The Leadership Conference
on Civil and Human Rights

1620 L Street, NW
Suite 1100
Washington, DC
20036

202.466.3311 voice
202.466.3435 fax
www.civilrights.org

September 25, 2017

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

RE: *Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 Fed. Reg. 34,616 (July 26, 2017), RIN 1235-AA20

Dear Ms. Smith:

On behalf of the Leadership Conference on Civil and Human Rights and the undersigned organizations, we submit the following comments on the Wage and Hour Division's Request for Information on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (RIN 1235-AA20).[1]

The Department of Labor's 2016 Final Rule updating the overtime standards was a long-overdue change that strengthened critical wage protections for working and middle-class families.[2] It is the product of a comprehensive, thorough, multi-year rulemaking process that provided ample justification for the Department's ultimate conclusions. And it will directly benefit as many as 12.5 million people – a working population that includes a disproportionate share of women and people of color. For the Department to begin a new rulemaking effort with the goal of weakening these wage protections would not only be a punch in the gut to working families in America, but also would be extremely difficult to defend in court against the backdrop of the rulemaking record that supports the 2016 Final Rule. As explained further in this comment, we therefore strongly oppose any effort to undermine or weaken the 2016 Final Rule.

I. Introduction. Congress's enactment of the Fair Labor Standards Act nearly 80 years ago codified a fundamental tenet of our economy: a hard day's work should lead to a fair day's pay. The Act provides basic rights and wage protections for workers in America,

[1] *See Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 82 Fed. Reg. 34,616 (July 26, 2017) (the "2017 Request for Information").

[2] Final Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 81 Fed. Reg. 32,391 (May 23, 2016) (the "2016 Final Rule").

including federal minimum wage and overtime requirements. Under the Act, most covered workers are entitled to the minimum wage as well as time-and-a-half pay for more than forty hours of work in a week. By 2016, however, the Department of Labor's regulations regarding exemptions from the Act's overtime requirement – particularly for executive, administrative, and professional employees (often referred to as the "white collar" exemption) – had fallen significantly out of date with economic realities, with the result that millions of workers Congress originally intended to be protected by the Act were instead being denied overtime protections and even the right to the minimum wage.

For example, the $455 per week standard salary level set in 2004 (with no provision for automatic updating) had, by 2015, fallen *below* the poverty line for a family of four, and covered less than 10 percent of full-time salaried workers.[3] By contrast, in 1975, 62 percent of full-time salaried workers were eligible for overtime pay.[4] Allowing salaried workers earning below the poverty threshold to be forced to work more than forty hours a week without receiving overtime pay had a particularly harsh impact on female-headed households and communities of color; and, by essentially allowing the white collar exemption to swallow the rule, was completely divorced from Congress's original intent.

The 2016 Final Rule addressed these shortcomings by raising the standard salary below which salaried workers are automatically eligible for overtime pay from $455 to $913 per week; establishing a mechanism for automatically updating the standard salary test to prevent future erosion of overtime protections; and retaining a straightforward duties test to make it easier for employers to administer.[5] These changes provide new or strengthened overtime protections for as many as 12.5 million people,[6] while also increasing employment by spreading work to new or existing employees.

The workers directly benefited by the Department's 2016 Final Rule are primarily women, people of color, and low-income workers. For example, women make up 47% of the salaried workforce, but nearly 51% of the workforce receiving new and strengthened overtime protections under the 2016 Final Rule.[7] Black and Hispanic workers are similarly overrepresented in the class of workers who benefit from the 2016 Final Rule: black workers are 8.9% of the salaried workforce but 12% of workers who

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[3] Notice of Proposed Rulemaking, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 80 Fed. Reg. 38,516, 38,521 & n.11 (July 6, 2015) (the "2015 NPRM").

[4] *See* White House Office of the Press Secretary, *Fact Sheet: Middle Class Economics – Rewarding Hard Work by Restoring Overtime Pay* (June 30, 2015), at https://obamawhitehouse.archives.gov/the-press-office/2015/06/30/fact-sheet-middle-class-economics-rewarding-hard-work-restoring-overtime.

[5] *See* 2016 Final Rule, 81 Fed. Reg. at 32,393.

