Senate Democratic Policy Committee Hearing

"Will the Bush Administration's Overtime Proposals Mean Less Pay and Longer Hours for American Workers?"

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STATEMENT FOR THE RECORD

"The Department Of Labor's Proposed "Standard" Salary Level"

A. Introduction

This analysis addresses only the salary level for exempt status for executive, administrative, and professional employees under Section 13(a)(1) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 213(a)(1), in regulations proposed by the U.S. Department of Labor on March 31, 2003 (68 Fed. Reg. 15560).

The current salary levels of $155 per week under the so-called long test for executive and administrative employees and $170 for professionals, and $250 per week under the so-called short test for all three classifications, have not been adjusted since 1975, despite the fact that the Secretary intended those levels to be "interim" or temporary rates (40 F.R. 7091 (Feb. 19, 1975)). Both employers and employee advocates have long recognized that these 1975 levels require considerable upward adjustment if they are to provide meaningful tests for exempt status under the Act. A nonexempt worker paid the current $5.15 per hour minimum wage can earn $155 in just over 30 hours, $170 in 33 hours, and (with time-and-one-half overtime pay after 40 hours) $250 in less than 46 hours of work in a week. Accordingly, the Department itself recognizes that "the existing salary tests no longer provide employees or employers any help in distinguishing between bona fide executive, administrative, and professional employees and those who should not be considered for exemption." 68 Fed. Reg. at 15562.

The Department has taken several approaches in the past to decide how to increase the salary levels used in the regulations. The most accurate approach to set salary levels for exempt executive, administrative, and professional employees is first to determine the range of salaries actually paid to employees who qualify for the exemption in each of the three categories. The Department took this approach when it set new salary levels effective in 1959, based on a report the year before by Harry Kantor of the U.S. Department of Labor entitled "Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms 'Executive,' 'Administrative,' Professional,' 'Local Retailing Capacity,' 'Outside Salesman'" (March 2, 1958)("Kantor Report"). The Kantor Report also noted, as the Department mentions in its Preamble, that:

> the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the 'bona fide' executive, administrative, and professional employees without disqualifying any substantial number of such employees.

68 Fed. Reg. at 15570, quoting Kantor Report at 5. The Department's present proposal purports to use the approach of the Kantor Report. However, as we explain in detail below, the Department has completely misrepresented and misused the Kantor Report. <u>The actual methodology used in the Kantor Report would result today not in a "standard salary" of $425 as proposed by the Department, but instead in a "long test" salary of $610 per week and a "short test" salary of $980 per week</u>.

Another approach which the Department has used in the past to set new salary levels relies on the increase in the rate of inflation from the time of the most recent salary increase until the present, based on the Consumer Price Index (CPI). This was done in 1975, though the salaries actually adopted at that time were set at a "level slightly below" the actual CPI increase "to eliminate any inflationary impact." 40 Fed. Reg. 7091 (Feb.19, 1975). The Department, as explained in more detail below, now rejects any reliance on the CPI on various grounds, but its reasoning for ignoring the CPI is highly dubious. Moreover, as is demonstrated below, the CPI increase serves at a very minimum as a reliable benchmark by which to gauge the reasonableness of the proposed salary levels. Upward adjustments in the current salary levels based on the CPI would result in salaries far higher than $425 per week -- namely, $530 for executive and administrative employees under the long duties test, $580 for professional employees under the long duties test, and $855 for all three categories of employees under the short duties tests.

Another approach used by the Department in the past, particularly in the earlier years when data published by the government on the salary levels of white-collar employees were less plentiful than in recent years, was to examine the wages of nonexempt employees, because the salary level established by the regulations must reliably and accurately distinguish between exempt employees and those who should be entitled to time-and-one-half overtime compensation. This approach was adopted in the report by Harry Weiss of the U.S. Department of Labor, entitled "Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541: Defining the terms 'Executive, 'Administrative,' 'Professional,' Local Capacity,' 'Outside Salesman' as Contained in Section 13(a)(1) of the Fair Labor Standards Act" (June 30, 1949)("Weiss Report"). As stated in the Weiss Report (in referring to the appropriate salary level for bona fide administrative employees), the salary level should be set significantly higher than the compensation earned by clerical employees, in order to have an effective "dividing line between clerical and administrative employees." Weiss Report at 16. The Department has not based its proposed salary of $425 on any such comparison. It is not surprising, then, that rate is far too low to act as an effective dividing line. For example, the median wage of payroll and timekeeping clerks in 2001 was $13.58 per hour (www.bls.gov/oes/2001/oes_43of.htm), which means that these employees earned $543.20 in a 40-hour week. Yet under the Department's proposal a salaried supervisor of two such clerks in a payroll department who earns the substantially lesser amount of $425 per week would be exempt, and hence deprived of minimum wage and overtime compensation protections. It would be quite impossible to say that such an exempt employee, who earns $118.20 per week less than the payroll and timekeeping clerks that he or she supervises, enjoys, as the Weiss Report put it, the "compensatory privileges" that accompany "a certain prestige, status, and importance" inherent in his job. Weiss Report at 8.

