S. HRG. 108–233

PROPOSED RULE ON OVERTIME PAY

HEARING

BEFORE A

SUBCOMMITTEE OF THE

COMMITTEE ON APPROPRIATIONS

UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

SPECIAL HEARING

JULY 31, 2003—WASHINGTON, DC

Printed for the use of the Committee on Appropriations

Available via the World Wide Web: http://www.access.gpo.gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE

90–395 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON APPROPRIATIONS

TED STEVENS, Alaska, *Chairman*

THAD COCHRAN, Mississippi	ROBERT C. BYRD, West Virginia
ARLEN SPECTER, Pennsylvania	DANIEL K. INOUYE, Hawaii
PETE V. DOMENICI, New Mexico	ERNEST F. HOLLINGS, South Carolina
CHRISTOPHER S. BOND, Missouri	PATRICK J. LEAHY, Vermont
MITCH MCCONNELL, Kentucky	TOM HARKIN, Iowa
CONRAD BURNS, Montana	BARBARA A. MIKULSKI, Maryland
RICHARD C. SHELBY, Alabama	HARRY REID, Nevada
JUDD GREGG, New Hampshire	HERB KOHL, Wisconsin
ROBERT F. BENNETT, Utah	PATTY MURRAY, Washington
BEN NIGHTHORSE CAMPBELL, Colorado	BYRON L. DORGAN, North Dakota
LARRY CRAIG, Idaho	DIANNE FEINSTEIN, California
KAY BAILEY HUTCHISON, Texas	RICHARD J. DURBIN, Illinois
MIKE DEWINE, Ohio	TIM JOHNSON, South Dakota
SAM BROWNBACK, Kansas	MARY L. LANDRIEU, Louisiana

JAMES W. MORHARD, *Staff Director*
LISA SUTHERLAND, *Deputy Staff Director*
TERRENCE E. SAUVAIN, *Minority Staff Director*

SUBCOMMITTEE ON DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES

ARLEN SPECTER, Pennsylvania, *Chairman*

THAD COCHRAN, Mississippi	TOM HARKIN, Iowa
JUDD GREGG, New Hampshire	ERNEST F. HOLLINGS, South Carolina
LARRY CRAIG, Idaho	DANIEL K. INOUYE, Hawaii
KAY BAILEY HUTCHISON, Texas	HARRY REID, Nevada
TED STEVENS, Alaska	HERB KOHL, Wisconsin
MIKE DEWINE, Ohio	PATTY MURRAY, Washington
RICHARD C. SHELBY, Alabama	MARY L. LANDRIEU, Louisiana

Professional Staff
BETTILOU TAYLOR
JIM SOURWINE
MARK LAISCH
SUDIP SHRIKANT PARIKH
CANDICE ROGERS
ELLEN MURRAY *(Minority)*
ERIK FATEMI *(Minority)*
ADRIENNE HALLETT *(Minority)*

Administrative Support
CAROLE GEAGLEY

CONTENTS

PROPOSED RULE ON OVERTIME PAY

THURSDAY, JULY 31, 2003

U.S. SENATE,
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, AND EDUCATION, AND RELATED AGENCIES,
COMMITTEE ON APPROPRIATIONS,
Washington, DC.

The subcommittee met at 3:02 p.m., in room SD–192, Dirksen Senate Office Building, Hon. Arlen Specter (chairman) presiding.

Present: Senators Specter, Craig, Harkin, and Murray.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. We now move to our panel on overtime, and our first witness will be Ms. Tammy McCutchen, Administrator of the Wage and Hour Division of the Employment Standards Administration. Ms. McCutchen has a law degree from Northwestern and a bachelor's degree in English literature also from Northwestern.

Ms. McCutchen, thank you for joining us today. We are going to be sticking very close to the time limits because we are under time constraints to conclude both this hearing and another segment on union financial reporting by 4:45.

I now turn to my distinguished colleague, Senator Harkin.

OPENING STATEMENT OF SENATOR TOM HARKIN

Senator HARKIN. Thank you very much, Mr. Chairman, for having this hearing on such an important issue as overtime pay. You are to be commended for having this hearing. I thank you.

I want to thank Ms. McCutchen and Mr. Eisenbrey for joining us today to discuss this issue.

I just have a brief statement I would like to make. I will shorten it as much as I can.

Mr. Chairman, we had a similar discussion at our authorizing committee meeting earlier this week on the nomination for the new Labor Solicitor. I was disturbed that he believed that Congress gave the Labor Secretary authority to broadly define the terms of the Federal Labor Standards Act and the overtime protections within that law. I do not believe that is the case. All we have to do is look at history and what Congress intended.

Congress passed time-and-a-half pay for overtime to increase jobs, and it included narrow exceptions as to who would fall outside the overtime pay protections. So what I hope we can find out at today's hearing is does this updated regulation reflect the intent of Congress that overtime protection and the 40-hour work week applies to all American workers with very few narrow exceptions.

At this point I have my doubts. From everything I have read and reviewed, the proposal goes much further than that. It makes the duties test so vague that employers can easily reclassify workers and take away their overtime protection even when it is obvious these workers are not managers and they are not in charge.

Now, I know the FLSA is an old law. It needs updating and that is fine. I do not mind that. We can increase the salary threshold. That is, I know, in the proposal. And that is good. But do not take away the protections that workers currently have. These workers include nurses, paralegals, secretaries, police officers, health technicians, many, many more, and a lot of times this overtime can be 25 percent of their entire paycheck.

So again, I just want to close by saying that in 1999 a GAO report found that employees who do not have overtime protection are twice as likely to work overtime than those who are covered. I repeat. The GAO found that employees who do not have overtime protection are twice as likely to work overtime than those who are covered. So why would we want to encourage that kind of activity?

Last, I asked the Labor Solicitor, the person who just got confirmed by us this week—Mr. Radzely I believe his name is—how many comments they had received on this, and I guess it is over 80,000.

Ms. MCCUTCHEN. Just about 80,000.

Senator HARKIN. About 80,000 comments have been received on this from all over the country, obviously indicating a strong interest in this proposal. My point is this is a proposal that has broad-reaching effects. It affects a lot of people in this country, and not one public hearing was ever held on it. To me that is the kind of proposed rule that should not go into effect until they have heard from the public and they get out in the public and hear from them on this.

So with that, I thank you again, Mr. Chairman, for holding this hearing.

Senator SPECTER. Thank you, Senator Harkin.

Ms. McCutchen, 5 minutes, and we look forward to your testimony.

STATEMENT OF TAMMY D. McCUTCHEN, ADMINISTRATOR, WAGE AND HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR

Ms. MCCUTCHEN. Thank you, Mr. Chairman and members of the committee. I am pleased to appear before you today to correct some of the confusion and misinformation that has been circulating regarding the Department of Labor's proposed revision to the white collar regulations. The Department and the administration began this difficult project because we care about working Americans. The minimum wage and overtime requirements of the Fair Labor Standards Act are among the Nation's most important worker protections, but these protections have been severely eroded because the Department has not been able to update the white collar regulations in over 50 years. Through its proposal, the Department is seeking to restore the overtime protections intended by the Fair Labor Standards Act, especially to low wage and vulnerable workers who have very little bargaining power with their employers,

while at the same time minimizing, to the extent possible, the economic impacts of any changes.

I have submitted a written statement for the record describing the Department's proposal in more detail. In the few minutes I have today, I would like to briefly summarize the proposal and discuss its likely impact.

To qualify as an exempt white collar worker under the existing regulations, the employee must be guaranteed a minimum weekly salary and perform certain job duties. The minimum salary level was last updated in 1975, over 28 years ago, and is now only $155 per week. Thus, under existing regulations an employee earning only $8,060 a year may be classified as an exempt executive and be denied overtime pay. By comparison, a minimum wage employee earns about $10,700 per year.

Our proposal would increase this minimum salary level to $425 per week, or $22,100 per year. This is a $270 per week increase and the largest increase in the 65-year history of the FLSA. The largest prior increase was only $50 per week. With this change, all employees earning less than $22,100 per year will be automatically entitled to overtime no matter what job duties they perform. An outside independent economist has concluded that this change will result in 1.3 million additional workers sharing up to $895 million in additional wages every year. This change is necessary to restore overtime protections to the most vulnerable of workers in America today. Of the 1.3 million workers who gain this guaranteed overtime protection, 55 percent are women, 41 percent are minorities, and 69 percent have a high school education or less.

Changes to the duties test are also necessary to restore overtime protections to the workers in America today. The existing regulations are so confusing that often employment lawyers and even wage and hour investigators have difficulty determining whether employees qualify for the exemption. The regulations are nearly impossible for the average worker to understand. This confusion is made worse because the job duty requirements in the regulations have not been changed since 1949 when Harry Truman was President and a computer filled an entire room. The regulations are hopelessly outdated, discussing jobs such as keypunch operators, leg men and gang leaders that we do not believe exist today, while providing little guidance for jobs of the 21st century. Confusing, complex and outdated regulations allow unscrupulous employers to play games and to manipulate the rules. More and more, employees must resort to lengthy court battles to receive their overtime pay.

Thus, the Department has attempted to clarify and simplify the existing regulations while minimizing the impact on workers to the greatest extent possible. The Department proposes to add a requirement to the executive duties test used today to test most employees for exemption, thus making it more difficult to qualify as an exempt executive. The basic requirements of the professional exemption will remain the same and the Department has sought comments on how to improve the confusing requirements for the administrative exemption and seeks to find a common sense test that average workers can understand. We have no intent to expand the exemptions.

These changes to the duties test should make it easier for employees to understand their rights and enable the Department to vigorously enforce the law. It will ensure employers have no excuse for abuse. The changes to the duties test should also reduce litigation, thus ensuring that employees receive their overtime pay now today when they need it to house and feed their families, not years from now after lengthy litigation.

