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29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1215–AA14

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule and request for comments.

SUMMARY: The Department of Labor proposes to update and revise the regulations issued under the Fair Labor Standards Act (FLSA) implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees. These exemptions are often referred to as the FLSA's ''white collar'' exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and be paid on a salary basis at not less than specified minimum amounts. The basic ''duties'' tests were originally established in 1938 and revised in 1940. The duties tests were last modified in 1949 and have remained essentially unchanged since that time. The ''salary basis'' test has remained essentially unchanged since 1954. The salary levels required for exemption were last updated in 1975, and the amounts adopted at that time were intended as an interim adjustment. Suggested changes to the part 541 regulations have been the subject of public commentary for years, including a review of the regulations by the U.S. General Accounting Office (GAO) in 1999. GAO recommended that the Secretary of Labor comprehensively review and make necessary changes to the part 541 regulations to better meet the needs of both employers and employees in the modern work place, and to anticipate future work place trends. During 2002, the Department of Labor convened a series of stakeholder meetings, and heard suggestions for changes from over 40 interest groups representing employees and employers. The Department of Labor has carefully examined issues of concern raised by various interested parties in developing this proposed rule. The Department now invites public comment on all aspects of the proposed rule.

DATES: Submit written comments on or before June 30, 2003.

ADDRESSES: Address written comments to Tammy D. McCutchen, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who would like to be notified that their comments were received should include with their comments a self-addressed, stamped postcard or submit them certified mail, return receipt requested. As a convenience, comments of 20 pages or less may be submitted by facsimile (''FAX'') machine to (202) 693–1432, which is not a toll-free number, or by e-mail to: *whd-reg@fenix2.dol-esa.gov.* Because we continue to experience delays in receiving mail in our area, commenters are encouraged to submit any comments by mail early, or to transmit them electronically by FAX or e-mail.

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Deputy Director, Office of Enforcement Policy, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3506, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: (202) 693–0745 (this is not a toll-free number). Copies of this proposed rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency or referenced in this notice may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling our toll-free help line at 1–866–4USWAGE (1–866–487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This proposed 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. *See* 29 CFR 516.0 and 516.3.

II. Background

The FLSA generally requires covered employers to pay their employees at least the federal minimum wage (which is currently $5.15 an hour), and overtime premium pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a work week. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime pay ''any employee employed in a bona fide executive, administrative, or professional capacity * * * 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 FLSA does not define the terms ''executive,'' ''administrative,'' ''professional,'' or ''outside salesman.'' However, pursuant to Congress' grant of rulemaking authority, implementing regulations have been issued, at 29 CFR part 541, defining the scope of the section 13(a)(1) exemptions. Because the FLSA delegates to the Secretary of Labor the power to define and delimit the specific terms of the exemptions through notice-and-comment rulemaking, the regulations so issued have the binding effect of law.[1]

These exemptions have engendered considerable confusion over the years regarding who is, and who is not, exempt. The implementing regulations generally require each of three tests to be met for the exemption to apply: (1) The employee must be paid a predetermined and fixed salary, not an hourly wage that is subject to reductions because of variations in the quality or quantity of work performed (the ''salary basis test''); (2) the amount of salary paid must meet minimum specified amounts (the ''salary level test''); and (3) the employee's job duties must primarily involve managerial, administrative or professional skills as defined by the regulations (the ''duties tests'').

Legislative History

Section 13(a)(1) was included in the original FLSA of 1938, and was based on provisions contained in the earlier

[1] *See Batterton* v. *Francis,* 432 U.S. 416, 425 n. 9 (1977).

National Industrial Recovery Act and state law precedents. Specific references in the legislative history to the employee exemptions contained in section 13(a)(1) are scant. However, the exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits, greater job security and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay.[2] Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.[3]

Initially, persons employed in a ''local retailing capacity'' were also exempt, but Congress eliminated that language from the section 13(a)(1) exemptions in 1961 when the FLSA was expanded to cover retail and service enterprises.[4] Teachers and academic administrative personnel were added to the exemption when elementary and secondary schools were made subject to the FLSA in 1966. The Education Amendments of 1972 made the Equal Pay provisions, section 6(d) of the FLSA, expressly applicable to employees who were otherwise exempt from the FLSA under section 13(a)(1). A 1990 enactment expanded the exemption to include computer systems analysts, computer programmers, software engineers, and similarly skilled professional workers, including those paid on an hourly basis if paid at least 6½ times the minimum wage.[5] The compensation test for computer-related occupations was subsequently capped at $27.63 an hour (6½ times the former $4.25 minimum wage) when Congress increased the minimum wage to its current $5.15 rate and enacted the new section 13(a)(17) exemption for such computer employees as part of the 1996 FLSA Amendments.[6]

Regulatory History

The FLSA became law on June 25, 1938, and the first version of part 541 was issued later that year in October (3 FR 2518; Oct. 20, 1938). In 1940, after receiving many comments on the original regulations, the Wage and Hour Division convened a series of public hearings for interested parties to express views on the regulations and to propose amendments. Revised regulations were issued in October 1940 (5 FR 4077; Oct. 15, 1940).[7] Further hearings were initiated in 1947, leading to revised regulations that were issued in December 1949 (14 FR 7705; Dec. 24, 1949).[8] An explanatory bulletin interpreting some of the terms used in the regulations was published as subpart B of part 541 on December 28, 1949 (14 FR 7730), and became effective on January 25, 1950. On March 9, 1954, the Department issued proposed revisions to the regulatory interpretations of ''salary basis'' (19 FR 1321), followed by a final rule issued on July 17, 1954 (19 FR 4405). The regulations were revised in 1958 to adjust the salary levels (23 FR 8962; Nov. 18, 1958).[9] Further changes were made to accommodate statutory amendments to the FLSA and/or to increase the salary levels in 1961, 1963, 1967, 1970, 1973, and 1975.[10] The existing salary rates were last revised on an interim basis in 1975 (*see* 40 FR 7092; Feb. 19, 1975). Revisions to increase the salary rates in January 1981 (issued at the end of the Carter Administration) were stayed indefinitely by the incoming Reagan Administration (46 FR 11972; Feb. 12, 1981). Based on petitions from industry groups to address other parts of the rules, and developing case law, the Department began a more comprehensive review leading to a 1985 Advance Notice of Proposed Rulemaking (ANPRM) that reopened the public comment period and broadened the review to all aspects of the regulations (50 FR 47696; Nov. 11, 1985).

The Department revised these regulations in the early 1990s to address two specific issues. A 1990 law (Pub. L. 101–583; Nov. 15, 1990) required regulations to be issued permitting computer systems analysts, computer programmers, software engineers, and other similarly-skilled workers in the computer field to be exempt, including those paid on an hourly basis if the hourly rate exceeded 6½ times the applicable minimum wage. (57 FR 46744; Oct. 9, 1992). Also, in 1992, the Department issued a final rule to modify the exemption's requirement for payment on a ''salary basis'' as applied in the public sector for otherwise exempt employees paid according to pay and leave systems based on principles of public accountability. Under 29 CFR 541.5d (57 FR 37677; Aug. 19, 1992), an otherwise exempt public sector employee does not lose exempt status under a regulated public sector pay and leave system that requires partial-day (or hourly) deductions from pay for employee absences not covered by accrued leave, or for budget-driven furloughs.

Overview of Existing Requirements

The implementing regulations in part 541 contain specific criteria that define each category of exemption provided by section 13(a)(1). The applicability of any particular exemption is not presumed under the FLSA, but must be affirmatively established. Job titles, nomenclature, or job descriptions do not determine the exemptions, nor does paying a ''salary'' rather than an hourly rate. Rather, whether an exemption applies depends on the specific duties and responsibilities of each employee's job, how much salary the employee is paid, and whether the salary is guaranteed without regard to the quality or quantity of work performed, as defined by the regulations.

The duties tests differ for each category of exemption. Two different salary (or fee) levels exist for each of the exemptions for executive, administrative, and professional employees. The salary requirements do not apply to certain licensed or certified doctors, lawyers and teachers, or to outside sales employees. Employees paid below the applicable lower salary rate are not exempt regardless of their duties. Those paid above the higher (or

[2] Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

[3] *Id.*

[4] Public Law 87–30, 75 Stat. 65 (May 5, 1961). Although Congress eliminated the separate, broad exemption for retail employees in 1961, such employees could still qualify as exempt executive, administrative or professional employees if they met the requirements for these exemptions, and Congress relaxed the duties tests solely to make it easier for such firms to meet the exemption requirements.

[5] Public Law 101–583, 104 Stat. 2871 (Nov. 15, 1990).

[6] 29 U.S.C. 213(a)(17), as added by the 1996 FLSA Amendments (sec. 2105(a), Public Law 104–188, 110 Stat. 1755 (Aug. 20, 1996)).

[7] *See,* ''Executive, Administrative, Professional * * * Outside Salesman'' Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) (''Stein Report'').

[8] *See,* Report and Recommendations on Proposed Revisions of Regulations, part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) (''Weiss Report'').

[9] *See,* Report and Recommendations on Proposed Revisions of Regulations, part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) (''Kantor Report'').

[10] *See,* 26 FR 8635 (Sept. 15, 1961); 28 FR 9505 (Aug. 30, 1963); 32 FR 7823 (May 30, 1967); 35 FR 883 (Jan. 22, 1970); 38 FR 11390 (May 7, 1973); and 40 FR 7091 (Feb. 15, 1975).

''upset'') salary rate are exempt if they meet a ''short'' duties test. Those paid between the higher and lower salary rates must meet a more detailed ''long'' duties test.

The salary tests were originally designed to operate as a ready guide to assist employers in deciding which employees were more likely to meet the duties tests in the exemptions. In fact, the salary levels specified in the regulations were once viewed as the best indicator of exempt status. As last revised effective April 1, 1975, the salary required for executive and administrative employees under the current ''long'' test is $155 per week; professional employees are exempt at $170 per week. The short test salary level (requiring fewer duties to be satisfied) for all three exemptions is $250 per week. Because these salary levels have not been raised in 28 years, virtually all employees are tested for exemption today under the ''short'' duties tests. Moreover, while the existing salary tests ($155, $170, and $250 per week) still reflect the interim 1975 rates, a full-time minimum wage worker today earns $206 per week for a 40-hour work week. Consequently, the existing salary tests no longer provide employees or employers any help in distinguishing between bona fide executive, administrative, and professional employees and those who should not be considered for exemption. Moreover, the outdated salary tests and complex duties tests in the current regulation cause employees to be erroneously misclassified as exempt and thus not paid properly.

Under the currently applicable ''short'' test exemption requirements, an exempt ''executive'' employee must be paid at least $250 per week on a salary basis, have a primary duty to manage the enterprise or a customarily recognized department or subdivision thereof, and regularly direct the work of two or more other employees. An exempt ''administrative'' employee must be paid at least $250 per week on a salary or fee basis, have a primary duty of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers (or similar functions in the administration of a school system or educational institution in work directly related to academic instruction), and perform work requiring the exercise of discretion and independent judgment. An exempt ''professional'' employee must be paid at least $250 per week on a salary or fee basis; have a primary duty of (1) work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged, specialized, intellectual instruction and study, or (2) work that is original and creative in a recognized field of artistic endeavor, or (3) teaching in a school system or educational institution, or (4) work as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer software field; and perform work requiring the consistent exercise of discretion and judgment, or work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Under the professional exemption, the salary or fee requirement does not apply to certain licensed or certified doctors, lawyers and teachers; or to certain computer-related occupations if paid on an hourly basis at $27.63 or more per hour. An ''outside sales'' employee who is customarily and regularly engaged away from the employer's places of business making sales or obtaining orders or contracts for services or use of facilities, and who does not exceed a twenty percent tolerance per work week performing duties unrelated to his or her own outside sales or solicitations, is exempt. There are no salary or fee requirements for outside sales employees.

Employees meeting the foregoing requirements are excluded from the Act's minimum wage and overtime protections. Thus, they may work any number of hours in the work week and are not subject to the Federal law's overtime pay requirements. Some state laws have stricter exemption standards than those just described. The FLSA does not preempt any such stricter State standards. If a State or local law establishes a higher standard than the provisions of the FLSA, the higher standard applies. *See* section 18 of the FLSA, 29 U.S.C. 218.

The executive and administrative exemptions apply generally to certain management and staff-level positions within an employer's organization. For example, department heads with management as their primary duty, who regularly supervise two or more full time employees in their department, may qualify as executives if they are paid a predetermined salary of $250 or more per week. An administrative employee must primarily perform office or nonmanual work of substantial importance to the management of the business, but is not required to supervise other employees. Persons with functional (rather than departmental) management authority, or who perform ''staff'' rather than production or sales work, may qualify as administrative employees if their duties include ''discretion and independent judgment'' or decision-making responsibilities on important matters in managing the employer's general business operations (*e.g.,* if they primarily determine or affect management policies in a particular area, such as credit, personnel, or labor relations). Executive assistants delegated decision-making authority to carry out parts of an exempt executive or administrative employee's management responsibilities may also qualify as exempt administrative employees.

The professional exemption (aside from the artistic, teaching, and computer-related categories) applies to the recognized professions requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (*i.e.,* the ''learned'' professions, such as doctor, lawyer, architect, engineer, etc.), and is typically characterized by possession of the appropriate academic degree for the particular profession. Outside sales employees must regularly work away from their employer's place of business making sales or obtaining orders or contracts; they may not exceed a 20 percent tolerance for performing duties unrelated to their own outside sales work. ''Inside sales'' employees are not included within the scope of the exemption for ''outside sales'' employees.

Under the regulatory ''salary basis'' test codified at 29 CFR 541.118, partial-day deductions from pay based on the number of hours worked (''pay-docking'') are generally not allowed in the private sector (unless made in the first or last weeks of employment or due to unpaid leave taken pursuant to the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq.*). Disciplinary deductions from pay also violate the ''salary basis'' test (except for safety rules of major significance, such as no-smoking rules in oil refineries and coal mines). These concepts clarify the intended meaning of the requirements for payment of a guaranteed salary—*i.e.,* the predetermined salary amount may not be reduced because of variations in either the quality or quantity of the work performed by the employee. Pay practices not meeting the guaranteed ''salary basis'' requirements cause the exemption to be declared inapplicable, in some cases for entire classes of employees.[11]

[11] As noted, a special rule applies to employees of public agencies paid according to regulated pay and leave systems that require deductions for partial-day absences not covered by accrued leave,

Public Commentary and the GAO Report

Suggested changes to the part 541 regulations have been the subject of extensive public commentary for years, including a report issued by the General Accounting Office (GAO) in September 1999.[12] In this report, GAO chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, identified the major concerns of employers and employees regarding the exemptions, and suggested possible solutions to the issues of concern raised by the affected interests. In general, the employers contacted by GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern work place, and create potential liability for violations when errors in classification occur.[13]

Employers were particularly concerned about potential liability for violations of the complex ''salary basis'' test and the exacting requirements of the so-called ''no-docking'' rule, which has been the focus of lawsuits against employers in recent years brought collectively by groups of highly paid managerial and professional employees. This test in effect limits employers' ability to ''dock'' exempt employees'' pay for partial-day personal absences and disciplinary violations, which limits employers' ability to hold exempt employees accountable for their time and actions. In addition, employers believed that limiting the administrative and professional exemptions to ''nonproduction'' employees did not account for the effects of modern technology on employment today. They also noted the traditional limits of the exemptions have blurred in the modern work place, citing highly skilled and highly paid technical workers without college degrees who do not qualify as exempt professionals but who perform essentially the same job as exempt engineers who have the required academic degrees. Manufacturing employers pointed to new technology used in factories, which requires advanced technical skills but far less traditional ''manual'' labor. They also told GAO that, while these workers may have to follow precise written guidelines to perform their work, prescribed procedures were important to modern quality control. Employers also believed adherence to precise written guidelines—one major distinction between exempt and nonexempt workers under the existing regulations—is necessary in a modern, efficient work place. Employers also complained that the discretion and independent judgment requirements for administrative and professional employees are confusing and applied inconsistently by Wage and Hour Division investigators in classifying similarly-situated employees, and are particularly difficult to apply. Thus, employers were unsure how to classify administrative personnel. GAO's discussions with employers and Wage and Hour Division investigators, and its review of compliance cases, confirmed that this part of the duties test involved particularly difficult and subjective determinations, for both the employers and the investigators, and that it was a source of contention in Department audits.

Employee representatives contacted by GAO, in contrast, were most concerned that the use of the exemptions be limited to preserve existing overtime work hour limits and the 40-hour standard work week for as many employees as possible. They believed the tests have become weakened as applied today by judicial rulings and do not adequately restrict employers' use of the exemptions. When combined with the low salary test levels, the employee representatives felt that few protections remain, particularly for low-income supervisory employees. They believed that inflation has severely eroded the salary-level limitations originally envisioned by the regulations. Because of inflation, according to the employee representatives, the current salary test levels are now near the minimum wage level, rendering application of the regulations to the current work force virtually meaningless.

GAO's report noted that the conflicting interests affected by these rules have made consensus difficult and that, since the FLSA was enacted, the interests of employers to expand the white collar exemptions have competed with those of employees to limit use of the exemptions. To resolve the issues presented, GAO suggested that employers' desires for clear and unambiguous regulatory standards must be balanced with employees' desires for fair and equitable treatment in the work place. The GAO recommended that the Secretary of Labor comprehensively review the regulations and restructure the exemptions to better accommodate today's workplace and to anticipate future work place trends.

