



May 20, 2019

VIA ELECTRONIC SUBMISSION

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Melissa Smith
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (commonly known as the “Overtime” Rule)

Dear Secretary Acosta and Ms. Smith:

The U.S. Small Business Administration’s (SBA) Office of Advocacy (Advocacy) submits the following comments in response to the U.S. Department of Labor’s (DOL) proposed rule, which proposes to revise and update the regulations issued under the Fair Labor Standards Act (FLSA), implementing an exemption from minimum wage and overtime pay for executive,



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administrative, professional, outside sales and computer employees.¹ This proposed rule sets a minimum salary threshold of \$35,308 for this “white collar” exemption.

Advocacy appreciates that DOL has adopted many recommendations made by Advocacy that will reduce the economic impacts of this rule to small businesses.² Most small businesses have told Advocacy that they support this proposal’s more moderate \$35,308 minimum salary threshold. Small businesses were concerned that DOL’s 2016 final rule, which doubled the minimum salary threshold from \$23,660 to \$47,476 within a short time frame, would have been disruptive for their companies. While Advocacy supports the proposed regulatory changes, some small businesses in rural communities and in the restaurant and retail industries are still concerned with the costs of this minimum salary threshold increase and have suggested further tailored regulatory alternatives to this proposal to ease their compliance burdens.

The Office of Advocacy

Congress established Advocacy under Pub. L. No. 94-305 to represent the views of small entities before Federal agencies and Congress.³ Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁶ The agency must include, in any explanation or discussion accompanying the final rule’s publication in the Federal Register, the agency’s response to these written comments submitted by Advocacy on the proposed rule. The agency is not required to provide a response for the Federal Register if it certifies that the public interest is not served by doing so.⁷

¹ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*, 84 Fed. Reg. 10,901 (Mar. 22, 2019) (hereinafter “2019 Proposed Rule”).

² See U.S. Small Bus. Admin., Office of Advocacy Comment Letter (Sept. 4, 2015), <https://www.sba.gov/advocacy/942015-defining-and-delimiting-exemptions-executive-administrative-professional-outside>; see also U.S. Small Bus. Admin., Office of Advocacy Request for Information (Sep. 22, 2017), <https://advocacy.sba.gov/2017/09/22/advocacy-submits-request-for-information-defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-computer-employees/>.

³ 1976 Amendments to the Small Business Act and Small Business Investment Act, Pub. L. No. 94-305, 90 Stat. 663.

⁴ 5 U.S.C. § 601 *et seq.*

⁵ Pub. L. 104-121, 110 Stat. 857 (1996) (codified at U.S.C. § 601, *et seq.*)

⁶ See Pub. L. No. 111-240 §1601, 124 Stat. 2504, 2551 (2010).

⁷ 5 U.S.C. §§ 604, 608 (2016).

Background

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and overtime pay of time and a half for work over 40 hours a week.⁸ While these protections extend to most workers, the FLSA provides numerous exemptions. The “white collar” exemption is for executive, administrative, professional, outside sales, and computer employees. To be considered exempt, employees must meet tests related to their primary job duties, be paid on a salary basis, and be paid not less than the minimum salary threshold.⁹

In May 2016, DOL finalized a rule that changed the minimum salary threshold for the “white collar” exemption under the FLSA from \$23,660 to \$47,476.¹⁰ The minimum salary threshold for this exemption had last been changed in 2004.¹¹ In November 2016, one month before the rule was to become effective, the rule was temporarily enjoined by a federal court.¹² On July 26, 2017, DOL published a Request for Information (RFI), seeking feedback on these regulations.¹³ On August 31, 2017, the United States District Court for the Eastern District of Texas invalidated the Department of Labor’s 2016 final rule, making the injunction permanent.¹⁴

In March 2019, DOL proposed to rescind the 2016 final rule and adopt a minimum salary threshold of \$35,308 per year. This proposed rule utilizes the same wage methodology from the 2004 rulemaking, but it has been updated with current data. DOL proposes to allow employers to count nondiscretionary bonuses and incentive payments to satisfy up to 10 percent of the minimum salary threshold, provided they are paid annually or more frequently. DOL is proposing to update the minimum salary threshold once every four years though a proposed rule published in the Federal Register, followed by a notice-and-comment rulemaking. Finally, DOL will not make any changes to the duties tests under the FLSA in this regulation.¹⁵

Small Businesses Generally Support 35K Minimum Salary Threshold and Other Provisions, But Some Seek Regulatory Alternatives

In the last five years, Advocacy has completed extensive outreach to small businesses across the country on DOL’s overtime regulations and has submitted comment letters based on this feedback. In response to the 2015 proposed overtime rule, Advocacy held multiple small business roundtables in Colorado, Kentucky, Louisiana, and Washington, D.C. In response to DOL’s 2017 RFI, Advocacy attended DOL roundtables in Colorado, Georgia, Missouri, Washington, and Washington, DC. In the last two years, Advocacy also held Small Business

⁸ 29 U.S.C. § 206(a)(1)(c); *see also* 29 U.S.C. § 207(a)(1).

⁹ 29 C.F.R. pt. 541.

¹⁰ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016) (hereinafter “2016 Final Rule”).

¹¹ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004) (hereinafter “2004 Final Rule”).

¹² *State of Nevada, et al. v. U.S. Dep’t of Labor, et al.*, 218 F. Supp. 3d 520 (E.D. Tex. Nov. 22, 2016) (No. 4:16-CV-00731).

¹³ Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34,616 (Jul. 26, 2017) (hereinafter “2017 RFI”).

¹⁴ *State of Nevada, et al. v. U.S. Dep’t of Labor, et al.*, 275 F. Supp. 3d 795 (E.D. Tex. Aug. 31, 2017) (No. 4:16-CV-00731).

