



# Federal Register

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**Friday,  
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## **Part II**

# **Department of Labor**

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**Wage and Hour Division**

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**29 CFR Part 541  
Defining and Delimiting the Exemptions  
for Executive, Administrative,  
Professional, Outside Sales and Computer  
Employees; Final Rule**

**Economic Report**

requirements codified at 29 CFR Part 516, which were approved by the Office of Management and Budget under OMB Control number 1215-0017. See 29 CFR 516.0 and 516.3.

#### **VI. Executive Order 12866 and the Small Business Regulatory Enforcement Fairness Act**

This rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is an “economically significant” regulatory action under section 3(f)(1) of Executive Order 12866. Based on the analysis presented below, the Department has determined that the final rule will have an annual effect on the economy of \$100 million or more. For similar reasons, the Department has concluded that this rule also is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). As a result, the Department has prepared a Regulatory Impact Analysis (RIA) in connection with this rule as required under Section 6(a)(3) of the Order and the Office of Management and Budget has reviewed the rule. The RIA in its entirety is presented below.

##### *Regulatory Impact Analysis*

##### Chapter 1: Executive Summary

The final rule will restore overtime protection for lower-wage workers, strengthen overtime protection for middle-income workers including first responders, and reduce costly and lengthy litigation. Both workers and employers will benefit from having clearer rules that are easier to understand and enforce. More workers will know their rights and if they are being paid correctly, more employers will understand exactly what their obligations are for paying overtime, and clearer more up-to-date rules will help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately.

Specifically:

- Raising the salary level test to \$455 will strengthen overtime protection for more than 6.7 million salaried workers who earn \$155 or more and less than \$455 per week regardless of their duties or exempt status.

- There are 5.4 million currently nonexempt salaried workers whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current regulation, will be automatic under the final rule. This includes 2.6 million nonexempt salaried white collar

employees who are at particular risk of being misclassified.

- There are 1.3 million currently exempt white collar salaried workers who will gain overtime protection.

- The final rule is as protective as the current regulation for the 57.0 million paid hourly and salaried workers who earn between \$23,660 and \$100,000 per year.

- An estimated 107,000 workers who earn \$100,000 or more per year could lose their overtime protection from the new highly compensated test.

- The total first-year implementation costs to employers are estimated to be \$738.5 million, of which \$627.1 is related to reviewing the regulation and revising overtime policies and \$111.4 million is related to conducting job reviews.

- Transfers from employers to employees, in the form of greater overtime pay or higher base salaries, are estimated to be \$375 million per year. Therefore, the total cost to employers is estimated to be \$1.1 billion in year-one and \$375 million per year thereafter.

- Updating and clarifying the rule will reduce Part 541 violations and are likely to save businesses at least \$252.2 million per year.

- There is not likely to be a substantial impact on small businesses or state and local governments.

Due to data limitations, a variety of benefits from the final rule can only be discussed qualitatively. For example:

- It will be more difficult to exempt workers from overtime as executive employees.

- Raising the salary level test to \$455 per week will strengthen overtime protection for 2.8 million salaried workers in blue-collar occupations, because their protection, which is based on the duties tests under the current regulation, will be automatic under the new rules. The Department concluded that most of these workers are nonexempt under the current regulation, however, making their nonexempt status certain will unambiguously increase their overtime protection.

- Updating and clarifying the rule will reduce the human resource and legal costs for classifying workers (particularly for small businesses), and reduced litigation could improve job opportunities.

- Updating the rule is an action forcing event and a catalyst for compliance. Employers who may not have undertaken an audit of the classification of their workforce will be more likely to do so after the promulgation of the final rule, resulting

#### **V. Paperwork Reduction Act**

This rule contains no new information collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The information collection requirements for employers who claim exemption under 29 CFR Part 541 are contained in the general FLSA recordkeeping

in greater levels of compliance with the law.

Chapter 2: Summary of the Updates to Part 541 That Affect the Economic Analysis

The first step in analyzing the costs and benefits associated with this rulemaking is to compare the existing Part 541 regulations with the final rule and determine the likely impact it will have on the exempt or nonexempt status of workers. After analyzing the impact of the salary level increase, updating the duties tests, and the highly compensated test, the Department reached the following conclusions:

- Employees earning less than \$155 per week will not be affected.
- Increasing the salary level test will strengthen overtime protection for salaried workers who earn \$155 or more and less than \$455 per week regardless of their duties or current exempt status. Hourly workers in this income range will continue to be guaranteed overtime protection.
- Exempt employees earning less than \$455 per week will gain overtime protection, thus resulting in additional payroll costs to employers.
- The final rule is as protective as the current regulation for workers who earn between \$23,660 and \$100,000 per year. On the whole, employees will gain overtime protection because some revisions are more protective than the existing short duties tests. However, this number is too small to estimate quantitatively.
- An estimated 107,000 employees earning \$100,000 per year or more could lose overtime protection under the highly compensated test.
- The final rule is more protective for police officers, fire fighters, paramedics,

emergency medical technicians, and other first responders, and the highly compensated test does not apply to those who are not performing office or non-manual duties.

- The Part 541 exemptions also do not apply to manual laborers or other non-management blue-collar workers such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

2.1 The Impact of Streamlining the Duties Tests and Raising the Salary Level Test

Under the existing regulations, the minimum salary level for exemption is only \$155 per week (\$8,060 annually). Employees earning at least \$155 per week and less than \$250 per week are tested for exemption under the existing “long” duties tests. Employees earning at least \$250 per week (\$13,000 annually) are considered “higher salaried” employees under the existing regulations, and are tested for exemption under the “short” duties tests. The final rule increases the minimum salary level for exemption to \$455 per week, a \$300 per week increase.

As discussed in the preamble, the Department disagrees with the commenters who argue that the Department’s proposal to move away from the “long” and “short” duties test structure of the existing regulations will result in employees losing overtime protection. This assertion fails to account for the impact of the increased minimum salary level in the final rule. The final rule guarantees overtime protection for all workers earning less

than \$455 per week (\$23,660 annually), the new minimum salary level for exemption. Thus, all employees earning at least \$155 per week and less than \$250 per week—the workers currently tested for exemption under the “long” duties tests—will be guaranteed overtime protection, regardless of their job duties, under the final regulations. Overtime protection is also guaranteed under the final rule for employees earning at least \$250 per week and less than \$455 per week who are currently tested for exemption under the existing “short” duties tests.

Comparisons between the existing “long” duties tests and the standard tests in the final regulation to describe the impacts on workers are thus misleading and inappropriate. The “long” duties tests, under which some employees are exempt and others nonexempt, have been replaced in the final rule by guaranteed overtime protection. Accordingly, the Department concludes that no worker who earns less than \$455 per week will lose their overtime protection under the final regulations. Most employees earning less than \$455 per week (\$23,660 annually) who are exempt under the existing regulations will be entitled to overtime pay under the final regulations (there are some workers, such as teachers, doctors, lawyers, and clergy, who are statutorily exempt or whose exempt status is not affected by the increased salary requirement in the final rule).

The additional overtime protections for employees currently earning less than \$455 per week and tested for exemption under the “long” and “short” duties tests are illustrated in Table 2–1:

TABLE 2–1.—COMPARISON OF SALARY LEVELS

Earnings	Existing regulations	Final regulations
Less than \$155/week	Guaranteed Overtime	Guaranteed Overtime.
\$155 to \$249.99/week	Long Duties Test	Guaranteed Overtime.
\$250 to \$454.99/week	Short Duties Test	Guaranteed Overtime.
\$455/week to \$100,000/year	Short Duties Test	Standard Duties Test.
\$100,000/year or more	Short Duties Test	Highly Compensated Test.

In the sections that follow, the Department presents its assessment of the impact the standard tests will have on the exempt status of workers compared to the current short duties tests. In several cases, the Department determined that the impact of the final rule will be too small to assess quantitatively because of the methodology used to estimate the number of exempt workers (presented below in Chapter 3).

The methodology used to estimate the number of currently exempt workers is based upon the broad WHD exemption probability categories presented in Table 3–2 that were designed to produce national estimates of the number of exempt and nonexempt workers. The WHD exemption probability categories were not designed to estimate the number of exempt workers for each Part 541 exemption (executive, administrative, or professional) because

there is significant overlap in the exemptions with some workers in a number of occupations being potentially exempt under more than one duties test. Moreover, some occupations include both supervisory and production workers. Given the lack of data on the duties being performed by specific workers in the Current Population Survey, the Department concludes that it is impossible to quantitatively estimate the number of exempt workers

resulting from the *deminimis* differences in the standard duties tests compared to the current short duties tests (see the discussions presented below).

2.2 Impact of the Final Duties Test for Executive Employees

Although some commenters asserted the proposed duties test for executive employees would reduce overtime protection for workers, as discussed in the preamble above and shown in Table 2-2, the final standard duties test for

executives, like the proposed duties test, is stronger than the current short duties test because it incorporates an additional requirement taken from the current long duties test: An exempt executive must have authority to hire or fire other employees, or the exempt executive's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. The final rule also returns to the language in the current rule "whose

primary duty" is management, instead of the proposed rule's "with a primary duty" of management.

Because of these changes, the Department concludes the standard duties test for executive employees in the proposed and final regulations is more protective than the current short test and some workers may gain overtime protection. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

TABLE 2-2.—COMPARING THE DUTIES TEST FOR EXECUTIVE EMPLOYEES

Salary level	Current short test \$250 per week	Final standard test \$455 per week
Duties .....	Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and Who customarily and regularly directs the work of two or more other employees.	Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; Who customarily and regularly directs the work of two or more other employees; and Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

2.3 Impact of the Final Duties Tests for Administrative Employees

The proposed duties tests for administrative employees generated a significant number of comments. As discussed in the preamble above, the final rule's duties test for administrative employees is significantly different than the test contained in the proposed rule. In drafting the final language, the Department sought to avoid introducing new terms (such as "position of responsibility") that generated confusion in the comments on the proposal and to retain terms (such as "primary duty," "discretion and independent judgment" and "general

business operations") that are used in the current rule and have been clarified by court decisions and opinion letters. The final regulatory text also requires that the discretion and independent judgment must be exercised "with respect to matters of significance," language that appears only in the current interpretive guidelines and not the existing regulatory text.

As Table 2-3 indicates, the standard duties test for administrative employees in the final rule is very similar, if not functionally identical, to the current short duties test when the current interpretive guidelines are taken into account as would be appropriate. Based

on the significant changes the Department made in the final rule to return the administrative duties test to the structure in the current rule, the Department has concluded that the standard duties test for administrative employees in the final rule is as protective as the current short test. Therefore, the Department has determined that very few, if any, workers will lose their right to overtime as a result of updating the current short test with the final standard duties test. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

TABLE 2-3.—COMPARING THE DUTIES TEST FOR ADMINISTRATIVE EMPLOYEES

Salary level	Current short test \$250 per week	Final standard test \$455 per week
Duties .....	Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and Which includes work requiring the exercise of discretion and independent judgment.	Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

2.4 The Impact of the Final Duties Tests for Learned Professional Employees

For reasons discussed in the preamble above, the final standard duties test for the learned professional exemption was

modified from the proposed test to track the current rule's primary duty test and to restructure the proposed rule's reference to acquiring advanced knowledge through other means such as an equivalent combination of

intellectual instruction and work experience so that it is consistent with the current regulation. As the preamble explains, the Department did not intend to depart from the current rule's educational requirements for the

learned professional exemption. Accordingly, the final rule clarifies that, just as under the current primary duty test, an employee must meet all three requirements of the test in order to be exempt—the primary duty must be performing work that requires advanced knowledge; the knowledge must be in a field of science or learning; and the knowledge must be customarily

acquired by a prolonged course of specialized intellectual instruction. The final rule also expands on each of those three components, using language from the current rule. For example, an employee’s “work requiring advanced knowledge” must include work requiring the consistent exercise of discretion and judgment (see Table 2–4). The final standard duties test for

learned professionals also adds language from the current long test in section 541.301(b) by defining work requiring advanced knowledge as work that is “predominantly intellectual in character” as distinguished from the “performance of routine mental, manual, mechanical or physical work.” These revisions clarify that the final rule is at least as protective as current rule.

TABLE 2–4.—COMPARING THE DUTIES TEST FOR PROFESSIONAL EMPLOYEES

Salary level	Current short test \$250 per week	Final standard test \$455 per week
Duties .....	Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and Which includes work requiring the consistent exercise of discretion and judgment; or Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Other commenters expressed concern the proposed duties test for learned professionals would result in many workers in some occupations (e.g., Licensed Practical Nurses, dental assistants, and cooks) losing overtime protection. Although most of the specific concerns raised by these comments were addressed by the Department’s modifications to the proposed rule’s professional duties test, discussed above, the Department notes the final rule clarifies a number of occupations. For example, Licensed Practical Nurses could not be classified as learned professionals because, unlike Registered Nurses, the possession of a specialized advanced academic degree is not a standard prerequisite for entry into that occupation. Therefore, the Department has determined very few, if any, workers will lose overtime protection as a result of updating the current short duties tests with the final standard duties test for learned professionals. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.5 The Impact of the Final Duties Test for Creative Professional Employees

As discussed in the preamble above, the comments stating the proposed revisions weakened the current duties

tests illustrate the confusion and misunderstanding that surrounds the current short duties test for artistic professionals. The Department considers the language in the final rule to be a restatement of the artistic primary duty test in the current short test (see Table 2–4). Further, the final rule reflects current case law regarding the creative professional exemption for journalists while recognizing, as the current regulations do, that the duties of employees referred to as journalists vary along a wide spectrum from the nonexempt to the exempt (29 CFR 541.302(f)). Therefore, the Department considers the language in the final rule for creative professionals to be as protective as the current short test and that few, if any, creative professionals will lose overtime protection as the result of the revisions. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.6 The Impact of the Final Duties Tests for Teachers and the Practice of Law or Medicine

As discussed above in the preamble, contrary to the assertions made by some commenters, the proposed and final rule merely restate the current exclusions from the salary requirements and do not change the existing exemption criteria

for teachers in educational establishments and licensed practitioners of law and medicine. The Department concludes these provisions in the final rule are not likely to result in any additional teachers in educational establishments, or licensed practitioners of law or medicine losing overtime protections compared to the current regulations.

2.7 The Impact of the Final Duties Tests for Computer Employees

Based on the comments received and for reasons discussed in the preamble above, several revisions were made in the final rule to align the current regulatory text with the specific standards adopted by Congress in 1996 for the computer employee exemption in section 13(a)(17) of the Act. As shown in Table 2–5, the Department considers the duties tests in the final regulations for computer employees to be functionally identical to those in the current regulations (section 541.303(b)) and statute (29 U.S.C. 213(a)(17)). Therefore, the Department concludes that it is unlikely that any additional employees will lose overtime protection as a result of the final duties tests for computer employees as compared to current law.

TABLE 2-5.—THE DUTIES TESTS FOR COMPUTER EMPLOYEES IN THE CURRENT AND FINAL REGULATIONS

Salary	Current short test \$250 per week	Section 13(a)(17) \$27.63 an hour	Final standard test \$455 per week or \$27.63 an hour
Duties .....	Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field (as provided in 541.303). Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering; and Whose work requires the consistent exercise of discretion and judgment.	Employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional applications; (B) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (C) design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of duties described in (A), (B) and (C), the performance of which requires the same level of skills.	The exemptions apply only to a computer employee whose primary duty consists of: (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

### 2.8 The Impact of the Final Duties Tests for Outside Sales Employees

As discussed in the preamble above, the Department has determined that the application of the proposed primary duty test to the outside sales exemption is preferable to the 20 percent tolerance test. Utilization of the explicit primary duty concept also provides a consistent approach between the structure of the outside sales exemption and the exemptions for executive, administrative, and professional employees. Moreover, any potential issues under the final rule are addressed by the objective criteria and factors for determining an employee's primary duty that are contained in section 541.700. Therefore, the Department concludes that few, if any, employees would lose overtime protection as a result of the final revisions to the duties tests for outside sales employees. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

### 2.9 The Impact of the Final Rule on Police Officers, Fire Fighters, Paramedics, and Other First Responders

As discussed in the preamble above, the final rule expressly provides that the section 13(a)(1) exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians (EMTs), and other first responders "regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing

fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work." Most courts have held that such workers generally are non-exempt because they typically do not perform the duties that are required for the executive or administrative exemption. Similarly, federal courts have held that police officers, paramedics, EMTs, and similar employees are not exempt professionals because they do not perform work requiring knowledge of an advanced type in a "field of science or learning" requiring knowledge "customarily acquired by a prolonged course of specialized intellectual instruction" as required under the current and final rules. The Department has no intention of departing from this established case law. Moreover, some police officers, firefighters, paramedics and EMTs treated as exempt executives under the current regulations may be entitled to overtime under the final rule because of the additional requirement in the standard duties test not found in the current short test that an exempt executive must have the authority to "hire or fire" other employees or make

recommendations given particular weight on hiring, firing, advancement, promotion or other change of status. Therefore, the Department concludes that the executive duties tests for police officers, fire fighters, paramedics, EMTs, or other first responders in the final rule is more stringent than the current short tests and some such workers may actually gain overtime protection. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

### 2.10 The Impact of the Final Highly Compensated Test

Some employees earning \$100,000 or more per year could lose overtime protection because of the less stringent duties test applicable to these employees under the highly compensated test adopted in the final regulations. However, the number of highly compensated employees earning \$100,000 or more per year who could lose protection is relatively small—approximately 107,000 (see Chapter 4). Taking into account the differences in regional wage levels, the highly compensated test has been set high enough to avoid exempting employees who are likely to be otherwise entitled to overtime protection. Adopting a \$100,000 salary level for the highly compensated test, increased from the proposed \$65,000 level, will result in far fewer workers being reclassified as exempt compared to the proposed rule. Moreover, in the Department's enforcement experience, most salaried

white collar workers earning \$100,000 or more per year would satisfy the existing short test and the final standard test. As shown below in Chapter 4, most salaried white-collar workers earning \$100,000 or more per year are already exempt and there are very few hourly workers earning \$100,000 or more per year in the white-collar occupations (only 47,000) likely to be affected. The Department also notes that the highly compensated test will not affect police, fire fighters, paramedics, EMT's and other first responders who are not performing office or non-manual work, nor will it affect manual laborers or other blue-collar workers who perform work involving repetitive operations with their hands, physical skill and energy.

#### 2.11 The Impact of the Final Safe Harbor Provision

As explained in the preamble above, the Department has decided to retain in final subsection 541.603(c) the proposed approach that an employer who has an actual practice of making improper deductions will lose the exemption during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the improper deductions. However, if an employer has a clearly communicated policy prohibiting improper deductions and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, the employer will not lose the exemption unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. The Department believes that the safe harbor provision is an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole without providing a windfall to workers who have not been harmed. The final rule encourages employers to adopt proactive management practices that demonstrate the employers' intent to pay on a salary basis and correct violative payroll practices. In addition, employees will benefit from the additional notification of their rights under the FLSA. The updated safe harbor provision in the final rule will reduce costly and lengthy litigation while ensuring that workers whose pay is decreased in violation of the salary

basis test receive their back wages. Reducing litigation costs will free up resources and stimulate economic growth.

#### 2.12 The Impact of a Clearer and Easier to Understand Rule

Although there are a variety of benefits from the final rule that accrue to both workers and employers, data limitations enable the Department to discuss many benefits only qualitatively. One of the largest benefits to workers comes from having clearer rules that are easier to understand and enforce. More workers will know their rights and if they are being paid correctly (instead of going years without knowing they should be paid overtime). Fewer workers will be unintentionally misclassified, therefore they won't have to go to court and wait years for their back pay. Clearer more up-to-date rules will also help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately.

Salaried workers will also benefit from more equitable disciplinary actions (*i.e.*, under the current rule an employer would have to suspend an exempt manager for a full week for a Title VII violation in order to preserve the employee's exempt status even if the company's policy called for just a three day suspension without pay. Under the final rule salaried employees would lose only three days of pay).

Like workers, employers will also benefit from having clearer rules that are easier to understand. More employers will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced.

As explained elsewhere in the preamble, the Department recognizes the benefit of retaining relevant portions of the current standard so as not to completely jettison decades of federal court decisions and agency opinion letters and has made significant changes to the final rule that are intended to clarify the existing regulation, to make the rule easier to understand and apply to the 21st Century workplace, and to better reflect existing federal case law without substantially changing the current law. The Department believes that the final rule accomplishes these objectives and will result in some reduction in litigation, particularly in the long term.

#### Chapter 3: Estimating the Number of Workers Impacted by the Final Rule

In this chapter, the Department presents its estimates of the number of workers covered by the FLSA, subject to the salary level or salary basis tests, and who are currently Part 541-exempt or nonexempt.

- An estimated 35.2 million hourly paid workers and 7.6 million nonhourly workers are in occupations with no measurable probability of meeting the current duties tests (*e.g.*, blue-collar occupations).

- An estimated 32.7 million hourly workers and 31.7 million nonhourly workers are in occupations with some possibility of meeting the duties tests (*e.g.*, white-collar occupations).

- Of the estimated 31.7 million nonhourly workers in occupations with some possibility of meeting the duties tests, an estimated 19.4 million are exempt under the current rule.

As discussed below, the Department's approach is similar to that used by previous researchers, with the primary difference being that the Department used a nonlinear model to estimate the relationship between income and the exemption probability among current workers.

#### 3.1 Estimating the Number of Workers Covered by the FLSA

Based on the previous work in this area by the U.S. General Accounting Office (GAO), the University of Tennessee, CONSAD Research Corporation (CONSAD), and the Economic Policy Institute (EPI), the Department started with the latest available data from the U.S. Department of Labor, Bureau of Labor Statistics (BLS), 2002 Current Population Survey (CPS) Outgoing Rotation Group public use data set to estimate the number of workers that would be affected by changes in the Part 541 regulations. The primary reason the Department used this particular data source is its size (more than 474,000 observations) and breadth of detail (*e.g.*, occupation and industry classifications, salary, and hours worked). As the previous researchers found, no other data source provides the necessary detail for this type of analysis.

The GAO used the CPS because after reviewing "several Bureau of Labor Statistics (BLS) and DOL reports to determine whether any data sources could be used for [GAO's] purposes [and] discussions with DOL and experts, [the GAO] decided that the CPS Outgoing Rotations was the best available data source to estimate both the proportion of the labor force that is

covered by the white-collar exemptions and the demographic characteristics of this population.” (GAO/HEHS-99-164, pg. 40)

As discussed below, in order to provide transparency and the means for others to replicate our results, the Department chose to use the 2002 CPS Outgoing Rotation Group public use data set even though the employment weights for the observations are based on the 1990 Census and not the 2000 Census.

The Department created a subset of the entire survey that only included employed workers 16 years of age and older (Item PREMPNOT = 1—This is the name of the variable and its value in the BLS dataset used to create this subset. Similar variable names and values are provided below to assist researchers in replicating the Department’s results). The number of employed workers in 2002 was estimated by summing the CPS outgoing rotation weight (PWORWGT; note this weight must be divided by 120,000 to provide annual averages and to account for the 4 implied decimal points in the data) for each of the remaining observations in the dataset. This resulted in a total employment estimate of 134.3 million, which does not match BLS’s published 2002 total household employment of 136.5 million.

The 1.6 percent discrepancy is due to different weights being used to estimate the published employment totals. The weights in the public use file utilized by the Department in this analysis are

based on the 1990 Census. In January 2003, the BLS revised the weights using the 2000 Census. Although BLS changed its published employment totals back to January 2000, the weights in the public use files were not updated. The 134.3 million total for 2002 employment matches the published BLS 2002 employment estimate before the weights were changed. As noted below in Chapter 4, several commenters criticized the estimates in the Preliminary Regulatory Impact Analysis (PRIA) for being difficult to reproduce. Therefore, the Department chose not to use an internally available dataset with updated weights and instead used the publicly available dataset with 1990 Census weights to make its estimates easier to reproduce.

Using weights based on the 1990 Census does not significantly affect the accuracy or quality of the results. The difference between the employment totals (136.5 – 134.3 = 2.2 million) based on the two sets of weights is distributed across all occupations, in all industries in all regions of the country, and is thus unlikely to bias the estimates. For the final regulatory impact analysis, the Department has endeavored to ensure maximum transparency even though the estimates differ slightly from the most recent BLS-published estimates.

Next, the Department excluded the 14.9 million workers not covered by the FLSA, such as the self-employed and unpaid volunteers (item PEIO1COW = 6, 7, or 8), and the clergy and religious

workers (item PTIO1OCD = 176 and 177). An additional 3.1 million workers were excluded because they are in occupations specifically exempted from the FLSA’s overtime provisions (see Table 3–1), which reduced the total to 116.3 million workers. Another group, 1.5 million federal employees, were excluded from the total (item PEIO1COW = 1) because they are not subject to the regulations promulgated by the Department (they are covered by U.S. Office of Personnel Management regulations). However, federal workers (PEIO1COW = 1) in Postal Offices (PEIO1ICD= 412), the Tennessee Valley Authority (PEIO1ICD = 450 and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, and Virginia), and the Library of Congress (PEIO1ICD = 852 in the Washington D.C. MSA) were included in the analysis, as they are covered by final rule. The remaining 114.8 million workers represent the Department’s best estimate from available data of the total number of employees who are covered by the FLSA’s overtime provisions (see Chart 1). They are comprised of 69.0 million hourly paid workers and 45.8 million salaried workers (item PEERNHRY = 1 and 2, respectively). For the purposes of this RIA, the Department, like the GAO, assumed that workers paid on a nonhourly basis (CPS variable, PEERNHRY = 2) were paid on a salary or fee basis, and henceforth uses the term “salaried workers” to refer to workers classified as nonhourly in the CPS.

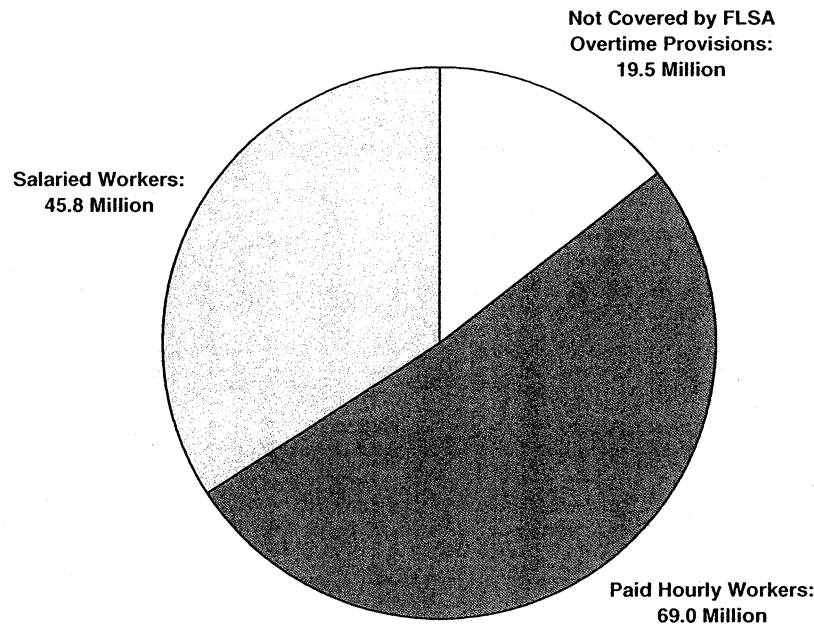
TABLE 3–1.—OCCUPATIONS EXEMPT FROM THE FLSA’S OVERTIME PROVISIONS

CPS occupation code	Number of workers
Self-Employed and Unpaid Family: 29 U.S.C. 203(e) .....	14,288,000
Clergy and Religious Workers: WHD Field Operations Handbook, Section 10b03 .....	569,000
Federal Workers covered by OPM regulations: 29 U.S.C. 204(f) .....	1,546,000
Certain Employees of Carriers Over Highways, Rail, Air, and Sea: 29 U.S.C. 213(b)(1), (b)(2), (b)(3), and (b)(6) (PTIO1OCD = 823–826 in PEIO1ICD 400, PTIO1OCD = 505, 507 & 804 in PEIO1ICD 410, PTIO1OCD = 828, 829 & 833 in PEIO1ICD 420, and PTIO1OCD = 226, 508 & 515 in PEIO1ICD 421) ...	1,562,000
Certain Agricultural Workers: 29 U.S.C. 213(b)(12) (PEIO1ICD = 10, 11 & 30) .....	995,000
Certain Partsmen, Salesmen, and Mechanics at Auto Dealers: 29 U.S.C. 213(b)(10) (PTIO1OCD = 263, 269, 505, 506, 507 & 514 in PEIO1ICD 612) .....	543,000
Total .....	19,503,000

Source: CONSAD and the U.S. Department of Labor.



**Chart 1: Number of Workers Covered by the FLSA**  
Total 134.3 Million Workers



Source: CONSAD and the U.S. Department of Labor

### 3.2 Estimating the Number of Workers Who Are Currently Exempt and Nonexempt

Since the CPS does not contain a variable that can be used to determine whether workers are Part 541-exempt or nonexempt under the current, proposed, or final rules, the Department relied on a methodology that has been used in previous research and supported by the record. As noted by the GAO in its report, in order to estimate the number of workers covered by the white-collar exemptions using the CPS data, a determination must be made on the basis of the worker's primary occupational classification (GAO/HEHS-99-164, pg. 40). Although there are many variables in the CPS dataset, including earnings, occupation, industry, paid hourly, and hours worked, none of these variables either individually or in combination permit a precise mapping of a worker's exempt or nonexempt status under Part 541 because there is no information on the actual duties performed by a worker. As found in previous research, in order to develop estimates of Part 541-exempt workers under the current regulations, it is necessary to use some measure of expert judgment. The use of expert judgment in cases where it is necessary to make informed decisions or lower

uncertainty is also consistent with OMB's regulatory analysis guidance.

In response to a specific request from the GAO, the Wage and Hour Division (WHD) in 1998 assembled a group of experienced WHD employees to develop estimates of the probability that FLSA covered salaried workers in various CPS occupational categories would be Part 541-exempt under the current regulations (U.S. General Accounting Office, "Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place," GAO/HEHS-99-164, September 30, 1999). Based upon their collective experience in FLSA enforcement, the WHD staff classified each of the 499 Occupational Classification Codes (OCC) used in the CPS (Item PEIO1COCD) according to an estimated probability that some workers in a particular OCC would be Part 541-exempt. The GAO, the University of Tennessee (U.S. Department of Labor, "The 'New Economy' and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA)," January 2001), CONSAD ("Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541," January 14, 2003), and the EPI ("Eliminating the Right to Overtime Pay," June 26, 2003), all based their estimates of the number

of workers who are exempt under the current rule on these judgments or probabilities. The EPI report was submitted for the record as part of the AFL-CIO's comments.

The GAO explained this methodology in the following manner: "In determining which of the workers would likely be exempt and therefore included in our estimate, we applied the percentage ranges provided by the officials at DOL." However, "Rather than counting the number of employees actually classified as exempt by employers, we estimated how many employees are likely to be classified as exempt, based on the occupational classifications and income reported in the CPS sample." (GAO/HEHS-99-164, pg. 41 and 42) The Department, as did the GAO, used the CPS variable for a worker's occupation (Item PTIO1OCD) as a proxy for the person's job classification (there are a variety of jobs in each CPS occupation code).

The GAO also noted that there are data limitations and some uncertainty associated with their methodology that reduces the ability to precisely estimate the number of currently exempt workers (GAO/HEHS-99-164, pg. 42). The Department notes that these same limitations and uncertainties, combined with the broad probability classifications provided by DOL to GAO

and used in this RIA and other research, make it impossible to accurately estimate the number of exempt workers by detailed industry or by state. Moreover, because of this uncertainty, the Department did not rely on its estimates of the number of exempt workers to set the salary levels and instead used these estimates as just one of several methods to confirm the reasonableness of the \$455/week and \$100,000/year salary levels.

Both the 1999 GAO report and the PRIA discussed the probability classifications in terms of Standard Occupational Classifications (SOCs). This resulted in some confusion among researchers attempting to replicate the estimates. For example, the AFL-CIO stated, "the study's methodology is confusing, and because CONSAD does a poor job of explanation, it is not capable of replication \* \* \* CONSAD relies upon both the Current Population Survey (CPS) and the 1998 Standard Occupational Classification (SOC) system. Conflicts between these two data sets make the study opaque."

In order to develop the probability estimates, the WHD staff utilized Appendix B in the CPS documentation to obtain the list of occupational titles. The CPS Appendix specifies the occupational title and the associated SOC codes used by the CPS for each OCC code. The CPS Appendix is available on the U.S. Census Bureau Web site (<http://www.census.gov/apsd/techdoc/cps/sep97/det-occ.html>). According to the BLS, the OCC "classification is developed from the

1980 Standard Occupational Classification." The WHD staff used the documentation on the SOC codes in assessing the exempt probability range for the associated OCC codes. This analysis was first used by GAO, and then followed by the University of Tennessee and by CONSAD Research Corporation in the Part 541 PRIA.

In addition, for the PRIA, CONSAD also made its own assessments based upon O\*NET data (O\*NET, the Occupational Information Network, is a comprehensive database of worker attributes and job characteristics available at <http://www.onetcenter.org/whatsnew.html>).

For the final RIA, however, the Department has reverted to the original estimates developed in 1998 by its WHD experts for the GAO. This adjustment from the proposed rule does not materially affect the total number of workers impacted, and ensures transparency and enables the public to replicate and evaluate the final RIA. Although newer and more detailed than the occupation descriptions available to the WHD staff in 1998, O\*NET is still under development. Also, the O\*NET categories do not directly correspond to the occupation categories used in the CPS making it difficult for the public to replicate the results. Some O\*NET descriptions apply to more than one CPS occupation and some CPS occupations apply to more than one O\*NET description.

Of the 499 occupation codes in the CPS, one is not related to employment (code 905 is assigned to unemployed persons whose last job was in the

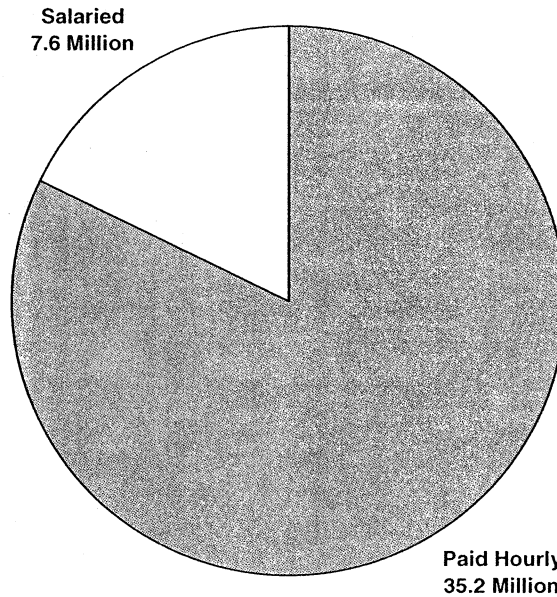
Armed Forces), two are assigned to clergy and religious workers (codes 176 and 177) who are not covered by the FLSA, one had no observations (code 149 for home economics teachers), and five had no observations after the removal of various industry exemptions (code 474 for horticultural specialty farmers, code 499 for hunters and trappers, code 826 for rail vehicle operators, code 639 for machinist apprentices, and code 655 for miscellaneous precision metal workers).

### 3.3 Estimated Number of Nonexempt Workers in the Blue-Collar Occupations

In 1998, the WHD experts estimated that 239 of the remaining 490 categories would be entirely comprised of nonexempt workers in "blue-collar" occupations. The estimated number of hourly and salaried workers in each of the 239 occupations is presented in Table A-1 of Appendix A at the end of this preamble. Although the Department has consistently held (and continues to hold) the view that job titles and job descriptions cannot be used to determine the exempt status of any particular employee, for the purpose of this economic analysis only, the Department, with the expertise of the WHD, has determined that the CPS occupational groups in Table A-1 most likely contain jobs with nonexempt duties. This assumption was also made by the GAO and other researchers.

There are 35.2 million hourly paid workers and 7.6 million salaried workers in these "nonexempt" blue-collar occupations (see Chart 2).

**Chart 2: Number of Paid Hourly and Salaried Workers in Blue-Collar Occupations**



Source: CONSAD and the U.S. Department of Labor

For purposes of this economic analysis, the Department has assumed that no workers within the 239 blue-collar occupations are Part 541-exempt. However, it is important to note that the final rule will strengthen overtime protection for 2.8 million blue-collar salaried workers in these occupations who earn at least \$155 and less than \$455 per week regardless of their duties or whatever occupational group in which they may be classified. Although the Department has determined that most, if not all, of these workers are currently nonexempt, they are currently

subject to the long and short duties tests; therefore, their exempt status is fundamentally less certain than under the bright line salary test in the final rule.

**3.4 Estimated Number of Workers in the White-Collar Occupations**

To determine the number of exempt workers that could be affected by the final rule, the Department, like the GAO, concentrated on the 251 occupations likely to include exempt workers. As the GAO stated, "To develop our estimate, we analyzed each of the 257 job titles likely to include

exempt workers." (GAO/HEHS-99-164, pg. 41) After accounting for the six occupations with no observations (noted above), this corresponds with the 257 titles used by the GAO in 1999.

Each of the remaining 251 "white-collar" occupations was then classified into one of four exemption probability ranges, or categories, presented below in Table 3-2. The GAO did the same in its 1999 report when "DOL officials provided [them] with one of four ranges of likelihood of exemption for each occupation." (GAO/HEHS-99-164, pg. 42)

**TABLE 3-2.—PART 541 EXEMPTION PROBABILITY CATEGORIES FOR SALARIED WORKERS UNDER THE CURRENT SHORT DUTIES TESTS**

Classification	Lower bound estimate	Upper bound estimate
1. High Probability of Exemption .....	90%	100%
2. Probably Exempt .....	50%	90%
3. Probably Not Exempt .....	10%	50%
4. Low or No Probability of Exemption .....	0%	10%

Source: U.S. Department of Labor.

Note: Many occupations were classified as having a "Low or No Probability of Exemption" because the CPS data may include some supervisory employees who could potentially be exempt under the executive duties test, although the occupations would generally be nonexempt. (See GAO/HEHS-99-164, data limitations, pg. 42)

Next, the Department excluded workers who are exempt under the current and final rules because they are

in occupations that are not subject to the salary level or salary basis tests and will not be affected by the final rule (see

Table 3-3). As noted by the GAO in its 1999 report "The exemption for physicians, lawyers, and teachers does

not depend on the income of the employee.” (GAO/HEHS-99-164, pg. 41) These occupational groups consist of: outside sales employees (CPS item PTIO1OCD = 277); teachers and academic administrative personnel (item PTIO1OCD = 14, 113-159, and 163) in educational establishments (item PEIO1ICD = 842 and 850); certain medical professions (item PTIO1OCD = 84, 85, 87, 88, and 89); and lawyers and judges (item PTIO1OCD = 178).

