THE NATIONAL ASSOCIATION OF CONVENIENCE STORES

RESPONSE TO USDOL'S REQUEST FOR INFORMATION

REGARDING THE 2016 REVISIONS OF THE FAIR LABOR STANDARDS ACT'S

SECTION 13(a)(1) REGULATIONS

(RIN 1235-AA20)

Founded in 1961 as the National Association of Convenience Stores, NACS (convenience.org) advances the role of convenience stores as positive economic, social and philanthropic contributors to the communities they serve. The U.S. convenience store industry, with more than 154,000 stores across the country, posted $549.9 billion in total sales in 2016, of which 58% were motor fuels sales. NACS has 2,100 retail and 1,750 supplier member companies, which do business in more than 50 countries.

The convenience and fuel 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 2016, the industry employed more than 2.7 million workers and generated $549.9 billion in total sales, representing approximately 3.2% of the GDP in the United States—or one of every 30 dollars spent—in 2016.NACS and its members have a strong interest in the requirements governing the application of the white-collar 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.

Recent developments with respect to the white-collar exemptions have been concerning to NACS members. The 2016 Final Rule grew out of a basic misconception that the salary-threshold is a minimum wage for exempt employees that should constitute a "fair day's pay" and otherwise facilitate exempt employees' monetary well-being, and that this should continue through future "updates". While these might be laudable aims in other contexts, here the object of any compensation requirements must be limited to defining the exemptions. The only proper purpose of these tests under Section 13(a)(1), is the definitional line-drawing that is committed to the Agency.

NACS therefore welcomes the opportunity to submit comments in response to the "Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" (the "RFI") published by the U.S. Labor Department ("USDOL" or "Agency") on July 6, 2015 at 82 Fed. Reg. 34616, Regulatory Information Number (RIN) 1235-AA20.

RFI Item No. 1

> In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

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

Preliminarily, it continues to be of utmost importance to bear in mind that "improving the conditions of [exempt] employees is not the objective of the regulations." *Weiss Report* at 11. USDOL should not, *and indeed is not authorized to*, consider whether the threshold amount is "a living wage", or adequate compensation for "the extra hours they spend on the job and away from their families", or any of the other descriptors to similar effect that have crept into the process, particularly in 2016.

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

Furthermore, the prior administration appeared to accept that this impact would fall disproportionately upon both lower-wage geographical areas and lower-wage industries. *See* 80 Fed. Reg. 38564 (July 6, 2015). Of course, the anticipated effects of the salary threshold upon both of these segments have historically (and properly) been of great concern to USDOL in setting the figure. *See*, *e.g.*, *Kantor Report* at 4-6. Moreover, as comments submitted in connection with the 2015 proposed rulemaking made abundantly clear, in today's economy these effects are especially devastating to retailers and others that tend to be of a comparatively lower-wage nature due to the financial constraints that typically apply to them. Notably, a survey of NACS members indicates the 2016 *median* annual *compensation* of Store Managers was under $46,000. The *minimum salary* reported for Store Managers in the Southeast was approximately *half* of that median.

In any event, a salary-threshold requirement (indeed, a salary or pay component of any kind) presumably serves as a barrier to the exempt status of at least *some* employees who meet an exemption's duties criteria. Accordingly, as a matter of policy the Agency should not set a threshold that does not effectuate Congress's patent intent that the nature of an employee's work should play a determinative (if not the exclusive) role in the assessment of exempt status. History has shown repeatedly that it is an unattainable quest to set a national level that is "just right"; and multiple levels (on whatever basis) are not practical. Likewise, there is no need to change the duties test in response to a change in (or even the elimination of) the salary pay component.

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

By no means should the Agency use a revised method (for example, a lower percentile) and apply it to the same (updated) data set utilized by the prior administration, which was at best inapposite. USDOL referred without citation to "[t]he chosen population – all full-time salaried workers" and to "the BLS data for this pool . . . ." 80 Fed. Reg. at 38540. The cited data, however, included "any overtime pay, commissions, or tips usually received" by "workers who do not report being paid an hourly rate." http://www.bls.gov/cps. 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 meet the exemptions' *duties* tests.

