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The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)

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Summary

Section 13(a)(1) of the Fair Labor Standards Act permits exemption of employers of *bona fide* executive, administrative and professional employees from the minimum wage and overtime pay requirements of the act; that is, from the basic federal labor standards (wage/hour) statute. What constitutes a bona fide *executive, administrative* or *professional* employee has been left by Congress for the Secretary of Labor to *define* and *delimit*. That process, begun in 1938, continued intermittently until 1975. Thereafter, no further general updates have been made. The Bush Administration has now proposed a general revision of the regulation (29 CFR 541).

The first Section 13(a)(1) regulation appeared in 1938. *Inter alia*, it imposed two classification tests. *First*. To qualify as *bona fide*, a worker had to be paid at a rate befitting an executive or administrator. *Second*. The worker had to perform the actual work (duties) of an executive or administrator. A salary threshold was set at $30 a week. Initially, professionals were subject only to a duties test. In 1940, an earnings threshold ($50 a week) was set for professionals.

The definitions were modified periodically (both the earnings thresholds and the duties tests) so that they could, credibly, serve as indicators of who ought to be deemed an executive, administrator or professional for Section 13(a)(1) purposes. The updates were always contentious. The lower the thresholds, the greater the number of workers who would find themselves unprotected by the minimum wage and overtime pay provisions of the FLSA. Thus, it was in the interests of employers to keep the thresholds low — and the duties tests as broad as possible. Workers sought the opposite: a higher threshold and a narrow definition of duties.

The last general revision occurred in 1975, but the effort encountered significant objections from employers. In 1978, a further update was proposed. Initially a matter of controversy, the final rule was unpublished until January of 1981 — and thereafter withdrawn for review by the new Reagan Administration. It never reappeared. The thresholds remain at 1975 levels: $155 per week for executives and administrators and $170 for professionals — with slightly lower levels for Puerto Rico, the Virgin Islands and American Samoa. The duties tests have evolved, slowly, since 1938 but remain heavily anchored in regulations from the act's early history.

On March 31, 2003, Wage/Hour Administrator Tammy McCutchen published in the *Federal Register* a proposed update of the Section 13(a)(1) regulation. The proposal sparked an intense public and legislative debate. (See, *inter alia*, H.R. 2660, H.R. 2673, H.R. 2665, H.R. 4520, S. 1485, S. 1611, and S. 1637 of the 108th Congress.) On April 23, 2004, DOL issued the rule in final form (*Federal Register*, April 23, 2004, pp. 22122-22274) to take effect the last week of August 2004. *The new provisions have now been placed in effect*.

This report sketches the evolution of the Section 13(a)(1) regulation and explores the arguments, pro and con, that it has encountered. It will be updated if developments warrant.

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Introduction

The Fair Labor Standards Act (FLSA) is the primary federal statute dealing with minimum wages, overtime pay, and related issues. Under Section 13(a)(1) of the act, *employers* of persons employed "in a bona fide executive, administrative, or professional capacity" (EAP employees) are freed from the act's otherwise applicable minimum wage and overtime pay requirements. Employees classified as executive, administrative or professional are *not* protected by the act's regular wage and hour provisions.

The Section 13(a)(1) exemption was written into the initial version of the FLSA in 1938 and, in one form or another, has continued to be a part of the statute. On March 31, 2003, the Wage and Hour Division, United States Department of Labor (DOL), proposed revision of the regulations (29 CFR 541) that define the terms *executive, administrative* and *professional* and govern implementation of the FLSA exemption. When the opportunity for public comment closed on June 30, 2003, the Department had received in excess of 75,000 communications and the issue had become a focus of intense debate — both with the public and in Congress.[1] When a final rule was issued on April 23, 2004, debate continued.[2] Within the weeks that followed, the new regulation was the subject of various congressional hearings and had been subject to floor action both in the Senate and in the House of Representatives.

In late August 2004, the new rule was implemented. Public debate would continue throughout the fall, but without avail.

This report sketches the evolution of the Section 13(a)(1) since 1938, noting the occasions on which the regulations governing the exemption (29 CFR 541) were modified. It identifying entries in the *Federal Register* (with other related sources) to which one might refer for the precise language of the evolving regulation. It does not trace each nuance of change as each modification to the definitions of *executive, administrative* and *professional* was added.

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[1] Bureau of National Affairs, *Daily Labor Report*, Sept. 11, 2003, p. AA1. (Hereafter cited as *DLR*.)

[2] For the final rule, see *Federal Register*, Apr. 23, 2004, pp. 22122-22274.

SECTION I

Initial Implementation of the "EAP" Exemption

Following a year of hearings and debate, Congress approved the federal *wage and hour law* (the Fair Labor Standards Act) in June 1938. The act provided, *inter alia*, for minimum wages (Section 6) and overtime pay (Section 7) for covered workers. Neither then nor now were all workers covered under the protections of the statute; but, in Section 13, Congress wrote into the act certain specific exemptions. Among them was the following:

> The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional ... capacity ... (as such terms are defined and delimited by regulations of the Administrator ...).

The act went on to create within the Department of Labor a sub-unit — the Wage and Hour Division — to be presided over by an Administrator to be "appointed by the President with the advice and consent of the Senate."[3]

Establishing a Standard (1938)

The act was to become effective October 24, 1938, which allowed four months in which to establish an administrative structure, prepare interpretive materials, and be ready to enforce compliance with the new federal wage/hour standards — of which the EAP exemption was only one small portion. As Administrator, President Franklin Roosevelt selected Elmer F. Andrews, Industrial Commissioner for the state of New York. By mid-August of 1938, Andrews was on duty at the Department and had begun to assemble his staff.

Creating a Structure and Process. Beyond the statutory language (that bona fide executive, administrative and professional employees were to be exempt), Congress provided the new Administrator with little guidance. The concepts — *bona fide executive, administrative* and *professional* — were not defined. No reference was made, in the statute, to *salaried* as opposed to *hourly paid workers*; nor was any distinction made between *manual* and *non-manual* work. While Andrews could draw from the experience of the National Recovery Administration (1933-1935) in which more highly paid workers appear to have been excluded from wage and hour standards, he was under no obligation to do so.[4] He was free to structure the

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[3] See Sections 4, 6, 7, and 13 of P.L. 75-718. The exemption also deals with persons working in outside sale and, now, in certain educational fields.

[4] See *Federal Register*, Mar. 31, 2003, pp.15560-15561; Leon C. Marshall, *Hours and Wages Provisions in NRA Codes* (Washington: The Brookings Institution, 1935), p. 16; and Margaret H. Schoenfeld, "Analysis of the Labor Provisions of the N.R.A. Codes," *Monthly*

(continued...)

exemption as he chose; but, given the numerous other tasks before him, he may not have been under any immediate pressure to deal with the EAP exemption.[5]

Defining Concepts. During a presentation before the Southern States Industrial Council in Birmingham, Alabama, September 29, 1938, Andrews was asked if he had taken any action with respect to Section 13(a)(1), to which he responded: "No. I have had that in mind more than anything else, and we will have that for you within the next week or two." He discussed his experience with the issue in New York state — pointing out how some employers had attempted to circumvent the state law by too broadly defining their workforce as executive or administrative or professional. "... [I]t is very difficult to say ... where a worker leaves off and a professional or executive begins."[6]

During the fall of 1938, Andrews, with a draft in hand, "called a conference of representatives of industry and labor to ascertain their views" on the definition of the several terms.[7] On October 19, 1938, five days before the act was to go into effect, the Department announced that the Administrator, "in consultation with the legal branch of the division," had reached a determination.[8] The terms *executive* and *administrative* would have a single definition. Among other elements, they were to have the "primary duty" of "management of the establishment" and do "no substantial amount of work of the same nature as that performed by nonexempt employees of the employer." The concept of *professional* was to be characterized by work that was "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work" and was to involve "discretion and judgment both as to the manner and time of performance, as opposed to work subject to active direction and supervision." The education of a professional was to be based upon "a specially organized body of knowledge *as distinguished from* a general academic education and from an apprenticeship" or other routine training.

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[4] (...continued)
Labor Review, Mar. 1935, p. 583. Schoenfeld states: "In contrast with the code wage provisions, which cover for the most part only the unskilled classes of labor, [NRA] restrictions upon working time affect all but a small group of administrative employees and executives falling in the higher earnings brackets ...."

[5] It would not be until the spring of 1940 that pressure began to mount for the Administrator to take more specific action with respect to the EAP exemption (though earlier regulations had been promulgated). See U.S. Department of Labor, Wage and Hour Division, Press Releases, Mar. 18, 1940. (The collected set, running to at least 11 bound volumes, is hereafter cited as DOL/WH/R-Series.)

[6] DOL/WH/R-Series, transcript of question and answer session, Birmingham, Alabama, Sept. 29, 1938, pp. 3-4.

[7] U.S. Department of Labor, Wage and Hour Division, *Executive, Administrative, Professional ... Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (Washington: U.S. Govt. Print. Off., 1940), p. 1. (Hereafter cited as *The Stein Report*.)

[8] DOL/WH/R-Series, Press Release of Oct. 19, 1938, p. 1.

He (or she) was not to do any "substantial amount of work of the same nature as that performed by non-exempt employees of the employer."[9]

The entire regulation, including introductory comments by Andrews, took up two columns in the *Federal Register*. But, much of the language, at least in skeletal form, would remain central to the EAP regulation and to the proposed rule of March 31, 2003. Whatever the understanding may have been, the concept of *salaried* was not specified — other than that an executive or administrator would need to earn "not less than $30" for a work week. No earnings threshold was set for a professional.

In setting forth the Section 13(a)(1) regulations, Andrews had affirmed that the machinery, within the Department, was in place for contesting any aspect of the definitions that were deemed flawed — inviting citizen input.[10] But, apparently protests were not forthcoming — except, possibly, with respect to the concept of *professional*.[11] Addressing the Associated Industries of New York meeting at Syracuse in late 1938, Rufus Poole, Assistant General Counsel for the Wage and Hour Division, asked:

> Have you ever tried to define a professional? That is hard enough, but engaged in a "bona fide professional capacity" is even harder. The dictionaries do not give us the answer. They indicate that sometimes the word "professional" is used to mean a person engaged in one of the learned professions — that is medicine, law and the ministry. Then, the dictionaries talk about education and skill and even about one who engages in sports for money. We had to define this term so that employers and employees could use it ....

The concept of professional, he stated, was the "only one that has been seriously questioned to date" and, even here, DOL found that critics were not able to suggest "a better definition." Poole added: "There is a statutory duty on the Administrator to promulgate a definition. So we put out the best definition we could."[12]

Gradually, employers would voice concern with the Section 13(a)(1) structure: particularly with respect to "certain high-salaried employees." "As the statute now stands," Andrews stated, "these persons are covered unless they fall within the definition of employees engaged in an executive, administrative, or professional capacity." Some employers had argued, Andrews reported, "that certain employees who do not fall within these categories ... are, nevertheless, paid rather high salaries and are engaged steadily in work which is of a very responsible nature." But: "The number of such employees is not know[n] nor is the extent to which the provisions of Section 7 of the Act may impose changes in the personnel policies and the administrative practices of business enterprises." Andrews concluded: "... any line

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[9] *Federal Register*, Oct. 20, 1938, p. 2518. (Italics added.)

[10] DOL/WH/R-Series, Press Release of Oct. 19, 1938, p. 2.

[11] See U.S. Department of Labor, *Annual Report of the Secretary*, June 30, 1939 (Washington: U.S. Govt. Print. Off., 1939), pp. 5 and 203.

[12] DOL/WH/R-Series, address of Rufus Poole before the Associated Industries of New York, Syracuse, Nov. 18, 1938, p. 11.

of demarcation placing these high-salaried employees into a separate category for special treatment would have to be very carefully drawn ....”[13]

Meanwhile, legislation was introduced that would variously have modified Section 13(a)(1) especially with respect to treatment of professionals and/or higher wage employees — though this does not appear to have been a high priority, neither with DOL nor with Congress.[14] Andrews indicated his support for “certain clarifying amendments” to the FLSA but opposed the measure reported from the House Labor Committee (H.R. 5435 of the 76th Congress) as “A Bill to Lower Wages and Establish Longer Hours of Work.”[15] The legislation was not adopted.[16]

Hearings and Administrative Review. During the fall of 1939, Andrews left the Department and was succeeded as Administrator by Colonel Philip B. Fleming, formerly of the Army Corps of Engineers.[17] Other changes in personnel of the Wage and Hour Division followed — as would shifts in administrative policy.

In mid-March 1940 (when the regulation governing the EAP exemption, 29 CFR 541, was just under 18 months old), Fleming announced a hearing on proposed changes to the regulation. Apparently anticipating a relatively low-key review (since the EAP exemption appears to have sparked little controversy), the hearing was projected as a one-day affair (April 10) with the Division’s Harold Stein designated to preside.[18] In an accompanying press statement, the Division stated:

> Until recently the Wage and Hour Division had not received any formal application for such exemptions and hearing. The hearing now ordered is in response to the first petitions that were presented. They were granted promptly, which disposes of all pending petitions, and [were] the only ones which have been sent to the Division requesting amendment and hearing in connection with Section 13(a)(1) of the Act.

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[13] U.S. Department of Labor, Wage and Hour Division. *Interim Report of the Administrator for the Period August 15 to December 31, 1938*, p. IV-8. See also DOL/WH/R-Series, Andrews address before the Cleveland City Club, Feb. 18, 1939, pp. 7-8; and Andrews before the American Newspaper Guild, San Francisco, July 31, 1939, pp. 8-12.

[14] U.S. Department of Labor, *First Annual Report of the Administrator of the Wage and Hour Division, 1939* (Washington: U.S. Gov. Print. Office, 1940), p. 129.

[15] DOL/WH/R-Series, Press Release of June 7, 1939.

[16] *Congressional Record*, June 5, 1939, pp. 6620-6622. H.R. 5435, an umbrella measure, would have changed a number of requirements of the FLSA: *inter alia*, that “any employee employed at a guaranteed monthly salary of $200 or more shall be entirely exempt” from the wage and hour standards of the act. See U.S. Congress, House Committee on Labor, *Amendments to the Fair Labor Standards Act of 1938*, report to accompany H.R. 5435, 76th Cong., 1st sess., H.Rept. 76-522 (Washington, GPO, 1939), pp. 3 and 8-9.

[17] George Martin, *Madam Secretary, Frances Perkins* (Boston: Houghton Mifflin Company, 1976), pp. 392-393.

[18] DOL/WH/R-Series, hearing announcement, Mar. 18, 1940, pp. 2-3.

The Division further advised that the hearing "is confined to the wholesale distributive trades because those are the only interests which have petitioned for amendments and hearing on the definitions in question."[19]

As Fleming would later observe, "the power to define is the power to exclude."[20] The scope of the exemption (or of wage/hour protection) would rest on the manner in which the basic concepts surrounding the Section 13(a)(1) exemption were defined: not just the pivotal words *executive*, *administrative* or *professional*, but also the terms of the explanatory language associated with the regulation.

When that reality was understood by the public, there was a move for more comprehensive hearings. Abraham Isserman, Counsel for the American Newspaper Guild, wrote to Fleming urging caution.

> From the way this hearing was announced, first impression was gained that persons employed in these categories in the newspaper industry would not be affected by this hearing.
>
> On reflection, however, it becomes apparent that if these categories are re-defined for the wholesale distributive trades, a precedent undoubtedly will be established which will have a tremendous weight in the other industries covered by the Fair Labor Standards Act of 1938.

Isserman suggested that the hearing could result, whatever its intent, in "a *fait accompli* in the way of changed definitions in respect to which they would have had no opportunity for study and comment." He suggested a somewhat broader agenda than the announcement had stated and urged the Division to make clear to all interested parties the potential implications of the April 10 hearing.

Fleming, in response, indicated that he had considered and rejected concerns such as those of Isserman prior to announcing the hearing.

> There is such a wide variation in the work and functions performed by executive, administrative and professional employees ... especially in the administrative and professional classes, that it appeared more practicable to hold separate industry hearings. It follows that a definition for one of these classifications in one industry is not necessarily to be treated as a precedent in others.

Fleming invited Isserman and representatives of other worker interests to attend the hearing as observers or to submit oral or written comments. But, he also held out the possibility that hearings dealing with other industries might be conducted.[21] Fleming

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[19] DOL/WH/R-Series, press release, Mar. 18, 1940, pp. 1-2. Petitioning for a hearing were the Council of National Wholesale Associations, the American Retail Federation, and the Southern States Industrial Council.

[20] *Annual Report of the Secretary*, 1940, p. 236.

[21] DOL/WH/R-Series, press release of Apr. 2, 1940, concerning the Apr. 10 hearing. Attached was Isserman's letter to Fleming, Mar. 22, 1940, and Fleming's reply to Isserman, Mar. 28, 1940.

extended the comment period with respect to the April 10 hearing and released the text of the changes proposed by the various industry groups.[22]

The hearing commenced as scheduled, but it extended intermittently through several months.[23] "In addition to the oral testimony, approximately 180 briefs, written statements and memoranda were received."[24] Some proposals were sweeping in concept. The Division estimated that "some 1,500,000 clerical or 'white collar' workers employed by all establishments in all industries" were covered by the act and could be rendered exempt (i.e., ineligible for minimum wage and overtime pay protection), depending upon the manner in which the basic concepts were defined.[25] Some argued for a series of regional differentials — or earnings/coverage thresholds based upon the population of the communities in which the firms operated. How should on-the-job training be treated for overtime pay purposes? Or, "the efforts of ambitious young men to improve their status by studying their employer's business after working hours?" Other issues were also raised — some of which would reappear frequently through the next several decades.[26]

In his review of the evidence, Stein took pains to distinguish between the terms "defined" and "delimited" as they appear in Section 13(a)(1). Thus the Administrator is charged, he suggests, with determining "which employees are entitled to the exemption," but also with "drawing the line beyond which the exemption is not applicable." He concluded: "The general rule in a statute of this nature, that coverage should be broadly interpreted and exemptions narrowly interpreted, is so well known as to need little elaboration here."[27]

A New Regulation Promulgated (1940)

On October 14, 1940, Colonel Fleming made public a new regulation governing the EAP exemption. It would take effect on October 24, 1940, the second

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[22] DOL/WH/R-Series, press release of Apr. 3, 1940, concerning the Apr. 10 hearing.

[23] See DOL/WH/R-Series, press releases of May 11and 12, 1940, June 21, 1940, and July 25, 1940. A comprehensive analysis of the information gathered through the hearings (*The Stein Report*) was subsequently published by the Department of Labor.

[24] *The Stein Report*, p. 2.

[25] DOL/WH/R-Series, press release of Apr. 10, 1940. The Southern States Industrial Council would have redefined *administrative* to include "clerical employees such as bookkeepers, payroll clerks, auditors, cost accountants, statisticians, and all other office help regularly employed on a straight salary basis and given vacations and sick leave with pay."

[26] *The Stein Report*, pp. 5-7.

[27] Ibid., p. 2. Stein added, p. 6-7 "... if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in Section 13(a)(1) of the act. The theory of general exemption is further negated by the grant of power to the Administrator to define and delimit those terms." In another context, but in the same spirit, DOL has observed that "Exemptions provided in the Act 'are to be narrowly construed against the employer seeking to assert them' and their application limited to those who come 'plainly and unmistakably within their terms and spirit.'" See 29 CFR 780.2.

anniversary of implementation of the FLSA — and the date on which the standard work week, under the act, was to be phased down to 40 hours.

Administrative Initiative. In announcing the 1940 EAP regulation, DOL stated that the Administrator "has broad powers, not only to define but to delimit the extent of these exemptions under Section 13(a)(1)."[28] It is important to recall that the act, itself, provided only that "sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, [or] professional ... capacity." Technical distinctions with respect to qualifications and tests for exemption were the constructs of the Wage and Hour Division in defining and delimiting the brief mandate from the Congress. And, even then, it was the product of a young agency exploring its mandate and working with the benefit of relatively few precedents from which to draw guidance.

The 1938 regulation set down by Administrator Andrews, however useful, was an administrative device — which Andrews, himself, recognized when inviting *post facto* comment. But, once in place, the 1938 regulation became the standard upon which future regulations would rest. Fleming had before him some 2,000 pages of testimony collected during the Stein hearings from representatives of employers and organized labor. But, those hearings had operated within the context (and under the assumptions) set down in the Andrews regulation. Thus, the Fleming regulation (1940), a modification of the Andrews regulation (1938), would begin some 60 years of parsing regulatory language leading to the proposed rule of March 31, 2003.[29]

The 1940 regulation, including covering statement, ran just over one page in the *Federal Register*: still a reasonably simple statement of policy.[30] Where the 1938 regulation had combined *executive* and *administrative* as a single category, the 1940 regulation separated them into two classifications.[31]

An *executive*, the regulation stated, is one "whose primary duty" consists of management: i.e., "who customarily and regularly directs the work of other employees," "who has the authority to hire or fire other employees," "who customarily and regularly exercises discretionary powers," and whose time spent engaged in work comparable to that of nonexempt employees does not exceed 20% of his (the executive's) work hours. The regulation added that the 20% restriction "shall not apply in the case of an employee who is in sole charge of an independent

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[28] DOL/WH/R-Series, press release of Oct. 14, 1940, p. 4.

[29] This report, a historical sketch, will not follow the variations, proposed and adopted, with respect to each regulatory initiative. In DOL/WH/R-Series, press release of Oct. 1 4, 1940, there is a somewhat detailed, 10-page analysis of the variations accepted by the Division in 1940. See also *The Stein Report*, cited above. Among industries testifying was the motion picture industry. See discussion below.

[30] The language defining executive, administrative and professional is drawn from the regulation as published in the *Federal Register*, Oct. 15, 1940, pp. 4077-4078. The actual regulation includes additional detail and qualifications for exemption.

[31] DOL/WH/R-Series, press release of Oct. 14, 1940, p. 1.

establishment or a physically separated branch establishment."[32] An exempt executive must be paid a salary of at least $30 per week.

An *administrative* employee "... is compensated for his services on a salary or fee basis at a rate of not less than $200 per month." He must "regularly and directly" assist another "bona fide executive or administrative" employee "where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment." Further, it provides, an administrative employee is one:

> ... who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment;
> or... whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment.[33]

Administrative employees were more broadly defined in the new regulations "to include those whose duties, while important and associated with management, are functional rather than supervisory."[34]

A *professional* is one whose work is "predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work." It is work that requires "the consistent exercise of discretion and judgment," the output of which cannot "be standardized in relation to a given period of time," that does not exceed 20% of the type of work performed by nonexempt employees, that requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from apprenticeship, and from training in the performance of routine mental, manual, or physical processes," and that is "predominantly original and creative in character." A professional employee must be paid not less than $200 per month (roughly $50 per week).[35]

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[32] The Division, in DOL/WH/R-Series, press release of Oct. 14, 1940, p. 3, stated that the aspect of the original definition of executive "which caused more questions than any other was the requirement that an executive do no substantial amount of the work done by his subordinate." Thus, a percentage restriction was added in 1940.

[33] *The Stein Report*, pp. 4-5, is less rigid. "While the usage of the two terms is so vague and so overlapping that there is no generally recognized and precise line of demarcation between them, it does no violence to the common understanding of the words to apply 'executive' to the person who is a boss over men and apply 'administrative' to the person who establishes or affects or carries out policy but who has little or no authority over the specific actions of other individuals."

[34] DOL/WH/R-Series, press release of Oct. 14, 1940, p. 1.

[35] The earnings test would not apply with respect to "an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof." The license or certificate

(continued...)

A Foundation Established. The 1940 regulation followed closely the pattern (and the language) of the 1938 regulation. With the former in place, a long-term foundation was established for implementation of the EAP exemption.

Some accounts of the new regulation "were confusing," DOL acknowledged, and Colonel Fleming, in a letter to Joseph Curran, president, Greater New York Industrial Union Council, offered certain clarifications. He commenced by affirming the individual character of the EAP exemption. "Of course," he explained, "the exemption or non-exemption of any individual employee under these definitions is a question for individual factual determination ...." Thus, the Division would need to proceed on a case-by-case basis where any controversy existed.[36]

The pattern of requirements fell gradually into place. Some thought the $30 earnings threshold for exemption as an *executive* was "too high." Fleming, reflecting the authority of the Administrator, explained: "... it was my belief that there would be a basic error in describing as an 'executive' any person who is paid less than $30 a week." He added: "... heretofore the exemption was applicable to hourly paid employees if their hourly pay was sufficiently high to produce $30 a week. This proviso has been changed and no hourly paid employee can qualify for the exemption." Thus, *the salary basis test* was set in place.[37]

Similarly, other qualifying elements came to be established. The work of an *administrative* employee, for example, would need to be "non-manual." Limitation on the amount of time devoted to non-EAP duties must be no more than 20%. Technical or "routine work" would not qualify a worker for exemption.[38] Further, professionals, to be exempt, would have to meet a series of tests which Fleming enunciated and which would remain, by and large, a part of the regulatory structure.

Again, the regulatory language (the qualifying elements for Section 13(a)(1) exemption) was the creation of the various Wage and Hour Administrators. Increasingly, that language became precise and detailed. Once in place, it seemed to take on an authority and weight almost equivalent to the statutory language.

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[35] (...continued)
would be taken as a substitute in specific instances.

[36] DOL/WH/R-Series, letter from Fleming to Joseph Curran, Oct. 24, 1940, p. 1. Enforcement would not be easy, Fleming said. It "requires the Division representative to visit the establishment, interview the employer, examine his pay roll and time records, and talk to a representative number of his employees. Where records indicate violations or falsifications," he stated, "... they are transcribed in whole or in part and checked against the statements of the employees." *Annual Report of the Secretary*, 1941, p. 147.

[37] DOL/WH/R-Series, letter from Fleming to Joseph Curran, Oct. 24, 1940, p. 2. There was a sense that the title *executive* carried with it "a certain prestige, status, and importance" and that such persons enjoyed "compensatory privileges." These might include such things as "authority over people, a privilege generally considered desirable to possess," along with "opportunities for promotion," possibly "paid vacation and sick leave" and "greater security of tenure." *The Stein Report*, pp. 19-22.

[38] DOL/WH/R-Series, letter from Fleming to Joseph Curran, Oct. 24, 1940, pp. 2-5. Other conditions, affecting coverage, were also explained.

Hearings and Regulatory Modification (1949)

Through the next several years, various proposals surfaced that urged modification of the EAP regulation.[39] However, given the exigencies of World War II, public policy concerns seem to have been deflected into other areas.

