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Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final 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: Final rule.

SUMMARY: This document provides the text of final regulations under the Fair Labor Standards Act 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 ''white collar'' exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in pertinent sections of these regulations.

EFFECTIVE DATE: These rules are effective on August 23, 2004.

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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. Summary of Major Changes and Economic Impact

The minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) are among the nation's most important worker protections. These protections have been severely eroded, however, because the Department of Labor has not updated the regulations defining and delimiting the exemptions for ''white collar'' executive, administrative and professional employees. By way of this rulemaking, the Department seeks to restore the overtime protections intended by the FLSA.

Under section 13(a)(1) of the FLSA and its implementing regulations, employees cannot be classified as exempt from the minimum wage and overtime requirements unless they are guaranteed a minimum weekly salary and perform certain required job duties. The minimum salary level was last updated in 1975, almost 30 years ago, and is only $155 per week. The job duty requirements in the regulations have not been changed since 1949—almost 55 years ago.

Revisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades. In addition, workplace changes over the decades and federal case law developments are not reflected in the current regulations. Under the existing regulations, an employee earning only $8,060 per year may be classified as an ''executive'' and denied overtime pay. By comparison, a minimum wage employee earns about $10,700 per year. The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption. The existing regulations are very difficult for the average worker or small business owner to understand. The regulations discuss jobs like key punch operators, legmen, straw bosses and gang leaders that no longer exist, while providing little guidance for jobs of the 21st Century.

Confusing, complex and outdated regulations allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer. In addition, more and more, employees must resort to lengthy court battles to receive their overtime pay. In the Department's view, this situation cannot be allowed to continue. Allowing more time to pass without updating the regulations contravenes the Department's statutory duty to ''define and delimit'' the section 13(a)(1) exemptions ''from time to time.''

Accordingly, on March 31, 2003, the Department published a Notice of Proposed Rulemaking (68 FR 15560) suggesting changes to the Part 541 regulations, including the largest increase of the salary levels in the 65-year history of the FLSA. The proposed changes to the duties tests were designed to ensure that employees could understand their rights, employers could understand their legal obligations, and the Department could vigorously enforce the law.

During a 90-day comment period, the Department received 75,280 comments from a wide variety of employees, employers, trade and professional associations, small business owners, labor unions, government entities, law firms and others. In addition, the Department's proposal prompted vigorous public policy debate in Congress and the media. The public commentary revealed significant misunderstandings regarding the scope of the ''white collar'' exemptions, but also provided many helpful suggestions for improving the proposed regulations.

After carefully considering all of the relevant comments, and as detailed in this preamble, the Department has made numerous changes from the *proposed* rule to the final rule, including the following:

Scope of the Exemptions

- New section 541.3(a) states that exemptions do not apply to manual laborers or other ''blue collar'' workers who perform work involving repetitive operations with their hands, physical skill and energy. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers have always been, and will continue to be, entitled to overtime pay.
- New section 541.3(b) states that the exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections

for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work.

• New section 541.4 clarifies that the FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply with State laws providing additional worker protections (a higher minimum wage, for example), and the Act does not preclude employers from entering into collective bargaining agreements providing wages higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example).

Salary

• The final rule nearly triples the current $155 per week minimum salary level required for exemption to $455 per week—a $30 per week increase over the proposal and a $300 per week increase over the existing regulations.

• The "highly compensated'' test in the final rule applies only to employees who earn at least $100,000 per year, a $35,000 increase over the proposal.

• The "highly compensated'' test in the final rule applies only to employees who receive at least $455 per week on a salary basis.

• The final regulation adds a new requirement that exempt highly compensated employees also must "customarily and regularly'' perform exempt duties.

Executive

• The final rule deletes the special rules for exemption applicable to "sole charge'' executives.

• The final rule adds the requirement that employees who own at least a bona fide 20-percent equity interest in an enterprise are exempt only if they are "actively engaged in its management.''

• The final rule retains the "long'' duties test requirement that an exempt executive must have authority to "hire or fire'' other employees or must make recommendations as to the "hiring, firing, advancement, promotion or any other change of status'' which are "given particular weight,'' but provides a new definition of "particular weight.''

Administrative

• The final rule eliminates the proposed "position of responsibility'' test for the administrative exemption.

• The final rule eliminates the proposed "high level of skill or training'' standard under the administrative exemption.

• The final rule retains the existing requirement (deleted in the proposed regulations) that exempt administrative employees must exercise discretion and independent judgment.

Professional

• The final section 541.301(e)(2) states that licensed practical nurses and other similar health care employees do not qualify as exempt professionals. The final rule retains the provisions of the existing regulations regarding registered nurses.

• As intended in the proposal, the final rule does not make any changes to the educational requirements for the professional exemption. Further, the Department never intended to allow the professional exemption for any employee based on veterans' status. The final rule has been modified to avoid any such misinterpretations. The references to training in the armed forces, attending a technical school and attending a community college have been removed from final section 541.301(d).

• The final rule defines "work requiring advanced knowledge,'' one of the three essential elements of the professional primary duties test, as "work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment.''

As a result of these changes, made in response to public commentary, the final Part 541 regulations strengthen overtime protections for millions of low-wage and middle-class workers, while reducing litigation costs for employers. Both employees and employers benefit from the final rules. Employees will be better able to understand their rights to overtime pay, and employees who know their rights are better able to complain if they are not being paid correctly. Employers will be able to more readily determine their legal obligations and comply with the law. The Department's Wage and Hour Division will be better able to vigorously enforce the law.

The economic analysis found in section VI of this preamble concludes that the final rule guarantees overtime protection for all workers earning less than the $455 per week ($23,660 annually), the new minimum salary level required for exemption. Because of the increased salary level, overtime protection will be strengthened for more than 6.7 million salaried workers who earn between the current minimum salary level of $155 per week ($8,060 annually) and the new minimum salary level of $455 per week ($23,660 annually). These 6.7 million salaried workers include:

• 1.3 million currently exempt white-collar workers who will gain overtime protection;

• 2.6 million nonexempt salaried white-collar workers who are at particular risk of being misclassified; and

• 2.8 million nonexempt workers in blue-collar occupations whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current rules, will be automatic under the final rules regardless of their job duties.

The standard duties tests adopted in the final regulation are equally or more protective than the short duties tests currently applicable to workers who earn between $23,660 and $100,000 per year. The final "highly compensated'' test might result in 107,000 employees who earn $100,000 or more per year losing overtime protection.

Because the rules have not been adjusted in decades, the final rule does impose additional costs on employers, including up to $375 million in additional annual payroll and $739 million in one-time implementation costs. However, updating and clarifying the rule will reduce Part 541 violations and are likely to save businesses at least an additional $252.2 million every year that could be used to create new jobs. The final rule is not likely to have a substantial impact on small businesses, state and local governments, or any other geographic or industry sector.

II. Background

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all hours worked, and overtime premium pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a single workweek. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for "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 * * *).'' 29 U.S.C. 213(a)(1).

Congress has never defined the terms "executive,'' "administrative,'' "professional,'' or "outside salesman.'' Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant. The legislative history indicates that the

section 13(a)(1) 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 and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. 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 compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

Pursuant to Congress' specific grant of rulemaking authority, the Department of Labor has issued implementing regulations, 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 these exemptions through notice-and-comment rulemaking, the regulations so issued have the binding effect of law. *See Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9 (1977).

The existing Part 541 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 that is not 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 executive, administrative or professional duties as defined by the regulations (the "duties tests'').[1]

The major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years. 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). After receiving many comments on the original regulations, the Wage and Hour Division issued revised regulations in 1940. 5 FR 4077 (Oct. 15, 1940). *See also*, "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) ("1940 Stein Report''). The Department issued the last major revision of the duties test regulatory provisions in 1949. 14 FR 7705 (Dec. 24, 1949). Also in 1949, an explanatory bulletin interpreting some of the terms in the regulatory provisions was published as Subpart B of Part 541. 14 FR 7730 (Dec. 28, 1949). *See also*, 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) ("1949 Weiss Report''). In 1954, the Department issued the last major revisions to the regulatory interpretations of the "salary basis'' test. 19 FR 4405 (July 17, 1954). After the initial minimum salary levels were set at $30 per week in 1938, the Department revised the Part 541 regulations to increase the salary levels in 1940, 1949, 1958, 1963, 1970 and 1975. 5 FR 4077 (Oct. 15, 1940); 14 FR 7705 (Dec. 24, 1949); 23 FR 8962 (Nov. 18, 1958); 28 FR 9505 (Aug. 30, 1963); 35 FR 883 (Jan. 22, 1970); 40 FR 7092 (Feb. 15, 1975). *See also*, 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) ("1958 Kantor Report'').[2]

The framework of the existing Part 541 regulation is based upon the 1940 Stein Report, the 1949 Weiss Report and the 1958 Kantor report, which reflect the best evidence of the American workplace a half-century ago. The existing regulation, therefore, reflects the structure of the workplace, the type of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long been altered. As the workplace and structure of our economy has evolved, so, too, must Part 541 be modernized to remain current and relevant. This necessary adaptation forms the philosophical underpinnings of this update and reflects the Department's efforts to remain true to the intent of Congress, which mandated that the DOL "from time to time'' define and delimit these exemptions and the myriad terms contained therein.

The Department notes, however, that much of the reasoning of the Stein, Weiss and Kantor reports remains as relevant as ever. This preamble notes such instances, and articulates why the reasoning is still sound. However, while the Department carefully has reviewed these reports in undertaking this update, it is not bound by the reports. The Department is responsible for updating regulations that, with each passing decade of inattention, have become increasingly out of step with the realities of the workplace. Indeed, under this rulemaking, the Department is charged with utilizing record evidence submitted in 2003 * * * not in the 1940s or 1950s * * * in exercising its discretion to update the terms of this Part.

Suggested changes to the Part 541 regulations have been the subject of extensive public commentary for two decades, including public comments responding to an Advance Notice of Proposed Rulemaking issued by the Department in November 1985,[3] a March 1995 oversight hearing by the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities, U.S. House of Representatives, a report issued by the General Accounting Office (GAO) in September 1999,[4] and a May 2000 hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, U.S. House of Representatives. In its 1999 report to Congress and at the May 2000 hearing, the 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 the GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern workplace, and create potential liability for violations when errors in classification occur. Employers were particularly concerned about potential liability for violations of the complex "salary basis'' test, and complained that the "discretion and independent judgment'' standard for administrative employees is confusing and applied inconsistently by the Wage

[1] A number of states arguably have more stringent exemption standards than those provided by Federal law. 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.

[2] Revisions to increase the salary rates in January 1981 were stayed indefinitely. 46 FR 11972 (Feb. 12, 1981). The Department also revised the regulations to accommodate statutory amendments to the FLSA in 1961, 1967, 1973, and 1992. 26 FR 8635 (Sept. 15, 1961); 32 FR 7823 (May 30, 1967); 38 FR 11390 (May 7, 1973); 57 FR 37677 (Aug. 19, 1992); 57 FR 46744 (Oct. 9, 1992).

[3] 50 FR 47696 (Nov. 11, 1985).

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

and Hour Division. They also noted the traditional limits of the exemptions have blurred in the modern workplace. Employee representatives contacted by the 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 workweek 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. The GAO 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, the GAO suggested that employers' desires for clear and unambiguous regulatory standards must be balanced with employees' desires for fair and equitable treatment in the workplace. 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 workplace trends.

Responding to the extensive public commentary, on March 31, 2003, the Department published proposed revisions to these regulations in the **Federal Register** inviting public comments for 90 days (see 68 FR 15560; March 31, 2003). In response to the proposed rule, the Department received a total of 75,280 comments during the official comment period. The Department received comments from a wide variety of individuals, employees, employers, trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others.

Most of the comments received were form letters submitted by e-mail or facsimile. Form letters expressing general support of the proposal were received, for example, from members of the Society for Human Resource Management and from individuals who identified themselves as being in agreement with the HR Policy Association or the National Funeral Directors Association. More than 90 percent of the comments were form letters generated by organizations affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) expressing general opposition to the proposal. These largely identical submissions raise concerns that the proposal would, for example, "diminish the application of overtime pay and seriously erode the 40 hour workweek'' and lead to "[c]utting overtime pay'' which "would really hurt America's working families.'' The form letters, however, do not address any particular aspect of the changes being proposed to the existing regulations. Indeed, some letters and emails appear to be from individuals who clearly perform non-exempt duties and are not covered by the Part 541 exemptions.

Approximately 600 of the comments include substantive analysis of the proposed revisions. Virtually all of these 600 comments favor some change to the existing regulations. Among the commenters there are a wide variety of views on the merits of particular sections of the proposed regulations. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered all of the comments and the arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. In addition to the more substantive comments discussed below, the Department received some editorial suggestions, some of which have been adopted and some of which have not. A number of other minor editorial changes have been made to better organize or structure the regulatory text. Finally, a number of comments were received on issues that go beyond the scope or authority of these regulations (such as eliminating all exemptions from overtime, lowering the overtime threshold to fewer hours worked per week or per day, banning all mandatory overtime, and basing overtime on a two-week/80-hour limit), which the Department will not address in the discussion that follows.

III. Authority of the Secretary of Labor

Section 13(a)(1) of the FLSA provides exemptions from the minimum wage and overtime requirements for employees "employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesman * * *.'' 29 U.S.C. 213(a)(1). Congress included these exemptions in the original enactment of the FLSA in 1938, but the statute contains no definitions, guidance or instructions as to their meaning.

Rather than define the section 13(a)(1) exemptions in the statute, Congress granted the Secretary of Labor broad authority to "define and delimit'' these terms "from time to time by regulations.'' *Id.* A unanimous Supreme Court reaffirmed the broad nature of this delegation in *Auer* v. *Robbins*, 519 U.S. 452, 456 (1997), stating that the "FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative and professionals employees.'' *See also Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 613 n.6 (1944) (authority given to define and delimit the terms "bona fide executive, administrative, professional''); *Spradling* v. *City of Tulsa, Oklahoma*, 95 F.3d 1492, 1495 (10th Cir. 1996) (the Department "is responsible for determining the operative definitions of these terms through interpretive regulations''), *cert. denied*, 519 U.S. 1149 (1997); *Dalheim* v. *KDFW–TV*, 918 F.2d 1220, 1224 (5th Cir. 1990) (the FLSA "empowers the Secretary of Labor'' to define by regulation the terms executive, administrative, and professional).

Several commenters, including the AFL–CIO, claim that the proposal exceeds the authority of the Secretary and will not be entitled to judicial deference. They assert that the proposal improperly broadens the exemptions, fails to safeguard employees from being misclassified, and is not consistent with Congressional intent. As an initial matter, the Supreme Court's decision in *Auer* confirmed the Secretary's "broad authority'' to define and delimit these exemptions. 519 U.S. at 456. Moreover, as this preamble establishes, the final rule will simplify, clarify and better organize the regulations defining and delimiting the exemptions for administrative, executive and professional employees. Rather than broadening the exemptions, the final rule will enhance understanding of the boundaries and demarcations of the exemptions Congress created. The final rule will protect more employees from being misclassified and reduce the likelihood of litigation over employee classifications because both employees and employers will be better able to understand and follow the regulations.

Other commenters contend that the proposal violates the rule of interpretation articulated in *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), that FLSA exemptions are to be "narrowly construed.'' However, in *Auer* v. *Robbins*, 519 U.S. at 462–63, the Supreme Court addressed the difference between the "narrowly construed'' rule of judicial interpretation and the broad

authority possessed by the Secretary to promulgate these regulations:

Petitioners also suggest that the Secretary's approach contravenes the rule that FLSA exemptions are to be "narrowly construed against * * * employers'' and are to be withheld except as to persons "plainly and unmistakably within their terms and spirit.'' *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S. Ct. 453, 456, 4 L. Ed. 2d 393 (1960). But that is a rule governing judicial interpretation of statutes and regulations, not a limitation on the Secretary's power to resolve ambiguities in his own regulations. A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limits imposed by the statute.

Thus, the commenters' contentions are unfounded because the "narrowly construed'' standard does not govern or limit the Secretary's broad rulemaking authority.

IV. Summary of Major Comments

Effective Date

There were very few comments concerning the effective date of the regulations. The National Association of Convenience Stores (NACS) recommends that the rules become effective 180 days after they are published, but in no event before the passage of 90 days. NACS asserts that "employers will need considerable time to make and implement important business decisions about how to arrange their affairs in light of the revisions,'' and that a "relatively long period is certainly justified.'' The Department has set an effective date that is 120 days after the date of publication of these final regulations. The Department believes that a period of 120 days will provide employers ample time to make any changes necessary to ensure compliance with the final regulations. Moreover, a 120-day effective date exceeds the 30-day minimum required under the Administrative Procedure Act, 5 U.S.C. 553(d), and the 60 days mandated for a "major rule'' under the Congressional Review Act, 5 U.S.C. 801(a)(3)(A).

The law firm of Morgan Lewis & Bockius and the Information Technology Industry Council request that the Department establish a "short-term 'amnesty' program'' that would exist for two years after the regulations'' effective date. The program, the commenters suggest, would either allow or require employees seeking unpaid overtime wages based on a misclassification occurring prior to the effective date of the final regulations to submit their claims to the Department for resolution. Under the program, the Department would request that the employer conduct a self-audit of past compliance concerning the positions at issue and would supervise payments of up to two years of back wages, excluding liquidated damages. The statute of limitations would be tolled during this administrative procedure. If the employer refused to perform a self-audit, or did not pay the back wages due, the employee could then bring a lawsuit. The commenters cite FLSA section 16(b) as the source of the Department's authority to implement such a program. Section 16(b) provides aggrieved employees a private right of action that terminates upon the Department's filing a lawsuit for back wages for such employees under section 17. Nothing in section 16(b) or in any other section of the statute authorizes the Department to create the proposed amnesty program.

Structure and Organization

The existing Part 541 contains two subparts. Current Subpart A provides the regulatory tests that define each category of the exemption (executive, administrative, professional, and outside sales). Current Subpart B provides interpretations of the terms used in the exemptions. Subpart B was first issued as an explanatory bulletin in 1949 (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 proposed to eliminate this distinction between the "regulations'' in Subpart A and the "interpretations'' in Subpart B. The proposed rule also reorganized the subparts according to each category of exemption, eliminated outdated and uninformative examples, updated definitions of key terms and phrases, and consolidated provisions relevant to several or all of the exemption categories into unified, common sections to eliminate unnecessary repetition (*e.g.*, a number of sections pertaining to salary issues were proposed to be consolidated into a new Subpart G, Salary Requirements, discussed below). The proposed rule also streamlined, reorganized, and updated the regulations in other ways. The proposed regulations utilized objective, plain language in an attempt to make the regulations more understandable to employees and employee representatives, small business owners and human resource professionals. This proposed restructuring of Part 541 was intended to consolidate and streamline the regulatory text, reduce unnecessary duplication and redundancies, make the regulations easier to understand and decipher when applying them to particular factual situations, and eliminate the confusion regarding the appropriate level of deference to be given to the provisions in each subpart.

The proposed regulations also streamlined the existing regulations by adopting a single standard duties test for each exemption category, rather than the existing "long'' and "short'' duties tests structure. Because of the outdated salary levels, the "long'' duties tests have, as a practical matter, become effectively dormant. As the American Payroll Association states, the "long'' duties tests have "become 'inoperative' because of the extremely low minimum salary test ($155 per week) and federal courts' refusal to apply the percentage restrictions on nonexempt work in the modern workplace.'' The U.S. Chamber of Commerce similarly notes that the "elements unique to the long test have largely been dormant for some time due to the compensation levels.'' The U.S. House of Representatives' Committee on Education and the Workforce also comments that the "long'' duties tests have "become rarely, if ever, used.'' The Fisher & Phillips law firm notes that "the 'long' test has played little role in the executive exemption's application for many years.'' Similarly, the American Bakers Association notes that the "long'' duties tests "lack[] current relevance.'' Finally, the National Association of Federal Wage Hour Consultants states that the "long'' duties tests are "seldom used today in the business community.'' Faced with this reality, the Department decided that elimination of most of the "long'' duties tests requirements is warranted, especially since the relatively small number of employees currently earning from $155 to $250 per week, and thus tested for exemption under the "long'' duties tests, will gain stronger protections under the increased minimum salary level which, under the final rule, guarantees overtime protection for all employees earning less than $455 per week ($23,660 annually). Further, as explained in the preamble to the proposed rule, the former tests are complicated and require employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek. Reintroducing these effectively dormant requirements now would add new complexity and burdens to the exemption tests that do not currently apply. For example, employers are not generally required to maintain any records of daily or weekly hours worked by exempt employees (see 29 CFR 516.3), nor are they required to

perform a moment-by-moment examination of an exempt employee's specific duties to establish that an exemption is available. Yet reactivating the former strict percentage limitations on nonexempt work in the existing "long'' duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the "long'' test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes. Moreover, making such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks. *See, e.g., Jones* v. *Virginia Oil Co.,* 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks''); *Donovan* v. *Burger King Corp.,* 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work,'' and "this other work does not negate the conclusion that his primary duty is management''). Accordingly, given these developments, the Department believed that the percentage limitations on particular duties formerly applied under the "long'' tests were not useful criteria that should be reintroduced for defining the "white collar'' exemptions in today's workplace, and that employees who would have been tested under the "long'' tests are better protected by the final rule's guarantee of overtime protection to all employees earning less than $455 per week.

Most comments addressing the structure and organization of the proposed rule generally favor the proposed restructuring, indicating the consolidation of the former regulations and interpretations into a unified set of rules and other proposed changes provide needed simplification and more clarity to a complex regulation. The weight of comments support replacing the former "long'' and "short'' test structure with the proposed standard tests and deleting the former "long'' test percentage limits on performing nonexempt duties.[5] For example, the U.S. Chamber of Commerce comments that it was their members' experience that the percentage limitations have been difficult to apply and have been of little utility. The Associated Prevailing Wage Contractors states that the percentage requirements created additional and needless recordkeeping requirements. The National Small Business Association comments that a move away from a percentage basis test will alleviate the burden on small business owners.

However, some commenters oppose these changes, asserting that they weakened the requirements for exemption, would allow manipulation of job titles to evade paying overtime to lower-level employees, would open the floodgates to misclassification of employees, and lead to more lawsuits. Some commenters state that the proposed language is too simple for this complex subject or that the proposed language continues to be vague in some areas, making it susceptible to differing interpretations and a continuation of an overly complex subject under the law. Other dissenting comments point to a loss of judicial and opinion letter interpretative precedent that would occur by changing the duties tests as the Department proposed.[6]

The Department has carefully considered these arguments, and continues to believe that reducing the inherent complexity of the exemption criteria by replacing the subjective and effectively dormant "long'' test requirements is an essential goal to be pursued in this rulemaking. Streamlining and simplification of the applicable standards is critical to ensuring correct interpretations and proper application of the exemptions in the workplace today. It serves no productive interest if a complicated regulatory structure implementing a statutory directive means that few people can arrive at a correct conclusion, or that many people arrive at different conclusions, when trying to apply the standards to widely varying and diverse employment settings. The extensive public comments on the difficulties experienced under the existing regulatory standards amply demonstrate the need for change, in the Department's view. The comments suggesting there is no need to change the current regulatory "long'' and "short'' test structure are not persuasive when contrasted with the described difficulties under the existing regulatory standards, as confirmed by many other commenters. The Department also does not agree with the comments suggesting that elimination of the "long'' test percentage limitations on nonexempt work, which are rarely applied today, and retention of the primary duty approach as currently interpreted by federal courts, will somehow increase litigation or decrease the protections currently afforded to employees. Rather, we believe that employees are more clearly protected by the final rule, which guarantees overtime protection to all employees earning less than $455 per week, than by the existing rule which contains confusing and differing requirements for employees earning between $155 and $455 per week. Moreover, as explained in more detail in Subpart B of the preamble, the Department's final "standard'' duties test for the executive exemption incorporates the "authority to hire or fire'' requirement from the existing long test.

A number of commenters suggest that the 20-percent limitation on nonexempt work is mandated by the FLSA itself because, when amending the FLSA in 1961 to cover retail and service establishments, Congress added in section 13(a)(1) that "an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities

[5] *See, e.g.*, Comments of American Bakers Association; American Corporate Counsel Association; American Hotel and Lodging Association; American Insurance Association; American Nursery and Landscape Association; American Payroll Association; American Network of Community Options and Resources (ANCOR); Associated Builders and Contractors; Associated Prevailing Wage Contractors; Colley & McCoy Company; Contract Services Association of America; Financial Services Roundtable; Grocery Manufacturers of America; National Association of Chain Drug Stores; National Association of Manufacturers; National Council of Agricultural Employers; National Grocers Association; National Newspaper Association; National Restaurant Association; National Small Business Association; New Jersey Restaurant Association; Pennsylvania Credit Union Association; Public Sector FLSA Coalition; Society for Human Resource Management; State of Oklahoma Office of Personnel Management; Tennessee Valley Authority; the U.S. Chamber of Commerce; and Virginia Department of Human Resource Management.

[6] *See, e.g.*, Comments of 9–5 National Association of Working Women; AFL-CIO; American Federation of State, County and Municipal Employees; American Federation of Teachers; Building and Construction Trades Department, AFL-CIO; Communication Workers of America; International Association of Fire Fighters; International Association of Machinists and Aerospace Workers; International Federation of Professional & Technical Engineers; National Employment Law Project; New York State Public Employees Federation; United Food and Commercial Workers Union; Weinberg, Roger and Rosenfeld; and World at Work.

not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities.''

The Department does not believe that eliminating the 20-percent rule from the new standard test contravenes Congress' intent. By adding the 40-percent language in 1961, Congress intended that the 20-percent limitation in the ''long'' tests would not be used to prohibit employers from applying the exemption to retail and service employees, even if they spent more than 20 percent of their time in nonexempt work. Thus, this statutory language is a limitation on the Department's authority to define certain employees as *nonexempt*—not a Congressional declaration that the Department can never reconsider the 20-percent limitation. Congress could have imposed the 20-percent rule on all employees in 1961, but it did not. In fact, the primary duty approach of the final regulations was first adopted by the Department as part of the ''short'' tests in 1949. When Congress amended the FLSA in 1961, the primary duty tests were in effect and did not contain mandatory percentage limitations on nonexempt work. *See* 29 CFR 541.103 (50 percent is ''rule of thumb''); *Jones,* 2003 WL 21699882, at *3 (the 50-percent ''rule of thumb'' is not dispositive). Congress did not act to abrogate the primary duty tests, and the Department believes that the ''short'' duties tests are in no way inconsistent with section 13(a)(1) of the Act.

In reaching its regulatory decisions, the Department is mindful of its obligations under the delegated statutory authority applicable in this situation, and other laws and Executive Orders that apply to the regulatory process, to define and delimit the ''white collar'' exemption criteria in ways that reduce unnecessary burdens (*e.g.*, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and Executive Orders 12866, 13272, and 13132). Under currently applicable guidelines, implementation of regulatory standards should, to the maximum extent possible within the limits of controlling statutory authority and intent, strike an appropriate balance and be compatible with existing recordkeeping and other prudent business practices, not unduly disruptive of them. Regulatory standards should also strive to apply plain, coherent, and unambiguous terminology that is easily understandable to everyone affected by the rules. Consequently, the Department has decided to adopt the proposed restructuring of the regulations into separate subparts containing standard tests under each category of the exemption, which do not include the former ''long'' test requirements that require calculating the 20-percent (or 40-percent in retail or service establishments) limits on the amount of time devoted to nonexempt tasks.

Subpart A, General Regulations

Proposed Subpart A included several general, introductory provisions scattered throughout the existing regulations. Proposed section 541.0 combined an introductory statement from existing 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 541.0 also provided 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 541.1 provided definitions of ''Act'' and ''Administrator'' from their current location in section 541.0. Finally, proposed section 541.2 provided 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) of the existing regulations regarding administrative employees.

The Department received few comments on these general regulations. Thus, Subpart A is adopted as proposed, except for the addition of a new section 541.3 entitled ''Scope of the section 13(a)(1) exemptions'' and a new section 541.4 entitled ''Other laws and collective bargaining agreements.'' The Department adds these new sections in response to public commentary which evidenced general confusion, especially among employees, regarding the scope of the exemptions and the impact of these regulations on state laws and collective bargaining agreements.

The subsection 541.3(a) clarifies that the section 13(a)(1) exemptions and the Part 541 regulations do not apply to manual laborers or other ''blue collar'' workers who ''perform work involving repetitive operations with their hands, physical skill and energy.'' Such employees ''gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required of exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.''

The new § 541.3(a) responds to comments revealing a fundamental misunderstanding of the scope and application of the Part 541 regulations among employees and employee representatives. To ensure employees understand their rights, the new subsection 541.3(a) clearly states that manual laborers and other ''blue collar'' workers cannot qualify for exemption under section 13(a)(1) of the FLSA. The description of a ''blue collar'' worker as an employee performing ''work involving repetitive operations with their hands, physical skill and energy'' was derived from a standard dictionary definition of the word ''manual.'' *See, e.g., Adam* v. *United States,* 26 Cl. Ct. 782, 792–93 (1992) (''dictionary definition of 'manual' is, 'requiring or using physical skill and energy' ''). The illustrative list of such ''blue collar'' occupations included in this subsection is the same language included in the proposed and final section 541.601 on highly compensated employees.

Section 541.3(b)(1) provides that the section 13(a)(1) exemptions and these regulations also do not apply to ''police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation

or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or similar work.'' Final subsection 541.3(b)(2) provides that such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under section 541.100. Thus, for example, ''a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.'' Final subsection 541.3(b)(3) provides that such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under section 541.200. Final subsection 541.3(b)(4) provides that such employees do not qualify as exempt learned professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under section 541.300. Final subsection 541.3(b)(4) also states that ''although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.''

This new subsection 541.3(b) responds to commenters, most notably the Fraternal Order of Police, expressing concerns about the impact of the proposed regulations on police officers, fire fighters, paramedics, emergency medical technicians (EMTs) and other first responders. The current regulations do not explicitly address the exempt status of police officers, fire fighters, paramedics or EMTs. This silence in the current regulations has resulted in significant federal court litigation to determine whether such employees meet the requirements for exemption as executive, administrative or professional employees.

Most of the courts facing this issue have held that police officers, fire fighters, paramedics and EMTs and similar employees are not exempt because they usually cannot meet the requirements for exemption as executive or administrative employees. In *Department of Labor* v. *City of Sapulpa, Oklahoma,* 30 F.3d 1285, 1288 (10th Cir. 1994), for example, the court held that fire department captains were not exempt executives because they were not in charge of most fire scenes; had no authority to call additional personnel to a fire scene; did not set work schedules; participated in all the routine manual station duties such as sweeping and mopping floors, washing dishes and cleaning bathrooms; and did not earn much more than the employees they allegedly supervised. In *Reich* v. *State of New York,* 3 F.3d 581, 585–87 (2nd Cir. 1993), *cert. denied,* 510 U.S. 1163 (1994), the court granted overtime pay to police investigators whose duties included investigating crime scenes, gathering evidence, interviewing witnesses, interrogating and fingerprinting suspects, making arrests, conducting surveillance, obtaining search warrants, and testifying in court. The court held that such police officers are not exempt administrative employees because their primary duty is conducting investigations, not administering the affairs of the department itself. *See also Bratt* v. *County of Los Angeles,* 912 F.2d 1066, 1068–70 (9th Cir. 1990) (probation officers who conduct investigations and make recommendations to the court regarding sentencing are not exempt administrative employees), *cert. denied,* 498 U.S. 1086 (1991); *Mulverhill* v. *State of New York,* 1994 WL 263594 (N.D.N.Y. 1994) (investigators of environmental crimes who carry firearms, patrol a sector of the state and conduct covert surveillance, and rangers who prevent and suppress forest fires, are not exempt administrative employees).

Similarly, federal courts have held that police officers, paramedics, EMTs, and similar employees are not exempt professionals because they do not perform work in a ''field of science or learning'' requiring knowledge ''customarily acquired by a prolonged course of specialized intellectual instruction'' as required under the current and final section 541.301 of the regulations. The paramedic plaintiffs in *Vela* v. *City of Houston,* 276 F.3d 659, 674–676 (5th Cir. 2001), for example, were required to complete 880 hours of classroom training, clinical experience and a field internship. The EMT plaintiffs were required to complete 200 hours of classroom training, clinical experience and a field internship. The court held that the paramedics and EMTs were not exempt professionals because they were not required to have a college degree. *See also Dybach* v. *State of Florida Department of Corrections,* 942 F.2d 1562, 1564–65 (11th Cir. 1991) (probation officer held not exempt professional because the required college degree could be in any field—''`nuclear physics, or * * * corrections, or * * * physical education or basket weaving'''—not in a specialized field); *Fraternal Order of Police, Lodge 3* v. *Baltimore City Police Department,* 1996 WL 1187049 (D. Md. 1996) (police sergeants and lieutenants held not exempt professionals, even though some possessed college degrees, because college degrees were not required for the positions); *Quirk* v. *Baltimore County, Maryland,* 895 F. Supp. 773, 784–86 (D. Md. 1995) (certified paramedics required to have a high school education and less than a year of specialized training are not exempt professionals).

The Department has no intention of departing from this established case law. Rather, for the first time, the Department intends to make clear in these revisions to the Part 541 regulations that such police officers, fire fighters, paramedics, EMTs and other first responders are entitled to overtime pay. Police sergeants, for example, are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment.[7]

Finally, such police officers, fire fighters, paramedics, EMTs and other public safety employees also cannot qualify as exempt under the highly compensated test in final section 541.601. As discussed below, final section 541.601(b) provides that the highly compensated test ''applies only to employees whose primary duty includes performing office or non-manual work.'' Federal courts have recognized that

[7] In addition to the case law and comments cited above, when drafting this new section, the Department also looked to the definitions of ''fire protection activities'' and ''law enforcement activities'' contained in Sections 3(y) and 7(k) of the FLSA, and their implementing regulations at 29 CFR 553.210 and 553.211, which allow public agencies to pay overtime to fire and law enforcement employees based on a 7 to 28 day period, rather than the 40-hour workweek. These sections do not govern exempt status under section 13(a)(1) and, thus, are illustrative but not determinative of duties performed by nonexempt fire and law enforcement employees. *See* 29 CFR 553.216.

such public safety employees do not perform "office or non-manual'' work. *Adam* v. *United States,* 26 Cl. Ct. at 792–93, for example, involved border patrol agents who spent a significant amount of time in the field, wore "uniforms and black work boots,'' and used "a handgun, a baton, night-vision goggles, and binoculars.'' Their work required "frequent and recurring walking and running over rough terrain, stooping, bending, crawling in restricted areas such as culverts, climbing fences and freight car ladders, and protecting one's self and others from physical attacks.'' Their work also involved "high speed pursuits, boarding moving trains and vessels, and physical threat while detaining and arresting illegal aliens, smugglers, and other criminal elements.'' The court held that these border patrol agents are not exempt from the FLSA overtime requirements, stating that the "level of physical effort required in the environment described plainly cannot be characterized as 'office or other predominately nonmanual work.' A dictionary definition of 'manual' is, 'requiring or using physical skill and energy.' * * * Non-manual work, therefore, would not call for significant use of physical skill or energy. Certainly, the agents' job duties do not fit that definition.'' *See also, Roney* v. *United States,* 790 F. Supp. 23, 25 (D.D.C. 1992) (Deputy U.S. Marshal entitled to overtime pay where position requires " 'physical strength and stamina to perform such activities as long periods of surveillance, pursuing and restraining suspects, carrying heavy equipment' " and the employee " 'may be subject to physical attack, including the use of lethal weapons' ") (citation omitted).

Federal courts have found high-level police and fire officials to be exempt executive or administrative employees only if, in addition to satisfying the other pertinent requirements, such as directing the work of two or more other full time employees as required for the executive exemption, their primary duty is performing managerial tasks such as evaluating personnel performance; enforcing and imposing penalties for violations of the rules and regulations; making recommendations as to hiring, promotion, discipline or termination; coordinating and implementing training programs; maintaining company payroll and personnel records; handling community complaints, including determining whether to refer such complaints to internal affairs for further investigation; preparing budgets and controlling expenditures; ensuring operational readiness through supervision and inspection of personnel, equipment and quarters; deciding how and where to allocate personnel; managing the distribution of equipment; maintaining inventory of property and supplies; and directing operations at crime, fire or accident scenes, including deciding whether additional personnel or equipment is needed. *See, e.g., West* v. *Anne Arundel County, Maryland,* 137 F.3d 752 (4th Cir.) (EMT captains and lieutenants), *cert. denied,* 525 U.S. 1048 (1998); *Smith* v. *City of Jackson, Mississippi,* 954 F.2d 296 (5th Cir. 1992) (fire chiefs); *Masters* v. *City of Huntington,* 800 F. Supp. 363 (S.D.W. Va. 1992) (fire deputy chiefs and captains); *Simmons* v. *City of Fort Worth, Texas,* 805 F. Supp. 419 (N.D. Tex. 1992) (fire deputy and district chiefs); *Keller* v. *City of Columbus, Indiana,* 778 F. Supp. 1480 (S.D. Ind. 1991) (fire captains and lieutenants). Another important fact considered in at least one case is that exempt police and fire executives generally are not dispatched to calls, but rather have discretion to determine whether and where their assistance is needed. *See, e.g., Anderson* v. *City of Cleveland, Tennessee,* 90 F. Supp.2d 906, 909 (E.D. Tenn. 2000) (police lieutenants "monitor the radio in order to keep tabs on their men and determine where their assistance is needed'').[8]

A new section 541.4 highlights that the FLSA establishes a minimum standard that may be exceeded, but cannot be waived or reduced. *See Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 706 (1945). Section 18 of the FLSA states that employers must comply "with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum * * * or a maximum workweek lower than the maximum workweek established under the Act.'' 29 U.S.C. 218. Similarly, employers, on their own initiative or in collective bargaining negotiations with a labor union, are not precluded by the FLSA from providing a wage higher than the statutory minimum, a shorter workweek than provided by the FLSA, or a higher overtime premium (double time, for example) than provided by the FLSA. *See, e.g., Barrentine* v. *Arkansas-Best Freight System, Inc.,* 450 U.S. 728, 739 (1981) ("In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests collectively, the FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.' '') (citation omitted); *NLRB* v. *R & H Coal Co.,* 992 F.2d 46 (4th Cir. 1993) (purpose of FLSA is to guarantee minimum level of compensation to workers, regardless of outcome of bargaining process; by contrast, purpose of National Labor Relations Act is to facilitate collective bargaining process and ensure that its outcome is enforced). Thus, the new section 541.4 states: "The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.''

Subpart B, Executive Employees

Section 541.100 General Rule for Executive Employees

The Department's proposal streamlined the existing regulations by adopting a single standard duties test in proposed section 541.100. The proposed standard duties test provided that an exempt executive employee must: have a primary duty of managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; customarily and regularly direct the work of two or more other employees; and 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

[8] Some police officers, fire fighters, paramedics and EMTs treated as exempt executives under the current regulations may be entitled to overtime under the final rule because of the additional requirement in the standard duties test that an exempt executive must have the authority to "hire or fire'' other employees or make recommendations given particular weight on hiring, firing, advancement, promotion or other change of status.

employees. This standard test, consisting of the current short test requirements plus a third objective requirement taken from the long test, was more protective than the existing ''short'' duties test applied to employees earning $250 or more per week ($13,000 annually).

The Department has retained this standard test for the final rule but has made minor changes to section 541.100(a)(2). Subsection 541.100(a)(2) has been modified now to read ''whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof.'' This change was made in response to several commenters, such as the AFL–CIO, who felt that the change from ''whose'' primary duty as written in the existing regulations to ''a'' primary duty as written in the proposal weakened this prong of the test by allowing for more than one primary duty and not requiring that the most important duty be management. As the Department did not intend any substantive change to the concept that an employee can only have one primary duty, the final rule uses the introductory phrasing from the existing regulations.

Several commenters state that the phrases ''change in status'' and ''particular weight'' contained in both the existing regulations and proposed 541.100(a)(4) are vague and should be defined. The Department has added a definition of ''particular weight'' based on case law, which now appears in section 541.105, as discussed below. Although the Department has not added a definition of ''change of status'' to the final regulation, the Department intends that this phrase be given the same meaning as that given by the Supreme Court in defining the term ''tangible employment action'' for purposes of Title VII liability. In *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742, 761–62 (1998), the Supreme Court defined ''tangible employment action'' as ''a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'' The Department believes that this discussion provides the necessary guidance to reflect the types of employment actions a supervisor would have to make recommendations regarding, other than hiring, firing or promoting, to meet this prong of the executive test. Because the Department intends to follow the Supreme Court's disjunctive definition of ''tangible employment action'' in *Ellerth,* we also reject comments from the AFL–CIO and others requesting that proposed subsection 541.100(a)(4) be changed to requiring ''hiring *or* firing *and* advancement, promotion or any other change of status.'' An employee who provides guidance on any one of the specified changes in employment status may meet the section 541.100(a)(4) requirement.

The New York State Public Employees Federation suggests that the Department should provide a definition of the phrase ''authority to hire or fire'' which would require that a significant part of the employee's responsibility must involve either hiring or firing. The Department believes that these terms are straightforward and should be interpreted in accordance with their customary definition, *i.e.*, to engage or disengage an individual for employment. Therefore, the Department has determined that such a definition need not be incorporated into the final regulation.

Several commenters from the public sector, such as the Metropolitan Transportation Authority, the New York State Police, and the Public Sector FLSA Coalition, indicate that the requirement in the proposal that an employee have the authority to hire or fire will cause many exempt employees to lose exempt status since employees in the public sector do not have authority to make such decisions. According to the Metropolitan Transportation Authority, ''the authority to hire or fire (or to have his recommendation to change an employee's employment status given strong consideration) only exists at the highest levels in public employment'' because of such factors as ''unionization within the state and local public sector and statutory constraints, such as civil service laws, which have been developed to protect employees in the public sector from various factors, including the political process, favoritism or for other reasons.'' The Society for Human Resource Management (SHRM) similarly states that this requirement would be ''particularly troublesome'' for public entities governed by civil service rules that dictate the use of a board to make hiring or firing decisions. SHRM recommends that this requirement be deleted or that the Department define the term ''particular weight'' in the regulations. The Johnson County Government also asks for clarification of the term ''particular weight.'' The Department has evaluated these comments and, as noted above, has included a definition of the term ''particular weight'' in section 541.105. That definition clarifies that an executive does not have to possess full authority to make the ultimate decision regarding an employee's status, such as where a higher level manager or a personnel board makes the final hiring, promotion or termination decision. With this clarification, and with the clarification that this rule encompasses other tangible employment actions, we have determined that this requirement should not pose a hardship since public sector supervisory employees provide recommendations as to hiring, firing or other personnel decisions that are given ''particular weight'' to the extent allowed under civil service laws and thus may meet this requirement for exemption. As the National School Board Association comments, although state law may vest the school board with the exclusive authority to discharge an employee, such an action is precipitated by a department supervisor who evaluates the employee's performance and recommends the action, and the superintendent's recommendation to the board is based on the department supervisor's recommendations. In addition, such employees may also qualify for exemption as administrative or professional employees.

A number of employer groups urge the Department to eliminate proposed 541.100(a)(4) entirely. These commenters argue that this requirement will cause many employees to lose their exempt executive status because the ''hire or fire'' requirement is not contained in the current short test and therefore has been effectively dormant for practical purposes as a measure of exempt executive status. The Department carefully reviewed these comments and believes that this requirement may result in some currently exempt employees becoming nonexempt; however, the number is too small to estimate quantitatively. Subsection 541.100(a)(4) is an important and objective measure of executive exempt status which is simple to understand and easy to administer. As the 1940 Stein Report stated at page 12: ''[i]t is difficult to see how anyone, whether high or low in the hierarchy of management, can be considered as employed in a bona fide executive capacity unless he is directly concerned either with the hiring or the firing and other change of status of the employees under his supervision, whether by direct action or by recommendation to those to whom the hiring and firing functions are delegated.'' Although this new requirement may exclude a few employees from the executive exemption, the Department has determined that it will have a minimal impact on employers. Most supervisors

and managers should at least have their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees be given particular weight. Further, employees who cannot meet the ''hire or fire'' requirement in section 541.100(a)(4) may nonetheless qualify for exemption as administrative or professional employees.

Section 541.101 Business Owner

Section 541.101 of the proposed rule provided that an 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,'' is exempt as an executive employee.

The Department made two modifications to the provision in the final rule. First, we inserted the term ''bona fide'' before the phrase ''20-percent equity interest.'' Second, we added a duties requirement that the 20-percent business owner must be ''actively engaged in its management.''

These changes were made to address commenter concerns that this section could be subject to abuse. For example, the McInroy & Rigby law firm argues that the exemption would be subject to ''great abuse.'' The firm speculates that ''[s]mall business employers could grant employees an illusory ownership interest and avoid having to even pay the minimum wage to such employees. One would anticipate many sham transactions conveying illusory ownership interests if the provision is adopted.'' Adding the modifier ''bona fide'' before the phrase ''20-percent equity interest'' serves to emphasize that the employee's ownership stake in the business must be genuine. The AFL–CIO argues that this section ''cannot stand'' because it would allow the exemption for employees who perform no management duties: ''an individual may have a 20 percent interest in an independent gas station, or a small food mart. In order to break even, the business stays open through the night, and as the minority owner that person keeps the operations going during those hours. He makes no management decisions, supervises no one, and has no authority over personnel, and could make less than the minimum wage. Under the Department's proposal, this employee meets the test for the bona fide executive.'' The Department agrees that such an employee should not qualify for the exemption. Thus, we have added the duties requirement that the 20-percent owner be actively engaged in management. *See* 1949 Weiss Report at 42 (section is ''intended to recognize the special status of an owner, or partial owner, of an enterprise *who is actively engaged in its management'')* (emphasis added).

The proposed rule contained no salary level or salary basis requirements for the business owner. The Department requested comments on whether the salary level and/or salary basis tests should be included in the provision. 65 FR 15560, 15565 (March 31, 2003). Commenters typically favor the exemption and agree with the Department that the salary requirements are not necessary, given the likelihood that an employee who owns a bona fide 20-percent equity interest in the enterprise will share in its profits. Thus, this ownership interest is an adequate substitute for the salary requirements. Additionally, several commenters, for example, the Workplace Practices Group, note that business owners at this level are able to receive compensation in other ways and have sufficient control over the business to prevent abuse. Thus, in the final rule, as in the proposal, the salary requirements do not apply to a 20-percent equity owner. However, requiring a ''bona fide'' ownership interest and that the 20-percent owner be actively engaged in management will prevent abuses such as that described by commenters and in *Lavian* v. *Haghnazari*, 884 F. Supp. 670, 678 (E.D.N.Y. 1995). In *Lavian*, an uncle invested more than $70,000 in his nephew's pharmacy business in exchange for a promise of 49 percent stock ownership interest in the closely-held corporation. After working at the pharmacy for two years without compensation, and never receiving share certificates, the uncle sued. The court denied a motion to dismiss an FLSA claim, noting that the court must accept as true the uncle's allegations that his duties were ''clerical, and lacking in actual supervisory and discretionary authority in relation to the enterprise.'' *Id.,* at 680. The final rule ensures that employees with such limited job duties in a company would not meet the definition of ''actively engaged in its management.''

Section 541.102 Management (Proposed § 541.103, ''Management of the Enterprise'' and Proposed § 541.102, ''Sole Charge Executive'')

The proposed regulations at section 541.102 provided a modified test for the executive exemption for an employee who is in sole charge of an independent establishment or a physically separated branch establishment. Proposed section 541.103 defined the term ''management of the enterprise.'' For the reasons discussed below, the final rule deletes the ''sole charge'' provision and renumbers the remaining sections of Subpart B.

Under proposed section 541.102, an employee in sole charge of an independent or branch establishment would qualify for the executive exemption if the employee (1) is 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) is the top and only person in charge of the company activities at the location where employed; and (3) has 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. Under the proposal, an ''independent establishment or physically separated branch establishment'' was defined as ''an establishment that has a fixed location and is geographically separated from other company property.'' The proposal permitted a leased department to qualify as a physically separated branch establishment when the lessee operated under a separate trade name, with its own separate employees and records, and in other respects conducted its business independent of the lessor's with regard to such matters as hiring and firing of employees, other personnel policies, advertising, purchasing, pricing, credit operations, insurance and taxes.

The final rule deletes this section in its entirety.

Commenters such as the AFL–CIO, the National Employment Law Project, the National Employment Lawyers Association and the Goldstein, Demchak, Baller, Borgen & Dardarian law firm object to this provision as allowing the exemption for employees who perform mostly nonexempt tasks (such as opening and closing up the location, ringing up cash register sales, stocking shelves, answering phones, serving customers, etc.) and few, if any, management functions. These commenters also believe that, when no other employees worked at the establishment, the provision would allow an employee to qualify for the exemption without having supervisory responsibility for any other employees. The International Association of Fire Fighters expresses strong concerns that the sole charge provision would exempt a low-ranking officer in charge of a fire station during a particular shift, even though a higher ranking officer is in charge of the overall management of the station. The Department agrees with these commenter concerns. In addition,

the Department recognizes that, although not intended, section 541.102 as proposed could be construed as allowing the exemption for fairly low-level employees with fewer management duties than those required for "highly compensated'' employees in final section 541.601.

Before deciding to eliminate this section entirely, the Department considered comments of groups such as the U.S. Chamber of Commerce, the National Retail Federation, the National Association of Convenience Stores, the Fisher & Phillips law firm, the National Association of Chain Drug Stores, the FLSA Reform Coalition, the Illinois Credit Union League, the Food Marketing Institute, the National Grocers Association, the International Mass Retail Association, the League of Minnesota Cities and others that request changes to expand the "sole charge'' provision. For example, these commenters suggest eliminating the salary level and salary basis requirements; including in the exemption all employees who are in charge of an establishment at any time during the day or week; allowing more than occasional visits by the sole charge executive's superior; eliminating the requirement that the independent establishment must be geographically separate from other company property; and eliminating the requirements that a leased department must operate under a separate trade name and be responsible for its own insurance, advertising, taxes, purchasing, pricing and credit operations. In the existing regulations, the "sole charge'' rule is an exception from the 20-percent restriction on nonexempt work in the "long'' duties test. After considering all comments, and for the reasons stated above, the Department concludes that this rule is not appropriate as a stand-alone test for the executive exemption.

Proposed section 541.103, defining the term "management of the enterprise'' as used in subsection 541.100(a)(2), has been renumbered as final section 541.102. The proposed definition of "management'' included the following list of activities that would generally meet this definition: "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.''

In response to comments, the Department has amended section 541.102 to rename the section as "management,'' add language to make clear that the list is not exhaustive, and add the management functions of "planning and controlling the budget'' and "monitoring or implementing legal compliance measures.''

Comments from the Fisher & Phillips law firm and the National Association of Convenience Stores ask the Department to change the phrase "management of the enterprise'' to "management,'' pointing out that the current regulatory section is simply entitled "management'' and the name "management of the enterprise'' suggests that these management duties apply to an entity broader than that required by section 541.100. Because section 541.100(a)(2) requires that the primary duty of the employee involve management of the "enterprise or of a customarily recognized department or subdivision thereof,'' the Department has renamed the section "management'' to avoid any confusion.

The Department also received a number of comments, including from the Fisher & Phillips law firm, the National Retail Federation, the National Association of Federal Wage Hour Consultants, the National Council of Chain Restaurants and the National Association of Chain Drug Stores, asking the Department to make clear that the list was not exhaustive and other types of functions could constitute "management'' activities. The Department believes that such a change is consistent with the current interpretive guidelines which make clear the factors listed are just examples, and the final rule has been revised accordingly.

Several commenters did ask that specific functions be added to the list. The Morgan Lewis & Bockius law firm comments that the examples used in this section were too focused on supervision and suggested that this section should recognize management of processes, projects and contracts in addition to employees. The Department agrees that management activities are not limited to supervisory functions. Accordingly, the final rule adds the management functions of "planning and controlling the budget'' and "monitoring or implementing legal compliance measures.'' Further, the Department notes that management of processes, projects or contracts are also appropriately considered exempt administrative duties. The National Retail Federation asks that the list be "augmented to confirm that additional duties are exempt when performed by retail employees in the course of managing: such as walking the floor, interacting with customers to determine satisfaction * * *, team building, conducting inspections, evaluating efficiency, monitoring or implementing legal compliance measures, training * * *, attending management meetings, planning meetings and developing meeting materials, planning and conducting marketing activities * * *, and investigating or otherwise addressing matters regarding personnel, proficiency, productivity, staffing or management issues.'' The National Council of Chain Restaurants suggests that "handling customer complaints'' is just as much a management function as handling employee complaints and therefore should be added to the list of examples, along with "coaching employees in proper job performance techniques and procedures.'' The Department believes that it is not appropriate to further augment the list. Although many of these suggestions are appropriate examples of "management'' functions, some appear duplicative of functions already included in the section and others, such as "handling customer complaints'' and "conducting inspections,'' are functions that could qualify as either management or production type functions depending on the specific facts involved. A case-by-case analysis would be more appropriate to determine whether such functions meet the definition of "management.'' Moreover, because the Department has added language to make clear that the list is not exhaustive, such functions could be considered management functions in appropriate circumstances. For example, a customer service representative may routinely handle customer complaints but not be acting in a management capacity. In contrast, a manager in a restaurant may be the person responsible for handling such complaints as the individual responsible for the functioning of the operation and therefore would be operating in a management capacity.

Finally, the management function listed as "appraising their productivity and efficiency'' has been augmented with the phrase from the current regulations, "for the purpose of recommending promotions or other changes in their status.'' The AFL-CIO argues that the elimination of this

phrase would allow the definition of management to include low-level personnel functions. As the Department did not intend to change the meaning of this phrase, this language has been added to the final rule.

Section 541.103 Department or Subdivision (Proposed § 541.104)

Proposed section 541.104 stated that the phrase "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.'' The section defined "department or subdivision'' as requiring "a permanent status and a continuing function.'' Proposed subsection 541.104(b) recognized that "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.'' Proposed subsection 541.104(c) stated that "a recognized department or subdivision need not be physically within the employer's establishment and may move from place to place'' and provided that 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.'' Finally, proposed subsection 541.104(d) stated that "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.''

The only changes to proposed section 541.104 are to renumber the section as 541.103 in the final rule, and to delete the sentence in subsection (b) that "[t]he employee also may qualify for the sole charge exemption, if all of the requirements of § 541.102 are satisfied.'' This sentence is no longer necessary because of the deletion of the "sole charge'' exemption in proposed section 541.102. No other changes have been made.

Several commenters request that the Department expand or clarify the phrase "department or subdivision.'' The Morgan Lewis & Bockius law firm asks the Department to expand the phrase "department or subdivision'' to include "grouping.'' The Public Sector FLSA Coalition suggests that the phrase be broadened to account for a functional unit which would provide for a more flexible or fluid organizational philosophy. The National Council of Chain Restaurants asks for confirmation of the Department's historic enforcement position that "front of the house'' and "back of the house'' are recognized subdivisions. The U.S. Chamber of Commerce states that the phrase "department or subdivision'' is outdated and the applicable units should provide for project teams. Finally, the League of Minnesota Cities questions whether a subdivision would include supervision of a day shift.