The exemptions only apply to white collar employees who work in an office setting. The proposal will not impact blue collar workers who perform routine or manual labor such as construction workers, carpenters, electricians, mechanics, cooks, secretaries, or similar workers. In addition, the Department has not proposed any changes to the current rules for nurses or medical technicians, and the proposal will have no impact on police officers, fire fighters, or other first responders.

PREPARED STATEMENT

Finally, this rule does not affect obligations under existing collective bargaining agreements, and thus should not impact union members covered under union contracts.

I see my time is up. Thank you for allowing me to speak today.

[The statement follows:]

PREPARED STATEMENT OF HON. TAMMY D. MCCUTCHEN

Mr. Chairman and members of the Subcommittee: I am pleased to appear before you today to discuss the Department of Labor's proposed revision of the Fair Labor Standards Act's "white collar" regulations, which provide the criteria for determining who is excluded from the Act's minimum wage and overtime requirements as an executive, administrative, or professional employee.

Congress included this exemption from the Act's monetary requirements in the original Fair Labor Standards Act of 1938, in Section 13(a)(1). The regulations that we are revising appear in Title 29 of the Code of Federal Regulations, Part 541. As provided in the Act itself, employees working in a bona fide executive, administrative or professional capacity are not entitled to receive the minimum wage or overtime pay otherwise required by the Fair Labor Standards Act.

The statute itself does not define the terms executive, administrative or professional. Rather, the statute delegates to the Secretary of Labor the administrative discretion, and the duty, to define and delimit these terms "from time to time by regulations."

The existing regulations require three basic tests for each exemption: (1) a minimum salary level, now set at $155 per week for executive and administrative employees and $170 per week for professionals under the basic "long" duties tests for exemption, whereas a higher salary level of $250 per week triggers a shorter duties test in each category; (2) a salary basis test, requiring payment of a fixed, predetermined salary amount that is not subject to reduction because of variations in the quality or quantity of work performed; and (3) a duties test, specifying the particular types of job duties that qualify for each exemption.

The criteria in the existing regulations defining who is exempt have not been changed in decades. The job duties tests were last revised in 1949. The salary basis test was set in 1954. The minimum salary levels were last updated in 1975, over 28 years ago. Under those salary rates that are still in effect today, an employee earning only $8,060 a year may qualify as an exempt "executive." By comparison, an employee paid the current minimum wage of $5.15 an hour and working 40 hours per week earns about $10,700 a year.

The Congress recently asked the U.S. General Accounting Office (GAO) to review these "white collar" exemption regulations under the Fair Labor Standards Act. In a report issued by the GAO in September 1999,[1] GAO chronicled the background and history to the exemptions, estimated the number of workers who might be in-

[1] *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place* (GAO/HEHS–99–164, September 30, 1999).

cluded within the scope of the exemptions, identified the major concerns of employers and employees regarding the exemptions, and suggested possible solutions to the issues of concern raised by the affected interests. In its September 1999 report, the GAO said "We recommend that the Secretary of Labor comprehensively review the regulations for the white-collar exemptions and make necessary changes to better meet the needs of both employers and employees in the modern work place. Some key areas of review are (1) the salary levels used to trigger the regulatory tests, and (2) the categories of employees covered by the exemptions."

For the past year and a half, the Department has been working on proposed reforms to update and clarify these exemptions, published as a regulatory proposal in the Federal Register on March 31st this year (61 FR 15560). Last spring, we invited both business associations and worker advocates to meet with the Department so we could listen to their views and concerns about the existing regulations. We invited nearly 80 different stakeholder groups, including those who commented on previous proposed rules on this issue, including 16 employee unions, and heard from over 40 of them. We also reviewed comments that were filed with the Department during rulemaking efforts in the 1980s, and studied the entire regulatory history from 1938 to the present.

The existing regulations are complex. Complex rules are difficult to apply and particularly difficult to enforce. In many instances, even lawyers and experienced Department of Labor investigators have had difficulty interpreting and applying the current regulations. When rules are not clear, the confusion becomes a breeding ground for litigation. In 2001, for the fist time ever, private collective actions filed in federal court for violations of the Fair Labor Standards Act outnumbered discrimination class actions. This lack of clarity benefits no one and is particularly harmful to employees. Many misclassified employees may be forced to wait years to receive overtime pay that they need today as the legal process winds its way through the court system. Other misclassified employees, who never bring a lawsuit or complain to the Department, may never receive the wages they are due under federal law.

Under the leadership of Secretary of Labor Elaine Chao, the Department of Labor has issued a proposed rule to modernize and simplify the regulations. Reforms are needed to make the regulations easier to apply and enforce. Reforms are also necessary to strengthen overtime protections for low-wage workers. Bringing the rules into the 21st century and clarifying outdated regulatory language will help employees better understand their rights and ensure they receive their overtime pay when due. Employers will be better able to understand their obligations and comply with the law. Reducing administrative and litigation costs will free up resources that may be devoted to stimulating economic growth. And clearer rules will better equip the Department of Labor to vigorously enforce the law.

I would like to spend a few moments discussing our proposal and how we believe it will impact workers, but let me first discuss the workers who will not be impacted. First, because these exemptions are limited to certain defined classes of "white collar" workers, only those employees who perform office or non-manual work meeting the specified duties tests can be classified as exempt from receiving overtime pay. This rule does not impact employees who perform routine or manual work. Thus, for example, the proposal will not impact construction workers, carpenters, electricians, mechanics, plumbers, teamsters, cooks, secretaries and similar workers because none of these workers would qualify as "white collar" workers meeting the duties tests contained in the regulations. In addition, the Department has not proposed any changes to the current regulation regarding overtime pay for nurses or medical technicians and the proposal would have virtually no impact on police officers or firefighters. Finally, this rule does not affect obligations under existing collective bargaining agreements so if such an agreement provides that certain categories of workers will receive overtime premium pay, employers must continue to abide by those agreements without regard to these regulations.

Our proposal would increase the minimum salary level required for exemption as a "white collar" employee to $425 per week, or $22,100 per year. This is a $270 a week increase, and the largest increase since the Congress passed the Fair Labor Standards Act in 1938. (The largest prior increase was $50 per week.) With this change, all employees earning less than $22,100 a year would be automatically entitled to the overtime protections of the Fair Labor Standards Act. Under the current rules, even a worker earning minimum wage would not be automatically entitled to overtime protections. We estimate that this change will result in 1.3 million additional workers, eligible for overtime pay for the first time, sharing up to $895 million in additional wages every year.

As in the current regulations, the Department's proposal also includes a streamlined test for higher compensated "white collar" employees. To qualify for exemption

under this aspect of the proposed rule, an employee must: (1) be guaranteed total annual compensation of at least $65,000, regardless of the quality or quantity of worked performed; (2) perform office or non-manual work, and (3) meet at least one or more of the exempt duties or responsibilities specified for an executive, administrative, or professional employee. This is the same concept found in the current rules for the "Special Proviso for High Salaried Executives" known as the "short test."

The Department's proposal will also update, simplify and clarify the duties tests. The current regulations provide two sets of duties tests for each of the three exemption categories—that is, there is both a short duties test and a long duties test for each of the executive, administrative and professional exemptions. The current long duties tests only apply to employees earning between $8,000 and $13,000 a year, and thus, has been basically inoperative for a decade. Thus, our proposal would rely on the existing "primary duty" approach found in the current short tests. To be exempt, an employee must receive the required minimum salary amount and have a primary duty of performing the duties specified for an executive, administrative or professional employee.

For the executive exemption, the proposal would maintain the two requirements from the current short test and add a third requirement from the current long test. Thus, under the proposal, an exempt executive must (1) have a primary duty of managing the entire enterprise or a customarily recognized department or subdivision thereof, (2) direct the work of two or more other workers, and (3) have authority to hire or fire other employees or have recommendations as to hiring and firing be given particular weight. By adding this third requirement from the inoperative long test, the proposal would make it more difficult to qualify as an exempt executive. In other words, fewer workers would qualify as exempt executives under the proposal than qualify for the exemption today.

The Department has not proposed substantial changes for the professional exemption. The current duties test for professional employees requires a primary duty of "work requiring knowledge of an advance type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study." The proposal would add a phrase clarifying that the required advanced knowledge can also be gained through an equivalent combination of intellectual study and work experience. But, this is not a change from the current rule. As explained in the current regulations at section 541.301, and in case law, the term "customarily" restricts the exemption to those professions where an advanced, specialized degree is a standard prerequisite for entry into the profession, but also makes the exemption available for "the occasional lawyer who has not gone to law school, or the occasional chemist who is not a possessor of a degree in chemistry." The proposed change merely clarifies that the chemist without a chemistry degree cannot qualify for exemption unless he possesses knowledge and skills equivalent to a chemist with the advanced degree, and that such equivalent knowledge may be gained through combinations of military training, community college or technical school courses or specialized on-the-job training.

The major change to the duties test for the administrative exemption is the proposal to replace the "discretion and independent judgment" requirement, which has been a source of much confusion and litigation, with a new standard that exempt administrative employees must hold a "position of responsibility with the employer." To meet this requirement, an employee must either customarily and regularly perform work of substantial importance or perform work requiring a high level of skill or training. This change seeks to clarify the standards for determining eligibility for administrative workers. In our proposal the Department specifically sought comment about replacing the "discretion and independent judgment" test. Under both the current rule and the proposal, the exemption applies only to those employees who meet the administrative employee primary duty test of performing office or non-manual work related to management policies or general business operations.

