Introduction

As law professors with expertise in administrative law,[1] we submit this comment in support of the rule proposed by the Department of Labor, entitled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees."[2] We wish especially to support its automatic updating feature against anticipated challenges to its substantive and procedural lawfulness and to suggest how the Department might provide yet more detail to substantiate the workability of the proposed rule's severability provision.

Background to the Current Proposal

The rule would implement 29 U.S.C. § 213(a)(1), which exempts employees functioning in a "bona fide executive, administrative, or professional [EAP] capacity" from the mandatory overtime provisions of the Fair Labor Standards Act [FLSA]. That section authorizes the Secretary of Labor to "define" and "delimit" what it means to function in a "bona fide executive, administrative, or professional capacity" and to do so by "regulations" as may be issued "from time to time." The broader the EAP exemption, the fewer the employees who enjoy the wages and hours protections of the FLSA.

Since 1940, ten sets of Department of Labor regulations have used tests based both on salary level and on the nature of work performed to determine the scope of the EAP exemption. From 1958 to 2004, the regulations encompassed four critical elements. First, to be exempt, an employee would have to be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. Second, the rules specified a low-income threshold below which salaried employees would categorically not be deemed exempt under the EAP rationale. Third, the rules set forth a high-income threshold above which salaried high-income employees (HCEs) were likely to be exempt if a "short test" of their work showed that they performed any EAP duties, even if they did non-exempt work also. Finally, the rules contemplated a "long test" of the work performed by non-HCE's paid above the low-threshold level, but below the higher threshold. Under the long test, an employee would not be exempt if more than 20 percent of their work entailed the performance of non-exempt duties. As explained in the preamble to the current proposal: "From 1958 until 2004, the regulations in place generally set the long test salary level to exclude from exemption approximately the lowest-paid 10 percent of salaried white-collar employees who performed EAP duties in lower wage areas and industries."[3]

In 2004, the Department amended the rules to substitute the equivalent of the "short test" for all employees over a "standard salary" level, comparable to what would have been the lower, "long test" threshold salary level under the earlier rule. The standard salary level was set at a figure roughly equivalent to the 20th percentile of weekly earnings of full-time salaried workers in the South and in the retail industry nationwide. A rule proposed by the Obama Administration in 2016 would have geared the standard level to the 40th such percentile and would have added a mechanism to update the earnings thresholds every three years. In 2017, the U.S. District Court for the Eastern District of Texas invalidated the rule as supposedly exceeding the Secretary's legal authority.[4] At the request of the Trump Administration, the Fifth Circuit agreed to hold the Government's appeal in abeyance in anticipation of a new rulemaking, which eventually produced the 2019 rule now in effect. The 2019 rule raised the standard salary level from the 2004 figure, but still indexed the figure to the 20th percentile of weekly

[1] This comment was prepared with the assistance of Will Dobbs-Allsopp and Reed Shaw of Governing for Impact.
[2] 88 Fed. Reg. 62152 (2023).
[3] *Id*. at 62155.
[4] Nevada v. U.S. Department of Labor, 275 F. Supp. 3d 295 (E.D. Tex. 2017).

earnings of full-time salaried workers in the South and in the retail industry nationwide.[5] The rule made no changes to the test of EAP duties and did not provide for any regular updating.

It is a premise of the 2023 rule (and all of its predecessors) that a particular salary figure can be set for which salaried employees making under that amount may reasonably be treated categorically as non-exempt. In other words, such employees are making too little to be reasonably classified as executive, administrative, or professional. The District Court decision invalidating the 2016 proposed rule rejected that premise, at least if the threshold was set as high as the 40th percentile figure then specified. The court held that "the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test."[6] Because the Texas court's reasoning represented a sharp departure from judicial and regulatory precedent and the Obama Administration did not have the opportunity to appeal before the 2017 presidential transition, our comment accepts the premise that using a salary level as the Department has for nearly a century is reasonable. A more recent decision of the U.S. District Court for the Western District of Texas specifically upheld the 2019 rule against a challenge to its use of a minimum salary test as part of its EAP delimitation:

> The Department has used minimum salary levels as part of its EAP Exemption determinations for over 75 years. 84 Fed. Reg at 51239. It has found that a salary level is helpful to determine who is not an executive, administrative or professional employee because it is a helpful indicator of the capacity in which an employee is employed, especially among lower paid employees." Id. (internal citations omitted). Therefore, the Department's use of a salary-level test is not arbitrary or capricious.[7]

Notably, substituting the 2004 one-test approach for the earlier two-test approach significantly expanded the number of relatively low-income workers who might fall within the EAP exemption (and therefore become ineligible for overtime pay) despite engaging in substantial non-exempt work. The Department's newly proposed framework—maintaining the one-test approach while indexing the standard salary level to the 35th, rather than the 20th percentile of salaried workers—is reasonably geared to restoring non-exempt status to the same class of low-salaried workers who would have been deemed non-exempt under the two-test approach that the Department used for decades.