The House Subcommittee on Workforce Protections of the Committee on Education and the Workforce held a hearing in May 2000 to receive testimony from GAO and other interested parties on GAO's September 1999 report. Testimony provided by the GAO, representatives of business and labor organizations, and the Department of Labor confirmed GAO's assessment of the issues and the difficulty in moving forward with constructive changes due to the differing views of the many affected and interested parties, and the potential impact of possible changes. Representatives of worker interests opposed making changes that would remove overtime protections for workers now covered, while business interests and employer groups advocated modernizing the regulations to exempt more classifications of workers from overtime pay.

III. Summary of Current Regulatory Proposal

Structure and Organization

Part 541 presently contains two subparts. Subpart A provides the regulatory tests that define each category of the exemption (executive, administrative, professional, and outside sales). Subpart B provides interpretations of the terms used in the exemptions. Subpart B was first issued as an explanatory bulletin effective in January 1950 to provide guidance to the public on how the Wage and Hour Division interpreted and applied the exemption criteria when enforcing the FLSA. The Department proposes to eliminate the current distinction between the ''regulations'' in subpart A and the ''interpretations'' in subpart B. This will consolidate and streamline the regulatory text, reduce redundancies, and make the regulations more understandable and easier to decipher when applying them to particular factual situations, providing much-requested simplification. In addition, eliminating the distinction between the subpart A ''regulations'' and the subpart B ''interpretations'' will eliminate confusion regarding the appropriate level of deference to be given to the provisions in each subpart.

The proposed rule reorganizes the subparts according to each category of exemption, and consolidates common elements (such as a new subpart containing common definitions), in order to eliminate unnecessary duplication and repetition of regulatory

and for budget-driven furloughs (*see* 29 CFR 541.5d).

[12] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place (GAO/HEHS–99–164, September 30, 1999).

[13] Under the FLSA, employees may sue their employer (individually or collectively) for up to two, or in some cases three, years of back wages, plus an equal amount in liquidated damages and attorney fees and court costs, for violations of the FLSA's minimum wage and overtime requirements.

text. Thus, after several introductory provisions in subpart A, the proposed new subpart B would pertain to the executive exemption; subpart C would pertain to the administrative exemption; subpart D would pertain to the professional exemption; subpart E would contain provisions regarding computer employees; and subpart F would contain provisions regarding outside sales employees. The proposed subpart G would include provisions regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G would also include a section on highly compensated employees. Proposed subpart H would contain definitions and other miscellaneous provisions applicable to all or several of the exemptions. Finally, numerous editorial changes are proposed throughout the rule to streamline and improve its clarity, delete outdated references and illustrations, and remove gender-specific references.

Current section 541.6, entitled ''Petition for amendment of regulations,'' has been deleted in this proposed rule. The substance of that section, originally adopted in 1938 and providing for interested persons to petition the Administrator for desired changes in these regulations, has been superseded and supplanted by enactment of the Administrative Procedure Act, 5 U.S.C. 553(e).

Finally, the proposed rule deletes a number of discussions regarding application of the exemption to specific occupations. These discussions appeared to be outdated, relating to occupations and duties which may not exist in the 21st century economy. However, because most stakeholders find such examples useful in applying the regulations to specific occupations, we invite comments on specific occupations and duties which should be discussed in the regulations. In particular, we invite comments on occupations the exempt status of which has been the subject of confusion and litigation including but not limited to pilots, athletic trainers, funeral directors, insurance salespersons, loan officers, stock brokers, hotel sales and catering managers, and dietary managers in retirement homes. The Department anticipates that the final rule will include additional provisions on the application of the exemptions to such borderline occupations, but requires more information about the particular job duties and responsibilities generally found in such occupations. We invite comments on which occupations should be included in the final rule and whether such occupations should be treated as exempt or nonexempt, including detailed information about job duties in such occupations.

Subpart A, General Regulations, §§ 541.000—.002

The current regulations have several general, introductory provisions scattered in various locations. The proposed regulations would gather these provisions together into proposed subpart A. Thus, the proposed section 541.000 combines an introductory statement currently located at section 541.99 and information currently located at section 541.5b regarding the application of the equal pay provisions in section 6(d) of the FLSA to employees exempt from the minimum wage and overtime provisions of the FLSA under section 13(a)(1). Proposed section 541.000 also contains new language to reflect legislative changes to the FLSA regarding computer employees and information regarding the new organizational structure of the proposed regulations. Proposed section 541.001 relocates definitions of ''Act'' and ''Administrator'' from their current location in section 541.0. Finally, proposed section 541.002 contains a general statement that job titles alone are insufficient to establish the exempt status of an employee. This fundamental concept, equally applicable to all the exemption categories, currently appears in section 541.201(b) regarding administrative employees.

Subpart B, Executive Employees, §§ 541.100—.107

To qualify as an exempt executive under the current regulations, an employee must be compensated on a salary basis at a rate of not less than $155 per week and meet the ''long'' duties test, or at a rate of not less than $250 per week and meet an abbreviated ''short'' duties test. The long test requires that an exempt executive employee: Have a primary duty of managing the enterprise (or a recognized department or subdivision thereof); customarily and regularly direct the work of two or more other employees; have authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status; customarily and regularly exercise discretionary powers; and devote no more than 20 percent (or as much as 40 percent in retail or service establishments) of hours worked per week to activities that are not directly and closely related to performing exempt managerial work. The percentage restrictions on performing nonexempt work in the long test do not apply to an employee who is in sole charge of an independent or physically separate branch establishment, or to an owner of at least a 20 percent interest in the enterprise in which the employee is employed. The executive short duties test requires that the employee have a primary duty of managing the enterprise (or a recognized department or subdivision thereof) and customarily and regularly direct the work of two or more other employees.

The proposed regulations would streamline the current regulations by eliminating the separate long and short tests, and substituting a single standard duties test in proposed § 541.100. The proposed standard duties test would provide that an exempt executive employee must: (1) Have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (2) customarily and regularly direct the work of two or more other employees; and (3) have the authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees. This standard test, consisting of the current short test requirements plus a third objective requirement taken from the long test, represents a middle ground between the current long and short tests.

This streamlining and simplification of the current executive exemption regulations will eliminate the long test subsections regarding the percentage restrictions on nonexempt work and the discretionary powers requirement. We propose to eliminate these subsections for several reasons. Because of its outdated salary level, the long test has, as a practical matter, not been operative for many years. Reintroducing its requirements now would add new complexity and burdens to the exemption tests. The tests are complex and require time-testing managers for the duties they perform, hour-by-hour in a typical work week. Employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees (*see* 29 CFR 516.3), let alone perform a moment-by-moment examination of an employee's specific duties performed or discretionary powers exercised. Yet reactivating the long test's limitations on nonexempt work could impose such significant new monitoring requirements (and, indirectly, new recordkeeping burdens) for employers to analyze the substance of each particular

employee's daily and weekly tasks in order to be confident of any claimed exemption. Further, historically, deciding which specific activities were not inherently an ''essential part of and necessarily incident to'' the exempt work proved to be a subjective and difficult standard to apply for employers, employees, as well as Wage and Hour Division investigators. The discretionary powers test has similarly proved to be a subjective and difficult standard to apply. Moreover, making such finite determinations would be made even more difficult in the aftermath of the decisions in *Donovan* v. *Burger King, Corp.*, 675 F.2d 516 (2nd Cir. 1982), *Donovan* v. *Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982), and similar judicial rulings which hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks. Accordingly, given these developments in judicial construction of the law, the Department is of the view that the discretionary powers provision and the percentage limitations on particular duties formerly applied under the now dormant long test are not useful criteria that should be reintroduced for defining the executive exemption in today's work place.

The proposed regulations at § 541.101 would recognize as an exempt executive any employee who owns at least a 20 percent equity interest in the enterprise in which the employee is employed. Section 541.102 of the proposed regulations would continue the principle that an employee in ''sole charge'' of an independent establishment or a physically separated branch establishment may qualify as an exempt executive. ''Sole charge'' of an establishment is defined to include the senior employee with authority to make decisions regarding day-to-day operations and to direct the work of other employees. These provisions appear in the current regulations as exceptions to the percentage restrictions on non-exempt work under the former long test, in recognition of the due weight to be given the freedom from direct supervision and the high degree of executive responsibility enjoyed by the top person in charge of a separate business location, as well as the special status of a partial equity owner of an enterprise. The Department believes that these continue to be valid concepts for special status as executives under the proposed restructured regulations as well. The Department seeks comments on whether the salary level and/or salary basis requirements should be eliminated as unnecessary for sole charge executives and business owners. We have proposed to eliminate those requirements only for the 20 percent owner, based upon our belief that such an individual likely will share in the profits of the enterprise and that this is an adequate substitute indicator of exempt status.

The proposed regulations also would reorganize, simplify, streamline and update the regulations in other ways. The proposed regulations utilize objective, plain language in an attempt to make the regulations understandable to employees and employee representatives, small business owners and human resource professionals. We also propose to eliminate outdated and uninformative examples and to update definitions of key terms and phrases. The proposed regulations would move a number of sections pertaining to salary issues (current §§ 541.117, 541.118) to a new subpart G (discussed below), where all such provisions will be consolidated. Other sections relevant to several or all of the exemption categories (such as the definition of primary duty and a section regarding application of the exemptions to trainees) would move to a proposed new subpart H (Definitions and Miscellaneous Provisions) to eliminate unnecessary repetition. The following sections of the current regulations have been edited and moved to proposed new subpart H:

Current Section . . .	Moved to . . .	Proposed section
541.101	General	541.702
541.103	Primary duty	541.700
541.108	Work directly and closely related	541.703
541.109	Emergencies	541.705
541.110	Occasional tasks	541.706
541.111	Nonexempt work generally	541.702
541.116	Trainees	541.704

Section 541.102 of the current regulations, entitled ''Management,'' has been modified and moved to proposed section 541.103.

Section 541.115 of the current regulations, entitled ''Working foremen,'' has been moved to proposed § 541.106 and renamed, ''Working supervisors,'' although no substantive changes are intended. A new provision on supervisors in retail establishments has been added as proposed § 541.107. Both 541.106 and 541.107 address the difficult issue of classifying employees who have both exempt supervisory duties and non-exempt duties, and the Department invites comments on whether these sections have appropriately distinguished exempt and non-exempt employees. Section 541.106 provides, as in the current regulation, that an employee with a primary duty of ordinary production work is not exempt even if the employee also has some supervisory responsibilities. This situation often occurs in a factory setting where a collective bargaining unit employee who works on a production line also has some responsibility to direct the work of other bargaining unit employees. Another example is a police officer who directs the work of other police officers on the conduct of an investigation but is also a member of a bargaining unit. Bargaining unit members do not become exempt employees simply because they are given some supervisory responsibilities.

The definition of the term ''department or subdivision'' remains at § 541.104, and the definition of ''two or more employees'' remains at § 541.105. The Department invites comments on whether the supervision of ''two or more employees'' required for exemption should be modified to include ''the customary or regular leadership, alone or in combination with others, of two or more other employees.''

Section 541.106 of the current regulations, entitled ''Authority to hire or fire,'' is proposed to be deleted. The text in this section does not contribute to any further explanation of the requirement, and no further explanation seems necessary. Section 541.107 of the current regulations, entitled ''Discretionary powers,'' and § 541.112 of the current regulations, ''Percentage limitations on nonexempt work,'' are also deleted from the proposed rule for the reasons discussed above.

Subpart C, Administrative Employees, §§ 541.200–.207

To qualify as an exempt administrative employee under the current regulations, an employee must be paid on a salary or fee basis at a rate of not less than $155 per week and meet the ''long'' duties test, or earn $250 per week and meet the ''short'' duties test. The long test requires that an exempt administrative employee have a primary duty of either performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers; or performing functions in the administration of a school system, or educational establishment or institution, in work directly related to academic instruction or training. In addition, the current regulations require that an administrative employee: Customarily and regularly exercise discretion and

independent judgment; regularly and directly assist another exempt employee or perform work along specialized or technical lines requiring special training, experience or knowledge under only general supervision *or* perform special assignments and tasks under only general supervision; and devote no more than 20 percent (or as much as 40 percent in retail or service establishments) of work hours in a week to activities that are not directly and closely related to the performance of exempt work. The short test requires that the employee have a primary duty of performing office or non-manual work directly related to management policies or general business operations, which must include work requiring the exercise of discretion and independent judgment. Under both tests, when considering whether an employee's work is ''directly related to management policies or general business operations'' the regulations and the courts assess whether the work is ''related to the administrative operations of the business as distinguished from production''—known as the ''production versus staff dichotomy''—and whether the work is ''of substantial importance to the management or operation of the business.''

The current duties test for administrative employees is the most difficult to apply of all the duties tests. The requirement that the employee exercise ''discretion and independent judgment,'' for instance, has generated significant confusion and litigation, as noted in the GAO report discussed above. This rule has been interpreted to deny the exemption to an employee who follows a procedures manual, even though most employees in the modern workplace are required to operate within standard procedures. The ''production versus staff dichotomy'' also is difficult to apply uniformly in the 21st century workplace.

The proposed regulations at § 541.200 would retain the requirement that an exempt administrative employee have a ''primary duty'' of ''performing office or non-manual work related to the management or general business operations of the employer or the employer's customers,'' but replace the ''discretion and independent judgment'' requirement with a new requirement that the employee hold ''a position of responsibility'' with the employer.

The primary duty requirement of ''performing office or non-manual work related to the management or general business operations'' is defined in a new § 541.201. New § 541.201 clarifies that this requirement refers to the type of work performed by the employee and includes an illustrative list of the types of work areas that meet this requirement: tax, finance, accounting, auditing, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities. The Department invites comments on any other areas that should be included in this list and on any areas that should be deleted. Like the proposed changes to the executive exemption, the proposed administrative exemption focuses on ''primary duty'' and eliminates the percentage restrictions on non-exempt work currently required by the now-inoperative long duties test, for the same reasons discussed above under the executive exemption.

The proposed rule would also reduce the emphasis on the so-called ''production versus staff'' dichotomy in distinguishing between exempt and non-exempt workers, while retaining the concept that an exempt administrative employee must be engaged in work related to the management or general business operations of the employer or of the employer's customers. These changes are needed to reflect emerging case law in this area. For example, the court in *Piscione* v. *Ernst & Young,* 171 F.3d 527 (7th Cir. 1999), examined whether an employee's duties were directly related to Ernst & Young's management policies or general business operations or those of the firm's clients. The employee worked as a consultant in the firm's Human Resources Consulting Group on several multi-million dollar defined benefit plans and defined contribution plans in which thousands of individuals participated. The employee's work involved benefits calculations, actuarial valuations, government filings, compliance testing, and client advice. The court stated that this work influenced the internal business operations and policies of Ernst & Young's clients with regard to their benefit plans. The employee was the primary contact for several clients; the employee identified problems with their plans and suggested solutions, and the employee offered suggestions to clients regarding how to improve their efficiency. The court rejected the argument that, because the employee provided clients with reports and government forms to file, the work was production work. Rather, the employee was an advisory specialist or consultant whose work was exempt. In addition, the court found that the employee contributed to the management policies of Ernst & Young because the employee played a major role in developing new methods for improving client services and the timeliness of firm operations.

The proposed § 541.200 also contains a second requirement for the administrative exemption relating to the importance of the work performed or the high level of competence required by the work performed—a requirement that an exempt employee must hold a ''position of responsibility.'' The term ''position of responsibility'' is defined in the proposed regulations at new § 541.202. To meet this new ''position of responsibility'' requirement, an employee must either (1) perform work of substantial importance, or (2) employ a high level of skill or training. The concept of ''work of substantial importance'' has been in the interpretive regulations since 1950, as a factor for determining whether a worker is an exempt administrative employee. The proposed regulations at new § 541.204 define this phrase based on language in the current regulations and include a revised list illustrating the types of activities that are generally considered of ''substantial importance'' for purposes of the exemption including: Formulating or interpreting management policies; providing consultation and expert advice to management; making or recommending decisions that have a substantial impact on business operations or finances; analyzing and recommending changes to operating practices; planning long or short-term business objectives; analyzing data, drawing conclusions and recommending changes; and handling complaints, arbitrating disputes or resolving grievances. The Department invites comments on any additional activities that should be included in this list and on any activities that should be deleted. The second alternative for meeting the ''position of responsibility'' requirement, ''work requiring a high level of skill or training,'' defined in the proposed regulations at new § 541.205, would ensure that the administrative exemption is not denied to a highly trained and skilled employee who performs administrative functions merely because the employee uses a procedures manual, so long as the manual contains information that can only be interpreted properly by someone with a high level of specialized skills or training, as opposed to a manual in which the employee simply looks up the correct answer for a particular set of circumstances. As reflected in the GAO report noted above,

it has become commonplace for employees in the modern work place to use procedures manuals and written guidelines as standard practices for achieving quality control and efficiency.

The administrative exemption is the most challenging of the § 13(a)(1) exemptions to define and delimit, and the ''discretion and independent judgment'' requirement has become increasingly difficult to apply with uniformity in the 21st century workplace. Thus, the Department proposes to delete this requirement and replace it with the requirement that an employee hold a ''position of responsibility.'' The Department specifically seeks comments on whether the ''discretion and independent judgment'' requirement should be deleted entirely, retained as a third alternative for meeting the ''position of responsibility'' requirement, or retained by itself but modified to provide better guidance on distinguishing exempt administrative employees. The Department invites commenters to submit alternative proposed regulatory language for either ''discretion and independent judgment'' or ''position of responsibility.'' The Department solicits comment on how employers currently interpret the ''discretion and independent judgment'' requirement, and whether individuals currently exempt under that requirement would continue to be exempt under the new ''position of responsibility'' requirement.

