United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

May 21, 2019

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Comments on the Notice of Proposed Rulemaking, RIN 1235-AA20, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Secretary Acosta:

Thank you for the opportunity to submit comments in response to the Department of Labor's (DOL) March 22, 2019 Notice of Proposed Rulemaking Regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.

DOL has proposed to rescind its 2016 regulation defining and delimiting the executive, administrative, and professional overtime exemptions (EAP exemption) under the Fair Labor Standards Act (FLSA) and to promulgate a new regulation in its place. The Notice invites comments on this proposed rescission and rulemaking.

The proposed rule is contrary to Congressional intent, abandons the Secretary of Labor's (the Secretary) historic approach to defining and delimiting the EAP exemption, cedes the Secretary's congressionally-granted authority to define the EAP exemption to a single district court, and damages the integrity of the FLSA by not defending DOL's 2016 final rule and the Secretary's authority in court. For these reasons, we urge DOL to withdraw its proposed rescission and rulemaking and, instead, defend the 2016 rule and the Secretary's authority under the FLSA.

DOL's Proposed Rule is Contrary to Congressional Intent

In the FLSA, Congress Provided Overtime Protections to Most Workers and Directed the Secretary to Exempt Solely Bona Fide Executive, Administrative, and Professional Employees

The FLSA requires employers to pay their employees the federal minimum wage (currently $7.25) for all hours worked and limits the number of hours an employee can work in a workweek without additional compensation to 40 hours per week; employers are required to pay overtime

premium pay of 1.5 times the employee's regular rate of pay for all hours worked in excess of 40 hours in a given workweek.[1] Congress' policy objectives in enacting overtime protections were two-fold: (1) to reduce employees being overworked by their employers and (2) to spread employment by incentivizing employers to hire more employees rather than overworking current employees.[2]

In the original 1938 act, Congress included an exemption from both the minimum wage and overtime pay requirements 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…)" (EAP exemption).[3] While most workers need overtime protections because they do not have sufficient individual bargaining power to protect themselves from poverty wages and deleterious overwork, this limited set of workers was exempted because they commanded enough individual bargaining power to be able to advocate for themselves and extract a degree of protection at work.[4]

Congress included the EAP exemption based on its experience with the industry wage code provisions of the National Industrial Recovery Act of 1933 (NIRA) and several state laws on overtime, nearly all of which exempted administrative and executive employees based in part on compensation.[5] A 1935 analysis of the NIRA wage codes noted the "[NIRA] restrictions upon working time affect all but a small group of administrative employees and executives falling in the higher earnings brackets…" and over 90 percent of the 534 NIRA wage codes included a salary qualification for exempting executive and administrative employees.[6]

Congress did not define the terms "executive," "administrative," or "professional." Instead, Congress explicitly delegated to the Secretary the authority to define and delimit those terms. Shortly after the FLSA was passed, DOL exercised this authority and issued regulations in 1938

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[1] *See* 29 U.S.C. 206 and 29 U.S.C. 207.

[2] *See, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981); *See, e.g., Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009).

[3] 29 U.S.C. 213(a)(1)

[4] *See generally* Seth D. Harris, Conceptions of Fairness and the Fair Labor Standards Act, 18 Hofstra Lab. & Empo. L.J. 19, 98–100 (2000).

[5] Cong. Research Serv., The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1), at 2 & n.4, (Aug. 28, 2007); Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32394 (May 23, 2016); Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22122, 22123-22124 (April 23, 2004). There is reference to this in the legislative history, including during joint Senate and House hearings in 1937 when a witness who was a furniture manufacturer employer raised the question of how the white collar exemptions would be delineated and specifically who would be considered an "executive," to which Representative Connery responded, "They did not have any trouble with that in the N.R.A." Fair Labor Standards Act of 1937, Joint Hearings Before the Committee on Education and Labor U.S. Senate and the Committee on Labor U.S. House, 75th Cong, 1st Session, S.2475 and H.R.7200, Part 2, (June 7 to June 15, 1937).