With respect to the proposition that threshold adjustments should be based upon changes in the CPI-U, USDOL itself recognized that "inflation has been used as a method for setting the precise salary level *only in the breach* . . . ." 80 Fed. Reg. at 38533 (emphasis added). The Agency summarized some of the "prior concern[s]" among its predecessors with an inflation-based approach, "acknowledge[d] these concerns", and ultimately rejected this method. 80 Fed. Reg. at 38540. USDOL should instead propose to use internal, exemption-specific information of the sort which it summarily dismissed in drafting the 2016 Final Rule.

RFI Item No. 2

> Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

We oppose the adoption of multiple salary levels, on any basis. Multiple levels would simply confuse matters and would exacerbate the many problems presented by even a single salary threshold. Putting aside the huge undertaking that this would involve for USDOL in setting the levels, multiple levels would necessitate employers' undertaking a tedious analysis with respect to employees who clearly meet the duties test. Indeed, this could be particularly complicated with respect to an employee working at more than one location or for an employer that does not fit squarely within one industry.

RFI Item No. 3

> Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

For the same reasons discussed above with respect to multiple salary levels, the Agency should not adopt different levels for each duties test. In particular, this overly complicates matters with respect to employees meeting a combination of exemptions.

RFI Item No. 4

> In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

Please see our response above to Item No. 1, regarding methodologies, and our response below to Item No. 7, regarding the duties test.

RFI Item No. 5

> Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

Please see our response above to Item No. 1. In our view, the $913-per-week figure established in the 2016 Final Rule "eclipses" the role of the exemptions' duties tests with respect to an appreciable and largely-unpredictable percentage of the workforce. In fact, we believe that multiple statements made by the prior administration demonstrate that the figure was *intended* to do so. For example, one goal the administration expressly articulated that exceeded its legal authority was that of "reducing the number of employees for whom employers must perform a duties analysis." 80 Fed. Reg. 38529 (July 6, 2015). The responsibility of an employer, or USDOL, to perform a "duties analysis" arises from an indispensable aspect of Section 13(a)(1) itself; it is not proper to set a salary threshold in the interests of *avoiding* this evaluation.

Additionally, at what point the salary-threshold no longer fulfills its historical role in "determining" exempt status is not a proper question. Even *asking* this presumes a function that is inconsistent with Section 13(a)(1). In addition, the matter never has been – and never can be – satisfactorily resolved; *any* approach will exclude at least some employees from exempt status who clearly meet the duties tests.

RFI Item No. 6

> To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

Employers' responses to the 2016 Final Rule (and the preliminary injunction) varied. Anecdotally, reportedly the more-common steps fell into the following scenarios:

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

- Other employers converted employees with salaries falling below $913 per week to hourly, nonexempt employees with the understanding that it would increase the overall costs. In setting the hourly rate, however, some employers considered minimizing this increase rather than simply dividing an employee's salary by 40 hours.

- Employers who increased the salaries for one or more exempt employees often restructured the work and/or pay of one or more positions to directly or indirectly offset the increases.

The adverse effects of the Final Rule did in fact play-out as we and others foresaw, as well as in ways that had not been anticipated when the preliminary injunction was issued (particularly with respect to small employers or other employers that were on the brink of implementing changes). The Final Rule led to financial, and psychological, damage for both employers and employees. Employee morale significantly declined by and large, most notably with respect to the employees actually reclassified as nonexempt. Strikingly, while we cannot say for certain that there is a correlation, the reported 2016 turnover rates in the NACS survey were substantially higher with 27% for Stores Managers (10% in 2015) and 48% for Assistant Managers (21% in 2015).

USDOL must understand that, other policy considerations aside, most employers simply cannot implement the kinds of changes that the Final Rule necessitated (both directly and indirectly), at least not without taking steps that, in the end, are detrimental to employee interests.