Finally, the proposed regulations also would reorganize, simplify, streamline and update the regulations in other ways. The proposed regulations utilize objective, plain language; eliminate outdated and uninformative examples; and update definitions of key terms and phrases. As with the executive exemption, the proposal for the administrative exemption would move a number of sections pertaining to salary issues (current §§ 541.211, 541.212 and 541.213) to subpart G, and other sections relevant to several or all of the exemption categories would move to the proposed subpart H (Definitions and Miscellaneous Provisions) to eliminate unnecessary repetition. For example, current § 541.203 entitled ''Nonmanual work'' is moved to proposed new § 541.703. Current § 541.206 entitled ''Primary duty'' is merged with current § 541.103 and moved to proposed new § 541.700. Current § 541.208 entitled ''Directly and closely related'' is combined with current §§ 541.108, 541.202, and 541.307 and moved to proposed new § 541.702. Current § 541.210 entitled ''Trainees, administrative'' is combined with current § 541.116 (''Trainees, executive'') and current § 541.310 (''Trainees, professional'') and moved to proposed new § 541.704. Provisions related to the administration of educational institutions in current §§ 541.2, 541.201(c), 541.202(e), and 541.215 have been consolidated and moved to new § 541.206; no substantive changes are intended by this consolidation.

Subpart D, Professional Employees, §§ 541.300–.304

The current regulations pertaining to the professional exemption contain four separate categories of exempt employees: learned professionals, artistic professionals, teachers, and computer professionals. As with the executive and administrative exemptions, the regulations contain both ''short'' and ''long'' duties tests, depending upon the salary level of the employee. The long test contains a separate primary duty requirement for each of the four categories of employees. The long test for learned professionals requires that the primary duty consist 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, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes. For creative professionals, the primary duty must consist of work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee. For teachers, the primary duty must consist of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge by an employee who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which the person is employed. The duties tests for computer employees are discussed in subpart E. The long test also requires that an exempt employee: Perform work requiring the consistent exercise of discretion and judgment; do work that is predominantly intellectual and varied in character, such that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and devote no more than 20 percent of work hours in a week to activities that are not an essential part of and necessarily incident to exempt work. The short test in the current regulations for both learned professionals and teachers contains the specific primary duty requirement discussed above, and requires that the employee perform work requiring the consistent exercise of discretion and judgment. For artistic professionals, the work must require invention, imagination or talent in a recognized field of artistic endeavor.

The proposed regulations pertaining to the professional employee exemption would make changes similar to those we propose for the executive and administrative exemptions. The goal is to clarify and simplify the regulations defining the professional employee exemption, while remaining consistent with the purposes of the FLSA. For ease of reference, and making no substantive changes, we propose to move the provisions pertaining to computer professionals to new subpart E, which will contain all information pertinent to such employees. We also propose to simplify the regulations by eliminating the separate short and long tests for each of the remaining three categories and substituting a single standard duties test for each. This restructuring and simplification would eliminate the percentage limitation on nonexempt work and the consistent exercise of discretion and judgment requirement. As discussed above in connection with similar proposed changes to the executive and administrative exemptions, we are proposing to eliminate these subsections because they have proven difficult standards to apply uniformly.

For learned professionals, the proposed new standard test in § 541.301 would provide that employees qualify for exemption as a learned professional if they have a primary duty of performing office or non-manual work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by an equivalent combination of intellectual instruction and work experience. This proposed standard test for learned professionals would focus on the knowledge of the employee and how that knowledge is used in everyday work, not on the educational path followed to obtain that knowledge. Although some flexibility to focus on the worker's knowledge exists in the current regulation, it is very limited and rarely used. The clarified test reflects changes in the 21st century workplace in how some ''knowledge workers'' acquire specialized learning and skills: in the modern workplace, some

employees acquire advanced knowledge through a combination of formal college-level education, training and work experience, even where other employees in that field customarily acquire advanced knowledge by obtaining a baccalaureate or advanced degree. The proposed changes would clarify that, so long as such an employee's level of advanced knowledge is equivalent to the knowledge possessed by an employee with the typical academic degree generally required by the profession, the employee may qualify as an exempt professional. Thus, for example, an employee who obtained advanced knowledge by completing college courses in a field such as engineering, and who worked in that field for a number of years, could qualify for exemption if the knowledge acquired was equivalent to that of an employee with a baccalaureate degree in engineering. We have not proposed any specific formula in the regulations for determining the equivalencies of intellectual instruction and qualifying work experience, although some examples from the current rule have been included and expanded. Public comments are invited on whether the regulations should specify such equivalencies.

The view that several years of specialized training plus intensive on-the-job training for a number of additional years may be equated with a college degree in certain fields has found support in reported judicial decisions. For example, the professional exemption has been applied to employees with a combination of training and academics in *Leslie* v. *Ingalls Shipbuilding, Inc.,* 899 F. Supp. 1578 (D. Miss. 1995). In Leslie, the court concluded that an employee who had completed three years of engineering study at a university and had many years of experience in the field of engineering was properly classified as a professional employee, even though the employee did not satisfy one of the usual minimum qualifications for an engineering position of having a bachelor's degree in an engineering discipline. The court considered the employee's combination of education and experience as satisfying the requirement for a prolonged course of specialized intellectual instruction and study.

For creative professionals, we propose to adopt the current short test, slightly modified, as the new standard test in proposed § 541.302. This new standard test would apply the creative professional exemption to any employee with the primary duty of ''performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.'' This language, although simplified, is not intended to make any material changes from the existing regulations. This standard was applied in the case of *Freeman* v. *National Broadcasting Company, Inc.,* 80 F.3d 78 (2nd Cir. 1996), in which employees who researched facts, developed story elements, interviewed subjects, wrote scripts, and supervised the editing of videotape were deemed to have been correctly classified as artistic professional employees. On the other hand, employees of small news organizations who spent their time gathering facts about routine community events such as municipal, school board, and city council meetings, and gathering information from the police blotter and real estate transaction reports, and then reporting those facts in a standard format were deemed not to be artistic professional employees in *Reich* v. *Newspapers of New England,* 44 F.3d 1060 (1st Cir. 1995) and *Reich* v. *Gateway Press, Inc.,* 13 F.3d 685 (3d Cir. 1994).

The standard test for teachers in proposed section 541.303 would be unchanged from the current short test, with the exception of the deletion of the requirement that the employee's work require the consistent exercise of discretion and judgment, a requirement that, as discussed above, has engendered significant confusion. Provisions on teachers from current §§ 541.3, 541.301(g), and 541.314 have been consolidated into proposed new § 541.303. The minor editorial changes are not intended to cause any substantive changes.

In addition, the proposed regulations utilize objective, plain language that can be easily understood by employees, small business owners and human resource professionals, and eliminate outdated and uninformative examples. The proposed regulations also would address a number of specific occupations that have been the subject of ambiguity and litigation. For example, we propose to update and clarify the circumstances under which employees working as newspaper journalists or as radio or television commentators are exempt, because the case law regarding such employees has been evolving over the years, and the existing regulations discussing such employees are outdated.

Provisions of the current regulations in §§ 541.3 and 541.314 that provide an exception to the salary or fee requirements for physicians and lawyers have been consolidated and moved to proposed § 541.304. Current § 541.307 entitled ''Essential part of and necessarily incident to'' has been combined with current § 541.108 (''Work directly and closely related''), 541.202 (''Categories of work''), and § 541.208 (''Directly and closely related''), and moved to proposed new § 541.702 (''Directly and closely related''), for a streamlined discussion of the principles for distinguishing exempt and nonexempt work. Although these sections have been consolidated and simplified, we do not intend any substantive changes.

Finally, we propose to move sections that pertain to salary issues (§§ 541.311, 541.312 and 541.313) to subpart G, where all such issues will be consolidated. Other sections relevant to several or all of the exemption categories (such as the definition of primary duty, a section regarding application of the exemption to trainees, and a section discussing nonexempt work generally) would move to the proposed subpart H (Definitions and Miscellaneous Provisions) to eliminate unnecessary repetition. Current § 541.305 entitled ''Discretion and judgment'' and current § 541.309 entitled ''20-percent nonexempt work limitation'' have been deleted from the proposed regulations for the same reasons similar changes are being proposed in the executive and administrative exemptions as discussed above.

Subpart E, Computer Employees Exemption, §§ 541.400–.403

The exemption for employees in computer occupations has a unique legislative and regulatory history. Prior to 1991, the interpretative regulations acknowledged that employees in various computer-related occupations could have supervisory or managerial duties meeting the exemption for ''executive'' or ''administrative'' employees, provided that all the applicable regulatory tests were otherwise met. However, the regulations did not recognize computer employees as exempt ''learned'' professionals absent a showing that specialized, prolonged academic education and training was an essential prerequisite for entry into the computer field. At the time, colleges and universities did not consistently recognize computer sciences as a *bona fide* academic discipline under which standard licensing, certification, or registration procedures were being followed. Thus, before 1990, employees in computer occupations were rarely recognized as exempt ''learned'' professionals and many also did not perform duties

meeting all the requirements for the executive or administrative exemptions. Of course, much has changed since then, and today ''computer scientists'' who possess advanced academic degrees in the computer field are routinely recognized as exempt professionals.

In November 1990, Congress enacted legislation directing the Department to issue regulations permitting computer systems analysts, computer programmers, software engineers, and other similarly-skilled professional workers to qualify for exemption under FLSA section 13(a)(1). This enactment also extended the exemption to employees in such computer occupations if paid on an hourly basis at a rate at least 6½ times the minimum wage. Final implementing regulations were issued in 1992 following public notice and comment procedures (*see* 29 CFR 541.3(a)(4) and 541.303; 57 FR 46744, Oct. 9, 1992; 57 FR 47163, Oct. 14, 1992). However, when Congress increased the minimum wage in 1996, that law included some of the Department's regulatory language as a separate statutory exemption under a new FLSA section 13(a)(17). The 1996 enactment also froze the hourly compensation test at $27.63 (which equaled 6½ times the former $4.25 minimum wage). The original 1990 statute was not affected by the 1996 enactment.

Accordingly, under the current regulations, an exempt computer employee must have a primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, or software engineering. In addition, an exempt computer employee must be engaged in performing these activities as a computer systems analyst, computer programmer, software engineer, or other similarly-skilled worker in the computer software field. Finally, under the current regulations, an exempt computer employee must consistently exercise discretion and judgment, and be paid not less than $250 per week on a salary basis or not less than $27.63 an hour if paid an hourly rate.

The proposed regulations would consolidate and condense all of the regulatory guidance on the computer occupations exemption into a new regulatory subpart E by combining provisions of the current regulations found at §§ 541.3(a)(4), 541.205(c)(7), and 541.303. This new subpart will collect in one place the substance of the original 1990 enactment, the 1992 final regulations, and the 1996 enactment. The key regulatory language that resulted from the 1990 enactment is now substantially codified in section 13(a)(17) of the Act, and thus no substantive changes have been made to that language. However, consistent with changes in the professional exemption, the proposal deletes the additional requirement that an exempt computer employee must consistently exercise discretion and judgment. Further, the former regulatory text has been edited and streamlined to provide a more concise presentation, and the structure has been modified to conform to similar changes proposed in the professional exemption. Because of the tremendously rapid pace of significant changes occurring in the information technology industry, we have avoided citing specific job titles as examples of exempt workers, as they tend to quickly become outdated once included in the regulatory text. The Department recognizes that the computer employee exemption has been particularly confusing, and invites comments on any further clarifications possible under the statute.

Subpart F, Outside Sales Employees, §§ 541.500–.504

Section 13(a)(1) of the FLSA contains a specific and separate exemption for any employee employed ''in the capacity of outside salesman.'' Under the existing regulations, outside sales employees must be customarily and regularly engaged away from the employer's places of business making sales or obtaining orders or contracts for services or the use of facilities. (''Inside sales'' employees are not within the scope of this statutory exemption for ''outside sales'' employees.) The regulatory interpretations examine whether any given employee's chief duty or primary function is to make sales or take orders while away from the employer's premises, by analyzing the character of the job as a whole, to distinguish exempt outside sales employees from other nonexempt occupations (*e.g.*, route delivery personnel).

Under the current regulations, outside sales employees also may not exceed a 20 percent tolerance, per work week, performing duties unrelated to their own outside sales or solicitations. Activities that are incidental to, and in conjunction with, their own outside sales or solicitations, including incidental deliveries and collections, are not counted against the 20 percent nonexempt work limitation. The 20 percent limit is based not upon the employee's own hours of work performed, but upon the hours worked by other nonexempt employees of the employer who perform the kind of nonexempt work performed by the outside sales employee. If no one else performs such nonexempt work, the base applied is 40 hours, and the amount of nonexempt work allowed is eight hours per week. There is no salary or fee requirement for the outside sales employee exemption.

In keeping with similar proposed changes to the other exemptions in this part, and to simplify the outside sales exemption, the Department proposes to adopt a primary duty concept similar to the other exemptions, and to eliminate the particularly confusing 20 percent restriction on nonexempt work by outside sales employees. By eliminating this percentage limitation, the Department proposes to avoid any necessity that the employer track hours of outside sales employees. This will provide a consistent approach between this exemption and the exemptions for executive, administrative and professional employees. The essential elements required for exemption would continue, *i.e.*, the outside sales employee's primary duty must be to make sales or obtain orders or contracts for services or the use of facilities, and the employee must be customarily and regularly engaged away from the employer's place of business performing such duty. Outdated illustrations and redundant examples have also been deleted from the regulations, but no substantive changes are intended by these deletions. Finally, although the FLSA refers to the ''outside salesman,'' we propose replacing this gender-specific term and refer instead to the ''outside sales employee.'' The discussion of nonexempt work generally in current § 541.506 has been incorporated into proposed new § 541.701, and the discussion of outside sales trainees in current § 541.508 has been incorporated into proposed new § 541.704. As noted above and in connection with similar proposed changes to the executive, administrative and professional exemptions, the 20-percent limitation on nonexempt work in current § 541.507 is proposed to be deleted.

Subpart G, Compensation Requirements, §§ 541.600–.606

Salary Levels

Salary level tests have been included as part of the exemption criteria since the original regulations of 1938. Under the current rules, most executive, administrative and professional employees must earn a minimum salary

level to qualify for the exemption.[14] Employees paid below the minimum salary level are not exempt, irrespective of their job duties and responsibilities. Employees paid a salary above the minimum level in the regulations may be exempt if they also meet the salary basis and job duties tests.

To qualify for exemption under the existing regulations, an employee currently must earn a minimum salary of $155 per week for the executive and administrative exemptions, and $170 per week for the professional exemption. Employees paid above these minimum salary levels must meet a ''long'' duties test to qualify for the exemption. The current regulations also provide that employees paid above a higher (or ''upset'') salary rate of $250 per week are exempt if they meet a ''short'' duties test. As explained above, the short tests contain fewer requirements and are less burdensome to meet.[15] The most recent updates to these minimum salary levels were in 1975. In January 1981, revisions to increase the salary rates by the outgoing Carter Administration were stayed indefinitely by the incoming Reagan Administration. Because the salary levels have not been increased since 1975, the existing salary levels are outdated and no longer useful in distinguishing between exempt and nonexempt employees.

Proposed Standard Test. Under the proposal, the minimum salary level to qualify for exemption from the FLSA minimum wage and overtime requirements as an executive, administrative, or professional employee would be increased from $155 per week to $425 per week. This salary level would be referred to as the ''standard test,'' thus eliminating the ''short test'' and ''long test'' terminology. The separate, higher salary level test for professional employees also would be eliminated.

Most stakeholders agreed that the salary levels need to be increased. A full-time minimum wage worker earns $206 per week ($5.15/hour x 40 hours)—an amount above the current long test levels and closely approaching the current short test level. As a result, under the current regulations, no full-time salaried worker is automatically exempt by earning below the long test level, and most salaried employees are tested for exemption under the short tests. Salary level was once viewed as being the best indicator of exempt status. Today, the existing salary level tests are of no help in distinguishing exempt employees from non-exempt workers. Accordingly, the question is not whether the Department should raise the salary levels, but by how much.

One suggestion for increasing the current salary levels is to adjust the existing rates, adopted in 1975, to account for inflation. The 1999 General Accounting Office report adjusted the 1975 salary levels for inflation based on 1998 BLS Consumer Price Index (CPI) data, resulting in the following salary levels: $470/week for the executive and administrative long test; $515/week for the professional long tests; and $757/week for the short test.[16] In January 2001, the Department published a report that applied 1999 CPI data to inflation adjust the current salary levels to $480/week for the long test and $774/week for the short test.[17]

However, several considerations weigh against mechanically adjusting the 1975 salary levels for inflation. First, the Department is proposing a different, standard duties test. Consequently, equivalency to either the current long and short test salary levels is not appropriate. Second, although adjusting the existing rates for inflation might provide the simplest, mechanical approach, the Department is concerned about the impact such adjusted salary levels would have on certain segments of industry and geographic areas of the country, particularly in the retail industry and in rural areas in the South, which tend to pay lower salaries. Third, mechanically adjusting for inflation presumes that the salary levels set in 1975 are precisely the appropriate baseline; and that the nature of work and the relationship between job duties and compensation practices have not changed in the intervening years since 1975. Fourth, the regulatory history has looked to information on actual salaries and incomes, not inflation-adjusted amounts. The 1949 Weiss Report, for example, considered and rejected proposals to increase salary levels based upon the change in the cost of living from the 1940 levels.[18]

Because of these concerns, the Department believes it would be more appropriate to examine available data on actual salary levels currently being paid in the economy. We reviewed a preliminary report on actual salary levels based on the BLS year 2000 Current Population Survey (CPS) Outgoing Rotations data set. This data included full-time, salaried workers aged 16 and above, but excluded the self-employed, agricultural workers, volunteers and federal employees (who are all not subject to the salary level tests in the part 541 regulations), broken out by industry and geographic area.

