September 4, 2015

VIA ELECTRONIC SUBMISSION: *www.regulations.gov*

Mary Ziegler, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

Re: Notice of Proposed Rulemaking (NPRM): Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 80 Fed. Reg. 38515 (July 6, 2015), RIN: 1235-AA11

Dear Director Ziegler:

It would have been helpful for the regulated community to better assist the Department in gathering substantive information on the impact the proposed revisions would have on the nation's employers for the Department to have granted a longer comment period to allow for the data to be gathered and analyzed. Listening sessions on general ideas are no substitute for the robust notice and comment requirements mandated by law, particularly when the proposed regulation shows little indication that the Department listened to our main concerns.

Our Association is the leading business representative for the restaurant and foodservice industry. The industry is comprised of one million restaurant and foodservice outlets employing 14 million

people—about ten percent of the U.S. workforce.[1] Restaurants are job creators and the nation's second-largest private-sector employer. Despite its size, small businesses dominate the industry; even larger chains are often collections of smaller franchised businesses.

The Department states that its goal in revamping federal overtime rules is to set a standard salary level for full-time salaried employees that "adequately distinguishes between employees who may meet the duties requirements of the [executive, administrative, and professional (EAP)] exemption and those who likely do not, **without necessitating a return to the more detailed long duties test**."[2] We strongly agree that the Department should not return to the more detailed long duties test, which was effectively abandoned decades ago.

Imposing a long duties test, particularly one similar to what is found in California, would lead to less clarity and more litigation, which the Department states it would like to avoid.[3] We also agree that the 2004 salary threshold for exempt status is now too low and should be raised. However, the Department's proposed salary level is not the appropriate level for our diverse industry, especially given regional and local variations in salaries paid due to sharp differences in the cost of living in the United States.

Below, we address in more detail several of the questions raised in the NPRM, specifically:

1. Whether adjustments to the duties test are necessary;
2. Whether the Department should modify the standard exemption for executive, administrative, and professional

[1] *2015 Restaurant Industry Forecast*, National Restaurant Association (2015). The 2015 employment projections are based on historical data from the Bureau of Labor Statistics (BLS).
[2] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule, 80 Fed. Reg. 38515, 38517 (July 6, 2015) (emphasis added).
[3] 80 Fed. Reg. 38515. The Department even alleges that a "potential impact" of the proposed rule "is a reduction in litigation costs." 80 Fed. Reg. at 38518.

employees to permit nondiscretionary bonuses and incentive payments to count toward satisfaction of the salary level test;
3. Whether the Department's proposed salary level is adequate and, if not, what would be an appropriate alternative salary level amount; and,
4. Whether the standard salary level should automatically go up and, if so, which method is better, CPI–U or the 40th percentile of full-time non-hourly employees approach.

Adjustments to the duties test are not necessary and should be avoided.

It is clear to us that any reduction in litigation that the Department seeks to obtain with the proposed rule's increase in the salary threshold would be lost if the changes being considered to the duties test became final. In particular, we are extremely troubled by the notion that the Department is even looking at California's over-50% quantitative requirement for an exempt employee's primary duty.

In meetings with the Secretary of Labor and others, our members have emphasized that this has resulted in considerably higher levels of litigation in California, as plaintiff's lawyers and employers fight over the percentage of time spent on various tasks and whether those tasks are appropriately classified as exempt or nonexempt.[4] Furthermore, as I personally stated at one of the several U.S. Small Business Administration Office of Advocacy hearing sessions with representatives from the Department of Labor, any changes to the duties test, particularly the substantial changes being considered, should be done only

[4] Representatives from our board and our Association's executive team met with the Secretary and his team on May 1, 2014, less than two months after the President's announcement and a year before any specifics were known on the proposal.

through a true notice and comment process in accordance with the Administrative Procedure Act (APA).[5]

Moreover, if the Department enacted changes to the duties test based only on answers to the general questions asked in the NPRM, rather than on the basis of comments on any specific proposal, the requirements of the APA, the Regulatory Flexibility Act, and the various Executive Orders related to regulatory activity would not have been followed. Seeking input this way is no substitute for an actual regulatory proposal that the regulated community can consider, evaluate, and comment upon. Likewise, adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA.

This is particularly true because the changes being contemplated by the Department are significant, and deserve a full regulatory vetting. The changes suggested by the Department's questions would result in massive changes in employer processes, including having to monitor and track if and how often exempt employees perform non-managerial, or nonexempt, work for the business. These changes would dramatically impact the cost of implementing the proposal. These costly compliance requirements are not addressed in the economic analysis of the current NPRM.

