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VIA ELECTRONIC FILING: WWW.REGULATIONS.GOV

Dr. David Weil
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: RIN 1235-AA11, Proposed Rule, ***Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer*** **Employees, 80 Fed. Reg. 38516 (July 6, 2015)**

Dear Dr. Weil:

Littler Mendelson, P.C. ("Littler") submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") the Department of Labor (the "Department" or "DOL") published in the *Federal Register* on July 6, 2015, to revise the regulations at 29 C.F.R. Part 541, defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees in Section 13(a)(1) of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. § 213(a)(1).

Littler is the largest global employment and labor law practice with more than 1,000 attorneys in over 60 offices worldwide, representing clients across virtually every industry in all aspects of employment and labor law. Littler is a single source solution provider to the global employer community, consistently recognized in the industry as a leading and innovative law practice. Throughout its more than 70-year history, Littler has provided legal advice and compliance assistance to employers large and small, on the full range of labor and employment matters including the Fair Labor Standards Act and state wage and hour requirements. We have also represented our clients in thousands of wage and hour, discrimination and other class action matters under state and federal law. In the past five years alone, Littler has represented employers in more than 1,700 class and collective actions across the United States. Applying its collective knowledge and experience, the firm created the leading treatise, Littler Mendelson on Employment Law Class Actions, a comprehensive guide to all aspects of employment class and collective actions, including analysis of recent developments and trends. Littler is the collective trade name for an international legal practice, the practicing entities of which are separate and distinct professional firms.

Our Firm has significant concerns regarding the far reaching adverse impact the Department of Labor's proposed changes to the regulations at 29 C.F.R. Part 541 (the "white collar" regulations) will have upon American business. Littler also objects to any effort to make modifications to the current white collar duties tests as such changes are not only procedurally barred, but would overturn well-settled case authority interpreting the white collar exemptions and dramatically disrupt the operations of businesses across the country at a time of a wavering economic recovery. Our concerns with the Notice of Proposed Rulemaking are set forth below.

I. SALARY LEVELS

A. The Proposed Salary Level Is Unprecedented and Would Result in a 113% Increase from Current Requirements

In the NPRM, the DOL proposes to increase both the minimum salary level for the "white collar" exemptions for highly compensated employees. Additionally, the DOL proposes to adopt a mechanism for automatic annual increases to these salary levels. The DOL proposes to set the minimum salary threshold for the "white collar" exemption using data from the Bureau of Labor Statistics (BLS), at the 40th percentile for all non-hourly paid employees.[1] Currently, according to the DOL, this methodology would result in a minimum salary level of $921 per week or $47,892 annually.[2] When a Final Rule is published in 2016, the DOL predicts the minimum salary level based at the 40th percentile will increase to $970 per week or $50,440 annually[3] – an astounding ***113% increase*** from the current requirement of $455 per week or $23,660 per year set just a decade ago.[4]

The proposed increase and the DOL's methodology are unprecedented and unsupported. Defying 77 years of regulatory tradition, the DOL used information regarding employee salaries to benchmark the salary level at the 40th percentile. While the Department in prior rulemakings has utilized actual salaries in setting the minimum salary level, it has never come close to the 40th percentile. In 1958, the DOL used data on the actual salary levels of employees that wage and hour investigators found to be exempt during investigations conducted over an eight-month period.[5] Based on this data, the DOL set the minimum salary required for the white collar 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,

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[1] 80 Fed. Reg. 38516, 38517 (July 6, 2015) (hereinafter "2015 NPRM").

[2] *Id.*

[3] *Id.* at n.1.

[4] 2015 NPRM at 38517.