[6] *See* Harold Stein, Wage and Hour Div., U.S. Dep't of Labor, Executive, Administrative, Professional . . . Outside Salesman Redefined: Report & Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 20 (1940) (hereafter the "Stein Report"); Margaret H. Schoenfeld, *Analysis of the Labor Provisions of the N.R.A. Codes*, 40 Monthly Labor Review 574, 583 (1935).

that defined and delimited those terms, setting out both a duties test and a salary level (or salary threshold) an employee had to satisfy to qualify for the EAP exemption.[7]

In a 1940 report on the exemption and regulations (the Stein Report), DOL addressed the appropriateness of using a salary threshold in defining and delimiting the exemption. Specifically it argued the NIRA codes and numerous state laws used a salary test, "the good faith specifically required by the act is best shown by the salary paid," and there was agreement on the appropriateness of a salary test as indicated by the inclusion of one in the proposals of numerous industry groups, including the National Association of Manufacturers, National Small Business Association, National Association of Broadcasters, and American Retail Federation.[8] Indeed, the FLSA language requiring employees to be *bona fide* EAP employees in order to qualify as being overtime-exempt necessitates an examination of salary. As DOL stated in the Stein Report, "if an employer states that a particular employee is of sufficient importance to his firm to be classified as an 'executive' employee and thereby exempt from the protection of the act, the best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them."[9] DOL has since repeatedly reaffirmed this principle.[10]

Based on this principle, DOL developed both a "long" and a "short" test for exemption in which salary and duties were integrally related to one another. The long test paired a lower salary threshold with a stringent duties test and a 20 percent cap on the amount of time overtime-exempt employees could spend on nonexempt duties; the short test paired a higher salary threshold with a far less stringent duties test.[11] Though the salary thresholds varied over the decades, DOL typically determined the salary threshold for the long test and then set the short test as a percentage in excess of the long test's salary threshold.[12] This percentage tended to sit between 130 percent and 182 percent of the lower salary threshold under the long test, with the average being 149 percent.[13] The long and short tests worked together to ensure that Congress' intent was effectuated by only exempting bona fide EAP employees from the FLSA's minimum wage and overtime protections.

However, DOL's 2004 rule abandoned this system and, instead, established a single "standard" test that essentially paired the less stringent duties test from the short test with the lower salary threshold from the long test—resulting in the "inappropriate classification of employees as EAP

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[7] 3 Fed. Reg. 2518 (Oct. 20, 1938). The test naturally also includes a "salary basis" test requiring EAP employees to be paid on a salary basis, rather than an hourly or other basis. Therefore, the test for the EAP exemption is often described as having three parts: the duties test, the salary basis test, and the salary level test. For the purposes of this letter, salary test or salary threshold test are intended to imply the encapsulation of the salary basis test with the salary level test.

[8] Stein Report at 5, 19, n.16, and n.66. At the time, the National Small Business Association was named the National Small Business Men's Association" *See* NSBA, NSBA Backgrounder, https://nsba.biz/docs/nsba_backgrounder.pdf.

[9] Stein Report at 19.

[10] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32400-401 (May 23, 2016) (codified at 29 C.F.R. pt. 541).

[11] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016) (codified at 29 C.F.R. pt. 541).

[12] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 11 (2017).

[13] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 11 (2017).

exempt ... [because the employees] ... pass the standard duties test but would have failed the long duties test."[14] As the Congressional Research Service notes, "the standard duties test is quite comparable to the short duties test," and when DOL promulgated the 2004 rule, the agency itself "acknowledged that the differences between the standard and short duties tests were minimal;"[15] in fact, DOL recognizes this fact in the proposed rule at issue here.[16]

DOL recognized it erred in developing the 2004 rule by effectively adopting the less stringent duties test of the "short" test and failing to pair it with a far higher salary threshold.[17] The 2016 rule corrected this error by maintaining the "standard" duties test but updating and raising the salary threshold to a more appropriate level that was closer to that of the historic "short" test. DOL arrived at the new salary threshold of $913 per week (or $47,476 per year), restoring the ability of the salary threshold to differentiate between overtime-protected employees and those employees who may be bona fide EAP employees. According to an analysis by the Congressional Research Service, the 2016 rule set the salary threshold at the low end of what it should be based on historical trends: "indexing the EAP salary levels to inflation at the point of any of the changes from 1949 through 1975 would have resulted in a 2016 salary level ranging from $991 per week ($78 above the 2016 level) to $1,231 per week ($318 above the 2016 level)."[18]

