STATEMENT FOR THE RECORD

OF THE

NATIONAL ASSOCIATION OF CONVENIENCE STORES

AND THE

SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA

FOR THE

HEARING OF THE COMMITTEE ON EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

FEBRUARY 16, 2017

"FEDERAL WAGE AND HOUR POLICIES

IN THE TWENTY-FIRST CENTURY ECONOMY"

This statement is submitted on behalf of the National Association of Convenience Stores ("NACS") and the Society of Independent Gasoline Marketers of America ("SIGMA"). We thank the Subcommittee for holding today's hearing on federal wage and hour policies in the modern-day economy. NACS and SIGMA appreciate the opportunity to offer our views regarding the Department of Labor's ("DOL") Overtime Rule, updated and finalized in 2016.

NACS and SIGMA collectively represent approximately 80% of retail fuel sales in the United States. These associations' members employee over 2.7 million individuals and have over 154,000 stores throughout the United States.

While NACS and SIGMA were supportive of DOL's objective to update the overtime salary threshold, we believe the final rule will have substantial adverse effects on the retail fuel industry. The final rule contained questionable methodology and lacked adequate economic analysis, especially with respect to the disparate impact the rule will have on small businesses, those in the retail industry, and those in rural areas. We have included our detailed comments to the DOL that outline these concerns, amongst others.

As the Subcommittee is aware, the U.S. District Court for the Eastern District of Texas granted a preliminary injunction that halted DOL's updated overtime requirements immediately before the rule was to take effect on December 1, 2016, and the case is working its way through the courts. While many in the business community cheered the preliminary injunction, the uncertainty surrounding the future of the overtime standards is troubling for business owners and operators. This uncertainty prevents these businesses from effectively managing their workforce and from planning for future operating expenses.

NACS and SIGMA supported legislation last Congress that would have halted the DOL's proposed rule until the DOL performed more in-depth economic analysis of the proposed rule's effects on small businesses and on the salary and cost of living differences across various regions. Given the far-reaching effects of DOL's final rule, we continue to believe that it is appropriate for DOL to do greater analysis on the impact of raising the overtime threshold before any rule takes effect.

We thank this Subcommittee for its oversight of this matter and look forward to working with Congress to create 21st century federal wage and hour policies that are reasonable for both workers and business owners.

NACS®

COMMENTS BY

THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

REGARDING PROPOSED REVISIONS OF THE FAIR LABOR STANDARDS ACT'S

SECTION 13(a)(1) REGULATIONS

(RIN 1235-AA11)

The National Association of Convenience Stores and Petroleum Retailing ("NACS") is an international nonprofit trade organization representing more than 2,200 retail and 1,800 supplier company members with the majority of its members based in the United States.

The convenience and petroleum retailing industry has become a fixture in American society and a critical component of the nation's economy, with stores in each and every Congressional district. In 2014 the industry employed more than two million workers and generated $696.1 billion in total sales.

NACS and its members have a strong interest in the requirements governing the application of the exemptions set forth in Section 13(a)(1) of the Fair Labor Standards Act, because those provisions have a substantial impact upon the industry. This is particularly the case as to the "executive" exemption, because many industry employers rely upon that exemption for first- and second-line managerial employees at thousands of individual, freestanding establishments. NACS therefore welcomes the opportunity to submit comments in response to the "Proposed rule and request for comments" published by the U.S. Labor Department ("USDOL" or "Agency") on July 6, 2015 at 80 Federal Register 38516, Regulatory Information Number (RIN) 1235-AA11.

1. The Salary Level

The Agency proposes to increase the threshold salary for exempt status to $921 per week. However, it also suggests that, under its contemplated methodology, the figure might even be $970 per week by the time any regulatory changes become final. 80 Fed. Reg. 38517; *Id.* at n. 1. Either level will be devastating to NACS's membership.

To begin with, even a figure of $921 per week will represent another $466 per week added to the $300-per-week rise that went into effect in 2004, *i.e.*, there will have been a nearly six-fold increase over the pre-2004 threshold. NACS realizes that more than ten years have now passed since the prior change

The adverse impact that such a substantial change will have upon the industry is starkly revealed when one takes into account the current salary levels for first- and second-line managerial employees in convenience stores. Due to the economic realities of the modern-day convenience industry, those salary levels for most such managerial employees are relatively low. For example, convenience-store companies employ a substantial number of Store Managers at a weighted-mean salary of about $ 39,580

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annually. For Assistant Store Managers, the median/mean is about $ 26,024 annually. Obviously, then, raising the threshold even to $921 per week would put a large number of industry employers to the impossible choice between increasing salaries versus abandoning the exemption for Store Managers and (for those who today qualify for exempt status) Assistant Store Managers.

Throughout the history of the Section 13(a)(1) exemptions, the salary threshold has been set to "serve as a guide to the classification [of exempt employees] and *not as a barrier to their exemption*." Weiss Report at 15 (emphasis added).[1] It is especially relevant that Mr. Weiss's statement was made with specific reference to "the executives of small establishments". *Id.* Establishing a dollar-level test that would cause thousands of these employees to change from exempt status to nonexempt status overnight *for that reason alone* will erect precisely such a barrier to the exemption of many employees. It will also represent a departure from USDOL's expressed concerns in 2004 (and, for that matter, in prior decades) that an increased salary not impose a disproportionate hardship upon retailing. *See, e.g.*, 69 Fed. Reg. 22170-71 (April 23, 2004).

NACS is of course mindful that the role of the salary-level test is to *assist* in drawing a line between employees who are properly treated as exempt and those who are not. We also realize that, wherever the threshold is set, some employees who meet the tests for exempt status will fall below it.

Nevertheless, for decades, USDOL has assiduously tried to avoid that effect to the maximum extent it can. It has been especially careful about this where retailing is concerned. The relatively-lower salaries prevailing among those workers are the result of financial and economic characteristics, rather than being a reflection of any allegedly "borderline" nature of the duties they perform. In other words, failing to weight these retailing-specific financial and economic factors heavily thereby transforms the salary level into the *only* test for exempt status as to a disproportionately-high number of retail employees, and it does so without appreciably advancing the distinctions called for in applying the exemptions.

This is at least as true in the convenience-store segment of retailing as it is of any others, as the above compensation data illustrate. A figure as great as $921 will therefore operate as a "barrier to [the] exemption" of thousands of industry employees without facilitating the effectiveness of the line-drawing to be done. As we will later point out in a different context, in crafting the exemptions both Congress and USDOL have long recognized the unique responsibilities of managerial employees at individual retail establishments.

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[1] In portions of this discussion, NACS will refer to historical USDOL documents relating to the Section 13(a)(1) exemptions and revisions of the Regulations at Part 541. These reports were produced by Harold Stein in 1940 ("Stein Report"), Harry Weiss in 1949 ("Weiss Report"), and Harry S. Kantor in 1958 ("Kantor Report"). Page numbers in these citations refer to the corresponding location in the actual report, rather than to any reproduction of the report.

The Agency has not tailored its dollar-test proposal by specifically adjusting it in recognition of the lower-wage characteristics of retailing. *See, e.g.*, 80 Fed. Reg. at 38528. This departs from not only the approach taken in 2004 (as USDOL acknowledges), but also from even-earlier decades of practice in setting the salary level. The Agency contends that its proposed methodology "already accounts for" and "adequately protects low-wage industries" by selecting a 40th percentile to apply to the data it has selected, *see, e.g.*, 80 Fed. Reg. at 38532, 38541. On the contrary, there is serious reason to question whether USDOL has actually done a sufficient analysis of the matter.