TABLE 3-3.—NUMBER OF WORKERS IN CPS OCCUPATIONS THAT ARE NOT SUBJECT TO THE PART 541 SALARY LEVEL TEST

Occupational title	Number of workers
Teachers & Academic Administrative Personnel in Industry 842 and 850 .....	6,106,083
Physicians .....	550,748

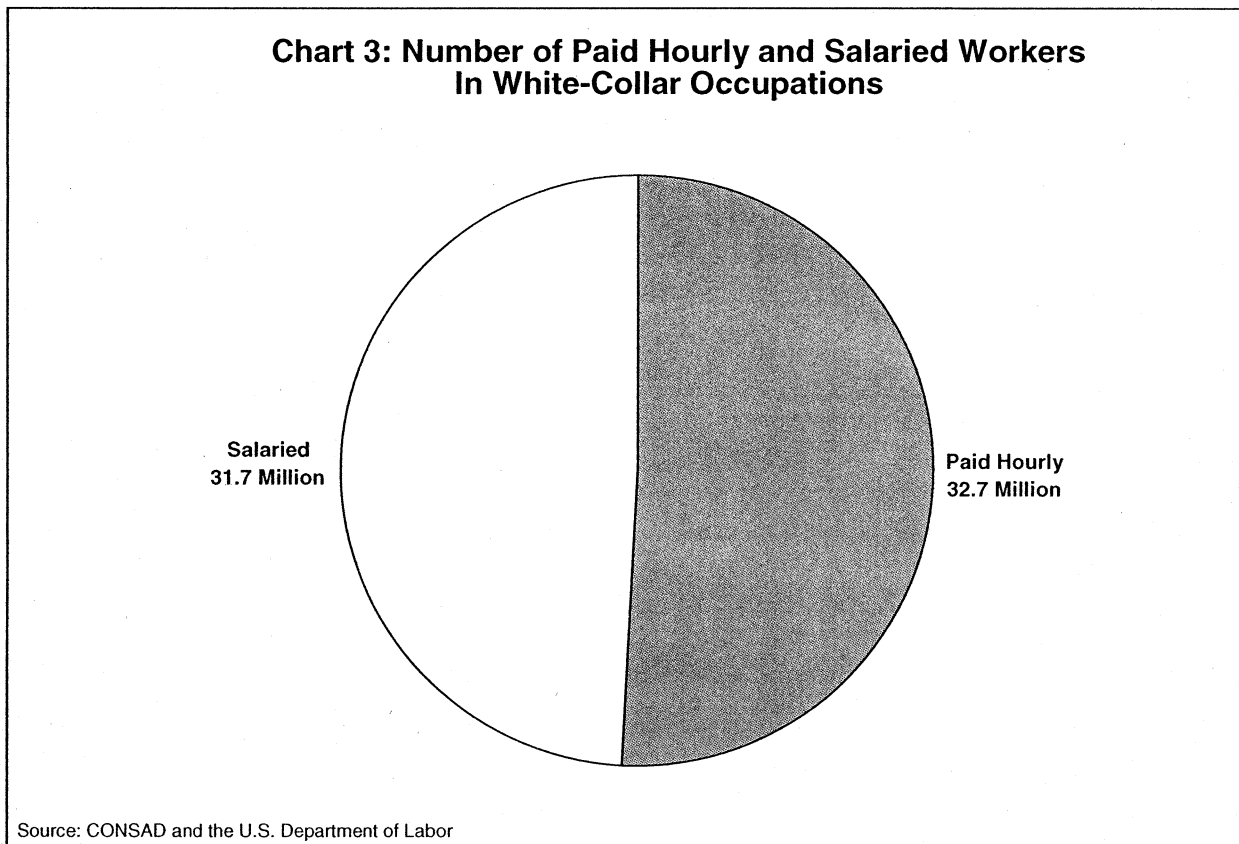
TABLE 3-3.—NUMBER OF WORKERS IN CPS OCCUPATIONS THAT ARE NOT SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

Occupational title	Number of workers
Dentists .....	48,565
Optometrists .....	20,288
Podiatrists .....	3,999
Health Diagnosing Practitioners, n.e.c. (1) .....	17,020
Lawyers and Judges .....	622,549
Street and Door-to-Door Sales Workers .....	184,998
Total .....	7,554,250

(1) Not elsewhere classified.  
 Source: CONSAD and the U.S. Department of Labor  
 Note: These occupations are identified separately here since they differ from those in Table 3-1: they are covered by FLSA's overtime provisions but are not subject to the Part 541 salary level tests.

After excluding from the analysis most of the observations for teachers and academic administrative personnel, and all of the observations for outside sales employees, certain medical professions, lawyers and judges, there remained 64.4 million workers in potentially exempt “white-collar” occupations who are both covered by the FLSA and subject to the Part 541 salary level tests and thus could be affected by the final rule.

As noted above, for purposes of estimating the number of exempt workers, the Department, like the GAO, assumed that workers paid on a nonhourly basis (CPS variable, PEERNHRY=2) were paid on a salary or fee basis. There are 32.7 million hourly workers and 31.7 million salaried workers in potentially exempt “white-collar” occupations (see Chart 3).



The estimated number of hourly and salaried workers in each of the 251 white-collar occupations is presented in Table A-2 of Appendix A. Table A-2 also presents the Exempt Status Codes developed by WHD in 1998 for each CPS occupation code.

3.5 Methodology Used To Estimate the Number of Exempt Salaried Workers

In order to develop a baseline estimate of the number of currently exempt white-collar salaried workers, the Department reviewed several approaches. The first approach was used by the GAO, which “made the

following assumption: duties that make an employee more likely to be covered by the white-collar exemptions are duties that, generally speaking, elicit a higher salary. Under this assumption, as workers have more exempt duties and responsibilities, their incomes increase—as does the likelihood of

being exempt.” (GAO/HEHS-99-164, pg. 41) The GAO sorted the observations in each occupational code by earnings from highest to lowest. Then, beginning at the highest earnings, the GAO kept all of the observations until the number of workers represented by the observations as a percent of total employment in the occupation equaled the target estimated probability of being exempt for that occupation. The remaining observations (lower income workers) were assumed to be nonexempt. For example, the method used to estimate the upper bound coverage estimates for the Probably Not Exempt Classification (which has a 10 to 50 percent probability range of exemption) was developed by including the observations representing the highest 50 percent of earnings. The lower bound coverage estimates, on the other hand, were developed including the observations representing only the highest 10 percent of earnings.

Although this was the methodology used by the GAO, the Department decided not to follow it for the final RIA because the compensation within each occupation varies not only because of exempt status and duties, as the GAO assumed, but also because of the industry and geographic location where the worker is employed. The Department determined the GAO approach creates biased estimates for low-wage industries and localities because the GAO methodology excludes, as nonexempt, most of the observations for intermediate and low-wage workers who could be exempt in comparatively low-wage industries and occupations. In other words, while it is true that, all other things being equal, exempt employees generally receive higher salaries than nonexempt employees, it is also true that employees in certain industries and localities generally receive higher salaries than

employees in the same occupation in other industries and localities.

Further, in order to develop more accurate estimates based upon the GAO’s methodology of completely excluding the lower-wage workers, the data would have to be stratified by both industry and locality. As the AFL-CIO stated in its comments, this analysis would have to be done at the 3-digit industry level because “Generalizing to a 2-digit code loses important distinctions within industry sectors, and this causes a corresponding loss of precision.” Similarly, the analysis may also have to be done at the county level, because generalizing to the state level could also cause the loss of too much precision. Multiplying the nearly 1,000 3-digit industry codes by the more than 3,000 counties would result in some 3 million industry and county combinations. As large as the CPS is, however, it will not accurately support this level of detailed analysis. GAO, in fact, did not even present (much less develop) its estimates at the state or 2-digit industry level of detail.

The second approach was to give all observations in an occupation the same probability regardless of income. Under this approach, estimates are generated by multiplying the CPS weight (item PWORWGT) for each observation (worker) by the average of the upper and lower bound exemption probability associated with the occupation code. Although this approach corrects for the bias against the low-wage industries and localities, the Department determined it was unsatisfactory because it does not account for the fact that higher income workers are more likely to be exempt. For example, someone in real estate sales (OCC 254) earning \$405 per week would be given the same 30 percent probability of being exempt (*i.e.*, average of 10 percent and 50 percent for “probably not exempt classification”) as

one earning \$2,155 per week. Even considering the existence of regional and industry salary differentials, this approach did not seem reasonable.

The Department employed two basic approaches to address these issues, which are discussed below. First, the Department used a linear model to combine aspects from both of the first two approaches. The Department excluded the 803,000 salaried workers with weekly earnings (item PTERNWA) below \$155, because these workers are nonexempt under both the current and final rules. The GAO used a similar approach by considering workers earning less than \$250 per week as nonexempt and eliminating them from the calculations. (GAO/HEHS-99-164, pg. 41) The Department used the lower figure primarily to account for nontraditional work arrangements. For example, under a job sharing arrangement, two workers sharing an exempt position could each work part-time earning only a portion of the total salary allocated to the position, when one of these workers is out, the other covers. At such times, the exempt worker would not be eligible for overtime even if the weekly hours exceed 40. There are only 670,000 salaried workers in the 251 occupations earning at least \$155 but less than \$250 per week. As the analysis presented below demonstrates, only a small percentage of these were estimated to be exempt.

The Department then modified the observation’s weight for each OCC by multiplying the CPS weight (item PWORWGT) by the probability that an individual with that salary in that OCC is exempt. The specific probability of exemption for each salaried worker in a particular occupation code was estimated using linear interpolation according to the following equation:

$$\text{Prob\_Exempt} = \text{LB} + \frac{(\text{PTERNWA} - 155) \times (\text{UB} - \text{LB})}{(\$2,885 - 155)}$$

Where:

Prob\_Exempt = Probability of individual in the occupational classification (OCC) being exempt

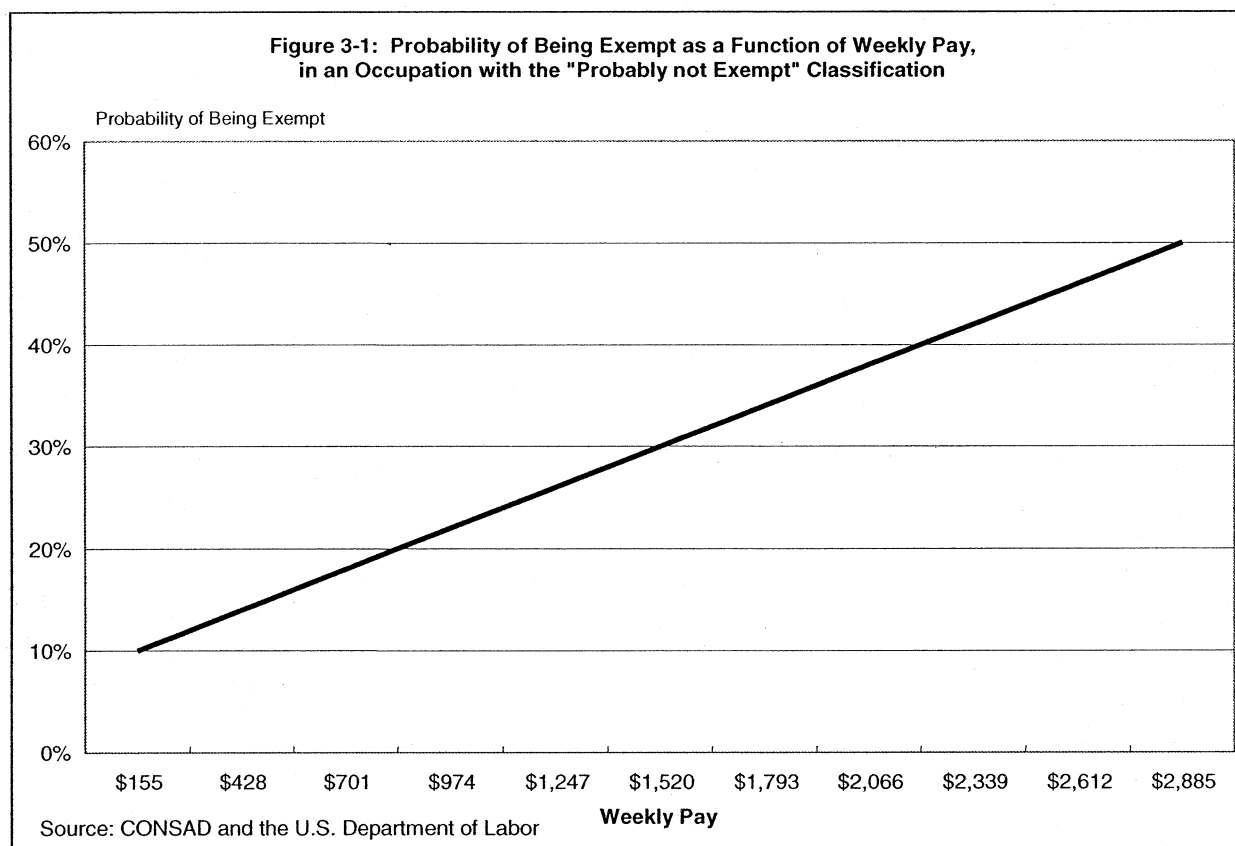
LB = WHD lower bound probability from Table 3-2

PTERNWA = CPS weekly earnings amount

UB = WHD upper bound probability from Table 3-2

The equation above specifies that the probability of a worker with a weekly salary of \$155 being exempt is equal to the lower bound probability specified by the WHD experts for a given white-collar occupation, while the probability of an individual with the highest weekly salary in the occupation (often the top coded value of \$2,885) being exempt is equal to the upper bound probability specified for a given white-collar

occupation. The probability of exemption for weekly salaries between \$155 and \$2,885 is derived using the above linear interpolation equation. Figure 3-1 presents a graphical illustration for the “Probably Not Exempt” classification (see Table 3-2). Similar graphs could be developed for the other three classifications but were not included in the RIA.



Although the linear model was designed to more accurately include lower-wage industries and regions while accounting for the determination by WHD that higher earnings are associated

with a higher probability of exemption, the model appears to underestimate the total number of currently exempt workers compared to using the midpoint of the WHD probability range

(e.g., averaging the WHD upper and lower bound estimates) at the national level. Table 3-4 shows this effect.

TABLE 3-4.—COMPARISON OF PART 541-EXEMPT WORKER ESTIMATES MID-POINT VERSUS LINEAR MODEL

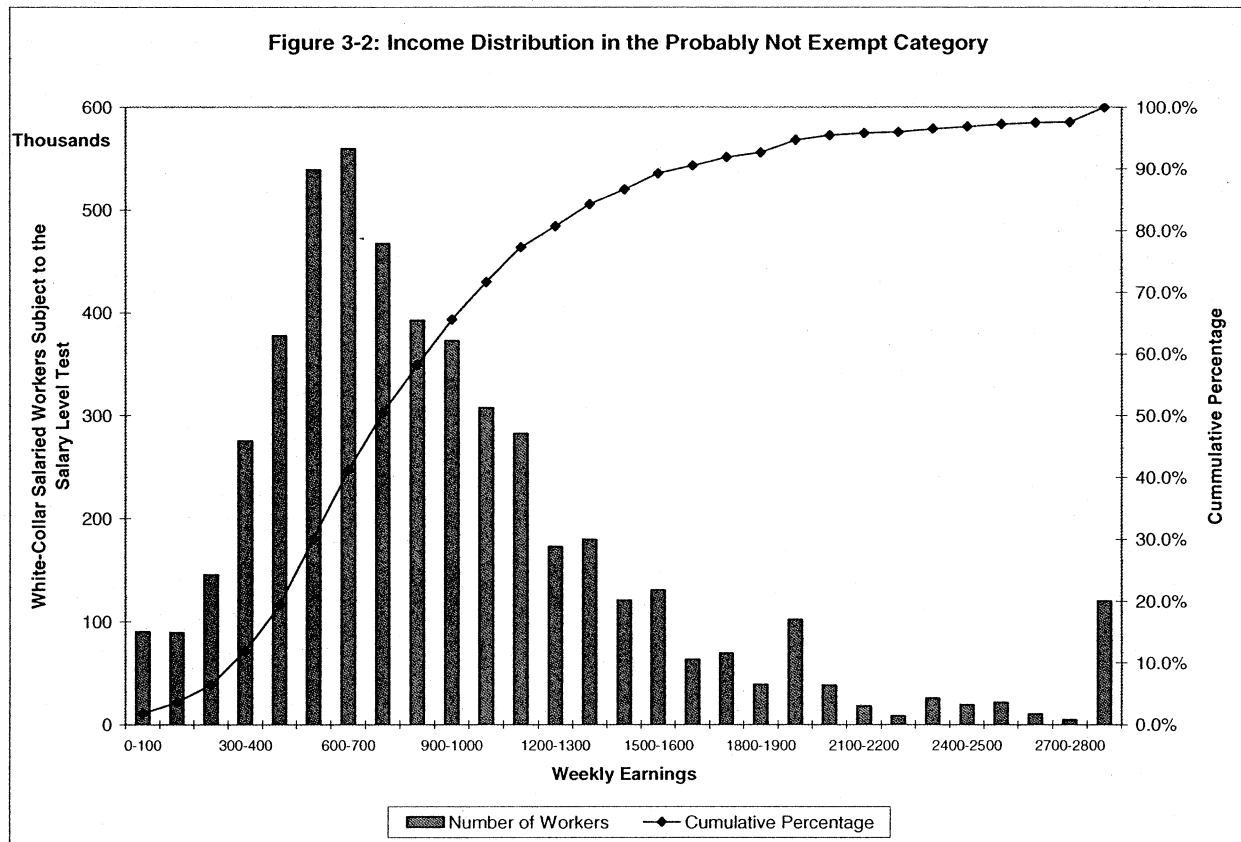
WHD category	Number of white-collar salaried workers earning \$155 or more*	Midpoint of the WHD probability range	Estimated number exempt	
			Number of workers times midpoint probability	Linear model
High Probability of Exemption .....	14,053,817	95%	13,351,126	13,170,751
Probably Exempt .....	6,102,827	70%	4,271,979	3,812,164
Probably Not Exempt .....	4,904,421	30%	1,471,326	1,076,901
Low or No Probability of Exemption .....	5,822,134	5%	291,107	130,662
<b>Total .....</b>	<b>30,883,199</b>	<b>.....</b>	<b>19,385,538</b>	<b>18,190,479</b>

\*Excludes workers not subject to salary test.  
Source: CONSAD and the U.S. Department of Labor.

This occurs because the underlying earnings distribution is not symmetric. Rather, it is skewed toward low earnings levels. When the linear model of exemption probabilities is applied to that earnings distribution, it produces

estimates that are skewed toward low earnings levels. Figure 3-2 presents the histogram and cumulative distribution for the "Probably Not Exempt" category. The higher bar in Figure 3-2 at \$2,800 in weekly earnings level is a result of

the top coding of the CPS data that includes all of the workers with weekly earnings of \$2,800 or more into one group. Similar graphs were developed for the other three classifications but were not included in the RIA.



Because the linear model results in more observations being assigned a probability lower than the midpoint than a probability higher than the midpoint, it tends to underestimate the number of exempt workers compared to multiplying the number of workers by the midpoint probability. The Department considers the midpoint estimate to be a valid benchmark since it has been used by other researchers (such as EPI) and is equivalent to averaging the GAO estimates using updated data. Although this is not a classic statistical bias, the linear model implies that the average probability of being exempt within each category range is slightly lower than implied by the midpoint of the range, which was not the intent of the original probability determinations made by the WHD study. Since the overall estimate of the number of currently exempt workers using the linear model is 1.2 million workers less than this benchmark, the

Department decided to explore if a nonlinear model that is consistent with the assumptions about the likelihood of exemption would produce national level estimates that more closely match the midpoint benchmark.

The Department applied a series of nonlinear models to try and compensate for the nonsymmetrical income distributions in the four exemption categories. First, the observations with weekly earnings less than \$155 were excluded because these workers are nonexempt under the current and final rules. Next, the observations that were top coded for weekly earnings (Item PTWK =1) were excluded from the distribution to smooth out the right-hand tail (*i.e.*, all of these observations were assigned the upper bound probability and keeping them in the distribution would only have distorted the curves). Finally, the cumulative probability distributions of three nonlinear functions (*i.e.*, normal,

lognormal, and gamma) were fitted to the cumulative income distributions for the remaining observations in each of the four exemption categories.

Each of the functions was calibrated to the empirical data by using the mean and standard error of the empirical distributions. For the normal distribution the mean was set to the sample mean and the standard deviation was set to the standard error. For the gamma distribution, alpha was set to the square of the quotient of the sample mean divided by the standard error, and beta was set to the standard error squared divided by the sample mean. The lognormal distribution was developed by taking the logs of the sample data and then using a normal distribution with the mean set to the mean of the logs of the sample data and the standard deviation set to the standard error of the logs of the sample data (see Table 3-5).

TABLE 3-5.—PARAMETERS OF EMPIRICAL INCOME DISTRIBUTIONS

WHD category	Sample mean	Standard error	Mean of logged sample data	Standard error of logged sample data
High Probability of Exemption .....	1,107	538	6.9	0.5

TABLE 3-5.—PARAMETERS OF EMPIRICAL INCOME DISTRIBUTIONS—Continued

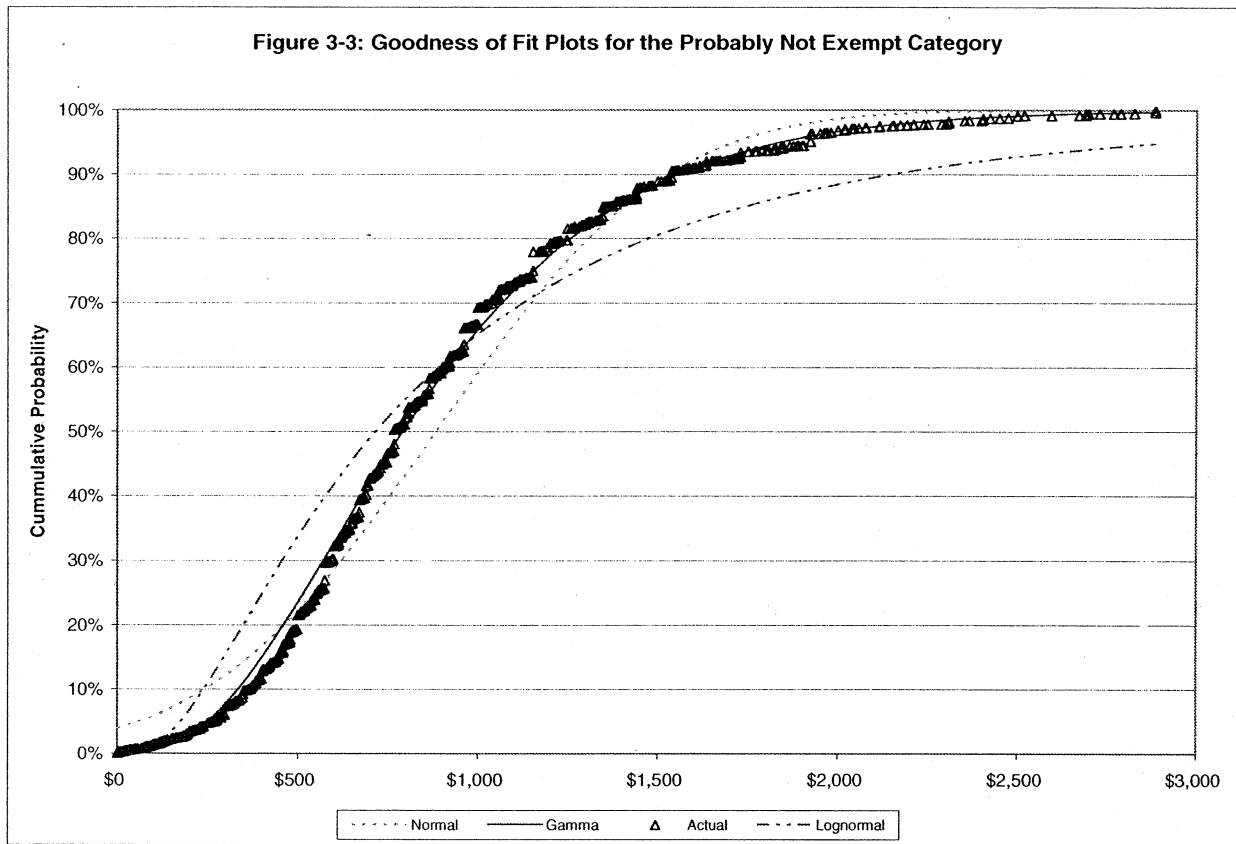
WHD category	Sample mean	Standard error	Mean of logged sample data	Standard error of logged sample data
Probably Exempt .....	928	512	6.7	0.8
Probably Not Exempt .....	886	502	6.6	0.9
Low or No Probability of Exemption .....	630	375	6.2	0.8

Source: CONSAD and the U.S. Department of Labor.

Figure 3-3 presents plots depicting the goodness of fit of the three nonlinear functions that were estimated for the “Probably Not Exempt” category. Similar plots were developed for the other three classifications but were not included in the RIA. As one can see in figure 3-3, all three distributions had

the same general shape as the empirical data; however, the function estimated for the gamma distribution appears to fit the actual data better than the functions estimated for the other two distributions. The Department, however, did not use a formal goodness of fit test to choose a distribution for the principal

estimates of this final rule; rather, the Department measured how well each of the distributions matched up against the estimate as a function of the midpoint probabilities, since calibrating the totals to the midpoint probabilities was the primary reason for examining the non-linear models.



Before determining the distribution that would be used to develop the baseline for the RIA, the Department estimated the number of exempt workers using each of the three distributions and compared the estimates to the benchmark developed using the midpoint probability. For each of the four exemption categories (EC), the probability that an individual with a specific salary in each category is

exempt was estimated using nonlinear interpolation according to the following equation:

$$\text{Prob\_Exempt} = \text{LB} + \frac{\text{Function\_EC}(\text{PTERNWA}) \times (\text{UB} - \text{LB})}{\text{PTERNWA}}$$

Where:

Prob\_Exempt = Probability of an individual in the exemption classification being exempt

LB = Lower bound probability from Table 3-2 for the exemption category

PTERNWA = CPS weekly earnings amount

UB = Upper bound probability from Table 3-2 for the exemption category

Function\_EC(PTERNWA) = the cumulative probability of the distribution function for the



exemption category (*i.e.*, calibrated as discussed above) at that earnings. The total number of exempt salaried workers for each white-collar occupation was estimated by multiplying the estimated probability of being exempt (based upon the earnings and exemption category) by the CPS weight for each worker and then summing the modified weights for each occupation. Observations with earnings

less than \$155 per week were assigned a probability of zero and observations with top coded earnings were assigned the upper bound probability for the category. As shown in Table 3-6, the gamma distribution resulted in estimates that most closely approximated the number of exempt workers estimated using the midpoint probability. The symmetrical normal distribution underestimated the

midpoint total by approximately 104,000 workers (0.5%) while the lognormal distribution overestimated the midpoint total by 3.2 million (16.5%). The gamma distribution resulted in essentially the same estimated number of exempt workers as using the midpoint probability. The two methods differ by approximately 0.2 percent, or less than 60,000 workers.

TABLE 3-6.—COMPARISON OF PART 541-EXEMPT WORKER ESTIMATES

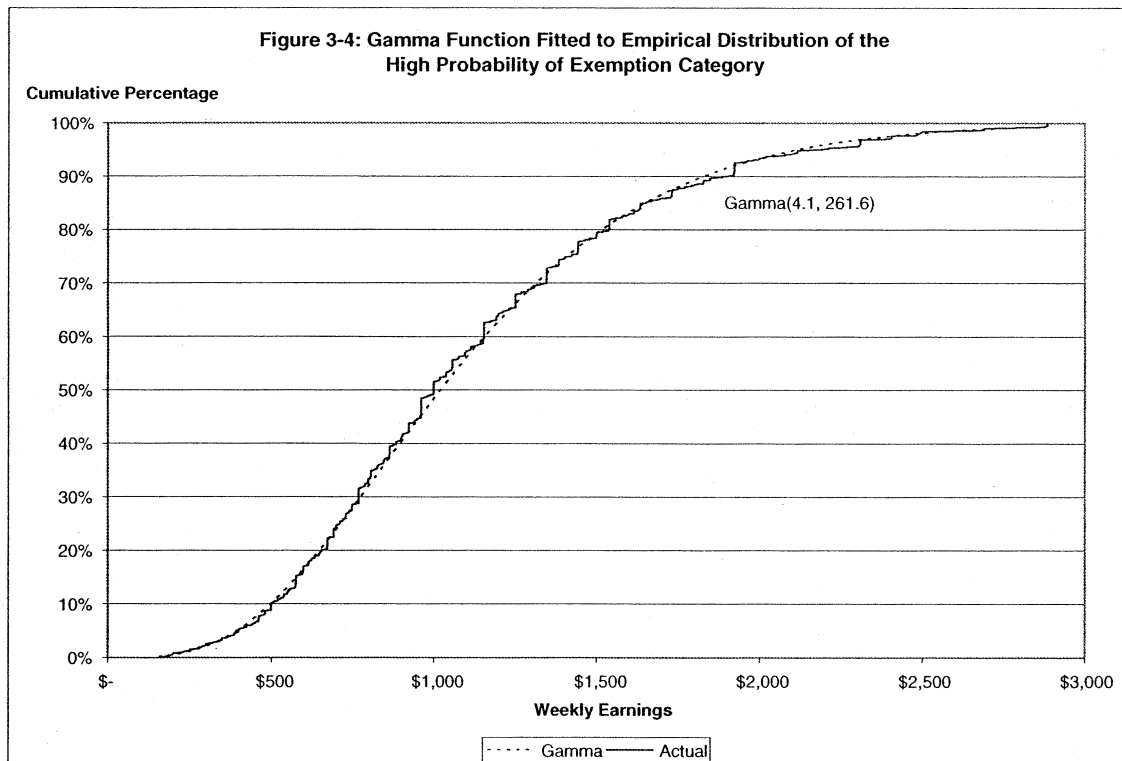
WHD category	Midpoint probability estimate	Normal distribution model estimate	Lognormal distribution model estimate	Gamma distribution model estimate
High Probability of Exemption .....	13,351,126	13,341,039	14,053,814	13,370,021
Probably Exempt .....	4,271,979	4,232,533	5,492,548	4,294,132
Probably Not Exempt .....	1,471,326	1,432,806	2,452,211	1,482,972
Low or No Probability of Exemption .....	291,107	274,707	582,213	292,266
Total .....	19,385,538	19,281,085	22,580,786	19,439,391

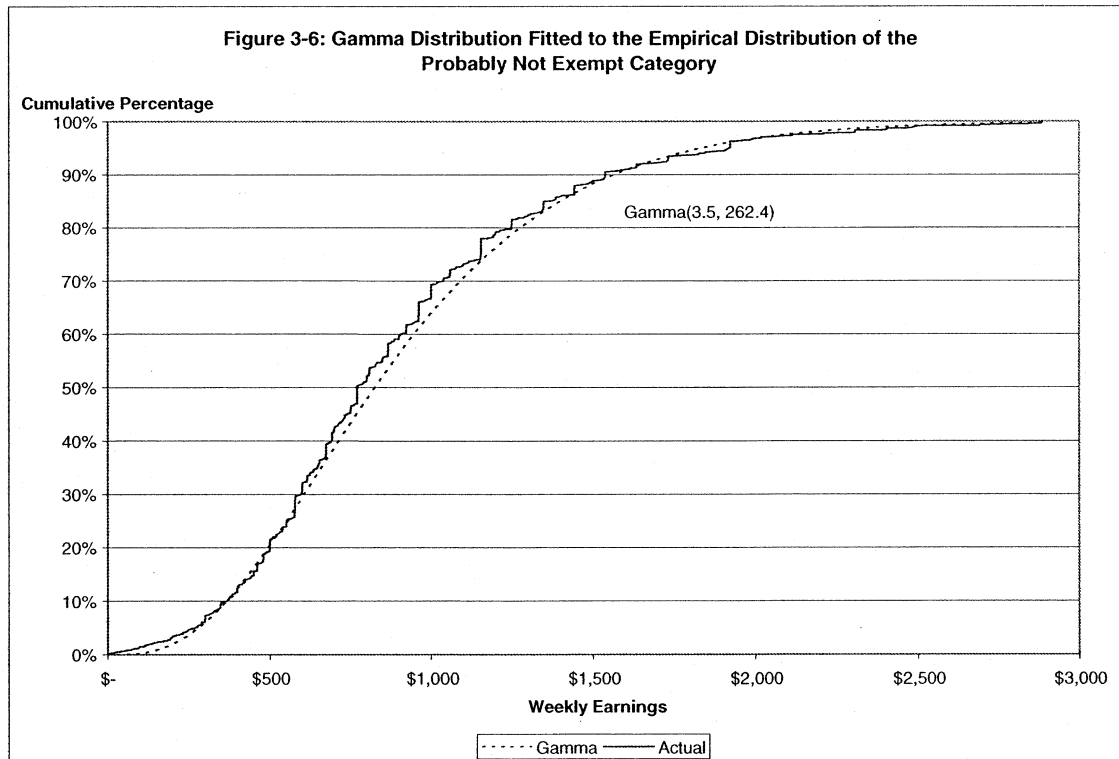
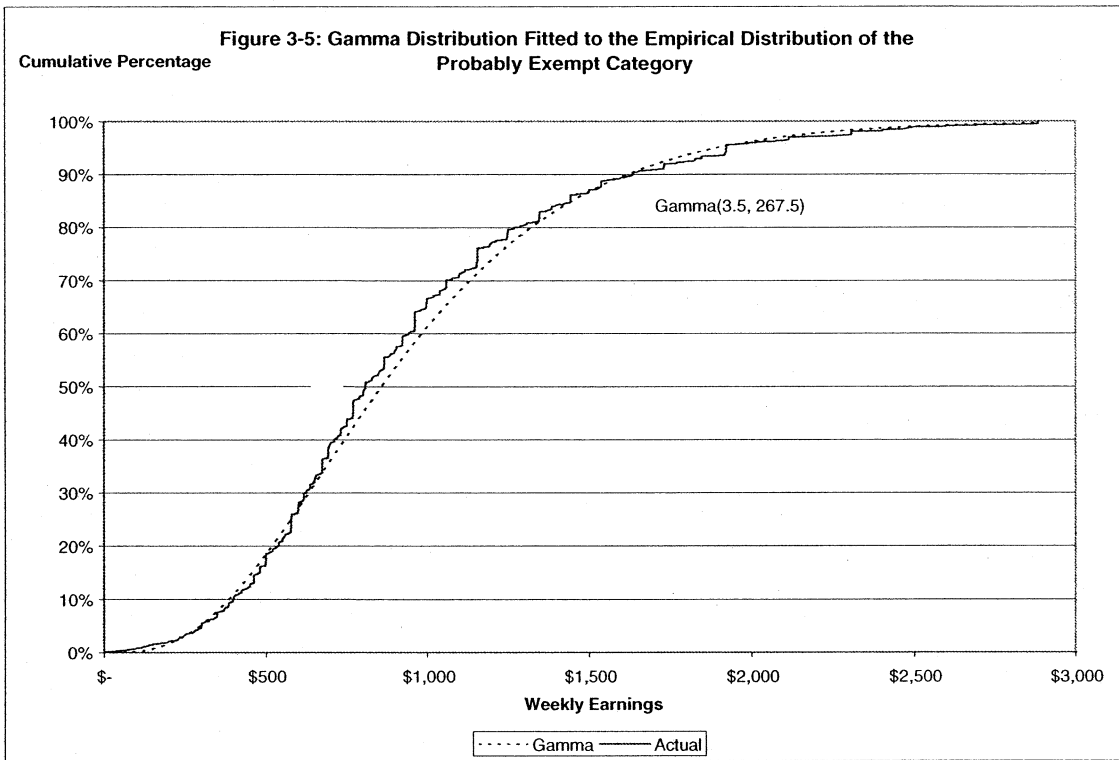
Source: CONSAD and the U.S. Department of Labor.

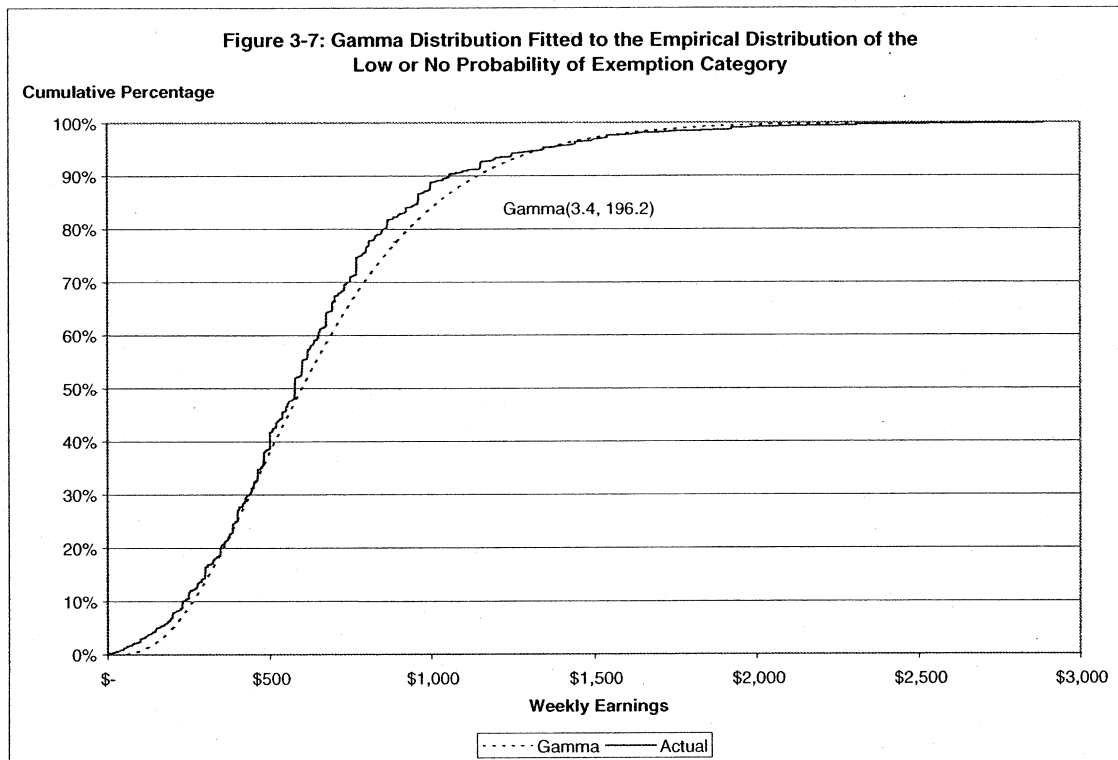
Although the Department did not conduct formal goodness of fit tests, Figures 3-4 through 3-7 indicate that the gamma distribution preserves the shape of the empirical cumulative distribution for the four exemption categories. Thus, for the RIA the Department developed its baseline estimates of exempt workers using a

gamma distribution model. Although some other distribution could exist that improves upon the gamma distribution, the Department has determined that it would not significantly alter the RIA results given how well the gamma distribution approximates the empirical data. In addition, as demonstrated above in Table 3-6, the estimated number of

workers impacted by the final rule does not depend critically on any particular nonlinear model; in fact, the estimated number of workers impacted even under the linear model is not substantially different than under the gamma distribution model, proving that the Department's estimates are relatively robust to estimation procedure choices.