[6] Economic Policy Institute, *The New Overtime Rule Will Directly Benefit 12.5 Million Working People: Who They Are and Where They Live*, tbl. 1 (May 17, 2016), at http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/. The Labor Department's own estimate projected that 13.1 million workers will benefit, with 4.2 million workers getting new overtime protections and 8.9 million workers receiving strengthened overtime rights. *See* U.S. Department of Labor, *Overtime Final Rule: Summary of the Economic Impact Study* (May 2016), at https://www.dol.gov/whd/overtime/final2016/overtimeFinalRule.pdf.

[7] Economic Policy Institute, *The New Overtime Rule Will Directly Benefit 12.5 Million Working People: Who They Are and Where They Live*, tbl. 1 (May 17, 2016), at http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/.

directly benefit from the Final Rule; and Hispanic workers represent 11.8% of the salaried workforce, but 16% of those who directly benefit from the 2016 Final Rule's new and strengthened overtime protections.[8] Put differently, nearly one-third of all black and Hispanic salaried workers (31.3% and 31.5% respectively) receive new or strengthened overtime rights under the 2016 Final Rule, compared to about one-fifth of all white salaried workers.[9] The rule also expands economic opportunity for workers with lower educational attainment: Workers with only a high-school diploma make up 15.5% of the salaried workforce nationwide, but are more than 25% of workers whose overtime rights are expanded or strengthened by the 2016 Final Rule.[10]

These protections are particularly important for women and people of color because those workers already face a persistent wage gap in our economy. According to the most recent annual data, the median wage for full-time salaried female employees in 2016 was just 81% of the median for salaried male employees.[11] Disparities for people of color are even greater: the median wage for full-time salaried black employees was 80.5% that for whites, and the comparable gap for Hispanic workers was 74.5%.[12] By providing new and strengthened overtime rights for a class of salaried workers that was disproportionately minority and female, the 2016 Final Rule helps close these unjustified wage gaps based on race and sex.

Women, people of color, and lower-income workers will be among the workers most harmed if the Department of Labor revisits the 2016 Final Rule and lowers the standard salary threshold or makes other changes that weaken overtime protections. These working families need and deserve a fair day's pay for a fair day's work. We will oppose any revised or amended rulemaking that would weaken overtime protections and reduce economic opportunity for working- and middle-class families.

II. Responses to request for information. The Department has asked for information on a series of questions to aid in formulating a proposal to revise the 2016 Final Rule, with a focus on "lowering regulatory burden" pursuant to Executive Order 13,777.[13] More detailed input on each question follows. Broadly speaking, however, the Department's Request for Information retreads questions the Department already exhaustively considered and resolved in its rulemaking just last year.

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See* Bureau of Labor Statistics, *Research Series on Deciles of Usual Weekly Earnings of Nonhourly Full-Time Workers, Annual Average 2016*, at https://www.bls.gov/cps/research_nonhourly_earnings_2016.htm. These disparities persist in the most recent quarterly data for 2017 as well, and reflect a salary gap of 82.2% for women, 77.9% for black, and 76.9% for Hispanic workers as compared to male and white salaried workers respectively. *See* Bureau of Labor Statistics, *Research Series on Deciles of Usual Weekly Earnings of Nonhourly Full-Time Workers, 2nd Quarter 2017 Averages*, at https://www.bls.gov/cps/research_nonhourly_earnings_2017q2.htm.

[12] *See* Bureau of Labor Statistics, *Research Series on Deciles of Usual Weekly Earnings of Nonhourly Full-Time Workers, Annual Average 2016*, at https://www.bls.gov/cps/research_nonhourly_earnings_2016.htm.

[13] 2017 Request for Information, 82 Fed. Reg. at 34,618 (citing Exec. Order 13,777, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017)).

The 2016 Final Rule was the product of an extremely thorough rulemaking process that began when President Obama signed a Presidential Memorandum in March 2014 directing the Department to update the regulations defining which white collar workers are protected by the FLSA's minimum wage and overtime standards.[14] Following issuance of that Memorandum, the Department conducted an extensive outreach program, ultimately meeting with over two hundred organizations and stakeholders to identify concerns with the current regulations and suggestions for changes.[15] That input informed the Department's Notice of Proposed Rulemaking, published the following year.[16] The Department then received and reviewed more than 270,000 comments on its proposal, and discussed its responses to those comments in a comprehensive final rule and detailed economic analysis published just last year.[17]

In light of this recent, painstaking, multi-year rulemaking effort, any decision by the Department to propose and adopt a new approach that, in essence, disagrees with its own prior conclusions would be subject to searching judicial review.[18] Our responses to the specific questions in the Department's Request for Information follow.

