



## Statement of the U.S. Chamber of Commerce

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**ON:**        **Examining the Costs and Consequences of the Administration's Overtime Proposal**

**TO:**        **House Education and the Workforce Committee's Subcommittee on Workforce Protections**

**BY:**        **Tammy D. McCutchen, Esq., Littler Mendelson P.C.**

**DATE:**     **July 23, 2015**

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1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

**Testimony of**  
**Tammy D. McCutchen, Esq.**  
**Before the**  
**United States House of Representatives**  
**Committee on Education and the Workforce**  
**Subcommittee on Workforce Protections**  
*Hearing on*  
**“Examining the Costs and Consequences of the Administration’s Overtime Proposal”**  
**July 23, 2015**

*Mr. Chairman and members of the Subcommittee:*

Thank you for the opportunity to speak with you today regarding the U.S. Department of Labor’s (DOL) proposed revisions to the “white collar” overtime exemption regulations at 29 CFR Part 541.

Currently, I am a principal in the Washington D.C. office of Littler Mendelson, P.C. where my practice focuses on helping employers comply with the Fair Labor Standards Act, including conducting internal audits on independent contractor status, overtime exemptions, and other pay practices. I also represent employers during wage-hour investigations by the U.S. Department of Labor and have served as an expert witness in wage-hour collective and class actions, including being retained by the U.S. Department of Justice in *Nigg v. United States Postal Service*, a case alleging that the Postal Service had misclassified postal inspectors as exempt from the FLSA overtime requirement.

I also serve as VP & Managing Director, Strategic Solutions for ComplianceHR, which develops compliance applications that guide employers through key employment decisions including whether to classify employees as exempt from overtime requirements.

Perhaps of most relevance to the topic of this hearing, I served as Administrator of the DOL’s Wage and Hour Division from 2001 to 2004. During that time, I oversaw DOL’s 2004 revisions to the overtime regulations, the first major changes to the regulations in 55 years.

I am appearing today on behalf of the U.S. Chamber of Commerce. I am also a member of the Small Business Legal Advisory Board of the National Federation of Independent Business, a Policy Fellow at the ACU Foundation, and Chair of the Federalist Society’s Labor & Employment Practice Group.

Mr. Chairman, I request that the entirety of my written testimony and its attachments be entered into the record of this hearing.

## I. A Brief Regulatory History

The Fair Labor Standards Act requires covered employers to pay employees at least the minimum wage for all hours worked and overtime at one and one-half the employee's regular rate of pay for hours worked over 40 in a workweek. However, the FLSA also contains 51 separate partial or complete exemptions from the minimum wage and/or overtime requirements. The hearing today focuses on the exemptions for executive, administrative, professional and outside sales employees, codified at 29 U.S.C. § 213(a)(1).

These exemptions, sometimes called the “white collar” exemptions, were included in the FLSA when the Act was passed by Congress in 1938. The FLSA itself includes no definitions of the terms executive, administrative, professional or outside sales. Rather, the Act provides that these terms are to be “defined and delimited from time to time by regulations of the Secretary.”

The Secretary of Labor first issued such regulations to define the white collar exemptions on October 20, 1938, at 29 C.F.R. Part 541. The original regulations, only two columns in the Federal Register, set a minimum salary level for exemption at \$30 per week and established the job duties employees must perform to qualify for the exemptions.

The duties tests were significantly revised in 1949, including the addition of “special proviso[s] for high salaried” executive, administrative and professional employees – known as the “short tests.” Except for revisions in 1992, at the direction of Congress, allowing certain computer employees to qualify for exemption,<sup>1</sup> the duties tests in the Part 541 regulations were unchanged for 55 years, from 1949 until the DOL significantly revised the regulations in 2004.

