NATIONAL ASSOCIATION OF Manufacturers

Joe Trauger

Vice President
Human Resources Policy

September 4, 2015

Mary Ziegler
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, D.C. 20210

Via Electronic Submission: http://www.regulations.gov

Re: Comments to Proposed Rule Regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 80 Fed. Reg. 38,516 (July 6, 2015), Regulatory Information Number 1235-AA11

Dear Ms. Ziegler:

The National Association of Manufacturers ("NAM") is pleased to provide the Wage and Hour Division ("WHD") with these comments on the Agency's Proposed Rule to amend the Fair Labor Standards Act regulations at 29 C.F.R. part 541. The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $2 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

In our comments below, the NAM highlights several areas of concern to manufacturers across the country. These concerns include:

- The proposed salary threshold is grossly out of step with nearly 80 years of historical practice and precedent.
- The proposed rule fails to account for the extreme effect the proposed salary threshold will have in different regions of the country.
- The proposed rule fails to address the full impact on employers, particularly small businesses.
- The contemplated annual revisions to the salary threshold are contrary to the Fair Labor Standards Act ("FLSA") and barred by the Administrative Procedure Act ("APA").
- The proposed rule will not raise the earnings of the workers it purports to help.

- The proposed rule will damage employee morale.
- The proposed rule will increase, not decrease litigation.
- The proposed rule does not support any revision to the primary duties standard or to the concurrent duties concept.

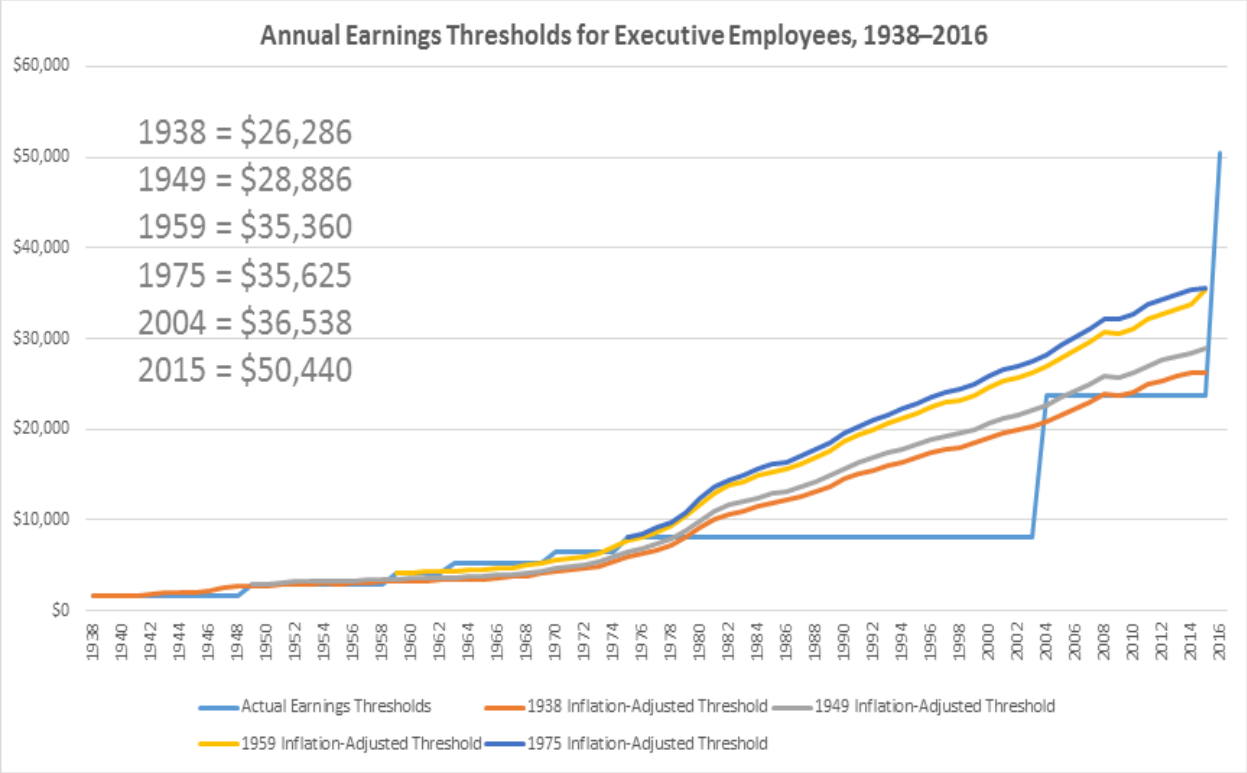
In the end, the NAM emphatically urges WHD to withdraw this Proposed Rule.