Like the linear model, this methodology accounts for the existence of lower-wage industries and regions while remaining consistent with the GAO's assumption that "duties that make an employee more likely to be covered by the white-collar exemptions are duties that, generally speaking, elicit a higher salary." The non-linear model also accounts for the different marginal effect on exemption probabilities that lower wage and higher wage workers are likely to have. For example, the change in the exemption probability for social workers as their income rises is likely to be relatively small for social workers earning between \$155 and \$455 per week compared to a relatively constant change in the exemption probability for social workers earning between \$455 and \$1,250 per week. However, once workers earn a relatively high pay level, the rate of change in their exemption probability is likely to decrease as their income increases and they approach the maximum exemption probability and maximum income reported for their job. The Department also feels that this methodology is consistent with recent findings in the economic literature. For example, Bell and Hart ("Unpaid Work," *Economica*, 66: 271-290, 1999) and Bell,

Hart, Hubler, and Schwerdt ("Paid and Unpaid Overtime Working in Germany and the UK," IZA Discussion Paper Number 133, Bonn, Germany: The Institute for the Study of Labor, March 2000) found that unpaid overtime is more often worked by employees with managerial status and with comparatively high wage rates; whereas paid overtime is more often worked by employees with lower wage rates.

Due to data limitations, this analysis was conducted on a national level and was intended to produce national estimates. For a specific occupation, individuals in low-wage industries or localities will likely have slightly higher probabilities than estimated using the gamma distribution model, while individuals in high-wage industries and localities will likely have slightly lower probabilities. However, the Department believes the overall estimates using this approach are reasonable because these factors tend to balance each other at the national level.

Clearly, this approach cannot be used by an employer to determine the exempt status of individual employees. The approach was designed to estimate the number of exempt employees in entire occupations for statistical purposes

only, not to determine the specific status of a particular individual in a specific occupation. The latter requires consideration of the individual's specific duties, which must be done on a case-by-case basis.

### 3.6 Estimated Number of Exempt Salaried Workers

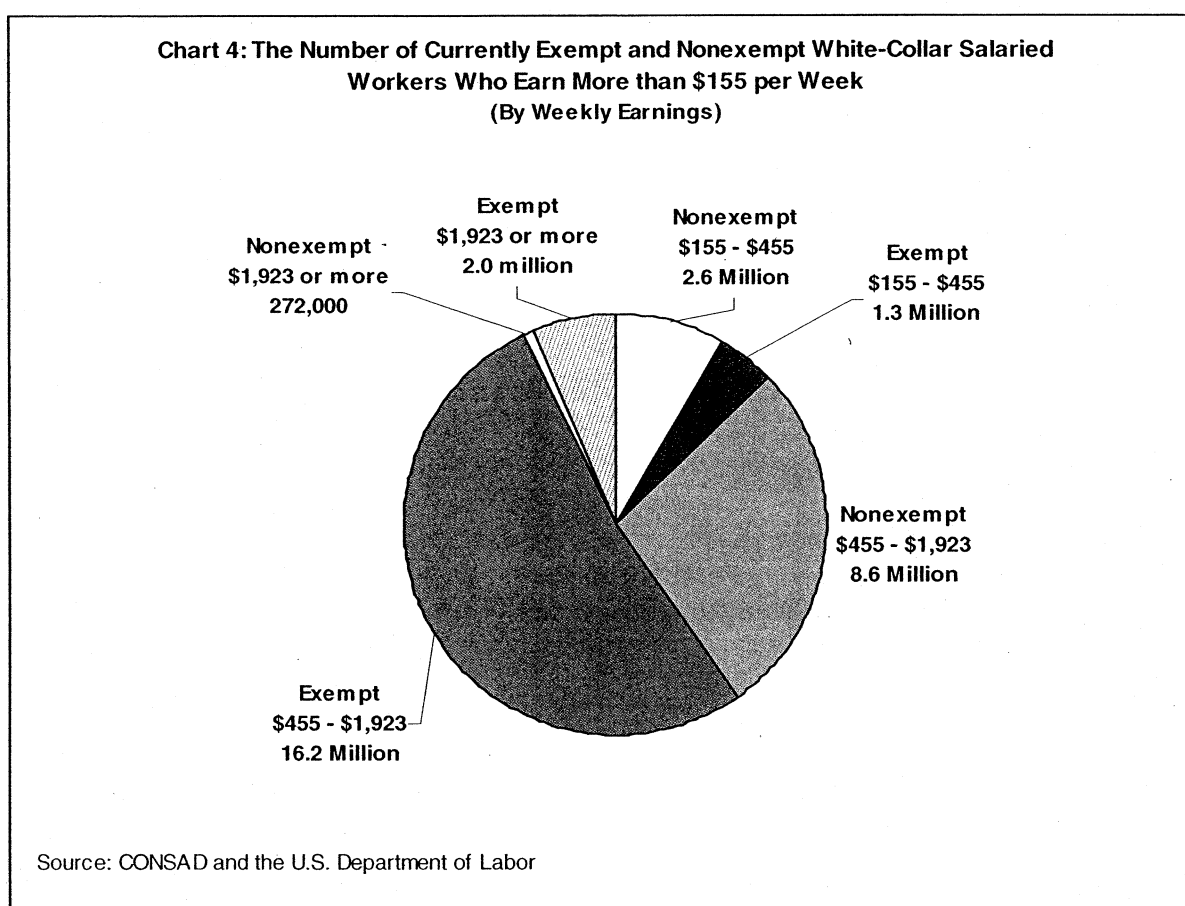
The total number of exempt salaried workers for each white-collar occupation was estimated by multiplying the estimated probability of being exempt by the CPS weight for each worker to produce a modified weight, and then summing the modified weights for each occupation. Based on this analysis, the Department estimates that 19.4 million of the 30.9 million white-collar workers who earn \$155 or more per week and are subject to the Part 541 salary tests are currently exempt. Table 3-7 presents the number of exempt workers in each WHD category by weekly earnings. Table A-3 in Appendix A presents the number of exempt workers in each white-collar occupation. Also presented in Table A-3 is the number of nonexempt salaried workers in each of the 251 white-collar occupations earning at least \$155 per week.

TABLE 3-7.—NUMBER OF EXEMPT WORKERS BY EARNINGS AND WHD EXEMPTION PROBABILITY CATEGORY

WHD exemption probability category	Weekly earnings			
	\$155 to \$455	\$455 to \$1,923	\$1,923 +	Total
High Probability of Exemption .....	815,600	11,105,374	1,449,047	13,370,021
Probably Exempt .....	364,607	3,540,717	388,809	4,294,132
Probably Not Exempt .....	88,111	1,257,050	137,811	1,482,972
Low or No Probability of Exemption .....	29,535	253,597	9,134	292,266
<b>Total .....</b>	<b>1,297,852</b>	<b>16,156,738</b>	<b>1,984,801</b>	<b>19,439,391</b>

Source: CONSAD and the U.S. Department of Labor.

Chart 4 shows the distribution of the currently exempt and nonexempt workers by weekly earnings.



*Chapter 4: Estimating the Change in Overtime Protection*

In this chapter, the Department presents the estimated changes in exempt status of workers that are likely to occur as a result of the final rule. The estimates presented below are based on the assessment of the final rule presented in Chapter 2 and elsewhere in the preamble and on the coverage estimates presented in Chapter 3. The methodology detailed below differs

from the PRIA because of modifications made to the proposed rule to address the comments. In addition to changes resulting from the revised methodology, the estimates are different from the PRIA because the data sources have been updated.

The major findings in this chapter are as follows:

- Workers earning less than \$155 per week will remain nonexempt under the final rule.

- An estimated 6.7 million workers earning \$155 or more but less than \$455 per week will be guaranteed overtime protection under the revisions regardless of their duties.

- There are an estimated 5.4 million currently nonexempt salaried workers whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current rules, will be automatic under the new rules.

- There are an estimated 1.3 million white-collar salaried workers earning at least \$155 but less than \$455 per week currently exempt under the long and short duties tests who will gain overtime protection.

- Workers earning at least \$455 per week will benefit from the clarification of the duties test requirements. This clarification is expected to reduce the uncertainty surrounding the application of the current outdated regulations. Both workers and employers will benefit from reduced litigation and from having greater confidence in the exemption status of employees. Workers will better understand their rights, employers will know their obligations, and WHD investigators will be better able to enforce the law.

- The Department has determined that the differences in the number of workers earning \$455 or more to \$1,923 per week who will be exempt under the standard tests as compared to the number currently exempt are too small to estimate quantitatively. In addition, the very few, if any, workers that might be converted from nonexempt status to exempt status as a result of the updated administrative and professional tests are likely to be offset by workers gaining overtime protection as the result of the tightened executive test.

- The Department estimates that approximately 107,000 workers (47,000 hourly and 60,000 salaried) could be converted to exempt salaried status as a result of the new test for highly compensated workers. As explained more fully below, the primary reason for the low estimate is the small number of workers earning \$100,000 or more per year, combined with the Department's assessment that most white-collar workers earning \$100,000 or more per year are very likely currently Part 541-exempt.

#### 4.1 Comments to the Proposed Rule on the Number of Exempt Workers

The Department received comments in response to the estimated number of workers whose exempt status could change, contained in the PRIA and the CONSAD report upon which the PRIA was partially based. For example, the AFL-CIO stated, "The Department asserts that its proposal will cause 644,000 employees to lose their right to overtime, 68 Fed. Reg. at 15580, and that roughly 1.3 million workers will become automatically nonexempt \* \* \* [F]laws in the study's approach and methodology, as well as its lack of transparency, call into serious question the reliability of these estimates."

The Building and Construction Trades Department of the AFL-CIO stated, "As

the Economic Policy Institute points out in a report it recently issued, DOL seems to assume, without any factual support, that all of these highly compensated employees are already exempt under the current white-collar regulations. \* \* \* However, as the Economic Policy Institute Briefing Paper observed, it is not at all clear that all of these highly compensated employees are already exempt under current law."

Several labor unions, citing the EPI analysis, asserted the Department's preliminary analysis greatly underestimated the effect of changing the overtime regulations. For example, the AFL-CIO stated, "Based on its analysis of 78 occupations, EPI concluded that more than 8 million workers will lose overtime protection under the proposed regulatory changes \* \* \* This includes 2.5 million salaried workers and 5.5 million hourly employees who meet the duties test under the proposed rule and who are at risk of being converted to salaried status, thus eliminating their overtime protections. There are 1.3 million workers [who] would lose overtime protection because of the new "Highly Compensated Employee" category." In response to these comments and in the interest of transparency, the Department has chosen to set forth a detailed presentation of the methodology used to compute the estimates regarding the impact of the final rule.

#### 4.2 Critique of the EPI Report

Before explaining how the Department estimated the impact of the final rule, it is important to discuss the EPI report because it has received considerable publicity and was the only detailed alternative impact analysis of the proposed rule that was submitted to the record. The Department has concluded that the EPI report is unsound because its conclusions are based on a substantial number of errors, particularly regarding whether the proposal represented a change from the tests in the current regulation. Because those errors led EPI to overstate significantly the number of employees losing overtime protection as a result of the Department's proposal, it is important to present an overview of the most serious errors in the EPI report.

First, the basis for the EPI estimate that millions of workers would lose their right to overtime was the contention that the proposed standard duties tests that applied to workers earning \$425 or more per week were weaker than the current long and short duties tests. Many other commenters adopted this contention. For example, the National Treasury Employees Union

stated, "Millions of workers with salaries between \$22,101 and \$65,000 who now receive overtime pay could be reclassified as exempt under the broadened definitions of executive, administrative, and professional employees." The Public Justice Center added, "If exemptions are easy to obtain, a large middle segment of the work force will be exempted. Employers will give this exempted portion of the workforce extra work, since they are essentially 'free labor.' And employers will be discouraged from both hiring more entry level employees to do the extra work and from paying lower paid employees at the time and one-half rate, thereby undermining the very purposes of the hours-of-work standard and harming the classes of persons who need protection the most, the low-wage employee and unemployed worker."

Most of the adverse comments resulted from mistakenly comparing the new standard duties tests to the old long duties tests. As explained above, this comparison is not valid because the current long duties test is only applicable to workers earning less than \$250 per week and the few workers that are subject to the long test under the current rule will be guaranteed overtime protection under the final rule.

The EPI report erroneously claims that "Changes in the primary duty test and the redefinition of 'executive' will allow employers to deny overtime pay to workers who do a very low level of supervising and a great deal of manual or routine work, including employees who do set-up work in factories and industrial plants. Employees who can only recommend—but not carry out—the hiring or firing of the two employees they supervise will be exempted as executives." In fact, both the Department's proposed and final rules will make it more difficult to qualify as an exempt executive. The final rule contains the same two requirements as the current regulation's short duties test, and it adds a third requirement from the existing, but essentially inoperative, long duties test. The "only recommend" hiring or firing language that EPI finds objectionable is the same language currently in section 541.1(c), which has been in the regulations since 1949. Moreover, that requirement now appears only in the long test and thus is applicable only to employees earning less than \$250 per week. The Department's proposed and final rules make this authority to recommend hiring or firing the third prong of the standard test, thus strengthening the executive duties test for workers earning \$455 or more to \$1,923 per week. Similarly, the reference to set-up work

that EPI finds objectionable also is taken substantially word-for-word from the current regulation at section 541.108(d), which describes work that may be treated as exempt work if it is directly and closely related to exempt work. Thus, EPI simply misses the mark in claiming the Department's proposed rule would exempt more workers as executives than under the current regulations. This claim is equally invalid under the final rule.

EPI also claims the "exemption for professional employees has been dramatically expanded to include *occupations* that not only do not require an advanced degree or postgraduate study, but also those that do not require even an associate's degree or any prolonged course of academic training or intellectual instruction (emphasis added)." In fact, the Department's proposed and final rules do not change the current regulation's educational requirements for exemption as a learned professional. The Department retains the current regulatory requirement limiting the professional exemption to employees whose primary duty is work that requires advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of specialized intellectual instruction. The Department also recognizes, as the current regulation has recognized since 1949 at section 541.301(d), that an advanced, specialized degree is "customarily" required but that an employee with equal status and knowledge—"the occasional chemist who is not the possessor of a degree in chemistry"—is not "barred from the exemption." But, as the final regulation continues to recognize (section 541.301(d)), in all cases the exemption is restricted to professions where an advanced, specialized academic degree is a "standard prerequisite for entrance into the profession." Because the professional exemption only applies to workers whose primary duty consists of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, it is simply impossible for the changes proposed or finalized here to extend that exemption to occupations that do not meet this test, as EPI claims.

Like many other commenters, EPI has confused the occupations specifically covered by proposed section 541.301(e). Based upon its misperception that the Department had changed the regulatory standard, the EPI report stated that under the proposed rule, "no minimum level even of on-the-job training will be

required" for the professional exemption. In fact, the proposed and final rules clearly state that professional occupations do not include those whose duties may be performed with general knowledge acquired by an academic degree in any field or with knowledge acquired through an apprenticeship or from training in routine mental, manual, mechanical, or physical processes.

Similarly, the EPI report claims that licensed practical nurses (LPNs) and an additional 40 percent of other technologists and technicians in the health care field will become newly exempt as learned professionals. In fact, there are no such changes regarding nurses and others in the health care field. The Department's current regulation, at section 541.301(e)(1), has long recognized that registered nurses perform exempt duties (and whether they are, in fact, exempt turns on whether they are paid on a salary basis). The proposed and final regulatory exemptions are similarly limited to registered nurses, not LPNs. Moreover, the final rule specifically states that "licensed practical nurses and other similar health care employees \* \* \* generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations." The current regulation also recognizes that certified medical technologists would satisfy the duties test if they complete "3 academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association." This exact language appeared in the proposed rule and is in the final rule. Thus, EPI's claim that 40 percent of health technologists will lose the right to overtime pay because they would be considered learned professionals simply is incorrect.

EPI's claim that "the great majority of dental hygienists will be exempt professionals" also is similarly wrong. The proposed and final rules provide that dental hygienists would qualify for exemption only if they have successfully completed four years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association. The regulation simply restates what has long been in the Wage and Hour Division's Field Operations Handbook and its opinion letters (e.g., 1975 WL 40986,

WHD Opinion Letter, WH-363, November 10, 1975) regarding dental hygienists, and thus there is no change from current law.

Section 541.301(f) of the final rule also notes that accrediting and certifying organizations may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

EPI's report also is similarly flawed regarding the administrative exemption, which it claimed "is vastly expanded by \* \* \* eliminating the requirement that the employee's primary duty must be staff work rather than production work." In fact, the proposal expressly stated that it would "reduce but not eliminate the emphasis on the so-called production versus staff dichotomy in distinguishing between exempt and non-exempt workers." Thus, the EPI's report simply misstates the impact of the proposal in this area. Moreover, the final rule retains the current regulatory requirement that an exempt employee's primary duty must be work directly related to the management or general business operations of the employer or the employer's customers, and includes a provision found only in the interpretive portion of the current rule (section 541.205(a)) clarifying that this phrase refers to activities relating to the running or servicing of a business as distinguished from working on a manufacturing production line or selling a product in a retail or service establishment.

In addition to the workers that EPI estimated would lose the right to overtime protection under the proposed standard duties tests, EPI also estimated that millions of workers would lose their right to overtime protection as the result of the proposed duties tests for highly compensated employees: "In FLSA-covered industries and occupations, there were 8.3 million white-collar employees who earned at least \$65,000 in 2000. Approximately 7.4 million were paid a salary, and about 843,000 were paid hourly. Like the Department of Labor, we assume that hourly workers who would be exempt under the new rules if they were paid a salary will be converted to a salary basis by their employers and will therefore be exempt \* \* \* We also assume that every employee paid \$65,000 or more will be able to meet at least one prong of the many duties tests. There is no minimum educational attainment or job experience to qualify for this exemption."

The Department determined that EPI's estimate of 8.3 million is incorrect. First, this inflated figure includes a significant number of workers who are already exempt under the current short test, which double-counts millions of workers. More importantly, EPI erroneously described the impact of the highly compensated test, stating it would "deny overtime pay to white-collar employees who earn \$65,000 or more a year, even if they do not meet the definition of executive, administrative or professional employees." In fact, the proposal would have exempted employees only if they earned at least \$65,000 and performed "office or non-manual work" and performed "one or more of the exempt duties and responsibilities of an executive, administrative, or professional employee." EPI similarly erred when it claimed that, "every employee paid \$65,000 or more will be able to meet at least one prong of the many duties tests." This claim ignored the fact that only employees performing office or non-manual work could meet the test, thus ensuring that highly paid blue-collar workers such as plumbers, electricians, steelworkers, autoworkers and longshoremen would never qualify for exemption. Further, the highly compensated test in the final rule has been increased to \$100,000 or more per year.

These errors by EPI and other commenters are a good example of why the current regulation needs to be updated and clarified. If the group of "experts in employment law and in the application of the FLSA exemptions" that was consulted by EPI made these errors, it is probably similarly difficult for most small businesses to accurately understand their overtime obligations under the current rule.

The Department also concluded the EPI analysis is flawed because it erroneously assumes that employers completely control the terms of employment and can at their sole discretion and without consequence convert millions of workers to exempt status to avoid paying overtime. In fact, the economic laws of supply and demand usually dictate the terms of employment; therefore, if employers offer too little compensation for the hours of work they demand they will not be able to attract a sufficient number of qualified workers to meet their needs. If employers could completely dictate the terms of employment, in the absence of a state or local ordinance, hourly workers covered by the FLSA would only receive the federally-mandated minimum wage. Similarly, salaried workers would be paid no more than

\$250 per week, the minimum required to meet the current short duties test. These workers would then be required by their employers to work extremely long hours with no overtime. Since this is clearly not the situation in today's labor market, it is a mistake to assume that employers are in complete control of the terms of employment.

Consider the example of registered nurses. The Department received many comments alleging the proposal would cause registered nurses to lose overtime. For example, the American Nurses Association stated, "the proposed income test for white-collar employees, who are paid \$65,000 or more annually, will exclude some of the most experienced registered nurses from overtime protections and will undermine efforts to retain these valuable members in the nursing workforce." The Massachusetts Nurses Association stated, "according to a recent national survey conducted by Advance For Nurses (a nursing publication), 32 percent of all nurses are salaried, which, given the long-established status of RNs as 'professionals' under the FLSA, means that 32 percent of nurses are subject to possible automatic exclusion from the FLSA simply based upon income if the proposed rule were adopted \* \* \* Thus, the proposed regulation would likely render a great many rank-and-file RNs per se exempt from the FLSA."

These comments fail to recognize that RNs already satisfy the duties test for exemption under the current regulations, and have since 1971. Section 541.301(e)(1) of the current rule specifically states "Registered nurses have traditionally been recognized as professional employees by the Division in the enforcement of the act \* \* \* [N]urses who are registered by the appropriate State examining board will continue to be recognized as having met the requirement of 541.3(a)(1) of the regulations." Given that most (94.1 percent) registered nurses have weekly earnings greater than \$250, almost all registered nurses could be classified as exempt under current regulations if they were paid on a salary basis. Nevertheless, 75.5 percent of RNs continue to be paid by the hour and are eligible for overtime pay, strongly indicating there are other labor market factors involved in determining how RNs are paid.

Just as many RNs continue to be paid overtime despite the fact the current regulations classify them as performing exempt professional duties, the Department believes the same will happen for other occupations under the duties tests for highly compensated

employees. There are many more factors involved in employee compensation beyond the FLSA requirements and an employer's desire to minimize overtime costs. The nature of the work (particularly peak work loads in relation to average work loads), the supply of qualified workers, the risk tolerance of both the employer and the employee, and tradition/culture are just some of the factors involved that influence whether or not a particular job is paid on a salaried or hourly basis.

A review of the literature on pay policies posted by Human Resource (HR) professionals on publicly accessible Internet sites with workforce and salary themes (e.g., Salary.com) also indicates the ability of employers to dictate the terms and conditions of employment is limited by a variety of labor market conditions. The pertinent market conditions include: Competition among employers, scarcity of skilled workers, accessibility of information, and worker mobility.

The effect of competition for skilled workers by firms operating in local or regional labor markets is clearly explained in the HR literature, "Just as organizations compete to sell their products and services, they also compete with one another for talented employees." (Lena M. Bontos and Christopher J. Fusco, SPHR 2002, Competitive Pay Policy, Salary.com, Inc.) Firms expend time and resources designing compensation plans that attract and retain skilled workers, without exhausting their limited financial resources. Under those conditions, exploiting workers by imposing unsatisfactory working conditions, such as excessive unpaid overtime, detracts from such firms' overall competitive strategies. It also exposes them to increases in labor turnover as displeased workers seek and find new jobs with competing employers.

Therefore, the Department concludes that any analysis or comment that explicitly or implicitly assumes that employers completely control all the terms of employment and can heedlessly convert millions of workers from nonexempt to exempt status to avoid paying overtime is inconsistent with prevailing economic theory (particularly regarding high-wage labor markets) and empirical analysis. For this reason, as well as the many mistakes and incorrect assumptions explained above, the Department finds the alternative impact analysis conducted by EPI and submitted by the AFL-CIO to the record to be unconvincing.

#### 4.3 Estimated Number of Workers Converted to Nonexempt Status as a Result of Raising the Salary Level

The Department estimates that the final rule will strengthen overtime protection for millions of workers. Raising the salary level test to \$455 will:

- Strengthen overtime protection for an additional 6.7 million salaried workers earning \$155 or more but less than \$455 per week regardless of their duties or exempt status. This includes 1.3 million exempt white-collar salaried workers who will gain overtime protection and 5.4 million nonexempt salaried workers whose overtime protection will be strengthened by the higher bright-line salary level test compared to a combination of the salary basis test and the confusing long and short duties tests in the current regulations.

- Another 3.4 million white-collar employees who are paid by the hour (and earn \$155 or more but less than \$455 per week) but work in occupations with a high probability of being exempt also will have their overtime protection strengthened. Under the current regulations these workers are at some risk of being misclassified and denied overtime. Under the higher salary level test in the final rule, they will be guaranteed overtime regardless of their duties or how they are paid.

- These 10.1 million workers are predominantly married women with less than a college education.

The estimated 1.3 million currently exempt salaried workers earning at least \$155 but less than \$455 per week for all white-collar occupations is the Department's best estimate of the number of workers who are likely to gain compensation under the final rule. A detailed breakdown of the estimates is presented in Table A-4 of Appendix A. The occupations gaining most from raising the salary level are 203,000 managers and administrators not elsewhere classified, 143,000 supervisors and proprietors of sales occupations, 52,000 accountants and auditors, 49,000 registered nurses, and 48,000 teachers not elsewhere classified.

When developing this estimate, the Department did not focus exclusively on the number of workers reporting overtime (41 or more hours worked). The Department assumed that all of the estimated 1.3 million exempt salaried workers earning at least \$155 but less than \$455 per week are likely to work some overtime during the year for two reasons: First, the CPS Outgoing Rotation Group dataset likely underestimated the number of employees who work some overtime

during the year; and second, employers have an economic disincentive to exempt workers that never work overtime.

Moreover, because the CPS Outgoing Rotation Group dataset is based on only twelve one-week reference periods, it provides a significantly lower estimate of the number of employees who actually worked overtime at some point during the year than a survey based upon a full-year reference period such as the CPS Supplement. For example, the Bureau of Labor Statistics notes that because the Annual Social and Economic Supplement to the CPS has a "reference period [that] is a full year, the number of persons with some employment or unemployment greatly exceeds the average levels for any given month, which are based on a 1-week reference period, and the corresponding annual average of the monthly estimates." (BLS, Work Experience of the Population in 2002, Press Release.) The Department has determined that the same is likely to be true for the number of workers who work overtime.

The Department believes that including all 1.3 million workers is reasonable given the exempt status of these workers. Conferring exempt status on an employee has both costs and benefits. The cost is that these workers may work less than 40 hours per week without using leave, and under the salary basis test employers cannot adjust employee pay for working less than 40 hours. In fact, the CPS data states that about 23 percent of likely exempt workers worked less than 35 hours per week during the reporting period. In this situation, employers have to pay for hours that are not worked. This cost must be offset by the benefit of flexibility. Both employers and employees may prefer a salary basis for payment in order to smooth out cash flows; however, that preference depends on the employer having a need for flexibility in the number of hours the employee works, and the employee accepting that their pay will not be tightly tied to hours worked. In other words, employers will have a need for overtime and salaried employees would be willing to work overtime. Therefore, employers have an economic disincentive to exempt workers that never work overtime, and the Department considers an exemption a strong signal that the worker is likely to work some overtime during the year.

Furthermore, the Department considers the estimated 1.3 million workers gaining compensation to be a lower bound estimate of the workers who will benefit from raising the salary

level to \$455 per week. Specifically, the following workers will also benefit:

- An estimated 2.6 million nonexempt salaried workers earning \$155 or more but less than \$455 per week in the white collar occupations will gain some overtime protection (in the form of a reduced probability of being misclassified) from the \$455 bright line salary level test compared to the current combination of long and short duties tests.

- Up to 14.0 million hourly paid workers earning \$155 or more but less than \$455 per week in the white-collar occupations will also benefit from the \$455 bright line salary level test. Under the current regulations these workers are at some risk of being misclassified and denied overtime. Under the higher salary level test in the final rule, they will be guaranteed overtime regardless of their duties or how they are paid. This estimate includes the 3.4 million white-collar employees noted above who are paid by the hour but work in occupations with a high probability of being exempt.

- Raising the salary level test to \$455 per week will strengthen overtime protection for 2.8 million salaried workers in blue-collar occupations, because their protection, which is based on the duties tests under the current regulation, will be automatic under the new rules. The Department concluded that most of these workers are nonexempt under the current regulation, however, making their nonexempt status certain will unambiguously increase their overtime protection.

#### 4.4 Estimated Number of Workers Changing Exempt Status as a Result of Updating the Duties Tests

Given the comparability of the standard tests in the final rule and the current short tests (see Chapter 2), the Department has determined the final rule is as protective as the current regulation for the 57.0 million workers who earn between \$23,660 and \$100,000 per year. The differences in the number of workers who could change exempt status under the standard duties tests compared to the current regulation are too small to estimate quantitatively. The very few, if any, workers whose exempt status might possibly change as a result of updating the administrative and professional duties tests are likely to be offset by workers gaining overtime protection as a result of the tightened executive test.

Clearly, the final standard duties test for the executive exemption is more protective than the current regulation with the additional requirement from



the current long test. The numerous significant changes the Department made in the final rule to return the administrative duties test to the structure of the current rule, as well as the retention of terms that are used in the current rule that have been the subject of numerous clarifying court decisions and opinion letters, have made the standard duties test for administrative employees in the final rule as protective as the current short test. Further, the significant changes the Department made in the final standard duties test for the learned professional exemption to track the current rule's primary duty test, to restructure the reference to acquiring advanced knowledge through other means so that the final rule is consistent with the current rule, to add language from the current long test that defines work requiring advanced knowledge as "work that is predominantly intellectual in character," and to define work requiring advanced knowledge as including work requiring the consistent exercise of discretion and judgment have made the learned professional exemption in the final rule at least as protective as the current rule. It should also be noted that both the current and final rule recognize that the areas in which the professional exemption may be available are expanding as knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields.

Before reaching this determination, the Department convened a group of WHD and DOL employees with a combined total of more than 160 years of WHD experience. The group was asked to quantitatively compare the duties tests in the current and final standards with respect to how the updated final rule could impact the probability of exemption. The group concluded that, given the minor and editorial updates to the duties tests in the final rule, the CPS data limitations, and the broad probability ranges previously developed (see Table 3-2), the differences in the exemption probabilities under the current and final rule would be too small to estimate.

As the GAO previously noted, basing the estimates on the CPS and the 1998 judgments of the WHD staff imposes some limitations on the analysis: "There are two major limitations on the use of CPS data. First, the CPS occupational classifications do not distinguish between supervisory and nonsupervisory employees, which is important for the long and short duties tests under the Fair Labor Standards Act (FLSA). Therefore, one job title, 'managers and administrators,' could

include the President of General Motors, but it may also include an office assistant. Second, CPS respondents self-identify their duties and some may tend to exaggerate them. This may result in overestimates of the number of management employees and, consequently, may overestimate the number of exempt employees." (GAO/HEHS-99-164, pg. 42)

#### 4.5 Estimated Number of Salaried Workers Converted to Exempt Status as a Result of the Highly Compensated Test

Although the test in the final rule for highly compensated employees who earn \$100,000 or more per year is clearly more protective than a simple salary level test, it is less stringent than both the current short duties tests and the standard duties tests in the final rule. The Department estimates that under the highly compensated test:

- About 107,000 nonexempt white-collar workers who earn \$100,000 or more per year could be converted to exempt salaried status as a result of the new highly compensated test. This includes 60,000 salaried and 47,000 paid hourly workers.
- No blue-collar workers will be affected because the test only applies to employees performing office or non-manual work. Carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers, and other employees who perform manual work are not exempt under the test no matter how highly paid they might be.
- No police officers, fire fighters, paramedics, emergency medical technicians (EMTs), and other first responders will be affected by the highly compensated test.
- The vast majority of salaried white-collar workers who earn \$100,000 or more per year, 2.0 million of the 2.3 million, or 87.0 percent, are already exempt under the current short test and will not be affected by the highly compensated test.

The methodology used to estimate the number of salaried workers that could be classified as exempt under the duties tests for highly compensated employees is similar to the methodology used to estimate the number of exempt workers under the current short duties tests. The primary distinction is that a higher set of probabilities was estimated for each white-collar CPS occupational classification reflecting the more limited duties tests for highly compensated workers.

Since the exemption for highly compensated workers is a new provision, the probabilities of

exemption for the four classifications could not be estimated on the basis of historical experience, as was done for the current duties tests in 1998 by the WHD staff (see Chapter 3). Therefore, the Department used a comparative approach whereby the probabilities developed by the WHD staff were modified based upon an analysis of the provisions of the highly compensated test in the final rule relative to the short duties tests in the current rule. The Department determined that this comparative approach should be used for the highly compensated test because it is substantially different from the current short duties test, whereas it should not be used for the standard duties tests because they are substantially similar to the current short duties tests.

In utilizing this approach, the Department rejected the worst-case assumption used by some commenters, that under the proposed highly compensated tests all workers earning more than the highly compensated salary level (\$65,000 per year in the proposal) could be made exempt. Rather, the Department determined that some workers earning more than \$100,000 per year would remain nonexempt because the final highly compensated test requires that exempt work be office or nonmanual and that the employee "customarily and regularly" perform one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee, and that the employee be paid at least \$455 per week on a salary basis. Other workers would remain nonexempt because most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital and minimizing their turnover costs.

Although the highly compensated test in the final rule is clearly more stringent than either a simple salary test or the highly compensated test in the proposed rule, it is also clear that the highly compensated test in the final rule is less stringent than both the current short tests and the standard duties tests in the final rule. To account for this, the Department determined that both the lower and upper bound probability estimates for the four probability categories should be higher than those used in Chapter 3 to estimate the number of currently exempt workers (see Table 3-2).

- For the "Low or No Probability of Exemption" classification, the Department raised the lower bound

probability of exemption from 9.9 percent estimated using the methodology presented in Chapter 3 for earnings of \$1,923 per week (*i.e.*, \$100,000 per year) to 15.0 percent, and the upper bound probability of exemption by approximately the same 5 percentage points, from 10 percent to 15 percent (see Table 3–2). This represents an increase of at least 50 percent for both the lower and upper bound probabilities.

These increases are sizable for occupations that have little or no probability of being exempt under the current short tests, but were included because the WHD staff in 1998 considered it conceivable that some exempt supervisors might be in the group.

- For the “Probably Not Exempt” classification both the lower and upper bound probabilities were raised by 10 percentage points. This raised the lower bound probability by approximately 21 percent from the 48.4 percent calculated at \$1,923 per week (*i.e.*, \$100,000 per year) to 58.4 percent, and increased the upper bound probability by 20 percent from the 50 percent in Table 3–2 to 60 percent.

These increases are sizable for occupations that have a relatively low

probability of being exempt under the current short tests.

- For the “Probably Exempt” classification the lower bound probability was increased from 88 percent (at \$100,000 per year) to 94 percent and the upper bound probability was raised from 90 percent to 96 percent. This raised both probabilities by 6 percentage points and effectively reduced the probability of being nonexempt by 50 percent for workers in this category who earn more than \$100,000 per year.

- For the “High Probability of Exemption” category both the lower and upper bound were set at the maximum value of 100 percent.

The lower bound probability for both the “Probably Exempt” and the “High Probability of Exemption” categories were already extremely high at earnings of \$100,000 per year using the methodology in Chapter 3 (88 percent and 99 percent, respectively). This is consistent with the belief of the WHD staff that most workers in these categories earning at least \$100,000 are probably already exempt.

The estimated probabilities of Part 541—exemption status under the duties tests for highly compensated employees

are presented in Table 4–1 for each coverage classification.

TABLE 4–1.—PART 541—EXEMPTION PROBABILITY CATEGORIES FOR SALARIED WORKERS UNDER THE FINAL HIGHLY COMPENSATED TEST

Category	Lower bound estimate (percent)	Upper bound estimate (percent)
1. High Probability of Exemption .....	100	100
2. Probably Exempt .....	94	96
3. Probably Not Exempt .....	58.4	60
4. Low or No Probability of Exemption .....	15	15

Source: U.S. Department of Labor, based upon estimates in Table 3–2.