From 1940 to 1975, the DOL raised the minimum salary level for exemption every 5 to 10 years. The 1975 salary levels set forth below remained in effect until 2004:

- \$155 per week for executive/ administrative
- \$170 for professionals
- \$250 for the short test

In 2004, the DOL eliminated the “long” and “short” test, instead adopting one standard test with a minimum salary of \$455 and a test for highly compensated employees with total annual compensation of at least \$100,000.

In its Notice of Proposed Rulemaking (NPRM), published in the Federal Register on July 6, 2015, the DOL proposes to increase the minimum salary level for exemption and has requested comments on possible changes to the duties tests.

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<sup>1</sup> In 1992, at the direction of Congress, DOL revised the duties tests to allow computer employees to qualify as exempt professionals. In 1996, Congress enacted a separate exemption for some computer employees in 29 U.S.C. § 213(a)(17), incorporating some, but not all, of DOL's regulations in the Act itself. Unlike the Section 13(a)(1) exemptions, however, Congress did not give DOL authority to issue regulations on Section 13(a)(17).

## II. Salary Levels

In the NPRM, the DOL proposes to increase both the minimum salary level for the “white collar” exemptions and the salary level for highly compensated employees. Additionally, the DOL proposes to adopt a mechanism for automatic annual increases to the salary levels.

### A. Minimum Salary Level

The DOL proposes to set the minimum salary threshold, using data from the Bureau of Labor Statistics (BLS), at the 40th percentile for all non-hourly paid employees. Currently, according to the DOL, this methodology would result in a minimum salary level of \$921 per week or \$47,892 annually. When a Final Rule is published in 2016, the DOL expects that the minimum salary level based on the 40th percentile will increase to \$970 per week or \$50,440 annually – more than doubling the current requirement of \$455 per week or \$23,660 per year.

*The DOL’s methodology and the amount of the increase are unprecedented in the FLSA’s 77 year history.*

In the past, the DOL has used information regarding employee salaries to set the minimum salary levels for exemption, but never used a salary level even close to the 40th percentile. In the 1958 rulemaking, for example, the DOL used data on actual salary levels of employees which wage and hour investigators found to be exempt during investigations conducted over an eight-month period. Based on this data, the DOL set the minimum salary required for exemption at a level that would exclude the lowest 10th percentile of employees in the lowest wage region, the lowest wage industries, the smallest businesses and the smallest size city. If the 1958 methodology were applied today, the resulting minimum salary level would be \$657 per week or \$34,167 annually (NPRM at Table 12). Similarly, in 2004, using BLS data, the DOL set the minimum salary level to exclude the lowest 20th percentile of employees in the lowest wage region (South) and industry (Retail). The DOL doubled the percentile used, from 10 percent to 20 percent, to account for changes to the duties test made in the 2004 Final Rule. According to the NPRM, if the 2004 methodology were applied today, the resulting minimum salary level would be \$577 per week or \$30,004 annually (NPRM at Table 12).

Thus, DOL’s proposed methodology of setting the minimum salary level at the 40th percentile of all non-hourly-paid<sup>2</sup> employees results in a minimum salary for exemption which is \$20,000 higher than the salary level if the DOL applied the 2004 methodology, and \$15,000 higher than the salary level if the DOL applied the 1958 methodology. The DOL justifies the jump from the 20% of lower wage regions and industries used in 2004 to its proposed 40% of all non-hourly-paid employees by asserting it made a “mistake” in 2004 in not accounting for changes in the duties tests. But, the DOL did account for those changes in 2004 by increasing the percentile from 10% to 20%. Further, even applying the 40th percentile, the DOL has not explained its failure to use salary levels in the lowest wage regions, the lowest wage industries, the smallest businesses and the smallest cities – or to include earnings data of lawyers, doctors

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<sup>2</sup> “Non-hourly-paid” employees include employees paid on a salary basis, but also include employees paid on a fee basis, by commission and any other arrangement which is not hourly pay.

and sales employees who are not subject to the Part 541 salary requirements. The DOL's data set also include salaries of federal workers, who generally earn wages higher than employees working in the private sector.