Moreover, the Department optimized the duties test in 2004 to reflect the realities of the modern economy, a move that recognized the unique roles and responsibilities restaurant managers have. In our industry, managers need to have a "hands-on" approach to ensure that operations run smoothly.

Performing hands-on work at the manager's own discretion to ensure that operations are successfully run in no way compromises the fact that the manager's primary responsibility is performing exempt work. In addition, restaurant managers are

[5] Roundtable on DOL's Overtime Regulations: Small Business Administration Office of Advocacy (July 22, 2015).

expected to develop their teams and the role of a "Coach" best exemplifies this. Most workers, younger workers in particular, can be motivated to reach their full potential faster when they learn from someone with a Coach's mentality. Jumping in to help out the team with their "nonexempt" duties personifies leadership qualities and is the best way to inspire, motivate and teach workers how to deliver the best service to the customer.

It also shows that the whole restaurant is a team and everyone should come to work prepared to do whatever it takes to make sure each customer has a great experience and will want to return in the future. The hospitality industry in this country would not be as successful as it is if managers were not free to lead, train, and inspire by example. Who would want to dine at a restaurant where every employee took a "Not My Job" attitude?

As you can see, any attempt to artificially cap the amount of time exempt managers can spend on nonexempt work would place significant administrative burdens on restaurant owners, increase labor costs, cause customer service to suffer and result in an increase in wage-and-hour litigation.

We are also extremely concerned that the Department expresses throughout the NPRM its belief that any amount below its proposed salary level would necessitate a more rigorous and restrictive long duties test. The realities associated with a more rigorous and restrictive long duties test exist regardless of the salary level chosen by the Department. Even if the salary level did not increase at all, a more rigorous and restrictive long duties test would still place significant administrative burdens on restaurant owners, increase labor costs, cause customer service to suffer and result in an increase in wage-and-hour litigation.

Furthermore, regardless of the particular work being done at any given time, managers neither lose nor put on hold their managerial duties. They have responsibility for the operation at all times. The pre-2004 regulations included a "sole-charge" test that

allowed employers to classify one manager as exempt during each shift, acknowledging that someone in the restaurant must be in charge at all times. Even if a manager performs a manual task at any given point in time, she retains responsibility for the staff, physical plant, and other assets of the restaurant.

Thus, the Department should leave the concurrent duties rule in place and untouched. The concurrent duties test rule recognizes that front-line managers in restaurants play a multi-faceted role in which they often perform nonexempt tasks at the same time as they carry out their exempt, managerial function. It recognizes that exempt and nonexempt work are not mutually exclusive.

The Department's own Field Operations Handbook highlights that "performing work such as serving customers or cooking food during peak customer periods" does not preclude exempt status. (See § 22b04.) Exempt supervisors make these decisions while remaining responsible for the success or failure of business operations under their management and can both supervise subordinate employees and serve customers at the same time. (*Id.*)

Because of how drastic and costly changes in the duties test could become, we urge the Department to provide the public an opportunity to review and comment on a specific proposal and, simultaneously, conduct the necessary cost estimates before any changes are finalized.

Bonuses and other nondiscretionary incentives should count toward the salary level test.

In the restaurant industry, bonuses are critical components of our employees' total compensation packages and should be counted toward meeting the salary level threshold under the executive, administrative, and professional exemption. In a nationwide survey of the restaurant industry published last year, 71 percent of salaried restaurant managers said that they received a bonus within

the past 12 months.[6] Among salaried shift and crew supervisors, half reported receiving a bonus, while 47 percent of salaried chefs and cooks reported earning a bonus in the past 12 months.[7]

Thus, we support the Department's suggestion of considering nondiscretionary bonuses and incentive payments, such as "nondiscretionary incentive bonuses tied to productivity and profitability," toward meeting the salary level.[8] However, we disagree with the Department's suggested limitation that would allow such bonuses to satisfy no more than 10% of the weekly salary level.[9]

It should make no difference to an exemption analysis whether someone earns $40,000 per year in base salary with $10,000 in bonus versus $45,000 per year in base salary with $5,000 in bonus. As far as the employee is concerned, at the end of the year, the total compensation is the same. In addition, employers value the ability to look at compensation in terms of total compensation, rather than the individual components. The regulation should support flexibility.

