PARTNERSHIP TO PROTECT
WORKPLACE OPPORTUNITY

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Submitted via regulations.gov
Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Request for Information (RIN 1235-AA20) (82 Fed. Reg. 34616, July 26, 2017)

Dear Ms. Smith:

This response to the request for information related to the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA) is submitted on behalf of the Partnership to Protect Workplace Opportunity (PPWO). The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of "white-collar" employees across the country in almost every industry who were (or who would have been) impacted by the Department's 2016 Final Rule that nearly doubled the existing required minimum salary level.

The PPWO's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. We applaud the Department of Labor's (DOL or the Department) review of these issues pursuant to President Trump's Executive Order 13777. As was clear before the U. S. District Court for the Eastern District of Texas invalidated it, the 2016 Final Rule's salary level created (or was expected to create) significant additional

costs, and disruptions in operations, often resulting in identical pay to an employee for identical hours worked, but with dramatic increases in costs for an employer to monitor and ensure compliance. Revisiting the 2016 Final Rule's salary level is entirely appropriate and consistent with an effort to lower unnecessary regulatory burdens.

Although detailed data is unavailable, anecdotal evidence provided by employers who belong to PPWO member groups suggests that the 2016 Final Rule's salary level, had it become effective, would have:

- harmed the ability of employers to provide, and employees to take advantage of, flexible scheduling options;
- resulted in employees in the same job classification (for the same employer) being treated differently based on regional cost-of-living differences;
- limited career advancement opportunities for employees;
- decreased morale for those employees who would have been (or, in some cases, were) reclassified to non-exempt status, particularly where peers in other locations remain exempt;
- reduced employee access to a variety of additional benefits, including incentive pay;
- reduced opportunities for employees to travel to conferences, meetings, and other events that can be beneficial to their career development;
- deterred employers from providing newly-reclassified employees with mobile devices and remote electronic access, further limiting employee flexibility;
- increased FLSA litigation based on off-the-clock and regular rate of pay claims; and
- introduced other legal and operational issues, such as increased administrative costs.

Thankfully, the 2016 Final Rule's salary level was preliminarily enjoined and has now been invalidated. As a result, the Final Rule's most harmful impacts were limited.

Below, we respond to the Department's specific questions contained in the Request for Information. Fundamental to the PPWO's response is the understanding that the white-collar exemptions' minimum salary level must be set at a level that satisfies is historical gatekeeper function: since at least 1940, the Department has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees."[1] That is, the salary level should be set so that the employees below it clearly would not meet any duties test; above the level, employees would still need to meet a duties test in order to qualify for exemption. This is in contrast with the 2016 rule which was explicitly intended to increase the number of employees eligible for overtime.[2] The PPWO rejects that intent behind the 2016 rule.

The thrust of these comments is that the Department should revert to the 2004 methodology in setting the salary threshold for determining exempt status and keep most other factors *status quo*. Following this approach will return these rulemakings to their traditional role of merely updating the salary level associated with the duties to be exempt. More importantly, by not making any other changes (e.g. multiple salary levels, changes to the duties test) the possibilities of new disruptions, confusion and litigation will be greatly reduced.

Responses to Request for Information

1. In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

[1] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).

[2] *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule,* 81 Fed. Reg. 32,392, 32,400 (May 23, 2016).

If the Department decides to increase the minimum salary level, the PPWO believes the appropriate methodology for determining that level is the same methodology used by the Department in 2004. The 2004 methodology was consistent with the historical methods by which the Department had set the minimum level, as appropriately adjusted for the 2004 revisions to the long test/short test structure. It remains the best methodology to establish the level of a "screening" salary.

Throughout the history of the white-collar exemptions, the Department generally established the minimum salary level for exemption in a similar way. The regulatory history of the previous salary increases reveals that, in determining appropriate salary levels, the Department has examined actual salaries and wages paid to exempt and nonexempt employees and set the salary level in such a way as to ensure that it served a screening function and did not operate as a *de facto* salary-only test:

- In 1940, the Department attempted to determine 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 to account for low-wage areas and industries.
- In 1949, the Department considered wages in small towns and low-wage industries, among other factors. The Department compared weekly earnings in 1940 with weekly earnings in 1949 to determine the average percentage increase in earnings, then set a lower salary level to account for small businesses.
- In 1958, the Department considered the actual salaries paid to employees who "qualified for exemption" (as determined by Wage & Hour Division investigations), grouped by geographic region, broad industry groups, number of employees and size of city. The 1958 salary was 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."
- In 1963, the Department followed the same methodology, setting the salary level for executive and administrative at $100 per week because survey data showed

that 13 percent of establishments paid one or more exempt executives less than $100 per week; and increasing the professional salary level to $115 per week, when the data showed that 12 percent of establishments paid one or more professional employees less than $115 per week.