Under the Department's proposal, all employees who earn less than $22,100 per year would be automatically entitled to the overtime protections of the law. Outside economists estimate that this change would guarantee overtime pay to an additional 1.3 million low-wage workers. Overtime protections will be strengthened for another 10.7 million hourly workers who currently perform both exempt and non-exempt duties and are paid overtime; the proposed changes to the duties tests will make entitlement to overtime pay more certain for these employees. Thus, under our proposal, overtime protections will be guaranteed or strengthened for 12 million workers. Our economists have estimated that there are about 640,000 hourly workers earning an average of $50,000 a year, all with college degrees, that employers might be able to reclassify as exempt. Of the 1.3 million additional workers who will be guaranteed overtime protection under our proposal, all earn under $22,100 per year; almost

55 percent are women; over 40 percent are minorities, and almost 25 percent are Hispanic; and almost 70 percent have only a high school education or less. Thus, consistent with the original purposes behind the enactment of the Fair Labor Standards Act in 1938, our regulatory proposal focuses additional overtime protections on some of our country's most vulnerable low-wage workers.

The Department's Notice of Proposed Rulemaking invited public comments for 90 days. During that comment period, which closed on June 30, we received almost 80,000 submissions, some of which are duplicates (for example, multiple copies of identical comments were received by e-mail, facsimile, and regular mail or delivery/courier service). We are continuing to sort through these comments to identify such duplications among the many comments received. The Department will review all comments received and give careful consideration to all of the views that have been submitted. I would be happy to answer any questions any Members of the Subcommittee may have, but note for the record that the Department is in the midst of rulemaking and will carefully consider the full record before deciding on the next step.

This concludes my prepared statement in this matter.

Senator SPECTER. Thank you very much, Ms. McCutchen.

We are going to proceed with the panel 2, so if you would step back. We find the process works best when we have heard both sides and then can have an exchange during the question and answer session.

STATEMENT OF CHRISTINE L. OWENS, DIRECTOR, PUBLIC POLICY, AFL–CIO

Senator SPECTER. Our next witness is Ms. Christine Owens, director of the AFL–CIO Public Policy Department, a law degree from the University of Virginia, bachelor's from the College of William and Mary. Thank you for joining us, Ms. Owens, and the floor is yours.

Ms. OWENS. Thank you, Senator Specter and Senator Harkin, members of the committee. I appreciate the opportunity to appear here today on behalf of the AFL–CIO to discuss our concerns about the proposed changes to the overtime regulations.

In our view there is no justification whatsoever for any regulatory change that would disqualify more workers from the overtime protections of the Fair Labor Standards Act. This is for reasons that are every bit as vital and valid today as they were in 1938.

First, the purposes of the FLSA's overtime rules have not changed. They are designed to encourage employers to hire more workers by discouraging them from assigning excessive hours to their current employees and to ensure that when workers put in overtime hours, they receive a fair wage for doing so.

Second, as the Supreme Court has held and this Congress has recognized, coverage under the FLSA is broad and exemptions are to be narrowly construed. No institution other than this Congress has the authority to make changes that deviate from these purposes and basic rules of construction.

With the steady escalation in Americans' work hours in recent years, workers need the protections of the FLSA overtime requirements as much now as ever, and in an economy that is experiencing the greatest job loss in a decade and in which wages are flat, American workers need more and better jobs, not fewer. For these reasons, changes in the overtime regulations must enhance rather than reduce overtime protections and extend them to more workers not fewer.

Regrettably, we believe that the Department's proposals take us in the opposite direction. There has been considerable debate over the number of workers who will be affected, and Ross Eisenbrey from EPI will speak to that. But let me just say that to our knowledge, the only study that even attempts to estimate the number of workers who will lose overtime protection is the EPI study, and that study concludes that more than 8 million workers are at risk of losing their overtime protection.

The Department has argued that its proposals are necessary to update the overtime rules for the new economy of the 21st century, but what is it about today's economy that makes it less critical that licensed practical nurses, medical technicians, paralegals, bookkeepers, some secretaries, and low-level supervisors have protections against excessive work hours and have the capacity to control their work hours and to earn overtime pay? Many of these workers need that pay to send their kids to college, to pay bills, and many of these workers need these protections to have time with their families.

But more is at stake than just these workers. Also at stake is the future of the 40-hour work week and its vulnerability to repeal by regulation. If DOL can expand the exceptions to the rule every time it regulates, then it will repeal the Fair Labor Standards Act through regulatory action alone.

I want to point out that on Tuesday—and Senator Harkin referenced this—when acting DOL Solicitor Howard Radzely testified, he took the position that the Secretary of Labor has the authority to define the overtime exemptions broadly, and that is precisely what he said. She can define the exemptions broadly. He went on to say that consistent with that authority, the Secretary could, under proper circumstances, exempt as many as 90 percent of all workers who earn above the proposed minimum salary threshold of $22,100. If this rule were the case, the Fair Labor Standards Act would no longer exist for most American workers.

We believe the Department's proposals are inconsistent with the intent of the FLSA and the scope of the Department's own authority. Congress intended for the FLSA overtime protections to apply to the vast majority of workers and for the exemptions to cover a limited few. Congress plainly did not intend, nor did it empower the Department of Labor to repeal the 40-hour work week for most American workers through regulation. I am not suggesting that is what the Department is doing right now, but we do believe that these regulations move us in that direction and create a dangerous precedent for further broadening of the exemptions by regulation.

PREPARED STATEMENT

The 40-hour work week enshrined in the Fair Labor Standards Act of 1938 is a bedrock labor protection that American workers and their families depend on. DOL's proposal threatens the protections of the overtime rules and sets an alarming precedent for the future that will hurt workers and hurt the economy.

Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF CHRISTINE L. OWENS

Mr. Chairman, members of the Committee, thank you for inviting me to testify on behalf of the AFL–CIO about the Department of Labor's (DOL) proposed revisions to the Part 541 regulations governing overtime eligibility.

Let me begin by saying there is no justification for disqualifying more workers from the overtime protections of the Fair Labor Standards Act (FLSA). This is for two reasons every bit as vital and valid today as when the FLSA was passed in 1938.

First, the purposes of the FLSA's overtime rules—to encourage employers to hire more workers by discouraging them from assigning excessive hours to their current employees and to ensure that workers who do put in overtime hours receive a fair wage for doing so—are unchanged. And second, as the Supreme Court and Congress have repeatedly recognized, coverage under the FLSA must be broadly construed and exemptions from the Act must be narrowly interpreted. In these respects, the law has not changed since 1938—and no institution other than Congress has the authority to make changes that are inconsistent with the FLSA's abiding purposes and precepts.

With the steady escalation in work hours Americans have experienced over the last two decades, workers today need the protections of the 40-hour workweek now more than ever. There can be no question that the FLSA works to help workers control their hours: the GAO has found that 44 percent of workers without overtime protection work more than 40 hours per week, compared with only 20 percent of workers protected by the FLSA. Unfortunately, as the GAO has also documented, a declining percentage of American workers are protected by the FLSA, as more and more of them fall into the statutory exemptions for "executive," "administrative," and "professional" employees.

If we are serious about addressing the problem of excessive work hours, we must extend the overtime protections of the FLSA to more workers, not fewer.

Regrettably, DOL's proposed changes to the overtime regulations take us in the opposite direction. There has been considerable debate over the precise number of workers who could lose overtime protection under the proposed regulations. To my knowledge, the only study that even attempts to estimate this figure is a report by the Economic Policy Institute (EPI), which concludes that over eight (8) million workers could lose their overtime protection. DOL's deeply flawed regulatory analysis, by contrast, only attempts to estimate the number of workers currently earning overtime pay who would lose overtime protection under the proposed regulations. The number of workers currently earning overtime pay is only about one-seventh the total number of workers who enjoy overtime protection under the FLSA.

DOL argues that its proposed changes in the regulations are necessary to "update" the overtime rules for the "new economy" of the 21st century. This is curious, given that DOL issued a report only two years ago concluding that changes in the new economy neither negate the need for overtime protections nor warrant broadening of the overtime exemptions. DOL has failed to explain, nor can it explain, why the 40-hour workweek is obsolete for the eight million workers who would lose overtime protection under the proposed regulations. What is it about the 21st century economy that makes the 40-hour workweek obsolete for police, firefighters, licensed practical nurses, paramedics, secretaries, paralegals, bookkeepers, and low-level supervisors? Just as they did in 1938, these workers need more control over their time, and they need protection against excessive work hours. Many of them need overtime pay to send their children to college and pay their bills, just as they did in 1938.

Yet much more is at stake here than just the work schedules and household budgets of eight million workers, as important as these may be. Also at stake is the future of the 40-hour workweek, and its vulnerability to repeal by regulation. If DOL has the authority to expand the exceptions to the 40-hour workweek, at some point those exceptions will swallow the rule. Broadening the overtime exemptions amounts to the same thing as rolling back the 40-hour workweek. On Tuesday, acting DOL solicitor Howard M. Radzely took the position that the Secretary of Labor has authority to define the overtime exemptions "broadly." Mr. Radzely testified that under certain circumstances, the Secretary may even have authority to disqualify from overtime protection 90 percent of all workers earning more than $22,100.

The direction DOL is headed is a radical departure from both its past practice and from the intent of the FLSA. Every single change DOL proposes to the "duties" tests—the tests used to determine whether the nature of individuals' work warrants stripping them of overtime eligibility—would make it easier for employers to deny their workers overtime protection. DOL trumpets the fact that its proposal would

raise the minimum salary threshold—the salary level below which workers are automatically guaranteed overtime protection—and there is no question that an increase in the salary threshold is long overdue. However, on at least six occasions in the past, DOL has adjusted the minimum salary threshold for inflation, without ever once hiding behind one of these periodic inflation adjustments in order to weaken the "duties" tests and restrict overtime eligibility for workers above the threshold. If DOL weakened the "duties" tests every time it adjusted the minimum salary threshold, it would eventually gut the overtime protections of the FLSA entirely and effectively repeal the 40-hour workweek by regulation. DOL does not have that authority.