We are glad that the Department envisions allowing bonus payments paid monthly.[10] Some of our members already pay bonuses based on monthly results. In fact, I know of at least one company that has done it this way since its inception and currently pays over 2,000 field manager's monthly bonuses.

However, the Department should also seriously consider the inclusion of bonuses paid quarterly, semi-annually, or annually, to

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[6] Who Works in the Restaurant Industry: A Nationwide Survey of the Restaurant Workforce, National Restaurant Association Educational Foundation (2014), 19. Figures are based on salaried employees who have worked for their current employer for at least one year.
[7] *Id.*
[8] 80 Fed. Reg. 38535.
[9] *Id.*
[10] *Id.* at 38536.

reflect how these incentive payments are made by other employers in the restaurant industry.

Most bonus payments are typically made less often than monthly because they are tied to larger business results (such as profitability) that fluctuate significantly in our industry on a month-to-month basis. The Department's suggested preference for allowing bonuses to count toward salary levels only if payment intervals are monthly or more frequently undoes for most of our members much of what its original suggestion seems to put into place.

The Department also does not favor allowing "catch-up" payments at the end of the year in the event that the metrics for a bonus payment were not met for a given employee.[11] However, we encourage the Department to reconsider this position, and allow employers to make a yearly catch-up payment as the department allows under the Highly Compensated Employees exemption.

In the alternative to annual catch-up payments, we urge the Department to permit employers to make catch-up payments based on when they pay the bonuses, i.e., monthly, semi-annually, or quarterly. The monthly, semi-annual or quarterly bonus structure should address the Department's concern of ensuring that exempt workers receive a minimum level of compensation on a consistent basis. Likewise, not allowing for catch-up payments at all could make an exempt employee retroactively nonexempt during slow business periods, diluting the "ownership mindset" that bonuses encourage.

In our opinion, allowing for catch-up payments makes more logical sense. It guarantees that the employee would always meet the salary level, regardless of the potential for high and low business cycles. Catch-up payments also increase the potential for bonuses

[11] 80 Fed. Reg. at 38536.

that would take the employee's total compensation above the minimum salary threshold when the business is doing well.

The Department's proposed minimum salary level for the EAP exemption is inadequate for our industry and makes the exemption inoperative in many parts of the country.

We want to start our comments on the salary level by re-emphasizing that we disagree with the Department's suggestion that the only way to compensate for a lower salary level than the one proposed is by re-imposing the outdated long duties test or something similar. The reasons for our deep opposition towards a long duties test and all of its negative consequences are outlined above.

The Department believes its proposed salary level does not exclude from exemption an unacceptably high number of employees who meet the duties test.[12] However, when applied to our industry, the contrary is true. To be clear, we do support raising the salary threshold. None of the many National Restaurant Association members that provided feedback to us employ exempt salaried staff at the current $455 per week level.

Conversely, even before adjusting for regional economic and market differences, most managers and crew supervisors in our industry do not meet the proposed salary level of $970 per week. Some of these employees would qualify as exempt under the new proposed salary level only if the Department allowed bonuses to be used to calculate the employee's salary level.

The purpose of setting a salary level, historically, has been to "provid[e] a ready method of screening out the obviously nonexempt employees."[13] In other words, the salary level should

[12] 80 Fed. Reg. at 38556.
[13] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22165 (April 23, 2004).

be set at a level at which the employees below it would clearly not meet any duties test. With its proposed changes, however, the Department is upending this historic rationale and setting the salary level at a point at which all employees above the line would be exempt. This would greatly limit employers in the restaurant industry from availing themselves of the EAP exemption.

For example, the median annual base salary paid to crew and shift supervisors in our industry is $38,000.[14] Even those in the upper quartile at $47,000 would not qualify as exempt under the Department's proposed $50,440 salary level for 2016.[15] Likewise, the median base salary for restaurant managers is $47,000, while the lower quartile stands at $39,000.[16]

These are employees who would meet the duties test but who would become non-exempt under the proposed salary level. It is then clear that, at least in reference to the restaurant industry—the nation's second-largest private-sector employer—the proposed salary level does exclude from exemption an unacceptably high number of employees who meet the duties test. The impact would be magnified in many regions of the country.