[5] Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (hereinafter, the "Kantor Report") at 6.

and the smallest size city.[6] If the 1958 methodology were applied today, the resulting minimum salary level would be $657 per week or $34,167 annually. 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).[7] In the 2004 Final Rule, the DOL doubled the percentile used, from 10th to 20th, to account for changes to the duties test. 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.[8]

The current 40th percentile proposal results in a salary level that is 47% higher than the 1958 methodology and 68% higher than the 2004 methodology. Further, 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 and sales employees who are not subject to the Part 541 salary requirements. Historically, with only a few exceptions, the DOL has increased the salary levels at a rate of between 2.8% and 5.5% per year.[9] The DOL's proposed increase to $50,440[10] represents an increase of 10.29% per year. Over the last decade, salaries did not increase by over 10% annually. Indeed, the DOL ignored the fact that during the preceding ten years the country faced the "Great Recession" in which hundreds of thousands of jobs were lost and many American businesses saw a precipitous economic decline. The DOL has never before doubled the salary levels for the white collar exemptions in a single rulemaking, let alone more than doubled the salary levels as has been proposed here.

Remarkably, the DOL's proposal wholly discounts the significant impact increasing the salary level at the proposed rate will have upon the majority of the country, particularly in regions and industries where the identified 40% threshold is entirely disproportionate to actual average salaries. Indeed, the proposed salary level for the exemption is well above the current California and New York minimum salary thresholds for their state exemption tests ($37,440[11] and $34,124[12] respectively), two jurisdictions with some of the highest cost of living areas in the country and – correspondingly – the highest per household earnings. Similar to the 2004 methodology, consideration needs to be paid to regional and industry averages.

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[6] *Id*. at 7-8.

[7] Final Rule, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22167 & Table 2 (Apr. 23, 2004) (hereinafter "2004 Final Rule).

[8] 2015 NPRM at 38558-38559.

[9] *Id*. at 38524-38527.

[10] *Id*. at 38517, n. 1.

[11] *See* Cal. Lab. Code § 515(a).

[12] 12 NYCRR §142- 2.14.

The proposed salary level will have a disproportionate impact on many industries – and in particular small businesses. Millions of employees who work for smaller employers will clearly meet the white collar duties requirements but earn below $50,000 a year. We respectfully request that the Department significantly reduce its proposed standard salary level for exemption. The DOL's proposal further undermines the purpose of the salary threshold. Since 1949 through to the current NPRM:

> The Department has long recognized that the salary paid to an employee is the "best single test" of exempt status (Stein Report at 19) and that setting a minimum salary threshold provides a "ready method of screening out the obviously nonexempt employees" while furnishing a "completely objective and precise measure which is not subject to differences of opinion or variations in judgment." Weiss Report at 8–9. The Department reaffirmed this position in the 2004 Final Rule, explaining that the "salary level test is intended to help distinguish bona fide executive, administrative, and professional employees from those who were not intended by Congress to come within these exempt categories[,]" and reiterating that any increase in the salary level must "have as its primary objective the drawing of a line separating exempt from nonexempt employees."[13]

To effectuate Congress' intent, the DOL should not set the minimum salary threshold at a level that excludes a significant number of employees who obviously meet the duties tests for exemption. The salary level must be appropriate across the "many thousands of different situations throughout the country."[14] As the Department stated in 1949: "To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary."[15] Thus, to avoid excluding millions of employees from the exemption who perform exempt job duties, the Department has recognized that "the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex as that of the United States. Despite the variation in effect, however, it 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"[16] of exempt employees "in the

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[13] 2015 NPRM at 38524 (citing 69 Fed. Reg. 22165).

[14] *Report and Recommendations on Proposed Revisions of Regulations, Part 541,* at 9, Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949).

[15] *Id.* at 11.

[16] 1958 Kantor Report at 5.

lowest-wage region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry."[17]

Indexing based upon the 40th percentile is unworkable and will render the duties test superfluous – particularly over time if annual indexing is utilized. The 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 seeks to do here. This is particularly true for many of our clients who operate in regions where the 40th percentile is far below the estimated $50,440 salary and who have employees who clearly meet the duties tests.