The Department has decided not to expand the term "department or subdivision'' because the phrase has not caused confusion or excessive litigation. Expanding the definition would unduly complicate this requirement and likely lead to unnecessary litigation. Indeed, the courts already have provided clarification of the phrase on a number of occasions. For example, several courts have stated that a shift can constitute a department or subdivision, which responds to the question raised by the League of Minnesota Cities. *See West* v. *Anne Arundel County, Maryland*, 137 F.3d 752, 763 (4th Cir. 1998); *Joiner* v. *City of Macon*, 647 F. Supp. 718, 721–22 (M.D. Ga. 1986); *Molina* v. *Sea Land Services, Inc.*, 2 F. Supp. 2d 185, 188 (D.P.R. 1998). The Department notes that the issue identified by the National Retail Federation as to whether "front of the house'' in a store constitutes a department or subdivision was answered by at least one court in the affirmative. *See Debartolo* v. *Butera Finer Foods*, 1995 WL 516990, at *4 (N.D. Ill. 1995). Finally, the Department observes that "groupings'' or "teams'' may constitute a department or subdivision under the existing definition, but a case-by-case analysis is required. *See Gorman* v. *Continental Can Co.*, 1985 WL 5208, at *6 (N.D. Ill. 1985) (department or subdivision can "include small groups of employees working on a related project within a larger department, such as a group leader of four draftsmen in the gauge section of a much larger department''). The Department believes these cases correctly define and delimit the term "department or subdivision.''

Section 541.104 Two or More Other Employees (Proposed § 541.105)

Proposed section 541.105 defined the term "two or more other employees'' to mean "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.'' Proposed section 541.105(b) stated that 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 nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.'' However, under proposed subsections (c) and (d), 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,'' and "[h]ours 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.''

Except for renumbering the section as 541.104, no other changes were made.

In its proposal, the Department invited 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.'' *See* 61 FR 15565 (March 31, 2003). In response to this request, the Department received a large number of comments both in support of and against the modification. Commenters such as the U.S. Chamber of Commerce, the National Association of Manufacturers, the League of Minnesota Cities, the Financial Services Roundtable, the National Automobile Dealers Association, the State of Oklahoma, the State of Kansas Department of Administration Division of Personnel Services, the Tennessee Valley Authority, the Public Sector FLSA Coalition, and the FLSA Reform Coalition support the modified language as more applicable to the realities of the modern workforce. In contrast, other commenters believe this language would compromise the executive exemption or create confusion. For example, the National Employment Lawyers Association "disputes that there is any need for modification changing the long-established requirement that an exempt executive must supervise two or more employees'' because those "who supervise fewer than two employees are, as [a] practical matter, clearly not performing exempt activity at a level that could conceivably justify their characterization as bona

fide executives.'' The Contract Services Association of America states that the "word 'leadership' has too many connotations to be practical in the work environment.''

After full consideration of these comments, the Department has decided to retain the existing and proposed language that the employee direct the work of "two or more other employees'' to qualify as an executive under the final rule. The Department agrees with the comments opposing this change, and has rejected the "leadership'' modification because the present requirement provides a well established, easily applied, bright-line test for exemption, and the ambiguity attached to the term "lead,'' the Department believes, could spark needless litigation. Also, an employee whose primary duty is management and who customarily and regularly leads other employees, alone or with another, may qualify for exemption under the administrative exemption.

The Department also received a number of other comments and requests for clarification on this section. The FLSA Reform Coalition asks that the Department clarify what the term "full-time'' means, and requests that the clarification include a statement that the term should be defined by the employer's practices. The Department does not believe additional clarification is necessary, and stands by its current interpretation that an exempt supervisor generally must direct a total of 80 employee-hours of work each week. As the Wage and Hour Division's Field Operations Handbook (FOH) states, however, circumstances might justify lower standards. For example, firms in some industries have standard workweeks of 37½ hours or 35 hours for their full-time employees. In such cases, supervision of employees working a total of 70 or 75 hours in a workweek will constitute the equivalent of two full-time employees. FOH 22c00.

Several commenters, such as the Financial Services Roundtable and the Mortgage Bankers Association of America, urge the Department to clarify the phrase "in the manager's actual absence'' in subsection (c). The Department continues to believe that the phrase provides useful guidance in defining the exempt executive, and intends that this phrase be interpreted to mean that an employee who simply supervises on a short-term basis, such as during a lunch break or while a manager is on vacation, is not meeting the requirement of customarily and regularly supervising two or more employees.

Several commenters ask that the requirement of directing two or more employees be eliminated. Other commenters state that the requirement should be lowered to directing only one other employee. Yet others argue that the number of employees supervised should be raised. For example, the National Association of Federal Wage Hour Consultants states that the requirement should be five employees while the Labor Board, Inc. suggests the number should be four employees. The Department continues to believe that the current requirement of directing two or more employees is an appropriate measure of exempt status and to raise the threshold would disproportionately harm small businesses that may not have a large number of employees. *See* 1940 Weiss Report at 45–46.

Several commenters question whether the requirement that an employee direct two or more other "employees'' includes employees of a contractor. Several commenters also urge the Department to expand this requirement to two or more "individuals'' so as to count the supervision of volunteers, contractors, and other non-employees. The Department has evaluated these comments and determined that no changes should be made. The FLSA itself defines the term "employee'' as an "individual employed by an employer,'' and this definition has been subject to extensive judicial interpretation. *See* 29 U.S.C. § 203(e)(1). The Department also observes, however, that the administrative exemption may apply to the employee who supervises contractors, volunteers or other non-employees if the other requirements for that exemption are met.

Section 541.105 Particular Weight

Section 541.105 of the final rule contains a new definition of the phrase "particular weight'' as follows:

> To determine whether an employee's suggestions and recommendations are given "particular weight,'' factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight'' even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

This definition has been added in response to comments received from groups such as the Society for Human Resource Management, Leggett & Platt, the Food Marketing Institute, the League of Minnesota Cities and the American Council of Engineering Companies, who indicate that this phrase is extremely vague and needs clarification. As one of the Department's goals is to provide clarity to the terms contained in the regulations, we have defined "particular weight'' by incorporating factors relied on by the courts to define this term under the current regulations. *See, e.g., Baldwin* v. *Trailer Inns, Inc.*, 266 F.3d 1104, 1116 (9th Cir. 2001); *Molina* v. *Sea Land Services, Inc.*, 2 F. Supp. 2d 185, 188 (D.P.R. 1998); *Wendt* v. *New York Life Insurance Co.*, 1998 WL 118168, at *6 (S.D.N.Y. 1998); *Passer* v. *American Chemical Society*, 749 F. Supp. 277, 280 (D.D.C. 1990); *Wright* v. *Zenner & Ritter, Inc.*, 1986 WL 6152, at *2 (W.D.N.Y. 1986); *Kuhlmann* v. *American College of Cardiology*, 1974 WL 1344, at *1 (D.D.C. 1974); *Marchant* v. *Sands Taylor & Woods Co.*, 75 F. Supp. 783, 786 (D. Mass. 1948); *Anderson* v. *Federal Cartridge Corp.*, 62 F. Supp. 775, 781 (D. Minn. 1945).

As illustrated by these cases, factors such as the frequency of making recommendations, frequency of an employer's relying on an employee's recommendations, as well as evidence that the employee's job duties explicitly include the responsibility to make such recommendations, are important considerations in determining whether "particular weight'' is given to the employee's recommendations. Thus, for example, an employee who provides few recommendations which are never followed would not meet the "hire or fire'' requirement in final section 541.100(a)(4). Evidence that an employee's recommendation are given "particular weight'' could include witness testimony that recommendations were made and considered; the exempt employee's job description listing responsibilities in this area; the exempt employee's performance reviews documenting the employee's activities in this area; and other documents regarding promotions, demotions or other change of status that reveal the employee's role in this area.

Section 541.106 Concurrent Duties (Proposed §§ 541.106 and 541.107)

Proposed section 541.106 entitled "Working supervisors'' stated: "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.'' Proposed section 541.107 entitled "Supervisors in retail establishments'' stated: "Supervisors in retail establishments often perform work such as serving customers, cooking food, stocking shelves, cleaning the establishment or other nonexempt work. Performance of such nonexempt 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 nonexempt work.''

As the Department explained in the preamble to the proposed rule, both proposed section 541.106 and proposed section 541.107 were meant to address the difficult issue of classifying employees who have both exempt supervisory duties and nonexempt duties. The Department invited comments on whether these sections have appropriately distinguished exempt and nonexempt employees. 61 FR 15565.

Based on the comments received, the Department has decided to combine these two proposed sections into one section entitled "concurrent duties.'' The Department believes that a unified section on this topic will better illustrate when an employee satisfies the requirements of the executive exemption. The final section 541.106 incorporates the general principles and examples from both proposed section 541.106 and proposed section 541.107. The final section 541.106(a) thus provides: "Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met.'' To further distinguish exempt executives from nonexempt workers, the final subsection 541.106(a) also states: "Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.'' Final subsections 541.106(b) and (c) contain examples to further illustrate these general principles.

The final section provides, as in the current regulations, that an employee with a primary duty of ordinary production work is not exempt even if the employee also has some supervisory responsibilities. As explained in the preamble to the proposed rule, this situation often occurs in a factory setting where an employee who works on a production line also has some responsibility to direct the work of other production line workers. Another example is an employee whose primary duty is to work as an electrician, but who also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor. Nonexempt employees do not become exempt executives simply because they direct the work of other employees upon occasion or provide input on performance issues from time to time because such employees typically do not meet the other requirements of section 541.100, such as having a primary duty of management.

The Department decided to combine proposed sections 541.106 and 541.107 into one section on "concurrent duties'' in response to a number of comments indicating that the proposed separate sections were duplicative and not helpful in understanding the distinction between exempt and nonexempt employees. The National Council of Chain Restaurants argues that proposed section 541.106 should be eliminated because of confusion created by having two separate sections. The Fisher & Phillips law firm and the National Association of Convenience Stores argue that proposed section 541.106 should be eliminated as no longer necessary because that section has always related to the percentage limitations on nonexempt work from the existing long test. Similar comments were received from the U.S. Chamber of Commerce. The Workplace Practices Group argues for the elimination of proposed section 541.106 and suggests that proposed section 541.107 apply to all supervisors, as both working supervisors and retail supervisors have the same or very similar responsibilities such as scheduling employees, assigning work and overseeing product quality. The County of Culpeper, Virginia, argues that proposed section 541.106 ignored the realities of small governments where department heads have to perform both exempt management duties and nonexempt work.

Some commenters, including the New Jersey Business & Industry Association, the National Retail Federation and the HR Policy Association, commend the Department for recognizing the special circumstances of retail supervisors. In contrast, the Society for Human Resource Management, Senator Orrin G. Hatch and others argue that a distinction between retail and non-retail supervisors does not exist. The American Hotel & Lodging Association, the International Franchise Association, the FLSA Reform Coalition, the National Association of Chain Drug Stores and the International Mass Retail Association argue that proposed section 541.107 should be modified to cover both retail and service establishments.

Other commenters state that the description of "working supervisors'' was too broad. Such commenters argue that fast-food managers who spend the majority of their time on nonexempt work should not be exempt. The National Employment Law Project states that the proposed language would make it possible to exempt all line employees, provided they met the requirements of proposed section 541.100. The McInroy & Rigby law firm argues that proposed section 541.107 should be eliminated since there was no policy justification for assistant managers in fast-food establishments to be exempt from FLSA requirements. The Communications Workers of America similarly opposes any diminution of the existing regulatory standards for exempt executives.

The Department believes that the proposed and final regulations are consistent with current case law which makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption. Numerous courts have determined that an employee can have a primary duty of management while concurrently performing nonexempt duties. *See, e.g., Jones* v. *Virginia Oil Co.,* 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of

her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks''); *Murray* v. *Stuckey's, Inc.,* 939 F.2d 614, 617–20 (8th Cir. 1991) (store managers who spend 65 to 90 percent of their time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves'' were exempt executives); *Donovan* v. *Burger King Corp.,* 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work,'' and "this other work does not negate the conclusion that his primary duty is management''); *Horne* v. *Crown Central Petroleum, Inc.,* 775 F. Supp. 189, 190 (D.S.C. 1991) (convenience store manager held exempt even though she performed management duties "simultaneously with assisting the store clerks in waiting on customers''). Moreover, courts have noted that exempt executives generally remain responsible for the success or failure of business operations under their management while performing the nonexempt work. *See Jones* v. *Virginia Oil Co.,* 2003 WL 21699882, at *4 ("Jones'' managerial functions were critical to the success' of the business); *Donovan* v. *Burger King Corp.,* 675 F.2d 516, 521 (2nd Cir. 1982) (the employees' managerial responsibilities were "most important or critical to the success of the restaurant''); *Horne* v. *Crown Central Petroleum, Inc.,* 775 F. Supp. at 191 (nonexempt tasks were "not nearly as crucial to the store's success as were the management functions'').

The Department continues to believe that this case law accurately reflects the appropriate test of exempt executive status and is a practical approach that can be realistically applied in the modern workforce, particularly in restaurant and retail settings. Since all of the prongs of the executive test need to be met to classify an employee as an exempt executive, the Department believes the final rule has sufficient safeguards to protect nonexempt workers.

The Department also received more specific comments on the language contained in proposed sections 541.106 and 541.107. The National Retail Federation argues that the time spent "multi-tasking'' should also be considered exempt work. A comment from the Food Marketing Institute argues that it is critically important that proposed section 541.107 state unequivocally that managers shall not be subject to arbitrary percentage time limits on nonexempt work. The Department believes that sufficient language already is included in this section to make clear that, as stated in current case law, an otherwise exempt supervisory employee does not lose the exemption simply because the employee is simultaneously performing exempt and nonexempt work. The Department also believes that the final section 541.700, defining "primary duty,'' states clearly that there is no strict percentage limitation on the performance of nonexempt work.

One commenter suggests that the Department include in the final rule language from the current interpretive guidelines at 541.119(c) stating that the short test for highly compensated executives cannot be applied to the trades. The final rule, however, includes even stronger language in new section 541.3, which states that none of the section 13(a)(1) exemptions apply to the skilled trades, no matter how highly compensated they are. Thus, the Department believes that no further clarification is needed.

The State of Kansas Department of Administration, Division of Personnel Services, argues that proposed section 541.107 conflicts with language under the administrative exemption regarding project leaders. The Department does not believe that there is any conflict because the executive and administrative exemptions are independently defined and applied, and whether one or both of the exemptions apply will depend on the specific job duties the employee performs.

The Information Technology Industry Council, the U.S. Chamber of Commerce and the Morgan Lewis & Bockius law firm argue that language regarding performance of production or sales work should be eliminated from proposed section 541.106, as it continues to emphasize the production versus staff dichotomy. This language has been removed from the final rule. The Department has combined and streamlined proposed sections 541.106 and 541.107, and we do not believe that this phrase was instructive in clarifying the concept of concurrent duties.

Subpart C, Administrative Employees

Section 541.200 General Rule for Administrative Employees

As in the executive exemption, the proposed regulations streamlined the current regulations by adopting a single standard duties test in proposed section 541.200. The proposed standard duties test provided that an exempt administrative employee must have "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 hold "a position of responsibility with the employer.''

The final rule modifies both of the proposed requirements for the administrative exemption. First, the final rule provides that an exempt administrative employee is one "whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers.'' Second, the final rule deletes the proposed "position of responsibility'' requirement and instead reinserts the current requirement that an exempt administrative employee's primary duty include "the exercise of discretion and independent judgment with respect to matters of significance.''

In addition to the "discretion and independent judgment'' requirement discussed more fully below, the final rule makes two changes to the proposed primary duty test. *First,* as under the executive exemption, the AFL-CIO and other commenters state that changing from "whose'' primary duty as written in the current regulations to the proposed language of "a'' primary duty was a major weakening of the test because it allows for more than one primary duty. As the Department did not intend any substantive change, the final rule uses the existing language "whose primary duty.'' *Second,* the final rule reinserts language from the current regulation that the work must be "*directly*'' related to management or general business operations. Commenters such as the National Treasury Employees Union, the National Employment Lawyers Association, the American Federation of Television and Radio Artists, the Stoll, Stoll, Berne, Lokting & Shlachter law firm, and the Rudy, Exelrod & Zieff law firm oppose the deletion of the word "directly,'' stating that an employee whose duties relate only indirectly or tangentially to administrative functions should not qualify for exemption. As the Department did not intend any substantive change by deletion of the word "directly,'' we have reinserted this term to ensure that the administrative primary duty test is not interpreted as allowing the exemption to apply to employees whose primary duty is only remotely or tangentially related to exempt work. The same change has been made in other sections where the term is used.

The final rule, however, retains the proposed primary duty language that the exempt employee's work must be related to "management or general business operations,'' rather than the

"management policies'' language of the existing regulations. Although some commenters object to this change, other commenters, such as the FLSA Reform Coalition, the HR Policy Association, and the Fisher & Phillips law firm, approve of the proposed deletion of the word "policies'' as recognizing that while management policies are one component of management, there are many other administrative functions that support managing a business. The Department agrees and has retained the proposed language in the final regulation. As explained in the 1949 Weiss Report, the administrative operations of the business include the work of employees "servicing'' the business, such as, for example, "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.'' 1949 Weiss Report at 63. Much of this work, but not all, will relate directly to management policies. As the current regulations state at section 541.205(c), exempt administrative work includes not only those who participate in the formulation of management policies or in the operation of the business as a whole, but it "also includes a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business.'' Therefore, the Department considers the primary duty test for the administrative exemption to be as protective as the existing regulations.

In addition to the primary duty test, the proposed general rule for the administrative exemption also required that an employee hold a "position of responsibility.'' The proposal at section 541.202 further defined "position of responsibility'' as performing "work of substantial importance'' or "work requiring a high level of skill or training.'' The proposal also eliminated the current requirement that an exempt administrative employee perform work "requiring the exercise of discretion and independent judgment.'' The Department specifically invited comments on these changes, including 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 in place of the "position of responsibility requirement,'' but modified to provide better guidance on distinguishing exempt administrative employees.

The Department received numerous, widely divergent comments on these proposed changes. Commenters such as the FLSA Reform Coalition, the U.S. Chamber of Commerce, the HR Policy Association, the National Retail Federation, the Morgan, Lewis & Bockius law firm, and the National Association of Federal Wage Hour Consultants generally approve of the "position of responsibility'' requirement, preferring it to the mandatory "discretion and independent judgment'' requirement of the existing regulations. They support, in particular, the proposal that employees with a "high level of skill or training'' can qualify as exempt administrative employees, even if they use reference manuals to provide guidance in addressing difficult or novel circumstances. For example, the Morgan, Lewis & Bockius law firm states that, "in today's regulatory climate, few employers can leave highly complex issues totally to the discretion of even high level employees.'' The HR Policy Association states that this "new requirement that an employee have a 'high level of skill or training' distinguishes employees who are merely looking up information from those who use the information in an analytical way.''

However, even commenters who generally support the "position of responsibility'' structure also express concerns about the vagueness and subjectivity of the new terms. For example, the National Association of Manufacturers (NAM) states that it "is not sure what 'position of responsibility' means and fears that the Department is substituting one vague term for another.'' NAM also notes that, "using the term 'skill' in the administrative employee definition can be problematic. The term is often associated with nonexempt trade occupations—*i.e.,* people who perform work and are not exempt from the FLSA's wage and overtime rules.'' NAM states that "care should be used when introducing into the white-collar exemption definitions a term that has been historically associated with nonexempt workers.'' Similarly, the American Bakers Association states that the position of responsibility standard "is somewhat vague and subjective'' and that it "appears to invite another generation of court litigation to clarify the meaning of its key terms.'' The FLSA Reform Coalition expresses concern that the standard would be applied to the disadvantage of large companies, stating that "small fish in big ponds'' might not be found exempt even if they had the same degree of responsibility as employees working for small companies. Other commenters object to the implication that some employees do not have responsibility at work. For example, the Society for Human Resource Management states that, "each and every position in an organization is one of responsibility * * *.'' Similarly, the Workplace Practices Group recommends eliminating the term "position of responsibility'' because a "basic tenet of modern management philosophy is empowering employees to see their position in an organization, whatever it might be, as one of responsibility. This is true whether the position held is receptionist or customer service agent.'' Finally, the American Corporate Counsel Association, while approving of the abandonment of the "discretion and independent judgment'' requirement, suggests that the "position of responsibility'' test has "the potential to result in significant uncertainty and continued litigation. Employers often seek to foster an atmosphere and develop workplace programs emphasizing that the work of every employee involves a degree of responsibility and contributes something substantially important to the success of the enterprise. Thus, it appears to us that both 'white collar' and 'blue collar' positions may be positions of responsibility for which work of substantial importance is being performed.''

Other commenters strongly oppose the new "position of responsibility'' requirement as inappropriately weakening the requirements for exemption. For example, the AFL-CIO states that neither "work of substantial importance'' nor "work requiring a high level of skill or training'' was an adequate substitute for the "discretion and independent judgment'' test. Similarly, the Rudy, Exelrod & Zieff law firm states that the FLSA does not exempt highly skilled or trained employees, and such a regulatory change would allow employers to misclassify employees with duties related to the production of the company's goods and services. In addition, the firm argues that such a provision effectively and unreasonably broadens the professional exemption, by eliminating the advanced degree requirement. Professor David Walsh similarly comments that the proposed language is not more easily applied than the existing standard and "seems to conflate the administrative and professional exemptions.'' Commenters such as the American Federation of

State, County and Municipal Employees, the Communications Workers of America, the National Treasury Employees Union, the American Federation of Television and Radio Artists, the National Employment Lawyers Association, and the Goldstein, Demchak, Baller, Borgen & Dardarian law firm express similar views, stating that the "position of responsibility'' test is not an equivalent substitute for the "discretion and independent judgment requirement.'' These commenters also state that all workers possess skills and training in one form or another.

Many commenters view the "discretion and independent judgment'' standard of the existing regulations as vague, ambiguous and unworkable. Commenters such as the FLSA Reform Coalition, the Society for Human Resource Management, the HR Policy Association, the Fisher & Phillips law firm, the National Retail Federation, the National Association of Chain Drug Stores, and the National Council of Chain Restaurants state that the "discretion and independent judgment'' requirement is the cause of confusion and unnecessary litigation. Such commenters commend the Department for eliminating "discretion and independent judgment'' as a required element of the test for exemption. The Fisher & Phillips law firm, for example, states that this standard "has been an unending source of confusion, ambiguity, and dispute.''

Nevertheless, many of these same commenters support inclusion of the "discretion and independent judgment'' standard as a third alternative to satisfy the "position of responsibility'' test. For example, the National Association of Manufacturers suggests that the Department retain "discretion and independent judgment'' as an optional independent alternative to the "position of responsibility'' requirement. These commenters state that decades of court decisions and opinion letters provide guidance on its interpretation. Retaining the standard as an alternative would thus provide a level of continuity between the existing regulations and the new regulations, and avoid re-litigation of jobs already held to be exempt under the current "discretion and independent judgment'' test.

Other commenters such as the AFL–CIO, the American Federation of State, County and Municipal Employees, the Communications Workers of American, the National Treasury Employees Union, the New York Public Employees Federation, the National Employment Lawyers Association, the Rudy, Exelrod & Zieff law firm and Women Employed oppose the deletion of the "discretion and independent judgment'' standard as a required element for exemption. Such commenters view deletion of this test as a substantial expansion of the exemption. They cite the 1940 Stein Report and 1949 Weiss Report as stating that the "discretion and independent judgment'' requirement was necessary to minimize the opportunity for employer abuse in categorizing the diverse group of employees who might be labeled as administrative. Moreover, such commenters generally view the requirement as considerably more precise than the proposed "position of responsibility'' replacement, and note that the "discretion and independent judgment'' concept is also used under the National Labor Relations Act. Such commenters often state that the need to address developing case law prohibiting the use of manuals by exempt employees does not necessitate the entire abandonment of the "discretion and independent judgment'' standard. Finally, these commenters also state that decades of jurisprudence would be lost if the "discretion and independent judgment'' requirement is eliminated. Accordingly, the commenters recommend retention of the "discretion and independent judgment'' standard as an independent requirement for exemption.

The commenters' widely divergent views demonstrate the difficult task of clearly defining and delimiting the administrative exemption. The GAO Report documented the difficulty of applying the "discretion and independent judgment'' standard consistently, causing uncertainty for good faith employers attempting to classify employees correctly. Even the 1949 Weiss Report noted that this standard "is not as precise and objective as some other terms in the regulations.'' 1949 Weiss Report at 65. Numerous commenters concur with our observation in the proposal that this requirement has generated significant confusion and litigation. However, most commenters generally view both the "position of responsibility'' and the "high level of skill or training'' standards as similarly vague, ambiguous and subjective. Most of the commenters state that the "discretion and independent judgment'' standard should be retained in some form, although there was sharp disagreement on whether the standard should be a mandatory requirement. Despite sharp criticism of both the current "discretion and independent judgment'' requirement and the proposed "position of responsibility'' standard, the comments contain very few suggestions for clear and objective alternative language.

After careful consideration of the public comments submitted, the Department agrees that the "position of responsibility'' standard does little to bring clarity and certainty to the administrative exemption. In the proposal, the Department attempted to articulate a clear, simple, common sense test for exemption, but most commenters believe that we were not fully successful. Further, many commenters believe that the term "position of responsibility'' greatly expanded the scope of the exemption—a result which the Department did not intend. In addition, the Department agrees with the concerns of the National Association of Manufacturers and other commenters that the "high level of skill or training'' standard is problematic because it is too closely associated with nonexempt "blue collar'' skilled trade occupations.

Accordingly, the final rule deletes the proposed "position of responsibility'' requirement and its definition at proposed section 541.202 as "work of substantial importance'' or "work requiring a high level of skill or training.'' Instead, as the second requirement for the administrative exemption, the final rule requires that exempt administrative employees exercise "discretion and independent judgment with respect to matters of significance.'' Thus, consistent with the current short test, the final rule contains two independent, yet related, requirements for the administrative exemption. First, the employee must have a primary duty of performing office or non-manual work "directly related to management or general business operations.'' This first requirement refers to the type of work performed by the employee, and is further defined at section 541.201. Second, the employee's primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance.'' As discussed below, the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.'' The term "matters of significance'' refers to the level of importance or consequence of the work performed. These terms are further defined at final section 541.202. *See, e.g., Bothell* v. *Phase Metrics, Inc.,* 299 F.3d 1120, 1125–26 (9th Cir. 2002) (looking to both the "types of activities'' and the importance of the work).

Section 541.201 Directly Related to Management or General Business Operations

The proposed section 541.201 defined the phrase "related to the management or general business operations'' as referring "to the type of work performed by the employee'' and requiring that the exempt administrative employee "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.'' The proposal also provided examples of the types of work that generally relate to management or general business operations, including work in areas such as tax, finance, accounting, auditing, quality control, advertising, marketing, research, safety and health, personnel management, human resources, labor relations, and others. Finally, the proposal stated that an employee also may qualify for the administrative exemption if the "employee performs work related to the management or general business operations of the employer's customers,'' such as employees acting as advisers and consultants to their employer's clients or customers.

The Department made two changes in the final subsection 541.201(a). *First,* for the reasons discussed above, the final rule reinserts the word "directly'' throughout this section. Some commenters argue that the deletion of the word "directly'' from the existing regulations would allow the exemption for an employee whose duties relate only indirectly or tangentially to administrative functions. The Department did not intend any substantive change by deletion of the word "directly'' in the proposal, and thus has reinserted this term to ensure that the administrative duties test is not interpreted as allowing the exemption to apply to employees whose primary duty is only remotely or tangentially related to exempt work. *Second,* the words "retail or service establishment'' have been reinserted from the current rule in the phrase: "as distinguished, for example, from working on a manufacturing production line or selling a product *in a retail or service establishment.*'' This addition returns the regulatory text more closely to the current section 541.205(a): "as distinguished from 'production' or, in a retail or service establishment, 'sales' work.'' Commenters state that deletion of the words "retail or service establishment'' could be interpreted as denying the administrative exemption to any employee engaged in any sales, advertising, marketing or promotional activities. Because no such categorical change was intended, or is supported by current case law, the Department has restored the language from the current regulations. *See, e.g., Reich* v. *John Alden Life Insurance Co.*, 126 F.3d 1, 9–10 (1st Cir. 1997) (promoting sales in the insurance industry is exempt administrative work). The Department also notes that this phrase begins with the words "for example.'' This final phrase in section 541.201(a) provides non-exclusive examples. Thus, the concern of commenters such as the Rudy, Exelrod & Zieff law firm that the reference to "working on a manufacturing production line'' suggests that "working on what might be termed a 'white collar production line' is different from working on a manufacturing production line for purposes of the exemption'' is unfounded.

The primary focus of most comments on subsection 541.201(a) dealt with the so-called 'production versus staff' dichotomy. The preamble to the proposal stated that the Department intended "to reduce the emphasis on the so-called "production versus staff'' dichotomy in distinguishing between exempt and nonexempt 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.''

Many commenters, including the Society for Human Resource Management (SHRM), the FLSA Reform Coalition, the National Association of Manufacturers (NAM), the U.S. Chamber of Commerce (Chamber), the HR Policy Association, the Morgan, Lewis & Bockius law firm and the Fisher & Phillips law firm, strongly support the proposal's intended diminution of the production versus staff dichotomy, which they believe has little value in today's service-oriented economy. For example, the Chamber states that the dichotomy "does not fit in today's workplace'' because the "decline in manufacturing and the rise in the service and information industries has rendered the production dichotomy an artifact of a different age.'' SHRM "applauds the Department's elimination of much of the 'production v. staff' language'' but also "recognizes that the production versus staff in some circumstances can be a helpful aid in determining whether an employee fits under the administrative exemptions and, therefore, supports the proposed language. * * * This language strikes a proper balance between retaining this concept and ensuring that it is not so strictly construed so as to deny the exemption to an employee who should be exempt.'' Similarly, NAM supports the proposed rule's attempt to "reduce the emphasis on the production versus staff dichotomy.''

However, many of these commenters believe that the proposal did not go far enough, and that the final rule should strive to eliminate the dichotomy entirely. For example, the FLSA Reform Coalition states that the dichotomy should be eliminated by allowing an employee to qualify for the exemption either by performing work related to management or general business operations, or by doing any work that includes the exercise of discretion and independent judgment: "Thus, even if the employee's work could arguably be characterized as "production,'' he or she would nonetheless be an exempt administrative employee if his or her job is a responsible, non-manual one that includes the exercise of 'discretion and independent judgment.' '' Similarly, the HR Policy Association recommends that the Department "eliminate the production dichotomy from the administrative exemption'' because the confusion it causes is too great and it is difficult to apply with uniformity. The Fisher & Phillips law firm also states that the Department should "eliminate the 'dichotomy' altogether.''

The primary focus of these comments was the last sentence in proposed subsection (a), which states that the administrative exemption does not apply if an employee is "working on manufacturing production line or selling a product.'' Numerous commenters ask for clarification about the scope and meaning of the statement. For example, the Morgan, Lewis & Bockius law firm requests clarification that not all sales work is excluded from exemption, such as advertising, marketing and promotional activities, and for confirmation that some individuals who work on a production line, such as a safety and health administrator or quality control specialist, may still be exempt. The U.S. Chamber of Commerce also states that the Department should "revisit its approach, especially with regard to treatment of employees who may be involved in some aspect of sales,'' and should clarify that sales work is not inherently inconsistent with exempt work. The HR Policy Association recommends that the Department delete the "working on a manufacturing production line or selling a product'' phrase, or else clarify its meaning either in the regulations or this preamble.

A large number of commenters have the opposite view about the "production versus staff'' dichotomy, stating that minimizing or deleting the dichotomy would deprive the administrative exemption of its meaning. Such commenters, including the AFL–CIO, the National Treasury Employees Union, the American Federation of State, County and Municipal Employees, the Rudy, Exelrod & Zieff law firm, the National Employment Lawyers Association, the American Federation of Television and Radio Artists, the National Partnership for Women and Families and the Stoll, Stoll, Berne Lokting & Shlachter law firm, believe that the courts have found the dichotomy to be a useful and appropriate tool in analyzing workers in a broad variety of non-manufacturing contexts. They oppose any indication that the Department is minimizing the dichotomy.

For example, the AFL–CIO notes that the 1949 Weiss report explained that the phrase "directly related to management policies or general business operations'' describes those activities "relating to the administrative as distinguished from the 'production' operations of a business.'' Similarly, the 1940 Stein Report described administrative exempt employees as "those who can be described as staff rather than line employees, or functional rather than departmental heads.'' The AFL–CIO quotes *Reich* v. *New York*, 3 F.3d 581, 588 (2nd Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994), stating that the dichotomy "has repeatedly proven useful to courts in a variety of non-manufacturing settings,'' and cites a number of court decisions applying the dichotomy in a variety of government and service sector contexts. The National Treasury Employees Union states that the "distinction which the Department would so casually discard is a key tool to help identify the specific class of office workers that Congress intended to exempt: support staff contributing to business operations and management. It is imperative to keep this narrow focus rather than blur the distinction between support staff and line workers * * *.'' The Rudy, Exelrod & Zieff law firm notes that, prior to 1940, the Department did not separately define the administrative exemption from the executive exemption, because the Department recognized that the administrative exemption "was intended to cover no more than a small subclass of 'executive' employees.'' The firm states that the 1940 Stein Report concluded that the employees whom the administrative exemption was intended to cover had "functional rather than departmental authority,'' meaning they did not "give orders to individuals.'' The firm argues that nothing in the modern workplace, involving production of services instead of manufactured goods, makes it improper to continue to draw the line between employees who help to administer an employer's general business operations and those employees whose duties are related to the day-to-day production of the goods or services the employer sells.

Commenters, thus, have very different perspectives about how the Department should approach the "production versus staff'' dichotomy and apply it to the modern workplace. Except as stated above, we have not adopted any of the commenters' suggestions for substantial changes to the primary duty standard in section 541.201(a). The Department believes that our proposal struck the proper balance on the "production versus staff'' dichotomy. We do not believe that it is appropriate to eliminate the concept entirely from the administrative exemption, but neither do we believe that the dichotomy has ever been or should be a dispositive test for exemption. The Department believes that the dichotomy is still a relevant and useful tool in appropriate cases to identify employees who should be excluded from the exemption. As the Department recognized in the 1949 Weiss Report at 63, this exemption is intended to be limited to those employees whose duties relate "to the administrative as distinguished from the 'production' operations of a business.'' Thus, it relates to employees whose work involves servicing the business itself—employees who "can be described as staff rather than line employees, or as functional rather than departmental heads.'' 1940 Stein Report at 27. The 1940 Stein Report further described the exemption as being limited to employees who have "miscellaneous policy-making or policy-executing responsibilities'' but who do not give orders to other employees. 1940 Stein Report at 4. Based on these principles, the Department provided in proposed section 541.201(a) that the administrative exemption covers only employees performing a particular type of work—work related to assisting with the running or servicing of the business. The examples the Department provided in proposed section 541.201(b) were intended to identify departments or subdivisions that generally fit this rule.

The Department's view that the "production versus staff'' dichotomy has always been illustrative—but not dispositive—of exempt status is supported by federal case law. In *Bothell* v. *Phase Metrics*, Inc., 299 F.3d 1120 (9th Cir. 2002), for example, the Ninth Circuit found the dichotomy "useful only to the extent that it helps clarify the phrase 'work directly related to the management policies or general business operations.' '' *Id.* at 1126 (citation omitted). The court further stated:

> The other pertinent cases from our sister circuits similarly regard the administration/production dichotomy as but one piece of the larger inquiry, recognizing that a court must 'construe the statutes and applicable regulations as a whole.' Indeed, some cases analyze the primary duty test without referencing the § 541.205(a) dichotomy at all. This approach is sometimes appropriate because, as we have said, the dichotomy is but one analytical tool, to be used only to the extent that it clarifies the analysis. Only when work falls 'squarely on the production side of the line,' has the administration/production dichotomy been determinative.
> * * * * *
> Moreover, the distinction should only be employed as a tool toward answering the ultimate question, whether work is 'directly related to management policies or general business operations,' not as an end in itself.

Id. at 1127 (citations omitted). *See, e.g., Piscione* v. *Ernst & Young, L.L.P.,* 171 F.3d 527, 538–39 (7th Cir. 1999) (even though the employee "produced'' some reports and filings, and such work might be viewed as production work, the work was directly related to the management or general business operations); *Spinden* v. *GS Roofing Products Co.,* 94 F.3d 421, 428 (8th Cir. 1996) (employee held administratively exempt despite the fact that he "produced'' certain specific outputs), *cert. denied,* 520 U.S. 1120 (1997).

The final regulation is consistent with the Ninth Circuit's approach in *Phase Metrics:* the "production versus staff'' dichotomy is "one analytical tool'' that should be used "toward answering the ultimate question,'' and is only determinative if the work "falls squarely on the production side of the line.''

As noted above, proposed section 541.201(b) provided an illustrative list of the types of functional areas or departments, including accounting, auditing, marketing, human resources and public relations, typically administrative in nature. The commenters generally found this illustrative list to be accurate and helpful. For example, the FLSA Reform Coalition states that it supported the Department's efforts to clarify the administrative exemption by "focusing on the function performed by the employee and providing examples of exempt, administrative functions.'' The AFL–CIO comments that the list includes areas "which are clearly

encompassed within the servicing functions of a business, and which substantially overlap with the servicing examples set forth in current section 541.205(b).'' The U.S. Chamber of Commerce also notes that the list is similar to the examples in the existing regulations and agrees that all of the areas listed in the proposed regulation ''are proper illustrations of exempt administrative work.'' Some commenters suggest a variety of additional areas of work that should be added to the illustrative list. However, the National Treasury Employees Union cautions against exempting workers based upon their job area or title. Other commenters similarly suggest that the Department should include fewer categories in the list, because employees doing routine work may be misperceived as exempt simply because they work in an area like marketing, human resources, or research.

In light of these comments, we have added the language, ''but is not limited to,'' to emphasize that the list is intended only to be illustrative. It is not intended as a complete listing of exempt areas. Nor is it intended as a listing of specific jobs; rather, it is a list of functional areas or departments that generally relate to management and general business operations of an employer or an employer's customers, although each case must be examined individually. Within such areas or departments, it is still necessary to analyze the level or nature of the work (*i.e.*, does the employee exercise discretion and independent judgment as to matters of significance) in order to assess whether the administrative exemption applies. Commenters recommend the inclusion of several areas that we think are appropriate as additional examples of areas that generally relate to management and general business operations. Therefore, we are adding computer network, internet and database administration; legal and regulatory compliance; and budgeting to the illustrative list.

Finally, proposed section 541.201(c) provided that employees who perform work related to the management or general business operations of the employer's customers, such as advisers and consultants, also may qualify for the administrative exemption. The proposed rule included language from existing sections 541.2(a)(2) and 541.205(d), and no substantive changes were intended. The commenters express few substantive concerns with this provision. A small number of commenters suggest that the regulation should provide that the employer's customer could be an individual, while commenter Karen Dulaney Smith urges the Department to insert the word 'business' to clarify that the exemption does not apply to ''individuals, whose ''business'' is purely personal.'' The Department has not made either change. Nothing in the existing or final regulations precludes the exemption because the customer is an individual, rather than a business, as long as the work relates to management or general business operations. As stated by commenter Smith, the exemption does not apply when the individual's 'business' is purely personal, but providing expert advice to a small business owner or a sole proprietor regarding management and general business operations, for example, is an administrative function. The 1949 Weiss Report stated that the administrative exemption should not be read to exclude ''employees whose duties relate directly to the management policies or to the general business operations of their employers' customers. For example, many bona fide administrative employees perform important functions as advisors and consultants but are employed by a concern engaged in furnishing such services for a fee * * *. Such employees, if they meet the other requirements of the regulations, should qualify for exemption regardless of whether the management policies or general business operations to which their work is directly related are those of the employers' clients or customers, or those of their employer.'' 1949 Weiss Report at 65. Weiss also noted that a consultant employed by a firm of consultants is exempt if the employee's ''work consists primarily of analyzing, and recommending changes in, the business operations of his employer's client.'' 1949 Weiss Report at 56. This provision is meant to place work done for a client or customer on the same footing as work done for the employer directly, regardless of whether the client is a sole proprietor or a Fortune 500 company, as long as the work relates to ''management or general business operations.''

Section 541.202 Discretion and Independent Judgment (Proposed ''Position of Responsibility'')

As discussed above, the Department has decided to eliminate the proposed ''position of responsibility'' requirement. Thus, the final rule deletes proposed section 541.202 defining ''position of responsibility,'' proposed section 541.203 defining ''substantial importance,'' and proposed section 541.204 defining ''high level of skill or training.'' Instead, the final rule reinserts the ''discretion and independent judgment'' requirement, and defines that term at final section 541.202. Some of the language in proposed sections 541.203 and 541.204 was retained from the existing regulations and also appears in the final regulations as described below. The language from proposed section 541.204 regarding the use of manuals has been moved to a new section in Subpart H, Definitions and Miscellaneous Provisions, and is discussed under that subpart.

The Department continues to believe, as most commenters confirm, that the current discretion and independent judgment standard has caused confusion and unnecessary litigation. Even in the 1949 Weiss Report, the Department recognized that the ''discretion and independent judgment'' standard was somewhat subjective, and the difficulty of applying the standard consistently has increased with the passing decades. As evidenced by the increasing court litigation, it has become progressively more difficult to apply the standard with the creation of many new jobs that did not exist 50 years ago. Nonetheless, the vast majority of commenters express concern that abandoning the ''discretion and independent judgment'' standard entirely would create even more uncertainty and litigation. We also recognize the benefit of retaining the standard in some form so as not to jettison completely decades of federal court decisions and agency opinion letters.

Accordingly, while retaining this standard from the existing regulations, final section 541.202 clarifies the definition of discretion and independent judgment to reflect existing federal case law and to eliminate outdated and confusing language in the existing interpretive guidelines. The Department intends the final rule to clarify the existing standard and to make the standard easier to understand and apply to the 21st Century workplace.

Final section 541.202(a) thus restates the requirement that the exempt administrative employee's primary duty must ''include'' the exercise of discretion and independent judgment and includes the general definition of this term, taken word-for-word from the existing interpretive guideline at subsection 541.207(a): ''In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered.'' The requirement that the primary duty must ''include'' the

exercise of discretion and independent judgment—rather than "customarily and regularly'' exercise discretion and independent judgment—is not a change from current law. Although the Department is aware that there has been some confusion regarding the appropriate standard under the existing "short'' duties test, federal court decisions have recognized that the current "short'' duties test does not require that the exempt employee "customarily and regularly'' exercise discretion and independent judgment, as does the effectively dormant "long'' test. *See, e.g., O'Dell* v. *Alyeska Pipeline Service Co.,* 856 F.2d 1452, 1454 (9th Cir. 1988) (district court erred in not applying more lenient "includes'' standard under short test which made a difference in determining whether employee was exempt); *Dymond* v. *United States Postal Service,* 670 F.2d 93, 95 (8th Cir. 1982) (while the "long'' duties test for the administrative exemption requires that the employee "customarily and regularly'' exercise discretion and independent judgment, when an employee makes more than $250 a week, "that requirement is reduced to requiring that the employee's primary duty simply 'includes work requiring the exercise of discretion and independent judgment'").

Also retained from existing subsection 541.207(a), the final subsection 541.202(a) provides that discretion and independent judgment must be exercised "with respect to matters of significance.'' Final subsection 541.202(a) states that the term "matters of significance'' refers to "the level of importance or consequence of the work performed.'' This concept of the importance or high level of work performed does not appear as a regulatory requirement in existing section 541.2, but is included twice in the existing interpretive guidance. Existing section 541.205(a), defining the primary duty requirement, states that the administrative exemption is limited "to persons who perform *work of substantial importance* to the management or operation of the business.'' This language was the basis of the "work of substantial importance'' option in the proposed definition of "position of responsibility.'' Existing section 541.207(a), defining the term "discretion and independent judgment'' provides that an exempt administrative employee "has the authority or power to make an independent choice, free from immediate direction or supervision and *with respect to matters of significance.''*

The existing regulations use these two different phrases found in two different sections to describe the same general concept—that the work performed by an exempt administrative employee must be significant, substantial, important, or of consequence. *See, e.g., Piscione* v. *Ernst & Young, L.L.P.,* 171 F.3d 527, 535–43 (7th Cir. 1999). The words "substantial'' and "significant'' are synonyms. Existing section 541.207(d) describes the "matters of significance'' concept as requiring that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence.'' Further, existing section 541.205 and existing section 541.207 use some of the same examples (*i.e.*, personnel clerks, inspectors, buyers) to illustrate the meaning of "substantial importance'' and the meaning of "matters of significance.''

Describing the same concept using two different phrases in two different sections of the existing interpretive guidelines is duplicative and confusing. Accordingly, the final rule chooses one phrase—"matters of significance''—and makes that phrase part of the regulatory test for the administrative exemption, rather than merely interpretive guidance. As described below, final subsections 541.202(b) through (f) combine language from existing section 541.205, existing section 541.207, and current case law to more clearly define and delimit this concept.

Final subsection 541.202(b) begins with language from existing section 541.207(b) stating that the phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises.'' Final subsection 541.202(b) then contains the following non-exclusive list of factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance:

> [W]hether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

These factors were taken from the existing regulations, *see* 541.205(b), 541.205(c) and 541.207(d), or developed from facts which federal courts have found relevant when determining whether an employee exercises discretion and independent judgment. Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required. *See, e.g., Bondy* v. *City of Dallas,* 2003 WL 22316855, at *1 (5th Cir. 2003) (making recommendations to management on policies and procedures); *McAllister* v. *Transamerica Occidental Life Insurance Co.,* 325 F.3d 997, 1000–02 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *Cowart* v. *Ingalls Shipbuilding,* Inc., 213 F.3d 261, 267 (5th Cir. 2000) (developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Piscione,* 171 F.3d at 535–43 (making recommendations to management on policies and procedures); *Haywood* v. *North American Van Lines, Inc.,* 121 F.3d 1066, 1071–73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority; independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *O'Neill-Marino* v. *Omni Hotels Management Corp.,* 2001 WL 210360, at *8–9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority; developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Stricker* v. *Eastern Off-Road Equipment, Inc.,* 935 F. Supp. 650, 656–59 (D. Md. 1996) (authority to commit employer in matters that have financial impact); *Reich* v. *Haemonetics Corp.,* 907 F. Supp. 512, 517–18 (D. Mass. 1995) (negotiating on behalf of the employer with some degree of settlement authority; authority to commit employer in matters that have financial impact); *Hippen* v. *First National Bank,* 1992 WL 73554, at *6 (D. Kan. 1992) (authority to commit employer in matters that have

financial impact). Other factors which federal courts have found relevant in assessing whether an employee exercises discretion and independent judgment include the employee's freedom from direct supervision, personnel responsibilities, troubleshooting or problem-solving activities on behalf of management, use of personalized communication techniques, authority to handle atypical or unusual situations, authority to set budgets, responsibility for assessing customer needs, primary contact to public or customers on behalf of the employer, the duty to anticipate competitive products or services and distinguish them from competitor's products or services, advertising or promotion work, and coordination of departments, requirements, or other activities for or on behalf of employer or employer's clients or customers. *See, e.g., Hogan* v. *Allstate Insurance Co.,* 2004 WL 362378 (11th Cir. 2004); *Demos* v. *City of Indianapolis,* 302 F.3d 698 (7th Cir. 2002); *Lutz* v. *Ameritech Corp.,* 2000 WL 245485 (6th Cir. 2000); *Lott* v. *Howard Wilson Chrysler-Plymouth, Inc.,* 203 F.3d 326 (5th Cir. 2001); *Heidtman* v. *County of El Paso,* 171 F.3d 1038 (5th Cir. 1999); *Piscione* v. *Ernst & Young, L.L.P.,* 171 F.3d 527 (7th Cir. 1999); *Shockley* v. *City of Newport News,* 997 F.2d 18 (4th Cir. 1993); *West* v. *Anne Arundel County, Maryland,* 137 F.3d 752 (4th Cir.), *cert. denied,* 525 U.S. 1048 (1998); *Reich* v. *John Alden Life Insurance Co.,* 126 F.3d 1 (1st Cir. 1997); *Wilshin* v. *Allstate Insurance Co.,* 212 F. Supp. 2d 1360 (M.D. Ga. 2002); *Roberts* v. *National Autotech, Inc.,* 192 F. Supp. 2d 672 (N.D. Tex. 2002); *Orphanos* v. *Charles Industries, Ltd.,* 1996 WL 437380 (N.D. Ill. 1996).

Most of the remaining subsections in final 541.202 contain language from the existing regulations. Final subsection 541.202(c) contains language from existing section 541.207(a) and existing section 541.207(e) providing that "discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision.'' However, "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.'' Final subsection (c) also retains the credit manager and management consultant examples from existing section 541.207(e)(2). Final subsection 541.202(d) contains language from existing section 541.205(c)(6) providing that 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 does not involve the exercise of discretion and independent judgment with respect to matters of significance.'' Final subsection 541.202(e) contains language from existing sections 541.207(c)(1) and 541.207(c)(2) stating that the exercise of discretion and independent judgment "must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.'' As in existing section 541.205(c), final subsection 541.202(e) provides that the exercise of discretion and independent judgment "does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.'' Final subsection 541.202(f) includes language from existing section 541.205(c)(2) that an employee "does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.''

In sum, as in the existing regulations, the final administrative exemption regulations establish a two-part inquiry for determining whether an employee performs exempt administrative duties. First, what *type* of work is performed by the employee? Is the employee's primary duty the performance of work directly related to management or general business operations? Second, what is the *level* or *nature* of the work performed? Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance? *See, e.g., Bothell* v. *Phase Metrics, Inc.,* 299 F.3d 1120, 1125–26 (9th Cir. 2002) (looking to both the type of work and the importance of the work). By retaining the "discretion and independent judgment'' standard from the existing regulations, as clarified to reflect current case law, and combining the existing concepts of "substantial importance'' and "matters of significance,'' the final rule provides clarity while at the same time maintaining continuity with the existing regulations.

Section 541.203 Administrative Exemption Examples

The final regulations include a new section 541.203 which includes illustrations of the application of the administrative duties test to particular occupations. Many of the examples are from sections 541.201, 541.205 and 541.207 of the existing regulations. Other examples reflect existing case law.

Final subsection 541.203(a) provides that insurance claims adjusters "generally meet the duties requirements for the administrative exemption, 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.'' This section was moved from proposed section 541.203(b)(2). Commenters, such as National Employment Lawyers Association (NELA), the Rudy, Exelrod & Zieff law firm and the Stoll, Stoll, Berne, Lokting & Shlachter law firm, state that the Department should not single out insurance claims adjusters in the regulations. NELA states that this example "flies in the face of the basic rule that titles are not dispositive in determining whether employees are exempt. Many insurance claims adjusters perform routine production work.'' Such commenters state that the work of many adjusters involves the day-to-day work of the company, such as whether to repair or replace a dented fender, rather than work related to the management or general business operations of the firm such as the overall methods used to process claims generally. However, this provision of the proposed rule is consistent with existing section 541.205(c)(5) and an Administrator's opinion letter issued on November 19, 2002, to which the court in *Jastremski* v. *Safeco Insurance Cos.,* 243 F. Supp. 2d 743, 753 (N.D. Ohio 2003), deferred because it was a "thorough, well reasoned, and accurate interpretation of the regulations.'' *See also Palacio* v. *Progressive Insurance Co.,* 244 F. Supp. 2d 1040 (C.D. Cal. 2002). The final subsection 541.203(a)—like the opinion letter and the case law—does not rely on the "claims adjuster'' job title alone. Rather, there must be a case-by-case assessment to determine whether the employee's duties meet the requirement for exemption. Thus, the final subsection (a) identifies the typical duties of an exempt claims adjuster as, among others, preparing damage estimates, evaluating and making recommendations regarding coverage of the claim, determining liability and total value of the claim, negotiating settlements, and making

recommendations regarding litigation. The courts have evaluated such factors to assess whether the employee is engaged in servicing the business itself. Moreover, as the court in *Palacio* emphasized, claims adjusters are not production employees because the insurance company is "in the business of writing and selling automobile insurance,'' rather than in the business of producing claims. *Id.* at 1046. Because the vast majority of customers never make a claim against the policy they purchase, the court concluded that claims adjusters do "not produce the very goods and services'' that the employer offered to the public. *Id.* at 1047. Similarly, federal courts have evaluated such factors to assess whether the employee's exercises discretion and independent judgment. *See, e.g., Palacio,* 244 F. Supp. 2d at 1048 (claims agent who spent half her time negotiating with claimants and attorneys, who had independent authority to settle claims between $5,000 and $7,500, and whose recommendations regarding offers for larger claims often were accepted exercised discretion and independent judgment); *Jastremski,* 243 F. Supp. 2d at 757 (claims adjuster who planned and carried out investigations, determined whether the loss was covered by the policy, negotiated settlements, had independent settlement authority up to $15,000 and could recommend settlements, which were usually accepted, above his authority level exercised discretion and independent judgment).

Consistent with existing case law, final subsection 541.203(b) provides that employees in the financial services industry "generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.'' Several commenters request a section regarding various occupations in the financial services industry because of growing litigation in this area.

In cases such as *Reich* v. *John Alden Life Insurance Co.,* 126 F.3d 1 (1st Cir. 1997), *Hogan* v. *Allstate Insurance Co.,* 2004 WL 362378 (11th Cir. 2004), and *Wilshin* v. *Allstate Insurance Co.,* 212 F. Supp. 2d 1360 (M.D. Ga. 2002), federal courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, even though the employees also engaged in some inside sales activities. In contrast, the court in *Casas* v. *Conseco Finance Corp.,* 2002 WL 507059, at *9 (D. Minn. 2002), held that the administrative exemption was not available for employees who had a "primary duty to sell [the company's] lending products on a day-to-day basis'' directly to consumers and failed to exercise discretion and independent judgment.

The *John Alden* case involved the exempt status of marketing representatives working for a company that designed, created and sold insurance products, primarily for businesses that were purchasing group coverage for their employees. The marketing representatives did not sell through direct contacts with the ultimate customers, but instead relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of such independent sales agents to keep them apprised of the employer's financial products, to inform them of changes in prices, and to discuss how the products might fit their customers' needs. The marketing representatives also would inform the employer of anything they learned from the independent sales agents, such as information about a competitor's products or pricing. The First Circuit ruled that these activities were directly related to management policies or general business operations and that the marketing representatives were exempt. Their activities involved "servicing'' of the business because their work was "in the nature of 'representing the company' and 'promoting sales' of John Alden products, two examples of exempt administrative work provided by § 541.205(b) of the interpretations.'' 126 F.3d at 10. Thus, the court concluded that the marketing representatives' contact with the independent sales agents involved 'something more than routine selling efforts focused simply on particular sales transactions.' Rather, their agent contacts are 'aimed at promoting (*i.e.*, increasing, developing, facilitating, and/or maintaining) customer sales *generally,*' activity which is deemed administrative sales promotion work under section 541.205(b).'' *Id.* (citations omitted, emphasis in original), quoting *Martin* v. *Cooper Electric Supply Co.,* 940 F.2d 896, 905 (3rd Cir. 1991), *cert. denied,* 503 U.S. 936 (1992).