For one thing, as is the salary proposal generally speaking, the entire discussion of the percentile selected is tainted by USDOL's repeated reliance upon data said to have to do with "full-time salaried employees", "full-time salaried workers", and so on. Indeed, although USDOL refers to the data as having to do with "actual *salaries* paid to employees", "all full-time *salaried* employees", "*salary* levels throughout the economy", and many more formulations to the same effect, the information instead relates to "full-time . . . *non-hourly paid* employees." *See, e.g.*, 80 Fed. Reg. at 38517 n. 1; 80 Fed. Reg. at 38527 n. 20; 80 Fed. Reg. at 38540 n. 37; 80 Fed. Reg. at 38548 n. 54 (all emphasis added). USDOL says that it "considers" the data to be "an appropriate proxy for compensation paid to salaried workers," *see, e.g.*, 80 Fed. Reg. at 38527 n.20; 80 Fed. Reg. at 38548 n. 54, but it is difficult to see how this could be so in any relevant way. The employees to whom this information relates might be largely or entirely commissioned; or paid on a day-rate basis, a job-rate basis, or a piece-rate basis; or paid a salary for 40 hours; or paid on a fluctuating-workweek basis; or paid via a combination of these methods; or paid in a variety of other unspecified ways. NACS further understands that the data include overtime pay, commissions, and tips; whether other kinds of payments are included is unclear. Finally, these data are self-reported and are therefore not subject to verification.

We also note that USDOL's explanation repeatedly uses the words "salary" and "salaried" to mean different things in different places. The concepts of "salary" and "salary basis" have a very specific meaning under the pertinent exemptions. *See, e.g.*, 29 C.F.R. § 541.602. Whether an employee is paid on a "salary basis" is itself an indicator of exempt status, independently of the salary's amount. By contrast, it appears that, in many if not most instances, USDOL is not referring to "salary" or "salaried" in the exemption-related sense. This has likely led to flaws in USDOL's analysis, in part because juxtaposing "non-hourly paid" compensation with compensation on a "salary basis" as that phrase relates to the exemptions is necessarily an apples-and-oranges proposition.

NACS believes that the setting of a salary level should be based upon reasonably contemporaneous data and statistics relating to *salaries* (as defined by the regulations) of *exempt* employees. The salary level was established in this way from at least as early as 1949, based upon the view that "[a]ctual data showing the increases in the prevailing minimum salary levels of bona fide executive, administrative and professional employees . . . would be the best evidence of the appropriate salary increases for the revised regulations." Weiss Report at 12. Wages and earnings among nonexempt employees were relied upon only where "no direct evidence was available or where the available data were fragmentary . . . ." *Id.*

This was also the case in 1958, when USDOL's decisions were informed by information that included "salaries paid to employees who qualified for exemption." Kantor Report at 6. These figures included "tabulations of salaries grouped by major geographic regions, by number of employees in the establishment, by size of city, and by broad industry groups." *Id.* This "most direct evidence of actual salaries paid", "obtained as a by-product of the Divisions' regular investigation program rather than as a special statistical survey," was judged to "reflect[] the salary patterns with reasonable accuracy." *Id.* 28 Fed. Reg. 7002 (July 9, 1963); 35 Fed. Reg. 883, 884-85 (Jan. 22, 1970).

The Agency should return to the compelling practice of predicating the salary level to the maximum extent possible upon "a sample limited to exempt salaried employees." *See* 80 Fed. Reg. at 38528. Clearly, information having to do precisely with the matter being decided is "the best evidence" upon which to base any adjustment in the salary level.

And USDOL apparently already has that information and has evaluated it in the present proceedings. For instance, the proposals' explanation says:

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

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

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

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

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

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

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

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

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80 Fed. Reg. at 38529, 38532, 38557, 38560 n.82. These statistics are obviously derived from internal data that are directly relevant to current salary levels as they relate to the application of the exemptions.

The Agency suggests that employing such information is undesirable on the premises that:

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

Whatever uncertainties there might be as to the above-referenced internal evaluations carried out by USDOL personnel with deep experience in such matters (the statistical meaningfulness of which NACS cannot assess without seeing the underlying information), those arising from the Agency's current reliance upon "non-hourly paid employees" must be, though of a different kind, at least as great.

Furthermore, the Agency apparently remains committed to a single standard salary level for nationwide application. Therefore, as have most of its predecessors, it must weigh more heavily than it has the fact what it has proposed might tend to eliminate employees who are "obviously nonexempt", Weiss Report at 18, reasonably well in high-income industries will at the same time be a "barrier to the[] exemption", Weiss Report at 15, of disproportionately-many employees who meet the duties tests but who work in relatively low-income industries. Such a threshold impermissibly shortcuts the qualitative determination called for under the exemptions for employees in the lower-wage industries.

NACS recognizes that some such effect is an outcome of having a single salary threshold. But then this is the product of a structure that USDOL itself formulated and embraced in the past and proposes to maintain. Because the Agency has made that choice, its responsibilities can be adequately carried out only by significantly limiting that effect, that is, by setting the salary rate near the lower end of the appropriate scale. It is for this very reason that USDOL has set a lower-end salary in the past, and the Agency must do so again. Whatever nationwide figure is established must be set so as to, as Mr. Kantor put it, exclude a relatively small percentage "of those in the lowest-range region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories . . . ." Kantor Report at 6-7.

By contrast, USDOL has so far declined to tailor its dollar-test proposal to the compensation characteristics of regions or industries. *See*, *e.g*, 80 Fed. Reg. at 38528. As the Agency acknowledges, this departs from the approach taken in 2004, and it also abandons decades of earlier practice in setting the salary level. The Agency says that its proposed methodology "already accounts for" and "adequately protects low-wage industries and areas" by selecting a 40th percentile, *see*, *e.g.*, 80 Fed. Reg. at 38532, 38541, but, putting aside that the entire "already accounts for" construct rests upon a flawed data set, there is serious reason to doubt that this has actually accounted for the characteristics of such industries.

The Agency's initial "already accounts for" remarks defer to the explanation's Section VII.D. for a discussion of why USDOL "believes [its] proposal is appropriate in low-wage areas and low-wage industries." 80 Fed. Reg. at 38532. However, all that appears in that section on the point is an assertion that employers in lower-wage industries "may perceive a greater impact" from the proposed level,[2] but that, "because the vast majority of potentially affected workers reside in [Metropolitan Statistical Areas or] MSAs and *do not work in low-wage industries*," USDOL "believes that the proposed salary level is appropriate." 80 Fed. Reg. at 38564 (emphasis added). With all respect, this is hardly an adequate explanation to offer to lower-wage industries and to the employees in them who will be disproportionately excluded from exempt status as the result of USDOL's proposal.

Moreover, USDOL appears to have considered only three industries to be "low-wage" ones: "Leisure and hospitality, other services, and public administration." 80 Fed. Reg. at 38557.[3] What these labels actually encompass is indefinite, but they do not include retailing. *See*, *e.g.*, 80 Fed. Reg. at 38556, Table 11. Retailing has of course been explicitly considered a lower-wage category in repeated salary-level rulemakings, and the Agency's own data indicate that "Retail trade" represents 7.5% of the "potentially affected EAP workers", the second-highest percentage in the entire list. *See* 80 Fed. Reg. at 38602, Appendix B, Table B1.

The Agency says it engaged in a process involving undescribed "estimated . . . distributions" of unstated "weekly *earnings*" of two groups from which unspecified "alternate *salary* levels" were somehow "identified" by applying "pre-determined percentiles". 80 Fed. Reg. at 38557 (emphasis added). This analysis generated figures that were $344 lower than the proposal under one method and $264 lower under the

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

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

other. 80 Fed. Reg. at 38558. Even so, the $921 proposal has not been adjusted, apparently "because the vast majority of potentially affected workers . . . do not work in low-wage industries . . . ." 80 Fed. Reg. at 38564.