DOL's Proposed Rule is Contrary to the FLSA and Misstates Congressional Intent, Improperly Exempting Employees from Overtime Protection

In trying to justify its proposal to both wholly rescind the 2016 final rule and promulgate a completely new rule with a lower salary threshold, DOL misstates the congressional intent behind the FLSA. DOL states the final 2016 rule was "in significant tension with the text of section 13(a)(1)" and "stands in tension with Congress' command to exempt bona fide EAP employees." DOL's argument is that in setting the salary threshold at $913 per week ($47,476 per year), the 2016 rule removed about 4.2 million workers who perform some exempt duties from the EAP exemption, thereby supposedly going "beyond the limited traditional purpose of setting a salary 'floor' to identify certain obviously nonexempt employees, and instead exclud[ing] from exemption many employees who had previously been, and should have continued to be, exempt by reference to their duties."[19]

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[14] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016) (codified at 29 C.F.R. pt. 541).
[15] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 17 (2017).
[16] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed. Reg. 10900, 10908–09 (Mar. 22, 2019) (codified at 29 C.F.R. pt. 541) (DOL states "the standard duties test was introduced by the 2004 final rule and has been in effect for 15 years. The short duties test, which it is similar to...").
[17] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541) (as DOL painstakingly explained in 2016, when DOL updated the salary threshold in the 2004 rule it also fundamentally altered the duties test.).
[18] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 17 (2017).
[19] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed. Reg. 10900, 10901, 10903, and 10908 (Mar. 22, 2019) (codified at 29 C.F.R. pt. 541).

DOL's argument misunderstands and mischaracterizes congressional intent. The purpose of the salary threshold is to deny the EAP exemption to "obviously nonexempt employees," but the "obvious" nature of their nonexempt status is not exclusively due to their performance of some EAP duties. It is also due to the salary of these employees being too low to qualify them as bona fide executive, administrative, or professional employees. Contrary to DOL's assertion, Section 13(a)(1) of the FLSA and its legislative history provide no indication that an employee's duties are the sole and exclusive factor to be considered in applying the exemption, nor does it prohibit DOL from examining salary in determining if an employee is a bona fide EAP employee.

Indeed, as is detailed in the section above, the legislative, statutory, and regulatory history of the exemption indicate the opposite: Congress gave DOL authority to define and delimit the exemption, including through the use of both duties and salary; Congress *expected* DOL to use salary as an integral part of the test for exemption; and Congress ratified DOL's approach of using salaries and duties in tandem to properly identify bona fide EAP employees.[20]

Far from aligning with what Congress intended, the proposed rule instead is reverting to the flawed methodology that created the 2004 final rule, thereby denying overtime rights to millions of workers. DOL is now attempting to justify its use of the flawed 2004 methodology in its proposed rule by claiming that, while the 2004 rule essentially adopted the "short" test's duties test as the new "standard" duties test, it already accounted for that fact in 2004 by increasing the percentile of earnings used to set the threshold.[21] However, that argument is not borne out by the regulatory history.

Beginning in 1958, DOL set the salary threshold for the "long" test at a level that attempted to ensure about 10 percent of EAP employees in the lowest-wage regions and industries would fail to qualify as exempt (meaning the threshold was set near the 10th percentile of earnings, so that about 10 percent of EAP employees made less than the threshold). Then DOL would multiply this salary threshold by a given percentage (between 130 percent and 182 percent, as mentioned above) to arrive at the salary threshold for the "short" test.[22] In the 2004 rule, DOL claimed that, specifically because "of the proposed change from the 'short' and 'long' test structure and because the data included nonexempt salaried employees,"[23] it was setting the salary threshold at the 20th percentile of full-time salaried employees in the South. This supposedly set the threshold so that about 20 percent of EAP employees made less than the threshold, rather than the 10 percent DOL had used since its 1958 rule. DOL repeats this justification almost verbatim in the current proposed rule.[24] However, this justification fails in its entirety, as the increase from the