The specific probabilities of exemption for the annual salaries between the \$100,000 salary level for the highly compensated test and the top coded salary of \$150,000 per year (*i.e.*, \$2,885 per week) were estimated using linear interpolation according to the following equation:

$$\text{Prob\_Exempt\_HC} = \text{LB}^* + \frac{(\text{PTERNWA} - \$1,923) \times (\text{UB}^* - \text{LB}^*)}{(\$2,885 - \$1,923)}$$

Where:

Prob\_Exempt\_HC = Probability of the individual in occupational classification OCC being exempt under the duties tests for highly compensated employees

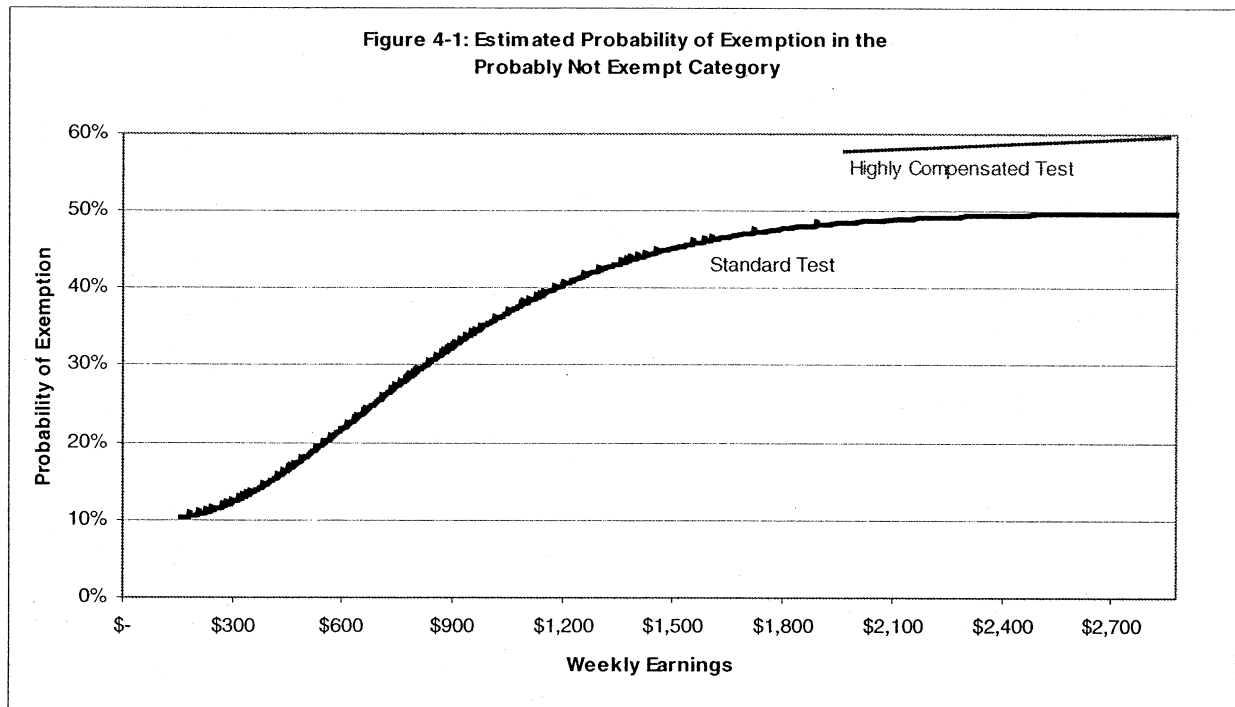
PTERNWA = CPS weekly earnings variable

LB\* = Lower bound probability from Table 4–1

UB\* = Upper bound probability from Table 4–1

Linear interpolation was used rather than a nonlinear model because the income distributions for all four categories are relatively linear once weekly earnings reach \$1,923 (*i.e.*, the \$100,000 annual earnings level). Figure 4–1 presents a graphical illustration of the probable exemption status for the “Probably Not Exempt” classification. Similar illustrations could have been developed for the other three classifications but were not included in the final RIA.

As Figure 4–1 illustrates, the probability of being exempt is higher under the highly compensated test than under the standard test. To estimate the number of additional employees that become exempt as a result of the new highly compensated test, the Department simply subtracted the estimated number of workers who would be exempt under the standard tests from the total number who would be exempt under the highly compensated tests.



The Department excluded salaried computer system analysts and scientists (in occupation 64) and salaried computer programmers (in occupation 229) because they could have already been made exempt under section 13(a)(17) of the Act. In addition, salaried registered nurses (in occupation 95) and salaried pharmacists (occupation 96) were excluded because they could have already been made exempt under both the current short tests and the standard duties tests in the final rule. Thus, the Department estimates approximately 60,000 additional salaried workers earning \$100,000 or more per year could become exempt under the highly compensated test as compared to the current short test or the standard duties tests in the final rule. A detailed breakdown of the additional number of workers who could be made exempt under the highly compensated tests is presented in Table A-5 of Appendix A.

#### 4.6 Estimated Number of Hourly Paid Workers Converted to Exempt Status as a Result of the Highly Compensated Test

The procedure used to estimate the number of highly compensated hourly employees that could be converted to exempt salaried status under the final rule is different from that used in Section 4.5 because, under both current regulations and the final rule, virtually all hourly workers are considered nonexempt (except those not required to be paid on a salary basis, such as doctors and lawyers). Thus, before any

hourly worker could be made exempt under the highly compensated tests, employers would first have to convert them to a salaried basis and pay them at least \$455 per week plus commissions and bonuses that brings their total compensation to \$100,000 or more per year. To estimate the number of hourly workers that could be converted, the Department utilized a number of reasonable assumptions.

First, the Department assumed that over the 29 years since the last revision to Part 541 the market has established an optimal distribution between the number of salaried and hourly workers who earn \$100,000 or more per year. Although there are many more factors involved in employee compensation beyond the FLSA requirements as was noted above in Section 4.2, it appears that both employers and employees prefer a salary basis for earnings at this level, given the greater than 7 to 1 ratio of salaried workers (2,321,000) to hourly workers (345,000) subject to the Part 541 salary tests.

The nature of the work, the supply of qualified workers, the risk tolerance of both the employer and the employee, and tradition/culture are just some of the factors involved that influence whether or not a particular job is paid on a salaried or hourly basis. Therefore, the Department has determined that just as 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn \$100,000 or more per year continue to be paid by the hour (and eligible for

overtime) despite the fact the current regulations classify them as performing exempt professional duties, the same will happen for other white-collar occupations under the highly compensated test and that many paid hourly workers will remain paid by the hour. The Department then assumed:

- For both the “Low or No Probability of Exemption” and the “Probably Not Exempt” categories, that highly compensated white-collar hourly workers would have the same marginal probability of being converted to exempt salaried status as the currently nonexempt highly compensated salaried white-collar workers. Thus, highly compensated white-collar hourly workers in these two categories were assigned probabilities of exemption of 5 percent and 10 percent, respectively.

These probabilities are consistent with the Department’s first assumption that the market has established an optimal distribution between the number of salaried and hourly workers who earn \$100,000 or more per year and that only a marginal change is likely to occur in the exempt status of paid hourly workers who earn \$100,000 or more per year in these two categories.

Second, the Department assumed that:

- The probability of being converted to exempt salaried status for highly compensated white-collar hourly workers in the “Probably Exempt” category is twice that of highly compensated white-collar hourly workers in the “Probably Not Exempt” category, or 20 percent. Unlike the two

categories discussed above, the Department did not base its estimates on the marginal probabilities for salaried white-collar workers in the "Probably Exempt" category because, as discussed in Section 4.5, the upper bound probability for such workers in that category was limited by its close proximity to 100 percent.

- The Department also assumed that the probability of being converted to exempt salaried status for highly compensated white-collar hourly workers in the "High Probability of Exemption" category is twice that of highly compensated white-collar hourly workers in the "Probably Exempt" category, or 40 percent. The Department once again did not base its estimate on the marginal probabilities for salaried white-collar workers in the "High Probability of Exemption" category because, as discussed in Section 4.5, the upper bound probability for such workers in that category was limited by its close proximity to 100 percent.

These estimates are presented in Table 4-2.

TABLE 4-2.—ESTIMATED PROBABILITY OF EXEMPTION FOR WHITE-COLLAR HOURLY WORKERS EARNING AT LEAST \$100,000 PER YEAR

Category	Estimated probability (percent)
1. High Probability of Exemption .....	40
2. Probably Exempt .....	20
3. Probably Not Exempt .....	10
4. Low or No Probability of Exemption .....	5

Source: U.S. Department of Labor.

Further, the Department rejected the worst-case assumption that under the highly compensated test all paid hourly workers earning \$100,000 or more per year could be made exempt. Rather, the Department determined that some paid hourly workers earning more than \$100,000 per year would remain nonexempt because the final highly compensated test requires that exempt work be office or nonmanual and that the employee "customarily and regularly" perform one or more of exempt duties. Other paid hourly workers would remain nonexempt because most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital and minimizing their turnover costs.

The next step was to estimate the number of hourly white-collar workers

earning \$100,000 or more per year who would meet the duties tests for highly compensated employees in the final rule. The Department excluded approximately 29,000 computer professionals (in occupations 64 and 229) because these computer professionals earning \$100,000 or more per year would currently be exempt under section 13(a)(17) of the Act. Approximately 22,000 registered nurses (occupation 95) and 10,000 pharmacists (occupation 96) were also excluded because current section 541.301(e)(1) has long recognized that registered nurses and pharmacists perform exempt duties (and whether they are, in fact, exempt turns on whether they are paid on a salary basis). If it were advantageous for employers to convert any of these workers to exempt status, they could and presumably would have been converted under the current rule. After excluding these two groups, there are approximately 182,000 hourly white-collar workers earning at least \$1,923 per week in the 251 white-collar occupations who potentially could be impacted by the highly compensated tests. Workers in occupations not subject to the salary level test (*i.e.*, teachers in educational establishments, doctors and lawyers) were previously excluded from the analysis whether they are paid on a salary or hourly basis.

The number of hourly workers in each white-collar occupation earning at least \$1,923 per week was multiplied by the associated probability in Table 4-2 and summed across all occupations to arrive at the Department's estimate that about 47,000 hourly workers could be converted to exempt salaried status as the result of the highly compensated test (Note: this procedure is equivalent to using the same linear model as in Section 4.5 with all of the lines being horizontal). Managers and administrators not elsewhere classified (occupation 22) account for approximately 31 percent of all hourly workers that could potentially be converted to exempt salaried status. No other occupation accounts for more than five percent of the total. Table A-6 in Appendix A presents the detailed breakdown by occupation.

#### 4.7 Estimated Total Number of Workers Converted to Exempt Status as a Result of the Highly Compensated Tests

The Department estimates that 107,000 workers could be converted to exempt status as a result of the new highly compensated tests. The major reason for the decrease in this estimate compared to the PRIA is the salary level for the test being raised to \$100,000 and

there are far fewer workers earning this higher salary. The Department estimates there are 2.3 million salaried workers earning at least \$100,000 in white-collar occupations subject to the salary test, compared to 7.0 million earning at least \$65,000. In addition, after excluding the computer programmers, RNs and pharmacists, because they could already be made exempt if paid on a salaried basis under the current rule, 2.0 million of the 2.1 million remaining highly compensated white-collar salaried workers (95.2 percent) are estimated to be already exempt under the current short duties tests. In addition, there are only 182,000 hourly workers that could be potentially impacted by the highly compensated test at the \$100,000 level. Moreover, the final rule's highly compensated test applies only if the employee performs office or non-manual work.

Thus, for example, police officers, firefighters, paramedics, and other first responders could not be exempt under the highly compensated test although the Department estimates that 1,300 police commissioners, police and fire chiefs, and police captains who earn \$100,000 or more per year could be converted to exempt status. (However, 940 of these 1,300 workers are performing exempt duties but are currently nonexempt because they report that they are paid by the hour, rather than on a salary basis. Therefore, the Department believes that many of them are unlikely to be converted because of the final rule.) Finally, by increasing the earnings level for the highly compensated test and adding the requirement that the exempt duties must be performed customarily and regularly, the Department increased the probability that the salaried workers at that level would already be exempt under the current rule.

The Department notes that the CPS earnings data includes wages, commissions and tips, but does not include some bonuses. According to the Census Bureau Web site, the usual weekly earnings "data represent earnings before taxes and other deductions, and include any overtime pay, commissions, or tips usually received (at the main job in the case of multiple jobholders). Earnings reported on a basis other than weekly (*e.g.*, annual, monthly, hourly) are converted to weekly. The term 'usual' is as perceived by the respondent. If the respondent asks for a definition of usual, interviewers are instructed to define the term as more than half the weeks worked during the past 4 or 5 months." (<http://www.bls.census.gov/cps/bconcept.htm>)

The Department concludes that infrequent bonuses (e.g., Christmas bonuses) are probably not reported as usual earnings, while regular non-discretionary bonuses (such as those described in section 541.601(b) of the final rule) are likely to be included. Given that some workers surveyed for the CPS may not have reported their non-discretionary bonuses, the Department may have slightly underestimated the number of workers potentially impacted by the highly compensated test. However, the Department believes this is balanced by the fact that the analysis was conducted using weekly earnings rather than annual earnings as is required by the highly compensated test, which may result in an overestimate of the number of workers earning \$100,000 or more per year (weekly earnings were used because the CPS dataset does not contain a variable for annual salary). Since there are many more white-collar hourly workers earning less than \$100,000 per year than earning \$100,000 or more per year, it is likely that basing the estimate on a single week of data will likely result in the inclusion of many more workers with an abnormally high earnings week (e.g., due to a large amount of overtime or an unusually high commission) in the estimate of workers earning \$100,000 or more per year than the number of workers excluded from the total of workers earning \$100,000 or more per year due to one abnormally low earnings week (e.g., due to the lack of overtime or an unusually low commission).

Finally, as discussed above in Section 4.6, the estimate of 47,000 hourly workers who could be converted to exempt salaried status is likely an overestimation due to the assumptions made about the ease of converting these workers to a salary basis.

4.8 Estimated Total Impact of the Part 541 Revisions

As indicated in Table 4-3, the Department estimates 1.3 million salaried workers earning less than \$455 per week who are currently exempt under the long and short duties tests could benefit from higher earnings in the form of either paid overtime or higher base salaries. In addition, an estimated 47,000 hourly workers and 60,000 salaried workers with annual earnings of \$100,000 or more could be converted to exempt status as a result of the new highly compensated test.

TABLE 4-3.—ESTIMATED IMPACT OF THE FINAL RULE ON THE OVERTIME STATUS OF WHITE-COLLAR WORKERS

Exempt to Nonexempt .....	1,298,000
Salaried Nonexempt to Exempt	60,000
Hourly Nonexempt to Salaried Exempt .....	47,000

Source: CONSAD and the U.S. Department of Labor.

Chapter 5: Economic Profiles

In the PRIA, the Department presented estimates at the 2-digit standard industry code (SIC) and by state. As noted above, several commenters suggested more detailed breakdowns should have been published. For example the AFL-CIO stated, “Generalizing to a 2-digit code loses important distinctions within industry sector, and this causes a corresponding loss of precision within the study.”

However, there are not a sufficient number of observations in the CPS dataset to provide reliable estimates even at the 2-digit level of detail, much less the 4-digit level suggested by the AFL-CIO. For example as discussed above, the methodology used in Chapter 3 was conducted on a national level and was intended to produce national estimates of the number of currently exempt workers. To produce industry specific or regional estimates, the income distributions would have had to have been developed at more disaggregated levels in order to account for the industry or regional wage structure. While sufficient to produce national estimates, the Department determined that the CPS dataset was too small to develop income distributions for each of the categories at this more disaggregated level.

Similarly, the costs presented below in Chapter 6 were estimated at a national level and then allocated to specific major industry groups on the basis of employment or number of employers. Presenting the data at a more disaggregated level would simply indicate a degree of precision that does not exist.

The Department decided to present nine industry sectors and the government sector because these estimates are based on at least 998 observations, and an average observation number of 18,230 per sector. The Department felt that these sample sizes were sufficient to accurately represent the sectors. Further disaggregation would have required the Department to extrapolate from smaller samples. For example, a subset among all 50 states and industry categories

would have implied a dependence on a minimum sample size of 1 observation (for a particular sector and state), and an average sample size of 14 observations across all states and sectors. Extrapolating from these small subsamples would be problematic, and would not offer the level of precision desired by the commenters.

For this reason, the Department has developed the economic profiles for the nine major industry categories plus State and Local Government. Although compiled from more detailed levels, these profiles were aggregated to match the level of precision available in the coverage and cost estimates. The Department notes that due to these very same data limitations, the GAO took a similar approach in presenting aggregated data: “Our work presents data for six industry groupings: (1) Services; (2) retail trade; (3) manufacturing; (4) finance, insurance, and real estate; (5) public sector; and (6) other. We developed these groups by combining 932 detailed CPS industry codes.” (GAO/HEHS-99-164, pg. 41)

Also, the number of employees presented in this chapter does not match the numbers presented in Chapter 3 because of different data sources and different time periods. For example, the covered employment numbers presented in Chapter 3 only count each individual once regardless of the number of jobs held. The covered employment numbers presented in Chapter 5 are based on the number of workers employed by each employer so some individuals are counted more than once.

5.1 Private Sector Profile

The AFL-CIO commented on the PRIA that, “CONSAD has not provided—and, given the sheer number of the sources, probably could not provide—sufficient detail to allow for the reader to understand and/or replicate the process.” The AFL-CIO also stated, “the study’s methodology is confusing, and because CONSAD does a poor job of explanation, it is not capable of replication. For example, CONSAD uses a myriad of statistical sources from several different time periods to come up with the data it needs to estimate the number of exempt employees under the proposal and the corresponding impact on business.” In the following section, the Department has attempted to provide the detail that will allow the reader to understand and replicate this analysis.

Since the FLSA and the Part 541 overtime regulations apply nationally, the Department obtained data on firms in the private sector primarily from the

U.S. Department of Commerce's Economic Census. The Economic Census is the only data source that has the scope covered by the revised regulations. The most recent Economic Census that is available was published in 2001 for the year 1997. As noted in the footnotes to the tables that follow, even this source had to be supplemented in some cases with additional data.

First, the Department notes that it relied on only a single data source to produce its estimates of the number of salaried and hourly workers covered by the FLSA, the 2002 CPS Outgoing Rotation Group data set. This was also the only source used to produce the estimates of the number of exempt workers and the associated changes in overtime costs related to changes in the regulations. As noted in Chapter 3, the CPS data were supplemented with probabilities developed by the WHD enforcement staff concerning the likelihood that workers in various white-collar occupations would be exempt. These same assessments were previously used by both the GAO and the University of Tennessee. They were also used in an analysis by the EPI that the AFL-CIO submitted for the record. In order to make the estimates easier to replicate, the Department has added a considerable amount of additional detail in this preamble that was not provided in the PRIA. For example, the Exempt Status assessments of the WHD staff for each occupation are presented in Appendix A.

Second, in order to estimate the one-time implementation costs, the Department had to rely on the 1997 Economic Census (supplemented by the 1997 County Business Patterns) because some costs are based on the number of establishments or firms and these are the latest available data. Such information is not available in the 2002 CPS Outgoing Rotation Group dataset. After assessing the economic impact of the revisions, the Department relied on a number of other statistical sources, such as multiple years of IRS and Dun & Bradstreet (D&B) data, to obtain the payroll, revenue, and profit data needed to put the estimated payroll and implementation costs in perspective. Moreover, as the AFL-CIO conceded, "relying on several sources is not itself a fatal flaw."

Although the Department used various data sources covering different time periods, this could not be avoided to complete the required economic analysis since the primary data set used in the analysis, the 2002 CPS, is based on the Standard Industrial Classification (SIC) while most of the more recent data

is based upon the newer North American Industry Classification System (NAICS). The U.S. Census Bureau cautions that "While many of the individual SIC industries correspond directly to industries as defined under the NAICS system, most of the higher level groupings do not. Particular care should be taken in comparing data for retail trade, wholesale trade, and manufacturing, which are sector titles used in both NAICS and SIC, but cover somewhat different groups of industries." (<http://www.census.gov/epcd/ec97brdg/introbdg.htm>) Given that the profit data from Dun & Bradstreet (D&B) were also SIC based, the Department decided to use data sets that were also SIC based rather than conduct a complicated crosswalk conversion that potentially introduces other errors into the analysis.

Although the use of SIC based data required the use of data from several different years, the Department also determined that this was unlikely to significantly bias the results. The CPS Outgoing Rotation Group data came from 2002; the Economic Census, County Business Patterns, and IRS data came from 1997; and the D&B data came from 2000, 2001 and 2002.

The D&B data on profits match up fairly well with the payroll cost estimates derived from the 2002 CPS data presented in Chapter 6. The D&B data from 2002 were from the same year as the CPS data. The use of D&B data from 2000, the peak of the economic expansion, is likely to somewhat overstate 2002 profits, while the use of D&B from 2001, the year of the last recession and the 9/11 terrorist attacks, is likely to somewhat understate 2002 profits. So on average, the Department has determined that the use of D&B data from these three years is reasonable and provides a valid comparison with the cost estimates based upon the 2002 CPS data.

However, using the 1997 Economic Census, 1997 County Business Patterns, and the 1997 IRS data is likely to affect the analysis because the economy expanded for three years after the 1997 data were collected. For example, civilian employment in 1997 averaged 129.6 million, while employment in 2002 averaged 134.3 million (based upon the old weights). Therefore, use of the 1997 data is likely to understate the 2002 payroll employment.

In Chapter 7, the Department adjusted the dollar values for the 1997 payroll data because wages continued to increase from 1997 to 2002. Nevertheless, the comparison of the adjusted 1997 payroll data with the cost estimates based upon the 2002 CPS data

are likely to overstate the economic impacts presented in Chapter 7 because the denominator (based upon the 1997 employment) will be relatively smaller than the numerator (based upon 2002 employment).

While acknowledging these data issues, the Department notes that they are unavoidable because the 1997 data is the latest available for the required economic analysis. Although some more recent data (*e.g.*, 2001 County Business Patterns and 2001 Statistics of U.S. Business) are available, these could not be used in this analysis because the newer data are based on the North American Industry Classification System (NAICS), while this analysis is tied to the dated Standard Industrial Classification (SIC) used in both the CPS and D&B data.

Finally, some of the one-time implementation costs were based upon the number of establishments in the 1997 Economic Census (supplemented by the 1997 County Business Patterns). Although the Department was unable to ascertain the relation of the establishment estimates in 1997 to those in 2002, it believes that on average the counts in 1997 are likely to be less than those in 2002. Therefore, the impact of some one-time implementation costs (*i.e.*, those based on establishment counts) is likely to be somewhat understated. Again, attempting to update establishment counts using NAICS-based data would involve a complicated crosswalk conversion that potentially introduces other errors into the analysis. However, the sales revenue estimates are similarly based on 1997 data. Although the Department adjusted the dollar sales revenue data in Chapter 7 to account for inflation, no adjustments were made to account for the growth in the number of establishments. The Department believes these two effects will offset themselves to some degree when calculating the cost to revenue ratios in Chapter 7 and concludes this is the best approach available given the scope of the regulations and the limitations of the available data sources.

In summary, the Department attempted wherever possible to ensure the compatibility of the different cost, payroll, revenue, and profit numbers. The Department adjusted the 1997 estimates for inflation and wage growth in order to allow for a valid comparison with the later year cost estimates. In practice, however, this adjustment made very little difference in the per firm percentage impacts described below; for example, the average decrease in impact due to adjusting the revenue numbers for inflation was less than one-tenth of

one percent. Therefore, the Department's per firm impact estimates are robust to these assumptions. Unfortunately, the Department is unable to adjust upward the number of establishments. This source of possible underestimation of cost, however, is more than offset since the Department did not quantify any of the benefits of this rule for the purposes of per firm impact analysis. These benefits do accrue to the same employers as the costs estimated in the following section.

The resulting estimates, based on 1997 data, indicate that there are 6.5 million establishments with 99.8 million employees, annual payroll

totaling \$2.8 trillion, annual sales revenues of \$17.9 trillion, and annual pre-tax profits of \$579.7 billion in the affected industry sectors (see Table 5-1). Across all industries, the services industry has the largest numbers of establishments, employees, and payroll. This is followed by retail trade for establishments and employees, and manufacturing for payroll. Annual sales are largest in wholesale trade followed by manufacturing. Annual pre-tax profits are largest for the finance, insurance, and real estate industry followed by manufacturing.

On average, employment per establishment ranges from seven

employees in the agricultural services, forestry, and fishing industry to 47 employees in manufacturing. The average annual payroll per establishment ranges from \$71,000 in the agricultural services, forestry, and fishing industry to \$1.6 million in manufacturing. The average annual sales per establishment ranges from \$504,000 in the agricultural services, forestry, and fishing industry to \$10.7 million in manufacturing, while the average annual pre-tax profits per establishment ranges from \$20,000 in the agricultural services, forestry, and fishing industry to \$1.0 million in the mining industry.

TABLE 5-1.—ESTIMATES OF ESTABLISHMENTS COVERED BY THE FLSA AND THEIR ASSOCIATED EMPLOYMENT, PAYROLLS, SALES AND PROFITS

Industry Division	Number of establishments	Number of employees <sup>1</sup>	Annual payroll (\$1,000) <sup>2</sup>	Sales, receipts, value of shipments (\$1,000)	Pre-Tax profits (\$1,000) <sup>3</sup>
Agricultural Services, Forestry, and Fishing <sup>4</sup> ..	116,523	777,671	\$8,318,830	\$58,687,096	\$2,357,130
Mining .....	25,103	531,683	21,566,696	179,763,175	25,488,881
Construction .....	639,478	5,702,374	176,357,238	859,877,289	28,628,686
Manufacturing .....	377,456	17,796,092	608,751,849	4,037,904,247	94,604,018
Transportation and Public Utilities <sup>5</sup> .....	331,594	6,767,563	247,245,240	1,226,952,529	76,411,219
Wholesale Trade .....	521,127	6,544,480	241,917,819	4,362,657,653	86,688,186
Retail Trade .....	1,561,195	20,145,349	268,498,043	2,459,061,733	37,467,739
Finance, Insurance, and Real Estate .....	661,389	7,397,569	273,607,500	2,250,789,643	156,048,617
Services <sup>6</sup> .....	2,302,848	34,164,093	939,353,069	2,462,227,737	71,969,249
All Industries .....	6,536,713	99,826,874	2,785,616,284	17,897,921,102	579,663,726

Note: Unless otherwise noted, data are from USDOC (2001a).

Note: For SICs 07, 08, 09, and 89, the number of establishments, number of employees, and annual payroll are derived from the USDOC (1999) database. Sales data are derived from the D&B (2001a) database.

<sup>1</sup>Employment is estimated when data suppression occurs.

<sup>2</sup>Values may be underestimated due to data suppression in USDOC (2001a).

<sup>3</sup>Pre-tax profits are based on sales data and pre-tax profit rates from D&B (2002), except for SIC 09 which is from D&B (2001b), and SICs 21, 60, 63, and 64 which are from IRS (2000).

<sup>4</sup>Excludes agriculture (SICs 01 and 02).

<sup>5</sup>Excludes railroad transportation (SIC 40). All data for the U.S. Postal Service (SIC 43) are from USPS (1997). Also, data do not include large certificated passenger carriers (in SIC 45) that report to the Office of Airline Statistics, U.S. Department of Transportation.

<sup>6</sup>Excludes private households (SIC 88).

Sources: U.S. Department of Commerce, Bureau of the Census (USDOC, 2001a), 1997 Economic Census: Comparative Statistics, downloaded from <http://www.census.gov/epcd/ec97sic/index.html#download>;

U.S. Department of Commerce, Bureau of the Census (USDOC (1999), 1997 County Business Patterns; Dun & Bradstreet (D&B, 2001a), National Profile of Businesses Database for Fiscal Year 2000;

Dun & Bradstreet (D&B, 2001b), Industry Norms and Key Business Ratios for Fiscal Year 2000/2001; Dun & Bradstreet (D&B, 2002), Industry Norms and Key Business Ratios for Fiscal Year 2001/2002;

U.S. Department of the Treasury, Internal Revenue Service (IRS, 2000) Corporate Tax Returns for Active Corporations for 1997; And U.S. Postal Service (USPS, 1997), 1997 Annual Report.

5.2 Private Sector Small Business Profile

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the Department to estimate the number of small businesses affected by the final rule. For the industries of interest here, the Small Business Administration (SBA) generally defines small businesses using either a criterion based on employment or a criterion based on annual sales. For a complete list of the SBA criteria, see the SBA Web site at <http://www.sba.gov/size/indexableofsize.html>.

To estimate the number of, and employment in, firms covered under SBREFA and affected by the final rule, the Department used the data described above on the numbers of firms, establishments, employment, payroll, and annual receipts for various firm size categories (i.e., employment ranges). The first step in this process involved developing an employment-based firm size standard for each affected industry. For the manufacturing and the retail and wholesale trade sectors, the SBA firm size standard is based directly on employment. For other industries, the SBA most often uses annual sales to

define a small business entity. For the industries where employment is not used, the standards specified by the SBA have been converted to employment-based firm size estimates. Specifically, employment-based firm size standards were estimated by first calculating an employment level, based on the industry average annual receipts per employee, that would be sufficient to produce total sales per firm that are consistent with the sales-based firm size standard. Then, the employment-based firm size standard was chosen on the basis of the firm size categories defined in the County Business Patterns data.

Specifically, the chosen employment-based standard corresponds to the boundary between firm size categories in County Business Patterns that is closest to the calculated employment level, regardless of whether it is higher or lower than the calculated level.

Using these employment-based firm size standards for each affected industry, the data have been used to estimate the percentages of all firms, establishments, employment, payroll, and receipts in the industry that correspond to the SBA firm size standard for a small business entity. Separate percentages have been calculated for each industry covered by the final rule. The percentages have then been used, in conjunction with the corresponding estimates in Table 5-1, to calculate the numbers of affected firms,

establishments, employment, and sales, receipts, or value of shipments in each industry that are associated with firms covered under SBREFA.

The resulting estimates, based on 1997 data, for establishments covered by SBREFA and the FLSA, indicate that there are 5.2 million establishments with 38.7 million employees, annual payroll totaling \$939.7 billion, annual sales revenues of \$5.7 trillion, and annual pre-tax profits of \$180.5 billion in the affected industry sectors (see Table 5-2). Across all industries, the services industry has the largest numbers of establishments, employees, and payroll. This is followed by retail trade for establishments, and manufacturing for employees and payroll. Annual sales are largest in wholesale trade followed by

manufacturing. Annual pre-tax profits are largest for wholesale trade and services followed by manufacturing.

On average, employment per establishment ranges from four employees in the finance, insurance, and real estate industry to 22 employees in manufacturing. The average annual payroll per establishment ranges from \$43,000 in the agricultural services, forestry, and fishing industry to \$613,000 in manufacturing. The average annual sales per establishment range from \$145,000 in the agricultural services, forestry, and fishing industry to \$4.7 million in wholesale trade, while the average annual pre-tax profits per establishment range from \$5,000 in the agricultural services, forestry, and fishing industry to \$319,000 in the mining industry.

TABLE 5-2.—NATIONAL ESTIMATES OF ESTABLISHMENTS COVERED BY BOTH SBREFA AND THE FLSA, AND THEIR ASSOCIATED EMPLOYMENT, PAYROLLS, SALES AND PROFITS

Industry division	Number of establishments	Number of employees <sup>1</sup>	Annual payroll (\$1,000) <sup>2</sup>	Sales, receipts, value of shipments (\$1,000)	Pre-tax profits (\$1,000) <sup>3</sup>
Agricultural Services, Forestry, and Fishing <sup>4</sup> ..	112,753	533,953	\$4,881,450	\$16,352,802	\$591,216
Mining .....	20,422	196,576	6,813,271	61,505,605	6,505,730
Construction .....	626,526	4,083,143	110,470,847	541,608,129	21,109,308
Manufacturing .....	336,378	7,438,944	206,153,159	1,051,526,216	27,723,186
Transportation and Public Utilities <sup>5</sup> .....	213,230	1,651,188	42,500,111	187,741,483	6,210,156
Wholesale Trade .....	419,518	3,412,996	110,749,281	2,002,294,028	40,071,557
Retail Trade .....	1,072,889	7,321,520	85,165,909	672,361,280	17,360,512
Finance, Insurance, and Real Estate .....	430,060	1,623,287	48,840,399	283,951,606	22,193,420
Services <sup>6</sup> .....	1,985,065	12,460,309	324,122,531	872,922,124	38,694,702
All Industries .....	5,216,843	38,721,918	939,696,957	5,690,263,273	180,459,786

Note: Firms covered under SBREFA are based on the Small Business Administration (SBA) firm size standard (maximum number of employees) for a small business entity.

Note: Unless otherwise noted, data are from USDOC (2001a).

Note: For SICs 07, 08, 09, and 89, the number of establishments, number of employees, and annual payroll are derived from the USDOC (1999) database. Sales data are derived from the D&B (2001a) database.

<sup>1</sup> Employment is estimated when data suppression occurs.

<sup>2</sup> Values may be underestimated due to data suppression in USDOC (2001a).

<sup>3</sup> Pre-tax profits are based on sales data and pre-tax profit rates from D&B (2002), except for SIC 09 which is from D&B (2001b), and SICs 21, 60, 63, and 64 which are from IRS (2000).

<sup>4</sup> Excludes agriculture (SICs 01 and 02).

<sup>5</sup> Excludes railroad transportation (SIC 40). All data for the U.S. Postal Service (SIC 43) are from USPS (1997). Also, data do not include large certificated passenger carriers (in SIC 45) that report to the Office of Airline Statistics, U.S. Department of Transportation.

<sup>6</sup> Excludes private households (SIC 88).

Sources: U.S. Department of Commerce, Bureau of the Census (USDOC, 2001a), 1997 Economic Census: Comparative Statistics, downloaded from <http://www.census.gov/epcd/ec97sic/index.html#download>;

U.S. Department of Commerce, Bureau of the Census (USDOC (1999), 1997 County Business Patterns; Dun & Bradstreet (D&B, 2001a), National Profile of Businesses Database for Fiscal Year 2000;

Dun & Bradstreet (D&B, 2001b), Industry Norms and Key Business Ratios for Fiscal Year 2000/2001; Dun & Bradstreet (D&B, 2002), Industry Norms and Key Business Ratios for Fiscal Year 2001/2002;

U.S. Department of the Treasury, Internal Revenue Service (IRS, 2000) Corporate Tax Returns for Active Corporations for 1997; and U.S. Postal Service (USPS, 1997), 1997 Annual Report.

### 5.3 State and Local Government Profile

The Bureau of the Census collects data on state and local government finances for the 50 states. The local government entities for which data are collected include: 3,043 county governments, which provide general government activities in specified geographic areas; 19,372 municipal

governments, which provide general government services for a specific population concentration in a defined area; 16,629 township governments, which provide general government services for areas without regard to population concentrations; 34,683 special district governments, which provide only one or a limited number of designated functions, and have sufficient administrative and fiscal

autonomy to qualify as independent governments; and 13,726 school district governments, which provide public elementary, secondary, or higher education, and have sufficient administrative and fiscal autonomy to qualify as independent governments.

Nearly 90,000 state and local governmental entities will be affected by the final rule. Nationwide, these entities receive more than \$1.5 trillion in



general revenues, including revenues from taxes, some categories of fees and charges, and intergovernmental transfers (see Table 5–3). State and local government entities employ more than 16.7 million workers and their payrolls exceed \$472.9 billion.

TABLE 5–3.—STATE AND LOCAL GOVERNMENT EMPLOYMENT, PAYROLL AND REVENUE

Census region division	Total employment (1997)	Total payroll (\$1,000) (1997)	Total revenue (\$1,000) (FY 1999–2000)
<b>NORTHEAST REGION</b> .....	3,125,659	\$105,089,601	\$343,863,277
New England Division .....	787,604	24,050,377	83,842,665
Mid Atlantic Division .....	2,338,055	81,039,224	260,020,612
<b>MIDWEST REGION</b> .....	4,024,781	107,566,034	341,985,336
East North Central Division .....	2,695,154	75,893,117	240,173,619
West North Central Division .....	1,329,627	31,672,917	101,811,717
<b>SOUTH REGION</b> .....	5,938,313	148,975,497	484,923,138
South Atlantic Division .....	2,984,616	78,443,501	260,912,968
East South Central Division .....	1,026,199	23,959,899	78,848,812
West South Central Division .....	1,927,498	46,572,098	145,161,358
<b>WEST REGION</b> .....	3,644,206	111,309,198	370,550,730
Mountain Division .....	1,093,048	27,431,594	91,648,161
Pacific Division .....	2,551,158	83,877,604	278,902,569
U.S. Total—All Regions .....	16,732,959	472,940,330	1,541,322,481

Note: Employment, payroll and revenue data downloaded from the Census Bureau Web site. Some data suppression existed in the original data file.

Note: General revenue consists of general revenue from own sources (taxes and some categories of fees and charges) plus intergovernmental revenue.

Source: U.S. Department of Commerce (USDOC, 2002a), 1997 Census of Governments, for employment and payroll; U.S. Department of Commerce (USDOC, 2002c), State and Local Government Finances, by Level of Government and by State: 1999–2000, for General revenues.

Chapter 6: Estimated Implementation Costs and Payroll Impacts of the Final Rule

In this section, the Department presents the methodology used to estimate the implementation costs and payroll impacts to employers that are associated with the final rule. As in the PRIA, the Department determined that there are two components to compliance: The one-time implementation costs associated with employers reviewing and coming into compliance with the revised regulations, and the incremental payroll transfers from employers to employees associated with changes in the exempt status of the labor force.

The estimated costs of the final rule that are described below may be somewhat overstated because they do not take into account costs already borne by some employers under existing state or local laws. As noted above, a number of state laws arguably impose more stringent exemption standards than those provided under the current rules, or even the new final rules. The FLSA does not preempt any such stricter state and local standards. See Section 18 of the FLSA, 29 U.S.C. § 218 and section 541.4 in the final regulations. As indicated in Chapters 3 and 5 of this analysis, however, because of data limitations and some uncertainty with the methodology, combined with the broad probability classifications provided by DOL to GAO and used in this RIA and other research, estimates of

the number of exempt workers can only be done at a national level and cannot be disaggregated by state. Thus, the Department has not estimated the costs already imposed on some employers by stricter pre-existing state or local laws, and, consequently, the estimated costs to employers to comply with this final rule may be somewhat overstated.

6.1 One-Time Implementation Costs

The one-time implementation costs contain two components. The first component relates to the efforts employers will expend in adapting their overtime policies in response to the revised regulations, and then informing their employees about the updated policies. The second component relates to the efforts employers will expend in reviewing the duties performed by employees in particular job categories, and determining whether, based on their adapted overtime policies, employees in the job categories qualify for exemption from the overtime provisions of the FLSA. The final rule contains no new information-collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The information-collection requirements for employers who claim exemption under 29 CFR Part 541 are contained in the general FLSA recordkeeping requirements codified at 29 CFR Part 516, which were approved by the Office of Management and

Budget under OMB Control Number 1215–0017.

For both components, the costs are based on the amounts of time typically required to perform the associated efforts, the average hourly costs of the employees who perform the efforts and the numbers of employers and establishments for which the efforts are performed. Separate cost estimates are developed for nine broad industry divisions in the private sector and for state and local government in the aggregate. The industry divisions for which implementation costs have been estimated include: Agricultural services; mining; construction; manufacturing; transportation, communication, and public utilities; wholesale trade; retail trade; finance, insurance, and real estate; and services.

6.2 Estimated Costs Related To Adapting Overtime Policies

To estimate the efforts typically required by employers to implement the revisions to the FLSA regulations, the Department of Labor contacted six human resource experts from different regions nationwide. For the first cost component, estimates were obtained for the amount of time employers will typically require to: (1) Read and understand the revised rule, (2) update and adapt their overtime policies, (3) notify their employees of the policy changes, and (4) perform all other pertinent activities at the corporate level. Separate estimates were provided

for employers in eight employment size ranges. The ranges are: 1 to 4, 5 to 9, 10 to 19, 20 to 49, 50 to 99, 100 to 499, 500 to 999, and 1,000 or more employees per employer.

