

November 7, 2023

Ms. Amy DeBisschop
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

Re: Wage and Hour Division Proposed Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees [RIN 1235-AA39]

Submitted via www.regulations.gov.

Dear Ms. DeBisschop:

I appreciate this opportunity to provide comment on the proposed rule, “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees.”¹

Proposed Rule Summary

The proposed rule (1) increases the standard salary threshold that the Department has used for determining exemption under the Fair Labor Standards Act (FLSA) from \$684 per week to \$1,059² per week (tied to the 35th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region of the South); (2) increases the highly compensated employee exemption from \$107,432 to \$143,988; (3) increases the salary levels in the U.S. territories; and (4) automatically updates the salary thresholds every three years.³

The FLSA requires that employees who are paid hourly rates are to receive overtime pay, at a rate of 1.5 times their hourly rate, for any hours over 40 that they work in a given week. Most, but not all employees who receive regular salaries that do not vary based on hours worked are exempt from overtime requirements. In particular, section 13(a)(1) of the FLSA provides exemptions for executive, administrative, and professional employees (EAP exemptions).⁴ Those exemptions apply to workers who perform certain job duties, such as executive or administrative functions, working in professional roles, or engaging in outside sales.⁵

¹U.S. Department of Labor, Wage and Hour Division, “Notice of Proposed Rulemaking; Request for Comments,” *Federal Register*, Vol. 88, No. 173, September 8, 2023, pp. 62152–62240, <https://www.govinfo.gov/content/pkg/FR-2023-09-08/pdf/2023-19032.pdf> (accessed November 7, 2023) (hereinafter “Proposing Release”).

²The actual threshold will be set at the time the rule is finalized, and will almost certainly exceed \$1,158 per week, per Proposing Release, footnote 3, pp. 62152–62153.

³Proposing Release.

⁴29 U.S.C. § 213(a)(1).

⁵The executive exemption applies to employees who primarily manage the work of others, have hiring and firing authority, and who exercise independent judgment and discretion in their roles. The administrative exemption

Congress gave the Department the authority to “define and delimit” the terms of the EAP exemptions from time to time, subject to the Administrative Procedures Act (APA).⁶ While the FLSA defines the EAP exemptions based on duties alone, the Department has applied various salary-level tests as a way to weed out “obviously nonexempt” employees from the exemptions.⁷ In practice, this has led to a two-part test for EAP exemptions. Workers must first meet the salary test by having weekly salaries equal to or greater than the salary threshold, and then must also perform duties included in the duties test.

Although this comment will not address the lawfulness of any salary test, it should be noted that Congress has not specified a salary test; Congress stipulated a duties test and specified an exemption for “any employee employed in a bona fide executive, administrative, or professional capacity.”⁸

My comments will critique the proposed rule on the grounds that it: (1) supersedes Congress’s specified duties test for millions of workers; (2) relies on faulty economic analysis; (3) sets a salary threshold that disparately affects certain workers and employers; (4) could upend labor markets and take away FLSA protection from workers in U.S. territories; and (5) hurts workers’ flexibility and upward mobility.

1. The Department’s Threshold Supersedes Congress’s Specified Duties Test for Millions of Workers.

Section 13(a)(1) of the FLSA specifies exemptions for executive, administrative, and professional employees⁹ and provides the Department the authority to “define and delimit” the terms of the EAP exemptions from time to time.¹⁰

Even if the Department’s authority to define and delimit the terms include the authority for the Department to set a salary test to weed out obviously exempt employees, the Department states in the proposing release that

“The Department’s authority to set a salary level is not without limits;”¹¹

applies to employees who perform office or non-manual work related to the business operations or management of the employer, and whose work requires them to exercise independent judgment and discretion. The professional exemption is for work that requires advanced knowledge in a specialized field and which is predominantly intellectual and requires regular discretion and judgment. The outside sales exemption is for employees who regularly and customarily engage in sales activities outside their employer’s place of business.

⁶29 U.S.C. § 213(a)(1).

⁷Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Assistant Administrator, Office of Regulations and Research, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958) (Kantor Report) at 2–3; 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) (Weiss Report) at 8.

⁸29 U.S.C. § 213(a)(1).

⁹Ibid.

¹⁰Ibid.

¹¹Proposing Release, p. 62157.

“the Department believes that the salary level test should fulfill a ‘useful, but limited, role’”; and

“the Department seeks to: preserve the primary role of an analysis of employee duties in determining EAP exemption status.”

The Department’s proposed salary threshold is not sufficiently limited as it would displace the primary duties test for nearly 30 percent of nonhourly workers, and it would negate existing duties exemptions for millions of workers.¹² In some areas, the salary test would become the dominant factor in the duties test. (See discussion of and data on affected workers in sections 2 and 3 below.)

By definition, a factor that is supposed to aid in the determination of the duties test does not aid in that determination if it results in the opposite determination for significant numbers of workers. For example, a college admissions board would be unwise to adopt an admissions threshold test that resulted in it denying acceptance to 30 percent of the applicants that its admissions board had accepted based on its admissions criteria.

The Department’s proposed overtime thresholds are arbitrary and capricious and violate even the Department’s own interpretation of its statutory jurisdiction to apply a salary threshold only so far as it serves a “limited” and “non-primary” role.

2. The Department’s Analysis Relies on Faulty Economic Analysis.

The Department of Labor estimated that the increase in the salary threshold would affect 3.4 million workers in the first year.¹³ New data released by the Bureau of Labor Statistics in September 2023 reveals that 12.3 million nonhourly workers have earnings below the proposed overtime threshold and above the current threshold.¹⁴ (The Department uses nonhourly workers as a proxy for salaried workers.) Under the proposed threshold, the percentage of nonhourly workers with earnings below the overtime threshold would more than triple, from 9.4 percent under the current rule to 29.8 percent under the proposed rule.¹⁵

While there are exemptions to the overtime rules, the Department’s estimate that it will affect 3.4 million workers lacks sufficient data and is likely understated.¹⁶

¹²See data in section 2. Author’s calculations of data from the Bureau of Labor Statistics, Percentiles of usual weekly earnings of nonhourly full-time workers by selected characteristics, 2nd quarter 2023 averages, available for download at <https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm> (accessed October 5, 2023).

