Dated: July 18, 2017.

Anna K. Abram,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

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DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 541

RIN 1235–AA20

Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, U.S. Department of Labor.

ACTION: Request for information.

SUMMARY: The Department of Labor (Department) is seeking information from the public regarding the regulations located at 29 CFR part 541, which define and delimit exemptions from the Fair Labor Standards Act's minimum wage and overtime requirements for certain executive, administrative, professional, outside sales and computer employees. The Department is publishing this Request for Information (RFI) to gather information to aid in formulating a proposal to revise the part 541 regulations.

DATES: Submit written comments on or before September 25, 2017.

ADDRESSES: To facilitate the receipt and processing of written comments on this RFI, the Department encourages interested persons to submit their comments electronically. You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA20, by either of the following methods:

Electronic Comments: Follow the instructions for submitting comments on the Federal eRulemaking Portal *http://www.regulations.gov.*

Mail: Address written submissions to Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: This RFI is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the Wage and Hour Division's (WHD) Web site at *http://www.dol.gov/whd/.* All comment submissions must include the agency name and Regulatory Information Number (RIN 1235–AA20) for this RFI. Response to this RFI is voluntary and respondents need not reply to all questions listed below. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this RFI. Submit only one copy of your comment by only one method (*e.g.,* persons submitting comments electronically are encouraged not to submit paper copies). Please be advised that comments received will become a matter of public record and will be posted without change to *http://www.regulations.gov,* including any personal information provided. All comments must be received by 11:59 p.m. on the date indicated for consideration in this RFI; comments received after the comment period closes will not be considered. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period. Electronic submission via *http://www.regulations.gov* enables prompt receipt of comments submitted as the Department continues to experience delays in the receipt of mail in our area. For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Melissa Smith, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this RFI may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1 (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's Web site at *http://www.dol.gov/whd/america2.htm* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

The Fair Labor Standards Act (FLSA or Act) generally requires covered employers to pay their employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime premium pay of not less than one and one-half times the employee's regular rate of pay for any hours worked over 40 in a workweek. *See* 29 U.S.C. 206(a)(1)(C); 29 U.S.C. 207(a)(1). Section 13(a)(1) of the FLSA, however, exempts from both minimum wage and overtime protection ''any employee employed in a bona fide executive, administrative, or professional capacity'' and expressly delegates to the Secretary of Labor the power to define and delimit these terms through regulation. 29 U.S.C. 213(a)(1). This exemption is frequently referred to as the ''white collar'' exemption.

For more than 75 years, the Department's part 541 regulations implementing the exemptions under Section 13(a)(1) of the Act have generally defined the terms ''bona fide executive, administrative, or professional capacity'' by the use of three criteria. With some exceptions, for an employee to be exempt: (1) The employee must be paid on a salary basis (''salary basis test''); (2) the employee must receive at least a minimum specified salary amount (''salary level test''); and (3) the employee's job must primarily involve executive, administrative, or professional duties as defined by the regulations (''duties test''). *See* 29 CFR part 541.

The Department issued the initial part 541 regulations in October 1938, slightly less than four months after the FLSA became law. 3 FR 2518 (Oct. 20, 1938). These regulations established duties tests for executive, administrative, and professional employees, and also set a minimum compensation requirement of $30 per week for exempt executive and administrative employees. In 1940, the Department revised the part 541 regulations, establishing the salary basis test, retaining a $30 per week salary level for executive employees, and establishing a $50 per week ($200 per month) salary level for administrative and professional employees. 5 FR 4077 (Oct. 15, 1940). The Department again amended the part 541 regulations nine years later, in 1949, establishing a two-tier structure for assessing compliance with the salary level and duties tests. 14 FR 7705, 7706 (Dec. 24, 1949). Employers could satisfy either a ''long'' test based on the previous test—combining a rigorous duties test and lower salary level—or a new ''short'' test—combining an easier duties test and a higher salary level. The long test duties requirement was more rigorous because it contained a bright-line, 20 percent limit on the amount of time an employee could spend performing non-exempt work.[1] The short test duties requirement, in contrast, did not limit the amount of time an exempt employee could spend on non-exempt duties. The Department reasoned that employees who met this higher salary level would almost always meet the long test duties requirement—including the 20 percent limit on performing non-exempt work. Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) at 22–23.

For the next five decades, the Department retained the ''long'' and ''short'' test structure for exemption. The Department updated the salary levels four times between 1958 and 1975. Beginning in 1958, the Department set the lower long test salary level to exclude from the exemption approximately the lowest paid ten percent of employees who passed the long test in low-wage regions, low-wage industries, small establishments, and small towns. *See* Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) at 6–7. The Department followed a similar methodology in 1963 and 1970, setting the salary at a level that excluded a small percentage of employees who satisfied the long test. *See Tentative Decision on Proposed Rule Making Proceedings,* 28 FR 7002, 7004 (July 9, 1963); 35 FR 883, 884 (Jan. 22, 1970). In 1975, the Department set what were intended to be ''interim'' salary levels, adjusting the previous long test salary level for inflation. *See* 40 FR 7091 (Feb. 19, 1975). At each of these updates, the Department also set a short test salary level higher than the long test salary levels. 81 FR 32391, 32401 (May 23, 2016).