RFI Item No. 7

> Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

While NACS appreciates the objective nature of the salary pay component, it recognizes that a duties-only test is consistent with the Congressional intent embodied by Section 13(a)(1).

As for whether an "examination of the amount of non-exempt work performed [would] be required", our response is that, whether part of a duties-only test or not, no such separate or freestanding examination would be or should be required (or is even desirable). Presumably, some different "examination of the amount of non-exempt work" would amount to imposing some percentage limitation upon "non-exempt work". While this had and would have a superficial appearance of a rigorous numerical standard, in truth it introduces uncertainty that rendered a similar approach ineffectual in the past. The role of any "non-exempt work" should not be expanded beyond, at most, the manifestation of this concept as it *currently* exists as part of the *qualitative* "primary duty" analysis.

From nearly the very beginning, USDOL, the courts, and the public faced ultimately-irresolvable difficulties in trying to discern what "non-exempt work" actually consisted of. *See*, *e.g.*, *Weiss Report* at 29-31. The concept of work that is "directly and closely related" to exempt duties evolved from an effort to provide more clarity. *Weiss Report* at 32. Ultimately, this formulation moved the inquiry back to what counted as "exempt" work and had more to do with "primary duty" than with percentage limitations.

USDOL wisely and appropriately eliminated any percentage limitations in 2004. It did so in significant part in recognition of the fact that experience had shown the factor not to contribute in any appreciable or effective way to distinguishing between exempt employees and nonexempt ones. *See*, *e.g*., 69 Fed.Reg. 22122, 22126-27 (April 23, 2004). At the same time, the principle of work that is "directly and closely related" to exempt work was preserved and remains in effect; it is incorporated into the meaning of "exempt work"; and both are integral parts of "primary duty", where the inquiry properly belongs. *Compare* 29 C.F.R. § 541.700 *with* § 541.702 *and* § 541.703. This arrangement is historically well-founded and analytically elegant. Determinations of exempt status would not be served by superimposing some kind of "examination" having to do with nonexempt work.

Moreover, as USDOL rightly recognized in 2004, a *qual*itative discernment of "nonexempt work" is one thing; undertaking to measure *quant*itatively how much of it is done from hour-to-hour, workday-to-workday, and workweek-to-workweek is quite another. 69 Fed.Reg. at 22126-7. For one thing, there is serious reason to doubt that any attempted quantification could be done in any useful and reliable way. Furthermore, if a percentage limitation were re-imposed on a *workweek* basis, it would lead to frankly-absurd "exempt-this-workweek-but-nonexempt-another-workweek" outcomes and disputes.

RFI Item No. 8

> Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

This request aptly illustrates the points we have made above regarding the examination of the amount of "non-exempt work". Preoccupation with "non-exempt work" is an unwarranted and unjustifiable diversion from that fundamental task, a task that is based upon the descriptions of what kind of work is *actually or constructively exempt*. If an employee's work does not meet the "primary duty" test in light of an evaluation of these factors, for example, then he or she is not exempt; what kind or amount of "non-exempt work" (whatever that means) the employee performs is *irrelevant*.

RFI Item No. 9

> The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

As set forth in our 2015 Comments, we question whether such a credit provision is necessary, or already permitted. Regardless, if an employee is paid on a "salary basis", then the *source* of the dollars comprising the predetermined amount is irrelevant. An employer's ensuring payment of a predetermined amount each pay period at the requisite dollar level still serves as "the best single test of the employer's good faith in attributing importance to the employee's services", *Stein Report* at 21, even if that amount consists in whole or in part of nondiscretionary sums. The essential element is the *predetermined* nature of the amount paid each pay period.