¹³The Department also estimated that the increase in the highly compensated executives threshold (from \$107,432 to \$143,988) would affect an additional 248,900 workers.

¹⁴Bureau of Labor Statistics, “Percentiles of usual weekly earnings of nonhourly full-time workers by selected characteristics, 2nd quarter 2023 averages,” Current Population Survey, September 2023, <https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm> (accessed October 10, 2023).

¹⁵Author’s estimates, based on a \$1,115 overtime threshold applied to the BLS’s 2nd quarter 2023 earnings data. The Department notes that the proposed threshold of \$1,059 is based on 2022 earnings and the actual threshold will be determined at the time the rule is finalized. The presumed \$1,115 threshold follows the Department’s methodology to arrive at a level that aligns with the 2nd quarter 2023 BLS data used in this analysis.

¹⁶The Department’s analysis started with all wage and salary workers (166.2 million). It then excluded those not subject to the FLSA or the Department’s regulations such as active-duty military, the self-employed, religious

According to the Bureau of Labor Statistics (BLS) data, a total of 60.2 million workers across the U.S. are “non-hourly full-time workers,” meaning they are paid a regular salary, and they usually work 35 hours or more per week at their sole or primary job. Analysis of the BLS data reveals that 5.7 million or 9.4 percent of all full-time salaried workers currently earn below the \$35,568 salary threshold and are thus almost certainly subject to the overtime rule.¹⁷ At the proposed salary threshold, 18.0 million or 29.8 percent of full-time salaried workers would have earnings below the threshold and be subject to the overtime threshold unless they have an exemption.¹⁸ The difference between the number of salaried workers under the current salary threshold and those under the proposed threshold equals 12.3 million.¹⁹

In particular, while some workers who currently earn above the threshold may not qualify for an EAP exemption and thus are already subject to overtime rules, the Department notes that it does not actually know how many of those workers are currently exempt because there is “no data source that identifies workers as EAP exempt,”²⁰ and the CPS MORG data that the Department uses “do not capture information about job duties.”²¹

Lacking any actual data on how many of the potentially affected 12.3 million workers currently qualify for EAP exemptions, the Department relied on a set of 25-year-old probability codes that were used to determine whether an occupation meets an EAP. Those probability codes were created for fewer than one-third of occupational classifications, and they were based on job functions at a

workers, and most federal employees (26.8 million). It then excluded all workers who are already hourly and subject to overtime rules and those who qualify for other non-executive, administrative, or professional (non-EAP) exemptions (87.5 million). Of the remaining 51.8 million potentially affected workers, the Department estimated that 15.4 million are not EAP exempt, meaning they do not pass the duties test and are already subject to overtime rules. Of the remaining 36.4 million, the Department estimated that 8.1 million are in named occupations (such as teachers and academic administrators, outside sales workers, physicians, and lawyers) that are exempt from the overtime rule. And finally, of the 28.4 million remaining workers potentially affected by the proposed rule, the Department estimated that only 3.4 million would be affected by the proposed \$1,059 standard overtime threshold and 0.2 million would be affected by the highly compensated executives level. (This analysis focuses on those affected by the standard threshold.)

¹⁷The BLS data on earnings of nonhourly full-time workers divides the workers into 20 groups of approximately equal size to represent five-percent increments. The author’s estimates include all persons earning below a specified salary threshold of \$1,115 (see footnote 28 below), and assume an equal distribution of workers’ earnings within income groups. For example, the 25th percentile of weekly earnings for all non-hourly full-time workers equals \$1,007, and the 30th percentile equals \$1,119. The newly proposed threshold equals \$1,115 for the applicable 2nd quarter of 2023. Thus, fully 25 percent of all nonhourly, full-time workers (15.051 million) earn below \$1,007 and another estimated 2,903 workers earn between \$1,007 and the newly proposed \$1,115 weekly threshold. The estimated 2,903 workers is based on a calculation that 96 percent of workers between the 25th and 30th percentiles of workers will earn between \$1,007 and \$1,115 because the difference between \$1,115 and \$1,007 (\$108) equals 96 percent of the difference between the 25th and 30th percentile earnings markers of \$1,119 and \$1,007 (\$112).

¹⁸The data on nonhourly workers’ earnings is from the second quarter of 2023. To align the Department’s proposed overtime threshold with that second quarter 2023 data, this analysis estimated that the proposed overtime threshold for the second quarter of 2023 would equal \$1,115 per week. This is based on the Department’s stated assumption of 4.5 percent wage growth from 2022 to 2023, and its estimate that the applicable overtime threshold would equal \$1,140 in the 4th quarter of 2023. See Proposing Release, footnote 3, pp. 62152–62153.

¹⁹This does not account for salaried workers who usually work fewer than 35 hours per week and could be converted to hourly employees.

²⁰Proposing Release, p. 62185.

²¹Ibid., p. 62189.

time that the Internet was only just gaining common use.²² Those codes do not include probabilities for entire new industries and jobs that exist today, and they do not take into account changes within job classifications and job duties tests over the past 25 years. While the Department claimed that it verified that the probability codes from 1998 were still applicable today, it provided no details about its verification process and no evidence of such sustained applicability.

The Department also did not adequately explain how it came up with probability codes for job classifications that exist in 2023, but that did not exist in 1998. Moreover, as discussed in the disparate impacts critique below, those probability codes are based on occupation and earnings, but do not appear to take into account differences in earnings across high- and low-cost areas of the country, which play an outsized role under the Department's proposed increase.

The Department's analysis also understates the economic costs and overstates the economic benefits of its proposed rule. Section 5 provides details of costs that the Department either ignored entirely or failed to adequately measure.

A comparison of a Congressional Budget Office's (CBO) analysis of the Department's proposed 2016 rule (which was only slightly lower in relative terms to the current proposal) serves as a basis for evaluating the Department's estimated costs and benefits. That CBO report, "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations,"²³ analyzed the impact of cancelling the proposed regulations and noted that canceling the scheduled changes would have similar-sized and opposite effects to enacting the scheduled changes.²⁴ Thus, it provides an analysis of the impacts of the 2016 overtime proposal.