- In 1970, 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.
- In 1975, the Department set the salary levels based on increases in the Consumer Price Index, and adjusted the salary level downward to eliminate any potential inflationary impact. These salary levels, however, were intended as interim levels. The "interim" salary levels remained in place for nearly 30 years.
- In 2004, the Department set the minimum salary level at $455 per week ($23,660 annually), the 20th percentile for salaried employees in the South region and retail industry, rather than at the 10th percentile as in 1958, to account for the proposed change from the "short" and "long" test structure and because the data included nonexempt salaried employees.

With the exception of the outlier "interim" level established in 1975, the methodologies adopted by the Department have consistently sought to achieve the same objective: "demarcating the 'bona fide' executive, administrative and professional employees without disqualifying any substantial number of such employees."[3] Based on the data available to the Department, the 2004 methodology remains the best at achieving that objective.

With respect to using inflationary measures to determine the appropriate salary level--whether based on the 2004 salary levels or otherwise--the Department has had a long-standing tradition of avoiding the use of such measures for determining the salary level. That tradition is based on a well-founded concern that a mechanical adjustment

[3] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. at 22,167 (citing prior rulemakings and Kantor Report).

for inflation could have an inflationary impact or cause job losses, particularly on lower-wage sectors such as businesses in rural areas, businesses in the retail and restaurant industry, and small businesses. The Department should continue this tradition and avoid the application of mechanical inflationary adjustments to determine the salary level. Following the 2004 methodology will produce a regulation that is far more precisely tailored to the gatekeeper objective of the salary threshold.

As noted above, as well as in the preamble to the 2004 Final Rule, the revisions to the duties tests in 2004 were accounted for in setting the salary level in 2004. Should the Department choose to apply the 2004 methodology to current data, no additional revisions to the duties tests would be necessary.

2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

Assuming the Department applies the 2004 methodology to current data, there is no need for multiple standard salary levels. A salary level that is sufficiently low to avoid excluding from the exemption employees performing exempt duties in the South serves the same function in the West or the Northeast. If the objective is to screen out obviously nonexempt employees (thereby rendering analysis of the duties unnecessary), then a salary level that works in the lowest wage areas and the lowest wage industries is sufficient. There simply is no need for multiple salary levels.

Although it may be tempting to consider multiple salary levels to more precisely address regional, industry, or employer size variations, the more prudent course of action is to set the salary level low enough to take those variations into account. Establishing different salary levels based on geographic area or employer size or

industry will also require the Department to establish rules for assessing when an employer or employee is working in a particular geographic area or industry or how employer size should be determined. Those rules, once promulgated, would almost certainly be the subject of litigation as the future workforce pushes the bounds of what it means to be employed by a particular employer in a specific industry in a static location. Multiple regional salary levels would also create significant difficulties when employees move around between locations in different salary regions. Maintaining a single salary level sufficient to screen out clearly nonexempt employees in the lowest wage industries and regions is far preferable to yet another subject for litigation.

3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

As is the case with multiple salary levels based on the factors discussed in Question 2, there is no need for additional salary levels based on the specific exempt duties performed by an exempt employee. As the workforce has evolved--and has become more educated--the lines of distinction surrounding which employee is administrative vs. executive vs. professional have become much less sharp. This was explicitly recognized in the 2004 regulations' combination exemption, which provides that "an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption." 29 CFR 541.708. The focus of the regulations is on whether the totality of the tasks performed by an employee result in an exempt primary duty, regardless of the percentage of time that employee spends in a particular exemption.

Establishing different salary levels for administrative and executive employees as compared to professional employees (or some other variation) would require employers to make a determination that a particular exemption applied or, more likely, that a

particular exemption is the "primary" primary duty. This, again, is likely to result in increased litigation to determine which specific salary level might apply.