DOL appears to fundamentally misunderstand the intent of the FLSA and the scope of its own authority. Congress intended the protections of the 40-hour workweek to apply to the vast majority of workers, with the exception of only a narrowly limited class of employees. Few would dispute—and we certainly do not—that low wage workers should never be exempt from the FLSA and should always enjoy its absolute protection. But it is quite another thing altogether to contend, as DOL does now, that Congress's purpose in legislating the 40-hour workweek was exclusively or even primarily to protect only low-income workers. Congress most definitely did not intend such a cramped reading of the FLSA or a correspondingly expansive reading of the exemptions. And Congress plainly did not intend nor did it empower DOL to repeal the 40-hour workweek for the vast majority of American workers through regulation. DOL's position is inconsistent with the purposes and history of the FLSA and with how the courts and this Congress have viewed the law and its exemptions. While this view is of obvious benefit to employers, it hurts rather than helps American workers and the American economy.

Although we believe DOL's proposed changes to the duties tests are unjustified, there are other steps DOL could take to "clarify" the overtime rules and discourage litigation. The single most important step in this regard is for DOL to adequately adjust the minimum salary threshold. If DOL applied the methodology it most recently used in the past (and incorrectly claims to be using now), the salary threshold for the stricter "long" duties test would be $31,720. There would be no confusion over whether workers earning less than this amount are entitled to overtime protection, and there would be no litigation over their overtime rights. DOL has chosen not to make this clarification, or any one of a number of other clarifications that would guarantee overtime protection for more workers. The real issue is not whether the overtime rules should be clarified, but whether any clarification of the overtime rules should protect more or fewer workers.

The 40-hour workweek enshrined in the Fair Labor Standards Act of 1938 is a bedrock labor protection that American workers have depended on for decades and still value as a fundamental workplace right. It is also a benchmark by which we measure social progress in America and around the world. DOL's proposal not only threatens this core protection for eight million workers, but also sets an alarming precedent for further restriction of overtime eligibility and for regulatory repeal of the 40-hour workweek.

STATEMENT OF LAWRENCE Z. LORBER, PARTNER, PROSKAUER ROSE LLP

Senator SPECTER. Thank you, Ms. Owens. We turn next to Mr. Lawrence Lorber, partner in the law firm of Proskauer Rose, a member of the U.S. Chamber of Commerce, law degree from the University of Maryland, undergraduate degree from Brooklyn College.

Would Mr. Ross Eisenbrey also come forward at this time?

Thank you for joining us, Mr. Lorber, and the floor is yours.

Mr. LORBER. Thank you, Mr. Chairman. My name is Lawrence Lorber. I am a partner in the law firm of Proskauer Rose. I am testifying today on behalf of the U.S. Chamber of Commerce. The Chamber is the world's largest business federation.

The Fair Labor Standards Act is one of our oldest employment laws. It was passed in 1938, a very different time when the American work place bore little resemblance to the work place of the 21st century. The Congress was clear in 1938, and the law remains so today that the FLSA was not intended to be universal law pre-

scribing with finite detail the working conditions, including the compensable hours of employment of every employee. Rather in 1938 and today the FLSA recognizes that its reach is constrained and that a significant number of employees falling into the statutorily identified categories of executive, administrative, and professional would remain outside its purview. And it was never intended that the boundaries of these white collar exemptions would remain static.

Throughout the past 65 years, there have been efforts to review the FLSA and its regulatory structure so that it would accurately reflect work place conditions. In 1999, the General Accounting Office found that the Department of Labor should "amend the regulations to better suit the modern work place. This report," the GAO report, "recommends that the Secretary of Labor comprehensively review current regulations and restructure white collar exemptions to better accommodate today's work place and anticipate future work place trends."

It certainly cannot be argued that the GAO is a partisan agency. And it is illuminating to note that in response to the GAO recommendation, the Department of Labor, then in the administration of President Clinton, stated that, "the white collar exemption regulations were on its agenda to be reviewed in the future." And former Wage and Hour Administrator Kerr, who testified at House hearings on the GAO report, said that while the GAO recommendations could not be accomplished in the short run, the extensive process of consultation with all stakeholders and regulatory analysis could well lead to the implementation of "comprehensive 541 changes." So it should come as absolutely no surprise to this committee, the Congress, or the public that the Department of Labor, after conducting extensive stakeholder meetings, has begun the process of modernizing the regulations governing which white collar employees are eligible for overtime.

I would note that in his seminal book, "The Work of Nations," former Secretary of Labor Robert Reich described the dramatic change in the designations of work in America. He noted that even beginning 1870 the Census Bureau categorized jobs into executive or managerial, sales or administrative or production functions. However, Secretary Reich goes on to say, however: "But these categories have little bearing upon the competitive positions of Americans worldwide, now that America's core corporations are transforming into finely spun global webs. Someone whose job falls officially into a 'technical' or 'sales' subcategory may, in fact, be among the best paid and influential people in such a web. To understand the real competitive positions of Americans in the global economy, it is necessary to devise new categories."

Secretary Reich's prescient analysis of the evolution of the American work place was right in 1991 and it is certainly right today. And the Department's proposal adapts the regulatory scheme to the modern realities so that the statute continues to have meaning and vitality, but even more importantly, the proposal attempts to simplify the categorization of exempt and non-exempt work.

I would add, as an attorney, it seems to me it makes no sense for employers, large or small, to hire expensive lawyers, consultants, and job analysts to answer what should be a relatively simple

question of who is to be paid premium overtime for work over 40 hours in a week. Yet, under the current regulatory scheme, that is precisely what has happened.

I would note as well that in 1995 I was appointed to the first board of directors of the Office of Compliance which enforced the Congressional Accountability Act which this committee knows applied 11 labor laws, including the FLSA, to the Congress. The FLSA on the Hill and the Congress as an employer impacted a small number of jobs involving highly skilled individuals. Yet, the fluctuating work weeks, the uncertain nature of authority, and the non-hierarchical office structures made compliance an extremely difficult process here. Think then of the impact on new businesses which do not have the benefits or resources available to Congress.

I note in my testimony a case which I think exemplifies the problems in the current regulations, the case called *Hashop* v. *Rockwell Space Operations* where the trainers of the NASA Space Shuttle ground personnel who relied on manuals were deemed to be non-exempt because they relied on manuals and worked in groups. Astronauts would come under that same criteria as non-exempt workers.

PREPARED STATEMENT

I see that my time has concluded. Again, we simply hope that this committee will understand that the proposal is an ongoing process and will allow that process to continue. Thank you.

[The statement follows:]

PREPARED STATEMENT OF LAWRENCE Z. LORBER

Mr. Chairman, Members of the Committee. My name is Lawrence Lorber and I am a partner in the law firm of Proskauer Rose LLP. I am testifying today on behalf of the United States Chamber of Commerce. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector and geographical region. Proskauer Rose LLP is a member of the Chamber's Labor Relations Committee and I serve on the Steering Committee of that Committee. While I am here today on behalf of the Chamber, my testimony also reflects my experience as a practicing labor and employment lawyer for over thirty years as well as my previous experience at the Labor Department in various administrative and advisory positions. Thus, I am someone who has been charged with the responsibility to interpret and enforce employment regulations from the perspective of the enforcement agency and someone who has counseled employers with respect to their obligations under the regulations and represented employers facing enforcement actions. In addition, from the period 1995 through 1998, I had the unique experience of serving on the first Board of Directors of the Office of Compliance, the agency of Congress established by the Congressional Accountability Act to apply and enforce eleven labor and employment laws, including the Fair Labor Standards Act to the Congress and Congressional entities in your role as an employer. I will briefly discuss that experience in the context of the proposed regulatory revision in this testimony.

The Fair Labor Standards Act is one of our oldest employment laws. It was passed in 1938, a very different time, when the American workplace bore little resemblance to the workplace of the 21st Century. Yet its basic thrust is still timely—to ensure that employees are treated fairly and that "the unprotected, unorganized and lowest paid of the nation's working population . . . secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1944). However, the Congress was clear in 1938, and the law remains so today, that the FLSA was not intended to be a universal law prescribing with finite detail the working conditions, including the compensable hours of employment, of every employee. Rather, in 1938, and today, the FLSA recognizes that its reach is constrained, and that a significant number of employees falling into the statutorily identified categories of executive, administrative, and professional would remain outside of its

purview. However, it was never intended that the boundaries of these "white collar" exemptions would remain static. Indeed, the Congress in 1938 recognized that the Secretary of Labor would review the reach of the exemptions periodically and, in order to remain a vital part of our employment system, the regulations would need to be adjusted to reflect the dynamic changes in the workplace and workplace relationships between employees. Indeed, the statute specifically charges the Labor Department with the responsibility to define and delimit the regulations from time to time. Unfortunately, they have not been significantly adjusted in over half a century, despite urging to the contrary.

Throughout the past 65 years, there have been efforts to review the FLSA and its regulatory structure so that it would accurately reflect workplace conditions. In 1999, the General Accounting Office reported to Congress the following:

"In the last 45 years, the DoL has adjusted the FLSA regulations only in a piecemeal fashion to meet the needs of particular types of employers and employees. Given the economic and work place changes over this period, a more comprehensive look at these regulations is necessary to determine whether a consensus could be achieved on how to amend the regulations *to better suit the modern work place. This report recommends that the Secretary of Labor comprehensively review current regulations and restructure white-collar exemptions to better accommodate today's work place and anticipate future work place trends.*" (Emphasis added)——Report of the GAO-Fair Labor Standards Act—White Collar Exemptions in the Modern Place, September 1999.

Surely it cannot be argued that the GAO adopted a partisan report designed to dismember the system of labor and employment laws we presently have. And it is illuminating to note that in response to the GAO recommendation, the Department of Labor, then in the administration of President Clinton, stated that "the white-collar exemption regulations [were] on its agenda to be reviewed in the future." Former Wage and Hour Administrator Kerr, testifying in hearings before the House Committee on Education and the Workforce in 2000 pursuant to the GAO Report, stated that while the scope of the GAO recommendations could not be accomplished in the short run, an extensive process of consultation with all stakeholders and regulatory analysis could well lead to the implementation of "comprehensive 541 changes." So, it should come as absolutely no surprise to this Committee, the Congress or the public that the DoL, after conducting extensive stake holder meetings, has begun the process of modernizing the regulations governing which white collar employees are eligible for overtime—known as the "white collar" or "541" regulations.

The Current Proposal.—The Labor Department has conducted an extensive process of consultation and review to design the proposals issued on March 30. While Administrator McCutchen can elaborate more fully on that process, the U.S. Chamber participated as did other interested parties. The regulations published for comment thus represent the distillation of a long process of review and consultation, indeed a process that began even before the current Administration took office, as evidenced by the 1999 GAO Report and even earlier when the Labor Department requested comments on the issue as a result of an Advance Notice of Proposed Rulemaking in 1985. The question being asked therefore should not be why this rulemaking process is being undertaken, but rather is the proposal a valid response to the GAO Report and the obvious changes in the workplace.

In his seminal book, "The Work of Nations," former Secretary of Labor Robert Reich described the dramatic change in the designations of work in America. He noted that beginning in 1870, the Census Bureau began categorizing jobs into executive or managerial functions, sales and administrative support functions and basic production or laborer functions. Reiph goes on to say however:

"This set of classifications made sense when the economy was focused on high-volume, standardized production, in which almost every job fit into, or around, the core American corporation, and when status and income depended on one's ranking in the standard corporate bureaucracy. But these categories have little bearing upon the competitive positions of Americans worldwide, now that America's core corporations are transforming into finely spun global webs. Someone whose job falls officially into a "technical" or "sales" subcategory may, in fact be among the best-paid and influential people in such a web. To understand the real competitive positions of Americans in the global economy, it is necessary to devise new categories."—— Robert B. Reich, "The Work of Nations," 173–74 (1991).

Secretary Reich's prescient analysis of the evolution of the American workplace is particularly relevant to the proposed revisions to the white-collar regulations. The proposal takes as its starting point the basic structure of the statute in recognizing

that there are broad classes of positions that are exempt from the overtime requirements. It then adapts the regulatory scheme to the modern realities so that the statute continues to have meaning and vitality. But perhaps even more importantly, the proposal also attempts to simplify the categorization of exempt and non-exempt work.

It makes no sense to require the services of attorneys, consultants, and job analysts to answer what should be the relatively simple question of who is to be paid premium overtime for work over 40 hours in a week. Yet, under the current regulatory regime, with hundreds of pages of interpretations, thousands of opinions issued by Wage and Hour Administrators, and hundreds of court cases analyzing this weighty mass of precedent, that is precisely what is required. Too, the fact that regulators and the courts, as well as the employers and employees are forced to "pour new wine into old bottles," and fit new jobs into old and antiquated definitions, makes no sense. And particularly for the small and medium sized employers, who not only represent job growth but the new innovations needed in our economy, and who make up a large portion of the U.S. Chamber membership, such an exercise is entirely non-productive. Nor does such an exercise afford the protection to the lower paid workers the FLSA was enacted to provide.

I am reminded here of the time in 1995 and 1996 when Congress was required to comply for the first time with the FLSA due to the passage of the Congressional Accountability Act. As I noted, I was appointed to the original Board of Directors by the joint leadership and remember well the confusion and consternation when Congressional offices, which have a small number of different jobs, were forced to wade through the obtuse requirements of determining who exercised discretion, or who had hiring and firing authority, and which staff member exercised discretion, when in fact only the Member exercised discretion. As applied to Congress, the FLSA impacted a small number of jobs involving highly skilled individuals. Yet the fluctuating work weeks, the uncertain nature of authority and the non-hierarchical office structures made compliance an extremely difficult process. Think then of the impact on new businesses which don't have the benefits or the resources available to Congress.

So too, it should be a major warning sign that one of the growth areas in class action litigation is the explosion of FLSA classification cases. It is obvious that a law as old as the FLSA should not now be the source of such litigation activity if the requirements are clear and well understood. In fact, it is precisely because the old definitions have lost much of their meaning that we are witnessing this new phenomenon. An examination of some of the reasons for this highlights the reason the new regulations are so sorely needed.

The current regulations require that in order to qualify as an exempt professional, an employee must perform work requiring the consistent exercise of discretion and judgment. However, as interpreted by the Wage and Hour Division, and applied by the courts, this requirement led to the strange case of *Hasop* v. *Rockwell Space Operations Company,* 867 F. Supp. 1287 (S.D. Texas 1994) where the court interpreted the current regulations to mean that employees responsible for training NASA Space Shuttle ground personnel were not exempt because they relied on technical manuals and made decisions in a group. Indeed, under this analysis, the astronauts themselves could be deemed non-exempt. The proverbial rocket scientists are thus classified as if they are common laborers. And so would the advanced computer technicians who work in help desks and other technically challenging positions. Do we really want them to guess as to the reason for a systems failure or would we prefer that they refer to and interpret software manuals? So too, the requirement that professionals must have college degrees. As we well know, and as the proposed regulations recognize, advanced learning can be obtained by training and experience. Would the law deny to Bill Gates or Steve Jobs the exempt status simply because they do not have college degrees?

The purpose of this testimony however, is not to summarize or comment on all of the proposed changes. For that I commend to the attention of the Committee the detailed and extensive comments fled by the Chamber on June 30. Those comments were the result of an intense and inclusive process whereby the members brought their comments and concerns to the Chamber's Fair Labor Standards Committee and a special task force that analyzed the proposal and the members concerns. This was a serious process that resulted in a uniquely analytical set of comments. Nor are these comments simply a resounding endorsement of all of the proposals. Far from it. It would hardly take 81 pages to say "amen." Rather, there are still serious concerns that the Chamber hopes that the Labor Department will carefully consider. While the proposal simplifies the regulations, it still leaves areas of uncertainty. For example, the Chamber believes that just as the regulations recognize a realistic bright line test to determine which jobs should be deemed non-exempt because the

salary is less than $425 per week regardless of function, so should there be a bright line test to distinguish the highly compensated, so that a salary above a certain level would be considered per se exempt for white collar employees.

It is also important to briefly comment upon some of the criticism of the proposed regulations. As I noted, the Chamber of Commerce took the proposal seriously and its obligation to provide reasoned input into the regulatory process. It did not attempt to overwhelm the regulatory process with volumes of comments or sound bite criticisms. Indeed, it would be helpful if the same requirements that govern the introduction of scientific fact into court proceedings would apply as well to regulatory comments. If the Daubert standard applied, then the unsupported allegation that 8 million jobs would be reclassified if these proposals are adopted would be rejected as the great example of junk science. Unfortunately, there are no such limitations on public comment and the regulators must spend the time to analyze these as well as the serious comments.

However, let me take a few moments to comment upon some of the more outrageous criticisms that have been levied. Some critics have claimed that somehow the Department's proposal would impact first responders, police and fire department personnel, manual laborers, nurses, and other health care workers. However, these claims do not withstand scrutiny.

For example, some have claimed that because the Department has proposed modifications to the so-called "production dichotomy," a part of the administrative exemption, that law enforcement officers will now be exempt. But this ignores the threshold question that in order to qualify as an exempt administrative employee, the employee must perform office or non-manual work. Employees such as first responders who are required to run, climb, lift and carry people or heavy objects, or who may be required to be skilled in self-defense and the use of firearms, simply cannot be said to perform office or non-manual work.

Indeed, under the Department's proposal no employee could qualify as exempt under the highly compensated employee test or the standard test for administrative or professional employees unless he or she performed office or non-manual work. The only other way a law enforcement employee could be exempt under the Department's proposal would be under the standard test for executives, the threshold question of which is whether the employee's primary duty is the management of the enterprise or a customarily recognized subdivision in which he or she is employed. This does not mean that an officer with only a few supervisory duties can be exempt from overtime. The Department has specifically included language stating that supervisors whose primary duty is performing the same kind of work as their subordinates are simply not going to be exempt.

This analysis applies equally to any other type of manual labor. What these critics leave out is that these regulations only apply to white collar employees—not to those who principally perform manual work.

The status of nurses and other health care workers is also the subject of a significant amount of baseless rhetoric. Indeed, under the current regulations, registered nurses are already recognized as exempt professionals. Nevertheless, in practice, most are paid hourly and receive overtime. Why? Because hourly pay and overtime are simply a part of the market. Nothing in the Department's proposal changes the status of these nurses, nor, for that matter, physician's assistants and medical technologists who usually meet the requirements of the current test for exempt professionals because they have advanced knowledge customarily acquired through a prolonged course of specialized intellectual study.

In conclusion, the Chamber of Commerce believes that the recognition of the dramatic changes in the American workplace is long overdue and requires the revision or regeneration of the encrusted and obsolete regulatory structure of the current white collar regulations. We commend the efforts of the Labor Department to undertake this effort and believe that the March 30 proposal represents a major step forward in the rationalization of this bedrock employment law. While we hope that the Labor Department addresses the issues highlighted in our comments, we believe that regardless of the ultimate result of regulatory review process, and the compromises that must be made, we strongly believe that the Department should be encouraged to finish this job. It serves neither the economy, nor the employees or employers, to leave in place an obsolete and almost inoperable regulatory scheme. Nor should the basic purpose of the Fair Labor Standards Act be ignored. This was a law designed to assist and protect the unprotected and least paid in the workforce. We would therefore hope that the regulatory process be allowed to continue to completion.

Thank you for your time and attention to this matter. I would be happy to answer any questions that you might have.

STATEMENT OF ROSS EISENBREY, VICE PRESIDENT AND POLICY DIRECTOR, ECONOMIC POLICY INSTITUTE

Senator SPECTER. Thank you, Mr. Lorber. Our next witness is Mr. Ross Eisenbrey, vice president of the Economic Policy Institute, former Commissioner of the U.S. Occupational Safety and Health Review Commission, a law degree from Michigan, and undergrad from Middlebury College. Thank you for coming in today, Mr. Eisenbrey, and we look forward to your testimony.