B. Salaries Should Not Be Indexed Annually

We are particularly concerned with the Department's proposal to annually adjust the salary level tied to either: (a) the applicable 40th percentile (for white collar exempt employees) or 90th percentile (for highly compensated employees); or (2) at the same rate at the CPI-U.[18]

Littler strongly urges the DOL to abandon the proposed annual indexing. As a threshold matter, automatically increasing the minimum salary level annually creates an unsustainable floor and creates annual instability and uncertainty in employers' carefully calibrated compensation strategies and budgeting models. Employers operate on varying fiscal calendars. Preparing for annual increases presents challenges in terms of budgeting and implementation. Potential annual reclassification puts an undue burden upon employers who must in an extremely limited time period comply with state notice requirements, reprogram compensation systems and conduct additional training, much less conduct the necessary legal and compliance review to determine if reclassification is appropriate. Additionally, employers must contend not only with the costs of increased wage rates, but also must incur the additional expense of routine classification analysis, decision-making, and implementation of changes in response to the new salary level when it is announced each year.

At no time has Congress granted the Department the authority to index its salary test. While the issue has been raised by stakeholders during prior rulemakings, the DOL has repeatedly rejected the imposition of automatic annual increases. Most recently, in 2004, the Department summarily rejected the concept of automatic increases to the minimal salary level.[19] At the time, the DOL contended that such an action is contrary to Congressional intent and disproportionately impacted lower-wage geographic regions and industries:

> [S]ome commenters ask the Department to provide for future automatic increases of the salary levels tied to some inflationary

[17] *Id.* at 6-7.

[18] 2015 NPRM at 38524, 38537-38542.

[19] *See* Preamble to 2004 Final Rule, 69 Fed. Reg. at 22167 (Apr. 23, 2004) (hereinafter, "Preamble").

> measure, the minimum wage or prevailing wages. Other commenters suggest that the Department provide some mechanism for regular review or updates at a fixed interval, such as every five years. Commenters who made these suggestions are concerned that the Department will let another 29 years pass before the salary levels are again increased. The Department intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur. The salary levels should be adjusted when wage survey data and other policy concerns support such a change. Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6½ times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze the minimum hourly wage for the computer exemption at $27.63 (6½ times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.[20]

Mandating annual increases not only runs afoul of Congressional intent but also presents an issue of parity, not currently addressed by the DOL's financial impact analysis. By continuously raising the salary floor, a cascading effect necessarily occurs. Businesses must face the prospect of either continual reclassification of employees otherwise performing exempt duties and an increase to overall labor costs as, arguably, those salaries above the minimum must be equally raised or risk compensation inequity.

Astonishingly, in the NPRM, the DOL effectively suggests that annual indexing is necessary because the DOL is too busy to engage in rule making and to provide stakeholders with a meaningful opportunity to comment on the impact of proposed salary increases ("competing regulatory priorities, overall agency workload and the time intensive nature of the

[20] 2004 Final Rule at 22171-72.

notice and comment process have hindered the Department's ability to [update the salary levels on a more regular basis.]"). Respectfully, the DOL's workload does not provide a legitimate basis for the DOL to avoid the long recognized notice and comment process when seeking to raise the white collar salary levels.

Moreover, should the increases be tied to the 40th percentile, the minimum salary level will quickly skyrocket, entirely destabilizing Congressional intent that the salary should not be set at a level that excludes many employees who obviously meet the white collar duties tests. By increasing the minimum salary level from $23,660 to over $50,000, employers will either have to reclassify employees (thus they drop out of the BLS survey) or will increase their salaries to meet the minimum requirements. This will have the overall result of causing a significant spike in the BLS survey results – far in excess of the average of 2.6% the DOL estimates the 40th percentile has increased year over year since 2003. Continuing to raise the base salary level will cause disproportionate increases in the salary levels if increases are tied to a percentile of earnings. Carrying DOL's proposal to its logical conclusion, $970 per week – if implemented – would represent the lowest percentile of earned salaries. All of those making less than the projected minimum salary of $50,440 drop out of the calculation. Thus, the 40th percentile would be disproportionately raised, rendering a large percentage of the workforce ineligible for the white collar exemptions.

The complexities associated with indexing the current salary level clearly undermines President Obama's stated goal to "modernize and streamline" the current regulations.[21] Contrary to the DOL's representation in the NPRM, automatic annual increases to the minimum salary levels will not "provide more certainty and stability for employers."[22] Accordingly, Littler urges the Department to reconsider its proposal to implement annual increases in the minimum salary level upon the regulated community.