4. In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

As noted in response to Question 1, and as stated repeatedly throughout the preamble to the 2004 Final Rule, the 2004 salary methodology already accounts for changes in the duties tests. The Department's apparent change of heart in 2015-16 is unsupported by the data or the regulatory record and was driven by the inappropriate goal of increasing the number of employees eligible for overtime. By contrast, the salary level in 2004 was entirely appropriate for its more legitimate purpose: to screen out clearly nonexempt employees while still requiring employees earning in excess of the salary level to go through the gauntlet of the duties tests.

The Department's 2015-16 claim of a "mismatch" between the salary level and the revised duties tests is fictionalized. The 2004 standard duties tests are not equivalent to the old "short" tests, which might be used to justify a higher standard salary level. In fact, the pre-2004 "short" test for the executive exemption required only that the employee have a primary duty of managing the enterprise (or a recognized department or subdivision thereof) and customarily and regularly direct the work of two or more other employees. The 2004 regulations, however, added a third requirement: "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." On its face, this added requirement means that the 2004 duties tests are more stringent than the pre-2004 short tests.

As noted above, the PPWO believes the appropriate level for any increase to the minimum salary should be determined by application of the 2004 methodology to current data. No effort to "slot" the salary to the long test or short test is necessary, nor is any change to the duties tests. The 2004 rulemaking adequately and appropriately addressed each of these issues and the Department should not deviate from that methodology.

5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

As the Eastern District of Texas determined in *Nevada v. Dep't of Labor*, 4:16-CV-731 (E.D. Tex. Aug. 31, 2017) (order granting expedited motion for summary judgment), the Department's 2016 standard salary level of $913 per week would have operated as a *de facto* salary-only test, thus eclipsing the role of the duties test. The PPWO articulated these concerns in its comments to the Department's 2015 Proposed Rule, and agrees with the decision in *Nevada*. At $913 per week, many employees performing exempt duties would have been excluded from the exemption based entirely on salary level, thus eliminating the relevancy of the duties test for those employees. This has never been the Department's objective in setting the salary level.

The specific salary level at which the duties test no longer fulfills its historical role in determining exempt status is unclear. It also is unnecessary to determine where that line is with any precision. Because the historical role is one of gatekeeper, there is little harm in setting the level "too low"-- even if the employee meets the salary level, she still must meet the duties test. On the other hand, setting it "too high" would mean that the Department would have again failed to regulate in accordance with Congressional intent.

Accordingly, applying the 2004 methodology--which was favorably referenced by the Eastern District--to current data would appear to be the solution that best comports with Congressional intent.

6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

There does not appear to be any generalization that can be made with respect to employers' responses to the 2016 Final Rule. Some employees got raises in the Fall of 2016 to ensure compliance by December 1. Some employees were reclassified to non-exempt status. Some employers took these actions well in advance of December 1. Some employers abandoned plans to take these actions after the preliminary injunction was issued. Some employers reversed announced plans to take actions. Some employers had not taken any action to address the December 1 effective date.

For employers who reclassified employees to non-exempt status, many employees lost their ability to earn incentive compensation. When employees were converted to non-exempt status, they were taken off of incentive compensation plans because many of the incentive payments must be included in a non-exempt employee's "regular rate" (*i.e.*, the base rate for overtime) of pay. Faced with the difficult calculation (and recalculation) of these overtime rates—sometimes looking back over every pay period in a year—employers simply eliminated these types of incentive payments to the newly non-exempt employees rather than attempt to perform the required calculations.

As this question suggests, reclassification is not limited to economic consequences. Policy changes and other non-economic changes accompanied reclassification. The change to non-exempt status meant that many employees lost the ability to structure their time to address needs such as attending their child's school activities or scheduling doctors' appointments. Many other employees lost the opportunity to work from home or remotely, because it can be difficult for employers to track employees' hours in those situations. A number of employers reportedly stopped providing employees with mobile devices, or permitting electronic communication outside the workplace, as such time spent would now have to be accounted for.