NACS also submits that the data USDOL relied upon in formulating its proposal are not appropriate to the task. For one thing, even if they were pertinent to the question at hand, USDOL has employed them as a *national composite*. Doing so fails to give "appropriate consideration . . . to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries . . . in an economy as complex and diversified as that of the United States." Kantor Report at 5.

The Agency further says that it "considered" non-Metropolitan Statistical Area regions to be lower-wage ones in choosing the proposed salary level. 80 Fed. Reg. at 38557. There is no discussion of whether USDOL has made an appropriate use of these statistical divisions, whether they were correctly used in those ways, or whether the fact that the delineations do not represent an urban/rural distinction might be a pertinent consideration. *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB Bull. No. 13-01, *Revised Delineations of Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and Guidance on Uses of the Delineations of These Areas* (2013).[4]

In addition, USDOL says that an analysis of "the historical relationship between the 40th percentile benchmark and the [CPI Index for all urban consumers ("CPI-U")]" has led it to determine "that the data does not substantiate . . . past concerns about the likely effects on low-wage regions and industries . . . ." 80 Fed. Reg. at 38541. However, CPI-U provides no information specific to low-wage *industries* and "is designed to measure inflation for the U.S. *urban* population and thus may not accurately reflect the experience of people living in rural areas" (emphasis added).[5]

It is also true that information related to the salaries of exempt employees has historically been used to establish a salary level "near the lower end" of the range so modeled. *See, e.g.*, Weiss Report at 12. This is especially warranted as to a relatively lower-wage industry such as that comprising NACS' membership.

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

Finally, NACS reminds the Agency that the impact will not be limited to those employees whose salaries would have to be raised to maintain the exemption. There

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

[5] Dep't of Labor Bureau of Labor Statistics, *Consumer Price Index: Frequently Asked Questions*, http://stats.bls.gov/cpi/cpifaq.htm#Question_21 (last visited Aug. 20, 2015).

would also be a "ripple effect" throughout the rest of the workforce, both exempt and nonexempt. Salary increases caused by the threshold rise must be worked-into the salary levels of more-highly-paid exempt employees in order to avoid compression in the compensation structure. Many voluntary and legally-required benefits are tied to or at least sensitive to those salary levels, as are legally-mandated employer contributions.

Industry employers have only so much in the way of resources to devote to labor costs. Consequently, among the results of any increase of the magnitude proposed will be that industry employment will decrease through layoffs, unreplaced attrition, the elimination of positions, or deferring or elimination of expansion plans. Pressure to reallocate resources will also cause industry employers to eliminate or reduce benefits and to reduce wages and other compensation by changing their kind and/or amount.

Inelastic consumer spending and the low industry profit margins simply will not support the absorption of more than a small fraction of yet-another large salary increase and the related costs so as to squeeze industry employers to (in some cases perhaps beyond) the breaking-point. Even so, there will also unavoidably be a resulting higher cost to consumers of the industry's goods and services. The adverse effects will be even greater in relatively lower-wage geographical regions.

Against this background, NACS recommends the following:

- ◇ The proposed level is ill-founded and too high, and the entire proposal should be withdrawn;
- ◇ USDOL should conduct an entirely new evaluation and should make a different proposal on the basis of the internal, exemption-specific information (as updated, if need be) and analysis to which it has referred in the current explanation;
- ◇ USDOL should publish a detailed report on both the contents and results of the exemption-specific analysis to which the proposals refer and upon which the new proposal will presumably be based; and
- ◇ USDOL should return to the 20% guideline selected in 2004 and should apply it to the array of reasonably-current salaries paid on a "salary basis" to exempt employees in the lowest geographical and industry sectors, rather than to composite figures which represent a combination of high-wage and low-wage geographical and/or industry sectors.

2. Proposed Automatic Update

USDOL's proposal to update the salary level automatically should not be adopted. First, USDOL "is not proposing specific regulatory text", 80 Fed. Reg. at 38539, so the adoption of any such indexing mechanism would be unlawful and without effect under the Administrative Procedure Act.

Such a mechanism would also disserve some of the very interests USDOL has sought to promote. Furthermore, the other rationales articulated are unsupported, outweighed by other considerations, and fraught with the very-real potential for unforeseen and unintended consequences.

To begin with, USDOL recognizes that "the line of demarcation" provided by the salary test "cannot be reduced to a standard formula." 80 Fed. Reg. at 38527. But the proposal involves exactly this: Taking the new salary level and then annually extrapolating it into the indefinite future based upon "a standard formula".

One articulated rationale is that "frequent updates are imperative to keep pace with changing employee salary levels." 80 Fed. Reg. at 38539. To the extent that this is so, USDOL provides no reason why any such imperative cannot be addressed without resort to an automatic mechanism.

The explanation makes multiple references to historically-uneven and sometimes-long intervals between adjustments in the salary levels. *Id.* But surely past administrative inaction, which could be improved upon, is an insufficient justification for such an extreme and unprecedented change.

NACS is concerned that USDOL has expressed no intention to undertake substantive salary re-evaluations regularly *in the future*. There is no assurance that the underlying determinations leading to the coming figure will go un-reconsidered indefinitely, thus leaving whatever the figure is in five, ten, or even twenty years simply to the cumulative impact of annually applying "*a standard formula*" that calls for simply:

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

Apparently in anticipation of such a response, USDOL refers to:

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

80 Fed. Reg. at 38539. NACS respectfully submits that these concerns are better resolved internally when evaluating priorities and allocations of resources. This is particularly true in light of the fact that the salary test itself is entirely a creature of USDOL's making in the first place, one that, in its own words, "cannot be reduced to a standard formula."

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

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

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

The Agency contends that indexing would have no disproportionately harmful effect upon lower-wage regions or industries. This is said to be so in part because USDOL selected the 40th percentile rather than a higher one "to account for low-wage regions and industries." 80 Fed. Reg. at 38541. However, the 40th percentile does not "adequately protect" them given the shortcomings NACS discussed previously.

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

A. The Re-Evaluation Period

First, changes should not occur annually. Yearly revisions will seriously complicate and interfere with management's ability to formulate both short-term and longer-term budgets.

In addition, it is unwarranted to derive from USDOL's recounting lengthy hiatuses in re-visiting the salary test the proposition that an *annual* re-set is somehow necessary. Furthermore, such a frequency would undercut USDOL's stated desire to promote simplicity, efficiency, consistency, and predictability where the exemptions are concerned.

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

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

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

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

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

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

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

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

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

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

80 Fed. Reg. at 38540. The Agency seeks comments on both methods, including as to which is "better suited" to the undertaking. 80 Fed. Reg. at 38541. NACS contends that *neither* method is an appropriate way to index future salary levels.

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

The only data set USDOL specifically cites and appears to intend to use has to do with a Bureau of Labor Statistics "table of deciles of the weekly wages of full-time salaried workers, calculated using CPS data . . . ." 80 Fed. Reg. at 38540 n. 37. But, again, neither do these data "specifically identify salaried workers" and certainly not employees paid on a "salary basis". They instead include unverified, unverifiable, and unspecified "usual weekly earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received" as given by "workers who do not report being paid an hourly rate."[6] What else these "earnings" might consist of is unstated and probably unknowable. *Id.* Moreover, whereas USDOL refers elsewhere to a sample of 60,000 "households", these data represent a sub-sample of only "one-fourth of the CPS monthly sample", or presumably as few as 15,000 "households". *Id.*

Furthermore, by initially increasing the minimum salary level to the 40th percentile of the "salaried workers" data set, USDOL will also skew those very data in favor of substantial increases when future adjustments are made. For example, assuming for the moment that the 40th percentile of "salaried workers" in 2016 is the projected $970 per workweek, employers will overwhelmingly (1) convert employees who are currently paid on a salary basis at a lower rate to nonexempt, hourly-paid ones; and/or (2) increase the salaries of employees who will remain exempt to at least $970 per workweek, along with raising the salaries of more-highly-paid employees to prevent or mitigate compression. The first option will necessarily reduce the proportion of exempt employees paid on a "salary basis" in the "salaried workers" data pool USDOL proposes to use, and the second will substantially increase the amount which that remaining pool is paid. In sum, USDOL's proposal will result in a smaller group of "salaried workers" who will in turn be paid at higher salary levels, thereby artificially and unduly influencing the "prevailing minimum salary levels" used to compute the new minimum salary for exempt status.