The proposed 2016 threshold equaled 104 percent of workers' average weekly earnings across the U.S., and the proposed 2023 threshold equals at 96 percent of workers' average weekly earnings.²⁵

²²Government Accountability Office, "Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place," GAO Report No. GAO/HEHS-99-164, <https://www.gao.gov/assets/hehs-99-164.pdf> (accessed November 7, 2023).

²³Congressional Budget Office, "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations," November 2016, <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51925-overtimeregulations.pdf> (accessed October 29, 2023).

²⁴The report noted that businesses had already incurred some compliance costs in anticipation of the scheduled changes taking effect. Thus, the compliance costs of the rule would be higher than the costs of cancelling it.

²⁵When the 2016 threshold was finalized in May 2023, the \$913 weekly level equaled 103.8 percent of the \$880 average weekly earnings of all private-sector workers. The proposed overtime threshold is specified to equal \$1,059 per week, but the rule notes in footnote 3 of the Proposing Release (pp. 62152–62153) that the actual overtime threshold will be determined at the time the rule is finalized. The proposal notes that if the threshold is set equal to the 35th percentile of nonhourly earnings in the lowest wage census region (currently the south), the threshold would be \$1,140 per week in the fourth quarter of 2023, and \$1,158 in the first quarter of 2024. This is based on an assumed annual wage and salary increase of 4.5 percent. Applying that assumed 4.5 percent increase to the 4th quarter 2022 average weekly earnings results in average weekly earnings of \$1,182 for the 4th quarter of 2023. The Department's estimate of the threshold equaling \$1,140 per week in the 4th quarter of 2023 is equivalent to 96.4 percent of the estimated average weekly earnings of \$1,182. Source: Bureau of Labor Statistics, "Employment, Hours, and Earnings from the Current Employment Statistics Survey," Average weekly earnings of all employees, total private, seasonally adjusted, available for download at <https://www.bls.gov/data/home.htm> (accessed October 30, 2023).

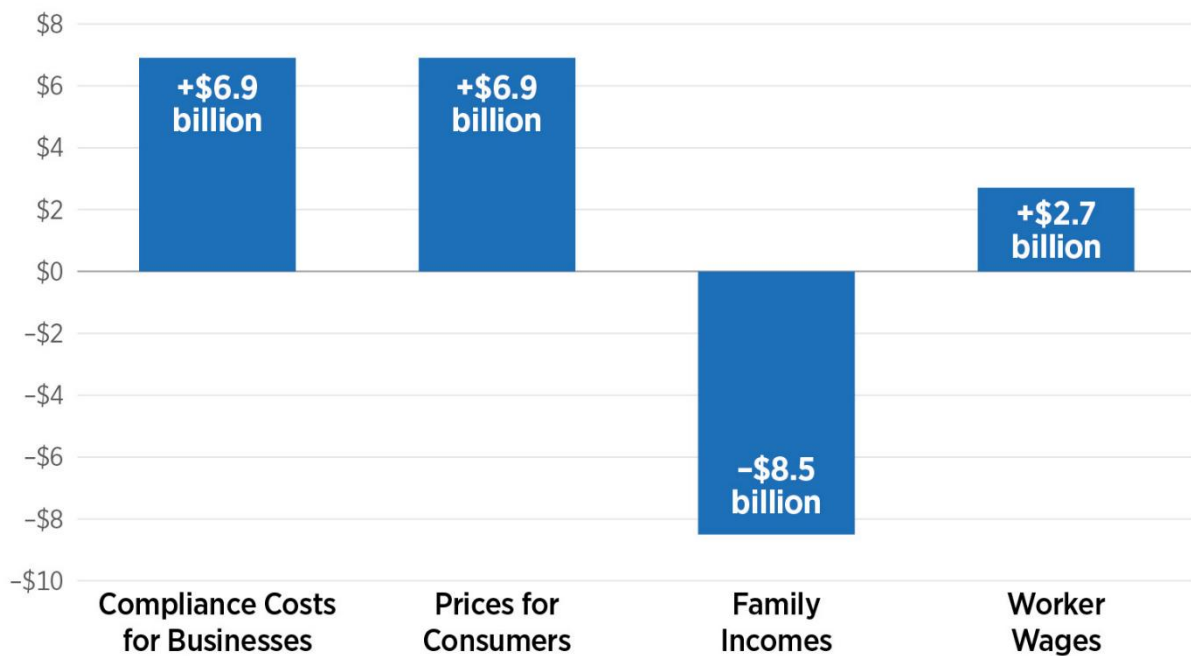
Thus, the measured economic effects of the current, 2023 proposed threshold will likely be close to, but slightly lower than, those of the 2016 rule.

The CBO report found that the 2016 overtime rule would have imposed upwards of \$6.9 billion in compliance costs on employers over the first seven years.²⁶ In comparison, the Department estimated that the direct employer costs of its proposed rule will equal \$1.203 billion in year one, \$508 billion in year two, and \$748 billion in year 10.²⁷ Applying a straight line increase between

CHART 1

Estimated Effects of An Increased Overtime Threshold

ESTIMATES OF A PRIOR 2016 PROPOSED INCREASE IN THE OVERTIME THRESHOLD*



* CBO estimates of the prior 2016 proposed increase were for a threshold equal to 104 percent of workers' average weekly earnings across the U.S. The current 2023 proposed threshold equals 96 percent of workers' average weekly earnings. Thus, the economic effects of the 2023 proposal are likely similar to but slightly lower than CBO's estimate of the prior proposal.

NOTE: Estimated costs and benefits are discrete and should not be added together. For example, higher compliance costs and higher wages contribute to and are a part of the resulting higher prices and lower family incomes.

SOURCE: Congressional Budget Office, "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations," November 2016, <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51925-overtimeregulations.pdf> (accessed October 29, 2023).

²⁶Ibid.

²⁷Proposing Release, p. 62195.

years 2 and year 10, this suggests a total estimated cost of \$4.658 billion over the first seven years, which is 32 percent lower than the CBO's \$6.9 billion estimate. (The CBO's \$6.9 billion estimate would be higher in today's dollars as a result of significantly higher-than-expected inflation.)