C. Inclusion of Additional Compensation Should Be Permitted

In the NPRM, the Department has indicated that it is considering permitting the inclusion of non-discretionary bonuses and/or commissions – up to 10% of the total required salary –to establish minimal salary levels.[23] According to the Department, such sums must be paid at least once a month in order to be considered in meeting the salary threshold.[24] While Littler supports the inclusion of additional compensation in calculating an employee's salary, the Department's proposal is unnecessarily limited and represents a fundamental misconception as to how businesses utilize non-discretionary bonus and commission plans to reward and incentivize their employees.

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[21] 2015 NPRM at 38521.

[22] 2015 NPRM at 38523.

[23] 2015 NPRM at 38535-38536.

[24] *Id.*

Many bonuses or incentive payments earned by exempt employees are paid on a far less frequent basis than monthly payments. Often, such earnings are paid quarterly or annually. These payment cycles are not arbitrary, but instead are a function of the practical reality that the computational methods require longer earning cycles to access performance metrics. Excluding these payments from total compensation unduly burdens employers as they are often critical components of an employee's total wages. As the stakeholders conveyed prior to the issuance of the NPRM "nondiscretionary bonuses and incentive payments are an important component of employee compensation in many industries" and "such compensation might be curtailed if the standard salary level was increased and employers had to shift compensation from bonuses to salary to satisfy the new standard salary level."[25] Doing so would have a "negative impact on the workplace and would undermine managers' sense of 'ownership' in their organizations."[26]

Arbitrarily capping the amount of additional compensation that can be considered as meeting the salary threshold runs afoul of other provisions of the FLSA. For example, recognizing the realities of compensation structures, the regulations reflect that "commissions, nondiscretionary bonuses and other nondiscretionary compensation" – in addition to a guaranteed salary – may be counted towards meeting the current $100,000 threshold required to establish the highly compensated employee exemption.[27]

In addition to permitting unrestricted incentive pay and commissions to comprise the required salary, the Department should also include a "make up" provision, similar to that provided by the regulations governing the highly compensated employee exemption.[28] In other

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[25] *Id.* at 38535.

[26] *Id.*

[27] *See* 29 C.F.R. § 541.601(b)(1) ("'Total annual compensation' must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period.").

[28] 29 C.F.R. § 541.601(b)(2) provides that:

> If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $10,000 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid.

words, employers should be given an opportunity to provide employees who otherwise meet the white collar duties tests additional compensation – on an annual basis – to ensure that they are at the minimum salary level.

II. THE DEPARTMENT SHOULD NOT MODIFY THE CURRENT DUTIES TEST

We are particularly concerned that the final rulemaking will contain significant changes to the white collar duties tests without first giving stakeholders the opportunity to review and comment on specifically delineated changes. While the Department has not proposed any changes to the current white collar duties test, it has indicated that it "seeks to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted"[29] and "invites comments on whether adjustments to the duties tests are necessary, particularly in light of the proposed change in the salary level test."[30] Without identifying any particular proposals, the Department broadly seeks comment on the following topics:

- 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 exemption? If so, what should that minimum amount be?
- Should the DOL look to the State of California's law (requiring that 50% of an employee's time be spent exclusively on work that is the employee's primary duty) as a model?
- Is some other threshold that is less than 50% of an employee's time worked a better indicator of the realities of the workplace today?
- Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees?
- 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

[29] 2015 NPRM at 38543.
[30] *Id.*

extent are lower-level executive employees performing nonexempt work?[31]

A. Changes to the Duties Test Are Not Well-Founded Procedurally

While we accept that some increase to the salary level may ultimately result from this rulemaking, we object to any changes to the duties tests on the grounds the DOL has failed to provide the public with adequate regulatory changes that can be evaluated against long-settled case authority.