I. The Proposed Changes to the Salary Threshold is Unjustified and Legally Questionable

A. The Proposed Salary Threshold Is Grossly Out Of Step With Nearly Eighty Years Of Historical Practice and Precedent.

The proposed increase to the minimum salary threshold from the present $455 per week ($23,660 per year) to $970 per week in 2016 ($50,440 per year) represents an extreme upward departure from historical levels throughout the 77-year history of the Fair Labor Standards Act FLSA. As the chart below shows, the annual earnings thresholds for the executive exemption based on the years when the Department of Labor ("DOL") has changed these levels, adjusted for inflation to reflect 2015 dollars, are:

- 1938: $26,286
- 1949: $28,886
- 1959: $35,360
- 1975: $35,625
- 2004: $36,538
- 2015: $50,440



As the chart demonstrates, the salary level proposed by WHD is nearly $14,000, or 38 percent, higher than necessary to replicate the salary threshold at any other time since the enactment of the FLSA. In real terms, the proposed level is almost twice as high as the original salary threshold established the same year as the passage of the statute. If WHD were to take the average of the historical changes noted above it would set the new threshold at $32,539, or just 64.5 percent of the amount in the Proposed Rule. Such a radical break from nearly 80 years of practice and congressional acquiescence is nothing short of a rejection of legislative intent and complete disregard for economic reality.

The factual record in no way supports such an extreme move. Since 1938, the salary threshold has served the purpose of identifying individuals who, due to relatively low compensation levels, are very unlikely to satisfy the duties requirements of the executive, administrative, or professional exemptions. WHD now attempts to stand the salary threshold on its head to serve an entirely different purpose: restricting the pool of potentially qualifying employees to those who are very likely to satisfy the duties standards for exemption. While it may not seem like a significant difference, the effect of this change is a critical departure from decades of regulatory structure and regional sensitivity: a salary level low enough to sort out the clearly non-exempt is a fundamentally different regulatory tool from a salary level set high enough to leave only the likely exempt.

There is no evidence in the rulemaking record supporting such an unprecedented shift in the salary threshold paradigm. Nor is the current salary threshold, set just 11 years ago, so dated as to justify jettisoning the historical purpose of the salary level entirely. At a minimum, it is unfair and inappropriate to present such a significant proposed change while at the same time

allowing the regulated community only sixty days to evaluate the proposal and to submit comments.

Indeed, even the Current Population Survey ("CPS") data WHD relies on as the basis for its proposed new threshold includes compensation that the Proposed Rule would exclude in determining whether employees satisfy that threshold. The CPS data looks to all employees who report their earnings as other than on an hourly basis, and it reflects the total compensation for these individuals. The Proposed Rule, however, excludes such central aspects of compensation as bonuses, commissions, and other incentive compensation for purposes of evaluating compliance with the proposed threshold. Nor does the CPS data provide any indication of what proportion of employee earnings constitutes salary as opposed to these other non-salary payments. Therefore, the CPS data is an apples-to-oranges comparison. The greater the proportion of non-salary earnings reflected in the CPS data, the more inappropriately inflated the proposed $50,440 figure becomes.

B. The Proposed Rule Fails To Account For The Extreme Effect The Proposed Salary Threshold Will Have In Different Regions Of The Country.