[20] See notes 1-17 above.
[21] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22122, 22166–67 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).
[22] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 23 (2017).
[23] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 69 Fed. Reg. 22122, 22166–67 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541).
[24] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed Reg. 10900, 10906–07 (Mar. 22, 2019) (codified at 29 C.F.R. pt. 541) (DOL states "[a]lthough prior salary levels had been based on salaries of approximately the lowest 10 percent of exempt salaried employees in low-wage regions and industries, the Department explained that the change in methodology was warranted in part

10th percentile to the 20th percentile merely accounted for the broader data set that DOL shifted to in 2004 and did not account for the change in the duties test.

As DOL explained in its 2016 final rule, when DOL crafted the 2004 rule, it changed the data it used in the calculation.[25] While the data traditionally used to determine the 10th percentile was based on the salaries of EAP exempt workers alone, the 2004 rule used the salaries of both exempt and nonexempt full-time salaried workers, significantly broadening the pool of salaries being measured.[26] The problem with this approach is that the salaries of all full-time salaried workers are lower than the salaries of exempt workers alone, meaning that the inclusion of nonexempt workers pulled the 10th percentile down to a lower earnings number than it would be for solely exempt workers.[27] The 2016 rule demonstrated this by citing to the 2004 rule's own data, which showed that the 2004 rule's chosen salary threshold of $455 per week sat at about the 20th percentile of *all full-time salaried employees* in the South and for the retail industry, but sat at about the 10th percentile for *likely exempt employees*—the latter category being what was used for the traditional method established in 1958.[28] This ultimately meant that the 2004 rule's increase from the 10th percentile to the 20th percentile only accounted for the inclusion of all full-time salaried employees in the data, and did not in any way account for the mismatch of pairing the lower "long" test salary threshold with the "short" test duties test.

Therefore, because DOL adopted the "short" duties test as its "standard" duties test in 2004, DOL would have needed to pair the standard duties test with a higher salary threshold derived by multiplying the long test's salary threshold by a given percentage to be in line with what Congress intended. DOL's 2004 salary threshold of $455 per week ($23,660 per year)—which was set at about the 10th percentile for exempt employees, the traditional percentile of the "long" test—would have needed to be multiplied by the traditional percentages of between 130 percent and 182 percent in order to be paired with the short duties test DOL adopted as the "standard" duties test. Following this approach would have resulted in a 2004 salary threshold between $591 and $828 per week ($30,732 and $43,056 per year in 2004).[29]

In fact, Congress immediately expressed its disapproval of DOL's 2004 methodology as not comporting with congressional intent. In 2004, both Houses of Congress voted on a bipartisan basis to block the implementation of the rule, with the Senate voting 54 to 45 to prohibit

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to account for the elimination of the short and long tests, and because the data sample included nonexempt salaried employees, as opposed to only exempt salaried employees.").

[25] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32461 (May 23, 2016) (codified at 29 C.F.R. pt. 541) ("A significant change in 2004 from the [1958] long test Kantor method was that the Department used the salaries of both exempt and nonexempt full-time salaried workers in the South and the retail industry to determine the required salary level ..., rather than the salaries of exempt workers only. However, because the salaries of exempt workers on average are higher than the salaries of all full-time salaried workers, the Department selected a higher earnings percentile when setting the required salary. Based on the Department's 2004 analysis, the 20th percentile of earnings for exempt and nonexempt full-time salaried workers in the South and retail achieved a result very similar to the 10th percentile for workers in the lowest-wage census regions and industries who were estimated to be exempt.").

[26] *Id.*

[27] *Id.*

[28] *Id.* (citing to the 2004 rule's data at 69 Fed. Reg. 22169).