The CBO report estimated that workers' earnings would increase by \$2.67 billion over seven years. In comparison (and using the same straight-line methodology to extrapolate the Department's estimates), the Department estimated roughly \$8.492 billion in increased earnings, or transfers to workers over the first seven years.²⁸ The Department's estimate of increased earnings is more than three times that of the CBO's estimate.

The Department does not cite the CBO's report in its proposed rule and fails to provide any evidence as to why its compliance cost estimates are significantly lower compliance costs and significantly higher earnings increases for workers. Moreover, the CBO report also estimated economic impacts in the form of increased prices (+\$6.9 billion), reduced profits (-\$4.35 billion), and overall lower family incomes (-\$8.5 billion over seven years), all of which are effects the Department failed to include in its estimates.

It is arbitrary and capricious for the Department to ignore billions of dollars in costs for workers, employers, and consumers, particularly as excessive inflation has weighed so heavily on workers' wages and families' incomes in recent years.

3. The Department's Threshold Disparately Affects Certain Workers, Areas, and Employers.

The Department's proposed threshold—tied to the 35th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region of the South—would disproportionately affect certain workers, employers, and regions. While the lowest-wage Census Region has been used as a basis for setting salary thresholds in the past, such thresholds have been set at the 10th and 20th percentiles of earnings. The 2016 rule that set the threshold at the 40th percentile of earnings was determined by the courts to exceed the Department's authority.

Table 1 provides a demographic breakdown of the number and percent of workers with salaries below the newly-proposed overtime threshold and above the current threshold. The increased overtime threshold would disproportionately affect female, black, and Hispanic workers, while Asian workers would be the least impacted.

²⁸Proposing Release, p. 62195.

TABLE 1

Proposed Overtime Salary Threshold Will Impact Millions of Salaried Workers

FIGURES ARE AVERAGES FOR Q2 2023

	Number of workers below current \$684/week (thousands)	Number of workers below proposed \$1,115*/week (thousands)	Difference (thousands)	Percentage of workers below current \$684/week	Percentage of workers below proposed \$1,115*/week	Difference (percentage points)
Total Workers Ages 16+	5,680	17,954	12,274	9.4%	29.8%	20.4%
Men	2,693	8,820	6,128	8.0%	26.1%	18.1%
Women	3,206	9,463	6,257	12.1%	35.8%	23.7%
White	4,125	13,676	9,551	8.9%	29.4%	20.6%
Black	1,017	2,709	1,692	15.3%	40.8%	25.5%
Asian	352	1,059	707	6.4%	19.3%	12.9%
Hispanic	1,408	3,542	2,134	17.8%	44.7%	26.9%
Northeast	960	3,000	2,039	8.4%	26.3%	17.9%
Midwest	922	3,425	2,503	7.9%	29.4%	21.5%
South	2,839	8,426	5,587	11.8%	35.1%	23.3%
West	1,159	3,225	2,066	8.8%	24.6%	15.7%

* The Department of Labor notes that the proposed threshold of \$1,059 is based on 2022 earnings and the actual threshold will be determined at the time the rule is finalized. The presumed \$1,115 threshold follows the Department of Labor's methodology to arrive at a level that aligns with the 2nd quarter 2023 data used in this analysis.

SOURCE: Author's calculations based on data from the Bureau of Labor Statistics, "Research Series on Percentiles of Usual Weekly Earnings of Nonhourly Full-time Workers," <https://www.bls.gov/cps/research/nonhourly/earnings-nonhourly-workers.htm> (accessed October 5, 2023).

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The proposed overtime threshold would also have greater impacts in low-cost areas of the country, with more workers potentially impacted in the South and fewer in the Northeast and West. It is important to note that the regional data are overly broad as they do not account for differences across states, counties, and urban versus rural areas. For example, the South region has the lowest salary levels, but even that is skewed upwards by the inclusion of very high-cost areas like Maryland, Virginia, and Washington, DC.

While the BLS data on nonhourly earnings is not yet available on a state or county level, the BLS does provide earnings data for all workers (hourly and nonhourly) by state. Table 2 below shows the percentage of workers in each state who are paid less, on an hourly basis, than the proposed overtime threshold. While these percentages do not directly represent how many workers are subject to overtime laws under the current and proposed thresholds because they do not take into account current exemptions, they nevertheless provide a relative comparison of the magnitude of the impacts across different states. For example, while only 4.5 percent of workers in Massachusetts have earnings between the current and proposed thresholds, 33.2 percent of workers

in Arizona have earnings between the current and proposed thresholds and would thus be affected if they are salaried and perform administrative, executive, or professional jobs.

TABLE 2

Percentage of Workers with Earnings Below Proposed Overtime Threshold, by State

	THRESHOLD		THRESHOLD		
	Current: \$684/Week (\$17.10/Hour)	Proposed: \$1,059/Week (\$26.48/Hour)	Current: \$684/Week (\$17.10/Hour)	Proposed: \$1,059/Week (\$26.48/Hour)	
Alabama	43.0%	69.1%	Montana	35.2%	66.3%
Alaska	22.4%	52.7%	Nebraska	33.3%	64.2%
Arizona	28.9%	62.1%	Nevada	38.1%	66.1%
Arkansas	45.2%	75.0%	New Hampshire	25.4%	56.9%
California	23.1%	53.9%	New Jersey	24.3%	53.1%
Colorado	22.2%	54.0%	New Mexico	40.0%	66.4%
Connecticut	24.0%	52.7%	New York	21.9%	51.9%
Delaware	30.9%	56.8%	North Carolina	36.8%	65.0%
D.C.	9.9%	28.5%	North Dakota	25.5%	61.2%
Florida	37.5%	65.9%	Ohio	33.1%	62.2%
Georgia	35.9%	63.0%	Oklahoma	41.7%	68.7%
Hawaii	26.3%	56.4%	Oregon	24.3%	56.6%
Idaho	38.6%	68.3%	Pennsylvania	31.4%	59.9%
Illinois	27.3%	56.4%	Rhode Island	25.2%	54.9%
Indiana	35.1%	66.3%	South Carolina	41.6%	69.2%
Iowa	32.8%	64.9%	South Dakota	38.7%	72.8%
Kansas	36.5%	66.2%	Tennessee	39.0%	68.1%
Kentucky	39.0%	68.5%	Texas	35.6%	63.2%
Louisiana	42.7%	68.4%	Utah	32.2%	62.7%
Maine	26.3%	63.6%	Vermont	23.7%	59.8%
Maryland	24.5%	52.8%	Virginia	29.1%	55.5%
Massachusetts	17.6%	22.1%	Washington	14.3%	20.6%
Michigan	31.1%	60.9%	West Virginia	44.5%	70.9%
Minnesota	24.1%	55.7%	Wisconsin	29.4%	62.9%
Mississippi	48.7%	77.0%	Wyoming	32.2%	62.5%
Missouri	36.1%	65.6%			