Based on the judgments provided by the human resource experts, it is estimated that, on average nationwide, the efforts associated with revising overtime policies will range from two hours per employer in the smallest size range to 57 hours per employer in the largest size range. The Department assumed the efforts required to implement the revised regulations will be furnished substantially by human resources specialists. The costs per hour

for human resources specialists at eight different skill or experience levels have been obtained from the National Compensation Survey data compiled by the Bureau of Labor Statistics (BLS). The average costs per hour for personnel, training, and labor relation specialists working for employers in the eight employment size ranges were estimated as weighted averages of the costs per hour for the various skill or experience levels reported by the BLS. Weights were developed by positing a typical staffing pattern for human resources specialists working for employers or establishments in different size ranges,

and then calculating the average cost per hour for the mix of workers corresponding to that staffing pattern. The estimates of costs per hour calculated through this process rise monotonically as size range increases, and range from \$16.03 for the smallest size range to \$25.08 for the largest size range. These estimates were then multiplied by a loading factor of 1.4 to account for fringe benefits.

The cost per hour used for state and local governments is the estimated cost per hour for private sector employers in the size range from 100 to 499 employees.

TABLE 6-1.—ESTIMATED UNIT IMPLEMENTATION TIME/COSTS OF THE FINAL RULE BY SIZE OF EMPLOYER

Unit time/cost category	Number of employees per employer							
	1 to 4	5 to 9	10 to 19	20 to 49	50 to 99	100 to 499	500 to 999	1000+
Hours per employer to revise overtime policies								
Read and understand revised rule .....	1.0	2.0	4.0	6.0	8.0	10.0	24.0	32.0
Update or adapt overtime policies .....	0.5	0.5	1.3	2.0	3.0	5.0	12.0	16.0
Notify employees .....	0.5	0.5	0.8	1.0	1.5	2.0	4.0	5.0
Other related activities .....	0.0	0.3	0.5	1.0	1.0	2.0	4.0	4.0
Total hours per employer .....	2.0	3.3	6.5	10.0	13.5	19.0	44.0	57.0
Wage Rate for human resources specialists .....	\$16.03	\$21.34	\$21.78	\$22.91	\$23.39	\$24.02	\$24.20	\$25.08
Cost per hour .....	\$22.44	\$29.88	\$30.49	\$32.07	\$32.75	\$33.63	\$33.88	\$35.11

Source: CONSAD and the U.S. Department of Labor.

The estimated implementation efforts and costs were derived by summing the corresponding estimates for the individual industry divisions and calculating ratios, as appropriate, to estimate average hours and average costs. For all industry divisions except state and local government, identical calculations were performed to estimate implementation costs. Those calculations are explained below and are followed by a discussion of the additional calculations involved in estimating implementation costs for state and local government.

For each industry division, the estimated cost that employers will incur to revise their overtime policies was

calculated, for each employment size range, as the product of: (1) The total hours required per employer, on average, to perform the associated efforts, (2) the average cost per hour for human resources specialists working for employers in that size range, and (3) the number of employers in the size range. The derivation of values for items (1) and (2) have been discussed above. The values for item (3) were derived from data in the U.S. Department of Commerce (2002), Statistics of U.S. Businesses 1996. The total estimated values for the industry division were calculated by summing the values for the various size ranges. It should be noted that using the 1996 data may

understate these implementation costs because the number of employers likely has grown since then.

The implementation costs for state and local government to review the final rule and to revise their overtime policies were estimated in a manner similar to that used for the private sector. However, because no data are available that describe the size distribution of state and local government entities, the estimation was performed at the aggregate level.

As is shown in Table 6-2, the total nationwide cost to review the final rule and revise the overtime policies is estimated to be \$627 million.

TABLE 6-2.—ESTIMATED COSTS TO REVIEW THE FINAL RULE AND REVISE OVERTIME POLICIES, BY INDUSTRY

Industry division	Number of employers	Total hours to revise overtime policies	Cost to revise overtime policies
Agricultural services .....	101,356	350,553	\$9,845,483
Mining .....	17,384	98,090	3,009,596
Construction .....	597,393	2,227,515	63,501,051
Manufacturing .....	297,154	2,231,762	70,711,656

TABLE 6-2.—ESTIMATED COSTS TO REVIEW THE FINAL RULE AND REVISE OVERTIME POLICIES, BY INDUSTRY—  
Continued

Industry division	Number of employers	Total hours to revise overtime policies	Cost to revise overtime policies
Transportation, communication & public utilities .....	209,122	983,166	29,311,496
Wholesale trade .....	325,432	1,765,346	53,735,371
Retail trade .....	909,206	4,068,622	120,331,292
Finance, insurance & real estate (FIRE) .....	411,052	1,650,164	47,787,363
Services .....	1,877,862	7,662,502	222,849,283
State and Local Government .....	89,953	179,906	6,049,519
All Industries .....	4,835,913	21,217,625	627,132,111

Source: CONSAD and the U.S. Department of Labor.

Estimates were also developed for the portion of the implementation costs in each private-sector industry division incurred by small businesses (*i.e.*, businesses that are covered under the Small Business Regulatory Enforcement Fairness Act (SBREFA)). For each industry division, the portion of the aggregate costs of revising corporate overtime policies that will be incurred by firms covered by SBREFA was based on the portion of the total number of establishments in the industry division that are operated by small businesses and is presented in Table 6-3.

TABLE 6-3.—ESTIMATED SHARE OF COSTS TO REVIEW FINAL RULE AND REVISE OVERTIME POLICIES INCURRED BY SMALL BUSINESSES, BY INDUSTRY

Industry division	Total industry	Small business share of total cost	
		Percentage	Cost
Agricultural services .....	\$9,845,483	0.9676	\$9,526,490
Mining .....	3,009,596	0.8135	2,448,307
Construction .....	63,501,051	0.9797	62,211,980
Manufacturing .....	70,711,656	0.8912	63,018,228
Transportation, communication & public utilities .....	29,311,496	0.6430	18,847,292
Wholesale trade .....	53,735,371	0.8050	43,256,973
Retail trade .....	120,331,292	0.6872	82,691,664
Finance, insurance & real estate .....	47,787,363	0.6502	31,071,344
Services .....	222,849,283	0.8620	192,096,082
Total private sector .....	621,082,592	0.8134	505,168,359

Source: CONSAD and the U.S. Department of Labor.

6.3 Estimated Cost To Reexamine Jobs

The methodology used to estimate the costs related to the reexamination of jobs was significantly different from that used in Section 6.2 because the Department assumed that employers would have to conduct the job review at the establishment level. Therefore, rather than basing the cost estimates on the number of employers, as was done for the review of the final rule and the revision of the overtime policies, the Department based the cost estimates for the job reviews on the number of potentially affected white-collar workers. In addition, since the CPS database does not contain information related to the size of the worker's employer, the Department used an average cost of \$32.41 per hour (\$23.15, obtained from the BLS National Compensation Survey for a labor relation specialist, multiplied by 1.4 to account for fringe benefits).

Based upon the analysis in Chapter 3, the Department assumed that none of

the blue-collar jobs (*e.g.*, occupations in the 239 excluded OCCs) would have to be reviewed. As was shown in Chapter 2, none of the revisions should cause employers to think that currently nonexempt blue-collar workers could possibly be made exempt under the final rule. So employers should not incur any additional expenses related to these workers after completing the process of adapting their overtime policies in response to the revised regulations.

The Department assumed that for the white-collar workers earning less than \$455 per week, employers would only review the jobs of workers who are currently exempt and would not review the jobs of any currently nonexempt workers. As was shown in Chapter 2, the \$455 salary level in the final rule should make it absolutely clear to employers that the currently nonexempt white-collar workers earning less than \$455 per week could not possibly be made exempt under the final rule. So,

again, employers should not incur any additional expenses related to these workers after completing the process of adapting their overtime policies in response to the revised regulations.

As is more fully discussed in the next section of this chapter, employers will have to determine how to alter the compensation for each of the approximately 1.3 million currently exempt workers earning less than \$455 per week. In some cases employers will decide to pay the overtime premium, while in others employers will decide to increase the worker's salary in order to maintain the exemption. The Department assumed that on average these reviews would take approximately 1/2 hour per currently exempt employee to complete. For most employees, the review will consist of an examination of their payroll records to determine how they should be paid under the final rule (*e.g.*, pay overtime or increase their salaries). The duties of the remaining, relatively small number of employees

(i.e., only a portion of those whom employers decide to maintain in exempt status by increasing their salaries to \$455 or more) will have to be reexamined to determine if they continue to qualify for exemption given the minor differences in the duties tests under the final rule compared to the current rule. While it may take employers more than 30 minutes to reexamine these few workers, it will take less than 30 minutes for many others. Thus, the Department estimated that the cost of reexamining the jobs of workers earning less than \$455 per week would be about \$21 million (1.3 million workers  $\times$  1/2 hour per worker  $\times$  \$32.41 per hour).

In assessing the costs of reviewing the jobs of the highly compensated white-collar workers, the Department assumed that employers would use an approach complementary to that assumed for the lower-wage white-collar workers. Employers would only review the jobs of workers who are currently nonexempt and would not review the jobs of any currently exempt workers earning \$100,000 or more per year. As shown in Chapter 2, the duties test for the highly compensated workers is less stringent than those under either the current short tests or the standard tests in the final rule. Thus, the Department assumed that after completing the process of adapting their overtime policies in response to the revised regulations, employers would conclude that all currently exempt highly compensated workers would continue to be exempt under the final rule and, therefore, would not expend additional resources to review any of these jobs. In addition, as explained in Chapter 4, the Department excluded computer programmers, registered nurses and pharmacists. It is unlikely that employers would review these jobs due to the final rule given that these workers could already be made Part 541-exempt under the current rule if they are paid on a salaried basis.

The Department assumed that on average employers would take approximately 1/2 hour to review the duties of each currently nonexempt highly compensated employee to determine if they could be made exempt

under the highly compensated test. In addition, the Department assumed that employers would expend an additional 1/2 hour to review the pay basis of each hourly worker to determine if it could be modified to comply with the requirements of the highly compensated test. For most employees, the review will consist of an examination of their payroll records to determine how they currently are paid and how they should be paid under the final rule (e.g., paid overtime or paid on a salary basis). While it may take employers more than one hour to reexamine both the duties and compensation of some workers, it will clearly not be necessary for employers to review both the duties and compensation of many others (e.g., there is no need to review the compensation of hourly workers whose duties are not exempt under the highly compensated test). The Department estimated that the cost of reexamining the jobs and pay of current salaried workers earning \$100,000 or more per year would be approximately \$4.4 million (270,000 workers  $\times$  1/2 hour per worker  $\times$  \$32.41 per hour) and the cost of reexamining the jobs of current hourly workers earning \$100,000 or more per year would be approximately \$6 million (182,600 workers  $\times$  1 hour per worker  $\times$  \$32.41 per hour). The Department believes that this estimate probably overstates the costs to businesses because many employers will probably choose not to review the jobs of hourly workers who could not easily be converted to a salary basis (e.g., workers covered by union contracts).

For workers earning \$455 to \$1,923 per week, the Department assumed that none of the hourly workers would require a job review and that employers would review only a portion of the jobs held by salaried workers. Given the comparability of the standard tests in the final rule with the short tests in the current rule (see Chapter 2), the Department assumed that after completing the process of adapting their overtime policies in response to the revised regulations, employers would conclude that all of the current hourly workers earning \$455 to \$1,923 per week would continue to be nonexempt

under the final rule and would not expend additional resources to review any of these jobs.

The Department also assumed that, given the comparability of the standard tests in the final rule with the short tests in the current rule, extensive reexamination of exemption status will likely be required for only a minor portion of the white-collar jobs in which salaried workers earning \$455 to \$1,923 per week are employed in any establishment. As demonstrated above, the duties tests in the standard tests of the final rule do not differ greatly from the current short duties tests. As a result, employers will likely conclude, after completing the process of adapting their overtime policies, that no change in exemption status is warranted for most of their white-collar jobs.

Appreciable effort will only be expended for reviewing the duties of the remaining, relatively small number of white-collar salaried employees earning \$455 to \$1,923 per week whose status might be impacted by the changed duties tests. To account for the slight changes in the rule (such as the inclusion of some requirements from the long tests), the Department assumed that employers would take one hour to review the duties of 10 percent of all white-collar salaried employees earning \$455 to \$1,923 per week to either ensure that they are still exempt or to determine if they could be made exempt under the final rule. Given the comparability of the duties tests in the current short tests and the final standard tests, the Department feels that both the one hour and the 10 percent may be overestimates. Nevertheless, based upon these assumptions, the Department estimated that the cost of reexamining the jobs of the white-collar salaried employees earning \$455 to \$1,923 per week would be approximately \$80 million (10 percent  $\times$  24.7 million workers  $\times$  1 hour per worker  $\times$  \$32.41 per hour).

The total nationwide cost to conduct the job reviews is estimated to be \$111 million. As is shown in Table 6-4, these costs were then apportioned to each industry division in proportion to its share of the affected work force.

TABLE 6-4.—ESTIMATED COSTS TO REEXAMINE JOBS, BY INDUSTRY

Industry division	Total hours to re-examine affected jobs	Cost to reexamine affected jobs
Agricultural Services, Forestry, and Fishing .....	11,552	\$374,407
Mining .....	15,598	505,542
Construction .....	125,380	4,063,562
Manufacturing .....	500,511	16,221,574
Transportation and Public Utilities .....	256,757	8,321,482

TABLE 6-4.—ESTIMATED COSTS TO REEXAMINE JOBS, BY INDUSTRY—Continued

Industry division	Total hours to re-examine affected jobs	Cost to reexamine affected jobs
Wholesale Trade .....	212,294	6,880,451
Retail Trade .....	403,130	13,065,451
Finance, Insurance, and Real Estate .....	488,120	15,819,984
Services .....	1,256,435	40,721,065
State and Local Government .....	167,532	5,429,724
All Industries .....	3,437,311	111,403,241

Source: CONSAD and the U.S. Department of Labor.

For each industry division, the portion of the aggregate costs of reexamining the exemption status of specific jobs that will be incurred by firms covered by SBREFA has been estimated on the basis of the proportion of the total employment in the industry division that is in such firms and is presented in Table 6-5.

TABLE 6-5.—ESTIMATED SHARE OF COSTS TO REEXAMINE JOBS INCURRED BY SMALL BUSINESSES, BY INDUSTRY

Industry division	Total industry	Small business share of total industry cost	
		Percentage	Cost
Agricultural services .....	\$374,407	0.6866	\$257,068
Mining .....	505,542	0.3697	186,899
Construction .....	4,063,562	0.7160	2,909,511
Manufacturing .....	16,221,574	0.4180	6,780,618
Transportation, communication & public utilities .....	8,321,482	0.2440	2,030,442
Wholesale trade .....	6,880,451	0.5215	3,588,155
Retail trade .....	13,065,451	0.3634	4,747,985
Finance, insurance & real estate .....	15,819,984	0.2194	3,470,904
Services .....	40,721,065	0.3647	14,850,972
Total private sector .....	105,973,517	0.3663	38,822,554

Source: CONSAD and the U.S. Department of Labor.

6.4 Incremental Payroll Impact

The Department based its estimates of the incremental payroll impact on the preceding analysis used to estimate the number of salaried workers converted from exempt to nonexempt status as a result of raising the salary level for the standard tests to \$455 per week. However, the Department acknowledges that these estimates may vary for a variety of reasons. For example, these estimates were developed utilizing a snapshot of the labor market provided by the 2002 CPS data, which may not be a perfect predictor of the amount of overtime worked in future years. Moreover, the Department also recognizes that employers may adjust their payrolls in reaction to the final rule in a variety of ways, especially in the long term as employers and employees adjust to the final rule.

However, employers are, at all times, obligated to pay overtime in accordance with the FLSA. For example, employers could pay overtime to their low-income, white-collar workers for any hours worked over 40, or they could raise the salaries of these currently exempt workers to at least \$455 per week to

maintain their exempt status. The Department estimates that 1.3 million low-income, white-collar salaried workers are likely to see larger paychecks as a result of these responses.

In this analysis, the Department assumes that the best estimate of the impact on employers of changing the status of some salaried workers from exempt to nonexempt as a result of raising the salary level for the standard tests is the lower of the amount of raising the worker's salary to \$455 or the amount of the paying for the overtime hours that were previously exempt under the current rules. There were about 1,000 observations in the potentially impacted occupations with weekly earnings (item PTERNWA) \$155 or more and less than \$455, and actual hours worked (PEHRACT1, the CPS variable name) greater than 40.

The Department estimates the amount of raising the individual's salary to \$455 by multiplying the net increase in salary (\$455—PTERNWA) by the Prob\_Exempt and by the weight (PWORWGT).

The Department estimated the number of exempt hours that would be converted to paid overtime hours by

multiplying the number of hours in excess of 40 (PEHRACT1—40) for each of the workers by the Prob\_Exempt and by the weight (PWORWGT). In this manner, the Department estimated 173.0 million hours would be converted from exempt to nonexempt as a result of raising the salary level to \$455.

Since there is no hourly pay rate for salaried workers in the dataset, the employer impacts associated with converting exempt hours to nonexempt had to be estimated from the weekly earnings data. In addition, the Department assumed that the weekly wage for a salaried worker covers the usual hours worked by the employee. The equivalent hourly wage rate would be the weekly earnings (item PTERNWA) divided by the usual hours worked weekly (item PEHRUSL1). If the worker were converted from exempt to nonexempt status, the worker would only be paid an additional premium of one-half times the hourly rate for each hour worked in excess of 40, because the base compensation for the overtime hours is already included in the worker's salary. Thus, the amount of the employer's additional weekly overtime

pay would be the overtime hours converted to nonexempt times the hourly pay rate times 0.5 (this assumption is consistent with the enforcement approach currently used by the Department to calculate back pay when a salaried employee is found to not qualify for exemption under Part 541 and it is clear that the salary was intended to serve as payment for all hours worked each week).

The weekly increase in payroll for each worker is the lower of the amount of raising the worker's salary to \$455 or the amount of paying for the overtime hours that were currently exempt. The total weekly impact due to raising the salary level would be the sum of the weekly increase in payroll for all

workers. Since the data in the CPS annual Outgoing Rotation Group data set consists of 12 months of observations, the Department has assumed the data account for the seasonal variations in overtime hours worked. The annual impact is the weekly increase in payroll multiplied by 52, which is approximately \$375 million. Table 6-6 presents the impact for each industry division and the portion attributed to small businesses in the private sector.

For the proposed rule, the Department estimated a range of impacts based, in part, on an alternative assumption that the pay of currently exempt salaried workers represents compensation for a standard 40-hour work week. For the

final rule, the Department chose to develop a point-estimate instead of a range for the impact associated with raising the salary level tests, and has estimated the impact in a way that is consistent with the longstanding enforcement approach used by the Department to calculate back pay when a salaried employee is found to not qualify for exemption under Part 541. For these reasons, and those mentioned above, the Department acknowledges that the impact of raising the salary level tests may vary. Employers, however, are obligated to pay time-and-one-half for any overtime hours worked by nonexempt employees beyond 40 per week.

TABLE 6-6.—ESTIMATED PAYROLL IMPACT BY INDUSTRY AND SIZE OF BUSINESS

SIC industry division	All firms incremental payroll impact	Percent SBREFA covered	SBREFA covered firms incremental payroll impact
Agricultural Services, Forestry, and Fishing .....	\$802,343	68.7%	\$551,210
Mining .....	90,738	37.0	33,573
Construction .....	14,486,732	71.6	10,372,500
Manufacturing .....	28,377,501	41.8	11,861,795
Transportation and Public Utilities .....	24,913,745	24.4	6,078,954
Wholesale Trade .....	7,168,683	52.2	3,742,053
Retail Trade .....	107,300,882	36.3	38,950,220
Finance, Insurance, and Real Estate .....	39,960,717	21.9	8,751,397
Services .....	141,881,530	36.5	51,786,758
All Private Sector .....	364,982,872	36.2	132,128,461
State and Local Government .....	9,850,334	.....	.....
All Industries .....	374,833,206	.....	.....

Source: CONSAD and the U.S. Department of Labor.

#### 6.5 Total Costs of the Final Rule

The Department estimates that the total first-year costs are approximately \$1.1 billion. This is equal to the sum of the implementation costs related to

reviewing the regulation and revising company policies (\$627 million), the implementation costs related to reviewing the jobs (\$111 million), and the increased payroll costs related to raising the salary level to \$455 per week

(\$375 million). In subsequent years, the Department estimates that employers could experience a payroll increase of as much as \$375 million per year. Table 6-7 presents a summary of the costs by industry.

TABLE 6-7.—ESTIMATED FIRST YEAR COSTS BY INDUSTRY

Industry division	Revise OT policies	Reexamine jobs	Payroll costs	Total first year costs
Agricultural Services, Forestry, and Fishing .....	\$9,845,483	\$374,407	\$802,343	\$11,022,234
Mining .....	3,009,596	505,542	90,738	3,605,876
Construction .....	63,501,051	4,063,562	14,486,732	82,051,346
Manufacturing .....	70,711,656	16,221,574	28,377,501	115,310,731
Transportation and Public Utilities .....	29,311,496	8,321,482	24,913,745	62,546,723
Wholesale Trade .....	53,735,371	6,880,451	7,168,683	67,784,505
Retail Trade .....	120,331,292	13,065,451	107,300,882	240,697,625
Finance, Insurance, and Real Estate .....	47,787,363	15,819,984	39,960,717	103,568,065
Services .....	222,849,283	40,721,065	141,881,530	405,451,877
State and Local Government .....	6,049,519	5,429,724	9,850,334	21,329,577
All Industries .....	627,132,111	111,403,241	374,833,206	1,113,368,558

Source: CONSAD and the U.S. Department of Labor.

Total first-year costs for small business are approximately \$676 million as shown in Table 6–8. This is equal to the sum of the implementation costs related to reviewing the regulation

and revising company policies (\$505 million), the implementation costs related to reviewing the jobs (\$39 million), and the increased payroll costs related to raising the salary level to \$455

per week (\$132 million). In subsequent years, the Department estimates that small business employers may experience a payroll increase of as much as \$132 million per year.

TABLE 6–8.—ESTIMATED FIRST YEAR SMALL BUSINESS COSTS BY INDUSTRY

Industry division	Revise OT policies	Reexamine jobs	Payroll costs	Total first year costs
Agricultural Services, Forestry, and Fishing .....	\$9,526,490	\$257,068	\$551,210	\$10,334,767
Mining .....	2,448,307	186,899	33,573	2,668,779
Construction .....	62,211,980	2,909,511	10,372,500	75,493,991
Manufacturing .....	63,018,228	6,780,618	11,861,795	81,660,641
Transportation and Public Utilities .....	18,847,292	2,030,442	6,078,954	26,956,687
Wholesale Trade .....	43,256,973	3,588,155	3,742,053	50,587,181
Retail Trade .....	82,691,664	4,747,985	38,950,220	126,389,869
Finance, Insurance, and Real Estate .....	31,071,344	3,470,904	8,751,397	43,293,645
Services .....	192,096,082	14,850,972	51,786,758	258,733,812
All Private Sector Industries .....	505,168,359	38,822,554	132,128,461	676,119,373

Source: CONSAD and the U.S. Department of Labor.

Total first-year costs for state and local governments are approximately \$21 million. This is equal to the sum of the implementation costs related to reviewing the regulation and revising agency policies (\$6 million), the implementation costs related to reviewing the jobs (\$5 million), and the increased payroll costs related to raising the salary level to \$455 per week (\$10 million). In subsequent years, the Department estimates that state and local governments may experience a payroll increase of as much as \$10 million per year.

Chapter 7: Economic Impacts

7.1 Typical Impacts

The impacts on the typical entity in each of the nine major private sector industry divisions and in state and local governments were examined using the ratios of the first-year costs to payrolls, revenue and profits. This approach was based on the assumption that if the first-year costs were manageable, so too would be the lower costs in subsequent years.

As shown in Table 7–1, the ratio of total first-year costs to payrolls averaged 0.04 percent nationwide in the private sector. The largest impact relative to payrolls was approximately 0.12 percent

in agricultural services. The ratio of total first-year costs to revenue averaged less than 0.01 percent nationwide in the private sector. The largest impact relative to revenue was approximately 0.02 percent in agricultural services and the services industries. The ratio of total first-year costs to pre-tax profit averaged 0.19 percent nationwide in the private sector. The largest impact relative to pre-tax profit was approximately 0.64 percent in the retail industry. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical firms in any of the major industry sectors.

TABLE 7–1.—ECONOMIC IMPACTS OF THE PART 541 REVISIONS BY INDUSTRY DIVISION, BASED ON FIRST-YEAR COSTS

Industry division	Annual payroll (\$1,000)	Sales, receipts, value of shipments (\$1,000)	Pre-tax profits (\$1,000)	First-year costs (\$1,000)	First-year costs as a percentage of payroll	First-year costs as a percentage of sales, receipts, value of shipments	First-year costs as a percentage of pre-tax profit
Agricultural services .....	\$9,324,346	\$63,936,121	\$2,357,130	\$11,022	0.12	0.02	0.47
Mining .....	24,173,512	195,841,349	25,488,881	3,606	0.01	0.00	0.01
Construction .....	197,673,938	936,785,456	28,628,686	82,051	0.04	0.01	0.29
Manufacturing .....	682,333,069	4,399,057,890	94,604,018	115,311	0.02	0.00	0.12
Trans., Comm., & Public Utilities .....	277,130,334	1,336,692,223	76,411,219	62,547	0.02	0.00	0.08
Wholesale trade .....	271,158,976	4,752,857,521	86,688,186	67,785	0.02	0.00	0.08
Retail trade .....	300,952,012	2,679,002,338	37,467,739	240,698	0.08	0.01	0.64
Finance, Insurance, and Real Estate .....	306,679,061	2,452,102,212	156,048,617	103,568	0.03	0.00	0.07
Services .....	1,052,894,811	2,682,451,513	71,969,249	405,452	0.04	0.02	0.56
All Industries .....	2,785,616,284	17,897,921,102	579,663,726	1,092,039	0.04	0.01	0.19

Note: Annual payroll; sales, receipts, value of shipments; and pre-tax profits are from Table 5–1. Payrolls were adjusted from 1997 values using the CPI–U (1997 index = 160.5; 2002 index = 179.9). Sales revenue and Value of shipments were adjusted from 1997 using GDP Price Index (1997 index = 95.415; 2002 index = 130.949).

First-Year Costs in 2002 dollars are from Table 6–7.

The total first-year costs for state and local governments (also presented in Table 6–7) were allocated among census regions on the basis of data on the numbers of local governments, special districts, and school districts in each state. These were then aggregated to produce data on total numbers of local government entities by census region. The estimated 2,500 state government entities were allocated among the

census regions on the basis of the numbers of local government entities in the census regions.

As shown in Table 7–2, the ratio of total first-year costs to both payrolls and revenue were less than one-hundredth of one-percent nationwide in the public sector. The highest impact was in the West North Central Census Division, where the ratio of first-year costs to payrolls was 0.014 percent and the ratio

of first-year costs to revenue was 0.004 percent. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical state and local governments.

Thus, the Department concludes that the Part 541 revisions will not have a significant impact on typical entities in either the public or private sectors.

TABLE 7–2.—ECONOMIC IMPACTS OF THE PART 541 REVISIONS ON STATE AND LOCAL GOVERNMENTS BY CENSUS DIVISION BASED ON FIRST-YEAR COSTS

Census division	Total payroll (\$1,000)	Total revenue (\$1,000)	First-year costs (\$1,000)	First-year costs as a percentage of payroll	First-year costs as a percentage of revenue
New England Division .....	\$26,957,401	\$91,341,625	\$894	0.003	0.001
Mid Atlantic Division .....	90,834,619	283,277,080	2,424	0.003	0.001
East North Central Division .....	85,066,491	261,654,955	4,729	0.006	0.002
West North Central Division .....	35,501,295	110,917,845	4,882	0.014	0.004
South Atlantic Division .....	87,925,145	284,249,249	1,506	0.002	0.001
East South Central Division .....	26,855,986	85,901,118	1,070	0.004	0.001
West South Central Division .....	52,201,373	158,144,715	2,074	0.004	0.001
Mountain Division .....	30,747,313	99,845,252	1,756	0.006	0.002
Pacific Division .....	94,016,081	303,847,856	1,995	0.002	0.001
All Census Divisions .....	530,105,704	1,679,179,695	21,330	0.004	0.001

Note: Annual payroll; sales, receipts, value of shipments; and pre-tax profits are from Table 5–3. Payrolls were adjusted from 1997 values using the CPI-U (1997 index = 160.5; 2002 index = 179.9). Sales revenue and Value of shipments were adjusted from 1997 using GDP Price Index (1997 index = 95.415; 2002 index = 130.949).

First-Year Costs (in 2002 dollars) are based on Table 6–7 (allocated amongst the Census divisions according to the procedure described in the text).

## 7.2 Small Business Impacts

As is shown in Table 7–3, the ratio of first-year costs to payrolls averaged 0.07 percent for private sector small businesses nationwide. The largest impact relative to payrolls was approximately 0.19 percent for small businesses in agricultural services. The ratio of first-year costs to revenue averaged approximately 0.01 percent for private sector small businesses nationwide. The largest impact relative to revenues was approximately 0.06 percent for small businesses in agricultural services. The ratio of first-year costs to pre-tax profit averaged 0.37 percent for private sector small businesses nationwide. The largest impact relative to pre-tax profit was approximately 1.75 percent for small businesses in agricultural services.

Particular concern over such impacts was expressed by the National Restaurant Association, which stated, “Since salary levels have not been changed in over a quarter century, the Association agrees that the existing salary levels are out of date. However, it is important to emphasize that the substantial increase proposed by DOL will have a major impact on employers in the restaurant industry, particularly those who are located in areas of the

country with lower general wage rates. In addition, restaurants generally have very small profit-to-loss (‘P + L’) margins each year.”

The NFIB expressed concern that under the proposed rule two industries, general merchandise stores and private educational services, would suffer payroll cost increases of more than two percent of pretax profit. See Table 5.4 of Final Report, Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541, prepared by CONSAD Research Corporation, February 10, 2003, p. 75–76, incorporated by reference at 68 FR 15573; March 31, 2003 (estimated 4.5 percent increase for general merchandise stores and 2.03 percent increase for educational services). The NFIB noted that given the “large percentage of our members” in the general merchandise category, the estimated 4.5 percent increased payroll cost “would be a significant burden,” particularly for a small business owner struggling with economic conditions. The NFIB also expressed similar concern regarding a “significant burden” for its members in the private educational services sector and urged the Department to carefully review any

payroll increases resulting from updating the rule. The Department has given these comments serious consideration. Under the final rule, as noted in Table 7–3, first-year costs are estimated to be less than four-tenths of a percent of pre-tax profit for all SBREFA-covered small businesses, and approximately seven-tenths of a percent for all small business retail trade and services industries.

As discussed throughout the preamble, the Department maintains it has taken a prudent course of action in revising Part 541. First-year costs of the magnitude estimated in Table 7–3 are clearly affordable and will not result in significant disruptions to small businesses in any of the major industry sectors. Moreover, these impacts do not include the possible decrease in payroll impacts due to the highly compensated test, and the benefits of the rule in the form of lower litigation costs, which accrue to the same groups of employers as the costs of the rule. The Department chose to look at the per-firm impacts to employers without netting out these advantages in order to look at what may accrue to firms that are not under current litigation risk and do not employ highly compensated employees who may be reclassified as exempt.



Therefore these averages likely overstate the true impact of the rule on businesses and small businesses.

TABLE 7-3.—ECONOMIC IMPACTS OF THE PART 541 REVISIONS ON SMALL BUSINESSES COVERED BY SBREFA, BY INDUSTRY DIVISION BASED ON FIRST-YEAR COSTS

Industry division	Annual payroll (\$1,000)	Sales, receipts, value of shipments (\$1,000)	Pre-tax profits (\$1,000)	First-year costs (\$1,000)	First-year costs as a percentage of payroll	First-year costs as a percentage of sales, receipts, value of shipments	First-year costs as a percentage of pre-tax profit
Agricultural services .....	\$5,471,482	\$17,815,411	\$591,216	\$10,335	0.19	0.06	1.75
Mining .....	7,636,807	67,006,719	6,505,730	2,669	0.03	0.00	0.04
Construction .....	123,823,709	590,050,028	21,109,308	75,494	0.06	0.01	0.36
Manufacturing .....	231,071,360	1,145,575,629	27,723,186	81,661	0.04	0.01	0.29
Trans., Comm., & Public Utilities .....	47,637,196	204,533,244	6,210,156	26,957	0.06	0.01	0.43
Wholesale trade .....	124,135,798	2,181,380,935	40,071,557	50,587	0.04	0.00	0.13
Retail trade .....	95,460,106	732,497,854	17,360,512	126,390	0.13	0.02	0.73
Finance, Insurance, and Real Estate .....	54,743,849	309,348,483	22,193,420	43,294	0.08	0.01	0.20
Services .....	363,299,958	950,997,033	38,694,702	258,734	0.07	0.03	0.67
All Industries .....	939,696,957	5,690,263,273	180,459,786	676,119	0.07	0.01	0.37

Note: Annual payroll; sales, receipts, value of shipments; and pre-tax profits are from Table 5-2. Payrolls were adjusted from 1997 values using the CPI-U (1997 index = 160.5; 2002 index = 179.9). Sales revenue and Value of shipments were adjusted from 1997 using GDP Price Index (1997 index = 95.415; 2002 index = 130.949).

First-Year Costs (in 2002 Dollars) are from Table 6-8.

#### Chapter 8: Estimating the Benefits

The Department has determined that the final rule provides a variety of benefits to both workers and employers. Although some benefits can be estimated, data limitations require the Department to discuss other benefits only qualitatively. For example, 2.8 million salaried workers in blue-collar occupations who earn \$155 or more and less than \$455 per week will benefit from increased overtime protection because their nonexempt status, which is based on the duties tests under the current rules, will be guaranteed and unambiguous under the final rule. The final rule also makes it more difficult to exempt workers from overtime as executive employees. Although the final rule will plainly benefit workers, data limitations prevent the Department from estimating the dollar value of these benefits. Moreover, salaried workers will also benefit from more equitable treatment in disciplinary actions (*i.e.*, under the current rule an employer would have to suspend an exempt manager for a full week for a Title VII violation in order to preserve the employee's exempt status even if the company's policy called for just a three-day suspension without pay; under the final rule salaried employees would lose only three days of pay).

One of the largest benefits to workers comes from having clearer rules that are easier to understand and enforce. Workers will better know their rights

and whether they are being paid correctly (instead of going years without knowing whether they should be paid overtime). Fewer workers will be unintentionally misclassified, and they will not have to go to court and possibly wait years to recover back pay. Clearer, more up-to-date rules will also help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately. The safe harbor provision in the final rule will also continue to ensure that employees whose pay is reduced in violation of the salary basis test are made whole and will encourage employers to adopt and communicate employment policies prohibiting improper pay deductions to their workers.

Employers will also benefit in a variety of ways from the final rule. As estimated in Chapter 4, the highly compensated test in the final rule could result in approximately 107,000 currently nonexempt white-collar workers earning \$100,000 or more per year being converted to exempt salaried status. Some employers could experience a reduction in their payroll costs related to this change in status. However, neither the record in this rulemaking nor the economic literature provides a means for quantifying the amount of this reduction. The highly compensated test does not require employers to change the exemption status of their workers who earn

\$100,000 or more per year, so the effect of this provision is far less certain than the impact of the raising the salary level test. Moreover, as discussed in Chapter 4, there are a variety of reasons why employers might not convert the exemption status of these highly paid workers. These include, but are not limited to, the incentives to preserve an investment in human capital, retain institutional memory, and minimize turnover costs, as well as the nature of the work, tradition, and culture. Although the Department has tried to account for these incentives when estimating the number of workers who could be affected, these estimates do not completely account for all of the effects, particularly the market power of these highly skilled workers.

As noted earlier, data limitations and the uncertainty that remains with the updated RIA methodology reduces the ability to precisely estimate the impact of the highly compensated test. Specifically, the RIA is based on a methodology that was originally designed to produce reasonable estimates of the number of exempt workers at the national level across all incomes. It was not designed to measure changes in payroll costs for a small group of workers at the very upper end of the income distribution. Nor can it be adapted or updated to generate these types of estimates without a number of simplifying assumptions that are inconsistent with high-wage labor

markets. For example, to estimate the change in payroll costs from the highly compensated test requires the assumption that employers would no longer pay a premium for overtime hours when, in fact, 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn \$100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties. The Department expects that most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital, and are likely to continue to pay many highly compensated workers by the hour. Although the Department could have assumed that some portion of the overtime hours would not be paid, there is nothing in the record, the economic literature, or the WHD's enforcement experience on which to base the assumption.

One benefit to employers that can be quantified based on the record is the benefit of having clearer rules that are easier to understand. Several commenters offered evidence that clearer, up-to-date rules are likely to reduce costly litigation. For example, Verizon noted that the current rule "offers little assistance to employers \* \* \* who have to make challenging exemption classification decisions in the high technology environment of the twenty-first century. And the importance of making correct exemption classification decisions has never been higher. In recent years, employers have increasingly found themselves the target of large-scale class actions with multi-million dollar exposures challenging various exemption classification decisions that were based on good faith attempts to comply with the law." The National Association of Federal Wage Hour Consultants stated, "The business community has faced numerous unnecessary 'class inclusion type' law suits in the past few years and some of these have been brought in part as the result of a lack of proper interpretation of various parts of the regulations or regulations that are difficult to comprehend \* \* \* Secondly, the legal community appears likewise to have problems when it comes to providing guidance to its clients as enforcement through interpretations and litigation have rendered varying results." Finally, Edward Potter, on behalf of the Employment Policy Foundation (EPF) noted that "[s]implification of rules may

reasonably reduce the number of case filings by one-third to one-half, based on the error rate reductions used elsewhere in DOL's analysis." EPF also suggested that "[c]lost savings for reduced litigation would include reductions in total cases filed—including both those cases found to have merit and those without merit."

Other commenters noted that the proposed rule, particularly the proposed administrative duties test, "is somewhat vague and subjective" and that it "appears to invite another generation of court litigation to clarify the meaning of its key terms." For example, the National Association of Manufacturers stated that "like the language in the current regulations, the proposed 'position of responsibility' language is subjective, ambiguous, and, if adopted, could be the subject of a flood of litigation." And the International Foodservice Distributors Association noted, "The proposal must not merely substitute one subjective phrase for another. If the rule is to succeed in its goal of providing clarity to employers, it must make clear the distinctions between exempt and nonexempt activity. While IFDA recognizes the difficulty of this task across the entire economy, unless it is accomplished the new rule will only result in increased litigation as court battles are waged to delineate key terms of the new rule."

