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ADVOCATING for the working poor and the unemployed

June 30, 2003

Sent via fax (202) 693-1432

Tammy D. McCutcheon
Administrator, Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Section 541 FLSA Overtime Regulations (Proposed)

Dear Ms. McCutcheon:

The National Employment Law Project (NELP) and other signatories to this letter submit these comments on the proposed rulemaking regarding the executive, professional and administrative exemptions to overtime under the Fair Labor Standards Act (FLSA). The National Employment Law Project is a non-profit law office that advocates on behalf of low-income workers and the unemployed. For over 25 years, NELP has worked with state and local advocates around the country, including legal services offices, community groups, and labor organizations to achieve strong workplace protections and access to government systems of support for low-wage workers and the unemployed. In addition, NELP has a long history of litigation and policy advocacy on a broad range of issues, including job training, employment discrimination, unemployment compensation, the employment rights of workfare participants, the Family and Medical Leave Act, and the FLSA.

The other signatories to this letter include individual academics and lawyers and organizations with a wide experience working with lower-income workers who would be adversely affected by the proposed regulations. A listing of those signatories is at the end of these comments.

NELP, the signatories, and their constituents have a direct and sustained interest in continued strict enforcement of a national hours-of-work standard and the narrow application of FLSA exemptions which is essential to coverage of low-wage workers who comprise a disproportionate and growing share of the workforce.

The signatories to this comment letter recognize the need to ensure overtime protection to individuals who work in lower-paid jobs who are not, under any definition, executives or white-collar professionals enjoying the discretion and independence that accompanies those jobs.

Together we appreciate the opportunity to comment on the proposed regulations.

Our comments are divided into three primary areas. First, we describe the historical purposes of and intent behind the overtime provisions of the FLSA to remind us all that the Act was intended to sweep broadly. Some aspects of the proposed regulations do not comport with the statutory language of the FLSA nor the legislative intent behind the statutory exemptions, improperly excluding workers who were intended to be within the statute's wide reach. This legal overreaching by the regulations is especially onerous given the increasing numbers of low-income workers having trouble making ends meet.

Second, we provide examples of the workers we encounter in our work who would be improperly denied overtime pay under the proposed regulations, which do not sufficiently narrowly define the exemptions for executive and administrative employees. These exemptions have been called "white-collar" to describe the intended group of employees not subject to overtime. If the exemptions are unduly broadened, significant numbers of low-income workers intended to get overtime premium pay will be excluded from the Act.

Third, we provide specific comments to those aspects of the proposed regulations pertaining to executive and administrative employees in particular that we find to be contrary to the purposes and intent of the FLSA.

If exemptions are easy to obtain, a large middle segment of the work force will be exempted. Employers will impose extra work on this exempted portion of the workforce, since they are essentially "free labor." And employers will be discouraged from both hiring more entry level employees to do the extra work and from paying lower paid employees at the time and one-half rate, thereby undermining the very purposes of the hours-of-work standard and harming the classes of persons who need protection the most, the low-wage employee and unemployed worker.

I. The Purposes of the "White-Collar" Exemptions

The FLSA's hours-of-work standard establishes the forty hour work week. The FLSA was enacted with a dual purpose; the 1938 Act was explicit that the first congressional purpose was to protect workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a).[1] The second purpose of the Act, the job creation goal, was highlighted by Justice Reed's 1941

1 See also *United States v. Darby*, 312 U.S. 100, 109 (1941); *Barrantine v. Arkansas Freight System*, 450 U.S. 728, 739 (1981).

opinion in *Overnight Motor Transport v. Missel*, 316 U.S. 572, 576 (1941):