In considering this data and various salary levels in the development of this proposal, the Department was guided by the prescient analysis of a 1958 Department of Labor report recommending changes to the salary levels:

> The salary tests have thus been set for the country as a whole * * * with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States. Despite the variation in effect, however, it is clear that the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the ''*bona fide*'' executive, administrative and professional employees without disqualifying any substantial number of such employees.
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> It is my conclusion, from all the evidence, that the lower portion of the range of prevailing salaries will be most nearly approximated if the tests are set at about the levels at which no more than about 10 percent of those in the lowest-range region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests. Although this may result in loss of exemption for a few employees who might otherwise qualify for exemption, * * * in the light of the objectives discussed above, this is a reasonable exercise of the Administrator's authority to ''delimit'' as well as define.[19]

As in the 1958 analysis, the Department looked to ''points near the

[14] There is no salary level test for outside sales employees and some professional employees (teachers, doctors, lawyers). Such employees are exempt regardless of their salary.

[15] Also, in 1996, Congress amended the FLSA to exempt certain hourly-paid computer professionals paid at least $27.63 per hour ($57,470 per year, assuming 40 hours per week).

[16] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, GAO/HEHS–99–164, September 30, 1999.

[17] The ''New Economy'' and Its Impact on Executive, Administrative and Professional Exemptions to the Fair Labor Standards Act (FLSA), January 2001, pp. 71–73.

[18] ''Actual data showing the increases in the prevailing minimum salary levels of bona fide executive, administrative and professional employees since October 1940 would be the best evidence of the appropriate salary increases for the revised regulations. * * * The change in the cost of living which was urged by several witnesses as a basis for determining the appropriate levels is, in my opinion, not a measure of the rise in prevailing minimum salary levels.'' Weiss Report, p. 12.

[19] Report and Recommendations on Proposed Revision of Regulations, Part 541 under the Fair Labor Standards Act, March 3, 1958, by Harry S. Kantor, Assistant Administrator, Presiding Officer.

lower end of the current range of salaries'' to determine an appropriate salary level for the standard test—although we settled upon on the lowest 20 percent, rather than the lowest 10 percent, because of the proposed change from the ''short'' and ''long'' test structure in the proposed rule and because the data included some salaried employees who would not meet the duties tests for exemption. Applying this analysis, and also considering adjustments to the current salary levels for inflation, the Department proposes a standard salary level test of $425/week. Under this level, approximately the bottom 20 percent of salaried employees would fall below the minimum salary requirement and be automatically entitled to overtime pay.

Proposed special rule for highly compensated employees. The proposed regulations also include in § 541.601 a special, streamlined rule for employees paid $65,000 or more annually. Under this proposed rule for highly compensated employees, employees paid $65,000 or more annually and performing non-manual work would be exempt if they have an identifiable executive, administrative or professional function as described in the standard duties tests. These highly compensated employees would not have to meet all the elements of the standard duties test to qualify for the exemption as a highly compensated employee. For example, an employee who supervises two workers but does not participate in any hiring or termination decisions in the company would still be exempt because the employee has a function that is identifiable as an executive function. In addition, the proposed special rule for highly compensated employees would permit counting base salary, commissions, non-discretionary bonuses and other non-discretionary compensation in determining whether an employee earns $65,000 or more annually. To qualify as a highly compensated employee under the proposed regulation, any commissions or non-discretionary bonuses would have to be settled and paid out to the employee as due on at least a monthly basis. An employee who works only a portion of a year, whether because the employee begins work during the year or leaves before the end of the year, must be guaranteed a *pro rata* portion of the $65,000 annual guarantee. The pro rata portion should be based upon the number of weeks the employee works in such a position. If an employee's total annual compensation does not total at least the guaranteed $65,000 by the end of the year, the proposed regulation would allow the employer to make a payment by the next pay period sufficient to bring the employee to the guaranteed level. The employer is not required to make this payment; however, if the employer elects not to make the one-time payment, the employee is not exempt as a highly compensated employee.[20]

To determine an appropriate salary level for highly compensated employees, the Department looked to points near the higher end of the current range of salaries and found that the top 20 percent of all salaried employees earned above $65,000 annually. This level is consistent with setting the proposed standard test salary level at the bottom 20 percent of salaried employees.

Puerto Rico, Virgin Islands and American Samoa. Prior to the Fair Labor Standards Amendments of 1989 (Pub. L. 101–157), Puerto Rico, the Virgin Islands, and American Samoa were subject to wage order proceedings under the Act, in lieu of the FLSA minimum wage, and consequently lower salary test levels traditionally were established for employees in these jurisdictions. The 1989 Amendments removed Puerto Rico and the Virgin Islands from the Act's wage order proceedings, and provided that the U.S. mainland minimum hourly wage rates under section 6(a)(1) of the Act would apply in Puerto Rico and the Virgin Islands. For this reason, the proposed regulations would apply the mainland salary test level of $425 per week in Puerto Rico and the Virgin Islands. Employees in American Samoa remain subject to wage order proceedings under the Act. Consequently, the proposed regulations would apply a special, lower salary test level of $360 per week for executive, administrative and professional employees in American Samoa. This special salary level maintains approximately the same ratio to the mainland test in the current regulations (84% for executive and administrative workers). Similarly, the proposal would apply a special test for highly compensated employees in American Samoa of $55,000 annually. Comments are invited on whether the 84 percent ratio is appropriate.

Comments on salary levels. The Department invites comments on these proposed salary levels and on any alternative salary level amounts or methodologies for determining the appropriate salary level. In addition, the Department invites comments on the alternative of removing the salary tests from the regulations entirely and on how the regulations could be structured without the need for any specific salary amounts (relying only on duties tests, for example). The Department also invites comments on the alternative of adopting a ''salary only'' test for highly compensated employees. Under such an alternative, for example, employees performing non-manual or office work and earning a total annual compensation over a certain amount would automatically be considered exempt, without any reference to the employee's duties.

[20] Of course, if all of the requirements in either the executive, administrative or professional employee tests established in §§ 541.100, 541.200 or 541.300 are satisfied, the employer still would be able to claim the appropriate exemption.

Salary Basis Test

Under the current regulations, to qualify for the executive, administrative or professional exemption, an employee must be paid on a ''salary basis'' as defined in § 541.118. The employee must regularly receive a predetermined amount of salary, on a weekly or less frequent basis, that ''is not subject to reduction because of variations in the quality or quantity of the work performed.'' Thus, with a few exceptions described below, the employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked.

The salary basis test prohibits an employer from making deductions from the salary ''for absences occasioned by the employer or by the operating requirements of the business.'' In other words, ''if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.'' However, the employee does not have to be paid for any work week in which he or she performs no work.

The current salary basis test also prohibits deductions from pay for disciplinary problems, performance issues or for absences caused by jury duty, attendance as a witness, or temporary military leave (although employers may take offsets for jury or military pay) in any week in which an employee performs any work.

The current regulations contain several exceptions to these salary basis rules: An employer may make deductions from the guaranteed pay ''when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident.'' Deductions also are permitted for absences of a day or more due to sickness or disability, if taken in accordance with a *bona fide* plan, policy or law (workers compensation, for example) providing wage

replacement benefits. Employers also may make deductions from an exempt employee's salary for any hours not worked in the initial and final weeks of employment or for hours taken as unpaid FMLA leave without affecting the exempt status of the employee. Finally, less than full week deductions from pay are permitted for violations of major safety rules.

Under the current rules, an employer can lose the exemption for an entire class of employees for making improper deductions from guaranteed pay, even for highly paid employees. Depending on the facts, improper deductions can ''indicate that there was no intention to pay the employee on a salary basis. In such a case, the exemption would not be applicable to him during the entire period when such deductions were being made.'' For inadvertent mistakes, however, the regulations provide employers with a ''window of correction.'' If the facts demonstrate that the prohibited deduction from guaranteed pay was inadvertent, the exemption is not lost if the employer reimburses the employee for such deductions and promises to comply in the future.

In developing options for its proposed rule, the Department considered whether to eliminate the salary basis test. We carefully weighed the need for the salary basis test and concluded that the underlying concept of the test '' guaranteed pay, not subject to reduction because of variations in the quality or quantity of the work performed '' should be retained. The nearly universal practice of paying employees with the requisite status to be bona fide executive, administrative, or professional employees on a salary basis, as the 1949 hearings on the exemption revealed, reflected the understanding that such employees have discretion to manage their time and are not answerable for the number of hours worked or the number of tasks performed. Such employees are not paid by the hour or task, but for the general value of services performed. The salary basis test also describes the *quid pro quo* enjoyed by exempt employees, which distinguishes them from non-exempt workers. Exempt employees are not paid overtime for working over 40 hours in a week. In exchange, the employer must provide a guaranteed salary that cannot be reduced when an employee works less than 40 hours.

The Department also considered amending the salary basis test to permit deductions from pay for cases in which an exempt employee chooses to be absent for a part of a day. But allowing such ''pay docking'' for partial-day absences would breach the quid pro quo and blur the line between exempt and non-exempt employees. An exempt manager, for example, does not receive extra pay for working 16 hours on a Thursday to complete a project; thus, as a matter of fundamental fairness, an employer should not be allowed to dock the employee's salary for leaving work early on Friday. Of course, an employer can terminate an employee who abuses this salary arrangement.

Although the proposed rule retains the salary basis test and its concept of guaranteed pay in proposed § 541.602, two significant updates are included in the proposal: *Disciplinary Deductions.* The proposed regulations would allow an exception to the no pay-docking rule for deductions from pay for full-day disciplinary suspensions. For example, an employer would be permitted to suspend an exempt employee without pay for reasons such as sexual harassment or workplace violence. The current regulations permit such deductions only for penalties imposed for infractions of safety rules of major significance and for unpaid suspensions for one or more full work weeks (*i.e.*, Monday to Friday). The proposed change would allow employers to suspend exempt employees without pay for discriminatory harassment for two days, four days or 10 days, as appropriate to respond to the misconduct. The Department believes this is a common-sense change that will permit employers to uniformly hold exempt employees to the same standards of conduct as that required of nonexempt, hourly workers. *Safe Harbor Provision.* Under the current regulations, an employer who makes improper deductions from pay can lose the exemption for an entire class of employees. However, as mentioned above, the current rules also include a ''window of correction'' provision at 541.118(a)(6) under which an employer who inadvertently makes impermissible deductions can, in some circumstances, retain the exemption by reimbursing employees for any improper deductions. Unfortunately, the ''window of correction'' has proved difficult for the Department to administer and has been the source of considerable litigation. The proposed rule, at 541.603, would clarify the circumstances and the extent to which an improper deduction causes an employee or groups of employees to become nonexempt. The proposed rule maintains the underlying purpose of the current rule that an employer does not lose the FLSA exemption because of isolated incidents of improper pay deductions. Under the proposal, the exemption would be lost only if there is a pattern and practice of improper deductions, and then only for employees in the same job classification and working for the same manager who is responsible for the improper pay docking decision or policy. For example, if one manager at a single company facility routinely docks the pay of engineers for partial-day absences, then all engineers at that one facility whose pay could have been docked by that same manager are not exempt. Engineers at other facilities or working for other managers would remain exempt. Further, the proposed rule would create a new ''safe harbor'' provision: if an employer has a written policy prohibiting improper pay deductions, notifies employees of that policy and reimburses employees for any improper deductions, then that employer would not lose the exemption for any employees unless the employer's policy prohibiting improper deductions is repeatedly and willfully violated. The Department believes this approach would be much easier to apply uniformly and more consistent with the purposes of the FLSA.

Proposed section 541.604 continues the guidance from current 541.118(b) on allowing payments of additional compensation besides the salary as not being inconsistent with the salary basis of payment, and on pay plans that compute an exempt employee's salary from daily or shift rates if accompanied by the minimum guarantee. The language has been clarified to add hourly compensation plans that include such guarantees, consistent with established enforcement practices, if a reasonable relationship exists between the guaranteed amount and an employee's usual earnings for a normal scheduled work week.

Proposed § 541.605 contains updated guidance on the ''fee basis'' of payment permitted for administrative and professional employees, taken from current sections 541.213 and 541.313. Proposed § 541.606 provides guidance on payment of required salary amounts ''exclusive of board, lodging or other facilities'' or ''free and clear,'' taken from §§ 541.117(c), 541.211(d), and 541.311(d) of the current regulations and expanded to cross-reference 29 CFR 531.32 for more guidance on qualifying ''other facilities'' similar to board and lodging.

The former ''upset salary'' provisions that were part of the short tests for executive, administrative and professional employees have been deleted from this proposed rule (current §§ 541.119, 541.214, and 541.315).

Subpart H, Definitions and Miscellaneous Provisions, §§ 541.700–.708

To eliminate unnecessary repetition, the proposed regulations would move definitions and other provisions applicable to several or all of the exemption categories to a new subpart H, Definitions and Miscellaneous Provisions. The proposed subpart H would define ''primary duty'' in proposed § 541.700; ''directly and closely related'' in proposed Section 541.702; ''exempt and nonexempt work'' in proposed § 541.701; and ''office or non-manual work'' in proposed § 541.703. Subpart H would also contain provisions regarding trainees, emergencies and occasional tasks, combination exemptions, the motion picture producing industry, and employees of public agencies. Most of these provisions have been moved from the existing regulations without substantial change, although some changes have been made to simplify and update the current regulations. Current § 541.602, containing guidance on the percentage limitations on performing nonexempt work for executive and administrative employees in multi-store retailing operations, is proposed to be deleted for the same reasons noted above for eliminating those former long duties test requirements from the executive and administrative exemptions.

IV. Executive Order 12866 and the Small Business Regulatory Enforcement Fairness Act

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that the proposed rule is an economically significant regulatory action under section 3(f)(1) of Executive Order 12866. Based on a preliminary analysis of the data the rule could have an annual effect on the economy of $100 million or more. However, the proposed rule is not likely to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof.

For similar reasons, the Department has concluded that this proposed rule also is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). Although it could result in an annual effect on the economy of $100 million or more, it is not likely to result in a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

As a result, the Department has prepared a Preliminary Regulatory Impact Analysis (PRIA) in connection with this proposed rule as required under section 6(a)(3) of the Order and the Office of Management and Budget has reviewed the rule. Copies of the complete PRIA may be obtained from the Department by contacting the Wage and Hour Division at the address and telephone number provided above. The results of the PRIA are summarized below.

Preliminary Regulatory Impact Analysis

Overview

The proposed changes in the rules for determining whether an employee is exempt as an executive, administrative, or professional (EAP) worker under the Fair Labor Standards Act (FLSA) will affect virtually all employers covered by the FLSA that employ workers within the scope of the exemptions in 29 CFR part 541. Employers will be affected unless all of their employees are expressly excluded from FLSA coverage by the statute. Excluded from these regulations are the self-employed, agricultural workers, railroad workers, selected occupations in the transportation industries and in automobile dealerships, and most Federal employees subject to separate rules administered by the U.S. Office of Personnel Management. However, 29 CFR part 541 regulations apply to the following Federal agencies: Library of Congress, U.S. Postal Service, Postal Rate Commission, and Tennessee Valley Authority (see 29 U.S.C. 204(f)).

Therefore, employers in all industrial sectors except agriculture, railroads, and private households are subject to the existing and proposed regulations. The regulations also apply to State and local governmental employees.

The PRIA indicates that there are 6.5 million establishments with 109.5 million employees, annual payrolls totaling $2.8 trillion, annual sales revenues of $17.9 trillion, and annual pre-tax profits of $769.5 billion in the industry sectors affected by the proposed rule. Corresponding data based on SBA's size standards for small business entities indicates that over 5.2 million of these establishments are considered to be small businesses. These small firms employ approximately 38.7 million workers with an annual payroll of $940.0 billion. Their total annual sales are estimated to be $5.7 trillion and their annual pre-tax profits are estimated to be $233.9 billion. Approximately 79.8 percent of the affected establishments are considered to be small businesses and they account for 38.8 percent of the employment, 33.7 percent of the payroll, 31.8 percent of the annual sales, and 30.4 percent of the annual pre-tax profits.

Over 87,400 state and local governmental entities will be affected by the proposed rule (3,043 county governments, 19,372 municipal governments, 16,629 township governments, 34,683 special district governments, and 13,726 school district governments). Nationwide, these entities receive more than $1.4 trillion in general revenues, including revenues from taxes, some categories of fees and charges, and intergovernmental transfers. Their direct expenditures exceed $1.6 trillion in the aggregate. State and local governments employ more than 4 million workers and their payrolls exceed $12.6 billion per month.

The following tables summarize the provisions of the current 29 CFR part 541 and the proposed rule that were analyzed in the PRIA.

TABLE 1.—WEEKLY SALARY LEVELS IN THE CURRENT AND PROPOSED RULES

	Dollars
Current Rule	
Long Test:	
Executives	155
Administrative	155
Professionals	170
Short Test	250
Proposed Rule	
Standard Test	425
Highly Compensated	1,250

TABLE 2.—THE CURRENT AND PROPOSED DUTIES TESTS FOR EXECUTIVE EMPLOYEES

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
$155 per week	$250 per week	$425 per week.
Primary duty of the management of the enterprise or a recognized department or subdivision.	Primary duty of the management of the enterprise or a recognized department or subdivision.	Primary duty of management of the enterprise or a recognized department or subdivision.
Customarily and regularly directs the work of two or more other employees.	Customarily and regularly directs the work of two or more other employees.	Customarily and regularly directs the work of two or more other employees.
Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of employees is given particlar weight).		Has authority to hire or fire other employees (or recommendations as to hiring, firing, promotion or other change of status of other employees is given particlar weight).
Customarily and regularly exercises discretionary powers.		
Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.		