WHD is well aware of the proliferation of state wage and hour laws, especially since the enactment of the FLSA. The states have not been shy about setting higher wage standards when they deem it appropriate to address the prevailing local conditions. Yet even in high-wage states that are at the forefront of such laws, no state has seen fit to enact a minimum salary threshold for exemption that comes anywhere close to what WHD now proposes to do. The states with the highest minimum salary standards for exempt status are California and New York, which in 2016 will have minimum requirements of $800 per week ($41,600 per year) and $675 per week ($35,100 per year) respectively. WHD's proposed requirement of $50,440 is more than 21 percent higher than California's highest-in-the-nation exemption threshold, and more than 43 percent higher than New York's standard.[1]

In previous rulemakings, WHD has based its salary level on the wage statistics for the South, where earnings tend to be lowest in the country. The Proposed Rule abandons that approach, instead opting to use nationwide averages that homogenize the different regions. Such use of national wage data has an extreme, disproportionate, and unfair effect on lower-wage parts of the country such as the South, the Midwest, and rural areas. The federal government itself even recognizes this when it sets the pay of its own employees, which is based on geographical location. The fact that WHD is now proposing to surpass California by more than 21 percent, making exempt status significantly harder to achieve even in that very high-wage state, speaks volumes about what the impact will be in Alabama, Mississippi, Missouri, Arkansas, Puerto

[1] Cal. Indus. Welfare Comm'n Minimum Wage Order MW-2014 (setting the state minimum wage at $10.00 per hour beginning January 1, 2016); Cal. Code Regs. tit. 8, §§ 11040(1)(A)(1)(f), 11040(1)(A)(2)(g), 11040(1)(A)(3)(d) (specifying the minimum weekly salary threshold for the executive, administrative, and professional exemptions as eighty times the state minimum wage, which equals $800 per week, or $41,600 per year); New York Comp. Codes R. & Regs. tit. 12, §§ 142-2.14(c)(4)(i)(e)(5), 142-2.14(c)(4)(ii)(d)(5) (setting the minimum weekly salary threshold for the executive and administrative exemptions at $675 per week as of December 31, 2015, which equals $35,100 per year).

Rico, and other parts of the country where employees in fully comparable jobs earn substantially lower salaries based on local economic conditions.

For example, one NAM member company explained they have multiple facilities in different states with approximately 400 exempt employees located in each of these facilities. Though the employees are performing similar duties as first line supervisors or managers, they are paid different salaries based on the locality of the facility. Under the Proposed Rule, some of these employees will be stripped of their exempt status and reclassified as non-exempt because it would not be economically feasible to pay them the $50,440 the WHD proposes. Others, closer to the $50,440 level will have their salaries increased to meet the new threshold and remain exempt. Due to regional differences, an unnecessary rift and inequality among employees will be created, where none currently exists, simply because of where an employee happens to live. It should be noted again that the federal government itself recognizes that employees engaged in substantially similar work in different regions of the country can and should be paid at different rates due to economic conditions in the regions in which they are employed. This is standard practice by business, non-profits, federal, and even state governments.

Yet the Proposed Rule virtually ignores how the burden of the contemplated increase to $50,440 will affect those regions. When Congress in section 13(a)(1) of the FLSA delegated to the Secretary the authority to "define[] and delimit[] from time to time" these exemptions,[2] it plainly did not intend for the Secretary to make these exemptions difficult to achieve under the best of circumstances and nearly impossible to achieve in regions with more moderate wage levels. Congress clearly intended that executive, administrative, and professional employees are to be exempt from the FLSA's overtime provisions. WHD's attempt to make those exemptions largely unavailable in significant portions of the country by artificially manipulating the salary threshold is starkly inconsistent with legislative intent.