1. Establishing a new standard salary level based on the 2004 methodology would perpetuate fundamental flaws with the 2004 regulatory scheme. The Department seeks comment on whether the salary level set in the 2016 Final Rule should be discarded and replaced with a new standard salary level that uses the Department's 2004 rulemaking as a benchmark (to be updated either by indexing the 2004 salary level for inflation, or by applying the 2004 methodology to current salary data). The 2004 salary level and methodology are inappropriate benchmarks for future rulemaking because, as the Department acknowledged in its 2016 Final Rule, that approach was fundamentally flawed and led to indefensible results.[19]

The Department's regulations implementing the EAP exemption have for the past eighty years generally required that employers establish three factors in order to treat employees as exempt (and therefore overtime-ineligible): the employee must (1) be paid on a salary basis, (2) earn above a specified salary threshold, and (3) have primarily executive, administrative, or professional duties. For nearly all of the time period until the Department's 2004 rulemaking, the Department's methodology for assessing the

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[14] *See* Presidential Memorandum – Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737 (Apr. 3, 2014) (the "2014 Presidential Memorandum").

[15] *See* 2016 Final Rule, 81 Fed. Reg. at 32,396.

[16] *See* 2015 NPRM, 80 Fed. Reg. at 38,516.

[17] *See* 2016 Final Rule, 81 Fed. Reg. at 32,397.

[18] *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (explaining that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009)); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

[19] *See* 2016 Final Rule, 81 Fed. Reg. at 32,392 ("[T]he Department has concluded that the effect of the 2004 Final Rule's pairing of a standard duties test based on the less rigorous short duties test with the kind of low salary level previously associated with the more rigorous long duties test was to exempt from overtime many lower paid workers who performed little EAP work and whose work was otherwise indistinguishable from their overtime eligible colleagues. This has resulted in the inappropriate classification of employees as EAP exempt . . . .").

second and third of these factors involved two separate approaches: employers could satisfy either a "long test" that combined a strict test of employee duties with a lower salary level, or a "short test" that combined an easier duties test with a higher salary level.[20] The purpose of the inverse relationship between these two factors was to ensure that an employer seeking to exempt lower-paid workers from receiving overtime would have to make a more rigorous showing that the employee's job functions were truly "executive, administrative, or professional"; but to demonstrate that a higher-paid employee was exempt, employers would be subject to a less stringent demonstration of job duties.

In 2004, however, the Department discarded this two-tiered approach and created a "standard" test that paired a duties analysis based on the less-stringent short duties test with the lower salary level derived from the previous long-test salary level.[21] In other words, the Department abandoned its longstanding expectation that employers seeking to exempt lower-paid workers from overtime be required to meet a more rigorous showing of job duties, and decided instead to allow employers to claim overtime exemptions for relatively low-paid employees without demonstrating any searching review of their job functions. The predictable consequence of this decision was to deprive hundreds of thousands of salaried workers of the overtime protection they were entitled to: by the Department's own estimate last year, more than 732,000 white collar salaried workers earning between $455 and $913 per week (the 2004 and 2016 standard salary levels, respectively) were in fact overtime-eligible but improperly misclassified.[22]

The Department's 2016 Final Rule corrected for this mismatch by retaining the less strict duties test (in line with the historical short-test approach), while returning to a higher salary threshold (also in line with the historical short-test salary level approach). If the Department were instead to revert to the mismatch in the 2004 approach by setting a salary level that applied the 2004 methodology to current salary data, it would be intentionally adopting a standard that it knows will subject hundreds of thousands of employees to the risk of routine overtime wage theft – more than one in every eight salaried workers earning between $455 and $913 per week, by the Department's own recent estimation.[23] And vulnerable workers – including low-wage workers, young people, immigrants and noncitizens, women, and people of color – are the most likely to be subject to wage theft.[24] The deliberate exclusion of low-paid and economically vulnerable workers from overtime eligibility cannot justifiably be perpetuated, yet also cannot be avoided under the 2004 approach.

If the Department were to propose updates based on the 2004 methodology or salary level notwithstanding these indefensible results, it would need to significantly expand the duties test to better account for Congress's intent that only bona fide executive, administrative, and professional employees be exempt from overtime pay. The Department "has always recognized that the salary level test works in

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[20] *See id.* at 32,392 (describing the Department's regulatory approaches over time).