The \$50,440 wage level is also unsupported by looking to historical salary level increases or by adjusting for inflation. The table on the following page shows the history of salary level increases in the Part 541 regulations, calculates the percentage of increase from the prior levels, and shows what the salary level would be today if corrected for inflation (applying the BLS inflation calculator available at [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm)).

Historically, with only a few exceptions, the DOL has increased the salary levels at a rate of between 2.8 percent and 5.5 percent per year. The DOL's proposed increase to \$50,440 represents an increase of 10.29% per year. Over the last decade, salaries did not increase by over 10% annually. The DOL has never before doubled the salary levels for exemption in a single rulemaking, let alone more than doubled the salary levels as has been proposed here. Further, in applying inflation to historic salary levels, only the short test levels for 1958, 1963 and 1975 would exceed \$50,000. If adjusted for inflation, the average salary level under all tests for all years is \$42,236.23.

Since 1949, and in the 2015 NPRM, the DOL has consistently stated the purpose of setting a minimum salary threshold is to provide a "ready method of screening out the *obviously* nonexempt employees." After all, in Section 13(a)(1), Congress exempted white collar employees from both the minimum wage and overtime requirements of the FLSA. Thus, to implement Congress' intent, the DOL should not set the minimum salary threshold at a level that excludes many employees who *obviously meet* the duties tests for exemption. Or, put another way, DOL should not set the level so high that it expands the number of employees eligible for overtime beyond what Congress envisioned when it created the exemptions. Yet, this is exactly what the DOL proposes in this rulemaking. Particularly in the retail, restaurant, hospitality, and health care industries – and in the public sector – there are many, many employees earning below \$50,440 annually who have been found exempt under the duties tests both in DOL investigations and by the federal courts.

Perhaps most telling, the DOL's proposed minimum salary level of \$970 per week, \$50,440 annually, is higher than the current minimum salary levels for exemption under California and New York law. Just like the minimum wage, States may set higher standards for exemptions from state overtime requirements. In New York, the minimum salary level for exemption is \$34,124 -- \$16,320 *lower* than what the DOL has proposed on a national level. In California, the minimum salary level is currently \$37,440 annually -- \$13,000 *lower* than the DOL's proposal. Although California's minimum salary will increase to \$41,600 in 2016, California's minimum will remain almost \$9,000 lower than the federal. Thus, the DOL's proposed salary level of \$50,440 is \$9,000 to \$16,000 higher than the salary level required for exemption under California and New York, arguably the two states with the highest income and cost of living. How can the DOL's proposed salary level possibly reflect the local economies in the rural South and Midwest?

The DOL is also seeking comments on the possibility of allowing nondiscretionary bonuses and commissions provided to exempt employees to satisfy up to 10% of the standard salary level. Although this proposal would provide some relief, the DOL’s intention to limit the credit to commissions and bonuses paid monthly or more frequently negates most of this relief. In my experience, the bulk of bonuses earned by exempt employees are only paid quarterly or annually.

Year	Salary Level		Percentage Increase		Adjusted for Inflation	
			Total	Per Year	Weekly	Annual
1938	\$30	All Exemptions			\$505.97	\$26,310.44
1940	\$30	Executive	0.00%	0.00%	\$509.58	\$26,498.16
	\$50	Administrative, Professional	66.67%	33.33%	\$849.30	\$44,163.60
1949	\$55	Executive	83.33%	9.26%	\$549.55	\$28,576.60
	\$75	Administrative, Professional	50.00%	5.56%	\$749.39	\$38,968.28
	\$100	Short Test	New Test		\$999.18	\$51,957.36
1958	\$80	Executive	45.45%	5.05%	\$658.28	\$34,230.56
	\$95	Administrative, Professional	26.67%	2.96%	\$781.71	\$40,648.92
	\$125	Short Test	25.00%	2.78%	\$1,028.57	\$53,485.64
1963	\$100	Executive, Administrative	25.00%	5.00%	\$777.14	\$40,411.28
	\$115	Professionals	21.05%	4.21%	\$893.71	\$46,472.92
	\$150	Short Test	20.00%	4.00%	\$1,165.71	\$60,616.92
1970	\$125	Executive, Administrative	25.00%	5.00%	\$766.12	\$39,838.24
	\$140	Professionals	21.74%	3.11%	\$858.06	\$44,619.12
	\$200	Short Test	33.33%	4.76%	\$1,225.80	\$63,741.60
1975	\$155	Executive, Administrative	24.00%	3.43%	\$685.13	\$35,626.76
	\$170	Professionals	21.43%	3.06%	\$751.43	\$39,074.36
	\$250	Short Test	25.00%	3.57%	\$1,105.04	\$57,462.08
2004	\$455	All Exemptions	82.00%*	2.83%*	\$572.80	\$29,785.60
2015	\$970	All Exemptions	113.19%	10.29%		