At the very least, WHD had an obligation to analyze this critical facet of the impact of its Proposed Rule. For WHD not to address the regional and local implications of a Proposed Rule that substantially raises the hurdle to exempt status even in states with higher thresholds, like California and New York, constitutes an utter failure of the agency's obligation to conduct a meaningful regulatory impact analysis.

C. The Proposed Rule Fails To Address The Full Impact On Employers, Particularly Small Businesses.

There are a number of roles in a typical manufacturing facility that may be within the scope of the Proposed Rule. There are various types of administrative and professional positions that may earn below $50,440 a year, particularly in markets with lower wage levels. The Proposed Rule presents significant challenges with respect to those employees.

For nearly all manufacturers, however, the main area of concern presented by the Proposed Rule involves supervisors and managers. It is very common for the first, second, or even third tier of supervisory and managerial personnel in manufacturing facilities to earn above $23,660 but less than $50,440 a year. A rule rendering these individuals non-exempt will have

[2] 29 U.S.C. § 213(a)(1).

serious consequences for companies trying to remain viable in an increasingly competitive global marketplace. The law has long recognized that supervisory and managerial work is very different from the work of non-management employees. This is why so many employment laws, from the National Labor Relations Act to Title VII of the Civil Rights Act to the FLSA and more, treat employees differently from management. The work of supervisors and managers is to oversee a team of employees and assume responsibility for that team. This is not a function based on hourly physical tasks; it is fundamentally about responsibility and commitment to the employer. Supervisors and managers receive a salary, often with various forms of incentive compensation, and they do what it takes to fulfill their work responsibilities. This likely means longer working hours, though this is a trade-off that each supervisor and manager has willingly made, and indeed sought out, rather than working as an hourly wage earner in any other capacity.

If manufacturers must now start viewing supervisors and managers as hourly employees, with a high marginal cost for certain working hours, then the whole nature of these roles changes significantly. The importance of the operational efficiencies achieved by having a management team whose work is not tied to the clock cannot be overstated. The economic pressure of an overtime premium would force most manufacturers to change how they staff their operations, reducing work schedules for newly non-exempt supervisors and managers and shifting responsibilities to other employees.

One small manufacturer explained that it would have to completely restructure how its workforce is organized. This company, based on employee input, formed different "teams," with a supervisor assigned to each. The supervisor is currently exempt and is able to work during off-hours to check in on production and other work aspects, as well as being assigned the responsibility of overseeing the team. The employees like this organization as it gives them a sense of how to progress through the company. Should the salary be raised to the proposed level, this small business will have to completely reorganize this structure and come up with a new concept, one that may be negatively received by the employees. All this reorganization will come with a cost to the company that the WHD proposal fails to realize.

Indeed, the Proposed Rule fails to address, for employers of any size, the economic cost of the operational impact of reclassifying employees from exempt to non-exempt. This is not just a mere matter of accounting for potential changes in direct wage costs. Exempt and non-exempt employees function very differently in the workplace. Reclassifying employees imposes costs with respect to re-engineering roles, determining new performance metrics, and devising compensation programs that drive the desired behaviors consistent with an obligation to pay a wage premium after forty hours in a workweek. The Proposed Rule makes no attempt to quantify these costs or to justify imposing these costs based on the supposed benefits of the new salary threshold.

The central purpose of the FLSA's overtime premium is to encourage employers to spread work around so that instead of having a few employees working longer hours, the employers will have more employees working fewer hours. For small businesses with low headcounts, perhaps with only one or two employees in a role that is being converted from exempt to non-exempt, there is not any feasible way to implement this workload redistribution. As a result, small businesses will disproportionately find themselves unable to rearrange schedules in order to bring workers under the 40-hour threshold. This, in turn, will lead to

significantly greater costs for these employers than would be the case for other employers that have a greater ability to redistribute work to other employees.

Just as the Proposed Rule ignores the operational inefficiencies reclassifying supervisors and managers would present for virtually any employer, the proposal fails to address this disparity in the impact of the proposed salary threshold increase on small businesses as compared to larger businesses. Thus, the Proposed Rule fails to comply with the Regulatory Flexibility Act and the Small Business Regulatory Fairness Act.