In October 1947, the Division initiated a new round of hearings on 29 CFR 541 to commence on December 2, 1947.[40] As in 1940, the hearings led to publication of a study of the *executive, administrative* and *professional* exemption. Prepared by Harry Weiss who presided at the hearings, it was published in June 1949.[41] The hearings "continued for 22 separate days" and heard "more than 100" witnesses. In addition, briefs were filed "in lieu of personal appearances ... by more than 150 groups and individuals."[42] The proposed regulatory revisions were published on September 10, 1949,[43] and a new final rule was published on December 24, 1949, under authority of William R. McComb, the new Wage and Hour Administrator.[44]

Among the changes in the regulation was an increase in the earnings threshold: to be exempt, an *executive* was to be paid "on a salary basis at a rate of not less than $55 per week ($30 in Puerto Rico or the Virgin Islands)"; an *administrator* was to be paid "on a salary or fee basis at a rate of not less than $75 per week ($200 per month in Puerto Rico or the Virgin Islands)"; and a *professional* was to be paid "on a salary or fee basis at a rate of not less than $75 per week ($200 per month in Puerto Rico or the Virgin Islands)."[45] In each category a worker paid not less than $100 per week — and meeting certain other specified duties requirements — would be deemed to qualify for exempt status.[46] (See discussion of "salary basis" below.)

On December 28, 1949, the Division published in the *Federal Register* a lengthy interpretive bulletin explaining the regulation in detail and defining the terms used

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[39] See for example, *Federal Register*, Jan. 17, 1942, p. 332.

[40] *Federal Register*, Oct. 21, 1947, pp. 6863-6864.

[41] Department of Labor, Wage and Hour Division, *Report and Recommendations on Proposed Revisions or Regulations, Part 541, Defining the Terms "Executive," "Administrative," "Professional," "Local Retailing Capacity," [and] "Outside Salesman"* (Washington: U.S. Govt. Print. Off., 1949), 100 pp. (Hereafter cited as *The Weiss Report*.)

[42] *Annual Report of the Secretary*, 1948, p. 90.

[43] *Federal Register*, Sept. 10, 1949, pp. 5573-5574.

[44] *Federal Register*, Dec. 24, 1949, p. 7705.

[45] Following enactment of the FLSA, certain economic interests in Puerto Rico urged that the act not apply to the island or that it be applied in modified form. As a result, in 1940, Congress amended the FLSA to provide that Puerto Rico and the Virgin Islands be afforded special treatment. See Section 3, Public Resolution 88, June 26, 1940.

[46] *Federal Register*, Dec. 24, 1949, p. 7706.

in the regulation. The interpretive material would be incorporated within 29 CFR 541 as Subpart B.[47]

A More Systematic Development of Policy (1950s)

The Weiss Report would continue through a decade to provide a context for discussion of how executives, administrators, and professionals were to be treated under the FLSA. Gradually, a more detailed policy would evolve.

Paid on *A Salary Basis*

During the hearings of the late 1940s, one issue raised by the witnesses had been the concept of payment *on a salary (or fee) basis*.[48] *The Weiss Report* explained:

> ... a number of proposals relating to the "salary basis" requirements in the regulations were made in the course of the hearing. One of these was that the requirement of payment "on a salary ... basis" be eliminated and that the "average compensation" be used instead; another, that employees be permitted to qualify for exemption even if paid an hourly wage. Some witnesses suggested that the term "salary basis" be defined to mean payment of a fixed or guaranteed sum. The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term 'bona fide' executive. Similarly, pay on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status.[49]

Although presented as a general requirement in Subpart A of the regulation (29 CFR 541), the concept was explained more fully in Subpart B.[50]

By the 1950s, speaking generally, several patterns were already discernable where the salary tests were concerned. *First*. The threshold was regarded as the best determinant of who might legitimately be classified as an executive, administrator or, in some contexts, a professional. *Second*. There was some interest in indexation of the thresholds — though it also drew opposition and seems to have been dismissed by the Division.[51] *Third*. It was clear that, with inflation, there was some erosion of the value of the thresholds — but, if undesirable, this was not deemed intolerable.

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[47] *Federal Register*, Dec. 28, 1949, pp. 7730-7745.

[48] *The Weiss Report*, p. 24.

[49] Ibid.

[50] *Federal Register*, Dec. 28, 1949, p. 7735.

[51] Concerning the matter of indexation, see *The Weiss Report*, pp. 10-11. Comments are presented in *The Weiss Report* in aggregate form.

The Motion Picture Exemption. By the early 1940s, the motion picture industry had argued that FLSA overtime requirements were especially burdensome, given the special nature of the work of production technicians. After a review, Harold Stein (1940) observed: "Although the hourly pay of most of these employees is extremely high in comparison with most other industries, that fact in itself does not and cannot qualify them for exemption as 'administrative employees.'"[52]

In May 1953, the Association of Motion Picture Producers, Inc., protested that many of its highly paid technical workers ought to have been exempt under Section 13(a)(1) of the FLSA except that they were paid on an hourly basis rather than on a salary basis. Administrator McComb explained that "[t]hose portions of the regulations which define and delimit the terms 'executive,' 'administrative,' and 'professional' include in each case the requirement that the employee must be compensated 'on a salary basis.'" The requirement had been written into the regulation in 1940 by Fleming — at his discretion. Now, at the urging of industry, McComb (exercising his discretionary authority) proposed a further change.[53]

Following a 30-day comment period (during which no comments were received), the Division published the following modification of the regulation:

> 541.5a *Special provision for motion picture producing industry*. The requirement ... that the employee be paid "on a salary basis" shall not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $200 a week (exclusive of board, lodging or other facilities).[54]

The special provision for the motion picture industry remains in the regulation; the earnings threshold would remain at $200 per week until 1975 when it was raised to $250 per week on *an interim basis* by Administrator Betty Southard Murphy.[55]

***Salary Basis* Applied More Broadly.** In the *Federal Register* of March 9, 1954, McComb proposed amendment to 541.118 of Subpart B: the segment dealing with payment on a salary basis. Among other changes in the wording of the section, he added language dealing with deductions from pay and the impact they could have for a worker's status as exempt.[56]

Following a comment period, McComb issued a final rule. The Division now disallowed deductions from salary as a penalty for disciplinary infractions. It did,

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[52] *The Stein Report*, p. 29.

[53] *Federal Register*, May 10, 1953, p. 2881.

[54] *Federal Register*, July 7, 1953, p. 3931. The earnings threshold, assuming full-time employment (which may not be a valid assumption), would be $10,400 a year.

[55] *Federal Register*, Feb. 19, 1975, p. 7094.

[56] *Federal Register*, Mar. 9, 1954, pp. 1321-1322.

however, agree to allow deductions from salary as a penalty for violations of safety rules "of major significance."[57] (See discussion of *pay docking* below.)

To Raise the Earnings Threshold

Given inflationary pressures ("particularly the widespread increases in wage and salary levels"), Administrator Newell Brown proposed (late 1955) that the earnings thresholds for Section 13(a)(1) exemption be raised. He scheduled a December 12 hearing on the issue — leaving recommendations for the level of such increases to the witnesses.[58] In January 1956, Brown noted that the base rates (for EAP exemption) had not been raised for Puerto Rico and the Virgin Islands since 1940 and called for a review of conditions in those areas.[59]

During hearings conducted by Assistant Administrator Harry Kantor, the salary issue was discussed at length. Some urged "that the salary tests be eliminated." It was argued that they were unnecessary and that exemption "should be based solely on the employee's duties." Kantor disagreed, dismissing the suggestions.

> The terms bona fide executive, administrative and professional imply a certain prestige, status and importance, and the employee's salary serves as one mark of his status in management or the professions. It is an index of the status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or sub-professional from one who is performing administrative or professional work. Generally speaking, salary is a good indicator of the degree of importance attached to a particular employee's job.

Maintaining the *salary tests* was discretionary with the Administrator; but there was a practical consideration. They "simplify enforcement" by "screening out the obviously nonexempt employees. Employees who do not meet the salary test," he stated, "are generally also found not to meet the other requirements...."[60]

Proposals varied. There was apparent consensus that an increase was warranted — but industry suggested a lower wage structure, whereas labor argued for a higher range. Kantor, in assessing the issue, may inadvertently have exposed what some may view as the arbitrary character of the process. The "primary objective of the salary test," he said, is drawing a line between groups of workers. That line, he stated, "... cannot be drawn with great precision, and can at best be only

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[57] *Federal Register*, July 17, 1954, pp. 4405-4406.

[58] *Federal Register*, Nov. 1955, pp. 8388-8389.

[59] *Federal Register*, Jan. 17, 1956, pp. 323-324. Administrator Brown noted that a report on "Salaries in Puerto Rico and the Virgin Islands" was being prepared by Wage/Hour.

[60] Department of Labor, Wage and Hour Division, *Report and Recommendations on Proposed Revisions or Regulations, Part 541, Defining the Terms "Executive," "Administrative," "Professional," "Local Retailing Capacity," [and] "Outside Salesman"* (Washington: U.S. Govt. Print. Off., 1958), 12 pp. (Hereafter cited as *The Kantor Report*.) It was also proposed that exemption be based on occupational status — licenced engineers or certified public accountants — but that, too, was disallowed as imprecise. See pp. 3-4.

approximate," and "has been recognized in previous revisions of the regulations." He added:

> The salary tests have thus been set for the country as a whole ..., with appropriate consideration given to the fact that the same salary cannot operate with equal effect as a test in high-wage and low-wage industries and regions, and in metropolitan and rural areas, in an economy as complex and diversified as that of the United States.

Having raised, obliquely, the issue of regional differentials, he did not pursue it. However, if the tests were to be used, Kantor opined, they should be set "at points near the lower end of the current range of salaries for each of the categories."[61]

Like Stein, Kantor had concerns about the entire process. "Available information indicates clearly that there is considerable overlapping between salaries paid non-exempt employees and the salaries currently paid employees for whom exemption may be claimed ...." And, again: "It has been the Divisions' experience that there is a tendency on the part of employers to misclassify employees, particularly in the administrative and professional categories, when the salary levels become outdated by a marked upward movement of wages and salaries."[62]

A proposed rule, raising the salary thresholds, was issued on April 5, 1958.[63] Although some urged that any increase in the thresholds be deferred "because of unfavorable economic conditions," Administrator Clarence Lundquist resolved to proceed — and issued a final rule to take effect on February 2, 1959. The threshold for *executives* was to be "not less than $80 per week ($55 ... in Puerto Rico or the Virgin Islands)." For administrators, it would be "not less than $95 per week ($70 ... in Puerto Rico or the Virgin Islands)." And, for a professional, the rate would be "not less than $95 per week ($70 ... in Puerto Rico or the Virgin Islands)." In each case, an employee paid at not less than $125 per week, meeting other standards, would be deemed to meet the requirements for exempt status.[64]

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[61] *The Kantor Report*, pp. 4-5.

[62] Ibid.

[63] *Federal Register*, Apr. 5, 1958, p. 2256. The initiative, in terms of "the number of employees and establishments" impacted, was regarded by Labor Secretary James Mitchell as "the most important" labor-related regulatory change of the year. See *Annual Report of the Secretary*, 1959, p. 228.

[64] *Federal Register*, Nov. 18, 1958, pp. 8962-8963. With a *Federal Register* notice of Jan. 27, 1959, pp. 581-582, Administrator Lundquist updated Subpart B of 29 CFR 541.

Updating and Reconsideration (1960s)

During the early 1960s, the Wage/Hour Division took up two aspects of the Section 13(a)(1) exemption. *First*, there was the continuing issue of adjustment of salary thresholds. *Second*, there was a broader concern about how exemption should be applied — especially in retail and service industries to which wage/hour protections had been extended under the 1961 FLSA amendments.

Adjusting the Earnings Thresholds

In January 1962, Administrator Lundquist noted the "widespread increases in wage and payroll levels which have taken place" since the various thresholds were last adjusted (1959) and convoked two hearings on the issue: March 26, 1962, in Washington, and April 9, 1962, in Santurce.[65]

As might have been expected, reaction to the EAP exemption was split. (a) Some employer representatives proposed elimination of the salary tests entirely. (b) Others argued for retention but "set on an industry, area, or regional basis." (c) Still others proposed that the tests "be set at the level of the lowest paid executive employees in the lowest wage and salary areas of the country." The dominant position among employers, DOL reported, was that the salary levels "should not be increased." Generally, employee representatives appeared to favor a threshold increase. It was also suggested that any increase in the salary thresholds be pegged to a percentage of the increase in the cost of living: a form of indexation.[66]

Ultimately (to be effective September 30, 1963), the thresholds were raised as follows: for *executives*, to "not less than $100 per week ($75 ... in Puerto Rico, the Virgin Islands, or American Samoa)"; for *administrative* workers, to "not less than $100 per week ($75 ... in Puerto Rico, the Virgin Islands or American Samoa)"; and for *professionals*, to "not less than $115 per week ($95 ... in Puerto Rico, the Virgin Islands or American Samoa)." In each case, where other qualifications had been met, a salary of $150 per week would be deemed sufficient "to meet all of the requirements of this section."[67]

Treatment of the Service and Retail Industries

Initially, the Fair Labor Standards Act (FLSA) had applied primarily to workers and establishments in production work. Under the 1961 FLSA amendments, wage/hour protection was gradually extended to workers employed in the retail and

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[65] *Federal Register*, Jan. 23, 1962, pp. 665-666. See also *Annual Report of the Secretary*, 1962, p. 226.

[66] *Federal Register*, July 9, 1963, p. 7002.

[67] *Federal Register*, Aug. 30, 1963, pp. 9505-9506. Under P.L 84-1023, Aug. 8, 1956, a special industry structure (still in place) was established through which to regulate the minimum wage in American Samoa. Puerto Rico and the Virgin Islands remained under a similar arrangement until the 1990s. See also *Federal Register*, Sept. 6, 1963, p. 9782.

service trades. That process would continue under the 1966 amendments to the FLSA and cause the Department to update its EAP coverage criteria.[68]

The basic employer position, during the 1963 Wage/Hour hearings, was "... that the present [29 CFR 541] regulations are not appropriate to the retail and service industry and should not be applied."[69] It was concerned, *inter alia*, about problems of definition, of industry structure, and of the separation of exempt from non-exempt functions. The DOL summary states: "Employer representatives made it clear that the primary purpose of these [their alternative proposals] ... is to extend the minimum wage and overtime exemption to assistant managers and assistant buyers." Again:

> Employer representatives further state that it is necessary in retail establishments to delegate managerial authority and responsibility downward to the lowest possible echelons. With particular reference to assistant managers and assistant buyers in this regard, they contend that such employees are not "assistants to" the manager or buyer, but that they in fact have equal authority and responsibility with the manager or buyer in the managerial function.

Some argued that the wage/salary structure in retail and service establishments (with commissions, bonuses, etc.) was different from other industries and that "the imposition of salary tests would require a complete revamping of their accounting practices."[70]

Lundquist was "not persuaded ... that the managerial functions of executive employees in retail and service establishments differ in any significant particular from those of bona fide executive employees in other industries or establishments." Further, the Administrator stated:

> ... without intending comment as to the merits of the proposed definition of management in retail and service establishments, I consider it both unnecessary and improper to include in the regulations a definition of the managerial function which would have exclusive application in any one industry.

Lundquist argued for a lower "tolerance" for non-exempt work by otherwise exempt executive and administrative employees.[71] He accepted the employer contention that the salary threshold for administrative employees should not be set higher than for executive employees. "Employer representatives contend, and the Division's experience under the regulations has demonstrated," he stated, "that there is

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[68] See Milton C. Denbo, "The Fair Labor Standards Amendments of 1961: An Analysis," *Labor Law Review*, Aug. 1961, pp. 731-738; and "Expansion of Minimum Wage Law Approved," *Congressional Quarterly: Almanac*, 89th Congress, 2nd Session, 1966 (Washington: Congressional Quarterly Service, 1966), pp. 821-830. See also *Annual Report of the Secretary*, 1963, pp. 244-245.

[69] *Federal Register*, July 9, 1963, p. 7002.

[70] Ibid., p. 7003.

[71] Ibid., pp. 7005-7006.

frequently an overlapping in the work performed by executive and administrative employees, with attendant difficulty in distinguishing these categories."[72]

Threshold adjustment was allowed on an interim basis for newly covered workers in the retail and service industries: i.e., $80 per week for executive and administrative employees ($55 in the territories) and $95 for professionals ($75 in the territories). After September 1965, the rates were to equal those for otherwise covered employees.[73] Section 13(a)(1) concerns then moved on to peripheral matters.

Refining the Process (late 1960s and 1970s)

In June 1969, Wage and Hour Administrator Robert D. Moran noted that "significant increases in wages and salary levels have taken place since the salary tests were last amended." Therefore, he proposed an across the board increase with a public hearing on the projected increase to be held on September 16, 1969.[74]

Adjusting the Earnings Thresholds

Employers, generally, urged: (a) that the rates not be raised; (b) that the salary tests be eliminated; and (c) that differentials be established for geographical regions and for different industries. Some employers argued that increases should "be limited to the percentage increase in the Consumer Price Index" — in effect, a form of indexation. At the same time, Moran acknowledged, "[m]any organizations and individuals opposed our proposals on the basis that they would be inflationary." Labor spokespersons "all agreed that an increase in the salary requirements" was needed — but that the proposed increases were insufficient. "One union representative recommended an automatic salary review provision ... stating that such a provision would eliminate the lengthy periods which normally occur between revisions ... and would keep the salaries current and meaningful."[75]

By this point, a certain redundancy was apparent: perhaps among the witnesses, but certainly in the reaction of the Division. To an employer call for differentials (geographic and industrial), Moran responded that the current system had "been

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[72] Ibid., p. 7004. Various other adjustments, restructuring definitions and patterns of exemption or coverage, would be made to the regulation during the period. See *Federal Register*, Sept. 15, 1961, pp. 8635-8638; Dec. 28, 1963, pp. 14423-14424; Apr. 14, 1964, p. 5088; and Dec. 30, 1964, pp. 19103-19104. Refinement of the treatment of *driver salesmen* is dealt with in *Federal Register*, Mar. 10, 1964, p. 3206; June 22, 1965, pp. 8005-8006; July 10, 1965, p. 8754; Dec. 24, 1965, pp. 16077-16079; and *Annual Report of the Secretary*, 1965, p. 185, and 1966, p. 173. The treatment of *academic administrative personnel* and *teachers* is taken up in *Federal Register*, Jan. 10, 1967, pp. 228-234, and May 30, 1967, pp. 7823-7829.

[73] *Federal Register*, Sept. 6, 1963, p. 9782; and *Annual Report of the Secretary*, 1964, p. 185.

[74] *Federal Register*, June 27, 1969, pp. 9934-9935.

[75] *Federal Register*, Jan. 22, 1970, pp. 883-884. Comments are presented in the aggregate.

successfully applied for 30 years." As for elimination of salary tests, he stated: "... the validity of these tests has been fully explored;" arguments for their elimination "are not supported by the Divisions' experience." Annual review and/or indexation were relegated to the realm of "further study." Industry objection to higher thresholds, Moran argued, was faulty: the increases would simply be keeping up with past inflationary trends. With respect to the union appeal for substantially higher thresholds, he protested: "... a salary increase of the magnitude which they have proposed would in my judgment cause the loss of the exemption to a substantial number of employees who were intended by Congress to be exempted."[76]

New salary tests were set as follows: $125 per week for executive and administrative employees; $140 for professional employees. A rate of $200 was set for persons earning at a higher level under which "less emphasis is given" to a worker's duties and responsibilities.[77] For those brought under FLSA wage and hour requirements by the 1966 amendments, Moran set a phased-in structure: executive and administrative employees, $115 per week until February 1, 1971, when the rate would go up to $125 per week; professionals, $130 per week to rise to $140 per week afer February 1, 1971. The test for those earning at higher levels would similarly be phased-up: $175 per week, to rise to $200 beginning February 1, 1971.[78]

Expansion and Tinkering

With the basic update of the thresholds out of the way, Moran turned to broader (and, potentially, more contentious) issues. A notice in the *Federal Register* of September 10, 1970, cited several new areas that, ultimately, would become subjects of concern with respect to the Section 13(a)(1) exemption. Among them:

First. The 1966 FLSA amendments made the act "applicable ... to employees in hospitals, nursing and rest homes, and other residential care establishments ... bringing within the Act various para-medical employees in occupations" — not then included with the 29 CFR 541 structure.

Second. "Consideration is also being given to the status under the exemption of employees in occupations in the data processing field." Moran explained: "Employees are identified by a multitude of titles, including program operator, programer, systems analyst, and many others. They have varied experience and training," he explained, "and perform a variety of tasks which are difficult to measure in terms of their significance and importance to management."

Third. While the concept of *professional* had applied to the learned and artistic professions, there were others to whom it might also be made to apply. Should it include, Moran asked, other occupations such as "highly skilled technicians in the

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[76] Ibid.

[77] Ibid., p. 885. For Puerto Rico, the Virgin Islands and American Samoa, the rates would be $115 for executives, $100 for administrative employees, and $125 for professionals.

[78] *Federal Register*, Jan. 22, 1970, p. 885. Moran subsequently extended the effective date of the earnings thresholds to Mar. 15, 1970. See *Federal Register*, Feb. 20, 1970, p. 3220.

electronics and aerospace industries" — not, strictly speaking, in a field of science or learning but whose crafts "are learned primarily through extensive experience and on-the-job training rather than through a 'prolonged course of specialized intellectual instruction and study."

The Division, faced with petitions from some industries, was beginning to rethink the scope of the EAP exemption and whether it might not be expanded to include certain workers presently covered under FLSA minimum wage and overtime pay standards.[79]

Among issues specified for discussion were: (a) to explore "a clearer definition of 'prolonged course of specialized intellectual instruction and study'"; (b) whether those possessed of such training "perform activities substantially different or more difficult than those having a lesser degree of training"; and (c) the extent to which workers trained in fields of science and learning "consistently exercise discretion and judgment of substantial importance, as opposed to engaging in merely routine or mechanical work or making analyses based on the results of standardized tests."[80]

An initial hearing was scheduled for December 1, 1970; but then, in the interim, the Administrator broadened the scope of the hearing. On November 13, 1970, he called for written testimony on a proposal to clarify "the interpretation of the 'primary duty' test" and to explore the manner in which the Division should deal with "employees who have responsibilities similar to those of the owner or manager."[81] The hearing was moved back to February 2, 1971.[82]

In December 1971, a new Administrator, Horace E. Menasco, issued a new final rule which involved, primarily, interpretation. He added guidelines "to aid in determining exemption of paramedical employees."[83] With respect to the status of computer services workers, Menasco was dubious. Although he offered clarification, he was unwilling to recognize the field as *professional*. He explained:

> The employer representatives contended that computer programers and systems analysts should be considered professional employees. Some supporters of this position would include the position of junior programer in this category. The testimony brought out, however, that a college degree is not a requirement for entry into the data processing field, that only a few colleges offer any courses in a field designated as computer science, and that there are presently no licensing, certification, or registration provided as a condition for employment in these occupations.

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[79] *Federal Register*, Sept. 10, 1970, p. 14268. Treatment of data-processing and other computer industry personnel for EAP purposes had been a DOL concern at least as early as the late 1950s and early 1960s. See *Annual Report of the Secretary*, 1960, p. 243.

[80] Ibid., pp. 14268-14269.

[81] *Federal Register*, Nov. 13, 1970, p. 17424. See *Federal Register*, Mar. 15, 1971, p. 608.

[82] *Federal Register*, Nov. 6, 1970, p. 17116.

[83] *Federal Register*, Dec. 2, 1971, pp. 22976-22977.

Menasco stated that employee spokespersons had opposed a grant of professional status to computer services workers, arguing that it was "a relatively new occupation area" and is in "a state of flux and that job titles and duties are not regularized and overlap and intermix in a confusing manner." They also argued that "to expand the exemption [to the computer services field] was an invitation for employers to work such employees longer hours with no additional compensation." Menasco concurred that the field was not, then, "generally recognized by colleges and universities as a bona fide academic discipline." He added:

> To consider a period of technical training, on-the-job training, or years of experience as an alternative to a prolonged course of intellectual instruction and study would seriously weaken the professional exemption by allowing employers to claim the exemption for various kinds of paraprofessional and sub-professional groups.

Thus, he declined to grant professional status for the industry but did make "certain additions and clarifications" in Subpart B.[84]

Treatment of "highly paid technicians" proved to be similarly vexing. Statements, pro and con, were received from "the electronic and aerospace industries; the funeral service industry; the news media; employment placement agencies; and technical artists and writers of the electronics industry." In a review of the submissions and testimony, Menasco found that salary levels for the targeted technicians "were not exceptionally high."[85] Further, the workers in question feared a "loss of income" through the "loss of overtime pay." They expressed concern that the absence of an overtime pay requirement would result in assignment of longer hours of work and a parallel "increase in unemployment." Menasco declined "to change the definition of professional employee" with respect to technicians.[86]

Adding *Equal Pay* Protections

As part of the "Education Amendments of 1972," Congress added to Section 13(a)(1) the language "(except section 6(d) in the case of paragraph (1) of this subsection)." Adding Section 6(d), which prohibits discrimination on the basis of sex in the payment of wages, to Section 13(a)(1) creates a situation in which an employer may be exempt from the minimum wage and overtime pay requirements of the FLSA but must comply with the act's *equal pay* requirements.[87]

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[84] *Federal Register*, Dec. 2, 1971, p. 22977. Congress would later adjust the status of computer services workers. See CRS Report RL30537, *Computer Services Personnel: Overtime Pay Under the Fair Labor Standards Act*, by William G. Whittaker.

[85] As a case study, see CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*, by William G. Whittaker.

[86] *Federal Register*, Dec. 2, 1971, p. 22977. In language dealing with *primary duty*, Menasco reiterated the position of his predecessors in affirming the case-by-case character of the EAP exemption. "A determination of whether an employee has management as his primary duty," the rule stated, "must be based on all the facts in a particular case."

[87] See P.L. 92-318, Section 906(b).

In mid-March of 1973, Acting Wage and Hour Administrator Ben Robertson made the necessary technical adjustments to the Code of Federal Regulations and then arranged for publication of the equal pay provisions in the *Federal Register*.[88]

Readjusting the Earnings Thresholds

On August 12, 1974, Wage and Hour Administrator Betty Southard Murphy signed a notice of proposed rulemaking dealing with the several salary thresholds under Section 13(a)(1) of the FLSA. The thresholds, she pointed out, had last been raised in March 1970 and she argued that they were increasingly out of date. Since the last round of increases, she stated, the Consumer Price Index had increased by 27.0 points. Further, Congress had raised the federal minimum wage by 40 cents an hour: from $1.60 to $2.00 — with mandated step increases in the minimum wage to $2.30 by January 1976. To make the salary tests "realistic," Murphy proposed new thresholds and called for comment through a 30-day period.[89] The response was substantial and the Administrator extended the comment period until October 29, 1974. A public hearing was also scheduled.[90]

The proposal sparked attention, but it was reported that comment was "predominantly negative" with the exception of trade union testimony. The proposed threshold increases would be "inflationary," it was argued. The National Association of Manufacturers (NAM) protested that it did not see "how it is possible to justify the increase."[91] For the NAM, Michael Markowitz stated:

> Throughout industry, there are many supervisory positions, both in the plant and in the office, which pay less than $15,600 a year [the interim 'upset' test level proposed by Murphy]. To establish the upper limit at that level would create administrative chaos since, for a substantial percentage of employees with responsibilities that are genuinely executive or administrative, it would become necessary to document all the other tests to ensure compliance with the law.[92]

A similar concern, though from a different perspective, was voiced by Nathaniel Goldfinger of the AFL-CIO. He stated:

> It has been clear throughout the history of the FLSA that unless the salary tests were set high enough to separate nonexempt from exempt employees they would

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[88] *Federal Register*, Mar. 16, 1973, pp. 7114-7115, and May 7, 1973, pp. 11390-11412.

[89] *Federal Register*, Aug. 16, 1974. The rates Murphy proposed were intended to be of an interim character, pending completion and analysis of a study by the Bureau of Labor Statistics of the exemptions under Section 13 of the act — a study mandated by Congress in the 1974 FLSA amendments (P.L. 93-259). See also Bureau of National Affairs, *Daily Labor Report*, Aug. 16, 1974, p. A15. (Hereafter cited as *DLR*.)

[90] *Federal Register*, Sept. 17, 1974, p. 33377.

[91] *DLR*, Oct. 11, 1974, p. A12.

[92] Ibid., p. A13. The concept of "upset" refers to the higher threshold for a "short test" for exemption.

> be useless and the other duty tests would have to be depended upon to make a correct separation between exempt and nonexempt employees.[93]

The interim character of the proposed threshold increases caused broad concern. It would set in motion two shifts in personnel policy: interim and long-term. And, there was concern that, whatever a survey by Bureau of Labor Statistics (BLS) might find, rolling back the interim threshold levels would be impractical. Other issues were raised: the desire for regional differentials (for the South and rural areas), small business viability, and alleged inflationary and employment impacts.[94]

Murphy did not call for indexation of the thresholds, *per se*, but she stated: "...it is believed that the widely accepted Consumer Price Index may be utilized as a guide for establishing these interim rates." While the increases initially proposed had been deemed economically justified by DOL, Murphy opted for a more conservative approach. Thus, she stated, "in order to eliminate any inflationary impact, the interim rates hereinafter specified are set at a level slightly below the rates based on the CPI." Because she had adopted a conservative approach, Murphy decided that no further distinction should be made between the covered workforce at large and those brought under the act by the amendments of 1966 or by subsequent enactments.

The new rates, to become effective in April 1975, were listed as follows: for executive and administrative employees, not less that $155 per week; for professionals, not less than $170. Special sub-minima were set at $130 per week for executive and administrative employees and at $150 per week for professionals in Puerto Rico, the Virgin Islands, and American Samoa. For workers paid at a higher rate (and whose duties may not be monitored as carefully for exemption purposes), the so-called "upset test" was set at $250 — with a special rate of $200 for workers in Puerto Rico, the Virgin Islands, and American Samoa. The threshold applicable to the motion picture industry was set at $250 per week.

Murphy regarded the threshold rates as an interim expedient. "The present rates have become obsolete and interim rates are required to protect the interests of all concerned, including employees and employers, and to enable the Wage and Hour Division to administer the Act in a proper and equitable manner." But, she admonished: "The use of interim rates is not ... to be considered a precedent."[95]

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[93] *DLR*, Oct. 11, 1974, p. E1.

[94] *DLR*, Oct. 22, 1974, pp. A16-A17.

[95] *Federal Register*, Feb. 19, 1975, pp. 7091-7094. See also *DLR*, Feb. 19, 1975, p.A2.

The Salary Thresholds Fall into Disuse

A salary threshold as an indicator of *executive or administrative* status had been instituted under Andrews and, extended to *professionals*, expanded upon by his successors. Some may argue that the system was flawed: that the thresholds were too low or, conversely, too high. Some suggested that the thresholds be indexed in order to retain a fixed value; others urged that they be dispensed with altogether, classification for exemption resting upon the duties tests. Threshold elimination was never, formally, adopted as a policy goal: indeed, their retention and updating would be continuously espoused. But, in practice, they came to be dispensed with after 1975 — and remain so, subject to resolution of the March 31, 2003, proposal.[96]

The Carter Administration

Administrator Murphy had regarded the 1975 threshold levels as temporary, pending an economic study of the EAP exemption by BLS and its review by Wage/Hour. The study, prepared by Robert Turner, was published in 1977.[97]

In an April 7, 1978, statement, Wage and Hour Administrator Xavier M. Vela affirmed that "current salary tests ... no longer provide basic minimum safeguards and protection for the economic position of low paid executive, administrative, and professional employees ...." Vela called for a hearing on May 8, 1978, to review the thresholds and "to determine the amount" by which they "should be increased." Taking into account changes in the CPI and a recently legislated increase in the federal minimum wage, Vela urged that the thresholds be raised.[98]

The May 1978 hearings spanned three days with 22 witnesses and 189 written statements. Comments, DOL noted, fell into two categories: concern about the methodology for determining threshold levels; and, assertions with respect to impact. DOL reported that some employers, "particularly those with fixed or declining revenues, stated that they would have no option but to lay off some of their employees, if the levels were raised." Employee witnesses anticipated little impact since, in many industries, "average hourly wages were significantly higher than the salary tests being proposed."[99] Rudy Oswald of the AFL-CIO argued that the proposed tests "are not high enough to eliminate from the exemption employees whose status in management or the professions is questionable."[100]

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[96] *Federal Register*, Mar. 31, 2003, p. 15562.

[97] U.S. Department of Labor, Employment Standards Administration. *Executive, Administrative and Professional Employees* (Washington: U.S. Govt. Print. Off., May 1977), 112 pp. plus a statistical appendix of 182 pp.

[98] *Federal Register*, Apr. 7, 1978, p. 14688-14691. Under P.L. 95-151 (Nov. 1, 1977), the federal minimum wage had been increased, in steps, to $3.35 per hour after Jan. 1981.

[99] *Federal Register*, Jan. 13, 1981, pp. 3011-3013.

[100] *DLR*, June 13, 1978, p. A8.

Some may have found puzzling a split within the Carter Administration, pitting the Council on Wage and Price Stability (COWPS) against DOL. In a June 1978 submission to the Department, COWPS argued that "[n]o rationale for the exemptions" had been provided by Congress in 1938. Since "no rationale is given for the salary test," it stated, "no consistent reason for or method of changing it can be or is offered." COWPS faulted the methodology used by DOL, charging that it rested upon support documents that provide neither "cost data or evidence of a need for DOL action in this area."[101] COWPS asserted that the proposed increase would be inflationary and raise labor costs to the disadvantage of employers: an impact that "could signal an insincerity on the part of this government in its anti-inflationary stance." It then presented its view of appropriate economic policy, urged that some form of indexation be instituted with respect to the thresholds (perhaps pegging, but apparently not reliance upon the Consumer Price Index), and concluded:

> In summary the Council urges DOL to withdraw its proposal on the grounds that this DOL action is unnecessary to protect workers, that it is not required by Congress, and that it unduly contributes to inflationary pressures. Moreover DOL's action ... is in direct contravention of clearly stated administration policy to restrain increases in prices and wages.[102]

The only benefit to which the Council would point was the "higher pay received by impacted workers."[103] Both DOL and COWPS focused upon statistical analysis of the cost impact of a threshold change — and both (to a lesser extent, COWPS) tended to ignore fundamental policies inherent in the Section 13(a)(1) exemption.

For 2 ½ years, the proposed rule remained dormant. Then, on January 9, 1981, Donald Elisburg, Assistant Secretary for Employment Standards, signed a final rule increasing the thresholds on a two-step basis: the first to take effect on February 13, 1981; the second, on February 13, 1983.[104] But other events intervened.

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[101] Ibid., p. D1. Later, the Council would, explain (without documentation) what Congress "no doubt" had in mind in creating the Section 13(a)(1) exemption in 1938.

[102] *DLR*, June 13, 1978, p. D3. The Council's testimony, signed by COWPS Director Barry Bosworth, with others, is reprinted in full in the *DLR.*

[103] *DLR*, June 13, 1978, p. D2. For a brief discussion of the relationship between COWPS and the Secretary of Labor (economist Ray Marshall), see Melvyn Dubofsky, "Jimmy Carter and the End of the Politics of Productivity," in Gary M. Fink and Hugh Davis Graham, eds., *The Carter Presidency: Policy Choices in the Post-New Deal Era* (Lawrence: University Press of Kansas, 1998), pp.108-111.

[104] *Federal Register*, Jan. 13, 1981, pp. 3010-3017. Under the final rule, the salary schedule was to have been as follows: for executives, $225 on Feb. 13, 1981, and $250 on Feb. 13, 1983; for administrative personnel, $250 on Feb. 13, 1981, and $280 on Feb. 13, 1983; for professionals, $320 on Feb. 13, 1981, and $345 on Feb. 13, 1983. Parallel rates for Puerto Rico, the Virgin Islands and American Samoa would have been: executives, $180 and $200; administrative personnel, $225 and 250; and professionals, $260 and $285.

The Reagan and Bush Administrations

On February 12, 1981, there appeared in the *Federal Register* a brief notice, signed by Henry T. White, Jr., Deputy Administrator, Wage and Hour Division, stating that the effective date of the rule dealing with the EAP exemption would be "stayed indefinitely ... to allow the Department to review the rule fully before it takes effect." The comment period on the rule was declared "reopened."[105]

Reconsidering the Threshold Issue. The process remained open but did not reach fruition. On March 27, 1981, DOL sought comment as to whether the stay should be indefinite.[106] Of early responders, "the overwhelming majority ... mostly restaurant[s] and hotels," were reportedly opposed to any increase in EAP thresholds — some opponents quoting COWPS criticism of the initiative.[107] An announcement of April 30, 1982, stated that the rule had been "targeted for review by the President's Task Force on Regulatory Relief" — but a new rule did not appear.[108]

The process began anew with an advanced notice of proposed rulemaking published in the *Federal Register* of November 19, 1985. "The Department is interested in the views of the public with respect to all aspects of the regulations. Comments," it stated, "are invited concerning the current definitions of terms relating to the salary, duties, and responsibilities tests for such employees, as well as the interpretations of such definitions." The notice presented 20 specific areas of concern.[109] On January 17, 1986, the comment period, originally set to close on January 21, was extended to March 22, 1986.[110] No action on the broad issue would be taken through the next several years.

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[105] *Federal Register*, Feb. 12, 1981, p. 11972. See also *Federal Register*, Feb. 13, 1981, pp. 12206-12207; and *DLR*, Jan. 27, 1981, p. A10.

[106] *Federal Register*, Mar. 27, 1981, pp. 18998-18999. A standoff may have developed between labor and the Administration on the issue. Secretary of Labor Raymond Donovan stated that DOL was "concerned that modification of the wage provision could aggravate already intolerable levels of unemployment and inflation and exacerbate the business costs" and could have a "devastating" effect on small business. Conversely, the AFL-CIO's John Zalusky asserted that the Administration's "track record has not been good" with respect to labor standards protections and expressed fear that any further regulatory changes in this area would "brutalize" the FLSA exemptions. See *DLR*, Mar. 4, 1987, p. A8.

[107] *DLR*, Apr. 10, 1981, p. A5-A8. DLR noted: "Restaurants and restaurant employees comprise the largest single category among the 300 to 400 responses received so far by DOL." While many industry comments were "similar or identical letters," few responses were found to have been received from labor by Apr. 6 when *DLR* conducted its review.

[108] *Federal Register*, Apr. 30, 1982, p. 18709. See also *Federal Register*, Oct. 28, 1982, p. 48536; Apr. 25, 1983, p. 18169; Oct. 17, 1983, p. 47547; Apr. 19, 1984, p. 16043; and Oct. 22, 1984, p. 41825.

[109] *Federal Register*, Nov. 19, 1985, pp. 47696-47698. See also *DLR*, Apr. 30, 1985, p. A9.

[110] *Federal Register*, Jan. 17, 1986, p. 2525.

***Pay Docking* and Local Governmental Employees.** When developing regulations for Section 13(a)(1), the Secretary had imposed numerous requirements that, once in place, had to be complied with. Among these was the requirement that workers be *salaried* — which had come to mean:

> ...that an employee will be considered to be paid 'on a salary basis' if the employee regularly receives each pay period a predetermined amount constituting all or part of the employee's compensation and the predetermined amount is not subject to reduction because of variations in the quality or quantity of work performed. Subject to specified exceptions, the employee must receive the full salary for any week in which any work is performed without regard to the number of days or hours worked ....[111]

Thus, for short periods (the language would be interpreted to mean less than one day), any deduction from an employee's pay for hours not worked would vitiate his or her status as *salaried*.[112]

With the passage of time (and amendment of the FLSA), state and local governmental employees were brought under the act. At the same time, state and local statutes, in some cases, forbade payment of workers for time not actually worked (even for short periods). And, so, a conflict developed. If deduction were not made, the employer would be in violation of state and local law. On July 11, 1990, the Court of Appeals for the 9th Circuit ruled, in effect, that salaried employees, against whom a deduction was made for absences of less than a full day could no longer be regarded as exempt under Section 13(a)(1) and, therefore would be eligible for overtime pay for hours worked in excess of 40 per week.[113] State and local governments found themselves confronted with substantial back pay liability.

As the liability debt mounted, some Members of Congress called upon DOL for clarification.[114] "To date," chided Senator John Seymour (R-CA), "DOL has not issued final regulations; this has left the courts without clear guidance and, as evidence, they have rendered conflicting rulings."[115] In early September 1991, the Department issued a new regulation: to provide immediate relief and to effect a longer term solution.[116] However, in March 1992, the regulation (which had been

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[111] See 19 CFR 541.118, as explained in *Federal Register*, Aug. 19, 1992, p. 37666.

[112] This is not a matter of payment for work not performed. Rather, as an exempt executive, administrative or professional employee, the worker is expected to complete his or her duties: sometime working extra hours *without extra pay* and on other occasions being absent for less than one day *without a deduction* from his or her salary.

[113] See, for example, *Abshire* v. *County of Kern*, 908 F. 2d 483 (9th Cir. 1990).

[114] In testimony before the House Subcommittee on Labor Standards, July 1, 1993, William J. Kilberg, Solicitor of Labor during the Ford Administration, suggested that the "actual impact, in fact, may greatly exceed" a $20 billion figure estimated by the Employment Policy Foundation. See *DLR*, July 2, 1993, p. D3.

[115] *Congressional Record*, Aug. 2, 1991, pp. S12253-S12254.

[116] *Federal Register*, Sept. 6, 1991, pp. 45824-45826 and 45828-45830. See *DLR*, Sept. 9, (continued...)

implemented on an emergency basis) was invalidated by the U.S. District Court for Eastern California.[117] Again, public sector employers voiced concern, as did some Members of Congress.[118] On August 14, 1992, DOL issued a new final rule. It provided that an "employee of a public agency," otherwise qualified for EAP exempt status, "shall not be disqualified from exemption ... on the basis that such employee is paid according to a pay system established by statute, ordinance, or regulation" that, in effect, mandates docking of pay for short-term absences.[119]

The Clinton Administration

For the Clinton Administration, updating the earnings thresholds remained a part of the regulatory agenda. A target date for rulemaking was initially set for September 1993.[120] No action was taken, however. Although the issue remained on the agenda, no new timetable was immediately set.[121]

In a *Federal Register* notice for November 14, 1994, DOL recalled that the thresholds had not been updated since 1975 when they were set "on an interim basis." It noted further that the "salary level tests are outdated and offer little practical guidance in the application of the exemption." Numerous comments and petitions, it stated, had "been received in recent years from industry groups regarding the duties and responsibilities tests in the regulations" and "recent court rulings have caused confusion on what constitutes compliance with the regulation's 'salary basis' criteria in both the public and private sectors." The Department continued:

> Some 23 million employees are within the scope of these regulations. Legal developments in court cases are causing progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices .... Clear and comprehensive regulations will once again provide for central, uniform control over application of these regulations and will eliminate this apprehension.

Thus, DOL concluded "that a comprehensive review" was needed. It stated that it would re-open the comment period — continuing from the Reagan era initiatives of 1985. A proposed rule, it suggested, might be expected by April 1995.[122]

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[116] (...continued)
1991, pp. A11-A12.

[117] *Alex* v. *State of California*, 1992 U.S. Dist. LEXIS 6795; 30 Wage & Hour Cas. (BNA) 1353. See also *DLR*, Mar. 30, 1992, pp. A14-A15.

[118] *DLR*, July 17, 1992, pp. A13-A15, and Aug. 3, 1992, A5/A6. See also *DLR*, Aug. 4, 1993, pp. A4-A5.

[119] *Federal Register*, Aug. 19, 1992, pp. 37666-37678.

[120] *Federal Register*, Apr. 26, 1993, p. 24569.

[121] *Federal Register*, Oct. 25, 1993, p. 56587; and Apr. 25, 1994, p. 20610.

[122] *Federal Register*, Nov. 14, 1994, pp. 57129-57130.

In May 1995, the issue was again deferred — as it would be through the remainder of the Clinton Administration.[123] On April 24, 2000, the now routine notice in the *Federal Register* projected the target date for notice of proposed rulemaking as April 2001 — after the Administration would have left office — and that date, in turn, was deferred until September 2001.[124]

[123] See *Federal Register*, May 8, 1995, pp. 23544-23545; Nov. 28, 1995, pp. 59613-59614; May 13, 1996, pp. 23239-23240; Nov. 29, 1996, pp. 62087-62088; Apr. 25, 1997, p. 21941; Oct. 29, 1997, pp. 57093-57094; Apr. 27, 1998, pp. 22232-22233; Nov. 9, 1998, pp. 61288-61289; Apr. 26, 1999, pp. 21500-21501; and Nov. 22, 1999, pp. 63979-63980.

[124] *Federal Register*, Apr. 24, 2000, pp. 23029-23030; and Nov. 30, 2000, pp. 73410-73411.

SECTION II

A New Initiative from the Bush Administration (2003-2004)

Entering office early in 2001, the Bush Administration was confronted with the on-going issue of 29 CFR 541: the EAP regulation. It, too, noted that the regulation was outdated and pledged to engage in "outreach and consultation."[125] The spring of 2002 saw yet one more deferral — with action targeted for early 2003.[126]

A New Rule Proposed

On March 31, 2003, Wage and Hour Administrator Tammy McCutchen posted in the *Federal Register* a "proposed rule with request for comments."[127] Administrator McCutchen proposed an extensive reworking of the EAP regulation. The proposal would somewhat condense the existing regulation and, further, would:

- Raise the salary test threshold for all EAP workers to $425 per week (annualized at $22,100 per year). Anyone earning less than the new threshold would automatically be eligible for overtime pay on the basis of low earnings. Those satisfying the salary test (earning more than $22,100 annually) would still have to meet a *duties* test.[128]
- Create a new *highly compensated* threshold at $65,000 per year. Anyone earning in excess of $65,000 a year and performing any function associated with EAP status could be exempt.[129]
- Redefine portions of the *duties* test for EAP exemption. Such definitions may include what the employee actually does, his or her relationship to the employer or the firm, the relative importance of the EAP duties as opposed to non-EAP work, matters of independence of judgment and initiative, the education required of a professional, and related matters.

As had been the case during earlier Administrations, a review of 29 CFR 541 sparked intense interest. By the time the comment period closed on June 30, over 75,000 comments had been received by the Department and an intense debate had been

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[125] *Federal Register*, May 14, 2001, pp. 25687-25688.

[126] *Federal Register*, May 13, 2002, pp. 33314-33315.

[127] *Federal Register*, Mar. 31, 2003, pp. 15560-15597.

[128] There are workers currently earning between the existing EAP thresholds ($8,060 for executives and administrators; $8,840 for professionals) and the proposed threshold of $22,100 who, because they do not perform the *duties* of an executive, administrator or professional worker, are covered by the minimum wage and overtime pay requirements of the FLSA. The proposed regulation would not extend any new protection to these workers.

[129] How this would work out, in practice, may depend upon how one defines the *duties* of an otherwise exempt EAP employee.

triggered.[130] In the early fall of 2003, DOL continued to evaluate testimony and to review policy options.

Congressional Reaction

The complications and controversies involving the Section 13(a)(1) exemption, had deep roots. Litigation concerning aspects of the problem had drawn the attention of workers and employers — and of Members of Congress. The problems were not new; that action was taken to rectify them may have been somewhat unexpected.

An Early Alert? During the second Clinton Administration, the General Accounting Office began a review of the Section 13(a)(1) exemptions. It conferred widely and, thus, alerted each side of the debate to potential regulatory issues.

In September 1999, GAO published a report, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*. The report focused upon five issues.

> (1) How many employees are covered by the white-collar exemptions and how have the demographic characteristics of these employees changed in recent years? (2) How have the statutory and regulatory requirements changed since the enactment of the FLSA? (3) What are the major concerns of employers regarding the white-collar exemptions? (4) What are the major concerns of employees regarding the white-collar exemptions? (5) What are possible solutions to the issues of concern raised by employers and employees.[131]

GAO found (in 1998) between 19 and 26 million full-time workers classified as executive, administrative, or professional employees and, thus, exempt from FLSA minimum wage and overtime pay protections. A gradual shift from manufacturing to a service economy since 1938, GAO suggested, had resulted in an increase in the number of exempt workers. About 42% of exempt workers were women: exempt workers "were more than twice as likely as nonexempt workers to work overtime."[132]

Neither side appears to have been wholly satisfied with the EAP exemption as structured. Employers, GAO found, were concerned about potential liability where workers were mis-classified. They also argued that the existing regulation was "confusing" and led to "inconsistent results in classifications of similarly situated employees."[133] Workers were concerned "about preserving work-hour limitations"

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[130] *Congressional Record*, Oct. 2, 2003, p. H9155.

[131] U.S.General Accounting Office, *Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place*, GAO/HEHS-99-164, p. 2. (Hereafter cited as GAO Report 99-164, *White Collar Exemptions*.) The report was amplified by testimony of GAO's Cynthia M. Fagnoni before the House Subcommittee on Workforce Protections, May 3, 2000, *Fair Labor Standards Act: White-Collar Exemptions Need Adjustment for Today's Work Place*, GAO/T-HEHS-00-105. GAO's review is lengthy, detailed, and replete with recommendations for possible revision of the Section 13(a)(1) exemption.

[132] GAO Report 99-164, *White Collar Exemptions*, p. 2.

[133] Ibid., p. 3. GAO found aspects of the duties test that "involved difficult and sometimes (continued...)

and believed that the regulations "as applied ... were not sufficient" and did not "adequately restrict" classification of workers as exempt. The salary test, they stated, had been "severely eroded" by inflation and the duties test had been "oversimplified, leading to inadequate protection of low-income supervisory employees."[134]

The Appropriations Process. On July 10, 2003, during House floor consideration of the Labor, Health and Human Services, and Education, and Related Agencies Appropriations bill (H.R. 2660), an effort was made by Representative David Obey (D-WI) to block implementation of the proposed EAP rule. The Obey amendment was defeated in the House by a vote of 210 ayes to 213 nays.[135]

Through early September, similar action was debated in the Senate. On September 10, 2003, by a vote of 54 yeas to 45 nays, the Senate voted to approve an amendment to H.R. 2660 offered by Senator Tom Harkin (D-IA).[136] It read:

> None of the funds provided under this Act shall be used to promulgate or implement any regulation that exempts from the requirements of Section 7 of the Fair Labor Standards Act of 1938 ... any employee who is not otherwise exempted pursuant to regulations under Section 13 of such Act (29 U.S.C. 213) that were in effect as of September 3, 2003.[137]

Thus, under the Harkin amendment, DOL would be able to proceed with its initiative to increase the earnings thresholds, since that would narrow the exemption rather than expand it, but would be restricted from making changes in the definitions of *duties* and of the concepts of executive, administrative, or professional which some perceived as potentially expanding the general exemption and certainly removing overtime pay coverage from individual workers currently protected.[138]

On October 2, 2003, the House took up appointment of conferees on H.R. 2660. At that juncture, Representative Obey offered a motion to instruct the House

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[133] (...continued)
subjective determinations, and that it was a source of contention in DOL audits."

[134] GAO Report 99-164, *White Collar Exemptions*, pp. 2-3. GAO stated of the executive exemption: "... it is, in fact, difficult to challenge exempt classification if employees supervise two or more full-time employees and spend some time — even if minimal — on management tasks." Further, see Daniel V. Yager, Senior Vice President & General Counsel, the Labor Policy Association, to Administrator McCutchen, June 30, 2003, 64 p.; and Ross Eisenbrey and Jared Bernstein, *Eliminating the Right to Overtime Pay*, Briefing Paper, Economic Policy Institute, undated but early summer 2003, 17 p.

[135] *Congressional Record*, July 10, 2003, pp. H6568-H6571, and H6579-H6580.

[136] *Congressional Record*, Sept. 10, 2003, p. S11269. See also *DLR*, July 25, 2003, p. A4, Sept. 4, 2003, p. A6, Sept 8, 2003, pp. A4-A5, and Sept. 11, 2003, pp. AA1-AA2.

[137] *Congressional Record*, Sept. 5, 2003, p. S11136.

[138] Later, some questioned whether the Harkin amendment would apply only to current employees or to prospective employees as well? Representative Obey stated: "The Senate provision would provide the same protections to newly hired workers as to current workers. It does not grandfather in current workers but ensures the same overtime pay protections to all workers in a job classification." *Congressional Record*, Oct. 2, 2003, p. H9155.

conferees "to insist on Section 106 of the Senate amendment regarding overtime compensation under the Fair Labor Standards Act" (i.e., the Harkin amendment). Following debate, the Obey motion was approved by 221 ayes to 203 nays: the House conferees were instructed to support the Harkin amendment in conference.[139]

Thus, both the Senate and the House were on record with respect to the Harkin amendment and the proposed revision of the Section 13(a)(1) regulation. The Senate had spoken directly; the House, through instruction given to its conferees. In the background was the threat of a Presidential veto if the Harkin amendment (and/or certain other contentious provisions) remained part of the bill.[140]

As the first session of the 108th Congress moved to a close, several appropriations bills (among them, the DOL funding measure) remained to be passed. Ultimately, the House developed an omnibus appropriations bill (H.R. 2673: the FY2004 Consolidated Appropriations bill). H.R. 2660 remained in conference, having been by-passed. The conference report on H.R. 2673 (H.Rept. 108-401), filed November 25, 2003, provided:

> The conference agreement deletes without prejudice language proposed by the Senate that none of the funds appropriated in this Act shall be used to promulgate or implement any regulation that exempts employees from the Fair Labor Standards Act of 1938.[141]

If approved as reported, the conference report would leave the Department free to move forward with the proposed rule restructuring the Section 13(a)(1) exemption.

House Consideration of the Conference Report. The report was called up for debate in the House on December 8, 2003. Representative Louise Slaughter (D-NY) opened discussion of the issue by pointing out that, the instructions given to the conferees notwithstanding, the Harkin amendment has "mysteriously ... disappeared."[142] Representative Rosa DeLauro (D-CT) picked up on the same theme. "... [I]n clear defiance of the will of both chambers of Congress ...," she stated, this bill "allows the Department of Labor to gut" the FLSA, "effectively repealing the 40-hour workweek" while it "opens the door to mandatory overtime...."[143] And, Representative Obey affirmed: "Both Houses of the Congress voted to provide overtime protections for workers because the administration is trying to take those protections away...." Mr. Obey added: "This bill, without one minute of comment

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[139] *Congressional Record*, Oct. 2, 2003, pp. H9155-H9166.