In *Hogan* v. *Allstate Insurance Co.,* 2004 WL 362378, at *4 (11th Cir. 2004), the Eleventh Circuit held that insurance agents who "spent the majority of their time servicing existing customers'' and performed duties including "promoting sales, advising customers, adapting policies to customer's needs, deciding on advertising budget and techniques, hiring and training staff, determining staff's pay, and delegating routine matters and sales to said staff '' were exempt administrative employees. The court held the insurance agents exempt even though they also sold insurance products directly to existing and new customers.

The court in *Wilshin* v. *Allstate Insurance Co.,* 212 F. Supp. 2d 1360, 1377–79 (M.D. Ga. 2002), held that a neighborhood insurance agent met the requirements for the administrative exemption when his responsibilities included such activities as recommending products and providing claims help to different customers, as well as using his own personal sales techniques to promote and close transactions. He also was required to represent his employer in the market, and be knowledgeable about the market and the needs of actual and potential customers. The *Wilshin* court found that selling financial products to an individual, ultimate consumer—as opposed to an agent, broker or company—was not enough of a distinction to negate his exempt status.

In contrast, the district court in *Casas* v. *Conseco Finance Corp.,* 2002 WL 507059 (D. Minn. 2002), held that loan originators were not exempt because they had a "primary duty to sell [the company's] lending products on a day-to-day basis'' directly to consumers. 2002 WL 507059, at *9. The employees called potential customers from a list provided to them by the employer and, using the employer's guidelines and standard operating procedures, obtained information such as income level, home ownership history, credit history and property value; ran credit reports; forwarded the application to an underwriter; and attempted to match the customer's needs with one of Conseco's loan products. If the underwriter approved the loan, the originator gathered documents for the closing, verified the information, and ordered the title work and appraisals. The court concluded that this was the ordinary production work of Conseco, which has the business purpose of designing, creating, and selling home lending

products, making them nonexempt production employees. The court also found that the plaintiffs lacked discretion and independent judgment necessary to qualify for the exemption since they followed strict guidelines and operating procedures, and had no authority to approve loans.

The Department agrees that employees whose primary duty is inside sales cannot qualify as exempt administrative employees. However, as found by the *John Alden, Hogan* and *Wilshin* courts, many financial services employees qualify as exempt administrative employees, even if they are involved in some selling to consumers. Servicing existing customers, promoting the employer's financial products, and advising customers on the appropriate financial product to fit their financial needs are duties directly related to the management or general business operations of their employer or their employer's customers, and which require the exercise of discretion and independent judgment.

Accordingly, consistent with this case law, the final rule distinguishes between exempt and nonexempt financial services employees based on the primary duty they perform. Final section 541.203(b) thus provides:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

The Department believes this approach also is consistent with the case law and the final rule regarding insurance claims adjusters, which emphasizes that employees performing duties related to servicing the company, such as representing the company in evaluating the merits of claims against it and in negotiating settlements, generally qualify for exemption. We also believe that this approach is consistent with the existing and final regulations providing that advisory specialists and consultants to management, such as tax experts, insurance experts, or financial consultants, who are employed by a firm that furnishes such services for a fee, should be treated the same as an in-house adviser regardless of whether the management policies or general business operations to which their work is directly related are those of their employer's clients or customers or those of their employer. *See* final rule section 541.201(c); existing sections 541.201(a)(2), 541.205(c)(5) and 541.205(d); and *Piscione* v. *Ernst & Young, L.L.P.,* 171 F.3d 527 (7th Cir. 1999). Finally, our approach is consistent with existing section 541.207(d)(2), which provides that "a customer's man in a brokerage house'' exercises discretion and independent judgment "in deciding what recommendations to make to customers for the purchase of securities,'' but reflects the modernization of this existing subsection for the 21st Century workforce.

Consistent with *Hogan,* the final rule rejects the view that selling financial products directly to a consumer automatically precludes a finding of exempt administrative status. Application of the exemption should not change based only on whether the employees' activities are aimed at an end user or an intermediary. The final rule distinguishes the exempt and nonexempt financial services employees based on the duties they perform, not the identity of the customer they serve. For example, a financial services employee whose primary duty is gathering and analyzing facts and providing consulting advice to assist customers in choosing among many complex financial products may be an exempt administrative employee. An employee whose primary duty is inside sales is not exempt.

Final subsection 541.203(c) provides that an employee "who leads a team of other employees assigned to complete major projects 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) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.'' This modification of proposed section 541.203(b)(3) responds to commenters who express concern that the executive exemption fails to reflect the modern practice of a company forming cross-functional or multi-department teams to complete major projects. Several commenters suggest that the manager or leader of such teams should be treated as exempt even if the leader did not have traditional supervisory authority over the other members of the team. Although, as stated above, the Department does not believe that the executive exemption applies, an employee who leads teams to complete major projects may qualify for exemption under the existing administrative regulations. *See* current 29 CFR 541.205(c) (exemption applies to employees who "carry out major assignments in conducting the operations of the business''). The final subsection (c) merely updates this concept with a more modern example.

Final subsection 541.203(d) includes the example regarding executive assistants and administrative assistants derived from existing sections 541.201(a)(1), 541.207(d)(2) and 541.207(e), and proposed at section 541.203(b)(4). Final subsection 541.203(e) distinguishes exempt human resources managers from nonexempt personnel clerks. The language in this subsection appears in existing sections 541.205(c)(3) and 541.207(c)(5), and was proposed at sections 541.203(b)(4) and 541.203(c). Final subsection 541.203(f) includes the purchasing agent example from proposed section 541.203(b)(4), which was derived from existing sections 541.205(c)(4), 541.207(d)(2) and 541.207(e)(2). Final subsection 541.203(g) contains the inspection work example from existing section 541.207(c)(2) and proposed section 541.204(c). Final section 541.203(h) contains the examples regarding examiners and graders from existing sections 541.207(c)(3) and (4) and proposed section 541.204(c). Final subsection 541.203(i) includes the comparison shopping example from existing section 541.207(c)(6). No substantive changes from current law are intended in these examples.

The Department received no substantive comments with respect to the examples of nonexempt work. With respect to administrative or executive assistants, a number of commenters assert that these employees should be exempt if they assist a senior executive in a corporation below the level of proprietor or chief executive of a business. Other commenters express a countervailing concern that these terms could be applied too broadly to employees with nonexempt duties, such as secretarial employees. The final rule makes no changes to current law, and thus this example should not expand the exemption to include secretaries or other clerical employees. We do not believe expansion of this example beyond current law is warranted on the record evidence.

Final subsection 541.203(j) contains a new example providing that "[p]ublic sector inspectors or investigators of

various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.'' This new example responds to comments from public sector employees and employer groups. The Public Sector FLSA Coalition, for example, comments that because the existing rules were written with only the private sector in mind, the proposed revisions offer an opportunity for the Department to include language addressing issues unique to public sector concerns. The Public Sector FLSA Coalition states that, although the discretion and independent judgment requirement is vague and unworkable, this standard retains the benefit of being the subject of several court decisions and opinion letters. These interpretations have provided some guidance for Public Sector FLSA Coalition members in assessing the exempt status of certain positions in the public sector. Similarly, the Wisconsin Department of Employment Relations suggests that the final regulations include specific examples from the public sector relating to the discretion and independent judgment standard. Various public sector unions and employees express concern that employees such as investigators, inspectors and parole officers would newly qualify for the administrative exemption under the proposed regulations. Thus, the final rule has been modified to add examples of various types of inspection work found in the public sector that typically fail the requirement for exercising discretion and independent judgment. The examples are straightforward and drawn from previous Wage and Hour opinion letters in which, based on the facts presented, the work involved was considered to be based on the employee's use of skills and technical abilities, rather than exercising the requisite discretion and independent judgment specified in the regulations. *See, e.g.*, Wage and Hour Opinion Letter of 4/17/98, 1998 WL 852783 (investigators); Wage and Hour Opinion Letter of 3/11/98, 1998 WL 852755 (inspectors); and Wage and Hour Opinion Letter of 12/21/94, 1994 WL 1004897 (probation officers).

Section 541.204 Educational Establishments (Proposed § 541.205)

The proposed rule established a separate exemption test for employees whose primary duty is "performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.'' Such employees are separately identified in section 13(a)(1) of the FLSA and are separately addressed in the existing regulation. The proposed rule defined the terms used and gave examples of employees who are engaged in academic administrative functions and employees who are not so engaged. Under the proposed rule, the term "educational institution'' was defined as an "elementary or secondary school system, an institution of higher education or other educational institution.''

As discussed below, the Department has added a list of relevant factors for determining whether post-secondary career programs qualify as "other educational institutions'' to final subsection 541.204(b), and added "academic counselors'' to the list of examples of exempt academic administrative employees in final subsection 541.204(c). Except for adjustment of the salary levels, the Department has made no other substantive changes to this section.

As the preamble to the proposed rule stated, this provision simply consolidated into a single section of the regulations a few provisions in the existing regulation pertaining to the administration of educational institutions, with no substantive changes intended. The Department received very few comments on this section.

A few commenters, including the Morgan, Lewis & Bockius law firm, the Air Force Labor Advisors and the Career College Association, suggest that the regulations contain some additional guidance regarding "other educational institutions'' such as schools that provide adult continuing education or post-secondary technical and vocational training programs such as aircraft flight schools. Opinion letters currently provide guidance about such institutions. For example, the Department has stated that a flight instruction installation approved by the Federal Aviation Administration under that agency's regulations would constitute an educational establishment. Wage and Hour Opinion Letter of April 2, 1970 (1970 WL 26390). *See also* 2000 WL 33126562. Factors that are relevant in assessing whether such post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. *Gonzales* v. *New England Tractor Trailer Training School,* 932 F. Supp. 697 (D. Md. 1996). Because such questions must be answered on a case-by-case basis, it would not be prudent for the Department to list just a few types of schools that could qualify as educational institutions. However, we have included the above factors in final subsection 541.204(b).

The American Council of Education suggests that we include admissions counselors and academic counselors on the list of examples of exempt academic administrative employees. The Department has provided guidance on these positions in opinion letters dated February 19, 1998 (1998 WL 852683), and April 20, 1999 (1999 WL 1002391). In those letters, the Department addressed the exempt status of academic counselors and enrollment or admissions counselors. Those letters elaborate on the regulatory requirement that the *academic* administrative exemption is limited to employees engaged in work relating to the academic operations and functions of a school rather than work relating to the general business operations of the school. Thus, academic counselors performing the job duties listed in the 1998 opinion letter were found to qualify for the academic administrative exemption because their primary duty involved work such as administering the school's testing programs, assisting students with academic problems, advising students concerning degree requirements, and performing other functions directly related to the school's educational functions. In contrast, enrollment counselors who engage in general outreach and recruitment efforts to encourage students to apply to the school did not qualify for the academic administrative exemption because their work was not sufficiently related to the school's *academic* operations. However, the 1999 letter noted that, depending upon the employees' duties, they might qualify for the general administrative exemption because their work related to the school's general business operations and involved work in the nature of general sales promotion work.

Consistent with these opinion letters, we have added academic counselors as an example of exempt academic administrative employees in final subsection 541.204(c), but not admissions counselors.

Subpart D, Professional Employees

Section 541.300 General Rule for Professional Employees

The proposed general rule for the professional exemption also streamlined the current regulations by adopting a single standard duties test. The proposed standard duties test provided that an exempt professional employee must have "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.''

The final rule modifies the proposed professional duties test in three ways, ensuring that the final professional test is as protective as the existing short duties test under which most employees are tested for exemption today. *First*, as under the other exemptions, the final rule changes the phrase "a primary duty'' back to the current language of "whose primary duty'' in response to commenter concerns that this change weakened the test for exemption. *Second*, consistent with the existing regulations, the final rule deletes the phrase "office or non-manual'' work. This revision was made in response to commenter concerns about the confusion that would result from applying the "office and non-manual'' requirement to the professional exemption for the first time. Employer commenters express concerns that occupations clearly satisfying the requirements of the existing tests for learned or creative professionals would not be exempt under the proposal because some aspect of the employee's duties requires "manual'' work, such as a surgeon using a scalpel or a portrait artist using a brush. The Department did not intend this result, and thus has removed the "office and non-manual'' language from the professional exemption. *Third,* the final rule deletes from subsection 541.300(a)(2)(i) the phrase, "but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.'' As discussed more fully under section 541.301 below, some commenters view the addition of this language as a significant expansion of the learned professional exemption. No such result was intended. Rather, this proposed language was merely an attempt to streamline and summarize the discussion of the word "customarily'' in subsection 541.301(d) of the current regulations.

Section 541.301 Learned Professionals

Proposed section 541.301(a) restated the duties tests for the learned professional exemption and defined "advanced knowledge'' as "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 proposed subsection (a) also included a list of traditional fields of science or learning such as law, medicine, theology and teaching "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.'' The remaining subsections in proposed section 541.301 defined the key terms in the duties test and provided examples of occupations which generally meet or do not meet the duties requirements for the learned professional exemption.

The final section 541.301(a) has been modified to track the existing learned professional duties test, and then list separately the three elements of this duties test: "(1) The employee must perform work requiring advanced knowledge; (2) The advanced knowledge must be in a field of science or learning; and (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.'' Other text from proposed subsection (a) has been moved as appropriate to final subsection (b) defining the phrase "advanced knowledge,'' final subsection (c) defining the phrase "field of science or learning,'' and final subsection (d) defining the phrase "customarily acquired by a prolonged course of specialized intellectual instruction.'' The final subsection (e) contains examples, consistent with existing case law as detailed below, illustrating how the learned professional duties test applies to specific occupations. The language in proposed subsection (f) has been deleted as redundant with the new section 541.3, and proposed subsection (g) has been renumbered.

Commenters on the learned professional exemption focus most of their discussion on the educational requirements for the exemption. Proposed section 541.301(a) provided that the advanced knowledge required for exemption is "customarily acquired through a prolonged course of specialized intellectual instruction,'' but may also "be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.'' Similarly, proposed section 541.301(d) provided: "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.'' This new "equivalent combination'' language generated sharp disagreement among the commenters.

Many commenters, including the FLSA Reform Coalition, the National Restaurant Association, the Food Marketing Institute, the State of Oklahoma Office of Personnel Management, the Johnson County Government Human Resources Department and Henrico County, Virginia, generally support the proposal as more appropriately focusing on an employee's knowledge level and application of such knowledge. Such commenters state that the proposal reflects the realities of the modern workplace where employees may take an alternative educational path, but perform the same duties as the degreed professionals. Comments filed by the HR Policy Association, for example, recognize that the current regulations allow some non-degreed employees to be classified as exempt learned professionals by providing that the requisite knowledge is "customarily'' acquired by a prolonged course of intellectual instruction. However, the HR Policy Association writes that the Department has not provided sufficient guidance, under the current or proposed regulations, on the application of this "customarily'' language. The HR Policy Association endorses the Department's proposal as providing a workable and reasonable standard which recognizes that more workers today perform work requiring professional knowledge without possessing a formal professional degree. The Society for Human Resource Management (SHRM)

expresses concern that the existing test requires an employer to classify and pay employees differently even if they who perform the same work and if they acquired their knowledge in different ways. SHRM supports the proposal because it would allow employers to classify and pay employees the same when they have the same knowledge level and perform the same work. The Workplace Practices Group similarly notes that the existing rule arguably creates difficulties for an employer who must treat differently two employees who perform the same work but acquired their knowledge in different manners. The National Association of Manufacturers (NAM) states that the proposal reflects the realities of the 21st century workplace while remaining consistent with the purposes of the FLSA. NAM agrees with the Department's proposal, stating that the regulations should focus on the employee's knowledge and application of that knowledge, not on how the employee acquired such knowledge. Comments filed by the U.S. Chamber of Commerce (Chamber) supporting the proposal discuss how the professions and professional education have evolved since the current regulations were promulgated in 1940. The current focus of the regulations, the Chamber notes, is inconsistent with this evolution in how knowledge is acquired.

Other commenters, however, argue that the proposed "equivalent combination'' language would greatly and unjustifiably expand the scope of the professional exemption. The AFL–CIO acknowledges that "on its face,'' the proposal "does not permit occupations that currently do not meet the test for learned professionals to qualify for the exemption under the new alternative educational requirement.'' The AFL–CIO notes that the 1940 Stein Report recognized a need for flexibility in the professional duties test to allow the exemption for the occasional employee who did not acquire the requisite knowledge for exemption through a formal degree program. The AFL–CIO also acknowledges that the court in *Leslie* v. *Ingalls Shipbuilding, Inc.,* 899 F. Supp. 1578 (S.D. Miss. 1995), focused on the knowledge level to find that an engineer without a formal degree was an exempt professional. Nonetheless, the AFL–CIO argues that the proposal would have the practical effect of allowing employers to classify as exempt any employee who has some post-high school education and job experience. According to the AFL–CIO, entire occupations such as medical technicians, licensed practical nurses, engineering technicians and other technical workers could be classified as exempt employees under the proposal. The American Federation of State, County and Municipal Employees claims that the Department's proposed rule would replace an existing "bright line'' test with a confusing standard. The National Treasury Employees Union argues that the proposal creates a new category of exempt technical professionals, which the Department lacks the statutory authority to do. The American Federation of Government Employees (AFGE) describes the proposal as substituting "a vague and unworkable "knowledge'' test'' for an existing "workable educational requirement.'' The AFGE also claims that the proposed professional exemption "utterly destroys'' the requirement that an exempt professional be in a recognized profession and eliminates any requirement for an advanced education degree. The International Association of Machinists and Aerospace Workers claims the proposal is an "unwarranted relaxation of FLSA standards.'' The International Federation of Professional and Technical Engineers argues that the proposal opens the door to classifying beauticians, barbers, radiological technicians and technicians that test or repair mechanical or electric equipment as exempt learned professionals.

The Department believes the proposal was consistent with current case law, and that the proposal would not have caused substantial expansion of the professional exemption. Nonetheless, after careful consideration of all the comments, the Department has modified sections 541.301(a) and (d) to ensure our intent cannot be so misconstrued. The Department did not and does not intend to change the long-standing educational requirements for the learned professional exemption. Rather, the revisions to these subsections were intended to provide additional guidance on the existing language, "customarily acquired'' by a prolonged course of specialized intellectual instruction.

The Department has modified proposed section 541.301(a) in response to the comments evidencing confusion regarding the different elements of the primary duty test for the learned professional exemption. As noted above, some commenters express concern that allowing the exemption for employees with "an equivalent combination of intellectual instruction and work experience'' would result in significant expansion of the exemption to new occupations never before considered to be professions, such as licensed practical nursing, the skilled trades, and various engineering and repair technicians. These concerns are unfounded because they incorrectly conflate the three separate elements of the learned professional duties test as described in the 1940 Stein Report:

> The first element in the requirement is that the knowledge be of an advanced type. Thus, generally speaking, it must be knowledge which cannot be attained at the high-school level. Second, it must be knowledge in a field of science or learning. This in itself is not entirely definitive but will serve to distinguish the 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. * * * The requisite knowledge, in the third place, must be customarily acquired by a prolonged course of specialized intellectual instruction and study.

1940 Stein Report at 38–39. All three of these essential elements must be satisfied before an employee qualifies as an exempt learned professional under the existing, proposed and final rule. Thus, for example, a journeyman electrician may acquire advanced knowledge and skills through a combination of training, formal apprenticeship, and work experience, but can never qualify as an exempt learned professional because the electrician occupation is not a "field of science or learning'' as required for exemption. A licensed practical nurse may work in a "field of science or learning,'' but cannot meet the requirements for the professional exemption because the occupation does not require knowledge "customarily acquired by a prolonged course of specialized intellectual instruction.''

The proper focus of inquiry is upon whether all three required elements have been satisfied, not upon any job title or "status'' the employee might have. Rather, only occupations that customarily require an advanced specialized degree are considered professional fields under the final rule. For example, no amount of military training can turn a technical field into a profession. Similarly, a veteran who received substantial training in the armed forces but is working on a manufacturing production line or as an engineering technician cannot be considered a learned professional because the employee is not performing professional duties.

The Department intended, and still intends, that these three essential elements, as set forth in the 1940 Stein Report, remain applicable and relevant today. Accordingly, final section 541.301(a) now separately lists the three elements, thus ensuring that nothing in

this section can be interpreted as allowing the professional exemption to be claimed for licensed practical nurses, skilled tradespersons, engineering technicians and other occupations that cannot meet all three of the elements.

Although the Department has removed the "equivalent combination'' language from the final section 541.301(a), the references to the educational requirements for the professional exemption and the term "customarily'' are discussed in subsection (d). As the AFL–CIO notes, the 1940 Stein Report recognized a need for flexibility in the professional duties test to allow the exemption for the occasional employee who does not possess the specialized academic degree usually required for entry into the profession. This flexibility is discussed in the existing regulations at section 541.301(d) which states, in part:

> Here it should be noted that the word "customarily'' has been used to meet a specific problem occurring in many industries. As is well known, even in the classical profession of law, there are still a few practitioners who have gained their knowledge by home study and experience. Characteristically, the members of the profession are graduates of law schools, but some few of their fellow professionals whose status is equal to theirs, whose attainments are the same, and whose word is the same did not enjoy that opportunity. Such persons are not barred from the exemption.

Thus, the existing section 541.301(d) states, the learned professional exemption is "available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry.''

The final section 541.301(d), defining the phrase "customarily acquired by a prolonged course of specialized intellectual instruction,'' retains these general concepts while providing additional guidance to clarify when an employee working in a "field of science or learning,'' but without a formal degree, can qualify as an exempt learned professional. The final subsection (d) requires two separate inquiries. *First,* as in the existing regulations, the occupation must be in a field of science or learning where specialized academic training is a standard prerequisite for entrance into the profession. Thus, the learned professional exemption is available for lawyers, doctors and engineers, but not for skilled tradespersons, technicians, beauticians or licensed practical nurses, as none of these occupations require specialized academic training at the level intended by the regulations as a standard prerequisite for entrance into the profession. *Second,* employees within such a learned profession can then only qualify for the learned professional exemption if they either possess the requisite advanced degree or "have substantially the same knowledge level and *perform substantially the same work* as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.''

The final subsection (d) thus recognizes, as evidenced by many comments and recognized in the existing regulations, that some employees, occasional though they may be, have the same knowledge level and perform the same work as degreed employees but obtain that advanced knowledge by a non-traditional path.'' [9] An employee with the same knowledge level and performing the same work in a professional field of science or learning as the degreed professionals should be classified and paid in the same manner as those degreed professionals. This principle does not expand the learned professional exemption to new quasi-professional fields. Rather, it merely ensures, as in the current regulations, that employees performing the same work, and who met the other requirements for exemption, are treated the same—a common theme in employment law today.

To ensure that the final rule is not interpreted to exempt entire occupations previously considered nonexempt by the Department, the final rule deletes the phrase in proposed section 541.301(d) that equivalent knowledge may be obtained "through a combination of work experience, training in the armed forces, attending a technical school, attending a community college or other intellectual instruction.'' Instead, final section 541.301(d) provides that the word "customarily'' means "that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.''

Thus, a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces. The International Federation of Professional & Technical Engineers, for example, describes its members as technicians who test and repair electronic or mechanical equipment using knowledge gained through on-the-job training, military training and technical or community colleges. This commenter states that such technicians "generally do not have specialized college degrees in engineering or scientific fields, and do not have the detailed and sophisticated knowledge that scientists or engineers possess.'' Such technical workers are entitled to overtime under the existing and final regulations because their work does not require advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

To further avoid any misunderstanding of our intent, the final rule adds the following additional language to subsection (d):

> Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

Some jobs require only a four-year college degree in any field or a two-year degree as a standard prerequisite for entrance into the field. Other jobs require only completion of an apprenticeship program or other short course of specialized training. The final section 541.301(d), drawn from existing subsection 541.301(d) and proposed section 541.301(f), makes clear that such occupations do not qualify for the learned professional exemption.

The decision in *Palardy* v. *Horner,* 711 F. Supp. 667 (D. Mass. 1989) (applying Office of Personnel Management and FLSA regulations), cited by the AFL–CIO, would not

[9] The preamble to the proposal, 68 FR at 15568, invited comments on whether the regulations should specify equivalencies of work experience and other intellectual instruction that could substitute for a specialized advanced degree. A few commenters supported various specific equivalencies, but most commenters opposed them because equivalencies might vary by industry or be an "arbitrary exercise subject to abuse.'' The Department has decided not to impose inflexible equivalencies in the final regulations. However, we have added the phrase "and performs substantially the same work'' to the final section 541.301(d), which should be a better guide for the regulated community in determining when a non-degreed employee working in a recognized professional field of science or learning can qualify as an exempt learned professional by focusing the inquiry on the actual work performed by the employee. *See, e.g., Leslie* v. *Ingalls Shipbuilding, Inc.,* 899 F. Supp. 1578 (S.D. Miss. 1995).

change if analyzed under the proposed or final regulations. The employees in that case were technicians employed by the Navy at the GS–11 grade level who performed "technical tasks relating to the proper design, repair, testing and overhaul of naval ship systems and equipment, as well as the vessels themselves.'' *Id.* at 668. The court described the employees as "primarily responsible for preparing drawings and schematics used in installing and reconfiguring equipment on navy vessels,'' but these tasks were "accomplished by consulting standard texts, guides and established formulas.'' *Id.* The work was "practical rather than theoretical,'' with the more complex tasks performed by professional engineers. *Id.* at 668–69. The only educational requirement for the positions was a high school diploma, and the skills needed to perform the work were "obtained through on the job training.'' *Id.* The work did "not require an advanced course of academic study.'' *Id.* Such technicians would be entitled to overtime pay under the final regulations, because the standard prerequisite for entry into such jobs is only a high school education, not advanced specialized academic training. In addition, the technicians would be entitled to overtime pay under the final regulations because they did not perform the same work as the professional engineers. In contrast, the employee in *Leslie* v. *Ingalls Shipbuilding, Inc.,* 899 F. Supp. 1578 (S.D. Miss. 1995), who had completed three years of engineering study at a university and had many years of experience in the field of engineering, would continue to be properly classified as an exempt learned professional.

The Department also received substantial comments on the proposal to eliminate the existing "short'' test requirement that an exempt professional employee "consistently exercise * * * discretion and judgment.'' Many commenters such as the U.S. Chamber of Commerce (Chamber), the HR Policy Association, the Public Sector FLSA Coalition, the National Restaurant Association, and the National Association of Chain Drug Stores support this change. The Chamber, for example, notes that the "discretion and judgment'' requirement is inconsistent with modern workforce practices, citing the case of *Hashop* v. *Rockwell Space Operations Co.,* 867 F. Supp. 1287, 1297 (S.D. Tex. 1994) (employees with degrees in electronic engineering and mathematics who trained Space Shuttle ground control personnel held not exempt). Difficulties in articulating and defining this requirement, the HR Policy Association states, have resulted in confusion in its application and have spawned numerous lawsuits. The HR Policy Association notes that professional employees are increasingly guided by operational parameters or standards because of the increased acceptance of international standards, especially in fields like engineering and science. According to the commenter, this evolution in work performed by professional employees has accelerated confusion with, and litigation over, the current professional exemption. The HR Policy Association also cites the *Rockwell Space Operations* case to illustrate that the current test can lead to illogical results.

Other commenters, such as the AFL–CIO, the American Federation of State, County and Municipal Employees, the National Treasury Employees Union, the American Federation of Government Employees and the International Federation of Professional and Technical Engineers, urge the Department to restore "discretion and judgment'' as a requirement for the professional exemption. Such commenters argue that the exercise of discretion and judgment demonstrates the independence and authority that is an inherent part of professional work. Similarly, the National Employment Law Project contends that the "discretion and judgment'' requirement "is a key limiting factor of the exemption and is intended to weed out those workers who are not bona fide exempt employees.'' Some of these commenters also believe that the proposal eliminated the "long'' duties test requirement that exempt professionals perform work "predominantly intellectual and varied in character.'' Such commenters object to the perceived deletion of the "predominantly intellectual'' requirement as further weakening the requirements for exemption.

The Department continues to believe that having a primary duty of "performing work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction'' includes, by its very nature, exercising discretion and independent judgment. Indeed, existing section 541.305 defines "discretion and judgment'' under the professional exemption by stating only that: "A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment. Purely mechanical or routine work is not professional.'' *See also* 1940 Stein Report at 37 ("A prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment.''). The Department has been unable to identify any occupation that would meet the primary duty test for the professional exemption, but not require the consistent exercise of discretion and judgment.

The Department observes that only a few courts have discussed the definition of the phrase "includes work requiring the consistent exercise of discretion and judgment'' in the existing "short'' professional duties test, and how this standard differs from the phrase "includes work requiring the exercise of discretion and *independent* judgment'' in the existing "short'' administrative duties test. *See, e.g., Piscione* v. *Ernst & Young, L.L.P.,* 171 F.3d 527, 536 (7th Cir. 1999); *Hashop,* 867 F. Supp. at 1298 n.6. The Department also notes that the "consistent exercise of discretion and judgment'' standard under the learned professional exemption is less stringent than the "includes work requiring the exercise of discretion and *independent* judgment'' standard of the administrative exemption. *See De Jesus Rentas* v. *Baxter Pharmacy Services Corp.,* 286 F. Supp. 2d 235, 241 (D.P.R. 2003) (noting that the discretion required for the professional exemption is "a lesser standard'' than the discretion required under the administrative exemption).

The Department continues to agree that a "prime characteristic of professional work is the fact that the employee does apply his special knowledge or talents with discretion and judgment,'' 29 CFR 541.305(b), and did not intend to delete this concept entirely from the professional duties test. Thus, consistent with existing section 541.305(b), the Department has included the "consistent exercise of discretion and judgment'' in final subsection 541.301(b) as part of the definition of "work requiring advanced knowledge,'' one of three essential elements of the learned professional primary duty tests:

> The phrase "work requiring advanced knowledge'' means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

This language, consistent with existing section 541.305, acknowledges that the exercise of ''discretion and judgment'' is a prime characteristic of professional work, while also providing a more substantive definition of ''advanced knowledge'' than the definition in existing section 541.301(b), which merely defines advanced knowledge as ''knowledge which cannot be attained at a high school level.'' These clarifications in the final rule are based on current law, should make the professional duties test easier to apply, and will not cause currently nonexempt employees to be classified as exempt learned professionals. At the same time, the final rule recognizes that some learned professionals in the modern workplace are required to comply with national or international standards or guidelines. Certified Public Accountants have not under current law, and will not under the final rule, lose the learned professional exemption because they follow the Generally Accepted Accounting Principles (GAAP). Similarly, a lawyer who follows Security and Exchange Commission rules to prepare corporate filings should still qualify for exemption even though such rules today allow for little variation. In such cases, the exempt professional employee applies advanced knowledge to identify and interpret varying facts and circumstances. As noted by several commenters, the decision in *Hashop* v. *Rockwell Space Operations Co.,* 867 F. Supp. 1287 (S.D. Tex. 1994), demonstrates the absurd result from too literally applying the current ''discretion and judgment'' requirement to a 21st century job. While this case has not been followed by any court in the decade since it was decided, the *Rockwell Space Operations* decision has caused confusion for employers attempting to determine the exempt status of employees. The plaintiffs in the *Rockwell Space Operations* case were instructors who trained ''Space Shuttle ground control personnel during simulated missions.'' *Id.* at 1291. The plaintiffs provided ''instruction on all communications, data, tracking, and telemetry information that ordinarily flows between the Space Shuttle and the Johnson Space Center Mission Control Center.'' *Id.* The plaintiffs were responsible for assisting in development of the script for the simulated missions, running the simulation, and debriefing Mission Control on whether the trainees handled simulated anomalies correctly. *Id.* at 1291–92. The plaintiffs also wrote workbooks and technical guides. *Id.* The plaintiffs had college degrees in electrical engineering, mathematics or physics. *Id.* at 1296. Nonetheless, the court found the plaintiffs did not ''consistently exercise discretion and judgment,'' and thus were entitled to overtime pay, because the appropriate responses to simulated Space Shuttle malfunctions were contained in a manual. *Id.* at 1297–98. In the Department's view, the reliance by an engineer or physicist on a manual outlining appropriate responses to a Space Shuttle emergency (or a problem in a nuclear reactor, as another example) should not transform an otherwise learned professional scientist into a nonexempt technician. The clarifications to the professional duties test are designed to prevent such an absurd result.

The definition of ''advanced knowledge'' also retains the ''predominantly intellectual'' concept from the existing ''long'' duties test. The Department notes that the proposal did not eliminate the requirement that exempt professional work must be predominantly intellectual. We agree with the commenters stating that professional work, by its very nature, must be intellectual. Thus, proposed section 541.301(a) defined learned professions to include those ''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.'' Nonetheless, the comments demonstrate that the proposal did not sufficiently stress this concept, and may have been unclear as to how the ''predominantly intellectual'' requirement fits into the primary duty test. Moving the ''predominantly intellectual'' language to final section 541.301(b) should address the commenter concerns discussed above.

A number of commenters ask the Department to declare various occupations as qualifying for the learned professional exemption, but these commenters did not provide sufficient information regarding the educational requirements of the occupations necessary for us to make that determination. For example, the Newspaper Association of America (NAA) suggests that the Department consider including a specific discussion on the applicability of the learned professional exemption to journalists, particularly given the guidance in the existing regulations that the learned professional exemption does not apply to ''quasi-professions'' such as journalism. The NAA cites a 1996 survey of daily newspaper editors conducted at the Ohio State Newspaper finding that 86 percent of daily newspaper entry-level hires just out of college had journalism and mass communication degrees. The Department, however, has no further supporting information about the requirements for the profession and, as such, declines to include journalists in the learned professional exemption at this time. Further discussion regarding journalists is retained as in the existing regulations under the creative professional exemption.

The record evidence is sufficient for the Department to provide additional guidance regarding the following occupations, some of which are covered by the current regulations but repeated here:

Nurses. The proposal retained the Department's existing interpretation regarding the exempt status of registered nurses (RNs). Simply stated, nurses who are *registered* by an appropriate state licensing board satisfy the duties requirements for exemption as learned professional employees. This well-established regulatory exemption for registered nurses has appeared in the existing interpretative guidelines for more than 32 years:

> Registered nurses have traditionally been recognized as professional employees by the Division in its enforcement of the act. Although, in some cases, the course of study has become shortened (but more concentrated), nurses who are registered by the appropriate examining board will continue to be recognized as having met the requirement of § 541.3(a)(1) of the regulations.

29 CFR 541.301(e)(1) (36 FR 22978, December 2, 1971). Final rule section 541.301(e)(2) continues to provide that RNs satisfy the duties test for the professional exemption, and clarifies that other nurses, such as licensed practical nurses (LPNs), would not be exempt from eligibility for overtime.

The AFL–CIO, the American Federation of Teachers (AFT), the American Nurses Association, the Maine State Nurses Association, the Minnesota Nurses Association, the Service Employees International Union (SEIU) and United Food and Commercial Workers International Union (UFCW), as well as many individual nurses, express reservations about the knowledge equivalency language of the proposal. They state that the proposed formulation of the professional standard duty test would exempt additional classes of healthcare workers, such as LPNs. For example, AFT and SEIU note that LPNs have some level of formal education but do

not possess the same level to be considered degreed exempt employees, as are RNs. SEIU also argues that the proposal ignored the differences in the permitted scope of practice between RNs and LPNs. The UFCW argues that the difference between RNs and LPNs is that the former typically enter the nursing profession by attending a specialized school and obtaining a specialized nursing degree while the latter do not. The UFCW criticizes the proposal as eliminating this distinction between RNs and LPNs, and for eliminating overtime for LPNs and other technical workers who have experience or training but do not have an advanced degree in a recognized field of science or learning. In describing the work and qualifications of LPNs, or a licensed vocational nurse (LVNs) in the state of California, UFCW comments that they perform patient care tasks pursuant to the direct and close supervision of RNs or physicians. LPNs and LVNs are not required to have an advanced degree or undergo a prolonged course of study in a recognized field of science or learning. "Typically, all that is required is a high school education and a year's training in a vocational school.'' As for their job duties, UFCW states that LPNs and LVNs have limited discretion and little supervisory or administrative duties; rather, they perform tasks such as "routine bedside care, including bathing, dressing, personal hygiene, feeding, and tending to patients' comfort and emotional needs.'' Since such nurses are nonexempt under the current regulatory framework, UFCW calls on the Department to expressly affirm that such nurses remain nonexempt under the final regulations. The Minnesota Nurses Association states that the proposal would detrimentally affect the nursing profession. Other organizations, such as the National Organization for Women and Women Employed Institute, also express similar concerns that nurses could be classified as exempt and no longer entitled to overtime.

Some of these same commenters view the proposal as classifying RNs as bona fide professionals and thereby exempting them from overtime for the first time. For example, the American Nurses Association states that the proposal would add RNs as exempt from overtime. Also, the Maine State Nurses Association argues that RNs should be treated as eligible for overtime.

As noted above, the existing regulations have treated RNs as performing exempt learned professional duties since 1971. The Department's long-standing position is that RNs satisfy the duties test for exempt learned professionals, but LPNs do not. *See* Wage and Hour Opinion Letters dated April 1, 1999, June 23, 1983, May 16, 1983 and November 16, 1976. As re-emphasized by the Administrator in an October 19, 1999 Opinion Letter, "in virtually every case, licensed practical nurses cannot be considered exempt, bona fide, professionals.'' Similarly, the scant case law in this area is consistent. For example, in *Fazekas* v. *Cleveland Clinic Foundation Health Care Ventures, Inc.,* 204 F.3d 673 (6th Cir. 2000), the parties did not dispute that the plaintiff RNs who made home health care visits possessed the requisite knowledge of an advanced type in a field of science to satisfy the duties test for the professional exemption. There, as in most reported cases involving claims by nurses for overtime pay, the issue was whether the nurses were paid on a fee basis that would meet the salary or fee basis test. *See also Elwell* v. *University Hospitals Home Care Services,* 276 F.3d 832, 835–36 (6th Cir. 2002) (dispute regarding whether home health care nurse providing "skilled nursing services'' was paid on a salary or fee basis, but no dispute that nurse met the duties test); *Klem* v. *County of Santa Clara, California,* 208 F.3d 1085, 1088–90 (9th Cir. 2000) (dispute on whether RN was paid on a salary basis, but no dispute that registered nurse met the duties test for the learned professional exemption).

The Department did not and does not have any intention of changing the current law regarding RNs, LPNs or other similar health care employees, and no language in the proposed regulations suggested otherwise. Consequently, the final rule reiterates the long-standing position that RNs satisfy the duties test for bona fide learned professional employees. The Department further clarifies that LPNs and other similar health care employees generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

Physician Assistants. Proposed section 541.301(e)(4) included an enforcement policy articulated in section 22d23 of the Wage and Hour Division Field Operations Handbook (FOH) that physician assistants who complete three years of pre-professional study (or 2,000 hours of patient care experience) and not less than one year of professional course work in a medical school or hospital generally meet the duties requirements for the learned professional exemption. Although a few commenters object to this section, the final rule retains this long-standing recognition of physician assistants as exempt learned professionals. However, the Department has modified the educational and certification requirements in final section 541.301(e)(4) in response to a comment filed by the American Academy of Physician Assistants (AAPA).

According to the AAPA, the standard prerequisite for practice as a physician assistant is graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant and certification by the National Commission on Certification of Physician Assistants (NCCPA). The AAPA states that the proposal, and thus section 22d23 of the FOH, describes the educational background or experience typical of an individual who is admitted into an accredited physician assistant program and includes an abbreviated version of the physician assistant educational curriculum—not the standard an individual must satisfy to practice as a physician assistant. For entry into an accredited physician assistant educational program, an individual should have a Bachelor's degree and 45 months of health care experience, according to the AAPA. Physician assistant programs are located at schools of medicine or health sciences, universities and teaching hospitals and typically consist of 111 weeks of instruction: 400 classroom and laboratory hours in the basic sciences with at least 70 hours in pharmacology, more than 149 hours in behavioral sciences and more than 535 hours in clinical medicine. In the second year of the program, 2,000 hours are spent in clinical rotations divided between primary care medicine and various specialties. To practice as a physician assistant, an individual must pass a national certifying examination jointly developed by the National Board of Medical Examiners and NCCPA. Physician assistants also must take continuing medical education credits and a recertification to maintain certification.

The Department recognizes that the FOH section has not been updated in many years and thus may be out of date. The information provided by the AAPA reveals a more lengthy and involved required course of study than is currently set forth in the FOH. The national testing and certification requirement also is consistent with exempt learned professional status. Thus, the Department concludes that physician assistants who have graduated from a program accredited by

the Accreditation Review Commission on Education for the Physician Assistant and who are certified by the National Commission on Certification of Physician Assistants generally meet the duties requirements for the learned professional exemption. Final section 541.301(e)(4) has been modified accordingly.

Chefs. Section 541.301(e)(6) of the proposal provided that 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.'' The Department received few comments addressing this section. The National Restaurant Association confirms that a four-year college degree in culinary arts is the standard prerequisite in the industry for executive chefs. The National Restaurant Association argues, however, that the Department should more explicitly allow work experience to substitute for a college degree. In contrast, the AFL–CIO expresses concern that the proposed language unjustly would expand the ''learned professional'' exemption to cover employees properly considered nonexempt cooks.

The Department agrees that the proposed language should be clarified to better distinguish between exempt professional chefs with four-year culinary arts degrees and nonexempt ordinary cooks who perform predominantly routine mental, manual, mechanical or physical work. The Department has no intention of departing from current law that ordinary cooks are not exempt professionals. *See, e.g.,* Wage and Hour Opinion Letter of February 18, 1983 (''Cooks and bakers are not considered to be executive, administrative, or professional employees within the meaning of the regulations regardless of how highly skilled or paid such employees may be''). *See also Cobb* v. *Finest Foods, Inc.,* 755 F.2d 1148, 1150 (5th Cir. 1985) (employee who directed the work of two or more employees and whose primary duty was management of hot food section of cafeteria was exempt executive); *Noble* v. *93 University Place Corp.,* 2003 WL 22722958, at *10 (S.D.N.Y. 2003) (summary judgment denied because of factual dispute over whether employee was head chef and kitchen manager with numerous managerial and supervisory responsibilities or ''simply a chef who spent 75 to 100 percent of his time cooking'').

Accordingly, to avoid any misinterpretations, the final rule replaces the proposed language ''a college degree'' with ''a four-year specialized academic degree'' and states that cooks are not exempt professionals. The final subsection 541.301(e)(6) thus provides: ''Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.'' This language is consistent with industry standard educational prerequisites as represented by the National Restaurant Association and distinguishes the exempt learned professional chef from the nonexempt cook. The Department rejects the National Restaurant Association's suggestion that the regulations should broadly allow work experience to substitute for a four-year college degree in the culinary arts because it would inappropriately expand the scope of the learned professional exemption.

The National Restaurant Association also argues that certain chefs qualify as creative professionals. The Department agrees that certain forms of culinary arts have risen to a recognized field of artistic or creative endeavor requiring ''invention, imagination, originality or talent.'' The National Restaurant Association points to the Department's Occupational Outlook Handbook, 2002–2003, stating at page 306 that ''[d]ue to their skillful preparation of traditional dishes and refreshing twists in creating new ones, many chefs have earned fame* * *.'' The National Restaurant Association also references various publications emphasizing the creative nature of certain culinary innovation, including the specialization of creating distinctive, unique dishes. Another commenter, a wage and hour consultant, also suggests that the Department consider the creative professional exemption for such chefs, noting the ''national acclaim'' and ''reputation and power in the industry'' enjoyed by certain chefs.

Accordingly, after careful consideration of this issue, the Department concludes that to the extent a chef has a primary duty of work requiring invention, imagination, originality or talent, such as that involved in regularly creating or designing unique dishes and menu items, such chef may be considered an exempt creative professional. Recognizing that some chefs may qualify as exempt creative professionals is consistent with the Department's long-standing enforcement policy regarding floral designers and other federal case law. *See* Wage and Hour Opinion Letter of September 4, 1970, 1970 WL 26442 (''The requirement that work must be original and creative in character would be, generally speaking, met by a flower designer who is given a subject matter, theme or occasion for which a floral design or arrangement is needed and creates the floral design or floral means of communicating an idea for the occasion. Work of this type is original and creative and depends primarily on the invention, imagination and talent of the employee''). *See also Freeman* v. *National Broadcasting Co.*, 80 F.3d 78, 82 (2nd Cir. 1996) (employees ''talented'' because they have a ''native and superior ability in their fields''); *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 700 (3rd Cir. 1994) (''developing an entirely fresh angle on a complicated topic''); *Shaw* v. *Prentice Hall, Inc.*, 977 F. Supp. 909, 914 (S.D. Ind. 1997) (''employees who have been found to meet the artistic professional exemption performed work that was much more inventive and 'artistic'''). However, there is a wide variation in duties of chefs, and the creative professional exemption must be applied on a case-by-case basis with particular focus on the creative duties and abilities of the particular chef at issue. The Department intends that the creative professional exemption extend only to truly ''original'' chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires ''invention, imagination, originality, or talent.''

Paralegals. The Department received a number of comments from paralegals and legal assistants expressing concern that they would be classified as exempt under the proposed regulations. Other commenters urge the Department to declare that paralegals are exempt learned professionals. However, none of these commenters provided any information to demonstrate that the educational requirement for paralegals is greater than a two-year associate degree from a community college or equivalent institution. Although many paralegals possess a Bachelor's degree, there is no evidence in the record that a four-year specialized paralegal degree is a standard prerequisite for entry into the occupation. Because comments revealed some confusion regarding paralegals, the final rule contains new language in section 541.301(e)(7) providing that paralegals generally do not qualify as exempt learned professionals. The final rule, however, also states that the learned professional exemption is available for paralegals

who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

Athletic Trainers. The Department requested and received a number of comments on athletic trainers. Commenters describe an athletic trainer's duties as evaluation of injuries and illnesses of athletes; designing and administering care, treatment and rehabilitation; keeping and maintaining records of injuries and progress; directly supervising student athletic trainers and student team managers; and maintaining current catalogues and files on research and information related to sports medicine. Athletic trainers are on call 24 hours a day to assist coaches and teams with athletic injuries, according to the commenters, and often travel to away competitions with teams.

In the past, the Department has taken the position that athletic trainers are not exempt learned professionals. However, the court in *Owsley* v. *San Antonio Independent School District*, 187 F.3d 521 (5th Cir. 1999), *cert. denied*, 529 U.S. 1020 (2000), rejected this position and held that athletic trainers certified by the State of Texas qualified for the learned professional exemption based upon their possession of a specialized advanced degree.

Further, the information submitted by commenters indicates that athletic trainers are nationally certified and that a specialized academic degree is a standard prerequisite for entry into the field. Athletic trainers are nationally certified by the Board of Certification of the National Athletic Trainers Association (NATA) Inc. In order to qualify for such certification, a candidate must meet NATA's basic requirements that include a Bachelor's degree in a curriculum accredited by the Commission on Accreditation of Allied Health Education Programs (CAAHEP). The CAAHEP-accredited curriculums are in specialized fields such as athletic training, health, physical education or exercise training, and require study in six particular courses—Human Anatomy, Human Physiology, Biometrics, Exercise Physiology, Athletic Training and Health/Nutrition. Candidates are strongly encouraged to take additional courses in the areas of Physics, Pharmacology, Recognition of Medical Conditions, Pathology of Illness and Injury, and Chemistry. Finally, a candidate must participate in extensive clinicals under the supervision of NATA licensed trainers. At least 25 percent of these clinical hours must be obtained on location, at the practice or game, in one of many eligible sports such as football, soccer, wrestling, basketball or gymnastics.

In light of the *Owsley* decision and the comments evidencing the specialized academic training required for certification, the Department concludes that athletic trainers certified by NATA, or under an equivalent state certification procedure, would qualify as exempt learned professionals. We have modified the regulation accordingly by adding a section on athletic trainers at final section 541.301(e)(8).

Funeral Directors. Comments from the National Funeral Directors Association (NFDA) include detailed information on the educational and licensure requirements in each state for licensed funeral directors and embalmers. The NFDA comments indicate that the licensing requirements for funeral directors or embalmers in 16 states require at least two years of college plus graduation from an accredited college of mortuary science, which requires two years of study. According to NFDA, the American Board of Funeral Service Education (ABFSE) is the sole national academic accreditation agency for college and university programs in funeral service and mortuary science education, and the ABFSE is recognized by the U.S. Department of Education and Council on Higher Education Accreditation. The ABFSE-recommended curriculum is used in all accredited mortuary colleges in the United States. The ABFSE stipulates that the minimum educational standard for the funeral service profession consists of 60 semester hours (equivalent to two years of college-level credits) in public health and technical studies, such as chemistry, anatomy and pathology; business management, such as funeral home management and merchandising and funeral directing; social sciences, such as grief dynamics and counseling; legal, ethical and regulatory subjects, such as mortuary law; and electives in general education or non-technical courses. Thus, licensed funeral directors or embalmers in 16 states must complete at least the equivalent of four years of post-secondary education which is sufficient, NFDA argues, to meet the educational requirements for the learned professional exemption. The NFDA comments also reveal that one state, Colorado, has no educational or licensing requirements for funeral directors or embalmers, and five states require funeral directors or embalmers to have only a high school education. The other states fall somewhere in between: some requiring high school and mortuary college, and some requiring one year of post-secondary education plus completion of the mortuary college program. Twelve states also require passage of a state or national exam for licensure.

Other commenters oppose recognizing licensed funeral directors or embalmers as learned professionals. For example, the International Brotherhood of Teamsters (Teamsters) contend that the proposed rule would improperly exempt most licensed funeral directors and embalmers. The Teamsters argue that the specialized intellectual instruction and apprenticeship that a licensed funeral director or embalmer attains does not constitute the requisite knowledge of an exempt professional. The Teamsters state that a four-year course of study is not a prerequisite to licensure, and cites a November 23, 1999, Wage and Hour Opinion letter in support of its position. In this opinion letter, the Wage and Hour Division wrote that "[a] prolonged course of specialized instruction and study generally has been interpreted to require at least a baccalaureate degree or its equivalent which includes an intellectual discipline in a particular course of study as opposed to a general academic course otherwise required for a baccalaureate degree.'' 1999 WL 33210905. The Teamsters also express concern that, under the proposal, more licensed funeral directors and embalmers could be classified as exempt professional employees because they could obtain the requisite knowledge through a combination of educational requirements, apprenticeships and on-the-job training.

The issue of the exempt status of funeral directors and embalmers presents precisely the situation long contemplated by the existing regulations at section 541.301(e)(2) that the "areas in which professional exemptions may be available are expanding. As knowledge is developed, academic training is broadened, degrees are offered in new and diverse fields, specialties are created and the true specialist, so trained, who is given new and greater responsibilities, comes closer to meeting the tests.'' *See also* discussion of final section 541.301(f), *infra.* In the past, the Department has taken the position that licensed funeral directors and embalmers are not exempt learned professionals. The Department took this position as *amicus curiae* in support of a funeral director's argument that he was not an exempt learned professional in the case of *Rutlin* v. *Prime Succession, Inc.*, 220 F.3d 737 (6th Cir.

2000). However, the court in *Rutlin* did not agree with the Department's position and held that funeral directors certified by the State of Michigan qualified for the learned professional exemption. In *Rutlin*, the district court found that the plaintiff funeral director's work "required knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study * * *.'' 220 F.3d at 742. Quoting from the lower court's decision, the appellate court agreed:

> As a funeral director and embalmer, plaintiff had to be licensed by the state. In order to become licensed, plaintiff had to complete a year of mortuary science school and two years of college, including classes such as chemistry and psychology, take national board tests covering embalming, pathology, anatomy, and cosmetology, practice as an apprentice for one year, and pass an examination given by the state.

Id. The appellate court characterized plaintiff's educational requirement as "a specialized course of instruction directly relating to his primary duty of embalming human remains,'' notwithstanding the fact that plaintiff "was not required to obtain a bachelor's degree.'' *Id.* The court noted that "[t]he FLSA regulations do not require that an exempt professional hold a bachelor's degree; rather, the regulations require that the duties of a professional entail advanced, specialized knowledge'' and concluded "that a licensed funeral director and embalmer must have advanced, specialized knowledge in order to perform his duties.'' *Id. See also Szarnych* v. *Theis-Gorski Funeral Home Inc.*, 1998 WL 382891 (7th Cir. 1998) (licensed funeral director/embalmer in Illinois was exempt learned professional).

After carefully weighing the comments and case law, the Department concludes that some licensed funeral directors and embalmers may meet the duties requirements for the learned professional exemption. The Teamsters state that a four-year course of study is not a prerequisite for licensure as a funeral director or embalmer. However, the detailed, state-by-state analysis submitted by NFDA evidences that four years of post-secondary education, including two years of specialized intellectual instruction in an accredited mortuary college, is a prerequisite for licensure in many states. In such states, a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the profession. *See, e.g., Reich* v. *State of Wyoming*, 993 F.2d 739, 742 (10th Cir. 1993) (the Department's argument that game wardens were not exempt professionals because "there is a lack of uniformity among states as to the requirement and duties of game wardens'' was rejected by the court, which stated that "Wyoming may rightfully require more duties of its game wardens than other states''). Further, the only federal appellate courts to address this issue—the Sixth Circuit in *Rutlin* and the Seventh Circuit in *Szarnych*—have held the licensed funeral directors and embalmers are exempt learned professionals. Indeed, the educational and licensing requirements for funeral directors or embalmers in the 16 states that require two years of post-secondary education and completion of a two-year program at an accredited mortuary college are comparable to the educational requirements for certified medical technologists, who have long been recognized in the existing regulations as exempt professionals. Accordingly, consistent with the case law and the existing rule on medical technologists, a new subsection 541.301(e)(9) in the final rule provides:

> Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

The Department recognizes, however, that some employees with the job title of "funeral director'' or "embalmer'' have not completed the four years of post-secondary education required in final subsection 541.301(d)(9). In fact, the NFDA comments reveal that the state of Colorado has no educational requirements for funeral directors and embalmers, and five other states require only a high school education. Such employees, of course, cannot qualify as exempt learned professionals.

Pilots. Most pilots are exempt from the FLSA overtime requirements under section 13(b)(3) of the Act, which exempts "any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act.'' Thus, pilots who are employed by commercial airlines are exempt from overtime under section 13(b)(3). However, the exempt status of other pilots, such as pilots of corporate jets, is determined under section 13(a)(1), and has been the subject of recent litigation.

The Department has taken the position that pilots are not exempt professionals. We have maintained that aviation is not a "field of science or learning,'' and that the knowledge required to be a pilot is not "customarily acquired by a prolonged course of specialized intellectual instruction.'' *See* Wage and Hour Opinion Letter dated January 20, 1975; In re *U.S. Postal Service ANET and WNET Contracts*, 2000 WL 1100166, at *7 (DOL Admin. Rev. Bd.).