The expansive list of questions posed by the Department on the current duties test–which range from the very broad "[w]hat, if any, changes should be made to the duties test?,"[32] to the very specific "[s]hould the Department look to the State of California's law (requiring that 50% of an employee's time be spent exclusively on work that is the employee's primary duty) as a model?"[33] –is insufficient to give stakeholders a meaningful opportunity to comment on proposed regulatory changes. Simply inviting comment on a range of generalized, unfocused questions is wholly at odds with the Department's obligations as set forth in the Administrative Procedures Act.[34] The public should not be left to guess at an agency's intentions, particularly on a subject that has such widespread impact upon America's workforce–such as any change to the "white collar" exemption duties requirements.[35] Put differently, stakeholders cannot be asked to "divine" the agency's "unspoken thoughts."[36] However, that is precisely what the Department now asks us to do. This approach is ambush rulemaking at its worst.

The Department's wide-ranging questions and lack of corresponding regulatory text have denied the public of its rightful and meaningful role in this rulemaking. Any changes to the well-entrenched duties test will result in the upheaval of the past decade of case law and agency opinions and would be done without providing any substantive notice to the regulated community.[37] While the Department may attempt to bootstrap any changes to the duties test to cherry-picked comments, this does not shield the final rule from challenge. As the D.C. Circuit has held, the "fact that some commenters actually submitted comments" addressing the

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[31] *Id.*

[32] 2015 NPRM at 38543

[33] *Id.*

[34] Pub. L. No. 70-4-4.

[35] *See CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1082 (D.C. Cir. 2009) (finding that commenters could not have anticipated which "particular aspects of [the agency's] proposal [were] open for consideration.").

[36] *Arizona Public Serv. Co. v. EPA,* 211 F.3d 1280 (D.C. Cir. 2000) (citation omitted).

[37] *See, e.g., Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (holding that final rule was not a logical outgrowth of "open-ended" questions that failed to describe what the agency was "considering or why").

final rule "is of little significance," because "[c]ommenting parties cannot be expected to monitor all other comments submitted to an agency."[38] Instead, the Department must "itself provide notice of a regulatory proposal," and its current approach has failed to do so.[39]

Should any changes to the duties test result from this notice of proposed rulemaking, the final rule would fail to comply with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 require agencies, in promulgating regulations, to assess all costs and benefits of available regulatory alternatives.[40] In particular, an agency must consider the costs of enforcement and compliance prior to implementing regulations.[41] Because the Department has declined to proffer any specific proposal, the enormity of the costs that the regulated community will inevitably face have not been explored. Stakeholders are left without the opportunity to address the potential costs and benefits the Department has identified in making any changes to the white collar duties test – as no such costs and benefits have been discussed. Thus, the requirements as set forth in Executive Orders 12866 and 13563 have not been met.[42]

The undefined topics upon which the Department seeks comments through the current NPRM utterly deprive stakeholders of this meaningful opportunity to express their views. It is, therefore, Littler's view that should the Department seek to change the duties requirements contained in 29 C.F.R. Part 541, it would first be required to notice the specific proposals being considered – and costs and benefits associated with the same – and then afford the public the appropriate opportunity to comment.

The importance of allowing the public to comment on specific changes to regulatory text can be found in the regulatory history of Part 541 itself. The Department balanced concerns raised by both the employee and employer communities in finalizing the current primary duties test contained in its 2004 Final Rule. In response to the Department's proposed regulation revising the test to determine an executive exempt employee, the AFL-CIO commented, among others, that the proposed phraseology "a primary duty" weakened the test by allowing for more than one primary duty and not requiring that the most important duty be management. The

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[38] *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (an agency cannot "bootstrap notice from a comment") (citations omitted).

[39] *See id.*

[40] 58 Fed. Reg. 51735 (Oct. 4, 1993); 76 Fed. Reg. 3821-23 (Jan. 21, 2011).

[41] 58 Fed. Reg. 51735 (Oct. 4, 1993).

[42] Executive Order 13563 also requires that regulations be adopted through a process that sufficiently involves public participation. 76 Fed. Reg. 3821-22 (Jan. 21, 2011). Specifically, Executive Order 13563 requires that an agency afford the public a "*meaningful opportunity* to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." 76 Fed. Reg. 3821-22 (Jan. 21, 2011) (emphasis supplied). In addition, Executive Order 13563 requires an agency, before issuing a notice of proposed rulemaking, to seek the views of those who are likely to be affected by such rulemaking. *Id.* at 3822.