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

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

3. Crediting Nondiscretionary Payments

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

NACS favors counting nondiscretionary bonuses and incentive payments toward the standard salary level. It is commonplace for employers in the industry to offer incentive-pay plans and bonuses, the single-most-important evaluative factor in which is profits, followed closely by sales and inventory control. In part, this reflects the fact that the labor-intensiveness of the industry, taken in conjunction with the price-sensitive nature of retail receipts, mandates that wage increases be accompanied by increases in employee efficiency, output, and revenue generation.

Incentive and bonus payments are closely tied to the unique control exercised in these areas by managerial employees at individual convenience-store establishments. The effectiveness of an establishment's management has a strong impact, sometimes a determinative one, upon the location's commercial success. Thus, taking these amounts into account in connection with an earnings test is entirely consistent with the statutory obligation to define and delimit the exemptions.

The Agency has not described how it envisions that such a mechanism would actually work. Depending upon what USDOL means, it might well be that this is *already* "permitted". In any event, NACS recommends that:

- ◇ The salary test *should* explicitly "permit" this crediting;
- ◇ The proportion of such payments that could be credited *should not be* limited to any particular percentage;
- ◇ "Commissions" *should be* included in such a provision, for reasons NACS will discuss below; and
- ◇ The crediting *should not be* limited to any particular timeframe.

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

Moreover, crediting these payments could at least reduce to some limited extent the impact of USDOL's doubling *both* the current salary level *and* the percentile that was last used as a benchmark, and its doing so without specifically adjusting the dollar amount in consideration of particular industries. This would be especially true with respect to the convenience-store industry, in which the payment of incentives and bonuses of various kinds is common. Convenience-store companies pay Store Managers and Assistant Store Managers at a weighted-mean average of $6,191 annually and $1,765 annually, respectively, in the form of bonuses or other incentive pay. While it would do little to negate the impact of any substantial salary level increase, NACS submits that, to the extent these amounts are nondiscretionary and paid on a "salary basis", they should be credited for purposes of meeting the salary level.

The Agency "believes it is important to strictly limit the amount of the salary requirement that could be satisfied" in this way and is considering restricting the offset to 10 percent. 80 Fed. Reg. at 38535. There is no discussion of specifically *why* USDOL believes this, nor any explanation for why 10 percent would be a proper proportion to consider, as opposed to, say, 50 percent, or 80 percent, or any other specific percentage.

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

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

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

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

This is an overly broad generalization about the alleged nature of the work performed by anyone who as a practical matter would be in consideration for one of these exemptions. Nevertheless, the "standard duties test" and the salary test are of course different and freestanding requirements calling for independent and unrelated analyses. If an employee for whom the employer takes a commission-against-salary credit does not meet the duties requirements for exempt status, then the employee is nonexempt *without regard to* any credit. What is supposedly the case as to the "standard duties test" for exempt status *overall* does not and should not have anything to do with how *the salary test* is constructed.

In a different vein, USDOL states that "the time period over which such compensation should be considered must be limited." 80 Fed. Reg. at 38536. On the contrary, as the foregoing authorities demonstrate, the qualitative requirements of the "salary basis", including the necessity that a "predetermined amount" be paid *each pay period*, obviate any need to restrict the counting of nondiscretionary bonuses, incentive payments, or "commissions" to a month or to any other timeframe.[7] But if some such maximum period is adopted, then NACS recommends that it be either:

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

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

4. Hypothetical Changes In The Duties Tests

The Agency says that, while "it is not proposing specific regulatory changes *at this time*, [it] is seeking additional information on the duties tests *for consideration in the Final Rule*." 80 Fed. Reg. at 38543 (emphasis added). Whether or not USDOL intended such an implication, this sentence may fairly be read to suggest that in the Final Rule it will purport to make actual changes in those portions of Part 541 relating to these requirements. Post-publication remarks made by Wage and Hour Administrator David Weil appear to mean that no such changes will be made. With that understanding, NACS offers the following discussions.

A. Minimum-Percentage Requirements

The Agency's Questions B and C deal with largely the same consideration: Whether there should there be a requirement that an employee spend a minimum amount of time in the requisite primary duty in order to be exempt. 80 Fed. Reg. at 38543. NACS submits that there should be no such minimum.

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

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

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

> Adopting a strict 50-percent rule for the first time would not be appropriate . . . because of the difficulties of tracking the amount of time spent on exempt tasks. * * * Such a rule would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens).

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

In light of the decades-long practice of evaluating "primary duty" on a *qualitative* basis, the Agency, the courts, and other interested members of the public have become familiar with these principles and have developed approaches to applying them. But USDOL now questions whether this 75-year period of policy and practice should be abandoned because of some concern that some employees might be "spending a significant amount of their work time performing non-exempt work" and that, "at some point, a disproportionate amount of time spent on nonexempt duties may call into question whether an employee is, in fact, a bona fide EAP employee." 80 Fed. Reg. at 38543.[8] Another apparent USDOL concern is that these and similar matters "can lead to varying results." *Id.*

Whether and to what extent some employees are or are not in fact spending "a significant amount" of time or "a disproportionate amount" of time on nonexempt work so as to "call into question" their exempt status are matters that are no more or less perplexing now than in 1938. Similarly, the fact that "varying results" might occur is just as true of the application of many other duties tests to an endless variety of inherently-uncertain facts and circumstances. *No* set of regulations properly defining and delimiting the exemptions will ever avoid "varying results".

As for whether USDOL should look to California wage orders to adopt a 50% threshold, obviously NACS does not feel that it should. However, were the Agency to adopt California's *quantitative* time test, then we submit that it must also look to and incorporate all of California's regulations addressing the duties test, including that portion of the California test which attempts to compensate for the flaws of its time test by requiring *qualitative* consideration of "the employer's realistic expectations and the realistic requirements of the job" in determining whether the requirement is met. *See, e.g.*, Cal. Indus. Welfare Comm'n, Order No. 1-2001, Section 1(A)(1)(e) (promulgated

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

under Cal. Code of Regs, tit. 8, § 11010(1)(A)(1)(e)). Otherwise, USDOL would be imposing exemption standards that are *more stringent* than California's.

B. "Concurrent Duties" Concept

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

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

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

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

> Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

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

The "concurrent duties" concept is of particular relevance to retailing, and especially to the convenience-store industry. Consider, as an illustration, a Store Manager who, in stocking shelves, simultaneously trains a new clerk in how shelves are to be stocked for merchandising and security purposes, gathers information as to stock levels to use in ordering, and checks on the performance of subordinates in their stocking work. As another example, a Store Manager who is working at a cash register is not simply "ringing sales" but is also monitoring store conditions and security, watching employee performance, noting customer comments, complaints, and preferences, and reviewing documents and reports prepared by others and preparing reports of his or her own.

And once again, that the application of the regulation might be "difficult" and might "lead to varying results" can be said of most if not all of the other duties-related tests for exempt status in a multitude of situations. Moreover, difficulty and "varying results" cannot be eliminated by *any* set of regulations that will also be consistent with USDOL's responsibilities in defining and delimiting the exemptions.

Finally, the Agency has asked "[t]o what extent . . . exempt lower-level executive employees [are] performing nonexempt work." 80 Fed. Reg. at 38543. Of course, if these hypothetical employees are exempt, then how much nonexempt work they are doing is irrelevant. As for the extent to which lower-level executive employees who might or might not be exempt are doing nonexempt work, it is highly unlikely that any response to such a question will be an adequate or legitimate predicate for rulemaking.

C. Reintroducing A Long-Test Provision

The Agency says throughout its proposals that its charge includes modernizing and simplifying the regulations, making them easier to understand, increasing vague "efficiencies" of their application, and reducing the frequency and amount of FLSA litigation. NACS assumes that USDOL is referring to adopting something along the lines of the pre-2004 exemption structure so as to impose a "long test" percentage limitation upon nonexempt work. These aims would not appear to be served by re-introducing a more-complicated "long/short duties test structure" that was formulated nearly 75 years ago and was dispensed with more than a decade ago. Stein Report at 14-15; 80 Fed. Reg. at 38543.

While the "long test" would have a *superficial* appearance of a rigorous numerical standard, in truth any such impression was and would be only an illusion. Stating such a percentage accomplishes nothing in itself; this simply moves the uncertainty to a different area and reveals why this approach was, and again would be, ineffectual.

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

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

And as USDOL rightly recognized in 2004, a *qualitative* discernment of "nonexempt work" is one thing; undertaking to measure *quantitatively* how much of it is done from hour-to-hour, workday-to-workday, and workweek-to-workweek is quite another altogether. 69 Fed. Reg. at 22126-27. There is currently no requirement to maintain any records of the amount of such work, and there is serious reason to doubt that the quantification could be done in any useful and reliable way. Furthermore, if a percentage limitation were re-imposed on a *workweek* basis, as it applied before, the exacerbated practical burdens imposed by trying to measure these things (even if that can be done) and by dealing with possible exempt-one-workweek/nonexempt-the-next-workweek scenarios are too obvious to warrant more discussion. For instance, untangling and quantifying "exempt" work and "nonexempt" work in just the couple of common "concurrent duties" situations NACS posed in the preceding section even once would be daunting at best and unreliable in result, not to mention the probable impossibility of doing so in an meaningful way on a workweek-by-workweek basis.

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

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

D. Managers At Individual Retail Or Service Establishments

The Agency has declined to give any specific consideration to the adverse impact that increasing and indexing the salary level will have upon the retail and service industries. Therefore, in response to the Agency's invitation to propose other changes in the duties tests, and especially if some over-50% primary-duty is ultimately adopted, we recommend that the executive exemption be modified in future rulemaking to recognize the likelihood that the role and circumstances of the manager of an individual retail or service establishment support exempt status.

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

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

Note that, unlike in past recommended formulations, this addition would not pronounce such a manager to *be* exempt; the salary tests and the other duties requirements would also have to be met. Such a provision would not, of course, preclude the exemption's application to other, lower-ranking employees in the establishment if they satisfied the exemption's tests.[9]

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

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

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

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[9] Further, if some quantitative primary-duty analysis is adopted, to the extent that a lower-ranking employee is the highest-ranking employee on-site (for example, an assistant manager), we would submit that the activities and time be deemed exempt.

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

5. The Effective Date

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

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

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

◇ Design new pay plans and reduce the straight-time compensation for employees who will thereafter be treated as nonexempt;

◇ Determine to what extent to reduce or eliminate benefits or other advantages of employment to offset composite increases in labor costs; and/or

◇ Determine what workforce reductions or freezes are called for.

A substantial adjustment period longer than that provided in 2004 is certainly justified. *See* 69 Fed. Reg. at 22122. We recommend that the delay for this over *100%* increase be *not less than one year* after the revisions are published in their final form. Notably, this still is significantly less time than Congress provided in 2007 when, after nearly a decade at $5.15, it ultimately increased the federal minimum wage by (approximately *40%*, incrementally, from July 23, 2007 to July 24, 2009) comparatively far less than the salary level increase USDOL proposes. *See* 29 U.S.C. § 206(a)(1). *See also* Pay Workers a Living Wage Act, S. 1832, 114th Cong. (2015) (proposing an over 100% increase in the federal minimum wage, incrementally, over a four-year period).

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September 4, 2015

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The Honorable David Weil
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RE: Proposed Rule to Define and Delimit the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; RIN: 1235–AA11

Dear Secretary Perez and Administrator Weil:

On behalf of the Society of Independent Gasoline Marketers of America ("SIGMA"), I am pleased to provide these comments on the Department of Labor ("DOL" or "the Department"), Wage and Hour Division's proposed rule (the "Proposed Rule" or "Proposal")[1] to update and revise regulations implementing overtime pay exemptions under the Fair Labor Standards Act of 1938 ("FLSA").[2] SIGMA supports the Department's goal to raise the overtime salary threshold to ensure that it accurately protects American workers. Nevertheless, as articulated below, the Proposal raises significant concerns insofar as it would adversely impact the ability of small business fuel retailers to hire full-time fixed salary employees.

SIGMA supports a change in the overtime salary threshold, however, we believe that this level should be set as a percentile of the salary of full-time salaried employees in two populations: the South and the retail industry—the methodology used in the 2004 Final Rule.[3] The current Proposal would raise the overtime salary threshold to a level much higher than the salaries paid to first-line managers in our members' stores in many parts of the country. This is problematic because it will discourage long-term full-salary hiring in an industry that is a major entry-level employer generally, and a major employer for entry-level management positions in particular.

[1] "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," 80 Fed. Reg. 38516 (proposed July 6, 2015), *available at* http://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf.

[2] 29 U.S.C. §201, *et seq*.

[3] 2004 Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004).

Furthermore, while SIGMA favors scheduled salary updates that will prevent unpredictable jumps in the overtime threshold, we believe such automatic updates should occur every three to five years. Annual or biennial updates would create significant compliance costs that would ultimately frustrate the Department's goals and disincentivize full-time salary hiring. Lastly, SIGMA supports the existing duties test and cautions the Department against making alterations that would not account for industry differences.

I. BACKGROUND

A. SIGMA Members are Significant Entry-Level Employers.

The fuel retailing industry is a significant entry-level employer, employing over 2.47 million people. In fact, one in nine (11 %) adult Americans have worked at a retail motor fuel outlet or convenience store at some point in their working lives. Significantly, because our industry tends to promote from within, we are also a significant entry-level employer for management jobs. In 2014, SIGMA members alone provided over 353,000 jobs in fuel and convenience store operations.

The retail side of the industry as whole, with approximately 153,000 stores across the United States, posted $482 billion in motor fuel sales and $696 billion in total sales in 2014—representing approximately 2.5 percent of United States GDP.

SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel that sell more than 50 percent of motor fuel sold in the United States. Most SIGMA members are involved in gasoline retailing, approximately two-thirds are involved in wholesaling, 36 percent transport product, 25 percent have bulk plant operations, and 15 percent operate terminals. Member retail outlets come in many forms, including travel plazas, traditional "gas stations," convenience stores with gas pumps, cardlocks, and unattended public fueling locations. Some members sell gasoline over the Internet and a few are leaders in mobile refueling.

B. Nearly All Retail Gasoline Outlets Are Owned and Operated by Small Businesses that Operate on Thin Margins.

Despite the fact that one in every 23 dollars spent in the American economy is spent in our members' channel of trade, which conducts more than 160 million transactions per day, we are an industry of small businesses. Under five percent of the retail motor fuel outlets in the United States are owned or operated by integrated oil companies. The vast majority of branded outlets are locally owned and more than 70 percent of retail motor fuel and/or convenience store companies operate ten stores or less. In fact, more than 60 percent of businesses that sell motor fuels at retail operate just one store. For our industry, any additional regulatory burdens resulting from the Proposal will generally fall upon small businesses and their customers.