The Department's proposed salary of $425 per week is unreasonable not only because it falls far below the appropriate salaries indicated by all these methodologies, but also because it would result in an annual salary that is close to, or even below, the poverty level. The Department offers no justification why such impoverished workers should be denied the benefits of the minimum wage and overtime compensation protections of the FLSA. A salary of $425 per week equals $22,100 per year. In 2003, a family of four living on a salary of $425 per week would remain above the poverty line by only $71 per week.[1] Moreover, a family of four today with an income of up to $23,920 may be eligible for food stamps.[2] But that same family's breadwinner, earning a salary at or above $22,100, may be exempt and hence ineligible to earn overtime and thus help her family out of poverty. In addition, a single person caring for two or more children in 2003 can be eligible for the Earned Income Tax Credit if she earns less than $33,692; a single person caring for one child can be eligible for the Earned Income Tax

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[1] The U.S. Department of Health and Human Services' poverty guideline for a family of four in 2003 is $18,400. U.S. Department of Health and Human Services, The 2003 HHS Poverty Guidelines, The difference between the proposed salary threshold this poverty line is $3,700 per year or $71 per week.

[2] One of the requirements for determining eligibility for food stamps is that a household's gross income cannot be more than 130 percent of the federal poverty guidelines. Committee on Ways and Means, U.S. House of Representatives, 2000 Green Book, 873 (Oct. 6, 200). In 2003, the U.S. Department of Health and Human Services' poverty guideline for a family of four is $18,400. The food stamp eligibility ceiling for a family is therefore 130 percent of $18,400 or $23,920. U.S. Department of Health and Human Services, The 2003 HHS Poverty Guidelines, http://aspe.hhs.gov/poverty/03poverty.htm.

Credit if she earn less than $29,666.[3] But that very same breadwinner, under the Department's proposal, may be ineligible for overtime compensation. Further, in communities as economically diverse as Marion County, Indiana, Birmingham, Alabama, Dover, Delaware, Wakiki, Hawaii, and Hinds County, Mississippi, a salary of $22,100 annually would not provide a single mother with a preschool age child and a primary school age child the means to meet her family's basic needs-i.e. housing, childcare, food, transportation, healthcare, taxes-and thereby maintain familial self-sufficiency.[4] Clearly, the Department's current threshold fails to accomplish its purpose of distinguishing exempt from nonexempt employees.

B. The Department Has Not -- Despite its Claim to the Contrary -- Relied On and Improved Upon the Kantor Report's Methodology; If It Had, Then There Would Be No "Standard" Salary Test of $425 per Week, But Instead a Long Duties Salary Test of $610 Per Week and a Short Duties Salary Test of $980 per Week

The Department asserts that it has based its proposed $425 per week test on the approach used by DOL in the 1958 Kantor Report, which formed the basis for an increase early the next year in both the long and short salary tests. However, far from following the Kantor Report, DOL quotes selectively and misleadingly from that report at the same

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[3] Internal Revenue Service Bulletin 2002-46 at 847 (Nov. 18, 2002), http://www.irs.gov/pub/irs-jrbs/irb02-46.pdf.