[140] See Nick Anderson, "Spending Bill In Congress Might Draw Bush Veto," *Los Angeles Times*, Nov. 21, 2003, p. 20; "The Incredible Bloated Money Bill," *The New York Times*, Nov. 21, 2003, p. 30; and Murray Light, "Bush Used Veto Power To Pass Pork-Filled Spending Bill," *The Buffalo News*, Feb. 1, 2004, p. H5.

[141] U.S. Congress, Conference Committees, *Making Appropriations ... for the Fiscal Year Ending September 30, 2004, and for Other Purposes*, conference report to accompany H.R. 2673, 108th Cong., 1st sess., H.Rept. 108-401 (Washington, GPO, 2003), p. 734.

[142] *Congressional Record*, Dec. 8, 2003, p. H12754.

[143] Ibid., p. H12813.

in the conference committee, arbitrarily at the instruction of the Republican leadership rips out those protections."[144]

The omnibus bill was complex with overtime pay but one of its components. Representative John Boehner (R-OH), chairman of the Committee on Education and the Workforce, stressed the benefits the bill would provide for education.[145] House Majority Leader Tom DeLay (R-TX) lauded the fiscal aspects of H.R. 2673. "This omnibus represents the values of discipline, innovation, and conviction we all treasure," and declared the bill full of "... sound, disciplined policies, funded at responsible, reasonable levels."[146] And Representative C. W. Bill Young (R-FL), House Appropriations Committee Chairman, stressed fiscal responsibility, observing: "... is we are within the budget. There are a lot of good increases.... But we offset those increases with rescissions, so that we were able to stay within the budget."[147] From the context of the debate on the conference report, other issues appear to have been of greater concern to the Majority than was overtime pay regulation.

The House vote on the conference report was 242 yeas to 176 nays.[148]

Senate Consideration of the Conference Report. It remained for the Senate to consider the conference report on the omnibus appropriations bill. That action was postponed until late January 2004 — the start of the second session.

A First Cloture Attempt. On January 20, when the Senate reconvened, the Majority Leader, Senator Bill Frist (R-TN), announced that a cloture vote on consideration of the Consolidated Appropriations Act of 2004 would occur at 3 o'clock. He warned Members that failure to approve the measure could result in "a continuing resolution"and noted dire consequences such action could product.[149]

Minority Leader Tom Daschle (D-SD) responded that although the proposed legislation "was once a good bill," the Administration had "intervened at the eleventh hour and demanded changes, laid down an ultimatum, and even forced the conference to take positions in direct conflict with earlier positions taken on rollcall votes in both the House and the Senate." Certain provisions, he stated, now "made the bill unsupportable to many Senators" and urged the Senate to "take the time to fix the bill's problems because they affect millions of American families."[150]

The debate that followed was divided along partisan lines with Democratic Senators taking the lead on the overtime question. Two issues seemed paramount. First, there was substantive concern that the regulation proposed by DOL would

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[144] Ibid., p. H12826.

[145] Ibid., p. H12827.

[146] *Congressional Record*, Dec. 8, 2002, pp. H12828-H12829.

[147] *Congressional Record*, Dec. 8, 2003, p. H12830.

[148] Ibid., p. 12845.

[149] *Congressional Record*, Jan. 20, 2004, p. S1-S2.

[150] Ibid., p. S3.

adversely affect workers. Senator Joseph Biden (D-DE) stated that the regulation "... would make it easier — would actually create an incentive — for employers to classify workers who have little advanced education and little or no authority, to classify those workers as white collar workers" with the result that "... millions of workers could lose the right to overtime pay."[151] A second concern was with process. Senator Jack Reed (D-RI) protested that the bill "contains elements that contradict the express votes of this body and the other body, bipartisan votes...."[152] Senator Tim Johnson (D-SD) asserted that "[t]here "was no conference in a meaningful sense."[153]

When there was "no request for time" from the Majority, Senator Daschle pleaded for "... a few days to work with the administration and the House to fix the most egregious provisions in this bill, provisions that have already been rejected by both Houses of Congress and bipartisan majorities."[154] In reply, Senator Frist recalled the costs of delay: "shortchanging our diligent efforts ... in the fight against terrorism," loss of funding for "food security," a negative impact upon "millions of veterans," adverse effect for "people who suffer from HIV/AIDS," "shortchanging the needs of schools."[155] A vote on cloture failed: 48 yeas to 45 nays.[156]

Cloture and Approval of the Conference Report. On January 22, 2004, the Senate again considered cloture. Anticipating that cloture would carry, Senator Daschle viewed what he stated was "the hijacking of the process that went on during the deliberations on the Omnibus appropriations bill." The Senator opined:

> ... I know why we will probably get cloture today. Nobody here wants to be accused of shutting the Government down. Everybody understands the commitment that this legislation reflects in its support for veterans and for so many other things that we care deeply about. Senators are put in a very difficult position.

Turning again to the issue of process, Senator Daschle affirmed: "... I think it is an erosion of democracy in our Republic that is deplorable...."[157] Throughout, both in the House and Senate, debate on the overtime pay issue was laced with expressions of concern about the legislative process.

Senator Jon Corzine (D-NJ) sought unanimous consent to proceed with a concurrent resolution that would have restored the Harkin amendment to the omnibus

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[151] Ibid., p. S14.

[152] Ibid., p. S6.

[153] Ibid., p. S7.

[154] Ibid., p. S19.

[155] Ibid., p. S20.

[156] Ibid., p. S20. In an article in *The Washington Post*, Jan. 21, 2004, p. A4, reporter Helen Dewar explained: "Frist repeated earlier warnings that Congress was likely to keep funding programs at current levels if the bill failed — meaning loss of about $6 billion in proposed spending increases and nearly 8,000 home-state projects sought by senators of both parties."

[157] *Congressional Record*, Jan. 22, 2004, pp. S128-S129.

measure — i.e., barring the use of funds to be appropriated to DOL for implementation of the proposed overtime regulation. But, objection was heard.[158]

Moving from the overtime pay issue, Senator Kay Bailey Hutchison (R-TX) reminded the Members: "If we do not pass this bill — the alternative is a continuing resolution — it means that last year's priorities would prevail, and there would be some major losses in funding for the next nine months of this year." Like Senator Frist, Senator Hutchison reviewed the range of programs that could be negatively impacted were there resort to a continuing resolution. And, she concluded:

> We will pass this bill and give our children a chance, and our country a chance, to have the increases we need for our homeland security, and the education of our children and the research into cancer to find the cause and the cure. We must pass the omnibus bill to go forward in all of these aspects.[159]

From the Minority, however, it was suggested that the rationale for deleting language approved by both Houses had not been explained. "One would think if they were going to take these out," stated Senator Edward Kennedy (D-MA), "at least they would ... come down here and explain to the American people why." He continued: "Let's hear them defend the Labor Department's regulation...."[160] Senator Hutchison responded, *inter alia*: "There has been a full vetting of the differences on this bill." She again cited the programs that would suffer were the omnibus bill not approved.[161]

Just prior to a second vote on cloture, Senator Frist again reviewed the programs that would be lost were the conference report not approved. He did not, then, address the substance of the overtime pay regulation or of other provisions in dispute.

Cloture was agreed to by a vote of 61 yeas to 32 nays (7 not voting). Thereafter, the Senate approved the conference report by a vote of 65 yeas to 28 nays (7 not voting).[162] The bill was signed by President on January 23, 2004 (P.L. 108-199).

Alternative Attempts at Accommodation

Through 2003 and into 2004, several other initiatives with respect to overtime pay regulation (Section 13(a)(1)) had been under development.

Freestanding Legislation. On July 8, 2003, Representative Peter King (R-NY) introduced H.R. 2665, legislation to restrict the Department from exempting workers from overtime pay protection through the proposed rule. A companion bill, S. 1485, was introduced by Senator Kennedy on July 29, 2003. The bills were referred respectively to the House Committee on Education and the Workforce and

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[158] Ibid., p. S130.

[159] Ibid., pp. S130-S132.

[160] Ibid., p. S134.

[161] Ibid., p. S135.

[162] Ibid., pp. S155-S156.

to the Senate Committee on Health, Education, Labor, and Pensions. No action has been taken on either bill.

A Hearing in the Senate: Round One. On July 31, 2003, a hearing on the proposed overtime rule was conducted by the Labor, Health and Human Services, and Education Subcommittee on the Senate Appropriations Committee.[163] Chaired by Senator Arlen Specter (R-PA), the Subcommittee searched for common ground for agreement between DOL and those critical of the proposed regulation.[164]

Much of the testimony focused upon what the proposed Section 13(a)(1) rule would do. Ross Eisenbrey, speaking for the labor-oriented Economic Policy Institute, argued that DOL had seriously underestimated the likely impact of the rule. He suggested that the Department had not been entirely open with respect to the assumptions and methodology upon which its estimates were based. So the Institute, he explained, conducted its own analysis and came to conclusions somewhat different from those of DOL. Eisenbrey was concerned about definitions embedded in the rule — which could, he suggested, result in a significant body of workers being moved out from under the wage/hour protection of the act.[165] Wage/Hour Administrator Tammy McCutchen conceded that some workers would be reclassified to exempt status, but she argued that the impact would be slight. Quoted in the *Daily Labor Report*, she affirmed: "We have no intention of expanding the exemptions."[166]

The hearing established a context for debate; it did not appear to achieve common ground.[167]

The Study Commission Proposal. During the summer, critics of the proposed rule continued to voice concern — with respect to the particular workers who could be adversely impacted; and, more broadly, with respect to the implications of the regulatory change for the general structure of federal wage/hour regulation.

On September 9, 2003, in an effort to avoid any "disruption which would be occasioned ... by the [proposed DOL] regulations going into effect" and, hopefully, to effect a reasonable accommodation, Senator Specter introduced S. 1611. The bill proposed a commission of eleven members with representatives from business, the public sector, and organized labor. The commission would seem to bring clarity with respect to existing overtime pay regulations and the possible impact of the proposed rule.

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[163] The Subcommittee also considered revision of the Labor-Management Reporting and Disclosure Act and new technologies for combating the hazard of coal dust for miners.

[164] Press Release, Labor-HHS Subcommittee Hearings for July 31, U.S. Senate Committee on Appropriations, July 25, 2003.

[165] Testimony of Ross Eisenbrey, July 31, 2003, Senate Appropriations Committee website, visited Jan. 29, 2004.

[166] *DLR*, Aug. 1, 2003, p. AA1.

[167] U.S. Congress. Senate Committee on Appropriations, Subcommittee on Departments of Labor, Health and Human Services, and Education, and Related Agencies, *Proposed Rule on Overtime Pay*, 108th Cong., 1st sess., July 31, 2003 (Washington: GPO, 2004).

Under the proposed legislation, the commission would "conduct of a thorough study of, and develop recommendations on, issues relating to the modernization of the overtime provisions" of the FLSA. Among specific mandates, the commission would: (a) review the categories of exemptions, the numbers of workers involved, and the impacts of changes in overtime pay regulation (i.e., establish a more solid statistical base); (b) examine the regulation currently under consideration to determine whether it "is sufficiently clear to be easily understood by employers and workers;" (c) assess "the paperwork burden" associated with the regulation as proposed and the impact for enforcement and compliance by DOL; and (d) "study other issues determined appropriate by the Commission."

While the commission would proceed with its work, the pending Section 13(a)(1) regulation would be held in abeyance. Under S. 1611, no modification to the overtime pay requirements of the FLSA would be made until at least 60 days after the commission's report is submitted. Creation of a commission would assure, in effect, that the Secretary would not be able to proceed until Congress had an opportunity to evaluate any proposed regulatory change with respect to overtime pay. The bill was referred to the Committee on Health, Education, Labor, and Pensions.[168]

A Hearing in the Senate: Round Two. The proposed revision of the Section 13(a)(1) regulation produced a divided response: labor/workers, generally, in opposition to the proposal; the employer community generally in support of the change. On January 20, 2004, as the Senate returned from recess and took up consideration of the conference report on H.R. 2673 (discussed above), Senator Specter convened a hearing on the proposed rule before the Appropriations Subcommittee on Labor, Health and Human Services, and Education.

Secretary of Labor Elaine Chao, the lead witness, opened the hearing by reminding the Congress that, when adopting the FLSA, it has chosen "not to provide definitions for many of the terms used" but, rather, had left to the Secretary "the authority and responsibility to 'define and delimit' these terms 'from time to time by regulations.'" The "primary goal" of the proposed rule, she stated, "is to have better rules in place that will benefit more workers" — especially "low-wage workers." Its intent, she affirmed, is "to restore overtime protections, especially to low-wage, vulnerable workers who have little bargaining power with employers." She pointed to the need to clarify existing law: to free the parties from "costly class action lawsuits" and allow employers to "use litigation costs to grow and expand their businesses and create new jobs." Ms. Chao added: "Clear, concise and updated rules will better protect workers and strengthen the Department's ability to enforce the law." The Department, she stated, "... has 'zero tolerance' for employers who try to play games with the overtime laws."[169]

There seemed little disagreement among the witnesses that the existing regulations (29 CFR 541) were ambiguous and that the salary thresholds for exemption needed to be updated. There was significant disagreement, however,

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[168] See *Congressional Record*, Sept. 11, 2003, pp. S11419-S11421, and S. 1611.

[169] Testimony of Labor Secretary Elaine Chao, Jan. 20, 2004, Senate Appropriations Committee website, visited Jan. 29, 2004.

about both the intent and the likely impact of the proposed rule. AFL-CIO Secretary-Treasurer Richard Trumka charged that the proposed rule "would redefine 8 million workers as ineligible for federal overtime protection" and "thousands more workers every year would be stripped of their overtime rights." The proposal, he asserted, "would effectively gut the 40-hour workweek through administrative regulation." The issue before Congress, Trumka argued, "is ... whether the Bush Administration should be allowed to strip workers of their overtime rights." The proposed rule, he concluded, was "designed for the benefit of employers, not workers."[170]

Economist Jared Bernstein of the Economic Policy Institute questioned the statistical foundation for DOL assertions. The difference between the Department's impact assessments and those of the Institute "is large enough to totally change the way one views" the proposed regulation. And he argued that the proposed rule would be deleterious to the interests of workers.[171] Management attorney David Fortney, a former Deputy (and Acting) Solicitor of Labor in the first Bush Administration, praised Secretary Chao for undertaking "the long neglected task" of updating the Section 13(a)(1) regulations. While he declared the rulemaking process to be "fair and orderly," Fortney pointed out that those who might disagree with the outcome could always sue. The final regulations, he concluded, "will undoubtedly be the subject of challenges in the courts."[172]

To avoid unnecessary litigation, however, was an issue of Subcommittee concern. If one acknowledges an absence of clarity under the existing regulations, would the proposed rule be an improvement? The *Daily Labor Report* observed:

> Senator Arlen Specter (R-Pa.), who chairs the Labor-HHS subcommittee, said several times at the hearing that the proposed rule does not clarify definitions of "professional" and "administrative" employees who would be exempt from overtime protections. For example, he said, the proposed rule says a professional should be performing work "of substantial importance.... How do you define substantial importance?"

Secretary Chao acknowledged that both the current regulation and the proposed rule were "very complicated."[173]

A Continuing Focus of Dispute

Neither passage of the omnibus legislation nor the hearings by the Senate Appropriations Subcommittee resolved the dispute over the Administration's Section 13(a)(1) proposal. Consideration of the issue would continue in a variety of venues.

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[170] Testimony of Richard Trumka, Jan. 20, 2004, Senate Appropriations Subcommittee.

[171] Testimony of Jared Bernstein, Jan. 20, 2004, Senate Appropriations Subcommittee.

[172] Testimony of David Fortney, Jan. 20, 2004, Senate Appropriations Subcommittee.

[173] *DLR*, Jan. 21, 2004, p. AA2.

Exempting Veterans? Central to the new regulation proposed by DOL is the issue of definition. For example, how would a *bona fide* "professional" be defined for Section 13(a)(1) purposes? Under current regulation, a professional is not simply a highly skilled worker. Rather, DOL has anchored the concept to an academic credential: normally (through not in all cases), a college degree plus appropriate professional training. The proposed rule would alter that — and, in the process, the exemption of *professionals* from FLSA wage/hour protection could be significantly expanded, some argue. Compare the language of the current and proposed regulations with respect to the requirements for professional status.[174]

A Professional Under the Existing Regulation (29 CFR 541.3(d) and (e)(2))	A Professional Under the Proposed Regulation (29 CFR 541.301(a) and (d))
... knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction *and study as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes....* [Italics added.]	The term "advanced knowledge" means knowledge that is customarily acquired through a prolonged course of specialized instruction but which also may be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience.
A college education would perhaps give an executive or administrator a more cultured and polished approach but the necessary know-how for doing the executive job would depend upon the person's own inherent talent. *The professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study*. [Italics added.]	The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that *the exemption is also available to employees in such professions who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience, training* ***in the armed forces****, attending a technical school, attending a community college or other intellectual instruction*. [Italics and bolding added.]

The proposed rule, some argue, is more flexible and/or ambiguous than the language that it would replace: moving from a documentable professional degree to a series of alternative sources and levels of knowledge — which, in turn, would presumably need to be defined and measured. What meaning is conveyed to an employer or employee in Seattle or El Paso by the terms *substantially the same knowledge level* or *the degreed employees* or *other intellectual instruction*. How much *work experience* (with other instruction) would be required for equivalency with the current concept of *bona fide* professional?

The phrase "training in the armed forces" sparked a vigorous immediate reaction. During a hearing sponsored by the Senate Democratic Policy Committee in early November 2003, John Garrity, a civilian electronics technician from

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[174] This report moves, sequentially, through consideration of the proposed rule and, ultimately, the final rule. The provisions will change in some measure prior to promulgation of the final rule on Apr. 23, 2004.

Philadelphia, expressed concern that "... the new rules will eliminate overtime pay for military veterans who gained their technical training in the military." Garrity argued that veterans, recipients of military training (however measured) who return to work in the civilian labor force, could be deemed to be *professional* for Section 13(a)(1) purposes and exempted from FLSA wage/hour protection.[175]

Concern about the veterans status issue built slowly, gradually being picked up by the media. During a hearing on January 20, 2004, Senator Patty Murray (D-WA) asked Secretary Chao about DOL's "attempts to lower the educational requirements" for the professional exemption and observed that "... there is no guidance on how to make the determination on whether or not a veteran's training in the military is equivalent to a four-year degree." Secretary Chao, perhaps misunderstanding the question, replied that "the military is not covered by these regulations."[176]

Ms. Chao's response did not quiet concerns. Trumka of the AFL-CIO, a later witness, branded as "particularly reprehensible" the action of the Administration (the proposed rule) in "stripping overtime rights from veterans who have received technical training in the military." Trumka stated that if "an employer determines" training received in the military is equivalent to professional training, "that employer will now be allowed to deny those veterans overtime eligibility and refuse to pay them anything for overtime work."[177] Later that afternoon, Senator Kennedy asserted that "our veterans and our men and women serving so bravely now in Iraq and across the world ... return to civilian life only to find that the training they earned in the military is cruelly used to deny them their right to overtime pay." He added:

> Under current regulations, workers can be denied overtime protection if they fall within the category of what they call professional employees, workers with a 4-year degree in a professional field. It is changed this year under the Bush administration. The plan would do away with the standard and allow equivalent training in the Armed Forces. You go and serve in Iraq and get the training to serve in Iraq, and come back here and you are ineligible, under these regulations, for overtime pay.[178]

Discussion continued over several days with Senator Kennedy (and others) repeatedly raising the issue of training received in the armed forces and exemption from FLSA wage/hour protections. Some major companies, the Senator suggested, find that "most skilled technical workers received a significant portion of their knowledge and training outside the university classroom, typically in a branch of the military

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[175] Hearing by the Senate Democratic Policy Committee, Washington, D.C., Nov. 3, 2003, text in Federal Document Clearing House, Inc.

[176] Transcript of hearing, Jan. 20, 2004, Subcommittee on Labor, Health and Human Services, and Education, Senate Appropriations Committee, LEXIS-NEXIS document, pp. 8-9. See also *DLR*, Jan. 21, 2004, p. AA.

[177] Testimony of Richard Trumka, Jan. 20, 2004, Senate Labor, Health and Human Services, and Education Subcommittee.

[178] *Congressional Record*, Jan. 20, 2004, p. S4. See also comments of Sen. Jack Reed (D-RI), *Congressional Record*, Jan. 21, 2004, p. S72.

service." So, Senator Kennedy stated, the Administration added the military training provision "banning them from receiving overtime."[179]

A Dialogue with the Department of Labor. A Departmental response was not immediate, but a DOL spokesperson later stated that "no veterans will be affected unless they are professionals."[180] To critics, however, the affirmation may have begged the question since at issue was how the concept of *professional* would be defined and how it would be applied to veterans once they were discharged and reentered the civilian labor force.

Later, under date of January 27, 2004, Secretary Chao addressed a letter to Speaker Dennis Hastert (R-IL) in which she affirmed that the "'white collar exemptions' do not apply to the military. They cover only the civilian workforce." She added that "nothing in the current or proposed regulation makes any mention of veteran status" and the proposed rule "will not strip any veteran of overtime eligibility." Ms. Chao argued that "military personnel and veterans are not affected by these proposed rules by virtue of their military duties or training." And she charged that critics of the proposed rule were trying "to confuse and frighten workers."[181] Similarly, Assistant Secretary Victoria Lipnic reportedly asserted: "This is a new low in the disinformation campaign against the Department of Labor's proposal to strengthen overtime pay protection for workers."[182]

"No one is claiming that the rule affects the military force," countered Senator Kennedy. "The issue is [that] the veterans who leave the military to work in the civilian workforce would lose overtime protections because they have had training in the Armed Forces." The provision expanding the definition of learned professional to persons who have received "training in the armed forces," the Senator stated, "is new language. It is not in the current regulations. The only purpose is to take away overtime for veterans." The proposed regulation is not concerned about "people who are in the military" but, rather: "It is after they get out that they are going to be subject to this."[183]

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[179] *Congressional Record*, Jan. 23, 2004, p. S212. Sen. Hillary Clinton (D-NY), *Congressional Record*, Jan. 22, 2004, pp. S136-S137, would argue that the Administration was "breaking faith with our veterans."

[180] Helen Dewar, "Senate Passes Funding and Democrats Relent," *The Washington Post*, Jan. 23, 2004, p. A5.

[181] See *Congressional Record*, Feb. 2, 2004, p. S351-S352, for the text of the Secretary's letter to Speaker Hastert. Rep. Sam Johnson (R-TX) also had Ms. Chao's letter printed in the *Congressional Record*, Feb. 4, 2004, p. H368, taking the occasion "... to denounce an effort by Big Labor to scare our Nation's veterans and service men and women into thinking the Department of Labor is out to take away their overtime." He added: "It is a sad day indeed when the men and women of our forces are exploited for political gain."

[182] Lipnic is quoted by Leigh Strope, "Unions Say Veterans Risk Losing Overtime," *Chattanooga Times Free Press*, Jan. 30, 2004, p. C2.

[183] *Congressional Record*, Feb. 2, 2004, p. S352.

On February 12, 2004, during a hearing before the House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Representative Steny Hoyer (D-MD) questioned Secretary Chao on the veterans' issue. The expanded definition of a learned professional is "new language in your regulation" and has caused "fear ... by some veterans groups and by others" that training received in the military will be regarded as "professional training which will then be used to exempt people from overtime eligibility." Secretary Chao responded that "... there is a great deal of malicious disinformation on this rule." The Hoyer/Chao dialogue continued:

> CHAO: ... These regulations are very, very hard now to enforce. Our own investigators are sometimes at a quandary as to how to fully enforce these rules. And what's happening is that the courts themselves are very confused....
>
> Veterans, I don't know how — the people who spread the rumors that veterans would lose all overtime ought to be ashamed of themselves because they are, again, potentially endangering veterans. They are frightening them for no good purpose. And as I mentioned, there is no such provision in the proposed rule affecting veterans. Our final rule has not even come out yet....
>
> HOYER: But you didn't reference as to why the language was added.
>
> CHAO: I don't think it was added at all. It was not added. There is no impact at all on veterans. There was some aspect about the military training. This is a white-collar regulation, so that's why it does not affect workers such as construction workers, because it's blue collar. First responders, it doesn't — it's only white-collar workers.
>
> Second issue was about — and this rule only applies to civilian workforce. it does not apply to the military workforce.
>
> HOYER: ... Veterans are for the most part civilians.
>
> CHAO: Well, this — that is not the case. Veteran status has got nothing to do with qualifying for the professional exemption. Military training does not, in and of itself, qualify someone for the professional exemption. So that is not true.

The Secretary then responded more generally. "The current regulations are very, very complex and the outdated nature of the regulations have made it even more ambiguous and difficult to interpret ... very, very confusing."[184]

On March 4, 2004, the venue had changed (a hearing before the House Committee on Ways and Means concerning the Fiscal Year 2005 Budget) but the issue remained largely the same. Representative Earl Pomeroy (D-ND) again raised the question of overtime pay with Secretary Chao, citing reports that the Department had provided "guidance" to employers — "advisory points that appear to be advising employers in terms of how to avoid paying overtime." The Secretary replied: "Any

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[184] Quotations are from a Feb. 12, 2004, House Appropriations Subcommittee hearing, transcript by Federal Document Clearing House, Inc. To a question by Rep. Jesse Jackson (D-IL), Ms. Chao spoke of "an active campaign of disinformation."

employer trying to evade the overtime rules will feel the full wrath of the United States government. We will brook no evasion of the law." But Representative Pomeroy posed the question differently.

> POMEROY. ... It appears to me that you have allowed employers to avoid paying overtime by changing the overtime rules. I understand you enforce the rules, but you have changed the rules for the benefit of employers at the expense of their employees....
>
> CHAO. Sir, I take great offense at your tone.
>
> I do not need to be lectured about a tremendous disinformation campaign that is waged by people who are deliberately — deliberately taking action that could potentially hurt workers.

Ms. Chao went on to explain that the advisory points had been written into the regulatory proposal. "It was required by the regs."[185]

Amending the JOBS Act (S. 1637): Phase I

Defeat of the Harkin amendment to the omnibus appropriations bill (FY2004) *may* have had less to do with the overtime pay issue than with the need to conclude the appropriations process. If so, it would be reasonable to expect a Harkin-type amendment to reemerge in another context.

Debate Recommences in the Senate. On March 3, 2004, the "Jumpstart Our Business Strength (JOBS) Act" (S. 1637) was called up in the Senate.[186] Early in the process, it would be linked to the Section 13(a)(1) overtime pay issue.

Almost immediately, Senator Harkin announced that he would "offer an amendment ... that will stop the administration from implementing its proposed new rules to eliminate overtime pay protection for millions of American workers." The Administration, he stated, "has zero credibility on this issue [overtime pay]"; the proposed regulation is "a frontal attack on the 40-hour workweek." He averred that "the new criteria for excluding employees from overtime are deliberately vague and elastic so as to stretch across vast swaths of the workforce." Senator Harkin again raised the veterans' training issue. "According to the proposed rules, employers can consider specialized training and knowledge gained in the military as equivalent to what is learned in professional schools. This will allow employers to reclassify veterans as ineligible for overtime." Senator Harkin concluded broadly: "The truth

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[185] Quotations are from the transcript of the Mar. 4, 2004, Ways and Means Committee hearing, prepared by FDCH Transcripts. The advisory points referred to by Rep. Pomeroy are set forth in a background segment, "Methodology for Estimating Costs," part of the rulemaking process. See *Federal Register*, Mar. 31, 2003, pp. 15576-15577.

[186] S. 1637 is a largely a tax and trade proposal dealing with international business issues, introduced by Sen. Charles Grassley (R-IA) with a bipartisan group of cosponsors.

is, we cannot build a sustainable recovery by exporting jobs, by driving down wages, and by making Americans work longer hours without compensation."[187]

Support for the Administration's proposal was voiced by Senator Mike Enzi (R-WY). Senator Enzi recalled discussions with "small businessmen" in Wyoming who "are being killed by the [current] ... regulations and, in some cases, by trial attorneys." Turning to the putative Harkin amendment (not then introduced), Senator Enzi asserted that it would "prohibit the Secretary of Labor from updating the rules exempting white-collar employees" from the wage/hour protections of the act and would be "an attempt to reject the new, turn back the clock, and look to yesterday for the answer to tomorrow's problems." Senator Enzi stated: "Through the course of the debate on overtime over the next several days, we will hear a lot of numbers. Some of them are statistics and we know how statistics work." With that caveat, he read into the record the statistical projections of possible impact presented by DOL in support of the proposed rule.[188]

Senator Enzi turned to the issue of the possible impact of the proposed rule for veterans. "Supporters of this amendment claim that military personnel and veterans will lose their overtime pay under the proposed rules. However, military personnel and veterans are not affected by the proposed rules by virtue of their military status or training," he said. Ignoring the issues raised by Senator Kennedy and others, he observed: "Nothing in the current or proposed regulation makes any mention of veteran status."

Senator Enzi described the current regulation as "antiquated and confusing," adding: "Ambiguities and outdated terms have generated significant confusion regarding which employees are exempt from the overtime requirement. The confusion has generated significant litigation and overtime pay awards for highly paid white-collar employees." The proposed regulation, he stated, would "update and clarify" the treatment of workers under Section 13(a)(1).[189]

Discussion of the overtime pay issue continued intermittently as part of the general debate on S. 1637. On March 4, Senator Reid appealed for a vote on the Harkin amendment to limit the authority of DOL to proceed with the proposed rule. "We have not been able to have a vote on that," he stated, "because of parliamentary barriers thrown up by the majority."[190] Senator Harkin agreed: "It is obvious that the Republican side of the aisle does not want to vote on the overtime bill."[191]

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[187] *Congressional Record*, Mar. 3, 2004, pp. S2076-S2079.

[188] Ibid., pp. S2081-S2082. The statistics on each side of the issue have been a focus of dispute by persons holding conflicting views.

[189] *Congressional Record*, Mar. 3, 2004, pp. S2082-S2083.

[190] *Congressional Record*, Mar. 4, 2004, p. S2205.

[191] Ibid., p. S2211. Later, p. S2212, Sen. Harkin speculated on Administration motives in declining to permit a vote on the overtime rule. "Perhaps that is why the Republican side doesn't want to vote on them. They want the Department to issue the regulations, get them in force and effect. Then they know it is harder to overturn them, once those rules and

(continued...)

Prelude to Cloture. For the most part, comment originated with the Minority, the Majority remaining focused on other aspects of S. 1637 — issues that, of course, also concerned the Minority.

After the discussion of March 4, the Senate moved on to other matters, resuming consideration of S. 1637 on March 22. Again, Senator Harkin stressed "how urgently necessary it is" to deal with the proposed overtime rule.[192] Pointing to the essential trust of the bill (serious issues of trade and international economy), he urged: "Let's have a good debate. I am willing to have a time agreement, if the other side would like to have a time agreement." Referring to the paucity of opposition comment, he stated:

> I want to hear from the other side why we should let these proposed regulations go into effect. Let's have the debate so the American people can understand what is at stake, and let's have an up-or-down vote .... Let's have an up-or-down vote on whether the Senate would agree with the administration that these proposed rules ... should go into effect....

He suggested that the Department might "go back to the drawing board, work with Congress, do it in an open, aboveboard manner."[193]

Senator Charles Grassley (R-IA) proposed that a series of amendments to S. 1637 — including the Harkin amendment — be in order. Senator Reid, joining the Senator from Iowa in a call for "an up-or-down vote," expressed concern that the Majority still might invoke cloture — which be viewed as counterproductive — in an effort to block the Harkin amendment. Senator Reid added: "... I think it would be extremely doubtful, without an up-or-down vote on overtime, that he [the majority leader] would be able to get cloture on this bill."[194]

When the Grassley amendment had been agreed to, Senator Harkin called up amendment No. 2881, the overtime amendment, and sought its immediate consideration.[195] Senator Harkin reaffirmed: "... all we want is debate and a vote on

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[191] (...continued)
regulations are out there."

[192] *Congressional Record*, Mar. 22, 2004, p. S2848.

[193] Ibid., p. S2850.

[194] Ibid., p. S2851.

[195] The Harkin amendment would prohibit any further exemptions under Section 13(a)(1) and would render invalid any regulatory change with respect to Section 13(a)(1) that would exempt workers who would otherwise be protected under the FLSA. However, it would not impede the Department from moving forward with an increase in the earnings threshold for Section 13(a)(1) purposes. The Harkin amendment, in pertinent part, reads:

> (1) The Secretary shall not promulgate any rule under subsection (a)(1) that exempts from the overtime pay provisions of section 7 any employee who would not be exempt under regulations in effect on March 31, 2003.
> (2) Any portion of a rule promulgated under subsection (a)(1) after March 31,

(continued...)

the overtime issue ... probably tomorrow — not tonight but tomorrow." Like Senator Reid, he had procedural concerns. "I have heard some talk around that the other side, the Republican side, will now file a cloture motion. Obviously, if that cloture motion wins, then my amendment fails...."[196]

Senator Grassley acknowledged the possibility that cloture would be sought, although he indicated that he would be opposed to doing so. "That, of course, is a leadership decision." Were cloture to be called for, Senator Grassley expressed the "hope that [it] will not poison the waters." He noted that the cloture process takes 48 hours and suggested that the intervening period be used to reach agreement so that "the cloture motion could be vitiated." The Senator then turned to the tax and trade issues of S. 1637.[197] Thereafter, Senator Mitch McConnell (R-KY) submitted a motion for cloture.[198]

The motion for cloture, some suggested, would serve as a gauntlet. The Minority, said Senator Reid, "believe we are entitled to an up-or-down vote regarding ... overtime." He explained: "We know there is an effort not to have a vote, the reason being this amendment will pass.... The majority doesn't want to vote on this because it is embarrassing to the President who has no support from the American people on this overtime issue." While it was not the purpose of the Minority, he stated, "to amend this bill to death," still a cloture vote could result in bringing down S. 1637 which, he averred, "is not good for the country."[199]

Cloture Denied, the Senate Moves On. Senator Max Baucus (D-MT) opened the session of March 23 with an explanation of the parliamentary situation. The Harkin amendment was then pending. "The effect of this cloture motion," he said, "would be to block a vote on the Harkin Amendment." The motion for cloture, he concluded, "has brought the Senate to something of an impasse."[200]

Senator Harkin stated that the motion for cloture would delay a vote until March 24 and even then "[t]hey will not get cloture."[201] There seemed a general agreement that the primary bill was important. The World Trade Organization, Senator Grassley explained, had found that "our pretax policy is an illegal export subsidy, and

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[195] (...continued)
2003, that exempts from the overtime pay provisions of section 7 any employee who would not otherwise be exempt if the regulations in effect on March 31, 2003, remained in effect shall have no effect.

[196] *Congressional Record*, Mar. 22, 2004, pp. S2852-S2853. Sen. Harkin expressed his willingness "to enter into a time agreement" on debate on the amendment.

[197] *Congressional Record*, Mar. 22, 2004, p. S2853.

[198] Ibid., p. S2853. Pointing to the legislative history of the Harkin overtime pay amendment, Sen. McConnell saw the initiative as "repetitious," and "irrelevant." See *Congressional Record*, Mar. 22, 2004, p. S2936.

[199] Ibid., p. S2936.

[200] *Congressional Record*, Mar. 23, 2004, p. S2958.

[201] Ibid., p. S2970.

consequently ... has authorized Europe to do up to $4 billion a year in sanction against U.S. exports."[202] Senator Harkin stated that he had heard "rumors the leadership on the Republican side will ... pull the bill and somehow blame Democrats ... for not getting this bill through." While he affirmed that he "would like to get this bill through," Senator Harkin averred:

> The other side, though, simply because they do not want a vote on overtime, is saying they are going to go ahead and pay these tariffs. It seems to me what they are saying is they would rather pay tariffs to Europe than overtime to workers.

Again: "The administration may want to take away overtime pay ... But at least we ought to have the right to vote on whether we ought to uphold that decision."[203]

Senator Jon Kyl (R-AZ) rose in opposition to the Harkin amendment and to critique the views of opponents of the DOL initiative. He sought "to clarify the situation so American workers are not frightened of these proposed rules" — which, he said, had been subject to "mischaracterization by certain people." He suggested that some comments about the rule might be "inaccurate, misleading, and therefore ... frightening." Senator Kyl then reaffirmed the case for the rule that had been presented by Secretary Chao, affirming:

> It [the proposed rule] does not take away people: it adds to the number of people who would qualify for overtime.... It will actually ensure that the lowest 20 percent of all salaried workers get pay of time and a half for overtime work.

Further, he stated, by redefining the concepts included in the Section 13(a)(1) exemption, the DOL initiative would "eliminate all of [the] ... cost and all of the wasted energy in litigation and paying a lot of trial lawyers by clarifying who is covered and who is not covered."[204]

In general, Senator Jeff Sessions (R-AL) concurred with the Senator from Arizona. He protested "how frustrating it is to see a very carefully constructed proposal by the Secretary of Labor, Elaine Chao, being mischaracterized, therefore placing fear in the American people through the misrepresentation of the nature of these regulations."[205] Of the alleged negative impact of the proposed rule, Senator Sessions affirmed: "That is not true. It is false. In fact, it is going to guarantee a lot of people overtime who are not receiving it today." And, he continued: "There is no

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[202] Ibid., p. S2959.

[203] Ibid., pp. S2970-S2971.

[204] Ibid., p. S2977. The comment by Sen. Kyl, which parallel's the position taken by Secretary Chao and DOL, is predicated upon an increase in the earnings threshold. What the impact of that increase might be is subject to dispute — as is the question of whether the proposed rule would bring clarity or added confusion. But, in any case, the Harkin amendment would not interfere with an increase in the earnings threshold. It would simply restrict the Secretary from redefining the non-monetary concepts of *executive*, *administrative*, and *professional* as they appear in the proposed rule.

[205] *Congressional Record*, Mar. 23, 2004, p. S2979.

plot here to try to undermine the right of working Americans to receive overtime. That is a completely bogus and political argument...."

Senator Sessions voiced concern about the "confusing and outdated regulations" currently in place. Suggesting at least one of the reasons some employers have endorsed the Department's initiative, he stated:

> Many employers worry about incurring large unexpected litigation costs due to their inability to properly interpret these confusing rules. Even lawyers and Department of Labor investigators can have difficulty deciphering the line between exempt and nonexempt employees.

Senator Sessions added: "If we make it clearer so that it is indisputable what overtime is and what it is not, we will see less confusion."[206]

On the motion for cloture, March 24, the vote was largely along party lines (51 yeas to 47 nays: Republicans in favor of cloture, Democrats opposed) — short of the 60 votes needed to end debate.[207] The Senate then moved on to other business.

A Second Cloture Attempt. Various bills, in some respects interrelated, would occupy the attention of the Senate during late March and early April. Among them was H.R. 4, welfare reform reauthorization, consideration of which commenced on March 29. As an adjunct to the effort to move people from welfare to work, Senators Barbara Boxer (D-CA) and Kennedy proposed an amendment to raise the federal minimum wage from its current level of $5.15 and hour, in steps, to $7.00 an hour. On March 30, Senator Frist called for invocation of cloture; and, on April 1, 2004, the motion for cloture failed (51 yeas to 47 nays) — and again, setting aside a major piece of legislation, the Senate moved on to other issues.[208]

Debate in the Senate through this period shifted easily from minimum wage to overtime pay (with other labor-related concerns) often linked both in substance and procedure. On both sides of the debate, there were some who appeared to view these issues as part of a general initiative — though their perspectives differed. Senator Frist, as the vote for cloture on H.R. 4 neared, observed: "If cloture is not invoked, it will be clear that this legislation will be gridlocked by these unrelated matters and

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[206] Ibid., p. S2980. Later, Sen. Judd Gregg would describe the current rule as "a morass of regulations" that have "led to a litigation frenzy." See *Congressional Record*, Mar. 24, 2004, p. S3083.

[207] *Congressional Record*, Mar. 24, 2004, p. S3066. For parliamentary reasons, Sen. Frist voted with the prevailing side — and then entered "a motion to reconsider the vote by which cloture was not invoked." At the session's close, Sen. Frist warned: "I hope Members will all rethink their desire to offer unrelated amendments and bring unrelated issues to the floor.... If we are unable to come to some resolution, we will do what we are doing now and proceed to other Senate business with the Unborn Victims of Violence Act." *Congressional Record*, Mar. 24, 2004, p. S116. See also *DLR*, Mar. 25, 2004, p. AA1.

[208] *Congressional Record*, Mar. 30, 2004, p. S3359, Mar. 30, 2004, p.S3359, and Apr. 1, 2004, p. S3538. The Boxer-Kennedy amendment would also have established a federal minimum wage for the Commonwealth of the Northern Mariana Islands.

therefore will be difficult to finish."[209] Senator Dashle denied that there was a partisan purpose in resisting cloture. "It isn't our unwillingness to have a good debate; it is our unwillingness to be locked out of the process." Again, Senator Daschle stated: "People on the other side of the aisle, for whatever reason, have refused to allow us an opportunity to have an up-or-down vote on protecting worker's overtime, on minimum wage, and on unemployment compensation."[210]

With the failure of cloture on H.R. 4, the focus shifted back to overtime pay and S. 1637. Off the floor, discussion proceeded between the Majority and Minority with respect to compromise. On the floor, debate continued.[211] On Monday, April 5, Senator Frist announced that the Senate would try again to complete consideration of S. 1637. "We continue to have discussions on how to finish this legislation ... Given the importance of this bill and the timeliness of it," he stated, "it is imperative we find a way to complete the measure as quickly as possible...."[212] Later that afternoon, Senator Frist filed a second cloture motion on S. 1637.[213] He announced that a vote on cloture would occur on Wednesday, April 7.[214]

Debate and negotiation continued. Senator Harkin rose to discuss the economy: outsourcing of jobs, an increase in the minimum wage, and the DOL overtime pay initiative. Tying the issues together, he asserted that revision of the Section 13(a)(1) regulation was "all but guaranteed to hurt job creation." He chided that the Majority "would rather sacrifice the underlying bills [S. 1637 and H.R. 4] ... than allow a vote on these issues so crucial to working Americans."[215] Conversely, Senator Grassley stressed the importance of the tax and trade provisions of S. 1637. "I want Americans to understand that Senators on my side of the aisle are ready, willing, and able to provide a real shot in the arm to America's manufacturing sector." He said: "We are blocked from providing the relief that American manufacturing deserves and needs."[216] Senator Gregg charged the Minority with "shooting the programs which would create jobs"and termed the Minority position "cynicism ... rather extreme."[217] Senator Grassley added: "A vote against stopping debate is a vote against tax relief for America's beleaguered manufacturing sector...."[218]

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[209] *Congressional Record*, Apr. 1, 2004, p. S3520.

[210] Ibid., p. S. 3521. Extension of unemployment benefits was the third in the group of labor-related issues variously in contest before the Senate since late in the first session of the 108th Congress.

[211] *Congressional Record*, Apr. 2, 2004, p. S3600.

[212] *Congressional Record*, Apr. 5, 2004, p. S3624.

[213] Ibid., p. S3729.

[214] Ibid., p. S3730.

[215] Ibid., p. S3731.

[216] *Congressional Record*, Apr. 7, 2004, p. S3892.

[217] *Congressional Record*, Apr. 6, 2004, p. S3739.

[218] *Congressional Record*, Apr. 7, 2004, p. S3893.

On April 7, the Senate conducted a second cloture vote with respect to S. 1637. Again, it failed: 50 yeas to 47 nays.[219]

Later, Senator Frist stated that the negotiators were "making real progress" and that they were attempting to pare down likely amendments through agreement by both sides.[220] At day's end, he still expressed hope that the Senate would continue to work with S. 1637.[221] As the session commenced on April 8, Senator Frist announced that the Senate "will resume consideration" of S. 1637. "We have been working with the Democratic leadership to lock in a final list of amendments to the bill. We will be continuing that effort over the course of this morning."[222]

Further consideration, however, would not be immediate. The bill was again set aside but Senator Frist sought unanimous consent "that when the Senate returns to the bill, Senator Harkin or his designee be recognized in order to offer his amendment relating to overtime."[223] He affirmed that S. 1637 was a bill "that we absolutely must address and we will continue to address."[224]

As he laid out the program for April 19 (following the Easter recess), the Majority Leader announced that an agreement had been reached with respect to limitation of amendments on S. 1637.[225] But, still ahead was actual floor consideration of S. 1637 and of the Harkin amendment — and accommodation of any differences with the House of Representatives.

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[219] Ibid., pp. S3894-S3895.

[220] Ibid., p. S3910.

[221] Ibid., p. S3952.

[222] *Congressional Record*, Apr. 8, 2004, p. S2959.

[223] Ibid., pp. S4008-S4009.

[224] Ibid., p. S4060.

[225] Ibid., p. S4072.

SECTION III

Promulgation of the Final Rule: April 23, 2004

The final rule governing Section 13(a)(1) was published on April 23, 2004. The 152-page document was divided into two parts. Section one summarizes comments received by DOL, together with the Department's reaction and policy justification for the final rule. The second section constitutes the rule *per se*. Both segments are essential to an understanding of DOL's intent and to the interpretation of its policy. The final rule quickly sparked hearings and floor debate.[226]

Substance or Illusion?

The final rule appears to differ from the proposed rule in some details but not in broad approach. The lower salary threshold below which workers cannot be classified as exempt ($22,100 in the proposed rule) was raised to $23,660. The proposed rule had set $65,000 and over as the salary test for *highly compensated employees*. That upper threshold, under the final rule, was increased to $100,000. Above that level, workers who perform some executive, administrative and/or professional functions, can be classified as exempt. Thus, there are three categories of salaried workers under the final rule: (a) those earning less than $23,660 who are minimum wage and overtime pay protected; (b) those earning between $23,660 and $100,000, who, depending upon their duties, *may* be exempt; and (c) those earning more than $100,000 who likely are exempt.

The new threshold levels of the final rule have received considerable attention. How significant these changes are may not be clear. Most *bona fide* executive, administrative or professional workers can be expected to earn in excess of $23,660. Above that level, exemption rests, largely, upon *the duties test*. While DOL argues that the duties test under the final rule will be clearer and easier to apply, critics suggest that it could prove to be more complex and more likely to provoke litigation.

Professional exemption, based upon knowledge acquired in the armed forces, had produced strongly negative public comment. It was argued (incorrectly, according to DOL) that returning veterans could find themselves unexpectedly exempt because they had received training in or through the military: for example, in such fields as nursing, electronics, and space related work. While the old rule had emphasized knowledge acquired on the basis of college plus technical/professional training, ***the proposed rule*** had opened professional status and exempt status to workers:

> ... who have substantially the same knowledge level as the degreed employees, but who attained such knowledge through a combination of work experience,

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[226] *Federal Register*, Apr. 23, 2004, pp. 22122-22274. At this writing, some committee transcripts were not yet available. Therefore, citations are often fragmentary, prepared testimony, press releases, and other relevant documents.

> **training in the armed forces**, attending a technical school, attending a community college or other intellectual instruction.[227] (Emphasis added.)

In ***the final rule***, DOL dropped the phrase "training in the armed forces" (and other wording) and restructured subsection 541.301(d) to read in pertinent part as follows:

> ... who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.[228]

DOL explained that it "never intended to allow the professional exemption for any employee based on veteran's status. The final rule," it stated, "has been modified to avoid any such misinterpretations."[229] Arguably, exemption under the proposed rule would not have been "based on veteran's status" but, rather, upon knowledge acquired through one's employment — which, under each version of the rule, might include military employment. Thus, the revised language may not satisfy critics.

Building the Case for Reform?

Certain business interests have long sought FLSA modification. In late 1994, the Labor Policy Association (LPA), a Washington-based "non-profit association of corporate employee relations executives,"[230] published a report, *Reinventing the Fair Labor Standards Act To Support the Reengineered Workplace*. It pointed to "dramatic changes in workplace demographics and work structures" since enactment of the FLSA in 1938. With time, it argued, "... the FLSA's coverage rules have become so encrusted with meaningless distinctions that no employer can be completely confident which types of employees come within the Act's ambit."[231] The LPA report, focusing heavily on Section 13(a)(1), argued that the FLSA was aged, out-of-date, and in need of reform — and, among federal labor laws, "holds a position nearly comparable to that of the Dead Sea Scrolls."[232]

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[227] *Federal Register*, Mar. 31, 2003, p. 15589.

[228] *Federal Register*, Apr. 23, 2004, p. 22265.

[229] Ibid., p. 22123.

[230] See Labor Policy Association (LPA), Annual Report 1988, for a description of its orientation and work. In 2003, LPA became The Association of Senior Human Resource Executives or HR Policy Association. See LPA/HR Policy Association press release July 17, 2003. For consistency, the old name will be used here.

[231] Labor Policy Association, *Reinvention the Fair Labor Standards Act To Support the Reengineered Workplace*, Oct. 7, 1994, p. i, reprinted in U.S. Congress, House Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections, *Hearings on the Fair Labor Standards Act*, 104th Cong., 1st sess., Mar. 30, June 8, Oct. 25, and Nov. 1, 1995, p. 27. (Hereafter cited as House Subcommittee on Workforce Protections, *Reinvention the Fair Labor Standards Act To Support the Reengineered Workplace*, 1995.)

[232] Ibid., p. 30. Maggi Coil of Motorola, Inc, appearing on behalf of the LPA (pp. 16-18), explained to the Committee that she was also a member of LPA's FLSA Reform Task Force "which has been meeting for approximately a year, to try to look at ways to bring a more (continued...)

Both in the final rule and the flurry of DOL comment associated with its release, several themes were emphasized that would be picked up, initially, by the media, and repeated by supporters of the DOL initiative.

DOL argued, in building the case for reform, that the existing regulation was "confusing, complex and outdated" — so much so "that employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for exemption" — "very difficult for the average worker or small business owner to understand."[233] The FLSA is based, Secretary Chao stated, upon the "workplace of a half-century ago."[234]

DOL had "listened very carefully," Chao observed (and others reiterated), implying that the Department had been responsive to commenters and had adjusted the final rule accordingly.[235] Critics may disagree as to whether DOL's changes in the proposed rule were corrective or merely non-substantive adjustments of language. "The primary goal" in crafting the rule, DOL emphasized, was "to protect low-wage workers." Ms. Chao said: "Overtime pay is important to American workers and their families, and this updated rule represents a great benefit to them."[236]

Whatever the reality may be (it is a subject of dispute), DOL declared that the final rule "strengthens and clarifies" overtime protection.[237] The new regulations, McCutchen stated, "are clear, straightforward and fair."[238]

There was also a negative element in DOL's defense of the final rule. Some critics of the initiative, the Secretary seemed to suggest, lacked integrity. On Capitol

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[232] (...continued)
than 50-year-old piece of labor law into the 20th century...." Ms. Coil explained that the Task Force "includes more than 50 LPA member companies" and is "...composed primarily of compensation directors and legal counsel within the companies."

[233] *Federal Register*, Apr. 23, 2004, p. 22122.

[234] Secretary Chao, House Committee on Education and the Workforce, Apr. 28, 2004. (Hereafter cited as House Education and the Workforce Committee, and by date.) Kirk Pickerel, president, Associated Builders and Contractors, applauded revision of "the antiquated and outdated regulations." See ABC press release, Apr. 20, 2004.

[235] House Education and the Workforce Committee, Apr. 28, 2004. Administrator McCutchen, before the Senate Appropriations Subcommittee on Labor, Health and Human Services, and Education, May 4, 2004, testified: "For the past year, we listened to thousands of comments — from workers and employers — and have designed new regulations...." (Hereafter cited as Senate Appropriations Subcommittee, and by date.)

[236] House Education and the Workforce Committee, Apr. 28, 2004. See also testimony of Alfred Robinson, Deputy Wage and Hour Administrator, House Small Business Subcommittee on Workforce, Empowerment, and Government Programs, May 20, 2004. (Hereafter cited as House Small Business Committee, and by date.)

[237] House Committee on Education and the Workforce, Apr. 28, 2004.

[238] Administrator McCutchen, Senate Appropriations Subcommittee, May 4, 2004. The industry-oriented Small Business Survival Committee, in a press release of May 20, 2004, expressed its agreement that the final rule provides "certainty and clarity."

Hill to brief Republicans on the final rule, Ms. Chao asserted: "There has been a massive misinformation about this rule."[239] On that theme, Karen Kerrigan of the Small Business Survival Committee would assert: "The campaign of disinformation to discredit the rule update has been shameful."[240] Similarly, the "O. T. Coalition," an business-oriented group, stated: "Throughout the entire rulemaking process, opponents have engaged in a campaign of blatant misinformation about the proposed regulation."[241] When the labor-oriented Economic Policy Institute issued a report in July 2004, critical of the final rule, DOL spokesperson Ed Frank termed it "a last-ditch effort to re-start the misinformation campaign...."[242]

A Mixed Reaction

The final rule sparked a prompt and sharply divided reaction. Each side seemed to question the intentions of the other. While critics tended to focus upon detail, definition, and potential administrative complications, proponents seemed to prefer more generalized statements about the need for reform and the benefits that, they asserted, would flow from the new rule.

"The Department is very proud of the final rule," Secretary Chao stated. From the beginning, she observed, DOL "has been consistent in what it wanted to achieve with this update. The primary goal," she urged, "remains to protect low-wage workers."[243] DOL would frequently reiterate its determination to protect the right of low-wage non-professional and non-managerial workers to overtime pay. When technical questions were raised, DOL spokespersons tended to cite or read a provision of the rule — letting the rule speak for itself. "We are pleased to see people recognize the significant gains to workers under our final rule," Ms. Chao stated: "... there can be no doubt that workers win."[244] "America's workers," added Deputy Administrator Robinson, "... now have a strengthened overtime standard that will serve them well for the 21st Century."[245] And, Majority Leader DeLay reportedly "said he is 'very excited at the fact that the administration took on a politically sensitive issue'" and "'showed leadership and understanding.'"[246]

Others offered different perspectives. "When you start to read the fine print," said Representative George Miller, Ranking Minority Member of the Committee on

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[239] *DLR*, Apr. 21, 2004, p. AA5.

[240] Press release, Small Business Survival Committee, May 20, 2004.

[241] Letter from the O. T. Coalition to Chairman W. Todd Akin of the House Small Business Subcommittee on Workforce, Empowerment, and Government Programs, May 20, 2004.

[242] *DLR*, July 15, 2004, p. AA2.

[243] Secretary Chao, House Committee on Education and the Workforce, Apr. 28, 2004.

[244] Secretary Chao is quoted in Kirstin Downey, "Plan Expands Eligibility for Overtime Pay," *The Washington Post*, Apr. 20, 2004, p. A8.

[245] Deputy Wage and Hour Administrator Robinson, House Small Business Subcommittee, May 20, 2004.

[246] *DLR*, Apr. 21, 2004, p. AA4.

Education and the Workforce, "you see that overtime pay for potentially millions of employees ... is at risk."[247] Senator Harkin viewed the rule as "anti-employee," "anti ... overtime" pay, and "designed to strip many workers of their right to fair compensation." He averred that it was a "frontal attack on the 40-hour workweek."[248] Some from industry seemed less than enthusiastic. R. Bruce Josten of the U.S. Chamber of Commerce, though he found the final rule a "much needed improvement over the plainly unacceptable status quo," allowed that "[n]o one disputes that there are some controversies raised by the Department's regulation[s]" and stated that they "do not address all of the concerns of the Chamber."[249] The industry journal, *Nation's Restaurant News*, reported that the final rules will be "more complicated and costly for restaurant operators to implement than those first proposed" — but there seemed to be agreement that the rule was "an improvement" over the current regulation.[250] The Labor Policy Association termed the rule a "first step."[251]

Promulgation of the final rule did little to mollify critics of the initiative. Some questioned whether the rule would "reduce needless and costly litigation" as McCutchen had promised."[252] Deputy Administrator Robinson noted that the current rule had been "streamlined" and shortened by some 15,000 words.[253] But each deletion and change of language, others contended, could provoke interpretive issues and spark new litigation. DOL, observed Ross Eisenbrey of the Economic Policy Institute, has chosen "to adopt new definitions that are unclear and new tests for exemption that require a case-by-case analysis that will be almost impossible for Wage and Hour's enforcement staff." He characterized that approach as "a guaranteed recipe for litigation."[254]

Would the final rule be protective of workers, whatever their duties and wage level? Was it sufficiently clear to eliminate *needless and costly* litigation? Could it be enforced, reasonably, by DOL's Wage and Hour Division? There were wide interpretive differences.

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[247] *DLR*, Apr. 29, 2004, p. AA1.

[248] *DLR*, May 5, 2005, p. AA3.

[249] Press release, U.S. Chamber of Commerce, May 3, 2004, p. 1.

[250] Dina Berta, "Industry Leaders: DOL's Final OT Rules More Complex, Costly," *Nation's Restaurant News*, May 24, 2004, p. 12.

[251] LPA (HR) Fact Sheet, June 30, 2003.

[252] McCutchen, Senate Appropriations Subcommittee, May 4, 2004.

[253] *DLR*, May 27, 2004, p. B2.

[254] Eisenbrey, Senate Appropriations Subcommittee, May 4, 2004.

Oversight and Legislation

Beginning during the last week of April 2004, as Members and staff attempted to digest the lengthy and complex text of the final rule, hearings would be held before three separate committees of the Congress. Further, the final rule would repeatedly be the focus of floor debate, both in the Senate and in the House of Representatives.

Hearing: Education and the Workforce, April 28, 2004

On April 28, 2004, five days after release of the final rule, an oversight hearing was conducted by the full House Committee on Education and the Workforce.

Setting the Tone for Debate? Current regulations, Chairman Boehner noted in an opening statement, are "outdated," "complex, confusing and often" incite "needless litigation," and are "next to impossible" to apply. The American people, he said, had been "subjected to a campaign of misinformation based on fear, distortions and untruths." He added that the final rule would protect "the overtime rights of blue-collar workers, union workers, nurses, veterans, firefighters, policemen and similar public safety workers," and adversely affect "few, if any workers, making less than $100,000 per year." Further, he predicted, "[c]lear rules will reduce the cost of litigation, encourage employers to hire more workers and strengthen current ... overtime protections." It is, he concluded, "good for American workers ... for American employers ... and for the American economy."[255]

Conversely, Representative Miller stated that the proposed rule would have threatened "the overtime protections" of millions of workers and asserted: "... in the time available to read and analyze the 530 pages of these artfully crafted new regulations," it seems clear that the policy continues to be "... to cut the overtime protection for millions of workers...."[256] He enumerated groups of workers he deemed vulnerable: those "working in financial services, chefs, computer programmers, route drivers, assistant retail managers, preschool teachers, team leaders, working foremen and many other categories that are created in these regulations either in reactions to lawsuits" or in response to special constituencies who "have been seeking these changes for a number of years."[257]

The Department Weighs In. Secretary Chao, the lead witness, accompanied by Administrator McCutchen, pointed first to the "ambiguity and the outdated nature" of the current regulations: "frozen in time" and "difficult and

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[255] FDCH Transcripts, Congressional Hearings, House Committee on Education and the Workforce Committee, *Overtime Pay Rules*, Apr. 28, 2004, pp. 1-2. (Hereafter cited as *FDCH Transcripts*. Separate from prepared statements cited by witness.)

[256] *FDCH Transcripts*, p. 3. The rule was issued in various formats, the more extended first. Rep. John Tierney (D-MA) later opined: "... I think it's a little bit unfortunate that this hearing has actually happened before most people have had an opportunity to really digest the complications that are in this new rule...." *FDCH Transcripts*, p. 54.

[257] Ibid., p. 3.

sometimes nearly impossible to interpret or enforce in the modern workplace."[258] Then, turning to the DOL response, she affirmed: "... we have listened very carefully ... and we have produced a final rule that puts workers' overtime protections first...."[259]

Without delving into technical issues, Secretary Chao listed groups of workers that she said would now be protected. "The final regulations preserve overtime protections for veterans, cooks. They were never, never taken away." "We have also included union members and made sure that the final regulations preserve overtime protections for union members whose overtime pay is secured under a collective bargaining agreement." She added: "...all blue-collar and manual laborers are entitled to overtime." "The new rules either preserve existing definitions of executive, professional and administrative duties or make them stronger and clearer to protect workers based on current federal case law or statutes...," and further:

> With these new rules workers will clearly know their rights to overtime pay, employers will know what their legal obligations are and this administration, which has set new records for aggressive wage and hour enforcement, will have updated and strengthened standards with which to vigorously enforce the rule to protect workers' pay.

Turning to the alleged campaign of misinformation, the Secretary stated that "... unfortunately, a great deal of misinformation and distortions harmful to workers has been spread about the impact of these rules." She urged people "to not be misled by misinformation that is being spread." Mildly chiding critics of the final rule, she asserted: "... I am deeply concerned about the campaign of misinformation about these new rules. The confusion it is designed to create will only harm workers by denying them good information about their overtime pay rights."[260]

Interpreting the Rules. Assertions of clarity notwithstanding, the final rule is lengthy and complicated — replete with new terms and concepts that, some charge, will need to be litigated. Perhaps most notable among these is the new subsection 541.301(d) which expands the criteria for professional exemption from a primarily degree-based orientation (normally, college plus technical/professional education) to a broader and, arguably, more ambiguous standard:

> ... employees in such professions who have **substantially the same knowledge level** and **perform substantially the same work** as the degreed employees, but **who attained the advanced knowledge through a combination of work experience and intellectual instruction**.[261] (Bolding added.)

Directly or implicitly, Subsection 541.301(d) was central to much of the questioning during the hearing before the House Committee on Education and the Workforce — and the other hearings that would immediately follow.

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[258] Ibid., p. 5.

[259] Ibid., p. 6.

[260] Ibid.

[261] 29 CFR 541.301(d) of the final rule. *Federal Register*, Apr. 23, 2004, p. 22265.

The questions suggested by subsection 541.301(d) were numerous, *inter alia*: What is meant by *substantially the same*? How will the employer, the employee, and the Department assess the substantial sameness of an employee's knowledge and work? How much *work experience* or *intellectual instruction* does it take to reach equivalency to the "prolonged course of specialized intellectual instruction" under the existing rule? And pressed, how would one define *intellectual instruction* in the context of the Section 13(a)(1) exemption? In practical terms, would the option be loosely applied (broadening the Section 13(a)(1) exemption and extending it to a wide range of currently protected workers) or would its application be narrow?

Registered Nurses and LPNs. With publication of the proposed rule, Chairman Boehner recalled, concern was voiced "both [by] registered nurses and licensed practical nurses, about threats to their overtime." He asked Secretary Chao: "Can you explain to the committee exactly how the final regulations treat registered nurses and licensed practical nurses, and about nurses whose overtime is guaranteed under a collective bargaining agreement?"

> CHAO: The new overtime rules actually strengthen overtime for licensed practical nurses. For the very first time LPN's are specifically listed as being guaranteed overtime. Registered nurses' status remains unchanged. It is what the current rule says. Furthermore, registered nurses who are receiving overtime under collective bargaining agreements will continue to receive overtime. And if registered nurses are continuing to receive overtime, they will continue to receive overtime.[262]

How the concept of "substantially the same" might apply with respect to nurses and LPNs was not addressed — nor were issues relating to the potential for adjustment of *hourly* and *salaried* pay status for nurses and related workers.[263]

Chefs and Cooks. The final rule states that "executive chefs and sous chefs" (concepts not defined in the rule) who "have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for *the learned professional exemption*." (Italics added.) "The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work."[264] And, "to the extent a chef has a primary

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[262] *FDCH Transcripts*, p. 8.

[263] See comments of Karen Dulaney Smith, former investigator for DOL's Wage and Hour Administration, *FDCH Transcripts*, p. 43 and pp. 5 and 6 of her prepared statement. *FDCH Transcripts*, p. 8.

Chairman Boehner stated that the final rule "is really going to cost employers more money" and asked Ms. Chao why employers supported the rule. She responded: "I think what most people want is clarity. We need clarity in these much outdated rules so that workers know their overtime and so that employers can know what their legal obligations are. And so, the department can again more fully vigorously enforce the law as well." And, she emphasized: "... clarity is a very important part of why this updated rule is so much needed." *FDCH Transcripts*, p. 7.

[264] 29 CFR 541.301(e)(6). Exemption, generally, is based upon the employee's "primary (continued...)

duty of work requiring invention, imagination, originality or talent" (concepts not defined in the rule), "... such a chef may be considered *an exempt creative professional*."[265] (Italics added.) Here, too, the alternative standard, "substantially the same," could come into play.

Representative Miller raised the issue with Secretary Chao. "We say that those chefs that have four-year degrees are exempt and we describe the duties that will make them exempted and, yet," he continued, "we know that there are hundreds of thousands of chefs in this country that have two-year degrees that do those exact same duties...."[266] Ms. Chao affirmed that "[o]vertime rights are expressly guaranteed" in the final rule and protested that "there has been disinformation going on and a lot of workers have been scared."[267] She then turned for a technical response to McCutchen, who explained that "... only chefs who have advanced four-year college degrees in the culinary arts can be denied overtime pay. And we clarified," she stated, "that ordinary cooks and any other type of cook or chef who does not have a four-year post high school degree cannot be denied overtime pay."[268]

Later in the hearing, the issue was revived by Representative Robert Andrews (D-NJ) who asked if a chef, in the "creative professional category,"could lose his or her overtime protection.

> ANDREWS: But there are chefs that have less than this minimum academic standard who could lose their overtime under the new rule, correct?
>
> McCUTCHEN: Only if they're creating unique new dishes, like they're creating recipes themselves.
>
> ANDREWS: Every chef claims that he or she does that, right?[269]

For 12 years, Karen Delaney Smith, now a consultant and part of a second panel, had been an investigator with DOL's Wage and Hour Division. Of chefs and sous chefs, Ms. Smith stated: "This is not a white-collar job; it is manual; much of it is repetitive; it is not a field of science or learning." Again:

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[264] (...continued)
duty" — under Section 541.700(a), the "principal, main, major or most important duty that the employee performs." Section 541.700(b) states that "[t]ime alone ... is not the sole test" of what constitutes a worker's primary duty. Thus, an employee (performing exempt functions for a relatively brief period), if not regarded as a learned or creative professional, could still potentially be classified as an exempt executive or administrator.

[265] *Federal Register*, Apr. 23, 2004, p. 22154. Comment is from the preface to the final rule.

[266] *FDCH Transcripts*, p. 9.

[267] Ibid., p. 11.

[268] Ibid., p. 12.

[269] Ibid., p. 36.

> The regulation makes clear that chefs who have a four year degree are exempt. To the extent that chefs have creative ability, they can be exempt [creative] professionals. That means potentially every chef can be exempt....
>
> Furthermore, having declared the culinary arts a learned profession, the Department creates the possibility of attaining professional status not just through a four-year college degree but also through work experience. How will the Department determine that a non-degreed employee has 'substantially the same knowledge' as a degreed sous-chef?

Ms. Smith inquired rhetorically, "How will the Department even tell a cook from a sous chef? After all, the dictionary definition of 'chef' is 'cook'...."[270] The restaurant industry, Smith said, has been identified by DOL "as a low-wage industry" and she added that "it's very common in this industry to work 50 or 60 hours a week."[271]

Status of Union Workers. The final rule provides, *inter alia*, that employers and employees "are not precluded" from negotiating "a higher overtime premium ... than provided by the Act." Again: "... nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements."[272] Secretary Chao assured the Committee: "We have ... made sure that the final regulations preserve overtime protections for union members whose overtime pay is secured under a collective bargaining agreement."[273]

During questioning, Representative Dale Kildee (D-MI) suggested that union workers had concerns about the final rule. Secretary Chao quickly responded that "... union members covered by collective bargaining agreements are not impacted at all by this rule" and that such concerns were the result of "misinformation that was being circulated." The Secretary added:

> Because we wanted to combat some of this misinformation, we expressly put [in] overtime guarantees for union members who are under collective bargaining agreements. Because union members under collective bargaining agreements will abide by the collective bargaining agreement, and when they get overtime that will, of course, remain the same.

Representative Kildee acknowledged that nothing in the regulation "relieves employers from their contractual obligations under collective bargaining agreements." But, he added: "If the union contracts simply refer to applicable law for overtime eligibility, a union worker will be directly and immediately affected by these regulations when they take effect. Isn't that true?" The Secretary asked that the question be repeated.

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[270] Statement of Karen Dulaney Smith, House Committee on Education and the Workforce Hearing, Apr. 28, 2004. "The rule's treatment of chefs is a major victory for restaurateurs," Rob Green of the National Restaurant Association reportedly told the *Daily Labor Report*. See *DLR*, Apr. 21, 2004, p. AA6.

[271] *FDCH Transcripts*, pp. 43-44.

[272] Subsection 541.4 of the final rule.

[273] *FDCH Transcripts*, p. 6.

> KILDEE: If union contracts simply refer to applicable law for overtime eligibility, a union worker will be directly and immediately affected by the applicable law then. In other words, if the ...
>
> CHAO: If a worker is under a collective bargaining agreement, they're covered by the collective bargaining agreement, and it does not impacted [sic] by these white-collar regulations.
>
> KILDEE: But if the contract refers only to the Wage and Hour Act, as it says, in effect, the overtime shall be in accordance with the Wage and Hour Act then it would be affected by your changes in the Wage and Hour Act.
>
> CHAO: I don't think so, and I will give you another example. Just because...

At that point, Representative Kildee broke in to affirm: "Well, but it would be."

A brief discussion followed, at the close of which Ms. Chao again affirmed: "... union members under collective bargaining agreements are not impacted." Then, she turned to McCutchen "... perhaps to clarify it even further." McCutchen explained:

> ... for a union member, if you're paid by the hour, you're entitled to overtime. That's what these rules say.... If you perform blue-collar and manual labor, 541.3 clearly states that you're entitled to overtime. So these rules strengthen protections for union workers no matter what's in their collective bargaining agreement.

Representative Kildee protested: "You have still not answered my question."[274]

Related Issues. After a short break, discussion resumed with a second panel. Among issues discussed was the status of *inside* and *outside* sales people, treatment of *nursery school teachers*, how *team leaders* (a new concept in the final rule) and *working foremen* (or assistant managers or working supervisors) were to be treated, coverage of *computer services employees* and of those employed in the *financial services industry*. Each of these types of work involved technical issues. Some had been a subject of congressional hearings and/or of litigation. Their status for Section 13(a)(1) purposes appeared, some argued, neither obvious nor clear.

As the hearing closed, Chairman Boehner declared that "trying to determine exempt or non-exempt status is not an exact science." As for the final rule, he stated, "Is it going to be perfect? No. Is it a lot better than it was? Absolutely."[275]

Hearing: Senate Appropriations Subcommittee, May 4, 2004

Senator Specter had early focused attention on DOL's new overtime pay policy. His Appropriations Subcommittee on Labor, Health and Human Services, and Education, had conducted oversight hearings on the issue on July 31, 2003, and again on January 20, 2004. (See discussion above.) In each case, DOL had argued that the new rule would benefit both employers and employees; but it had, some believed, been less forthcoming about the actual provisions of the rule (then only proposed)

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[274] Ibid., pp. 16-18.

[275] Ibid., p. 69.

and how it could be implemented. Some Subcommittee members questioned whether the rule, if finalized, would reduce the need for litigation — or, conversely, would render increased litigation inevitable.

At the January 20 hearing, Ms. Chao had affirmed: "Clear, concise and updated rules will better protect workers and strengthen the Department's ability to enforce the law."[276] Meanwhile, DOL spokesperson Ed Frank would speak of "needless litigation" and "outdated" FLSA rules. Reiterating the views of Ms. Chao, Frank stated: "Clearer up-to-date rules will also better protect workers' overtime rights."[277]

Views from the Department of Labor. The Appropriations Subcommittee, on May 4, 2004, conducted a third hearing on the overtime pay rule — now in its final form. "Overtime pay is important to American workers and their families," began Administrator McCutchen, "and this updated rule represents a great benefit to them." The rule, she affirmed, will "strengthen overtime rights" for various categories of workers, "end much of the confusion about these exemptions," and return "clarity and common sense" to the Section 13(a)(1) regulations: it will "help workers better understand their overtime rights, make it easier for employers to comply with the law, and strengthen the Labor Department's enforcement of overtime protections." DOL's "primary goal," she said, "remains to protect low-wage workers" — and, further, to reduce "wasteful litigation." She declared: "We simply cannot allow this legal morass to continue unabated."

McCutchen assured the Subcommittee that DOL had "listened to thousands of comments" and had "designed new regulations that are clear, straightforward and fair." She also lamented that "recent press coverage and public debate over this rule has been misleading and inaccurate" and decried the "tremendous amount of misinformation about the likely impact of the Department's new rule on employees such as blue-collar workers...." McCutchen explained:

> The Department never had any intention of taking overtime rights away from such employees, and the final rule makes this clear beyond a shadow of a doubt. ... the final rule provides that manual laborers or other 'blue collar' workers are not exempt under the regulations and are entitled to overtime pay no matter how highly paid they might be. This includes, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations....

McCutchen continued: "... the Department never intended to allow the professional exemption for any employee based on veteran status." And: "...those working under union contracts are protected" under Section 541.4, she affirmed, adding: "The final rule will not affect union workers covered by collective bargaining agreements."

In closing, she charged once more that "a great deal of misinformation has surrounded" the regulations. "They have been unfairly characterized as taking away

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[276] Secretary Chao, Senate Appropriations Subcommittee, Jan. 20, 2004.

[277] *DLR*, Mar. 3, 2004, p. A8.

overtime pay from millions of Americans when the exact opposite is true." She affirmed: "...workers win under this final rule."[278]

A Voice in Support of the Final Rule. In defense of the final rule, David S. Fortney, Deputy and Acting Solicitor at DOL during the first Bush Administration, characterized the existing regulation in starkly negative terms: "dramatically outdated," imposing "significant confusion and uncertainty," "frustrate[s] compliance efforts," "vague regulations result in unintentional noncompliance and resulting liabilities," and "vague and ambiguous ... difficult to apply." His comments were positive with respect to the final rule: "employers clearly benefit from having an unambiguous rule that helps facilitate compliance," "introduce[s] clarity and common sense," "add[s] much needed clarity," "more concise, easier to understand, clearer in scope...." He stated: "There also has been a significant amount of confusion resulting from inaccurate information and news stories...."

To provide clarity, Fortney addressed the matter of the professional exemption and training received in the armed forces. He assured the Subcommittee, quoting from the preface to the final rule, that DOL "'... never intended to allow the professional exemption based on veterans' status.'" He added, again quoting the final rule: "'Thus, a veteran who is not performing work in a recognized professional field will not be exempt, regardless of any training received in the armed forces.'" The language of the final rule, he explained, "was amended to clarify that veteran status alone will not be sufficient, but that a combination of work and experience may allow the employee to qualify for exemption, determined on a case-by-case basis."[279]

Fortney praised the "primary duty" test. Under current regulation, he said, "there were drawn out disputes requiring expensive time-motion studies or similar efforts in order to determine whether the employee was properly engaged in exempt work." The new test "will avoid the need for such expensive and time consuming analyses and promote greater compliance." He also stated: "Unionized employees will continue to receive overtime as provided by their collective bargaining agreements, and a specific provision has been added to the regulations specifying that 'blue collar' workers are not exempt from overtime." He urged "employers, employees and government enforcement agencies alike" to embrace the final rule.[280]

Overall, he ventured little beyond the final rule, *per se*. Technical administrative questions, raised by critics, remained to be addressed.

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[278] Administrator McCutchen, Senate Appropriation Subcommittee, May 4, 2004.

[279] Accordingly, if an employee were engaged in professional work as a result of training that was received in the armed forces, it may be that he or she could be exempt *on the basis of that training* — not on the basis of veteran status.

[280] David Fortney, Senate Appropriation Subcommittee, May 4, 2004.

Doubts and Concerns. Where supporters of the final rule tended to speak in general terms and to emphasize what they viewed as its positive aspects, critics looked to *nuts-and-bolts* issues (i.e., to definitional questions), to practical aspects of administering the rule, and to its more specific workforce implications.

Team Leaders. Subsection 541.203(c) of the final rule introduced the concept of the exempt *team leader*. It states:

> An employee who leads a team of other employees assigned to complete major projects for the employer (*such as* purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, *even if the employee does not have direct supervisory responsibility over the other employees on the team*. (Italics added.)

The AFL-CIO quickly took note of this provision, declaring that it was "an enormous new loophole that will allow management to disqualify workers from overtime simply by appointing them 'team leaders.'"[281] Responding to AFL-CIO concern, DOL declared in flat and unqualified terms: "The final rules ensure overtime protection for 'blue collar' team leaders and are **more protective** of overtime pay for 'white collar' team leaders than the current regulations."[282] (Bolding in original.)

The issue had been raised during the April 28 hearing before the House Committee on Education and the Workforce. Representative Donald Payne (D-NJ) questioned Secretary Chao about the team leader provision.

> CHAO: ... I'll be more than glad to answer the issue about team leaders because that is also an area of confusion. In fact, our final rule strengthens overtime protection for workers because we tighten up on the language and we clarify language and narrowed its scope....

Ms. Chao then turned to Administrator McCutchen, who read into the record the phasing of the final rule and affirmed "that only the leaders of these major project teams can be exempt...." McCutchen added: "...we've defined what it means to carry out a major assignment and limited it to only those very significant assignments that happen in a corporation." The Administrator concluded: "So it's very much tightened and more protective than the current regulatory language."[283]

Representative Payne suggested there seemed to be a certain "subjectivity" rather than clarity. "You know, what is significant to one person may not be significant to someone else."[284] Former Wage/Hour investigator Karen Dulaney Smith raised similar concerns. "That word [team leader] is not in the current regulation. We don't know what that's going to mean. Team leaders," Smith stated,

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[281] *DLR*, Apr. 27, 2004, p. E3.

[282] Ibid., p. E5.

[283] *FDCH Transcripts*, pp. 27-28.

[284] Ibid., p. 28.

"would have been non-exempt when I was an investigator unless they had supervisory duties and management responsibilities."[285]

During her testimony a week later at the Senate Appropriations Subcommittee, McCutchen was silent on the team leader matter. But the issue was promptly raised by AFL-CIO Associate General Counsel Craig Becker. "This is a broad new category of exempt employees," he stated. "Given the increasing organization of work into teams and the incentive this provision will give employers to so organize work, it potentially sweeps large numbers of employees in numerous industries outside the protections of the Act."[286] Ross Eisenbrey of the Economic Policy Institute shared a similar view.

> ... a bizarre and poorly explained new exemption for 'team leaders' creates the potential for hundreds of thousands of currently [non-]exempt non-supervisory workers to lose their overtime rights. The use of self-managed teams of non-managerial, non-supervisory, front-line employees is widespread in American industry, and millions of employees are routinely involved in them.

Eisenbrey concluded: "The regulations provide no definition of 'team leader,' it has never been defined in FLSA case law, and the Department's assertion that it is clarifying current law is patently false."[287]

"Blue-Collar" Worker Protection? Before the Committee on Education and the Workforce, Secretary Chao had affirmed: "The new rules are very clear ... all blue-collar and manual laborers are entitled to overtime." And, again: "The new rule exempts only 'white-collar' jobs from overtime protection." Blue-collar workers "will not be affected by the new regulation."[288]

The final rule, Subsection 541.3(a), however, states in pertinent part: "The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other 'blue collar' workers who perform work involving repetitive operations with their hands, physical skill and energy." And, later:

> Thus, for example, **non-management** production-line employees and **non-management** employees in maintenance, construction and similar occupations ... are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be. (Bolding added.)

What if a blue-collar worker, engaged in line or production work, also had duties that could be classified as executive or administrative? The final rule sets no standard with respect to the proportion of a worker's time that must be devoted to exempt work in order to be classified as exempt. If, upon whatever basis, a worker's *primary duty* ("the principal, main, major or most important duty that the employee performs"

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[285] Ibid., p. 44. The term is not defined in the final rule.

[286] Becker, Senate Appropriations Subcommittee, May 4, 2004.

[287] Eisenbrey, Senate Appropriations Subcommittee, May 4, 2004.

[288] *FDCH Transcripts*, pp. 1 and 6.