Mr. EISENBREY. Thank you very much, Mr. Chairman. It is an honor to be here and an honor to testify before the subcommittee.

When the Department of Labor issued its notice of proposed rulemaking back at the end of March, we read it and tried to understand how it could conclude that so few workers—they concluded 644,000 employees would lose their right to overtime pay. The proposal makes sweeping changes in the law and they are not reflected in the Department's analysis.

So we called the Department and we asked them to explain things and could not get answers from them. So we conducted our own analysis, with the help of a team of experts, and estimated only 78 out of 257 possible occupational categories, what the effects of the rule would be.

Our conclusions were very different from the Department's. We estimate that in those 78 occupations, over 8 million workers will lose the right to overtime pay. In Pennsylvania alone, we estimate that about 318,000 workers will lose the right.

Why is this? Why are our numbers so different? Well, we think that there are three major flaws in the Department's analysis.

The first is that it failed to analyze the effect of most of the key changes in the regulations. They do not calculate how many employees will lose overtime protection for the following changes, which are a handful among scores of changes. The proposal eliminates the requirement that professionals and administrators consistently exercise independent judgment and discretion. That is a change that appears over and over in Department opinion letters, many court cases, including the *Hashop* case that Mr. Lorber just mentioned. It is a fundamental part of the current law and it is being removed. It is not reflected anywhere in the Department's analysis how many employees will lose their right when that requirement for the exemption is eliminated. In cases it has affected trucking company dispatchers, entry level architects and engineers, trainers in police academies at Rockwell, among many others, mortgage loan officers, engineering firm designers, a very broad category.

The proposal eliminates the provision that distinguishes between staff jobs and line or production jobs. That has been essential for fire fighters, paralegals, parole officers, and importantly news producers in determining that they were non-exempt and had the right to overtime protection. Without that factor in the law, the Department does not analyze what the difference will be.

The proposal undermines the educational requirements in substantial ways. These are a key part of the professional exemption. Generally, employees now are required to have an advanced degree in the area of their profession. It is not enough even to have a college degree that is a general degree. The Department turns the ex-

ception in the rule on its head and now says that any or all of the educational requirement can be substituted with work experience. That is an enormous change. They do not really analyze that, although there is a note in the preliminary regulatory impact analysis suggesting that 44 out of every 100 non-degreed professionals will lose their right to overtime pay because of that.

The primary duty test is changed, and there is no analysis of changing it so that instead of having to determine what the employee's single primary duty is, now if a primary duty is an exempt duty, the employee will be exempt.

Finally, the highly compensated test will deny overtime pay to employees who do not meet the current or even the proposed rules for administrative professional or executive exemption, but only meet a part of those tests if they make $65,000 a year. There is not a full or adequate analysis.

The second thing the Department failed to do is estimate how many people lose protection. They only estimated how many people will actually lose pay, but only a small percentage of workers at any given time, as reflected in the current population survey, are actually receiving overtime pay. What is important is do they have the protection. If they do not have it, it is more likely that they will be assigned overtime because now the premium is a break on employers. Nobody denies that employers are less likely to assign overtime to people who have the right to time-and-a-half pay. Once they do not have the right, they will be assigned overtime and a lot of it.

The Department did not, finally, apply the changes in the rule on an occupation-by-occupation basis, which the Department did for GAO in 1999 and again in 2001 in the intervening report, that Mr. Lorber did not mention, when the Department reviewed these rules and determined that there was no need to update them, that they did apply to the 21st century work force and that the kind of changes in this proposed rule were not necessary.

The Department has suggested and Ms. McCutchen suggested just now again that nurses will not be affected, but the rule on its face shows that they will. Nurses are required to have a 4-year degree under current law. Under the proposal, any or all of their educational requirement can be substituted with work experience so that a 2-year R.N. now will be treated as an exempt professional with some additional work experience.

PREPARED STATEMENT

Police sergeants, secretaries, the other categories that she mentioned will be affected by the changes in the law because the rule does not apply to broad categories. It requires a look at individual employees and what the individual's duties are. The rules have changed. Every employee's duties will be reexamined and I submit that it is very likely that secretaries, many police officers, and many of the other occupations she mentioned will be affected.

Thank you very much.

[The statement follows:]

PREPARED STATEMENT OF ROSS EISENBREY

Mr. Chairman, thank you for inviting me to testify today. It's an honor for me and for the Economic Policy Institute to present our views to you and the subcommittee.

When the Department of Labor issued its Notice of Proposed-Rulemaking at the end of March, we tried to understand how it could conclude that only 644,000 employees would lose their right to overtime pay. The proposal makes radical changes in the law, but the regulatory analysis does not reflect them. We asked the Department and its contractor for explanations, but could not get answers to our questions.

So we analyzed the changes ourselves, with the help of a team of experts, and prepared an estimate for the effect of the proposed rule on a subset of the working population, employees in 78 occupational categories out of a total of 257 categories identified by the Department of Labor as having substantial numbers of white collar (office or non-manual) employees.

Our conclusions are very different from those of the Department. We estimate that in those 78 occupations, over 8 million workers will lose the right to overtime pay. In Pennsylvania alone, we estimate that about 318,000 workers will lose their overtime protection.

Why do our numbers differ so greatly from what the Department of Labor has reported? Briefly, we think the Department's analysis has three major flaws:

1. It fails to analyze the effect of most of the key changes in the regulations. DOL does not calculate how many employees will lose overtime protection because of the following changes, among many others:

—The proposal eliminates the requirement that professionals and administrators consistently exercise independent judgment and discretion. DOL opinion letters and many court cases identify this as a key test in determining whether workers are the kind of professional or top administrator who should be exempt or have less authority and—however highly skilled or well trained they might be—should have the right to overtime pay. See, for example, *Hashop* v. *Rockwell Space Operations Co.,* 867 F. Supp. 1287 (S.D. Tex. 1994), involving space shuttle ground control instructors, and cases involving trucking company dispatchers and entry-level architects and engineers listed at page 24 of GAO's September 1999 report, *Fair Labor Standards Act: White Collar Exemptions in the Modern Workplace.* Based on this requirement, DOL opinion letters have denied employers' requests to exempt employees in a wide range of occupations, from executive secretaries and mortgage loan officers to engineering firm designers and human resource generalists.

—The proposal eliminates the provision in current law that distinguishes between "staff' jobs that are exempt and "line" or "production" jobs that have overtime protection. Numerous DOL opinion letters and cases involving employees ranging from police and firefighters to paralegals and parole officers have denied employer attempts to exempt employees because the employees were non-exempt line or production workers. See, for example, *Dalheim* v. *KDFW–TV,* 918 F.2d 1220 (5th Cir. 1990), where the court found that producers and other employees in the departments responsible for the production of newscasts were non-exempt.

—The proposal undermines the educational requirements that are a key part of the professional exemption. Whereas current law has, in rare instances, permitted employers to deny overtime protection to a highly skilled and experienced employee who does not have the advanced degree generally required to qualify as a learned professional, the proposal allows employers to substitute work experience "for all or part of the educational requirement." Rather than exempting what the Department has termed the "occasional chemist," the proposal allows every employee working in a professional field (and the number of such fields is constantly expanding) to be deemed a professional and denied overtime pay if they have enough work experience. DOL assumes in its regulatory analysis that six years of job tenure is the equivalent of a college degree and estimates that 44 out of 100 non-degreed employees working in the learned professions will be exempt. DOL neglects to calculate how many such employees there are or which professions are affected and to what extent.

—The primary duty test, which applies to each of the three exemptions, is rewritten to make it easier for employers to exempt their workers. Under the proposal, exempt executives, for example, must have only "a" primary duty that is executive. Current law contemplates that executive tasks must be "the" primary duty of the exempt employee.

—The new "highly compensated" test will allow employers to deny overtime pay to employees whose primary duty is not administrative, professional or execu-

tive. Rather, employees who perform any "office or non-manual work" and are guaranteed "total compensation" (not necessarily a salary) of at least $65,000 a year, will be exempt if the employee performs any exempt duty or responsibility. Thus, any "highly compensated" employee who does "work in areas such as tax, finance, accounting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, employee benefits, labor relations, public relations, government relations and similar activities" will be automatically exempt.

2. The Department does not estimate how many employees will lose overtime protection; rather it only estimates how many employees who are currently receiving overtime pay will lose it. While approximately 80 or 90 million workers have overtime protection, only about 12 million at any one time are actually working overtime and being paid for it. Because the overtime premium works as it was designed to, and discourages employers from assigning overtime to non-exempt workers, removing overtime protection will result in many employees working overtime who don't work overtime now. Congress and the public should be concerned about the loss of overtime protection, not just the loss of overtime pay.

3. The Department did not apply the changes in the rule on an occupation-by-occupation basis, using the methodology established by the Department and GAO in 1999. No attempt was made to estimate the effect of the rule changes on social workers, paralegals, respiratory therapists, reporters and news announcers, bank loan officers, or any of the other scores of occupations DOL examined in detail in the past.

In the weeks since the comment period closed, the Department has said a number of things about the effects of the proposed rule that downplay the extent to which the proposal will weaken or eliminate overtime protections but which are at odds with its text and with the regulatory analysis.

Most notably, the Department has argued that the proposed rule makes no changes in the professional exemption that will affect nurses and other health technicians, no changes that will affect police officers, no changes that will affect cooks, and none that will affect secretaries. Each of these claims is wrong.

To be exempt, nurses, like all professionals, have had to meet strict educational requirements under current law. Under the proposed rule, as both the text of the rule and the regulatory analysis make plain, work experience may be substituted "for all or part of the educational requirements" for any learned profession, including nursing. Once an employer determines that an R.N. with only a two-year degree has substantially the same knowledge as an R.N. with a four-year degree, it will be free under the proposed rule to exempt him or her and refuse to pay overtime.