\*Increase over 1975 short test

## **B. Automatic Annual Increases to the Salary Levels**

The DOL has proposed to establish a mechanism for automatically increasing the salary levels annually based either on the percentile (the 40th percentile for the white collar exemptions, the 90th percentile for highly compensated employees) methodology or inflation (CPI-U). Such annual automatic increases also would be unprecedented in the 77 year history of the FLSA. Historically, Congress has consistently rejected automatic annual increases to the minimum wage. Also in 1996, when amending the FLSA to add the Section 13(a)(17) exemption for computer employees, Congress set the minimum hourly wage for exemption at \$77.63 (6 1/2 times the 1990 minimum wage) without providing for automatic increases of that amount. Thus, it seems unlikely that Congress intended the DOL to impose automatic annual increases for the salary-based exemption from the FLSA's minimum wage and overtime requirements. Further, as far back as 1949, the DOL rejected requests from stakeholders to impose automatic annual increases to the salary levels. Although acknowledging that it should update the salary level on a regular basis, previously, the DOL stated that salary levels should be adjusted when the wage survey data and other policy concerns support the change.

As stated in the 2004 Final Rule, the Department has repeatedly rejected requests to rely mechanically on inflationary measures when setting the salary levels because of concerns regarding the impact on lower-wage industries and geographic regions. The same reasoning applies to automatic annual salary increases based on inflation. Using the percentile methodology to trigger automatic annual increases is equally troublesome, and will lead to rapidly increasing income thresholds, effectively punishing the business community for increasing salary levels. If the DOL implements the 40<sup>th</sup> percentile threshold indexed to the weekly earnings of all full-time salaried workers nationwide, this will result in an accelerated upward movement of the threshold as previously salaried workers are reclassified to hourly or have their incomes increased to be over the new \$50,440 threshold.<sup>3</sup> Currently, the pool includes all workers down to the salary level just above the current \$23,660 annual level. Once the new threshold is implemented, a 40<sup>th</sup> percentile level will necessarily be substantially higher going forward since there will no longer be exempt employees earning less than \$50,440. The threshold will continue to move upward rapidly as the pool of employees being taken into account continues to skew towards higher salary levels with the result of creating a ratchet effect that could soon, as a practical matter, eliminate the white collar exemptions entirely.

## **III. Duties Tests**

In addition to earning the minimum salary level paid on a salary basis, an employer cannot classify an employee as exempt unless the employee also meets one of the duties tests for exemption. The Part 541 regulations establish different duties tests for executive, administrative, learned professional, creative professional, computer and outside sales employees. Many employees earn above the minimum salary level, but cannot be classified as exempt because they

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<sup>3</sup> While the Department devotes considerable commentary in the NPRM to this methodology, the actual proposed regulatory text is silent on what method the Secretary will use to update this threshold annually. See proposed Section 541.600, Amount of Salary Required, 80 Fed. Reg. 38610 (July 6, 2015).



do not supervise employees, are not involved with managing the business or do not hold professional degrees – engineering technicians, who often earn \$80,000 or even \$100,000 annually depending on the industry, are a good example.