A contrary result was reached in *Paul* v. *Petroleum Equipment Tools Co.*, 708 F.2d 168 (5th Cir. 1983). In *Paul*, the Fifth Circuit allowed the learned professional exemption for a company airline pilot who held an airline transport pilot (ATP) certificate, a flight instructor certificate, a commercial pilot certificate, an instrument flight rules (IFR) rating, and was authorized to fly both single and multiengine airplanes. The court examined the Federal Aviation Authority regulations setting forth the requirements for the licenses and ratings, finding the combination of instruction and flight tests sufficient to satisfy the requirement of a prolonged course of specialized instruction, "despite its distance from campus.'' *Id.* at 173.

Despite *Paul*, the Department continued to assert that pilots are not exempt in *Kitty Hawk Air Cargo, Inc.* v. *Chao*, 2004 WL 305603 (N.D. Tex. 2004) (Service Contract Act case), supported by the decision in *Ragnone* v. *Belo Corp.*, 131 F. Supp. 2d 1189, 1193–94 (D. Ore. 2001), holding that a helicopter pilot was not exempt under section 13(a)(1).

However, the district court in *Kitty Hawk*, relying on *Paul*, ruled on January 26, 2004, that the pilots at issue did in fact meet the requirements of the professional exemption. In addition, a number of commenters argue that the Department should reconsider its position on pilots. Such commenters note that aviation degrees are now available from a few institutions of higher education. Further, pilots must complete classroom training, hours of flying with an instructor, pass tests and meet other requirements to obtain FAA licenses. Because of the conflict in the courts, and the insufficient record evidence on the standard educational requirements for the various pilot licenses, the Department has decided not to modify its position on pilots at this time.

Other Professions. The final rule adopts without change subsection 541.301(e)(1) on medical technologists, subsection 541.301(e)(3) on dental hygienists and subsection 541.301(e)(5) on accountants. These subsections are consistent with the existing regulations and long-standing policies of the Wage and Hour Division. None of the

comments received provided information justifying departure from the current law.

Finally, consistent with the existing regulations and the proposal, final section 541.301(f) recognizes that the areas in which the professional exemption may be available are expanding. Final section 541.301(f) also now provides:

> Accrediting and certifying organizations similar to those listed in subsections (e)(1), (3), (4), (8) and (9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

This new language is adopted to ensure that final subsections 541.301(e)(1), (3), (4), (8) and (9) do not become outdated if the accrediting and certifying organizations change or if new organizations are created. Accredited curriculums and certification programs are relevant to determining exempt learned professional status to the extent they provide evidence that a prolonged course of specialized intellectual instruction has become a standard prerequisite for entrance into the occupation as required under section 541.301. Neither the identity of the certifying organization nor the mere fact that certification is required is determinative, if certification does not involve a prolonged course of specialized intellectual instruction. For example, certified physician assistants meet the duties requirements for the learned professional exemption because certification requires four years of specialized post-secondary school instruction; employees with cosmetology licenses are not exempt because the licenses do not require a prolonged course of specialized intellectual instruction.

Section 541.302 Creative Professionals

Proposed section 541.302 provided further guidance on the primary duties test for creative professionals. In the proposal, subsection (a) set forth the general rule that 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.'' Proposed subsection (b) set forth some general examples of fields of "artistic or creative endeavor.'' Proposed subsection (c) set forth more specific examples of creative professionals, and proposed subsection (d) provided guidance on journalists.

The final rule deletes the "office or non-manual work'' language in subsection 541.302(a) for the reasons discussed above under section 541.300. In addition, the words "or intellectual'' have been reinserted from the existing regulations into subsection (a) because its deletion in the proposal was unintentional. To add further clarity to the requirement of "invention, imagination, originality or talent,'' final subsection (c) adds: "The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis.'' As described in more detail below, the final rule also makes substantial changes to subsection (d) regarding journalists.

Because the proposal adopted the primary duty test of the existing regulations with few changes, the Department received few substantive comments on this section except for comments regarding journalists. The American Federation of Television and Radio Artists expresses concern that the proposed regulations would lead to an across-the-board exemption of all journalists, including employees of smaller news organizations, whom the organization believes should not be exempt. In an opposing view, the Newspaper Association of America and the National Newspaper Association, an organization of smaller newspapers,[10] support the proposed regulations relating to journalists and would seek to have all reporters of community newspapers classified as exempt.

Proposed subsection (d) was intended to reflect current federal case law regarding the status of journalists as creative professionals. *Reich* v. *Gateway Press, Inc.*, 13 F.3d 685, 689 (3rd Cir. 1994), for example, involved the exempt status of reporters who worked for weekly newspapers either rewriting press releases under various topics such as "what's happening,'' "church news,'' "school lunch menus,'' and "military news,'' or writing standard recounts of public information by gathering facts on routine community events. In affirming the lower court's decision that the plaintiffs were not exempt, the appellate court evaluated the duties of reporters in light of the Department's interpretive guidelines, current section 541.302(d), which states: "The majority of reporters do work which depends primarily on intelligence, diligence, and accuracy. It is the minority whose work depends primarily on 'invention, imaging [sic], or talent.''' The court concluded that the duties of the weekly newspaper reporters did not require invention, imagination, or talent:

> This work does not require any special imagination or skill at making a complicated thing seem simple, or at developing an entirely fresh angle on a complicated topic. Nor does it require invention or even some unique talent in finding informants or sources that may give access to difficult-to-obtain information.

13 F.3d at 700. However, the appellate court did recognize that not all fact-gathering duties are necessarily nonexempt work. While some fact-gathering would entail the skill or expertise of an investigative reporter or bureau chief, the court found that the fact gathering performed by the reporters in the *Gateway* case did not rise to such level.

The First Circuit reached a similar conclusion in *Reich* v. *Newspapers of New England, Inc.*, 44 F.3d 1060 (1st Cir. 1995). In *Newspapers of New England*, the reporters had duties similar to those in the *Gateway* case. In finding such reporters nonexempt, the court observed that "the day-to-day duties of these three reporters consisted primarily of 'general assignment' work,'' and the reporters "[r]arely'' were "asked to editorialize about or interpret the events they covered.'' Rather, the focus of their writing was "to tell someone who wanted to know what happened * * * in a quick and informative and understandable way.'' *Id.* at 1075. Like the Third Circuit in *Gateway*, the First Circuit concluded that the reporters "were not performing duties which would place them in that minority of reporters 'whose work depends primarily on invention, imaging [sic], or talent.''' *Id.* (citation omitted). *See also Bohn* v. *Park City Group Inc.*, 94 F.3d 1457 (10th Cir. 1996) (employee employed as a technical writer or documenter in software and training departments did not perform work requiring artistic invention, imagination, or talent to qualify as an exempt artistic professional); *Shaw* v. *Prentice Hall, Inc.*, 977 F. Supp. 909, 914 (S.D. Ind. 1997), *aff'd*, 151 F.3d 640 (7th Cir. 1998) (district court found that production editor in book publishing industry did not qualify as exempt

[10] Employees of small newspapers and small radio and television stations are statutorily exempt from the overtime pay requirement under sections 13(a)(8) and 13(b)(9) of the Act, respectively. 29 U.S.C. 213(a)(8); 29 U.S.C. 213(b)(9).

creative professional because the "duty * * * to manage a book project through the editing and publishing process'' did not entail "invention, imagination, or talent in an artistic field of endeavor.'').

In addition to examining the nature of the journalists' duties to determine exempt creative professional status, courts have looked to whether an employee's work is subject to substantial control from management. For example, in *Dalheim* v. *KDFW–TV*, 918 F. 2d 1220, 1229 (5th Cir. 1990), the court found that while general-assignment reporters could be exempt creative professionals, the reporters in this case were nonexempt because "their day-to-day work is in large part dictated by management.'' In addition, the court held that news producers were not exempt creative professionals because they performed work pursuant to "a well-defined framework of management policies and editorial convention.''

In contrast, other courts have recognized that some journalists perform work requiring invention, imagination and talent, and thus qualify as exempt creative professionals. For example, in *Freeman* v. *National Broadcasting Co.*, 80 F.3d 78 (2nd Cir. 1996), the appellate court found that the duties of a domestic news writer, domestic producer, and field producer for television news shows involved a sufficient amount of creativity to qualify them as exempt "employees whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.'' *Id.* at 82. The court noted that technological changes and the more sophisticated demands of the current news consumer have caused changes in the news industry, and stated that the lower court erred in finding the plaintiffs were nonexempt because it relied on a nonbinding, outdated, and inapplicable interpretation by the U.S. Department of Labor of the artistic professional exemption, section 541.302(a). One of the reasons the appellate court gave scant weight to the Department's interpretation was the Department's failure to reflect the vast changes in the industry. The court described the transition that modern news organizations had experienced as follows:

> Dizzying technological advances and the sophisticated demands of the news consumer have resulted in changes in the news industry over the past half-century. This is particularly true of television news where the same news may be communicated by a variety of combined audio and visual presentations in which creativity is at a premium. Yet, over this period, the DOL has failed to update the journalism interpretations.

Id. at 85. Citing *Sherwood* v. *Washington Post*, 871 F. Supp. 1471, 1482 (D.D.C. 1994), the *NBC* court acknowledged that there is a fundamental difference between a journalist working for a major news organization and a journalist working as a small press reporter. It would be "anachronistic, even irrational,'' the court wrote, "to continue to impose these guidelines on many journalists in major news organizations.'' 80 F.3d at 85. The court in *Truex* v. *Hearst Communications, Inc.*, 96 F. Supp. 2d 652, 661 (S.D. Tex. 2000), denying the employer's summary judgment motion regarding a sportswriter, also acknowledged the continuum that, on one end, consists of nonexempt reporters who gather and "regurgitate'' facts and, on the other end, consists of exempt creative professionals who generate and develop ideas for stories in print or broadcast, with little editorial input.

In proposed subsection (d), the Department intended to modify the existing regulations to reflect this federal case law. The Department did not intend to create an across the board exemption for journalists. As stated in the case law, the duties of employees referred to as journalists vary along a spectrum from the exempt to the nonexempt, regardless of the size of the news organization by which they are employed. The less creativity and originality involved in their efforts, and the more control exercised by the employer, the less likely are employees classified as journalists to qualify as exempt. The determination of whether a journalist is exempt must be made on a case-by-case basis. The majority of journalists, who simply collect and organize information that is already public, or do not contribute a unique or creative interpretation or analysis to a news product, are not likely to be exempt.

In order to reflect this case law more accurately, the Department has modified section 541.302(d) to state as follows:

> Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

Section 541.303 Teachers

The Department received few comments on this provision and does not believe any substantive changes to this section are necessary in light of those comments.

Section 541.304 Practice of Law or Medicine

The Department received few comments on this provision and does not believe any substantive changes to this section are necessary in light of those comments.

Subpart E, Computer Employees

Sections 541.400–402

The proposed regulations consolidated 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 sections 541.3(a)(4), 541.205(c)(7), and 541.303. Proposed Subpart E collected into one place the substance of the original 1990 statutory enactment, the 1992 final regulations, and the 1996 statutory enactment (section 13(a)(17) of the FLSA). Because the key regulatory language that resulted from the 1990 enactment is now substantially codified in section 13(a)(17) of the FLSA, no substantive changes were proposed to that language comprising the primary duty test for the computer exemption. However, the proposal removed the additional regulatory requirement, not contained in section 13(a)(17) of the FLSA, that an exempt computer employee must consistently exercise discretion and judgment. Because of the tremendously rapid pace of significant changes occurring in the information technology industry, the proposal did not cite specific job titles as examples of exempt computer employees, as job titles tend to quickly become outdated.

Based on the comments received and for reasons discussed below, several changes have been made in the final rule to further align the regulatory text with the specific standards adopted by the Congress for the computer employee

exemption in section 13(a)(17) of the FLSA. Section 541.401 of the proposed rule, which discussed the high level of skill and expertise in "theoretical and practical application'' of specialized computer systems knowledge as a prerequisite for exemption (a carry-over from the rules in effect prior to the 1996 statutory amendment), has been deleted from the final rule, as it goes beyond the scope of the specific standards adopted by Congress in section 13(a)(17).

As described in the preamble to the proposed rule, the exemption for employees in computer occupations has a unique legislative and regulatory history. In November 1990, Congress enacted legislation directing the Department of Labor to issue regulations permitting computer systems analysts, computer programmers, software engineers, and other similarly-skilled professional workers to qualify as exempt executive, administrative, or professional employees 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. *See* 29 CFR 541.3(a)(4), 541.303; 57 FR 46744 (Oct. 9, 1992); 57 FR 47163 (Oct. 14, 1992). However, when Congress increased the minimum wage in 1996, Congress enacted, almost verbatim, *most*—but not *all*—of the Department's regulatory language comprising the computer employee "primary duty test'' as a separate statutory exemption, under a new FLSA section 13(a)(17). Section 13(a)(17) exempts "any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is (A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (B) 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; (C) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (D) a combination of [the aforementioned duties], the performance of which requires the same level of skills * * *.'' The 1996 enactment also froze the hourly compensation test at $27.63 (which equaled 6½ times the former $4.25 minimum wage). The 1996 enactment included no delegation of rulemaking authority to the Department of Labor to further interpret or define the scope of the exemption; however, the original 1990 statute was not repealed by the 1996 amendment.

A number of employers and business groups commenting on the proposal believe that the Department should update the computer exemption regulations to reflect the status of the many new job classifications that have arisen since the computer exemption regulations were first promulgated in the early 1990s. They suggest that the Department expand the computer employee exemption beyond the specific terms used in section 13(a)(17), to include additional job titles like network managers, LAN/WAN administrators, database administrators, web site design and maintenance specialists, and systems support specialists performing similar duties with hardware, software and communications networks.

The Wisconsin Department of Employment Relations notes that most computer professionals now work within a personal computer, network-based environment and recommends adding language to the duties test that addresses hardware, software, and network-based duties, to make the test more relevant and applicable to current computer environments. The HR Policy Association comments that the computer professionals exemption was written 11 years ago, and considerable confusion exists over which jobs are covered. The commenter suggests that the Department provide additional guidance in the preamble through illustrative examples analyzing exempt computer jobs. The HR Policy Association also recommends clarifying the duties for computer employees who do not program yet have highly sophisticated roles in maintaining computer software and systems, such as network managers, systems integration professionals, programmers, certain help desk professionals, and those who provide end-user support. The U.S. Chamber of Commerce asks the Department to recognize that the computer exemption applies not only to analysts, programmers, and engineers, but also to those with similar skills, and suggested amendments to the regulations to include network, LAN, and database analysts and developers, Internet administrators, individuals responsible for troubleshooting, those who train new employees, and those who install hardware and software. The Financial Services Roundtable comments that the specialized education necessary to acquire the complex knowledge associated with software languages, relational database applications, and/or communication or operating system software should correlate with the exemption for computer employees. The Information Technology Industry Council and Organization Resources Counselors suggest the Department clarify that computer networks and the Internet are included in the phrase "computer systems,'' and that high-level work on a computer's database or on the Internet is covered by the reference to programming or analysis.

The Workplace Practices Group notes that past distinctions between software and hardware positions have long converged. Today, according to this commenter, enterprise applications run on sophisticated networks administered by highly skilled and highly compensated LAN/WAN professionals who typically understand both networking and telecommunications theory and practice, some of whom are required to have a college degree in computer science, management information systems, or the equivalent, often with an additional preference that the individual have server or system-level engineer certification.

The National Association of Computer Consultant Businesses (NACCB) notes that the computer employee exemption is unique in that it has a dual statutory basis—section 13(a)(1) (from the 1990 law) and section 13(a)(17) (from 1996). NACCB urges that the Department explore how the exemption applies under the 1990 law to workers beyond those covered by section 13(a)(17) in 1996, and address what other duties, apart from those listed in the proposed regulations, should be included in the computer employee exemption in accordance with the 1990 enactment. This commenter suggests an illustrative list of "similarly skilled workers'' covered by the exemption, to include database administrators, network or system administrators, computer support specialists including help desk technicians, and technical writers. This commenter also suggests definitions for "system functional specifications,'' "computer systems,'' and "machine operating systems.''

Other commenters, in contrast, question the Department's authority to expand the computer employee exemption beyond the express terms used by the Congress in 1996 under section 13(a)(17). The McInroy & Rigby law firm states that the Department should not expand the computer exemption, and that there is no justification for any such expansion. The Fisher & Phillips law firm states

that, unlike in section 13(a)(1), in section 13(a)(17) Congress granted no authority to the Secretary of Labor to define or delimit the computer employee exemption. This commenter suggests that the final regulations clarify that references to section 13(a)(17) are illustrative only and are not to be taken as affecting the scope or application of that exemption in any respect.

The Workplace Practices Group also traces the evolution of the statutory exemption for computer employees noting that, while the Department has authority to define and delimit the section 13(a)(1) exemptions by regulation, the Department has no such authority under the computer exemption in section 13(a)(17). If additional positions are to be found exempt under the computer exemption, that status must be found clearly within the provisions specified by Congress under section 13(a)(17), according to this commenter.

While the Department recognizes that the computer employee exemption has been particularly confusing given its history, and that comments were invited on whether any further clarifications were possible under the terms of the statute, the Department believes that creating two different definitions for computer employees exempt under sections 13(a)(1) and 13(a)(17) of the FLSA would be inappropriate given that Congress recently spoke directly on this issue in 1996 under section 13(a)(17). Moreover, adopting such inconsistent definitions would be confusing and unwieldy for the regulated community.

Section 13(a)(17) exempts computer positions that are ''similarly skilled'' to a systems analyst, programmer, or software engineer, but only *if* the primary duty of the position in question includes the specified ''systems analysis techniques * * * to determine hardware, software, or system functional specifications'' or a combination of duties prescribed in section 13(a)(17), ''the performance of which requires the same level of skills.'' Depending on the particular facts, some of the computer occupations mentioned in the comments could in fact meet this statutory primary duty test for the computer exemption without having to specifically cite job titles in the regulations to qualify for exemption. Where the prescribed duties tests are met, the exemption may be applied regardless of the job title given to the particular position. Since an employee's job *duties*, not job *title*, determine whether the exemption applies, we do not believe it is appropriate, given the history of the computer employee exemption, to cite additional job titles as exempt beyond those cited in the primary duty test of the statute itself. In each instance, regardless of the job title involved, the exempt status of any employee under the computer exemption must be determined from an examination of the actual job duties performed under the criteria in section 13(a)(17) of the Act. In addition, the Department notes that certain jobs cited in the comments could in fact meet the duties test for the *administrative* employee exemption and be exempt on that basis where all those tests are met, as the proposed regulations pointed out (see proposed section 541.403) and some commenters observe.

Several commenters question whether it was an oversight for the Department not to include the computer employee exemption within the proposed special exemption for highly compensated employees. As originally proposed in section 541.601, an employee performing office or non-manual work who is guaranteed total annual compensation of at least $65,000 and who performs any *one* or more of the exempt duties or responsibilities of an executive, administrative, or professional employee could be found exempt. Because Congress included a detailed primary duty test in the computer exemption, the Department did not apply the highly compensated exemption to computer employees. We continue to believe that decision was sound, and follows the statutory primary duty standards adopted by the Congress in section 13(a)(17) of the Act. It should also be noted that, for the same reason, the Department in its proposal removed the limitation contained in section 541.303 of the current rule (adopted prior to 1996) that limited the exemption to employees who work in *software* functions, as no such limitation exists in the statutory exemption enacted in 1996. Similarly, the Department rejects, as inconsistent with the 1996 enactment, comments suggesting that we reinsert the requirement that an exempt computer employee must ''consistently exercise discretion and judgment.'' Minor editorial revisions have been made to further conform the regulatory language to the statute, but no other suggested revisions have been adopted.

Subpart F, Outside Sales Employees

Section 541.500 General Rule for Outside Sales Employees

Section 13(a)(1) of the FLSA contains a separate exemption for any employee employed ''in the capacity of outside salesman.'' Proposed section 541.500 set forth the general rule for exemption of such ''outside sales'' employees.[11] Under proposed subsection 541.500(a), the outside sales exemption applied to any employee ''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.'' In addition, to qualify for exemption the outside sales employee must be ''customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.'' Finally, proposed subsection 541.500(b) stated that 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.'' Under this subsection, other work that furthers the employee's sales effort, including ''writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences,'' is also considered exempt work.

The Department has retained this general rule as proposed.

The only modification intended in the proposed regulations was removing the restriction that exempt outside sales employees could not perform work unrelated to outside sales for more than 20-percent of the hours worked in a workweek by nonexempt employees of the employer. This revision was proposed for consistency with the ''primary duty'' approach adopted for the other section 13(a)(1) exemptions. In addition, the current outside sales 20-percent restriction is particularly complicated and confusing since it relies on the work hours of nonexempt employees and requires tracking the time of employees who, by definition, spend much of their time away from the employer's place of business.

A large majority of the comments that address the outside sales exemption express support for the adoption of the ''primary duty'' test in lieu of the 20-percent rule. For example, the Society for Human Resource Management (SHRM) and Grocery Manufacturers of America (GMA) state that this revision would provide a more practical method for employers to determine whether an employee qualifies as an exempt outside sales employee. According to SHRM, in

[11] Although the statute refers to ''salesman,'' the final rule, without objection from commenters, replaces this gender-specific term with ''outside sales employees.''

order to keep an account of the percentage of time that outside sales employees spend on exempt versus nonexempt tasks, as required under the 20-percent rule, employers essentially have to track the hours of their outside sales employees. SHRM notes that it is very difficult for employers to meet this responsibility given that outside sales employees spend large amounts of time away from their employers' regular places of business. GMA shares these concerns, stating that keeping track of an outside sales employee's individual activities to determine whether they are exempt, nonexempt or incidental to exempt sales activity is administratively difficult, if not impossible. The National Small Business Association comments that moving away from a percentage basis to the new definition of "primary duty'' will alleviate much of the administrative burden on small business owners.

Two law firms commenting on the outside sales exemption (Goldstein Demchak Baller Borgen & Dardarian and McInroy & Rigby) ask the Department to retain the current 20-percent limit on nonexempt work. Both firms express concern that the outside sales exemption would be subject to abuse by employers without a "bright-line'' 20-percent test. In other words, employers might misclassify sales personnel as exempt under the outside sales exemption by merely requiring that they perform only minor amounts of outside sales work. A few commenters, such as the AFL-CIO, generally oppose removing the 20-percent limitation on nonexempt work for the same reasons discussed above in connection with the executive, administrative and professional exemptions.

After review of the relevant comments, the Department continues to believe that the application of the primary duty test to the outside sales exemption is preferable to the 20-percent tolerance test. As noted in several comments, the primary duty test is relatively simple, understandable and eliminates much of the confusion and uncertainty that are present under the existing rule. *Cf. Ackerman* v. *Coca-Cola Enterprises, Inc.*, 179 F.3d 1260, 1267 (10th Cir. 1999) (citing existing § 541.505(a) to the effect that "'[a] determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole' and that "the time devoted to the various duties is an important, but not necessarily controlling, element' "), *cert. denied*, 528 U.S. 1145 (2000). It also avoids the necessity that employers track the hours of its outside sales employees, which is consistent with the underlying rationale for exempting outside salespersons. Utilization of the primary duty concept also provides a consistent approach between the outside sales exemption and the exemptions for executive, administrative and professional employees. Finally, the Department is of the view that concerns relating to potential abuse under the new rule are addressed by the objective criteria and factors for determining an employee's primary duty that are contained in section 541.700.

Section 541.501 Making Sales or Obtaining Orders

Proposed section 541.501 defined the term "sales'' consistent with section 3(k) of the FLSA, to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.'' Proposed subsection (b) also stated that "sales'' includes the transfer of title to tangible property and transfer of tangible and valuable evidences of intangible property. Proposed subsections (c) and (d) defined the phrase "obtaining orders or contracts for services or for the use of facilities'' to include such activities as selling of time on radio or television; soliciting of advertising for newspapers and other periodicals; soliciting of freight for railroads and other transportation agencies; and taking orders for a service which may be performed for the customer by someone other than the person taking the order.

The Department's proposal removed outdated examples and unnecessary language from current section 541.501, but did not intend any substantive changes. The Department has retained the proposed changes to section 541.501 in the final rule.

The Department received few comments on this section. However, one commenter expresses concern regarding the Department's decision to remove current section 541.501(e), which states that the outside sales exemption does not apply to "servicemen even though they may sell the service which they themselves perform.'' The commenter claims that, because of the removal of subsection (e), service technicians would be classified as exempt outside sales employees. The Department believes that subsection (e) is an unnecessary example, and its removal is not a substantive change. The Department agrees with the commenter that an employee whose primary duty is to repair or service products (*e.g.,* refrigerator repair) does not qualify as an exempt outside sales employee. However, we continue to believe that this conclusion is obvious from the regulations and this example is unnecessary.

Section 541.502 Away From Employer's Place of Business

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business.'' This phrase was defined in proposed section 541.502, which began in subsection (a) by stating: "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).'' The actual definition of "away from the employer's place of business'' was contained in proposed subsection (b) which requires that an exempt outside sales employee make sales "at the customer's place of business or, if selling door-to-door, at the customer's home.'' Proposed subsection (b) also stated that: "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.''

Numerous commenters request that the Department delete the language in proposed section 541.502(a) regarding the Administrator's lack of authority to expand the outside sales exemption to include inside sales work. For example, the U.S. Chamber of Commerce urges the Department not to use expansive language that could be read to render all inside sales employees nonexempt, even if they meet the requirements of the executive, administrative or professional exemptions.

The Department has decided to make the changes requested by these commenters, not due to any inaccuracy in the sentence, but because we agree that this language might imply that sales employees, inside or outside, can only have exempt status by meeting the requirements for the section 13(a)(1) "outside sales'' exemption. Thus, the final rule eliminates most of the regulatory text in proposed section 541.502(a), including the language

regarding the Administrator's lack of authority to define the "outside'' sales exemption to include "inside'' sales work and the language regarding the section 7(i) exemption. The Department is deleting this language to avoid any misunderstanding that the outside sales exemption is the only exemption available for sales employees. Other exemptions in the statute, including the section 7(i) exemption for commissioned employees of retail and service establishments, and the executive, administrative and professional exemptions, are also available for sales employees who can meet all the requirements for any of those exemptions.

The Department emphasizes, however, that notwithstanding these deletions to the proposed language of section 541.502(a), the Administrator does not have statutory authority to exempt inside sales employees from the FLSA minimum wage and overtime requirements under the outside sales exemption. Those comments that ask the Department to revise the regulatory definition of an outside sales employee to include inside sales employees, on the basis that they perform much the same functions as outside sales employees, must be rejected as beyond the statutory authority of the Administrator. For example, the National Association of Manufacturers (NAM) states that, because of technological advances, inside sales employees perform the same functions as outside sales employees, with the only distinction being an on-site visit by the outside sales employee. According to NAM, fax machines, voice-mail, teleconferencing, cellular phones, computers, and videoconferencing all enable office-based sales personnel to emulate the customer contact formerly within the exclusive province of outside salespersons.

Finally, the National Automobile Dealers Association asks that the definition of "away from the employer's place of business'' be expanded to encompass trade shows. The Department believes that, if sales occur, trade shows are similar to the "hotel sample room'' example in the current and proposed regulations. In trade shows, as in the hotel sample room, a sales employee displays the employer's product over a short time period and for the purpose of promoting or making sales in a room not owned by the employer. Accordingly, we have added language to clarify that an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.,* one or two weeks) should not be considered as the employer's places of business.

Section 541.503 Promotion Work

Under proposed section 541.503, "promotional work'' is exempt outside sales work if it "is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations.'' However, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.'' Proposed subsections 541.503(b) and 541.503(c) include examples to illustrate when promotional activities are exempt versus nonexempt work. To address commenter concerns discussed below, the Department has made minor changes to section 541.503(c).

Several commenters, including the Grocery Manufacturers Association (GMA), ask the Department to eliminate the emphasis upon an employee's "own'' sales in the proposed regulations. According to GMA, because of team selling, customer control of order processing, and increasing computerization of sales and purchasing activities, many of its members do not analyze performance of their salespersons by looking at their "own'' sales. In other words, they do not evaluate their sales personnel based on their "sales numbers,'' but rather their "sales efforts.'' GMA urges the Department to modify the outside sales regulations to exempt promotion work when it is performed incidental to and in connection with an employee's "sales efforts'' and to delete the requirement that such work be incidental to the employee's "own'' sales. GMA states this change is necessary to maintain the exemption where customers enter orders into a computer system, rather than by submitting a paper order to the outside sales employee whose promotional efforts helped facilitate the sale.

The U.S. Chamber of Commerce (Chamber) expresses similar concerns, stating that due to advances in computerized tracking of inventory and product shipment, the sales of manufactured goods are increasingly driven by computerized recognition of decreases in customer's inventory, rather than specific face-to-face solicitations by outside sales employees. The Chamber states that, under these circumstances, the role of the outside sales employee has, in many instances, changed to one of facilitation of sales. The Chamber maintains that promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process.

The National Association of Manufacturers (NAM) also expresses concern that the proposal does not take into account the extent to which modern technology affects the outside sales exemption. NAM states, for example, that outside sales employees might lose their exempt status where products stored in centralized warehouses are ordered through the customer's internal computerized purchasing system. In other words, such employees might not be viewed as having "consummated the sale'' or "directed efforts toward the consummation of the sale.'' NAM comments that employees who have long functioned as outside sales employees may no longer be exempt under the proposed regulations because they no longer execute contracts or write orders due to technological advances in the retail business.

After reviewing the comments and current case law, the Department has made minor changes to section 541.503(c) to address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales. As indicated in the proposal, the Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale'') (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test. *See* 1940 Stein Report at 46 (outside sales exemption does not extend to employees "engaged in paving the way for salesmen, assisting retailers, and establishing sales displays, and so forth'').

Nonetheless, the Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales. Employees have a primary duty of making sales if they "obtain a commitment to buy'' from the customer and are credited with the sale. *See* 1949 Weiss Report at 83 ("In borderline cases

the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt''). *See also Ackerman* v. *Coca-Cola Enterprises, Inc.,* 179 F.3d 1260, 1266–67 (10th Cir. 1999) (substantial merchandising responsibilities, including restocking of store shelves and setting up product displays, did not defeat outside sales exemption for soft drink advance sales reps and account managers where such responsibilities were "incidental to and in conjunction with'' sales they consummated at stores they visited), *cert. denied,* 528 U.S. 1145 (2000); *Wirtz* v. *Keystone Readers Service, Inc.,* 418 F.2d 249, 261 (5th Cir. 1969) ("student salesmen'' not exempt where engaged in promotional activities incidental to sales thereafter made by others).

Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. The changes to proposed section 541.503(c) are intended to avoid such a result. Finally, the Department notes that outside sales employees may also qualify as exempt executive, administrative or professional employees if they meet the requirements for those exemptions. For example, an employee whose primary duty is promotion work such as advertising or marketing—not selling—may not meet the requirements for the "outside sales'' exemption, but could be an exempt administrative employee.

Section 541.504 Drivers Who Sell

Under proposed section 541.504(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.'' Proposed subsection (b) provided factors that should be considered when determining whether the driver's primary duty is making sales: "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.''

The Department has made no substantive changes to proposed section 541.504, although editorial changes have been made to final subsections 541.504(a) and 541.504(c)(4) as described below.

The Grocery Manufacturers Association (GMA) has several concerns regarding proposed section 541.504. In its comments, for example, GMA sees a possible inconsistency between the language of proposed section 541.500(b) and proposed section 541.504(a). Proposed section 541.500(b) states that "[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with an employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.'' Proposed section 541.504(a) states with respect to drivers who sell that "[i]f the employee has a primary duty of making sales, all work performed incidental to and in conjunction with the employee's own sales efforts * * * is exempt work.'' GMA believes that it is inconsistent with section 541.500(b) to make the inclusion of driver/salesperson's incidental work within the outside sales exemption conditional upon the employee having a primary duty of making sales. GMA therefore urges the Department to delete the conditional phrase "[i]f the employee has a primary duty,'' from the second sentence of proposed section 541.504(a).

The Department had no intention of creating a different standard regarding incidental work for drivers who sell as opposed to other outside sales employees. The two subsections at issue used different language to describe the same concept, which could lead to confusion. Accordingly, we have modified final section 541.504(a) to track the language from section 541.500(b).

GMA also requests that the Department clarify section 541.504(c)(1), to the extent it describes a driver who may qualify for the outside sales exemption as one "who receives compensation commensurate with the volume of products sold.'' GMA does not believe that commissions alone should be used to determine exempt status. GMA therefore suggests that this regulation be broadened to recognize compensation systems which, while not commission-based, provide "compensation at least partially based on the volume of products sold,'' such as bonuses or other forms of recognition based on individual, group or corporate goals and volumes.

The Department believes that the phrase in question, "[a] driver * * * who receives compensation commensurate with the volume of products sold,'' helps provide an accurate example of an employee who has a primary duty of making sales. This phrase generally describes an employee paid on a commission basis, which is a commonly and frequently utilized method for compensating sales personnel. Since section 541.504(c)(1) is intended to provide guidance by presenting an example of a driver who may qualify as an exempt outside sales employee and, as such, does not foreclose the exemption for employees who receive other types of compensation, we have not made the requested change.

GMA also suggests that the Department delete the phrase "and carrying an assortment of the employer's products'' from proposed section 541.504(c)(4), because it should not matter whether the driver/salesperson is carrying one product or an assortment of them. The Department agrees with the comment that it is not necessary for a driver to carry "an assortment'' of products in order to qualify as exempt under the outside sales exemption. The availability of this exemption does not depend on either the volume or variety of products carried by the driver/salesperson in question. Accordingly, we have made the suggested change.

Another commenter asks that the Department clarify that "Professional Drivers'' are nonexempt. This exemption covers drivers who have a primary duty of making sales. The primary duty test offers an alternative to job titles that may not accurately reflect job duties and actual performance. Therefore, the Department believes that a blanket statement that "Professional Drivers'' are not exempt employees would not serve the interest of a more accurate rule.

Finally, a commenter asks for more examples of outside sales employees, including drivers who sell. Proposed subsection 541.504(c) and 541.504(d) already contain a number of examples of drivers who would or would not qualify as exempt employees. The Department does not believe that there will be any value added to the regulation through additional examples.

Subpart G, Salary Requirements

Section 541.600 Amount of Salary Required

Salary level tests have been included as part of the exemption criteria since

the original regulations of 1938. With a few exceptions, executive, administrative and professional employees must earn a minimum salary level to qualify for the exemption.[12] Employees paid below the minimum salary level are not exempt, irrespective of their job duties and responsibilities. Employees paid a salary at or above the minimum level in the regulations are only exempt if they also meet the salary basis and job duties tests. To qualify for exemption under the existing regulations, an employee must earn a minimum salary of $155 per week ($8,060/year) for the executive and administrative exemptions, and $170 per week ($8,840/year) for the professional exemption. Employees paid above these minimum salary levels must meet a ''long'' duties test to qualify for the exemption. The existing regulations also provide, under special provisions for ''high salaried'' employees (*see* 29 CFR 541.119, 541.214 and 541.315), that employees paid above a higher salary rate of $250 per week ($13,000/year) are exempt if they meet a ''short'' duties test. As the name implies, the short tests contain fewer duties requirements. 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. A full-time minimum wage worker, in comparison, earns $206 per week ($5.15/hour × 40 hours)—an amount above the existing ''long'' test levels and closely approaching the existing ''short'' test level. As a result, under the existing regulations, most employees are now tested for exemption under the ''short'' duties tests.

The Department proposed that the minimum salary level required for exemption as an executive, administrative, or professional employee be increased from $155 per week ($8,060/year) to $425 per week ($22,100/year). Thus, under proposed section 541.600(a), all employees earning less than $425 per week, either on an hourly or salary basis, would be guaranteed overtime protection, irrespective of their job duties and responsibilities. Employees earning $425 or more on a salary basis would only qualify for exemption if they met a new ''standard'' test of duties.

The final rule adopts the new structure of the proposal to include a ''standard'' test of duties tied to a minimum salary level. However, the proposed rule used the Bureau of Labor Statistics' (BLS) year 2000 Current Population Survey Outgoing Rotation Group data set, the most recent data available from BLS when the Preliminary Regulatory Impact Analysis was completed. When the Regulatory Impact Analysis for this final rule was completed, the most recent data available was the 2002 CPS data set. Based on the more recent data, and taking into account numerous comments about the salary levels in the proposal, the Department has raised the minimum weekly salary level required for exemption in the final rule from $425 per week to $455 per week, an increase of $30 from the proposed regulations and an increase of $300 per week from the existing minimum salary level. As a result of this increase, 6.7 million salaried workers who earn between $155 and $455 per week will be guaranteed overtime protection, regardless of their duties.

The remaining subsections of 541.600 retained, without substantive change from the existing regulations, certain special provisions regarding the salary requirements: Subsection (b) set forth the minimum salary levels required if the employee is paid on a biweekly, semimonthly or monthly basis; subsection (c) discussed the salary required for academic administrative employees; subsection (d) set forth the salary required for computer employees; and subsection (e) provided that the salary requirements do not apply to teachers, lawyers and doctors. The Department did not receive significant comments on these subsections, and thus no other changes have been made to section 541.600.

Most commenters agree that the minimum salary level needed to be increased, but disagreed sharply regarding the size of the increase. Some commenters state that the proposed $425 minimum salary level is too high, other commenters say it is too low, and some say it is just right.

Some employer commenters, such as the U.S. Small Business Administration's Office of Advocacy, the American Health Care Association, and the Securities Industry Association's Human Resources Management Committee, strongly oppose the $425 per week minimum salary as too high. The Associated Builders and Contractors state that $425 per week ''may be particularly high for rural areas of the country.'' Similarly, the National Grocers Association (NGA) comments that the $425 level ''could prove problematic for some retail grocers operating in differing geographic regions, such as rural areas and the South where economic conditions vary and pay scales are less.'' Based on their 2003 compensation survey, NGA suggests that the Department lower the minimum salary level to $400 per week. Some owners of small retail and restaurant businesses also filed comments asserting that $425 per week is too high. An owner of four Dairy Queen stores in Austin, Texas, for example, asks the Department to lower the minimum salary level to $400 per week because supervisor salaries in the area start at $21,000 per year. A comment from Wesfam Restaurants requests that the Department lower the minimum salary level to $350 per week because the Department's proposed $425 level will cost the company at least $100,000 each year.

Other organizations representing employer interests generally support the $425 salary level, but object to any further increase in this proposed minimum. For example, the U.S. Chamber of Commerce (Chamber) does not oppose the minimum salary level, but states that a significant minority of its members oppose the proposed compensation level as too high. Nevertheless, the Chamber opposes an increase to $425 per week if ''unaccompanied by significant changes in the duties and salary basis tests,'' and would oppose any compensation level higher than $425. The FLSA Reform Coalition, the Public Sector FLSA Coalition, the American Corporate Counsel Association and the HR Policy Association believe that the $425 per week minimum is reasonable. The National Restaurant Association recognizes that the salary levels have not been changed for many years, but states: ''Under no circumstance should the threshold be increased to a higher salary level [than $425 per week]. In fact, the Association urges DOL to review the methodology used to establish the proposed minimum salary threshold of $425/wk. and reevaluate the impact of this threshold on specific industry sectors, including restaurants and retail establishments. Strong consideration should be given to adjusting the threshold downward to reflect the realities of variations in industry and regional compensation levels.'' Similarly, the National Council of Chain Restaurants asks the Department to ''resist any pressure to raise the salary threshold to an even

[12] For many years, the regulations have contained no salary level test for outside sales employees and some professional employees (teachers, doctors, lawyers). Such employees are exempt regardless of their salary. The final rule makes no changes in this area. Also, in 1990, Congress amended the FLSA to exempt certain hourly-paid computer professionals paid at least 6½ times the minimum wage (which then totaled $27.63 per hour; $57,470 per year, assuming 40 hours per week). Congress froze this compensation test at $27.63 per hour in 1996.

higher level, which would wreak havoc on the chain restaurant industry, and retailers generally.'' The Food Marketing Institute also opposes increasing the minimum salary level above $425, noting that this salary level will already particularly affect independent, family-owned grocery stores.

On the other hand, organizations representing employee interests oppose the standard salary level as being too low. Such organizations advocate salary levels ranging from $530 per week to $1,000 per week. The AFL–CIO and the International Association of Machinists and Aerospace Workers, for example, purporting to apply the approach set forth in the 1958 Kantor Report to the current ''long'' and ''short'' duties test structure, suggest salary levels of at least $610 per week for the long test and $980 for the short test. The United Food and Commercial Workers International Union would adjust the current salary levels for inflation using the Consumer Price Index (CPI), resulting in a ''minimum of $530/week for the first level ($580 for professionals), and $855 for the second level.'' The American Federation of State, County and Municipal Employees similarly comments that adjusting the current salary levels to reflect changes in the CPI would increase the salary level under the ''long'' test for executive and administrative employees to $530 per week ($580 for professional employees) and to $855 per week for the ''short'' test.

The Department has long recognized that the salary paid to an employee is the ''best single test'' of exempt status (1940 Stein Report at 19), which has ''simplified enforcement by providing a ready method of screening out the obviously nonexempt employees'' and furnished a ''completely objective and precise measure which is not subject to differences of opinion or variations in judgment.'' As the Department stated in 1949:

> [T]he salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them. In the years of experience in administering the regulations, the Divisions have found no satisfactory substitute for the salary test.
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> Regulations of general applicability such as these must be drawn in general terms to apply to many thousands of different situations throughout the country. In view of the wide variation in their applicability the regulations cannot have the precision of a mathematical formula. The addition to the regulations of a salary requirement furnishes a completely objective and precise measure which is not subject to differences of opinion or variations in judgment. The usefulness of such a precise measure as an aid in drawing the line between exempt and nonexempt employees, particularly in borderline cases, seems to me to be established beyond doubt.

1949 Weiss Report at 8–9. *See also* 1940 Stein Report at 42 (''salary paid the employee is the best single test''); 1958 Kantor Report at 2–3 (salary levels ''furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees'').

While the purpose of the FLSA is to provide for the establishment of fair labor standards, the law does not give the Department authority to set minimum wages for executive, administrative and professional employees. These employees are exempt from any minimum wage requirements. The salary level test is intended to help distinguish bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these exempt categories. Any increase in the salary levels from those contained in the existing regulation, therefore, has to have as its primary objective the drawing of a line separating exempt from nonexempt employees. Moreover, it has long been recognized that ''such a dividing line cannot be drawn with great precision but can at best be only approximate.'' 1949 Weiss Report at 11.

Some of the comments opposed to the proposed $425 minimum salary level question the Department's methodology for setting the appropriate salary levels. The Department determined the appropriate methodology for adjusting the salary levels after a thorough review of the regulatory history of previous increases. The initial minimum salary level requirement for exemption, adopted in the 1938 regulations, was $30 a week for executive and administrative employees. The 1938 regulations did not include a salary requirement for professional employees, or a ''short test'' salary level. We could find no regulatory history from 1938 regarding the rationale for setting the salary level at $30 a week. *But see* 1940 Stein Report at 20–21 ($30 salary level adopted from the National Industrial Recovery Act and State law). Since 1938, and as shown in Table 1, the Department has increased the salary levels on six occasions—in 1940, 1949, 1958, 1963, 1970 and 1975. Until 1975, the Department increased salary levels every five to nine years, and the largest increase was only $50 per week.

TABLE 1.—WEEKLY SALARY LEVELS FOR EXEMPTION

	Executive	Administrative	Professional	Short test
1938	$30	$30	None	None
1940	30	50	50	None
1949	55	75	75	$100
1958	80	95	95	125
1963	100	100	115	150
1970	125	125	140	200
1975	155	155	170	250

The regulatory history of these six increases reveals that, in determining appropriate salary levels, the Department has examined data on actual salaries and wages paid to exempt and nonexempt employees. In 1940, the Department considered salary surveys by government agencies, experience under the National Industrial Recovery Act, and federal government salaries. 1940 Stein Report at 9, 20, 31–32. The Department then

used these salary data to determine the average salary that was the "dividing line'' between exempt and nonexempt employees, and to find the percentage of employees earning below various salary levels. The Department set the minimum required salary at levels below the average salary dividing exempt from nonexempt employees: "Furthermore, these figures are averages, and the act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude.'' 1940 Stein Report at 32.

In 1949, the Department looked at salary data from state and federal agencies, including the Bureau of Labor Statistics (BLS). The Department considered wages in small towns and low-wage industries, wages of federal employees, average weekly earnings for exempt employees and starting salaries for college graduates. 1949 Weiss Report at 10, 14–17, 19. The Department compared weekly earnings in 1940 with weekly earnings in 1949 to determine the average percentage increase in earnings. As in 1940, the Department then set a salary level at a "figure slightly lower than might be indicated by the data'' because of concerns regarding the impact of the salary level increases on small businesses: "The salary test for bona fide executives must not be so high as to exclude large numbers of the executives of small establishments from the exemption.'' 1949 Weiss Report at 15.

In 1958, the Department considered data collected during 1955 Wage and Hour Division investigations on "the actual salaries paid'' to employees who "qualified for exemption'' (*i.e.*, met the applicable salary and duties tests), grouped by geographic region, broad industry groups, number of employees and size of city. 1958 Kantor Report at 6. The Department then set the salary tests for exempt employees "at about the levels at which no more than about 10 percent of those in the lowest-wage 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.'' 1958 Kantor Report at 6–7.

The Department followed this same methodology when determining the appropriate salary level increase in 1963. The Department examined data on salaries paid to exempt workers collected in a special survey conducted by the Wage and Hour Division in 1961. 28 FR 7002 (July 9, 1963). The salary level for executive and administrative employees was increased to $100 per week, for example, when the 1961 survey data showed that 13 percent of establishments paid one or more exempt executives less than $100 per week; and 4 percent of establishments paid one or more exempt administrative employees less than $100 a week. 28 FR 7004 (July 9, 1963). The professional salary level was increased to $115 per week, when the 1961 survey data showed that 12 percent of establishments surveyed paid one or more professional employees less than $115 per week. 28 FR 7004. The Department noted that these salary levels approximated the same percentages used in 1958:

> Salary tests set at this level would bear approximately the same relationship to the minimum salaries reflected in the 1961 survey data as the tests adopted in 1958, on the occasion of the last previous adjustment, bore to the minimum salaries reflected in a comparable survey, adjusted by trend data to early 1958. At that time, 10 percent of the establishments employing executive employees paid one or more executive employees less than the minimum salary adopted for executive employees and 15 percent of the establishments employing administrative or professional employees paid one or more employees employed in such capacities less than the minimum salary adopted for administrative and professional employees. (28 FR 7004).

The Department continued to use this methodology when adopting salary level increases in 1970. In 1970, the Department examined data from 1968 Wage and Hour Division investigations and 1969 BLS wage data. The Department increased the salary level for executive employees to $140 per week when the salary data showed that 20 percent of executive employees from all regions and 12 percent of executive employees in the West earned less than $130 a week. 35 FR 884 (January 22, 1970).

The last increase to the salary levels was in 1975. Instead of following the prior approaches, in 1975 the Department set the salary levels based on increases in the Consumer Price Index, although it adjusted the salary level downward to eliminate any potential inflationary impact. 40 FR 7091 (February 19, 1975) ("However, in order to eliminate any inflationary impact, the interim rates hereinafter specified are set at a level slightly below the rates based on the CPI''). More to the point, the salary levels adopted were intended as *interim* levels "pending the completion and analysis of a study by the Bureau of Labor Statistics covering a six month period in 1975.'' *Id.* Thus, the Department again intended to increase the salary levels based on actual salaries paid to employees. However, the intended process was never completed, and the so-called "interim'' salary levels have remained untouched for 29 years.

In summary, the regulatory history reveals a common methodology used, with some variations, to determine appropriate salary levels. In almost every case, the Department examined data on actual wages paid to employees and then set the salary level at an amount slightly lower than might be indicated by the data. In 1940 and 1949, the Department looked to the average salary paid to the lowest level of exempt employee. Beginning in 1958, however, the Department set salary levels to exclude approximately the lowest-paid 10 percent of exempt salaried employees. Perhaps the best summary of this methodology appears in the 1958 Kantor Report at pages 5–7:

> 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-wage 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.

Using this regulatory history as guidance, the Department reached the proposed minimum salary level of $425 per week after considering available data on actual salary levels currently being paid in the economy, broken out by broad industry categories and geographic areas. We reviewed a preliminary report on actual salary levels based on the BLS year 2000 Current Population Survey (CPS) Outgoing Rotations Group data set. These data included all full-time (defined as 35 hours or more per week),

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). We considered the data in Table 2 below showing the salary levels of the bottom 10 percent, 15 percent and 20 percent of all salaried employees, and salaried employees in the lower-wage South and retail sectors:

TABLE 2.—WAGES OF FULL-TIME SALARIED EMPLOYEES (2000 CPS)

	All	South	Retail
10%	$18,195	$15,955	$15,600
15%	21,050	19,950	19,400
20%	24,455	22,200	21,800

As in the 1958 Kantor Report analysis, the Department's proposal looked to "points near the lower end of the current range of salaries'' to determine an appropriate salary level for the standard test—although we relied on the lowest 20 percent of salaried employees in the South, rather than the lowest 10 percent, because of the proposed change from the "short'' and "long'' test structure and because the data included nonexempt salaried employees. Applying this analysis, the Department proposed a standard salary level of $425 per week, an increase of $270 per week over the existing rule's salary level of $155 per week.[13] Using this level, approximately the bottom 20 percent of all salaried employees covered by the FLSA would fall below the minimum salary requirement and be automatically entitled to overtime.

Many commenters find this methodology appropriate and reasonable. Comments filed by the U.S. House of Representatives Committee on Education and the Workforce, for example, "commend the Department for its thoughtful analysis of the prior revisions to the salary level test,'' and "endorse the Department's review of and adherence to regulatory precedent.''

However, some commenters who oppose the proposed $425 minimum salary level as too low argue that the Department should adjust the existing salary levels for inflation by applying the Consumer Price Index. This methodology would result in salary levels of $530 per week ($580 for professionals) for the "long'' duties test and $855 per week for the "short'' duties tests, according to the commenters.

[13] The Department's proposal to eliminate the different salary level associated with the professional "long'' duties test is adopted in the final regulations as most commenters supported this as simplifying the existing regulations.

Other commenters, including the AFL–CIO, agree with the Department that the 1958 Kantor Report methodology of looking to the "range of salaries actually paid'' to employees is the "most accurate approach to set the salary levels,'' but assert that the Department "misrepresented and misused the Kantor Report.'' Thus, comments filed by the AFL–CIO, and adopted by many of their affiliated unions, state:

> The Department has taken several approaches in the past to decide how to increase the salary levels used in the regulations. The most accurate approach to set salary levels for exempt executive, administrative, and professional employees is first to determine the range of salaries actually paid to employees who qualify for the exemption in each of the three categories. The Department took this approach when it set new salary levels effective in 1959, based on the Kantor Report. The Kantor Report also noted, as the Department mentions in its preamble, that: "the objectives of the salary tests will be accomplished if the levels selected are set at points near the lower end of the current range of salaries for each of the categories. Such levels will assist in demarcating the bona fide executive, administrative, and professional employees without disqualifying any substantial number of such employees.'' 68 Fed. Reg. at 15570, quoting Kantor Report at 5. The Department's present proposal purports to use the approach of the Kantor Report. However * * * the Department has completely misrepresented and misused the Kantor Report. *The actual methodology used in the Kantor Report would result today not in a "standard salary'' of $425 as proposed by the Department, but instead in a "long test'' salary of $610 per week and a "short test'' salary of $980 per week. (Emphasis in comment.)*

The AFL–CIO claims that the Department "misused'' the Kantor methodology by relying on year 2000 BLS data regarding salary levels of *all* salaried employees: "Kantor's salary survey was limited to those executive, administrative and professional employees who were found to be exempt—that is, employees who were paid on a salary basis, and met the applicable salary and duties tests. * * * Instead, the DOL survey encompasses the broadest possible group—*all* salaried employees in every occupation, even those who could not be regarded by any stretch of the imagination as executive, administrative, or professional employees.'' The AFL–CIO thus suggests that the Department use more current salary data and look only at salaries of *exempt* employees.

The National Association of Convenience Stores (NACS) also believes the Department misapplied the Kantor methodology, but resulting in a salary level that is too *high,* rather than too *low* as the AFL–CIO contends: "Instead of setting the threshold at the lowest 10% of the salaries reviewed as was done in 1958, the proposed cutoff has been set at 20%. * * * NACS submits that, to remain faithful to the wise principles of the Kantor Report, the Labor Department should use the 10% guideline and should apply it to the salaries in the lowest geographical or industry sector (whichever of the two data sets is lower), rather than to composite figures which represent a combination of high-wage and low-wage geographical and/or industry sectors.''

The Department recognizes the strong views in this area, and has carefully considered the comments addressing the amount of the proposed minimum salary level. The Department continues to believe that its methodology is consistent with the regulatory history and, most importantly, is a reasonable approach to updating the salary level tests. For example, instead of investigating the lowest 10% of *exempt* salaried employees, an approach that depends on uncertain assumptions regarding which employees are actually exempt, the Department decided to set the minimum salary level based on the lowest 20% of *all* salaried employees. The Department felt this adjustment achieved much the same purpose as restricting the analysis to a lower percentage of exempt employees. Assuming that employees earning a lower salary are more likely non-exempt, both approaches are capable of reaching exactly the same endpoint, as discussed more fully below. The Department, in order to address the many comments regarding this assumption, decided for this final rule to directly test whether our method for setting the salary threshold was robust to different analytical approaches. In fact, the Department found that our proposed approach to setting salary levels was very consistent with past approaches. Therefore we disagree with the AFL–CIO's contention that the proposed analysis was flawed and not consistent with the Kantor approach.

The final rule reflects the Department's long-standing tradition of avoiding the use of inflation indicators for automatic adjustments to these salary requirements. 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:

> 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.

1949 Weiss Report at 12. The Department continues to believe that such a mechanical adjustment for inflation could have an inflationary impact or cause job losses. We are particularly concerned about, and required to consider, the impact that an inflation adjustment could have on lower-wage sectors such as businesses in rural areas, businesses in the retail and restaurant industry, and small businesses.

Thus, as in the proposal, the Department determined the minimum salary level in the final rule by examining available data on actual salary levels currently being paid in the economy as suggested by the 1958 Kantor Report. In the proposed rule, we relied on year 2000 salary data because it was the most current data available at that time. However, the Department should rely on the most current salary data available. Thus, for the final rule, we carefully reviewed a report on actual salary levels based on the 2002 Current Population Survey (CPS) Outgoing Rotation public use data set, the most current data available at the time the analysis was conducted.[14] As explained in more detail under section VI of this preamble, the CPS data is the best available data source because of its size (more than 474,000 observations) and its breadth of detail (*e.g.*, occupation classifications, salary, hours worked and industry). Consistent with the proposal, the Department examined a subset of the 2002 CPS data, broken out by broad industry categories and geographic areas, that included full-time (working 35 or more hours per week) employed workers age 16 years and older who are both covered by the Fair Labor Standards Act and subject to the Part 541 salary tests. Thus, the Department relied on a data set that excluded: (1) The self-employed, unpaid volunteers and religious workers who are not covered by the FLSA; (2) agricultural workers, certain transportation workers, and certain automobile dealerships employees who are exempt from overtime under other provisions of the Act; (3) teachers, academic administrative personnel, certain medical professionals, outside sales employees, lawyers and judges who are not subject to the Part 541 salary tests; and (4) federal employees who are not subject to the Part 541 regulations.