D. The Contemplated Annual Revisions To The Salary Threshold Are Contrary To The FLSA And Barred By The Administrative Procedure Act.

As noted above, the FLSA authorizes changes to the regulatory definitions for the executive, administrative, and professional exemptions "from time to time[.]" [3] For nearly 80 years, the statute has never been interpreted to allow the WHD to index wage levels to inflation or any other measure to facilitate automatic annual or periodic updates. While numerous other statutory schemes do provide for annual increases, the FLSA simply does not. Changes to the salary threshold for these exemptions are obviously substantive changes to the regulations as they affect very directly which employees qualify for exempt status and determine how employers compensate large numbers of employees. Such changes have always occurred through notice-and-comment rulemaking under the APA.

The Proposed Rule purports to arrogate to WHD the unique and unilateral authority to bypass the APA and issue annual revisions to the salary threshold without providing the public an opportunity for notice and comment. An agency cannot claim for itself authority that Congress for decades, and multiple revisions of the law, has denied it. The FLSA requires any subsequent revisions of the salary threshold to go through full notice-and-comment rulemaking. Moreover, the impact of each such revisions must be evaluated based on the conditions prevailing at the time, including the likely number of employees who will, as a result of the increase, no longer qualify for exempt status and the resulting implementation costs of each new round of reclassifications.

Indeed, if WHD proceeds with enforcing the 40 percent salary concept year after year, as it has proposed as an option, the likely effect is a rapid upward spiral because employees reclassified from exempt to non-exempt each year are in many, if not most, instances likely to find themselves compensated on an hourly basis going forward. As currently salaried exempt employees fall out of the pool of salaried workers used to establish the 40 percent level, and these are individuals toward the lower end of the salary distribution, the overall average and 40 percent salary levels will naturally increase as a result, over and above any increase potentially justified by inflation or by an apples-to-apples comparison of comparable jobs. This shift to hourly compensation rather than salaried non-exempt pay following a reclassification is much more likely now than in earlier years in light of the increasingly onerous obstacles to employer

[3] 29 U.S.C. § 213(a)(1).

use of the fluctuating workweek method of calculating overtime.[4] One such obstacle is a number of state laws that prohibit or potentially prohibit paying a half-time premium on top of a salary that covers all hours worked in a week.[5] Another obstacle to the use of salaried for non-exempt employees is the statement that WHD made in the preamble to the 2011 Final Rule suggesting that incentive compensation is inconsistent with the fluctuating workweek,[6] guidance that has now spawned litigation leading to divergent federal district court rulings in New York and Ohio with appeals currently pending in the U.S. Courts of Appeals for the Second and Sixth Circuits.[7]

II. The Proposed Rule Will Not Achieve The Goals Set By The President's Directive To The Secretary Of Labor.

Based on the Proposed Rule, employees will not simply receive a higher salary in order to remain exempt. In fact, 41 percent of manufacturers asked about how they would respond to the Proposed Rule indicated that they would have to reclassify their employees. When manufacturers reclassify a role from exempt to non-exempt, they do not simply start paying overtime on top of the employee's original weekly earnings, thereby affording what would amount to a significant raise for no additional work. Instead, the most common approach is to aim to have an employee's post-reclassification hours worked and total pay mirror as closely as feasible the employee's pre-reclassification conditions and/or reduce the hours worked. Indeed, 37.2 percent of manufacturers indicated that they would have to reduce employees' hours when they are reclassified to non-exempt.

As an example, one NAM member company explained that approximately 125 of their employees will have to be reclassified from exempt to non-exempt. Currently these employees not only enjoy the benefits of being exempt, but they also receive a year-end bonus on top of their salary. The company has been providing this benefit for their exempt employees for 50 years. Once these employees are reclassified, they will not only lose the opportunity to earn this bonus, reducing their pay, but there will also be a loss other benefits, such as paid sick time that the company offers to its exempt employees based on the number of years of service.

