

*(1) Reasons Why Action by Agency Is Being Considered*

Section 13(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 213(a)(1), directs the Secretary of Labor to define and delimit from time to time, by regulations subject to the Administrative Procedure Act, "any employee employed in a *bona fide* executive, administrative, or professional capacity \* \* \* or in the capacity of outside salesman \* \* \*." Employees meeting the criteria specified in these regulations are completely exempt from minimum wage and overtime pay under the FLSA. The existing regulations contain requirements for payment "on a salary basis," at not less than specified minimum amounts, and certain additional tests related to an employee's primary job duties and responsibilities. The duties tests were last modified in 1949 and have remained essentially unchanged since contributing to higher human resource and legal costs in the economy. The salary levels required for exemption were last updated in 1975 on an interim basis. In 1999, the U.S. General Accounting Office reviewed these regulations and recommended that the Secretary of Labor comprehensively review and update them, and make necessary changes to better meet the needs of both employers and employees in the modern work place. These regulations were also suggested as a candidate for reform in public comments submitted on OMB's 2001 and 2002 Reports to Congress on the Costs and Benefits of Regulations. The Department is proposing revisions to these regulations in response to the concerns that have been raised over the years to update, clarify and simplify them for the 21st century workplace.

*(2) Objectives of and Legal Basis for Rule*

This proposed rule is issued pursuant to the authority provided by section 13(a)(1) of the FLSA. Its objective is to provide clear and concise regulatory guidance, in plain language, that will assist employers and employees in determining whether an employee is exempt from the FLSA as a *bona fide* executive, administrative, professional, or outside sales employee.

*(3) Number of Small Entities Covered by the Rule*

The estimated number of small entities covered by this rule is presented in the Department's Preliminary Regulatory Impact Analysis (PRIA). A copy of the Department's complete PRIA may be obtained by contacting the Wage

and Hour Division at the address and telephone number provided above. Data based on SBA's size standards for small business entities indicates that 5.2 million establishments that will be affected by the proposed rule are considered to be small businesses. These small businesses employ approximately 38.7 million workers with an annual payroll of \$940.0 billion. Their total annual sales are estimated to be \$5.7 trillion and their annual pre-tax profits are estimated to be \$233.9 billion. Approximately 79.8 percent of all affected establishments are considered to be small businesses and they account for 38.8 percent of the employment, 33.7 percent of the payroll, 31.8 percent of the annual sales, and 30.4 percent of the annual pre-tax profits.

*(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule*

Although an employer claiming an exemption from the FLSA under 29 CFR part 541 must be prepared to establish affirmatively that all required conditions for the exemption are met, this proposed rule contains no reporting or recordkeeping requirements as a condition for the exemption. However, the recordkeeping requirements for employers claiming exemptions from the FLSA under 29 CFR part 541 for particular employees are contained in the general FLSA recordkeeping regulations, applicable to all employers covered by the FLSA (codified at 29 CFR part 516; *see* 29 CFR 516.0 and 516.3) and have been approved by the Office of Management and Budget Control Number 1215-0017. There are no other compliance requirements under the proposed rule.

*(5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule*

No other Federal rules duplicate or conflict with the requirements contained in these rules. Federal employees subject to the jurisdiction of the U.S. Office of Personnel Management (OPM) are governed by separate regulations administered by OPM and not these regulations. Some state laws have exemption standards applied under state law that differ from the exemption standards provided by these Federal rules. The FLSA does not preempt any stricter exemption standards that may apply under state law. *See* 29 U.S.C. 218.

*(6) Differing Compliance and Reporting Requirements for Small Entities*

The FLSA generally requires employers to pay covered non-exempt

employees at least the federal minimum wage of \$5.15 an hour, and time-and-one-half overtime premium pay for hours worked over 40 per week. Under the terms of the statute, Congress excluded some smaller businesses (those with annual revenues less than \$500,000) from the definition of covered "enterprises" (although individual workers who are engaged in interstate commerce or who produce goods for such commerce may be individually covered by the FLSA). This proposed rule clarifies and updates the criteria for the statutory exemption from the FLSA for executive, administrative, professional, and outside sales employees for all employers covered by the FLSA. Moreover, given the purpose of the FLSA, Congressional intent, and the statutory provisions regarding the coverage for smaller businesses, adopting different compliance requirements for small entities under this rule was not considered feasible.

*(7) Clarification, Consolidation and Simplification of Compliance and Reporting Requirements for Small Entities*

As previously noted, the purpose of this proposed rule is to clarify, consolidate, simplify, and update the existing criteria for compliance with the exemption from the FLSA for executive, administrative, professional, and outside sales employees, for all businesses including small businesses. The proposed rule contains no new reporting requirements.

*(8) Use of Performance Rather Than Design Standards*

The FLSA requires that employers comply with the minimum wage and overtime pay requirements and permits a number of ways in which employers can achieve these "performance standards."

The Department considered a number of alternatives to the proposed rule that would impact small entities. One alternative would be not to change the existing regulations. This alternative was rejected because the Department has determined that the existing salary tests, which have not been raised in over 27 years, no longer provide any help in distinguishing between *bona fide* executive, administrative, and professional employees and those who should not be considered for exemption, and that the duties tests, which were last modified in 1949, are too complicated, confusing, and outdated for the modern workplace.

Two other alternatives would be to raise the salary levels and not update the duties tests or conversely to update