The Legality of Automatic Regulatory Updating

With regard to low-income workers presumed not to fall within plausible EAP exemption, the Department's key proposed change is setting a threshold figure "at the 35th percentile of weekly earnings of full-time nonhourly workers in the lowest-wage Census Region (currently the South)."[8] The proposed new provision for automatic adjustment is essentially to feed updated numbers into the same regulatory formula. Nonetheless, in response to the Department's 2015 proposed rule, the U.S. Chamber of Commerce challenged the use of automatic updating as (1) exceeding the Secretary's substantive FLSA authority and (2) evading the notice-and-comment requirements for rulemaking under the APA.[9] We believe these objections, likely to be raised again to the Acting Secretary's current proposal, are without merit.

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[5] 81 Fed. Reg. 51230 (2019).
[6] Nevada v. United States Dep't of Labor, 275 F. Supp. 3d at 805.
[7] Mayfield v. U.S. Dep't of Lab., No. 1:22-CV-792-RP, 2023 WL 6168251, at *5 (W.D. Tex. Sept. 20, 2023).
[8] 88 Fed. Reg. at 62,159.
[9] Letter from Marc D. Freedman, Exec. Director, Labor Law Policy, Labor, Immigration & Employee Benefits, U.S. Chamber of Commerce, to Dr. David Weil, Administrator, Wage and Hour Division, Attachment at 30-36 (Sept. 4, 2015) (hereafter, "U.S. Chamber 2015 Comment"), available at https://www.regulations.gov/comment/WHD-2015-0001-5666.

Substantive FLSA Authority

Automatic adjustments to the amounts required to be paid to an exempt employee fall within the Labor Secretary's authority to "define" and "delimit" what it means to function in a "bona fide executive, administrative, or professional capacity" and to do so by "regulations" as may be issued "from time to time."[10] "Delimit" means to "determine the limits or boundaries of," not just to "identify the meaning of." Not to acknowledge the broader scope of the power to "delimit" would be to render the authority to "define and delimit" redundant. Further, the explicit statutory reference to regulatory change from "time to time" plainly signals Congress's anticipation that periodic review will be undertaken to avoid regulatory obsolescence.

It is true, as the U.S. Chamber noted in its 2015 comment, that the Department, in its 2004 rulemaking, described automatic indexing as "contrary to congressional intent."[11] The 2004 preamble[12] announced an intention to update salary levels "on a more regular basis," but found "nothing in the legislative or regulatory history that would support indexing or automatic increases." With one exception, the Department noted, Congress had been silent on automatic indexing in the FLSA, although indexing has been explicitly adopted under other statutes. In 1990, the Department conceded, "Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 6.5 times the minimum wage." It regarded this exception as weak evidence of congressional support for indexing, however, because "this standard lasted only until the next minimum wage increase six years later." The Preamble said further that the Department had "repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries."

These arguments, however, are unpersuasive as to the scope of the Labor Secretary's statutory authority or as to the reasonableness of an automatic updating mechanism. The absence of legislative history one way or the other on the question of indexing only makes more important the Acting Secretary's reliance on the plain text of the statute, which is entirely consistent with automatic updating. Additionally, both the U.S. Chamber comment and the 2004 rulemaking Preamble seem to assume that automatic adjustments will inevitably be upward. The automatic updating now contemplated would result in lower dollar amounts in the event, for example, of a recession resulting in disinflation.

Regardless, the Labor Department is legally entitled to change its view of the law, as long as its updated interpretation satisfies the "arbitrary and capricious" test.[13] For example, unlike the Labor Department of 2004, the Labor Department of 2023 knows that, despite the intention announced in 2004 to update salary levels on "a more regular basis," it took the Department eleven years even to propose the next round of adjustments. A gap of eleven years is preferable to the previous gap of 29 years. But the ordinary course of economic change strongly suggests that reviews delayed for over a decade will not keep pace with the need to fulfill Congress's purposes in enacting the Fair Labor Standards Act based on evolving data.[14] As

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[10] 29 U.S.C. § 213(a)(1).
[11] U.S. Chamber 2015 Comment, at 32.
[12] 69 Fed. Reg. 22022, 22171-72 (2004).
[13] Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) ("Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."); *Cf.*, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009) ("[O]ur opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.")
[14] 29 U.S.C. § 202.

a result, the Department might justifiably conclude, given its experience over the past nearly two decades, that its 2004 assumptions deserve to be set aside.

Moreover, it is misleading to suggest that a salary threshold pegged to an income percentile or an indexed dollar threshold is somehow substantively distinct from a static salary threshold, as used in prior rules. While commenters such as the Chamber of Commerce have suggested the former impermissibly dynamic compared to the latter, in truth both approaches entail economic variability. A dollar figure simply represents economic value at a particular moment. And as all Americans have experienced in recent years, the purchasing power of the dollar can swing dramatically. So even a so-called "static" salary threshold expressed in non-indexed dollar terms is actually constantly changing as a matter of economic value. Looking under the economic hood of the traditional "static" approach helps explain why it is impossible to identify a limitation in the FLSA or the APA on the Department's current proposal—if a non-indexed salary threshold is lawful, as nobody seriously questions, so too is a standard pegged to income percentile. The rule's opponents might prefer that changes in salary value over time tend to benefit employers rather than workers, but that is a quintessential policy question which the Labor Department is entitled to resolve. And it is arguably more rational for the agency to proffer a regulation that expressly accounts for the inevitably dynamic nature of every salary threshold — again, even those expressed in non-indexed dollar terms — rather than to permit arbitrarily fluid macroeconomic conditions to dictate the threshold's true economic worth.

Indexation has been judicially approved outside the FLSA context, even in the absence of specific authorizing statutory language. In *Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*,[15] the court upheld a rule promulgated by the Copyright Royalty Tribunal establishing a $50 compulsory royalty fee to be paid by jukebox operators which would be implemented in stages and, crucially, be subject to future inflationary adjustments. The authorizing language on which the court relied simply directed the Tribunal to "make determinations and adjustments of reasonable terms and rates of royalty payments."[16] It made no reference to inflation, indexation, or automatic adjustments. Indeed, the court reached its conclusion even though "other portions of the copyright law covering different industries, such as cable television, specifically contemplate adjustments for inflation and no such express requirement was contained in the part of the Act covering jukebox royalties."[17] The Court relied on the reasonableness of the Tribunal's regulation in implementing the stated purposes of the Copyright Revision Act of 1976 and the existence of substantial evidence supporting the Tribunal's determinations.[18]

The Copyright Royalty Tribunal was not breaking new ground in subjecting jukebox royalty payments to periodic inflationary adjustments. Automatic updating is a common feature of regulations pegged to monetary values, even when the relevant authorizing statutes make no specific reference to indexing or periodic adjustment. Thus, for example, in 2014, the Department of Education issued a regulation specifying that an applicant for a PLUS loan ("Parent Loan for Undergraduate Student") would be considered to have "an adverse credit history if the applicant has one or more debts with a total combined outstanding balance greater than $2,085 that are 90 or more days delinquent as of the date of the credit report, or that have been placed in collection or charged off during the two years preceding the date of the credit report."[19] It further provided that "the combined outstanding balance threshold of $2,085 will be increased over time based on the rate of inflation, as measured by the Consumer Price Index for All

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[15] 676 F.2d 1144 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 210 (1982).
[16] 17 U.S.C. § 801(b)(1).
[17] Charles J. Cooper et. al., *The Legal Authority of the Department of the Treasury to Promulgate a Regulation Providing for Indexation of Capital Gains*, 12 VA. TAX REV. 631, 655 (1993).
[18] 676 F.2d at 1155.
[19] William D. Ford Federal Direct Loan Program, 79 Fed. Reg. 63,317, 63,317 (2014).

Urban Consumers (CPI–U)."[20] The authorizing statute permits eligibility for PLUS loans if the graduate or parents "do not have an adverse credit history as determined pursuant to regulations promulgated by the Secretary," but makes no mention of inflationary adjustments.[21] As in the current proposal for the Labor Department's overtime rule, the Education Department's 2014 rule represented an explicit policy decision to substitute indexing for that department's reliance in the then-current rule on a static dollar threshold.[22] Even a cursory search of the Code of Federal Regulations reveals similar examples of automatic updating, even without a statutory mandate.[23]

The use of automatic updating makes no change in the basic methodology by which the Labor Department has implemented the FLSA. For over 80 years, the Department has relied on a combination of salary levels and task assessments to delimit the EAP exemption—a practice with which Congress has been completely familiar. Nor does automatic updating qualitatively change the reach of the FLSA. In enacting the FLSA, Congress necessarily contemplated regulations with a broad reach across the national economy. Automatic updating simply ensures that the 2023 rule will be implemented based on the most relevant economic data.