There is much confusion and concern in the business community regarding what changes the DOL intends to make to the duties tests. In the NPRM, the DOL stated that it “is not proposing specific regulatory changes at this time” and that the agency “seeks to determine whether, in light of our salary level proposal, changes to the duties test are also warranted.”

Instead, the DOL raises “issues” for discussion that seem to indicate that the agency is considering some very significant and unprecedented changes:

- What, if any changes, should be made to the duties test?
- Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for the exemption? If so, what should that minimum be?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Or, should the Department reconsider our decisions to eliminate the long/short duties test structure?
- Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are lower-level executive employees performing nonexempt work?

The DOL also is requesting comments regarding what additional occupational titles or categories as well as duties should be included as examples in the regulations, especially in the computer industry.

The NPRM contains no proposed changes to the regulatory text describing the duties that employees must perform to qualify for exemption. However, the DOL’s failure to propose specific changes to the regulatory text does not mean that the Department will not make any changes to the duties test in the final regulations. Traditionally, under the Administrative Procedure Act, the DOL would be effectively precluded from making changes because they will not have given the public notice and the opportunity to comment. But, the DOL has not foreclosed that possibility. To the contrary, in an email responding to a question from the publication Law360, the DOL stated, “while no specific changes are proposed for the duties tests, the NPRM contains a detailed discussion of concerns with the current duties tests and seeks comments on specific questions regarding possible changes. The Administrative Procedure Act does not require agencies to include proposed regulatory text and permits a discussion of issues instead.”

Of course, the Chamber and other business groups will provide comments on these issues. In fact, we are deeply concerned that the DOL will implement the California over-50% quantitative rule for primary duty. The California example is instructive as the implementation of the quantitative rule, rather than the qualitative standard that has been the test for exemption under the “white collar” exemptions since 1949, has resulted in considerably higher levels of litigation in California; plaintiffs’ attorneys understand the difficulty for employers of proving the amount of time that employees spend on exempt versus non-exempt tasks.

Similarly, employers are equally concerned that the “issues” raised in the NPRM suggest the DOL will eliminate the concurrent duties provision in the final rule. Currently, exempt employees such as store or restaurant managers are permitted to perform duties that are non-exempt in nature while simultaneously acting in a managerial capacity. If this “concurrent duties” provision is eliminated, it could mean the whole-sale loss of the exemption for both assistant store managers and store managers, particularly in smaller establishments.

Finally, returning to the “long test” – a test effectively inoperable since the early 1980s – seems to be a radical change, but cannot be ruled out.

DOL’s failure to provide specific regulatory text for any of these “issues” is perhaps the most alarming aspect of the NPRM. Perhaps the DOL plans to rely on the “logical outgrowth” doctrine that allows regulators to issue final regulations that are a “logical outgrowth” of the proposed regulations. But “outgrowth” implies *something* to grow out of. Words matter. Specific word choices, and even the placement of a comma, can make a significant difference in how a regulation is interpreted and applied by the DOL itself and federal courts. Yet, apparently, the DOL is signaling that it plans to make changes to the specific text of the regulations without giving the public any chance to review and comment on that language. Even if the DOL has a colorable argument that it need not propose specific regulatory text, making significant changes to the Part 541 regulations without first doing so, flies in the face of Congress’ intent in passing the Administrative Procedure Act to allow the public a meaningful role in rulemaking, and also contradicts the Administration’s promise to bring more transparency to the federal government’s policy-making process.

#### **IV. Impact on Employees**

Not only will these proposed changes create problems for employers, but employees will very likely be disadvantaged as well. Because the new regulation will cause many employees to be reclassified from exempt to non-exempt, employees will lose various advantages many currently enjoy because they are paid on a salaried basis rather than hourly. Among these are workplace flexibility and the ability to structure their hours around personal needs; career opportunities; preferred benefits; and status and morale. Furthermore, merely because an employee is eligible for overtime does not necessarily mean he or she will earn overtime—employers are likely to be very careful about monitoring hours worked.