A) Better Alternatives Considered by the Department

The Department considered several alternatives that we believe are better options. We would support "Alternative 1," which calculates the new salary level by adjusting the 2004 salary level of $455 for inflation from 2004 to 2013, as measured by the CPI–U, and results in a salary level of $561 per week.[17] Likewise, we would also support "Alternative 2," which uses the 2004 method to set the salary level at $577 per week.[18]

[14] Who Works in the Restaurant Industry: A Nationwide Survey, p. 19.
[15] *Id.*
[16] *Id.*
[17] 80 Fed. Reg. at 385561.
[18] *Id.*

Understanding that the Department now finds the salary level it set in 2004 as too low, we could also support "Alternative 3," which would set the salary level at $657 per week.[19]

Alternative 3 truly minimizes the number of employees who would pass a duties test but be denied the EAP exemption under the proposed salary level. It does so by taking into account employees in lower-wage regions and industries, in order to prevent "disqualifying any substantial number of such employees" from the EAP exemption.[20] The current proposal claims to do this, but fails to achieve this goal. Once again, when discussing this alternative, the Department feels unwilling to accept it without bringing back the long duties test.[21] This would go against the President's memorandum instructing the Department to look for ways to modernize and simplify the regulations.[22]

It is also important to look at the impact these regulations would have on the majority of the employees who will now become "overtime protected." The Department estimates that 75 percent of newly overtime-protected employees would see no change in compensation and no change in hours worked.[23]

However, in the restaurant industry, salaried employees enjoy a number of benefits not available to hourly employees. Thus, in addition to getting paid a salary regardless of the fact that they are not working over 40 hours a week, these newly overtime-protected employees could lose flexibility as well as benefits, including substantive bonuses, paid vacation, flex time, paid holidays, 401K with employer match, and health insurance.

Finally, throughout the NPRM, the Department creates the impression that salaried employees feel they are being taken

[19] 80 Fed. Reg. at 385561.
[20] *Id.* at 385558.
[21] *Id.*
[22] *Id.* at 385517, 385521.
[23] *Id.* at 385573, 385574.

advantage of by virtue of their exempt status. In reality, employees often view reclassifications to non-exempt status as demotions, particularly where other employees within the same restaurant continue to be exempt. Most employees view their exempt status as a symbol of their success within the company. Far from being enthusiastic, National Restaurant Association members have described reclassified employees as feeling like they were being disciplined and distraught over being reclassified.

Don Fox, CEO of Firehouse of America, LLC, in his own comments to this NPRM, attested that he has promoted dozens of managers to salaried positions in his professional lifetime and "without exception," not one believed it to be anything other than a significant milestone in their professional life.

For the reasons stated above, the Department should reconsider its salary level proposal and set it in the final rule at no more than $657 per week to avoid disqualifying a substantial number of employees in our industry from continuing to enjoy the benefits of being salaried exempt employees.

B) Additional Alternatives Not Considered by the Department

There are two additional alternatives that could also work better than the current proposal that deserve further exploration:

1) Salary levels determined using sector/industry specific data; and,
2) Salary levels determined on a regional basis.

As explained above, the proposed methodology of setting the threshold at the 40th percentile of all exempt employees regardless of industry ends up creating extreme industry disparities on who would qualify. While a supervisor in high tech would qualify, a supervisor with similar duties at a non-profit or a restaurant would not because they would not pass the high salary level threshold being proposed.

From our perspective, it is very unfair to include high tech, finance, medical device and other businesses with high sales and high profits per employee in the same metric with retail and restaurant companies where the sales and profits per employee are comparatively very low. It would be more reasonable to have several threshold salary levels using sector/industry specific calculations.

Similarly, the proposed salary level could be determined on a regional basis to take into account cost-of-living differences. The federal government considers geographic variations when setting the compensation level for its own employees. For example, the federal government sets some of its highest compensation levels for its employees in California and New York.

Analogously, setting a salary level for the EAP exemption that exceeds the minimum level determined by those two states' own legislatures to be appropriate highlights the significant impact the proposed salary level would have in Oklahoma and Mississippi.

Substantial pay differences exist even for employees in the same restaurant company, based on their geographical region or even a metro area within a state. These pay differences are unlikely to be related to differences in job duties. For example, the median pay of "First-line supervisors/managers of food preparation and serving workers" is 51 percent higher in New York City than in Little Rock, Arkansas.[24]

For multi-state restaurant employers, a high proposed salary level would result in employees in the same job classification being treated differently based on where they live. Without lowering the proposed salary level or, in the alternative, allowing regional salary-level determinations, even when positions meet the duties test, employers in our industry would likely have to reclassify positions

[24] Based on BLS data.

where the nature of the industry or the regional economy cannot justify a salary increase.