As explained elsewhere in the preamble, the Department recognizes the benefit of retaining relevant portions of the current standard so as not to completely jettison decades of federal court decisions and agency opinion letters and has made significant changes to the final rule that are intended to clarify the existing regulation, to make the rule easier to understand and apply to the 21st Century workplace, and to better reflect existing federal case law. The Department believes that the final rule accomplishes these objectives and will result in some reduction in litigation, particularly in the long term.

Another benefit to workers and employers is enhanced compliance with the FLSA. Updating Part 541 will be a catalyst for employers to review the exemption classifications of their workforce and will result in greater levels of compliance with the law. More employers will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced. Reducing regulatory red tape and litigation costs will free up resources and stimulate economic growth. The updated safe harbor provision in the final rule encourages

employers to adopt proactive management practices, enables them to reimburse employees for overtime errors, and take meaningful measures to prevent improper deductions. The benefit for employers of clearer rules and the safe harbor provision comes from the lower liquidated damage awards that are associated with having fewer Part 541 overtime and salary basis violations (see Table 8-1). These proactive management practices will also reduce costly and lengthy litigation expenses.

The recent increase in large-scale class action overtime lawsuits in recent years illustrates the significant cost to the economy as that has resulted from the ambiguities in the current rule (a fact noted by a number of commenters such as Verizon, the National Association of Federal Wage Hour Consultants, and EPF). This increase in overtime litigation has been widely reported. For example, the Washington Post reported on April 10, 2004 that the number of Federal lawsuits involving overtime "held steady" at approximately 1,500 per year in the 1990s but increased to 3,904 in 2002 and 2,751 in 2003, and the National Law Journal, Vol. 26, No. 30, March 29, 2004, reported that since July 2001, "wage-and-hour class actions have skyrocketed."

To estimate the benefit of clearer rules and the safe harbor provision, the Department used data from a Minimum Wage Study Commission report that estimated overtime violation rates by industry (Report of the Minimum Wage Study Commission, Volume 1, May 1981, p.154) and assumed that these rates still apply today. The Department applied these rates to the number of white-collar salaried employees who worked overtime, the overtime hours that they worked, and their estimated earnings from those hours, from the Current Population Survey (CPS) Outgoing Rotation Group dataset, and then reduced these estimates by three-quarters (based on WHD investigation experience) to account for the other types of overtime violations, such as off-the-clock-work and straight time for all hours, that occur in addition to violations of the "white collar" exemptions. The benefit estimates are derived from the assumption, reflected in the comments, that clarifying the rule and the safe harbor provision will reduce the number of Part 541 violations. Specifically, the Department assumed that clarifying the rule and the safe harbor provision would reduce overtime violations by 25 percent (the low-range estimate used in the PRIA). The actual calculation is: "Total

Overtime × Hours for these Workers” × “FLSA Overtime Violation Rate” × “Share Overtime Violations – 541 Related” × “Reduction in 541 Violations” × “Average Hourly Earnings per Worker” × “the overtime premium or 0.50” (see Table 8–1).

The Department currently estimates the benefits from updating and clarifying the Part 541 rule that are associated with reduced liquidated damages to be at least \$252.2 million. The services industry is estimated to have the largest quantifiable benefits, followed by retail trade and the finance, insurance, and real estate industry (see Table 8–1). However, based on comments in the record, the Department believes that the estimates presented in Table 8–1 may understate the actual benefits of the final rule that are

associated with liquidated damages. For example, EPF commented that “[s]implification of rules may reasonably reduce the number of case filings by one-third to one-half, based on the error rate reductions used elsewhere in DOL’s [PRIA] analysis.” Using EPF’s one-third to one-half reduction rates instead of the Department’s more conservative 25 percent assumption would increase the estimated benefits to \$336.3 million to \$504.5 million.

However, liquidated damages are only one part of the costs associated with Part 541 litigation. There are many other significant benefits that cannot be quantified in this analysis because although there is anecdotal evidence of other Part 541 related costs, data limitations preclude the Department from developing other quantitative

estimates. Thus, the estimates presented in Table 8–1 do not include benefits such as reduced litigation-related costs including plaintiffs’ attorneys fees, defense costs, and court related expenses that can be substantial; reduced back wage liability due to the safe harbor provision; the lower costs associated with determining the exempt status of employees including conducting expensive time-and-motion studies and other outside human resource expenses; and improved management productivity from reduced WHD investigations and private litigation. Consequently, the Department believes that the benefits due to clarifying the rules and the safe harbor provision are significantly higher than the quantified amount of \$252.2 million.

TABLE 8-1.—ESTIMATED BENEFITS OF REVISED FLSA REGULATIONS AT 29 CFR 541

	Agricultural services	Mining	Construction	Manufacturing	Transportation, communication, and Public utilities	Wholesale trade	Retail trade	Finance, insurance, and real estate	Services	State and local government	Total
Total white-collar workers who worked overtime	48,761	63,989	410,010	1,988,986	794,799	861,156	1,754,428	1,445,543	2,889,213	201,997	10,458,882
Total overtime hours for these workers	34,395,423	66,031,880	279,597,133	1,193,109,481	471,925,654	544,699,007	1,155,081,280	872,722,033	1,772,769,183	117,693,406	6,508,024,479
Average annual overtime per worker	705	1,032	682	600	594	633	658	604	614	583	622
Total annual earnings for these workers	\$2,398,158,778	\$4,509,404,749	\$26,221,165,904	\$143,621,959,659	\$54,632,035,944	\$54,371,706,153	\$90,225,585,058	\$105,911,687,622	\$188,027,119,347	\$11,904,722,482	\$681,823,545,696
Average annual earnings per worker	\$49,182	\$70,471	\$63,952	\$72,209	\$68,737	\$63,138	\$51,427	\$73,268	\$66,079	\$58,935	\$65,191
Average hourly earnings per worker	\$17.66	\$22.65	\$23.16	\$26.94	\$25.71	\$23.28	\$18.78	\$27.30	\$24.16	\$22.13	\$24.12
FLSA overtime violation rate <sup>1</sup>	8.8%	3.1%	4.9%	1.5%	3.2%	5.6%	8.1%	5.3%	7.1%	0.5%	5.3%
Share overtime violations—541 related <sup>2</sup>	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%
Adjusted 541 violation rate	2.2%	0.8%	1.2%	0.4%	0.8%	1.4%	2.0%	1.3%	1.8%	0.1%	1.3%
Number of 541 violations	1,073	496	5,023	7,459	6,358	12,056	35,527	19,153	51,284	252	138,681
Reduction in 541 violations <sup>3</sup>	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%	25.0%
Benefit from clarifying rule & safe harbor <sup>4</sup>	\$1,670,145	\$1,448,601	\$9,913,431	\$15,069,504	\$12,132,214	\$22,187,719	\$54,909,560	\$39,461,662	\$95,032,301	\$407,036	\$252,232,174

<sup>1</sup> Overtime Violation Rates from 1981 Minimum Wage Commission Report, Vol. 1.

<sup>2</sup> Percentage from Wage and Hour Division enforcement experience.

<sup>3</sup> This reduction is associated with clarifying the rule and the safe harbor provision.

<sup>4</sup> These benefits are liquidated damages that are not incurred.

## VII. Other Regulatory Analysis

### *Unfunded Mandates Reform*

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, requires agencies to prepare a written statement that identifies the: (1) Authorizing legislation; (2) cost-benefit analysis; (3) macro-economic effects; (4) summary of state, local, and tribal government input; and (5) identification of reasonable alternatives and selection, or explanation of non-selection, of the least costly, most cost-effective or least burdensome alternative; for rules for which a general notice of proposed rulemaking was published and that include any federal mandate that may result in increased expenditures by state, local, and tribal governments, in the aggregate, or by the private sector, of \$118 million or more in any one year.

#### (1) Authorizing Legislation

This rule is issued pursuant to Section 13(a)(1) of the Fair Labor Standards Act, 29 U.S.C. 213(a)(1). The section exempts from the FLSA's minimum wage and overtime pay requirements "any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act \* \* \*)." The requirements of the exemption provided by this section of the Act are contained in this rule, 29 CFR Part 541.

Section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e) defines "employee" to include most individuals employed by a state, political subdivision of a state, or interstate governmental agency. Section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x), also defines public agencies to include the government of a state or political subdivision thereof, or any interstate governmental agency.

#### (2) Cost-Benefit Analysis

For purposes of the Unfunded Mandates Reform Act of 1995, this rule includes a Federal mandate that might result in increased expenditures by the private sector of more than \$118 million in any one year, but the rule will not result in increased expenditures by State, local and tribal governments, in the aggregate, of \$118 million or more in any one year. Based on the Regulatory Impact Analysis (RIA), the Department has determined that the

final rule will result in first-year costs for state and local governments of approximately \$21 million. In subsequent years, the Department estimates that state and local governments may experience a payroll increase of as much as \$10 million per year.

The benefits accruing to state and local governments will be similar to those accruing to other employers. Like other employers, state and local governments will benefit from having clearer rules that are easier to understand. State and local governments will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced. Reducing regulatory red tape and litigation costs will free up resources.

#### (3) Macro-Economic Effects

Agencies are expected to estimate the effect of a regulation on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if accurate estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product, or in the range of \$1.5 billion to \$3.0 billion. A regulation with smaller aggregate effect is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's RIA estimates that the total first-year impacts on employers of the final rule will be approximately \$1.1 billion. However, given OMB's guidance, the Department has determined that a full macro-economic analysis is not likely to show any measurable impact on the economy.

The ratio of total first-year costs to private sector payrolls averaged 0.04 percent nationwide, the ratio of total first-year costs to private sector revenue averaged less than 0.01 percent nationwide, and the ratio of total first-year costs to private sector pre-tax profit averaged 0.19 percent nationwide in the private sector. The Department concludes that impacts of this

magnitude are clearly affordable and will not result in significant disruptions to typical firms in any of the major industry sectors.

The ratio of total first-year state and local government costs were less than one-hundredth of one-percent of both state and local government payrolls and revenue. Impacts of this magnitude will not result in significant disruptions to typical state and local governments.

#### (4) Summary of State, Local, and Tribal Government Input

Many state and local public employers and employees commented on specific aspects of the proposed rule. These have been addressed above in the preamble and, where appropriate, changes have been made to the final rule. In addition, many of the comments from state and local governments concerned the ability of these entities to absorb the costs related to the proposed revisions. For example, the Public Sector FLSA Coalition stated, "The result of adopting proposed Section 541.100(a)(4) could be that state and local governments would be forced to reclassify many of their currently exempt executive managers and supervisors as non-exempt. This possible limitation on the use of the executive exemption in the public sector was apparently not contemplated or intended by the Department. The \* \* \* Department's statements concerning the methods by which resulting increased payroll costs could be ameliorated by employers may be of no assistance to the public sector." The preamble to the final rule clarifies how the executive exemption applies in the public sector and the impact of section 541.100(a)(4), which requires that an employee either have authority to hire or fire employees or that the employee's recommendations regarding the change in status of other employees be given particular weight. The Department also added a definition of "particular weight."

The preamble of the proposed rule contains (at 68 FR 15583) a brief summary and history of this rule and its impact on state, local and tribal governments. As noted therein, Congress amended the FLSA in 1985 following the Garcia decision to readjust how the Act would apply to public sector employers by allowing (1) compensatory time off in lieu of cash overtime pay, (2) partial overtime exemptions for police and fire departments, (3) the use of unpaid volunteers in certain circumstances, and (4) a temporary phase-in period for meeting FLSA compliance obligations. *Garcia v. San Antonio Metropolitan*

*Transit Authority*, 469 U.S. 528 (1985). However, Congress enacted no special provisions for public agencies related to the section 13(a)(1) exemptions or the 541 regulations. As a result, the same rules for determining 541-exempt employees in the private sector were initially applied to the public sector following the 1985 amendments.

When first confronted with the requirements of the FLSA, many state and local governments attempted to classify nearly all of their non-supervisory “white-collar” workers as exempt administrative employees without regard to whether their primary duty related directly to agency management policies or general business operations, or whether they met the existing discretion and independent judgment test. In the late 1980s, several Governors and state and local government agencies urged the Department to exempt many public sector classifications (including social workers, detectives, probation officers, and others) to avoid having the overtime requirements (either through increased costs or reduced hours of service) disrupt the level of public services they need to provide. In 1989, following a review of the concerns expressed, former Labor Secretary Elizabeth Dole responded by confirming what was required to meet the administrative exemption’s duties test as applied to public sector employees, but also solicited specific input with accompanying rationale to support requested changes. Responses were limited but argued generally that government services should be considered unique because of the impact on health, safety, welfare or liberty of citizens. This, they argued, should allow exemption of positions in law enforcement and criminal justice, human services, health care and rehabilitation services, and the unemployment compensation systems, regardless of whether any particular employee’s job duties included important decision-making authority on how the government agency is internally operated or managed. In effect, the suggestions essentially overlooked the focus on “management or general business operations” that has always been an essential foundation to the administrative employee exemption, but without explaining why that result was consistent with the intent of the FLSA and the exemptions provided by section 13(a)(1) as applied to the public sector. They also urged that the DOL redefine the professional exemption to recognize a broader contemporary use of that term in government employment,

again without regard to the historical application of the professional exemption to only the recognized professions in particular fields of science or learning in which specialized intellectual instruction and specific academic training were prerequisites for entry into those particular professions. No supporting justifications were provided to explain how this broader application of the exemption would be in accord with the purposes of the FLSA or the exemptions in Section 13(a)(1).

During a growing wave of private lawsuits filed by public employees against their employers challenging their exempt status, a series of court decisions were issued that sharply limited public employers’ ability to successfully claim exemption under the “salary basis” rule. This prompted the Department to modify the “salary basis” rule to provide specific relief to public employers based on principles of public accountability in a final rule establishing 29 CFR § 541.5d issued in August 1992 (57 FR 37666; Aug. 19, 1992). Under this special rule, the fact that a public sector pay and leave system included partial-day deductions from pay for absences not covered by accrued paid leave became irrelevant to determining a public sector employee’s eligibility for exemption. This particular provision was carried over into the Department’s recent proposed rule, at § 541.709 (68 FR 15597; March 31, 2003) and is included in the final rule at § 541.710.

Public sector employers have become less vocal over FLSA issues since the Department’s 1992 rulemaking on the “salary basis” issue. The U.S. Supreme Court’s 1997 decision in *Auer v. Robbins*, 519 U.S. 452 (1997), a public sector case involving the City of St. Louis Police Department and disciplinary deductions from pay, may also have relieved many public agencies’ concerns over pay-docking for discipline.

Although public agency organizations were invited to the Department’s stakeholder meetings in 2002 to address concerns over the Part 541 regulations, most did not respond to the invitations. The International Personnel Management Association, accompanied by the National Public Employers Labor Relations Association and the U.S. Conference of Mayors, suggested that progressive discipline systems are common in the public sector (some collectively bargained) and the “salary basis” rule for exempt workers, which prohibits disciplinary deductions except for major safety rules, conflicts with such systems. Representatives of the Interstate Labor Standards Association

(ILSA) submitted written views suggesting that the salary threshold be indexed to the current minimum wage or some multiple thereof (*i.e.*, three times the minimum wage for a 40-hour workweek or \$618 per week). One additional idea was to relate the salary levels to those of the supervised employees. No other input was provided.

The proposed rule intended to clarify and thus simplify the exemptions’ duties tests, but would continue to apply the same basic duties tests in both the public and private sectors. The public sector has been regulated under a different set of pay-docking rules since 1992, and additional revisions included in the final rule would broaden permissible disciplinary deductions to include partial-week suspensions for infractions of certain workplace conduct rules such as sexual harassment and work-place violence. The Department is not persuaded, however, by the comments seeking a separate, less-stringent duties test rule applicable solely to the public sector.

As discussed above in the RIA, the estimated first-year costs for state and local government are approximately \$21 million, approximately half of which are one-time implementation costs. This \$21 million constitutes an average of less than \$250 for each of the approximately 90,000 state and local entities. The Department considers impacts of this magnitude to be quite small both in absolute terms and in relation to payrolls and revenue.

#### (5) Least Burdensome Option or Explanation Required

The Department’s consideration of various options has been described throughout the preamble. The Department believes that it has chosen the least burdensome option that updates, clarifies, and simplifies the rule. One alternative option would have set the exemptions’ salary level at a rate lower than \$455 per week, which might impose lower direct payroll costs on employers, but may not necessarily be the most cost-effective or least burdensome alternative for employers. A lower salary level could result in a less effective “bright-line” test that separates exempt workers from those nonexempt workers whom Congress intended to cover by the Act. Greater ambiguity regarding who is exempt and nonexempt increases the potential legal liability from unintentionally misclassifying workers, and thus the ultimate cost of the regulation.

*Executive Order 13132 (Federalism)*

This rule will not have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” As noted previously, the FLSA explicitly applies to states, political subdivisions of states, and interstate governmental entities, 29 U.S.C. 203(e), (x). To the extent necessary, the final rule addresses effects on state and local government employers, including retaining the previous rule’s specific exception to the salary basis requirement for public employees (now at section 541.710) that was promulgated in 1992 (57 FR 37677 (August 19, 1992)) to address state constitutional or statutory public accountability requirements in the funding of state and local governments. As described above, the Department considers the estimated cost impacts of the rule on state and local governments to be quite small both in absolute terms and in relation to payrolls and revenues. State and local governments will also accrue benefits from this final rule like other employers in the form of clearer rules and reduced litigation.

In addition, the FLSA specifies that employers must comply with any state or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum work week than those established under the Act, 29 U.S.C. 218(a). Section 541.4 in the final regulations clarifies in the rule itself that state laws providing additional worker protections are not preempted and that employers must continue to comply with those laws. Consequently, under the terms of section 6 of E.O. 13132, it has been determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.*, requires agencies to prepare regulatory flexibility analyses, and make them available for public comment, when promulgating regulations that will have “a significant economic impact on a substantial number of small entities.” Accordingly, the following analysis assesses the impact of these regulations on small entities as defined by the applicable SBA size standards.

In accordance with E.O. 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” this rule has been reviewed to assess its potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the Regulatory Flexibility Act. The Department gave the notice of proposed rulemaking and the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration for review.

The County Attorney for the County of Culpeper, Virginia, asserted that the DOL has never reviewed the effects of Part 541 on state and local governments or sought to minimize its burdens. This, according to the County Attorney, is a failure by the DOL to meet its obligations under the RFA and Executive Order 13272. This commenter cited as the most obvious example the “salary basis” test and the flood of litigation against public employers in the aftermath of the U.S. Supreme Court’s 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The County Attorney suggested that the Department should confer with state and local officials and jointly prepare proposed rules designed specifically for government employers that recognize the differences between urban and rural governments and between large and small government jurisdictions, and which minimize the burden on these employers while still conforming to Congressional intent. (The crux of this issue in the Department’s view, of course, is how best to minimize the burden on these employers while still conforming to Congressional intent.)

The Department disagrees with this comment. The Department has, in fact, reviewed the impact of these regulations on state and local governments and sought to minimize burdens on state and local governments and on small entities to the extent permitted by Congressional intent and the statutory objectives of the FLSA. A case simply has not been made for creating separate, less-stringent exemption criteria under special rules for state and local governments that bypass Congressional intent or the statutory objectives of the FLSA and the exemptions provided in section 13(a)(1).

*Final Regulatory Flexibility Analysis*

## (1) Succinct Statement of Need For, and Objectives of, Rule

Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1), directs the Secretary of Labor to issue regulations “from time to time”

(subject to the Administrative Procedure Act) to define and delimit the terms “any employee employed in a bona fide executive, administrative, or professional capacity \* \* \* or in the capacity of outside salesman \* \* \*” Employees who meet the specified regulatory criteria are completely exempt from minimum wage and overtime pay under the FLSA. The existing regulations require payment “on a salary basis,” at not less than specified minimum amounts, and certain additional tests must be met related to an employee’s primary job duties and responsibilities. The duties tests were last modified in 1949 and have remained essentially unchanged since. The salary levels required for exemption were last updated in 1975 on an interim basis. In 1999, the U.S. General Accounting Office reviewed these regulations and recommended that the Secretary of Labor comprehensively review and update them, and make necessary changes to better meet the needs of both employers and employees in the modern work place. These regulations were also recommended for reform in public comments submitted on OMB’s 2001 and 2002 Reports to Congress on the Costs and Benefits of Regulations. The Department proposed revisions to these regulations in response to the concerns that have been raised over the years, to update, clarify and simplify them for the 21st Century workplace. The objectives of the revised rule are to provide clear and concise regulatory guidance to implement the statutory exemption, in plain language, to assist employers and employees in determining whether an employee is exempt from the FLSA as a bona fide executive, administrative, professional, or outside sales employee.

## (2) Summary of Significant Issues Raised in Comments and Responses Thereto

Many of the issues raised by small businesses in the public comments received on the proposed rule are described in the preamble above. The significant issues raised by representatives of small businesses and the U.S. Small Business Administration’s Office of Advocacy (“Advocacy”) are repeated here to meet the guidelines under the Regulatory Flexibility Act.

Advocacy commended the Department for its outreach to small entities in developing the proposed rule and encouraged those efforts to continue, including the development of small entity compliance assistance materials for the final rule. The Department will continue to expand its

available compliance assistance materials related to these regulations for small entities.

*Primary duty test:* Small business representatives informed Advocacy that the proposed movement away from a percentage-of-time primary duty test was an important development in reducing the regulation's compliance burden on small businesses. Advocacy recommended that the Department incorporate the proposed primary duty test in the final rule. The final rule includes the proposed primary duty test, with minor and clarifying modifications.

*Salary test:* Small businesses told Advocacy that, because of regional differences in salaries and industry characteristics, they will face disproportionate burdens if the Department adopts the \$425 per week minimum salary test. Advocacy stated that, in different regions of the country, small business employees enjoy the same or similar living standards with very different salaries. Further, some small business industries, such as retail stores and restaurants, operate on thin margins with labor costs constituting a significant portion of their expenses. Many of these small businesses rely heavily on small numbers of management-level employees who would no longer be exempt from overtime. Advocacy encouraged the Department to provide flexibility to small businesses under the salary test, such as lower minimum salary levels for small businesses, to alleviate the disproportionate effects. At a minimum, Advocacy urged the Department not to adopt a minimum salary test for small businesses above \$425 per week.

The National Small Business Association (NSBA) (formerly National Small Business United) commented in general support of the proposal and asserted overall that the benefits of the changes would outweigh the potentially negative impacts of the changes on its members. However, NSBA also commented that lower salary tests (both the standard tests and the highly compensated test) would be more desirable for small businesses.

The National Federation of Independent Business (NFIB) observed that DOL's analysis showed two industries in which incremental payroll costs rise by more than two percent of pretax profit—general merchandise stores (SIC 53) and private educational services (SIC 82)—when employees are reclassified according to the proposed new FLSA rules (based on 2001 data). NFIB suggested that any agency proffering rule changes that cause potential losses in small firm profits

ought to give careful consideration to ameliorating those particular circumstances.

The Department carefully considered the FLSA's statutory purposes and the context for its exemption of "white-collar" employees under section 13(a)(1), and studied its extensive regulatory history. Employees who qualify under these exemptions are exempt from the Act's minimum wage and overtime requirements. They are assumed to enjoy a certain prestige, status, and importance within their employer's organization commensurate with the exempt level accorded their position, as well as other compensatory privileges in exchange for not being covered by the Act. Consequently, to achieve its intended purpose, the salary level adopted for exemption should help to accurately distinguish exempt from nonexempt workers under these principles, and without inviting evasion of the FLSA's minimum wage and overtime requirements for large numbers of workers for whom the Act's basic protections were intended. At the same time, the level selected should not operate to exclude large numbers of employees whose jobs were intended to be within the exemption. Accordingly, in arriving at the salary level, the Department's methodology specifically considered salary levels actually being paid by small business industries (such as retail stores and restaurants), and in lower-wage regions (such as the South). Therefore, the Department concluded these commenters have not fully understood the true effects of the Department's methodology in setting the exemption's salary level.

Although the analysis does not include precise data delineating the salary levels paid by small businesses to their exempt employees in each exemption category (due to data limitations), the Department applied a reasonable proxy that takes into account lower-wage industries that include many small businesses, specifically by looking to the salary levels actually being paid in the retail and service sectors and in the South. This approach is based on and entirely consistent with previous revisions of these regulations. It tries to approximate the lower portion of the range of prevailing salaries already being paid to employees intended for exemption (thus mitigating actual impacts in retail stores and restaurants and in lower-wage regions of the country). For example, when the Department revised the regulations in 1958, it looked at the salaries paid to exempt employees and set rates "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." In the 1958 Kantor Report (at 5-7) and the 1940 Stein Report (at 32), it was noted that " \* \* \* these figures are averages, and the act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude." Moreover, the 1949 Weiss Report (at 11-15) stated "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. By and large, however, if the salary levels are selected carefully and if they approximate the prevailing minimum salaries for this type of personnel and are above the generally prevailing levels for nonexempt occupations, they can be useful adjuncts in satisfying employers and employees as well as the Divisions as to the exempt status of the particular individuals." DOL set a salary level at that time at a "figure slightly lower than might be indicated by the data" because of concerns regarding the impact of the salary level increases on small businesses: "The salary test for bona fide executives must not be set so high as to exclude large numbers of the executives of small establishments from the exemption."

The Department's current approach was similar, and thus already specifically considered the lower salary levels paid by smaller businesses in the retail and service sectors and in the South, which the data confirm pay lower wages. The Department's approach is designed specifically to achieve a careful and delicate balance: Mitigate the adverse impacts of raising the salary threshold on smaller businesses covered by the law while staying consistent with the objectives of the statute to clearly define and delimit which workers qualify for exemption as Congress intended, and at the same time helping to prevent the misclassification of obviously nonexempt employees. Adopting an even lower minimum salary level for small businesses, when the methodology has already given special consideration to lower salaries being paid in the retail and service sectors and in the South (two cohorts in which small businesses are prevalent), would result in a rule that fails to effectuate its statutory purposes.

The FLSA itself does provide special treatment for small entities under some of its exemptions, e.g., smaller farms



and small newspapers are specifically exempt and enterprises with annual dollar volumes of business less than \$500,000 per year are not covered under the enterprise coverage test. Small businesses that have as their only regular employees the owner or parent, spouse, child or other member of the immediate family of the owner are also specifically excluded from the FLSA's enterprise coverage test. However, the FLSA's statutory exemption for white-collar employees in section 13(a)(1) contains no special provision based on size of business.

Regional and population-based salary differentials were also previously considered and rejected in prior revisions of these regulations. They were considered unworkable because they would increase enormously the difficulties of administration and enforcement, and were questionably beyond the Administrator's authority under the Act (perceived as comparable to setting different minimum wages for a class of workers that Congress specifically exempted). See 1940 Stein Report at 5-6 and 32. While the Department did once again reconsider these possible options in response to suggestions from commenters, no new arguments or rationales were advanced during this rulemaking that would overcome the same shortcomings and previously-reached conclusions. Setting multiple minimum salary levels according to SBA size standards industry-by-industry would present the same insurmountable challenges.

As described under the Unfunded Mandates Reform Act section in the preamble of the proposed rule (see 68 FR 15584), the Department considered as an alternative option setting the salary level even lower than the proposed \$425 per week and concluded that, while it might appear to impose lower direct payroll costs on employers, it may not necessarily be the most cost-effective or least burdensome alternative for employers. A lower salary level that is not above the generally prevailing levels for nonexempt occupations fails to adequately distinguish bona fide exempt workers from those nonexempt workers whom Congress intended to protect. It provides a less effective "bright-line" test under the exemption, which invites misclassification. Greater ambiguity over who is and who is not exempt increases the potential legal liability for employers from unintentionally misclassifying workers, and thus the ultimate cost of the regulation. Reducing the needless ambiguity of the existing regulations is one of the principal objectives of the final rule. Setting the exemption salary

level at or near the wage levels paid to large numbers of nonexempt workers would fail the objectives of these regulations and the purposes of the statute.

The law provides considerable built-in flexibility to small businesses to enable them to respond to the regulations in the most cost-effective manner that best suits their individual needs. The FLSA requires that covered employers comply with its basic minimum wage and overtime pay requirements unless a particular exemption applies. Unless it chooses to do so, no employer is required to claim an exemption from the law or to pay an employee the salary level required for the "white-collar" exemptions. The law therefore provides a measure of maximum flexibility to employers in this respect for meeting their compliance obligations.

Employers affected by the final rule could respond in a variety of ways. For example, they could adhere to a 40-hour work week (by spreading available work to more employees, and limiting each to no more than 40 hours of work per week, consistent with the statutory objective of the FLSA's overtime requirements); pay the statutory overtime premiums to affected employees who work more than 40 hours per week; or raise exempt employees' salaries to the new level required under the final rule. Given the range of responses employers may take when confronted with paying overtime to an employee previously treated as exempt, and in light of the Department's methodology that specifically considered lower salary levels actually being paid by small businesses in the retail sector and in the South, the Department believes that it has properly considered the available options that are consistent with the purposes of the statute and has selected a regulatory approach that alleviates the perceived disproportionate effects that small businesses have suggested would occur under the rule.

*Enforcement flexibility:* Advocacy noted that SBREFA requires Federal agencies to establish policies which reduce or waive civil penalties for small businesses in appropriate cases. Advocacy encouraged the Department to consider civil penalty flexibility where appropriate, noting that flexibility in dealing with small businesses will encourage such entities to work more closely with the Department to voluntarily achieve compliance. The Department's policies under the FLSA for reducing or waiving civil money penalties for small businesses under appropriate circumstances are fully

consistent with SBREFA requirements and principles. However, there is a distinction between civil money penalties and statutory wages due under the FLSA. Violations of the FLSA's minimum wage or overtime provisions create an employer liability directly to its employees who were not paid their statutory wages due. The Department has no authority under the FLSA or SBREFA to reduce or waive an employer's liability to employees for statutory minimum wages or overtime pay legally due. The Department will continue to expand its compliance assistance efforts to promote voluntary employer compliance with these regulations, especially for smaller businesses.

Small business representatives and Advocacy commented that the safe harbor's requirement for a pre-existing "written policy" may exclude some small businesses which do not produce written compliance materials in the ordinary course of their business. Understanding that the purpose of this requirement is to encourage regulated entities to better understand the law's requirements, Advocacy still believed that the Department should not exclude small businesses from the proposed safe harbor, while offering it to large businesses that are more able to dedicate resources to drafting comprehensive written employment policies. While Advocacy commended the DOL for including a safe harbor provision, it encouraged the Department to consider alternatives to the written policy requirement proposed at § 541.603.

After carefully considering all the comments on the proposal and pertinent case law on the current rule's "window of correction," the Department modified the proposed rule's safe harbor requirement. The final rule does not require employers to adopt and communicate a written employment policy in order to utilize the rule's safe harbor. While an employer must still have a policy prohibiting improper pay deductions, and clearly communicate it to its employees, a written policy is no longer required. In addition, the clearly communicated policy must also now include a complaint mechanism. Communication to employees in some form is important so that employees will also benefit from this notification of their rights under the FLSA. As other commenters (e.g., the American Health Care Association, American Corporate Counsel Association, and National Association of Manufacturers) have stated, adopting a written policy is the best evidence of the employer's good faith efforts to comply. Further, this

particular requirement is narrowly focused on an employer's policy prohibiting improper pay deductions, which includes a complaint mechanism, for salaried-exempt workers; it does not suggest the adoption of "comprehensive written employment policies" covering other matters.

*Small entity compliance guide:* Advocacy noted that the Department has historically made compliance materials available to small businesses via its Web site. Advocacy encouraged the Department to update and revise these compliance assistance materials for small entity use with the new rule, as well as to distribute these materials to small businesses that do not have access to the Internet. The Department is revising all pertinent compliance assistance materials for small entities' use with the new rule and will distribute printed versions of the materials for employers that do not have access to the Internet. The Department has also planned a comprehensive compliance assistance effort on the changes in the regulations so that employers will better understand their compliance responsibilities and employees will better understand their rights under the new rules.

The American Hotel & Lodging Association and the International Franchise Association both commented that, for the lodging industry, entities with annual receipts of less than \$6 million are considered "small" according to SBA size standards. They asserted that the FLSA's statutory exemption for firms with annual revenues less than \$500,000 does not relieve the Department of the requirement in the Regulatory Flexibility Act to address the disproportionate impact on smaller firms. The impact of the dramatically increased salary threshold on an owner of a single, limited-service hotel in a rural area could be quite significant, they maintained, and they urged the Department to more carefully explore regulatory alternatives for reducing significant economic impact on small entities. For the reasons discussed more fully above, the Department disagrees that it has not carefully explored the available regulatory alternatives consistent with the purposes of the statute in ways that address the disproportionate impact on smaller firms. The Department believes that it has properly considered the available options and has selected a regulatory approach that appropriately considers the lower salary levels being paid by smaller businesses in the retail sector and in the South, thereby mitigating the perceived disproportionate effects that

would otherwise occur to small businesses. In so doing, the Department has not, contrary to the assertions of these commenters, assumed that the FLSA's statutory coverage test relieves the DOL of its obligations under the Regulatory Flexibility Act.

#### (3) Number of Small Entities Covered by the Rule

The Department based its small firm estimates on the same data sources used for the private sector as a whole. Based on SBA's size standards for small business entities, the Department estimates more than 5.2 million establishments impacted by the final standard are considered to be small businesses. These small firms employ approximately 38.7 million workers with an annual payroll of \$940 billion. Their total annual sales are estimated to be \$5.7 trillion and their annual pre-tax profits are estimated to be \$180 billion. Approximately 80 percent of the affected establishments are considered to be small businesses and they account for 39 percent of the employment, 35 percent of the payroll, 32 percent of the annual sales, and 31 percent of the annual pre-tax profits.

#### (4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

Although an employer claiming an exemption from the FLSA under 29 CFR Part 541 must be prepared to establish affirmatively that all required conditions for the exemption are met, this rule contains no reporting or recordkeeping requirements as a condition for the exemption. However, the recordkeeping requirements for employers claiming exemptions from the FLSA under 29 CFR Part 541 for particular employees are contained in the general FLSA recordkeeping regulations, applicable to all employers covered by the FLSA (codified at 29 CFR Part 516; see 29 CFR § 516.0 and 516.3) and have been approved by the Office of Management and Budget Control Number 1215-0017. There are no other compliance requirements under the final rule.

#### (5) Steps Taken To Minimize Significant Impact on Small Entities Consistent With Objectives of Applicable Statutes

The FLSA generally requires employers to pay covered nonexempt employees at least the federal minimum wage of \$5.15 per hour, and time-and-one-half overtime premium pay for hours worked over 40 per week. Under the terms of the statute, Congress excluded some smaller businesses (those with annual revenues less than \$500,000) from the definition of covered

"enterprises" (although individual workers who are engaged in interstate commerce or who produce goods for such commerce may be individually covered by the FLSA). This rule clarifies and updates the criteria for the statutory exemption from the FLSA for executive, administrative, professional, and outside sales employees for all employers covered by the FLSA.

The factual, policy and legal reasons for selecting the regulatory alternatives adopted in the final rule are set out in full detail above in section (2) of this Final Regulatory Flexibility Analysis and elsewhere in the preceding sections of the preamble discussing the public comments received on specific sections of the proposal and our responses thereto, and include the statutory objectives of the FLSA and the purposes of the section 13(a)(1) exemptions; the extensive regulatory history and procedures followed during prior updates of these regulations; extensive public commentary over the years on the current rules as recently documented by the GAO and others; available data for determining the scope and impact of making changes to the current rule; and the regulatory principles embodied in the Paperwork Reduction Act, the Regulatory Flexibility Act, and the various Executive Orders applicable to the rulemaking process.

The Department considered a number of alternatives to the rule that would impact small entities. One alternative is not to change the existing regulations. This alternative was rejected because the Department has determined the existing salary tests, which have not been raised in more than 28 years, no longer distinguish between bona fide executive, administrative, and professional employees and those who should not be considered for exemption. Also, the duties tests, which were last modified in 1949, are viewed in the regulated community as too complicated, confusing, and outdated for the modern workplace.

Two other alternatives are to raise the salary levels and not update the duties tests, or conversely to update the duties tests without raising the salary levels. However, the Department rejected these alternatives and concluded that raising the salary levels is necessary to reestablish a clear, relevant bright-line test between exempt and nonexempt workers. Moreover, the duties tests were last revised in 1949 and have remained essentially unchanged since that time, and the salary levels were last updated in 1975. The Department has determined that updating both the salary level and duties tests is necessary

to better meet the needs of both employees and employers in the modern workplace and to anticipate future workplace trends.

Another alternative is to adjust the salary levels for the standard test for inflation. However, the Department has never relied solely on inflation adjustments to determine the appropriate salary levels, and has decided to continue its long-standing regulatory practice to reject such mechanical adjustments for inflation and base the salary levels for exemption on wage levels actually being paid in the economy with appropriate consideration given to low-wage regions and low-wage industries and the effects on smaller businesses, as explained above.

*Assessment of the Impact on Families*

A number of commenters, including numerous individuals who submitted form letters, expressed concerns that the proposed rule would have an adverse impact on families.

Many of these comments were based upon the erroneous assertion that the proposed rule would have made millions of workers exempt from overtime and, as a result, would have deprived families of a significant source of income. As discussed more fully above (see Chapters 2 and 4 of the RIA), many of these allegations were based upon misleading and inappropriate comparisons between the existing "long" duties tests and the standard tests in the final regulation. The "long" duties tests, under which some employees are exempt and others nonexempt, have been replaced in the final rule by guaranteed overtime protection. Accordingly, the Department concludes that no worker who earns less than \$455 per week will lose their overtime protection under the final rule.

The Department estimates that 1.3 million white-collar workers earning less than \$455 per week (\$23,660 per year) are Part 541-exempt under the current rule. These workers are likely to benefit under the final rule in the form of increased compensation of approximately \$375 million per year in the form of either paid overtime or higher salaries. According to the CPS data, many of these workers are married

women and minorities with less than a college degree. Another 5.4 million salaried workers who earn between \$155 and \$455 per week will have their overtime protection strengthened because their protection, which is based on the duties tests under the current regulation, will be guaranteed under the final rule.