[29] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 11 (2017).

implementation and with the House voting 221 to 203—though House leaders later stripped the provision out of the final legislation.[30] As the Republican Chairman of the Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education, and Related Agencies, Senator Arlen Specter stated at an oversight hearing on the proposed 2004 rule: "So both the House and the Senate are on the record as…recommending the denial of funds to the administration for the implementation of this regulation."[31]

As explained above, DOL addressed this error in its 2016 rule by raising the salary threshold to be more appropriately aligned with the short duties test. Yet, DOL's proposed rule would return to the flawed methodology of the 2004 rule, pairing the proposed salary threshold of $679 per week ($35,308 per year) with the far less stringent duties test from the "short" test. If this $679 threshold were treated as the "long" test salary threshold that it actually is (since it is being set at the 20th percentile derived from the 2004 rule), then it would need to be multiplied by the 130 percent to 182 percent increase that was historically applied to arrive at the "short" test's salary threshold. This would set it between $882 and $1,235 per week ($45,864 and $64,220 per year). In light of the historical analysis above, far from providing justification for a rescission of the 2016 rule, DOL's proposed rule makes even more clear the need for the 2016 rule and the propriety of the 2016 rule's salary threshold, which at $913 per week ($47,476 per year) was at the lower end of this range, putting it squarely in line with the historical approach.

This is all the more apparent when considered in light of the fact that DOL has long recognized that, to be considered an EAP employee, an employee must be paid considerably more than the FLSA's minimum wage. As a result, DOL historically has set the salary threshold at a level far in excess of the minimum wage.[32] From 1950 to 1975 (the last year the overtime regulations were updated before the methodology change in 2004), each year DOL updated the EAP exemption, it set the salary threshold at a rate that was between 2.98 and 3.33 times the minimum wage (when converted to a weekly salary, i.e. 40 hours times the minimum wage in effect at the time).[33] Based on the current minimum wage of $7.25 per hour—which is itself in desperate need of an increase as it has not increased in over a decade—matching the historic norm of 2.98 and 3.33 times the minimum wage would mean setting the salary threshold at between $864 and

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[30] Department of Labor's Proposed Rule on Overtime Pay, Hearing before the Appropriations Subcommittee On Departments of Labor, Health and Human Services, and Education, and Related Agencies, Jan. 20, 2004, S.Hrg. 108-394, 7-8.

[31] Department of Labor's Proposed Rule on Overtime Pay, Hearing before the Appropriations Subcommittee On Departments of Labor, Health and Human Services, and Education, and Related Agencies, Jan. 20, 2004, S.Hrg. 108-394, 1.

[32] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 18 (2017). The Stein Report first articulated this, stating that EAP employees must be "paid a salary substantially higher than the wages guaranteed as a mere minimum under section 6 of this act." Stein Report at 19. Further, the Congressional Research Service states that "[the federal minimum wage] has traditionally been used explicitly by DOL as a benchmark when establishing the EAP salary thresholds. … As one of many examples, the 1963 rule noted '[I]n nearly a quarter century of administering the act … the salary test established for executives … has fluctuated between 73 and 120 times the statutory hourly minimum wage applicable at the time, the arithmetical mean being 92.' This comparison then guided DOL's establishment of the salary threshold for executive and administrative employees at 80 times the prevailing the prevailing [sic] hourly minimum wage at the time."

[33] David H. Bradley, Cong. Research Serv., R45007, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees 19 (2017).

$965 per week ($44,928 and $50,180 per year). Once again, while the proposed rule's threshold of $679 per week is far below these historic ratios, making it fail DOL's longstanding principle that any EAP employee's salary must far exceed the minimum wage, the 2016 rule's threshold was within this range.

Therefore, by proposing to rescind the 2016 rule and promulgate a new salary threshold based on the flawed methodology of the 2004 rule, DOL's proposed rule violates congressional intent to exempt from the FLSA's overtime protections only those employees who are bona fide executive, administrative, or professional employees.