[4] Diana Pearce with Jennifer Brooks, The Self-Sufficiency Standard for Alabama, Diana Pearce and Wider Opportunities for Women (Feb. 2003); Diana Pearce with Jennifer Brooks, The Self-Sufficiency Standard for Delaware, Diana Pearce and Wider Opportunities for Women, (Jan. 2003); Diana Pearce with Jennifer Brooks, The Self-Sufficiency Standard for Hawaii, Diana Pearce and Wider Opportunities for Women (April 2003); Diana Pearce with Jennifer Brooks, The Self-Sufficiency Standard for Mississippi, Diana Pearce and Wider Opportunities for Women (March 2003); Diana Pearce with Jennifer Brooks, The Self-Sufficiency Standard for Indiana, Diana Pearce and Wider Opportunities for Women (Dec. 2002).

time as it distorts the very methodology that it purports to embrace. If DOL had used the same methodology as used in the Kantor Report, then it would have set the long salary test at $610 and the short salary test at $980. Further, the Department would not attempt to couple a "standard" single salary level modeled on the current lower threshold with a stripped down version of the long duties test.

In describing how it arrived at $425 for the standard salary test, DOL asserts that it "was guided by the prescient analysis" of the 1958 Kantor Report, 68 Fed. Reg. at 15570, which states that:

> [I]t is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories.

Id., citing Kantor Report at 5. That central tenet led Kantor to conclude,

> from all the evidence, that the lower proportion of the range of the prevailing salaries will be most nearly approximated if the tests are set at about the levels at which no more than about 10 percent 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 would fail to meet the tests.

Id., citing Kantor Report at 6-7. DOL purports to adopt this methodology but, at the same time, to protect even more employees from becoming exempt (and hence losing minimum wage and overtime compensation protection) than did Kantor, by retaining nonexempt status for:

> <u>the lowest 20 percent, rather than the lowest 10 percent</u>, because of the proposed change from the "short" and "long" test structure in the proposed rule and because the data [used by DOL in its current study] included some salaried employees who would not meet the duties tests for the exemption.

68 Fed. Reg. at 15571 (emphasis added). The Department thus "proposes a standard salary level test of $425 per week" by:

> [a]pplying this [Kantor's] analysis, and also considering adjustments to the current salary levels for inflation. . . . Under this level [of $425], <u>approximately the bottom 20 percent of salaried employees</u> would fall below the minimum salary requirement and be automatically entitled to overtime pay.

Id. (emphasis added).

Despite these assertions, a careful reading of the Kantor Report reveals that DOL's approach differs markedly from Kantor's in three critical respects, each of which depresses the proposed salary threshold from where DOL would have to set it if it had, in fact, paid allegiance to Kantor.

First, the scope of the salary surveys was far different. Kantor's salary survey was limited to those executive, administrative and professional employees who were found to be exempt -- that is, employees who were paid on a salary basis, and met the applicable salary and duties tests. The Report explicitly explains this approach by stating that the survey relied upon was "of salaries paid to employees <u>who qualified for exemption</u>." Kantor at 6 (emphasis added). DOL's proposal, by contrast, is based on a study that is not restricted to executive, administrative, and professional employees who satisfied both the salary level and duties tests, nor even to a larger group of all salaried executive, administrative, and professional employees, regardless of whether or not they met the salary tests and the duties tests. Instead, the DOL survey encompasses the broadest possible group -- *all* salaried employees in every occupation, even those who could not be regarded by any stretch of the imagination as executive, administrative, or professional employees. Specifically, this survey, according to the Department, was of

> actual salary levels based on the BLS year 2000 Current Population Survey (CPS) Outgoing Rotations data set. This data included full-time, salaried workers aged 16 and above, but excluded the self-employed, agricultural workers, volunteers, and federal employees . . . .

68 Fed. Reg. at 15570. The current DOL survey, therefore, even though it is restricted to salaried employees, includes many employees who could not possibly qualify for exempt status under 29 C.F.R. Part 541 even now, because their salaries are too low and/or their job duties do not satisfy the duties tests. This difference between the Kantor survey and the Department's present survey has profound effects, as we explain below when we show the much higher salary levels that the Department would have arrived at if it had

actually followed Kantor's methodology.