NOTE: The data for these estimates includes the hourly earnings of all workers, including those already subject to overtime laws. The current \$684 and proposed \$1,059 thresholds have been converted to hourly rates. This data does not equal the exact percentages who are currently and would be subject to overtime laws under the proposal because they do not take into account exemptions.

SOURCE: Author's calculations using data from Bureau of Labor Statistics, "May 2022 State Occupational Employment and Wage Statistics," https://www.bls.gov/oes/current/oes_pr.htm#00-0000 (accessed October 29, 2023).

The proposed overtime threshold creates disparate impacts across otherwise similar workers. Workers performing the same jobs—perhaps even at the same companies—could be treated differently under the new overtime rule because of differences in their costs of living and thus their pay. For example, the median salary of a meeting, convention, and events planner in Louisiana is \$866 per week whereas the median salary of a meeting, convention, and events planner in Massachusetts is \$1,185 per week.²⁹ Thus, the worker in Louisiana would almost certainly be converted to an hourly employee and become subject to overtime laws while the worker in Massachusetts would not. And yet, their salaries say very little about their relative financial well-being due to significant differences in the cost of living. While the worker in Louisiana makes 27 percent less than her counterpart in Massachusetts, the median mortgage on a home in Baton Rouge, Louisiana, is 65 percent less than the median mortgage in Boston, Massachusetts.³⁰

If the true purpose of the salary threshold were to rule out “obviously nonexempt” workers, the salary threshold would be set equal to a specified percentile of local earnings. For example, while the proposed \$1,059 threshold equals 39 percent of the average \$2,684 weekly wage in San Francisco, California, it equals 110 percent of the \$957 average weekly wage in Wierton, West Virginia.³¹ A salary threshold tied to local area wages would provide a vastly more accurate tool for ruling out obviously nonexempt workers than a single nationwide threshold.

It is arbitrary and capricious for the Department to set a salary threshold that imposes disparate impacts across workers who perform similar duties.

Further, in failing to tailor the proposed rule to account for differences in salaries across the U.S., the Department violates Executive Order 13563, which requires agencies to propose or adopt a regulation “that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits.”³²

Absent withdrawing its proposed rule entirely, the Department should consider replacing the singular standard threshold with local area thresholds, set equal to 20th percentile of nonhourly workers’ earnings in the area (consistent with the current threshold that is based on the 20th percentile of nonhourly earnings of workers in the lowest-earnings Census Region).

4. Proposed Rule Could Upend Labor Markets and Take Away Worker Protections in U.S. Territories.

²⁹Bureau of Labor Statistics, “Occupational Employment and Wage Statistics,” May 2022, https://www.bls.gov/oes/current/oes_la.htm (accessed October 25, 2023).

³⁰The monthly mortgage payment on a median-value home in East Baton Rouge Parish, Louisiana, is \$1,297 and the monthly mortgage payment on a median-value home in Suffolk County, Massachusetts, is \$3,718. Source: National Association of Realtors, “County Median Home Prices and Monthly Mortgage Payments,” 1st Quarter, 2023, <https://www.nar.realtor/research-and-statistics/housing-statistics/county-median-home-prices-and-monthly-mortgage-payment> (accessed October 25, 2023).

³¹Bureau of Labor Statistics, Geographic Information, Economic Summaries, <https://www.bls.gov/regions/economic-summaries.htm#MA> (accessed November 6, 2023).

³²Ibid.

The proposed rule subjects U.S. territories to the same overtime thresholds as the U.S. mainland (with the exception of American Samoa, to which it applies a lower overtime threshold). This marks a shift from the 2019 rule, which applied lower thresholds to the U.S. territories due to the territories' substantially lower earnings levels. As a result, the overtime threshold in Puerto Rico, Guam, U.S. Virgin Islands, and Commonwealth of Northern Mariana Islands (CNMI) will increase by 155 percent (from the current level of \$455 per week to \$1,158³³ per week). This is significantly greater than the roughly 69 percent increase in the threshold for the mainland U.S.

The Department has proposed this massive increase without a sufficient analysis of its probable effects. The Department notes that “[u]nfortunately, data are not available to conduct a full analysis of impacts in the territories.”³⁴

The analysis the Department does include provides evidence that the proposed threshold exceeds Congress's stated intent for a duties test as Table 5 notes that of salaried workers in Puerto Rico who are estimated to meet the duties test, 49 percent of them are between the current and proposed threshold and thus will have the salary threshold override their existing duties exemptions.³⁵ The estimated percentages of workers who will similarly have their duties exemptions overridden by the proposed salary threshold are 38 percent in Guam, 32 percent in the Virgin Islands, 48 percent in American Samoa, and 48 percent in CNMI.

It is arbitrary and capricious for the Department to set thresholds that result in nearly half of all workers who meet Congress's specified duties exemption being deemed nonexempt by way of an additional test created by the Department as a way to aid in the duties determination.

This large jump in the overtime threshold will increase pressure on employers to push workers into underground employment with no workplace protections. This is particularly relevant in Puerto Rico where existing overtime rules—notwithstanding the overtime threshold—are more stringent than in the U.S. For example, workers in Puerto Rico are entitled to 1.5 times their hourly rate for any hours over 8 in a given day and are entitled to 2.0 times their hourly rate for any hours over 40 in a given week and for work on statutory rest days.