If employees are reclassified to hourly workers, they will only be compensated for those hours they work. Exempt employees, however, must be paid a guaranteed salary every week in which they perform any work, regardless of the number of hours worked. Yes, non-exempt

employees receive overtime pay for working more than 40 hours in a workweek, but they also lose pay if they work less than 40 hours. Exempt employees do not receive overtime for working more than 40 hours in a workweek, but do not lose pay if they work less.

This means that instead of being able to structure their day around child care needs, children's school meetings, doctor's appointments and other personal needs without losing pay, non-exempt employees have to think carefully before taking time off work, "Can I afford to take this time off." The administration and the Secretary have been very aggressive about promoting mandated paid leave as a way to help employees balance their work and personal lives, yet with this proposal they are effectively consigning millions of exempt employees who currently enjoy the benefit of being able to leave work early to attend a daughter's soccer game without losing pay to an entirely different work life tied to being on the clock.

These employees will also have less flexibility with respect to where they work. Employers will no longer be able to allow employees to work from home or other locations removed from the central workplace since doing so will not allow the employer to reliably and accurately track the hours worked. This may even go so far as employers ceasing to provide electronic devices since using them beyond the specified work hours would require the employee to be compensated.<sup>4</sup>

A sizable increase in the minimum salary level would also eliminate many part-time exempt positions where the employees value the flexibility. For example, currently a full-time salaried employee making \$60,000 could have the opportunity to reduce his or her position to half-time to allow more family time and still be exempt at \$30,000. If the salary threshold level is increased to above \$30,000, this employee would no longer be exempt. The change to the hourly status may make the position far less flexible with respect to both when and where the employee works. Employers also may be reluctant to allow part-time work that is otherwise exempt to be performed by hourly employees, and thus the change could reduce the number of part-time work opportunities for salaried employees.

Changes to the overtime regulations could reduce career opportunities and prevent employee advancement as employees may need to forgo workplace training or other career-enhancing opportunities because the employer is not able to pay overtime rates for that time. Just being reclassified to an hourly employee may mean the employee may not be considered for certain positions that are intended for professional, salaried employees.

When employees have been reclassified from exempt to non-exempt, there is very often a decline in employee morale, as this change is generally seen as a loss of "workplace status." Employees often believe they are being punished or demoted, and some even lose trust that their employer sees them as professionals.

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<sup>4</sup> The DOL has indicated it will be issuing a Request for Information in August to determine how much work is done using these devices outside the workplace and normal work hours, and may adopt more stringent rules regarding paying non-exempt employees for such time.

“Non-exempt” does not necessarily mean that employees will be paid more due to a windfall of overtime hours; eligibility for overtime does not necessarily mean earning overtime. Employees will still have to work more than 40 hours in a given week. Employers must always carefully manage labor costs to remain in business, and there is no reason to believe that they would not do so here as well.

Employees who lose exempt status also may find that they have lost their ability to earn incentive pay. Under the existing rules for calculating overtime for hourly workers, many incentive payments must be included in a non-exempt employee’s “regular rate” (i.e., overtime) of pay. Faced with the difficult recalculation of overtime rates—sometimes for every pay period in a year—employers often simply forgo these incentive payments to non-exempt employees rather than attempt to perform the calculations.

## **V. Enforcement Issues**

Because these new regulations, if finalized, will create tremendous uncertainty among employers, just as most of issues surrounding the last revisions of these regulations have been resolved, there will be a critical need for the Wage and Hour Division (WHD) to make sure its approach to enforcement is reasonable and even-handed. The Chamber recognizes that to have effective regulations, the Department must—at the same time—have effective enforcement and mechanisms to drive compliance. However, the Chamber believes that the Department can improve its approach to enforcement to be more reasonable and even-handed.