The Proposed Rule Would Run Afoul of the FLSA and Defeat Congressional Intent by Exempting Employees Who Congress Intended to have Overtime Protection

The end result of DOL's proposed rule is to use the flawed 2004 methodology to exempt millions of employees who Congress intended to have the protections of the FLSA's minimum wage and overtime provisions. As DOL itself noted in 2016, this flawed methodology results in the "inappropriate classification of employees as EAP exempt...."[34] By DOL's own calculations in the proposed rule, DOL is proposing to leave 2.8 million employees without overtime protections.[35]

The Secretary is Failing to Fulfill his Obligations Under the FLSA, Damaging the Integrity of that Law

Congress bestowed upon the Secretary alone the authority to define and delimit the EAP exemption, as well as the obligation to effectively enforce the FLSA and act as a steward of its rights and protections. In the proposed rule, the Secretary instead undermines the FLSA both by ceding his authority to define and delimit the EAP exemption to a single district court without sufficient independent rationale or justification for the threshold set in the proposed rule and by refusing to defend Secretarial authority under the FLSA in court.

The EAP exemption contained in the FLSA as originally enacted was the sole exemption that explicitly directed the Secretary to define and delimit its terms, indicating the specificity and clarity of Congress' grant of authority to the Secretary.[36] It is well-settled law that when Congress explicitly delegates regulatory authority to an agency, that agency has discretion in creating its regulations and is entitled to deference from the courts.[37] The more than 80-year statutory history of the FLSA demonstrates Congressional ratification of the Secretary's long-

[34] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 81 Fed. Reg. 32391, 32392 (May 23, 2016) (to be codified at 29 C.F.R. pt. 541).
[35] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed Reg. 10900, 10951 (Mar. 22, 2019) (to be codified at 29 C.F.R. pt. 541).
[36] Cong. Research Service, Overtime Exemptions in the Fair Labor Standards Act for Executive, Administrative, and Professional Employees, 4-5, (Oct 31, 2017). Only one other exemption explicitly referenced DOL defining a piece of an exemption—the phrase "area of production" in 13(a)(10) for activities related to agriculture—but that directive is constrained to that limited phrase and is obviously not nearly as broad and sweeping as the directive to delimit the entirety of the exemption, as in EAP exemption in 13(a)(1). *See Id.*
[37] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

standing interpretation of and approach to the EAP exemption.[38] For decades, the Secretary fulfilled his or her statutory mandate to define and delimit the EAP exemption, using his or her delegated authority numerous times to issue regulations that apply a duties test and a salary threshold that operate in tandem in determining an employee's eligibility for overtime protection. Over the years, Congress has amended the FLSA at least 10 times, but has never amended the relevant language of the EAP exemption, has never curtailed the Secretary's authority to "define and delimit" the EAP exemption, and has never precluded the Secretary from using a salary threshold to exclude employees from the exemption.

In the proposed rule, the Secretary relies on faulty reasoning and an erroneous decision from the U.S. District Court for the Eastern District of Texas to justify his abandonment of the longstanding role of the salary threshold in defining and delimiting the EAP exemption. DOL's reliance on the district court's decision is evidenced by the number of times DOL cites the court's reasoning, including: "The Department has reconsidered the $913 per week standard salary level set in the 2016 final rule in light of the district court's decisions…"; "To address the district court's and the Department's concerns with the 2016 final rule and set a more appropriate salary level…"; "In proposing a new salary level, the Department considered the district court's conclusion that the salary level set in the 2016 final rule exceeded the Department's authority…"; "The Department's proposed approach would also address concerns with the 2016 final rule identified by the district court."; "The district court's invalidation of the 2016 final rule has prompted the Department to…"; "The Department is engaging in this rulemaking… to address the concerns about the 2016 final rule identified by the district court…";[39] among others.[40]

DOL further proposes to adopt the salary level that the district court came up with in its ruling. Even though the legality of the flawed 2004 rule was not before the court, the court stepped into the Secretary's shoes and explicitly opined that, "During questioning…the Court suggested it would be permissible if [DOL] adjusted the 2004 salary level for inflation. In fact, the Court

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[38] *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817 (2013) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Id.* At 827-28, internal quotation marks and citation omitted).