Consistency with APA Procedural Requirements

Nor would there be merit to any claim that automatic indexing is inconsistent with the notice and comment provisions of the Administrative Procedure Act.[24] The automatic updates would be implemented pursuant to "a notice in the Federal Register" to be published by the Secretary "stating the updated amounts required by [the provisions on the standard salary level and on highly compensated employees], which shall be determined by applying the methodologies set forth in those paragraphs to data from the four quarters preceding the notice as published by the Bureau of Labor Statistics." When these notices issue, the Labor Department would be on solid ground in asserting that public comment is "unnecessary" and therefore optional within the terms of 5 U.S.C. § 553(b).[25] As the D.C. Circuit has held, "[A] notice doing no more than faithfully implementing established regulations does not require renewed notice and comment."[26]

[20] *Id*.
[21] 20 U.S.C. § 1078–2(a)(1)(A).
[22] 79 Fed. Reg. 46,640, 46.646 (2014).
[23] Other examples include automatic adjustments in the minimum wage requirements made applicable to federal contractors pursuant to regulations under the Federal Property and Administrative Services Act, 29 C.F.R., Part 23, Appendix A, par. (b)(2); automatic adjustments made to the amount of "Denied Boarding Compensation" airlines must pay affected passengers pursuant to regulations under the so-called TICKETS Act, 76 Fed. Reg. 23110 (2011); and once-every-five year inflation adjustments to the revenue threshold for defining a "small business" for purposes of the Consumer Finance Protection Bureau regulations imposing obligations on financial institutions are required to collect and report to the CFPB data on "small business" applications for credit, 88 Fed. Reg. 35,150 (2023). In none of these cases is there statutory language referring specifically to inflationary adjustments, indexing, or automatic updating..
[24] We would also note that, because nothing in the proposed rule explicitly precludes public comment on later updates, APA challenges to the procedures attending future notices would have to await an actual update notice.
[25] "'Unnecessary' means unnecessary so far as the public is concerned, as would be the case if a minor or merely technical amendment," Nat'l Nutritional Foods Ass'n v. Kennedy, 572 F.2d 377, 385 (2d Cir. 1978), quoting the Senate report on the APA, S.Rep. 79-752, 79th Cong. 1st Sess. (1945). As the Second Circuit noted, the language of the House report was identical, H.R.Rep. No. 1980, 79th Cong., 2d Sess. (1946). 572 F.2d at 385 n. 14.See also Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. AM. U. 317, 386-87 (1989); MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 364 (5th ed. 2020) ("Public comment is also considered 'unnecessary' when the agency has absolutely no discretion about the contents of its rule, as where its task is merely to make a mathematical calculation or ascertain an objective fact.")
[26] City of Idaho Falls, Idaho v. FERC, 629 F.3d 222, 227 (D.C. Cir. 2011)

Most important, nothing about the automatic updating provisions precludes subsequently revisiting those provisions through notice-and-comment rulemaking. The 2023 proposal explicitly envisions that future secretaries may desire to engage in such rethinking, which would be triggered by notices of proposed rulemaking that would entail public comment. The automatic updating provisions are best viewed as prescribing a default should the Secretary decide *not* to engage in new substantive rulemaking:

> [§ 541.607(d).] *Delay of Updates*. An automatic update to the earnings thresholds is delayed from taking effect for a period of 120 days if the Secretary has separately published a notice of proposed rulemaking in the Federal Register, not fewer than 150 days before the date the automatic update is set to take effect, proposing changes to the earnings threshold(s) and/or automatic updating mechanism. If the Secretary does not issue a final rule affecting the scheduled automatic update to the earnings thresholds by the end of the 120-day extension, the updated amounts published in accordance with paragraph (c)(1) of this section will take effect upon the expiration of the 120-day period. The 120-day delay of a scheduled update under this paragraph will not change the effective dates for future automatic updates of the earnings requirements under this section.[27]

The U.S. Chamber's 2015 comment that automatic updating "would end . . . public debate forever"[28] with regard to the Labor Department's threshold salary levels had no merit then and has no merit with regard to the current proposal either.

Severability

Finally, we support the Secretary's decision to include a severability provision in the new rule. Such a clause is in keeping with 2018 guidance from the Administrative Conference of the United States ("ACUS"), which, after commissioning a report on the subject,[29] recommended that agencies incorporate severability clauses "when an agency recognizes that some portions of its proposed rule are more likely to be challenged than others and that the remaining portions of the rule can and should function independently."[30] Given the virtual certainty of litigation challenging the new rule once finalized, including the severability clause is prudent, even if, as we believe, the rule stands on firm legal ground.