> [The Court of Appeals] felt that one of the fundamental purposes of the Act was to induce work-sharing and relieve unemployment by reducing hours. We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work. Of course, effect was to require extra pay for overtime work by those covered by the act even though the hourly wages exceeded the statutory minimum. The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous. It calls for 150% of the regular, not the minimum wage. By this requirement although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours of the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was part of the plan from the beginning.... The message of November 15, 1937 calling for the enactment of this type of legislation referred again to protection from excessive hours. May 24, 1937, 81 Cong. Rec. 4983, 75th Cong. 1st Sess. Sen. Rep. No. 884 on S. 24754 (July 6, 1937), at 4. The Senate Report No, 884, the companions House Report, 82 House Rep. 1452, 75th Cong. 1st Sess., at 14 and 15 (1937), and the Conference Report, 83 Cong. Rec. 9246, 9254 (1937), all spoke of maximum hours as a separate desirable object. Indeed the Act itself in setting up two sections of standards, § 6 for wages and § 7 for hours, emphasizes the duality of the Congressional purpose. 316 U.S. at 577- 578. (emphasis added).

Louis Brandeis articulated the argument for an hours-of-work standard, in the first case in which this Court upheld a state statute limiting the hours of work. *Muller v. Oregon*, 208 U.S. 412 (1908). The original "Brandeis Brief" persuasively argued that protective hours of work statutes should be upheld for the public health, public safety and general well-being of women and society as a whole. Relying on over ninety national and international medical studies and committee reports, Brandeis found that long hours of labor cause bad effects on health, safety, morals and the general welfare. He further discussed the economic benefits of short hours. Although the 1908 Brandeis Brief and *Muller* decision are hopelessly outdated with regard to their views that women are weaker and inferior to men, Brandeis' reasons for enforcing a strict hours of work statute hold true, even after eighty-eight years.

The negative effect of long hours on health remains prevalent in today's society. Long working hours are related to stress and injuries at the workplace. Juliet B. Schor, The Piper Lecture: Worktime In Contemporary Context: Amending The Fair Labor Standards Act, 70 Chi. Kent L. Rev. 157, 161 (1994) (hereafter "Piper Lecture"). According to the International Labor Office, job stress, which costs the United States $200 billion a year, is "'one of the most serious health issues of the twentieth century.'" International Labor Office, World Labor Report at 65-67 (1993), quoted in Piper Lecture at 161. In 1991, approximately two-thirds of

women with children are employed.2 In 1987, women's household hours were 1123. Men spent 689 hours doing household work.3 This leaves families with little non-work time. The more hours spent at work, the less with the family. American men and women both need family time.

The impact of the existing exemptions for administrative, executive and professional employees has increased in recent years, and has fallen disproportionately on female workers, according to the recent General Accounting Office report, "Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place," GAO/HEHS-99-164 (September 1999)(hereafter "GAO Report"). The GAO found that in 1988, as many as 26 million full-time workers were covered by the white-collar exemptions, a shocking 27% of the entire workforce, and an increase of 9% in five years. GAO Report at 8. Not surprisingly, exempt workers were more likely to work overtime in fact than their non-exempt co-workers: 44 % of exempt workers worked overtime, while approximately 33% of non-exempt workers worked overtime, according to the GAO. GAO Report at 12.

FLSA Exemptions Must be Read Narrowly.

The Supreme Court has emphasized that the "breadth of coverage" of the FLSA's overtime work rules is "vital to [its] mission" of establishing a national work week standard and that statutory exemptions to the Act should be narrowly construed.4 The presumption must be that all workers are covered.5

A central tenet of the FLSA is that employer-provided labels or job titles are not determinative of an employee's coverage under the Act. This runs through the FLSA jurisprudence and should be adhered to in determinations of overtime coverage as well, to ensure that employers may not simply evade requirements by naming employees exempt. *See, e.g.,* 29 C.F.R. § 541.201 (b) "Titles can be had cheaply and are of no determinative value." This is to avoid employer manipulation of job titles in an effort to avoid FLSA overtime pay responsibility.

II. Employer Abuse of the FLSA Exemptions Disproportionately Penalizes Low-Wage Workers.

Today's employers remain driven toward treating as many workers as exempt as possible in

2 Bureau of Labor Statistics Memo, "Marital and Family Characteristics of the Labor Force from the March 1990 Current Population Survey," at 4 table 15 (Oct. 1990)).