Consider the impact of this threshold for a high-income worker with a salary of \$864 per week in Puerto Rico (this amount equals the 85th percentile of earners): if this individual currently works 45 hours per week for a set salary, his employer will now have to either increase his salary by more than \$10,000 per year or convert him to an hourly employee and pay him for 50 hours of work each week (40 hours plus 5 hours of overtime at a rate of two times hourly pay). Unless the employer reduced his base pay, the hourly option would result in a cost increase of \$10,000 or

³³The Department notes that the overtime threshold will be set at the time the rule is finalized and estimates that for the first quarter of 2024, the overtime threshold will equal to \$1,158. Proposing Release, footnote 3, pp. 62152–62153.

³⁴Proposing Release, p. 62192.

³⁵Proposing Release, p. 62193.

more. Another possibility is that his employer would shift him from formal to informal (or underground) employment.

While the precise size of the underground economy in Puerto Rico is unknown, its existence is widely recognized. A May 2018 Government Accountability Office (GAO) report, “Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them,” noted that a reason for Puerto Rico’s dismally low labor force participation rate is “that a relatively large share of Puerto Rico residents work in the informal, or underground, economy.”³⁶

The GAO noted the role of labor market regulations, and in particular overtime laws, as a source of Puerto Rico’s weak economic performance:

Former Puerto Rico officials and experts on Puerto Rico’s economy cited the high cost to businesses of complying with Puerto Rico regulations and federal laws as one possible reason for Puerto Rico’s weak economic performance.... Local regulations pertaining to other worker benefits, such as overtime and paid leave, also raise the costs of hiring employees in Puerto Rico.³⁷

The GAO report explained how businesses in Puerto Rico may choose to hire workers in underground employment to avoid high labor costs imposed by regulations and taxes:

Former Puerto Rico officials and experts on Puerto Rico’s economy told us businesses looking to avoid either minimum wage requirements or the burdens of complying with Puerto Rico government taxes and regulations may have opted to hire workers from the informal labor market to bypass these regulations.³⁸

Workers who are hired in the informal, or underground, labor market are not operating under the FLSA or any other labor laws, and thus have no protections outside what their employers choose to provide them. The proposed threshold is so high as to likely to have the opposite of its intended effect in Puerto Rico and other territories by pushing more workers into the underground labor market and stripping them of existing workplace protections.

Moreover, underground work reduces government tax revenues and would contribute to Puerto Rico’s economic and fiscal crisis. The Department failed to consider the economic impacts of its proposed rule on the Puerto Rico’s economy and government finances.

It is arbitrary and capricious for the Department to impose an overtime threshold that is higher, on an hourly basis, than the earnings of more than 90 percent of Puerto Rican workers, and which the Department estimates will result in the salary threshold negating the duties test for 49 percent of salaried workers with earnings between the current and proposed thresholds.

³⁶Government Accountability Office, “Puerto Rico: Factors Contributing to the Debt Crisis and Potential Federal Actions to Address Them,” Report to Congressional Committees, May 2018, <https://www.gao.gov/assets/700/691944.pdf> (accessed November 6, 2023).

³⁷Ibid.

³⁸Ibid.

In light of lower relative earnings in the U.S. territories, and of ongoing economic and fiscal struggles in Puerto Rico, the Department should either make no changes to the current overtime thresholds in the U.S. territories, or it should set the standard overtime thresholds equal to the 20th percentile of locality-based nonhourly earnings.

5. Proposed Rule Could Cost Workers Benefits, Income, Jobs, Flexibility, Autonomy, and Upward Mobility.

The purpose of having an overtime rule is to prevent employers from paying workers in certain jobs low salaries and requiring them to work long hours that could end up with them receiving below required minimum wages on an hourly basis. On the surface, it may seem that a higher overtime threshold would simply result in higher pay for workers further up the income scale. Yet, the economics of raising the overtime threshold are more complex than simply increasing workers' pay, and workers, employers, and ordinary Americans stand to lose out as a result.

Requiring employers to change their pay structures by either paying workers higher salaries or paying workers overtime will not necessarily result in higher total compensation for workers, but it will significantly disrupt compensation, workplace circumstances, and the allocation of work. The proposed overtime rule will almost certainly affect total employment levels, workers' paychecks and benefits, their autonomy, and workplace flexibility and remote-work options.

Employers will likely respond to the proposed overtime rule in one of two ways—increasing base salaries or shifting workers to hourly employees. Each of those shifts will also entail many unintended consequences.

Employers Could Increase Workers' Salaries and Adjust Other Compensation

To avoid having to keep track of workers' hours and pay them overtime, employers could increase the salaries of all employers who meet the duties text exemption to the new salary threshold (\$55,068, rising to more than \$60,000 in 2024). If workers are currently making within a few hundred dollars of the new threshold, employers may raise their pay with little or no other changes.

But because the proposed threshold is roughly 69 percent (\$24,650 annually) above the current threshold and because the rule specifies that it will be automatically increased, employers will not be able to simply raise everyone's salaries without making other changes.³⁹ Thus, while some workers might get substantial raises—say, \$5,000 more per year—employers will almost certainly offset higher pay through one or more of the following actions:

Reduce Workplace Benefits. Since pay is only a portion of workers' total compensation, employers may be able to hold total compensation relatively constant by reducing or eliminating

³⁹The rule provides an estimate of \$1,158 per week for the overtime threshold in the first quarter of 2024. This is a 69 percent, or \$24,648, increase compared to the current threshold of \$684 per week. Proposing Release, footnote 3, pp. 62152–62153, <https://www.govinfo.gov/content/pkg/FR-2023-09-08/pdf/2023-19032.pdf> (accessed October 31, 2023).

benefits such as employer-provided health insurance, retirement contributions, and tuition and childcare subsidies.

Reduce Paid Time Off. The Bureau of Labor Statistics reports that 78 percent of workers have access to paid sick leave and 79 percent have access to paid vacation.⁴⁰ If employers increase workers' wages to accommodate the higher overtime threshold, they could reduce workers' paid time off to keep their labor costs constant.