Department agreed, replacing the word "a" with "whose," reinforcing its intent that an employee can only have one primary duty. Any attempt to undo the Department's fully vetted test – particularly in the absence of proposed regulatory text upon which the public can comment – may result in similarly unintended consequences. It further undermines the professed goal of simplifying the current regulations. Thus, as the AFL-CIO acknowledged in 2004, words matter and even minor changes to seemingly innocuous words can have a significant, even if inadvertent impact on the scope of the exemption.[43]

By adopting *any* changes to the regulatory text of the Part 541 duties tests in a Final Rule, the Department will be ignoring President Obama's directive provide the public with a "*meaningful opportunity*" to comment on proposed regulations.

B. The Concurrent Duties Provision Should Be Unchanged

Littler is particularly troubled that the Department may seek to eliminate or modify the current "concurrent duties" provision (that lets an exempt employee perform both exempt and non-exempt tasks without jeopardizing the executive exemption).[44] The inclusion of the concurrent duties rule in 2004 acknowledged the realities that front-line managers–particularly those working for small businesses–perform essential managerial functions even while performing many of the same jobs duties as their subordinates. These realities have not changed since 2004 and the Department should not change the rule.

Currently, the regulations provide:

> Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700 [related to primary duty test]. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work.[45]

Section 541.106 allows integral exempt employees such as store or restaurant managers 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 executive exemption for both assistant managers and managers, particularly in smaller

[43] Preamble at 22137 (citing Comments of AFL-CIO).

[44] 2015 NPRM at 38543.

[45] 29 C.F.R. § 541.106.

establishments. During the stakeholder listening sessions held in advance of this proposed rule, the Department heard from employer stakeholders who advocated for the need to maintain flexibility in the duties tests.[46] These stakeholders stated "that the ability of a store or restaurant manager or assistant manager to 'pitch in' and help line employees when needed was a key part of their organizations' management culture and necessary to enhancing the customer experience."[47] They further noted that "employees in these entry-level management positions are critically important to their organizations and that the experience they gain in these positions will lead to higher level management opportunities."[48] Littler joins these stakeholders in "universally urg[ing] the Department not to consider any changes to the current duties tests" because "while the duties tests are sometimes difficult to apply and may not be perfect, employers have an understanding of the meaning and application of the current duties tests and any changes might engender costly litigation as parties try to adapt to and interpret the new rules."[49]

This issue has already been reviewed and resolved during the 2004 rulemaking:

> The Department believes that the proposed and final regulations are consistent with current case law which makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption. Numerous courts have determined that an employee can have a primary duty of management while concurrently performing nonexempt duties. See, e.g., Jones v. Virginia Oil Co., 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks"); Murray v. Stuckey's, Inc., 939 F.2d 614, 617–20 (8th Cir. 1991) (store managers who spend 65 to 90 percent of their time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves" were exempt executives); Donovan v. Burger King Corp., 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that his primary duty is management"); Horne v. Crown Central Petroleum, Inc., 775 F. Supp. 189, 190 (D.S.C. 1991) (convenience store manager held exempt even though she performed management duties "simultaneously with assisting the

[46] 2015 NPRM at 38542.
[47] 2015 NPRM at 38542.
[48] *Id.*
[49] *Id.*

> store clerks in waiting on customers"). Moreover, courts have noted that exempt executives generally remain responsible for the success or failure of business operations under their management while performing the nonexempt work. See Jones v. Virginia Oil Co., 2003 WL 21699882, at *4 ("Jones" managerial functions were critical to the success' of the business); Donovan v. Burger King Corp., 675 F.2d 516, 521 (2nd Cir. 1982) (the employees' managerial responsibilities were "most important or critical to the success of the restaurant"); Horne v. Crown Central Petroleum, Inc., 775 F. Supp. at 191 (nonexempt tasks were "not nearly as crucial to the store's success as were the management functions").[50]

In 2004, the Department reviewed the case law cited above and stated that it believed these cases accurately reflected the appropriate test of exempt executive status and was a "practical approach that could be realistically applied in the modern workforce, particularly in restaurant and retail settings."[51] Accordingly, no changes to the concurrent duties provision are necessary or warranted.