The second critical difference in approach between the Kantor Report and the current DOL study is that Kantor increased the salary levels that resulted from his salary survey to reflect increases in salaries that had occurred between the date of the survey (January through August 1955) and the publication date of the Report (March 3, 1958). Kantor Report at 9. The current DOL proposal, by contrast, makes no such upward adjustment, even though it relies on data from 2000 in order to establish a salary threshold for 2003. Specifically, after eliminating the lowest-paid 10 percent of all exempt executive, administrative, and professional employees, Kantor found that "the survey data indicated salary levels of approximately $75 a week for executives, and $85 to $90 a week for administrative and professional employees." *Id.* at 8. However, since "[i]t is common knowledge that wages and salaries are generally higher now than they were at the time of the survey," *id.* at 9, Kantor looked at data from the Census Bureau and the Bureau of Labor Statistics to determine the appropriate increase in the survey-based salary levels. This resulted in a 6.7 percent increase of the recommended weekly salary from $75 to $80 for executive employees and an increase of 5.8 percent and 11.8 percent, respectively, from $85-$90 to $95 for administrative and professional employees. *Id.* at 9. DOL in its current proposal omits any mention of this highly significant upward adjustment in salary levels.

The third way in which Kantor's approach in determining salary levels differs from the Department's is that Kantor continued the requirement, which was introduced into the regulations in 1950, for a "long" -- and more stringent -- duties tests for the lower salaries of $80 and $95 per week and a higher or "upset" salary of $125 per week for those employees subject to the less stringent "short" duties test**s**. The Department's current proposal, by contrast, updates the salary historically associated with the "long" duties tests and then adopts it as the salary as the single "standard" salary, but couples it with a version of the long duties test that is less rigorous than the current long duties test. Even if the Department had set this "standard" salary at $610 per week instead of the proposed $425 per week, the effect of shortening the "long" duties tests is to expand the scope of the exemption, and thus to deprive a greater proportion of white-collar employees of the FLSA's protections than Kantor's approach did Adherence to Kantor's methodology can be achieved only if the current regulatory structure of two salary levels, attached to the long and short duties tests, continues in force, in which the lower salary level attaches to a more stringent duties test.

If DOL had actually followed the Kantor approach, rather than used it selectively to expand the scope of the exemption so enormously, then the proposed salary levels would be $610 per week for the "long" duties test and a $980 per week for the "short" duties test. In order to see why this is so, it is necessary to compare the data DOL relied on in making its $425 salary proposal to the data from the 1999 report of the U.S. General Accounting Office entitled "Fair Labor Standards Act: White-Collar Exemptions in the Modern Workplace" (GAO Report GAO/HEHS-99-164)(1999)("GAO Report").

DOL does not rely today for its data, as it did in the Kantor Report, on the results of actual investigations conducted by the Wage and Hour Division to determine employers' compliance with Part 541, which yielded information "on salaries paid to employees who qualified for exemption." Kantor Report at 6. Indeed, so far as we are aware, DOL does not possess any such data from actual investigations on which it can rely. DOL relies instead on the "Outgoing Rotations" of the Current Population Survey (CPS). The CPS Outgoing Rotations data set is a sampling of <u>all</u> salaried employees, including those employees who are not by any stretch of the imagination executive, administrative, or professional employees, those employees whose salaries are too low for exempt status, and those employees who do not meet the duties tests.

The unreasonable approach taken by DOL in relying on such an overbroad sampling in proposing salary level of $425 per week stands in stark contrast to the approach taken by the 1999 GAO Report. The GAO's approach was similar to the Kantor Report's approach in that the GAO looked only at the salaries of exempt executive, administrative, and professional employees. However, the GAO did not have the benefit of detailed data from eight months of Wage and Hour investigatory files as Kantor did. Therefore, it started with the CPS outgoing rotations data, and then tried to eliminate salary data for those employees who were not exempt executive, administrative, and professional employees. Specifically, the GAO, rather than including every salaried employee from the 905 job categories in the CPS outgoing rotations dataset, instead asked DOL officials to narrow the universe of all salaried employees in this overbroad dataset to try insofar as possible to exclude salaried employees who would not likely be exempt under Part 541. GAO Report at 40-43. GAO narrowed the sample in two ways. First, GAO asked DOL to examine all 905 occupational classifications in the CPS outgoing rotations dataset and assess the likelihood of Part 541 exempt status for each job based on job title alone. DOL determined that only 257 of the 905 job titles (or 28 percent) would likely include exempt workers. Hence, any salaried workers in the 648 other job classifications were automatically excluded. The second change that GAO made to the CPS outgoing rotations dataset was to focus on the remaining 257 job classifications and ask DOL to rank the likelihood, in percentile bands (90-100 percent, 50-90 percent; 10-50 percent, and 0-10 percent), that a person holding that job would be exempt under Part 541.