The retail fuel market is one of the most competitive in the United States. SIGMA members operate on tiny margins – generally two-to-three cents per gallon of fuel sold. The average annual pretax profit per store is approximately $47,000.[4] SIGMA members are unable to absorb incremental cost increases without passing them on to consumers.

Therefore, it is important that the final rule set a realistic salary threshold that encourages business innovation and hiring. This means that the Department must adjust the underlying data set used to calculate the salary level to account for regional and industry variations. Moreover, DOL should use a salary update mechanism that will promote certainty and be cost-effective for businesses. Otherwise, the Proposal will end up creating additional hurdles for small business owners that will deter investment and long-term job growth. Finally, the Department should not make alterations to the existing duties test that fail to account for industry differences.

II. COMMENTS ON THE PROPOSAL

SIGMA recognizes and supports the Department's objective in setting an adequate salary threshold for the overtime exemption. However, we remain concerned with the underlying methodology used by DOL to set the salary threshold, which is not supported by the rulemaking record, will have a negative impact on the people the Proposal seeks to benefit, and will conflict with the Department's objectives in revising this rule.

A. SIGMA Supports Raising the Salary Threshold But Opposes the Methodology Used in the Proposal.

The Department is proposing to update the salary threshold that triggers the overtime exemption to the 40th percentile of earnings for *national* full-time salaried workers across all industries: $970 per week, approximately $50,440 for a full-year worker.[5] This is a significantly higher percentile of the salary distribution from the standard level set in the 2004, which set the required standard salary level at approximately the 20th percentile of salaried employees based on data from salaried employees in the South and in the retail industry: $455 per week, approximately $23,660 per year for a full-time worker.[6] Raising the salary threshold to the 40th percentile of *national* full-time salaried workers without regard to the type of business in which people are employed is inconsistent with the Department's statutory mandate in this area and the rulemaking record. An increase in the salary threshold must account for regional and industry

[4] *See generally* National Association of Convenience Stores ("NACS"), State of the Industry Annual Report for 2014. This number was calculated using the average pretax profits for stores between 2010 and 2013, which ranged from $45,100 to $48,251per store. The average pretax profit for stores between 2010-2014 is $51,121. This higher number includes the average pretax profit in 2014 ($68,065), which is considered an anomaly resulting from the unusual behaviors of the crude oil market that year.

[5] The Proposal specifies raising the salary threshold to $921 per week, or $47,892 annually for a full-time salaried worker. However, we have chosen to refer to the numbers that will be in place if and when the rule is finalized as proposed (2016 data, projected to be $970 per week, $50,440 per year). DOL is also proposing to increase the Highly Compensated Employee annual compensation requirement to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers.

[6] 2004 Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004).

differences in order to avoid negative consequences for employment in regions and industries with lower mean salary levels today.

i. The Proposal's Methodology is a Significant Departure From the Methodology Used in Previous Rulemakings.

In the seven overtime rulemakings since enactment of the FLSA, DOL has relied upon a common methodology to set appropriate salary levels. With some slight variation, the Department has, in almost every prior rulemaking, surveyed a broad set of data on actual wages paid to salaried employees and then set the salary level at an amount slightly lower than might be indicated by the data.[7] The earliest rulemakings (1940 and 1949) set the salary level based on the lowest level of exempt employees.[8] Starting in 1958 with the Kantor Report, the Department began setting salary levels with distinct consideration for low-wage regions, employment size groups, city size, and industry sectors.[9]

In its most recent 2004 rulemaking, DOL used Current Population Survey ("CPS") data that encompassed "most salaried employees, and set the salary level to exclude roughly the bottom 20 percent of those salaried employees in each of the subpopulations (1) the South and (2) the retail industry."[10] While the 2004 methodology was slightly modified from earlier rulemakings, it still considered pay disparities among industries and regions when calculating the salary threshold. In fact, the Department specifically utilized "lower-salary" data sets from the South and the retail industry in 2004 to "*accommodate those businesses for which salaries were generally lower due to geographic or industry-specific reasons*."[11] The Department did not use this methodology in the current rulemaking. Rather, the Department used nationwide data for full-time salaried employees without limiting it to subpopulations with lower-salary data sets (i.e. the South and the retail industry).

This is the first time the Department has ever taken this approach and this departure will harm workers and businesses. The Department's Proposal fails to account for the marketplace reality found across the retail industry and in rural and southern America. As the Department recognized in 2004, the retail industry and the South generally have salaries that are lower than the rest of the nation.

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[7] *See* 80 Fed. Reg. at 38526.

[8] *Id.*; *See generally* Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541, Weiss Report (June 30, 1949) and Kantor Report (Mar. 3, 1958). As early as the 1949 Weiss Report, DOL recognized that in order for the exemption to function effectively, salary levels had to be set with consideration for disparities in pay across the nation and in different size establishments.

[9] Kantor Report at 5 (describing that "the salary tests have thus been set for the country as a whole…with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States").

[10] 80 Fed. Reg. at 38526.

[11] *Id.*, emphasis added.

In fact, it is common practice for the Federal Government to address these regional variations. For example, the Federal Government, in paying its own employees, requires locality-based comparability payments to adjust for regional pay disparities between government and private sector employees.[12] The Davis-Bacon Act requires DOL to determine locally prevailing wage rates to ensure that federal contractors and subcontractors in a particular area are paid at a rate no less than the locally prevailing wages and fringe benefits for corresponding work on similar projects.[13] Similarly, Medicaid and Medicare physician payments are adjusted according to geographic indices to account for regional price differences.[14] For the Department to completely disregard geographic and industry disparities in salary level runs counter to the Department's statutory mandate and past practice and will harm workers in some regions and industries.

By roping in all salaried employees across the country and across all industries into its base data set, DOL is creating a salary level that is out of sync with reality. In our industry, the average compensation for a store manager is approximately $39,580 and the average wage for an assistant store manager is $26,024.[15] These numbers vary greatly by region and company size, however, with some store managers in rural and southern areas earning closer to $24,000 and some assistant managers earning approximately $19,000 per year. By raising the overtime salary threshold from $23,660 to $50,440, in essence, DOL would be mandating at least a $10,000 salary jump ($25,000 in some instances) for managers and an over $24,000 jump ($31,000 in some instances) for assistant managers. Should our industry adjust salaries to those levels, the costs would run into the billions of dollars—and given the small profit margins in our industry that would not be sustainable.

While DOL may view companies adjusting up to meet the salary threshold as a positive development, the huge costs involved mean that will not happen. Instead, the industry will move to a system of hourly-wage employees, exactly what the Department is trying to avoid. This will happen because it will be significantly more cost efficient for employers to have employees work the same amount of hours they are working now at hourly rates, rather than pay their management employees at the threshold set by DOL. This will result in a net negative result for employees. By reverting to hourly employment, employees will lose job security and a significant amount in terms of benefits (e.g. paid sick leave and vacation time). And, hours will be more limited. Employees will then make less money, and have fewer benefits and less job security due to the DOL rule. This return to hourly-employment would be particularly damaging for employees in the fuel retailing industry because the industry is a major entry-level employer for first-line managers.

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[12] *See e.g.*, 5 U.S.C. § 5304.

[13] The Davis-Bacon Act, 40 U.S.C. § 3141. *See also* Wage and Hour Division, Davis-Bacon and Related Acts, *available at* http://www.dol.gov/whd/contracts/dbra.htm.

[14] *See e.g.*, 42 U.S.C. 1395w–4.

[15] NACS, State of the Industry: Compensation Report 2014, pages 29-31.

According to the Proposal, raising the salary level according to the 2004 methodology (20^{th} percentile of subpopulation data), would result in a salary level of $577 per week, approximately $30,004 per year. Using the Kantor method (10^{th} percentile of likely exempt employees in low-wage regions, employment size groups, city size, and industries) would result in a salary level of $657 per week, approximately $34,164 per week.[16] Interestingly, both of these methods, which address regional and industry variations, are more reflective of what are realistic wages in our industry. The Department, however, has rejected these methods without support, merely noting that using nationwide data creates a more "robust" sample.[17]

Although the Department analyzes the regulatory alternatives just described, it notably fails to consider a 40^{th} percentile increase in wages using the 2004 methodology.[18] Raising the salary threshold to the 40^{th} percentile of full-time salaried employees based on the 2004 data set – i.e. based on both exempt and nonexempt full-time salaried workers in the low-wage South and retail industry – would result in a salary level of $812 per week, approximately $42,224 per year. This would be $18,564 more than the current threshold and much higher than current wages in low-income areas. Yet, the Department failed to consider this option. Departing from the 2004 methodology without analysis or support was arbitrary and capricious, an abuse of discretion and contrary to the Department's statutory mandate.

<u>ii. The Rulemaking Record Lacks Analysis to Support the Department's Proposal.</u>

Under the FLSA, DOL is charged, among other things, with prescribing and enforcing standards relating to wages and overtime pay.[19] Unfortunately, the Department has come up short with its present Proposal. The rulemaking record shows that DOL has failed to consider or properly analyze several important issues that are critical to setting any effective overtime standard. Significantly, DOL has not considered the potential impact of its proposed changes on different regions and industries throughout the country.[20] While DOL does include some data

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[16] 80 Fed. Reg. at 38582. The 1958 Kantor method used data regarding the wages of exempt employees, and set the salary level so that "no more than about 10 percent" of such exempt employees "in the lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest wage industry of each of the categories would fail to meet the tests." Kantor Report, *supra* note 8, at pages 5-7. 69 Fed. Reg. at 22168.

[17] In addition to disregarding regional and industry variations, DOL's Proposal adds many groups to the sample pool that had previously been excluded. For example, the Proposal states that "while the self-employed…agricultural workers…teachers…and federal employees were excluded from the 2004 sample because they are not subject to the part 541 salary level test, they nonetheless are part of the universe of salaried employees and, as such, their salaries shed light on the salaries paid to employees performing exempt EAP duties." 80 Fed. Reg. at 38528. DOL explains the radically altered sample data by noting only that the old sample size may not "yield statistically meaningful results"—it does not provide any substantive analysis to account for this change.

[18] *See generally*, Table 12, Weekly Earnings Distribution, 2013, 80 Fed. Reg. at 38558.

[19] *See generally*, 29 U.S.C. §201, et seq.; *see also* the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

[20] It is unclear, for example, how DOL arrived at its estimate that "the average annualized direct employer costs will total between $239.6 and $255.3 million per year." 80 Fed. Reg. at 38518. In fact, given the lack of analysis conducted by DOL, these numbers could not account for the huge costs that will be foisted upon certain industries and regions of the country.

(divided by industry) on the number of EAP workers that may be affected by raising the threshold, it does not actually calculate and analyze how the Proposal would impact a particular industry beyond considering how many workers may now become overtime ineligible. Moreover, it does not conduct proper analysis to reach its conclusions, in part because the Department relies on certain assumptions when performing calculations that are without foundation and not supported by data.[21] Similarly, the Proposal does not compare how the rule's impact would vary by industry. The Department only asks stakeholders to estimate the potential impact on a regional or industry basis, otherwise abdicating its responsibility to perform in-depth analysis. Alternatively, in the few places where DOL highlights a potential impact, it then neglects to follow through with analysis. For instance, the Proposal highlights that increasing the overtime threshold may lead to a reduction in profits available to firms for business investment—but it never actually scrutinizes this statement or quantifies the potential loss in profit and related investment opportunity loss.

The absence of analysis relating to regional impact is particularly troubling since improperly set wage levels can destroy local economies.[22] Although the Department may ultimately conclude that changing the overtime regulations will not harm certain regions, the problem here is that it has not performed the analysis that would be necessary to reach that conclusion. While the Proposal notes the possibility of other alternatives, it does so without analyzing the outcomes that would result from those alternatives and comparing them to the outcomes that would result from the approach taken in the Proposal. This is not adequate and provides no foundation for the Department's decisions.

For example, the Department failed to compare salary levels by industry and analyze the impacts on each industry of imposing a salary level based on a national data set. The same is true for regional differences. The Department did not compare regional salary levels and analyze how different regions of the country would be impacted by imposing a salary level based on a national data set. The Department does not, therefore, know whether its Proposal will reduce wages, employment, and business profitability in particular industries or regions. The Department similarly does not know whether or to what extent its Proposal will push more workers in certain industries and regions into hourly rather than salaried positions.

The Department's failures to conduct the basic types of analysis that would be expected by any rational decision-maker in this area are striking and cannot be justified. By jumping to conclusions without support, the Proposal violates the Administrative Procedure Act.

iii. Nondiscretionary Bonuses and Incentive Payments Should Count Towards the Standard Salary Level Test for the Executive, Administrative, and Professional ("EAP") Exemption.

[21] For example, the Department at one point notes that to estimate the total regulatory familiarization costs, its analysis assumes that a mid-level human resource workers paid a median wage will review the rule and that it will only require one hour of time for regulatory familiarization. Yet, DOL does not clarify how it can assume that only one hour is needed for an employee to familiarize himself with the rule.

[22] *See e.g.*, Preston Cooper, The Federal Minimum Wage Is Killing Puerto Rico's Economy (July 5, 2015), *available at* http://www.economics21.org/commentary/federal-minimum-wage-killing-puerto-ricos-economy.

The Department has consistently assessed compliance with the standard salary level test by looking "only at the actual salary or fee payments made to employees" and has not included bonus payments of any kind in this calculation.[23] Bonuses, however, are "actual" payments and the Department cannot justify a finding that they are not. In the retail industry, in particular, it is very common for a substantial part of salaried employees' earnings to be in the form of such bonuses because they foster a sense of ownership and align managers' incentives with those of the business. To account for this practice, SIGMA supports including nondiscretionary bonuses to satisfy the overtime salary threshold. While the Proposal considers whether to permit such payments to satisfy 10 percent of the standard weekly salary level,[24] there is no good reason to set a cap at that amount. Nondiscretionary bonuses and incentive payments form a part of employee compensation. As such those payments should be fully counted as part of the standard salary level.

In addition, there is no principled reason why employers should not be able to credit such compensation to the standard salary level on an annual basis. As compensation, nondiscretionary bonuses should be counted towards the standard salary level even if they are paid out yearly. According to the Department, the weekly time requirement would be necessary to protect workers and ensure that they receive a minimum level of compensation on a consistent basis. This statement is without foundation—yearly salaries also provide consistency. Moreover, permitting employers to count bonuses annually incentivizes them to hire employees on an annual basis, ultimately promoting job security and long-term employment. Should DOL reject annual payments, however, quarterly payments should suffice as they provide businesses with flexibility in making adjustments to budget and outlays while supporting employees. More frequent monthly or weekly payments would burden businesses with compliance costs that would disincentivize bonus payments altogether and decrease overall compensation levels.

B. <u>SIGMA Supports Automatically Updating the Salary Threshold on a 3-5 Year Cycle According to a Fixed Percentile of Wages</u>.

SIGMA recognizes that the overtime salary threshold has become outdated due to the long periods of time between rulemakings. Sudden, large adjustments to the threshold without warning can cause dislocation in the industry, increase compliance costs, and provide disincentives to employing people on a salaried rather than an hourly basis. To avoid this outcome, we support establishing scheduled salary threshold updates to ensure that the salary threshold continues to be a reliable proxy for identifying overtime-eligible white collar employees while insulating small businesses from extreme changes in the salary threshold.

These automatic updates should not be annual. Rather, we support the Department automatically updating the salary level (with an accompanying rulemaking to approve the update) every three to five years. Annually updating the salary threshold will create an environment of uncertainty that will harm businesses and ultimately impede DOL's goal: setting a predictable and simple overtime salary threshold that is easy for businesses to comply with. If

[23] 80 Fed. Reg. at 38535.

[24] *Id.* at 38535.

the salary threshold were to change yearly, there would be significant compliance costs imposed on businesses. While regulatory familiarization costs would be of concern, the biggest costs would be the adjustment and managerial costs. Every time the salary threshold is changed, our members incur adjustment costs as they must update payroll systems, reevaluate employees' exempt status, and inform employees of policy changes. Relatedly, our members incur managerial costs as they work to adjust scheduling and monitor employee hours to ensure they are in compliance with the overtime rule. In practice, therefore, annual overtime salary adjustments would impose significant costs on SIGMA members and would make it extremely difficult for them to be able to plan or budget effectively. This, in turn, will incentivize a return to hourly employment practices and discourage long-term business investment. In contrast, if the threshold were updated on a three to five year cycle, companies would have the ability to implement business plans without worrying about frequently reworking numbers and adjusting work schedules and hiring practices. This certainty and consistency will be much more cost-efficient for businesses and will ensure that companies are not losing money that could go towards supporting long-term employment and hiring.

We support updating the salary threshold by using a fixed percentile of wages based on data sets that take into account regional and industry wage disparities. By using the methodology DOL employed in the 2004 Final Rule, which established the salary threshold based upon data that accounted for geographic and industry wage disparities, setting a fixed percentile will help the threshold keep pace with actual wage changes in the market. Adjusting the threshold based on inflation is not a valid way to proceed. Inflation and wages can increase at very different rates and the Department will risk harming workers and businesses if it uses inflation as the measure of future adjustments to the rule. Any automatic updates should also take into account any downward changes in wages.

SIGMA opposes using the Consumer Product Index for All Urban Consumers ("CPI-U") to update the salary threshold.[25] Using the CPI-U would run counter to the Department's past practice, whereby DOL has "repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries."[26] While the CPI-U covers approximately 89

[25] *See, e.g.*, http://www.bls.gov/cpi/cpifaq.htm (describing how "The CPI reflects spending patterns for each of two population groups: all urban consumers and urban wage earners and clerical workers. The all urban consumer group represents about 87 percent of the total U.S. population. the CPI for All Urban Consumers (CPI-U) and the Chained CPI for All Urban Consumers (C-CPI-U)"); *but see* BLS, Consumer Price Index May 2015, *available at* http://www.bls.gov/news.release/archives/cpi_06182015.pdf (describing the CPI-U as "cover[ing] approximately 89 percent of the total population").

[26] 69 Fed. Reg. at 22171-22172. DOL's regulatory history consistently has looked to information on actual salaries and incomes, not inflation-adjusted amounts. The 1949 Weiss Report, for example, considered and rejected proposals to increase salary levels based upon the change in the cost of living from the 1940 levels. *Weiss Report*, *supra* note 8 at 15. The Department also expressed concern in the 2003 NPRM about the effect that adjusting the 1975 salary levels for inflation ''would have on certain segments of industry and geographic areas of the county, particularly in the retail industry and in the South, which tend to pay lower salaries.'' 2003 Proposed Rule, 68 Fed. Reg.15560, at 15570. In the 2004 Final Rule, DOL explained that these concerns applied ''equally when considering automatic increases to the salary levels'' and did not institute an automatic update mechanism. 69 Fed. Reg. at 22171–22172. *See generally* 80 Fed. Reg. at 38541. The Proposal implies that present data does not substantiate the

percent of the total population, it does not represent rural consumers.[27] As such, we believe it would lead to an inaccurate salary adjustment that does not account for regional wage and consumer cost differences. This is particularly significant for the fuel retailing industry. Our industry, while servicing urban, suburban, and rural populations, has a proportionately greater presence in rural areas where our stores may be the only source of fresh food, staple goods, or gasoline for miles. Consequently, our industry is a very important employer and service provider in rural America. To adjust the salary threshold by the CPI-U, which does not consider rural cost data, would place significant burdens on rural businesses as any update would not reflect the wage reality in those places.

C. <u>SIGMA Supports the Existing Duties Test and Cautions the Department Against Making Alterations to the Duties Test That Would Not Account for Industry Differences</u>.

The current standard duties test adequately ensures that overtime-eligible employees are not erroneously identified as overtime exempt.

The retail industry has a unique structure and unique characteristics. It is not uncommon for a manager to run a store independently (which necessitates the completion of nonexempt duties) or to assist overtime eligible employees with nonexempt tasks to enhance morale and build company culture. Moreover, as a major entry-level employer – particularly for entry-level management positions – the fuel retailing industry's "all hands on deck" business model, which generally requires participation in all consumer-facing activities, is an important way for entry-level managers to learn the business and gain experience so that they can become eligible for upper-level management job opportunities. The existing duties test acknowledges this reality.

SIGMA supports the existing regulations that have a flexible 50 percent primary duty rule of thumb to account for EAP differences across industries. Under the current regulations, "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement."[28] Significantly, however, the 50 percent is not a strict cut-off. For example, the regulations allow an assistant manager in a retail establishment to spend more than 50 percent of his time performing nonexempt work (e.g. running the cash register) and still be found overtime ineligible.[29] By acknowledging differences in manager job duties that occur across disparate industries, the current duties test and accompanying regulations support a workable overtime rule. Changing the test to enforce more rigid requirements will be very impractical in our industry where it is quite common for the store manager to set the work

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Department's past concerns about the impact of inflation measures on low-wage areas—but that statement is not supported in the rulemaking record.

[27] *See* BLS, Consumer Price Index May 2015, *available at* http://www.bls.gov/news.release/archives/cpi_06182015.pdf. DOL increased the salary threshold in 1975 based on changes in the CPI, it then rejected that methodology in the 2004 Final Rule.

[28] 29 C.F.R. §541.700(b).

[29] 29 C.F.R. §541.700(c).

schedule so that s/he is the only employee serving customers – an overtime eligible task – at a particular time.

Any future changes to the "50 percent duty rule" should consider EAP differences across industries. This would not be unprecedented. In the past, the special 40 percent limit on the time an exempt employee could spend on nonexempt tasks took into account the particular characteristics of the retail and service industries.[30] SIGMA believes that any primary duty rule must be flexible to account for managerial variation among industries.

Furthermore, any primary duty rule should not exclude times during which nonexempt work is performed concurrently with exempt work. The existing concurrent duties doctrine, which allows an overtime ineligible employee to perform exempt and nonexempt work at the same time, is critical in the retail industry. In fact, the regulations understand this and permit a convenience store assistant manager to concurrently engage in nonexempt tasks (e.g. stocking shelves) and exempt tasks (e.g. supervising other employees or drafting work schedules).[31] Any changes to the duties rule should retain this flexibility.

IV. CONCLUSION

SIGMA appreciates the opportunity to comment on the Proposed Rule. Please do not hesitate to contact me if SIGMA may provide any assistance to the Department in this critical rulemaking.

Sincerely,

R. Timothy Columbus

[30] 80 Fed. Reg. at 38530. The general limit placed on the time an exempt non-retail employee could spend on nonexempt tasks under the long test was 20 percent.

[31] 29 C.F.R. §541.106.