Using this subset of the 2002 CPS data, the final rule again follows the 1958 Kantor Report analysis and looks to "points near the lower end of the current range of salaries'' to determine an appropriate salary level. The Department acknowledges that the 1958 Kantor Report used data regarding the wages of *exempt* employees, and set the salary level so that "no more than about 10 percent'' of such exempt employees "in the lowest-wage 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.'' 1958 Kantor Report at pages 5–7. The Department's proposal used a different data set—all salaried employees covered by the FLSA, rather than just exempt employees. However, the proposal accounted for these differences in data by setting a salary level excluding from the exemptions approximately the lowest *20 percent* of all salaried employees, rather than the Kantor Report's *10 percent* of exempt employees.

In developing the salary level for the final rule, the Department first looked at the proposed salary level of $425 per week to determine what percentage of salaried employees would fail to meet the test. As shown in Table 3, approximately 18 percent of full-time salaried employees in the South region and in the retail industry would fail to meet the $425 salary level. Because the Department was concerned by this drop from the 20 percent level used in the proposal, we assessed the salary level that would be necessary in order to exclude 20 percent of all salaried employees in the South region and in the retail industry.

As shown in Table 3, applying the 2002 CPS data, the lowest 20 percent of full-time salaried employees in the South region earn approximately $450 per week. The lowest 20 percent of full-time salaried employees in the retail industry earn approximately $455 per week. The lowest 20 percent of all salaried employees earn somewhere between $475 and $500 per week.

The Department maintains that this slight departure from the Kantor Report analysis was appropriate and within its discretion. As the AFL–CIO itself noted, the "Department has taken several approaches in the past to decide how to increase the salary levels used in the regulations.'' The regulatory history described above reveals that these various approaches have three things in common: (1) Relying on actual wages earned by employees; (2) setting the salary level slightly lower than indicated by the data because of the impact on lower-wage industries and regions; and (3) rejecting suggestions to mechanically adjust the salary levels based on an inflationary measure. Historically, however, the Department has looked at different wage surveys in an effort to find the best data available.

Nonetheless, to address concerns of the AFL–CIO, the National Association of Convenience Stores and other commenters regarding the Department's methodology, we also examined salary ranges for employees in the subset of 2002 CPS data who, applying a methodology modified from the GAO Report,[15] likely qualify as exempt employees under Section 13(a)(1) of the FLSA and the existing Part 541 regulations. Section VI of this preamble includes a detailed description of the Department's methodology for estimating the number and salary levels of exempt employees. The result of this analysis is Table 4, showing salary ranges for likely exempt workers. As shown in Table 4, the lowest 10 percent of all likely exempt salaried employees earn approximately $500 per week. The lowest 10 percent of likely exempt salaried employees in the South earn just over $475 per week. The lowest 10 percent of likely exempt salaried employees in the retail industry earn approximately $450 per week.

[14] The 2003 CPS data was made available after much of the economic analysis was completed. The Department reviewed the 2003 data in order to ensure that it had considered the most current salary information available. As explained in detail in Appendix B, an analysis of the 2003 data demonstrates that using this data would not alter the determination of the minimum salary level because the results are consistent under both data sets.

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

TABLE 3.—FULL-TIME SALARIED EMPLOYEES

Earnings		Percentile		
Weekly	Annual	All	South	Retail
$155	$8,060	1.6	1.6	1.8
255	13,260	4.6	5.3	5.4
355	18,460	10.0	11.8	12.0
380	19,760	11.1	13.3	13.3
405	21,060	14.1	16.9	17.1
425	22,100	15.2	18.3	18.1
450	23,400	16.7	20.2	19.9
455	23,660	16.8	20.2	20.0
460	23,920	16.9	20.4	20.1
465	24,180	18.3	21.9	21.9
470	24,440	18.4	21.9	21.9
475	24,700	18.7	22.3	22.3
500	26,000	22.7	26.9	27.4
550	28,600	25.8	30.6	30.7
600	31,200	32.4	37.9	38.3
650	33,800	36.0	41.7	42.5
700	36,400	41.9	47.9	49.6
750	39,000	45.8	51.6	53.6
800	41,600	50.8	56.8	58.9
850	44,200	54.2	59.9	61.8
900	46,800	57.9	63.6	64.9
950	49,400	60.7	66.6	67.9
1,000	52,000	66.6	72.1	73.5
1,100	57,200	70.8	75.9	76.9
1,200	62,400	76.0	80.8	80.8
1,300	67,600	79.2	83.5	83.3
1,400	72,800	82.8	86.6	85.9
1,500	78,000	85.8	89.2	88.7
1,600	83,200	88.0	90.9	90.3
1,700	88,400	89.6	92.2	91.4
1,800	93,600	91.1	93.3	93.0
1,900	98,800	92.0	94.0	93.7
1,925	100,100	93.7	95.3	95.1
1,950	101,400	93.7	95.4	95.1
1,975	102,700	93.9	95.5	95.2
2,000	104,000	94.2	95.6	95.4
2,100	109,200	94.6	96.1	95.9
2,200	114,400	95.2	96.5	96.2
2,300	119,600	95.4	96.6	96.5
2,400	124,800	96.2	97.1	97.1
2,500	130,000	97.0	97.6	97.8

TABLE 4.—LIKELY EXEMPT EMPLOYEES

Earnings		Percentile		
Weekly	Annual	All	South	Retail
$155	$8,060	0.0	0.0	0.0
255	13,260	1.3	1.6	1.6
355	18,460	3.6	4.2	5.3
380	19,760	4.0	4.9	6.2
405	21,060	5.4	6.5	8.4
425	22,100	5.9	7.2	9.0
450	23,400	6.6	8.1	10.2
455	23,660	6.7	8.2	10.2
460	23,920	6.7	8.2	10.3
465	24,180	7.7	9.2	11.7
470	24,440	7.8	9.3	11.8
475	24,700	7.9	9.5	12.0
500	26,000	10.3	12.3	15.3
550	28,600	12.3	14.9	18.1
600	31,200	17.2	20.5	24.6
650	33,800	20.0	23.9	29.3
700	36,400	25.2	29.9	36.3
750	39,000	28.9	33.7	40.7
800	41,600	33.7	39.0	46.0
850	44,200	37.3	42.4	49.4
900	46,800	41.2	46.7	53.0
950	49,400	44.5	50.4	56.9

TABLE 4.—LIKELY EXEMPT EMPLOYEES—Continued

Earnings		Percentile		
Weekly	Annual	All	South	Retail
1,000	52,000	51.3	57.2	63.5
1,100	57,200	56.7	62.2	67.6
1,200	62,400	63.5	69.3	72.9
1,300	67,600	67.9	73.3	76.4
1,400	72,800	73.1	77.9	80.4
1,500	78,000	77.5	81.9	83.7
1,600	83,200	80.8	84.7	85.9
1,700	88,400	83.3	86.8	87.7
1,800	93,600	85.7	88.6	90.0
1,900	98,800	87.2	89.8	90.8
1,925	100,100	89.8	92.0	92.7
1,950	101,400	89.9	92.1	92.8
1,975	102,700	90.1	92.3	92.9
2,000	104,000	90.6	92.6	93.1
2,100	109,200	91.3	93.3	93.6
2,200	114,400	92.2	93.9	94.1
2,300	119,600	92.6	94.2	94.4
2,400	124,800	93.9	95.0	95.4
2,500	130,000	95.2	95.9	96.4

TABLE 5.—FULL-TIME HOURLY WORKERS

Earnings		Percentile		
Weekly	Annual	All	South	Retail
$155	$8,060	1.2	1.3	2.0
255	13,260	7.6	9.5	13.7
355	18,460	25.8	30.4	41.4
380	19,760	31.4	36.6	47.9
405	21,060	38.5	44.4	55.9
425	22,100	41.3	47.5	59.1
450	23,400	46.1	52.4	64.1
455	23,660	46.4	52.8	64.5
460	23,920	47.3	53.6	65.4
465	24,180	47.9	54.3	65.9
470	24,440	48.3	54.8	66.4
475	24,700	48.7	55.2	66.9
500	26,000	54.8	61.5	71.9
550	28,600	60.6	67.0	76.7
600	31,200	68.2	73.9	82.6
650	33,800	72.2	77.5	85.8
700	36,400	76.3	81.1	88.7
750	39,000	79.6	83.9	90.9
800	41,600	83.6	87.1	93.2
850	44,200	85.9	88.9	94.1
900	46,800	88.0	90.7	95.1
950	49,400	89.6	92.0	95.7
1,000	52,000	91.9	93.9	96.7
1,100	57,200	94.0	95.5	97.4
1,200	62,400	95.8	96.9	98.0
1,300	67,600	96.7	97.6	98.3
1,400	72,800	97.6	98.2	98.8
1,500	78,000	98.2	98.6	99.1
1,600	83,200	98.7	99.0	99.4
1,700	88,400	99.0	99.2	99.5
1,800	93,600	99.2	99.4	99.6
1,900	98,800	99.3	99.4	99.6
1,925	100,100	99.4	99.5	99.7
1,950	101,400	99.4	99.5	99.7
1,975	102,700	99.4	99.5	99.7
2,000	104,000	99.5	99.6	99.7
2,100	109,200	99.6	99.6	99.7
2,200	114,400	99.6	99.6	99.7
2,300	119,600	99.7	99.7	99.8
2,400	124,800	99.7	99.7	99.8
2,500	130,000	99.8	99.8	99.8

Under the final rule, the minimum salary level for an employee to be exempt is increased from $155 per week ($8,060/year) to $455 per week ($23,660/year), a large increase by almost any yardstick. The $455 minimum salary level, as shown in Table 6, is an unprecedented increase in both absolute dollar amount and percentage terms. The $455 minimum salary level is a $10.34 annual dollar increase from 1975 to 2004, the highest annual dollar increase in the 65-year history of the FLSA.

TABLE 6.—COMPARISON OF SALARY LEVEL INCREASES

	Years since last increase	Executive long test salary level	Dollar change	Percent change	Average annual dollar change
1949	.....	$55	.....	.....	.....
1958	9	80	25	45.5	2.78
1963	5	100	20	25.0	4.00
1970	7	125	25	25.0	3.57
1975	5	155	30	24.0	6.00
2004	29	455	300	193.5	10.34

The Department believes that a $455 minimum salary level for exemption is consistent with the Department's historical practice of looking to "points near the lower end of the current range of salaries'' to determine an appropriate salary level. A minimum salary level of $455 per week represents the lowest 10.2 percent of likely exempt employees in the lower-wage retail industry; the lowest 8.2 percent of likely exempt employees in the South; and the lowest 6.7 percent of all likely exempt employees. The $455 level also represents the lowest 20.0 percent of salaried employees in the retail industry; the lowest 20.2 percent of salaried employees in the South; and the lowest 16.8 percent of all salaried employees. As shown in Table 5, the $455 minimum salary level also automatically excludes 46.4 percent of hourly workers from the exemptions. In addition, based on the comments from the business community, the Department believes this increase is clearly at the upper boundary of what is capable of being absorbed by employers without major disruptions to local labor markets. Accordingly, the Department concludes that a minimum salary level of $455 per week "will assist in demarcating the 'bona fide' executive, administrative and professional employees without disqualifying any substantial number of such employees.'' Kantor Report at 5.

Concerns by employer groups that a $455 per week salary level will disproportionately impact small businesses, businesses in rural areas, and retail businesses are misplaced. The Department examined the 2002 CPS data broken out by industry and geographic area, and as in the Kantor Report, selected a salary level "near the lower end of the current range of salaries'' to ensure the minimum salary level is practicable over the broadest possible range of industries, business sizes and geographic regions. Kantor Report at 5.

Similarly, the AFL–CIO's attempt to apply the Kantor Report analysis, yielding a result of $610 per week, is also flawed. Rather than starting with the 2002 CPS data, the AFL–CIO began its analysis by identifying the salary level for the lowest 10 percent of likely exempt employees from the 1998 data in the GAO Report. Then, the AFL–CIO adjusted that salary level for inflation by applying the Employment Cost Index. The problem with this approach is that the GAO Report methodology, as discussed in Section VI, inappropriately excludes from the analysis exempt employees in lower-wage regions and industries. The AFL–CIO then exacerbates the GAO's biased result by using the ECI to adjust the 1998 data, rather than using the available 2002 data. Table 4 contains more accurate data on current salary ranges of likely exempt employees. Applying these data, the AFL–CIO suggestion of a $610 salary level represents approximately the lowest 17 percent of all likely exempt salaried employees, the lowest 21 percent of such employees in the South, and the lowest 25 percent of such employees in retail—not the lowest 10 percent used by Kantor.

Finally, the comments raise a number of additional issues which the Department considered but did not find persuasive. *First,* several commenters urge the Department to adopt different salary levels for different areas of the country (or urban and rural areas) or for different kinds or sizes of businesses. The Department does not believe that this approach is administratively feasible because of the large number of different salary levels this would require. In addition, we believe that the traditional methodology addresses the concerns of such commenters by looking toward the lower end of the salary levels and considering salaries in the South and in the retail industry. We also considered but rejected comments requesting a special rule for part-time employees. The regulations have never included a different salary level for part-time employees, and such a rule appears unnecessary.

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

concerns regarding the impact on lower-wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.

Third, the Puerto Rico Chamber of Commerce recommends a special salary test for Puerto Rico of $360 per week (the same as the proposed salary level test for American Samoa). The Department considered this comment and concluded that such a differential in Puerto Rico would be inconsistent with the FLSA Amendments of 1989 (Pub. L. 101–157), which deleted Puerto Rico and the Virgin Islands from the special industry wage order proceedings under section 6(a)(1) of the FLSA allowing industry minimum wage rates that are lower than the U.S. mainland minimum wage. Before 1989, Puerto Rico, the Virgin Islands, and American Samoa all had minimum wages below the U.S. mainland and consequently lower salary level tests traditionally were established for employees in these jurisdictions. However, since Puerto Rico is now subject to the same minimum wage as the U.S. mainland, there is no longer a basis for a special salary level test. The final rule maintains the special minimum salary level for employees in American Samoa at approximately the same ratio to the mainland test (84 percent) used under the existing rule—which computes to $380 per week.

Fourth, the National Association of Chain Drug Stores (NACDS) comments that the exception to a minimum salary test for physicians should apply to pharmacists. The NACDS states that the educational requirements and professional standards for pharmacists have increased substantially since these regulations were last revised. For example, pharmacists graduating today complete a doctoral program before they are licensed to practice. In the Department's view, pharmacists can qualify, along with doctors, teachers, lawyers, *etc.,* as professionals under the FLSA exemption. However, the fact that the standards for the profession are rising does not mean that the minimum salary requirement to be exempt should be removed. The Department also considered but rejected suggestions from commenters that we remove the salary requirements for registered nurses and others. The Department does not think it is appropriate to expand the original, limited number of professions that were not subject to the salary test.

Fifth, several commenters favor a final rule that would eliminate the salary tests entirely. These commenters point out that this approach would eliminate concerns about how the salary levels might affect lower wage regions and industries. They argue that the duties tests have been the only active tests for some time, given the erosion of the value of the salary levels in the prior existing rule. Fairfax County states that the salary test should be eliminated because of the wide variation across the country in living costs and labor market viability. The National Automobile Dealers Association and others comment that the salary tests were simply unnecessary. The Central Iowa Society for Human Resource Management comments that job content should be the deciding factor, not salary level. On the other hand, many commenters oppose this approach. The Department has carefully considered the comments in this area and has not adopted this alternative, among other reasons, because this approach would be inconsistent with the Department's long-standing recognition that the amount of salary paid to an employee is the "best single test'' of exempt status. 1940 Stein Report at 19. Moreover, this alternative would require a significant restructuring of the regulations and probably the use of more rigid duties tests. Thus, this alternative conflicts with a key purpose of this rulemaking, namely, to simplify and streamline these regulations.

Section 541.601 Highly Compensated Employees

Proposed section 541.601 set forth a new rule for highly compensated employees. Under the proposed rule, an employee who had a guaranteed total annual compensation of at least $65,000 was deemed exempt under section 13(a)(1) of the Act if the employee performed an identifiable executive, administrative or professional function as described in the standard duties tests. Subsection (b) of the proposed rule defined "total annual compensation'' to include "base salary, commissions, non-discretionary bonuses and other non-discretionary compensation'' as long as that compensation was "paid out to the employee as due on at least a monthly basis.'' Proposed subsection (b) also provided for prorating the $65,000 annual compensation for employees who work only part of the year, and allowed an employer to make a lump-sum payment sufficient to bring the employee to the $65,000 level by the next pay period after the end of the year. Proposed subsection (c) stated that 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,'' and provided an example to illustrate the duties requirement applicable to highly compensated employees under this rule: "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.'' Proposed subsection (d) provided that the highly compensated rule applied only to employees performing office or non-manual work, and was not applicable to "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, teamsters and other employees who perform manual work * * * no matter how highly paid they might be.''[16]

The final section 541.601 raises the total annual compensation required for exemption as a highly compensated employee to $100,000, an increase of $35,000 from the proposal. The final rule also makes a number of additional changes, including: Requiring that the total annual compensation must include at least $455 per week paid on a salary or fee basis; modifying the definition of "total annual compensation'' to include commissions, nondiscretionary bonuses and other nondiscretionary compensation even if they are not paid to the employee on a monthly basis; allowing the make-up payment to be paid within one month after the end of the year and clarifying that such a payment counts toward the prior year's compensation; allowing a similar make-up payment to employees who terminate employment before the end of the year; and deleting the word "guaranteed'' to clarify that compliance with this provision does not create an employment contract. In addition, the final rule modifies the duties requirement to provide that the employee must "customarily and regularly'' perform one or more exempt duties. Finally, subsection (d) in the final rule has been modified to better reflect the language of new subsection 541.3(a) and now provides:

> This section applies only to employees performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers,

[16] Even if the requirements of section 541.601 are not met, an employee may still be tested for exemption under the standard tests for the executive, administrative or professional exemption.

longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

Comments on proposed section 541.601 disagree sharply. The AFL–CIO and other affiliated unions object entirely to section 541.601, claiming the section is beyond the scope of the Department's authority. The unions characterize this section as a "salary-only'' test that will exempt every employee earning above the highly compensated salary level. The unions argue that Congress did not intend to exempt all employees who are paid over a certain level. If Congress intended to exempt employees who are paid over a certain level, the unions argue, it could easily have done so. Comments submitted by unions and other employee advocates also argue that the highly compensated test should be deleted entirely because proposed section 541.601 will allow the exemption for employees traditionally entitled to overtime pay. Such commenters also argue that the proposed $65,000 level is too low and the proposed duties requirements too lax.

In contrast, organizations representing employer interests generally support the new provision, although a number of these commenters ask for technical modifications. However, some employer commenters argue that the total annual compensation requirement of $65,000 per year is too high. In addition, a significant number of employer commenters find a duties requirement in proposed section 541.601 unnecessary, and ask the Department to eliminate it. The Morgan, Lewis & Bockius law firm, for example, argues that the duties test for highly compensated employees can be eliminated because employees paid more than 80 percent of all full-time salaried workers are not the persons Congress sought to protect from exploitation when it passed the FLSA. The U.S. Chamber of Commerce comments that a "bright line'' (*i.e.,* salary only) test for highly compensated employees would add significant clarity to the regulations and is consistent with the historical approach of guaranteeing overtime protections to workers earning below the minimum salary level, regardless of duties performed. The Society for Human Resource Management adds that high compensation is indicative of likely exempt status and a bright line rule for highly compensated employees based on earnings alone would eliminate the need for an expensive and potentially confusing legal inquiry into whether the employee's duties truly are exempt.

The Department agrees with the AFL–CIO that the Secretary does not have authority under the FLSA to adopt a "salary only'' test for exemption, and rejects suggestions from employer groups to do so. Section 13(a)(1) of the FLSA requires that the Secretary "define and delimit'' the terms executive, administrative and professional employee. The Department has always maintained that the use of the phrase "bona fide executive, administrative or professional capacity'' in the statute requires the performance of specific duties. For example, the 1940 Stein report stated: "Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act.'' 1940 Stein Report at 6–7. In fact, as the AFL–CIO and other unions note, Congress rejected several statutory amendments during the FLSA's early history which would have established "salary only'' tests. In 1940, for example, Congress rejected an amendment which would have provided the exemption to all employees earning more than $200 per week. H.R. 8624, 76th Cong. (1940). *See also* Deborah Malamud, *Engineering the Middle Class: Class Line-Drawing in New Deal Hours Legislation,* 96 Mich. L. Rev. 2212, 2299–2303 (August 1998) (discussing four separate proposals to exempt all highly paid employees between 1939 and 1940). Finally, as the unions also correctly note, in *Jewell Ridge Coal Corp.* v. *United Mine Workers* of America, Local No. 6167, 325 U.S. 161, 167 (1949), the Supreme Court stated that "employees are not to be deprived of the benefits of the Act simply because they are well paid.'' *See also Overnite Motor Transportation Co.* v. *Missel,* 316 U.S. 572, 578 (1942) (the primary purposes of the overtime provisions were to "spread employment'' and assure workers additional pay "to compensate them for the burden of a workweek beyond the hours fixed in the Act'').

However, the Department rejects the view that section 541.601 does not contain a duties test. As noted above, the proposed section did require that an exempt highly compensated employee perform "any one or more exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.'' Some commenters find this language insufficient and confusing, arguing that it would allow employees to qualify for exemption under section 541.601 even if they performed only a single exempt duty once a year. The Department never intended to exempt as "highly compensated'' employees those who perform exempt duties only on an occasional or sporadic basis. Accordingly, to clarify this duties requirement for highly compensated employees and ensure exempt duties remain a meaningful aspect of this test, the final rule adds to section 541.601(a) that an employee must "customarily and regularly'' perform work that satisfies one or more of the elements of the standard duties test for an executive, administrative or professional employee.

The Department has the authority to adopt a more streamlined duties test for employees paid at a higher salary level. Indeed, no commenter challenges this authority. The Part 541 regulations have contained special provisions for "high salaried'' employees since 1949. Although commonly referred to as the "short'' duties tests today, the existing regulations actually refer to these tests as the "special proviso for high salaried executives'' (29 CFR 541.119), the "special proviso for high salaried administrative employees'' (29 CFR 541.214), and the "special proviso for high salaried professional employees'' (29 CFR 541.315). Perhaps the courts appropriately refer to these special provisions as the "short'' tests today because the associated salary level is only $250 per week ($13,000 annually)—hardly "high salaried'' in today's economy.

In any case, these special provisions applying more lenient duties standards to employees earning higher salaries have been in the Part 541 regulations for 52 years. The rationale for a highly compensated test was set forth in the 1949 Weiss Report and is still valid today:

> The experience of the Divisions has shown that in the categories of employees under consideration the higher the salaries paid the more likely the employees are to meet all the requirements for exemption, and the less productive are the hours of inspection time spent in analysis of the duties performed. At the higher salary levels in such classes of employment, the employees have almost invariably been found to meet all the other requirements of the regulations for exemption. In the rare instances when these employees do not meet all the other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the act. The evidence supported the experience of the Divisions, and indicated that a short-cut test of exemption along the lines suggested above would facilitate the administration of the regulations without defeating the purposes of section 13(a)(1). A number of management representatives stated that such a provision

would facilitate the classification of employees and would result in a considerable saving of time for the employer.

The definition of bona fide "executive,'' "administrative,'' or "professional'' in terms of a high salary alone is not consistent with the intent of Congress as expressed in section 13(a)(1) and would be of doubtful legality since many persons who obviously do not fall into these categories may earn large salaries. The Administrator would undoubtedly be exceeding his authority if he included within the definition of these terms craftsmen, such as mechanics, carpenters, or linotype operators, no matter how highly paid they might be. A special proviso for high salaried employees cannot be based on salary alone but must be drawn in terms which will actually exclude craftsmen while including only bona fide executive, administrative, or professional employees. The evidence indicates that this objective can best be achieved by combining the high salary requirements with certain qualitative requirements relating to the work performed by bona fide executive, administrative or professional employees, as the case may be. Such requirements will exclude craftsmen and others of the type not intended to come within the exemption.

1949 Weiss Report at 22–23.

Section 541.601 is merely a reformulation of such a test. Although final section 541.601 strikes a slightly different balance than the existing regulations " a much higher salary level associated with a more flexible duties standard " that balance, in the experience of the Department, still meets the goals of the 1949 Weiss Report of providing a "short-cut test'' that combines "high salary requirements with certain qualitative requirements relating to the work performed by bona fide executive, administrative or professional employees,'' while excluding "craftsmen and others of the type not intended to come within the exemption.'' Thus, the final section 541.601 provides that an exempt highly compensated employee must earn $100,000 per year and "customarily and regularly'' perform exempt duties, and that "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.''

The Department also received a substantial number of comments on the proposed $65,000 earnings level. Some commenters such as the National Association of Manufacturers, the American Corporate Counsel Association, the Society for Human Resource Management and the FLSA Reform Coalition endorse the proposed $65,000 level as appropriately serving the purposes of the FLSA. However, other employer groups state that the salary level is too high. The U.S. Chamber of Commerce asks the Department to lower the earnings level to $50,000 per year. The National Retail Federation also suggests a $50,000 level, arguing that the $65,000 standard is prohibitively high for most retailers. The National Grocers Association and the International Mass Retail Association similarly state that $65,000 is far too high a level, particularly in the retail industry. The National Association of Convenience Stores suggests that the Department should set the salary level for highly compensated employees at $36,000 per year or, in the alternative, at a level related to the minimum salary level for exemption, such as $44,200 per year, twice the proposed minimum.

Other commenters, including labor unions, argue that $65,000 is too low. The National Employment Lawyers Association argues that the $65,000 proposed level is not much higher than the annualized level of $57,470 per year for computer employees exempt under section 13(a)(17) of the FLSA, which retains substantial duties tests. The National Association of Wage Hour Consultants notes that, although the top 20 percent of salaried employees earn $65,000 in base wages, that number does not include other types of compensation (*e.g.,* commissions) that the proposal includes within the definition of "total annual compensation.'' Accordingly, this commenter argues, the Department either should raise the salary level to $80,000 per year or modify the provision to exclude non-salary compensation. The American Federation of Government Employees suggests that the salary level should be fixed at the rate for a federal GS–15/step 1 employee ($85,140 per year, at the time the comment was submitted, without the locality pay differentials that can raise the total to in excess of $100,000). Two employers suggest that the section 541.601 salary level should conform to the Internal Revenue Service pay threshold for highly compensated employees, which is currently $90,000 per year.

The Department continues to find that employees at higher salary levels are more likely to satisfy the requirements for exemption as an executive, administrative or professional employee. The purpose of section 541.601 is to provide a "short-cut test'' for such highly compensated employees who "have almost invariably been found to meet all the other requirements of the regulations for exemption.'' 1949 Weiss Report at 22. Thus, the highly compensated earnings level should be set high enough to avoid the unintended exemption of large numbers of employees—such as secretaries in New York City or Los Angeles—who clearly are outside the scope of the exemptions and are entitled to the FLSA's minimum wage and overtime pay protections.

Accordingly, the Department rejects the comments from employer groups that the highly compensated salary level should be reduced to as low as $36,000 per year, and instead sets the highly compensated test at $100,000 per year. In the Department's experience, employees earning annual salaries of $36,000 often fail the duties tests for exemption, while virtually every salaried "white collar'' employee with a total annual compensation of $100,000 per year would satisfy any duties test. Employees earning $100,000 or more per year are at the very top of today's economic ladder, and setting the highly compensated test at this salary level provides the Department with the confidence that, in the words of the Weiss report: "in the rare instances when these employees do not meet all other requirements of the regulations, a determination that such employees are exempt would not defeat the objectives of section 13(a)(1) of the Act.'' 1949 Weiss Report at 22–23.

Only roughly 10 percent of likely exempt employees who are subject to the salary tests earn $100,000 or more per year (Table 4). This is broadly symmetrical with the Kantor approach of setting the minimum salary level for exemption at the lowest 10 percent of likely exempt employees. In contrast, approximately 35 percent of likely exempt employees subject to the salary tests exceed the proposed $65,000 salary threshold. In addition, less than 1 percent of full-time hourly workers (0.6 percent) earn $100,000 or more (Table 5). Thus, at the $100,000 or more per year salary level, the highly compensated provision will *not be available* to the vast majority of both salaried and hourly employees. Unlike the $65,000 or more per year salary level, setting the highly compensated test at the $100,000 avoids the potential of unintended exemptions of large numbers of employees who are not bona fide executive, administrative or professional employees. At the same time, because the Department believes that many employees who earn between $65,000 and $100,000 per year also satisfy the standard duties tests, the section 13(a)(1) exemptions will still be available for such employees. The

Department believes this $100,000 level is also necessary to address commenters' concerns regarding the associated duties test, the possibility that workers in high-wage regions and industries could inappropriately lose overtime protection, and the effect of future inflation. The Department recognizes that the duties test for highly compensated employees in final section 541.601 is less stringent than the existing "short'' duties tests associated with the existing special provisions for "high salaried'' employees (29 CFR 541.119, 541.214, 541.315). But this change is more than sufficiently off-set by the $87,000 per year increase in the highly compensated level. Under the existing regulations, a "high salaried executive'' earns only $13,000 annually, which is approximately 60 percent higher than the minimum salary level of $8,060. Under the final rule, a highly compensated employee must earn $100,000 per year, which is more than 400 percent higher than the final minimum salary level of $23,660 annually.[17]

A number of commenters question the definition of "total annual compensation'' and the mechanics of applying the highly compensated test. *First,* a number of commenters are concerned that the requirement that an employee must be "guaranteed'' the total annual compensation amount would be interpreted as creating an employment contract for an employee who otherwise would be an at-will employee. Because the Department did not intend this result, we have deleted the word "guaranteed.''

Second, several commenters, including the Morgan, Lewis & Bockius law firm, the Securities Industry Association and the HR Policy Association, suggest that employers should be permitted to prorate the total annual compensation amount if an employee uses leave without pay, such as under the Family and Medical Leave Act. The Department does not believe that such deductions are appropriate. The test for highly compensated employees is intended to provide an alternative, simplified method of testing a select group of employees for exemption. We believe that the test for highly compensated employees should remain straightforward and easy to administer by maintaining a single, overall compensation figure applicable to every employee. Determining the variety of reasons that might qualify for deduction, such as for a medical leave of absence, a military leave of absence, or an educational leave of absence, and establishing rules about the lengths of time such absences must cover before deductions could be made, would unnecessarily complicate this rule.

Third, because the final rule increases the compensation level significantly, from $65,000 to $100,000, the Department agrees with comments that the definition of "total annual compensation'' should include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period, even if such compensation is not "paid out to the employee as due on at least a monthly basis'' as proposed in subsection 541.601(b)(1). Numerous commenters state that such payments often are paid on a quarterly or less frequent basis. Accordingly, we have deleted this requirement from the final rule. However, we have not adopted comments suggesting that discretionary bonuses should be included in "total annual compensation'' because there is not enough information in the record on the frequency, size and types of such payments. The Department also does not agree with comments that the costs of employee benefits, such as payments for medical insurance and matching 401(k) pension plan payments, should be included in computing total annual compensation. The inclusion of such costs in the calculations for testing highly compensated employees would make the test administratively unwieldy.

Fourth, final subsection 541.601(b)(1) contains a new safeguard against possible abuses that are of concern to some commenters, including the AFL–CIO: the "total annual compensation'' must include at least $455 per week paid on a salary or fee basis. This change will ensure that highly compensated employees will receive at least the same base salary throughout the year as required for exempt employees under the standard tests, while still allowing highly compensated employees to receive additional income in the form of commissions and nondiscretionary bonuses. As explained below, the salary basis requirement is a valuable and easily applied criterion that is a hallmark of exempt status. Accordingly, the Department has modified the final subsection 541.601(b)(1) to provide:

> "Total annual compensation'' must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

Fifth, the final rule also continues to permit a catch-up payment at the end of the year. Such a catch-up payment is necessary because, according to some commenters, many highly compensated employees receive commissions, profit sharing and other incentive pay that may not be calculated or paid by the end of the year. However, some commenters state that it would be difficult to compute the amount of any such payment due by the first pay period following the end of the year, as required by proposed section 541.601(b)(2). They emphasize that it takes some time after the close of the year to compute the amounts of any commissions or bonuses that are due, such as those based on total sales or profits. Thus, for example, the Mortgage Bankers Association, the Consumer Bankers Association and the Consumer Mortgage Coalition suggest that employers be allowed one month to make the catch-up payment. The Department recognizes that an employer may need some time after the close of the year to make calculations and determine the amount of any catch-up payment that is due. Accordingly, we have clarified that such a payment may be made during the last pay period of the year or within one month after the close of the year. The final rule also provides that a similar, but prorated, catch-up payment may be made within one month after termination of employment for employees whose employment ends before the end of the 52-week period. Finally, the final rule clarifies that any such payments made after the end of the year may only be counted once, toward the "total annual compensation'' for the preceding year. To ensure appropriate evidence is maintained of such catch-up payments, employers may want to document and advise the employee of the purpose of the payment, although this is not a requirement of the final rule.

Finally, some commenters suggest applying the highly compensated test to outside sales and computer employees. Outside sales employees have never been subject to a salary level or a salary

[17] In addition, the final compensation level of $100,000 for highly compensated employees is almost twice the highest salary level that the AFL–CIO advocates as necessary to update the salary level associated with the existing "short'' duties tests. The AFL–CIO did not suggest an alternative salary level for section 541.601, likely because of its strong objections to this section as a whole. However, the AFL–CIO suggests that the salary level associated with the existing "short'' duties test should be increased either to $855 per week ($44,460 annually) if based on inflation or to $980 per week ($50,960 annually) if based on the Kantor Report.

basis test as a requirement for exemption, and the Department did not propose to add these requirements. Since outside sales employees are not subject to the standard salary level test, it would not be appropriate to apply the highly compensated test to these employees. We have not applied the highly compensated test to computer employees because, as explained under subpart E, Congress has already created special compensation provisions for this industry in section 13(a)(17) of the Act.

Section 541.602 Salary Basis

In its proposal, the Department retained the requirement that, to qualify for the executive, administrative or professional exemption, an employee must be paid on a ''salary basis.'' Proposed section 541.602(a) set forth the general rules for determining whether an employee is paid on a salary basis, which were retained virtually unchanged from the existing regulation. Under this subsection (a), an 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.'' With a few identified exceptions, 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.'' Subsection (a) also provides that 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.'' Exempt employees, however, ''need not be paid for any workweek in which they perform no work.''

Proposed subsection (b) included several exceptions to the salary basis rules that are in the existing regulations. An employer may make deductions from the guaranteed pay: when the employee is ''absent from work for a full day for personal reasons, other than sickness or disability''; for absences of a full day or more due to sickness or disability, if taken in accordance with a bona fide plan, policy or practice providing wage replacement benefits; for any hours not worked in the initial and final weeks of employment; for hours taken as unpaid FMLA leave; as offsets for amounts received by an employee for jury or witness fees or military pay; or for penalties imposed in good faith for ''infractions of safety rules of major significance.'' The proposed subsection (b) also added a new exception to the salary basis rule for deductions for ''unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules,'' such as rules prohibiting sexual harassment or workplace violence. Such suspensions must be imposed ''pursuant to a written policy applied uniformly to all workers.''

The Department's final rule retains both the requirement that an exempt employee must be paid on a ''salary basis'' and the exceptions to this rule specified in the proposal, with only a few minor modifications. We have changed the phrase ''a full day or more'' to read ''one or more full days'' throughout section 541.602 to clarify that certain deductions can only be made for full day increments. In addition, the final rule modifies the text of the new disciplinary deduction exception to indicate more clearly that the disciplinary policy must be applicable to all employees.

A number of commenters, such as the Fisher & Phillips law firm, the National Association of Convenience Stores and the American Bakers Association, urge the Department to abandon the salary basis test entirely, arguing that this requirement serves as a barrier to the appropriate classification of exempt employees. These comments note that the explanation in the proposal that payment on a salary basis is the *quid pro quo* for an exempt employee not receiving overtime pay reflects an inappropriate regulation of the compensation of an otherwise exempt employee.

In contrast, commenters such as the AFL–CIO and the Goldstein, Demchak, Baller, Borgen & Dardarian law firm view the salary basis requirement as a hallmark of exempt status. In fact, many commenters such as the New York State Public Employees Federation, the National Employment Lawyers Association, and the National Employment Law Project, request that the salary basis test be tightened.

After considering the salary basis test in light of its historical context and judicial acceptance, the Department has decided that it should be retained. As early as 1940, the Department noted that there was ''surprisingly wide agreement'' among employers and employees ''that a salary qualification in the definition of the term 'executive' is a valuable and easily applied index to the 'bona fide' character of the employment. * * *'' 1940 Stein Report at 19. The basis of that agreement was that ''[t]he term 'executive' implies a certain prestige, status, and importance'' that is captured by a salary test. *Id.* Also, because ''executive'' employees are denied the protection of the Act, ''[i]t must be assumed that they enjoy compensatory privileges,'' including a salary ''substantially higher'' than the minimum wages guaranteed under the Act. *Id.* The 1940 Stein Report recommended a salary test for executives that would be satisfied if the ''employee is guaranteed a net compensation of not less than $30 a week '*free and clear.*' '' *Id.* at 23 (emphasis added). The Report concluded that the inclusion of a salary test was vital in defining administrative and professional employees as well. *Id.* at 26 (''[A] salary criterion constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity''); *id.* at 36 ([I]n order to avoid disputes, to assist in the effective enforcement of the act and to prevent abuse, it appears essential * * * to include a salary test in the definition [of professional]'').

Based on the 1940 Stein Report's recommendation, the Department promulgated regulations providing that an exempt executive must be ''compensated for his services *on a salary basis* at not less than $30 per week.'' 29 CFR 541(e) (1940 Supp.). The regulations required that exempt administrative and professional employees (except physicians and attorneys) must be paid ''*on a salary or fee basis* at a rate of not less than $200 per month.'' 29 CFR 541.2(a) (administrative), 541.3(b) (professional) (emphasis added).

In 1944, the Wage and Hour Division issued Release No. A–9, which addressed the meaning of ''salary basis.'' The Release stated that an employee will be considered to be paid on a salary basis if ''under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semi-monthly, monthly or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period.'' Release No. A–9 (Aug. 24, 1944), *reprinted in* Wage & Hour Manual (BNA) 719 (cum. ed. 1944–1945). The Release further explained that because ''bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work,'' such employees should

generally be free to go home early or occasionally take a day off without reduction in pay. *Id.*

After hearings conducted in 1947, the Wage and Hour Division recommended retention of the salary basis test in the 1949 Weiss Report, stating:

> The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide'' executive. Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment.

1949 Weiss Report at 24. Based on the Weiss Report recommendations, the Department issued revised Part 541 regulations in 1949 that retained the salary basis test. 29 CFR 541.1(f), 541.2(e), 541.3(e) (1949 Supp.). Shortly thereafter, the Department published the first version of 29 CFR 541.118 (1949 Supp.) in a new Subpart B, entitled "Interpretations.'' Section 541.118(a) provided as follows:

> An employee will be considered to be paid on a salary basis within the meaning of the regulations in Subpart A of this part, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed. The employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.

In 1954, the Administrator issued a revised section 541.118(a) that retained the salary basis test, but added a number of exceptions to the rule. In 1958, the Wage and Hour Division again conducted hearings for the purpose of determining whether the salary levels should be changed. Although the resulting 1958 Kantor Report related primarily to the salary levels, it reiterated that salary is a "mark of [the] status'' of an exempt employee, and reaffirmed the criterion's importance as an enforcement tool, noting that the Department had "found no satisfactory substitute for the salary tests.'' 1958 Kantor Report at 2–3. Since 1954, the salary basis test has remained unchanged.

The Department thus has determined over the course of many years that executive, administrative and professional employees are nearly universally paid on a salary basis. This practice reflects the widely-held understanding that employees with the requisite status to be bona fide executives, administrators or professionals have discretion to manage their time. Such employees are not paid by the hour or task, but for the general value of services performed. *See Kinney* v. *District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Brock* v. *Claridge Hotel & Casino*, 846 F.2d 180, 184 (3d Cir.), *cert. denied*, 488 U.S. 925 (1988). There is nothing in this rulemaking record that contradicts the Department's long-standing view. The comments accusing the Department of improperly regulating the wages of exempt employees miss the mark. The *quid pro quo* referenced in the proposal was simply a way to explain that payment on a salary basis reflects an employee's discretion to manage his or her time and to receive compensatory privileges commensurate with exempt status.

Many commenters, including the FLSA Reform Coalition, the Fisher & Phillips law firm, the U.S. Chamber of Commerce, the HR Policy Association and the Oklahoma Office of Personnel Management, support the proposed new exception to the salary basis rule for "unpaid disciplinary suspensions of a full day or more imposed in good faith for infractions of workplace conduct rules.'' These commenters note that this additional exception will permit employers to apply the same progressive disciplinary rules to both exempt and nonexempt employees, and is needed in light of federal and state laws requiring employers to take appropriate remedial action to address employee misconduct. A number of commenters ask the Department to construe the term "workplace misconduct'' more broadly to include off-site, off-duty conduct. The National Association of Manufacturers suggests that the term should be clarified, at a minimum, to refer to the standards of conduct imposed by state and federal anti-discrimination laws.

In contrast, commenters such as the AFL–CIO, the Communications Workers of America, the New York State Public Employees Federation and the National Employment Law Project oppose the new exception, arguing that the current rule properly recognizes that receiving a salary includes not being subject to disciplinary deductions of less than a week. These commenters argue that employers have other ways to discipline exempt employees without violating the salary basis test.

The final rule includes the exception to the salary basis requirement for deductions from pay due to suspensions for infractions of workplace conduct rules. The Department believes that this is a common-sense change that will permit employers to hold exempt employees to the same standards of conduct as that required of their nonexempt workforce. At the same time, as one commenter notes, it will avoid harsh treatment of exempt employees—in the form of a full-week suspension—when a shorter suspension would be appropriate. It also takes into account, as the comments of Representative Norwood, Representative Ballenger and the American Bakers Association recognize, that a growing number of laws governing the workplace have placed increased responsibility and risk of liability on employers for their exempt employees' conduct. *See Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998); *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) (liability for sexual harassment by supervisory employees may be imputed to the employer where employer fails to take prompt and effective remedial action). At the same time, the Department does not intend that the term "workplace conduct'' be construed expansively. As the term indicates, it refers to conduct, not performance or attendance, issues. Moreover, consistent with the examples included in the regulatory provision, it refers to serious workplace misconduct like sexual harassment, violence, drug or alcohol violations, or violations of state or federal laws. Although we believe that this additional exception to the general no-deduction rule is warranted (as was the exception added in 1954 for infractions of safety rules of major significance), it should be construed narrowly so as not to undermine the essential guarantees of the salary basis test. *See Mueller* v. *Reich*, 54 F.3d 438 (7th Cir. 1995). However, the fact that the employee misconduct occurred off the employer's property should not preclude an employer from imposing a disciplinary suspension, as long as the employer has a *bona fide* workplace conduct rule that covers such off-site conduct.

Commenters such as the FLSA Reform Coalition, the Fisher & Phillips law firm and the National Association of Chain Drug Stores urge the Department to delete the proposed requirement that any pay deductions for workplace conduct violations must be imposed pursuant to a "written policy applied uniformly to all workers.'' These commenters question the need for the policy to be in writing, and are concerned that the uniform application requirement would breed litigation and diminish employer flexibility to take individual circumstances into account. The American Corporate Counsel

Association notes that it "would not object if the present draft were further modified to condition full-day docking on the employer either adopting a written policy notifying employees of the potential for a suspension without pay as a disciplinary measure or providing the employee with written notice of a finding of job-related misconduct.'' The Department has decided to retain the requirement that the policy be in writing, on the assumption that most employers would put (or already have) significant conduct rules in writing, and to deter misuse of this exception. This provision is a new exception to the salary basis test, and the Department does not believe restricting this new exception to written disciplinary policies will lead to changes in current employer practices regarding such policies. However, the written policy need not include an exhaustive list of specific violations that could result in a suspension, or a definitive declaration of when a suspension will be imposed. The written policy should be sufficient to put employees on notice that they could be subject to an unpaid disciplinary suspension. We have clarified the regulatory language to provide that the written policy must be "applicable to all employees,'' which should not preclude an employer from making case-by-case disciplinary determinations. Thus, for example, the "written policy'' requirement for this exception would be satisfied by a sexual harassment policy, distributed generally to employees, that warns employees that violations of the policy will result in disciplinary action up to and including suspension or termination.

Commenters raise a number of other issues related to deductions from salary. *First*, in response to comments from the National Association of Convenience Stores and the Fisher & Phillips law firm, we have changed the phrase "of a full day or more'' to "one or more full days'' in sections 541.602(b)(1), (2) and (5), to clarify that a deduction of one and one-half days, for example, is impermissible.

Second, commenters, such as the National Association of Chain Drug Stores, the U.S. Chamber of Commerce, the HR Policy Association and the National Retail Federation, suggest that partial day deductions be permitted for any leave requested by an employee, including for sickness or rehabilitation, or for disciplinary suspensions. We believe that partial day deductions generally are inconsistent with the salary basis requirement, and should continue to be permitted only for infractions of safety rules of major significance, for leave under the Family and Medical Leave Act, or in the first and last weeks of employment.

Third, several commenters, such as the Morgan, Lewis & Bockius law firm, suggest an additional exception to the general no-docking rule: payments in the nature of restitution, fines, settlements or judgments an employer must make based on the misconduct of an employee. Such an additional exception, in our view, would be inappropriate and unwarranted because it would grant employers unfettered discretion to dock large amounts from the salaries of exempt employees in questionable circumstances (judgments against employers because of discriminatory employment actions taken by an exempt employee, for example). The new disciplinary deduction exception only allows deductions for unpaid suspensions of one or more days—not fines, settlements or judgments which could arguably be blamed on an exempt employee.

Fourth, the U.S. Chamber of Commerce and a few other commenters request that the Department expand proposed section 541.602 (b)(7) to include employee absences under an employer's family or medical leave policy. Subsection (b)(7) provides an exception from the no-deduction rule for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act (FMLA). This exception was mandated by Congress when it passed the FMLA in 1993. 29 U.S.C. 2612(c) ("Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938, * * * the compliance of an employer with this title by providing unpaid leave shall not affect the exempt status of the employee. * * * ''). There is no basis to enlarge the statutory exception. We also would note that deductions may be made for absences of one or more full days occasioned by sickness under section 541.602(b)(2).

Fifth, several commenters, including the National Association of Manufacturers and the American Corporate Counsel Association, urge the Department expressly to recognize that compensation shortages resulting from payroll system errors may not constitute impermissible "dockings.'' We do not believe it is appropriate to provide such a general rule in the context of this rulemaking. Whether payroll system errors constitute impermissible "dockings'' depends on the facts of the particular case, including the frequency of the errors, whether the errors are caused by employee data entry or the computer system, whether the employer promptly corrects the errors, and the feasibility of correcting the payroll system programming to eliminate the errors.

Sixth, a few commenters, such as the National Association of Chain Drug Stores and the National Council of Chain Restaurants, suggest that employers should be able to recover leave and salary advances from an employee's final pay. Recovery of salary advances would not affect an employee's exempt status, because it is not a deduction based on variations in the quality or quantity of the work performed. Recovery of partial-day leave advances, however, essentially are deductions for personal absences and would constitute an impermissible deduction. Whether recovery for a full-day leave is permissible depends on whether such a leave is covered by one of the section 541.602(b) exceptions.

Seventh, the New York State Public Employees Federation requests that if the Department retains the disciplinary deduction provision, it should eliminate the current pay-docking rule applicable to public employers. The public accountability rationale for the public employer pay-docking rule (section 541.709) continues to be valid, however, and is not affected by the new exception for disciplinary suspensions.

Finally, a number of commenters, including the Society for Human Resource Management, the National Association of Chain Drug Stores, the National Council of Chain Restaurants and the National Retail Federation, ask the Department to confirm that certain payroll and record keeping practices continue to be permissible under the new rules. We agree that employers, without affecting their employees' exempt status, may take deductions from accrued leave accounts; may require exempt employees to record and track hours; may require exempt employees to work a specified schedule; and may implement across-the-board changes in schedule under certain circumstances. *See, e.g., Webster* v. *Public School Employees of Washington, Inc.*, 247 F.3d 910 (9th Cir. 2001) (accrued leave accounts); *Douglas* v. *Argo-Tech Corp.*, 113 F.3d 67 (6th Cir. 1997) (record and track hours); *Aaron* v. *City of Wichita*, *Kansas*, 54 F.3d 652 (10th Cir.) (accrued leave accounts, record and track hours), *cert. denied*, 516 U.S. 965 (1995); *Graziano* v. *The Society of the New York Hospital*, 1997 WL 639026 (S.D.N.Y. 1997) (accrued leave accounts); Wage and Hour Opinion Letter of 2/23/98, 1998 WL 852696 (across-the-board changes in schedule); Wage and Hour Opinion

Letter of 4/15/95 (accrued leave accounts); Wage and Hour Opinion Letter of 3/30/94, 1994 WL 1004763 (accrued leave accounts); and Wage and Hour Opinion Letter of 4/14/92, 1992 WL 845095 (accrued leave accounts).

Section 541.603 Effect of Improper Deductions From Salary

Proposed section 541.603 discussed the effect of improper deductions from salary and established a new ''safe harbor'' rule. Subsection (a) of the proposal set forth the general rule that: ''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.'' Factors for determining whether an employer had such a ''pattern and practice'' listed in this subsection included: 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.'' Proposed subsection (a) also provided that ''isolated or inadvertent'' deductions would not result in loss of the exemption. Proposed section 541.603(b) further provided: ''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.'' Finally, proposed section 541.603(c) included a new ''safe harbor'' provision: ''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 would not lose the exemption for any employees unless the employer repeatedly and willfully violates that policy or continues to make improper deductions after receiving employee complaints.''

The final rule makes a number of substantive changes to the proposed section 541.603. We have modified the first two sentences of subsection (a) to better clarify that the effect of improper deductions depends upon whether the facts demonstrate that the employer intended to pay employees on a salary basis, and to substitute the phrase ''actual practice'' of making improper deductions for the ''pattern and practice'' language in proposed subsection (a). The final subsection (a) makes four changes in the factors to consider when determining whether an employer has an actual practice of making improper deductions: (1) Adding consideration of ''the number of employee infractions warranting discipline'' as compared to the number of deductions made; (2) modifying the written policy factor to state, ''whether the employer has a clearly communicated policy *permitting or* prohibiting improper deductions'' (3) deleting the ''size of employer'' factor; and (4) deleting the ''whether the employer corrected the improper deductions'' factor. The final rule moves the language regarding isolated or inadvertent improper deductions to subsection (c), and inserts language, developed from the existing regulations, requiring an employer to reimburse employees for isolated or inadvertent improper deductions. The ''safe harbor'' provision, found in final section 541.603(d), substitutes ''clearly communicated policy'' for the proposed ''written policy''; adds that the policy must include a complaint mechanism; deletes the term ''repeatedly''; clarifies that the safe harbor is not available if the employer ''willfully violates the policy by continuing to make improper deductions after receiving employee complaints''; and clarifies that if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same manager responsible for the actual improper deductions.

Proposed subsection 541.603(a) contained the general rule regarding the effect of improper deductions from salary on the exempt status of employees: ''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.'' Many commenters, including the FLSA Reform Coalition, the National Association of Manufacturers, the U.S. Chamber of Commerce and the AFL–CIO, express concern that the phrase ''pattern and practice of not paying employees on a salary basis'' in proposed subsection 541.603(a) was ambiguous and would engender litigation and perhaps result in unintended consequences. The final rule clarifies that the central inquiry to determine whether an employer who makes improper deductions will lose the exemption is whether ''the facts demonstrate that the employer did not intend to pay employees on a salary basis.'' The final subsection (a) replaces the proposed ''pattern and practice'' language with the phrase ''actual practice,'' and also states that an ''actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis.'' The phrase ''pattern and practice'' is a legal term of art in other employment law contexts which we had no intent to incorporate into these regulations. These changes should provide better guidance to the regulated community.

Most commenters support the listed factors in subsection (a) for determining when an employer has an actual practice of making improper deductions. Responding to comments submitted by the Fisher & Phillips law firm and the National Association of Convenience Stores, the final rule states that the number of improper deductions should be considered ''particularly as compared to the number of employee infractions warranting discipline.'' The Second Circuit in *Yourman* v. *Giuliani,* 229 F.3d 124, 130 (2nd Cir. 2000), *cert. denied,* 532 U.S. 923 (2001), provided the following useful comparison: an employer that regularly docks the pay of managers who come to work five hours late has more of an ''actual practice'' of improper deduction than does an employer that only sporadically docks the pay of managers who come to work five minutes late, even though the penalties imposed by this second employer could far outnumber the penalties imposed by the first. Thus, it is the *ratio* of deductions to infractions that is most informative, rather than simply the number of deductions, because the total number of deductions is significantly influenced by the size of the employer. In light of this change, we have also deleted the size of the employer as a relevant factor in final subsection (a), as we did not intend that this section be applied differently depending on the size of the employer, and have deleted ''whether the employer

has corrected the improper pay deductions'' as a relevant factor in determining whether an employer has an actual practice of improper pay deductions. We have modified the written policy factor to state: "Whether the employer has a clearly communicated policy permitting or prohibiting improper deductions'' because, as discussed below under subsection 541.603(d), the U.S. Small Business Administration Office of Advocacy and other commenters state that the written policy factor may be prejudicial to small businesses.

Final subsection 541.603(b), as in the proposal, addresses which employees will lose the exemption, and for what time period, if an employer has an actual practice of making improper deductions. The proposal provided that the exemption would be 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.'' The comments express strongly contrasting views on whether proposed section 541.603(b) should be retained or modified either to mitigate the impact on employers or to expand the circumstances in which employees would lose their exempt status. Commenters such as the Federal Wage Hour Consultants, the Society for Human Resource Management and the National Association of Chain Drug Stores support the proposal as resolving many of the misunderstandings that exist under the existing regulations and current case law. Other commenters, however, including the FLSA Reform Coalition, the U.S. Chamber of Commerce, the National Council of Chain Restaurants, the National Retail Federation, the HR Policy Association, and the County of Culpeper, Virginia, suggest that improper deductions should affect only the exempt status of the individual employees actually subjected to the impermissible pay deductions. These commenters argue that the possibility that employees who have never experienced a salary reduction could also lose their exempt status was first raised by the decision in *Abshire* v. *County of Kern, California,* 908 F.2d 483 (9th Cir. 1990), *cert. denied,* 498 U.S. 1068 (1991), and has led to extensive litigation thereafter. The HR Policy Association states that the Supreme Court in *Auer* v. *Robbins,* 519 U.S. 452 (1997), "did not rectify the central flaw in the current interpretation: that a few deductions made against a couple of employees arguably converts whole classes of employees to nonexempt.''