With respect to the 2016 Final Rule, the prior administration expressed a belief that "it is important to strictly limit the amount of the salary requirement that could be satisfied" in this way, and this led it to restrict the "credit" to 10 percent. 80 Fed. Reg. at 38535. There was no discussion of specifically *why* USDOL believed this, and neither was there any explanation of or rationale for why 10 percent was a proper limitation as opposed to, say, 30 percent, or 50 percent, or 80 percent, or any other specific percentage. Indeed, by limiting the amount of the "credit", USDOL places itself in the role of judging what form of compensation is appropriate, and doing so in an across-the-board fashion for all salaried-exempt employees regardless of the particular exemption, position, or industry. Employers should decide the best way to compensate employees to incentivize their work. By limiting the credit USDOL is, effectively, curbing an employer's ability to provide incentive-based pay while still ensuring an overall appropriate, feasible compensation package. For the Agency to make such determinations exceeds its role and is not appropriate.

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

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

Stein Report at 23 (emphasis added). *See also Opinion Letter of Acting Wage-Hour Administrator FLSA2006-43* (Nov. 27, 2006); *Opinion Letter of Wage-Hour Administrator No. 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.

On a related note, the "credit" provision set forth in the 2016 Final Rule was ill-conceived. The prior administration settled on a maximum time period of "13 weeks" and/or a "quarter" over which such compensation should be considered. 29 C.F.R. § 541.602(a)(3). But, the requirements of the "salary basis", including that a "predetermined amount" be paid *each pay period*, obviate any need to restrict the counting of nondiscretionary bonuses, incentive payments, or commissions to "13 weeks", to a "quarter", or to any other interval. Moreover, the Agency apparently gave no thought whatsoever to the practicalities of how this aspect of the "credit" would actually work, particularly given that many employers must take into account state wage-payment laws that at the very least seriously complicate the use of the mechanism.

If the "crediting" mechanism is to be retained for some reason, then we recommend that it be modified so as to eliminate both (i) the percentage limitation upon such "crediting", and (ii) any reference to a maximum period of time over which such payments can be earned.

RFI Item No. 10

> Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

Please see our response above to Item No. 2 regarding setting multiple levels.

RFI Item No. 11

> Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

As we said in our 2015 comments and continue to believe, USDOL should not automatically "update" the salary-threshold. Doing so would disserve some of the very interests the Agency has historically sought to promote. The prior administration recognized the Agency's longstanding view that "the line of demarcation" provided by the salary test "cannot be reduced to a standard formula." 80 Fed.Reg. 38527. Yet that is precisely what the "update" mechanism involves.

One rationale the prior administration offered was that "frequent updates are imperative to keep pace with changing employee salary levels." 80 Fed.Reg. 38539. USDOL offered no rationale establishing that any such imperative cannot be addressed without resorting to the rote, arithmetical approach it adopted. The explanation also made multiple references to the historically-uneven and lengthy intervals between adjustments in the salary levels, but this is not adequate justification for such a historically-unprecedented change that goes well beyond simply assessing more frequently whether it is, in fact, time to undertake an evaluation.

Consequently, there is currently a fear that the underlying *substantive* determinations leading to the $913-per-week figure (or any substitute figure) will go un-reconsidered for many more years, thus leaving whatever the figure is in, say, 2037 completely to the cumulative impact of the current evaluation.

USDOL also referred to considerations of:

- Competing regulatory priorities;

- Overall agency workload; and

- The time- and resource-intensive nature of notice-and-comment rulemaking.

80 Fed.Reg. 38539. We realize that such pressures exist, but these were and are in no respect sufficient bases for putting such a highly-important aspect of the exemptions' application (one that the Agency intended to loom far larger than most at the level established) on autopilot. While the prior administration took comfort in this regard in Congress's having "never enacted limits" curtailing the salary tests, 80 Fed.Reg. 38538, this had and has nothing to do with whether automatic "updating" of the salary-threshold is *desirable* or is consistent with Congress's original intent in enacting Section 13(a)(1). Furthermore, if and to the extent that Congressional inaction is relevant, a closer-to-home consideration is that Congress also "never enacted" a previously-made proposal to index the salary level. *See*, *e.g*., S. 2252 (112th Cong., 2d Sess.)(which would have called for tying the salary test to "the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers.").