For example, as noted in a recent article on the issue, "the DOL placed the occupation 'First Line Supervisors/Managers of Office and Administrative Support Workers' in the category corresponding to 90 to 100 percent of employees with sufficient managerial and professional duties to pass the duties test, yet 51 percent of employees in this occupation will likely fail the new salary test."[25]

In some parts of the country, restaurant employers are likely to find that almost 100 percent of their employees who have sufficient managerial and professional duties to pass the duties test—even including restaurant managers—would fall below the Department's proposed salary level and would need to be reclassified as a result.

In these situations the proposed salary level would not operate as a gatekeeper. It would instead serve as an absolute elimination of the exemption in our industry in large portions of the country. Clearly, Congress cannot possibly have intended to create an exemption to benefit only employees and employers in certain regions of the country.

Yet this is precisely what the Department would be doing by proposing a salary level at such a high level, based on a national survey that does not account for sector/industry differences or regional differences in any meaningful way.

The restaurant industry as well as the entire South and Midwest regions will be placed at a competitive disadvantage. Employers in urban areas or with high profits will be able to maintain exempt employees at a rate that far exceeds rural areas and the restaurant industry.

[25] Flawed Logic in DOL's Proposed White Collar Salary Test, S. Bronars, D. Foster, and N. Woods, Employment Law 360 (Aug. 25, 2015).

The Department does not have the authority to mandate an automatic salary level increase.

According to the NPRM, the Department seeks "to 'modernize' the EAP exemptions by establishing a mechanism for automatically updating the standard salary test."[26] The Department believes that this would "promote government efficiency by removing the need to continually revisit the issue through resource-intensive notice and comment rulemaking."[27]

However, it is unclear how the Department can avoid its obligations to engage in notice-and-comment rulemaking simply because notice-and-comment rulemaking takes resources. Many would say that it is precisely that reason why notice-and-comment rulemaking is appropriate here: to ensure that 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.[28]

When Congress authorized the Department to issue regulations under the Federal Labor Standards Act (FLSA), Congress did not, either in 1938 or at any time since, grant the Department the authority to index its salary test. Congress could have expressly provided such authority if it desired the Department to have it; Congress expressly permitted indexing in other statutes, including the Social Security Act and the Patient Protection and Affordable Care Act.

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. Moreover, when Congress has

[26] 80 Fed. Reg. at 38537.
[27] *Id.*
[28] See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (internal citations omitted).

amended the FLSA to increase the minimum wage, it similarly has not indexed that amount. Congress has demonstrated 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 Department recognized its lack of authority to index the salary test in the 2004 rulemaking. And, it acknowledges as much in the current NPRM, noting that it determined "nothing in the legislative or regulatory history…would support indexing or automatic increases."[29] The Department was correct in 2004, and nothing has occurred in the interim to justify the opposite conclusion.

Putting aside our legal objections to the Department's attempt to permanently index the salary level, between two bad options—neither of which would properly account for changes in economic conditions—we would prefer indexing tied to the CPI-U over indexing based on the 40th percentile of full-time non-hourly employees. However, for CPI-U indexing to be considered reasonable, the salary level itself needs to be reasonable.

As we explained above, our research shows that, with a salary level set at $970 per week, a yearly increase tied to CPI-U would make the EAP exemption perpetually unusable for large portions of our industry. Thus, we take this opportunity to recommend, once again, that the Department establish a minimum salary rate at a more reasonable level, such as "Alternative 3" at $657 per week, before indexing based on CPI-U.

The Department's other proposed alternative of indexing the salary level to the 40th percentile of non-hourly employees is a non-starter. Preliminary research points to it resulting in a death spiral that would render the EAP exemption obsolete in just a few years. The relevant data used to determine the 40th percentile of full-time salaried workers is found in the Current Population Survey from the

[29] 80 Fed. Reg. at 38537.

Bureau of Labor Statistics (BLS). The data consists of the total weekly earnings for all full-time non-hourly paid employees.[30] According to BLS, "total weekly earnings" includes overtime pay, commissions, and tips.[31]

As the new salary level becomes effective, the number of workers who report to the BLS that they are paid on a non-hourly basis will decrease as workers who fail the salary test in year one (and subsequent years) are reclassified as non-exempt. This will result in a dramatic upward skewing of compensation levels for non-hourly employees. If the 40th percentile test is adopted, in the years following the proposal, the salary level required for exempt status would be so high as to effectively eradicate the availability of the exemptions in our industry.