[21] *See* Final Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,192 (Apr. 23, 2004) (the "2004 Final Rule").

[22] 2016 Final Rule, 81 Fed. Reg. at 32,463.

[23] *See id.*

[24] *See, e.g.*, Economic Policy Institute, *Employers Steal Billions from Workers' Paychecks Each Year*, at 3, 20 (May 10, 2017), at http://www.epi.org/files/pdf/125116.pdf.

tandem with the duties requirements to identify bona fide EAP employees and protect the overtime rights of nonexempt white collar workers."[25] Returning to the lower salary level reflected in the 2004 approach would require a much more extensive duties analysis as an "imperative to ensure that overtime-eligible employees are not swept into the exemption."[26]

The RFI also asks whether, if the Department does propose updates to the 2004 salary level, those updates should be based on intervening price inflation or instead based on salary growth. For the reasons described in our response to Question 11 below, adjusting based on wages – not prices – is the most appropriate means of ensuring the salary level best approximates the pool of salaried workers that Congress intended to be presumptively eligible for overtime based on their pay.

However, as noted, any update to the standard salary level that is benchmarked to either the 2004 threshold or methodology would be fundamentally flawed. Indeed, in finalizing the 2016 Final Rule, the Department considered and rejected both approaches.[27] A proposal to jettison the Department's own reasoned conclusions from just last year would be closely scrutinized by the courts in any subsequent rulemaking challenge.

2. Using different salary levels that vary by region or size of employer is impractical and could lead to inequitable results. The Department requests input on whether the regulations should contain multiple standard salary levels that vary by size of employer, region, or some other measure. The Department's regulations have always employed a nationwide salary level that applies across regions and employers – an approach that promotes clarity and predictability for workers and employers alike.

The 2016 Final Rule already based the nationwide threshold on the lowest-wage Census Region (currently the South), rather than setting the salary level based on national earnings, precisely to accommodate regional wage differences and to avoid making overtime-eligible too many bona fide EAP employees in low-wage areas.[28] Regional variations would therefore have the most likely effect of *raising* the average threshold nationwide. And to the extent that local or industry-specific variations would be intended to adjust the salary level even further downward, to account for lower-wage industries or geographical areas, this approach would unreasonably exclude relatively higher-wage workers from protection. "[T]he salary threshold can be of little help in identifying bona fide EAP employees when large numbers of traditionally nonexempt workers in high wage areas earn in excess of the salary level."[29]

[25] 2016 Final Rule, 81 Fed. Reg. at 32,444.

[26] *Id.*

[27] *Id.* at 32,504 & tbl.32.

[28] *Id.* at 32,404.

[29] *Id.* at 32,410.

In addition, setting multiple salary levels based on region or industry would quickly become administratively infeasible and add to compliance burdens for employers.[30] The Department should continue to follow its longstanding approach of establishing a national floor for overtime eligibility.

3. Differentiating between the executive, administrative, and professional components of the EAP exemption is similarly unworkable and unnecessary. The Department also seeks comment on whether to establish different salary levels for the executive, administrative, and professional exemptions. The Department should retain the approach of establishing only one standard salary level for each Part 541 exemption (executive, administrative, and professional). The EAP exemptions are not easily distinguishable from one another; there is significant overlap in each of these exemptions, with workers in many occupations being potentially covered by multiple definitions.[31] Introducing variation would both raise the risk of worker misclassification and lead to significant compliance burdens for employers, with little apparent benefit.

As noted, the risk of worker misclassification bears most heavily on vulnerable workers, including people of color, immigrants, and women.[32] Changes to the rule that give greater discretion to employers therefore increase the risk that vulnerable workers in these categories and others with less bargaining power are harmed.

At minimum, to enable the Department to identify appropriate salary levels and to allow employers to accurately define employee classifications, significantly more rigorous duties tests for each exemption would be necessary. The administrative burden and likely increase in litigation that would accompany this kind of differentiation is inconsistent with the Department's burden-reduction goals, and would make it harder for workers to understand their rights and employers to comply with their obligations.