In addition, as expected, numerous employees viewed their reclassifications to non-exempt status as "demotions." The newly non-exempt employee now needs to account for his or her time in a way he or she has not had to previously. In addition, because of the increased attention that must be paid to the hours worked by the non-exempt employee, he or she is likely to be at a competitive disadvantage to an exempt employee in the same role. Many training opportunities became compensable time under the FLSA and where those opportunities would put the non-exempt employee into an overtime situation, his or her access to those opportunities may be limited; the same is not so for his or her exempt colleague.

Similarly, exempt employees may be given opportunities to travel to meetings, conventions, and other business events that can lead to professional development, while becoming non-exempt means having to track time out of the office including time spent traveling. Not only is this time difficult to track but these hours can often trigger overtime compensation thus making travel for non-exempt employees not feasible.

The reality is that many workers view their exempt status as a symbol of their success within the company. In fact, even when all other aspects of the work remain the same and even when their overall compensation increases with the addition of overtime pay, employees frequently view the transition from exempt to non-exempt as a demotion. Far from being enthusiastic, members of the PPWO have described reclassified employees as feeling like they were being disciplined and distraught over being reclassified.

Beyond these anecdotal accounts, the PPWO is unable to provide detailed or more quantified data.

7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

The PPWO does not support a duties-only test. The PPWO believes that, in order to adopt a duties-only test, the Department would almost certainly significantly restructure the regulations and would likely create more rigid duties tests--for example, applying a percentage-of-time rule for purposes of the exemptions' primary duty test. Such revisions could result in burdensome recordkeeping requirements, increased litigation costs, and would further complicate the exempt status analysis.

Changes to the duties test and an adoption of a duties-only test would increase FLSA litigation at a time when such litigation is already exploding. Increasing these litigation costs for employers is not good for employers, employees, or the economy, as noted by the Department in the preamble to the 2004 Final Rule:

> 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.[4]

[4] 69 Fed. Reg. at 22,127.

As a result, PPWO members have determined that a more rigorous, complicated duties-only test is not preferable to the current salary + duties model.

8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

The salary level set in the 2016 Final Rule negatively impacted the ability of employers to provide part-time exempt positions. Under the pre-2016 standard, a part-time employee working a 50 percent schedule could qualify as exempt so long as he or she worked in a position that had a full-time salary of approximately $48,000 per year. This is true not because the full-time equivalent salary is $48,000, but because the part-time salary of $24,000 is still in excess of the regulatory minimum.

Under the salary level set in the 2016 Final Rule, that employee no longer qualified for exemption. Instead, an employee working a 50 percent schedule would need to be working in a position earning more than $100,000 on a full-time basis. The number of employees who were eligible for part-time exempt employment was significantly limited. Although the wide variation in employer responses to the Final Rule and preliminary injunction, as well as the short time period that has elapsed, make it difficult to make detailed conclusions, anecdotally, the limitation on part-time exempt employment had a disproportionate impact on women and older workers.

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

The majority of employees who receive incentive payments are those who would otherwise qualify for an exemption. Those employees are most likely to have positions that include various combinations of duties associated with exempt positions. Thus, the PPWO believes that all forms of compensation should be used to determine whether the salary level has been met. It should make no difference to an exemption analysis whether someone performing exempt duties earns $45,000 per year in base salary with $45,000 in bonus potential or $50,000 per year in base salary with $40,000 in bonus potential. As far as the employee is concerned, at the end of the year, the total compensation is the same. In a similar vein, this is how employers value compensation — in terms of total compensation, rather than the individual components — and the regulatory scheme should reflect that reality, and permit that flexibility, rather than attempt to change it.

Bonus payments are typically made less often than monthly because they are tied to productivity, revenue generation, profitability, and other larger picture and longer-term business results. The Department should consider inclusion of bonuses paid quarterly, semi-annually, or annually to reflect how these incentive payments are made by employers.

Similarly, application of these payments should not be limited to 10 percent of the salary level as this does not adequately reflect how these payments are made by employers. Under the 2016 Final Rule, the Department would allow only $91 per week to be satisfied by a bonus that could be hundreds or thousands of dollars. The point of the salary level is to assist the Department in screening out non-exempt employees. Where someone is performing duties that qualify for exemption, is paid a substantial amount of money for doing so, and is paid some amount in salary, it is difficult to see why the precise manner in which the employer attributes the payments should make a difference as to that employee's exempt status.