The salaries of the workers in the 257 job categories played two roles in helping to estimate exempt status. First, any employee in these categories who earned less than $250 per week was considered nonexempt (except physicians, lawyers, and teachers, who under 29 C.F.R. 541.3(e) are not subject to a salary test). This use by GAO of the high or upset salary of $250, rather than the $155 and $170 salary levels in the long duties tests, was reasonable, given that in 1998, the year covered by the GAO report, a minimum wage worker would have earned far more than the low salary levels for a 40-hour week. Second, GAO assumed that employees with more demanding duties and responsibilities were likely to have higher salaries. Hence, the higher the employees' salaries were above $250, the more likely they were judged to be exempt.

Applying all of these adjustments to the CPS outgoing rotations dataset for 1998, GAO estimated that only 10 percent of all exempt executive, administrative, and professional employees in that year earned less than $500 per week. GAO Report at 13, Figure 5. In view of this finding, if DOL claims to be following the approach of the

Kantor Report, which set a long test salary level that excluded exempt workers in the lowest 10-percent salary range, then in 1998 the salary threshold for the long test would have been $500. This would cure the first defect in DOL's methodology.

Adopting a salary threshold of $500, however, would still suffer from the second defect in DOL's current methodology, namely, that it lacks a necessary upward adjustment from the 1998 threshold to reflect salary changes over this 5-year period. In order to make that adjustment, DOL should have used the most thorough and reliable source for updating salaries -- BLS's Employment Cost Index (ECI) -- which DOL itself publishes. The ECI is a quarterly index that measures the change in the price of labor by capturing the change in employers' costs for wages and salaries, and for various employer-paid fringe benefits, such as life and health insurance, employer contributions to retirement plans, and paid leave. The ECI separates out salaries and wages from fringe benefit costs, and also breaks down wage and salary costs into various occupational groups.

The ECI for June 1998 -- the middle of the 1998 survey year relied upon in the 1999 GAO Report -- for wages and salaries for the ECI category "executive, administrative, and managerial occupations" was 138.7. *See* www.bls.gov/ncs/ect/sp/ecbl0014.pdf. The ECI for wages and salaries for such employees in March 2003 was 169.1. *See* www.bls.gov/news.release/pdf/eci.pdf, Table 6, "Employment Cost Index for wages and salaries for private industry workers by industry and occupational group." This represents an increase of 21.9 percent for this category of workers Raising the $500 per week salary suggested by the 1998 GAO data by this same percentage yields an updated salary level for March 2003 of $610 per week (rounded up from the actual amount of $609.59). Thus, truly adopting the Kantor Report approach -- that is, automatically treating as nonexempt the bottom 10 percent of those employees who are currently exempt -- would result in a standard salary level of $610 per week. The $425 salary level proposed by DOL falls short of this result by 43 percent. Of course, the $610 salary level would need to increase even further if it was to exclude from exempt status the bottom 20 percent of currently exempt workers, as DOL misleadingly suggests that it has done.

Moreover, \$610 represents a legitimate updating of only the lower salary level associated with the long duties tests. Updating the higher \$250 salary level associated with the short duties tests would require increasing that threshold to \$980 per week for executive and administrative employees, in order to maintain the current differential of 61 percent between the long and short salary levels.[5]

If, however, DOL seeks to eliminate this 53-year old dual structure, supported by judicial precedent as well as published opinions of the Wage and Hour Administrator, and substitute for it only one salary and duties test, then the amount of the salary must be commensurate with the strictness of the duties test. A salary level of \$610 per week is plainly insufficient to accompany a duties test that actually weakens the current long duties test, as the Department proposes. Either the salary level must increase substantially, or the duties test must become even more stringent than the current long duties test.