Nearly thirty years passed before the Department next updated the part 541 regulations in 2004. By this point the passage of time had eroded the lower long test salary levels below the amount a minimum wage employee earned for a 40-hour workweek, and even the higher short test salary levels were not far above the minimum wage. *See* 69 FR 22122, 22164 (Apr. 23, 2004). Thus, as a practical matter, employers used the short test, with its less rigorous duties requirement, and the long test fell out of operation. In 2004, the Department eliminated the ''long'' and ''short'' test structure and created a new ''standard'' test. Like the old short test duties requirement, the new standard duties test did not limit the amount of non-exempt work an exempt employee could perform. The Department paired the new standard duties test with a salary level test of $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. The $455 per week salary level was equivalent to the lower salary level that would have resulted from the methodology the Department previously used to set the lower long test salary levels. *Id.* at 22168. In the same rulemaking, the Department also established a new test for ''highly compensated employees.'' Under this test, if an employee earned at least $100,000 a year he or she needed to satisfy only a very minimal duties test for exemption. *Id.* at 222172–22174.

Twelve years passed before the next update to the part 541 regulations in 2016. One of the Department's primary goals in undertaking the 2016 rulemaking was to update the standard salary level test to reflect increases in actual salary levels nationwide since 2004 and to adjust the standard salary level to fall within the historical range of the short test salary level in light of the absence of the more rigorous long test duties requirement. 81 FR 32399–32400. The Department set the standard salary at a level that would exclude from exemption the bottom 40 percent of salaried workers in the lowest-wage Census Region (currently the South), resulting in an increase from $455 per week to $913 per week. *Id.* at 32405, 32408. No changes were made to the standard duties test. *Id.* at 32444. The Department also established a mechanism for automatically updating the salary level every three years to ensure it remained a meaningful test for helping determine an employee's exempt status. Id. at 32438.[2] The Department published the 2016 Final Rule on May 23, 2016, with an effective date of December 1, 2016.

Litigation challenging the 2016 Final Rule is currently pending before the Fifth Circuit Court of Appeals and in the U.S. District Court for the Eastern District of Texas. By district court order, the Department is enjoined from implementing and enforcing the Final Rule. *See Nevada, et al.,* v. *U.S. Dep't of Labor, et al.,* 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016), appeal pending, No. 16–41606 (5th Cir.). The pending appeal of that order concerns the reasoning of the District Court which would call into question the Department's authority to utilize a salary level test in determining the exempt status of executive, administrative, and professional employees. The Department of Justice, on behalf of the Department, is arguing that 29 U.S.C. 213(a)(1) provides the Secretary of Labor authority to establish a salary level test. As stated in our reply brief filed with the Fifth Circuit, the Department has decided not to advocate for the specific salary level ($913 per week) set in the 2016 Final Rule at this time and intends to undertake further rulemaking to determine what the salary level should be. In light of the pending litigation, the Department has decided to issue this RFI rather than proceed immediately to a notice of proposed rulemaking (NPRM). The Department believes that gathering public input on the questions below will greatly aid in the development of an NPRM and help us move forward with rulemaking in a timely manner.

II. Promoting the Regulatory Reform Agenda

On February 24, 2017, President Donald Trump signed Executive Order 13777, ''Enforcing the Regulatory Reform Agenda.'' In relevant part, Sec. 3(d) of the Order tasks federal agencies to identify regulations for repeal, replacement, or modification that:

(i) eliminate jobs, or inhibit job creation;

(ii) are outdated, unnecessary, or ineffective;

(iii) impose costs that exceed benefits;

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[1] The Department had instituted a 20 percent cap on non-exempt work for executive and professional employees in 1940. *See* 5 FR 4077; ''Executive, Administrative, Professional . . . Outside Salesman'' Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) at 14–15, 40. It added the cap for administrative employees in 1949. *See* 14 FR 7706. In 1961, when Congress expanded FLSA coverage for employees of retail and service establishments, it amended Section 13(a)(1) to provide that exempt employees of such establishments could spend up to 40 percent of their hours worked performing non-exempt work. *See* Pub. L. 87–30, 75 Stat. 65, Sec. 9 (May 5, 1961).

[2] The 2016 rule modified the part 541 regulations to, for the first time, permit nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test. *See* 81 FR 32425–32426. The 2016 rule also increased the total annual compensation level for highly compensated employees to the annualized equivalent of the 90th percentile of the weekly earnings of full-time salaried workers nationwide and provides for it to be automatically updated every three years to maintain that level. *Id.* at 32429, 32443.

(iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Consistent with Executive Order 13777, the Department is reviewing the impact of the 2016 Final Rule's changes to the part 541 regulations with a focus on lowering regulatory burden. This RFI will assist the Department's Regulatory Reform Task Force in evaluating the 2016 Final Rule.