The Department also has determined that the final rule is as protective as the current regulation for workers who earn between \$23,660 and \$100,000 per year. On the whole, employees will gain overtime protection because some revisions are more protective than the existing short duties tests. For example, the executive duties test in the final rule is more protective than the current short duties test and the final rule is more protective for police officers, fire fighters, paramedics, emergency medical technicians, and other first responders, and the highly compensated test does not apply to them. The Part 541 exemptions also do not apply to manual laborers or other non-management blue-collar workers such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

Additionally, clearer more up-to-date rules will also help the Wage and Hour Division more vigorously enforce the law, ensuring that workers are being paid fairly and accurately. Fewer workers will be unintentionally misclassified; therefore they will not have to go to court and wait years for their back pay. This will have a positive impact on workers, especially low-wage, vulnerable workers and their families.

An estimated 107,000 workers who earn \$100,000 or more per year could lose their overtime protection due to the new highly compensated test. However, as discussed in Chapters 4 and 8 of the RIA, there are a variety of reasons why employers might not convert the exemption status of these highly paid workers. These include, but are not limited to, the incentives to preserve an investment in human capital, retain institutional memory, and minimize turnover costs, as well as the nature of the work, and tradition and culture. Moreover, it would be incorrect to

assume that employers would no longer pay a premium for overtime hours to these workers when 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn \$100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties. The Department expects that most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital, and are unlikely to reduce the compensation of many highly paid workers, even if they could theoretically be made exempt under the new highly compensated tests.

Therefore, the Department has determined that the final rule will have an overall positive impact on families, and: (1) Is unlikely to affect the stability or safety of the family, particularly the marital commitment; (2) has no effect on the authority and rights of parents in the education, nurture, and supervision of their children; (3) is likely to help the family perform its functions; (4) is likely to increase the disposable income of families and children and help reduce poverty; (5) can not be carried out by State or local government or by the family; and (6) does not establish an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society. Accordingly, this rule has been assessed under section 654 of the Treasury and General Government Appropriations Act, 1999, for its effect on family well-being and the undersigned hereby certifies that the rule will not adversely affect the well-being of families.

*Executive Order 13045, Protection of Children*

In accordance with Executive Order 13045, the Department has evaluated this rule and determined that it has no environmental health risk or safety risk that may disproportionately affect children.

**Appendix A—Detailed Coverage Estimates**

TABLE A-1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS

OCC code	Occupation title	Paid hourly	Nonhourly
403	Launderers and ironers	0	3,239
404	Cooks, private household	9,448	2,052
405	Housekeepers and butlers	6,892	3,275
406	Child care workers, private household	265,010	213,825
407	Private household cleaners and servants	451,534	506,876

TABLE A-1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

OCC code	Occupation title	Paid hourly	Nonhourly
416	Fire inspection and fire prevention occupations	10,707	1,748
417	Firefighting occupations	98,804	129,880
418	Police and detectives, public service	301,015	250,539
423	Sheriffs, bailiffs, and other law enforcement officers	72,306	72,512
424	Correctional institution officers	171,867	129,503
425	Crossing guards	30,947	4,612
426	Guards and police, except public service	681,655	134,843
427	Protective service occupations, not elsewhere classified (n.e.c.)	86,808	9,192
434	Bartenders	272,490	37,341
435	Waiters and waitresses	1,289,086	144,701
436	Cooks	1,821,259	251,916
438	Food counter, fountain and related occupations	394,989	8,887
439	Kitchen workers, food preparation	309,683	26,521
443	Waiters/waitresses' assistants	617,109	56,396
444	Miscellaneous food preparation occupations	582,667	56,533
445	Dental assistants	176,900	31,036
446	Health aides, except nursing	300,666	45,918
447	Nursing aides, orderlies, and attendants	1,905,597	254,413
449	Maids and housemen	548,780	71,577
453	Janitors and cleaners	1,616,839	404,414
454	Elevator operators	5,635	771
455	Pest control occupations	30,692	24,887
457	Barbers	12,811	25,388
458	Hairdressers and cosmetologists	214,791	330,329
459	Attendants, amusement and recreation facilities	210,873	33,786
461	Guides	23,487	8,556
462	Ushers	34,419	3,724
463	Public transportation attendants	79,221	43,725
464	Baggage porters and bellhops	38,447	3,765
465	Welfare service aides	78,519	28,057
466	Family child care providers	7,676	13,031
467	Early childhood teacher's assistants	400,055	105,253
468	Child care workers, n.e.c.	164,678	45,236
469	Personal service occupations, n.e.c.	167,870	61,095
473	Farmers, except horticultural	1,233	304
479	Farm workers	19,370	3,883
483	Marine life cultivation workers	767	0
484	Nursery workers	6,319	119
486	Groundskeepers and gardeners, except farm	628,009	163,202
487	Animal caretakers, except farm	83,895	21,766
488	Grader and sorter, agricultural products	38,938	5,673
489	Inspectors, agricultural products	1,946	1,214
495	Forestry workers, except logging	3,992	1,752
496	Timber cutting and logging occupations	22,039	12,078
497	Captains and other officers, fishing vessels	819	1,761
498	Fishers	4,933	15,923
505	Automobile mechanics	295,415	167,163
506	Auto mechanic apprentices	2,215	0
507	Bus, truck, and stationary engine mechanics	193,638	37,272
508	Aircraft engine mechanics	25,871	7,301
509	Small engine repairers	32,026	8,790
514	Automobile body and related repairers	95,820	49,978
515	Aircraft mechanics, except engine	10,919	652
516	Heavy equipment mechanics	134,978	25,158
517	Farm equipment mechanics	22,825	5,604
518	Industrial machinery repairers	373,093	56,377
519	Machinery maintenance occupations	13,041	1,085
523	Electronic repairers, communications & industrial equip	133,521	34,011
525	Data processing equipment repairers	152,554	105,323
526	Household appliance and power tool repairers	22,840	5,872
527	Telephone line installers and repairers	32,469	7,938
529	Telephone installers and repairers	177,639	49,190
533	Misc electrical and electronic equipment repairers	62,529	9,374
534	Heating, air conditioning, and refrigeration mechanics	240,044	44,067
535	Camera, watch, and musical instrument repairers	12,339	4,306
536	Locksmiths and safe repairers	12,211	3,458
538	Office machine repairers	30,822	14,624
539	Mechanical controls and valve repairers	15,324	713
543	Elevator installers and repairers	19,960	6,189
544	Millwrights	57,777	4,543
547	Specified mechanics and repairers, n.e.c.	300,199	87,967

TABLE A-1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

OCC code	Occupation title	Paid hourly	Nonhourly
549	Not specified mechanics and repairers	222,588	64,692
563	Brickmasons and stonemasons	142,889	28,805
564	Brickmason and stonemason apprentices	75	0
565	Tile setters, hard and soft	46,051	24,579
566	Carpet installers	48,699	33,509
567	Carpenters	912,769	201,178
569	Carpenter apprentices	8,875	0
573	Drywall installers	85,860	28,609
575	Electricians	597,557	113,341
576	Electrician apprentices	43,746	1,183
577	Electrical power installers and repairers	98,532	16,873
579	Painters, construction and maintenance	333,738	75,698
583	Paperhangers	4,407	1,037
584	Plasterers	32,335	10,035
585	Plumbers, pipefitters, and steamfitters	371,718	72,324
587	Plumber, pipefitter, and steamfitter apprentices	13,377	0
588	Concrete and terrazzo finishers	81,316	12,391
589	Glaziers	33,148	5,472
593	Insulation workers	46,275	5,649
594	Paving, surfacing, and tamping equipment operators	9,194	80
595	Roofers	129,010	21,411
596	Sheetmetal duct installers	39,013	1,057
597	Structural metal workers	61,917	1,904
598	Drillers, earth	9,141	1,776
599	Construction trades, n.e.c.	187,340	39,904
614	Drillers, oil well	17,924	3,243
615	Explosives workers	3,178	1,183
616	Mining machine operators	22,315	4,121
617	Mining occupations, n.e.c.	19,104	3,636
634	Tool and die makers	80,616	12,172
635	Tool and die maker apprentices	2,859	0
636	Precision assemblers, metal	23,659	1,136
637	Machinists	386,873	51,058
643	Boilermakers	19,509	776
644	Precision grinders, filers, and tool sharpeners	8,516	1,707
645	Patternmakers and model makers, metal	4,683	0
646	Lay-out workers	5,255	635
647	Precious stones and metals workers	29,041	6,328
649	Engravers, metal	7,338	1,551
653	Sheet metal workers	92,387	15,576
654	Sheet metal worker apprentices	1,381	0
656	Patternmakers and model makers, wood	839	0
657	Cabinet makers and bench carpenters	44,767	7,285
658	Furniture and wood finishers	13,123	3,757
659	Misc precision woodworkers	0	725
666	Dressmakers	36,301	7,723
667	Tailors	12,153	15,389
668	Upholsterers	28,643	12,756
669	Shoe repairers	2,501	2,396
674	Misc precision apparel and fabric workers	1,800	4,664
675	Hand molders and shapers, except jewelers	12,376	2,561
676	Patternmakers, lay-out workers, and cutters	3,466	1,486
677	Optical goods workers	56,957	12,550
678	Dental laboratory and medical appliance technicians	39,047	14,883
679	Bookbinders	21,558	823
683	Electrical/electronic equipment assemblers	195,790	26,801
684	Misc precision workers, n.e.c.	20,615	2,864
686	Butchers and meat cutters	186,712	22,176
687	Bakers	106,414	20,607
688	Food batchmakers	52,048	808
689	Inspectors, testers, and graders	105,805	45,156
693	Adjusters and calibrators	2,428	1,243
694	Water and sewage treatment plant operators	67,078	14,568
695	Power plant operators	33,157	9,373
696	Stationary engineers	89,271	36,207
699	Miscellaneous plant and system operators	31,904	6,416
703	Set-up operators, lathe and turning machine	10,097	0
704	Operators, lathe and turning machine	20,200	725
705	Milling and planing machine operators	5,203	754
706	Punching and stamping press machine operators	65,301	1,990
707	Rolling machine operators	6,821	1,090

TABLE A-1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

OCC code	Occupation title	Paid hourly	Nonhourly
708	Drilling and boring machine operators	6,431	0
709	Grinding, abrading, buffing, & polishing machine operators	78,620	8,005
713	Forging machine operators	12,998	0
714	Numerical control machine operators	31,734	1,992
715	Misc metal plastic stone & glass working mach operators	24,559	1,398
717	Fabricating machine operators, n.e.c.	10,165	2,159
719	Molding and casting machine operators	77,105	5,147
723	Metal plating machine operators	17,160	1,108
724	Heat treating equipment operators	9,526	688
725	Misc metal and plastic processing machine operators	19,318	209
726	Wood lathe, routing, and planing machine operators	6,929	0
727	Sawing machine operators	65,134	5,919
728	Shaping and joining machine operators	3,918	0
729	Nailing and tacking machine operators	830	0
733	Miscellaneous woodworking machine operators	19,125	2,170
734	Printing press operators	212,969	40,073
735	Photoengravers and lithographers	21,890	0
736	Typesetters and compositors	10,799	7,777
737	Miscellaneous printing machine operators	25,667	5,677
738	Winding and twisting machine operators	35,208	0
739	Knitting, looping, taping, and weaving machine operators	28,864	1,849
743	Textile cutting machine operators	7,841	2,060
744	Textile sewing machine operators	263,639	62,550
745	Shoe machine operators	7,011	1,163
747	Pressing machine operators	62,228	10,349
748	Laundering and dry cleaning machine operators	153,071	26,466
749	Miscellaneous textile machine operators	27,920	1,030
753	Cementing and gluing machine operators	18,824	0
754	Packaging and filling machine operators	245,604	17,916
755	Extruding and forming machine operators	25,335	2,570
756	Mixing and blending machine operators	95,832	6,349
757	Separating, filtering, and clarifying machine operators	55,133	12,234
758	Compressing and compacting machine operators	16,170	1,115
759	Painting and paint spraying machine operators	117,753	12,971
763	Roasting and baking machine operators, food	1,670	0
764	Washing, cleaning, and pickling machine operators	7,693	0
765	Folding machine operators	9,730	1,081
766	Furnace, kiln, and oven operators, except food	41,021	4,617
768	Crushing and grinding machine operators	33,990	3,233
769	Slicing and cutting machine operators	121,141	8,195
773	Motion picture projectionists	8,832	0
774	Photographic process machine operators	74,174	13,386
777	Miscellaneous machine operators, n.e.c.	882,925	76,713
779	Machine operators, not specified	329,240	39,598
783	Welders and cutters	416,948	30,243
784	Solderers and brazers	11,415	0
785	Assemblers	940,542	110,419
786	Hand cutting and trimming occupations	6,998	0
787	Hand molding, casting, and forming occupations	12,481	1,496
789	Hand painting, coating, and decorating occupations	18,227	0
793	Hand engraving and printing occupations	5,887	309
795	Miscellaneous hand working occupations	34,894	15,860
796	Production inspectors, checkers, and examiners	377,166	63,000
797	Production testers	42,433	7,419
798	Production samplers and weighers	2,789	466
799	Graders and sorters, except agricultural	103,271	11,534
804	Truck drivers	1,257,626	361,681
806	Driver-sales workers	57,728	70,691
808	Bus drivers	451,774	134,867
809	Taxicab drivers and chauffeurs	140,630	121,002
813	Parking lot attendants	43,783	6,349
814	Motor transportation occupations, n.e.c.	6,029	536
823	Railroad conductors and yardmasters	0	98
824	Locomotive operating occupations	16,157	789
825	Railroad brake, signal, and switch operators	1,977	0
828	Ship captains and mates, except fishing boats	3,014	3,098
829	Sailors and deckhands	644	762
833	Marine engineers	144	147
834	Bridge, lock, and lighthouse tenders	836	803
844	Operating engineers	207,133	41,129
845	Longshore equipment operators	2,950	0

TABLE A-1.—BLUE-COLLAR OCCUPATIONS THAT ARE MOST LIKELY NONEXEMPT UNDER THE CURRENT AND FINAL EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL EXEMPTIONS—Continued

OCC code	Occupation title	Paid hourly	Nonhourly
848	Hoist and winch operators	14,914	923
849	Crane and tower operators	59,531	7,474
853	Excavating and loading machine operators	72,226	5,875
855	Grader, dozer, and scraper operators	40,091	5,440
856	Industrial truck and tractor equipment operators	493,407	43,160
859	Misc material moving equipment operators	56,887	6,768
865	Helpers, mechanics, and repairers	25,150	3,270
866	Helpers, construction trades	107,065	6,016
867	Helpers, surveyor	3,080	791
868	Helpers, extractive occupations	4,282	0
869	Construction laborers	842,685	148,765
874	Production helpers	60,632	3,457
875	Garbage collectors	38,478	12,855
876	Stevedores	10,544	2,342
877	Stock handlers and baggers	1,022,741	57,619
878	Machine feeders and offbearers	57,112	1,302
883	Freight, stock, and material handlers, n.e.c.	637,494	73,143
885	Garage and service station related occupations	153,955	13,631
887	Vehicle washers and equipment cleaners	255,171	25,212
888	Hand packers and packagers	366,936	23,410
889	Laborers, except construction	1,066,097	123,495
	Total	35,208,824	7,621,800

Note: Some numbers may not add due to rounding.  
Source: CONSAD and the U.S. Department of Labor.

TABLE A-2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST

OCC code	Occupation title	Exempt status code (1)	Hourly paid workers	Salaried workers
4	Chief executives & general administrators, public admin	1	6,437	16,284
5	Administrators & officials, public administration	1	133,691	275,701
6	Administrators, protective services	1	16,367	33,128
7	Financial managers	1	119,763	625,039
8	Personnel & labor relations managers	1	30,326	180,553
9	Purchasing managers	1	29,311	102,247
13	Managers, marketing, advertising, & public relations	1	83,850	605,262
14	Admin, education & related fields	1	45,618	85,111
15	Managers, medicine & health	1	278,599	498,011
17	Managers, food serving & lodging establishments	3	423,699	706,689
18	Managers, properties & real estate	3	114,633	308,022
19	Funeral directors	2	10,388	32,306
21	Managers, service organizations, n.e.c. (2)	1	188,874	479,990
22	Managers & administrators, n.e.c.	1	1,203,610	4,778,194
23	Accountants & auditors	1	443,659	1,020,879
24	Underwriters	1	35,944	59,503
25	Other financial officers	2	163,865	591,312
26	Management analysts	2	62,981	244,104
27	Personnel, training, & labor relations specialists	2	202,064	365,268
28	Purchasing agents & buyers, farm products	2	4,155	4,800
29	Buyers, wholesale & retail trade except farm products	2	105,708	105,447
33	Purchase agents & buyers, n.e.c.	2	83,157	126,564
34	Business & promotion agents	2	4,849	30,822
35	Construction inspectors	3	36,718	28,236
36	Inspectors & compliance officers, except construction	3	64,857	109,744
37	Management related occupations, n.e.c.	2	249,125	223,981
43	Architects	1	29,545	106,161
44	Aerospace engineers	1	17,473	55,016
45	Metallurgical & materials engineers	1	5,286	16,242
46	Mining engineers	1	1,077	4,528
47	Petroleum engineers	1	666	12,768
48	Chemical engineers	1	9,965	67,074
49	Nuclear engineers	1	1,607	828
53	Civil engineers	1	67,305	155,453
54	Agricultural engineers	1	350	1,408
55	Engineers, electrical & electronic	1	115,616	499,179
56	Engineers, industrial	1	55,812	169,410
57	Engineers, mechanical	1	54,395	229,289

TABLE A-2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

OCC code	Occupation title	Exempt status code (1)	Hourly paid workers	Salaried workers
58	Marine & naval architects	1	3,943	7,187
59	Engineers, n.e.c.	1	59,412	204,684
63	Surveyors & mapping scientists	2	8,286	6,771
64	Computer systems analysts & scientists	1	300,404	1,182,634
65	Operations & systems researchers & analysts	1	70,749	154,890
66	Actuaries	1	0	15,038
67	Statisticians	1	4,485	18,483
68	Mathematical scientists, n.e.c.	1	0	3,314
69	Physicists & astronomers	1	2,128	14,535
73	Chemists, except biochemists	1	23,469	95,037
74	Atmospheric & space scientists	1	2,031	3,595
75	Geologists & geodesists	1	7,934	30,534
76	Physical scientists, n.e.c.	1	11,719	24,178
77	Agricultural & food scientists	1	10,103	20,486
78	Biological & life scientists	1	18,383	67,745
79	Forestry & conservation scientists	1	2,742	9,085
83	Medical scientists	1	18,769	54,452
84	Physicians	1	0	0
85	Dentists	1	0	0
86	Veterinarians	1	1,037	16,267
87	Optometrists	1	0	0
88	Podiatrists	1	0	0
89	Health diagnosing practitioners, n.e.c.	1	0	0
95	Registered nurses	1	1,627,489	567,191
96	Pharmacists	1	122,210	78,029
97	Dietitians	3	45,172	23,771
98	Respiratory therapists	3	75,024	22,684
99	Occupational therapists	3	33,605	32,130
103	Physical therapists	2	80,964	72,325
104	Speech therapists	2	29,295	77,446
105	Therapists, n.e.c.	2	46,667	43,329
106	Physicians' assistants	1	53,420	34,053
113	Earth, environmental, & marine science teachers	1	0	0
114	Biological science teachers	1	0	0
115	Chemistry teachers	1	0	0
116	Physics teachers	1	0	0
117	Natural science teachers, n.e.c.	1	0	719
118	Psychology teachers	1	0	580
119	Economics teachers	1	0	0
123	History teachers	1	0	0
124	Political science teachers	1	0	0
125	Sociology teachers	1	0	0
126	Social science teachers, n.e.c.	1	0	0
127	Engineering teachers	1	0	0
128	Math. science teachers	1	0	0
129	Computer science teachers	1	0	840
133	Medical science teachers	1	0	0
134	Health specialties teachers	1	0	0
135	Business, commerce, & marketing teachers	1	0	0
136	Agriculture & forestry teachers	1	0	0
137	Art, drama, & music teachers	1	0	0
138	Physical education teachers	1	0	0
139	Education teachers	1	0	0
143	English teachers	1	0	1,221
144	Foreign language teachers	1	0	0
145	Law teachers	1	0	0
146	Social work teachers	1	0	0
147	Theology teachers	1	0	0
148	Trade & industrial teachers	1	0	0
153	Teachers, postsecondary, n.e.c.	1	0	0
154	Postsecondary teachers, subject not specified	1	1,230	5,885
155	Teachers, prekindergarten & kindergarten	2	270,615	90,593
156	Teachers, elementary school	1	0	0
157	Teachers, secondary school	1	0	0
158	Teachers, special education	1	5,755	9,028
159	Teachers, n.e.c.	1	356,988	334,426
163	Counselors, Educational & Vocational	2	15,448	30,107
164	Librarians	1	83,000	111,753
165	Archivists & curators	1	9,744	14,922
166	Economists	2	24,240	72,828



TABLE A-2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

OCC code	Occupation title	Exempt status code (1)	Hourly paid workers	Salaried workers
167	Psychologists	1	65,812	129,335
168	Sociologists	2	0	384
169	Social scientists, n.e.c.	2	11,574	14,821
173	Urban planners	2	3,676	11,002
174	Social workers	3	338,352	460,604
175	Recreation workers	3	94,737	34,825
178	Lawyers & Judges	1	0	0
183	Authors	2	16,392	35,455
184	Technical writers	3	19,907	37,555
185	Designers	1	246,100	297,869
186	Musicians & composers	1	14,771	79,138
187	Actors & directors	1	27,520	83,834
188	Painters, sculptors, craft-artists, & artist printmakers	1	70,319	42,485
189	Photographers	1	65,293	36,661
193	Dancers	1	8,941	15,053
194	Artists, performers, & related workers, n.e.c.	1	41,483	37,539
195	Editors & reporters	3	91,740	166,068
197	Public relations specialists	3	45,106	126,849
198	Announcers	2	13,544	21,290
199	Athletes	4	27,688	48,316
203	Clinical laboratory technologists & technicians	3	296,794	63,229
204	Dental hygienists	3	92,852	35,461
205	Health record technologists & technicians	3	17,001	3,783
206	Radiologic technicians	3	140,955	30,201
207	Licensed practical nurses	3	325,853	45,359
208	Health technologists & technicians, n.e.c.	3	632,527	108,100
213	Electrical & electronic technicians	4	249,019	140,988
214	Industrial engineering technicians	4	5,952	765
215	Mechanical engineering technicians	4	11,789	5,626
216	Engineering technicians, n.e.c.	4	129,531	51,567
217	Drafting occupations	4	148,837	76,029
218	Surveying & mapping technicians	4	40,315	12,458
223	Biological technicians	4	88,414	36,733
224	Chemical technicians	4	49,811	13,038
225	Science technicians, n.e.c.	4	71,249	23,561
226	Airplane pilots & navigators	4	5,647	11,943
227	Air traffic controllers	4	3,037	7,013
228	Broadcast equipment operators	4	24,496	20,545
229	Computer programmers	2	122,757	421,040
233	Tool programmers, numerical control	4	6,099	2,917
234	Legal assistants	4	144,284	210,917
235	Technicians, n.e.c.	4	54,139	60,414
243	Supervisors & Proprietors, Sales Occupations	2	1,323,873	2,148,481
253	Insurance sales occupations	2	101,531	346,959
254	Real estate sales occupations	3	55,261	423,875
255	Securities & financial services sales occupations	2	61,157	396,030
256	Advertising & related sales occupations	2	42,796	126,558
257	Sales occupations, other business services	3	261,085	416,743
258	Sales engineers	3	2,475	31,762
259	Sales representatives, mining, manufact, & wholesale	3	294,010	1,099,707
263	Sales workers, motor vehicles & boats	4	30,391	33,687
264	Sales workers, apparel	4	336,383	37,347
265	Sales workers, shoes	4	79,014	12,018
266	Sales workers, furniture & home furnishings	4	85,411	89,456
267	Sales workers, radio, TV, hi-fi, & appliances	4	198,369	115,694
268	Sales workers, hardware & building supplies	4	201,525	79,240
269	Sales workers, parts	4	78,297	35,749
274	Sales workers, other commodities	4	1,107,970	243,311
275	Sales counter clerks	4	140,467	29,730
276	Cashiers	4	2,703,603	190,465
277	Street & door-to-door sales workers	4	0	0
278	News vendors	4	36,633	52,989
283	Demonstrators, promoters & models, sales	4	62,402	8,814
284	Auctioneers	4	1,003	3,083
285	Sales support occupations, n.e.c.	4	10,446	9,115
303	Supervisors, general office	1	160,230	212,649
304	Supervisors, computer equipment operators	1	3,280	12,961
305	Supervisors, financial records processing	1	44,084	61,890
306	Chief communications operators	1	2,343	3,105
307	Supervisors, distribution, scheduling, & adjusting clerks	1	74,454	84,487

TABLE A-2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

OCC code	Occupation title	Exempt status code (1)	Hourly paid workers	Salaried workers
308	Computer operators	4	183,860	97,773
309	Peripheral equipment operators	4	4,681	0
313	Secretaries	4	1,320,713	779,365
314	Stenographers	4	64,749	43,868
315	Typists	4	342,925	182,082
316	Interviewers	4	109,971	38,015
317	Hotel clerks	4	115,438	15,670
318	Transportation ticket & reservation agents	4	134,226	83,940
319	Receptionists	4	843,415	174,717
323	Information clerks, n.e.c.	4	310,301	101,956
325	Classified-ad clerks	4	1,394	912
326	Correspondence clerks	4	4,826	3,215
327	Order clerks	4	212,118	68,155
328	Personnel clerks, except payroll & timekeeping	4	43,039	15,127
329	Library clerks	4	107,372	19,863
335	File clerks	4	234,692	48,289
336	Records clerks	4	136,166	59,547
337	Bookkeepers, accounting, & auditing clerks	4	845,993	456,374
338	Payroll & timekeeping clerks	4	106,358	54,940
339	Billing clerks	4	152,019	52,185
343	Cost & rate clerks	4	33,709	15,380
344	Billing, posting, & calculating machine operators	4	120,303	32,171
345	Duplicating machine operators	4	25,214	3,785
346	Mail preparing & paper handling machine operators	4	2,978	1,311
347	Office mach. operators, n.e.c.	4	12,459	6,940
348	Telephone operators	4	99,426	19,448
353	Communications equipment operators, n.e.c.	4	14,637	5,031
354	Postal clerks, except mail carriers	4	224,732	50,333
355	Mail carriers, postal service	4	250,642	85,477
356	Mail clerks, except postal service	4	124,113	20,708
357	Messengers	4	98,258	25,407
359	Dispatchers	4	172,039	76,155
363	Production coordinators	4	118,886	97,632
364	Traffic, shipping, & receiving clerks	4	537,884	66,810
365	Stock & inventory clerks	4	345,187	77,301
366	Meter readers	4	38,823	7,657
368	Weighers, measurers, checkers, & samplers	4	41,663	2,906
373	Expeditors	4	268,885	37,551
374	Material recording, scheduling, & distrib. clerks, n.e.c.	4	9,301	2,445
375	Insurance adjusters, examiners, & investigators	2	249,632	242,454
376	Investigators & adjusters, except insurance	2	733,381	337,862
377	Eligibility clerks, social welfare	4	57,835	29,759
378	Bill & account collectors	4	159,577	47,047
379	General office clerks	4	558,808	196,513
383	Bank tellers	4	389,140	73,812
384	Proofreaders	4	10,630	1,213
385	Data-entry keyers	4	420,358	137,486
386	Statistical clerks	4	71,842	23,091
387	Teachers' aides	4	538,233	254,634
389	Administrative support occupations, n.e.c.	4	590,574	390,186
413	Supervisors, firefighting & fire prevention occupations	3	17,820	26,194
414	Supervisors, police & detectives	3	55,659	58,505
415	Supervisors, guards	4	38,215	22,766
433	Supervisors, food preparation & service occupations	3	415,710	75,847
448	Supervisors, cleaning & building service workers	4	121,660	55,974
456	Supervisors, personal service occupations	4	43,608	28,049
475	Managers, farms, except horticultural	3	1,640	1,184
476	Managers, horticultural specialty farms	3	4,224	125
477	Supervisors, farm workers	4	734	0
485	Supervisors, related agricultural occupations	4	54,229	39,120
494	Supervisors, forestry & logging workers	4	2,794	6,109
503	Supervisors, mechanics & repairers	3	91,019	123,140
553	Supervisors, brickmasons, stonemasons, & tile setters	4	1,204	1,260
554	Supervisors, carpenters & related workers	4	12,875	1,646
555	Supervisors, electricians & power transmission installers	4	20,131	9,715
556	Supervisors, painters, paperhangers, & plasterers	4	7,584	4,577
557	Supervisors, plumbers, pipefitters, & steamfitters	4	15,965	573
558	Supervisors, construction, n.e.c.	4	297,676	183,104
613	Supervisors, extractive occupations	3	13,961	16,199
628	Supervisors, production occupations	3	542,035	431,574

TABLE A-2.—NUMBER OF FLSA COVERED WORKERS IN WHITE-COLLAR OCCUPATION THAT ARE SUBJECT TO THE PART 541 SALARY LEVEL TEST—Continued

OCC code	Occupation title	Exempt status code (1)	Hourly paid workers	Salaried workers
803	Supervisors, motor vehicle operators	4	37,310	55,345
843	Supervisors, material moving equipment operators	4	6,006	1,054
864	Supervisors, handlers, equip cleaners, & laborers, n.e.c.	4	7,992	5,735
	Total		32,694,067	31,686,296

(1) See Table 3-2.

(2) Not elsewhere classified (n.e.c.)

Note: Some numbers may not add due to rounding.

Source: CONSAD and the U.S. Department of Labor.

TABLE A-3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN \$155 PER WEEK

OCC code	Occupational title	Exempt status code <sup>1</sup>	Subject to salary tests	Total nonexempt	Total exempt
4	Chief executives and general administrators, public admin	1	14,668	716	13,952
5	Administrators & officials, public administration	1	269,143	16,033	253,110
6	Administrators, protective services	1	32,316	1,666	30,650
7	Financial managers	1	623,191	28,750	594,441
8	Personnel & labor relations managers	1	180,553	8,868	171,685
9	Purchasing managers	1	102,247	4,269	97,978
13	Managers, marketing, advertising, & public relations	1	602,720	24,853	577,867
14	Admin, education & related fields	1	83,791	6,004	77,788
15	Managers, medicine & health	1	491,118	28,208	462,910
17	Managers, food serving & lodging establishments	3	685,704	497,115	188,589
18	Managers, properties & real estate	3	287,864	203,605	84,259
19	Funeral directors	2	29,867	8,024	21,843
21	Managers, service organizations, n.e.c.(2)	1	469,483	28,098	441,385
22	Managers & administrators, n.e.c.	1	4,727,919	201,405	4,526,514
23	Accountants & auditors	1	1,007,059	56,089	950,970
24	Underwriters	1	59,503	3,536	55,967
25	Other financial officers	2	582,440	153,454	428,986
26	Management analysts	2	237,587	56,734	180,853
27	Personnel, training, & labor relations specialists	2	359,471	104,951	254,520
28	Purchasing agents & buyers, farm products	2	4,800	1,149	3,651
29	Buyers, wholesale & retail trade except farm products	2	103,738	30,285	73,453
33	Purchase agents & buyers, n.e.c.	2	125,570	39,014	86,556
34	Business & promotion agents	2	30,822	9,936	20,886
35	Construction inspectors	3	27,939	19,074	8,865
36	Inspectors & compliance officers, except construction	3	107,722	71,768	35,954
37	Management related occupations, n.e.c.	2	220,371	76,347	144,024
43	Architects	1	106,161	5,138	101,023
44	Aerospace engineers	1	55,015	1,669	53,346
45	Metallurgical & materials engineers	1	16,242	613	15,629
46	Mining engineers	1	4,528	137	4,391
47	Petroleum engineers	1	12,768	503	12,265
48	Chemical engineers	1	67,075	2,168	64,907
49	Nuclear engineers	1	828	65	763
53	Civil engineers	1	155,242	6,787	148,455
54	Agricultural engineers	1	1,408	60	1,348
55	Engineers, electrical & electronic	1	496,379	18,953	477,426
56	Engineers, industrial	1	169,410	7,803	161,607
57	Engineers, mechanical	1	229,289	9,176	220,113
58	Marine & naval architects	1	7,187	418	6,769
59	Engineers, n.e.c.	1	204,685	9,158	195,527
63	Surveyors & mapping scientists	2	6,771	1,920	4,851
64	Computer systems analysts & scientists	1	1,176,238	50,415	1,125,823
65	Operations & systems researchers & analysts	1	153,985	7,753	146,232
66	Actuaries	1	15,038	573	14,465
67	Statisticians	1	17,607	909	16,698
68	Mathematical scientists, n.e.c.	1	3,315	170	3,145
69	Physicists & astronomers	1	14,534	375	14,159
73	Chemists, except biochemists	1	94,243	4,316	89,927
74	Atmospheric & space scientists	1	3,294	150	3,144
75	Geologists & geodesists	1	30,535	1,624	28,911
76	Physical scientists, n.e.c.	1	24,178	1,301	22,877
77	Agricultural & food scientists	1	19,592	1,097	18,495
78	Biological & life scientists	1	67,745	3,638	64,107

TABLE A-3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN \$155 PER WEEK—Continued

OCC code	Occupational title	Exempt status code <sup>1</sup>	Subject to salary tests	Total nonexempt	Total exempt
79	Forestry & conservation scientists	1	9,086	521	8,565
83	Medical scientists	1	53,678	2,817	50,861
84	Physicians	1	0	0	0
85	Dentists	1	0	0	0
86	Veterinarians	1	16,267	925	15,342
87	Optometrists	1	0	0	0
88	Podiatrists	1	0	0	0
89	Health diagnosing practitioners, n.e.c.	1	0	0	0
95	Registered nurses	1	555,307	33,950	521,357
96	Pharmacists	1	78,029	3,413	74,616
97	Dietitians	3	19,933	14,570	5,363
98	Respiratory therapists	3	22,683	16,353	6,330
99	Occupational therapists	3	30,448	20,984	9,464
103	Physical therapists	2	71,231	19,999	51,232
104	Speech therapists	2	75,935	23,298	52,637
105	Therapists, n.e.c.	2	42,330	14,038	28,292
106	Physicians' assistants	1	33,962	1,714	32,248
113	Earth, environmental, & marine science teachers	1	0	0	0
114	Biological science teachers	1	0	0	0
115	Chemistry teachers	1	0	0	0
116	Physics teachers	1	0	0	0
117	Natural science teachers, n.e.c.	1	719	53	666
118	Psychology teachers	1	579	23	556
119	Economics teachers	1	0	0	0
123	History teachers	1	0	0	0
124	Political science teachers	1	0	0	0
125	Sociology teachers	1	0	0	0
126	Social science teachers, n.e.c.	1	0	0	0
127	Engineering teachers	1	0	0	0
128	Math. science teachers	1	0	0	0
129	Computer science teachers	1	840	78	762
133	Medical science teachers	1	0	0	0
134	Health specialties teachers	1	0	0	0
135	Business, commerce, & marketing teachers	1	0	0	0
136	Agriculture & forestry teachers	1	0	0	0
137	Art, drama, & music teachers	1	0	0	0
138	Physical education teachers	1	0	0	0
139	Education teachers	1	0	0	0
143	English teachers	1	1,221	112	1,109
144	Foreign language teachers	1	0	0	0
145	Law teachers	1	0	0	0
146	Social work teachers	1	0	0	0
147	Theology teachers	1	0	0	0
148	Trade & industrial teachers	1	0	0	0
153	Teachers, postsecondary, n.e.c.	1	0	0	0
154	Postsecondary teachers, subject not specified	1	5,076	267	4,809
155	Teachers, prekindergarten & kindergarten	2	76,066	30,609	45,457
156	Teachers, elementary school	1	0	0	0
157	Teachers, secondary school	1	0	0	0
158	Teachers, special education	1	9,028	687	8,341
159	Teachers, n.e.c.	1	310,873	20,692	290,181
163	Counselors, Educational & Vocational	2	27,863	8,566	19,297
164	Librarians	1	107,389	6,701	100,688
165	Archivists & curators	1	14,923	843	14,080
166	Economists	2	70,746	19,706	51,040
167	Psychologists	1	128,495	7,890	120,605
168	Sociologists	2	384	64	320
169	Social scientists, n.e.c.	2	14,053	4,105	9,948
173	Urban planners	2	11,002	2,952	8,050
174	Social workers	3	451,756	334,732	117,024
175	Recreation workers	3	32,037	25,091	6,946
178	Lawyers & Judges	1	0	0	0
183	Authors	2	34,782	10,031	24,751
184	Technical writers	3	37,555	24,974	12,581
185	Designers	1	288,719	17,193	271,526
186	Musicians & composers	1	56,491	4,179	52,312
187	Actors & directors	1	79,236	4,050	75,186
188	Painters, sculptors, craft-artists, & artist printmakers	1	41,755	2,804	38,951
189	Photographers	1	34,892	2,523	32,369
193	Dancers	1	13,353	1,170	12,183

TABLE A-3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN \$155 PER WEEK—Continued