4. Barring changes to the standard duties test, the standard salary level should be set within the historical range of the short-test salary level. The Department's RFI asks whether the standard salary level should be aligned with the historical short-test salary level, the long-test salary level, or some other methodology. For the reasons explained in our response to Question 1 above, the 2016 Final Rule appropriately concluded that the standard salary level should be consistent with the historical short-test salary level approach, in order to maintain an inverse relationship with the strictness of the duties test. That is, assuming the Department retains a less searching duties test, the salary level must be set "high enough to prevent abuse" from misclassification, because higher salary is "the best single test of the employer's good faith in characterizing the employment as of a professional nature."[33] Any reduction in

[30] *See id.* at 32,411; *see also* 2004 Final Rule, 69 Fed. Reg. at 22,171.

[31] *See, e.g.*, 2004 Final Rule, 69 Fed. Reg. at 22,192.

[32] *See* Economic Policy Institute, *Employers Steal Billions from Workers' Paychecks Each Year* (May 10, 2017), at http://www.epi.org/files/pdf/125116.pdf.

[33] 2016 Final Rule, 81 Fed. Reg. at 32,413.

the standard salary level would require significant changes to make the duties test more stringent, "to ensure that overtime-eligible employees are not swept into the exemption."[34]

5. The standard salary level in the 2016 Final Rule works effectively in tandem with the standard duties test to determine exempt status. The Department's RFI asks for input on whether the salary level set in the 2016 Final Rule works effectively with the standard duties test or instead "eclipses" the historical role of the duties test in determining exempt status. The Department appears to be asking whether the standard salary test was set too high in the 2016 Final Rule such that it has displaced the duties test as a useful measure of determining exempt status. To the contrary, the 2016 Final Rule was a restoration of – not an aberration from – the appropriate and historical role of the salary level in protecting overtime entitlement for working people.[35]

In addition, at the 2016 level, there remain 6.5 million white collar salaried workers (fully 47% of all white collar salaried workers who fail the duties test) earning above the standard salary threshold but who would fail the duties test and therefore be overtime-eligible.[36] By contrast, only 22% of salaried white collar workers who currently meet the standard duties test earn less than the 2016 salary level of $913 per week.[37] In other words, the standard duties test continues to play a central role in determining overtime eligibility for white collar salaried workers. For the 6.5 million workers earning above the threshold but who fail the duties test, it is the duties test and not the salary level that determines their nonexempt status.

As the Department is of course aware, a federal district judge recently concluded that "the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by" the FLSA,[38] and held that the 2016 Final Rule impermissibly "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties."[39] In appealing the same court's earlier order preliminarily enjoining the 2016 Final Rule on the same grounds, the Department of Justice made clear that "the fact that salary level will be dispositive of exempt status in some cases does not transform the Department's three-part regulations into a 'salary only' test."[40] This conclusion is clearly correct, as is illustrated by (among other factors) the 6.5 million salaried workers whose nonexempt status is controlled by the duties test. And by setting the

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[34] *Id.*

[35] *See id.* at 32,410 (noting that ratio between the salary level and the minimum wage is comparable in the 2016 Final Rule to the level set in every rulemaking since 1949, with the exception solely of the 2004 rulemaking); *see also* Br. for the United States, *Nevada v. U.S. Dep't of Labor*, No. 16-41606, at 29 (5th Cir. filed Dec. 15, 2016) ("The updated salary level is commensurate with salary levels that the Department has set over the past 75 years, and the updated salary-level test operates in the same manner as prior salary-level tests.").

[36] 2016 Final Rule, 81 Fed. Reg. at 32,465 & tbl.3.

[37] *Id.*

[38] *Nevada v. U.S. Dep't of Labor*, No. 4:16-cv-00731, Order Granting Plaintiffs' Motion for Summary Judgment, slip op. at 14 (E.D. Tex. Aug. 31, 2017).

[39] *Id.*, slip op. at 15-16.

[40] *See* Reply Br. for the United States, *Nevada v. U.S. Dep't of Labor*, No. 16-41606, at 14 (5th Cir. filed June 30, 2017).

standard salary threshold at the lower end of the range of prevailing salaries – that is, the 40th percentile of salaried workers in the lowest-paid Census Region in the country – the 2016 Final Rule properly relied on the salary-level test as a floor to screen out obviously nonexempt employees.

In determining where to set the standard salary threshold, the Department was also balancing the concern that *over*-weighting the duties test leads to a greater likelihood of worker misclassification, resulting in wage theft for vulnerable, lower-income workers. As noted, the Department estimated that the standard salary level in the 2016 Final Rule would protect at least 732,000 salaried workers from unfairly and illegally being treated as overtime-exempt, as compared to the 2004 standard salary level.[41] Lowering the salary threshold in the interest of not "eclipsing" the duties test would have the effect of exposing a greater number of low-income salaried workers to overtime wage theft. There is therefore no basis to conclude that the duties test has been inappropriately undermined, and the Department should not revisit this balance in subsequent rulemaking.

6. The experience of those companies that implemented the 2016 Final Rule demonstrates that the salary threshold was workable. The Department requests input on a number of questions regarding implementation of the 2016 Final Rule, including whether particular employers faced unique challenges in preparing for the rule's effective date, and how employers have responded following the district court's order enjoining the rule. Nothing in the experience of employers that implemented the 2016 Final Rule would support an effort by the Department to revisit or lower the standard salary threshold below the 2016 level.

Employers had a number of options for implementing the 2016 Final Rule, as the Department's RFI acknowledges, including raising salaries of exempt employees, reducing the hours of newly non-exempt employees, or converting salaried workers to an hourly pay rate and paying them overtime for weekly hours worked over forty.[42] In addition, employers had access to a wide range of comprehensive compliance assistance materials from the Department of Labor, including materials tailored to specific industries facing unique circumstances.[43] And press accounts indicate that in many industries and sectors, a sizable share of employers that had already taken steps to comply with the 2016 Final Rule intended to retain their updated practices even after the district court injunction – from large retailers, to food and beverage providers, to colleges and universities.[44] If anything, the experience of preparing for the

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[41] 2016 Final Rule, 81 Fed. Reg. at 32,463.

[42] *See* 2017 Request for Information, 82 Fed. Reg. at 34,618.

[43] *See, e.g.*, Wage & Hour Div., U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime under the Fair Labor Standards Act* (May 18, 2016), at https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf; U.S. Dep't of Labor, *Overtime Final Rule and State and Local Governments*, at https://www.dol.gov/sites/default/files/overtime-government.pdf; Wage & Hour Div., U.S. Dep't of Labor, *Guidance for Higher Education Institutions on Paying Overtime under the Fair Labor Standards Act* (May 18, 2016), at https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf.

[44] *See, e.g.*, Andrew Kreighbaum, *Survey on Colleges' Responses to Overtime Changes*, Inside Higher Ed (Dec. 15, 2016), at https://www.insidehighered.com/quicktakes/2016/12/15/survey-colleges-responses-overtime-changes (reporting survey results that about one-third of colleges and universities would delay payroll changes, with the remainder implementing their planned changes in full or in part); Lydia DePillis, *Last-Minute Injunction Creates a Patchwork of Compliance*, Houston Chron. (Nov. 30, 2016), at http://www.houstonchronicle.com/business/

effective date of the 2016 Final Rule weighs in favor of retaining that standard in the interest of minimizing compliance burdens on employers and of protecting settled expectations by workers.[45]

7. Eliminating the use of a salary threshold entirely would lead to worker misclassification and promote uncertainty for workers and employers alike. The Department's RFI asks whether a duties-only test for identifying EAP-exempt workers would be preferable to the current test. Eliminating the salary test entirely and relying only on a duties test would dramatically complicate application of the rule and expose even more vulnerable workers to the risk of misclassification.

The purpose of the salary test is to establish a presumptive dividing line between nonexempt workers intended to be protected by the FLSA's overtime provisions and workers who may be performing exempt duties. "Throughout the regulatory history of the FLSA, the Department has considered the salary level test the 'best single test' of exempt status."[46] The test provides a bright line that is "easily observed, objective, and clear" – just a few of the reasons why the salary test has been a feature of every Department rulemaking on the EAP exemption since 1938.[47]

In addition, the salary test is – as the Department has also acknowledged – the "principal delimiting requirement preventing abuse."[48] Its elimination would both increase the risk of improper misclassification and lead to greatly increased litigation regarding overtime eligibility. In addition, the lowest-paid workers are most likely to be misclassified because they have the least bargaining power to protest, with the result that workers on the lower end of the earnings distribution – who are disproportionately women, people of color, immigrants, and young workers – would be the most likely victims of wage theft and improper overtime denials.

Addressing this increased risk would require "significant restructuring of the regulations," including the "use of more rigid duties tests."[49] All of these steps would be contrary to the goal of simplifying application of the exemption. The Department should instead follow its unbroken historical practice and retain a salary test in any forthcoming proposal.

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texasnomics/article/Last-minute-injunction-creates-a-patchwork-of-10644275.php (noting statements by Walmart and Starbucks that changes to their pay practices would stay in place).

[45] *Cf. Mortgage Bankers*, 135 S. Ct. at 1209 (noting that when considering changes to an existing policy, agencies must take into account serious reliance interests engendered by its prior policy) (citing *Fox Television Stations*, 566 U.S. at 515).

[46] 2016 Final Rule, 81 Fed. Reg. at 32,449 (quoting Harold Stein, *Report and Recommendations of the Presiding Officer*, Wage & Hour Div., U.S. Dep't of Labor, at Hearings Preliminary to Redefinition (Oct. 10, 1940)).

[47] *Id.*

[48] *Id.* at 32,422.

[49] *Id.* (quoting 2004 Final Rule, 69 Fed. Reg. at 22,172).

8. The 2016 Final Rule does not make specific occupations overtime-eligible that were historically exempt. Data from the Economic Policy Institute makes clear that the 2016 Final Rule does not have the effect of rendering particular occupations overtime-eligible that previously were not.[50]

It is certainly the case that some occupations have a disproportionate share of affected workers under the 2016 Final Rule relative to their share of the salaried workforce (including construction, wholesale and retail trade, leisure and hospitality, and public administration),[51] but these data are not evidence that those industries are unduly burdened by the 2016 Final Rule. Rather, the data show that workers in those occupations were most exposed to misclassification risk based on the 2004 mismatch; a disproportionate risk that has been corrected by the 2016 Final Rule.

9. The 10% maximum allowance for nondiscretionary bonuses and incentive payments should not be enlarged. In determining for the first time that nondiscretionary bonuses would be allowed to satisfy a portion of the salary test for the EAP exemption, the Department concluded in the 2016 Final Rule that some allowance for bonus payments was appropriate to modernize the rule in light of current business practices, but that certain limits were necessary to avoid undermining the salary test.[52] The Department accordingly capped the nondiscretionary bonus allowance at 10% of the standard salary threshold and required it to be paid no less than quarterly, because a larger bonus allowance or more time between nondiscretionary bonus payments would undermine the flexibility and income security associated with exempt status.[53]

In reaching this conclusion, the Department noted the strong concerns of worker advocates that a larger bonus allowance (or, in fact, any bonus allowance at all) would increase the risk of misclassification, make it harder for workers to understand and enforce their overtime eligibility, and erode the salary basis test by replacing a predictable salary with the uncertainty of fluctuating compensation.[54] Absent greater experience with the new 10% cap – and, in particular, absent more evidence on whether the bonus allowance has in fact led to the risk of misclassification that worker advocates predicted – the Department should not now increase the share of the salary test that can be satisfied with nondiscretionary bonus payments. The 2016 Final Rule specifically noted that because the bonus allowance was a new feature of the overtime requirements, more experience with its practical application would be necessary before changing it.[55] Any decision by the Department to *raise* the bonus allowance while also *lowering* the standard salary level would be particularly unwarranted, because it

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[50] See Economic Policy Institute, Comment on Department of Labor Request for Information, Response to Question 8 (Sept. 25, 2017).

[51] Economic Policy Institute, *The New Overtime Rule Will Directly Benefit 12.5 Million Working People: Who They Are and Where They Live*, tbl. 4 (May 17, 2016), at http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/.

[52] 2016 Final Rule, 81 Fed. Reg. at 32,423 – 32,427.

[53] *Id.* at 32,423.

[54] *Id.* at 32,425.

[55] *Id.* at 32,426 ("We believe that a 10 percent limit is also appropriate given that we are including nondiscretionary bonuses, incentive payments, and commissions as part of the salary level test for the first time and the full impact of this change on determination of EAP status is not yet known.").

would – without sufficient factual basis – expose workers to significantly greater risk of being classified overtime-ineligible while not in fact enjoying the job benefits historically associated with exempt status.

10. Varying the compensation levels for the highly-compensated-employee exception by region or size of employer is unnecessary. For the same reasons described in our response to Question 2 above, varying the compensation levels for the highly-compensated-employee exception would create unworkable administrative challenges. In addition, the 2016 Final Rule already rejected a request from the Chamber of Commerce to provide regional adjustments for the HCE salary level, concluding that "[t]he HCE exemption must use a national wage rate to effectively ensure that workers such as secretaries in high-wage areas, such as New York City and Los Angeles, are not inappropriately exempted based upon the HCE exemption's minimal duties test."[56] Any new proposal by the Department to reverse this position and adopt the Chamber of Commerce's preferred approach – on the basis of no new information – would require substantial justification (including as to how secretaries and other workers in high-wage areas would not be inappropriately exempted).