The Wage and Hour Division’s approach to FLSA enforcement, and specifically enforcement of overtime requirements and classification of employees, has become increasingly focused on merely punishing the employer rather than seeking balanced resolutions—regardless of whether the agency is investigating an employer with a long history of violations, or an employer with no prior violations; and regardless of whether there is a clear violation or ambiguity in allegations. In order to achieve and maintain regulatory compliance, WHD must be willing to provide employers with meaningful compliance assistance and to support those employers who evaluate their wage and hour practices and seek to correct any mistakes with DOL supervision of any back wage payments. Instead, WHD’s current practice is to offer negligible compliance assistance, refuse to supervise voluntary back wage payments, and to aggressively pursue maximum penalties regardless of the employer’s compliance history. This position helps no one, least of all the employees.

Further, utilizing certain investigatory tactics – conducting unannounced investigations, threatening subpoena actions if overbroad documents requests are not responded to within 72 hours, and imposing civil money penalties and liquidated damages in almost every case – have impeded resolution and hindered cooperation.<sup>5</sup> In many cases this has forced employers to

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<sup>5</sup> At the June 10 hearing before this subcommittee on “Reviewing the Rules and Regulations Implementing Federal Wage and Hour Standards” Chamber member Leonard Court presented testimony describing several examples and patterns of WHD enforcement tactics that serve no purpose except to put employers at a disadvantage and force them into one-sided settlements.

contest these actions which only delays employees receiving their compensation. While the WHD should punish bad-faith employers who willfully and/or repeatedly violate the law, not every employer with a wage and hour violation, or misclassified employee, should be handled the same way. Such an approach is counter-productive for good-faith employers who express a willingness to take corrective measures or redress mistakes. Without incentives for voluntary remediation, and given WHD's limited investigation resources, an all-stick-no-carrot approach cannot effectively accomplish the agency's key mission to ensure our nation's employees are paid in compliance with the FLSA.

To have an effective enforcement program, an agency must have an effective compliance assistance program that provides employers with meaningful assistance regarding the compliance challenges posed by the FLSA in an era of rapidly changing technology. This will become an even more pressing need if these new regulations are finalized. Recently, WHD's compliance assistance efforts appear focused primarily upon assisting employees and their advocacy groups in pursuing litigation against employers rather than helping employers achieve compliance through voluntary means short of litigation.

WHD should develop programs to recognize and reward good faith employers seeking to improve their compliance with the FLSA. One approach could be a Voluntary Settlement Program where employers who self-disclose a violation to WHD can agree to pay 100% of back wages, but are not subject to a third-year of willfulness back wages, liquidated damages or civil money penalties, and are issued WH-58 forms to obtain employee waivers. This would expedite payments to employees and discourage employers from contesting citations. It would also help WHD preserve their resources for those cases where they can be used most effectively.

Another new wrinkle to the WHD's enforcement activities just surfaced with the new Administrator's Interpretation (AI) further defining the terms "suffer or permit to work" in the context of classifying workers as either employees or independent contractors.<sup>6</sup> This new AI shifts the focus of analysis from the question of whether the employer controls the actions of the worker/employee to more emphasis on the "economic realities" test which revolves around inquiries such as "whether the worker is really in business for him or herself (and thus is an independent contractor) or "is economically dependent [on the business for which he or she provides services] (and thus is its employee)." This new AI will tip the balance in favor of plaintiffs' attorneys looking for employee misclassification cases. The result of this new interpretation will be to increase the chances that a worker will be found to be an employee rather than an independent contractor. Even if the result was not as favorable to one side, it will still mean that employers will have to reevaluate how they classify workers/employees and will introduce uncertainty and exposure to liability. As many of these investigations are triggered by questions of whether the worker was properly compensated under the overtime requirements, the addition of this new AI will further increase the number of overtime enforcement actions.

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<sup>6</sup> See, Administrator's Interpretation No. 2015-1, "The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors," Issued by Administrator David Weil, July 15, 2015.