While in the initial months following a reclassification, most employees tend to come out about the same in terms of total work and total compensation, the steady pressure of the overtime premium tends to result in a gradual reduction of the employee's schedule. The challenge for that employee is that the hourly rate does not normally increase to offset this loss in hours. Instead, the employer looks to give the work to other employees. The scaling back of the employee's weekly working hours can take a significant toll on the employee's earnings, especially given that the wages lost for each hour of overtime eliminated are at premium rates. The net economic

---

[4] *See* 29 C.F.R. § 778.114.

[5] *See, e.g.*, Alaska Admin. Code tit. 8, § 15.100; Cal. Lab. Code § 515(d); N.M. Stat. Ann. § 50-4-22(D).

[6] Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832, 18,848-50 (Apr. 5, 2011).

[7] *Willis v. RadioShack Corp.*, 981 F. Supp. 2d 245 (S.D.N.Y. 2013) (rejecting WHD's guidance), *appeal docketed*, No. 13-4661 (2d Cir. Dec. 9, 2013); *Sisson v. Radioshack Corp.*, 20 Wage & Hour Cas. 3d (BNA) 764 (N.D. Ohio Mar. 11, 2013) (deferring to WHD's guidance), *appeal docketed*, No. 14-3186 (6th Cir. Mar. 3, 2014).

effect of the Proposed Rule will be to take working hours and pay away from employees currently classified as exempt and redistribute those hours and pay to other employees.

III. The Proposed Rule Will Damage Employee Morale.

Exempt status in the modern workplace, particularly in manufacturing, often means a number of very important things for employees:

- Not punching a time clock;
- More flexibility in work day schedule such as unplanned breaks and variability in meal times;
- The economic security of having a fixed salary payment rather than having hours and cyclical workload affect their wages;
- Greater flexibility with respect to work schedules and locations, including the ability to perform some aspects of the job at home or otherwise away from the workplace;
- Access to modern technologies such as laptops, tablets or smartphones in order to perform work after hours or outside the workplace;
- Being viewed and treated as part of the leadership team at the company;
- Access to incentive compensation programs;
- Greater levels of benefits, such as vacation and 401(k) plan matching contributions;
- Workplace amenities such as a private office, a computer, an e-mail account, and a parking space; and
- Higher levels of overall compensation

Employees reclassified from exempt to non-exempt generally lose most or all of these benefits. The main complaint employees voice to manufacturers upon being told that they are being reclassified from exempt to non-exempt is they view the action as a demotion. As a result, they are concerned it will mean not only less pay and flexibility, but less respect from the company and from other employees as well. Employees normally view reclassification to non-exempt status as a negative to their career and find it highly upsetting.

In the context of reclassified supervisors and managers, manufacturers will not only reduce employee hours, and ultimately total pay, as an inevitable result of the pressure imposed by the overtime premium, but they will also naturally shift the most important managerial functions to employees who remain exempt after the reclassification. The end product will be a new cadre of team leads who have been stripped of most aspects of their former roles, earning less pay, and left with eligibility for overtime they are not likely to earn and a much more challenging path to try to obtain promotion back to exempt status. These demotions will severely disrupt career trajectories and hamper the ability of this cohort of employees to eventually achieve higher-level management positions and compensation.

IV. The Proposed Rule Will Increase, Not Decrease, Litigation.

One clear consequence of the massive reclassification that would result from the Proposed Rule is that there will be millions of very dissatisfied, newly-non-exempt employees in the workplace. This will inevitably lead to litigation.

More litigation is precisely what happened following the 2004 revisions to the part 541 regulations, when plaintiffs' lawyers became more focused on these issues, coupled with a spike in employees who were unhappy about being reclassified. Now, as then, much of the litigation will focus on exemption status preceding the regulatory changes, because millions of American workers will view their reclassification as a negative action taken against them by their employer rather than a benefit bestowed upon them by a misguided, though undoubtedly well-meaning federal regulation.