3 Id. at 35, table 2.3 and at 37 n. 40 (construing John P. Robinson, "Who's Doing the Housework?" American Demographics, 10, 12 (Dec. 1988)).

4 *Powell v. United States Cartridge Co*., 339 U.S. 497, 516 (1950); *Mitchell v. Kentucky Finance Co*., 359 U.S. 290, 295 (1959).

5 *Powell v. United States Cartridge Co., supra*, 339 U.S. at 516; *Arnold v. Ben Kanosky*, *Inc*., 361 U.S. 388, 392 (1960).

order to avoid paying employees overtime for working over forty hours in a week, and to avoid hiring more employees to do the extra work.

Recent real life examples of employer manipulation of the exemptions illustrate the point that low-wage workers are significantly impacted by a narrowing of the regulations.6 If the proposed regulations are enacted as currently written, many of these workers would have a more difficult time proving that they have been improperly excluded from overtime provisions under the FLSA.

Example # 1:

Maria is an assistant manager at a fast food restaurant. She works 80 hours a week for $460 salary. Her hourly rate is $5.75 an hour – slightly above the minimum wage. Her employer classified her as a low-level supervisor and did not pay her overtime under the "white collar" exemptions.

Under the proposed regulations, Maria may not be eligible for overtime if she is found to hold a "position of responsibility," e.g., assistant manager. For a low-paying job in this sector, such a result would be antithetical to the statute's purpose of only exempting bona fide executives with high-level authority and independent discretion.

Example # 2:

Ralph, a convenience store clerk in Weslaco, Texas, was often the only employee on the premises in the evenings and on weekends. He fulfilled all duties in the store, from ringing up customers, stocking shelves, and closing up the store, often after midnight. As a "manager," he was classified by his employer as an "executive employee," and did not receive overtime payments.

Under the proposed regulations, Ralph's employer may succeed in arguing that he should be exempt from overtime because he meets the "sole charge executive" regulation (to be codified at Section 541.02, where any individual is in "sole charge of an independent establishment or a physically separated branch establishment" would be considered a bona fide executive, regardless of whether the individual's primary duty is management, the individual customarily and regularly directs the work of two or more employees, or the individual has supervisory authority over any employees.

Example # 3:

Lucia is a garment worker who sews shirts for a sewing contractor. She supervises three other workers who also sew shirts alongside her. When her boss gets a big job, instead of hiring another three workers to get it done, she has to stay overnight three nights in a row

6 These examples are from cases pursued by legal services advocates that resulted in settlements in favor of the workers requiring that the parties' names and the case results remain confidential.

and over a weekend to finish by the deadline. Her employer, who calls her a supervisor, misclassifies her as an exempt employee, and she receives no overtime pay.

Under the proposed regulations, Lucia may not succeed in her claim for overtime if the employer shows that she meets all of the elements of the standard duties test, which includes supervising two or more other employees, and holding a “position of responsibility” with her employer.

Example # 4

Cristina worked as a receptionist from 2/2000 until 6/2000. Her hourly rate was $11 per hour and her yearly wage was $22,880. Then her job title changed, she was paid on a salary basis, but her duties remained the same. The only thing that changed was her classification, and she was suddenly classified her as exempt and stopped receiving overtime.

Under the proposed regulations, it is harder for Cristina to successfully argue that she is not paid on a “salary basis.” If she is paid on a “salary basis,” she will not be entitled to overtime. Even if she can show that she is not paid on a “salary basis,” the proposed “safe harbor” provisions in the proposed regulations provide her employer with an easy out.

