RETAIL INDUSTRY LEADERS ASSOCIATION

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Submitted via regulations.gov

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Room S–3502, 200 Constitution Avenue, N.W.
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Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Request for Information (RIN 1235-AA39) (88 Fed. Reg. 62,152 (September 8, 2023))

Dear Ms. DeBisschop:

Thank you for the opportunity to submit these comments on behalf of the Retail Industry Leaders Association ("RILA") in response to the U.S. Department of Labor's Notice of Proposed Rulemaking ("NPRM" or "Proposed Rule") proposing significant changes to the regulations found at 29 CFR Part 541 ("Part 541"). These proposed changes by the Department of Labor ("DOL" or the "Department") to the Part 541 regulations implementing the executive, administrative, professional, outside sales, and computer employee exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") were published in the Federal Register on September 8, 2023.[1]

I. INTRODUCTION

A. RILA

RILA is a trade association of the world's largest, most innovative, and recognizable retail companies and brands. RILA members include more than two hundred retailers, product manufacturers, and service suppliers, who together employ over 42 million Americans and account for $2.7 trillion in annual sales and hundreds of thousands of stores, manufacturing facilities, and distribution centers domestically and abroad. Given the enormous role that RILA members play in the U.S. economy, representing nearly a third of all retail sales, RILA has a strong interest in this NPRM which could have a major impact on thousands of "white-collar" retail employees across the country.

[1] 88 Fed. Reg. 62,152.

B. RILA Appreciates Having the Opportunity to Respond to the NPRM

RILA appreciates having the opportunity to respond to this NPRM. We recognize that the DOL committed itself in 2019 to engage in more regular reviews of the salary threshold level for the Executive, Administrative and Professional ("EAP") exemptions and that the DOL now is following up on that commitment. The notice-and-comment requirements for rulemaking are important and cannot be understated. We applaud the DOL for not proposing any changes to the duties test for any of the EAP exemptions as part of this NPRM. We also agree with the DOL that salary thresholds for the EAP exemptions should not be based on the Consumer Price Index of other inflationary indices.

C. RILA Also Has Serious Concerns Regarding the NPRM

RILA believes that employees and employers alike are best served with a system that: (1) promotes flexibility in structuring operations that benefit both the employee and employer (2) maximizes career advancement opportunities for employees; and (3) promotes clarity for employers when classifying employees. To this end, RILA has consistently taken the position that an employee's job duties are what truly defines whether an individual is "employed in a bona fide executive, administrative, or professional capacity" for purposes of Section 13(a)(1) of the FLSA.[2] This is particularly true in today's dynamic retail workplace.

Although the use of a minimum pay level for EAP exemptions may serve a gatekeeping function for "screening out the obviously non-exempt employees,"[3] RILA also has consistently taken the position that "[r]aising the threshold well above the level necessary to perform this function would undermine its purpose by excluding from the exemption many employees who undisputedly perform exempt functions."[4] Indeed, prior to the Eastern District of Texas striking down the DOL's attempt in 2016 to increase the annualized minimum salary level for these exemptions to $47,500,[5] RILA warned that increasing the overtime threshold too high and too fast would have deleterious effects on employers and employees.[6]

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[2] 29 U.S.C. §213(a)(1).

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

[4] Comments of the Retail Industry Leaders Association in response to the DOL's 2015 Notice of Proposed Rulemaking (hereinafter RILA's 2015 Comments) at 14.

[5] The District Court issued a nationwide preliminary injunction in November 2016, just before the final rule was about to go into effect. *Nevada v. Dep't of Labor*, 218 F.Supp.3d 520, 534 (E.D. Tex. Nov. 22, 2016). The District Court ultimately struck down the final rule in August 2017. 275 F.Supp.3d 795, 807-08 (E.D. Tex. Aug. 31, 2017).

[6] RILA's 2015 Comments at 13.

Unfortunately, the 2023 NPRM creates even greater concerns than the 2016 final rule that was invalidated, both substantively and procedurally. Although the DOL attempts to argue its proposal as taking a purported middle ground by not using exactly the same methodology that was struck down in 2016 (***i.e.***, setting the level at the 35th percentile of all salaried employees in the South, as opposed to the 2016 plan to use the 40th percentile of all salaried employees in the South), the proposal would still increase the salary threshold by at least 55 percent over the threshold that was contained in the final rule issued by the DOL in 2019 and that became effective on January 1, 2020. Although the increase in 2020 to $684 per week was 50 percent above the prior threshold of $455 per week, the $455 threshold was established in 2004, which means that nearly 16 years had passed. In addition, because many employers had already adjusted salaries in 2016 in anticipation of the 2016 Final Rule becoming effective, the 2020 increase did not create a significant level of disruption.

In the 2023 NPRM, the DOL could have taken a considered approach and proposed using the same salary threshold methodology that had been applied in 2004 and 2019. Such an approach would have been less likely to create controversy or lead to litigation. Instead, the NPRM abandons the previously accepted methodology in favor of a significantly altered formula that will likely increase operational and legal uncertainty for the regulated community, and particularly for retailers. As is discussed in more detail below, the DOL deviated from historical standards in the Proposed Rule when it expressly both removed the retail industry from its methodology for calculating the threshold and increased the percentile. The DOL's own analysis shows that using this proposed new methodology will have a significant impact on the retail industry. [7]

Furthermore, although the DOL has publicized its proposal as setting a weekly salary threshold of $1,059 per week or $55,068 per year, a close reading of the NPRM and its footnotes demonstrates that DOL is creating a moving target and is contemplating an amount that very well may exceed $60,000.[8] Indeed, if the DOL's projections are accurate, the new threshold may be $1,158 per week, which annualizes to $60,209,[9] and constitutes a *69 percent increase over the current salary level*. This is far beyond any amount or percentage that could appropriately serve a gatekeeping function. It also raises Administrative Procedure Act issues.[10]

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[7] ***See*** Section III.B. and Footnotes 16 and 17, *infra*.

[8] 88 Fed. Register at 62,152-62,153 and n.3.

[9] *Id*.

[10] ***See*** Footnote 18, *infra*.

The DOL then exacerbates and compounds this problem by attempting to tie the hands of future agency leadership[11] by creating an automatic indexing procedure in the regulations that would result in an increase in the salary level every three years using this same invalid formula. And the only way to delay and potentially block an increase from going into effect (but that would have no impact whatsoever on the schedule or level of future increases) would be through a convoluted notice of proposed rulemaking process that the Secretary would need to initiate at least 150 days prior to the effective date of the increase and then fast track to issue a final rule.[12] The DOL's proposed addition of a "severability" regulation is itself a tacit acknowledgment that it expects legal challenges to multiple aspects of the NPRM. Rather than invite litigation and create complexity, the DOL ought to instead take a more reasoned and predictable approach, which will be more beneficial to all stakeholders.

II. SUMMARY OF RILA'S POSITION

RILA's position with respect to the current NPRM can be summarized as follows:

- We agree with the DOL's decision not to change the current duties tests for each of the EAP exemptions, and not to return to any form of a "long test" and "short test."

- We agree with the DOL that minimum thresholds for the EAP and Highly Compensated Employee ("HCE") exemptions should not be based on the consumer price index or other inflationary indices, and we applaud the DOL for not proposing such an approach in the NPRM.

- We do not oppose an increase in the salary threshold to $822 per week (which annualizes to $42,744) for the EAP exemptions. This amount is based on the same methodology that the DOL used when setting the thresholds that became effective in 2004 and in 2020, and it is based on current numbers, so it creates predictability. We do oppose establishing a higher threshold.

- We oppose the DOL's use of a methodology that does not factor in the retail industry.

[11] Notably, the Department issued this proposal to bind future Presidentially appointed and Senate-confirmed Secretaries of Labor and Wage and Hour Division (WHD) Administrators at a time when the positions of Secretary of Labor and Administrator of the Wage and Hour Division (WHD) both were vacant. Deputy Secretary of Labor Julie Su was and is serving as the Acting Secretary of Labor. Jessica Looman was Principal Deputy Administrator for the WHD at the time of the NPRM, and was not confirmed by the Senate to fill the WHD Administrator position until October 25, 2023. This creates additional concerns regarding the enforceability of any final rule that might be issued.

[12] *See* 88 Fed. Reg. at 62,179, describing the mechanics of proposed 29 C.F.R. §541.607(d) and its interplay with proposed subsections (a) through (c).

- We oppose a methodology that creates significant administrative and compliance costs for retail and other industries.

- We agree that up to 10 percent of the salary threshold set by the DOL may continue to be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions that are paid annually or more frequently. In other words, we do not recommend any reduction in the percentage of salary that can be in the form of nondiscretionary bonuses, incentives and commissions, nor do we recommend any other changes to the language of 29 C.F.R. §542.602(a)(3). We would not oppose a higher percentage of the salary threshold being in the form of nondiscretionary bonuses, incentives, and commissions. And although we do oppose a salary level that is higher than $822 per week, we would respectfully request that the DOL allow at least 10 percent of whatever salary level is set to be in the form of nondiscretionary bonuses, incentives and commissions.

- We believe that an appropriate total compensation level for the HCE exemption should be no higher than $125,268, based on the methodology used by the DOL to establish the threshold that was published in the 2019 final rule and went into effect on January 1, 2020.

- We believe that employers must be given at least 120 days following the publication date of a final rule before any new threshold becomes effective. We also believe that any new threshold should be effective no earlier than January 1, 2025, so as to avoid requiring employers to have to make salary adjustments or reclassify employees in the third or fourth quarter of 2024. Accordingly, we request that the effective date of a final rule be at least 120 days after publication or January 1, 2025, whichever is later.

- We request that the DOL not include any form of automatic indexing in any final rule. Regardless of what formula is used, we believe the DOL's proposed mechanism for automatic indexing is outside the DOL's regulatory authority, violates public policy, will be disruptive to the economy, and is extremely cumbersome.

III. DISCUSSION

A. Any Minimum Threshold Should Not Eliminate Bona Fide Exempt EAP Employees.

As discussed above, RILA has consistently taken the position that any minimum threshold should not exclude individuals who are bona fide exempt EAP employees based on their job duties. This is important for several reasons.

First, job duties truly are the best measure of whether someone is a bona fide executive, administrative or professional employee. This is particularly true for national retailers, and for other businesses that have a nationwide footprint since differences in pay at the local level may simply be the result of market differences. Although they may be paid different salaries, an individual who manages a retail store in a high-cost, urban area, and an individual who manages a store in a rural, lower-cost area, may have exactly the same exempt job duties and should both be treated as exempt, regardless of any market-based salary differences.

As a matter of public policy, it is important for residents of small communities to have easy access to retail options, particularly reasonably priced groceries and perishables.[13] Small retailers are often the only businesses who are willing to step up to meet this need, and the salaries they pay to their exempt store managers often are tied to the geographic market. Requiring such employers to pay artificially inflated salaries or overtime compensation to individuals who are bona fide exempt based on their job duties violates FLSA Section 13(a)(1). Furthermore, if businesses decide that it is no longer cost effective to operate in these small communities based on the DOL regulations, then everyone loses. Customers in these communities will have fewer retail options, and potential employees will have fewer job opportunities.

Second, geographic differences also can be important with respect to the salary levels for individuals employed at national or regional offices, distribution centers, and other locations. For example, a company that is headquartered in a rural area and a company that is headquartered in an urban area may have EAP employees who perform exactly the same job duties, but whose salaries differ based on regional differences. The company headquartered in the rural area may be the largest or one of the largest employers in that community and may pay better than other employers in the community. Its employees are no less bona fide under the EAP exemption simply because of the difference in geography. Similarly, a business might choose to build a distribution center at a location where operational costs are lower and that has an advantageous location to critical infrastructure. That new distribution center may create a large number of undisputedly non-exempt jobs, which the employer will properly treat as non-exempt. However, the employer also will surely employ individuals at the distribution center who should be treated as bona fide exempt executive and administrative employees based on their job duties, and regardless of their salaries.

Third, although a guaranteed minimum may be one component of most exempt EAP employees' compensation, employers may often provide financial incentives and benefits to their bona fide EAP employees that go beyond a minimum salary threshold but do not result in total compensation at or above the HCE threshold. Although the current regulations do allow employers and employees to count nondiscretionary commissions, bonuses and other incentives toward up to 10 percent of the salary threshold (and the NPRM would continue this practice, a position that RILA supports), setting a higher minimum salary threshold does not fully take into account all of the incentives and benefits that may be offered to individuals whose job duties make them bona fide EAP employees.

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[13] According to Feeding America, 87 percent of counties with the highest food insecurity rates are rural. *See* https://www.feedingamerica.org/hunger-in-america/rural-hunger-facts; *see also* https://www.ruralhealthinfo.org/topics/food-and-hunger ("Many rural areas lack food retailers and are considered food deserts: areas with limited supplies of fresh, affordable foods.")

B. EAP Exemptions - The 2004 and 2019 Salary Methodology Works Well, and the DOL's Proposed New Methodology is Unwarranted and Excessive.

The NPRM demonstrates that current DOL officials have an underlying policy disagreement with the 2004 DOL's change from a two-test system to a one-test system. But as the current DOL recognizes, the one-test system has been in place for almost 20 years, and employers, employees and the courts are familiar with the current duties tests.[14] RILA applauds the DOL for not recommending any changes to the current duties tests, but disagrees with the current DOL's efforts to criticize its own streamlining of the tests in 2004 as a justification for a substantial increase in the current salary threshold or any departure from the 2004 and 2019 methodology that was used for setting the salary threshold. As the DOL itself recognizes in the NPRM, the old "long test" was essentially a dinosaur in 2004 because the salary level threshold for the long test had been less than the equivalent 40 hours at minimum wage since 1991.[15] The fact that the DOL established a single duties test for each exemption and single minimum salary level in 2004 that was significantly higher than the salary level for the old "short test" was certainly not nefarious, yet the current DOL somehow paints it as a process that disenfranchised numerous people who should have been overtime-eligible and ought to be corrected 20 years later. This, of course, is based on a faulty premise that the DOL got things wrong in 2004 when it set the salary level, and it continues to ignore the gatekeeping purpose that the minimum pay level is intended to serve.

Both the 2004 and 2019 final rules set the salary level based on the <u>20th percentile</u> of weekly earnings of full-time salaried workers in the South <u>and the retail industry</u>. Here, the DOL would be using <u>only the South</u> (not the South plus the retail industry or any other industry) and would be using <u>the 35th percentile</u>. Based on the DOL's own analysis, the potential negative impact of the proposed rule will be significant for the retail industry in comparison to many other industries.[16] For example, the transfer cost per affected worker for the retail trade category is $482, which is higher than any other industry category.[17] As the leading voice for retailers, RILA strongly opposes not including the retail industry when measuring percentiles, and also opposes this significant deviation from past practice by moving from the 20th percentile to the 35th percentile.

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[14] *See* NPRM, 88 Fed. Reg. at 62,165.

[15] The federal minimum wage increased to $4.25 per hour beginning April 1, 1991. At 40 hours, that would amount to $170. *See* NPRM, 88 Fed. Reg. at 62,163, 62,164 ("The Department also continues to be mindful of the post-1991 regulatory landscape, which remains highly relevant given that the two-test system effectively became a one-test system in 1991 when the Federal minimum wage equaled or surpassed the long test salary levels.")

[16] NPRM, 88 Fed. Reg. 62,215-62,217 and Tables 24-27.

[17] *See* NPRM, 88 Fed. Reg. 62,216 at Table 26.

In the NPRM, the DOL states that the new salary level using its proposed methodology would be $1,059 per week, based on current data. This weekly amount annualizes to $55,068. In various materials publicizing the NPRM, the DOL certainly implies that these $1,059 and $55,068 figures hard numbers. However, the DOL states in footnote 3 of the NPRM that it intends to use more current data at the time a final rule is issued and offers projections as to what the real numbers might be under its proposed methodology. As discussed above, this provides employers with no meaningful opportunity to prepare in advance for a final rule, and regardless of whether the annualized amount is $55,000+ or $60,000+, it is simply not justifiable for purposes of gatekeeping.[18]

According to the DOL, if the 2004 and 2019 methodologies were applied to the current NPRM, the salary threshold would be $822 per week, which annualizes to $42,744. [19] This is still an increase of 20.2 percent over the current $684 per week, which is a significant change. However, since it is consistent with both the 2004 and 2019 approaches, RILA would not oppose setting the level at $822 per week/$42,744 per year in the final rule, as long as employers are provided with sufficient time to implement changes (see discussion below regarding RILA's position regarding the proposed effective date of a final rule).

C. HCE Exemption - The 2004 and 2019 Salary Methodology Works Well, the 2019 Total Compensation Methodology Works Well, and the DOL's Proposed New Methodology is Unwarranted and Excessive.

1. HCE Salary Level

The DOL proposes that the salary level for the HCE exemption be the same as for the EAP exemptions. For the reasons stated above, RILA would not oppose setting the salary level for the HCE exemption at $822 per week/$42,744 per year, as long as employers are provided with sufficient time to implement changes. RILA would oppose a higher salary level for the HCE exemption.

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[18] The NPRM's moving target of a salary basis figure also raises concerns under the Administrative Procedure Act. It is a fundamental principle of administrative law that an agency's notice must be sufficiently detailed and specific in order for the regulated community to have a meaningful opportunity to comment. *See Florida Power Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988) ("Such notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"). Moreover, such a significant proposed policy change should not be buried in a footnote, as the DOL has done in footnote 3. *See MCI Telecommunications Corp. v. Federal Communications Commission*, 57 F.3d 1136, 1142 (D.C. Cir. 1995) (Questioning whether footnotes provide adequate agency notice because the "agency may not turn the provision of notice into a bureaucratic game of hide and seek").

[19] NPRM, 88 Fed. Reg. 62,159.

2. HCE Total Compensation Threshold

In 2004, the DOL set the total annual compensation threshold for the HCE exemption at exactly $100,000. This is consistent with the concept that a white-collar worker who receives a six-figure income should be treated as exempt from the overtime laws with minimal scrutiny.

In 2019, the DOL increased the annual compensation level for the HCE exemption to $107,432. The DOL's methodology for setting this level was to use the 80th percentile of annualized weekly earnings of all full-time salaried employees. According to the NPRM, if that methodology were applied now, the threshold would be $125,268, which is a 16.6 percent increase.[20]

Instead of following this methodology in the Proposed Rule, the DOL instead intends to set the new total compensation threshold for the HCE exemption at the annualized weekly earnings of the 85th percentile of full-time salaried workers. According to the DOL, this means the total compensation level based on current data would be $143,988 annually. Again however, since this amount is based on a percentile, the actual number could be even higher at the point when the DOL issues a final rule.

RILA opposes setting the total compensation level for the HCE exemption at any amount that is higher than $125,268. There is little to no reason to believe that a white collar employee who is paid a salary of at least $42,744 per year and receives total compensation in excess of $125,000 per year is not employed in a bona fide executive, administrative or professional capacity for purposes of FLSA Section 13(a)(1). Requiring a higher total compensation level is excessive and is not justifiable for the reasons set forth above.

D. The DOL Cannot and Should Not Include Automatic Increases in the Final Rule

1. The DOL lacks authority to implement an automatic increase.

RILA maintains its years'-long objection to an automatic increase of salary and total compensation thresholds. The Department's automatic increase proposal remains improper and flawed for the same reasons RILA cited in its 2015 comments to the DOL's proposed rule and its 2017 comments to the DOL's request for information.[21]

2. The Use of an Automatic Update is Fundamentally Inconsistent with the Secretary's Statutory Mandate.

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[20] *See* NPRM, 88 Fed. Reg. at 62,159.

[21] RILA's comments regarding "auto-indexing" are limited to this particular proposal and this particular implementing statute, where an automatic adjustment of the salary basis regardless of exigent economic circumstances is inappropriate. However, RILA recognizes that other "auto indexing" policy prescriptions may be proper under certain authorizing statutes and regulatory regimes.

Pursuant to 29 U.S.C. § 213(a)(1), the Secretary of Labor is to "defin[e] and delimi[t]" the white-collar exemptions "from time to time by regulations." There is no reason that the salary test may not be revised again (even every three years, in keeping with the proposal's suggested schedule). However, the FLSA does not authorize "automatic" updates. Any revision to the EAP exemptions must be done in accordance with the statutory mandate using the requisite notice and comment rulemaking procedure each time. The Department cannot avoid its obligations to engage in notice-and-comment rulemaking simply because notice-and-comment rulemaking takes time and resources; a federal agency cannot exceed the limits of its authority or otherwise "exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'" no matter how difficult an issue it seeks to address.[22]

The FLSA has never included an automatic increase to salary levels, and at no point has Congress granted the Department the authority to index its salary test. Notably, Congress has permitted indexing in other statutes, including the Social Security Act (which preceded the passage of the FLSA and was amended to add indexing in 1975) and the Patient Protection and Affordable Care Act. Despite having the ability to grant the Department similar authority here, however, Congress has declined to do so. This regulatory history reveals a clear intent that the salary level was meant to be re-evaluated as conditions warrant, allowing the Department and the community the opportunity to provide input into the appropriate levels – not to create an automatic increase schedule unrelated to economic realities. The Department itself recognized its lack of authority to index the salary level in its 2004 rulemaking, noting "nothing in the legislative or regulatory history . . . would support indexing or automatic increases."[23]

This proposed indexing would create, in essence, an auto-revision to the salary level without allowing for notice or comment. In so doing, the change would create a system where an employee may be clearly exempt on December 31 and clearly non-exempt the very next day, January 1, because of the automatic increase. Such an absurd scenario is likely a primary reason why Congress declined to vest the Department with this authority.[24]

When the Department has increased the salary level in the past, it has done so by stating what the new salary level would be and by leaving adjustments to that level to the Administrative Procedure Act's required notice-and-comment rulemaking process. The current regulatory process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. An automatic update mechanism would allow the Department to announce a new salary level on a predetermined schedule in the Federal Register without notice-and-comment, without a Regulatory

[22] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000).

[23] 69 Fed. Reg. 22,171.

[24] *See, e.g.*, *Nevada*, 275 F.Supp.3d at at 807; 69 Fed. Reg. 22,171.

Flexibility Act analysis, and without any of the other regulatory requirements established by various Executive Orders. Future automatic salary threshold increases could also take effect during economic downturns—exactly the wrong time to be increasing labor costs on employers. As the Department recognized in 1949, in response to concerns that the salary level might deny the exemption too broadly during economic downturns, "There is no reason why the salary tests may not be revised again, either upward or downward, in line with any future economic changes that may warrant such action."[25] These considerations remain just as valid today. Each of those regulatory requirements is intended to ensure the agency considers the consequences of its proposed actions and to ensure that the regulatory actions are carefully crafted and well-supported before being implemented. There is no reason to adopt an automatic increase to the salary level/highly compensated employee total annual compensation level based on an index.

E. The DOL's Proposal to Include a Provision Delaying a Scheduled Update While the DOL Engages in Notice-and-Comment Rulemaking is a Complex Mess.

In the NPRM, the DOL states:

> In proposing to automatically update the earnings thresholds, the Department is mindful of previous statements from stakeholders, and the Department's own prior statements, about the need to preserve flexibility to adapt to unanticipated circumstances and prevailing economic conditions when setting the salary level. Events since the Department's 2019 rule, including the COVID pandemic and its widespread impact on workplaces, have served to further validate these concerns. To address these concerns, the Department proposes to include in the regulatory provision the ability for the Department to temporarily delay a scheduled update where unforeseen economic or other conditions warrant.[26]

The DOL then discusses how the delay trigger would work: it would need to engage in notice-and-comment rulemaking to make a change, and any delay would occur only if the DOL publishes an NPRM before the date on which it publishes a required notice of the revised salary and compensation levels under the regulation (which must be published at least 150 days prior to the three year deadline for the new levels to go into effect). The notice of delay must state that the automatic update will be paused for 120 days from the date the update was set to occur and will be lifted on the 121st day if the Department has not issued a final rule by that time.[27]

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[25] Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) at 9.

[26] 88 Fed. Reg. 62,179 (internal footnotes omitted).

[27] 88 Fed. Reg. 62,179-62,180.

It is difficult to imagine a more convoluted, and less flexible process, than that described by the DOL in the NPRM. **If the DOL can engage in rulemaking to delay an automatic update, there is no reason why the DOL cannot engage in notice-and-comment rulemaking to decide whether an update is needed and the parameters of that update.** In addition, if the country were to experience another pandemic, a natural disaster, a war, or some other catastrophic event, and it were to start or occur within 150 days of the date of a scheduled three-year increase, the DOL apparently would have neither the flexibility nor the ability to delay or block the increase. This cannot be what Congress intended as "defining and delimiting" the white-collar regulations.

RILA acknowledges that some update, or future updates, to the minimum salary levels may be needed as time progresses. However, such changes should be made based on careful consideration and analysis of workplace realities and economic conditions of the time period at issue – not an automatic application of a pre-set formula. As evidenced by the extensive comments on this issue in past years, the notice and comment rulemaking period required by the Administrative Procedure Act is legally and practically necessary to ensure consideration of all relevant factors.

F. An Automatic Increase Would Impose Significant Burdens Without Adequate Justification or Benefit.

Frequent and automatic changes to the minimum salary would unduly burden employers, requiring the dedication of substantial time and resources simply to keep up. Rather than allowing employers to focus on employee performance and compensation planning, employers would instead be locked into an endless cycle of planning for and implementing specific salary increases on a schedule set by the Department. This would distort the proper functioning of compensation systems, forcing them to focus on whatever pronouncement the Secretary makes instead of tying compensation to market factors and performance. Compression of salaries between the first level of exempt employees and the next tier will further interfere with the proper functioning of merit-based compensation systems.

Despite the invalidation of similar auto-escalation clauses in past rules, the experiences of RILA members nonetheless demonstrate the hardship this one would cause if promulgated. Although the 2016 Final Rule, including its provision to insert an auto escalator provision, was enjoined, and ultimately invalidated by the court in *Nevada*, several RILA members preemptively adjusted to comply with the rule. Anecdotal evidence provided to RILA by members suggests that the 2016 Final Rule's increased salary level did and may continue to result in: (1) some employees being reclassified from exempt to non-exempt; result in a reduction of hours for some employees; (2) a reduction of job positions; and (3) negative feedback from those employees who would have been reclassified to non-exempt status. If this provision is promulgated, employers will be in an administrative race trying to keep up with the annual increases set by the Secretary in order to preserve the exempt status of certain professional and/or executive employees. Because compensation should be based on market forces and performance, this constant state of having to anticipate and react to an auto increase may, ultimately, force smaller or more rural employers out of business and harm employees by taking time and attention away from employers' annual compensation review processes.

Moreover, increasing the salary basis threshold can have negative impacts on retail employees. First, even if more employees become eligible for overtime pay, this doesn't mean that they will necessarily make more money. Employers carefully consider employee wages and hours worked and will likely respond to any regulatory changes by adjusting employee hours to ensure that their total pay remains within budget, regardless of exempt or nonexempt status. Second, as noted in the 2015 notice of proposed rulemaking, "[E]mployer stakeholders also raised concerns about changing currently exempt employees to nonexempt employees as a result of an increase in the salary requirement, stating that employees are attached to the perceived higher status of being in exempt salaried positions, and value the time flexibility and steady income that comes with such positions."[28] As described in RILA's 2015 Comments, "Exempt managers justifiably take great pride in their contributions to and responsibility for the success of their stores, and taking away their exempt status would have significant repercussions for recruitment, retention and employee morale." Thus, the proposal may result in undercutting employee morale and career opportunities with no real corresponding economic benefit.

G. Severability is Not a Legal Safety Net.

The DOL's proposed severability provision also poses problems. The Supreme Court has not yet addressed the amount of weight a severability provision should be granted in the context of agency rules and regulations. However, courts have explicitly declined to honor an agency's severability clause where that clause is not accompanied by adequate explanation.[29] Those cases instruct that the relevant inquiry in reviewing an agency's severability provision is whether severance would "distort" the agency's program and produce one strikingly different from any the agency has ever considered or promulgated.[30] This is so here.

In the NPRM, the Department does not provide a reasonable explanation for how the proposed rule would stand if pieces of it were indeed removed beyond declaring its "intent" that the rule remain in effect. This is particularly so given the Department's desire to create an auto-increase to the wage threshold – a change that would be unprecedented since the FLSA was adopted. It is difficult to understand how the Department anticipates its proposed rule could "function sensibly as a freestanding" final rule after the

[28] 80 Fed. Reg. 38,516, at 38,521 (July 6, 2015).

[29] *See, e.g., MD/DC/DE Broads. v. FCC*, 253 F.3d 732, 734–36 (D.C. Cir. 2001) (declining to honor an agency's severability clause because the agency did not adequately explain how the remaining portion of the rule would have served the goals for which the rule was designed).

[30] *Id.*; *Kiakombua v. Wolf,* 498 F. Supp. 3d 1, 55 (D.D.C. 2020*); see also North Carolina v. Envtl. Prot. Agency*, 531 F.3d 896, 929 , 382 U.S. App. D.C. 167 (D.C. Cir. 2008) ("Severance and affirmance of a portion of an administrative regulation is improper if there is substantial doubt that the agency would have adopted the severed portion on its own").

carving out of any potentially unlawful or improper provisions. That uncertainty leads to confusion not only to the rulemaking process itself, but to the employers who seek to comply with its requirements. Simply put, not all rules are amenable to a severability clause because not all rules are composed of provisions that are intended to operate independently. We believe this is one such rule.

Further, the process of revising the contents of the proposed rule to conform with applicable laws and regulations is "quintessentially the [Department's] responsibility" – not the court's.[31] The inclusion of a severability provision here would act to shift the burden of revising important rules which will necessarily impact employers and employees nationwide if passed, to the courts – leaving them to undertake their own amendment process by identifying and striking only certain portions of the rule, rather than undergoing the proper regulatory decision-making process. Ultimately, granting a severability clause empowers agencies to push beyond statutory limits because of a potential legal safety net. This is not what Congress intended with this rule and would create perverse incentives going forward.

H. Timing of a Final Rule

In the NPRM, the DOL proposes making each aspect of a final rule effective 60 days after publication, which is shorter than the effective dates that were set in 2004, 2016 and 2019.[32] The Department reasons that the shorter effective date is appropriate "because employers and employees are familiar with the procedures in the current regulations from the 2019 rulemaking and changed economic circumstances have caused a strong need to update the standard salary level." Even if this were the case, this argument ignores the operational difficulties that such an increase will impose on retailers, particularly when the DOL itself doesn't yet know what the final level will be and has suggested that it could be more than $60,000, despite proposing a level of $55,068.

Having such a short turnaround time fails to take into consideration the realities of business operations. Most employers provide merit raises and/or cost of living adjustments once per calendar or fiscal year, and they budget for those during the prior calendar/fiscal year. The busiest time of year for most retailers occurs during the final quarter of the calendar year, particularly between Thanksgiving and New Year's. If the DOL issues a final rule in the spring or summer of 2024, then a 60-day effective date will create tremendous operational challenges for many employers, and particularly for retailers. Thus, it is RILA's position that any final rule should have an effective date that is at least 120 days after the date of publication and should become effective no earlier than January 1, 2025. This is consistent with the approach taken in 2019 with respect to the final rule that went into effect on January 1, 2021.

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[31] *Id.;* citing *Dep't of Homeland Sec. v. Regents of the Univ. of California,* 140 S. Ct. 1891, 1916 n.7, 207 L. Ed. 2d 353 (2020) (noting that making "difficult decision[s]" concerning policy matters is the "agency's job").

[32] 88 Fed. Reg. 62,180.

IV. Conclusion

Instead of inviting litigation and creating needless uncertainty, the DOL should take a measured approach if and when it issues a final rule. By following the same methodology used in 2019 with respect to salary and total compensation levels; setting those levels based on current data at the time of the NPRM; dropping any automatic indexing or increases; and providing employers with an effective date at least 120 days after the date of publication or to January 1, 2025, whichever is later, the DOL can timely and effectively serve the interest of stakeholders.

Sincerely,

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