C. The Inclusion of Additional Duties Tests Is Unwarranted

Littler opposes any revision to the duties test – particularly one which introduces a quantitative requirement – whether made by reinstituting the long/short duties test or in some other fashion. Such a change would upend the regulated community, adding substantial unjustified (and unexplored) costs and burdens on employers, and serve to increase litigation. In its NPRM, the Department now looks to potentially nullify the established primary duties requirements contained in 29 C.F.R. Part 541 by inquiring whether employees should be required to spend a specified minimum amount of time exclusively performing their primary duty in order to qualify as exempt, citing California's 50% primary duty requirement as an example. The Department also suggests that it may return to the more detailed long duties test should, in its estimation, the minimum salary level not sufficiently succeed in demarcating between exempt executives and nonexempt employees.

The Department's reference to California's 50% primary duty rule[52] is particularly troubling because, like other jurisdictions that have adopted such quantitative tests, California has realized the unintended negative effects of its so-called "bright-line" rule. Rather than decreasing litigation and uncertainty over classifications, we have observed in our representation of hundreds of employers that California's rule has had the opposite effect—substantial litigation as members of the California plaintiffs' bar have come to realize (and

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[50] *See* Preamble at 22186.

[51] *Id.* at 22137.

[52] 2015 NPRM at 38543.

capitalize on) the extreme difficulty employers face in proving the amount of time employees spend on exempt versus non-exempt tasks. Indeed, such a rule places an enormous burden on employers to engage in extensive analysis and time testing, wading through the hour-by-hour—and in some cases minute-by-minute—tasks of their employees in order to defend their classification decisions. Regardless of any effort to regulate around such ambiguities, the central issue is and should remain what is—and what is not—exempt work.

The Department has already acknowledged that these precise concerns render quantitative testing impracticable. In 2004, responding to commenters who requested the addition of a quantitative test, the Department reasoned that such analysis unnecessarily adds complexity and burdens to exemption testing by, for example, requiring employers to "time-test managers for the duties they perform, hour-by-hour in a typical workweek"[53]. Requiring employers to "distinguish[] which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes." [54] Establishing quantitative requirements needlessly muddles a process the Department asserts through its NPRM should be streamlined. As the Department noted in 2004, "[i]t serves no productive interest if a complicated regulatory structure implementing a statutory directive means that few people can arrive at a correct conclusion, or that many people arrive at different conclusions, when trying to apply the standards to widely varying and diverse employment settings."[55]

The Preamble to the 2004 Final Rule identified further concerns with requiring a strict delineation of time spent on exempt and non-exempt duties:

> For example, employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees (see 29 CFR 516.3), nor are they required to perform a moment-by-moment examination of an exempt employee's specific duties to establish that that an exemption is available. Yet reactivating the former strict percentage limitations on nonexempt work in the existing 'long' duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied.[56]

Rather than solve any of the perceived problems with the primary duty test, a quantitative requirement only creates tremendous recordkeeping burdens on employers and

[53] Preamble at 22126.

[54] *Id*. at 22137.

[55] *Id*.

[56] *Id*. at 22126-22127.

adds to employers' uncertainty over classifications. Such a quantitative requirement merely serves to incentivize plaintiffs' attorneys to systematically attack an employee's classification. No benefit is to be derived from now injecting a quantitative requirement to the well-settled qualitative approach.