In contrast, commenters such as the AFL–CIO, the McInroy & Rigby law firm, the National Employment Law Project, the Goldstein, Demchak, Baller, Borgen & Dardarian law firm and the National Employment Lawyers Association urge the Department to modify the proposed provision to state that employees will lose their exempt status if they are subject to an employment policy permitting impermissible deductions, even absent any actual deductions. These comments note that the Supreme Court in *Auer* deferred to the Department's view, as expressed in its legal briefs to the Court, that employees should lose their exempt status if there is either an actual practice of making impermissible deductions or an employment policy that creates a significant likelihood of such deductions.

After giving this complex issue careful consideration, the Department has decided to retain in final subsection 541.603(b) the proposed approach that an employer who has an actual practice of making improper deductions will lose the exemption during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The final regulation also retains the language that employees in different job classifications or who work for different managers do not lose their status as exempt employees. Any other approach, on the one hand, would provide a windfall to employees who have not even arguably been harmed by a "policy'' that a manager has never applied and may never intend to apply, but on the other hand, would fail to recognize that some employees may reasonably believe that they would be subject to the same types of impermissible deductions made from the pay of similarly situated employees.

The final rule represents a departure from the Department's position in *Auer* v. *Robbins,* 519 U.S. 452 (1997). In *Auer,* the Supreme Court, deferring to arguments made in an *amicus* brief filed by the Department, found that the existing salary basis test operated to deny exempt status when "there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions.'' *Id.* at 461. In deferring to the Department, the Supreme Court stated:

> Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless "plainly erroneous or inconsistent with the regulation.''
>
> * * * * *
>
> Petitioners complain that the Secretary's interpretation comes to us in the form of a legal brief; but that does not, in the circumstances of this case, make it unworthy of deference.

Id. at 461–62 (citations omitted). Thus, in *Auer,* the Supreme Court relied on arguments made in the Department's *amicus* brief interpreting ambiguous regulations existing at the time of the decision. The "significant likelihood'' test is not found in the FLSA itself or anywhere in the existing Part 541 regulations. Moreover, nothing in *Auer* prohibits the Department from making changes to the salary basis regulations after appropriate notice and comment rulemaking. *See Keys* v. *Barnhart,* 347 F.3d 990, 993 (7th Cir. 2003).

We are concerned with those employees who actually suffer harm as a result of salary basis violations and want to ensure that those employees receive sufficient back pay awards and other appropriate relief. We disagree, however, with those comments arguing that only employees who suffered an actual deduction should lose their exempt status. An exempt employee who has not suffered an actual deduction nonetheless may be harmed by an employer docking the pay of a similarly situated co-worker. An exempt employee in the same job classification working for the same manager responsible for making improper deductions, for example, may choose not to leave work early for a parent-teacher conference for fear that her pay will be reduced, and thus is also suffering harm as a result of the manager's improper practices. Because exempt employees in the same job classification working for the same managers responsible for the actual improper deductions may reasonably believe that their salary will also be docked, such employees have also suffered harm and therefore should also lose their exempt status. The Department's construction best furthers the purposes of the section 13(a)(1) exemptions because it realistically assesses whether an employer intends to pay employees on a salary basis. For the same reasons, final subsection (a) provides that "whether the employer has a clearly communicated policy permitting or prohibiting improper deductions'' is one factor to consider when determining whether the employer has an actual practice of not paying employees on a salary basis.

A number of commenters, such as the FLSA Reform Coalition, the U.S. Chamber of Commerce and the National

Employment Lawyers Association, ask the Department to clarify how section 541.603(b) would apply if deductions result from a corporate-wide policy or the advice a manager receives from the human resources department. We believe that final section 541.603 calls for a case-by-case factual inquiry. Thus, for example, under final subsection 541.603(a), a corporate-wide policy permitting improper deductions is some evidence that an employer has an actual practice of not paying employees on a salary basis, but not sufficient evidence by itself to cause the exemption to be lost if a manager has never used that policy to make any actual deductions from the pay of other employees. Moreover, in such a circumstance, the existence of a clearly communicated policy prohibiting such improper deductions would weigh against the conclusion that an actual practice exists.

Final subsection (c) contains language taken from proposed subsection 541.603(a) and the existing ''window of correction'' in current subsection 541.118(a)(6) regarding the effect of ''isolated'' or ''inadvertent'' improper deductions. Some commenters request additional clarification regarding the meaning of these terms. Inadvertent deductions are those taken unintentionally, for example, as a result of a clerical or time-keeping error. *See, e.g., Jones* v. *Northwest Telemarketing, Inc.,* 2000 WL 568352, at *3 (D. Or. 2000); *Reeves* v. *Alliant Techsystems, Inc.,* 77 F. Supp. 2d 242, 251 (D.R.I. 1999). *See also Furlong* v. *Johnson Controls World Services, Inc.,* 97 F. Supp. 2d 1312, 1317 (S.D. Fla. 2000) (partial day deductions, made pursuant to the employer's mistaken belief that the employee's absences were covered by the Family and Medical Leave Act's statutory exemption to the salary basis test due to the employee's representations and actions, are considered inadvertent). Whether deductions are ''isolated'' is determined by reference to the factors set forth in final subsection 541.603(a). Other commenters object to the proposed ''isolated or inadvertent'' language because the proposal did not require employees to be reimbursed for the improper deductions that are isolated or inadvertent.

The AFL–CIO, for example, states that the ''underlying purpose of the window of correction is *not* simply to ensure that an employer does not lose the FLSA exemption because of inadvertent or isolated incidents of improper pay deductions, but rather to provide a means for an employer who has demonstrated an objective intention to pay its employees on a salary basis to remedy improper deductions and avoid further liability.'' We agree with commenters who state that employees whose salary has been improperly docked should be reimbursed, even if the improper deductions were isolated or inadvertent. Thus, final subsection (c) provides: ''Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.'' The Department continues to adhere to current law that reimbursement does not have to be made immediately upon the discovery that an improper deduction was made. *See*, *e.g.*, *Moore* v. *Hannon Food Service,* Inc., 317 F.3d 489, 498 (5th Cir.), *cert. denied,* 124 S. Ct. 76 (2003) (reimbursement made five days before trial held sufficient because reimbursement ''may be made at any time'').

The existing ''window of correction'' is not a model of clarity. It has been difficult for the Department to administer, been the source of considerable litigation, and produced divergent interpretations in the courts of appeals. Most notably, federal courts have reached different conclusions regarding the interpretation and application of existing section 541.118(a)(6), ''or is made for reasons other than lack of work.'' *Compare Moore* v. *Hannon Food Service, Inc.,* 317 F.3d 489 (5th Cir.), *cert. denied,* 124 S. Ct. 76 (2003), with *Takacs* v. *Hahn Automotive Corp.,* 246 F.3d 776 (6th Cir.), *cert. denied,* 534 U.S. 889 (2001), *Whetsel* v. *Network Property Services, L.L.C.,* 246 F.3d 897 (7th Cir. 2001), *Yourman* v. *Giuliani,* 229 F.3d 124 (2nd Cir. 2000), *cert. denied,* 532 U.S. 923 (2001), and *Klem* v. *County of Santa Clara,* 208 F.3d 1085 (9th Cir. 2000).

There is no need to resolve the conflict between these cases for purposes of the final rule because of the changes made in this subsection (c) and the new safe harbor provision in final subsection (d). Under final subsection (c), isolated and inadvertent improper deductions do not result in loss of the exemption if the employer reimburses the employee for such improper deductions. Further, as discussed below, for other actual improper deductions, employers can preserve the exemption by taking advantage of the safe harbor provision. The safe harbor provision applies regardless of the reason for the improper deduction—whether improper deductions were made for lack of work or for reasons other than lack of work. For the reasons discussed below, the Department believes that the new ''safe harbor'' is the best approach going forward. However, we recognize that some cases, based on events arising before the effective date of these revisions, will be governed by the prior version of the ''window of correction.'' This final rule is not intended to govern those cases in any way, or to express a view regarding the correct interpretation of the prior version of the ''window of correction.'' Instead, we intend only to adopt a different approach going forward for the reasons stated herein.

Many commenters, including the National Association of Manufacturers, the Society for Human Resource Management, the Federal Wage Hour Consultants, the American Health Care Association and the American Bakers Association, generally support the proposed safe harbor provision, moved to subsection (d) in the final rule. These commenters state that the proposal was an ''excellent common sense approach'' that promoted proactive steps by employers to protect employees without risking liability and resolved a conflict in the case law. Other commenters, however, while supporting the goal of the proposed safe harbor, believe it to be confusing and suggest modifications. The American Corporate Counsel Association, for example, notes that the interplay between sections 541.603(a), (b) and (c) ''is not immediately obvious to trained professionals responsible for securing compliance.'' The U.S. Chamber of Commerce (Chamber) comments that the phrase ''repeatedly and willfully'' in the proposed provision was vague, and the Chamber supports the construction of the ''window of correction'' in *Moore* v. *Hannon Food Service, Inc.,* 317 F.3d 489 (5th Cir.), *cert. denied,* 124 S. Ct. 76 (2003). The Chamber also argues that the proposal only provides an incentive for employers to adopt policies prohibiting improper deductions, but not to take corrective action; believes that the requirement for a written policy was impractical; and suggests eliminating the provision denying use of the safe harbor to employers that make improper deductions after receiving employee complaints. The U.S. Small Business Administration Office of Advocacy also objects to the written policy requirement as excluding some small businesses. The National Association of Manufacturers objects to the elimination of the phrase ''for reasons other than lack of work'' in the existing regulations.

Commenters such as the AFL–CIO, the National Employment Lawyers Association, the National Employment Law Project and the Public Justice

Center oppose the proposed safe harbor provision, arguing that it eviscerated the salary basis requirement by permitting an employer to avoid overtime liability even after making numerous impermissible deductions.

After careful consideration of the comments and case law, the Department continues to believe that the proposed safe harbor provision is an appropriate mechanism to encourage employers to adopt and communicate employment policies prohibiting improper pay deductions, while continuing to ensure that employees whose pay is reduced in violation of the salary basis test are made whole. Thus, the final rule retains the proposed language with several changes. In our view, this provision achieves the goals, supported by many comments, of both encouraging employers to adopt ''proactive management practices'' that demonstrate the employers' intent to pay on a salary basis, and correcting violative payroll practices. *Cf. Kolstad* v. *American Dental Ass'n,* 527 U.S. 526, 545 (1999) (Title VII of the Civil Rights Act is intended to promote prevention and remediation). In addition, employees will benefit from this additional notification of their rights under the FLSA and the complaint procedures. We intend this safe harbor provision to apply, for example, where an employer has a clearly communicated policy prohibiting improper deductions, but a manager engages in an actual practice (neither isolated nor inadvertent) of making improper deductions. In this situation, regardless of the reasons for the deductions, the exemption would not be lost for any employees if, after receiving and investigating an employee complaint, the employer reimburses the employees for the improper deductions and makes a good faith commitment to comply in the future. We believe it furthers the purposes of the FLSA to permit the employer who has a clearly communicated policy prohibiting improper pay deductions and a mechanism for employee complaints, to reimburse the affected employees for the impermissible deductions and take good faith measures to prevent improper deductions in the future. This is generally consistent with trends in employment law. An employer, for example, that has promulgated a policy against sexual harassment and takes corrective action upon receipt of a complaint of harassment may avoid liability. *See Faragher* v. *City of Boca Raton,* 524 U.S. 775 (1998), and *Burlington Industries, Inc.* v. *Ellerth,* 524 U.S. 742 (1998). Consistent with final subsection 541.603(b), final subsection (c) also provides that, if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, ''the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.''

The comments raise several additional issues. *First*, as previously noted, some commenters object to the requirement that an employer have a written policy in order to utilize the safe harbor. The U.S. Small Business Administration Office of Advocacy, for example, notes that small business representatives express concern that the safe harbor's requirement for a pre-existing written policy ''may exclude some small businesses which do not produce written compliance materials in the ordinary course of business.'' The U.S. Chamber of Commerce similarly heard concerns from its small business members that the requirement for a written policy would be impractical. It suggests that ''[w]hile employers seek to comply with the law, the safe harbor seems geared to those already sufficiently versed in the law and is likely to be of little effect to less sophisticated employers.'' Other commenters, such as the American Health Care Association, the American Corporate Counsel Association, and the National Association of Manufacturers, believe that adopting a written policy is an essential part of the employer's responsibility. We intend the safe harbor to be available to employers of all sizes. Thus, although a written policy is the best evidence of the employer's good faith efforts to comply with the Part 541 regulations, we have concluded, consistent with an employer's obligation under *Farragher* and *Ellerth*, that a written policy is not essential. However, the policy must have been communicated to employees prior to the actual impermissible deduction. Thus, final subsection (d) provides that the safe harbor is available to employers with a ''clearly communicated policy'' prohibiting improper pay deductions. To protect against possible abuses, final subsection (d) adds the requirement that the clearly communicated policy must include a ''complaint mechanism.'' Final subsection (d) also states that the ''clearly communicated'' standard may be met, for example, by ''providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.'' For small businesses, the ''clearly communicated policy'' could be a statement to employees that the employer intends to pay the employees on a salary basis and will not make deductions from salary that are prohibited under the Fair Labor Standards Act; such a statement would also need to include information regarding how the employees could complain about improper deductions, such as reporting the improper deduction to a manager or to an employee responsible for payroll. To further assist small businesses, the Department intends to publish a model safe harbor policy that would comply with final subsection 541.603(d).

Second, some commenters, such as the HR Policy Association and the National Employment Lawyers Association, support a requirement in the subsection (d) safe harbor provision that the employer must ''promise to comply'' in the future. Although other commenters oppose such a requirement, we believe that this promise is inherent in adopting the required employment policy and the duty to cease making improper deductions after receiving employee complaints. Thus, the Department has included as an explicit requirement for the safe harbor rule in final subsection (d) that the employer make a good faith commitment to comply in the future. There may be many ways that an employer could make and evidence its ''good faith commitment'' to comply in the future including, but not limited to: adopting or re-publishing to employees its policy prohibiting improper pay deductions; posting a notice including such a commitment on an employee bulletin board or employer Intranet; providing training to managers and supervisors; reprimanding or training the manager who has taken the improper deduction; or establishing a telephone number for employee complaints.

Third, to avoid confusion that some commenters noted with the ''actual practice'' determination under final subsection (a), we have changed the phrase ''repeatedly and willfully'' to ''willfully,'' and defined ''willfully'' as continuing to make improper deductions after receiving employee complaints. This definition of ''willfully'' is consistent with *McLaughlin* v. *Richland Shoe,* 486 U.S. 128, 133–35 (1988) (''willfulness'' means that ''the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute''). Thus, as stated above, an employer with a clearly

communicated policy that prohibits improper pay deductions and includes a complaint mechanism will not lose the exemption for any employee if the employer reimburses employees for the improper deductions after receiving employee complaints and makes a good faith commitment to comply in the future. This rule applies, moreover, regardless of the reasons for the improper pay deductions. The safe harbor is available both for improper deductions made because there is no work available and for improper deductions made for reasons other than lack of work. If the employer fails to reimburse the employees for improper deductions or continues to make improper deductions after receiving employee complaints, final subsection (d) clarifies that "the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.''

Fourth, the HR Policy Association, the U.S. Chamber of Commerce, the National Association of Chain Drug Stores and others ask the Department to allow employers a reasonable amount of time to investigate after receiving an employee complaint to determine whether the deductions were improper, to take action to halt any improper deductions, and to correct any improper deductions. We have not changed the text of the regulation in response to this suggestion because the Department views it as self-evident that, before reimbursing the employee or taking other corrective action, an employer will need a reasonable amount of time to investigate an employee's complaint that an improper deduction was made. The amount of time it will take to complete the investigation will depend upon the particular circumstances, but employers should begin such investigations promptly. The mere fact that other employee complaints are received by the employer before timely completion of the investigation should not, by itself, defeat the safe harbor.

Finally, a number of commenters, such as the Food Marketing Institute, ask the Department to clarify the burdens of proof. We do not intend to modify the burdens that courts currently apply. *See Schaefer* v. *Indiana Michigan Power Co.*, 358 F.3d 394 (6th Cir. 2004) (employer has the burden to show employee was paid on a salary basis); *Yourman* v. *Giuliani*, 229 F.3d 124 (2nd Cir. 2000) (employee has the burden to show actual practice of impermissible deductions), *cert. denied*, 532 U.S. 923 (2001).

Section 541.604 Minimum Guarantee Plus Extras

Under proposed section 541.604, an exempt employee may receive additional compensation beyond the minimum amount that is paid as a guaranteed salary. For example, an employee may receive, in addition to the guaranteed minimum paid on a salary basis, extra compensation from commissions on sales or a percentage of the profits. An exempt employee may also receive additional compensation for extra hours worked beyond the regular workweek, such as half-time pay, straight time pay, or a flat sum. Proposed section 541.604(b) provided that an exempt employee's salary may be computed on an hourly, daily or shift basis, if the employee is given 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 requirement is satisfied where the weekly guarantee is "roughly equivalent'' to the employee's actual usual earnings. Thus, for example, the proposal stated that where an employee is guaranteed at least $500 per week, and the employee normally works four or five shifts per week and is paid $150 per shift, the reasonable relationship requirement is satisfied.

The final rule does not make any substantive changes to the proposed rule, but does make a number of clarifying changes. The reasonable relationship requirement incorporates in the regulation Wage and Hour's long-standing interpretation of the existing salary basis regulation, which is set forth in the agency's Field Operations Handbook and in opinion letters. The courts also have upheld the reasonable relationship requirement. *See, e.g.*, *Brock* v. *Claridge Hotel & Casino,* 846 F.2d 180, 182–83 (3rd Cir.) (salary basis requirement not met where employees are paid by the hour and the guarantee is "nothing more than an illusion''), *cert. denied,* 488 U.S. 925 (1988). Some commenters, although not a significant number, object to the reasonable relationship requirement or question the clarity of the regulatory text, while others ask for additional specificity about the various types of additional compensation that may be paid above and beyond the guaranteed salary. The Department has made minor wording changes in response to the comments to clarify this provision.

The National Association of Manufacturers (NAM) suggests that the Department list the range of compensation options, such as cash overtime in any increment, compensatory time off, and shift or holiday differentials, that employers may provide in addition to the guaranteed salary without violating the salary basis requirement. NAM gave the specific example of an employer who allows an exempt worker to take a day off as a reward for hours worked on a weekend outside the employee's normal schedule. The proposed regulation provided some examples and stated that additional compensation "may be paid on any basis.'' We agree that the examples described above would not violate the salary basis test. However, we have not and could not include in the regulations every method employers might use to provide employees with extra compensation for work beyond their regular workweek. Thus, we have added only one of the examples NAM suggests regarding compensatory time off.

The National Technical Services Association states that it was unclear whether the reasonable relationship requirement applies in all cases to employees who receive a salary and additional compensation. We have clarified that this requirement applies only when an employee's actual pay is computed on an hourly, daily or shift basis. Thus, for example, if an employee receives a guaranteed salary plus a commission on each sale or a percentage of the employer's profits, the reasonable relationship requirement does not apply. Such an employee's pay will understandably vary widely from one week to the next, and the employee's actual compensation is not computed based upon the employee's hours, days or shifts of work.

A few commenters, including the National Association of Convenience Stores, the Fisher & Phillips law firm and the American Council of Engineering Companies, advocate the elimination of the reasonable relationship test. They question whether it was appropriate for the Department to require a reasonable relationship between the guaranteed salary and the employee's actual usual compensation when the payments are based on the employee's quantity of work, when the Department does not have such a requirement for salaries plus commissions or other similar compensation. They state that, so long as the employee also is guaranteed compensation of not less than the minimum required amount, it ought to be irrelevant how an employee's pay is computed. Moreover, they state that the terms "reasonable relationship'' and

"roughly equivalent'' are uncertain and will be subject to litigation. Fisher & Phillips also states that the first sentence of proposed section 541.604(a) is ambiguous because it suggests that the extra compensation must somehow be paid consistent with the salary basis requirements. The Department does not agree with the comments suggesting the elimination of the reasonable relationship requirement. If it were eliminated, an employer could establish a pay system that calculated exempt employees' pay based directly upon the number of hours they work multiplied by a set hourly rate of pay; employees could routinely receive weekly pay of $1,500 or more and yet be guaranteed only the minimum required $455 (thus effectively allowing the employer to dock the employees for partial day absences). Such a pay system would be inconsistent with the salary basis concept and the salary guarantee would be nothing more than an illusion. We believe that the proposed regulation provided clear guidance about the reasonable relationship requirement. The Department has never suggested a particular percentage requirement in prior opinion letters, and this issue has rarely arisen in litigation over the years. The proposed rule clarified these terms by stating that an employee who is 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.'' Therefore, we have not made any changes to the proposal in this regard. However, we have modified the introductory sentence to clarify that the extra compensation does not have to be paid on a salary basis.

One commenter states that the "minimum guarantee plus extras'' concept allows too much flexibility and essentially allows an employer to circumvent the prohibition against docking for absences due to a lack of work. The commenter gives the example of registered nurses whose average pay is $30 per hour, who would earn the guaranteed minimum in two shifts. The commenter believes that the entire balance of the workweek could be compensated as "extra compensation.'' Thus, the commenter expresses concern that a nurse could be paid for all additional shifts on a straight time basis, with no overtime, and if the hospital had a lack of work, the nurse might not receive more than the two shifts required to earn the minimum guarantee. This commenter views such a system as effectively converting a nurse into an hourly employee not paid overtime, or a salaried employee whose pay was reduced due to variations in the quantity of work performed. However, under the final rule, if an employee is compensated on an hourly basis, or on a shift basis, there must be a reasonable relationship between the amount guaranteed per week and the amount the employee typically earns per week. Thus, if a nurse whose actual compensation is determined on a shift or hourly basis usually earns $1,200 per week, the amount guaranteed must be roughly equivalent to $1,200; the employer could not guarantee such an employee only the minimum salary required by the regulation.

Another commenter states that allowing an exempt employee to be paid based on an hourly computation is inconsistent with the general requirement that exempt employees must be paid on a salary basis. This comment does not take account of the fact that the employees affected by the reasonable relationship requirement must receive a salary guarantee that applies in any week in which they perform any work. The tolerance for computing their actual pay on an hourly, shift or daily basis is for computation purposes only; it does not negate the fact that such employees must receive a salary guarantee that will be in effect any time the employer does not provide sufficient hours or shifts for them to reach the guarantee. We believe that the reasonable relationship requirement, which has been a Wage and Hour Division policy for at least 30 years (see FOH § 22b03), ensures that the salary guarantee for such employees is a meaningful guarantee rather than a mere illusion.

Section 541.605 Fee Basis

Proposed section 541.605 simplified the fee basis provision in the current rule, but made no substantive change. Thus, the proposed rule provided that administrative and professional employees may be paid on a fee basis, rather than a salary basis: "An employee may 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.'' Generally, a "fee'' is paid for a unique job. "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.''

The final rule does not make any changes to the proposed rule. Very few comments were submitted on this provision. The Fisher & Phillips law firm notes that the Sixth Circuit in *Elwell* v. *University Hospitals Home Care Services,* 276 F.3d 832 (6th Cir. 2002), held that a compensation plan that combines fee payments and hourly pay does not qualify as a fee basis because it ties compensation, at least in part, to the number of hours or days worked and not on the accomplishment of a given single task. It asks the Department to amend the rule to permit combining the payment of a fee with additional, non-fee-based compensation. The Department has decided not to change the long-standing fee basis rule because the only appellate decision that addresses this issue accepted the "fee-only'' requirement, and Fisher & Phillips conceded that this is an "arcane and rarely-used'' provision. We continue to believe that payment of a fee is best understood to preclude payment of additional sums based on the number of days or hours worked. Another commenter asks the Department to revise the rule to eliminate the necessity for "employers to track hours on a project or assignment in order to determine the exempt status of employees.'' However, as in the current rule, the final rule reasonably prescribes that in determining the adequacy of a fee payment, reference should be made to a standard workweek of 40 hours. Thus, "[t]o 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 $455 per week if the employee worked 40 hours.''

Section 541.606 Board, Lodging or Other Facilities

Proposed section 541.606 defined the terms, "board, lodging or other facilities.'' The Department did not receive substantive comments on this section, and has made no changes in the final rule.

Subpart H, Definitions and Miscellaneous Provisions

Section 541.700 Primary Duty

Proposed section 541.700 defined the term "primary duty'' as "the principal, main, major or most important duty that the employee performs.'' The proposed rule stated that a determination of an employee's primary duty "must be based on all the facts in a particular case,'' and set forth four nonexclusive factors to consider: "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 proposed rule also provided that exempt employees are not required to spend over 50 percent of their time performing exempt work. However, because the amount of time spent performing exempt work "can be a useful guide,'' employees who spend over 50 percent of their time performing exempt work "will be considered to have a primary duty of performing exempt work.'' The section contained an example illustrating the circumstances in which employees spending less than 50 percent of their time performing exempt work can meet the primary duty test, and stated that the fact an employer has "well-defined operating policies or procedures should not by itself defeat an employee's exempt status.''

Section 541.700 of the final rule retains essentially the same principles as the proposed rule, but has been reorganized and supplemented with additional language and a second example to clarify the "primary duty'' concept. Section 541.700(a) now sets forth the general principles regarding the "primary duty'' requirement. The basic definition of "primary duty,'' as the "principal, main, major or most important duty that the employee performs,'' is unchanged. However, the final rule reinserts language from existing section 541.304 that the words "primary duty'' places the "major emphasis on the character of the employee's job as a whole.'' The final section 541.700(b) discusses in more detail the factor of the amount of time an employee spends performing exempt work. With only minor changes from the proposed rule, subsection (b) states that the "amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.'' In addition, subsection (b) now includes language reinserted from existing section 541.103 with some editorial changes that: "Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.'' The final section 541.700(c) contains two examples applying the factors listed in subsection (a). The first example is modified from the proposed rule by deleting the proposed language "handling customer complaints'' and substituting the phrase "managing the budget.'' As explained elsewhere in this preamble, handling customer complaints may be exempt or nonexempt work depending on the facts of a particular case. Thus, "managing the budget'' is used as a better example of clearly exempt work. The second, new example states: "However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.'' Finally, the sentence in the proposed rule regarding operating policies or procedures has been deleted here because it seems relevant only to the administrative exemption and is addressed in that subpart of the final regulations.

Most of the commenters support the clarifying changes to the definition of "primary duty'' in section 541.700. For example, the HR Policy Association, the U.S. Chamber of Commerce, the National Restaurant Association, and the National Association of Manufacturers welcome clarification of the primary duty concept, particularly with respect to the amount of time spent performing exempt work, and found section 541.700 simpler to apply and more reflective of the current workplace. The National Association of Federal Wage Hour Consultants states that: " 'Primary Duty' is currently one of the most misunderstood sections of the regulations. Too often enforcement personnel, the business community and its representatives confuse 'primary' with a 'mechanical' percentage test, *i.e.*, 50-plus percent.''

Some commenters object to the definition of "primary duty'' in section 541.700 as the "principal, main, major or most important duty that the employee performs.'' Commenters such as the National Employment Lawyers Association, for example, argue that terms such as "most important'' are vague, expand the primary duty analysis "far beyond its current bounds,'' and would lead to increased litigation.

This language is the first time the Department has attempted to include a short, general statement defining the term "primary'' in the regulations, but it is not a change in current law. Numerous federal courts, relying primarily on dictionary definitions, have defined the term "primary'' to mean "most important,'' "principal'' or "chief.'' *See, e.g., Mellas* v. *City of Puyallup,* 1999 WL 841240, at *2 (9th Cir. 1999) ("most important'' duty); *Dalheim* v. *KDFW–TV,* 918 F.2d 1220, 1227 (5th Cir. 1990) ("[T]he essence of the test is to determine the employee's chief or principal duty * * * [T]he employee's primary duty will usually be what she does that is of principal value to the employer''); *Donovan* v. *Burger King Corp.,* 675 F.2d 516, 521 (2nd Cir. 1982) (primary duty defined as the employee's "principal responsibilities'' that are "most important or critical to the success'' of the employer); *Donovan* v. *Burger King Corp.,* 672 F.2d 221, 226 (1st Cir. 1982) (primary duty defined as the "principal'' or "chief'' duty, rather than "over one-half'') (internal quotation marks omitted). Because the Department relied on these cases, the existing regulations, and dictionary definitions to formulate the general definition of "primary,'' the commenters' concerns are without merit.

The major comments expressing opposition to proposed section 541.700 view the primary duty definition to be a major departure from a purported existing "bright-line'' test in the current regulations requiring exempt employees to spend more than 50 percent of their time performing exempt work. The American Federation of Government Employees (AFGE), for example, states that proposed section 541.700 was "essentially, the destruction of the most crucial test in the entire FLSA exemption area.'' The AFGE, like other commenters objecting to this section, believes that the current primary duty test "provides an absolutely essential 'bright line' for exemption analysis: 50% of an employee's actual job performance must be engaged in exempt activities.'' Abandonment of this "bright-line test,'' such commenters assert, will result in increased confusion and litigation. The National Employment Lawyers Association similarly states: "If the definition of 'primary duty' is to have meaning as a limit on the exemptions, it must contain a time component that has more effect than being one of five enumerated factors to consider.''

After careful consideration, the Department must reject these objections. These comments fail to take account of the existing regulations and federal case law. Comments objecting to section 541.700 are simply wrong in asserting that the current law defines "primary duty'' by a bright-line 50 percent test. The existing section 541.103 has for decades provided that "it may be taken *as a good rule of thumb* that primary duty means the major part, or over 50 percent, of the employee's time'' but that "[t]ime alone, however, is not the sole test.'' Thus, section 22c02 of the

Wage and Hour Field Operations Handbook states that "the 50% test is not a hard-and-fast rule but rather a flexible rule of thumb. In many cases, an exempt employee may spend less than 50% of his time in managerial duties but still have management as his primary duty.'' Federal courts also recognize that the current regulations establish a 50 percent "rule of thumb''—not a "bright-line'' test. Federal courts have found many employees exempt who spent less than 50 percent of their time performing exempt work. *See, e.g., Jones* v. *Virginia Oil Co.,* 2003 WL 21699882, at *4 (4th Cir. 2003) (management found to be the "primary duty'' of employee who spent 75 to 80 percent of her time on basic line-worker tasks); *Murray* v. *Stuckey's, Inc.,* 939 F.2d 614, 618–20 (8th Cir. 1991) (manager met the "primary duty'' test despite spending 65 to 90 percent of his time in non-management duties), *cert. denied,* 502 U.S. 1073 (1992); *Glefke* v. *K.F.C. Take Home Food Co.,* 1993 WL 521993, at *4–5 (E.D. Mich. 1993) (employee found exempt despite assertion that she spent less than 20 percent of time on managerial duties because "the percentage of time is not determinative of the primary duty question, rather, it is the collective weight of the four factors''); *Stein* v. *J.C. Penney Co.,* 557 F. Supp. 398, 404–05 (W.D. Tenn. 1983) (employee spending 70 to 80 percent of his time on non-managerial work held exempt because the "overall nature of the job'' is determinative, not "the precise percentage of time involved in a particular type of work'').

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

Other commenters objecting to section 541.700, such as the International Federation of Professional & Technical Engineers, assert that section 541.700 adopts an "Alice in Wonderland'' approach. They assert that this section creates an "outcome-oriented double standard'' because it provides that employees who spend more than 50 percent of their time performing exempt work generally satisfy the primary duty test, while employees spending less than 50 percent do not necessarily fail the test.

But what the commenters call an "Alice in Wonderland'' double standard actually appears in the current Part 541 regulations. For decades, current section 541.103 has created a presumption of exempt status for employees crossing the 50-percent threshold while recognizing no presumption of nonexempt status for those who do not cross the threshold. The existing section 541.103 states:

> Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion.

See also Auer v. *Robbins,* 65 F.3d 702, 712 (8th Cir. 1995) ("if an employee spends less than 50% of his time on managerial duties, he is not presumed to have a primary duty of nonmanagement''), *aff'd on another issue,* 519 U.S. 452 (1997). The final rule retains this current language with only minor editorial changes.

The final rule lists the same four non-exclusive factors as the proposal for determining the primary duty of an employee: (1) The relative importance of the exempt duties as compared with other types of duties; (2) the amount of time spent performing exempt work; (3) the employee's relative freedom from direct supervision; and (4) the relationship between the employee's salary and the wages paid to other employees for the same kind of nonexempt work. The time spent performing exempt work has always been, and will continue to be, just one factor for determining primary duty. Spending more than 50 percent of the time performing exempt work has been, and will continue to be, indicative of exempt status. Spending less than 50 percent of the time performing exempt work has never been, and will not be, dispositive of nonexempt status.

Several commenters request clarification as to whether the determination of an employee's primary duty is made by looking to a single duty or many duties. The Morgan, Lewis & Bockius law firm, for example, suggests that the Department change "primary duty'' to "primary duties,'' in order to reduce the perception that any single task, rather than the aggregate of job tasks, defines an employee's primary duty. In contrast, the AFL–CIO asserts that the term is properly considered in the singular.

The current law is actually somewhere in the middle of these two viewpoints. Although "primary duty'' is generally singular, an employee's primary duty can encompass multiple tasks. Thus, for example, an employee would have "management'' as his primary duty if he performed tasks such as preparing budgets, negotiating contracts, planning the work, and reporting on performance. As stated in the 1949 Weiss Report at 61, the search for an employee's primary duty is a search for the "character of the employee's job as a whole.'' Thus, both the current and final regulations "call for a holistic approach to determining an employee's primary duty,'' not "day-by-day scrutiny of the tasks of managerial or administrative employees.'' *Counts* v. *South Carolina Electric & Gas Co.,* 317 F.3d 453, 456 (4th Cir. 2003) ("Nothing in the FLSA compels any particular time frame for determining an employee's primary duty''). To clarify this "holistic approach,'' the Department has reinserted in subsection (a) the language from current 541.304 that the determination of an employee's primary duty must be based on all the facts in a particular case "*with the major emphasis on the character of the employee's job as a whole.*''

The Department considered but has not incorporated in the final rule other various proposals to add, delete or modify section 541.700. For example, because the Department does not intend to eliminate the amount of time spent on exempt tasks as a factor for determining primary duty, we reject the suggestion of the Morgan, Lewis & Bockius law firm and others to remove the language stating that time is a "useful guide.'' The Smith Currie law firm proposes adding "in the discretion of the employer'' to the definition of primary duty. However, the primary duty determination is based on all the facts and circumstances of each case, not upon the "discretion'' of the employer. Similarly, the National Association of Chain Drug Stores (NACDS) proposes allowing employers the opportunity, as they have under the Americans with Disabilities Act, to create a "rebuttable presumption'' regarding an employee's primary duty by identifying the principal duties of the employee in a job description. NACDS suggests adding "as determined or expressed by the employer in any agreement, job status form, job offer, job description or other document created by the employer in good faith and acknowledged by the employee verbally

or in writing.'' The Department recognizes that such documents or agreements may be of some evidentiary value. However, the work actually performed by an employee—not any description or agreement—controls the determination of the employee's primary duty. *See* 1949 Weiss Report at 86 (rejecting proposal to permit employer and employee to reach agreement as to whether exemptions apply); 1940 Stein Report at 25 ("a title alone is of little or no assistance in determining the true importance of an employee to the employer. Titles can be had cheaply and are of no determinative value''). The Food Marketing Institute comments that the definition should explicitly state that employees, such as managers in retail establishments, "should not be subject to arbitrary calculations of the time they spend performing manual labor. * * *'' As set forth in the cases cited above, and in the examples in the final rule, the Department has made clear that managers may perform exempt work less than 50 percent of the time and nevertheless have a primary duty of management, depending upon the collective weight of the factors. Final section 541.106 also provides that an employee's managerial duties can be performed concurrently with nonexempt tasks. No further clarification of this point is necessary. Finally, the Fisher & Phillips law firm seeks modification of the wage comparison factor to reflect that exempt employees are frequently eligible for other forms of compensation not widely available to nonexempt employees. Because final section 541.700(a) already provides that all the facts and circumstances of each case are relevant, such facts may be taken into account in determining primary duty without further changes in this section.

Section 541.701 Customarily and Regularly

Proposed section 541.701 defined the phrase "customarily and regularly'' to mean "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 workweek; it does not include isolated or one-time tasks.''

The final section 541.701 retains the proposed language without change.

The Department received a few comments on section 541.701 that the "every workweek'' requirement in section 541.701 does not reflect that some exempt tasks may not be performed every week or only once each week. The Grocery Manufacturers of America (GMA), for example, states that this language is ambiguous and does not take into account that certain activities, such as lengthy preparation and presentation time that often goes into significant sales efforts, may not take place "recurrently'' within a given week. GMA proposes that the term "customarily and regularly'' should mean "duties performed at least once in each workweek.'' Similarly, the McInroy & Rigby law firm and the Miller Canfield law firm seek clarification of the "workweek-by-workweek'' timeframe and its application in determining exempt activities.

The Department does not believe any changes to section 541.701 are necessary. A similar definition of the term "customarily and regularly'' has appeared for decades in section 541.107(b) of the existing regulations, and case law does not indicate significant difficulties with applying the definition. The term "customarily and regularly'' requires a case-by-case determination, based on all the facts and circumstances, over a time period of sufficient duration to exclude anomalies. *See, e.g.,* Wage and Hour Opinion of August 20, 1992, 1992 WL 845098 (analysis should be "over a significant time span, especially in smaller organizations * * * to eliminate the possibility of significant cycles in work requirements and to support that there are sufficient exempt duties on a week-in-week-out basis to support the exemption claimed''); Wage and Hour Field Operations Handbook, section 22c00(d) ("The determination as to whether an employee customarily and regularly supervises other employees * * * depends on all the facts and circumstances''). Nothing in this section requires that, to meet the definition of "customarily and regularly,'' a task be performed more than once a week or that a task be performed each and every workweek.

Section 541.702 Exempt and Nonexempt Work

Proposed section 541.702 stated, "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.' '' The final rule deletes the inadvertent reference to a non-existent section 541.206 and the reference to the now-deleted "sole charge'' exemption in proposed section 541.102. The Department received no significant comments on this section, and thus has made no other changes.

Section 541.703 Directly and Closely Related

Proposed section 541.703 defined the phrase "directly and closely related'' to mean "tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work.'' Subsection (a) further explains that "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.'' Proposed section 541.703(b) set forth 10 examples to illustrate the type of work that is and is not normally considered as directly and closely related to exempt work.

The final section 541.703 retains the proposed language without change.

The AFL–CIO comments that under the proposed section, "it is hard to imagine any type of nonexempt work failing to qualify as 'directly and closely related.' ''

The Department notes that the explanation of the phrase "directly and closely related'' in final section 541.703(a) is taken from the current sections 541.108 and 541.202, including the specific language concerning what is not "directly and closely related'' to which the AFL–CIO objected. *See* current 29 CFR 541.202(d) ("These 'directly and closely related' duties are distinguishable from * * * *those which are remotely related or completely unrelated to the more important tasks*'') (emphasis added). Similarly, the notion that "directly and closely related'' work contributes to or facilitates the performance of exempt work is a long-standing and common sense concept reflected in the current rule. *See* current 29 CFR 541.202(c). The Department did not intend any substantive change to the meaning of the phrase "directly and closely related'' and intends that the term be interpreted in accordance with the long-standing meaning under the current rule. *See Harrison* v. *Preston Trucking Co.,* 201 F. Supp. 654, 658–59 (D. Md. 1962) ("[T]he test is not whether the work is essential to the proper

performance of the more important work, but whether it is related'').

The International Association of Fire Fighters comments, without offering any specific suggestions, that the Department should add examples to the section concerning what is not "directly and closely related'' to exempt work. Other commenters make specific suggestions for additional tasks and examples including, among others, computer employees performing software debugging and other tasks (Contract Services Association), therapists or counselors participating in outdoor activities with patients as part of a treatment program (FLSA Reform Coalition) and financial consultants engaging in activities related to acquiring customers (Securities Industry Association).

The Department has retained the proposed rule without any additions. The question of whether work is "directly and closely related'' to the performance of exempt work is "one of fact depending upon the particular situation involved.'' *See* 1949 Weiss Report at 30. The final rule provides 10 representative examples to assist in illustrating the "directly and closely related'' concept. Each of the examples is taken directly from the current rule. In the interest of streamlining the regulations, the proposed and final rule consolidated the most salient examples. Given the fact-intensive nature of the inquiry, the Department believes that, similar to the approach taken in the current rule, providing guiding principles and these specific illustrative examples best enables a determination of what is and is not "directly and closely related.'' The Department believes final section 541.703 is straightforward and amply offers guiding principles that readily can be applied.

Section 541.704 Use of Manuals

Subpart H of the final regulations moves regulatory language on the use of manuals from proposed section 541.204, regarding the administrative exemption, to a new section 541.704 because the section is equally applicable to the other section 13(a)(1) exemptions. Final section 541.704 makes a number of minor editorial changes to the proposed language, none of which are intended as substantive. Final section 541.704 states:

> The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

Some commenters object to the language in proposed subsections 541.204(b) and (c) regarding the use of manuals, although most commenters are supportive of the proposed language. One commenter suggests that the Department eliminate the phrase "very difficult or novel circumstances'' so as not to exclude from the exemptions a highly skilled employee who must rely on or comply with manuals in other routine circumstances. Other commenters suggest that the regulations should distinguish manuals used to apply prescribed skills and knowledge in recurring and routine situations from manuals that simply set forth the bounds within which discretion and independent judgment are to be exercised with substantial leeway. These commenters state that the regulations should reinforce the idea that sharply-constrained authority to make day-to-day decisions within a narrow range of options will not satisfy the tests for exemption.

The Department has retained the provision on manuals in final section 541.704, with only minor wording changes. The proposal appropriately differentiated between manuals that dictate how an employee must apply prescribed skills in recurring and routine situations, and manuals that provide guidance involving highly complex information pertinent to difficult or novel circumstances. The provision adopted by the Department is consistent with existing case law. The employee in *McAllister* v. *Transamerica Occidental Life Insurance Co.,* 325 F.3d 997 (8th Cir. 2003), for example, was a claims coordinator responsible for handling the most complex death and disability insurance claims independently, including the complex and large dollar cases involving contestable claims, fraud and disappearances. The employee oversaw the investigation of claims, reviewed investigation files and determined if further investigation was necessary. The court found the employee to be an exempt administrator even though she relied upon a claims manual. The court quoted a statement made in the introduction to the manual itself, stating that the manual could not be written in sufficient detail to cover all facets of claims handling and that a large percentage of the work could not be guided by the manual. The court held the employee was exempt because the manual gave her authority to decide whether to pursue a fraudulent claim investigation and she had significant settlement authority. She did not merely apply specific, well-established guidance or constraining standards. *See also Haywood* v. *North American Van Lines, Inc.,* 121 F.3d 1066, 1073 (7th Cir. 1997) (employee administratively exempt even though she followed established procedures because the guidelines gave employees latitude in negotiating a settlement, including advising employees to use "common sense''); *Dymond* v. *United States Postal Service,* 670 F.2d 93 (8th Cir. 1982) (finding postal inspectors exempt even though some of their duties required them to follow a field manual that contained detailed procedures and standards). *Compare Brock* v. *National Health Corp.,* 667 F. Supp. 557, 566 (M.D. Tenn. 1987) ("staff accountants'' utilizing two major reference manuals not exempt as administrative employees where they simply "tabulated numbers by merely following the prescribed steps set out in a manual''). *See also Ale* v. *Tennessee Valley Authority,* 269 F.3d 680, 686 (6th Cir. 2001) (training officer not exempt administrative employee where employee simply applied knowledge in following prescribed procedures and determining whether specified standards were met under Administrative Orders); *Cooke* v. *General Dynamics Corp.,* 993 F. Supp. 56, 65 (D. Conn. 1997) (citing section 541.207(c)(2)'s preclusion of administrative exemption to "an inspector who must follow 'well-established techniques and procedures which may have been cataloged and described in manuals or other sources' '').

Final section 541.704 is intended to avoid the absurd result, noted by several commenters, reached in *Hashop* v. *Rockwell Space Operations Co.,* 867 F. Supp. 1287 (S.D. Tex. 1994). The plaintiffs in the *Rockwell Space Operations* case were instructors who trained "Space Shuttle ground control personnel during simulated missions.'' *Id.* at 1291. The plaintiffs were responsible for assisting in development of the script for the simulated missions, running the simulation, and debriefing Mission Control on whether the trainees handled simulated anomalies correctly. *Id.* at 1292. The plaintiffs had college degrees in electrical engineering,

mathematics or physics. *Id.* at 1296. Nonetheless, the court found the plaintiffs were not exempt professionals because the appropriate responses to simulated Space Shuttle malfunctions were contained in a manual. *Id.* at 1298. In the Department's view, the reliance by an engineer or physicist on a manual outlining appropriate responses to a Space Shuttle emergency (or a problem in a nuclear reactor, as another example) should not transform a learned professional scientist into a nonexempt technician.

The Department believes that the discussion of company manuals in the final rule is consistent with the weight of existing case law. The *Rockwell Space Operations* case appears to be an anomaly which has not been followed by other courts. In addition, final section 541.704 properly distinguishes between manuals that provide specific directions on routine and recurring circumstances and those that provide general guidance on addressing open-ended or novel circumstances.

Section 541.705 Trainees (Proposed § 541.704)

Proposed section 541.704 stated that the exemptions are not available 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.''

Proposed section 541.704 has been renumbered to 541.705 in the final regulation, but the proposed language is adopted without change.

The U.S. Chamber of Commerce (Chamber) suggests that this section should be modified to allow employees in bona fide executive training programs to qualify under the exemptions. The Chamber argues that the "principal'' duty of those in such training programs is not the varied nonexempt tasks they may perform, but rather, it is receiving the skills and knowledge necessary to assume managerial and/or executive roles. Furthermore, the Chamber states, the "primary duty'' of such trainees is substantially different from nonexempt employees.

The Department has no statutory authority to provide exemptions for management trainees who do not perform exempt duties and therefore must reject the Chamber's request to expand proposed section 541.704. *See* Wage and Hour Opinion of August 26, 1976, 1976 WL 41748; 1949 Weiss Report at 47–48. Employees, including trainees, who do not "actually perform'' the duties of an exempt executive, administrative, professional, outside sales or computer employee cannot be considered exempt. *See* Wage and Hour Opinion of March 7, 1994, 1994 WL 1004555; *Dole* v. *Papa Gino's of America, Inc.,* 712 F. Supp. 1038, 1042 (D. Mass. 1989) (associate managers performing "crew member'' work to "learn by doing'' were nonexempt trainees).

Other comments request additional clarification of the definition of "trainee,'' ask whether trainees who would become exempt upon completion of their training should be exempt while in training, and ask whether "interns'' are trainees.

The Department does not believe further clarification is necessary because section 541.705 is relatively straightforward. The inquiry in all cases simply involves determining whether or not the employee is "actually performing the duties of'' an executive, administrative, professional, outside sales or computer employee. The Department recognizes that there may be formalized, bona fide executive or management training programs that involve employees "actually performing'' exempt work, but other training programs can involve performance of significant nonexempt work. For example, an employee in a management training program of a restaurant who spends the first month of the program washing dishes and the second month of the program cooking does not have a primary duty of management. Accordingly, it is not appropriate to adopt a blanket exemption for all "trainees.''

Section 541.706 Emergencies (Proposed § 541.705)

Proposed section 541.705(a) provided that 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.'' Proposed section 541.705(b) stated that 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.'' Proposed section 541.705(c) set forth four illustrative examples to assist in distinguishing exempt emergency work from routine work that would not be considered exempt.

Proposed section 541.705 has been renumbered as 541.706, but the final rule retains the proposed language without change.

Comments from the Printing Industries of America and the Kullman Firm ask that the Department specifically include labor strikes and lockouts in this provision. Other comments, including those from the Miller Canfield law firm, suggest additional examples involving emergencies that endanger the public safety.

In light of the clear guiding principles set forth in proposed section 541.705, the Department sees no reason to change the language of the final provision. The Department agrees with Miller Canfield that emergencies arising out of an employer's business and affecting the public health or welfare can qualify as emergencies under this section, applying the same standards as emergencies that affect the safety of employees or customers. The main purpose of this provision is to provide a measure of common sense and flexibility in the regulations to allow for real emergencies "of the kind for which no provision can practicably be made by the employer in advance of their occurrence.'' *See* 1949 Weiss Report at 42. The Department also recognizes that, depending upon the circumstances, a labor strike may qualify as an emergency for some short time period, although all the facts must be considered in order to determine the length of the "emergency'' situation. *See Dunlop* v. *Western Union Telegraph Co.,* 22 Wage & Hour Cas. (BNA) 859 (D.N.J. 1976).

The list of situations in which exempt employees could perform nonexempt work without loss of the exemption is not meant to be exhaustive. Other such instances of exempt employees performing nonexempt work under unanticipated circumstances without loss of the exemption could arise on a case-by-case basis. In addition, it continues to be the Department's position that nonexempt work cannot routinely be assigned to exempt employees solely for the convenience of an employer without calling into question the application of the exemption to that employee.

Section 541.707 Occasional Tasks (Proposed § 541.706)

Proposed section 541.706 provided that 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.'' To determine whether such work is exempt work, proposed section 541.706 set forth the following factors: "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.''

Proposed section 541.706 has been renumbered to 541.707. Since this section is equally applicable to all the exemptions, the final section 541.707 deletes the inadvertent references to "executives'' throughout and instead refers to "exempt employees.''

Various commenters state that the regulations should take into account that exempt employees may choose, consistent with the nature of the employer's establishment and its operational requirements at a particular time, to perform nonexempt work necessary to accomplish the employee's primary duty. The Department believes that this issue has been adequately addressed in final section 541.106 (concurrent duties), and no changes are necessary here.

Section 541.708 Combination Exemptions (Proposed § 541.707)

Proposed section 541.707 provided that 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 40 percent of the time performing exempt administrative duties and another 40 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.''

Proposed section 541.707 has been renumbered as section 541.708. The final rule modifies the second sentence of section 541.708 to read: "Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption.''

The final rule retains the allowance for "tacking,'' or combining exempt work which may fall under different subparts of Part 541, while responding to comments raising concerns about the interplay of "primary duty'' with the example set forth in proposed section 541.707. The FLSA Reform Coalition and the American Insurance Association, for example, point out that the example in the proposed section suggests that an employee who works 40 percent of the time performing exempt administrative duties would be nonexempt absent the additional time spent on executive duties. The Department agrees with these concerns, and also agrees that such a suggestion in the proposal is contrary to the definition of "primary duty'' in section 541.700. Under section 541.700, such an employee would be an exempt administrator, even without the executive duties, if his or her administrative tasks constituted the employee's primary duty, regardless of the amount of time spent on them. Accordingly, the Department has changed the second sentence of the proposed section as follows, to clarify the intent and interplay of final section 541.708 with the primary duty concept of section 541.700: "Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption.'' The Department's clarification responds to similar comments by the HR Policy Association, the Society for Human Resource Management, the Food Marketing Institute, the National Council of Agricultural Employers and the Public Sector FLSA Coalition.

Section 541.709 Motion Picture Producing Industry (Proposed § 541.708)

Proposed section 541.708 provided an exception to the salary basis requirements for otherwise exempt executive, administrative, and professional employees in the motion picture producing industry. Generally, so long as such employees are earning a base rate of at least $650 a week based on a six-day workweek, employers may classify them as exempt even though they work partial workweeks and are paid a daily rate, rather than a weekly salary.

Proposed section 541.708 has been renumbered as section 541.709. The final section 541.709 retains the proposed language, except for a single clarifying correction in grammar (changing "under subparts B, C and D of this part'' to "under subparts B, C or D of this part''). The final rule also adjusts the $650 figure to $695, consistent with the increased minimum salary level for exemption.

The Department received only a few comments on this section. However, the Akin, Gump, Strauss, Hauer & Feld law firm argues, on behalf of a number of entertainment technology companies, that the rationale for section 541.709 is the project-based nature of the motion picture industry, one in which otherwise exempt employees are hired for finite periods of time and often work partial workweeks. Since the same "peculiar employment circumstances'' existing in the motion picture producing industry also exist throughout much of the entertainment industry, the firm states, section 541.709 should be expanded to cover the "entertainment industry'' generally. The commenter suggests that the definition of the entertainment industry in the Employee Retirement Income Security Act (ERISA) could be adopted for purposes of section 541.709.

In adopting the exception for the motion picture producing industry in 1953, the Department agreed with the Association of Motion Picture Producers that given the "peculiar employment conditions'' of the industry, the producers are not able to economically employ needed specialists on a constant basis, but must frequently employ such employees for partial workweeks. Accordingly, the industry developed over the years "methods of compensation which reflect this pattern of operations.'' *See* 18 FR 2881 (May 19, 1953); 18 FR 3930 (July 7, 1953).

Without further information and consideration of particular employment circumstances, the Department cannot extend the exception to the entire entertainment industry as suggested. The Department is not unaware, however, that technological advances in the past half century make it more likely that, on a case-by-case basis, the rationale underlying section 541.709 might be applied more broadly depending upon the specific facts. In that regard, the Department issued an opinion letter in 1963 extending the exception to employees of producers of television films and videotapes, noting, "the production of T.V. films and videotapes encompasses the same employment practices and conditions which characterize the production of motion pictures.'' Wage and Hour Opinion of October 29, 1963; *see also* Wage and Hour Field Operations Handbook, section 22b09 (adopting this extension to television and videotapes).

An additional commenter argues for the elimination of the "exemption'' for production assistants and post-production assistants. This commenter misunderstands that section 541.709 relates only to an exception from the salary basis requirements for *otherwise exempt* employees in the industry.

Section 541.710 Employees of Public Agencies (Proposed § 541.709)

Proposed section 541.709(a) provided that 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.'' Proposed section 541.709(b) stated that "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.''

Proposed section 541.709 has been renumbered as final section 541.710, and retains the proposed language without change.

The language in section 541.710 is from the current section 541.5(d), and the reasons for its promulgation were explained in 57 FR 37677 (August 19, 1992) and continue to be valid. The Department received comments from public employers and employees during the current rulemaking addressing many of the provisions of the entire proposal, including the salary basis of payment. None of their comments, however, addressed the constitutional or statutory public accountability requirements in the funding of state and local governments that was the original rationale for this particular provision. The Department continues to believe this is a necessary exception to the salary basis requirement for public employees, and it is included in the final regulations.

V. Paperwork Reduction Act

This rule contains no new information collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The information collection requirements for employers who claim exemption under 29 CFR Part 541 are contained in the general FLSA recordkeeping requirements codified at 29 CFR Part 516, which were approved by the Office of Management and Budget under OMB Control number 1215–0017. See 29 CFR 516.0 and 516.3.

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

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

Regulatory Impact Analysis

Chapter 1: Executive Summary

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

Specifically:

- Raising the salary level test to $455 will strengthen overtime protection for more than 6.7 million salaried workers who earn $155 or more and less than $455 per week regardless of their duties or exempt status.
- There are 5.4 million currently nonexempt salaried workers whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current regulation, will be automatic under the final rule. This includes 2.6 million nonexempt salaried white collar employees who are at particular risk of being misclassified.
- There are 1.3 million currently exempt white collar salaried workers who will gain overtime protection.
- The final rule is as protective as the current regulation for the 57.0 million paid hourly and salaried workers who earn between $23,660 and $100,000 per year.
- An estimated 107,000 workers who earn $100,000 or more per year could lose their overtime protection from the new highly compensated test.
- The total first-year implementation costs to employers are estimated to be $738.5 million, of which $627.1 is related to reviewing the regulation and revising overtime policies and $111.4 million is related to conducting job reviews.
- Transfers from employers to employees, in the form of greater overtime pay or higher base salaries, are estimated to be $375 million per year. Therefore, the total cost to employers is estimated to be $1.1 billion in year-one and $375 million per year thereafter.
- Updating and clarifying the rule will reduce Part 541 violations and are likely to save businesses at least $252.2 million per year.
- There is not likely to be a substantial impact on small businesses or state and local governments.