C. <u>The Department's Proposed Salary Increase to \$425 per Week Is Unreasonable Because It Is Far Less Than the Rate of Inflation Since 1975</u>

The current salary levels of \$155 per week under the long test for executive and administrative employees and \$170 for professionals, and \$250 per week under the short test for all three classifications have not been adjusted since 1975, despite the fact that the Secretary intended those levels to be "interim" or temporary rates (40 F.R. 7091 (Feb. 19, 1975)). Both employers and employee advocates have long recognized that these 1975 levels require considerable upward adjustment if they are to provide meaningful tests for

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[5] The existing "long" test salary level for professional employees of \$170 per week would increase to \$670 per week in order to maintain the same differential as now exists between it and the long test salary level for executive and administrative employees. The short test salary level would then be updated to \$980 per week.

exempt status under the Act.[6] The Department itself recognizes that **"**the existing salary tests no longer provide employees or employers any help in distinguishing between bona fide executive, administrative, and professional employees and those who should not be considered for exemption." 68 Fed. Reg. at 15562.

However, the Department's proposed adjustment to $425 per week does not even account for the effects of inflation in the 28 years since the salary levels were last raised in 1975. Indeed, in order to adjust for inflation as measured by the Consumer Price Index (CPI), the existing $155 per week salary level for executive and administrative employees under the long duties test would now reach $530 per week (rounded up from the actual amount of $528.67), which is 24 percent higher than the Department's proposed salary of $425 per week; and the existing $170 per week salary level for professional employees under the long duties test would reach $580 per week (rounded up from $579.83), which is 36 percent higher than the Department's proposed salary. Increasing the existing higher or "upset" salary under the short duties test to account for inflation since 1975 would require an increase to $855 per week (rounded up from $852.69).[7]

The Department rejects the approach of "mechanically adjusting the 1975 salary levels for inflation" (68 Fed. Reg. at 15570), and purports instead, as we have described above, to adopt the Kantor Report's approach of relying on actual salaries actually being paid to executive, administrative, and professional employees. The supreme irony --

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[6] A nonexempt worker paid the current $5.15 per hour minimum wage can earn $155 in just over 30 hours, $170 in 33 hours, and (with time-and-one-half overtime pay after 40 hours) $250 in less than 46 hours of work in a week.

[7] The Bureau of Labor Statistics includes an inflation calculator on its website which uses the average CPI in a given calendar year. *See* The salary levels in text were generated by using this calculator.

indeed, the shamelessness -- of the Department's position on this point is that its proposed salary level of $425 per week is not only far below the $610 per week salary that correct reliance on the Kantor Report's approach would have yielded, but also far below the $530 and $580 per week salaries that reliance on inflationary increases since 1975, as shown by the CPI, would have generated. The miserly and Dickensian approach saves employers enormous sums of money by permitting them to deprive an unprecedented percentage of their workers from minimum wage and overtime compensation protections.

DOL asserts several reasons for proposing a salary test that fails to adjust the current test for inflation. These reasons display how deeply the Department misunderstands (or chooses to ignore) the effects of what it is proposing. First, the Department states that it is proposing a **"**different, standard duties test" that is unlike both the existing long duties test and its associated salary levels and the existing short duties test and its associated salary levels, and therefore, the argument goes, it would not be appropriate to raise those existing salary levels based on inflationary increases since 1975. Fed. Reg. at 15570. This explanation completely ignores the 53-year history of the interrelationship between the duties tests and the salary levels. When DOL introduced the short duties test in 1950, its rationale was that "the higher the salaries paid the more likely the employees are to meet all the requirements for exemption. . . ." Weiss Report at 22. As a result, the long duties test could be shortened if there was a second salary level "considerably higher than the minimum salary levels established in" the long duties test. *Id.* at 23. The Department's proposal has the exact opposite effect of this rationale. As we have discussed, the Department's proposed "different, standard duties test" has fewer duties requirements that the existing long test. However, rather than increasing the salary level associated with this shorter test to a level higher than an inflation-based measure (or higher than the Kantor Report's methodology would yield), the Department proposes a salary level that is far lower. This proposed approach stands the logic of the two tests as explained in the Weiss Report on its head.

The Department's second reason for ignoring the CPI -- that DOL is "concerned about the impact" that an inflation adjustment would have on "the retail industry . . . and rural areas in the South" (68 Fed. Reg. at 15570) -- is equally unavailing. No data or evidence accompanies this claim, nor does the Department even point to any applicable study dealing with this effect. We note as well that the Kantor Report had no difficulty incorporating these factors into its salary-setting methodology. Kantor Report at 6.