TABLE 3.—THE CURRENT AND PROPOSED DUTIES TESTS FOR ADMINISTRATIVE EMPLOYEES

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
$155 per week	$250 per week	$425 per week.
Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.	Primary duty of performing office or non-manual work directly related to management policies or general business operations of the employer or the employer's customers.	Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.
Customarily and regularly exercises discretion and independent judgment.	Customarily and regularly exercises discretion and independent judgment.	Holds a ''position of responsibility'' with the employer, defined as either (1) performing work of substantial importance or (2) performing work requiring a high level skill or training.
Regularly and directly assists a proprietor, or exempt executive or administrative employee; or performs specialized or technical work requiring special knowledge under only general supervision; or executes special assignments under only general supervision.		
Does not devote more than 20 percent (40 percent in retail or service establishments) of time to activities that are not directly and closely related to exempt work.		

TABLE 4.—THE CURRENT AND PROPOSED DUTIES TESTS FOR LEARNED PROFESSIONAL EMPLOYEES

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
$170 per week	$250 per week	$425 per week.
Primary duty 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.	Primary duty 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	Primary duty of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.
Consistently exercises discretion and judgment.	Consistently exercises discretion and judgment.	
Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time..		
Does not devote more than 20 percent of time to activities that are not an essential part of and necessarily incident to exempt work.		

TABLE 5.—THE CURRENT AND PROPOSED DUTIES TESTS FOR CREATIVE PROFESSIONAL EMPLOYEES

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
$170 per week	$250 per week	$425 per week.

TABLE 5.—THE CURRENT AND PROPOSED DUTIES TESTS FOR CREATIVE PROFESSIONAL EMPLOYEES—Continued

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
Primary duty of performing work that is original and creative in character in a recognized field of artistic endeavor, and the result of which depends primarily on the invention, imagination, or talent of the employee. Consistently exercises discretion and judgment. Performs work that is predominantly intellectual and varied in character and is of such character that the output produced or result accomplished cannot be standardized in relation to a given period of time. Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.	Performs work requiring invention, imagination, or talent in a recognized field of artistic endeavor.	Primary duty of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

TABLE 6.—THE CURRENT AND PROPOSED DUTIES TESTS FOR COMPUTER EMPLOYEES

Current long test (salary and duties)	Current short test (salary and duties)	Section 13(a)(17) test (salary and duties)	Proposed Standard Test (salary and duties)
$170 per week ..... Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.	$250 per week ..... Primary duty of performing work requiring theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering.	$27.63 an hour ..... Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software of system functional applications; or (B) design, development, documentation analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user of system design specifications; or (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.	$425 per week or $27.63 an hour. Primary duty of (A) application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software of system functional applications; or (B) design, development, documentation analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user of system design specifications; or (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.
Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. Consistently exercises discretion and judgment. Performs work that is predominantly intellectual and varied in character and is of such character that he output produced or result accomplished cannot be standardized in relation to a given period of time. Does not devote more than 20 percent of time to activities that are not directly and closely related to exempt work.	Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field. Consistently exercises discretion and judgment.	Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.	Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field.

TABLE 7.—THE CURRENT AND PROPOSED DUTIES TESTS FOR OUTSIDE SALES EMPLOYEES

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
None required	None required	None required.

TABLE 7.—THE CURRENT AND PROPOSED DUTIES TESTS FOR OUTSIDE SALES EMPLOYEES—Continued

Current long test (salary and duties)	Current short test (salary and duties)	Proposed standard test (salary and duties)
Employed for the purpose of and customarily and regularly engaged away from the employer's place of business in making sales; or in obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer. Does not devote more than 20 percent of the hours worked by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee's own outside sales or solicitations.	No separate ''short'' test	Primary duty of making sales; or of obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer Customarily and regularly engaged away from the employer's place or places of business.

Methodology for Estimating Costs

The principal database used in the PRIA is the 2001 Current Population Survey (CPS). A complete description of the methodology used for determining the employees who are potentially exempt and nonexempt from the overtime requirements of the current and proposed rule is contained in the PRIA available by contacting the Wage and Hour Division at the address and telephone number provided above.

The economic impact of the proposed rule includes two components: One-time implementation costs; and recurring incremental payroll costs incurred by employers for those employees presently treated as exempt from overtime under the current rule, who become nonexempt.

The implementation costs contain two parts. The first part includes the amount of time employers would take to: (1) Read and understand the proposed rule; (2) update and formulate their overtime policies; (3) notify employees of any changes; and (4) all other time taken to implement the proposed rule. The second part of the implementation costs is the amount of time employers would take to review their job categories to determine (1) whether or not a particular job category is exempt or nonexempt under the proposed rule, and (2) how to adjust to the new salary levels and duties tests. To estimate the implementation costs of the proposed rule, the department contacted six human resource specialists from around the country to obtain information on the amount of time small and large businesses would take for each of these activities. High and low estimates of the implementation costs were estimated by varying the amount of time taken to review job categories and other time taken to implement the proposed rule.

The second component of the economic impact of the proposed rule is the recurring incremental payroll costs incurred by employers for those employees presently treated as exempt from overtime under the current rule, who become nonexempt as a result of raising the salary levels and revising the duties tests.

Affected employers would have four choices concerning potential payroll costs: (1) Adhering to a 40 hour work week; (2) paying statutory overtime premiums for affected workers' hours worked beyond 40 per week; (3) raising employees' salaries to levels required for exempt status by the proposed rule; or (4) converting salaried employees' basis of pay to an hourly rate (no less than the federal minimum wage) that results in virtually no (or only a minimal) changes to the total compensation paid to those workers. Employers could also change the duties of currently exempt and nonexempt workers to comply with the proposed rule.

For the second choice above, paying overtime premium pay, employers typically have two options, with differing cost implications, for meeting their statutory overtime obligations. For example, assume an employer paid an employee a fixed salary of $400 per week with no overtime premium pay, for which the employee worked 45 hours per week, and the employer must now begin to pay this employee overtime pay. As one option, the employer could assume that the former weekly salary of $400 represents compensation for a standard 40-hour workweek, and pay this employee in the future time-and-one-half the $10 hourly rate for any overtime hours worked beyond 40 per week. For a 45-hour workweek, total compensation due, including overtime, would equal $475 ((40 hours × $10/hour) + (5 hours × $15/hour) = $475), compared to $400 formerly. As a second option, the employer could pay the fixed salary of $400 per week as total straight time pay for all hours worked in the week (provided it equals or exceeds the federal minimum wage), and pay additional ''half-time'' for each hour worked beyond 40 in the week. This method of payment is known as a ''fixed salary for fluctuating hours'' (*see* 29 CFR 778.114). For a 45-hour workweek, total compensation due under this method, including overtime, would equal $422.22 ($400 + (($400÷45) × ½ × 5) = $422.22).

The third choice above is straightforward—an employer could simply raise the salary level for currently exempt salaried workers earning less than $22,100 to at least the new proposed salary level or more and have them remain exempt salaried workers.

Nothing in the FLSA would prohibit an employer affected by the proposed rule, or under the current rule, from implementing the fourth choice above that results in virtually no (or only a minimal) increase in labor costs. For example, to pay an hourly rate and time and one-half that rate for 5 hours of overtime in a 45-hour workweek and incur approximately the same total costs as the former $400 weekly salary, the regular hourly rate would compute to $8.421 ((40 hours × $8.421) + (5 hours × (1.5 × $8.421)) = $399.99).

Most employers affected by the proposed rule would be expected to choose the most cost-effective compensation adjustment method that maintains the stability of their work force, pay structure, and output levels. Given the range of options available to an employer confronted with paying overtime to employees previously treated as exempt, the actual payroll cost impact for individual employers could range from near zero to up to the maximum cost impacts estimated in the Department's PRIA. However, for the PRIA it is was assumed that, for any nonexempt employee who satisfies the pertinent duties test, the employer will choose to pay the smaller of either the additional weekly salary required to qualify the employee for exemption or the usual weekly overtime payment for the employee. Thus, the Department's

assessment of costs of the proposed rule reflects a range of upper bound estimates. Actual payroll costs would be expected to be lower than the estimates summarized below and presented in the PRIA because of the payroll adjustment option employers have that could offset the impact of the proposed rule. Moreover, some of the cost is likely to be passed on to consumers in the form of higher prices, some of the cost is likely to be passed on to business owners and shareholders in the form of lower profits, and some of the cost is likely to be passed on to workers in the form of fewer overtime hours.

Finally, estimated costs are presented as ranges because data limitations prevent the Department from identifying exactly which workers are exempt and nonexempt based on the current and proposed duties tests. The estimates were determined using previous Department and U.S. General Accounting Office methodology and the latest data from the Bureau of Labor Statistics, the Census Bureau, and Dunn and Bradstreet. The ranges result from estimating a minimum and maximum number of workers that are likely to change from exempt to nonexempt employees. To estimate the recurring payroll costs of the proposed rule, it was necessary to apply some assumptions to the PRIA data to identify which employees are exempt and nonexempt under the current and proposed rules. Specifically, the Department assumed that for employees in occupations with a combination of exempt and nonexempt duties those with lower salaries would more likely be non-exempt. The Department also assumed that six years or more of work experience would be considered equivalent to a bachelor's degree for the learned professional exemption. For each occupational category with a combination of exempt and nonexempt duties a lower bound and an upper bound estimate of the number of employees who are exempt has been calculated. Finally, it was assumed that for each executive, administrative, or professional employee who becomes nonexempt, the likely incremental payroll cost is the smaller of the additional weekly salary required to qualify for exemption or the usual weekly overtime payment required to be paid to that worker.

Methodology for Estimating Benefits

The benefit estimates are lower bound estimates based on PRIA data and a Minimum Wage Study Commission report that estimated overtime violation rates by industry. The Department applied these rates to the overtime hours worked by salaried employees in the PRIA data, and then reduced these estimates by two-thirds to account for other types of overtime violations (off-the-clock-work, straight time for all hours) that occur in addition to violations of the ''white collar'' exemptions. The Department's high and low benefit estimates result from different assumptions on the lower costs associated with determining the exempt status of employees including conducting expensive time-and-motion studies and lower litigation costs, as well as the updated window of correction and safe harbor provisions in the proposed rule. The benefit estimates summarized below are lower bound estimates because they exclude significant, but difficult to quantify, benefits such as avoidance of the following additional costs which could be incurred by an employer who has misclassified employees as exempt: (1) The second and third years of overtime back pay allowed under the FLSA; (2) an amount equal to the back pay as liquidated damages; and (3) litigation costs, including attorney's fees. The benefit estimates also exclude the reduced human resource and legal costs for classifying workers under the proposed rule, and improved management productivity from reduced Department of Labor investigations and private litigation.

Three assumptions were applied to the PRIA data to estimate the benefits of the proposed rule; the Department requests comments on these and all assumptions used for the impact analysis. First, the overtime violation rates published by the Minimum Wage Study Commission in 1980 were assumed to apply today. Second, the Commission's overtime violation rates were reduced to account for other types of overtime violations (off-the-clock-work, straight time for all hours) that occur in addition to violations of the ''white collar'' exemptions. Finally, the Department's range of benefit estimates result from different assumptions on the impact of the updated window-of-correction and safe harbor provisions in the proposed rule. The Department welcomes comments and estimates from the public on the amount of benefits associated with these provisions and other significant, but difficult to quantify, benefits such as the reduced human resource and legal costs for classifying workers under the proposed rule, and improved management productivity from reduced investigations and litigation.

Total Costs and Benefits

The upper bound total cost estimate for the proposed rule ranges from $870.3 million to $1,575.5 million. This includes one-time implementation costs ranging from $535.4 million to $680.0 million and recurring payroll costs ranging from $334.8 million to $895.5 million. The lower bound total benefit estimate for the proposed rule ranges from $1,109.8 million to $1,972.7 million.

Private Sector Costs and Benefits

The upper bound private sector cost estimate for the proposed rule ranges from $849.2 million to $1,531.9 million. This includes one-time implementation costs ranging from $521.4 million to $660.3 million and recurring payroll costs ranging from $327.8 million to $871.6 million. The total private sector costs as a percentage of total payroll range from 0.03 percent to 0.05 percent for all industries, and from 0.11 percent to 0.21 percent of total pre-tax profits for all industries.

The lower bound private sector benefit estimate for the proposed rule ranges from $1,061.3 million to $1,886.5 million. These estimates include the impact of updating the window of correction and safe harbor provisions in the proposed rule but do not include significant, but difficult to quantify, benefits such as the reduced human resource and legal costs for classifying workers under the proposed rule, and improved management productivity from reduced investigations and litigation.

The largest total costs are incurred by the Health Services industry ($85.3 million to $163.4 million), Construction ($71.2 million to $119.1 million), Business Services ($54.1 million to $86.4 million), Personal Services ($38.1 million to $83.8 million), and Real Estate ($32.2 million to $71.4 million). The 10 industries with the highest costs account for over 50.4 percent of the total private sector costs.

Although the benefits of the proposed rule exceed the costs at the total level and for many of the major industry levels, there are some industries where the costs exceed the benefits (*see* Table 8). This result arises for three reasons. First, the costs are upper bound estimates and the benefits are lower bound estimates (*see* Methodology section above). The true net benefit for most industries could very well be positive. Second, a large increase in the salary levels raises the potential costs of the proposed rule. Finally, the industries most likely to bear the cost of the proposed rule are not necessarily the

industries most likely to receive the benefits. Most of the benefits come from the reduction in the potential legal liability from unintentionally misclassifying fairly high paid salaried workers working more than 40 hours per week in occupations with exempt and nonexempt duties, while most of the costs come from increasing the salary level tests for relatively low paid salaried workers. The PRIA data suggest that the number of workers in these two groups is often not equal at a detailed industry level. For example, because of the historical pattern of compensation levels in the Personal Services and Automotive Repair, Services, and Parking industries one would expect to find far more relatively low paid salaried workers affected by the proposed salary level tests than relatively high paid salaried workers unintentionally misclassified.

The largest total costs as a percentage of payroll are incurred by the Educational Services industry (0.37 percent to 0.98 percent), Agricultural Services (0.22 percent to 0.53 percent), Personal Services (0.21 percent to 0.46 percent), Automotive Repair, Services, and Parking (0.13 percent to 0.29 percent), and Transportation by Air (0.11 percent to 0.22 percent).

The largest recurring payroll costs as a percentage of pre-tax profits are incurred by the Educational Services industry (1.95 percent to 5.22 percent), Personal Services (1.38 percent to 3.03 percent), Automotive Repair, Services, and Parking (0.84 percent to 1.81 percent), Agricultural Services (0.54 percent to 1.26 percent), and Transportation by Air (0.54 percent to 1.07 percent).