OCC code	Occupational title	Exempt status code <sup>1</sup>	Subject to salary tests	Total nonexempt	Total exempt
194	Artists, performers, & related workers, n.e.c.	1	34,090	2,557	31,533
195	Editors & reporters	3	157,150	108,308	48,842
197	Public relations specialists	3	123,346	85,253	38,093
198	Announcers	2	20,866	7,653	13,213
199	Athletes	4	42,674	40,167	2,507
203	Clinical laboratory technologists & technicians	3	61,577	45,016	16,561
204	Dental hygienists	3	35,460	25,944	9,516
205	Health record technologists & technicians	3	3,784	2,745	1,039
206	Radiologic technicians	3	28,006	20,200	7,806
207	Licensed practical nurses	3	43,258	33,490	9,768
208	Health technologists & technicians, n.e.c.	3	106,209	82,319	23,890
213	Electrical & electronic technicians	4	138,664	128,529	10,135
214	Industrial engineering technicians	4	765	694	71
215	Mechanical engineering technicians	4	5,626	5,186	440
216	Engineering technicians, n.e.c.	4	51,567	48,131	3,436
217	Drafting occupations	4	75,759	70,934	4,825
218	Surveying & mapping technicians	4	12,459	11,812	647
223	Biological technicians	4	36,520	34,477	2,043
224	Chemical technicians	4	13,038	12,151	887
225	Science technicians, n.e.c.	4	22,813	21,248	1,565
226	Airplane pilots & navigators	4	11,942	10,899	1,043
227	Air traffic controllers	4	7,013	6,476	537
228	Broadcast equipment operators	4	17,606	16,514	1,092
229	Computer programmers	2	419,594	106,640	312,954
233	Tool programmers, numerical control	4	2,917	2,818	99
234	Legal assistants	4	210,484	197,927	12,557
235	Technicians, n.e.c.	4	58,809	54,794	4,015
243	Supervisors & Proprietors, Sales Occupations	2	2,110,973	639,504	1,471,469
253	Insurance sales occupations	2	338,111	104,906	233,205
254	Real estate sales occupations	3	397,214	274,422	122,792
255	Securities & financial services sales occupations	2	389,500	94,325	295,175
256	Advertising & related sales occupations	2	124,299	38,599	85,700
257	Sales occupations, other business services	3	406,506	274,454	132,052
258	Sales engineers	3	31,762	19,486	12,276
259	Sales representatives, mining, manufact, & wholesale	3	1,083,546	719,374	364,172
263	Sales workers, motor vehicles & boats	4	33,687	31,744	1,943
264	Sales workers, apparel	4	32,719	31,061	1,658
265	Sales workers, shoes	4	10,726	10,400	326
266	Sales workers, furniture & home furnishings	4	81,247	76,908	4,339
267	Sales workers, radio, Tv, hi-fi, & appliances	4	110,822	103,629	7,193
268	Sales workers, hardware & building supplies	4	76,624	71,853	4,771
269	Sales workers, parts	4	34,874	32,885	1,989
274	Sales workers, other commodities	4	218,581	206,150	12,431
275	Sales counter clerks	4	26,317	24,997	1,320
276	Cashiers	4	166,023	159,718	6,305
277	Street & door-to-door sales workers	4	0	0	0
278	News vendors	4	31,236	30,207	1,029
283	Demonstrators, promoters & models, sales	4	4,717	4,385	332
284	Auctioneers	4	3,083	2,863	220
285	Sales support occupations, n.e.c.	4	5,922	5,641	281
303	Supervisors, general office	1	209,218	15,033	194,185
304	Supervisors, computer equipment operators	1	12,650	761	11,889
305	Supervisors, financial records processing	1	61,890	3,713	58,177
306	Chief communications operators	1	3,105	200	2,905
307	Supervisors, distribution, scheduling, & adjusting clerks	1	82,713	5,465	77,248
308	Computer operators	4	95,419	89,818	5,601
309	Peripheral equipment operators	4	0	0	0
313	Secretaries	4	732,456	700,875	31,581
314	Stenographers	4	41,427	39,303	2,124
315	Typists	4	173,573	165,891	7,682
316	Interviewers	4	34,809	33,181	1,628
317	Hotel clerks	4	15,560	14,859	701
318	Transportation ticket & reservation agents	4	83,940	79,540	4,400
319	Receptionists	4	159,035	152,899	6,136
323	Information clerks, n.e.c.	4	91,913	88,119	3,794
325	Classified-ad clerks	4	912	894	18
326	Correspondence clerks	4	3,215	3,000	215
327	Order clerks	4	66,907	63,590	3,317
328	Personnel clerks, except payroll & timekeeping	4	15,127	14,429	698
329	Library clerks	4	19,863	18,989	874

TABLE A-3.—NUMBER OF EXEMPT AND NONEXEMPT WHITE-COLLAR SALARIED WORKERS WHO EARN MORE THAN \$155 PER WEEK—Continued

OCC code	Occupational title	Exempt status code <sup>1</sup>	Subject to salary tests	Total nonexempt	Total exempt
335	File clerks	4	43,795	42,138	1,657
336	Records clerks	4	55,612	52,888	2,724
337	Bookkeepers, accounting, & auditing clerks	4	418,533	400,568	17,965
338	Payroll & timekeeping clerks	4	52,725	50,180	2,545
339	Billing clerks	4	51,114	48,834	2,280
343	Cost & rate clerks	4	15,380	14,589	791
344	Billing, posting, & calculating machine operators	4	32,171	30,724	1,447
345	Duplicating machine operators	4	3,479	3,249	230
346	Mail preparing & paper handling machine operators	4	1,310	1,277	33
347	Office mach. operators, n.e.c.	4	6,940	6,656	284
348	Telephone operators	4	18,620	17,753	867
353	Communications equipment operators, n.e.c.	4	5,030	4,854	176
354	Postal clerks, except mail carriers	4	48,045	45,012	3,033
355	Mail carriers, postal service	4	83,867	78,774	5,093
356	Mail clerks, except postal service	4	20,309	19,526	783
357	Messengers	4	19,617	18,875	742
359	Dispatchers	4	76,155	72,302	3,853
363	Production coordinators	4	96,876	91,080	5,796
364	Traffic, shipping, & receiving clerks	4	64,564	61,118	3,446
365	Stock & inventory clerks	4	74,641	70,701	3,940
366	Meter readers	4	7,657	7,253	404
368	Weighers, measurers, checkers, & samplers	4	2,610	2,453	157
373	Expeditors	4	36,606	34,866	1,740
374	Material recording, scheduling, & distrib. clerks, n.e.c.	4	2,445	2,256	189
375	Insurance adjusters, examiners, & investigators	2	241,764	80,980	160,784
376	Investigators & adjusters, except insurance	2	331,895	120,907	210,988
377	Eligibility clerks, social welfare	4	28,952	27,659	1,293
378	Bill & account collectors	4	47,047	44,833	2,214
379	General office clerks	4	184,737	176,255	8,482
383	Bank tellers	4	69,136	66,580	2,556
384	Proofreaders	4	1,213	1,126	87
385	Data-entry keyers	4	130,882	124,925	5,957
386	Statistical clerks	4	22,689	21,461	1,228
387	Teachers' aides	4	233,796	227,718	6,078
389	Administrative support occupations, n.e.c.	4	376,525	355,756	20,769
413	Supervisors, firefighting & fire prevention occupations	3	26,194	16,772	9,422
414	Supervisors, police & detectives	3	58,504	40,386	18,118
415	Supervisors, guards	4	22,766	21,276	1,490
433	Supervisors, food preparation & service occupations	3	70,106	55,774	14,332
448	Supervisors, cleaning & building service workers	4	54,408	51,853	2,555
456	Supervisors, personal service occupations	4	26,864	25,548	1,316
475	Managers, farms, except horticultural	3	1,184	874	310
476	Managers, horticultural specialty farms	3	125	107	18
477	Supervisors, farm workers	4	0	0	0
485	Supervisors, related agricultural occupations	4	38,427	36,355	2,072
494	Supervisors, forestry & logging workers	4	5,291	5,050	241
503	Supervisors, mechanics & repairers	3	121,639	83,730	37,909
553	Supervisors, brickmasons, stonemasons, & tile setters	4	1,260	1,229	31
554	Supervisors, carpenters & related workers	4	1,646	1,505	141
555	Supervisors, electricians & power trans. installers	4	9,715	8,922	793
556	Supervisors, painters, paperhangers, & plasterers	4	4,577	4,224	353
557	Supervisors, plumbers, pipefitters, & steamfitters	4	573	532	41
558	Supervisors, construction, n.e.c.	4	182,003	169,694	12,309
613	Supervisors, extractive occupations	3	16,199	10,366	5,833
628	Supervisors, production occupations	3	429,007	294,158	134,849
803	Supervisors, motor vehicle operators	4	55,346	52,412	2,934
843	Supervisors, material moving equipment operators	4	1,054	993	61
864	Supervisors, handlers, equip cleaners, & laborers, n.e.c.	4	5,736	5,449	287
	Total		30,883,198	11,443,807	19,439,391

(1) See Table 3-2.

(2) Not elsewhere classified (n.e.c.)

Note: Some numbers may not add due to rounding.

Source: CONSAD and the U.S. Department of Labor.

TABLE A-4.—NUMBER OF WHITE-COLLAR SALARIED WORKERS EARNING AT LEAST \$155 BUT LESS THAN \$455 PER WEEK WHO WILL MOST LIKELY GAIN COMPENSATION UNDER THE FINAL RULE

OCC code	Occupation title	Number of exempt workers
4	Chief executives & general administrators, public admin	734
5	Administrators & officials, public administration	21,133
6	Administrators, protective services	2,666
7	Financial managers	31,190
8	Personnel & labor relations managers	7,436
9	Purchasing managers	1,881
13	Managers, marketing, advertising, & public relations	24,677
14	Admin, education & related fields	17,564
15	Managers, medicine & health	45,404
17	Managers, food serving & lodging establishments	16,070
18	Managers, properties & real estate	7,086
19	Funeral directors	912
21	Managers, service organizations, n.e.c. (*)	45,865
22	Managers & administrators, n.e.c.	203,179
23	Accountants & auditors	51,848
24	Underwriters	4,624
25	Other financial officers	21,432
26	Management analysts	3,997
27	Personnel, training, & labor relations specialists	12,066
29	Buyers, wholesale & retail trade except farm products	4,393
33	Purchase agents & buyers, n.e.c.	5,287
34	Business & promotion agents	2,611
36	Inspectors & compliance officers, except construction	541
37	Management related occupations, n.e.c.	14,795
	Other Executive, Administrative, & Managerial Occ's	468
43	Architects	2,303
44	Aerospace engineers	1,107
45	Metallurgical & materials engineers	629
48	Chemical engineers	500
53	Civil engineers	2,929
55	Engineers, electrical & electronic	14,205
56	Engineers, industrial	2,699
57	Engineers, mechanical	5,691
59	Engineers, n.e.c.	6,233
64	Computer systems analysts & scientists	36,784
65	Operations & systems researchers & analysts	8,087
67	Statisticians	1,445
68	Mathematical scientists, n.e.c.	934
73	Chemists, except biochemists	4,740
75	Geologists & geodesists	672
76	Physical scientists, n.e.c.	790
77	Agricultural & food scientists	1,405
78	Biological & life scientists	4,710
83	Medical scientists	3,669
86	Veterinarians	594
95	Registered nurses	48,506
96	Pharmacists	4,541
97	Dietitians	561
103	Physical therapists	1,875
104	Speech therapists	1,183
105	Therapists, n.e.c.	4,420
106	Physicians' assistants	1,592
143	English teachers	1,109
155	Teachers, prekindergarten & kindergarten	19,966
158	Teachers, special education	768
159	Teachers, n.e.c.	48,451
163	Counselors, Educational & Vocational	1,719
164	Librarians	7,439
166	Economists	2,167
167	Psychologists	13,839
169	Social scientists, n.e.c.	990
174	Social workers	8,776
175	Recreation workers	1,632
183	Authors	1,829
185	Designers	32,399
186	Musicians & composers	19,399
187	Actors & directors	8,568
188	Painters, sculptors, craft-artists, & artist printmakers	4,895
189	Photographers	8,397
193	Dancers	6,811

TABLE A-4.—NUMBER OF WHITE-COLLAR SALARIED WORKERS EARNING AT LEAST \$155 BUT LESS THAN \$455 PER WEEK WHO WILL MOST LIKELY GAIN COMPENSATION UNDER THE FINAL RULE—Continued

OCC code	Occupation title	Number of exempt workers
194	Artists, performers, & related workers, n.e.c.	9,974
195	Editors & reporters	1,830
197	Public relations specialists	1,172
198	Announcers	2,822
	Other Professional Specialty Occ's (1)	2,754
203	Clinical laboratory technologists & technicians	1,199
204	Dental hygienists	752
206	Radiologic technicians	619
207	Licensed practical nurses	1,245
208	Health technologists & technicians, n.e.c.	5,563
229	Computer programmers	12,603
	Other Technicians & Related Support Occ's (2)	1,551
243	Supervisors & Proprietors, Sales Occupations	143,856
253	Insurance sales occupations	29,218
254	Real estate sales occupations	8,715
255	Securities & financial services sales occupations	12,588
256	Advertising & related sales occupations	9,836
257	Sales occupations, other business services	7,263
259	Sales representatives, mining, manufact, & wholesale	13,161
274	Sales workers, other commodities	954
276	Cashiers	1,107
	Other Sales Occ's (3)	2,342
303	Supervisors, general office	27,243
305	Supervisors, financial records processing	1,870
307	Supervisors, distribution, scheduling, & adjusting clerks	10,172
313	Secretaries	4,825
315	Typists	874
319	Receptionists	1,220
323	Information clerks, n.e.c.	727
337	Bookkeepers, accounting, & auditing clerks	2,685
375	Insurance adjusters, examiners, & investigators	16,705
376	Investigators & adjusters, except insurance	36,422
379	General office clerks	1,095
383	Bank tellers	688
385	Data-entry keyers	749
387	Teachers' aides	2,203
389	Administrative support occupations, n.e.c.	1,387
	Other Administrative Support Occ's (4)	5,969
628	Supervisors, production occupations	4,334
433	Supervisors, food preparation & service occupations	3,664
503	Supervisors, mechanics & repairers	1,424
414	Supervisors, police & detectives	1,144
	All Other White-Collar Occ's (5)	1,514
	Total	1,297,855

(\*) Not elsewhere classified (n.e.c.)

(1) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Urban Planners, Nuclear Engineers, Actuaries, and Archivists.

(2) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Legal Assistants, Drafting Occ's, Electrical Technicians, Engineering Technicians, and Biological Technicians.

(3) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Sales Workers Furniture, Sales Workers Radio TV, Sales Engineers, Sales Workers Hardware, and News Vendors.

(4) All of the occupations included in this group have less than 450 workers who will become nonexempt such as Order Clerks, Computer Operators, Dispatchers, Transportation Ticket Agents, Stock Clerks, Stenographers, and Billing Clerks.

(5) All of the occupations included in this group have less than 400 workers who will become nonexempt such as supervisors for cleaning & building service, construction, motor vehicle operators, and extractive occupations.

Note: Some numbers may not add due to rounding.

Source: CONRAD and the U.S. Department of Labor.

TABLE A-5.—NUMBER OF EXEMPT WHITE-COLLAR SALARIED WORKERS UNDER THE HIGHLY COMPENSATED TEST

OCC code	Occupational title	Total exempt under stand-ard duties test	Total exempt under highly compensated test	Newly exempt under highly compensated test
17	Managers, food serving & lodging establishments	15,163	18,195	3,031
18	Managers, properties & real estate	12,993	15,599	2,606
22	Managers & administrators, n.e.c. (*)	751,160	752,900	1,740
25	Other financial officers	58,462	62,303	3,841
26	Management analysts	28,086	29,883	1,797



TABLE A-5.—NUMBER OF EXEMPT WHITE-COLLAR SALARIED WORKERS UNDER THE HIGHLY COMPENSATED TEST—  
Continued

OCC code	Occupational title	Total exempt under stand-ard duties test	Total exempt under highly compensated test	Newly exempt under highly compensated test
27	Personnel, training, & labor relations specialists	19,012	20,239	1,227
	Other Executive, Administrative, & Managerial Occ's	358,867	361,087	2,216
174	Social workers	3,747	4,492	745
195	Editors & reporters	5,305	6,369	1,064
197	Public relations specialists	2,979	3,571	592
	Other Professional Specialty Occ's (2)	247,644	250,238	2,600
	Technicians & Related Support Occ's (3)	2,858	4,011	1,151
243	Supervisors & Proprietors, Sales Occupations	122,665	130,626	7,961
253	Insurance sales occupations	26,647	28,365	1,719
254	Real estate sales occupations	17,449	20,945	3,496
255	Securities & financial services sales occupations	72,297	77,083	4,786
257	Sales occupations, other business services	19,824	23,767	3,943
258	Sales engineers	3,232	3,866	633
259	Sales representatives, mining, manufact, & wholesale	40,365	48,394	8,029
	Other Sales Occ's (4)	9,865	11,711	1,847
	Administrative Support Occ's (5)	18,332	20,554	2,102
628	Supervisors, production occupations	6,444	7,724	1,281
	All Other White-Collar Occ's (6)	4,642	5,813	1,170
	Total	1,848,038	1,907,735	59,577

(\*) Not elsewhere classified (n.e.c.).

(1) Computer system analysts and scientists (occupation 64), registered nurses (occupation 95), pharmacists (occupation 96) and computer programmers (occupation 229) were removed from the analysis (see Section 4-3).

(2) All of the occupations included in this group have less than 300 workers who could become exempt such as Dietitians, Athletes, Economists and Electrical Engineers.

(3) All of the occupations included in this group have less than 350 workers who could become exempt such as Legal Assistants, Electrical Technicians, Engineering Technicians and Airplane Pilots.

(4) All of the occupations included in this group have less than 500 workers who could become exempt such as Advertising & Related Sales and Sales Workers Radio TV.

(5) All of the occupations included in this group have less than 400 workers who could become exempt such as supervisory Investigators & Adjusters, Administrative Support Occ's, and Secretaries.

(6) All of the occupations included in this group have less than 300 workers who could become exempt such as supervisors for mechanics & repairers, and extractive occupations.

Note: Some numbers may not add due to rounding.

Source: CONSAD Research Corporation and U.S. Department of Labor.

TABLE A-6.—NUMBER OF WHITE-COLLAR PAID HOURLY WORKERS WHO COULD BECOME EXEMPT UNDER THE HIGHLY COMPENSATED TEST

OCC code	Occupational title	Total number of paid hourly workers earning at least \$100,000 per year	Estimated number who could become exempt under highly compensated test
5	Administrators & officials, public administration	2,035	814
6	Administrators, protective services	1,949	779
7	Financial managers	2,576	1,031
13	Managers, marketing, advertising, & public relations	1,309	523
15	Managers, medicine & health	3,471	1,388
21	Managers, service organizations, n.e.c. (*)	3,591	1,436
22	Managers & administrators, n.e.c.	36,487	14,595
23	Accountants & auditors	6,737	2,695
26	Management analysts	4,879	976
	Other Executive, Administrative, & Managerial Occ's	9,031	1,875
43	Architects	1,379	552
44	Aerospace engineers	1,657	663
55	Engineers, electrical & electronic	5,762	2,305
56	Engineers, industrial	4,168	1,667
57	Engineers, mechanical	1,726	690
59	Engineers, n.e.c.	1,889	756
65	Operations & systems researchers & analysts	1,639	656
76	Physical scientists, n.e.c.	1,542	617
156	Teachers, elementary school	1,724	689
185	Designers	3,826	1,531
188	Painters, sculptors, craft-artists, & artist printmakers	2,401	960
	Other Professional Specialty Occ's (2)	18,048	4,099
	Technicians & Related Support Occ's (3)	19,294	1,231

TABLE A-6.—NUMBER OF WHITE-COLLAR PAID HOURLY WORKERS WHO COULD BECOME EXEMPT UNDER THE HIGHLY COMPENSATED TEST—Continued

OCC code	Occupational title	Total number of paid hourly workers earning at least \$100,000 per year	Estimated number who could become exempt under highly compensated test
243 .....	Supervisors & Proprietors, Sales Occupations .....	9,522	1,904
	Other Sales Occ's (4) .....	12,125	1,170
	Administrative Support Occ's (5) .....	11,618	631
	All Other White-Collar Occ's (6) .....	12,002	829
	Total .....	182,387	47,062

(\*) Not elsewhere classified (n.e.c.).

(1) Computer system analysts and scientists (occupation 64), registered nurses (occupation 95), pharmacists (occupation 96) and computer programmers (occupation 229) were removed from the analysis (see Section 4-3).

(2) All of the occupations included in this group have less than 350 workers who could become exempt such as Actors & Directors, Nuclear Engineers, Chemical Engineers, Civil Engineers, Medical Scientists, etc.

(3) All of the occupations included in this group have less than 300 workers who could become exempt such as Health Technologists, Clinical Laboratory Technologists, Airplane Pilots, etc.

(4) All of the occupations included in this group have less than 450 workers who could become exempt such as Sales Representatives for Mining & Manufacturing, Advertising & Related Sales, etc.

(5) All of the occupations included in this group have less than 150 workers who could become exempt such as supervisory Secretaries and Mail Carriers for the Postal Service.

(6) All of the occupations included in this group have less than 300 workers who could become exempt such as supervisors for construction, production, and extractive occupations.

Note: Some numbers may not add due to rounding.

Source: CONRAD and the U.S. Department of Labor.

## Appendix B

### Analysis of the 2003 Current Population Survey Outgoing Rotation Group Data

The Department conducted an analysis of the recently released 2003 Current Population Survey (CPS) Outgoing Rotation Group data to determine if the updated data would have an impact on the conclusions reached in the regulatory impact analysis (RIA) using the 2002 data. Although it is not possible to completely update the RIA due to the significant changes made to the CPS in 2003, the following analysis indicates that using the 2003 data would not alter the Department's determination of the salary level test nor would using the 2003 data have a significant impact on the RIA conclusions.

### Impact of the Changes to the CPS

In 2003, the industry and occupation classifications used in the CPS were significantly revised. The industry classification for workers was changed from the 1987 Standard Industrial Classification (SIC) system to the 2002 North American Industry Classification System (NAICS). Using the 2003 CPS data would require updating the data used to develop the profiles in Chapter 5 of the RIA, the cost estimates presented in Chapter 6 that are based upon the number of establishments in each industry, and the assessment of the impacts presented in Chapter 7. These revisions would also require a complicated conversion of the Dunn and Bradstreet profit data from the SIC system it uses to the NAICS system.

In 2003, the CPS changed its occupational classification of workers from the 1990 Standard Occupational Classification (SOC) system to the 2000 SOC system used in the 2000 Census. The significant changes that were made to the 2000 SOC make comparisons between 2002 CPS occupational

categories and 2003 categories very difficult. The U.S. Census Bureau warns that "you cannot compare the categories directly across the two years. The wording of the categories is different, and, even when the words appear to be the same, the definitions of the categories are sometimes different." (U.S. Census Bureau, "Instructions for Creating 1990-2000 Occupation Crosswalks, Using the Occupation Crosswalk Template," April 30, 2003) The Census Bureau also notes that although "different crosswalks could be created based on many different variables, including geography, sex, and race \* \* \* the crosswalk for occupational distributions is likely different in New York compared to Kansas, and for men compared to women. To create many different crosswalks depending on all characteristics, however, would require a very large sample controlled for all these variables. Neither financial nor human resources were available to create and analyze such a large sample."

The baseline estimates of the number of currently exempt and nonexempt workers (presented in Chapter 3) as well as the changes in the exemption status of workers resulting from the final rule (presented in Chapter 4) were based upon the exemption probability determinations made by the Wage and Hour Division staff in response to the GAO request in 1998 (see Chapter 3). These exemption probabilities were directly tied to the definitions of the 1990 SOC categories used in the 2002 CPS (and prior years) and not the definitions of the 2000 SOC categories used in the 2003 CPS. Further, many of the costs developed in Chapter 6 of the RIA were also developed on the basis of these determinations, particularly the determination of the occupations considered white-collar and blue-collar. After reviewing the 1990 SOC categories and the 2000 SOC categories, the Department has determined

that it is not possible to accurately map the exemption probabilities developed for the 1990 SOC categories to the 2000 SOC categories, particularly given the Census Bureau warnings. Many of the 1990 categories are mapped to several 2000 categories and many of 2000 categories are mapped to several 1990 categories, and as noted above many of the underlying definitions have changed. There is also an increase in the number of management and service-related occupations; an increase in occupations formerly called "professional" and "technical," especially healthcare and computer-related occupations; and a decrease in the number of clerical, maintenance, and production occupations.

Although it is theoretically possible to develop a schema to apportion the probabilities developed for the 1990 SOC categories to the 2000 SOC categories, the Department has determined that doing so could significantly distort the WHD exemption probability determinations for many occupations in the 2003 CPS. For example, the probability exemptions for engineering and science technicians in the 2002 CPS range from zero to 10 percent. However, these 1990 CPS categories, that each have the lowest exemption probability (zero to 10 percent), would be mapped to computer specialists, architects, life and physical scientists, and art and design workers, among others that may or may not have a higher exemption probability. Simply apportioning the probabilities without completely understanding the definitions underlying the new occupation categories could lead to erroneous results. Moreover, because some of the definitions of the 2000 SOC categories are different than the 1990 categories it is not certain that an accurate exemption probability crosswalk could be developed.

Therefore, the Department determined that, given the judgments needed to apportion the probabilities used for the 1990 SOC categories, it would be more precise to develop an entirely new set of probabilities for the 2000 SOC categories before using them. The Department also concluded, however, that developing an entire new set of probabilities at this stage of the rulemaking would not be appropriate, because the resulting estimates would not have had the benefit of review by GAO and others. Thus, the Department concluded that the 2003 CPS should not be used in the RIA and has only compared descriptive statistics from the 2003

CPS to the 2002 CPS in this Appendix. This comparison, however, strongly suggests that the quantitative and qualitative conclusions reached in the RIA using the 2002 CPS data are still valid.

**Estimated Number of Workers Covered by the FLSA**

The 2003 CPS data estimates a total employment level of 137.7 million compared to 134.3 million in the RIA using the 2002 CPS data. As noted in the RIA, most of the difference (2.2 million, or 64.7 percent) is due to using weights adjusted for the 2000 Census counts in the 2003 CPS, and using weights based on the 1990 Census in the

2002 CPS does not significantly affect the accuracy or quality of the results. The remaining difference (1.2 million or 35.3 percent) is due to employment growth as the economy expanded.

Following the procedure discussed in Chapter 3 of the RIA, the Department excluded workers who are specifically exempt from the FLSA's overtime provisions. A description of each group excluded, along with the specific CPS categories and codes used are presented in Table B-1. A total of 21.2 million workers were excluded compared to 19.5 million in the RIA using the 2002 CPS data.

**TABLE B-1.—WORKERS EXEMPT FROM THE FLSA'S OVERTIME PROVISIONS**

Occupation	CPS categories/codes	Number of workers (1,000's)
Self-Employed or Unpaid Volunteers .....	(PEIO1COW = 6, 7 & 8) and not (PEIO1OCD = 2040, 2050 & 2060) .....	13,974
Clergy and Religious .....	(PEIO1OCD = 2040, 2050 & 2060) not in (PEIO1COW = 1) .....	555
Employees of Carriers .....	.....	
Rail .....	(PEIO1OCD = 9240, 9200, 9260 & 9230) in (PEIO1ICD = 6080 & 6290) .....	101
Highway .....	(PEIO1OCD = 7110, 7200, 7210, 7220 & 9130) in (PEIO1ICD = 6170 & 6370) .....	1,323
Sea .....	(PEIO1OCD = 9310, 9300, 9520 & 9330) in (PEIO1ICD = 6090 & 6280) .....	30
Air .....	(PEIO1OCD = 9030, 7140 & 6070) .....	147
Agriculture .....	(PEIO1ICD = 170 & 180) .....	1,879
Partsmen, Salesmen & Mechanics at Auto Dealers.	(PEIO1OCD = 4700, 4760, 4850, 4750, 7110, 7200, 7210, 7220, 7150 & 7160) in (PEIO1ICD = 4670).	830
Federal Employees (Not postal, TVA and LC).	(PEIO1COW = 1) not in (PEIO1ICD = 6370), not in ((PEIO1ICD = 570) in (GESTFIPS = 21, 47, 28, 01, 13, 37 & 51)), and not in ((PEIO1ICD = 6770) in (GESTFIPS = 11)).	2,381
<b>Total .....</b>	.....	<b>21,222</b>

Note: Equivalent to Table 3-1 and associated text in the RIA. Source: U.S. Department of Labor.

After excluding the workers in occupations exempt from the FLSA's overtime provisions 116.5 million workers remain compared to an estimated 114.8 million using the 2002 CPS data (see Table B-2). In 2003, there were 70.3 million paid hourly workers and 46.2 million salaried workers compared to 69.0 million paid hourly workers and 45.8 million salaried workers in 2002. The difference between the total numbers of salaried employees is just 0.9 percent.

**TABLE B-2.—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA**

Year	Number of workers (1,000's)		
	Hourly	Salary	Total
2002 .....	68,982	45,784	114,765
2003 .....	70,300	46,202	116,514

Source: U.S. Department of Labor. PEERNHRY = 1 for Hourly Workers and 2 for Salaried.

**Estimated Number of Workers Subject to the Part 541 Salary Test**

The Department also developed estimates of the number of workers subject to the Part 541 salary level tests using the 2003 CPS data. As was done in Chapter 3 of the RIA, the Department excluded workers in occupations not subject to the salary tests. Table B-3 presents a description of each group excluded, along with the specific codes used. In 2003, there were 7.6 million workers were covered by the FLSA's overtime provisions but not subject to the salary level test, the same number that was estimated in the RIA using 2002 CPS data.

**TABLE B-3.—WORKERS NOT SUBJECT TO THE PART 541 SALARY LEVEL TEST IN 2003**

Occupation	CPS codes	Number of workers (1,000's)
Teachers & Academic Administrative Personnel in Education Establishments.	(PEIO1OCD = 230, 2000, 2200, 2300, 2310, 2320, 2330, 2340 & 2550) in (PEIO1ICD = 7860 & 7870).	6,157
Doctors .....	(PEIO1OCD = 3060, 3010, 3040, 3120 & 3260) .....	643
Lawyers & Judges .....	(PEIO1OCD = 2100 & 2110) .....	632
Street & Door-to-Door Sales .....	(PEIO1OCD = 4950) .....	151
<b>Total .....</b>	.....	<b>7,583</b>

Note: Equivalent to Table 3-3 and the associated text in the RIA. Source: U.S. Department of Labor.

In 2003, 108.9 million workers were covered by the FLSA's overtime provisions and subject to the salary level test compared to 107.2 million workers in 2002 (see Table B-4). In 2003, 69.2 million of these workers were paid by the hour and 39.7 million were salaried employees compared to 67.9 million paid hourly workers and 39.3 million salaried workers in 2002.

**TABLE B-4.—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA AND SUBJECT TO THE SALARY LEVEL TEST**

Year	Number of Workers (1,000's)		
	Hourly	Salary	Total
2002 .....	67,903	39,308	107,211

**TABLE B-4.—ESTIMATED NUMBER OF WORKERS COVERED BY THE FLSA AND SUBJECT TO THE SALARY LEVEL TEST—Continued**

Year	Number of Workers (1,000's)		
	Hourly	Salary	Total
2003 .....	69,247	39,683	108,930

Source: U.S. Department of Labor.

The distribution of workers by income who are covered by the FLSA and subject to the Part 541 salary level tests in 2002 and 2003 are presented in tables B-5 and B-6. Based upon the 2003 CPS data, the Department estimates that 6.7 million salaried workers who earn between \$155 and \$455 per week would have their overtime protection strengthened by raising the salary level test

in the final rule. This is similar to the 6.7 million based on the 2002 CPS data that was estimated in the RIA. Therefore, the Department concludes that using the 2003 CPS data would not change its estimate of the number of salaried workers who earn between \$155 and \$455 per week who will have their overtime protection strengthened by the final rule.

Based upon the 2003 CPS data, the Department estimates there are 2.9 million workers who earn \$1,923 or more per week compared to 2.7 million in 2002. Most of the difference, 82.5 percent, is from the increase in salaried workers, the vast majority of whom (as estimated in the RIA) are probably exempt under the current regulation. However, it is not possible to estimate the number of exempt and nonexempt workers because of the changes to the occupation categories discussed above.

**TABLE B-5.—WORKERS SUBJECT TO THE 541 SALARY LEVEL TESTS IN 2002**

Weekly earnings	Covered workers (1,000's)		
	Hourly	Salary	Total
Less than \$155 .....	7,700	1,767	9,467
\$155 to \$454.99 .....	31,351	6,749	38,100
\$455 to \$1,923.07 .....	28,506	28,472	56,978
\$1,923.08 or more .....	345	2,321	2,666
Total .....	67,902	39,309	107,211

Source: U.S. Department of Labor.

**TABLE B-6.—WORKERS SUBJECT TO THE 541 SALARY LEVEL TESTS IN 2003**

Weekly earnings	Covered workers (1,000's)		
	Hourly	Salary	Total
Less than \$155 .....	7,470	1,537	9,007
\$155 to \$454.99 .....	30,920	6,692	37,612
\$455 to \$1,923.07 .....	30,463	28,902	59,365
\$1,923.08 or more .....	394	2,552	2,946
Total .....	69,247	39,683	108,930

Source: U.S. Department of Labor.

#### The 2003 CPS Data and the Salary Level Test

As discussed in the preamble, the Department based its determination of the \$455 weekly salary level requirement in the Part 541 duties tests, in part, on preamble Tables 3, 4 and 5. Although it is not possible to update preamble Table 4 (Likely Exempt Workers) because of the changes to the occupation categories (see discussion above), updates of the other two tables using the 2003 CPS data are presented below.

Although the median weekly earnings for all full-time salary workers covered by the overtime provisions of the FLSA increased from \$800 in 2002 to \$808 in 2003, Table B-7 suggests that salaries declined in retail in

2003 compared to 2002. The 20th percentile in retail was just under \$450 in 2003 (see Table B-7) compared to \$455 in 2002 (see Preamble Table 3). Thus, the choice of the \$455 salary level is valid whether it is based upon the 2002 or the 2003 CPS data. The Department also notes that the lack of salary growth in retail appears to be consistent with many of the comments that were received on behalf of small businesses and summarized in the preamble (see the Regulatory Flexibility Analysis).

#### Summary

Although it is not possible to completely update the RIA due to the significant changes

made to the occupation categories that were used in the 2002 CPS, an analysis of descriptive statistics from the 2003 CPS indicates that using the 2003 data would not alter the Department's determination of the salary level test nor would using the 2003 data have a significant impact on the RIA conclusions. The number of workers, 6.7 million, who earn between \$155 and \$455 per week and will have their overtime protection strengthened by the final rule is unchanged using the 2003 data, and the number of workers who earn more than \$100,000 per year and could have their exemption status changed is not significantly higher.

TABLE B-7.—FULL-TIME SALARIED EMPLOYEES COVERED BY THE FLSA IN 2003

Earnings		Percentile		
Weekly	Annual	All	South	Retail
\$155	\$8,060	1.5	1.4	2.2
255	13,260	4.1	4.6	5.9
355	18,460	9.2	10.8	12.2
380	19,760	10.1	11.9	13.5
405	21,060	12.8	15.1	17.4
425	22,100	13.8	16.3	18.5
450	23,400	15.2	18.0	20.3
455	23,660	15.3	18.0	20.3
460	23,920	15.4	18.1	20.4
465	24,180	16.6	19.5	21.9
470	24,440	16.7	19.5	22.0
475	24,700	16.8	19.7	22.2
480	24,960	17.3	20.2	22.8
485	25,220	18.2	21.3	24.2
490	25,480	18.3	21.4	24.4
495	25,740	18.4	21.5	24.4
500	26,000	20.5	23.8	27.3
550	28,600	23.6	27.7	30.6
600	31,200	29.7	35.0	37.5
650	33,800	33.3	39.2	41.9
700	36,400	39.2	45.6	49.5
750	39,000	43.0	50.1	52.9
800	41,600	48.2	55.1	58.8
850	44,200	51.8	58.5	61.9
900	46,800	55.8	62.3	66.1
950	49,400	58.6	64.9	68.2
1,000	52,000	64.4	70.4	74.3
1,100	57,200	68.8	74.3	77.6
1,200	62,400	74.2	79.1	81.9
1,300	67,600	77.6	82.0	84.5
1,400	72,800	81.2	84.8	86.7
1,500	78,000	84.4	87.5	89.1
1,600	83,200	86.7	89.3	90.6
1,700	88,400	88.3	90.7	92.0
1,800	93,600	90.0	92.0	93.3
1,900	98,800	91.1	92.8	93.8
1,925	100,100	92.8	94.2	95.2
1,950	101,400	92.9	94.3	95.2
1,975	102,700	93.0	94.3	95.5
2,000	104,000	93.3	94.5	95.7
2,100	109,200	93.8	94.9	96.3
2,200	114,400	94.6	95.6	96.6
2,300	119,600	94.9	95.8	97.3
2,400	124,800	95.8	96.5	97.8
2,500	130,000	96.6	97.2	100.0

Note: Equivalent to Table 3 in the Preamble.  
Source: U.S. Department of Labor.

TABLE B-8.—FULL-TIME HOURLY WORKERS COVERED BY THE FLSA IN 2003

Earnings		Percentile		
Weekly	Annual	All	South	Retail
\$155	\$8,060	1.1	1.2	1.8
255	13,260	6.8	8.6	12.1
355	18,460	23.8	28.1	38.3
380	19,760	29.2	34.2	45.1
405	21,060	36.1	41.7	52.6
425	22,100	38.9	44.7	55.6
450	23,400	43.4	49.5	60.4
455	23,660	43.8	49.8	60.8
460	23,920	44.6	50.6	61.7
465	24,180	45.2	51.3	62.3
470	24,440	45.6	51.8	62.8
475	24,700	46.0	52.2	63.2
480	24,960	49.0	55.3	66.2
485	25,220	49.5	55.8	66.8
490	25,480	50.0	56.4	67.1
495	25,740	50.4	56.8	67.5

TABLE B-8.—FULL-TIME HOURLY WORKERS COVERED BY THE FLSA IN 2003—Continued

Earnings		Percentile		
Weekly	Annual	All	South	Retail
500	26,000	52.2	58.7	69.1
550	28,600	58.2	64.5	74.6
600	31,200	66.1	71.6	81.2
650	33,800	70.2	75.3	84.4
700	36,400	74.7	79.3	87.5
750	39,000	78.0	82.1	89.4
800	41,600	82.0	85.7	91.9
850	44,200	84.3	87.5	93.2
900	46,800	86.6	89.5	94.3
950	49,400	88.2	90.9	95.2
1,000	52,000	90.7	93.0	96.3
1,100	57,200	93.1	94.9	97.2
1,200	62,400	95.1	96.3	98.1
1,300	67,600	96.3	97.1	98.5
1,400	72,800	97.2	97.8	98.9
1,500	78,000	97.9	98.4	99.1
1,600	83,200	98.4	98.8	99.2
1,700	88,400	98.7	99.0	99.4
1,800	93,600	99.0	99.2	99.6
1,900	98,800	99.1	99.3	99.6
1,925	100,100	99.2	99.4	99.6
1,950	101,400	99.3	99.4	99.6
1,975	102,700	99.3	99.4	99.6
2,000	104,000	99.3	99.4	99.7
2,100	109,200	99.4	99.5	99.7
2,200	114,400	99.5	99.6	99.8
2,300	119,600	99.6	99.6	99.8
2,400	124,800	99.7	99.7	99.8
2,500	130,000	99.7	99.7	99.8

Note: Equivalent to Table 5 in the Preamble.  
Source: U.S. Department of Labor.

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#### **List of Subjects in 29 CFR Part 541**

Labor, Minimum wages, Overtime pay, Salaries, Teachers, Wages.

Signed at Washington, DC, this 16th day of April 2004.

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