Third, DOL states that such an inflation-based adjustment "presumes that the salary levels set in 1975 are precisely the appropriate baseline." 68 Fed. Reg. at 15570. Here again, the Department provides no evidence that the 1975 levels are not an appropriate baseline. This concern might make sense if the 1975 levels were set too high in relation to actual salaries paid in 1975 to exempt employees. There is no cause for concern on this point, however, because the 1975 salary levels were in fact too low. As the Department pointed on January 1981, the 1975 salary levels "did not fully reflect post-1970 increases in salaries that were being paid to such employees." 46 Fed. Reg. 3012 (Jan. 13, 1981). (The Reagan Administration, within three weeks of taking office, postponed indefinitely the effective date of the January 1981 regulations that would have increased the 1975 salary levels, and these regulations never came into effect. 46 Fed. Reg. 11972 (Feb. 12, 1981)).

As a corollary to this third reason, the Department claims that a mechanical adjustment for inflation presumes "that the nature of work and the relationship between job duties and compensation practices have not changed in the intervening years since 1975." 68 Fed. Reg. at 15570. Of course, there is not always a direct relationship in any specific time period between increases in the CPI and increases in actual salaries paid to exempt employees. Sometimes inflation may run ahead of salary increases for these employees, and sometimes these employees' salary increases may run ahead of inflation. For example, the history of the 1975 salary increase, which raised salary levels that had been set in 1970, shows that inflation increased during that five-year period at a greater rate that the salaries actually paid to exempt employees. However, as we have amply demonstrated above, from 1975 to 2003, the rate of inflation has lagged behind salary increases. Raising the salary level based on inflation during this 28-year period would lift the executive salary associated with the long test from $155 per week to $530 per week, but raising the $155 salary level based on the salary increases that are now actually being received by such employees (leaving out the bottom 10 percent of salaries) would result in a salary of $610 per week. Thus, if the Department, as it claims, truly wants to take account of "the nature of work and the relationship between job duties and compensation practices" that have occurred since 1975, it would adopt a salary under the long duties test of at least $610 per week.

Fourth, DOL asserts that "the regulatory history has looked to information on actual salaries and incomes, not inflation-adjusted amounts," citing as an example the 1949 Weiss Report. 68 Fed. Reg. at 15770. This assertion, insofar as it suggests that the Department has never looked at inflation-based salary increases, is incorrect; and even to the extent that the assertion is correct, it is highly misleading. The Department looked initially at inflationary increases in connection with the 1975 salary increases, because its study of actual salaries paid to exempt executive, administrative, and professional employees was not yet finished. 39 Fed. Reg. 29603 (Aug. 16, 1974). When it issued the final regulations, it did not raise the salary rates to reflect inflation because it believed that preliminary data on salaries for exempt employees suggested somewhat lower salary amounts. The Department made this same comparison of CPI increases with salary increases for exempt employees in 1981, when it attempted again to raise salaries. At that time the Department, in exploring various approaches to raising the salary levels, noted:

> We believe that the salary tests should more appropriately

> be indexed to a wage series that reflects the conditions in EAP [*i.e.,* executive, administrative, and professional] labor markets. Also, the CPI approach would result in salary test levels above those determined by most wage series, which would impose unnecessary additional cost burden on employers.

46 Fed. Reg. 3016 (Jan. 13, 1981).

As this history reveals, the Department has looked at the CPI increases in raising salary levels, not to rely on them mechanically, but to see how salary increases of exempt executive, administrative, and professional employees compare with CPI increases during the same period of time. When this comparison shows that CPI increases are higher than salary increases, as occurred during DOL's 1981 salary increase review, then the Department does not use the CPI to adjust the regulatory salary levels, because that approach would increase salary levels above the CPI increases and hence be inflationary. On the other hand, if salary increases for exempt employees have outstripped CPI increases for the same period, basing the salary level increases for exempt status on actual salaries would have little or no inflationary impact.

The Department's proposed $425 per week salary fails to follow either of these approaches, and hence has no basis in reason or history. Even though the CPI and salary data since 1975 show that increases in the salaries of executive, administrative, and professional employees who meet the duties tests have risen more than the rate of inflation during this 28-year period, the Department does not base it proposed salary increase on the rate of salary increase (because of its misuse of the Kantor Report's approach), nor does the Department rely on the lower rate of the CPI increase. Instead, the Department would set rate that is lower than both of these, and thereby undermine the very purpose and function of the salary level test.