuming and resource-intensive rulemaking processes will improve in the future. While the DOL has used different methods over the decades as it has adjusted the EAP salary thresholds, regulatory adjustments to the thresholds have slowed in recent years, causing the lower level salary thresholds to become increasingly out of date, permitting more employers of low-wage workers to sweep them into the exemptions, as happens now.
>
> Thus, not only does the Department have the authority to index the salary threshold to adjust annually, indexing is by far the most reasonable, efficient and predictable way to ensure that the standard for exemption remains true to the statute's intended purposes.[96]

Moreover, in NELP's view the Department selected the correct mechanism for indexing the salary level. Again, as we previously explained to the Department:

> We believe that indexing the threshold to wages is a superior approach for four reasons: (1) the wage level is a less volatile method for incremental regular updates; inflation adjustments are more volatile because they are based on prices in our economy, while salaries tend to inch upward in a more consistent trajectory; (2) because the FLSA sets a minimum *wage* standard, it makes policy sense to reference the increase in the salary threshold to wages, not prices; (3) it is reasonable that the salary threshold would rise along with the rise in wages overall, because the exemptions are intended to cover only the higher-paid employees in the workforce, and finally, (4) the growth in wages is more predictable and thus a better policy choice for the EAP exemptions.[97]

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[96] Letter from NELP to U.S. Dep't of Labor 11 (Sept. 4, 2015) (citations and footnotes omitted), http://www.nelp.org/content/uploads/NELP-Comments-Overtime-Pay-RIN-1235-AA11.pdf (last visited Sept. 25, 2017).

[97] *Id.*

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For the above-stated reasons, NELP supports retaining the 2016 Rule as is.

Respectfully submitted,

Christine L. Owens
Executive Director

APPENDIX

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Gaming Cage Workers	600	0%	5%
Telephone Operators	4,700	0%	4%
Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop	16,200	1%	3%
Library Assistants, Clerical	17,800	1%	4%
Tellers	55,400	1%	4%
Pharmacy Aides	4,000	2%	5%
Library Technicians	2,000	2%	5%
Door-to-Door Sales Workers, News and Street Vendors, and Related Workers	21,400	2%	3%
Medical Transcriptionists	10,500	2%	4%
Veterinary Assistants and Laboratory Animal Caretakers	6,200	2%	5%
Phlebotomists	13,300	2%	4%
Proofreaders and Copy Markers	2,500	2%	5%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Hotel, Motel, and Resort Desk Clerks	19,900	2%	5%
Medical Assistants	85,500	2%	4%
Healthcare support workers, all other, including medical equipment preparers	15,800	2%	5%
Receptionists and Information Clerks	205,600	2%	5%
Couriers and Messengers	54,000	2%	5%
File Clerks	50,100	2%	5%
Word Processors and Typists	27,900	2%	5%
Mail Clerks and Mail Machine Operators, Except Postal Service	14,800	2%	5%
Bill and Account Collectors	44,000	2%	5%
Office Clerks, General	357,900	2%	5%
Models, Demonstrators, and Product Promoters	11,600	2%	3%
Cashiers	287,700	2%	4%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Office Machine Operators, Except Computer	7,700	3%	5%
First-Line Supervisors of Farming, Fishing, and Forestry Workers	2,800	3%	4%
Shipping, Receiving, and Traffic Clerks	73,000	3%	5%
Data Entry Keyers	59,800	3%	5%
First-Line Supervisors of Housekeeping and Janitorial Workers	70,200	3%	5%
Teacher Assistants	20,500	3%	4%
Bookkeeping, Accounting, and Auditing Clerks	364,300	3%	5%
Interviewers, Except Eligibility and Loan	25,100	3%	5%
Information and Record Clerks, All Other	48,600	3%	5%
Animal Trainers	14,000	3%	5%
First-Line Supervisors of Personal Service Workers	42,300	3%	5%
Dispatchers	80,800	3%	5%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Billing and Posting Clerks	110,500	3%	5%
Secretaries and Administrative Assistants	1,035,000	3%	5%
Health Practitioner Support Technologists and Technicians	82,400	3%	5%
Parts Salespersons	19,800	3%	5%
Licensed Practical and Licensed Vocational Nurses	112,500	3%	5%
Weighers, Measurers, Checkers, and Samplers, Recordkeeping	9,700	3%	5%
Office and Administrative Support Workers, All Other	191,200	3%	5%
Reservation and Transportation Ticket Agents and Travel Clerks	35,800	3%	5%
Payroll and Timekeeping Clerks	57,800	3%	5%
Statistical Assistants	5,300	4%	5%
Meter Readers, Utilities	7,000	4%	5%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Retail Salespersons	685,700	4%	5%
Order Clerks	32,100	4%	5%
Travel Agents	29,700	4%	5%
Postal Service Clerks	28,000	4%	5%
Switchboard Operators, Including Answering Service	1,800	4%	5%
Human Resources Assistants, Except Payroll and Timekeeping	16,200	4%	5%
Court, Municipal, and License Clerks	32,600	4%	5%
Medical Records and Health Information Technicians	41,100	4%	5%
Counter and Rental Clerks	26,200	4%	5%
Miscellaneous Life, Physical, and Social Science Technicians	78,400	4%	5%
Paralegals and Legal Assistants	192,900	4%	5%
Computer Operators	23,800	4%	5%
Agricultural and Food Science Technicians	6,400	4%	5%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Production, Planning, and Expediting Clerks	108,000	4%	5%
Cargo and Freight Agents	8,400	4%	5%
Surveying and Mapping Technicians	21,700	4%	5%
Telemarketers	13,200	4%	5%
Chemical Technicians	25,300	4%	5%
First-Line Supervisors of Construction Trades and Extraction Workers	233,200	4%	5%
Procurement Clerks	13,400	4%	5%
Financial Clerks, All Other	32,500	4%	5%
Private Detectives and Investigators	32,200	4%	5%
Engineering Technicians, Except Drafters	123,300	4%	5%
Postal Service Mail Sorters, Processors, and Processing Machine Operators	14,900	4%	5%
Postal Service Mail Carriers	99,300	5%	5%
Drafters	39,900	5%	5%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Broadcast and Sound Engineering Technicians and Radio Operators	39,400	5%	5%
Computer Control Programmers and Operators	10,500	5%	5%
Communications Equipment Operators, All Other	2,400	5%	5%
Aircraft Pilots and Flight Engineers	18,900	5%	5%
Biological Technicians	9,800	5%	5%
Geological and Petroleum Technicians	6,000	5%	5%
New Accounts Clerks	6,000	5%	6%
Brokerage Clerks	1,800	6%	7%
First-Line Supervisors of Food Preparation and Serving Workers	119,300	12%	27%
First-Line Supervisors of Landscaping, Lawn Service, and Groundskeeping Workers	42,500	14%	27%
Actors	11,400	15%	60%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Insurance Claims and Policy Processing Clerks	88,000	16%	29%
Social and human service assistants	72,700	16%	28%
Loan Interviewers and Clerks	53,900	16%	29%
Air Traffic Controllers and Airfield Operations Specialists	5,000	18%	27%
Emergency Medical Technicians and Paramedics	43,600	18%	29%
Dental Hygienists	45,300	19%	28%
Customer Service Representatives	577,400	19%	28%
Food Service Managers	461,000	20%	29%
Eligibility Interviewers, Government Programs	19,400	20%	30%

Occupation	Total number of salaried workers nationwide	Share exempt under 2016 threshold ($913 per week)	Share exempt under prior threshold ($455 per week)
Miscellaneous Community and Social Service Specialists, including health educators and community health workers	49,800	20%	28%