The President's March 13, 2014 memorandum to Secretary Perez directed the Secretary "to modernize and streamline the existing overtime regulations" by considering how to "update existing protections consistent with the intent of the Act, address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply." In short, the Proposed Rule does none of these things.

What the Proposed Rule does is to substantially narrow the range of employees who can qualify for the executive, administrative, and professional exemptions by more than doubling the minimum salary threshold. What should be obvious is that one does not simplify a regulatory exemption scheme by making the exemptions unavailable.

The Proposed Rule also fails to address the changing nature of the workplace except to attempt to roll it back several decades when there were more hourly workers in the workforce. Our economy is vastly different than what it was decades ago, and most Americans are looking for more flexibility in their work schedules, not less. In many ways the Proposed Rule not only fails to meet its objective, it actually moves our workplaces backwards when juxtaposed to what Americans say they are looking for in a work arrangement.

The real challenge in applying these exemptions, for both employees and employers, is and always has been the amorphous nature of the duties standards. The substantive definitions for each exemption, and particularly the administrative exemption, have proved vague and incredibly difficult to apply for as long as they have been on the books. It bears noting that even WHD misclassified its own Wage and Hour Investigators for decades until the Office of Personnel Management conducted a desk audit in the 1970s and determined that these employees are production workers and not administrative employees.[8] To be clear, OPM's application of the interpretation of the exemptions is substantially similar to the DOL part 541 regulations.

WHD's stated belief that doubling the salary threshold will somehow end FLSA misclassification litigation is baseless. Yes, in a trivial sense, if roughly one quarter of all

[8] *See* Statement of Paul DeCamp, *Improving the Federal Wage and Hour Regulatory Structure: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. On Education and the Workforce*, 113th Cong., at 7-8 (July 23, 2014).

potential plaintiffs get reclassified to non-exempt status, that does as a matter of math reduce the ability of those individuals to sue for misclassification (at least once they are beyond the statute of limitations after the reclassification). But the private plaintiffs' class action bar has shown a penchant for pursuing large-scale cases involving employees earning well in excess of the $50,440 proposed new salary threshold. Consider, for example, the multitude of cases against the pharmaceutical industry, or the financial services industry, or many of the other new filings asserting misclassification with respect to employees earning more than $50,000. As long as there are employees classified as exempt pursuant to the vague, amorphous, increasingly out of touch substantive standards reflected in the part 541 regulations, there will be no end to the litigation. The duties tests for these exemptions, rather than the salary threshold, is and always has been the main driver of litigation over exempt status.

V. The Proposed Rule Does Not Support Changes To The Primary Duties Standard Or Abandoning The Concurrent Duties Principle In Any Final Rule.

The Proposed Rule invites comments regarding whether WHD should replace the "primary duty" standard with a California-style "primarily engaged in" rule, or perhaps some other specific quantitative cap on types of duties. WHD has not at this time proposed any actual regulatory text for comment, nor has the Department provided any analysis whatsoever of the potential impact of any such change. Any change in the duties standards for some or all of these exemptions would be misguided as a matter of policy and fatally flawed as a matter of law.

From a policy standpoint, one need only consider the experience of California in the past 20 years to see that the primarily engaged in concept does nothing but *ensure* litigation. Employers are hard-pressed to keep records sufficient to identify, by task and time, exactly how an exempt employee spends every minute of every day especially with the access employees have to work email accounts or other technological devices. Yet, that is the kind of recordkeeping an employer must be prepared to produce as evidence in order to have any hope of obtaining summary judgment under the California standard. All that it takes for litigation to be viable and attractive to a plaintiff's attorney is for a case to be able to survive beyond a motion to dismiss and summary judgment. If a plaintiff is willing to testify that he or she spent more than half of the working time performing non-exempt tasks—whatever that means in the context of concurrent duties and other issues that may make separating exempt and non-exempt time more difficult than it might appear—then most courts will view the case as sufficient to proceed to a jury. It is no accident or coincidence that California has the most active wage and hour litigation docket in the country. If WHD's desire is to clarify the exemptions and reduce litigation, it would do well to avoid replicating a model that has proved itself suited only to driving very high levels of litigation.