[39] Defining & Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales & Computer Employees, 84 Fed. Reg. 10900, 10901 (March 22, 2019) (to be codified at 29 C.F.R. pt. 541).

[40] See also: "As the district court noted in its decision invalidating the 2016 final rule, the increase also untethered the salary test from its historical justification…" *Id.* at 10901; "The district court's summary judgement decision endorse the Department's [current approach] to setting the salary level…" *Id.* at 10907; "The court then explained that in contrast to these acceptable past practices, the 2016 standard salary level…" *Id.* at 10907; "The court also emphasized the magnitude of the salary level increase…" *Id.* at 10908; "The Department has reexamined the 2016 final rule in light of the district court's decision." *Id.* at 10908; "The district court approvingly cited the Weiss Report and explained that setting 'the minimum salary level as a floor to 'screen[] out the obviously nonexempt employees'' is 'consistent with Congress's intent.'" *Id.* at 10909; "Further endorsing the Department's earlier rulemakings, the district court stated…" *Id.* at 10909; "As the district court recognized…" *Id.* at 10908; "As the district court stated, that increase department from the salary level's purpose…" *Id.* at 10909; "The proposed standard salary level also addresses the concerns raised in the district court's summary judgment decision." *Id.* at 10909; "The district court's decision raised concerns regarding the large number of exempt workers…" *Id.* at 10909; "The district court noted that this relatively high number indicated that the salary level was displacing the role of the duties test…" *Id.* at 10909.

stated in a question, '[I]f [the salary level] had been just adjusted for inflation, the 2004 figure, we wouldn't be here today....'"[41]

One adverse ruling from a single district court does not free the Secretary from his obligation to define and delimit the exemption. Instead, his attempt to rely on that decision in promulgating the proposed rule is tantamount to the Secretary ceding his congressionally-delegated authority to define and delimit the EAP exemption to the U.S. District Court for the Eastern District of Texas. This is particularly true given the reasoning of the court's decision effectively would overturn 80 years of practice and precedent and improperly restrict the Secretary's congressionally-delegated authority. While the district court cast unfounded doubt on the Secretary's authority to use a salary threshold as it exists in the 2016 rule and suggested a reversion back to the flawed 2004 methodology, the threshold needed to be revised to correct for the error of the 2004 rule, as outlined above, and the Secretary was well within his authority in doing so.

The Secretary's authority to define and delimit the exemption must be defended, and a decision as far-reaching as the district court's should be challenged. In fact, in 2016, then-Secretary Perez moved to appeal the decision to the U.S. Court of Appeals for the Fifth Circuit. However, the appeal is now being held in abeyance at Secretary Acosta's request so that he may complete this rulemaking and, according to this proposed rule, adopt the *district court's* definition and delimitation of the EAP exemption.

In short, the Secretary is acting in violation of his obligation to define and delimit the EAP exemption by outsourcing it to the U.S. District Court for the Eastern District of Texas. By pursuing that course, instead of defending both the 2016 rule and his authority under the FLSA by appealing the court's decision to the Fifth Circuit Court of Appeals, the Secretary is doing lasting damage to the FLSA in violation of congressional intent.

Conclusion

DOL's proposed rescission and rulemaking are contrary to congressional intent as demonstrated by the FLSA's legislative, statutory, and regulatory history. The proposed rule further undermines the FLSA by impermissibly ceding the Secretary's congressionally delegated authority to define and delimit the exemption to a single district court.

We urge DOL to withdraw its proposed rescission and rulemaking related to the EAP exemption to the FLSA's minimum wage and overtime protections. Instead, the Secretary should defend both the 2016 rule and his authority under the FLSA by appealing the court's decision to the Fifth Circuit Court of Appeals.

Thank you for your consideration of these views. For any questions or further communication, please contact Joe Shantz with my Senate Health, Education, Labor, and Pensions Committee Minority Staff at Joseph_Shantz@help.senate.gov or (202) 224-0767.

[41] *Nevada v. U.S. DOL*, 218 F. Supp. 3d 520, at n.6 (E.D. Tex. 2016).

Sincerely,

Patty Murray
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions