May 21, 2019

VIA ELECTRONIC SUBMISSION: www.regulations.gov

The Honorable R. Alexander Acosta
Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation & Interpretation
Wage and Hour Division
United States Department of Labor
200 Constitution Avenue N.W., Rm S-3502
Washington, DC 20210

Re: RIN 1235–AA20, Notice of Proposed Rulemaking, 29 CFR. Part 541, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 FR 10900 (March 22, 2019)

Dear Secretary Acosta:

The National Restaurant Association (the Association) and the Restaurant Law Center (the Law Center) submit these comments in response to the U.S. Department of Labor's Notice of Proposed Rulemaking on its Part 541 regulations, Defining and Delimiting the Exemptions for the Executive, Administrative, Professional, Outside Sales and Computer Employees. The Association and the Law Center submit these comments on behalf of themselves and their members.

The Association represents an industry with more than one million restaurant locations across the county. It is the leading business representative for the restaurant and foodservice industry, which employs almost fifteen million workers. The industry is currently the nation's second-largest private-sector employer, employing almost one of every ten Americans.

The Law Center is a public-policy organization affiliated with the Association. It provides legal representation and advocacy to protect the restaurant industry against overregulation at the local, state, and federal level. It works on behalf of restaurant owners, team members, and customers through both policy initiatives and litigation.

The restaurant industry has a particular interest in the Department's Proposed Rule, as the industry is dominated by thousands of small businesses. Each of these businesses faces unique economic conditions and challenges in its local community. These conditions include the local wage scale, the availability and skill of local labor, and other localized costs and revenues. National and regional restaurant companies face the same variances, as they often consist of associations and franchises reflecting their local neighborhoods, populations, and economies.

For that reason, the Association and the Law Center applaud the Department's decision to return to the 2004 methodology for setting minimum-salary levels for the executive, administrative, and professional exemptions. The 2004 methodology recognizes that salary levels serve only one valid function: to screen out employees who invariably fail to qualify under the duties tests. Salary levels should not and cannot substitute for those tests. The Department's 2016 Rule departed from that principle and, as a result, was declared invalid. The latest proposal therefore wisely returns to a methodology widely accepted and recognized by courts and stakeholders.

The Association and the Law Center do, however, have several reservations about the latest proposal. First, the proposal lacks any joint-employment safe harbor for restaurant franchisors who help their franchisees implement the new requirements. Many of the Association's members are small franchise businesses with limited resources to invest in education and legal compliance. Yet without a safe harbor, franchisors may refuse to step in and fill the gap. The Department included a safe harbor in its 2018 rule on association health plans under ERISA. A similar rule here would encourage franchisors to educate and assist franchisees, thereby improving compliance.

Second, the proposal sets the standard minimum-salary level too high. It calculates the salary level using a data set that includes some of the highest-wage jurisdictions in the country. Those jurisdictions skew the final level, which will unfairly burden restaurants and other small businesses in lower-wage regions.

Third, the proposal likewise sets the salary level for highly compensated employees too high. It increases that level by nearly 50%, placing it out of reach for most small businesses. This error comes largely from the Department's decision to use a national data set, instead of a regional one. The Department can easily correct that error by using targeted regional data in the final rule.

Fourth, the proposal caps credit for nondiscretionary bonuses and other incentive payments at 10%—an arbitrary and indefensible result. The Department offers no rationale for the 10% figure and ignores the role incentive payments play in modern compensation systems. The 10% cap will do nothing but stunt these systems' growth.

Fifth and finally, while the Association and the Law Center agree with the Department's decision to update salary levels in the future through rulemaking, they oppose embedding that approach in the regulations. A regulation committing the Department to adopt other regulations would serve no purpose but to invite litigation.

1. The Association and the Law Center Support the Department's Return to the 2004 Methodology.

In its response to the Department's 2017 Request for Information, the Association encouraged the Department to return to the methodology it used in 2004 for setting minimum salaries for executive, administrative, and professional employees.[1] The Department has now chosen to do so. The Association and the Law Center support that choice.

The 2004 methodology's chief virtue is its consistency with historical practice. Since 1940, the Department has included minimum salary levels in its definitions for the executive, administrative, and professional exemptions.[2] It has also emphasized that these levels play only a limited role. They screen out employees who, given their relatively low salaries, are unlikely to qualify for the exemptions under the duties tests.[3] In this way, salary levels save investigators and employers time by giving them a quick, short-hand test.[4] But in no way do they supplant the duties tests; they merely supplement and streamline those tests.[5]

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[1] National Restaurant Ass'n, Comments on RIN 1235-AA20, at 4 (Sept. 25, 2017) [hereinafter "Association 2017 Response"].

[2] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 79 Fed. Reg. 22122, 22166 (April 23, 2004) [hereinafter "2004 Final Rule"] (tracking historical development of salary levels).

[3] U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541 UNDER THE FAIR LABOR STANDARDS ACT DEFINING THE TERMS "EXECUTIVE, ADMINISTRATIVE," "PROFESSIONAL," "LOCAL RETAILING CAPACITY," "OUTSIDE SALESMAN" 2–3 (1958) [hereinafter "KANTOR REPORT"] (stating that the salary levels "furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees"); U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., REPORT AND RECOMMENDATIONS ON PROPOSED REVISION OF REGULATIONS, PART 541 UNDER THE FAIR LABOR STANDARDS ACT DEFINING THE TERMS "EXECUTIVE, ADMINISTRATIVE," "PROFESSIONAL," "LOCAL RETAILING CAPACITY," "OUTSIDE SALESMAN" 8 (1949) [hereinafter "WEISS REPORT"] (stating that the salary levels help prevent misclassification of "obviously nonexempt" employees); U.S. DEPT. OF LABOR, WAGE & HOUR & PUB. CONTRACTS DIV., EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED: REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT HEARINGS PRELIMINARY TO REDEFINITION (1940) [hereinafter the "STEIN REPORT"] (stating that the salary test would help identify employees "who obviously should be exempt" from those who were not).

[4] *See* Notice of Proposed Rulemaking, 29 CFR. Part 541, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 10900, 10913 (March 22, 2019) [hereinafter "2019 Proposed Rule"].

[5] *See id.*

The 2004 methodology accords with this practice by setting the salary levels toward the lower end of the salary range. First, it looks to the most up-to-date Current Population Survey Outgoing Rotation Group (CPS) data compiled by the Bureau of Labor Statistics.[6] From this data, it determines real salary levels in the lowest-wage Census region (the South) and the lowest-wage industry group (Retail).[7] It then sets the salary level at the 20th percentile.[8] By setting the level toward the lower end, the 2004 methodology ensures that only "obviously nonexempt" employees are excluded solely because of their salaries.[9]

The 2004 methodology is also legally defensible. Courts have applied it for 15 years without difficulty. By contrast, the Department's 2016 methodology stumbled almost immediately. In November 2016, the U.S. District Court for the Eastern District of Texas enjoined the 2016 rule from going into effect;[10] and the following year, the court declared it unlawful.[11] The court did so because the 2016 rule effectively elevated salary levels over duties.[12] The rule roughly doubled the prior salary levels and declared large swaths of the workforce nonexempt without regard for their duties.[13] The Department has no authority to define the exemptions by salary alone.[14] The court therefore held that the Department had exceeded its authority and struck the rule down.[15]

This result was predictable. Indeed, in 2015, the Association warned that by elevating salaries over duties, the Department's proposal exceeded its authority.[16] The Department's decision to return to the 2004 methodology is therefore an appropriate and overdue step.

Some commenters have criticized the 2004 methodology, but those critics operate on false premises. For example, some critics argue that that 2004 methodology combined the least-protective elements from the prior "long" and "short" tests—namely, the long test's salary levels and the short test's duties standards—which caused systemic undercoverage. These critics fail to recognize, however, that the 2004 methodology borrowed neither test's elements whole cloth.

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[6] *See* 2004 Final Rule, *supra* note 2, at 22164.

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 533 (E.D. Tex. 2016).

[11] *Nevada v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 806–808 (E.D. Tex. 2017).

[12] *Id.* at 805–07.

[13] *See id.*

[14] *See id.*

[15] *Id.* at 808.

[16] *See* Letter from Angelo Amador on behalf of the National Restaurant Association to Mary Ziegler, DOL, in response to NPRM, RIN: 1235-AA11 (Sept. 4, 2015).

While it did borrow parts of the short test, it also borrowed parts of the long test. For example, it carried forward the requirement that executive employees have the authority to hire and fire, or to make recommendations about hiring, firing, advancement, or other changes in status.[17] It also modified the long test's salary level by doubling the baseline from the 10th to the 20th percentile.[18] These changes resulted in an entirely new test, not a mere amalgamation of the old ones.

The Department wisely rejected these criticisms and returned to the 2004 methodology. That methodology is consistent with historical practice and judicial precedent. The Association and the Law Center support the Department's return to normalcy.

2. The Department Should Include a Joint-Employment Safe Harbor

Many restaurants are small businesses operating on a franchise model. These businesses often lack legal, accounting, or human-resources departments. As they have few resources to invest in legal compliance and education, their best resources are their franchisors. But franchisors may hesitate to help them understand and implement the Department's new requirements out of fear of suggesting a joint-employment relationship.[19]

The Department could ease these fears by adopting a "safe harbor" for franchisors providing such help. A safe harbor would encourage franchisors to help franchisees implement the Department's new rules, including the new rules on taking credit for nondiscretionary bonuses, commissions, and other incentive payments.[20] Such cooperation would improve compliance, reduce litigation, and further the Department's regulatory goals.[21]

As a model for structuring the safe harbor, the Department could look to its own 2018 rule on association health plans.[22] There, the Department stated that businesses would not be considered joint employers solely because they participated in such a plan.[23] Nor would those businesses be

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[17] *See* 29 C.F.R. § 541.100; 2004 Final Rule, *supra* note 2, at 22123.

[18] 2004 Final Rule, *supra* note 2, at 22167.

[19] *See* Joint Employer Status Under the Fair Labor Standards Act, 84 Fed. Reg. 14043, 14047 (April 9, 2019) (observing that uncertainty over joint-employment liability can impact an entity's willingness to provide assistance to another entity, such as a franchisee).

[20] *See id.* (stating that clarity around joint-employment liability will encourage positive behaviors, such as negotiating for workplace-safety requirements, and promote certainty in business relationships).

[21] *Cf. id.* at 14051 (clarifying that certain business practices, such as providing a sample handbook or other forms to a franchisee, do not make it more or less likely that the franchisor is a joint employer)

[22] *See* Definition of "Employer" Under Section 3(5) of ERISA—Association Health Plans, 83 Fed. Reg. 28912 (June 21, 2018).

[23] *Id.* at 28935.

considered employers of independent contractors also participating in the plan.[24] In short, their participation in a plan was irrelevant to their joint-employer status.[25]

That approach would work here as well. The Department should state that no franchisor will be considered a joint employer solely because it educates a franchisee about the Department's new requirements or helps the franchisee implement those requirements. Nor are the franchisor's efforts evidence of a joint-employment relationship. The franchisor's efforts to help the franchisee comply with the Department's requirements are simply irrelevant to any joint-employment analysis.

3. The Department Should Use a More Targeted Data Set to Exclude High-Wage Jurisdictions.

The Department's proposed methodology for setting the minimum salary level, while defensible and consistent with past practice, is not without flaws. The Department proposes to set minimum salary levels using data from the entire South Census Region. As the Association predicted in 2017,[26] that method has inflated the proposed levels and risks excluding swaths of otherwise exempt employees.

The South Census Region is home to three of the ten highest-wage jurisdictions in the country: Maryland, Virginia, and the District of Columbia. Within the South, these jurisdictions are outliers. Virginia's median income exceeds the next-highest jurisdiction, Delaware, by about $5,000 per year.[27] The District of Columbia exceeds Delaware by nearly $10,000, and Maryland exceeds it by nearly $15,000.[28] In fact, Maryland has the highest median household income in the country.[29] Thus, using these three jurisdictions to set salary levels at the "lower end" of the range is a contradiction in terms.

The Department should correct this error by using a more targeted data set. The South Census Region comprises three divisions: the South Atlantic Division, the East South Central Division, and the West South Central Division. Maryland, Virginia, and the District of Columbia fall in the South Atlantic Division. The other two divisions, the East and West, include largely lower-wage

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[24] *Id.*

[25] *Id.* at 28936 ("[N]othing in the final rule is intended to indicate that participating in an [association health plan]…gives rise to joint employer status under any federal or State law, rule, or regulation.").

[26] *See* Association 2017 Response, *supra* note 1, at 8–9.

[27] *See* U.S. CENSUS BUREAU, 2011-2015 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, MEDIAN HOUSEHOLD INCOME BY STATE.

[28] *See id.*

[29] *Id.*

states.[30] These two divisions provide a more targeted and appropriate baseline for the Department's calculations. By using only these two divisions, the Department can ensure that it is truly setting the minimum-salary level at the lower end of the range. It can also ensure that it does not inadvertently exclude large numbers of otherwise exempt employees in lower-wage states, many of whom may work in the restaurant industry.

4. The Department Should Reconsider the Proposed Salary Level for Highly Compensated Employees.

The Department proposes to raise the minimum salary for the highly compensated exemption from $100,000 to $147,414. The Association and the Law Center urge the Department to reconsider. Both the proposed salary level and the underlying methodology for calculating that level are flawed and unnecessarily disfavor small employers—including restaurants—particularly those in lower-wage regions.

First, the proposed salary level is so high that the exemption will become effectively useless for many of the Association's members. In more than half of all American states, fewer than 10% of households earn $150,000 or more each year.[31] Households increasingly include more than two earners,[32] so the number of workers earning at that level is likely considerably lower. As a result, in these states, only the largest and highest-paying employers will have a realistic opportunity to use the exemption.

The Department could not have intended that result. For nearly 80 years, it has included some form of exemption for well-compensated employees.[33] It has done so to give investigators and employers a short-hand for identifying highly valued employees likely to perform exempt duties.[34]

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[30] The South Atlantic Division is comprised of Delaware, Maryland, District of Columbia, West Virginia, Virginia, North Carolina, South Carolina, Georgia, and Florida; the East South Central Division is comprised of Kentucky, Tennessee, Alabama and Mississippi; the West South Central Division is comprised of Arkansas, Louisiana, Oklahoma and Texas.

[31] *See* Jeff Desjardins, *How Many People make More than $150,000 in Every U.S. State*, BUSINESS INSIDER (Nov. 7, 2017), https://www.businessinsider.com/how-many-people-make-more-than-150000-in-every-us-state-2017-11 (compiling figures from U.S. Census Bureau); *see also Current Population Survey, Annual Social and Economic Supplements*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-income-households/h08.xls (last visited April 4, 2019) [hereinafter "Census Population Survey"] (showing median income by state).

[32] *See The Rise in Dual Income Households*, PEW RESEARCH CENTER (June 18, 2015), https://www.pewresearch.org/ft_dual-income-households-1960-2012-2/ (reporting that percentage of dual-income households rose from 25% in 1960 to 60% in 2012).

[33] *See* WEISS REPORT, *supra* note 3, at 22–23 (discussing "special provisos" for "high salaried" exempt employees).

[34] *See* 2004 Final Rule, supra note 2, at 22173–74.

Both large and small employers have such employees. Both large and small employers, therefore, should have access to the short-hand test.

The Department's proposal, however, ignores that principle. Instead, it uses a national data set and pegs the highly compensated salary level to the 90th percentile.[35] That approach, unsurprisingly, inflates the proposed salary level by more than 47%. The Department offers no reason for such a dramatic increase. It does not claim that real salaries have risen that fast since 2004, nor does it assert that the current salary level has swept up otherwise nonexempt employees.[36] The new level is, in short, a solution in search of a problem.

The Department could correct this error using the same data set it uses for the standard salary levels. That is, it could calculate the new highly compensated level by using data from the South Census Region—in particular, the East and West Divisions. It could then peg the salary level to the 80th percentile. The Department has decided that the 20th percentile offers a reasonable proxy for the standard salary levels; employees below that level likely perform principally nonexempt work. The 80th percentile therefore offers an equally reasonable proxy at the other end: employees earning above that level likely perform principally exempt work.

5. The Department Should Abandon its Proposed Cap on Credit for Nondiscretionary Bonuses and Other Incentive Payments.

The Association supports the Department's decision to allow credit for nondiscretionary bonuses and other incentive payments. As the Association explained in its 2017 response, bonuses, commissions, and other incentive payments strongly correlate with exempt status.[37] The Department itself recognized that fact in 2016, when it acknowledged the "increased role bonuses play in many compensation systems."[38]

Exempt employees often perform duties closely linked with the employer's success, so employers need to build compensation schemes incentivizing the right behavior. The Department's proposal takes an important step toward allowing them to do so. In our industry, this is very important as non-discretionary bonuses and other incentive payments are common and also drive the achievement of key performance indicators.

[35] 2019 Proposed Rule, *supra* note 4, at 10913.

[36] *See id.*

[37] Association 2017 Response, *supra* note 1, at 18–19.

[38] Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 81 FR 32391, 32432 (May 23, 2016) [hereinafter "2016 Final Rule"].

The proposal fails, however, to go far enough. For reasons left unexplained, it caps the credit for bonuses and other incentive payments at 10%.[39] This number appears out of thin air. The Department offers no rationale or data supporting it; instead, it simply borrows the number from the 2016 proposal, which likewise failed to support the 10% cap.[40]

In fact, the Department fails to justify any cap at all. It suggests that a cap is necessary to prevent employers from compensating exempt employees entirely through bonuses or other nondiscretionary payments—as opposed to paying them a fixed salary.[41] But that fear is overblown. As the Association stated in its 2017 response, few employees would agree to a compensation plan offering them no guaranteed income.[42]

Similarly, the Department asserts that a cap is necessary to protect government and nonprofit employers from competition. But even whatever imbalance exists between those employers and for-profit employers, it exists separate from the Department's regulations.[43] For-profit employers already use incentive payments. Lifting the cap would not change that reality; it would merely reflect it.

But if the Department insists on some cap, 10% is still too low. A more realistic number would be 25%. Recent survey data suggests that incentive payments for exempt employees commonly make up between 10% and 40% of their income.[44] The Department could set the salary level at a reasonable middle point between these figures—25%. That level would accommodate modern compensation practices far better than the artificially low 10% cap now proposed.

For highly compensated employees, there is even less of a reason to cap the credit for bonuses and other incentive payments. But, once again, if the Department insists on some cap for highly compensated employees as well, it should set it closer to 40% to both accommodate modern compensation practices and recognize their special status as highly compensated employees that also receive a high bonus.

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[39] 2019 Proposed Rule, *supra* note 4, at 10912.

[40] *See id.* (citing 2016 Final Rule).

[41] *Id.* at 10912 (suggesting that a cap is necessary to ensure employees are paid "regularly").

[42] Association 2017 Response, *supra* note 1, at 19. While outside-sales employees do agree to such compensation plans, they fall outside the proposal's scope. *See* U.S. Dep't. of Labor, Wage & Hour Div., Fact Sheet No. 17, *Exemption for Outside Sales Employees Under the Fair Labor Standards Act (FLSA)* (2018), https://www.dol.gov/whd/overtime/fs17f outsidesales.pdf ("The salary requirements of the regulation do not apply to the outside sales exemption.").

[43] *See* WORLDATWORK, INCENTIVE PAY PRACTICES: NONPROFIT/GOVERNMENT ORGANIZATIONS 7 (2018).

[44] *See id.* (reporting that median annual incentive payments among respondent employers ranged from 10% to 40% of a management employee's salary).

Finally, the Department should expand the window for corrective payments. Currently, the Department proposes to allow employers to make a one-time "catch-up" payment each year to ensure that exempt employees paid in part through incentive payments receive the minimum annual salary.[45] It requires, however, employers to make this payment within one pay period after the end of the year.[46] That window is far too short.

Again, many businesses affected by the Proposed Rule lack sophisticated accounting and human-resources departments. These businesses, mostly small businesses, may make inadvertent errors in their annual calculations, which they will struggle to catch within a single pay period. The Department currently gives employers one month to make similar catch-up payments for highly compensated employees.[47]

In 2016, the Department declined to offer a similar catch-up window for incentive payments because, at that time, the Department required employers to pay incentives on a quarterly or more-frequent basis.[48] But now that the Department proposes to allow employers to pay qualifying incentives annually, its 2016 rationale no longer holds. It should allow, at minimum, one month to make any catch-up payments. That longer window will give businesses, particularly small ones, a fairer chance at compliance. It will also avoid imposing liability for small, inadvertent errors.

6. The Department Need Not Embed Its Commitment to Notice-and-Comment Rulemaking in the Regulations.

The Department proposes to revisit the salary levels every four years through notice-and-comment rulemaking. The Association supports that proposal. As the Association stated in its 2017 response, rulemaking is the appropriate way to update the salary levels to account for rises in real salaries.[49]

In fact, that is the only way to update them consistent with Congress's expressed will. Congress gave the Department no express authority to update the salary levels through indexing.[50] Had it intended the Department to have that authority, it would surely have said so. In multiple other statutes, when it intended to index payment levels, it spelled out explicitly how to accomplish that

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[45] 2019 Proposed Rule, *supra* note 4, at 10912–13.

[46] *Id.* at 10913.

[47] 29 C.F.R. § 641.601(b)(2).

[48] *See* 2016 Final Rule, supra note 38, at 32427.

[49] *See* Association 2017 Response, *supra* note 1, at 23.

[50] *See* 29 U.S.C. § 213(a)(1) (stating that the Department must define the exemptions "from time to time").

indexing.[51] Congress included no such instructions in section 13(a)(1) or any other section of the FLSA.

Instead, Congress spelled out how agencies should accomplish major policy changes in the Administrative Procedures Act (APA). The APA contemplates that agencies will enact those changes through formal notice-and-comment rulemaking.[52] The 2016 proposal sought to circumvent the APA's requirements by updating the salary levels automatically.[53] That approach not only clashed with Congress's instructions, but also would have deprived the Department of valuable public feedback.[54] Indexing is, therefore, both bad law and bad policy.[55]

The Department's new proposal, by contrast, will update salary levels through rulemaking.[56] While that proposal hews more closely to congressional intent, the Department need not embed it in the regulations. Quite simply, Department needs no new regulation to engage in rulemaking: it already has the authority to do that.[57] Such a regulation would therefore serve no purpose but to entangle the Department in disputes over whether and when to propose new rules.

Unsatisfied stakeholders, for example, could use the regulation as a hook for suing to compel rulemaking.[58] Or, at minimum, the regulation could create public expectations the Department is unable to satisfy. The Department has never successfully updated the salary levels on a fixed

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[51] *See* 42 U.S.C.A. § 1395ww(d)(2)(H) (Social Security Act) (providing for adjustments to previously standardized payments); Pub. L. 111-148, § 1102(c)(3), 124 Stat. 119, 145 (2010) (Patient Protection and Affordable Care Act) (codified at 42 U.S.C. § 18002); 28 U.S.C.A. § 2412(d)(2)(A)(ii) (Equal Access to Justice Act) (providing for an increase in the amount of attorneys' fees due because of an "increase in the cost of living").

[52] *See* 5 U.S.C. § 553.

[53] *See* 2016 Final Rule, *supra* note 38, at 32430.

[54] *See, e.g., Chocolate Mfrs. Ass'n of U.S. v. Block*, 755 F.2d 1098, 1102 (4th Cir. 1985) ("The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking."); *Nat'l Retired Teachers Ass'n v. U. S. Postal Serv.*, 430 F. Supp. 141, 147 (D.D.C. 1977) ("One of the central purposes of the notice and comment requirements is to allow public participation in the promulgation of rules which have a substantial impact on those regulated."), *aff'd*, 593 F.2d 1360 (D.C. Cir. 1979).

[55] *See Brown Exp., Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("Congress realized that an agency's judgment would be only as good as the information upon which it drew. It prescribed these procedures to ensure that the broadest base of information would be provided to the agency by those most interested and perhaps best informed on the subject of the rulemaking at hand.").

[56] 2019 Proposed Rule, *supra* note 4, at 10915 n.140.

[57] 29 U.S.C. § 213(a)(1); *Auer v. Robbins*, 519 U.S. 452, 456 (1997) ("The FLSA grants the Secretary broad authority to "defin[e] and delimi[t]" the scope of the exemption for executive, administrative, and professional employees." (quoting § 213(a)(1))).

[58] *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (finding that delay in mandatory rulemaking may be a final reviewable action under the APA) ("[A]gency inaction may represent effectively final agency action that the agency has not frankly acknowledged…").

schedule, and there is no reason to believe it would be able to do so going forward. Because a regulation would offer no benefits and would impose potential costs, the Department should decline to adopt one.

6. Conclusion

Thank you for the opportunity to comment on the Department's proposed rule. On balance, the Association and the Law Center support the proposal and believe it represents a significant improvement over the 2016 proposal. We look forward to continuing to work with the Department on this important issue.

Respectfully:

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