— likely prioritized by the employer) can be said to be an executive or administrative function, would that blue-collar worker still be non-exempt?[289]

It was a technical question (among many) that the Secretary and the Administrator did not explore: but Eisenbrey expressed concern about definitional issues involved. He suggested that despite claims "that blue-collar workers are entitled to overtime, the rule limits overtime rights to '**non-management** blue-collar employees,' begging the question of who gets classified as a **management** blue-collar worker, a seemingly new class of exempt workers that will grow significantly under these new rules." He observed: "It appears that the management of a team would transform a manual laborer or other blue-collar employee into a 'management blue-collar employee,' leading to exemption and loss of overtime pay."[290]

Financial Services Employees. For the past decade, certain interests have sought to have inside sales staff declared exempt from FLSA overtime pay protection.[291] Congress has not acceded; inside sales staff remain non-exempt. The final rule, however, moves toward exempting at least certain inside sales staff from wage/hour protection. Section 541.203(b) reads:

> Employees in the financial services industry generally meet the duties requirements for the administrative exemption **if their duties include work such as** collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, **an employee whose primary duty is selling financial products does not qualify for the administrative exemption**. (Bolding added.)

While the specified duties might "include work such as" those listed, it need not include all of them: others, not listed among the examples set forth in the rule, could also satisfy the requirement. As in other areas, the determinative factor would seem to be one's definition of "primary duty." Since the final rule eliminates a percentage factor with respect to performance of exempt duties (amount of time spent), a single exempt function might be sufficient to trigger exempt status.

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[289] Becker of the AFL-CIO, in his May 4, 2004 testimony, refers to "a vague definition of 'primary duty' ... that requires application of a wide variety of factors and ultimately a subjective judgment." He adds: "This vague and ultimately subjective test will lead many employers to misclassify employees as exempt based on the employer's own notion of what is 'most important,' thereby contracting coverage and increasing litigation."

[290] Eisenbrey, Senate Appropriations Subcommittee, May 4, 2004.

[291] See U.S. Congress, House Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Hearing on the Treatment of Inside Sales Personnel and Public Sector Volunteers Under the Fair Labor Standards Act*, hearings, 105th Cong., 1st sess., May 13, 1997; and CRS Report RL30003, *Modifying Minimum Wage and Overtime Pay Coverage for Certain Sales Employees Under the Fair Labor Standards Act*, by William Whittaker.

What the definition of *financial services industry* encompasses may also be of concern for some. For example, although it likely includes banks, what about brokerage firms? The insurance industry? Tax assistance? The interpretation given to *marketing, servicing or promoting* the employer's financial products may be more troublesome. How are those concepts to be differentiated from *selling*?

The issue of definition was raised during the April 28 hearing before the Committee on Education and the Workforce. With Chao and McCutchen at the witness table, Representative Miller reviewed the requirements of the final rule under 541.203(b) and observed that "... if you call a Citicorp or you call a Wells Fargo, you find out that there's one person on the other end of the line that does all of those things." For the employer, Representative Miller said, "a little flag" goes up. 'Make sure you don't designate these people as primarily selling the products.'"[292]

Administrator McCutchen responded that the financial services section of the final rule "reflects" the current regulation "and also adopts the current case law." She added:

> What we did was we took that current case law, we read what it said and we adopted it and put it in the regulations so that employees and employers don't have to hire a lawyer to go find the case law that's not reflected in the current regulations because, as the secretary said, this 50 years of federal court case law is not reflected in the current litigation.[293]

Later, Representative Judy Biggert (R-IL) caused DOL to revisit the issue. "As you know, we've heard in detail about a lot of misinformation spread around about these regulations," Ms. Biggert stated. "Can you specifically tell me how the final rules apply to workers in the financial services industry...." The Administrator replied:

> McCUTCHEN: What we did ... is to adopt the existing federal court case law, and we did not just list their title. We took the case law and we said, for example, financial services employees who collect and analyze financial information, who provide advice and consulting to a customer, about which financial products are appropriate, are entitled to overtime consistent with the federal regulation.

Ms. Biggert asked: "... why did the department specify these segments in particular?" Ms. McCutchen responded, in part: "Because these were segments in particular that in recent years have generated a lot of confusion and a lot of litigation."[294]

With the second panel seated, Representative Miller raised the issue with former Wage/Hour investigator Karen Dulaney Smith. Ms. Smith explained how an inside customer services representative could become exempt, under the final rule — so

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[292] *FDCH Transcripts*, p. 10.

[293] Ibid., pp. 11-12.

[294] Ibid., pp. 37-38. The treatment of funeral directors and embalmers and of insurance claims adjusters was also contentious — and were included in Rep. Biggert's question. Longstanding DOL positions in these areas are overturned through the final rule — and, indirectly, as the result of litigation.

long as the employer did not designate sales as the worker's *primary duty*. At the least, she suggested, the provision would "be a confusion to employers and could encourage more litigation."[295] She termed the provision a "loophole" that removed the distinction between inside sales (non-exempt) and outside sales (traditionally exempt). "The administration said repeatedly that they'd like to have a clearer law, one that lets employers know what its obligations are. This is not it."[296]

When Administrator McCutchen appeared before the Senate Appropriations Subcommittee a week later, her prepared statement made no reference to the financial services issue. Craig Becker of the AFL-CIO, however, before the same Subcommittee, did raise the question. The financial services provision, he stated, "exempts a vast range of employees with the only exception being those 'whose primary duty is selling financial products.'" Becker argued that a blanket exemption for an industry was "a radical departure from prior practice" which had relied upon the actual duties performed. Turning to DOL's reliance on case law, he stated that "case law is not as uniform as the Department suggests."[297]

Chairman Specter and Ranking Member Harkin had expressed strong interest in the overtime pay issue and the hearing presented an opportunity for an explanation of the final rule. According to the *Daily Labor Report*, each now reacted to DOL testimony "with varying degrees of skepticism." Senator Specter reportedly suggested that the new rules "require a lot of interpretation" and will spawn "lots of litigation, lots of class actions." Senator Harkin was quoted characterizing the final rule as "anti-employee" and an "attack on the 40-hour workweek."[298]

Amending the JOBS Act (S. 1637): Phase II

In early May 2004, the Senate resumed consideration of S. 1637. At issue was the Harkin amendment to deny DOL the authority to reduce overtime pay protection through implementation of the final rule. (See discussion above.)

Gregg Amendment Presented. On May 4, 2004, Senator Gregg rose to decry the "fairly Byzantine and complex set of regulations" governing overtime pay and to applaud DOL for its "conscientious job" with respect to the final rule. He spoke of the "hyperbole and attack" to which the rule had been subjected and the "totally spurious and inappropriate analysis" prepared by people "who either did not understand the rules or decided to pervert the rules" and which, in turn, led to "a lot of misrepresentation." Arguments of critics he termed "so bogus and so inaccurate that it is important to understand how misleading it was as it represents sort of a theme of inaccuracy relative to the initial proposed regulations."[299]

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[295] *FDCH Transcripts*, p. 63.

[296] Ibid., pp. 44 and 66.

[297] Becker, Senate Appropriations Subcommittee, May 4, 2004.

[298] *DLR*, May 5, 2004, p. AA3.

[299] *Congressional Record*, May 4, 2004, p. S4790.

Senator Gregg expressed regret about the "morass" in which "everything is getting litigated." Turning to the final rule, he stated: "The first goal of this regulation as proposed is to make sure people earning not a significant amount of money are going to get overtime." What the rule does "is try to put certainty and definition into the law."[300]

Senator Gregg characterized the Harkin amendment as an effort "to stall" the final rule and suggested that adoption of the Harkin amendment would put at risk the overtime protection of 6.7 million people. The amendment, he stated, provides "no attempt to address the overall issue in a comprehensive and systematic way."[301]

Thereupon, Senator Gregg proposed his own amendment to be "juxtaposed to the Harkin amendment."[302] He noted that about 55 groups have expressed concern about their overtime pay status under the final rule. "We don't think most of them are [at risk] because we think the regulation is pretty clear.... But just so there can be no question about it, this amendment specifically names every one of those groups and says they have the right ... to their present overtime situation." The Gregg Amendment provides:

> (1) The Secretary shall not promulgate any rule under subsection [13] (a)(1) that exempts from the overtime pay provisions of section 7 any employee who earns less than $23,660 per year.
>
> (2) The Secretary shall not promulgate any rule under subsection [13] (a)(1) concerning the right to overtime pay that is not protective, or more protective, of the overtime pay rights of employees in the occupations or job classifications described in paragraph (3) as the protections provided for such employees under the regulations in effect under such subsection on March 31, 2003.
>
> (3) The occupations or job classifications described in this paragraph are as follows:....

The list of potentially impacted "occupations or job classifications" was included in the Gregg amendment. Among them were the following:

- any worker paid on an hourly basis
- any blue collar worker
- any worker provided overtime under a collective bargaining agreement
- team leaders
- registered nurses
- licensed practical nurses
- technicians
- refinery workers

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[300] *Congressional Record*, May 4, 2004, p. S4791. Sen. Gregg is Chairman of the Senate Committee on Health, Education, Labor, and Pensions.

[301] *Congressional Record*, May 4, 2004, p. S4791.

[302] Ibid., p. S4790.

- chefs
- cooks
- police officers
- firefighters
- craftsmen
- funeral directors
- outside sales employees
- inside sales employees
- assistant retail managers
- financial services industry workers

A fourth paragraph reads: "Any portion of a rule promulgated under subsection (a)(1) after March 31, 2003, that modifies the overtime pay provisions of section 7 in a manner that is inconsistent with paragraphs (2) and (3) shall have no force or effect as it relates to the occupation or job classification involved." Senator Gregg affirmed: "... this amendment goes to getting clarity, clarity in the law ...."[303]

Senator Harkin challenged Senator Gregg's amendment as "a real acknowledgment, that there is a long list of occupations and people who are in danger of losing their overtime" pay. Senator Harkin suggested that one problem was *definitional*.

> For example, the Gregg amendment puts in team leaders, but we do not know what a team leader is because it has never been defined. What is a team leader?
>
> The Gregg amendment puts in refinery workers. Does that mean oil refinery or does that cover ethanol plants in Iowa? That is a refinery. Who is covered by that? We do not know.
>
> Technicians, what is a technician? There is no definition of a technician. The Gregg amendment covers funeral directors, but how about embalmers? We don't know.

He suggested that he could support the Gregg amendment to "move the process along," but his objections to it were numerous.[304]

Debate Resumes. Reconciling the Gregg amendment with the final rule was then explored. Senator Kennedy urged support for the Gregg amendment but argued that it would not produce clarification. "To the contrary, it will provide additional litigation because the test in the ... [final rule] refers to the duties and not to the professional names that are being used." The Harkin amendment, he said, "... is the right way to go and I hope the Senate will follow his lead."[305]

Conversely, Senator Mike Enzi (R-WY) charged that the Harkin amendment was a "trial lawyers' dream." Senator Enzi spoke in defense of the final rule.

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[303] Ibid., pp. S4792-S4793.

[304] Ibid., p. S4803.

[305] Ibid., pp. S4793-S4794.

> The reference to training in the Armed Forces has been deleted and clarifies that veteran status does not affect overtime. The veterans will get their overtime regardless of the training received in the armed services.
>
> The final rule states first responders such as police, firefighters, paramedics and emergency medical technicians are eligible for overtime pay. No question; no gray area, it clears it up.
>
> The final rule also states licensed practical nurses do not qualify as exempt learned professionals and are therefore eligible for overtime pay.
>
> The final rule clarifies [that] the contractual obligation under collective bargaining agreements is not affected.
>
> ... the new rule will guarantee overtime protection for blue collar team leaders and is more protective of overtime pay for white collar team leaders. Furthermore, there is no change to current law regarding the overtime status of computer employees, financial services employees, journalists, insurance claims directors, funeral directors, athletic trainers, nursery school-teachers, or chefs.

Senator Enzi further affirmed: "We need to keep it simple and understandable. The rule does that.... No lawsuits necessary, it is very clear. That is what the Department intends." After lamenting the "antiquated and confusing" current regulation with its "windfall for trial lawyers," he endorsed the Gregg amendment which he said would "provide clearer and fairer overtime rights for workers."[306]

The final rule, however, did not dispel interpretive disagreements. Senator Herb Kohl (D-WI), speaking immediately after Senator Enzi, found it "unlikely to clarify anything for small business.... We have not simplified anything." He noted "troubling exemptions of entire jobs and industries" and observed that the rule "exempts from overtime 'team leaders,' even though these employees may have no supervisory role...." He further stated:

> Certain industries have worked for years to get out of paying overtime to their workers — and the rule's list of exemptions reads like a roll call of those that succeeded. For reasons unclear, even after 500 pages of explanation, journalists, personal trainers, financial services workers, and computer industry workers — to name just a few classes — are summarily ineligible for overtime.

Senator Kohl concluded: "Any weakening of the overtime rules is a step down on the ladder of economic progress."[307]

While supporters of the final rule repeatedly affirmed that DOL *had listened* and had revised the rule to render it more acceptable, some disagreed. Senator Russell Feingold (D-WI) alluded to "largely cosmetic changes that the administration grudgingly made at the eleventh hour" that "did not change the rule's result...." At highest risk are "those workers whose salaries fall between $23,660 and $100,000"

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[306] Ibid., pp. S4796-S4798.

[307] Ibid., pp. S4798-S4799.

who "are not guaranteed overtime" pay and who, through "the new duties test," could be stripped of their wage and hour protections. "The administration's public relations campaign...," he asserted, "does not reflect the reality of this rule."[308]

As debate progressed, Senator Specter called attention to that morning's hearing before his Subcommittee. "This is a very complicated regulation," he began. The Senator agreed that clarity, with avoidance of unnecessary litigation, was "a very important objective." However, on the basis of "an extended hearing this morning" with Administrator McCutchen and witnesses for and against the final rule, he concluded that "there is no indication that this new regulation is going to clarify anything at all." He turned to the issue of "team leader."

> ... this term 'team leader,' I think, is going to provide additional complexity, so that a proposed final regulation here, instead of simplifying and directing and being an effective instrumentality to eliminate litigation, appears to me to be no advance over the current regulation, and when you come down to the injection of a new concept of team leader, it creates additional complications.

Senator Specter declared that, "[o]n the current state of the record, I am opposed to the proposed regulation." And, he affirmed his support for the Harkin amendment.[309]

Division seemed wide. "Does anybody believe this administration's Department of Labor is trying to expand overtime pay?," asked Senator Christopher Dodd (D-CT). "That is not why the business community is supporting this rule change, because they want to expand overtime pay," he stated. "The administration clearly wants to restrict it and redefine job categories that will allow them to do so."[310]

Proceeding to a Vote. On May 4, the Senate voted on the Harkin amendment and the Gregg amendment as well. Two parallel roll calls were conducted. On the Gregg amendment, the vote was 99 yeas with one Senator not voting. On the Harkin amendment, the vote was 52 yeas to 47 nays — very largely along party lines. Thus, both amendments were approved.[311] Action in this area, as discussed below, would now move on to the House.[312]

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[308] Ibid., pp. S4800-S4801.

[309] Ibid., pp. S4801-S4802. Senator Harkin concurred. The final rule, he stated, "at least what we heard about in the hearing this morning, is not a clarification. What we heard in the hearing is more ambiguous, and it is going to lead to much more litigation." See *Congressional Record*, May 4, 2004, p. S4803.

[310] Ibid., p. S4802.

[311] Ibid., p. S4806.

[312] H.R. 4520, roughly the counterpart of S. 1637, was passed by the House on June 17, 2004, and sent to the Senate — but without language dealing with the overtime pay issue. On July 15, 2004, amended to include, *inter alia*, the Harkin and Gregg amendments, H.R. 4520 (S. 1637) was passed. Senate conferrees were immediately appointed.

The Miller Motions to Instruct: May 2004

During fall 2003, Congress considered and sent to conference H.R. 2660, a bill to provide appropriations for FY2004 for the Departments of Labor, Health and Human Services, and Education, and Related Agencies. (See discussion above.) Ultimately, an appropriation for these agencies was arranged through an omnibus appropriations bill (H.R. 2673, P.L. 108-199). However, the original bill (H.R. 2660) remained, technically, in conference.

Motion of May 12, 2004. Representative George Miller, on May 12, 2004, moved to instruct the conferees on H.R. 2660 to insist on reporting an amendment supportive of overtime pay protections. The Miller motion was of two parts. First, it would prevent DOL from expending funds to diminish overtime protection accorded under Section 13(a)(1) of the FLSA as it stood prior to the recent DOL initiative. Second, it would allow DOL to increase the salary thresholds required to exempt workers from overtime pay protections under Section 13(a)(1).

Representative DeLay immediately moved to table the Miller motion. If concurred in, the DeLay motion would have prevented discussion of the substance of the Miller motion: i.e., the impact of DOL's final rule. Mr. Miller demanded a recorded vote, the result of which was 222 ayes (in favor of the DeLay motion) and 205 nays (favoring consideration of the Miller motion).[313] The vote was largely along party lines, two Republicans voting with the Democrats. Secretary Chao applauded the DeLay motion as "a victory for the millions of American workers who will benefit from stronger overtime protection."[314]

Motion of May 18, 2004. Again on May 18, 2004, Representative Miller moved to instruct the conferees on H.R. 2660 to insist on reporting an amendment to block funding for implementation of DOL's final rule — except that DOL would be permitted to proceed with adjustment of the salary thresholds for exemption under Section 13(a)(1). As before, Representative DeLay moved to table the Miller motion. Mr. Miller called for a recorded vote on the DeLay motion to table, the result was ayes 216 (to support the DeLay motion) and 199 nays (further to consider the Miller motion). The vote was largely along party lines.[315]

Hearing: House Small Business Subcommittee, May 20, 2004

Through the year between release of the proposed rule on March 31, 2003, and release of the final rule on April 23, 2004, areas of controversy with respect to the new regulations had been clearly (and, relatively early) identified. DOL stressed that it had conscientiously reviewed issues raised through the comment process, and had modified the rule to meet the various objections. Still, release of the 152-page final rule (as published in the *Federal Register*), cross-referenced to the current rule and

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[313] Ibid., pp. H2836-H2837, and H.2876.

[314] *DLR*, May 13, 2004, pp. A11-A12.

[315] *Congressional Record*, May 18, 2004, pp. H3106-H3107. See also *DLR*, May 19, 2004, pp. A8-A9.

to case law, may have left some non-specialists initially ill-prepared to raise issues during early hearings. By the May 20 hearing before the House Small Business Subcommittee on Workforce, Empowerment and Government Programs, however, there ought to have been few surprises.

Testimony from the Department of Labor. Alfred B. Robinson, Deputy Administrator for Policy, Wage and Hour Division, was the lead DOL witness for the May 20 hearing.[316] He began by affirming: "The Department is very proud of the final rule. Overtime pay is important to American workers ... and this updated rule represents a great benefit to them." He proceeded to list the groups of workers who, DOL held, would benefit from the "strengthened overtime protections." He noted the alleged deficiencies of the current regulations, stating that small business owners "can ill afford large and potentially devastating legal fees to decipher and litigate the old rule's maze of vague and complicated overtime standards." And, he praised the final rule as "clear, straightforward and fair."[317]

Robinson assured the Subcommittee that DOL had "listened to thousands of comments — from workers and employers" and from the Congress "whose comments have been a tremendous benefit to the Department." Then he added: "Unfortunately, much of the press coverage and public debate over this rule has been misleading and inaccurate."[318]

Robinson affirmed that DOL's "primary goal was to protect low-wage workers." Even lawyers, he said, "have found it difficult to determine who is entitled to overtime pay under the old rules, and very few employees understood their rights." Arguing for "clearer rules that reflect the workplace of the 21st Century," he concluded: "We simply cannot allow this legal morass to continue unabated."

Setting aside concerns about diminished coverage and increased litigation, Robinson accentuated the positive. DOL "... is pleased to report that estimated first-year costs of the final rule — which decrease significantly in subsequent years — are

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[316] On June 11, 2004, McCutchen, left DOL to become a partner at the Washington, D.C., law firm of Dickstein Shapiro Morin & Oshinsky. Robinson was designated as Acting Administrator. See *DLR*, June 3, 2004, p. A3.

[317] Robinson, House Small Business Subcommittee, May 20, 2004.

[318] The allegation appears to have become a standard DOL talking point. *DLR*, May 3, 2004, p. A10, covering the National Conference of State Legislatures' spring forum, reports on comments by Howard Radzely, Solicitor of Labor. "Radzely, in his presentation, made references to the dissemination of 'misinformation' by opponents of the rulemaking, a theme echoed by his fellow panelist, Katherine Graham Lugar, a lobbyist for the National Retail Federation and executive director of the O.T. Coalition." Again, on May 11, 2004, Radzely discussed with the Bureau of National Affairs a DOL program "to monitor court cases" involving the Section 13(a)(1) exemption. "Establishment of the new 'overtime security amicus program' is intended to counter what Radzely referred to as an 'unprecedented misinformation campaign' that is 'creating confusion which could compromise the stronger worker protections' in the new rules." See *DLR*, May 12, 2004, p. A11. At the annual meeting of the American Bar Association, Aug. 10, 2004, in Atlanta, Radzely reportedly complained "that there was a significant amount of misinformation regarding what was in the new rule and what they meant." See *DLR*, Aug. 12, 2004, p. AA1.

not likely to have a substantial impact on small businesses." He estimated that "... only 107,000 employees who earn at least $100,000 per year, *and* perform office or nonmanual work, and 'customarily and regularly' perform exempt duties *could* be classified as exempt. However, the Department believes even this result is unlikely...." (Italics in the original.) Robinson added that "few if any workers" earning between the $23,660 and $100,000 thresholds "are likely to lose the right to overtime pay."

In closing, Robinson again asserted that "a great deal of misinformation has surrounded" the final rule but stated: "We at the Department of Labor are very proud of the updated rule."

Although DOL did not initially address issues raised in prior hearings, they soon surfaced. Representative Linda Sanchez (D-CA) raised the issue of "team leaders." Robinson responded that the final rule is "more protective" of such workers than current regulation. When he stressed that "team leaders" would be engaged in "major projects," Ms. Sanchez pointed to those who might be involved in "quality teams," suggesting that the concept could be subject to litigation.[319]

Ms. Sanchez also raised the issue of overtime protection for workers covered by a collective bargaining agreement. Robinson replied that "[t]hese regulations do not apply to people in unions." He explained: "Union employees are protected by their collective bargaining agreements." Ms. Sanchez rephrased the question, explaining that some collective bargaining agreements defer to applicable federal law on overtime issues and, if the law (or, here, the regulation) were changed, it could impact workers — even those under a collective bargaining agreement. The query was expanded upon by Subcommittee Chairman W. Todd Akin (R-MO), but the issue was not resolved.[320]

Comment from Other Witnesses. Also appearing before the Small Business Subcommittee were two witnesses of industry orientation and one of a labor perspective.

"A loan officer for a mortgage broker," said Neill Fendly of the National Association of Mortgage Brokers, "must make certain judgments when assisting consumers in financing the most important purchase of their lives." This requires "a high degree of skill and judgment," he affirmed, and therefore the mortgage industry "has long held that loan officers are exempt from the government's overtime pay requirements." Under the financial services section of the final rule, Fendly noted, loan officers *might be* exempt administrative employees. "Although the final rule does not include specific language regarding loan officers," he stated, "we believe the department's decision to frame the rule in the context of existing law is positive for

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[319] Concerning the discussion portion of the hearing, see *DLR*, May 21, 2004, pp. AA1-AA2. With respect to the issue of team leaders, Robinson observed that DOL has relied on existing case law in drafting that provision.

[320] *DLR*, May 21, 2004, pp. AA1-AA2.

the industry and a significant benefit to small business mortgage brokers with little or no access to expensive labor attorneys."[321]

"Based on their licensing requirements and primary duties," suggested John Fitch, representing the National Funeral Directors Association, the "NFDA has long believed that licensed funeral directors and embalmers should be exempt from the overtime requirements of the FLSA." (The industry had sought exemption of such workers as *professionals* — a position that DOL had consistently rejected until promulgation of the final rule.) "The Department concluded in the early 1970's," Fitch explained, "that licensed funeral directors and embalmers do not satisfy the current duties test for learned professionals."[322] Fitch argued that funeral directors "continually exercise discretion and judgment," cannot "adhere to a rigid schedule" because death is "unpredictable," and are employed by "mostly small, family-owned businesses" — and should not receive overtime pay when called upon to work more than 40 hours a week.[323] *Under the final rule*, he concluded, DOL "recognized, for the first time, licensed funeral directors and embalmers as professionals."

Ross Eisenbrey of the Economic Policy Institute was more pessimistic. The rule, he protested, "is far more likely to *provoke* additional litigation than to prevent it."[324] (Italics in original.) He stated:

> ... I believe the rule is so ambiguous and internally inconsistent that businesses will find themselves unable to understand or explain it, and workers will be much more likely to sue when employers take advantage of the rule to reclassify their employees and cut costs.
>
> The rule both eliminates key objective tests that provide clarity in the current regulations and introduces a host of ambiguous new terms and provisions that will be the source of litigation for many years to come.

Eisenbrey projected a "lawsuit-by-lawsuit" interpretation of the final rule. With questions and comments, he walked the Subcommittee through the rule.

> ... why aren't sous chefs, who spend all but a few minutes of the day working with their hands, 'blue collar'?
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> ... it is only '**non-management** production line employees and **non-management** employees in maintenance, construction, and similar occupations' who are entitled to overtime premium pay.

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[321] Fendly, Small Business Subcommittee, May 20, 2004.

[322] Fitch, Small Business Subcommittee, May 20, 2004. Though DOL had not classified funeral directors and embalmers as *learned professionals*, depending upon their duties they could have been (and now could be) exempt as administrative or executive employees.

[323] Whether the funeral industry is composed mostly of *small, family-owned* establishments may be a debatable point. This industry has undergone extremely rapid change during recent years. See CRS Report RL30697, *Funeral Services: The Industry, Its Workforce, and Labor Standards*, by William G. Whittaker.

[324] Eisenbrey, Small Business Subcommittee, May 20, 2004.

> The rule gives no clue about how to distinguish a **management** production line employee from a **non-management** production line employee, or a **management** maintenance employee from a **non-management** maintenance employee.[325] (Bolding in original.)
>
> This [the concept of *team leaders*] is a broad new exemption that could apply to as many as 2.3 million currently non-exempt team leaders throughout American industry. The only limitation on this exemption is that the team's project must be 'major.' No definition of 'major' is provided in the rule....
>
> This new 'learned professional' exemption allows employers to deny overtime pay to employees who ... 'have substantially the same knowledge level and perform substantially the same work as the degreed employees.' What does 'substantially the same' mean? It doesn't mean equal knowledge; could it mean less? How much less could a non-degreed employee know and still be considered a professional?
>
> The DOL has gone to great lengths to deny that knowledge employees gain from service in the armed forces can be used to establish this exemption [the *learned professional*]. But how will employers ... prove that none of the knowledge a veteran has that gives him 'substantially the same knowledge' as degreed professionals, was gained in the armed services?[326]

Eisenbrey raised a number of other questions dealing, for example, with: the definition of "customarily and regularly" as applied to exempt highly compensated employees; the distinction, for exemption purposes, between "marketing, servicing or promoting the employer's financial products" and "selling financial products" [the former are exempt, the latter are not]; the issue of working supervisors; and the concept of *concurrent duties*.