## **Interplay with Executive Order 13673, “Fair Pay and Safe Workplaces”**

As noted above, revising the regulations for defining who is exempt and non-exempt for overtime compensation purposes will trigger many new enforcement actions as employers work to come into compliance. While these actions will create problems for any employer, coupled with the requirements for reporting of “violations” under the proposed Federal Acquisition Regulations Council regulations implementing President Obama’s Executive Order 13673, the impact could be potentially severe. Under that proposed regulation, as specified by the E.O., companies bidding on federal contracts, contractors, and their subcontractors will be required to report violations under an array of 14 different labor and employment laws and executive orders, including the Fair Labor Standards Act.

Under the proposed regulation, contractors will be required to report “administrative merits determinations” within the last three years which are defined as the initial step in an enforcement process. Contractors will have to report these “violations” even before they have had any chance to challenge them, settle the charges, or have the allegations dismissed.

These reported violations are then to be taken into account by the contracting officer in making the critical determination of whether the contractor, or bidding company, has sufficient integrity and business ethics to be considered responsible. The flaws and problems in the E.O. and the proposed regulations and guidance issued by the DOL are myriad and too extensive to go into in this statement. The important point is to recognize that the new overtime regulations, and AI on classification of employees, will not operate in a vacuum and will have significant spillover effects under the requirements of E.O. 13673.

## **VI. Conclusion**

The Department of Labor’s proposed revisions to the regulations defining the statutory “white collar” exemptions for executive, administrative, and professional employees would increase the salary level out of proportion to any previous increases. The new \$50,440 annual/\$970 weekly salary threshold would be out of synch with regional and local economies and various industries. It would even be higher than two of the states with the highest current salary thresholds, California and New York.

The Department’s proposal to index the salary threshold (and that for highly compensated employees as well) is also not in keeping with historic practice. Both Congress and previous administrations have explicitly declined to include automatic increases. The Department’s approach would result in a rapidly escalating salary threshold by skewing the pool of employees included to those with higher salaries.

By increasing the salary threshold so dramatically, the likely result of these changes will be that millions of employees will be reclassified from exempt to non-exempt. Where this has already happened, employees often feel they are being demoted and do not see this as beneficial. Among the reasons they see this as against their interests are: loss of flexibility in their work arrangements both in terms of hours worked and locations where they can perform their work; loss of professional opportunities as they may have a harder time taking classes or no longer be

considered for certain positions that are intended for salaried employees; and lower morale and sense of accomplishment.

Despite not proposing changes to the duties test, the Department is signaling that it intends to make some modifications such as adding a quantification requirement similar to California's where an employee must be performing exempt duties more than 50% of their time. The Department is also suggesting it may eliminate the "concurrent duties" provision that lets an exempt employee also perform non-exempt tasks without jeopardizing their exemption. Without providing proposed regulatory text for these changes, the Department is not giving affected parties an adequate opportunity to understand what changes may be made and provide comments on them. This is counter to basic principles of fairness embodied in the Administrative Procedure Act regarding appropriate rulemaking procedure, and the administration's own claims of conducting transparent policy making.

New regulations will necessarily mean more enforcement as employers will need time to become familiar with the new requirements and come into compliance, yet the current attitude of the Wage and Hour Division is to routinely seek maximum punishment rather than look for ways to find reasonable settlements or allow employers the opportunity to correct their errors. The WHD would be better served by adjusting its approach to expedite payments to employees and conserving resources for those cases where they are truly needed.

The expected increase in enforcement activity will be particularly problematic for federal contractors or companies bidding to be federal contractors or subcontractors. These companies will have to report any violation, even those still being adjudicated, under the FLSA within the last three years. Just as the dust is settling on the changes to these regulations put in place in 2004, these new regulations will start the enforcement process *de novo* creating considerable difficulties for those companies involved in federal contracting.

This concludes my statement. I would be pleased to respond to any questions.