For example, the Department predicts that the initial salary level increase will impact 4.6 million currently exempt workers. Employers must then choose to:

1) Reclassify such workers as nonexempt and convert them to an hourly rate of pay;
2) Reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked; or,
3) Increase the salaries of such workers to the new salary threshold to maintain their exempt status.

The Department estimates that only 67,000 of currently EAP exempt workers will see an increase in their salaries to bring them up to the new salary threshold in order to maintain their exempt status.[32] The overwhelming majority of affected employees would be reclassified as non-exempt.[33] In our industry, particularly under the

[30] 80 Fed. Reg. at 38527, n. 20.
[31] See http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.
[32] 80 Fed. Reg. at 38573, 38574.
[33] *Id.*

proposed $970 per week salary level, most of these employees will be converted to an hourly method of payment.

As Mr. Fox pointed out in his comments, a "[Restaurant Manager] will not be the beneficiary of an overnight raise from $38,584 to $50,440 per week (in fact, a raise of that magnitude is the least likely scenario)." In turn, for purposes of the 40th percentile test, these workers would no longer be included in the BLS's calculation because they would become "hourly" employees. This sentiment was echoed by others in the industry. Joseph Kadow, Executive Vice President and Chief Legal Officer of Bloomin' Brands, in his comments, also highlighted that keeping the salary threshold at the proposed level would lead businesses like his to "move currently exempt employees to hourly payment."

One economic analysis that we were able to review states that if just one quarter of the full-time, non-hourly workers earning less than the proposed 40th percentile were reclassified as hourly workers each year, in five years the new 40th percentile salary level would be $1,393 per week ($72,436 per year).[34] The more likely scenario is that an even greater percentage of employees would be reclassified from salaried to hourly. If just half of full-time, non-hourly employees are converted to hourly positions, the 40th percentile salary level would increase to $1,843 per week ($95,836 per year) by 2020.[35]

It is clear under analysis that the choice between indexing to CPI-U or the 40th percentile is really a non-choice because the alternative to CPI-U is not workable. This is yet another reason why the Department should adjust the salary level only in accordance with the Administrative Procedure Act's required notice-and-comment rulemaking process, following the Regulatory Flexibility Act, and undertaking a detailed economic and cost analysis.

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[34] See http://www.edgeworthseconomics.com/experience-and-news/edgewords-blogs/edgewords-business-analytics-and-regulation/article:08-27-2015-12-00am-indexing-the-white-collar-salary-test-a-look-at-the-dol-s-proposal/

[35] *Id.*

In the current rulemaking, however, the Department proposes to announce a new salary level each year 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. If the Department decides to ignore these requirements, we urge you not to include automatic increases to the salary level based on indexing tied to the 40th percentile of all full-time non-hourly-paid employees and, instead, tie the increases to CPI-U—after lowering the salary threshold to $657 per week.

Conclusion

In conclusion, the Department should have granted at least as much time as it did in 2004 for the regulated community to comment on the NPRM, particularly given the proposal's complexity and unusual new theories and mandates.

Above all, the restaurant industry would find a return to the long duties test to be the wrong approach. The Department says it is attempting to "modernize" and "simplify" the applicability of the EAP exemption. A return to a long duties test would absolutely nullify any efforts to modify and simplify the rules. However, if the Department is inclined to mandate a new duties test, it should comply with all regulatory requirements and allow for notice and comment on any specific new duties test proposal.

Bonuses are also an integral part of the restaurant industry's total compensation package that promotes a manager's sense of "ownership" in the restaurant. The final rule should encourage, not discourage, the use of nondiscretionary bonuses to meet the salary level. Meanwhile, the proposed salary level is too high for our industry and certain regions of the country, so we urge you to use a salary level of $657 per week without going back to the discarded long duties test.

Finally, we do not think the Department has the legal authority to automatically increase the salary level, but between the two choices provided, we oppose the use of the 40th percentile of full-time non-hourly employees in favor of the CPI-U.

On behalf of the National Restaurant Association and its members, I thank you for this opportunity to submit our comments and look forward to working with you on this important provision of the FLSA.

Sincerely,

Angelo I. Amador, Esq.
Regulatory Counsel &
Senior Vice President of Labor & Workforce Policy