Summer and Fall of 2004

As time for implementation of the new rule came closer, the options of critics seemed to fade.[327] Congress could intervene directly with amendment of the FLSA; but that would seem unlikely, given the position of the Administration. Congress might have taken up the Specter proposal for a study commission; but given the position of the Administration, that, too, may have seemed an unlikely solution.

Two bills remained before the Congress that could have affected the Department's rulemaking. *First*. There was the JOBS Act, S. 1637 (with its counterpart in the House, H.R. 4520), having already been passed by the Senate with

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[325] Subsection 541.3(a) provides, *inter alia*: "... non-management production-line employees and non-management employees in maintenance, construction and similar occupations ... are not exempt under the regulations in this part no matter how highly paid they might be."

[326] Eisenbrey predicted, Small Business Subcommittee, May 20, 2004: "The single change from current law that will create the most confusion and spark the most litigation is probably the new test for exemption as a learned professional."

[327] *DLR*, Aug. 23, 2004, p. AA1.

the Harkin and Gregg amendments included. *Second*. There was the FY2005 appropriations bill for the Department of Labor which might be amended to include language to eliminate (or restrict) funding for all or part of DOL's contentious rulemaking process.

Amending the JOBS Act (S. 1637, H.R. 4520): Phase III

On June 4, 2004, Representative William Thomas (R-CA) introduced H.R. 4520, the American Jobs Creation Act of 2004 — the House counterpart of S. 1637. The two bills were somewhat different: the House bill did not contain the Harkin and/or Gregg language. Following consideration by the Committees on Ways and Means and Agriculture, the bill was called up in the House on June 17 and passed by the House (yeas 251 and nays 178). Referred to the Senate, the bill was placed on the Senate's Legislative Calendar (Calendar No. 591).[328]

On July 14, 2004, Senate Majority Leader Frist sought unanimous consent for consideration of H.R. 4520. He proposed that the bill be called up, and that S. 1637 be offered as a substitute for the language of the House bill. This would have meant that the Senate bill (now in the guise of the House bill) would have contained the Harkin and Gregg amendments.[329] He further proposed that a conference be requested with the House — and that Senate conferees be appointed. Senator Frist observed that "[m]uch work remains to be done on this bill" and stated: "There are significant differences with the House bill, so this is likely going to be a challenging process. I want to make sure that all Senators know that it is unrealistic to expect that the House will agree with all our provisions and that we will likely have to make changes to S. 1637."[330]

The following day, on July 15, 2004, H.R. 4520 was called up in the Senate. As discussion drew to a close, Senator Barbara Mikulski (D-MD) spoke in behalf of the Harkin overtime pay amendment and urged "the conferees on this bill to make sure the Harkin amendment stays in the final version."[331] This was seconded by Senator Kennedy: "It would be unconscionable if this bill comes out of conference without those protections."[332] As amended to include the language of S. 1637 (including the Harkin and Gregg amendments), H.R. 4520 was passed by a voice vote.[333] Senate conferees were immediately appointed — but some time would pass prior to appointment of conferees by the House.[334]

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[328] *Congressional Record*, June 17, 2004, pp. H4295-H4388, H4393-H4433.

[329] *Congressional Record*, July 15, 2004, p. S8151.

[330] Ibid., pp. S8104-S8105.

[331] Ibid., p. S8219.

[332] Ibid., pp. S8220-S8221.

[333] Ibid., p. S8221. On July 19, 2004, the Senate formally notified the House of Representatives of its action. The Harkin and Gregg amendments were a part of H.R. 4520 as passed by the Senate.

[334] Several Republican Members of the House reportedly had urged that an "up-or-down (continued...)

On September 29, 2004, when the House moved to appoint conferees on H.R. 4520, DOL's new overtime provisions had already been in place for nearly a month. Reversing an act of the Department — in effect and to which industry had already committed itself — would seem to have been more difficult than in preventing its initial implementation. James McGovern (D-MS), commenting upon the conference report to be considered by the House, October 7, 2004, conceded that "these misguided regulations" continue to stay in effect — since the Harkin/Gregg amendments had been stripped from the bill in conference.[335] The House moved forward with the legislation as reported. On a roll call vote (280 yeas to 141 noes), the House concurred in the report of the conferees.[336]

The Senate moved quickly with final passage of the legislation. On October 11, the conference report was called up. Senator Olympia Snowe (R-ME) observed that the bill "is silent on an issue of great importance to working Americans" — the Department of Labor's new overtime regulations. Senator Snowe noted that in May, she "was one of 52 Senators who voted in support of the Harkin amendment" and, after reviewing the negative implications of the rule, stated that she "was disappointed that the Harkin amendment was not included."[337] Senator Reed of Rhode Island reviewed the number of times the Senate had voted in favor of the Harkin (and Gregg) amendments, observing: "I am amazed that the majority has again stripped this provision which has overwhelmingly passed" both Houses — and, in the Senate, now five times.[338] Senator Dodd concurred: "... it is now out, despite the fact we insisted it be part of this legislation."[339] On October 11, the Senate voted to accept the conference report on H.R. 4520 (yeas 69 to 17 noes).[340]

On October 21, 2004, the "JOBS" bill was signed into law.

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[334] (...continued)
vote" be taken on that portion of the bill dealing with overtime pay. In a letter to Speaker Dennis Hastert, *DLR* reported, it was acknowledged: "Once the new overtime regulations take effect on August 23, 2004, it may be too late to restore overtime eligibility for our constituents." See *DLR*, June 16, 2004, pp. A10-A11.

[335] *Congressional Record*, Oct. 7, 2004, p. H8706. The reference to overtime protections had been omitted from the bill. See also *DLR* Sept. 29, 2004, pp. A8-A9.

[336] Ibid., pp. H8725-H8726.

[337] *Congressional Record*, Oct. 11, 2004, p. S11211. "With the support of Sen. Olympia Snowe (R-Maine)," explained the *DLR*, Oct. 7, 2004, p. AA1-AA2, the Senate conferees on the bill approved the overtime amendment, offered by Sen. Tom Harkin (D-IA), by a vote of 12-11. The House conferees then rejected the provision by a vote of 6-3. Under conference rules, both House and Senate conferees must accept a provision if it is to appear in a conference report." The Bush Administration "has threatened to veto any conference report that includes Harkin's amendment," according to the *Daily Labor Report.*

[338] On Oct. 10, 2004, the Senate had again adopted the Harkin (and Kennedy) amendment as free standing legislation. See *Congressional Record*, Oct. 10, 2004, pp. Slll07, and S11215-S11216.

[339] *Congressional Record*, Oct. 11, 2004, p. S11236. See also *DLR* Oct. 13, 2004, p. A1 ff.

[340] Ibid., p. S11222.

Appropriations for the Department of Labor: FY2005

On July 14, 2004, the House Appropriations Committee approved legislation (with no bill number then assigned, but soon to be H.R. 5006) to provide funding for the Department of Labor for FY2005. During consideration of the measure, Representative David Obey (the Committee's Ranking Democrat from Wisconsin) proposed language restraining the Department from moving forward with implementation of the final rule governing the Section 13(a)(1) exemptions. As with prior restrictive initiatives, the Obey amendment would not have blocked the adjustment of the lower thresholds under the final rule (the *earnings thresholds*) but would have dealt with the duties tests.

As on prior occasions, those supporting the Administration objected. Representative Ralph Regula (R-OH), chair of the Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies, argued that the Obey amendment, were it approved, would "prevent any federal enforcement of the law" insofar as Section 13(a)(1) was concerned. Conversely, Representative Obey reportedly characterized his proposed amendment, aside from its substantive features, as "an attempt to bring the Labor Department back to the table" on the overtime pay issue.[341]

Outside of Congress, the battle continued. Ross Eisenbrey of the Economic Policy Institute released a study decrying the Department's action and forecasting seriously negative results were it implemented.[342] Meanwhile, Ed Frank, DOL's spokesperson, called the report "a last-ditch effort to re-start *the misinformation campaign* that has failed to cover up the fact that millions of workers will benefit from the Department's strong new overtime guarantees."[343]

The Obey amendment was defeated in the full Committee by a party-line vote of 31 nays to 29 yeas. According to the *Daily Labor Report*, Representative Obey "expects to offer" a similar amendment when the appropriations measure is called up in the House — perhaps early in fall 2004.[344]

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[341] *DLR*, July 15, 2004, p. AA1.

[342] Ibid., pp. AA1-AA2.

[343] Ibid., p. AA2. Emphasis added.

[344] DLR, July 16, 2004, p. A7. According to the *Daily Labor Report*, the Committee's leadership (Chairman Bill Young and Subcommittee Chair Regula) had expected a full House vote on the $142.5 billion measure "the week of July 19," but a leadership aide said that scheduling conflicts were "'highly likely' to postpone the measure until after the August recess." The target date for implementing the Section 13(a)(1) regulations would be late August. An aide to Obey observed: "I can't imagine what legislation might be more important to the leadership than the 2005 funding bills."

Floor Fight in the House (September 2004): H.R. 5006. On September 7, 2004, report was made to the full House on H.R. 5006[345] with discussion of the report to begin the following day.

The next morning, while introducing the rule for consideration of H.R. 5006, Representative Louise Slaughter (D-NY) opined that, among those workers who worry about having their jobs "shipped off to Mexico or China," are some "6 million workers who stand to lose access to overtime pay under the new rules" set forth by the Department of Labor.[346] Immediately, Representative Marsha Blackburn (R-TN) took the floor to charge that there is "a campaign of disinformation that is being waged against the overtime pay reforms" and to declare that the new rule, already in place, was "worker-friendly" and "fair."[347] Thereafter, the rule (H.Res. 754) was adopted (209 yeas to 190 nays), and the House proceeded.[348]

Thus, the stage was set for confrontation when, late on September 8, Representative Obey took the floor. "I had planned at this point to offer an amendment with the gentleman from California (Mr. George Miller) which would block most of the sections" of the new Departmental rule. "But now I have been told that if I intend to offer that amendment tonight, the majority will shut down the House for the evening." Obey termed the action "outrageous" but, ultimately, did not introduce the amendment.[349]

On September 9, however, Representative Obey did propose his amendment to H.R. 5006.[350] Immediately, Representative Boehner called for a point of order against the amendment — but his point of order was overruled by the chair.[351] As debate continued, two perspectives seem to have appeared. *On the one hand:* the Obey (Miller) amendment might have left the Department in limbo, unable to enforce the new rules but unable, absent a lengthy proceeding, to provide an alternative.

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[345] *Congressional Record*, Sept. 7, 2004, p. H6731.

[346] *Congressional Record*, Sept. 8, 2004, p. H6767.

[347] Ibid., pp. H6767-H6768.

[348] Ibid., pp. H6771-H6772.

[349] Ibid., p. H6858. Obey pledged that the amendment would be offered later — and the House did close for the evening. Earlier in the day, Representative DeLay "told reporters that Republicans were busy polling members to determine where they stood on the pending overtime amendment and that even if there were defections, Republicans 'have other options' including a likely veto by President Bush...." In a letter to House Members, Representatives Boehner and Norwood observed: "It is ironic and sad that Democratic Party leaders and Washington labor bosses — who portray themselves as the champions of working-class Americans families — are waging a campaign to take these valuable new overtime rights away" from those who would benefit because of the Department's action. See *DLR*, Sept. 9, 2004, p. A12. See comments of Representative Sherrod Brown (D-OH), *Congressional Record*, Sept. 8, 2004, pp. H6876-H6877.

[350] As with other similar amendments, the Obey/Miller amendment would have (a) restricted funding for *the duties portion* of the regulation while, at the same time, (b) allowing the Department to proceed with *the earnings threshold* segment.

[351] *Congressional Record*, Sept. 9, 2004, pp. H6922-H6923.

"Under the Obey amendment," Boehner stated, "the Secretary of Labor is prohibited from protecting workers overtime as required by her current regulations, and she will be forced to start the regulatory process over in order to develop new regulations to ensure those protections."[352] Representative Regula affirmed: "... the allegation is that we would go back to the old regulations, but the truth of the matter is, they are gone."[353] *Conversely:* Representative Obey read into the record a review "of applicable principles of administrative procedure and pertinent judicial precedents" that indicated that "the Department of Labor would have the authority to immediately reimplement overtime compensation regulations in effect prior to August 23, 2004, upon passage of the proposed Obey-Miller rider." He added: "That means that they can on their own volition reinstitute those rules within 1 day."[354]

As the debate drew to a close, Representative Regula noted that "most of our speakers have been from the Committee on Education and Workforce" and "illustrates the fact that this is a legislative issue that ought to be debated and dealt with there." But, "in reality, it is before us."[355] On passage of the Obey/Miller amendment, the vote was 223 yeas to 193 nays — the critics of the Department of Labor's rule having won, at least, a momentary victory.[356]

A New Proposal in the Senate: S. 2810. In the Senate, the appropriations subcommittee dealing with the Department of Labor and related agencies was under the chairmanship of Senator Specter. Through several hearings during consideration of the 2004 appropriations measure, the Senator had expressed some discomfort with the new overtime pay rules.[357]

On September 15, 2004, Senator Specter introduced new legislation providing for the 2005 appropriation for the Department of Labor. The Harkin language was not in the original bill — the Senator from Pennsylvania choosing to allow the full Committee on Appropriations to work its will. When the bill was considered, the vote was 16 yeas to 13 nays, Senators Specter and Ben Nighthorse Campbell (R-CO) in support of the Harkin provision.[358]

As reported, the bill (S. 2810) charged that "none of the funds provided in this Act may be used by the Department of Labor to implement or administer any changes to regulations regarding overtime compensation" except those changes "specifying

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[352] Ibid., p. H6925.

[353] Ibid., p. H6931.

[354] Ibid., p. H6925. For a discussion of the various interpretations, see *DLR*, Sept 13, 2004, pp. A9-A10.

[355] *Congressional Record*, Sept. 9, 2004, p. H6931.

[356] Ibid., p. H6951. See *DLR*, Sept. 10, 2004, p. AA1 ff.

[357] Sen. Specter had variously spoken in opposition to the proposed rule. "I have become convinced it is a bad regulation," he said to the *Daily Labor Report*, Aug. 24, 2004, p. A9. "It is 154 pages of confusing rhetoric which is going to give the employers a great deal of discretion on [workers'] classifications."

[358] National Journal Markup Reports, Sept. 15, 2004.

the amount of salary required to qualify as an exempt employee." In deference to the floor debates in the House, it would seem, a further provision was added: "This provision requires the immediate re-instatement and enforcement of the old overtime regulations in effect on July 14, 2004" — except for those provisions relating to salary. In short, the *duties test* was overturned; the *earnings test* was sustained. And, in each house, the substance of the Harkin amendment has been accepted.[359]

The Move to an Omnibus Bill: H.R. 4818. On September 9, 2004, following the vote in the House on the Obey/Miller amendment, a spokesperson for Speaker J. Dennis Hastert (R-IL) reportedly affirmed "that the amendment would likely be stripped from the funding bill in a conference committee and expressed little concern that the amendment would reach the president's desk."[360]

Gradually, the ground began to shift away from critics of the overtime pay rule. A few days after the vote, House Appropriations Chairman C. W. Young (R-FL) was asked his opinion on the issue. "'I won't have strong feelings either way,'" he responded; but he expressed some frustration. "'That held us up for weeks and weeks last year. That one amendment,'" he said.[361] A few days later, the *DLR*, citing Senate Appropriations Committee Chairman Ted Stevens (R-AL), reported that the "Labor-HHS bill will be rolled into an end-of-session omnibus spending bill." Further, the *Daily Labor Report* noted: "Despite the majority votes in both houses to rescind parts of the overtime rule on the Labor-HHS bill, Republican leaders have said they expect the overtime amendment to be stripped from the omnibus bill in the face of the administration's threat."[362] Again, in mid-November, quoting a senior Senate GOP aide, it was reported confidently that an overtime pay provision "will be stripped from an omnibus appropriations bill." The article continued: "'We're heading toward most policy pieces being taken out of the omnibus,' the aide said. 'They're controversial. They're time consuming, and the president won't sign most of them.'"[363]

On November 20, 2004, the House and Senate took up the conference report on H.R. 4810, the omnibus bill funding the Department of Labor and several other agencies during FY2005.[364] Several Members, during the debate, made reference to the overtime pay issue; but, at large, the measure seemed to have slipped from view.

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[359] U.S. Congress, S.Rept. 108-345, *Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2005*, report to accompany S. 2810, 108th Congress, 2d sess., Sept. 15, 2004, p. 334. See also *DLR*, Sept. 29, 2004, p. A9. The Senate amendment was included in the bill approved by the Senate Appropriations Committee, but was not voted upon by the entire Senate. The latter, of course, had variously voted on that issue in conjunction with other bills.

[360] *DLR*, Sept. 10, 2004, p. A12 ff.

[361] *DLR*, Sept. 16, 2004, p. AA2.

[362] *DLR*, Sept. 29, 204, p. A9.

[363] *DLR*, Nov. 17, 2004, p. A11.

[364] The bill contained nine smaller bills, took up in excess of 3,000 pages, and was completed the night before the debate. See comments of Sen. Robert Byrd (D-WV), beginning on page S11740 in the *Congressional Record*, Nov. 20, 2004.

Representative Obey stated that "the Republicans have taken out several provisions that were supported by the majority of this body and should have been retained" and they have "stripped out the language which would have protected 6 million workers from being chiseled on their overtime rights."[365] The White House, stated Senator Byrd, "issued veto threats" to block elimination of "the administration's overtime regulation."[366] "Pure and simple," charged Senator Kennedy, "denying overtime is a thinly veiled cut in workers' pay and boost employers' profits." He concluded: "Denying the will of Congress and the American people in this Omnibus bill doesn't settle the issue. This battle," he said, "is far from over. The fight will continue until workers' overtime rights are restored."[367]

In the House on November 20, 2004, the final vote was 344 yeas to 51 nays; in the Senate, 65 yeas to 30 nays.[368] The measure was signed into law as P.L. 108-447.

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[365] *Congressional Record*, Nov. 20, 2004, p. H10193.

[366] Ibid., p. S11741.

[367] Ibid., p. S11745.

[368] *Congressional Record*, Nov. 20, 2004, pp. H10208-H10209, and S11764-S11765.

SECTION IV

A Mixed Reaction

On October 15, 2004, with only two months of experience behind them, the Department of Labor's Solicitor Howard Radzely reportedly proclaimed a certain amount of satisfaction with the result of the overtime pay regulation. "The predictions were not accurate," Radzely said, referring to critics of the plan. "Almost without exception, the reports indicate people are gaining overtime protection."[369] But, the reports were anecdotal and fragmentary.

Others agreed. In early November, Thomas Sullivan, Chief Counsel for Advocacy at the Small Business Administration, asserted that the new rule "has produced the greatest cost savings for small businesses since the administration began attempting to streamline its regulatory system." Todd McCracken, National Small Business Association President, "concurred with Sullivan's assessment that the DOL overtime rule had produced the single biggest cost savings to the small business community."[370]

Tammy McCutchen, the author of the new rule (and now with the law firm of Dickstein Shapiro Morin & Oshinsky), asserted that the rule was "still alive, despite "'an AFL-CIO *misinformation campaign*, misleading media reports, and eight congressional votes to revoke the changes.'" She reported that "a substantial number of cases involving incorrect classifications ... of overtime is 'on the horizon.'" Mostly, she said, the cases involve calculation of the "'regular rate'" of pay. But, McCutchen suggested, the overtime reform was only the beginning of changes needed in FLSA administration.[371]

In a speech in Naples, Florida, in early April 2005, DOL's Radzely affirmed that the final rule has "clarified and significantly strengthened" the law. "We have not seen a single incident — let alone the predicted 6 million incidents — of an employee who has lost pay as a result of the regulations." He described the rule as "more user friendly" for both attorneys and human resources personnel — and "at least as protective as the old" where workers were concerned. He observed: "[o]nce we got

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[369] *DLR*, Oct. 18, 2004, p. A7 ff.

[370] *DLR*, Nov. 18, 2004, p. A2. The summary of comment is by the *DLR*.

[371] *DLR*, Mar. 17, 2005, p. C1 ff. Emphasis added. The summary of comment is by the *DLR*. McClutchen suggested the following changes in the FLSA:

> allow employers to pay employees up to 10 percent of their income in bonuses.
> apply Section 7(1), which exempts from the overtime rules commissioned inside sales employees of qualifying retail or service establishments if those employees meet the compensation requirements, to employees earning at least 50 percent of their compensation from commissions and whose hourly rates are at least 1.5 times the minimum wage....
> require employees with evidence of overtime violations to give the employer the opportunity to compensate them for two years of back pay before they go to court with charges of 'willful violations' of the FLSA....

past the extreme rhetoric ... there have been surprisingly few issues" in contention. But, some problems still existed and, Radzely affirmed: "When employees are 'on-the-line,' in terms of exempt/nonexempt status, you can change their job duties, so that they will become clearly exempt again...."[372]

New Initiatives of the 109th Congress

Early in the 109th Congress, Senator Harkin rose to address "an issue that my colleagues have heard me speak about on numerous occasions during the course of the past two years." Once more, he raised the issue of overtime protection for America's workers.

Senator Harkin reviewed the history of the Fair Labor Standards Act and of its importance to workers — especially to those at the margins of the economy. "Overtime pay rewards work, and it reduces exploitation." The 40-hour workweek, he suggested, "creates jobs. Requiring time-and-a-half pay for overtime work encourages employers to hire more workers, rather than requiring additional hours of work from existing employees." To compensate such workers, who are engaged through extended periods, he stated, is "simple fairness."[373]

At this point, Senator Harkin proposed a new bill, S. 223 of the 109th Congress, that addressed the current FLSA regulations in two ways. *First*. It sets aside the existing regulations (those in effect since August 2004), allowing all workers to be covered under the act on the basis of the regulations in effect on March 31, 2003. The proposal states: "that portion of such regulations (as in effect on March 31, 2003) that would prevent such employee from being exempt shall be reinstated." *Second*. It provides for indexation of the coverage formula under a new rule: that all persons earning less than $591 per week would be exempt from the rule — i.e., covered by the standard wage and hour provisions of the act. It then provided that, not later than December 31 of each calendar year, "the Secretary shall increase the minimum salary level for exemption under Subsection (a)(1) by an amount equal to the increase in the Employment Cost Index for executive, administrative, and managerial occupations for the year involved."[374]

Indexation of the exemption, he affirmed, would "avoid future loss of overtime protections due to inflation."[375] And, Senator Kennedy, a co-sponsor of the bill, stated: "This change will bring it to the level it would be if we'd made annual

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[372] DLR, Apr. 8, 2005, p. C3. Radzely was speaking, here, of employees who might have preferred exempt to nonexempt status.

[373] *Congressional Record*, Jan. 31, 2005, p. S673.

[374] Ibid., pp. S673-S674.

[375] *Congressional Record*, Jan. 31, 2005, p. S763. How each of the provisions would work (and would work together) may not be entirely clear. On the general question of indexation, see CRS Report RL30927, *The Federal Minimum Wage: The Issue of Indexation*, by Gerald Mayer.

adjustments for wage inflation over the last 30 years."[376] The bill was referred to the Committee on Health, Education, Labor, and Pensions.

On April 19, 2005, Senator Richard Durban (D-IL) introduced S. 846, a bill to protect the overtime rights of workers employed as executive, administrative, or professional employees. Like the Harkin bill, it would set aside existing regulations (those in effect since August 2004) and index the formula under which exemption under Section 13(a)(1) would be allowable. The bill was read a second time and placed on the Senate Legislative Calendar under General Orders, Calender No. 80.[377]

In Summary

On April 23, 2004, DOL promulgated its final rule on overtime pay under Section 13(a)(1). The target date for its implementation was August 23, 2004. With the new rule in effect, any administrative or legislative change of the regulatory structure would be difficult to achieve. Thus, the last week of August was regarded, in practical terms, as a deadline of sorts — not absolute, but with change, thereafter, more difficult to effect.

Those who opposed the final rule attempted a number of strategies designed to block its promulgation in final form and, ultimately, its implementation — notably, with the FY2005 DOL appropriations measure. None of these was successful. Critics of the new rule confronted a serious disadvantage. The Congress, long ago, had given to the Secretary the authority to modify the regulation governing *executive*, *administrative* and *professional* — and to define precisely what those terms meant.

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[376] *Congressional Record*, Jan. 31, 2005, p. S674.

[377] *Congressional Record*, Apr. 19, 2005, pp. S3897 and S902-3903. See, also, S. 14, introduced by Senator Debbie Stabenow (D-MI), a more general bill, part of which deals with Section 13(a)(1). The bill would index the salary test for exemption. See *Congressional Record*, Jan. 25, 2005, pp. S437-S438.

Table 1. Weekly Earnings Thresholds Applicable to Executive, Administrative, and Professional Employees Under Section 13(a)(1) of the Fair Labor Standards Act

Date mandated	Executive	Administrative	Professional	Motion picture industry
1938[a]	$30	$30	—	—
1940[b]	$30	$50[c]	$50[c]	—
1949[d]	$55	$75	$75	—
1953	—	—	—	$200
1959[e]	$80	$95	$95	—
1963[f]	$100	$100	$115	—
1970[g]	$125	$125	$140	—
1975[h]	$155	$155	$170	$250

a. *Federal Register*, Oct. 20, 1938, p. 2518.
b. *Federal Register*, Oct. 15, 1940, pp. 4077-4078.
c. *Federal Register*, Oct. 15, 1940, p. 4077. The salary, in the regulation, is stated as $200 per month; but, for consistency, has been converted here to $50 per week.
d. *Federal Register*, Dec. 24, 1949, p. 7706. In Puerto Rico and the Virgin Islands, the rates were $30 for executives, $50 for administrators and professionals.
e. *Federal Register*, Nov. 18, 1958, pp. 8962-8963. In Puerto Rico, the Virgin Islands, and American Samoa, the rates were $55 for executives, $70 for administrators and professionals.
f. *Federal Register*, Aug. 30, 1963, pp. 9505-9506. Special rates were set for workers newly covered (retail and service workers) under the 1961 FLSA amendments: $80 for executives and administrators ($55 in Puerto Rico, the Virgin Islands and American Samoa), and $95 for professionals ($75 in Puerto Rico, the Virgin Islands, and American Samoa). The regular rates would take effect on Sept. 2, 1965. In Puerto Rico, the Virgin Islands, and American Samoa, the rates were $75 for executives and administrators, $95 for professionals.
g. *Federal Register*, Jan. 22, 1970, p. 885, and Feb. 20, 1970, p. 3220. Special rates were set for workers newly covered under the 1966 FLSA amendments: $115 for executives and administrators, $130 for professionals. The regular rates would take effect on Feb. 1, 1971. In Puerto Rico, the Virgin Islands and American Samoa, the rates were $115 for executives, $100 for administrators, $125 for professionals. The special interim rates would not apply to the insular jurisdictions.
h. *Federal Register*, Feb. 19, 1975, p. 7092. In Puerto Rico, the Virgin Islands, and American Samoa, the rates were $130 for executives and administrators, $150 for professionals.