As part of its 2004 Rulemaking, the Department evaluated—and rejected—prior proposals for a quantitative "bright-line" test, such as the test California employs. Indeed, the Department first determined and warned:

> Adopting a strict 50-percent rule for the first time would not be appropriate . . . because of the difficulties of tracking the amount of time spent on exempt tasks. An inflexible 50-percent rule has the same flaws as an inflexible 20-percent rule. Such a rule would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens).[57]

The Department's reasoned analysis then still holds true in 2015. Rather than focusing on a quantitative test, the 2004 Final Rule instead chose to focus on four nonexclusive factors for determining the primary duty of the employee:

(1) The relative importance of the exempt duties as compared with other types of duties;

(2) The amount of time spent performing exempt work;

(3) The employee's relative freedom from direct supervision; and

(4) The relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work.[58]

Under these factors, the amount of time spent may be considered, but is not indicative alone of an exempt status. Indeed, the 2004 Preamble to the Final Rule emphasized that:

> The time spent performing exempt work has always been, and will continue to be, just one factor for determining primary duty. Spending more than 50 percent of the time performing exempt work has been, and will continue to be, indicative of exempt status. Spending less than 50 percent of the time performing

[57] *See* Preamble at 22186.

[58] 29 U.S.C. § 541.700.

> exempt work has never been, and will not be, dispositive of nonexempt status.
>
> . . . [T]he search for an employee's primary duty is a search for the "character of the employee's job as a whole." Thus, both the current and final regulations "call for a holistic approach to determining an employee's primary duty," not "day-by-day scrutiny of the tasks of managerial or administrative employees." Counts v. South Carolina Electric & Gas Co., 317 F.3d 453, 456 (4th Cir. 2003) ("Nothing in the FLSA compels any particular time frame for determining an employee's primary duty").[59]

Similarly, a resurrection of the previously abandoned "long/short" test would entirely undermine President Barack Obama's direction that the Secretary "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." This goal is plainly not met should the Department incorporate any form of the old quantitative prong contained in the prior long duties test. Nor is the goal furthered by returning to two tests instead of one standard test.

Complicating the duties test by creating a tiered system, requiring employers to test multiple requirements under different scenarios represents neither a modernization nor a streamlining of the analysis. Indeed, when the Department proposed merging the long/short test into a single duties test in its 2003 NPRM, the Department concluded:

> The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption.[60]

In eliminating the short/long duties test in favor of the current "primary duty" tests through the 2004 Final Rule, the Department advanced its goal to reform and simplify the regulations. A return to two tests will make it more difficult to determine the application of the duties test and create instability and uncertainty amongst the regulated community.

Indeed, as the Department recognizes in its NPRM, any increase in the salary level will have the result that "more employees performing bona fide white collar duties will become entitled to overtime because they are paid a salary below the salary threshold."[61] This is particularly true in states with a lower cost of living. As one recent study indicates, in 10 states indexing the salary threshold to the national 40th percentile would make 45%, not 40%, of full-

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[59] *See* Preamble at 22186.

[60] Preamble at 22122.

[61] 2015 NPRM at 38531.

time salaried workers eligible for overtime.[62] The study concludes that in eight states, 50% of salaried workers would be overtime eligible.[63] The resulting reduction in the number of employees who will qualify for an exemption to the FLSA's overtime requirements will impact the business community substantially. Such changes will only further be complicated by adding new requirements employers must contend with – just as having to address new varying exemption tests.

Littler urges the Department to continue its application of the approach developed in 2004 and reject any requirement that duties must be quantitatively measured or that an antiquated two test system be reinstituted.

III. ENFORCEMENT

If finalized, the new regulations, including possible changes to the duties test, will create tremendous uncertainty among employers. Following the issuance of the Final Rule, WHD must ensure that employers are provided with meaningful compliance assistance and must support those employers who evaluate their wage and hour practices and seek to correct any mistakes with DOL supervision of any back wage payments. Given the uncertainties that will result from any increase in the minimum salary level, Littler strongly encourages the Department to implement a year-long safe harbor, during which employers can self-correct violations without fear of litigation. This action will also help WHD preserve their resources for those cases where they can be used most effectively.

IV. CONCLUSION

In summary, Littler objects to any changes in the white collar exemption other than a modest increase to the standard salary level for exemption. We hope that the Department will seriously consider our views and the views of others in the business community.

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[62] *See* https://www.politicopro.com/labor/whiteboard/2015/09/nrf-overtime-threshold-too-high-for-rural-areas-059773 (last visited September 1, 2015).

[63] *Id.*

Sincerely,

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