Low wage workers comprise a disproportionate share of the workforce. Increasingly, workers classified as managers and administrators in growing industries such as retail, service industries and sales, are also finding themselves in low paying jobs. For example, the National Restaurant Association conducted a survey in 1994 which found that one-quarter of fast-food assistant managers earned less than $15,0007 and from 1964 to 1992, supervisory employees in eating and drinking establishments more than quadrupled, from 126,000 to 634,000.8

Low wage workers are also disproportionately women and members of racial and ethnic minority groups. By the year 2005, women and racial minorities will be two-thirds of all new entrants to the workforce.9 According to recent data from the U.S. Bureau of Labor Statistics, while women represent 48 percent of all managerial and professional workers, they are disproportionately working in lower paying jobs averaging 73 percent of the pay of men in managerial and professional jobs.10

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7 Marc Linder, "Labor Department is Subverting Wage Law," in The National Law Journal, January 17, 1994.

8 Marc Linder, "Closing the Gap Between Reich and Poor: Which Side is the Department of Labor On?", 21 New York University Review of Law and Social Change I, 22 (1993-94). U.S. Bureau of Labor Statistics, Bullet No. 2370, "Employment, Hours and Earnings," at 802-04 (1991).

9 Commission on the Future of Worker-Management Relations, U.S. Department of Labor, Fact Finding Report (May 1994) at 12.

10 U.S. Bureau of Labor Statistics, Current Population Survey, 1995 Annual Averages (Unpublished Data).

The proposed regulations broaden the exemptions to significantly impact the low-wage workers in industries such as retail, food service, and sales, where the lines often merge between the work of entry-level workers and managers. Deliberate employer manipulation of the exemption, by merely deeming entry-level employees "exempt" as supervisors, even when they spend a good part of their time performing the same work as the people they supervise, permits the employer to avoid paying overtime, and indeed, avoid paying wages at all for the extra hours worked.[11] This dynamic flouts the purpose of the narrow white-collar exemptions which recognized that the highest paid executives of a company had enough power (and wages) to dictate their own hours and working conditions. The regulations also recognize that the type of work exempt employees perform could not be easily spread to other workers after 40 hours. The notion that assistant managers at fast-food restaurants and convenience store clerks have the requisite power to qualify them for the executive exemption as it was intended is absurd.

III. DOL Proposed Regulations

A. Salary threshold level (proposed sections 541.600)

A worker's salary level is a good indicator of whether or not she should be exempt from the overtime requirements of the FLSA. The higher paid employees typically have more discretion, independent judgment in their jobs and certainly have more economic power to bargain for better pay or working conditions.

The proposed threshold level of $425 per week (approximately $10.50/hour, or $22,100 a year) is insufficient, for at least two reasons. First, few workers earning under this level would qualify as legally exempt under the existing regulations, so it does little if anything to help those workers. Second, the DOL's estimate that as many as 1.3 million low-wage workers could now become eligible for overtime pay due to the increase in the threshold level is not supported.

The proposed salary threshold level is only two times what a minimum wage earner makes in a week, meaning that many lower-paid workers could be deemed exempt from overtime. The DOL itself admits that 80% of the current workforce makes $425 a week or more. 68 Fed. Reg. 15570-15571. Workers earning more than $22,100 a year are low-income; they may be eligible for Food Stamps (family of four with incomes as high as $23,920 can be eligible) and the Earned Income Tax Credit (breadwinners with two or more children can make as much as $33,692 and still get the EITC). Under the proposed salary threshold, these same workers could be subject to exemption under the overtime rules.

B. Salary Basis Test (Proposed Section 541.602)

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11 The U.S. Department of Labor states in a 1940 report, "there is little advantage in salaried employment if it merely serves as a cloak for long hours and may well conceal excessively low hourly rates of pay." "The Stein Report" at 7 (1940).

The current regulations (at 29 C.F.R. § 541.118) require executive, administrative or professional employees to be paid on a salary basis that is "not subject to reduction because of variations in the quality or quantity of work performed." To show that an employee is paid on a salary basis, an employer must also generally show that the employee is paid without regard to how many hours worked in a pay period and regardless of his disciplinary status. 29 C.F.R. § 541.118. The purpose of the requirement that an exempt worker be paid on a "salary basis" is to distinguish those typically higher-level employees who are paid a salary for doing a job, regardless of the number of hours they spend doing that job, from those who work for a set number of hours at a set hourly rate. The first category of employee is not entitled to overtime premium pay, on the theory that they do their job without regard to the number of hours they actually spend performing that job. The second category of employee hired to work for a particular number of hours per workweek, is entitled to overtime premium pay for any hour worked over 40 in a workweek.