It will also be much easier to establish that "a" primary duty of a nurse is administrative or executive. An otherwise non-exempt nurse who spends 90 percent of her time performing patient care could still be found to have a primary duty that is administrative or executive, especially since the administrative duty tests have been substantially weakened.

Police sergeants and other low-level police supervisors are likely to be exempted as executives under the proposed rule. The "staff vs. line" dichotomy that helped establish the overtime rights of police officers has been eliminated. Overtime exemptions under section 13(a)(1) of the FLSA are not based on job titles or broad occupational class; rather, they depend on the tasks and functions each individual employee performs. Each officer's duties will be reexamined if the proposed rule becomes law, and if a primary duty is determined to be supervisory or administrative, the officer will lose overtime protection. Thus, the fact that a sergeant performs non-manual work like walking the beat during 90 percent of his work hours will not matter if he has a primary duty of supervising two other officers or performing non-exempt administrative work. Under the proposal, highly compensated police officers will not even have to have a primary duty of performing exempt work. If they perform any "office or non-manual work" and perform any one exempt duty of an executive, administrator or professional no matter how little of their time is spent doing it—they will lose the right to overtime pay.

Police departments have sometimes tried to exempt officers who teach in police academies, but have been prevented because the instructors did not exercise sufficient independent judgment and discretion in how they taught their courses. Because the proposed rule eliminates the requirement for independent judgment and discretion, those officers will lose their right to overtime pay under the proposed rule. The Department claims that under the proposal, "only chefs with a college degree in culinary arts qualify as professionals." But the rule clearly states—and the regulatory analysis supports—that work experience or training that comes from non-college sources can be substituted for all or part of the educational requirements.

Likewise, the proposal encourages employers to treat all of the various medical technicians, from respiratory therapists and physical therapists to physician assistants and radiology technicians as exempt professionals even if they do not have four-year college degrees in their professional field. The proposed rule explicitly allows physician assistants with 2,000 hours of patient care experience and one year of professional course work to be exempted as professionals.

Finally, the Department has claimed that even highly compensated "teamsters," autoworkers, plumbers, carpenters, and various other construction workers "will maintain their entitlement to overtime" because their work is not office or non-manual work. Some members of these trades and occupations do, however, perform office or nonmanual work during at least part of their workday or workweek. A tool and die maker who designs and draws up plans for a new tool, for example, performs non-manual work. The proposal does not set any minimum percentage of time that must be spent doing non-manual work to be subject to exemption and loss of overtime pay under the highly compensated test.

Because the Department's analysis suffers from each of the flaws I have described, there is little, if any, credibility in its numbers. EPI's study demonstrates that the paychecks of millions of workers are at stake in this rulemaking. If the Department intends to preserve the current law's overtime protections, then it will have to withdraw this rule and rewrite it. The Department should eliminate loopholes and clarify the rules in ways that preserve or expand overtime protection, rather than weaken it. There is no reason for workers to sacrifice their right to one of this country's bedrock entitlements.

Senator SPECTER. Thank you, Mr. Eisenbrey.

Would Ms. McCutchen and Ms. Owens please come back to the table? We are going to have 5-minute rounds for members.

Ms. McCutchen, the Federal Register says, "Estimated costs are presented as ranges because data limitations prevent the Department from identifying exactly which workers are exempt and not exempt based on the current and proposed duties test." That being so, if the Department cannot estimate how many employees will be denied overtime as a result of the proposed regulation, on what basis can you assert that workers' overtime rights will be strengthened?

Ms. MCCUTCHEN. The strengthening of overtime rights and our estimate of 1.3 million workers sharing almost $1 billion a year in additional income comes from BLS data on the number of hours employees work, what their duties are, and what their job titles are, and what they are currently being paid. The 1.3 million and the $895 million figure represents the difference in wage increases or additional overtime pay that employers will have to give to employees who are currently making between the current minimum of $8,000 a year and the proposed minimum of $22,100 a year. Employers who are paying employees less than that $22,100, will have two choices. They will either need to raise salaries to maintain the exemption or start paying these employees overtime pay.

Senator SPECTER. Mr. Eisenbrey, in your paper you state that the proposed rule is rife with ambiguity and new terms such as "position of responsibility" will spawn new litigation. We would be interested in the specifics that you may be able to answer now, but supplement, as to how you would craft regulations which would protect the overtime rights of workers while bringing greater clarity regarding overtime eligibility for employers and employees. There is general agreement that there is great ambiguity in the current rules and these new rules seek to change that. How can you satisfy the requirement of protecting workers from losing overtime but at the same time eliminate what everybody agrees are ambiguities and vagaries that are very difficult to follow?

Mr. EISENBREY. I would be happy to provide the subcommittee with some ideas. Some things are obvious. To go from a rule that says you have to have an advanced degree in your field of specialty to a rule that says we do not know how much work experience you need, but you can substitute work experience for the educational requirements throws open a whole new area of ambiguity that the law does not have.

Senator SPECTER. Mr. Lorber, your comments are that there should be a simple test to determine an employee's exempt status. In fact, it is obviously a complex one. What would you suggest on proposed regulations which would provide greater certainty with regard to overtime eligibility and reduce what has been characterized as "needless, exploitive litigation"?

Mr. LORBER. Well, just as the Department has proposed a bright line test at $22,100 for the minimum level under which everybody would get overtime, they do create a category of highly compensated, and the Chamber believes, we believe that there should be similar bright line tests at that level as well so that anybody over a certain level of income would not have to meet the various tests that are still and will still be present regardless of the simplification at the Department.

Senator SPECTER. Ms. Owens, you say that this regulation would be moving in the direction of covering fewer workers, but as I understood your testimony, it is not there on its face. What is the basis for your saying that although not there now, it is moving in that direction?

Ms. OWENS. Well, Senator Specter, we believe that if these regulations take effect that as many as 8 million workers are at risk of losing overtime protection, but just as significant, we think that by broadening the exemptions, that more workers in the future are at risk of losing overtime protection. This is more than the $8 million that EPI has estimated looking only at the work force today.

Senator SPECTER. Let the record show that the red light was not on when I finished my question.

I am not commenting about your answer. I just want everybody to know that we are observing the 5-minute rule because after this panel, we have another hearing.

Senator Harkin.

Senator HARKIN. Thank you very much, Mr. Chairman.

I would like to get a little bit to the bottom, whether it is 644,000 workers or 8 million. Ms. McCutchen, I understand the Department of Labor has said that 644,000 workers would lose overtime protection. Is that not just an estimate of workers currently earning overtime?

Ms. MCCUTCHEN. That is the regulatory analysis that we are required to do when we propose a regulation and it is required to be in our notice of proposed rulemaking. So that is correct, yes.

Senator HARKIN. It is.

Ms. Owens, what you are saying is that basically it is more important to determine the number of workers that would lose the protection, and those that would lose the protection would be closer to 8 million.

Ms. OWENS. That is right, Senator.

Senator HARKIN. I just wanted to get that cleared up.

Ms. McCutchen, do you agree that Congress did not intend to the 40-hour work week to apply only to low income workers, but rather that Congress intended the 40-hour work week to apply to the vast majority of all workers? In fact, did not Congress specifically reject a salary ceiling at that time?

Ms. MCCUTCHEN. I am not aware that it specifically addressed the salary ceiling. That could be the case.

I think Congress intended to cover everyone who was not in the 30 separate listed exemptions in the Fair Labor Standards Act itself from overtime and minimum wage requirements.

Senator HARKIN. So, again, since we rejected a salary ceiling, why is there a separate test for highly compensated workers in this proposed rule?

Ms. MCCUTCHEN. There has actually been a separate test now called the special proviso for highly compensated employees in the proposed regulations since the 1950's. There has always been a two-tier structure, and based on the regulatory history, this two-tier structure exists because the Department believes that salary is the best single indicator of exempt status.

Our proposal is not a salary cap. In fact, we rejected the stakeholder suggestions that we have a salary only rule at the top end.

Senator HARKIN. Excuse me. I have a chart here. Under current law, there is no test for highly compensated employees' exemption. Am I wrong on that?

Ms. MCCUTCHEN. You are and let me refer you to the section. The section in the current regulations for executive exemption is called 541.119, special proviso for high salaried executive; 541.214, special proviso for highly salaried administrative employees; and——

Senator HARKIN. But does it list a salary?

Ms. MCCUTCHEN. Yes, $250 a week.

Senator HARKIN. That is listed there.

Ms. MCCUTCHEN. Yes, in the regulations. The minimum is $155 for most employees, and then there is a special proviso with fewer duties tests for highly compensated employees, which, since this regulation has not been updated since 1975, is very low, $250 a week, or $13,000 a year. This is one of the complexities of the rules that we are trying to address.

Senator HARKIN. I have got to get a copy of that too.

Ms. MCCUTCHEN. Certainly.

Senator HARKIN. Now, I have read the changes you have proposed to the duties test, and I tried to apply it. I have heard this talk that we are going from something that is complex to something that is easier, but you apply those tests to particular workers, it is not easy. For example, again, on my chart here—maybe this one is wrong, since the first one was wrong—it says under the administrative exemptions, current law says customarily and regularly exercises discretion and independent judgment. That is current law. The proposed regulation says, holds a position of responsibility with the employer defined as either, one, performing work of substantial importance, or two, performing a work requiring a high level skill or training. Well, I guess I do not understand how the proposed regulation is any clearer or any easier than current law. It seems to me it is more convoluted. What does it mean to

perform work of substantial importance? I happen to think all work is important.

Ms. MCCUTCHEN. Both of those standards are actually in the regulations now as interpretive guidelines, and there is actually case law defining what those two things mean that we are going to be looking at closely. The administrative exemption is the most difficult exemption to define and to apply and we have asked for broad comments on how we can improve our proposal. We do not claim it is perfect or it has no ambiguities. That is why we need to continue the rulemaking process so we can read the comments.