The Supreme Court addressed the issue of administrative severability in *K-Mart Corp. v. Cartier*.[31] In that case, the Court held an invalid subsection of a Customs Service regulation severable from the rest of the rule, because doing so did "not impair the function of the statute as a whole, and there is no indication that the regulation would not have been passed but for its inclusion."[32] This test closely tracks that of severability in the legislative context,[33] and was perhaps more neatly articulated in a subsequent D.C. Circuit case, which outlined a two-part analysis for administrative severability: essentially, whether (1)

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[27] 88 Fed. Reg. at 62440.
[28] U.S. Chamber 2015 Comment, at 33.
[29] Charles W. Taylor & E. Donald Elliott, "Tailoring the Scope of Judicial Remedies in Administrative Law," Administrative Conference of the United States (May 4, 2018), available at: https://www.acus.gov/sites/default/files/documents/tailoring-the-scope-of-judicial-remedies-in-administrative-law-final-report.pdf.
[30] "Severability in Agency Rulemaking," Administrative Conference Recommendation 2018-2, 2 (adopted June 15, 2018), available at: https://www.acus.gov/sites/default/files/documents/recommendation-2018-2-severability%20in%20agency%20rulemaking.pdf.
[31] 486 U.S. 281 (1988).
[32] *Id*. at 294.
[33] See e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).

the agency intended for the invalidated provision's severability; and (2) the regulatory regime could function workably absent the invalidated provision.[34] While the mere, rote inclusion of a severability clause may not always invite judicial deference, agencies that both incorporate such a clause and also explain how a severed regulation could function in the absence of its removed provisions should fare better in court.

The preamble to the proposed rule clearly states the Secretary's intention "that the proposed automatic updating mechanism be effective even if the proposed increase in the standard salary level is invalidated."[35] It expresses the same intention with regard to the implementation of the HCE total annual compensation requirement whether or not the standard salary level is invalidated; the application of the standard salary level apply in territories subject to the federal minimum wage even if the increase in the standard salary level is invalidated; and the application of the Department's proposed 2023 earnings thresholds, whether or not automatic updating is upheld.[36]

Although it may seem obvious, it would be helpful for the final preamble to spell out with precision how the rule would remain workable should a court invalidate any of its key elements. For example, the preamble should state explicitly that invalidating the automatic updating provisions would have no bearing on the rationality or administrability of the standard salary and HCE salary thresholds as determined for 2023.

Moreover, should either of those thresholds be invalidated, it should be noted that automatic updating would simply take as the 2023 baseline the thresholds left in place from the 2019 rule. Thus, under the proposed § 541.607 provisions regarding "automatic updates to amounts of salary and compensation required," subsection (a)(1) calling for triennial updating of the standard salary level "to reflect current earnings data," does not depend on paragraph (a)(2), which calls for the Secretary to "determine the lowest-wage Census Region for paragraph (a)(1) . . . using the 35th percentile of weekly earnings of full-time nonhourly workers in the Census Regions based on data from the Current Population Survey as published by the Bureau of Labor Statistics." Likewise, subsection (b)(1) calling for triennial updating of the HCE salary requirement "to reflect current earnings data," could function independently of paragraph (b)(2), which pegs that requirement to "the 85th percentile of weekly earnings of fulltime nonhourly workers nationally." Setting out these points specifically would make evident to a reviewing court that the severability proposed was not a matter of rote but had received the Acting Secretary's careful deliberation.

Finally, explaining in the preamble the independent workability of any of the rule's provisions would not imply that the Acting Secretary doubts the rule's lawfulness in any respect. It would merely acknowledge the possibility of legal challenge and offer the Department's reasoned explanation as to how any adverse decision could be narrowly tailored via severability.

[34] See Davis Cnty. Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1455 (D.C. Cir. 1997); see also Charles W. Tyler and E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2296–97 (2015). Note also that nothing in the Administrative Procedure Act ("APA") requires a reviewing court that identifies procedural or substantive defects to invalidate the entire rule; the APA defines "agency action" to include "a part of an agency rule." 5 U.S.C. §551(13); see also Charles Tyler, "Severability in Agency Rulemaking" The Regulatory Rev., https://www.theregreview.org/2018/10/31/tyler-severability-agency-rulemaking/ (Oct. 31, 2018).
[35] 62 Fed. Reg. at 62151.
[36] *Id*.

Conclusion

Given how dramatically 2023 economic conditions differ from those of earlier decades—and the likelihood of continued economic volatility going forward—the Labor Department's proposed rule, including the commitment to automatic updating, is a commendable effort to help fulfill Congress's vision for "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

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