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

- It will be more difficult to exempt workers from overtime as executive employees.
- Raising the salary level test to $455 per week will strengthen overtime protection for 2.8 million salaried workers in blue-collar occupations, because their protection, which is based on the duties tests under the current regulation, will be automatic under the new rules. The Department concluded that most of these workers are nonexempt under the current regulation, however, making their nonexempt status certain will unambiguously increase their overtime protection.
- Updating and clarifying the rule will reduce the human resource and legal costs for classifying workers (particularly for small businesses), and reduced litigation could improve job opportunities.
- Updating the rule is an action forcing event and a catalyst for compliance. Employers who may not have undertaken an audit of the classification of their workforce will be more likely to do so after the promulgation of the final rule, resulting

in greater levels of compliance with the law.

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

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

- Employees earning less than $155 per week will not be affected.
- Increasing the salary level test will strengthen overtime protection for salaried workers who earn $155 or more and less than $455 per week regardless of their duties or current exempt status. Hourly workers in this income range will continue to be guaranteed overtime protection.
- Exempt employees earning less than $455 per week will gain overtime protection, thus resulting in additional payroll costs to employers.
- The final rule is as protective as the current regulation for workers who earn between $23,660 and $100,000 per year. On the whole, employees will gain overtime protection because some revisions are more protective than the existing short duties tests. However, this number is too small to estimate quantitatively.
- An estimated 107,000 employees earning $100,000 per year or more could lose overtime protection under the highly compensated test.
- The final rule is more protective for police officers, fire fighters, paramedics, emergency medical technicians, and other first responders, and the highly compensated test does not apply to those who are not performing office or non-manual duties.
- The Part 541 exemptions also do not apply to manual laborers or other non-management blue-collar workers such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers.

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

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

As discussed in the preamble, the Department disagrees with the commenters who argue that the Department's proposal to move away from the "long'' and "short'' duties test structure of the existing regulations will result in employees losing overtime protection. This assertion fails to account for the impact of the increased minimum salary level in the final rule. The final rule guarantees overtime protection for all workers earning less than $455 per week ($23,660 annually), the new minimum salary level for exemption. Thus, all employees earning at least $155 per week and less than $250 per week—the workers currently tested for exemption under the "long'' duties tests—will be guaranteed overtime protection, regardless of their job duties, under the final regulations. Overtime protection is also guaranteed under the final rule for employees earning at least $250 per week and less than $455 per week who are currently tested for exemption under the existing "short'' duties tests.

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

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

TABLE 2–1.—COMPARISON OF SALARY LEVELS

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

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

The methodology used to estimate the number of currently exempt workers is based upon the broad WHD exemption probability categories presented in Table 3–2 that were designed to produce national estimates of the number of exempt and nonexempt workers. The WHD exemption probability categories were not designed to estimate the number of exempt workers for each Part 541 exemption (executive, administrative, or professional) because there is significant overlap in the exemptions with some workers in a number of occupations being potentially exempt under more than one duties test. Moreover, some occupations include both supervisory and production workers. Given the lack of data on the duties being performed by specific workers in the Current Population Survey, the Department concludes that it is impossible to quantitatively estimate the number of exempt workers

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

2.2 Impact of the Final Duties Test for Executive Employees

Although some commenters asserted the proposed duties test for executive employees would reduce overtime protection for workers, as discussed in the preamble above and shown in Table 2–2, the final standard duties test for executives, like the proposed duties test, is stronger than the current short duties test because it incorporates an additional requirement taken from the current long duties test: An exempt executive must have authority to hire or fire other employees, or the exempt executive's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. The final rule also returns to the language in the current rule "whose primary duty'' is management, instead of the proposed rule's "with a primary duty'' of management.

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

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

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

2.3 Impact of the Final Duties Tests for Administrative Employees

The proposed duties tests for administrative employees generated a significant number of comments. As discussed in the preamble above, the final rule's duties test for administrative employees is significantly different than the test contained in the proposed rule. In drafting the final language, the Department sought to avoid introducing new terms (such as "position of responsibility'') that generated confusion in the comments on the proposal and to retain terms (such as "primary duty,'' "discretion and independent judgment'' and "general business operations'') that are used in the current rule and have been clarified by court decisions and opinion letters. The final regulatory text also requires that the discretion and independent judgment must be exercised "with respect to matters of significance,'' language that appears only in the current interpretive guidelines and not the existing regulatory text.

As Table 2–3 indicates, the standard duties test for administrative employees in the final rule is very similar, if not functionally identical, to the current short duties test when the current interpretive guidelines are taken into account as would be appropriate. Based on the significant changes the Department made in the final rule to return the administrative duties test to the structure in the current rule, the Department has concluded that the standard duties test for administrative employees in the final rule is as protective as the current short test. Therefore, the Department has determined that very few, if any, workers will lose their right to overtime as a result of updating the current short test with the final standard duties test. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

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

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

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

For reasons discussed in the preamble above, the final standard duties test for the learned professional exemption was modified from the proposed test to track the current rule's primary duty test and to restructure the proposed rule's reference to acquiring advanced knowledge through other means such as an equivalent combination of intellectual instruction and work experience so that it is consistent with the current regulation. As the preamble explains, the Department did not intend to depart from the current rule's educational requirements for the

learned professional exemption. Accordingly, the final rule clarifies that, just as under the current primary duty test, an employee must meet all three requirements of the test in order to be exempt—the primary duty must be performing work that requires advanced knowledge; the knowledge must be in a field of science or learning; and the knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. The final rule also expands on each of those three components, using language from the current rule. For example, an employee's ''work requiring advanced knowledge'' must include work requiring the consistent exercise of discretion and judgment (see Table 2–4). The final standard duties test for learned professionals also adds language from the current long test in section 541.301(b) by defining work requiring advanced knowledge as work that is ''predominantly intellectual in character'' as distinguished from the ''performance of routine mental, manual, mechanical or physical work.'' These revisions clarify that the final rule is at least as protective as current rule.

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

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

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

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

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

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

As discussed above in the preamble, contrary to the assertions made by some commenters, the proposed and final rule merely restate the current exclusions from the salary requirements and do not change the existing exemption criteria for teachers in educational establishments and licensed practitioners of law and medicine. The Department concludes these provisions in the final rule are not likely to result in any additional teachers in educational establishments, or licensed practitioners of law or medicine losing overtime protections compared to the current regulations.

2.7 The Impact of the Final Duties Tests for Computer Employees

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

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

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

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

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

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

As discussed in the preamble above, the final rule expressly provides that the section 13(a)(1) exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians (EMTs), and other first responders "regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.'' Most courts have held that such workers generally are non-exempt because they typically do not perform the duties that are required for the executive or administrative exemption. Similarly, federal courts have held that police officers, paramedics, EMTs, and similar employees are not exempt professionals because they do not perform work requiring knowledge of an advanced type in a "field of science or learning'' requiring knowledge "customarily acquired by a prolonged course of specialized intellectual instruction'' as required under the current and final rules. The Department has no intention of departing from this established case law. Moreover, some police officers, firefighters, paramedics and EMTs treated as exempt executives under the current regulations may be entitled to overtime under the final rule because of the additional requirement in the standard duties test not found in the current short test that an exempt executive must have the authority to "hire or fire'' other employees or make recommendations given particular weight on hiring, firing, advancement, promotion or other change of status. Therefore, the Department concludes that the executive duties tests for police officers, fire fighters, paramedics, EMTs, or other first responders in the final rule is more stringent than the current short tests and some such workers may actually gain overtime protection. However, this number is too small to estimate quantitatively given the data limitations presented below in Chapter 3.

2.10 The Impact of the Final Highly Compensated Test

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

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

2.11 The Impact of the Final Safe Harbor Provision

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

2.12 The Impact of a Clearer and Easier to Understand Rule

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

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

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

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

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

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

- An estimated 35.2 million hourly paid workers and 7.6 million nonhourly workers are in occupations with no measurable probability of meeting the current duties tests (*e.g.*, blue-collar occupations).
- An estimated 32.7 million hourly workers and 31.7 million nonhourly workers are in occupations with some possibility of meeting the duties tests (*e.g.*, white-collar occupations).
- Of the estimated 31.7 million nonhourly workers in occupations with some possibility of meeting the duties tests, an estimated 19.4 million are exempt under the current rule.

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

3.1 Estimating the Number of Workers Covered by the FLSA

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

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

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

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

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

The 1.6 percent discrepancy is due to different weights being used to estimate the published employment totals. The weights in the public use file utilized by the Department in this analysis are based on the 1990 Census. In January 2003, the BLS revised the weights using the 2000 Census. Although BLS changed its published employment totals back to January 2000, the weights in the public use files were not updated. The 134.3 million total for 2002 employment matches the published BLS 2002 employment estimate before the weights were changed. As noted below in Chapter 4, several commenters criticized the estimates in the Preliminary Regulatory Impact Analysis (PRIA) for being difficult to reproduce. Therefore, the Department chose not to use an internally available dataset with updated weights and instead used the publicly available dataset with 1990 Census weights to make its estimates easier to reproduce.

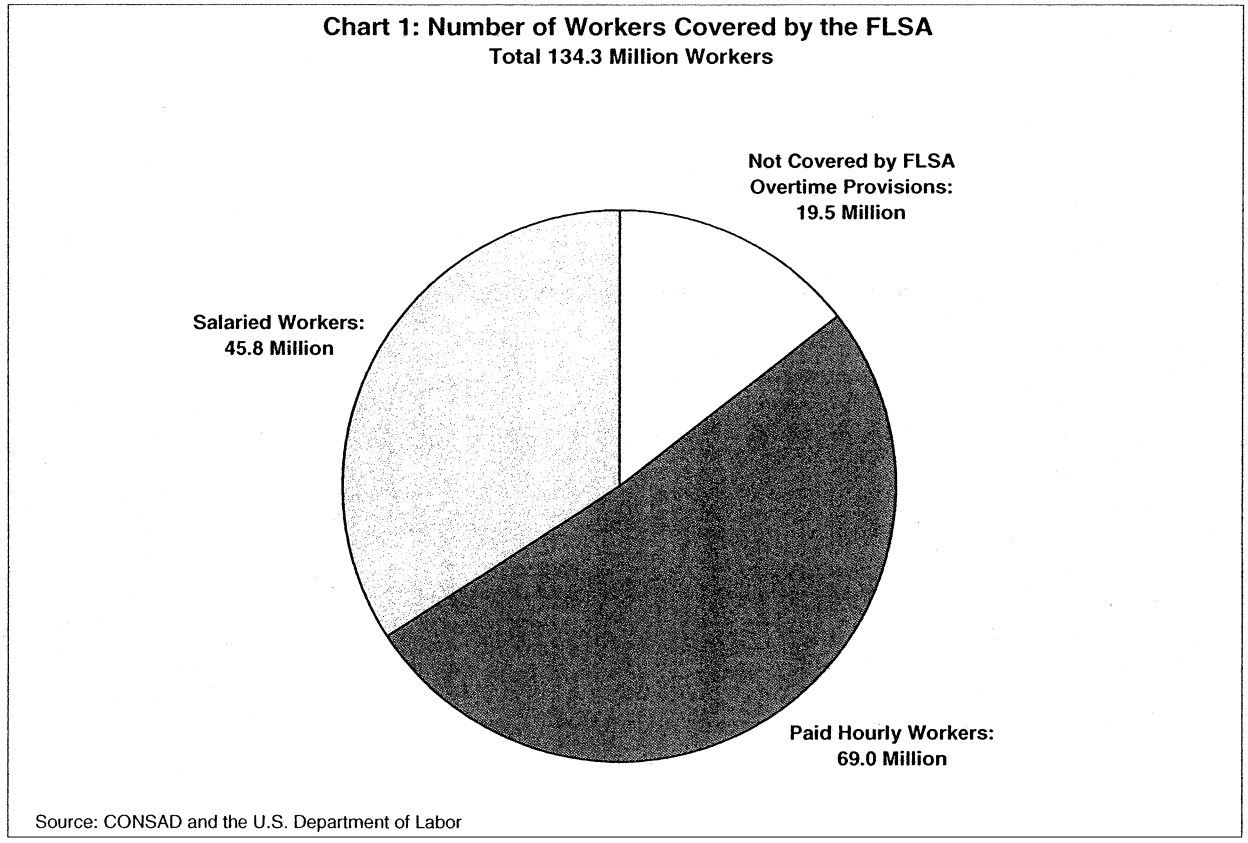
Using weights based on the 1990 Census does not significantly affect the accuracy or quality of the results. The difference between the employment totals (136.5 − 134.3 = 2.2 million) based on the two sets of weights is distributed across all occupations, in all industries in all regions of the country,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

Next, the Department excluded the 14.9 million workers not covered by the FLSA, such as the self-employed and unpaid volunteers (item PEIO1COW = 6, 7, or 8), and the clergy and religious workers (item PTIO1OCD = 176 and 177). An additional 3.1 million workers were excluded because they are in occupations specifically exempted from the FLSA's overtime provisions (see Table 3–1), which reduced the total to 116.3 million workers. Another group, 1.5 million federal employees, were excluded from the total (item PEIO1COW = 1) because they are not subject to the regulations promulgated by the Department (they are covered by U.S. Office of Personnel Management regulations). However, federal workers (PEIO1COW = 1) in Postal Offices (PEIO1ICD= 412), the Tennessee Valley Authority (PEIO1ICD = 450 and in Kentucky, Tennessee, Mississippi, Alabama, Georgia, North Carolina, and Virginia), and the Library of Congress (PEIO1ICD = 852 in the Washington D.C. MSA) were included in the analysis, as they are covered by final rule. The remaining 114.8 million workers represent the Department's best estimate from available data of the total number of employees who are covered by the FLSA's overtime provisions (see Chart 1). They are comprised of 69.0 million hourly paid workers and 45.8 million salaried workers (item PEERNHRY = 1 and 2, respectively). For the purposes of this RIA, the Department, like the GAO, assumed that workers paid on a nonhourly basis (CPS variable, PEERNHRY = 2) were paid on a salary or fee basis, and henceforth uses the term "salaried workers'' to refer to workers classified as nonhourly in the CPS.

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

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

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



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

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

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

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

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

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

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

In order to develop the probability estimates, the WHD staff utilized Appendix B in the CPS documentation to obtain the list of occupational titles. The CPS Appendix specifies the occupational title and the associated SOC codes used by the CPS for each OCC code. The CPS Appendix is available on the U.S. Census Bureau Web site (*http://www.census.gov/apsd/techdoc/cps/sep97/det-occ.html*). According to the BLS, the OCC "classification is developed from the 1980 Standard Occupational Classification.'' The WHD staff used the documentation on the SOC codes in assessing the exempt probability range for the associated OCC codes. This analysis was first used by GAO, and then followed by the University of Tennessee and by CONSAD Research Corporation in the Part 541 PRIA.

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

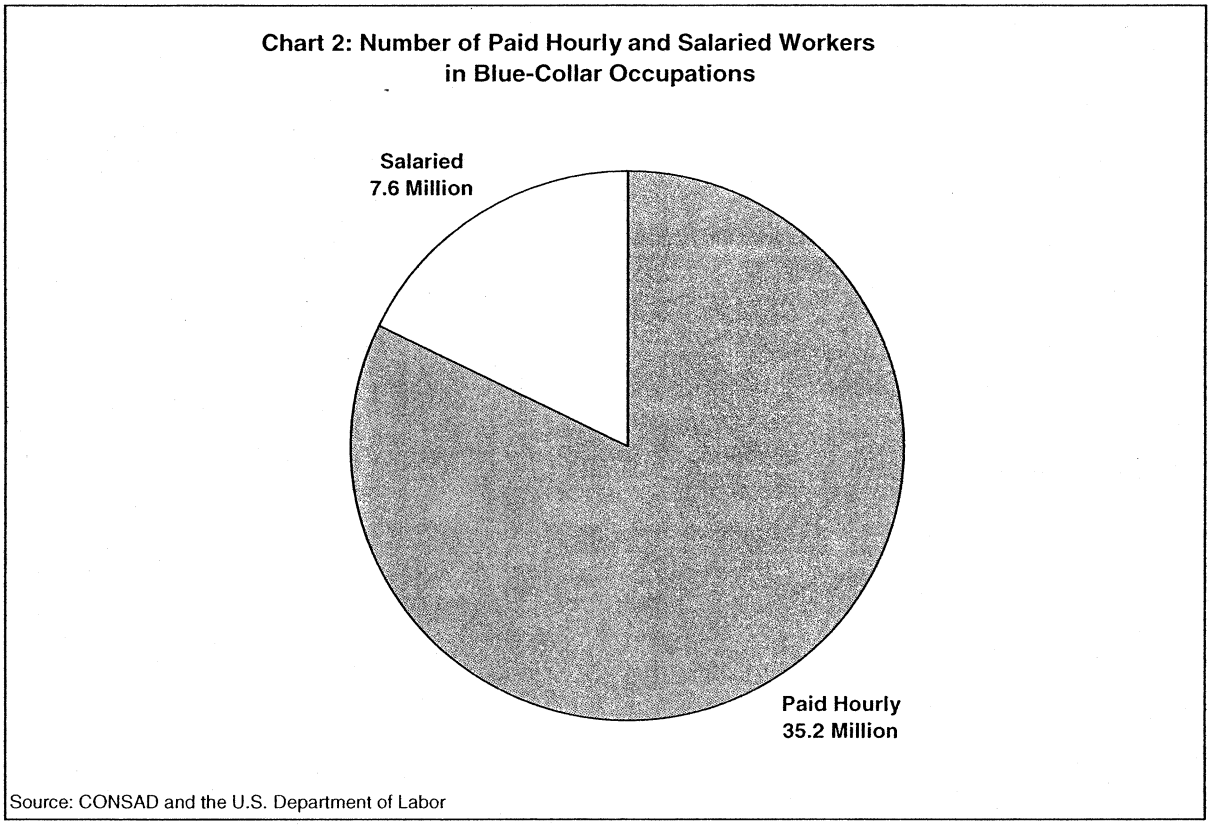
For the final RIA, however, the Department has reverted to the original estimates developed in 1998 by its WHD experts for the GAO. This adjustment from the proposed rule does not materially affect the total number of workers impacted, and ensures transparency and enables the public to replicate and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

Of the 499 occupation codes in the CPS, one is not related to employment (code 905 is assigned to unemployed persons whose last job was in the Armed Forces), two are assigned to clergy and religious workers (codes 176 and 177) who are not covered by the FLSA, one had no observations (code 149 for home economics teachers), and five had no observations after the removal of various industry exemptions (code 474 for horticultural specialty farmers, code 499 for hunters and trappers, code 826 for rail vehicle operators, code 639 for machinist apprentices, and code 655 for miscellaneous precision metal workers).

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

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

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



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

3.4 Estimated Number of Workers in the White-Collar Occupations

To determine the number of exempt workers that could be affected by the final rule, the Department, like the GAO, concentrated on the 251 occupations likely to include exempt workers. As the GAO stated, "To develop our estimate, we analyzed each of the 257 job titles likely to include exempt workers.'' (GAO/HEHS–99–164, pg. 41) After accounting for the six occupations with no observations (noted above), this corresponds with the 257 titles used by the GAO in 1999.

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

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

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

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

Next, the Department excluded workers who are exempt under the current and final rules because they are in occupations that are not subject to the salary level or salary basis tests and will not be affected by the final rule (see Table 3–3). As noted by the GAO in its 1999 report "The exemption for physicians, lawyers, and teachers does

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

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

Occupational title	Number of workers
Teachers & Academic Administrative Personnel in Industry 842 and 850	6,106,083
Physicians	550,748
Dentists	48,565
Optometrists	20,288
Podiatrists	3,999
Health Diagnosing Practitioners, n.e.c. (1)	17,020
Lawyers and Judges	622,549
Street and Door-to-Door Sales Workers	184,998
Total	7,554,250

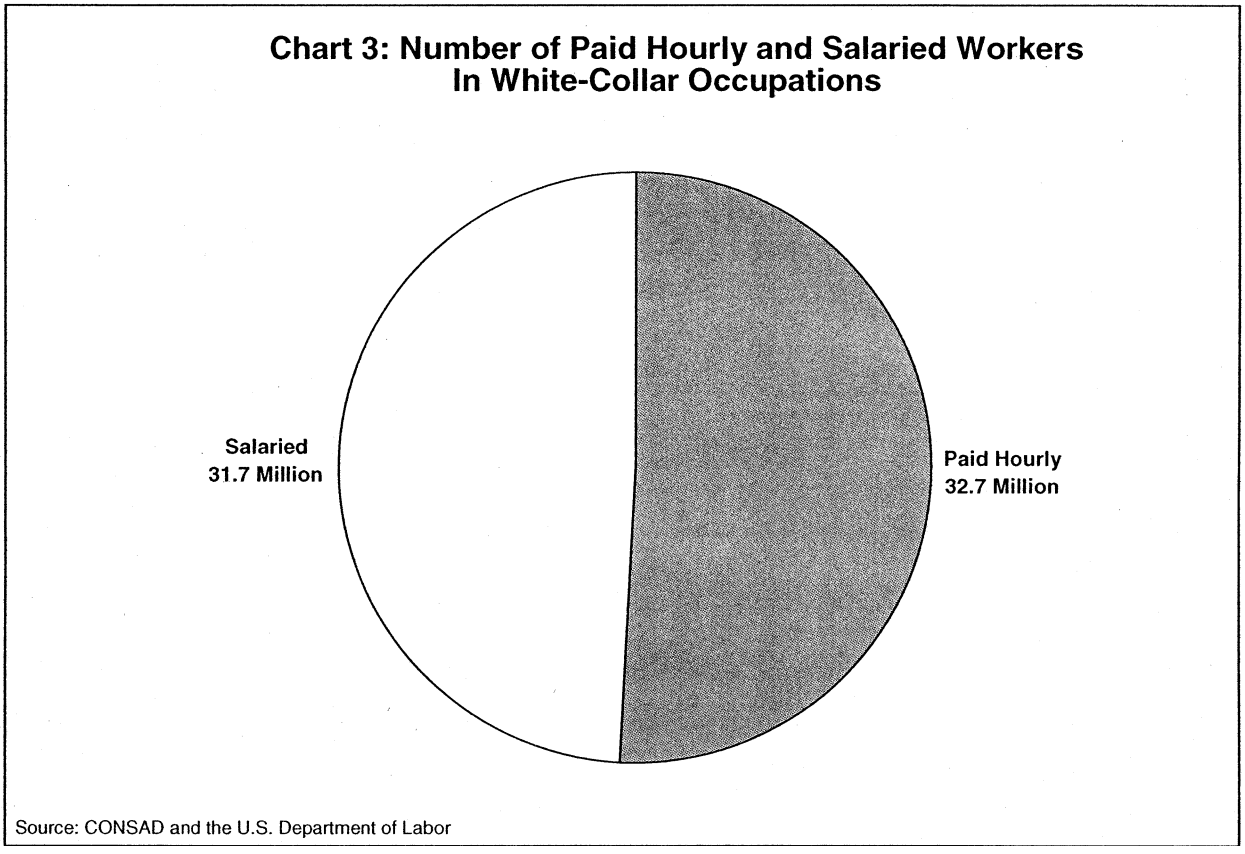
(1) Not elsewhere classified.

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

Note: These occupations are identified separately here since they differ from those in Table 3–1: they are covered by FLSA's overtime provisions but are not subject to the Part 541 salary level tests.

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

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



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

3.5 Methodology Used To Estimate the Number of Exempt Salaried Workers

In order to develop a baseline estimate of the number of currently exempt white-collar salaried workers, the Department reviewed several approaches. The first approach was used by the GAO, which "made the following assumption: duties that make an employee more likely to be covered by the white-collar exemptions are duties that, generally speaking, elicit a higher salary. Under this assumption, as workers have more exempt duties and responsibilities, their incomes increase—as does the likelihood of

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

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

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

The second approach was to give all observations in an occupation the same probability regardless of income. Under this approach, estimates are generated by multiplying the CPS weight (item PWORWGT) for each observation (worker) by the average of the upper and lower bound exemption probability associated with the occupation code. Although this approach corrects for the bias against the low-wage industries and localities, the Department determined it was unsatisfactory because it does not account for the fact that higher income workers are more likely to be exempt. For example, someone in real estate sales (OCC 254) earning $405 per week would be given the same 30 percent probability of being exempt (*i.e.,* average of 10 percent and 50 percent for "probably not exempt classification'') as one earning $2,155 per week. Even considering the existence of regional and industry salary differentials, this approach did not seem reasonable.

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

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

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

Where:

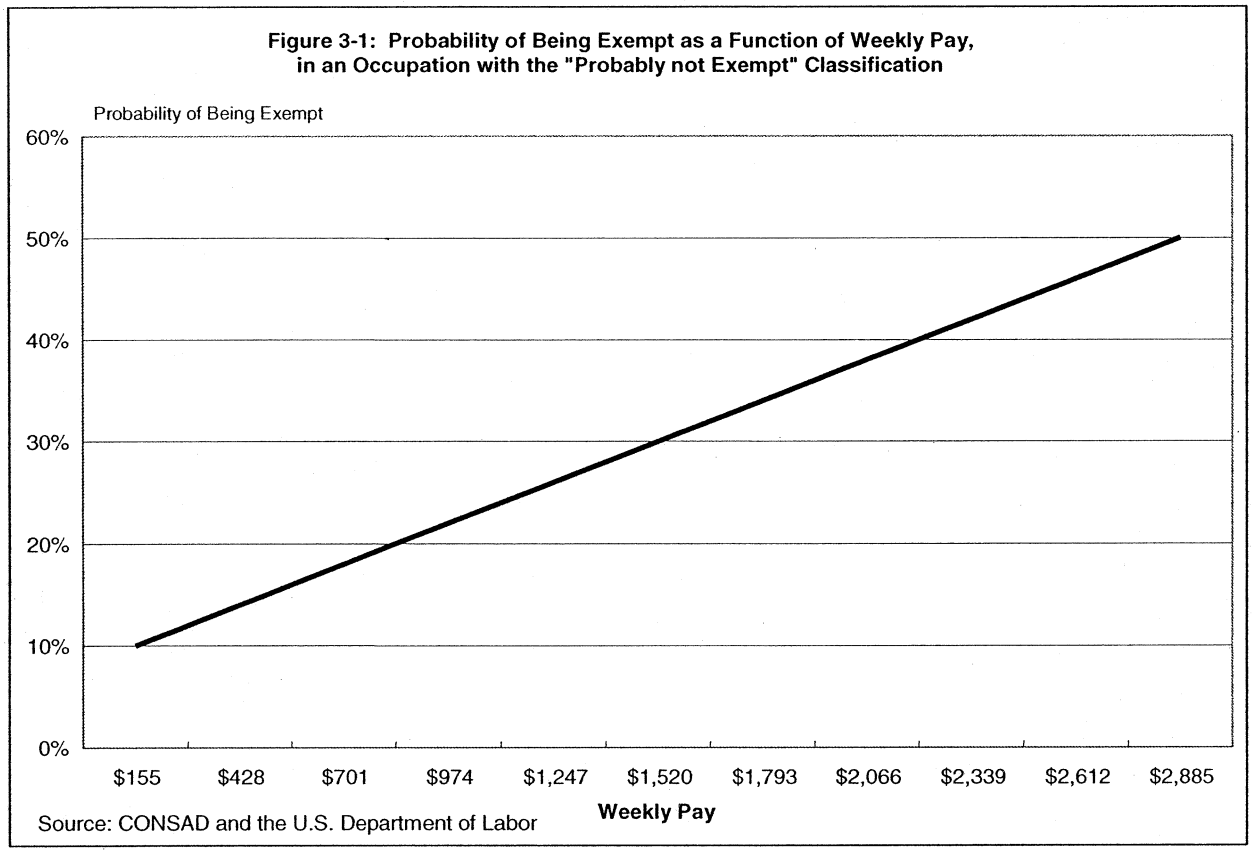
Prob_Exempt = Probability of individual in the occupational classification (OCC) being exempt

LB = WHD lower bound probability from Table 3–2

PTERNWA = CPS weekly earnings amount

UB = WHD upper bound probability from Table 3–2

The equation above specifies that the probability of a worker with a weekly salary of $155 being exempt is equal to the lower bound probability specified by the WHD experts for a given white-collar occupation, while the probability of an individual with the highest weekly salary in the occupation (often the top coded value of $2,885) being exempt is equal to the upper bound probability specified for a given white-collar occupation. The probability of exemption for weekly salaries between $155 and $2,885 is derived using the above linear interpolation equation. Figure 3–1 presents a graphical illustration for the "Probably Not Exempt'' classification (see Table 3–2). Similar graphs could be developed for the other three classifications but were not included in the RIA.



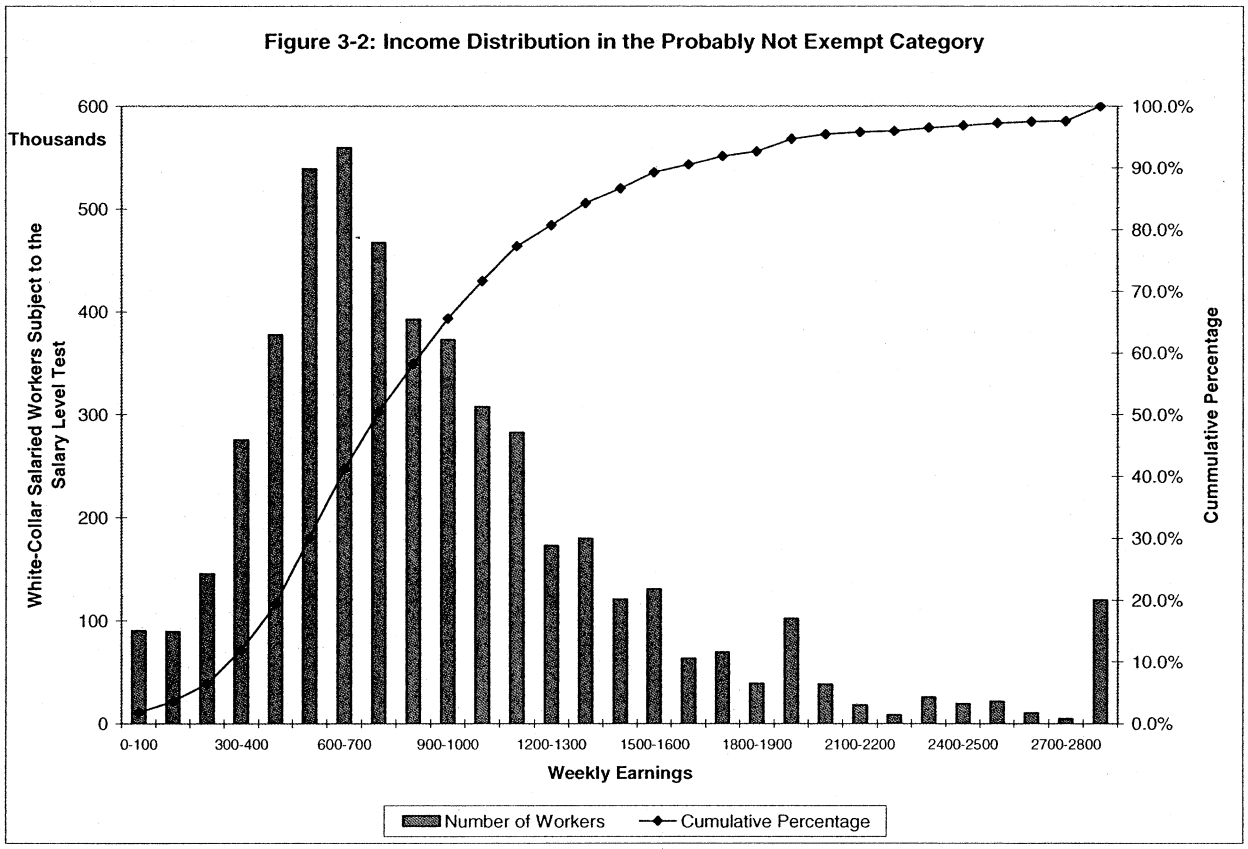
Although the linear model was designed to more accurately include lower-wage industries and regions while accounting for the determination by WHD that higher earnings are associated with a higher probability of exemption, the model appears to underestimate the total number of currently exempt workers compared to using the midpoint of the WHD probability range (*e.g.,* averaging the WHD upper and lower bound estimates) at the national level. Table 3–4 shows this effect.

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

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

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

This occurs because the underlying earnings distribution is not symmetric. Rather, it is skewed toward low earnings levels. When the linear model of exemption probabilities is applied to that earnings distribution, it produces estimates that are skewed toward low earnings levels. Figure 3–2 presents the histogram and cumulative distribution for the ''Probably Not Exempt'' category. The higher bar in Figure 3–2 at $2,800 in weekly earnings level is a result of the top coding of the CPS data that includes all of the workers with weekly earnings of $2,800 or more into one group. Similar graphs were developed for the other three classifications but were not included in the RIA.



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

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

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

TABLE 3–5.—PARAMETERS OF EMPIRICAL INCOME DISTRIBUTIONS

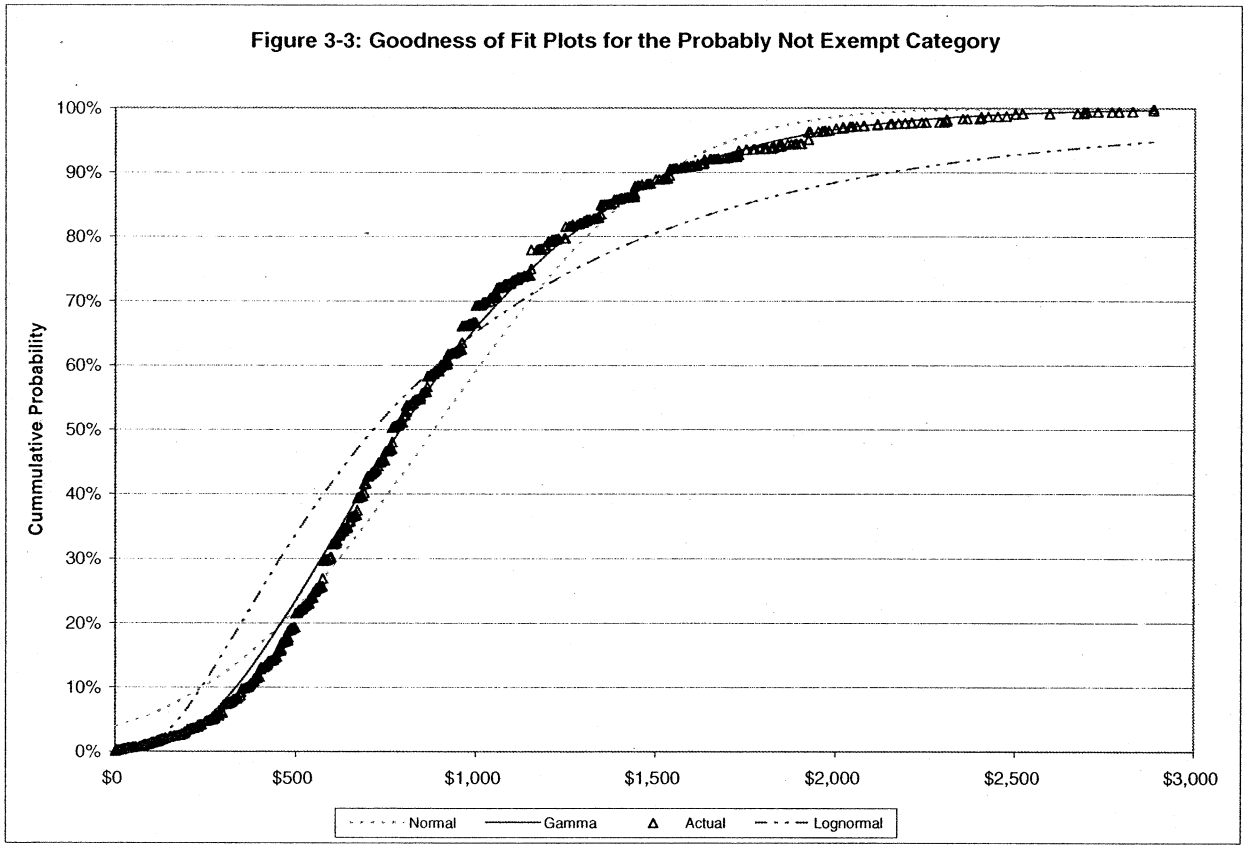
WHD category	Sample mean	Standard error	Mean of logged sample data	Standard error of logged sample data
High Probability of Exemption	1,107	538	6.9	0.5

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

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

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

Figure 3–3 presents plots depicting the goodness of fit of the three nonlinear functions that were estimated for the ''Probably Not Exempt'' category. Similar plots were developed for the other three classifications but were not included in the RIA. As one can see in figure 3–3, all three distributions had the same general shape as the empirical data; however, the function estimated for the gamma distribution appears to fit the actual data better than the functions estimated for the other two distributions. The Department, however, did not use a formal goodness of fit test to choose a distribution for the principal estimates of this final rule; rather, the Department measured how well each of the distributions matched up against the estimate as a function of the midpoint probabilities, since calibrating the totals to the midpoint probabilities was the primary reason for examining the non-linear models.



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

$$Prob\_Exempt = LB + Function\_EC(PTERNWA) \times (UB - LB)$$

Where:

Prob_Exempt = Probability of an individual in the exemption classification being exempt

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

PTERNWA = CPS weekly earnings amount

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

Function_EC(PTERNWA) = the cumulative probability of the distribution function for the

exemption category (*i.e.*, calibrated as discussed above) at that earnings

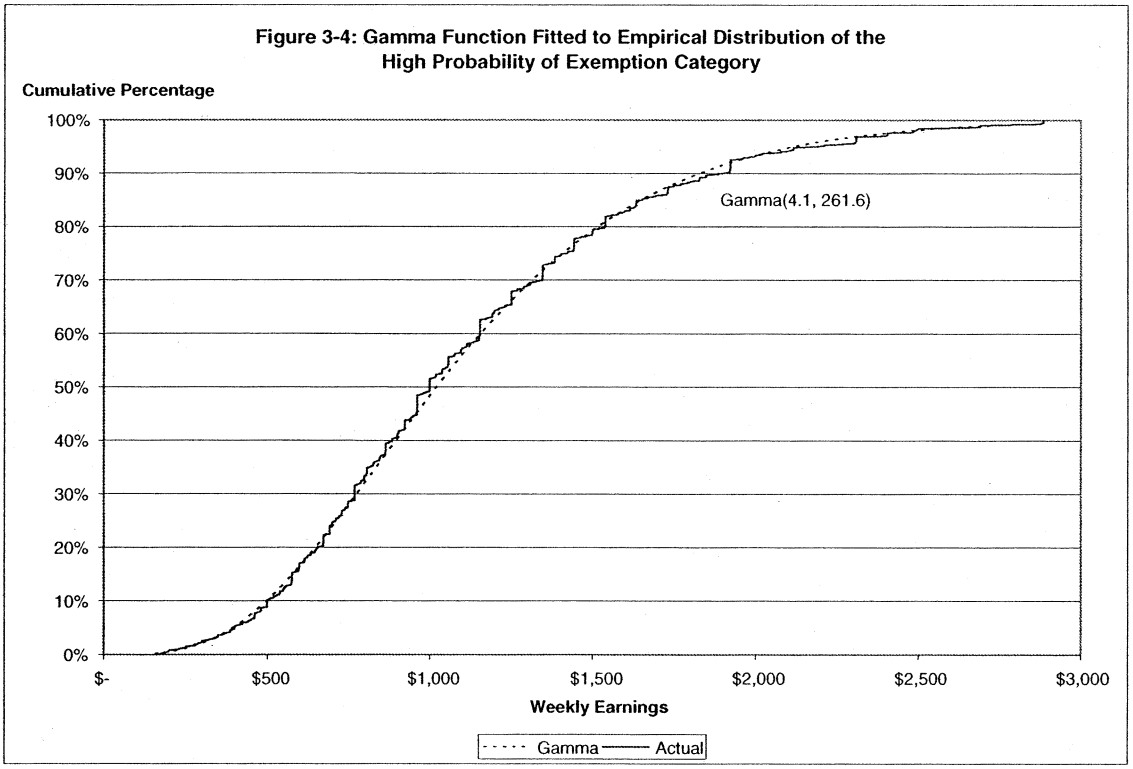
The total number of exempt salaried workers for each white-collar occupation was estimated by multiplying the estimated probability of being exempt (based upon the earnings and exemption category) by the CPS weight for each worker and then summing the modified weights for each occupation. Observations with earnings less than $155 per week were assigned a probability of zero and observations with top coded earnings were assigned the upper bound probability for the category. As shown in Table 3–6, the gamma distribution resulted in estimates that most closely approximated the number of exempt workers estimated using the midpoint probability. The symmetrical normal distribution underestimated the midpoint total by approximately 104,000 workers (0.5%) while the lognormal distribution overestimated the midpoint total by 3.2 million (16.5%). The gamma distribution resulted in essentially the same estimated number of exempt workers as using the midpoint probability. The two methods differ by approximately 0.2 percent, or less than 60,000 workers.

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

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

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

Although the Department did not conduct formal goodness of fit tests, Figures 3–4 through 3–7 indicate that the gamma distribution preserves the shape of the empirical cumulative distribution for the four exemption categories. Thus, for the RIA the Department developed its baseline estimates of exempt workers using a gamma distribution model. Although some other distribution could exist that improves upon the gamma distribution, the Department has determined that it would not significantly alter the RIA results given how well the gamma distribution approximates the empirical data. In addition, as demonstrated above in Table 3–6, the estimated number of workers impacted by the final rule does not depend critically on any particular nonlinear model; in fact, the estimated number of workers impacted even under the linear model is not substantially different than under the gamma distribution model, proving that the Department's estimates are relatively robust to estimation procedure choices.



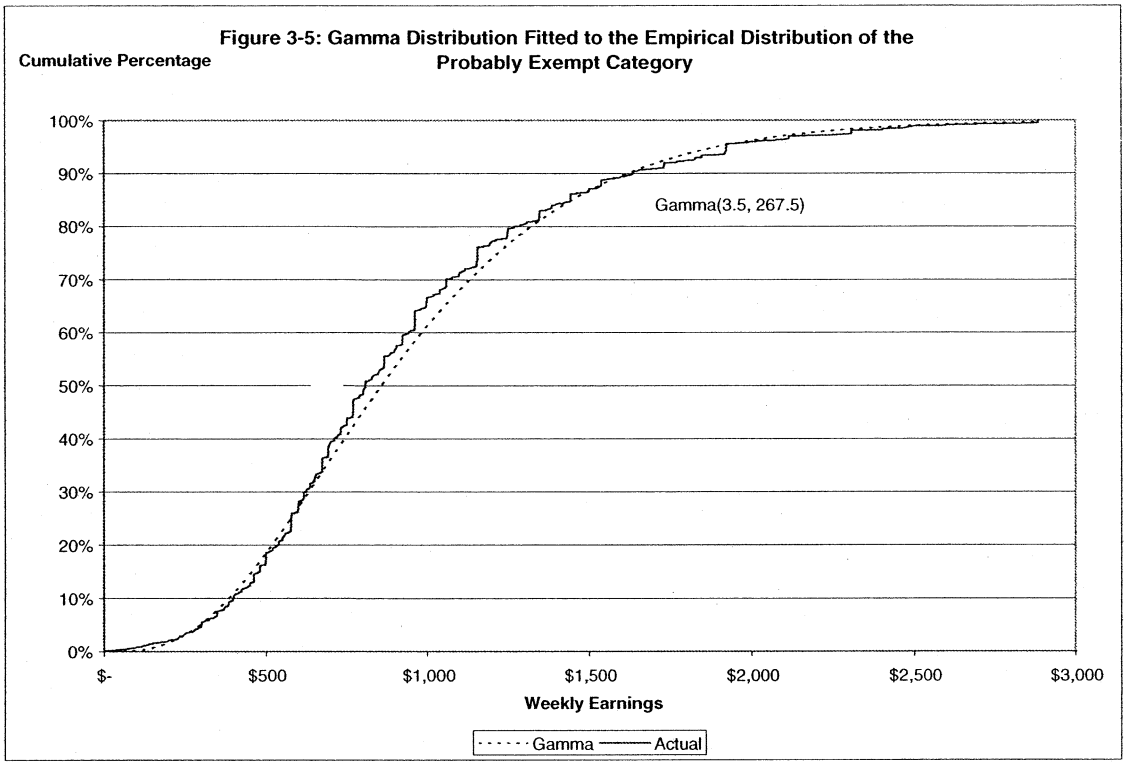


Figure 3-5: Gamma Distribution Fitted to the Empirical Distribution of the Probably Exempt Category
Cumulative Percentage
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Gamma(3.5, 267.5)
$-
$500
$1,000
$1,500
$2,000
$2,500
$3,000
Weekly Earnings
Gamma
Actual

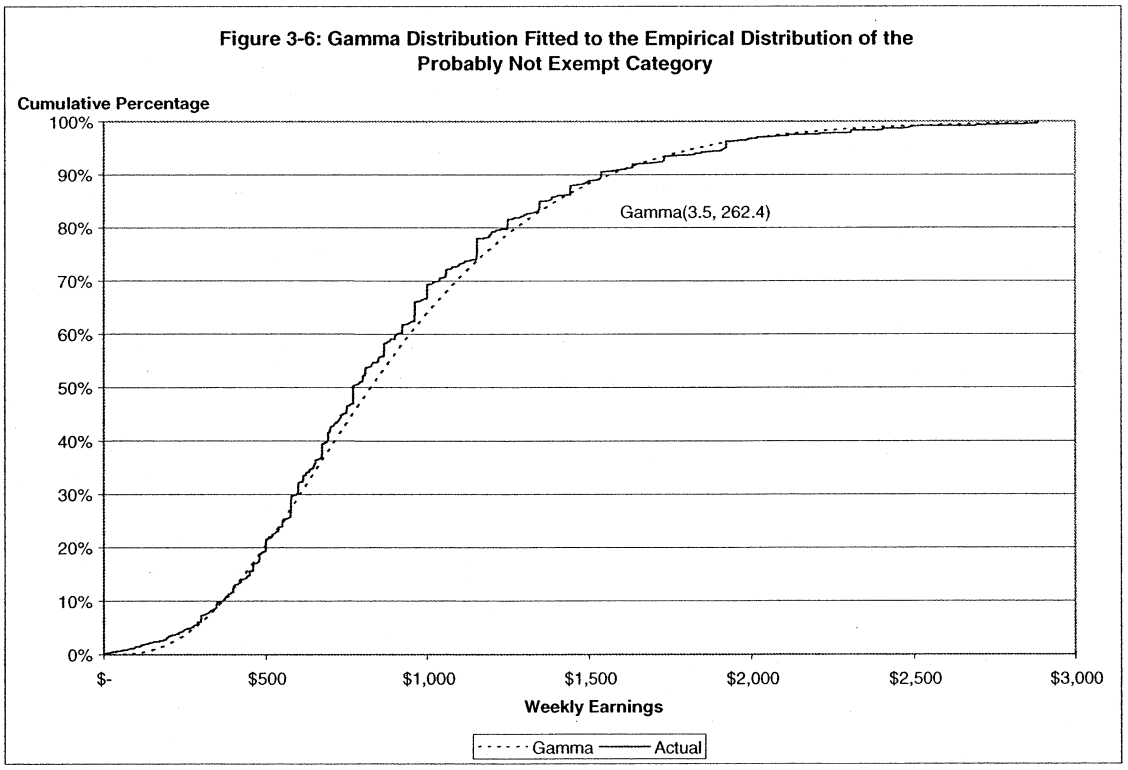
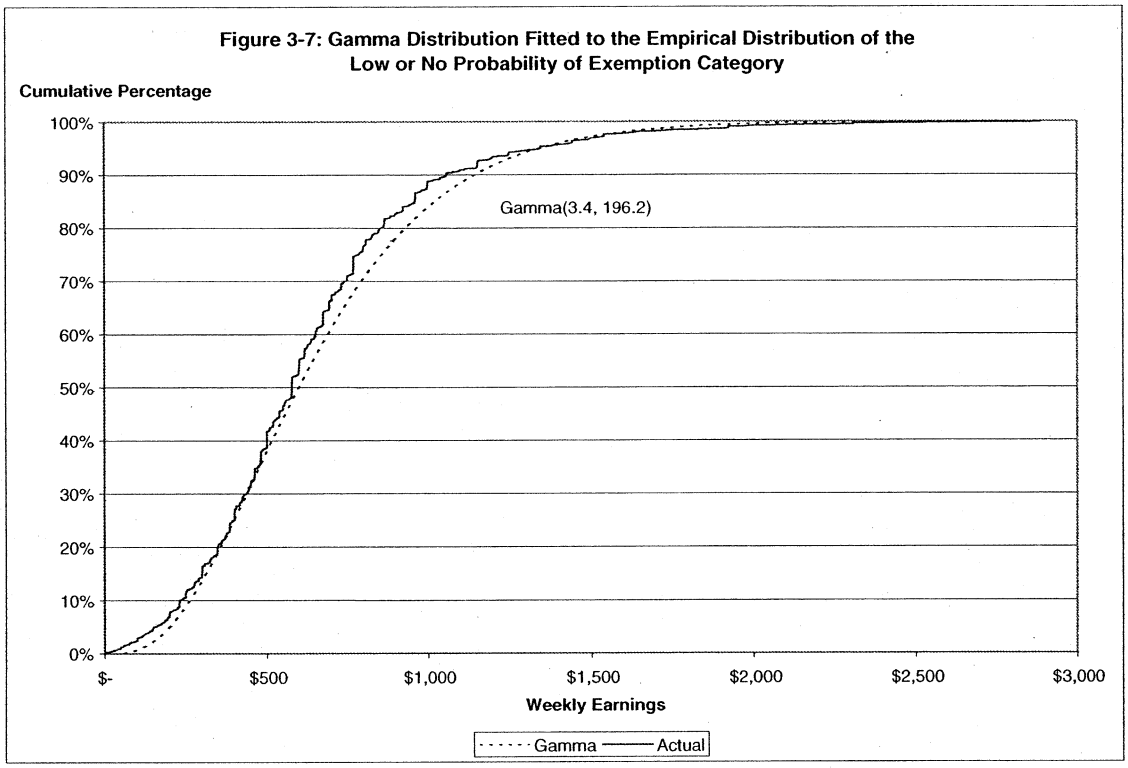


Figure 3-6: Gamma Distribution Fitted to the Empirical Distribution of the Probably Not Exempt Category
Cumulative Percentage
100%
90%
80%
70%
60%
50%
40%
30%
20%
10%
0%
Gamma(3.5, 262.4)
$-
$500
$1,000
$1,500
$2,000
$2,500
$3,000
Weekly Earnings
Gamma
Actual



Like the linear model, this methodology accounts for the existence of lower-wage industries and regions while remaining consistent with the GAO's assumption that "duties that make an employee more likely to be covered by the white-collar exemptions are duties that, generally speaking, elicit a higher salary.'' The non-linear model also accounts for the different marginal effect on exemption probabilities that lower wage and higher wage workers are likely to have. For example, the change in the exemption probability for social workers as their income rises is likely to be relatively small for social workers earning between $155 and $455 per week compared to a relatively constant change in the exemption probability for social workers earning between $455 and $1,250 per week. However, once workers earn a relatively high pay level, the rate of change in their exemption probability is likely to decrease as their income increases and they approach the maximum exemption probability and maximum income reported for their job. The Department also feels that this methodology is consistent with recent findings in the economic literature. For example, Bell and Hart ("Unpaid Work,'' Economica, 66: 271–290, 1999) and Bell, Hart, Hubler, and Schwerdt ("Paid and Unpaid Overtime Working in Germany and the UK,'' IZA Discussion Paper Number 133, Bonn, Germany: The Institute for the Study of Labor, March 2000) found that unpaid overtime is more often worked by employees with managerial status and with comparatively high wage rates; whereas paid overtime is more often worked by employees with lower wage rates.

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

Clearly, this approach cannot be used by an employer to determine the exempt status of individual employees. The approach was designed to estimate the number of exempt employees in entire occupations for statistical purposes only, not to determine the specific status of a particular individual in a specific occupation. The latter requires consideration of the individual's specific duties, which must be done on a case-by-case basis.

3.6 Estimated Number of Exempt Salaried Workers

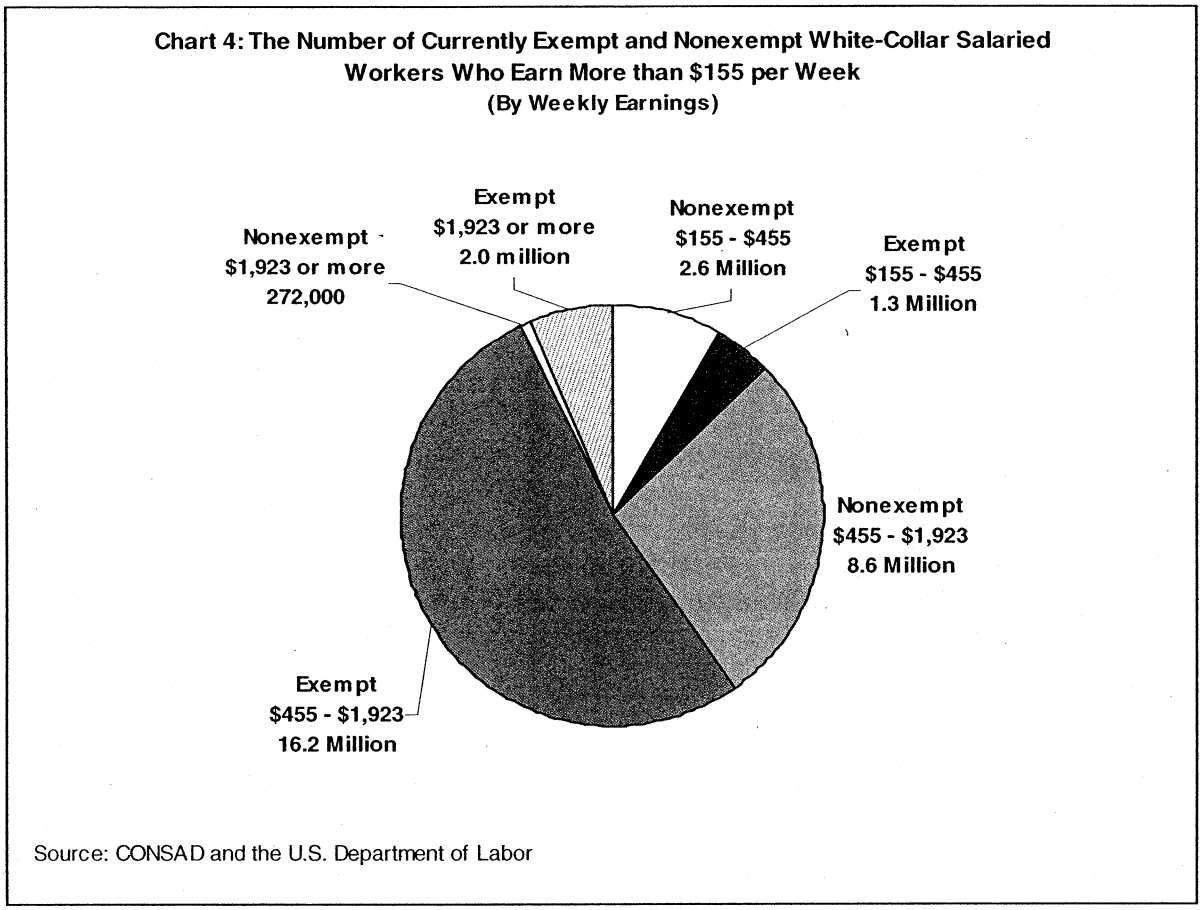
The total number of exempt salaried workers for each white-collar occupation was estimated by multiplying the estimated probability of being exempt by the CPS weight for each worker to produce a modified weight, and then summing the modified weights for each occupation. Based on this analysis, the Department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

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

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

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

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



Chapter 4: Estimating the Change in Overtime Protection

In this chapter, the Department presents the estimated changes in exempt status of workers that are likely to occur as a result of the final rule. The estimates presented below are based on the assessment of the final rule presented in Chapter 2 and elsewhere in the preamble and on the coverage estimates presented in Chapter 3. The methodology detailed below differs from the PRIA because of modifications made to the proposed rule to address the comments. In addition to changes resulting from the revised methodology, the estimates are different from the PRIA because the data sources have been updated.