III. Request for Public Comment

The Department is aware of stakeholder concerns that the standard salary level set in the 2016 Final Rule was too high. In particular, stakeholders have expressed the concern that the new salary level inappropriately excludes from exemption too many workers who pass the standard duties test, especially given the lack of a lower long test salary for employers to utilize for lower wage white collar employees. In the 2016 Final Rule the Department estimated that 4.2 million salaried white collar workers would, without some intervening action by their employers, change from exempt to non-exempt status. *See* 81 FR 32393. Concerns expressed by various stakeholders after publication of the 2016 Final Rule that the salary level would adversely impact low-wage regions and industries have further shown that additional rulemaking is appropriate. The Department is publishing this RFI to gather information to aid in formulating a proposal to revise the part 541 regulations.

The Department invites comments on the 2016 revisions to the white collar exemption regulations, including whether the standard salary level set in that rule effectively identifies employees who may be exempt, whether a different salary level would more appropriately identify such employees, the basis for setting a different salary level, and why a different salary level would be more appropriate or effective. In particular, the Department seeks comment on and information relating to the following questions:

1. In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

4. In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal

government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

IV. Conclusion

The Department invites interested parties to submit comments during the public comment period and welcomes any pertinent information that will provide a basis for reviewing the 2016 Final Rule.

Signed at Washington, DC, this 21st day of July 2017.

Patricia Davidson,

Deputy Administrator for Program Operations, Wage and Hour Division.

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BILLING CODE 4510–27–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Chapter XL

Regulatory Planning and Review of Existing Regulations

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Request for information.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is asking for input on what regulatory and deregulatory actions it should be considering as part of its regulatory program. PBGC is committed to a program that provides clear and helpful guidance, minimizes burdens and maximizes benefits, and addresses ineffective and outdated rules. This initiative supports PBGC's ongoing regulatory planning and active retrospective review of regulations and responds to the President's executive order on ''Enforcing the Regulatory Reform Agenda.''

DATES: PBGC requests that comments be received on or before August 25, 2017 to be assured of consideration.

ADDRESSES: Comments, identified by ''Regulatory Planning and Review,'' may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the Web site instructions for submitting comments.
- *Email: reg.comments@pbgc.gov.*
- *Mail or Hand Delivery:* Regulatory Affairs Group, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026.

Comments received, including personal information provided, will be posted to *www.pbgc.gov.* Copies of comments may also be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington, DC 20005–4026, or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Stephanie Cibinic, Deputy Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW., Washington DC 20005–4026; *cibinic.stephanie@pbgc.gov;* 202–326–4400 extension 6352. (TTY and TDD users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–326–4400 extension 6352.)

SUPPLEMENTARY INFORMATION:

Background

The Pension Benefit Guaranty Corporation (PBGC) is a federal corporation created under the Employee Retirement Income Security Act of 1974 (ERISA) to guarantee the payment of pension benefits earned by nearly 40 million American workers and retirees in nearly 24,000 private-sector defined benefit pension plans. PBGC administers two insurance programs—one for single-employer defined benefit pension plans and a second for multiemployer defined benefit pension plans. Each program is operated and financed separately from the other, and assets from one cannot be used to support the other. PBGC receives no funds from general tax revenues. Operations are financed by insurance premiums, investment income, assets from pension plans trusteed by PBGC, and recoveries from the companies formerly responsible for the trusteed plans.

To carry out its mission, PBGC issues regulations interpreting or implementing ERISA on such matters as: how to pay premiums, when reports are due, what benefits are covered by the insurance program, how to terminate a plan, the liability for underfunding, and how multiemployer plan withdrawal liability works. Regulatory objectives and priorities are developed in the context of PBGC's statutory purposes:

- To encourage the continuation and maintenance of voluntary private pension plans;
- To provide for the timely and uninterrupted payment of pension benefits; and
- To keep premiums at the lowest possible levels consistent with carrying out PBGC's obligations under title IV of ERISA.

PBGC intends to issue regulations consistent with its statutory mission of implementing the law and encouraging the continuation and maintenance of defined benefit plans. Thus, PBGC attempts to minimize administrative burdens on plans and participants, improve transparency, simplify filing, provide relief for small businesses, and assist plans to comply with applicable requirements. PBGC is committed to issuing simple, understandable, and timely regulations that help affected parties. PBGC looks to maximize net benefits and actively reviews regulations to identify and ameliorate inconsistencies, inaccuracies, and requirements made irrelevant over time, with the goal that net cost impact is zero or less overall.

PBGC develops its regulatory planning and review under a series of executive orders. E.O. 12866 (issued in 1993) and E.O. 13563 (issued in 2011) direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 also calls for the periodic review of existing regulations to identify any that can be made more effective or less burdensome in achieving regulatory objectives. E.O. 13771 (issued in January 2017) seeks to reduce regulatory requirements and control regulatory costs. This executive order was followed by E.O. 13777 (issued in February 2017), which calls for a Regulatory Reform Task Force (RRTF) in each agency to evaluate existing regulations and make recommendations regarding their ''repeal, replacement, or modification, consistent with applicable law.'' In evaluating regulations, the RRTF should ask for input from persons and entities affected by such regulations.