Senator HARKIN. Ms. McCutchen, is this true? The Chicago Tribune quoted you as saying: "The Labor Department's McCutchen predicts a deluge of lawsuits as employees and employers press for clarifications once the new rules go into effect." Did you say that?

Ms. MCCUTCHEN. I would not say deluge. I think anytime you have a new law or a new statute——

Senator HARKIN. If you did not say deluge, what did you say?

Ms. MCCUTCHEN. That you would see probably an immediate increase in lawsuits followed by a decrease in lawsuits as people, as with any new statute, need to go to the court to try to define its boundaries.

Senator HARKIN. Let the record show I quit with 10 seconds yet to go.

Senator SPECTER. See what a good example will do.

Senator Craig.

Senator CRAIG. I have no questions. Thank you, Mr. Chairman.

Senator SPECTER. Thank you, Senator Craig.

Senator Murray.

Senator MURRAY. Mr. Chairman, thank you very much and I appreciate the witnesses being here. I really appreciate your having this hearing.

I have to tell you at home in Washington State, I am hearing a great deal of concern about this proposed rule coming down. In my home State of Washington, we have literally lost thousands of jobs in the last several years. Boeing has laid off 35,000 people and everybody is saying to me why are you trying to cut the pay of the people who are still at work. It is pretty disheartening to see this coming through a stroke of the pen at the Department of Labor.

Mr. Chairman, I would like to submit for the record a letter to Secretary Chao signed by, I believe, 43 U.S. Senators urging the Secretary not to go forward with any regulation that denies overtime protections.

Senator SPECTER. It will be admitted as part of the record.

[The letter follows:]

U.S. SENATE,
Washington, DC, June 30, 2003.

DEAR SECRETARY CHAO: We write to express our serious concerns about the Department's proposed regulation on white collar exemptions to the Fair Labor Standards Act. These sweeping changes could eliminate overtime pay protections for millions of American workers.

We urge you not to implement this new regulation that will end overtime protections for those currently eligible. Under current law, the FLSA discourages employers from scheduling overtime by making overtime more expensive. According to a GAO study, employees exempt from overtime pay are twice as likely to work overtime as those covered by the protections. Our citizens are working longer hours than ever before—longer than in any other industrial nation. At least one in five employ-

ees now has a workweek that exceeds 50 hours. Protecting the 40-hour work week is vital to balancing work responsibilities and family needs. It is certainly not family friendly to require employees to work more hours for less pay.

Overtime protections clearly make an immense difference in preserving the 40-hour work week. Millions of employees depend on overtime pay to make ends meet and pay their bills for housing, food, and health care. Overtime pay often constitutes 20–25 percent of their wages. These workers will face an unfair reduction in their take-home pay if they can no longer receive their overtime pay.

We urge you not to go forward with any regulation that denies overtime pay protections to any of America's currently eligible hard-working men and women.

Sincerely,

Edward M. Kennedy, Tom Daschle, Patty Murray, Mary L. Landrieu, Byron L. Dorgan, Tom Harkin, Bill Nelson, Jack Reed, John D. Rockefeller, IV, Barbara A. Mikulski, Jon S. Corzine, Frank Lautenberg, Debbie Stabenow, Herb Kohl, Paul S. Sarbanes, Joseph R. Biden, Jr., John F. Kerry, Mark Dayton, Christopher J. Dodd, Patrick J. Leahy, John Edwards, Maria Cantwell, Joseph L. Liberman, Russell D. Feingold, Max Baucus, Robert C. Byrd, Harry Reid, Charles E. Schumer, Daniel K. Akaka, Barbara Boxer, Tim Johnson, Jeff Bingaman, Richard J. Durbin, Kent Conrad, Mark Pryor, Hillary Rodham Clinton, Evan Bayh, Carl Levin, Bob Graham, Ron Wyden, Tomas R. Carper, and Blanche L. Lincoln.

Senator MURRAY. Let me just start with Ms. Owens, and thank you for being here as well. I think there is a lot of confusion about how this law is going to affect people. Could you just describe for this committee what a typical worker would be that would be affected right now by the rule?

Ms. OWENS. Certainly. As we read the rule, because of the proposed changes in the duties test, which involve going from a two-prong test, long duties and short duties, to a single test, which we believe relax the duties requirements for classifying workers as executives or administrative or professional employees, we think, for example, that certain kinds of technical workers who might work side by side with a professional, like a medical technician who works with a medical professional of some sort, or an engineering tech who works with an engineer, because of the substitution, the permission for substituting experience for education—we think those workers who do now get overtime pay and are protected are at risk of losing those protections. And certainly a number of people who work in the industries in your State, Senator Murray, would be those types of workers.

Senator MURRAY. Right, and that is why I am hearing that concern.

Ms. McCutchen, I have to tell you as a former educator and as a former school board member, it appears to me these regulations are really an attempt to lower the education requirement for professional employees. Under current law, dental hygienists fall within the professional exemption to the 40-hour work week, but only if they have completed 4 years of professional study. And is it not true that under the proposed rule, dental hygienists with only 2 years of academic training and work experience would now fall into that exemption? So it seems to me that if employers decide that their employee's work experience in a field that customarily requires a degree—it could be biology or nursing or engineering, culinary arts, accounting—if they have the same knowledge as workers with degrees, will employers not now be free to deny those workers overtime?

Ms. MCCUTCHEN. No, they will not, Senator Murray.

Senator MURRAY. How can you say that?

Ms. MCCUTCHEN. Thank you for the opportunity to correct the record. We are not changing the rule, the basic rule, that only people who work in professions that customarily require a prolonged course of intellectual study are eligible for the exemption. The current rule says, for example, that customarily means the occasional chemist who is not in the possession of a chemistry degree or the occasional lawyer who does not have a law degree is not barred from the exemption as long as the profession itself is one that generally requires an advanced specialized degree for entry. And we have not changed that rule.

Senator MURRAY. Well, I would assume, Ms. Owens, that you would read that differently. Can you explain to me how you——

Ms. OWENS. Well, I think your example—and Mr. Eisenbrey may want to comment on this as well—of the dental hygienist as a profession that customarily would require that kind of degree but perhaps now more and more people who go into the field have work experience and a 2-year degree from a technical school or a community college, for example, we believe are subject to being classified as exempt under these rules. And if that is not the case, then I do not think the regulations, as written, are clear.

Senator MURRAY. Mr. Eisenbrey, could you comment?

Mr. EISENBREY. I think it is important to realize that if you wanted to keep the law the same, you would not change it. They have changed the professional exemption and put in a particular new provision that says that you can substitute work experience or other things other than the normal academic training, experience from the military for the 4 years that are currently required. Their regulatory analysis—and I will quote—says: "The proposed rule allows work experience to be substituted for all or part of the educational requirement for exemption of learned professionals." There is no legitimate doubt about the effect of that.

Senator MURRAY. Well, Mr. Chairman, I would have to agree. That is certainly how I read it and it certainly would go to Senator Harkin's question to Ms. McCutchen that this is going to increase litigation should this proposed rule move forward, it sounds to me from listening to this. My understanding was the rules were proposed just to clarify the overtime rules and to reduce litigation. So I think we have a real problem moving forward here.

Senator SPECTER. Thank you very much, Senator Murray.

Well, thank you very much, ladies and gentlemen. This is obviously a complex question. It has been very helpful.

Senator MURRAY. Mr. Chairman, if I could just ask to have my opening statement submitted for the record.

Senator SPECTER. Senator Murray's opening statement will be made a part of the record.

[The statement follows:]

PREPARED STATEMENT OF SENATOR PATTY MURRAY

Mr. Chairman, thank you for calling these important hearings today on the proposed regulatory changes the Department of Labor has put forth regarding overtime pay and labor union reporting.

I believe these hearings will provide critical information to the Members of this Committee to help them decide whether the rulemaking process at the United

States Department of Labor (USDOL) is driven by fact and reason or an anti-worker political agenda.

The shoddy rule-making process employed by the USDOL in the development of their draft regulations on overtime pay and labor union reporting leads this Senator to wonder what's the rush.

Congress has held no hearings, yet the Secretary of Labor—with a few strokes of her rule-making pen—is about to adversely affect the quality of life for millions of hard working Americans.

It is inconceivable to me that as families struggle in this tough economy, the Bush Administration wants to cut the pay of millions of workers who depend on their overtime to help make ends meet.

We know that overtime often makes up 25 percent of an eligible worker's wages.

Haven't working Americans been punished enough by this President's economic policies? Not only have we seen millions lose their pensions, but we've also seen massive tax cuts for the few while everyone else struggles just to get by.

Billion dollar corporate scandals continue to unfold on a regular basis, robbing millions of their economic security in their retirement years.

The answer from this Department of Labor is a rule that will require thousands of small local unions to comply with a new set of costly and unwarranted reporting requirements. These draft rules are more cumbersome than the reporting requirements for public corporations found in the recently enacted Sarbanes-Oxley legislation.

And of course we know that multi-billion dollar privately held corporations do not have any reporting requirements.

Unfortunately, these new labor union reporting rules are unlikely to "weed out corruption." Nor will they help to establish the transparency in labor union reporting the Secretary said was needed when she appeared before this Subcommittee to discuss her fiscal year 2004 budget request in April.

Millions of details on thousands of forms will not help assure labor unions are spending their money properly. Independently certified audits certainly remain a better approach, along with the diligence of the thousands of local, national and international union officials who care deeply about the fiscal integrity of their operations.

Again, I commend and thank the Chairman for calling these hearings. I look forward to working with him as we develop bipartisan approaches to critical policies that affect workers who are struggling to pay their mortgages and feed their families.

CONCLUSION OF HEARING

Senator SPECTER. Thank you all very much for being here. That concludes our hearing.

[Whereupon, at 3:47 p.m., Thursday, July 31, the hearing was concluded, and the subcommittee was recessed, to reconvene subject to the call of the Chair.]

○