The major findings in this chapter are as follows:

- Workers earning less than $155 per week will remain nonexempt under the final rule.
- An estimated 6.7 million workers earning $155 or more but less than $455 per week will be guaranteed overtime protection under the revisions regardless of their duties.
- There are an estimated 5.4 million currently nonexempt salaried workers whose overtime protection will be strengthened because their protection, which is based on the duties tests under the current rules, will be automatic under the new rules.

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

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

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

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

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

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

The Building and Construction Trades Department of the AFL–CIO stated, "As the Economic Policy Institute points out in a report it recently issued, DOL seems to assume, without any factual support, that all of these highly compensated employees are already exempt under the current white-collar regulations. * * * However, as the Economic Policy Institute Briefing Paper observed, it is not at all clear that all of these highly compensated employees are already exempt under current law.''

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

4.2 Critique of the EPI Report

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

First, the basis for the EPI estimate that millions of workers would lose their right to overtime was the contention that the proposed standard duties tests that applied to workers earning $425 or more per week were weaker than the current long and short duties tests. Many other commenters adopted this contention. For example, the National Treasury Employees Union stated, "Millions of workers with salaries between $22,101 and $65,000 who now receive overtime pay could be reclassified as exempt under the broadened definitions of executive, administrative, and professional employees.'' The Public Justice Center added, "If exemptions are easy to obtain, a large middle segment of the work force will be exempted. Employers will give this exempted portion of the workforce extra work, since they are essentially 'free labor.' And employers will be discouraged from both hiring more entry level employees to do the extra work and from paying lower paid employees at the time and one-half rate, thereby undermining the very purposes of the hours-of-work standard and harming the classes of persons who need protection the most, the low-wage employee and unemployed worker.''

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

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

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

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

Like many other commenters, EPI has confused the occupations specifically covered by proposed section 541.301(e). Based upon its misperception that the Department had changed the regulatory standard, the EPI report stated that under the proposed rule, "no minimum level even of on-the-job training will be required'' for the professional exemption. In fact, the proposed and final rules clearly state that professional occupations do not include those whose duties may be performed with general knowledge acquired by an academic degree in any field or with knowledge acquired through an apprenticeship or from training in routine mental, manual, mechanical, or physical processes.

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

EPI's claim that "the great majority of dental hygienists will be exempt professionals'' also is similarly wrong. The proposed and final rules provide that dental hygienists would qualify for exemption only if they have successfully completed four years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association. The regulation simply restates what has long been in the Wage and Hour Division's Field Operations Handbook and its opinion letters (*e.g.*, 1975 WL 40986, WHD Opinion Letter, WH–363, November 10, 1975) regarding dental hygienists, and thus there is no change from current law.

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

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

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

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

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

The Department also concluded the EPI analysis is flawed because it erroneously assumes that employers completely control the terms of employment and can at their sole discretion and without consequence convert millions of workers to exempt status to avoid paying overtime. In fact, the economic laws of supply and demand usually dictate the terms of employment; therefore, if employers offer too little compensation for the hours of work they demand they will not be able to attract a sufficient number of qualified workers to meet their needs. If employers could completely dictate the terms of employment, in the absence of a state or local ordinance, hourly workers covered by the FLSA would only receive the federally-mandated minimum wage. Similarly, salaried workers would be paid no more than $250 per week, the minimum required to meet the current short duties test. These workers would then be required by their employers to work extremely long hours with no overtime. Since this is clearly not the situation in today's labor market, it is a mistake to assume that employers are in complete control of the terms of employment.

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

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

Just as many RNs continue to be paid overtime despite the fact the current regulations classify them as performing exempt professional duties, the Department believes the same will happen for other occupations under the duties tests for highly compensated employees. There are many more factors involved in employee compensation beyond the FLSA requirements and an employer's desire to minimize overtime costs. The nature of the work (particularly peak work loads in relation to average work loads), the supply of qualified workers, the risk tolerance of both the employer and the employee, and tradition/culture are just some of the factors involved that influence whether or not a particular job is paid on a salaried or hourly basis.

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

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

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

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

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

- Strengthen overtime protection for an additional 6.7 million salaried workers earning $155 or more but less than $455 per week regardless of their duties or exempt status. This includes 1.3 million exempt white-collar salaried workers who will gain overtime protection and 5.4 million nonexempt salaried workers whose overtime protection will be strengthened by the higher bright-line salary level test compared to a combination of the salary basis test and the confusing long and short duties tests in the current regulations.
- Another 3.4 million white-collar employees who are paid by the hour (and earn $155 or more but less than $455 per week) but work in occupations with a high probability of being exempt also will have their overtime protection strengthened. Under the current regulations these workers are at some risk of being misclassified and denied overtime. Under the higher salary level test in the final rule, they will be guaranteed overtime regardless of their duties or how they are paid.
- These 10.1 million workers are predominantly married women with less than a college education.

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

When developing this estimate, the Department did not focus exclusively on the number of workers reporting overtime (41 or more hours worked). The Department assumed that all of the estimated 1.3 million exempt salaried workers earning at least $155 but less than $455 per week are likely to work some overtime during the year for two reasons: First, the CPS Outgoing Rotation Group dataset likely underestimated the number of employees who work some overtime during the year; and second, employers have an economic disincentive to exempt workers that never work overtime.

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

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

Furthermore, the Department considers the estimated 1.3 million workers gaining compensation to be a lower bound estimate of the workers who will benefit from raising the salary level to $455 per week. Specifically, the following workers will also benefit:

- An estimated 2.6 million nonexempt salaried workers earning $155 or more but less than $455 per week in the white collar occupations will gain some overtime protection (in the form of a reduced probability of being misclassified) from the $455 bright line salary level test compared to the current combination of long and short duties tests.
- Up to 14.0 million hourly paid workers earning $155 or more but less than $455 per week in the white-collar occupations will also benefit from the $455 bright line salary level test. Under the current regulations these workers are at some risk of being misclassified and denied overtime. Under the higher salary level test in the final rule, they will be guaranteed overtime regardless of their duties or how they are paid. This estimate includes the 3.4 million white-collar employees noted above who are paid by the hour but work in occupations with a high probability of being exempt.
- Raising the salary level test to $455 per week will strengthen overtime protection for 2.8 million salaried workers in blue-collar occupations, because their protection, which is based on the duties tests under the current regulation, will be automatic under the new rules. The Department concluded that most of these workers are nonexempt under the current regulation, however, making their nonexempt status certain will unambiguously increase their overtime protection.

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

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

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

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

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

As the GAO previously noted, basing the estimates on the CPS and the 1998 judgments of the WHD staff imposes some limitations on the analysis: "There are two major limitations on the use of CPS data. First, the CPS occupational classifications do not distinguish between supervisory and nonsupervisory employees, which is important for the long and short duties tests under the Fair Labor Standards Act (FLSA). Therefore, one job title, 'managers and administrators,' could include the President of General Motors, but it may also include an office assistant. Second, CPS respondents self-identify their duties and some may tend to exaggerate them. This may result in overestimates of the number of management employees and, consequently, may overestimate the number of exempt employees.'' (GAO/HEHS–99–164, pg. 42)

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

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

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

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

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

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

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

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

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

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

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

These increases are sizable for occupations that have a relatively low probability of being exempt under the current short tests.

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

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

The estimated probabilities of Part 541—exemption status under the duties tests for highly compensated employees are presented in Table 4–1 for each coverage classification.

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

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

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

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

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

Where:

Prob_Exempt_HC = Probability of the individual in occupational classification OCC being exempt under the duties tests for highly compensated employees

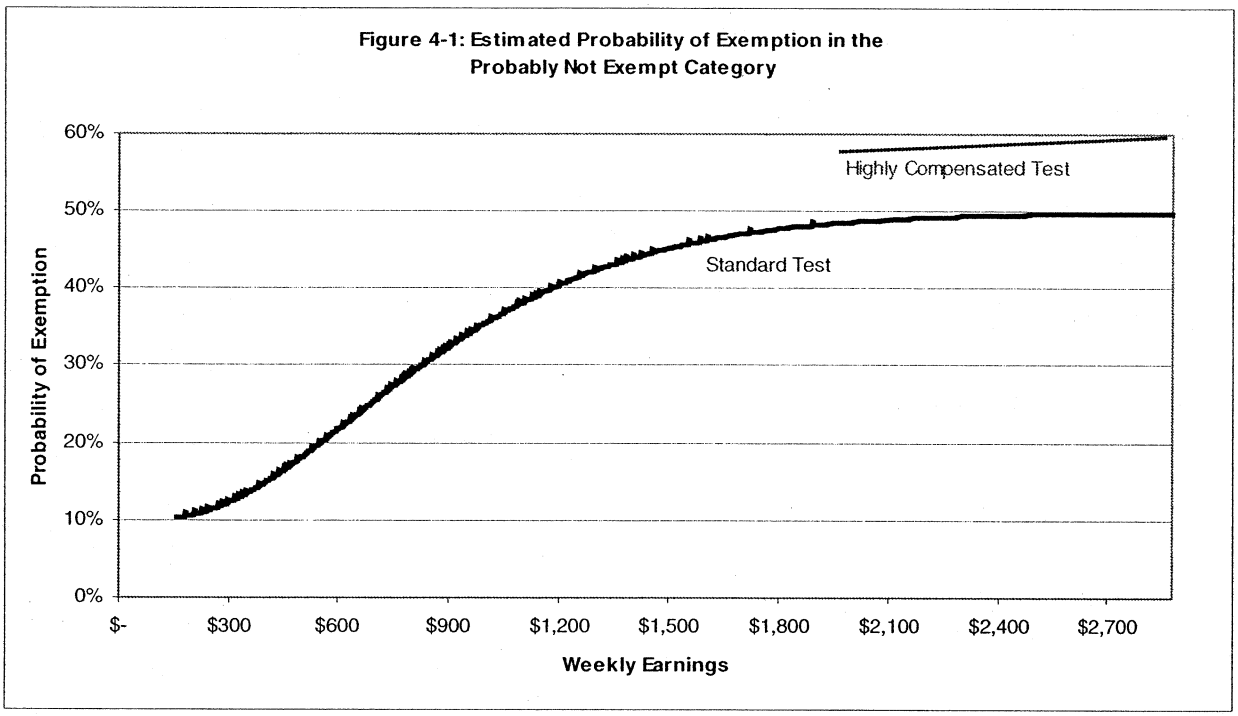
PTERNWA = CPS weekly earnings variable

LB* = Lower bound probability from Table 4–1

UB* = Upper bound probability from Table 4–1

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

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



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

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

The procedure used to estimate the number of highly compensated hourly employees that could be converted to exempt salaried status under the final rule is different from that used in Section 4.5 because, under both current regulations and the final rule, virtually all hourly workers are considered nonexempt (except those not required to be paid on a salary basis, such as doctors and lawyers). Thus, before any hourly worker could be made exempt under the highly compensated tests, employers would first have to convert them to a salaried basis and pay them at least $455 per week plus commissions and bonuses that brings their total compensation to $100,000 or more per year. To estimate the number of hourly workers that could be converted, the Department utilized a number of reasonable assumptions.

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

The nature of the work, the supply of qualified workers, the risk tolerance of both the employer and the employee, and tradition/culture are just some of the factors involved that influence whether or not a particular job is paid on a salaried or hourly basis. Therefore, the Department has determined that just as 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn $100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties, the same will happen for other white-collar occupations under the highly compensated test and that many paid hourly workers will remain paid by the hour. The Department then assumed:

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

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

Second, the Department assumed that:

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

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

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

These estimates are presented in Table 4–2.

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

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

Source: U.S. Department of Labor.

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

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

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

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

The Department estimates that 107,000 workers could be converted to exempt status as a result of the new highly compensated tests. The major reason for the decrease in this estimate compared to the PRIA is the salary level for the test being raised to $100,000 and there are far fewer workers earning this higher salary. The Department estimates there are 2.3 million salaried workers earning at least $100,000 in white-collar occupations subject to the salary test, compared to 7.0 million earning at least $65,000. In addition, after excluding the computer programmers, RNs and pharmacists, because they could already be made exempt if paid on a salaried basis under the current rule, 2.0 million of the 2.1 million remaining highly compensated white-collar salaried workers (95.2 percent) are estimated to be already exempt under the current short duties tests. In addition, there are only 182,000 hourly workers that could be potentially impacted by the highly compensated test at the $100,000 level. Moreover, the final rule's highly compensated test applies only if the employee performs office or non-manual work.

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

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

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

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

4.8 Estimated Total Impact of the Part 541 Revisions

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

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

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

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

Chapter 5: Economic Profiles

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

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

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

The Department decided to present nine industry sectors and the government sector because these estimates are based on at least 998 observations, and an average observation number of 18,230 per sector. The Department felt that these sample sizes were sufficient to accurately represent the sectors. Further disaggregation would have required the Department to extrapolate from smaller samples. For example, a subset among all 50 states and industry categories would have implied a dependence on a minimum sample size of 1 observation (for a particular sector and state), and an average sample size of 14 observations across all states and sectors. Extrapolating from these small sub-samples would be problematic, and would not offer the level of precision desired by the commenters.

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

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

5.1 Private Sector Profile

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

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

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

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

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

Although the Department used various data sources covering different time periods, this could not be avoided to complete the required economic analysis since the primary data set used in the analysis, the 2002 CPS, is based on the Standard Industrial Classification (SIC) while most of the more recent data is based upon the newer North American Industry Classification System (NAICS). The U.S. Census Bureau cautions that "While many of the individual SIC industries correspond directly to industries as defined under the NAICS system, most of the higher level groupings do not. Particular care should be taken in comparing data for retail trade, wholesale trade, and manufacturing, which are sector titles used in both NAICS and SIC, but cover somewhat different groups of industries.'' (*http://www.census.gov/epcd/ec97brdg/introbdg.htm*) Given that the profit data from Dun & Bradstreet (D&B) were also SIC based, the Department decided to use data sets that were also SIC based rather than conduct a complicated crosswalk conversion that potentially introduces other errors into the analysis.

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

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

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

In Chapter 7, the Department adjusted the dollar values for the 1997 payroll data because wages continued to increase from 1997 to 2002. Nevertheless, the comparison of the adjusted 1997 payroll data with the cost estimates based upon the 2002 CPS data are likely to overstate the economic impacts presented in Chapter 7 because the denominator (based upon the 1997 employment) will be relatively smaller than the numerator (based upon 2002 employment).

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

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

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

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

The resulting estimates, based on 1997 data, indicate that there are 6.5 million establishments with 99.8 million employees, annual payroll totaling $2.8 trillion, annual sales revenues of $17.9 trillion, and annual pre-tax profits of $579.7 billion in the affected industry sectors (see Table 5–1). Across all industries, the services industry has the largest numbers of establishments, employees, and payroll. This is followed by retail trade for establishments and employees, and manufacturing for payroll. Annual sales are largest in wholesale trade followed by manufacturing. Annual pre-tax profits are largest for the finance, insurance, and real estate industry followed by manufacturing.

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

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

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

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

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

[1]Employment is estimated when data suppression occurs.

[2]Values may be underestimated due to data suppression in USDOC (2001a).

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

[4]Excludes agriculture (SICs 01 and 02).

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

[6]Excludes private households (SIC 88).

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

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

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

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

5.2 Private Sector Small Business Profile

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

To estimate the number of, and employment in, firms covered under SBREFA and affected by the final rule, the Department used the data described above on the numbers of firms, establishments, employment, payroll, and annual receipts for various firm size categories (*i.e.*, employment ranges). The first step in this process involved developing an employment-based firm size standard for each affected industry. For the manufacturing and the retail and wholesale trade sectors, the SBA firm size standard is based directly on employment. For other industries, the SBA most often uses annual sales to define a small business entity. For the industries where employment is not used, the standards specified by the SBA have been converted to employment-based firm size estimates. Specifically, employment-based firm size standards were estimated by first calculating an employment level, based on the industry average annual receipts per employee, that would be sufficient to produce total sales per firm that are consistent with the sales-based firm size standard. Then, the employment-based firm size standard was chosen on the basis of the firm size categories defined in the County Business Patterns data.

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

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

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

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

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

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

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

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

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

[1] Employment is estimated when data suppression occurs.

[2] Values may be underestimated due to data suppression in USDOC (2001a).

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

[4] Excludes agriculture (SICs 01 and 02).

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

[6] Excludes private households (SIC 88).

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

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

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

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

5.3 State and Local Government Profile

The Bureau of the Census collects data on state and local government finances for the 50 states. The local government entities for which data are collected include: 3,043 county governments, which provide general government activities in specified geographic areas; 19,372 municipal governments, which provide general government services for a specific population concentration in a defined area; 16,629 township governments, which provide general government services for areas without regard to population concentrations; 34,683 special district governments, which provide only one or a limited number of designated functions, and have sufficient administrative and fiscal autonomy to qualify as independent governments; and 13,726 school district governments, which provide public elementary, secondary, or higher education, and have sufficient administrative and fiscal autonomy to qualify as independent governments.

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

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

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

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

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

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

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

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

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

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

6.1 One-Time Implementation Costs

The one-time implementation costs contain two components. The first component relates to the efforts employers will expend in adapting their overtime policies in response to the revised regulations, and then informing their employees about the updated policies. The second component relates to the efforts employers will expend in reviewing the duties performed by employees in particular job categories, and determining whether, based on their adapted overtime policies, employees in the job categories qualify for exemption from the overtime provisions of the FLSA. The final rule contains no new information-collection requirements subject to review and approval by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). The information-collection requirements for employers who claim exemption under 29 CFR Part 541 are contained in the general FLSA recordkeeping requirements codified at 29 CFR Part 516, which were approved by the Office of Management and Budget under OMB Control Number 1215–0017.

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

6.2 Estimated Costs Related To Adapting Overtime Policies

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

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

Based on the judgments provided by the human resource experts, it is estimated that, on average nationwide, the efforts associated with revising overtime policies will range from two hours per employer in the smallest size range to 57 hours per employer in the largest size range. The Department assumed the efforts required to implement the revised regulations will be furnished substantially by human resources specialists. The costs per hour for human resources specialists at eight different skill or experience levels have been obtained from the National Compensation Survey data compiled by the Bureau of Labor Statistics (BLS). The average costs per hour for personnel, training, and labor relation specialists working for employers in the eight employment size ranges were estimated as weighted averages of the costs per hour for the various skill or experience levels reported by the BLS. Weights were developed by positing a typical staffing pattern for human resources specialists working for employers or establishments in different size ranges, and then calculating the average cost per hour for the mix of workers corresponding to that staffing pattern. The estimates of costs per hour calculated through this process rise monotonically as size range increases, and range from $16.03 for the smallest size range to $25.08 for the largest size range. These estimates were then multiplied by a loading factor of 1.4 to account for fringe benefits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6.3 Estimated Cost To Reexamine Jobs

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

Based upon the analysis in Chapter 3, the Department assumed that none of the blue-collar jobs (*e.g.*, occupations in the 239 excluded OCCs) would have to be reviewed. As was shown in Chapter 2, none of the revisions should cause employers to think that currently nonexempt blue-collar workers could possibly be made exempt under the final rule. So employers should not incur any additional expenses related to these workers after completing the process of adapting their overtime policies in response to the revised regulations.

The Department assumed that for the white-collar workers earning less than $455 per week, employers would only review the jobs of workers who are currently exempt and would not review the jobs of any currently nonexempt workers. As was shown in Chapter 2, the $455 salary level in the final rule should make it absolutely clear to employers that the currently nonexempt white-collar workers earning less than $455 per week could not possibly be made exempt under the final rule. So, again, employers should not incur any additional expenses related to these workers after completing the process of adapting their overtime policies in response to the revised regulations.

As is more fully discussed in the next section of this chapter, employers will have to determine how to alter the compensation for each of the approximately 1.3 million currently exempt workers earning less than $455 per week. In some cases employers will decide to pay the overtime premium, while in others employers will decide to increase the worker's salary in order to maintain the exemption. The Department assumed that on average these reviews would take approximately ½ hour per currently exempt employee to complete. For most employees, the review will consist of an examination of their payroll records to determine how they should be paid under the final rule (*e.g.*, pay overtime or increase their salaries). The duties of the remaining, relatively small number of employees

(*i.e.*, only a portion of those whom employers decide to maintain in exempt status by increasing their salaries to $455 or more) will have to be reexamined to determine if they continue to qualify for exemption given the minor differences in the duties tests under the final rule compared to the current rule. While it may take employers more than 30 minutes to reexamine these few workers, it will take less than 30 minutes for many others. Thus, the Department estimated that the cost of reexamining the jobs of workers earning less than $455 per week would be about $21 million (1.3 million workers × ½ hour per worker × $32.41 per hour).

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

The Department assumed that on average employers would take approximately ½ hour to review the duties of each currently nonexempt highly compensated employee to determine if they could be made exempt under the highly compensated test. In addition, the Department assumed that employers would expend an additional ½ hour to review the pay basis of each hourly worker to determine if it could be modified to comply with the requirements of the highly compensated test. For most employees, the review will consist of an examination of their payroll records to determine how they currently are paid and how they should be paid under the final rule (*e.g.*, paid overtime or paid on a salary basis). While it may take employers more than one hour to reexamine both the duties and compensation of some workers, it will clearly not be necessary for employers to review both the duties and compensation of many others (*e.g.*, there is no need to review the compensation of hourly workers whose duties are not exempt under the highly compensated test). The Department estimated that the cost of reexamining the jobs and pay of current salaried workers earning $100,000 or more per year would be approximately $4.4 million (270,000 workers × ½ hour per worker × $32.41 per hour) and the cost of reexamining the jobs of current hourly workers earning $100,000 or more per year would be approximately $6 million (182,600 workers × 1 hour per worker × $32.41 per hour). The Department believes that this estimate probably overstates the costs to businesses because many employers will probably choose not to review the jobs of hourly workers who could not easily be converted to a salary basis (*e.g.*, workers covered by union contracts).

For workers earning $455 to $1,923 per week, the Department assumed that none of the hourly workers would require a job review and that employers would review only a portion of the jobs held by salaried workers. Given the comparability of the standard tests in the final rule with the short tests in the current rule (see Chapter 2), the Department assumed that after completing the process of adapting their overtime policies in response to the revised regulations, employers would conclude that all of the current hourly workers earning $455 to $1,923 per week would continue to be nonexempt under the final rule and would not expend additional resources to review any of these jobs.

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

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

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

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

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

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

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

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

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

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

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

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

6.4 Incremental Payroll Impact

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

However, employers are, at all times, obligated to pay overtime in accordance with the FLSA. For example, employers could pay overtime to their low-income, white-collar workers for any hours worked over 40, or they could raise the salaries of these currently exempt workers to at least $455 per week to maintain their exempt status. The Department estimates that 1.3 million low-income, white-collar salaried workers are likely to see larger paychecks as a result of these responses.

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

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

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

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

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

The weekly increase in payroll for each worker is the lower of the amount of raising the worker's salary to $455 or the amount of paying for the overtime hours that were currently exempt. The total weekly impact due to raising the salary level would be the sum of the weekly increase in payroll for all workers. Since the data in the CPS annual Outgoing Rotation Group data set consists of 12 months of observations, the Department has assumed the data account for the seasonal variations in overtime hours worked. The annual impact is the weekly increase in payroll multiplied by 52, which is approximately $375 million. Table 6–6 presents the impact for each industry division and the portion attributed to small businesses in the private sector.

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

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

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

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

6.5 Total Costs of the Final Rule

The Department estimates that the total first-year costs are approximately $1.1 billion. This is equal to the sum of the implementation costs related to reviewing the regulation and revising company policies ($627 million), the implementation costs related to reviewing the jobs ($111 million), and the increased payroll costs related to raising the salary level to $455 per week ($375 million). In subsequent years, the Department estimates that employers could experience a payroll increase of as much as $375 million per year. Table 6–7 presents a summary of the costs by industry.

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

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

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

Total first-year costs for small business are approximately $676 million as shown in Table 6–8. This is equal to the sum of the implementation costs related to reviewing the regulation and revising company policies ($505 million), the implementation costs related to reviewing the jobs ($39 million), and the increased payroll costs related to raising the salary level to $455 per week ($132 million). In subsequent years, the Department estimates that small business employers may experience a payroll increase of as much as $132 million per year.

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

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

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

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

Chapter 7: Economic Impacts

7.1 Typical Impacts

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

As shown in Table 7–1, the ratio of total first-year costs to payrolls averaged 0.04 percent nationwide in the private sector. The largest impact relative to payrolls was approximately 0.12 percent in agricultural services. The ratio of total first-year costs to revenue averaged less than 0.01 percent nationwide in the private sector. The largest impact relative to revenue was approximately 0.02 percent in agricultural services and the services industries. The ratio of total first-year costs to pre-tax profit averaged 0.19 percent nationwide in the private sector. The largest impact relative to pre-tax profit was approximately 0.64 percent in the retail industry. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical firms in any of the major industry sectors.

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

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

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

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

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

As shown in Table 7–2, the ratio of total first-year costs to both payrolls and revenue were less than one-hundredth of one-percent nationwide in the public sector. The highest impact was in the West North Central Census Division, where the ratio of first-year costs to payrolls was 0.014 percent and the ratio of first-year costs to revenue was 0.004 percent. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical state and local governments.

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

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

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

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

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

7.2 Small Business Impacts

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

Particular concern over such impacts was expressed by the National Restaurant Association, which stated, "Since salary levels have not been changed in over a quarter century, the Association agrees that the existing salary levels are out of date. However, it is important to emphasize that the substantial increase proposed by DOL will have a major impact on employers in the restaurant industry, particularly those who are located in areas of the country with lower general wage rates. In addition, restaurants generally have very small profit-to-loss ('P + L') margins each year.''

The NFIB expressed concern that under the proposed rule two industries, general merchandise stores and private educational services, would suffer payroll cost increases of more than two percent of pretax profit. See Table 5.4 of Final Report, Economic Analysis of the Proposed and Alternative Rules for the Fair Labor Standards Act (FLSA) Regulations at 29 CFR 541, prepared by CONSAD Research Corporation, February 10, 2003, p. 75–76, incorporated by reference at 68 FR 15573; March 31, 2003 (estimated 4.5 percent increase for general merchandise stores and 2.03 percent increase for educational services). The NFIB noted that given the "large percentage of our members'' in the general merchandise category, the estimated 4.5 percent increased payroll cost "would be a significant burden,'' particularly for a small business owner struggling with economic conditions. The NFIB also expressed similar concern regarding a "significant burden'' for its members in the private educational services sector and urged the Department to carefully review any payroll increases resulting from updating the rule. The Department has given these comments serious consideration. Under the final rule, as noted in Table 7–3, first-year costs are estimated to be less than four-tenths of a percent of pre-tax profit for all SBREFA-covered small businesses, and approximately seven-tenths of a percent for all small business retail trade and services industries.

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

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

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

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

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

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

Chapter 8: Estimating the Benefits

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

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

Employers will also benefit in a variety of ways from the final rule. As estimated in Chapter 4, the highly compensated test in the final rule could result in approximately 107,000 currently nonexempt white-collar workers earning $100,000 or more per year being converted to exempt salaried status. Some employers could experience a reduction in their payroll costs related to this change in status. However, neither the record in this rulemaking nor the economic literature provides a means for quantifying the amount of this reduction. The highly compensated test does not require employers to change the exemption status of their workers who earn $100,000 or more per year, so the effect of this provision is far less certain than the impact of the raising the salary level test. Moreover, as discussed in Chapter 4, there are a variety of reasons why employers might not convert the exemption status of these highly paid workers. These include, but are not limited to, the incentives to preserve an investment in human capital, retain institutional memory, and minimize turnover costs, as well as the nature of the work, tradition, and culture. Although the Department has tried to account for these incentives when estimating the number of workers who could be affected, these estimates do not completely account for all of the effects, particularly the market power of these highly skilled workers.

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

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

One benefit to employers that can be quantified based on the record is the benefit of having clearer rules that are easier to understand. Several commenters offered evidence that clearer, up-to-date rules are likely to reduce costly litigation. For example, Verizon noted that the current rule "offers little assistance to employers * * * who have to make challenging exemption classification decisions in the high technology environment of the twenty-first century. And the importance of making correct exemption classification decisions has never been higher. In recent years, employers have increasingly found themselves the target of large-scale class actions with multi-million dollar exposures challenging various exemption classification decisions that were based on good faith attempts to comply with the law.'' The National Association of Federal Wage Hour Consultants stated, "The business community has faced numerous unnecessary 'class inclusion type' law suits in the past few years and some of these have been brought in part as the result of a lack of proper interpretation of various parts of the regulations or regulations that are difficult to comprehend * * * Secondly, the legal community appears likewise to have problems when it comes to providing guidance to its clients as enforcement through interpretations and litigation have rendered varying results.'' Finally, Edward Potter, on behalf of the Employment Policy Foundation (EPF) noted that "[s]implification of rules may reasonably reduce the number of case filings by one-third to one-half, based on the error rate reductions used elsewhere in DOL's analysis.'' EPF also suggested that "[c]ost savings for reduced litigation would include reductions in total cases filed—including both those cases found to have merit and those without merit.''

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

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

Another benefit to workers and employers is enhanced compliance with the FLSA. Updating Part 541 will be a catalyst for employers to review the exemption classifications of their workforce and will result in greater levels of compliance with the law. More employers will understand exactly what their obligations are for paying overtime. Fewer workers will be unintentionally misclassified, and the potential legal liability that employers have under the current regulation will be reduced. Reducing regulatory red tape and litigation costs will free up resources and stimulate economic growth. The updated safe harbor provision in the final rule encourages employers to adopt proactive management practices, enables them to reimburse employees for overtime errors, and take meaningful measures to prevent improper deductions. The benefit for employers of clearer rules and the safe harbor provision comes from the lower liquidated damage awards that are associated with having fewer Part 541 overtime and salary basis violations (see Table 8–1). These proactive management practices will also reduce costly and lengthy litigation expenses.

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

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

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

The Department currently estimates the benefits from updating and clarifying the Part 541 rule that are associated with reduced liquidated damages to be at least $252.2 million. The services industry is estimated to have the largest quantifiable benefits, followed by retail trade and the finance, insurance, and real estate industry (see Table 8–1). However, based on comments in the record, the Department believes that the estimates presented in Table 8–1 may understate the actual benefits of the final rule that are associated with liquidated damages. For example, EPF commented that ''[s]implification of rules may reasonably reduce the number of case filings by one-third to one-half, based on the error rate reductions used elsewhere in DOL's [PRIA] analysis.'' Using EPF's one-third to one-half reduction rates instead of the Department's more conservative 25 percent assumption would increase the estimated benefits to $336.3 million to $504.5 million.

However, liquidated damages are only one part of the costs associated with Part 541 litigation. There are many other significant benefits that cannot be quantified in this analysis because although there is anecdotal evidence of other Part 541 related costs, data limitations preclude the Department from developing other quantitative estimates. Thus, the estimates presented in Table 8–1 do not include benefits such as reduced litigation-related costs including plaintiffs' attorneys fees, defense costs, and court related expenses that can be substantial; reduced back wage liability due to the safe harbor provision; the lower costs associated with determining the exempt status of employees including conducting expensive time-and-motion studies and other outside human resource expenses; and improved management productivity from reduced WHD investigations and private litigation. Consequently, the Department believes that the benefits due to clarifying the rules and the safe harbor provision are significantly higher than the quantified amount of $252.2 million.

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

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

[1] Overtime Violation Rates from 1981 Minimum Wage Commission Report, Vol. 1.
[2] Percentage from Wage and Hour Division enforcement experience.
[3] This reduction is associated with clarifying the rule and the safe harbor provision.
[4] These benefits are liquidated damages that are not incurred.

VII. Other Regulatory Analysis

Unfunded Mandates Reform

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

(1) Authorizing Legislation

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

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

(2) Cost-Benefit Analysis

For purposes of the Unfunded Mandates Reform Act of 1995, this rule includes a Federal mandate that might result in increased expenditures by the private sector of more than $118 million in any one year, but the rule will not result in increased expenditures by State, local and tribal governments, in the aggregate, of $118 million or more in any one year. Based on the Regulatory Impact Analysis (RIA), the Department has determined that the final rule will result in first-year costs for state and local governments of approximately $21 million. In subsequent years, the Department estimates that state and local governments may experience a payroll increase of as much as $10 million per year.

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

(3) Macro-Economic Effects

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

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

The ratio of total first-year costs to private sector payrolls averaged 0.04 percent nationwide, the ratio of total first-year costs to private sector revenue averaged less than 0.01 percent nationwide, and the ratio of total first-year costs to private sector pre-tax profit averaged 0.19 percent nationwide in the private sector. The Department concludes that impacts of this magnitude are clearly affordable and will not result in significant disruptions to typical firms in any of the major industry sectors.

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

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

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

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

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

When first confronted with the requirements of the FLSA, many state and local governments attempted to classify nearly all of their non-supervisory ''white-collar'' workers as exempt administrative employees without regard to whether their primary duty related directly to agency management policies or general business operations, or whether they met the existing discretion and independent judgment test. In the late 1980s, several Governors and state and local government agencies urged the Department to exempt many public sector classifications (including social workers, detectives, probation officers, and others) to avoid having the overtime requirements (either through increased costs or reduced hours of service) disrupt the level of public services they need to provide. In 1989, following a review of the concerns expressed, former Labor Secretary Elizabeth Dole responded by confirming what was required to meet the administrative exemption's duties test as applied to public sector employees, but also solicited specific input with accompanying rationale to support requested changes. Responses were limited but argued generally that government services should be considered unique because of the impact on health, safety, welfare or liberty of citizens. This, they argued, should allow exemption of positions in law enforcement and criminal justice, human services, health care and rehabilitation services, and the unemployment compensation systems, regardless of whether any particular employee's job duties included important decision-making authority on how the government agency is internally operated or managed. In effect, the suggestions essentially overlooked the focus on ''management or general business operations'' that has always been an essential foundation to the administrative employee exemption, but without explaining why that result was consistent with the intent of the FLSA and the exemptions provided by section 13(a)(1) as applied to the public sector. They also urged that the DOL redefine the professional exemption to recognize a broader contemporary use of that term in government employment, again without regard to the historical application of the professional exemption to only the recognized professions in particular fields of science or learning in which specialized intellectual instruction and specific academic training were prerequisites for entry into those particular professions. No supporting justifications were provided to explain how this broader application of the exemption would be in accord with the purposes of the FLSA or the exemptions in Section 13(a)(1).

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

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

Although public agency organizations were invited to the Department's stakeholder meetings in 2002 to address concerns over the Part 541 regulations, most did not respond to the invitations. The International Personnel Management Association, accompanied by the National Public Employers Labor Relations Association and the U.S. Conference of Mayors, suggested that progressive discipline systems are common in the public sector (some collectively bargained) and the ''salary basis'' rule for exempt workers, which prohibits disciplinary deductions except for major safety rules, conflicts with such systems. Representatives of the Interstate Labor Standards Association (ILSA) submitted written views suggesting that the salary threshold be indexed to the current minimum wage or some multiple thereof (*i.e.*, three times the minimum wage for a 40-hour workweek or $618 per week). One additional idea was to relate the salary levels to those of the supervised employees. No other input was provided.

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

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

(5) Least Burdensome Option or Explanation Required

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

Executive Order 13132 (Federalism)

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

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

Regulatory Flexibility Act and Executive Order 13272

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

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

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

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

Final Regulatory Flexibility Analysis

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

Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1), directs the Secretary of Labor to issue regulations ''from time to time'' (subject to the Administrative Procedure Act) to define and delimit the terms ''any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman * * *'' Employees who meet the specified regulatory criteria are completely exempt from minimum wage and overtime pay under the FLSA. The existing regulations require payment ''on a salary basis,'' at not less than specified minimum amounts, and certain additional tests must be met related to an employee's primary job duties and responsibilities. The duties tests were last modified in 1949 and have remained essentially unchanged since. The salary levels required for exemption were last updated in 1975 on an interim basis. In 1999, the U.S. General Accounting Office reviewed these regulations and recommended that the Secretary of Labor comprehensively review and update them, and make necessary changes to better meet the needs of both employers and employees in the modern work place. These regulations were also recommended for reform in public comments submitted on OMB's 2001 and 2002 Reports to Congress on the Costs and Benefits of Regulations. The Department proposed revisions to these regulations in response to the concerns that have been raised over the years, to update, clarify and simplify them for the 21st Century workplace. The objectives of the revised rule are to provide clear and concise regulatory guidance to implement the statutory exemption, in plain language, to assist employers and employees in determining whether an employee is exempt from the FLSA as a bona fide executive, administrative, professional, or outside sales employee.

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

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

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

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

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

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

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

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

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

Although the analysis does not include precise data delineating the salary levels paid by small businesses to their exempt employees in each exemption category (due to data limitations), the Department applied a reasonable proxy that takes into account lower-wage industries that include many small businesses, specifically by looking to the salary levels actually being paid in the retail and service sectors and in the South. This approach is based on and entirely consistent with previous revisions of these regulations. It tries to approximate the lower portion of the range of prevailing salaries already being paid to employees intended for exemption (thus mitigating actual impacts in retail stores and restaurants and in lower-wage regions of the country). For example, when the Department revised the regulations in 1958, it looked at the salaries paid to exempt employees and set rates "at about the levels at which no more than about 10 percent of those in the lowest-range region, or in the smallest size establishment group, or in the smallest-sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests.'' In the 1958 Kantor Report (at 5–7) and the 1940 Stein Report (at 32), it was noted that "* * * these figures are averages, and the act applies to low-wage areas and industries as well as to high-wage groups. Caution therefore dictates the adoption of a figure that is somewhat lower, though of the same general magnitude.'' Moreover, the 1949 Weiss Report (at 11–15) stated "To be sure, salaries vary, industry by industry, and in different parts of the country, and it undoubtedly occurs that an employee may have a high order of responsibility without a commensurate salary. By and large, however, if the salary levels are selected carefully and if they approximate the prevailing minimum salaries for this type of personnel and are above the generally prevailing levels for nonexempt occupations, they can be useful adjuncts in satisfying employers and employees as well as the Divisions as to the exempt status of the particular individuals.'' DOL set a salary level at that time at a "figure slightly lower than might be indicated by the data'' because of concerns regarding the impact of the salary level increases on small businesses: "The salary test for bona fide executives must not be set so high as to exclude large numbers of the executives of small establishments from the exemption.''

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

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

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

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

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

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

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

Enforcement flexibility: Advocacy noted that SBREFA requires Federal agencies to establish policies which reduce or waive civil penalties for small businesses in appropriate cases. Advocacy encouraged the Department to consider civil penalty flexibility where appropriate, noting that flexibility in dealing with small businesses will encourage such entities to work more closely with the Department to voluntarily achieve compliance. The Department's policies under the FLSA for reducing or waiving civil money penalties for small businesses under appropriate circumstances are fully consistent with SBREFA requirements and principles. However, there is a distinction between civil money penalties and statutory wages due under the FLSA. Violations of the FLSA's minimum wage or overtime provisions create an employer liability directly to its employees who were not paid their statutory wages due. The Department has no authority under the FLSA or SBREFA to reduce or waive an employer's liability to employees for statutory minimum wages or overtime pay legally due. The Department will continue to expand its compliance assistance efforts to promote voluntary employer compliance with these regulations, especially for smaller businesses.

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

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

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

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

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

(3) Number of Small Entities Covered by the Rule

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

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

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

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

The FLSA generally requires employers to pay covered nonexempt employees at least the federal minimum wage of $5.15 per hour, and time-and-one-half overtime premium pay for hours worked over 40 per week. Under the terms of the statute, Congress excluded some smaller businesses (those with annual revenues less than $500,000) from the definition of covered "enterprises'' (although individual workers who are engaged in interstate commerce or who produce goods for such commerce may be individually covered by the FLSA). This rule clarifies and updates the criteria for the statutory exemption from the FLSA for executive, administrative, professional, and outside sales employees for all employers covered by the FLSA.

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

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

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

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

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

Assessment of the Impact on Families

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

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

The Department estimates that 1.3 million white-collar workers earning less than $455 per week ($23,660 per year) are Part 541-exempt under the current rule. These workers are likely to benefit under the final rule in the form of increased compensation of approximately $375 million per year in the form of either paid overtime or higher salaries. According to the CPS data, many of these workers are married women and minorities with less than a college degree. Another 5.4 million salaried workers who earn between $155 and $455 per week will have their overtime protection strengthened because their protection, which is based on the duties tests under the current regulation, will be guaranteed under the final rule.

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

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

An estimated 107,000 workers who earn $100,000 or more per year could lose their overtime protection due to the new highly compensated test. However, as discussed in Chapters 4 and 8 of the RIA, there are a variety of reasons why employers might not convert the exemption status of these highly paid workers. These include, but are not limited to, the incentives to preserve an investment in human capital, retain institutional memory, and minimize turnover costs, as well as the nature of the work, and tradition and culture. Moreover, it would be incorrect to assume that employers would no longer pay a premium for overtime hours to these workers when 63.4 percent of the RNs and 76.1 percent of the Pharmacists who earn $100,000 or more per year continue to be paid by the hour (and eligible for overtime) despite the fact the current regulations classify them as performing exempt professional duties. The Department expects that most employers will adjust their compensation policies in a way that maintains the stability of their workforce, pay structure, and output levels while preserving their investment in human capital, and are unlikely to reduce the compensation of many highly paid workers, even if they could theoretically be made exempt under the new highly compensated tests.

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

Executive Order 13045, Protection of Children

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

Appendix A—Detailed Coverage Estimates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) See Table 3–2.
(2) Not elsewhere classified (n.e.c.)
Note: Some numbers may not add due to rounding.
Source: CONSAD and the U.S. Department of Labor.

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

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

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

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

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

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

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

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

(1) See Table 3–2.
(2) Not elsewhere classified (n.e.c.)
Note: Some numbers may not add due to rounding.
Source: CONSAD and the U.S. Department of Labor.

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

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

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

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

(*) Not elsewhere classified (n.e.c.)
(1) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Urban Planners, Nuclear Engineers, Actuaries, and Archivists.
(2) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Legal Assistants, Drafting Occ's, Electrical Technicians, Engineering Technicians, and Biological Technicians.
(3) All of the occupations included in this group have less than 500 workers who will become nonexempt such as Sales Workers Furniture, Sales Workers Radio TV, Sales Engineers, Sales Workers Hardware, and News Vendors.
(4) All of the occupations included in this group have less than 450 workers who will become nonexempt such as Order Clerks, Computer Operators, Dispatchers, Transportation Ticket Agents, Stock Clerks, Stenographers, and Billing Clerks.
(5) All of the occupations included in this group have less than 400 workers who will become nonexempt such as supervisors for cleaning & building service, construction, motor vehicle operators, and extractive occupations.
Note: Some numbers may not add due to rounding.
Source: CONSAD and the U.S. Department of Labor.

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

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

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

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

(*) Not elsewhere classified (n.e.c.).
(1) Computer system analysts and scientists (occupation 64), registered nurses (occupation 95), pharmacists (occupation 96) and computer programmers (occupation 229) were removed from the analysis (see Section 4–3).
(2) All of the occupations included in this group have less than 300 workers who could become exempt such as Dietitians, Athletes, Economists and Electrical Engineers.
(3) All of the occupations included in this group have less than 350 workers who could become exempt such as Legal Assistants, Electrical Technicians, Engineering Technicians and Airplane Pilots.
(4) All of the occupations included in this group have less than 500 workers who could become exempt such as Advertising & Related Sales and Sales Workers Radio TV.
(5) All of the occupations included in this group have less than 400 workers who could become exempt such as supervisory Investigators & Adjusters, Administrative Support Occ's, and Secretaries.
(6) All of the occupations included in this group have less than 300 workers who could become exempt such as supervisors for mechanics & repairers, and extractive occupations.
Note: Some numbers may not add due to rounding.
Source: CONSAD Research Corporation and U.S. Department of Labor.

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

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

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

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

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

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

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

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

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

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

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

Note: Some numbers may not add due to rounding.

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

Appendix B

Analysis of the 2003 Current Population Survey Outgoing Rotation Group Data

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

Impact of the Changes to the CPS

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

In 2003, the CPS changed its occupational classification of workers from the 1990 Standard Occupational Classification (SOC) system to the 2000 SOC system used in the 2000 Census. The significant changes that were made to the 2000 SOC make comparisons between 2002 CPS occupational categories and 2003 categories very difficult. The U.S. Census Bureau warns that "you cannot compare the categories directly across the two years. The wording of the categories is different, and, even when the words appear to be the same, the definitions of the categories are sometimes different.'' (U.S. Census Bureau, "Instructions for Creating 1990–2000 Occupation Crosswalks, Using the Occupation Crosswalk Template,''April 30, 2003) The Census Bureau also notes that although "different crosswalks could be created based on many different variables, including geography, sex, and race * * * the crosswalk for occupational distributions is likely different in New York compared to Kansas, and for men compared to women. To create many different crosswalks depending on all characteristics, however, would require a very large sample controlled for all these variables. Neither financial nor human resources were available to create and analyze such a large sample.''

The baseline estimates of the number of currently exempt and nonexempt workers (presented in Chapter 3) as well as the changes in the exemption status of workers resulting from the final rule (presented in Chapter 4) were based upon the exemption probability determinations made by the Wage and Hour Division staff in response to the GAO request in 1998 (see Chapter 3). These exemption probabilities were directly tied to the definitions of the 1990 SOC categories used in the 2002 CPS (and prior years) and not the definitions of the 2000 SOC categories used in the 2003 CPS. Further, many of the costs developed in Chapter 6 of the RIA were also developed on the basis of these determinations, particularly the determination of the occupations considered white-collar and blue-collar. After reviewing the 1990 SOC categories and the 2000 SOC categories, the Department has determined that it is not possible to accurately map the exemption probabilities developed for the 1990 SOC categories to the 2000 SOC categories, particularly given the Census Bureau warnings. Many of the 1990 categories are mapped to several 2000 categories and many of 2000 categories are mapped to several 1990 categories, and as noted above many of the underlying definitions have changed. There is also an increase in the number of management and service-related occupations; an increase in occupations formerly called "professional'' and "technical,'' especially healthcare and computer-related occupations; and a decrease in the number of clerical, maintenance, and production occupations.

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

Therefore, the Department determined that, given the judgments needed to apportion the probabilities used for the 1990 SOC categories, it would be more precise to develop an entirely new set of probabilities for the 2000 SOC categories before using them. The Department also concluded, however, that developing an entire new set of probabilities at this stage of the rulemaking would not be appropriate, because the resulting estimates would not have had the benefit of review by GAO and others. Thus, the Department concluded that the 2003 CPS should not be used in the RIA and has only compared descriptive statistics from the 2003 CPS to the 2002 CPS in this Appendix. This comparison, however, strongly suggests that the quantitative and qualitative conclusions reached in the RIA using the 2002 CPS data are still valid.

Estimated Number of Workers Covered by the FLSA

The 2003 CPS data estimates a total employment level of 137.7 million compared to 134.3 million in the RIA using the 2002 CPS data. As noted in the RIA, most of the difference (2.2 million, or 64.7 percent) is due to using weights adjusted for the 2000 Census counts in the 2003 CPS, and using weights based on the 1990 Census in the 2002 CPS does not significantly affect the accuracy or quality of the results. The remaining difference (1.2 million or 35.3 percent) is due to employment growth as the economy expanded.

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

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

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

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

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

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

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

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

Estimated Number of Workers Subject to the Part 541 Salary Test

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

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

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

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

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

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

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

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

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

Source: U.S. Department of Labor.

The distribution of workers by income who are covered by the FLSA and subject to the Part 541 salary level tests in 2002 and 2003 are presented in tables B–5 and B–6. Based upon the 2003 CPS data, the Department estimates that 6.7 million salaried workers who earn between $155 and $455 per week would have their overtime protection strengthened by raising the salary level test in the final rule. This is similar to the 6.7 million based on the 2002 CPS data that was estimated in the RIA. Therefore, the Department concludes that using the 2003 CPS data would not change its estimate of the number of salaried workers who earn between $155 and $455 per week who will have their overtime protection strengthened by the final rule.

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

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

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

Source: U.S. Department of Labor.

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

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

Source: U.S. Department of Labor.

The 2003 CPS Data and the Salary Level Test

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

Although the median weekly earnings for all full-time salary workers covered by the overtime provisions of the FLSA increased from $800 in 2002 to $808 in 2003, Table B–7 suggests that salaries declined in retail in 2003 compared to 2002. The 20th percentile in retail was just under $450 in 2003 (see Table B–7) compared to $455 in 2002 (see Preamble Table 3). Thus, the choice of the $455 salary level is valid whether it is based upon the 2002 or the 2003 CPS data. The Department also notes that the lack of salary growth in retail appears to be consistent with many of the comments that were received on behalf of small businesses and summarized in the preamble (see the Regulatory Flexibility Analysis).

Summary

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

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

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

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

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

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

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

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

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

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List of Subjects in 29 CFR Part 541

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

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

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Tammy D. McCutchen,

Administrator, Wage and Hour Division.

■ For the reasons set forth above, 29 CFR part 541 is revised to read as follows:

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

Subpart A—General Regulations

Subpart B—Executive Employees

Subpart C—Administrative Employees

Subpart D—Professional Employees

Subpart E—Computer Employees

Subpart F—Outside Sales Employees

Subpart G—Salary Requirements

Subpart H—Definitions And Miscellaneous Provisions

Authority: 29 U.S.C. 213; Public Law 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 used in regulations.

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.

§ 541.3 Scope of the section 13(a)(1) exemptions.

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other "blue collar'' workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt "blue collar'' employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged

course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

§ 541.4 Other laws and collective bargaining agreements.

The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.

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 $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is 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 are 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 bona fide 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, and who is actively engaged in its management. The term "management'' is defined in § 541.102. The requirements of Subpart G (salary requirements) of this part do not apply to the business owners described in this section.

§ 541.102 Management.

Generally, "management'' includes, but is not limited to, 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 for the purpose of recommending promotions or other changes in status; 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, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

§ 541.103 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.

(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.

§ 541.104 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 nonexempt 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.

§ 541.105 Particular weight.

To determine whether an employee's suggestions and recommendations are given "particular weight,'' factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight'' even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

§ 541.106 Concurrent duties.

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

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 $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

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

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(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 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations'' refers to the type of work

performed by the employee. To meet this requirement, an employee must perform work directly 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 in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

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

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance'' refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment'' must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment'' does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(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 does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician.''

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance 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 exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

§ 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, 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.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial

products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects 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) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen'' applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

§ 541.204 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 $455 per week (or $380 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) Whose primary duty is 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 curriculums 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 curriculums in secondary education. The term "other 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. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. 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.*; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; 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 $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of 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; 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) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase ''work requiring advanced knowledge'' means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase ''field of science or learning'' includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase ''customarily acquired by a prolonged course of specialized intellectual instruction'' 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 and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(e) (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 generally meet the duties requirements for the learned professional exemption.

(2) *Nurses.* Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(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 generally meet the duties requirements for the learned professional exemption.

(4) *Physician assistants.* Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the

duties requirements for the learned professional exemption.

(5) *Accountants.* Certified public accountants generally meet the duties requirements 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, bookkeepers 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 four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) *Athletic trainers.* Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) *Funeral directors or embalmers.* Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in paragraphs (e)(1), (e)(3), (e)(4), (e)(8) and (e)(9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

§ 541.302 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of 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 or intellectual 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. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. 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 satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

§ 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 § 541.204(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 semi-skilled 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 employees 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. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The section 13(a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities, and the section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

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

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

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

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

(c) 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 Computer manufacture and repair.

The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair 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 primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in § 541.400(b), are also not exempt computer professionals.

§ 541.402 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 generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption.

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) Whose primary duty is:

(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 catalogue, planning itineraries and attending sales conferences.

(c) 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.

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business.'' 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. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.,* one or two weeks) should not be considered as the employer's place 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. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(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 outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. 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 is not exempt outside sales work.

§ 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. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including, but not limited to: 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

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.

(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—Salary 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 $455 per week (or $380 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 $455 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 $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. 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 § 541.204(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(b).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 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 with total annual compensation of at least $100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly 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) (1) ''Total annual compensation'' must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $10,000 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. 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 amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) 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 will qualify for exemption if the employee customarily and regularly 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. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under § 541.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations

such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy 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 one or more full days 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 one or more full days 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 one or more full days 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 one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable 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 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent 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 did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; 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; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(b) If the facts demonstrate that the employer has an actual practice of

making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or 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) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

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

§ 541.604 Minimum guarantee plus extras.

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating 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 $455 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 $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. 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), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating 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 without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

§ 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 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 $455 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.

(a) To qualify for exemption under this part, an employee's "primary duty'' must be the performance of 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, with the major emphasis on the character of the employee's job as a whole. 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 kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

§ 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 workweek; it does not include isolated or one-time tasks.

§ 541.702 Exempt and nonexempt work.

The term "exempt work'' means all work described in §§ 541.100, 541.101, 541.200, 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 exempt 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 may be 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 Use of manuals.

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

§ 541.705 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.

§ 541.706 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.

§ 541.707 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 exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequently or occasionally; and existence of an industry practice for the exempt employee to perform the task.

§ 541.708 Combination exemptions.

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional, outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work 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.

§ 541.709 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 $695 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under subparts B, C or D of this part, and who is employed at a base rate of at least $695 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 $695 if 6 days were worked; or

(b) The employee is in a job category having a weekly base rate of at least $695 and the daily base rate is at least one-sixth of such weekly base rate.

§ 541.710 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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