Eliminate Jobs. Employers—especially large companies—may be able to hold total compensation constant by eliminating jobs. For example, an employer could eliminate one out of ten shift manager positions (presumably the lowest-performing one) and require the remaining nine shift managers to do slightly more work. Because benefits are such a significant portion of workers' compensation—currently equaling 42 percent of wages—eliminating entire jobs could be more advantageous for employers than raising wages.⁴¹ Employers may also replace lower-level jobs with automation and by shifting some of those job functions to higher-paid salaried workers.

Employers Could Convert Workers to Hourly Employees

Given the magnitude of the proposed increase and the establishment of automatic future increases, it is likely that most affected workers will be converted to hourly workers. A small portion of workers may benefit from this shift through an increase in pay, but most workers are likely to experience one or many unintended consequences. Employers who shift workers to hourly employees may:

Reduce Workers' Base Pay, Keeping Compensation and Hours Unchanged. If workers regularly put in more than 40 hours, then employers can incorporate overtime hours into total compensation by reducing workers' base pay. For example, if workers regularly work 42 hours a week, an employer can divide their weekly salary by 43 hours to set an hourly base pay that builds in two hours at 1.5 times their usual pay rate. This is exactly what IBM did when it reclassified 7,000 salaried employees as overtime eligible as part of a lawsuit settlement; the company reduced the workers' base pay by 15 percent, keeping their total compensation unchanged.⁴²

Restrict Hours to Reduce Benefit Costs. Benefits can be a significant portion of workers' total compensation, currently equaling 42 percent of workers' pay, on average.⁴³ Many employers only offer benefits for full-time workers, and the Obamacare health insurance mandate only applies to

⁴⁰Bureau of Labor Statistics, "Employee Benefits in the United States," Table 6. Selected paid leave benefits: Access, March 2023, <https://www.bls.gov/news.release/ebs2.t06.htm> (accessed October 25, 2023).

⁴¹For example, redistributing the wages of one worker across nine others would allow each to receive an 11.1 percent pay increase, but adding in the benefits would allow for a 15.7 percent pay increase. Source: Bureau of Labor Statistics, "Employer Costs for Employee Compensation," September 12, 2023, <https://www.bls.gov/news.release/pdf/ecec.pdf> (accessed October 31, 2023).

⁴²James Sherk, "Obama's Overtime Rule Tried at IBM, and It Didn't Work," The Daily Signal, May 19, 2016, <https://www.dailysignal.com/2016/05/19/obamas-overtime-rule-tried-at-ibm-and-it-didnt-work/> (accessed October 25, 2023).

⁴³Bureau of Labor Statistics, "Employer Costs for Employee Compensation," September 12, 2023, <https://www.bls.gov/news.release/pdf/ecec.pdf> (accessed October 31, 2023).

employees who regularly work 30 hours or more per week. Thus, some employers could prevent compensation increases while still maintaining the same output level by reducing workers' hours and using more part-time workers. The consequence for workers would be lower total pay and a loss of benefits.

For example, a company that currently has 20 workers each working an average of 42 hours per week could cut all workers' hours to 29 per week and achieve the same output and significantly lower employee costs using 29 part-time workers instead of 20 full-time workers.⁴⁴ This is what a study found happened in response to a minimum wage increase in California: each \$1 increase resulted in 23 percent of workers dropping below 20 hours a week and becoming ineligible for the retirement benefits and 14.9 percent having their hours reduced below 30 and losing their eligibility for health insurance benefits.⁴⁵ Another study that examined low-income workers' and families' access to employer-sponsored health insurance and retirement benefits over the 2005 to 2016 period that included many state-level minimum wage increases found that every \$1 increase in the minimum wage was followed by a 1 percentage point decrease in the probability of workers and their dependents having employer-sponsored health insurance.⁴⁶

The Overtime Rule Threatens to Take Away Workplace Flexibility

Even prior to the COVID-19 pandemic, employers were increasing workplace flexibility and family friendly policies as a way to attract and retain the workers they needed in a tight labor market. The physical realities of the COVID-19 pandemic and the even-tighter labor market that ensued contributed to a surge in workplace flexibility such as remote work options, flexible hours, and new and expanded paid family leave benefits. A key to employers being able to offer flexible work policies is employees offering flexibility in return to ensure the job gets done.

Government policies like the overtime threshold that tie employers' hands by requiring them to pay workers by the hour instead of paying them to do a job will force employers to tie employees' hands. Likely consequences for workers will include:

Lost Flexibility and Remote Work Options for Hourly Employees. The only way for employers to know how much time an employee spends working is if they control the time and location of the employee's work. Thus, the guidance to employers who want to avoid costly lawsuits for overtime violation is to prohibit or significantly restrict remote work for hourly employees. Such restrictions can include cutting off access to company e-mail and computer systems outside the

⁴⁴Author's calculations based on: Bureau of Labor Statistics, "Employer Costs for Employee Compensation."

⁴⁵Qiuping Yu and Shawn Mankad, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage," *Manufacturing and Service Operations Management*, forthcoming, last revised June 2, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3863757 (accessed October 25, 2023).

⁴⁶Michael S. Dworsky, Christine Eibner, Xiaouy Nie, and Jeffrey B. Wenger, "The Effect of the Minimum Wage on Employer-Sponsored Insurance for Low-Income Workers and Dependents," *American Journal of Health Economics*, Vol. 8, No. 1 (Winter 2022), https://www.journals.uchicago.edu/doi/abs/10.1086/716198?casa_token=jj022Ekeb1wAAAAA%3AXtuyqEhqJfQe_qaO-Iss4cmamlaEOrnzq8RCcPgHDIOKqU9-9zochTEOfnVVPq_d1EZibrkCr8w&journalCode=ajhe (accessed July 20, 2021).

typical Monday to Friday, nine-to-five work hours and limiting employees' access to company property.

In addition to the obvious lost benefit of some workers having fully remote jobs or being able to spend a couple days a week working remotely, remote work restrictions will also hurt workers who typically do most of their work in the office. For example:

Parents who would leave work an hour early to take a child to an appointment and then finish up work from home would no longer have that ability.

A worker who wants to take a last-minute vacation and is willing to answer pertinent e-mails and phone calls while away in exchange for the approved time off might be denied their vacation request because the company's policy—per legal advice—prohibits communication with hourly employees when they are off-site and off-the-clock.