TABLE 8.—SUMMARY OF COSTS AND BENEFITS FOR INDUSTRY SECTORS AFFECTED BY THE PROPOSED RULE

SIC	Industry description	Low implementation costs	High implementation costs	Low payroll costs	High payroll costs	Low total costs	High total costs	Low benefits	High benefits	Low difference	High difference
07	Agricultural Services [4]	$2,895	$4,020	$14,833	$37,529	$17,729	$41,549	$2,032	$3,612	−$15,697	−$37,937
08	Forestry [4]	83	113	27	58	110	171	346	614	235	444
09	Fishing, Hunting, & Trapping [4]	63	88	121	381	184	469	195	346	11	−123
	Agriculture Subtotal	3,042	4,221	14,981	37,968	18,023	42,188	2,572	4,573	−15,451	−37,616
10	Metal mining	121	146	0	0	121	146	185	328	64	182
12	Coal mining	239	293	119	346	358	639	647	1,150	289	511
13	Oil & gas extraction	1,431	1,820	856	1,882	2,287	3,701	4,525	8,044	2,238	4,342
14	Nonmetallic minerals, except fuels.	475	602	8	13	483	615	520	924	37	309
	Mining Subtotal	2,266	2,860	984	2,242	3,250	5,102	5,877	10,447	2,627	5,345
15–17	Construction	48,090	64,024	23,096	55,046	71,186	119,070	33,486	59,524	−37,700	−59,545
20	Food & kindred products	5,587	6,577	1,767	3,793	7,354	10,370	3,654	6,495	−3,700	−3,875
21	Tobacco products	87	100	83	197	169	297	110	195	−60	−102
22	Textile mill products	1,855	2,176	488	1,192	2,343	3,368	538	956	−1,806	−2,412
23	Apparel & other textile products	4,367	5,212	960	1,896	5,327	7,108	790	1,405	−4,537	−5,703
24	Lumber & wood products	5,746	6,917	804	2,103	6,550	9,021	922	1,639	−5,628	−7,382
25	Furniture & fixtures	2,454	2,918	371	1,068	2,824	3,986	727	1,292	−2,098	−2,694
26	Paper & allied products	2,034	2,383	826	1,754	2,860	4,137	1,484	2,638	−1,376	−1,500
27	Printing & publishing	10,260	12,319	3,607	16,921	13,867	29,240	3,554	6,318	−10,313	−22,922
28	Chemicals & allied products	3,118	3,678	2,969	11,299	6,087	14,977	5,892	10,473	−196	−4,504
29	Petroleum & coal products	481	569	910	1,637	1,390	2,206	776	1,380	−614	−826
30	Rubber & miscellaneous plastics products.	4,040	4,775	819	2,313	4,860	7,088	1,586	2,820	−3,274	−4,268
31	Leather & leather products	373	443	179	459	552	902	261	465	−291	−437
32	Stone, clay, & glass products	2,915	3,487	642	1,616	3,558	5,104	998	1,774	−2,560	−3,329
33	Primary metal industries	2,125	2,485	1,078	3,017	3,203	5,501	1,596	2,837	−1,607	−2,664
34	Fabricated metal products	7,498	8,927	1,993	4,837	9,491	13,764	1,942	3,452	−7,549	−10,311
35	Industrial machinery & equipment.	10,509	12,543	2,778	6,887	13,287	19,430	7,515	13,359	−5,772	−6,071
36	Electronic & other electric equipment.	5,180	6,076	3,768	8,860	8,948	14,936	6,759	12,014	−2,189	−2,922
37	Transportation equipment	4,689	5,469	5,207	11,883	9,896	17,352	5,352	9,513	−4,545	−7,839
38	Instruments & related products	3,032	3,573	1,911	4,940	4,943	8,512	3,057	5,435	−1,885	−3,078
39	Misc. manufacturing industries	2,886	3,470	1,281	3,727	4,167	7,196	1,220	2,169	−2,947	−5,027
	Manufacturing Subtotal	79,235	94,095	32,442	90,399	111,678	184,494	48,733	86,628	−62,944	−97,866
40	Railroad Transportation [5]	nc	nc	528	1,890	528	1,890	1,510	2,684	982	793
41	Local & interurban passenger transportation.	1,500	1,881	1,216	2,652	2,716	4,533	861	1,531	−1,854	−3,003
42	Motor freight transportation & warehousing.	8,873	11,271	3,415	7,879	12,288	19,150	7,722	13,727	−4,566	−5,423
43	U.S. Postal Service [6]	2,875	3,610	1,359	5,147	4,234	8,757	643	1,143	−3,591	−7,614
44	Water transportation	655	827	380	1,255	1,036	2,082	1,694	3,010	658	928
45	Transportation by air [7]	986	1,225	11,213	22,633	12,200	23,858	4,588	8,155	−7,612	−15,703
46	Pipelines, except natural gas	59	74	6	14	65	89	31	54	−35	−34
47	Transportation services	3,125	4,014	822	2,407	3,947	6,421	963	1,712	−2,984	−4,710
48	Communications	3,815	4,740	5,424	13,690	9,239	18,430	14,516	25,804	5,277	7,374
49	Electric, gas, & sanitary services	2,052	2,537	2,623	7,136	4,675	9,673	5,977	10,625	1,302	952
	Trans., Comm., & Pub. Util. Subtotal.	23,940	30,180	26,460	62,813	50,400	92,993	36,994	65,761	−13,406	−27,233
50	Wholesale trade—durable goods	25,544	32,579	4,334	10,296	29,877	42,875	38,356	68,182	8,479	25,307
51	Wholesale trade—nondurable goods.	14,764	18,738	4,538	10,934	19,302	29,672	31,512	56,016	12,210	26,344
	Wholesale Subtotal	40,308	51,318	8,871	21,229	49,179	72,547	69,868	124,198	20,689	51,650
52	Building materials, hardware, garden supply, & mobile home dealers.	4,608	5,874	949	2,380	5,557	8,254	10,553	18,758	4,995	10,504

TABLE 8.—SUMMARY OF COSTS AND BENEFITS FOR INDUSTRY SECTORS AFFECTED BY THE PROPOSED RULE—Continued

SIC	Industry description	Low implementation costs	High implementation costs	Low payroll costs	High payroll costs	Low total costs	High total costs	Low benefits	High benefits	Low difference	High difference
53	General merchandise stores	5,222	6,352	2,961	7,041	8,183	13,393	14,966	26,604	6,783	13,210
54	Food stores	13,060	16,499	6,487	16,941	19,547	33,441	19,519	34,698	−28	1,257
55	Automotive dealers & gasoline service stations.	13,380	17,101	3,942	10,470	17,322	27,571	38,529	68,490	21,207	40,919
56	Apparel & accessory stores	7,926	10,182	959	1,905	8,885	12,087	5,547	9,860	−3,339	−2,227
57	Home furniture, furnishings, & equipment stores.	7,015	9,032	1,627	3,795	8,641	12,827	20,518	36,472	11,876	23,646
58	Eating & drinking places	33,346	42,414	9,310	26,857	42,656	69,271	38,054	67,646	−4,601	−1,626
59	Miscellaneous retail	22,326	28,755	6,152	14,028	28,478	42,783	31,195	55,452	2,717	12,669
.....	Retail Subtotal	106,884	136,210	32,387	83,417	139,271	219,627	178,881	317,979	39,611	98,353
60	Depository institutions	6,943	8,924	2,677	8,836	9,620	17,760	23,042	40,960	13,422	23,200
61	Nondepository credit institutions	2,727	3,580	1,795	4,701	4,522	8,281	13,449	23,907	8,927	15,625
62–67	Holding & other investment offices, except trusts, & Security & commodity brokers, dealers, exchanges, & services.	4,055	5,302	8,260	20,789	12,315	26,091	30,936	54,992	18,620	28,901
63–64	Insurance carriers, Insurance agents, brokers, & services.	9,454	12,342	6,016	11,003	15,470	23,345	26,681	47,428	11,211	24,083
65	Real estate	10,801	14,565	21,401	56,982	32,202	71,546	21,773	38,703	−10,429	−32,843
.....	Fin., Insure., & Real Est. Subtotal.	33,980	44,713	40,150	102,311	74,130	147,024	115,881	205,990	41,751	58,966
70	Hotels, rooming houses, camps, & other lodging places.	6,394	7,899	2,707	7,492	9,101	15,391	10,461	18,595	1,359	3,204
72	Personal services	12,705	16,505	25,351	67,270	38,055	83,775	8,112	14,419	−29,943	−69,355
73	Business services	37,518	46,860	16,606	39,540	54,124	86,401	109,491	194,631	55,367	108,230
75	Automotive repair, services, & parking.	11,698	15,230	19,375	51,798	31,073	67,028	9,480	16,851	−21,593	−50,177
76	Miscellaneous repair services	4,164	5,406	1,373	4,213	5,537	9,618	1,586	2,819	−3,951	−6,800
78	Motion pictures	3,470	4,419	4,283	19,485	7,753	23,904	10,446	18,570	2,693	−5,334
79	Amusement & recreation services.	7,987	10,088	5,622	16,716	13,609	26,804	10,573	18,795	−3,035	−8,009
80	Health services	48,132	60,026	37,155	103,356	85,287	163,382	114,546	203,617	29,259	40,235
81	Legal services	10,263	13,361	2,246	8,969	12,509	22,329	42,821	76,119	30,313	53,790
82	Educational services	1,878	2,412	14,052	40,243	15,930	42,655	155,178	275,844	139,248	233,189
83	Social services	12,637	16,039	9,438	21,396	22,075	37,435	12,498	22,216	−9,577	−15,219
84	Museums, art galleries, & botanical & zoological gardens.	455	574	294	858	749	1,432	1,009	1,794	260	362
86	Membership organizations	4,425	5,701	1,396	9,151	5,821	14,851	8,252	14,668	2,430	−183
87	Engineering, accounting, research, management, & related services.	20,847	26,721	7,828	23,332	28,675	50,053	71,813	127,656	43,138	77,602
89	Services, not elsewhere classified [4].	1,080	1,405	206	488	1,286	1,892	1,205	2,143	−81	251
	Services Subtotal	183,651	232,645	147,933	414,307	331,584	646,952	567,471	1,008,736	235,887	361,784
	Private Industry	521,396	660,266	327,832	871,621	849,228	1,531,887	1,061,273	1,886,519	212,045	354,632
	State & Local Government	14,033	19,695	7,012	23,911	21,045	43,606	48,495	86,205	27,450	42,599
	Total	535,429	679,961	334,844	895,532	870,273	1,575,493	1,109,768	1,972,724	239,495	397,231

Note: Unless otherwise noted, data are from USDOC (2001a). Na: Data not available. Nc: Not calculable.
[1] Number of employers are derived from the U.S. Department of Commerce, Bureau of Census, 1992 Enterprise Statistics.
[2] Employment is estimated when data suppression occurs.
[3] Sales data for industries 07, 08, 09, and 89 are from the D&B (2001a) database.
[4] 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.
[5] Only includes Railroad Switching and Terminal Establishments (SIC 4013).
[6] All data for the U.S. Postal Service are from USPS (1997).
[7] Data do not include large certificated passenger carriers that report to the Office of Airline Statistics, U.S. Department of Transportation.

Sources: CONSAD Research Corporation and the U.S. Department of Labor; 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; 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.

Small Business Cost Estimates

The upper bound small business cost estimate for the proposed rule ranges from $502.4 million to $835.9 million. This includes one-time implementation costs ranging from $349.3 million to $451.7 million and recurring payroll costs ranging from $153.1 million to $384.2 million. The recurring payroll costs as a percentage of total payroll range from 0.02 percent to 0.04 percent, and from 0.07 percent to 0.16 percent of total pre-tax profits.

The lower bound small business benefit estimate for the proposed rule ranges from $629.8 million to $1,119.4 million. These estimates do not include significant, but difficult to quantify, benefits such as the reduced human resource and legal costs for classifying workers under the proposed rule, and improved management productivity from reduced investigations and litigation.

The largest recurring payroll costs are incurred by the Personal Services industry ($17.6 million to $46.6

million), Construction ($16.7 million to $39.4 million), Automotive Repair, Services, and Parking ($13.9 million to $37.1 million), Agricultural Services ($10.4 million to $26.4 million), and Real Estate ($9.9 million to $26.3 million). The 10 industries with the highest costs account for 57.4 percent to 67.0 percent of the total small business costs.

The largest recurring payroll costs as a percentage of payroll are incurred by the Educational Services industry (0.4 percent to 1.0 percent), Agricultural Services (0.2 percent to 0.6 percent), Personal Services (0.2 percent to 0.4 percent), Transportation by Air (0.1 percent to 0.3 percent), and Automotive Repair, Services, and Parking (0.1 percent to 0.2 percent).

The largest recurring payroll costs as a percentage of pre-tax profits are incurred by the General Merchandise Stores (4.5 percent to 10.6 percent), Educational Services (2.0 percent to 5.3 percent), Agricultural Services (1.1 percent to 2.8 percent), Personal Services (0.9 percent to 2.4 percent), and Eating and Drinking Places (0.8 percent to 2.2 percent).

State and Local Government Cost and Benefit Estimates

The upper bound cost estimate for State and local governments for the proposed rule ranges from $21.0 million to $43.6 million. This includes one-time implementation costs ranging from $14.0 million to $19.7 million and recurring payroll costs ranging from $7.0 million to $23.9 million. The cost estimates represents less than 0.005 percent of the $1.4 trillion in general revenues received by all state and local governmental entities nationwide, and 0.01 percent to 0.03 percent of the $150 billion in total payrolls for those entities.

The lower bound benefit estimate for State and local governments for the proposed rule ranges from $48.5 million to $86.2 million. These estimates do not include significant, but difficult to quantify, benefits such as the reduced human resource and legal costs for classifying workers under the proposed rule, and improved management productivity from reduced investigations and litigation.

The largest costs are incurred by California ($2.6 million to $5.3 million), New York ($2.3 million to $4.7 million), Texas ($1.3 million to $2.8 million), Illinois ($1.2 million to $2.5 million), and Florida ($1.1 million to $2.2 million).

The largest recurring payroll costs as a percentage of payroll are incurred by Arizona (0.2 percent to 0.4 percent), Wyoming (0.2 percent to 0.4 percent), Alabama (0.1 percent to 0.3 percent), Illinois (0.1 percent to 0.3 percent), and West Virginia (0.1 percent to 0.3 percent). As a percentage of total state and local government revenues, the recurring payroll costs do not exceed 0.01 percent in any state.

Economic Impact of Updating the Duties Tests

The economic impact of updating the duties tests includes two components. First, determining whether an employee satisfies the requirements of the updated duties tests will be less difficult than determining whether that employee satisfies the requirements of the current duties tests. As a result, employers will likely incur much lower costs associated with determining the exempt status of employees, including conducting expensive time-and-motion studies, and responding to litigation contesting their exemption decisions. The second component is the incremental payroll costs that employers would be required to pay to the employees who satisfy the updated duties test but do not satisfy the current duties test if the proposed salary level tests were adopted without simultaneously adopting the proposed duties tests.

The possible magnitude of the cost savings of the first component is indicated by the estimated numbers of employees with salaries between $425 per week and $1,250 per week who would have failed to satisfy the current duties tests but would pass the updated duties tests. Because very little evidence is available on the costs for this component, the only indicator that is available is the potential number of employees who might require time-and-motion studies or involve litigation. The PRIA indicates an additional 1.5 million to 2.7 million employees will be more readily identified as exempt from the overtime requirements of the FLSA because the updated duties tests will replace the current duties tests in determining their exemption. Although certification and adjudication costs would only have been incurred on behalf of some portion of those employees, the large number of employees who could bring litigation under the current regulations and their relatively high levels of compensation indicate that the impact of revising the duties tests is probably substantial.

The second component of the economic impact of the revised duties tests is the additional incremental payroll costs that employers would be required to pay if the revised salary level tests were adopted without updating duties tests. If the proposed rule had increased the standard salary level test and highly compensated salary levels to $425 per week and $1,250 per week, respectively, without replacing the current long duties tests with the updated duties test, employers would have incurred incremental payroll costs for all executive, administrative, and professional employees in that salary range who would satisfy the updated duties test but would not satisfy the current long duties tests. The PRIA estimates that the incremental payroll costs for those 1.5 million to 2.7 million employees will be between $1.839 billion and $3.370 billion, in addition to the $870.2 million to $1,575.5 million for the regulation as proposed.

Finally, revising the duties tests could result in some paid hourly workers becoming salaried employees. PRIA data indicate there are 644,000 paid hourly workers working overtime in occupations with exempt administrative and professional duties that could be converted to salaried employees. All of these workers have either an associate degree or 4 year college degree or more and their average income ranges from $50,100 to $54,700 per year. This is an upper bound estimate based on the number of professional and administrative workers in occupations with mixed exempt and nonexempt duties employing a high level of skill or training.

V. 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 proposing 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 proposed 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 Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to the Office of Management and Budget under E.O. 12866, Regulatory Planning and Review.

(1) Reasons Why Action by Agency Is Being Considered

Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1), directs the Secretary of Labor to define and delimit from time to time, by regulations subject to the Administrative Procedure Act, ''any employee employed in a *bona fide* executive, administrative, or professional capacity * * * or in the capacity of outside salesman * * *.'' Employees meeting the criteria specified in these regulations are completely exempt from minimum wage and overtime pay under the FLSA. The existing regulations contain requirements for payment ''on a salary basis,'' at not less than specified minimum amounts, and certain additional tests related to an employee's primary job duties and responsibilities. The duties tests were last modified in 1949 and have remained essentially unchanged since contributing to higher human resource and legal costs in the economy. 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 suggested as a candidate for reform in public comments submitted on OMB's 2001 and 2002 Reports to Congress on the Costs and Benefits of Regulations. The Department is proposing 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.

(2) Objectives of and Legal Basis for Rule

This proposed rule is issued pursuant to the authority provided by section 13(a)(1) of the FLSA. Its objective is to provide clear and concise regulatory guidance, in plain language, that will 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.

(3) Number of Small Entities Covered by the Rule

The estimated number of small entities covered by this rule is presented in the Department's Preliminary Regulatory Impact Analysis (PRIA). A copy of the Department's complete PRIA may be obtained by contacting the Wage and Hour Division at the address and telephone number provided above. Data based on SBA's size standards for small business entities indicates that 5.2 million establishments that will be affected by the proposed rule are considered to be small businesses. These small businesses employ approximately 38.7 million workers with an annual payroll of $940.0 billion. Their total annual sales are estimated to be $5.7 trillion and their annual pre-tax profits are estimated to be $233.9 billion. Approximately 79.8 percent of all affected establishments are considered to be small businesses and they account for 38.8 percent of the employment, 33.7 percent of the payroll, 31.8 percent of the annual sales, and 30.4 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 proposed 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 proposed rule.

(5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule

No other Federal rules duplicate or conflict with the requirements contained in these rules. Federal employees subject to the jurisdiction of the U.S. Office of Personnel Management (OPM) are governed by separate regulations administered by OPM and not these regulations. Some state laws have exemption standards applied under state law that differ from the exemption standards provided by these Federal rules. The FLSA does not preempt any stricter exemption standards that may apply under state law. *See* 29 U.S.C. 218.

(6) Differing Compliance and Reporting Requirements for Small Entities

The FLSA generally requires employers to pay covered non-exempt employees at least the federal minimum wage of $5.15 an 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 proposed 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. Moreover, given the purpose of the FLSA, Congressional intent, and the statutory provisions regarding the coverage for smaller businesses, adopting different compliance requirements for small entities under this rule was not considered feasible.

(7) Clarification, Consolidation and Simplification of Compliance and Reporting Requirements for Small Entities

As previously noted, the purpose of this proposed rule is to clarify, consolidate, simplify, and update the existing criteria for compliance with the exemption from the FLSA for executive, administrative, professional, and outside sales employees, for all businesses including small businesses. The proposed rule contains no new reporting requirements.

(8) Use of Performance Rather Than Design Standards

The FLSA requires that employers comply with the minimum wage and overtime pay requirements and permits a number of ways in which employers can achieve these ''performance standards.''

The Department considered a number of alternatives to the proposed rule that would impact small entities. One alternative would be not to change the existing regulations. This alternative was rejected because the Department has determined that the existing salary tests, which have not been raised in over 27 years, no longer provide any help in distinguishing between *bona fide* executive, administrative, and professional employees and those who should not be considered for exemption, and that the duties tests, which were last modified in 1949, are too complicated, confusing, and outdated for the modern workplace.

Two other alternatives would be 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 has concluded that raising the salary levels is necessary to reestablish a clear relevant bright-line test between exempt and nonexempt workers for both employers and employees. Moreover, increasing the salary levels without updating the duties tests would increase the cost of the proposed rule by $1.839 billion to $3.370 billion per year—much of which would be incurred by small business. The duties tests were last revised in 1949 and have remained essentially unchanged since that time. The salary levels were last updated in 1975. The Department has determined that updating both the salary level and duties tests are necessary to better meet the needs of both employees and employers in the modern workplace and to anticipate future workplace trends.

Another alternative could be to adjust the salary levels for the proposed 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. In addition, the Department has determined that this alternative would be far too burdensome on small businesses. The PRIA indicates that adjusting the salary levels for inflation would more than double the recurring payroll costs of the proposed rule from a range of $335 million to $896 million per year to $747 million to $1,966 million per year.

Another alternative would be to adjust the salary levels for the proposed standard test and highly compensated test to levels consistent with the 1958 Department of Labor report—no more than 10 percent of those [workers] in the lowest-range—instead of the 20 percent range in the proposed rule. However, the Department has concluded that this would exclude overtime protections for a significant number of workers without having much of an impact on the cost of the proposed rule. The PRIA indicates that adjusting the salary levels consistent with the 1958 report could exempt 319,000 to 360,000 employees from overtime and reduce the cost of the proposed rule to $265 million to $719 million per year. The Department invites comments on the appropriate salary levels for the proposed standard test and highly compensated test.

(9) Exemption from Coverage of the Rule for Small Entities

As discussed above in section (6) of this analysis, under the terms of the statute, Congress excluded smaller businesses with annual revenues less than $500,000 from the definition of covered enterprises under the FLSA. Given the purpose of the FLSA, Congressional intent, and the statutory provisions regarding the coverage for smaller businesses, adopting different compliance requirements for small entities under this rule was not considered feasible.

VI. Unfunded Mandates Reform Act

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 proposed rules 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 $100 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

Over 87,400 State and local governmental entities will be affected by the proposed rule (3,043 county governments, 19,372 municipal governments, 16,629 township governments, 34,683 special district governments, and 13,726 school district governments). Nationwide, these entities receive more than $1.4 trillion in general revenues, including revenues from taxes, some categories of fees and charges, and intergovernmental transfers. Their direct expenditures exceed $1.6 trillion in the aggregate. State and local governments employ more than 4 million workers and their payrolls exceed $12.6 billion per month.

The Department's Preliminary Regulatory Impact Analysis (PRIA) includes estimates of the implementation costs, incremental payroll costs, and benefits of the proposed rule for all state and local government sectors in the aggregate in each state. The results indicate that the total first year costs of the proposed rule on state and local government entities range from $21.0 to $43.6 million. This includes $14.0 to $19.7 million in first year (nonrecurring) implementation costs and $7.0 to $23.9 million in recurring incremental payroll costs. The first year costs represent less than three one-thousandths percent (0.003 percent) of the $1.434 trillion in general revenues received by all state and local government entities nationwide, and three one-hundredths percent (0.03 percent) of the $150.8 billion in total payrolls for those entities. The recurring incremental payroll costs are about one-half these very small amounts.

The Department's PRIA estimates that the benefits of the proposed rule for all state and local government sectors range from $48.5 to $86.2 million. These estimates exclude difficult to quantify benefits such as lower human resource costs and additional lower legal and settlement costs stemming from unintentionally misclassifying workers. The PRIA results indicate that the benefits of the proposed rule will exceed the costs for state and local governments in every year. However, State and local governments, as employers covered by the monetary requirements of the FLSA, will need to raise any such additional revenues required, however minimal, to meet their future compliance obligations if the proposed rule is adopted. The FLSA does not provide for Federal financial assistance or other Federal resources to meet the requirements of its intergovernmental mandates. The Federal mandate imposed by the rule is not expected to have measurable effects on health, safety, or the natural environment.

(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 PRIA estimates that the total aggregate economic impact of this proposed rule ranges from $870.3 million to $1,575.5 million. However, as noted in the previous section summarizing the Department's PRIA, these are upper bound estimates and the actual costs and impacts expected to be incurred by employers, including state and local governments, if the proposed rule were adopted, are likely to be lower. Therefore, 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.

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

Congress amended the FLSA in 1985 to readjust how the Act would apply to the public sector. The 1985 amendments allowed compensatory time off in lieu of cash overtime pay, partial overtime exemptions for police and fire departments, the use of unpaid volunteers in certain circumstances, and a temporary phase-in period for meeting FLSA compliance obligations. However, Congress enacted no special provisions for public agencies related to the section 13(a)(1) exemptions or the 541 regulations. Consequently, the same rules for distinguishing 541-exempt employees from nonexempt employees that apply in the private sector were initially applied to the public sector following the 1985 amendments.

Since 1985, State and local governments have confronted FLSA compliance issues and the 541 regulations have been among the foremost of their concerns, particularly in the administrative exemption category. Many State and local governments classified nearly all of their non-supervisory ''white collar'' workers as exempt administrative employees without regard to whether their primary duty relates directly to agency management policies or general business operations or meets the discretion and independent judgment test. In the late 1980s, several Governors and State and local government agencies urged the Department to exempt classifications such as social workers, detectives, probation officers, and others, to avoid disrupting the level of public services that would result from increasing costs or limiting the hours of service due to overtime requirements. In 1989, former Labor Secretary Elizabeth Dole, in a widely disseminated response to 13 Governors, confirmed the nature of the administrative exemption's duties test as applied to public sector employees but solicited specific input with accompanying rationale for what should be changed. Responses were limited but argued generally that government services are 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 include important decision-making on how the agency is operated or managed internally. They also urged the Department to redefine the professional exemption to recognize a broader contemporary use of that term in government employment.

In the midst of a growing wave of private lawsuits filed by public employees against their employers challenging their exempt status, a series of court decisions were rendered that sharply limited public employers' ability to successfully assert exemption under the ''salary basis'' rule. This led the Department to alter the ''salary basis'' rules to provide specific relief to public employers in a final rule issued in August 1992 (57 FR 37666; Aug. 19, 1992). Under this special rule, the fact that a public sector pay and leave system includes partial-day deductions from pay for absences not covered by accrued paid leave becomes irrelevant to determining any public sector employee's eligibility for exemption.

Public sector employers have been less vocal over FLSA issues since the Department's 1992 rulemaking allowing partial-day (or hourly) deductions from pay for employee absences not covered by accrued leave and other special ''salary basis'' rules for budget-driven furloughs (29 CFR 541.5d). 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 concerns of public agencies over pay docking for discipline.

Although public agency organizations were invited to the Department's stakeholder meetings to address concerns over the 541 regulations, they mostly 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, threatens 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 (*e.g.,* 3 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.

The proposed rule would revise and 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 is governed by a different set of pay-docking rules and additional proposed revisions in this rule would broaden permissible disciplinary deductions to include sanctions for infractions such as sexual harassment and work place violence. However, a broader or separate duties test rule applicable solely to the public sector does not seem warranted at this time, as the case has not been made for such separate treatment. The Department is interested in receiving specific public comments on any issues of concern to public employees and public employers, and will carefully examine any such public comments submitted on this proposal during the rulemaking process.

(5) Least Burdensome Option or Explanation Required

The Department's consideration of various options is described in the preceding section in the preamble on the Regulatory Flexibility Act and Executive Order 13272. 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 the proposed $425 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.

VII. Effects on Families

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.

VIII. 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.

IX. 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.'' 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.

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.

The Department's Preliminary Regulatory Impact Analysis (PRIA) estimates the implementation costs, incremental payroll costs, and benefits of the proposed rule for all state and local government sectors in the aggregate in each state. The results indicate that the total first year costs of the proposed rule on state and local government entities range from $24.1 to $43.6 million. This includes $14.0 to $19.7 million in first year (nonrecurring) implementation costs and $10.1 to $23.9 million in recurring incremental payroll costs. The first year costs represent less than three one-thousandths percent (0.003 percent) of the $1.434 trillion in general revenues received by all state and local government entities nationwide, and three one-hundredths percent (0.03 percent) of the $150.8 billion in total payrolls for those entities. The recurring incremental payroll costs are about one-half these very small amounts.

The Department's PRIA also estimates that the benefits of the proposed rule for all state and local government sectors range from $48.5 to $86.2 million. These estimates exclude difficult to quantify benefits such as lower human resource costs and additional lower legal and settlement costs stemming from unintentionally misclassifying workers. The PRIA results indicate that the benefits of the proposed rule will exceed the costs for state and local governments in every year. The Federal mandate imposed by the rule is not expected to have substantial direct effects on the States and will not affect the current relationship between the national government and the states or the distribution of power and responsibilities among the various levels of government.

X. Executive Order 13175, Indian Tribal Governments

This rule was reviewed under the terms of E.O. 13175 and determined not to have ''tribal implications.'' The rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

XI. Executive Order 12630, Constitutionally Protected Property Rights

This rule is not subject to E.O. 12630 because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

XII. Executive Order 12988, Civil Justice Reform Analysis

This rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct, and to promote burden reduction.

XIII. Executive Order 13211, Energy Supply

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

XIV. Environmental Impact Assessment

The Department has reviewed this rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 U.S.C. 1500), and the Department's NEPA procedures (29 CFR part 11). The rule will not have a significant impact on the quality of the human environment, and, thus, the Department has not conducted an environmental assessment or an environmental impact statement.

List of Subjects in 29 CFR Part 541

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

Signed in Washington, DC, this 25th day of March, 2003.

Tammy D. McCutchen,

Administrator, Wage and Hour Division.

For the reasons set forth above, 29 CFR part 541 is proposed to be amended as set forth below.

PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES

Authority: 29 U.S.C. 213; Pub. L. 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR 1945–53 Comp. p. 1004); Secretary's Order No. 4–2001 (66 FR 29656).

Subpart A—General Regulations

§ 541.0 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for 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 an outside sales employee, 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. Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees.

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E; outside sales employees, subpart F. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions.

(c) Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as *bona fide* executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee under section 13(a)(1) of the Act. The equal pay provisions in section 6(d) of the Fair Labor Standards Act are administered and enforced by the United States Equal Employment Opportunity Commission.

§ 541.1 Terms defined.

Act means the Fair Labor Standards Act of 1938, as amended.

Administrator means the Administrator of the Wage and Hour Division, United States Department of Labor. The Secretary of Labor has delegated to the Administrator the functions vested in the Secretary under sections 13(a)(1) and 13(a)(17) of the Fair Labor Standards Act.

§ 541.2 Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

Subpart B—Executive Employees

§ 541.100 General rule for executive employees.

(a) The term ''employee employed in a *bona fide* executive capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) With a primary duty of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) 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 will be given particular weight.

(b) The phrase ''salary basis'' is defined at § 541.602; ''board, lodging or other facilities'' is defined at § 541.606; ''primary duty'' is defined at § 541.700; and ''customarily and regularly'' is defined at § 541.701.

§ 541.101 Business owner.

The term ''employee employed in a *bona fide* executive capacity'' in section 13(a)(1) of the Act also includes any employee who owns at least a 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization.

The requirements of subpart G (salary requirements) of this part do not apply to the business owners described in this section.

§ 541.102 Sole charge executive.

(a) The term ''employee employed in a *bona fide* executive capacity'' in section 13(a)(1) of the Act also includes any employee compensated on a salary basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities, who is in sole charge of an independent establishment or a physically separated branch establishment.

(b) The term ''sole charge'' means that the employee ordinarily must be in charge of the company activities at the location where the employee is employed. Thus, to qualify as a ''sole charge'' executive, the employee must have authority to make decisions regarding the day-to-day operations of the establishment and to direct the work of any other employees at the establishment or branch. Only one person in any establishment can qualify as a sole charge executive, and then only if that person is the top person in charge at that location. The ''sole-charge'' status of an employee will not be considered lost because of an occasional visit to the establishment or branch office of a superior.

(c) The phrase ''independent establishment or a physically separated branch establishment'' means an establishment that has a fixed location and is geographically separated from other company property. The management of operations within one of several buildings located on single or adjoining tracts of company property does not qualify for the exemption under this section. In the case of a branch, there must be a true and complete physical separation from the main office.

(d) A leased department may qualify as an independent establishment when the lessee operates under a separate trade name, with its own separate employees and records, and in other respects conducts the lessee's business independently of the lessor's. In such a case the leased department would enjoy the same status as a physically separated branch establishment. A leased department cannot be considered an independent establishment when the lessor has authority over such matters as hiring and firing of employees, other personnel policies, advertising, purchasing, pricing, credit operations, insurance and taxes.

§ 541.103 Management of the enterprise.

Generally, ''management of the enterprise'' includes activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; and providing for the safety of the employees or the property.

§ 541.104 Department or subdivision.

(a) The phrase ''a customarily recognized department or subdivision'' is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.

(b) When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise. The employee also may qualify for the sole charge exemption, if all of the requirements of § 541.102 are satisfied.

(c) A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

§ 541.105 Two or more other employees.

(a) To qualify as an exempt executive under § 541.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase ''two or more other employees'' means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

(b) The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time non-exempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee cannot be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

§ 541.106 Working supervisors.

Employees, sometimes called ''working foremen'' or ''working supervisors,'' who have some supervisory functions, such as directing the work of other employees, but also perform work unrelated or only remotely related to the supervisory activities are not exempt executives if, instead of having management as their primary duty as required in § 541.100, their primary duty consists of either the same kind of work as that performed by their subordinates; work that, although not performed by their own subordinates, consists of ordinary production or sales work; or routine, recurrent or repetitive tasks.

§ 541.107 Supervisors in retail establishments.

Supervisors in retail establishments often perform work such as serving

customers, cooking food, stocking shelves, cleaning the establishment or other non-exempt work. Performance of such non-exempt work by a supervisor in a retail establishment does not disqualify the employee from the exemption if the requirements of § 541.100 are otherwise met. Thus, an assistant manager whose primary duty includes such activities as scheduling employees, assigning work, overseeing product quality, ordering merchandise, managing inventory, handling customer complaints, authorizing payment of bills or performing other management functions may be an exempt executive even though the assistant manager spends the majority of the time on non-exempt work.

Subpart C—Administrative Employees

§ 541.200 General rule for administrative employees.

(a) The term ''employee employed in a *bona fide* administrative capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) With a primary duty of the performance of office or non-manual work related to the management or general business operations of the employer or the employer's customers; and

(3) Who holds a position of responsibility with the employer.

(b) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

§ 541.201 Related to management or general business operations.

(a) To qualify for the administrative exemption, an employee must perform work related to the management or general business operations of the employer or the employer's customers. The phrase ''related to management or general business operations'' refers to the type of work performed by the employee. To meet this requirement, an employee must perform work related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product.

(b) Work related to management or general business operations includes, for example, work in areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption. For example, a tax attorney and an accountant likely are performing work that qualifies for the professional exemption.

(c) An employee may qualify for the administrative exemption if the employee performs work related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers and consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

§ 541.202 Position of responsibility.

To qualify for the administrative exemption, an employee must hold a position of responsibility with the employer. The phrase ''position of responsibility'' refers to the importance to the employer of the work performed or the high level of competence required by the work performed. To meet this requirement, an employee must either customarily and regularly perform work of substantial importance or perform work requiring a high level of skill or training. The phrase ''customarily and regularly'' is defined at § 541.710.

§ 541.203 Work of substantial importance.

(a) The phrase ''work of substantial importance'' means work that, by its nature or consequence, affects the employer's general business operations or finances to a significant degree.

(b) Work of substantial importance includes activities such as formulating, interpreting or implementing management policies; providing consultation or expert advice to management; making or recommending decisions that have a significant impact on general business operations or finances; analyzing and recommending changes to operating practices; planning long or short-term business objectives; analyzing data, drawing conclusions and recommending changes; handling complaints, arbitrating disputes or resolving grievances; representing the company during important contract negotiations; and work of similar impact on general business operations or finances. Work of substantial importance thus is not limited to employees who participate in the formulation of management policies or in the operation of the business as a whole. It includes the work of employees who carry out major assignments in conducting the operations of the business, or whose work affects general business operations to a significant degree, even though their assignments are tasks related to the operation of a particular segment of the business.

(1) For example, an employee who is a buyer of a particular type of equipment in an industrial plant or who is an assistant buyer for a retail or service establishment may have a significant impact on the business, even though the work may be limited to purchasing for a particular department. Similarly, although comparison shopping by an employee who merely reports findings on a competitor's prices is not work of substantial importance, the buyer who evaluates such reports to set the employer's prices does perform work of substantial importance.

(2) Insurance claims adjusters also generally perform work of substantial importance, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(3) An employee who leads a team of other employees assigned to complete a major project for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) performs work of substantial importance, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(4) Other employees that perform work of substantial importance, even if their decisions or recommendations are reviewed for possible modification or rejection at a higher level, include: a human resources manager who formulates employment policies; a management consultant who studies the operations of a business and proposes change in organization; a purchasing agent who is required to consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs; or an executive or administrative assistant to a proprietor or chief executive of a business if such

employee, without specific instructions or prescribed procedures, has been delegated authority to arrange meetings, handle callers and answer correspondence.

(c) Work of substantial importance does not include clerical or secretarial tasks, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. For example, an employee who simply tabulates data is not exempt, even if labeled as a ''statistician.'' An example of an employee who does not perform work of substantial importance is a personnel clerk engaged in ''screening'' of applicants (collecting data and rejecting applicants who do not meet basic qualifications), but who is not involved in making the decision to hire.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee is not work of substantial importance.