11. The automatic indexing provisions included in the 2016 Final Rule are necessary to prevent erosion of the salary threshold over time. The experience of agency rulemaking under the FLSA makes clear that absent a mechanism for automatically updating the salary threshold, any fixed level will gradually become out of date, increasing the risk of employees being inappropriately classified as exempt. However well-calibrated the salary threshold, a fixed level will become obsolete as wages for non-exempt workers increase over time and the real value of the salary threshold falls. And rulemaking to update the fixed level has historically been infrequent: the 2016 Final Rule was only the eighth update to the salary level in nearly 80 years (and only the second update in more than 40 years, since 1975). As the Department previously recognized, these "lapses between rulemakings have resulted in EAP salary levels that are based on outdated salary data, and thus are ill-equipped to help employers assess which employees are likely to meet the duties test for the exemptions."[57] Automatic indexing is therefore critical to avoid the problem that a sensible salary threshold today becomes an arbitrary and unjustifiable salary threshold tomorrow.

Automatic indexing also serves the Department's current regulatory reform goals by ensuring the salary threshold is based on the best available data (and thus remains a meaningful, bright line test), and produces more predictable and incremental salary level changes. Gradual changes occurring at predictable intervals will be much easier for employers to plan for and implement than infrequent – and thus more drastic – salary level changes.

The Department considered two different mechanisms for automatic updates in its most recent rulemaking: updating the salary level based on a fixed percentile of earnings for full-time salaried workers (that is, applying the same methodology used to set the initial salary level), and updating based on inflation.[58] Indexing to wages is preferable for the same reason that the Department used wages in

[56] *Id.* at 32,429.

[57] 2015 NPRM, 80 Fed. Reg. at 38,537.

[58] *See id.*

setting the initial salary level: the salary level reflects an appropriate earnings-based demarcation between exempt and non-exempt workers, and applying the same methodology to automatic updating will best ensure that future salary levels continue to meet the same objectives. In addition, because the underlying purpose of the FLSA is to regulate national wage policy, and because the EAP exemptions are intended only to cover higher-paid employees in the workforce, indexing to wages instead of prices is most consistent with Congress's statutory goals.[59]

If the Department revisits its automatic indexing decisions, it should conclude that indexing the salary threshold to wage growth remains the most effective and defensible way of keeping the salary level current, to avoid allowing more employers of low-wage workers to sweep them into the EAP exemptions over time.

III. Conclusion. The 2016 Final Rule updating the Department of Labor's overtime regulations was a critically important step to restore Congressionally-intended wage protections to millions of working- and middle-class employees in America. The Department's purported basis for revisiting this comprehensive rulemaking now, just one year later, is the directive to lower regulatory burdens pursuant to Executive Order 13,777.[60] But the 2016 Final Rule was already designed with burden reduction in mind,[61] and as explained in our comments, many of the approaches the Department is examining through this Request for Information would have the certain effect of *both* harming working families *and* making overtime requirements harder for employers to administer, while also exposing employers to greater risk of litigation.

No changes to the 2016 Final Rule are necessary to accomplish the goals of Executive Order 13,777. We strongly urge the Department to retain these critical overtime protections for working families. Please contact Kristine Lucius, Executive Vice President for Policy at The Leadership Conference on Civil and Human Rights, at (202) 466-3311 if you have questions about these comments.

Sincerely,

The Leadership Conference on Civil and Human Rights
Asian Americans Advancing Justice | AAJC
National CAPACD
NAACP
UnidosUS (formerly National Council of La Raza)

[59] See 29 U.S.C. §§ 202, 206, 207

[60] 2017 Request for Information, 82 Fed. Reg. at 34,618 (citing Exec. Order 13,777).

[61] *See, e.g.*, 2016 Final Rule, 81 Fed. Reg. at 32,410, 32,414, 32,422, 32,451, 32,466; *see also* 2014 Presidential Memorandum, 79 Fed. Reg. at 18,737 (directing the Department to "simplify the regulations to make them easier for both workers and businesses to understand and apply").