A young, entry-level worker who wants to come in early and stay a little late to learn the ropes and make a good impression would be prevented from that opportunity to put in the extra effort. Moreover, employers may respond to the added regulations by reducing workers' access to education and training opportunities because, unlike salaried employees, hourly employees would have to be paid extra to participate in such opportunities.

And two salaried shift managers who want to trade their Sunday for Monday shifts would likely be prevented from doing so because the switch would result in each working 48 hours one week and 32 another. Despite no changes in total hours worked, the managers' employer would have to pay them each 10 percent more.

While the proposed rule notes the likely loss of flexibility for some workers, it unreasonably dismisses such lost flexibility on the basis that the rule itself does not require employers to reduce workers flexibility:

[T]he proposed rule could impose costs on newly nonexempt, overtime eligible workers who could have a more limited ability to adjust their schedules. However, the proposed rule does not require employers to reduce scheduling flexibility. Employers can continue to offer flexible schedules and require workers to monitor their own hours and to follow the employers' timekeeping rules.⁴⁷

This is a baseless assumption as the Department fails to recognize the legal liabilities employers incur for failure to accurately track hours and pay workers. The fact that employers are free to do something (continue to offer flexible schedules to hourly employees) that exposes them to costly lawsuits does not mean that they will be willing to take on that cost risk.

Consequently, many workers will lose valuable workplace flexibility. While flexibility is a difficult job feature to quantify, a study of over 1 million Uber drivers estimated workers' willingness to

⁴⁷Proposing Release, p. 62201.

provide labor based on varying levels of job flexibility.⁴⁸ Plausible estimates are that workers value Uber's on-demand platform at amounts equal to between 38 percent and 50 percent of their earnings, or \$150 per week on average.⁴⁹ According to the Uber study, the average Uber driver works 16.1 hours a week with the fully flexible platform, would work 7.7 hours if they had to commit to a daily schedule, would work only 2.9 hours if they had to commit to a weekly schedule, and would not work at all if they had to commit to a monthly schedule typical of taxicab drivers that perform the same job as Uber drivers but are classified as employees. The Department should use economic analysis such as this to estimate the value of lost flexibility for millions of salaried workers who would be converted to hourly under the proposed rule.

Two-Tiered, Less-Satisfied Workforces. A big purpose behind providing a salary to employees is to create a team environment, where people do what is needed to accomplish company goals. A Gallup survey found that while hourly employees were slightly more satisfied than salaried employees with the amount of work that is required of them and the amount of on-the-job stress, hourly employees were significantly less satisfied on most other job aspects including: vacation time, retirement plan, earnings, safety conditions, job security, changes for promotion, health insurance benefits, and recognition for their work accomplishments.⁵⁰

Lower and Less Predictable Pay. Salaried employees receive the same pay regardless of whether they work 35 hours or 45 hours in a given week. Small business owner Clement Troutman explained at a recent Heritage Foundation event on labor policies for the 21st century how the new overtime rule would hurt one of his managers who is a single mom because, currently, if she has to leave work early because her child is sick at school, she still gets a full paycheck. Under the proposed overtime rule, she would get a smaller paycheck anytime she worked fewer than 40 hours, or else would have to use her paid time off to receive a full paycheck.

In addition to workers losing out on pay when they are not able to log a full 40 hours, employers could also intentionally restrict workers' hours, especially when business is slower or when they are trying to save costs. This has been a consequence of minimum wage laws that require employers to increase workers' pay. In California, a 9.1 percent increase in the minimum wage resulted in workers who were paid the minimum wage losing five hours of work per week and ending up with 13.6 percent smaller paychecks.⁵¹ In addition to fewer hours, workers also experienced more irregular schedules, including a 10 percent increase in the deviation of workers' start times and a 33 percent increase in the deviation of their weekly hours.⁵²

⁴⁸M. Keith Chen, Judith A. Chevalier, Peter E. Rossi, and Emily Oehlsen, "The Value of Flexible Work: Evidence from Uber Drivers," National Bureau of Economic Research *Working Paper* No. 23296, March 2017, <http://www.nber.org/papers/w23296> (accessed November 7, 2023).

⁴⁹Rachel Greszler, "The Value of Flexible Work Is Higher Than You May Think," Heritage Foundation *Backgrounder* No. 3246, September 15, 2017, <https://www.heritage.org/sites/default/files/2017-09/BG3246.pdf>.

⁵⁰Megan Brennan, "Hourly Workers Unhappier Than Salaried on Many Job Aspects," Gallup, August 23, 2017, <https://news.gallup.com/poll/216746/hourly-workers-unhappier-salaried-job-aspects.aspx> (accessed October 10, 2023).

⁵¹Qiuping Yu and Shawn Mankad, "Evidence of the Unintended Labor Scheduling Implications of the Minimum Wage."

⁵²*Ibid.*

The Department failed to consider many of the costs to workers of its proposed overtime rule, including: reduced workplace benefits, less paid time off, lost jobs, reduced hours, lower earnings, more irregular scheduling, and reduced flexibility. The Department's failure to include these costs violate Executive Order 13563,⁵³ which requires agencies to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs."⁵⁴ The Department's assessment fails the "reasoned determination" test because it neglects to consider many costs and fails to provide an explanation for excluding such costs. The Department should include estimates of and justification for these costs in its final rule and if such costs exceed the benefits, it should revise or abandon its proposed salary threshold increase.

Conclusion

The board should withdraw the proposed rule and either leave in place the existing rule or propose a revised rule that would either eliminate the salary thresholds entirely or else adjust them to local-area pay rates to provide more consistent and accurate means of weeding out workers who are obviously nonexempt from the FLSA's overtime rules.

Respectfully submitted,

Rachel Greszler
*Senior Research Fellow*⁵⁵
Grover M. Hermann Center for the Federal Budget
The Heritage Foundation

⁵³Which, in turn, by its terms supplements Executive Order 12866 of September 30, 1993.

⁵⁴The White House, "Executive Order 13563—Improving Regulation and Regulatory Review," January 18, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review> (accessed November 7, 2023).

⁵⁵This comment is submitted in my personal capacity, with my title provided for informational purposes only.