(e) The work of an employee does not meet this requirement merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not perform work of substantial importance even though serious consequences may flow from the employee's neglect. An employee who operates very expensive equipment is not performing work of substantial importance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

§ 541.204 High level of skill or training.

(a) The phrase ''work requiring a high level of skill or training'' means administrative work requiring specialized knowledge or abilities, or advanced training. The specialized knowledge or abilities need not be acquired through any particular course of academic training or study. Also, the high level of training required may involve advanced academic instruction or advanced on-the-job training, or a combination of both. Administrative work that satisfies the ''high level of skill or training'' standard includes advisory work performed for the management of the company (or for the management of the company's customers), as is typically performed by financial advisors, tax advisors, insurance experts, credit managers, employee benefits experts, human resource consultants, labor relations consultants, marketing consultants, safety directors, account executives of advertising agencies and stock brokers. Employees with a high level of skill or training also may perform special assignments, including assignments performed away from their employer's place of business if the employee serves as a field representative for the employer.

(b) Work requiring a high level of skill or training may include work by employees who use a reference manual. The use of such a manual can require a high level of skill and training if the manual contains highly technical, scientific, legal, financial or other similarly complex information that can be interpreted properly only by those with advanced training or specialized knowledge or skills. Such manuals are used to provide guidance in addressing very difficult or novel circumstances. Thus, if an employee performs administrative work that satisfies the ''high level of skill or training'' standard, using this type of reference manual would not affect the employee's exempt status.

(c) Work requiring a high level of skill or training does not include work requiring the employee simply to look up information (from a handbook, for example) to determine the correct response to an inquiry or set of circumstances. Nor does it include clerical or secretarial work, recording or tabulating data, or other mechanical, repetitive, recurrent or routine work. Employees such as inspectors, examiners and graders who use established techniques, procedures or standards to accept or reject a product do not perform work requiring a high level of skill or training, even though such employees may have some leeway in the performance of their work.

§ 541.205 Educational establishments.

(a) The term ''employee employed in a *bona fide* administrative capacity'' in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) With a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term ''educational establishment'' means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curricula in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curricula in secondary education. The term ''educational establishment'' includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase ''performing administrative functions directly related to academic instruction or training'' means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, etc.; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform

academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under § 541.200 or under other sections of this part provided the requirements for such exemptions are met.

Subpart D—Professional Employees

§ 541.300 General rule for professional employees.

(a) The term ''employee employed in a *bona fide* professional capacity'' in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) With a primary duty of performing office or non-manual work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

§ 541.301 Learned professionals.

(a) Learned professionals must have a primary duty of performing office or non-manual work requiring advanced knowledge in a field of science or learning. The term ''advanced knowledge'' means knowledge that is customarily acquired through a prolonged course of specialized intellectual instruction, but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. The learned professions include the professions of law, medicine, theology, teaching, accounting, actuarial computation, engineering, architecture, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status based on the acquirement of advanced knowledge and performance of work that is predominantly intellectual in character as opposed to routine, mental, manual, mechanical or physical work.

(b) The phrase ''knowledge of an advanced type'' means knowledge that cannot be attained at the high school level.

(c) The phrase ''field of science or learning'' distinguishes the learned professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

(d) The phrase ''customarily acquired by a prolonged course of specialized intellectual instruction'' generally restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word ''customarily'' means that the exemption is also available to employees in such professions who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction.

(e) The following professions have been found by the Administrator generally to meet the primary duty requirement for learned professionals in § 541.300(b)(1):

(1) *Registered or certified medical technologists.* Registered or certified medical technologists who have successfully completed three 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.

(2) *Registered nurses.* Nurses who are registered by the appropriate State examining board.

(3) *Dental hygienists.* Dental hygienists who have successfully completed four academic 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.

(4) *Physician assistants.* Physician assistants who have successfully completed three years of pre-professional study (or 2,000 hours of patient care experience in a military or civilian occupation such as laboratory technology, nursing, psychology, biology, or related activity) plus not less than one year of professional course work in a medical school or hospital.

(5) *Accountants.* Certified public accountants, except in unusual cases, meet the primary duty requirement for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) *Chefs.* Chefs, such as executive chefs and sous chefs, who have attained a college degree in a culinary arts program, meet the primary duty requirement for the learned professional exemption.

(f) Professional occupations do not include those whose duties may be performed with the general knowledge acquired by an academic degree in any field or with knowledge acquired through an apprenticeship or from training in routine mental, manual or physical processes. Thus, for example, the professional exemption does not apply to occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, teamsters and other employees who perform manual work that does not require an advanced academic degree.

(g) The areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When a specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession.

§ 541.302 Creative professionals.

(a) Creative professionals must have a primary duty of performing office or non-manual work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual ability and training.

(b) To qualify for exemption as a creative professional, the work performed must be ''in a recognized field of artistic or creative endeavor.'' This includes such fields as music, writing, acting and the graphic arts.

(c) The requirement of ''invention, imagination, originality or talent'' distinguishes the creative professions from work that primarily depends on

intelligence, diligence and accuracy. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an ''animator'' of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may qualify as creative professionals if their work generally requires invention, imagination, originality or talent. Writers for newspapers, news magazines, television news programs, the Internet and other media, for example, generally perform work involving originality and talent. Radio announcers and television announcers also perform work that requires artistic or creative talent. Exempt work includes conducting interviews, reporting or analyzing public events, and acting as a narrator, announcer or commentator. Positions that primarily require the employee to collect and record routine facts or data without analysis, interpretation, synthesis, or creative or original writing would not qualify for the creative professional exemption.

§ 541.303 Teachers.

(a) The term ''employee employed in a *bona fide* professional capacity'' in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term ''educational establishment'' is defined in § 541.205(b).

(b) Exempt teachers include, but are not limited to: regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semiskilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (*e.g.*, permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

§ 541.304 Practice of law or medicine.

(a) The term ''employee employed in a *bona fide* professional capacity'' in section 13(a)(1) of the Act also shall mean:

(1) Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) Any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(b) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term ''physicians'' includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(d) The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the licensed lawyers and medical professionals described in this section.

Subpart E—Computer Employees

§ 541.400 General rule for computer employees.

(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Employees who qualify for this exemption are highly skilled in computer systems analysis, programming, software engineering or similar computer functions. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption. To qualify for the computer occupations exemption, the employee must:

(1) Be compensated on a salary or fee basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities, or on an hourly basis at a rate not less than $27.63 an hour; and

(2) Have a primary duty consisting of:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(ii) 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;

(iii) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(iv) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(b) The term ''salary basis'' is defined at § 541.602; ''fee basis'' is defined at § 541.605; ''board, lodging or other facilities'' is defined at § 541.606; and ''primary duty'' is defined at § 541.700.

§ 541.401 High level of skill and expertise.

The exemption for computer employees applies only to highly-skilled employees who have achieved a level of proficiency in the theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming and software engineering. This exemption does not include trainees or employees in entry level positions learning to become proficient in such areas or to employees in computer occupations who have not attained a level of skill and expertise which allows them to work generally without close supervision. The level of expertise and skill required to qualify for this exemption is generally attained through combinations of education, specialized training and experience in the field. No particular academic degree is required for this exemption, nor are there any requirements for licensure or certification.

§ 541.402 Computer operation, manufacture and repair.

The exemption for employees in computer occupations does not include employees engaged in the operation of computers or in the manufacture, repair or maintenance of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not in computer systems analysis and programming occupations, are also not exempt computer professionals.

§ 541.403 Executive and administrative computer employees.

Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under subpart B or subpart C of this part. For example, systems analysts and computer programmers whose primary duties are to plan, schedule, and coordinate activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers are performing work of substantial importance related to management or general business operations and may qualify as exempt administrative employees under § 541.200. Similarly, a senior or lead computer programmer whose primary duty is to manage and direct the work of other programmers in a customarily recognized department or subdivision may qualify as an exempt executive employee under § 541.100.

Subpart F—Outside Sales Employees

§ 541.500 General rule for outside sales employees.

(a) The term ''employee employed in the capacity of outside salesman'' in section 13(a)(1) of the Act shall mean any employee:

(1) With a primary duty of:

(i) Making sales within the meaning of section 3(k) of the Act, or

(ii) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term ''primary duty'' is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalog, planning itineraries and attending sales conferences. The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

§ 541.501 Making sales or obtaining orders.

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that ''sale'' or ''sell'' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also ''obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.'' Obtaining orders for ''the use of facilities'' includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word ''services'' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

§ 541.502 Away from employer's place of business.

(a) An outside sales employee must be customarily and regularly engaged ''away from the employer's place or places of business.'' This requirement is based on the obvious connotation of the word ''outside'' in the statutory term ''outside salesman.'' The Administrator does not have authority to define this exemption for ''outside'' sales under section 13(a)(1) of the Act as including inside sales work. Section 13(a)(1) does not exempt inside sales and other inside work (except work performed incidental to and in conjunction with outside sales and solicitations). However, section 7(i) of the Act exempts commissioned inside sales employees of qualifying retail or service establishments if those employees meet the compensation requirements of section 7(i).

(b) The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business.

§ 541.503 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in

conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the store manager as to the requirements of the store, fills out a requisition for the quantity wanted, but leaves the requisition with the store manager to be transmitted to the central warehouse of the chain store company which later ships the quantity requested. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work in this example is not exempt.

§ 541.504 Drivers who sell.

(a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. If the employee has a primary duty of making sales, all work performed incidental to and in conjunction with the employee's own sales efforts, including loading, driving or delivering products, is exempt work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

(1) A driver who provides the only sales contact between the employer and the customers visited, who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.

(2) A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.

(3) A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods,

(4) A driver who calls on established customers along the route and carrying an assortment of the employer's products who persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who generally would not qualify as exempt outside sales employees include:

(1) A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations does not have a primary duty of making sales.

(2) A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when the sale was not significantly affected by solicitations of the customer by the delivering driver or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.

(3) A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless such work is in furtherance of the driver's own sales efforts.

Subpart G—Compensation Requirements

§ 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $425 per week (or $360 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(b) The $425 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $850, semimonthly on a salary basis of $920.84, or monthly on a salary basis of $1,841.67. However, the shortest period of payment that will meet this compensation requirement is one week.

(c) In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in § 541.206(a)(1).

(d) In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(a).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (§ 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

§ 541.601 Highly compensated employees.

(a) An employee who performs office or non-manual work and is guaranteed a total annual compensation of at least

$65,000 ($55,000 if employed in American Samoa by employers other than the Federal Government) is deemed exempt under section 13(a)(1) of the Act if the employee performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.

(b) The phrase ''total annual compensation'' excludes board, lodging or other facilities as defined in § 541.606, but includes base salary, commissions, non-discretionary bonuses and other non-discretionary compensation.

(1) The base salary, commissions and non-discretionary compensation must be settled and paid out to the employee as due on at least a monthly basis. Thus, for example, employees told they will receive a commission of 1 percent of all monthly sales orders that exceed $1 million must receive any commission due each month. Of course, if sales do not exceed $1 million in a particular month, no commission is due for that month. Similarly, employees who are told they will receive a $300 production bonus for each ton of product manufactured in excess of a weekly quota must receive any bonus earned at least monthly. Again, there may be months in which no bonus is due because production did not exceed the quota in any week of the month.

(2) If an employee's base salary and non-discretionary compensation do not total at least the minimum guarantee established in § 541.601(a) by end of the year, the employer may, by the next pay period after the end of the year, make a final payment sufficient to achieve the guaranteed level. For example, an employee may earn $36,000 in guaranteed base salary, and the employer may anticipate based upon past sales that the employee also will earn $36,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $26,000 in commissions. In this situation, the employer may by the next pay period after the end of the year make a payment of $3,000 to the employee. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a *pro rata* portion of the minimum guarantee established in § 541.601(a), based upon the number of weeks that the employee will be or has been employed. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee may qualify for exemption if the employee performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. Thus, an employee may qualify as a highly compensated executive employee, for example, if the employee directs the work of two or more other employees, even though the employee does not have authority to hire and fire.

(d) This section applies only to employees performing office or non-manual work. carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, teamsters and other employees who perform manual work are not exempt under this section no matter how highly paid they might be.

§ 541.602 Salary basis.

(a) *General rule.* An employee will be considered to be paid on a ''salary basis'' within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(b) *Exceptions.* The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for a full day for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of a full day or more occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a *bona fide* plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of a full day or more if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of

safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applied uniformly to all workers. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a uniformly applied written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a uniformly applied written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works forty hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10% of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

§ 541.603 Effect of improper deductions from salary.

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer has a pattern and practice of not paying employees on a salary basis. A pattern and practice of making improper deductions demonstrates that the employer did not intend to pay employees in the job classification on a salary basis. Improper deductions that are isolated or inadvertent, however, will not result in loss of the exemption. The factors to consider when determining whether an employer has a pattern and practice of not paying employees on a salary basis include, but are not limited to: The number of improper deductions; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; the size of the employer; whether the employer has a written policy prohibiting improper deductions; and whether the employer corrected the improper pay deductions.

(b) If the facts demonstrate that the employer has a policy of not paying on a salary basis, the exemption is lost during the time period in which improper deductions were made for employees in the same job classification working for the same managers responsible for the improper deductions. Employees in different job classifications who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

(c) If an employer has a written policy prohibiting improper pay deductions as provided in § 541.602, notifies employees of that policy and reimburses employees for any improper deductions, such employer will not lose the exemption for any employees unless the employer repeatedly and willfully violates the policy or continues to make improper deductions after receiving employee complaints. Examples of notification include publishing the policy to employees at the time of hire, in an employee handbook or on the employer's Intranet.

(d) This section shall not be construed in an unduly technical manner so as to defeat the exemption.

§ 541.604 Minimum guarantees plus extras.

(a) An exempt employee may receive additional compensation, consistent with the exemption and the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $425 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $425 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $425 each week paid on a salary basis also receives additional compensation based on hours worked. Such additional compensation may be paid on any basis (*e.g.* flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis).

(b) An exempt employee's salary may be computed on an hourly, a daily or a shift basis, consistent with the exemption and the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift consistent with the salary basis requirement.

§ 541.605 Fee basis.

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a ''fee basis'' within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble

piecework payments with the important distinction that generally a ''fee'' is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $425 per week if the employee worked 40 hours. Thus, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist $500 if 40 hours were worked.

§ 541.606 Board, lodging or other facilities.

(a) To qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in § 541.600, ''exclusive of board, lodging or other facilities.'' The phrase ''exclusive of board, lodging or other facilities'' means ''free and clear'' or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption under this part 541. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.

(b) Regulations defining what constitutes ''board, lodging, or other facilities'' are contained in 29 CFR part 531. As described in 29 CFR 531.32, the term ''other facilities'' refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished to employees for ordinary commuting between their homes and work.

Subpart H—Definitions and Miscellaneous Provisions

§ 541.700 Primary duty.

To qualify for exemption under this part, an employee must have a ''primary duty'' of performing exempt work. The term ''primary duty'' means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case. Factors to consider when determining the primary duty of an employee include, but are not limited to the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work. The term ''primary duty'' does not require that employees spend over fifty percent of their time performing exempt work. Thus, for example, an assistant manager in a retail establishment who performs exempt work such as supervising and directing the work of other employees, ordering merchandise, handling customer complaints and authorizing payment of bills may have management as the primary duty, even if the assistant manager spends more than fifty percent of the time performing non-exempt work such as running the cash register. However, the amount of time spent performing exempt work can be a useful guide, and employees who spend over fifty percent of the time performing exempt work will be considered to have a primary duty of performing exempt work. The fact that an employer has well-defined operating policies or procedures should not by itself defeat an employee's exempt status.

§ 541.701 Customarily and regularly.

The phrase ''customarily and regularly'' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed ''customarily and regularly'' includes work normally and recurrently performed every work week; it does not included isolated or one-time tasks.

§ 541.702 Exempt and nonexempt work.

The term ''exempt work'' means all work described in §§ 541.100, 541.101, 541.102, 541.200, 541.206, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500, and the activities directly and closely related to such work. All other work is considered ''nonexempt.''

§ 541.703 Directly and closely related.

(a) Work that is ''directly and closely related'' to the performance of exempt work is also considered exempt work. The phrase ''directly and closely related'' means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, ''directly and closely related'' work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's more important work cannot be performed properly. Work ''directly and closely related'' to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not ''directly and closely related'' if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(4) A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine

tender typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work is a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis, and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

§ 541.704 Trainees.

The executive, administrative, professional, outside sales and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee.

§ 541.705 Emergencies.

(a) An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

(b) An ''emergency'' does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

(1) A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a *bona fide* executive.

(2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

(3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

(4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

§ 541.706 Occasional tasks.

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: whether the same work is performed by any of the executive's subordinates; practicability of delegating the work to a nonexempt employee; whether the executive performs the task frequently or occasionally; and existence of an industry practice for the executive to perform the task.

§ 541.707 Combination exemptions.

Employees who perform a combination of exempt duties as set forth in these regulations for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee who works forty percent of the time performing exempt administrative duties and another forty percent of the time performing exempt executive duties may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

§ 541.708 Motion picture producing industry.

The requirement that the employee be paid ''on a salary basis'' does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $650 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under subparts B, C and D of this part, and who is employed at a base rate of at least $650 a week is exempt if paid a proportionate amount (based on a week

of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

(a) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least $650 if 6 days were worked; or

(b) The employee is in a job category having a weekly base rate of at least $650 and the daily base rate is at least one-sixth of such weekly base rate.

§ 541.709 Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

(1) Permission for its use has not been sought or has been sought and denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

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