The "no pay docking" rule currently found in the regulations makes sense, because it is aimed at permitting employers to exempt only those workers whose pay is not subject to docking. If an employer is permitted to dock an employee's pay because an employee had to leave work early one afternoon, that employee is an hourly employee and not truly a salaried one. *See, e.g., Klein v. Rush Presbyterian-St. Lukes Medical Center*, 990 F.2d 279, 284 (7th Cir. 1993); *Abshire v. County of Kern,* 908 F.2d 483, 486 (9th Cir. 1990). The DOL says permitting disciplinary deductions is a common sense change that will permit employers to hold exempt employees to the same standards of conduct as nonexempt hourly workers. 68 Fed. Reg. at 15572. Nothing in the current regulations prohibits employers from holding their exempt employees to the highest standards of conduct in their jobs. The regulations simply prohibit employers from docking exempt employees' pay for disciplinary reasons.

The current proposal is to permit employers to impose unpaid disciplinary suspensions of a full day or more without sacrificing an exempt employee's status. This would newly exempt workers such as nurses whose salary was docked for any violation of a hospital's code of conduct (*Klein v. Rush-Presbyterian-St.Luke's Medical Center*, 990 F. 2d 2790284-285 (7th Cir. 1993), restaurant general and assistant managers whose pay was docked due to cash shortages (*Belcher v. Shoney's, Inc.*, 30 F. Supp. 2d 1010 (M.D. Tenn. 1998) and police officers subject to pay docking for violating departmental rules (*Hurley v. Oregon*, 27 F.3d 392, 394-395 (9th Cir. 1994); *Arrington v. City of Macon*, 973 F. Supp. 1467 (M.D. Ga. 1997)); *see also, Klem v. County of Santa Clara, California*, 208 F.3d 1085 (9th Cir. 2000) (employer's reductions in pay for disciplinary violations mean employees subject to those deductions are not exempt from overtime requirements); *Muston v. MKI Systems, Inc.*, 951 F. Supp. 603 (E.D. Va. 1997) (employer's leave without pay policy on its face meant employee not exempt, even if employer had never docked pay.) It would also now exempt employees whose employer had a policy that created a significant likelihood of deductions. *Smith v. Central Security Bureau*, 2002 WL 31520361 (W.D. Va. 2002); *McCloskey v. Triborough Bridge*, 903 F. Supp. 558 (S.D.N.Y. 1995) (employer's policy of docking pay, even if not implemented, means employees are not exempt); *Stanley v. City of Tracy*, 120 F. 3d 179 (9th Cir. 1997) (employer's policy creating likelihood of improper deductions renders employees non-exempt); *Bankston v. State of Ill.*, 60 F. 3d 1249 (7th Cir. 1995) (employer's policy, even

if not implemented, sufficient to create non-exempt employees) ; *Spralding v. City of Tulsa, OK*, 95 F. 3d 1492 (10th Cir. 1996) (city's policy of docking pay for disciplinary reasons was inconsistent with salary basis test).

Where employers retain discretion to reduce an employee's pay due to an employee's hours or quality of work, the employee is not paid on a salary basis and is not exempt from overtime. *See Meringolo v. City of New York*, 908 F. Supp. 160 (S.D.N.Y. 1995). The proposed regulations would change this rule.

1. The "Subject To" Rule: § 541.118 (Proposed section 541.602).

If the regulations' "subject to" provision were upheld, an employer could permanently maintain a detailed attendance or disciplinary code which subjects all employees to pay docking. The employer could then pay overtime wages only to those employees who were actually docked. This would lead to the obviously unintended result that employees who violate the rules and are whose pay is in fact docked would be entitled to overtime, while those who obey the employers' rules would not receive such overtime.

The proposed regulations permit an employer to deduct wages for full-day disciplinary suspension as long as it is pursuant to a written policy and is applied uniformly. Section 541.602 (b)(5). This permits employers to put form over substance and merely promulgate a written policy that can be manipulated.

C. Standard Duties Test (Proposed section 541.700)

The proposed regulations do away with the current "long test" and adopt a more employer-friendly standard duties test as the sole proposal for these exemptions. This eliminates consideration of criteria that can operate in favor of employees, including increasing the tolerance for exempt employees spending time doing nonexempt work up to 50% (from 20%, and from 40% for retail and service workers). 68 Fed. Reg. 15595. The proposed test also eliminates the limitation requiring that exempt employees customarily and regularly exercise discretion and independent judgment. This is a key limiting factor of the exemption, and is intended to weed out those workers who are not bona fide exempt employees.

D. Executive Employees Exemption

The purpose behind the exemptions is to permit higher-level employees paid on a salary basis and with duties and responsibilities associated with managerial or professional work to be compensated on a basis other than hourly. Those managerial or professional duties by necessity must include independent judgment and discretion, and these concepts were central to the previous regulations' definitions. The DOL itself admits that the type of work exempt employees perform could not be easily spread to other workers after 40 hours in a week. 68 Fed. Reg. 15561. The proposed regulations require only that the worker hold a "position of responsibility". This permits employers to tag a worker with a responsible-sounding position while at the same time requiring that worker to perform menial tasks devoid of

discretion or independent judgment.

The idea is to distinguish between bona fide executives from the non-management workers. Employers complain that the current regulations are vague and not subject to predictable adjudication. The concepts may be refined, but the underlying purposes must not be lost. Statutory purpose cannot be flouted simply to creat bright line rules employers may find easier to apply.

The proposed duties test improperly eliminates the important limiting criteria found in the current regulations that an exempt employee only perform no more than 20% of non-exempt duties. Proposed section 541.100. This deletion impermissibly broadens the exemption to include workers who spend the majority of their time on non-exempt duties, permitting employers to manipulate job titles and evade overtime premium pay to low-level employees. Even under the previous regulations, the GAO Report concluded that the duties test for executive employees inadequately protected low-income supervisory employees, stating that "it is, in fact, difficult to challenge exempt classifications if employees supervise two or more full-time employees and spend some time – even if minimal – on management tasks." GAO Report at 4.

The proposed rule's descriptions of management duties for "working supervisors" (at 29 CFR Section 541.106) and in retail establishments (section 541.107) are too broad. The definitions would exempt from overtime fast food "managers" who spend the "majority of the time on non-exempt work." Section 541.107. This language makes it possible for fast food establishments to exempt nearly all line employees, as long as they meet the requirements of section 541.100. *Cowan v. Treetop Enterprises, Inc.*, 120 F. Supp. 2d 672 (M.D. Tenn. 1999).

The "working supervisors" similarly emphasizes the job title of the employee, which is at odds with the admonition in the introduction to Proposed subpart A that an employee's job title is not sufficient to confer exempt status. *See, e.g., Donovan v. Rockwell Tire & Fuel, Inc.*, 711 F.2d 1050 (4th Cir. 1983)(working foremen are not exempt where devoted most of their time to repair work, waiting on customers, and cleaning service area); *Brennan v. Whatley,* 432 F. Supp. 465 (E.D.Tex. 1977)(real estate supervisor who worked alongside crew and did common labor was not exempt).

F. Administrative Exemption (Proposed section 541.200)

As for the executive exemption proposal, the proposed administrative exemption rule eliminates the important limiting criteria found in the current regulations that an exempt employee only perform no more than 20% of non-exempt duties, or 40% for retail establishments. Proposed section 541.200. This deletion impermissibly broadens the exemption to include workers who spend the majority of their time on non-exempt duties, permitting employers to manipulate job titles and evade overtime premium pay to low-level employees. *See, e.g., Nelson v. Master Vaccine, Inc.,* 27 WH Cases 1024 (Minn. Ct. App. 1986) (office manager who performed 50% on computer handling inventory and 20% on clerical tasks was not exempt); *Marshall v. National Freight*, 87 Lab. Cases (CCH) ¶ 33, 839

(D.N.J. 1979) (dispatchers who did intermittent administrative functions are not exempt)

Contrary to the rule that a worker's job title does not render one exempt, this rule proposes that if an employee holds a "position of responsibility" it is sufficient to meet the exemption. 68 Fed. Reg. at 15566. The rule eliminates the previous important requirement that an exempt employee be found to utilize discretion and independent judgment (68 Fed. Reg. at 15566), a criterion that saved many workers' overtime pay in prior cases determined under the current regulations. *See,Bothell v. Phase Metrics, Inc*, 299 F.3d 1120 (9th Cir. 2002); *Hodgson v. Penn Packing Co.,* 335 F. Supp. 1015, 1021 (E.D. Pa. 1971) (occasional deviation from pricing sheet is not sufficient exercise of discretion to render employee exempt); *Donovan v. Rockwell Tire & Fuel, Inc.,*26 WH Cases 726 (M.D.N.C. 1982) (employee not exempt even when approved and disapproved credit, because credit decisions could be overruled by salespersons); *Brock v. National Health Corp*, 667 F. Supp. 557, 566 (28 WH Cases 342 (M.D.Tenn. 1987) (staff accountants who used detailed manuals to review books for accuracy not exempt)

D. The "Window of Correction": 541.118(a)(6). (Proposed section 541.602)

The DOL's view of the "window of correction" would also lead to unintended results. An employer who deliberately makes deductions that are inconsistent with the salary basis test, and is then sued in an FLSA suit, could escape liability easily. Such a rule would rob the salary basis regulations of its teeth.

No employer should be allowed access to the "window of correction" unless the employer meets a burden of establishing that any deductions made were "inadvertent," that all deductions made were reimbursed as soon as they came to the employer's attention, and that the employer has revised all of its rules, codes, policies, practices and procedures which leave no doubt that as a practical matter the affected employee will not be subject to such deductions in the future. *Takacs v. Hahn Automotive Corp.*, 246 F. 3d 776 (6th Cir. 2001); *Belcher v. Shoney's, Inc.*, 30 F. Supp. 2d 1010 (M.D. Tenn. 1998)

The proposed regulation has an extremely broad "safe harbor" provision, whereby an employee would have to show an employer's "pattern and practice of improper deductions" in the same job classification, with the same managers, and during the same time period. Section 541.603(b). It goes even further, permitting employers to escape responsibility as long as they have a written policy of no deductions, notify the employees, and then reimburse any employees whose pay was improperly deducted. Section 541.603 (c). An employee could only overcome this free pass for the employer by showing that the employer repeatedly and willfully continues to violate its own policy after receiving employee complaints.

DOL says the window of correction is hard to administer and that its proposed rule ensures that an employer does not lose the exemption due to isolated incidents. 68 Fed. Reg. at 15572. The proposed rule goes well beyond "isolated incidents," permitting employers to serially violate their own written policies and simply reimburse employees bold enough to complain without any further repercussions for the employer.

G. DOL Should Use Examples in the Regulations

Given that many workers earning over the DOL-proposed salary threshold of $22,100 a year may not be eligible for overtime pay, the DOL should create presumptions against certain jobs ever being exempt. These would include jobs where the annual earnings of the employees in that sector are close to the minimum wage and/or there are many immigrant or teenage workers, including such sectors as: fast food and restaurants, retail, and grocery.

For these reasons, the undersigned organizations urge the Department to revise the proposed regulations to comport with the statutory language and intent.

Respectfully submitted,

By:___________________________

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