We also believe that the Department should allow "catch up" payments in the event that the metrics for an incentive payment were not met for a given employee. It makes far more sense to allow a catch up payment in lieu of any bonus that might be due, and to permit such a catch-up on an up-to-annual basis.

Finally, we also urge the Department to apply discretionary bonuses toward the minimum salary level. Such payments are in many ways even more reflective of an individual employee's efforts and contributions (and by implication their exercise of independent judgment and other characteristics of the duties' test) than nondiscretionary bonuses. Thus, they too help effectuate laudable business objectives and often represent a substantial portion of an employees' earnings for a given time period.

10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

For the same reasons discussed above with respect to the standard salary level, the Department should not adopt multiple total annual compensation levels for the highly compensated employee exemption.

11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

The PPWO objects to an automatic increase in the standard salary level or the highly compensated employee total annual compensation level. Although automatic

increases are a bad idea for a variety of reasons, as an initial matter, the PPWO believes the Department lacks the authority to create them. The Department cannot avoid its obligations to engage in notice-and-comment rulemaking simply because notice-and-comment rulemaking takes time and resources; a federal agency cannot exceed the limits of its authority or otherwise "exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'" no matter how difficult an issue it seeks to address.[5]

At no point since Congress authorized the Department to issue regulations on the FLSA's section 13(a)(1) exemption has Congress granted the Department the authority to index its salary test. Congress could have provided such authority if it desired the Department to have it; Congress has permitted indexing expressly in other statutes, including the Social Security Act (which preceded the passage of the FLSA and was amended to add indexing in 1975) and the Patient Protection and Affordable Care Act (which was passed subsequent to the most recent revision to the Part 541 regulations). Yet Congress, despite full knowledge of the fact that the Department has increased the salary level required for exemption on an irregular schedule, has never amended the FLSA to permit the Department to index the salary level.[6] Congress's actions in the face of regulatory history demonstrate a clear intent that the salary level be revisited as conditions warrant, allowing the Department, and the regulated community, the opportunity to provide input into the appropriate level.

The importance of notice-and-comment on the salary level is evident. In 2004, the comment process resulted in increases to both the proposed salary level and the proposed highly compensated employee salary level. The Department is not omniscient on these issues, and automatic increases to the salary level are inconsistent with both the Department's statutory authority and with the Department's long-held understanding of the salary level's purpose. An annual, or other time interval, automatic revision to the salary level is inconsistent with the salary level's gatekeeper function. How can it be the case that an employee is "clearly exempt" on December 31

[5] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (internal citations omitted).
[6] Similarly, when Congress has amended the FLSA to increase the minimum wage, it has not indexed that amount.

and "clearly non-exempt" on January 1 of the following year because of the rate of inflation or some other indexing calculation? A gate need not be moved on an annual basis to ensure that it functions properly; only when it approaches the end of its usefulness does it need to be "fixed."

The Department recognized its lack of authority to index the salary level in its 2004 rulemaking. And it acknowledges as much in the 2015 Proposed Rule, noting that it determined "nothing in the legislative or regulatory history . . . would support indexing or automatic increases."[7] The Department was correct in 2004, and nothing has occurred since that time to justify a different conclusion.

When the Department has increased the salary level in the past, it has done so by stating what the new salary level would be and by leaving adjustments to that level to the Administrative Procedure Act's required notice-and-comment rulemaking process. The current regulatory process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. An automatic update mechanism would allow the Department to announce a new salary level on a predetermined schedule in the Federal Register without notice-and-comment, without a Regulatory Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders. Future automatic salary threshold increases would certainly take effect during economic downturns—exactly the wrong time to be increasing labor costs on employers. Each of those regulatory requirements is intended to force the agency to consider the consequences of its proposed actions and to ensure that the regulatory actions are carefully crafted and well-supported before being implemented. There is no reason to adopt an automatic increase to the salary level/highly compensated employee total annual compensation level based on an index.

For these reasons, the PPWO opposes any indexing of the salary level. No methodology can overcome the Department's lack of authority to automatically increase the salary level.

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[7] *See* 80 Fed. Reg. at 38,537.

The PPWO appreciates the opportunity to respond to this Request for Information and looks forward to working with the Department on this important issue.

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National Organizations

State and Local Organizations