Maintaining the indexing proposal using the percentile approach in the 2016 Final Rule would also mean that USDOL has 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 businesses in rural areas, businesses in the retail industry, and small businesses. *See, e.g*., 69 Fed.Reg. 22168 (April 23, 2004); 40 Fed.Reg. 7091 (February 19, 1975). The impact would be especially pronounced in a period of high inflation and could in fact contribute to a serious inflationary spiral. Nor would this effect be limited to the amount of the jump in the minimum salary itself. Similar to the effects of the $913-per-week figure, that move would also spark increases in:

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

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

Furthermore, an automatic update assumes that whatever method is used to devise a minimum salary that effectively "identifies exempt employees" in 2017 will remain an accurate indicator of exempt status indefinitely. But even USDOL admits that its "method for calculating the salary level has evolved" continually over the last 75 years. 80 Fed. Reg. 38524. Given this history, it would be a considerable act of hubris to assume that USDOL has found the perfect method for calculating the minimum salary level this time, and that no further revision (or "evolution") will be necessary.

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

The first option will necessarily reduce the proportion of exempt employees paid on a "salary basis" in the "salaried workers" data pool USDOL uses to "identify exempt employees". The second will substantially increase the amount which that remaining pool is paid. USDOL's approach will thus result in a smaller group of "salaried workers" who are in turn paid at higher salary levels, thereby artificially and unduly influencing the minimum salary levels used to compute the new minimum salary for exempt status. These effects will be even more pronounced if USDOL limits the data to the proper pool of employees as discussed above in response to Item No. 1.

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

A Per-Revision "Cap" Or "Maximum"

The prior administration said that an indexing approach is intended to replace "more drastic" changes with "gradual changes," but no safeguards were adopted to protect against drastic increases (or decreases) in the salary level. 80 Fed. Reg. 38523. We recommend that the change in salary level be no more than five percent of the prior salary level. This is slightly higher than the annualized increase in the salary level over the exemptions' history.

A "Safety Valve" For Exceptional Or Unforeseen Circumstances

As the RFI seems to contemplate, the day might well come when the actual or threatened effects of the "update" 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 deflation. There could also be times of national emergency for any number of reasons, episodes of extraordinarily high unemployment, or a host of other exigencies that would render the salary index untenable for at least some time. We recommend that the Secretary of Labor or the Wage and Hour Administrator be expressly authorized to modify or suspend the procedure for such reasons, in such ways, and for such periods as appear to be justified under the circumstances.

"Updates" Should Include The Possibility Of Reductions

We were dismayed to see the RFI ask whether "automatic updates [should] be *delayed* during periods of negative economic growth" without also entertaining the prospects for a potential *reduction*. 82 Fed.Reg. 34619, *Item No. 11* (emphasis added). Any automatic "update" must encompass the possibility that a salary-threshold will *decrease* "during periods of negative economic growth" in order to serve its definitional purpose. This is not a new or unprecedented concept. Nearly 70 years ago, USDOL recognized that "[t]here is no reason why the salary tests may not be revised again, either upward *or downward*, in line with any future economic changes which may warrant such action." *Weiss Report* at 9 (emphasis added).

Frequency of Updates

In our 2015 Comments we recommended that such re-evaluation period be not less than every three years, which in the end was the period adopted. If a recurring timeframe is proper, then changes should not occur so frequently to seriously complicate and interfere with management's ability to formulate both short-term and longer-term budgets or to administer or revise compensation plans.

Sufficient Advance Notice

Whether the salary threshold is reconsidered every three years or at longer intervals, providing sufficient notice of the revised figure is a matter of comparable importance. As the experiences of 2016 reveal, employers need an appreciable amount of time to determine which employees are actually or potentially affected; to analyze those varying circumstances; to formulate alternative approaches; and to consider all the ramifications of, and to devise measures to minimize the impact of actions taken. In many instances, all of this will have to occur before management can set an operating budget for the next fiscal year. We now submit that not less than twelve months' notice would be necessary.