As a legal matter, the failure to provide proposed regulatory text or to analyze its potential impact both circumvents the notice-and-comment process and fails to satisfy the Department's obligations under the Regulatory Flexibility Act and the Small Business Regulatory Fairness Act. Notice must "appris[e] the public of the nature and basis of the regulation or rule sufficiently to enable them to understand and identify the material issues relating to the justification for the regulation or rule so that they can comment thereon intelligently." *Ohio Valley Envtl. Coal. v. United States Army Corps of Eng'rs*, 674 F. Supp. 2d 783, 803 (S.D. W. Va. 2009) (citing *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 779 n.

2 (D.C. Cir. 1976) and *Appalachian Power Co. v. EPA*, 579 F.2 846, 852-53 (4th Cir. 1978)). As the courts have long recognized,

> "[t]he process of notice and comment rulemaking is not to be an empty charade. It is to be a process of reasoned decision-making. One particularly important component of the reasoning process is the opportunity for interested parties to parties to participate in a meaningful way in the discussion and final formulation of rules".
>
> * * *
>
> "The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rulemaking process. . . ".

Conn. Light and Power v. Nuclear Regulatory Comm'n, 673 F.2d 525, 528 (D.C. Cir. 1982) (citations omitted).

The Proposed Rule offers up a laundry list of questions upon which it seeks comment, including with respect to possible alternatives to the primary duty standard, whether to abandon the concurrent duties concept, and whether and to what extent to allow non-salary compensation to satisfy the proposed new salary threshold. By failing to propose specific regulatory text with any level of sufficient detail to inform the regulated community of the likely look of the overall regulatory package, including whether the net result will be 4.6 million individuals converted from exempt to non-exempt or instead a number several times greater, the NAM, or anyone else for that matter, is unable to fully "communicate information, concerns, and criticisms" of its members to WHD during the rulemaking process so that the Agency can make a fully informed decision in taking final action. Indeed, significant portions of the Proposed Rule read more like an Advanced Notice of Proposed Rulemaking than a Proposed Rule. While it is a good thing for an agency to seek information from stakeholders before regulating, the APA requires the agency not to skip the very important step of proposing regulatory text for notice and comment before proceeding directly to a final rule. Any change to the duties standards for any of these exemptions in the final rule would appear to violate not only the intent, but the letter of the APA.

* * *

In order to fulfill the President's March 2014 directive, and to make these exemptions clearer and more understandable to all interested parties, WHD should start over and hold hearings in numerous locations across the country to figure out not how best to make incremental changes to regulations that at their core still reflect an antiquated economic reality that has not existed for half a century or more, but rather how to fashion exemptions that make sense in the workplace of today and tomorrow. Employers, employees, and regulators can work together to come up with solutions that achieve the modernizing and simplifying goals the President articulated. The FLSA has become a wedge that divides employees and employers, separates exempts from non-exempts, and creates a massive amount of litigation that benefits primarily the lawyers who bring and defend these cases. It does not have to be this way. Regulations that are carefully crafted and based on cooperation can serve to bring employers and employees together,

while still furthering statutory objectives. As written, the Proposed Rule accomplishes none of this and may in fact do more harm than good for a majority of the affected workers.

The NAM appreciates the opportunity to submit these comments regarding the Proposed Rule. However, based on the concerns discussed above, it appears that the Proposed Rule is neither consistent with the President's March 13, 2014 memorandum to Secretary Perez, nor sound as a matter of policy or law. The NAM strongly encourages WHD to withdraw this Proposed Rule.

Respectfully submitted,

Joe Trauger
Vice President, Human Resources Policy
National Association of Manufacturers