¹⁵ 2019 Proposed Rule.

Regional Regulatory Reform Roundtables in over 25 states to seek feedback from small businesses on regulations that are burdensome and should be reformed pursuant to Executive Orders 13771 and 13777.¹⁶ At many of these roundtables, small businesses discussed their experiences and concerns with the overtime rule, and recommended that this rule be reformed.¹⁷

In response to the 2019 proposed rule, Advocacy held three Small Business Roundtables in Mobile, Alabama; Tampa, Florida, and Washington D.C. The following comments are reflective of the issues raised during the roundtables and meetings and in other discussions with small businesses and their representatives. Advocacy recommends that DOL consider these and other comments it receives from small businesses and incorporate those concerns in any final rule.

1. Advocacy supports DOL’s proposal to rescind the 2016 final rule’s \$47,476 minimum salary threshold and adopt a more moderate \$35,308 minimum salary threshold.

Advocacy submitted multiple public comment letters to DOL expressing concern that the 2016 final rule’s \$47,476 minimum salary threshold would have had detrimental economic impacts on small businesses, particularly in lower wage regions and industries.¹⁸ Small businesses told Advocacy that DOL’s doubling of the minimum salary threshold from \$23,660 to \$47,476 in such a short time frame would have been disruptive and costly for their companies. Small businesses expressed concern that this rule would impact their growth and expansion and would result in reductions in their workforce or closure.

Advocacy is pleased that DOL has adopted our recommendations to lower this minimum salary threshold and adopt the wage methodology set in the 2004 final rule to current data. The 2004 final rule set the minimum salary threshold at approximately the 20th percentile of earnings for full-time salaried workers in the lowest-wage census region (the South) and in the retail sector.¹⁹ Most small businesses attending Advocacy 2019 roundtables stated that they would have only a few employees affected by the \$35,308 minimum salary threshold, and they could absorb the costs from this rulemaking. However, some small businesses commented they would still encounter significant economic impacts from a higher threshold like \$47,476. Some roundtable participants also reported that they had already complied with the 2016 final rule’s \$47,476 minimum salary threshold, and therefore would have no impacts from this rule.

¹⁶ Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Enforcing the Regulatory Reform Agenda, Exec. Order No. 13777, 82 Fed. Reg. 12,285 (Feb. 24, 2017).

¹⁷ See U.S. Small Bus. Admin., Office of Advocacy Regulatory Reform Letter (Oct. 4, 2017), https://www.sba.gov/sites/default/files/advocacy/Advocacy_RRO_Letter_DOL.pdf; see also U.S. Small Bus. Admin., Office of Advocacy Regulatory Reform Letter (Nov. 16, 2018), <https://s3.amazonaws.com/advocacy-prod.sba.fun/wp-content/uploads/2018/11/16163936/FINAL-DOL-RRO-LETTER-2018.pdf>.

¹⁸ See, note 2.

¹⁹ 2004 Final Rule at 22,122.

While the national median wage is \$38,640 and above the new overtime threshold, there are many southern states with median salaries for all occupations below the proposed threshold of \$35,308.²⁰ These states include: Alabama, Arkansas, Florida, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, Tennessee and West Virginia. Furthermore, the table below shows that this \$35,308 minimum salary threshold may also particularly impact lower wage occupations such as restaurant and retail workers in these states.

May 2018 South Region Median Wages				
State	All Occupations	First-Line Supervisors of Food Preparation and Serving Workers	First-Line Supervisors of Retail Sales Workers	
National	\$ 38,640	\$ 32,450	\$ 39,630	
Alabama	\$ 33,740	\$ 28,480	\$ 37,560	
Arkansas	\$ 31,850	\$ 25,700	\$ 33,880	
Delaware	\$ 39,900	\$ 40,720	\$ 44,420	
District of Columbia	\$ 71,690	\$ 38,470	\$ 46,480	
Florida	\$ 34,560	\$ 34,510	\$ 41,000	
Georgia	\$ 35,950	\$ 26,850	\$ 37,660	
Kentucky	\$ 34,650	\$ 28,250	\$ 34,310	
Louisiana	\$ 33,390	\$ 30,150	\$ 35,320	
Maryland	\$ 44,690	\$ 34,720	\$ 41,380	
Mississippi	\$ 30,580	\$ 25,980	\$ 33,690	
North Carolina	\$ 35,750	\$ 31,850	\$ 40,050	
Oklahoma	\$ 34,560	\$ 25,960	\$ 35,150	
South Carolina	\$ 33,750	\$ 29,600	\$ 36,770	
Tennessee	\$ 34,890	\$ 29,770	\$ 38,300	
Texas	\$ 37,100	\$ 35,340	\$ 40,320	
Virginia	\$ 40,820	\$ 34,830	\$ 41,910	
West Virginia	\$ 32,640	\$ 26,620	\$ 31,320	

Source: Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2018

2. **Advocacy recommends that DOL consider additional tailored regulatory alternatives to minimize costs for small businesses from rural and in certain lower-wage industries.** Advocacy heard from small businesses in rural areas within Alabama, Florida, Pennsylvania, Puerto Rico and Texas that the \$35,308 minimum salary threshold would create economic hardships for their small businesses. These businesses were mainly restaurants and retail establishments whose managers and assistant managers were earning between \$25,000 to \$30,000 a year.

“The lower the number is set, the more money small and independent businesses have to grow their business and create jobs. The higher the number is set, the less they have available for that purpose,” according to David Addington, Senior Vice President and General Counsel at the National Federation of Independent Business.²¹

²⁰ U.S. Dept. of Labor, Bureau of Labor Statistics Occupational Employment Statistics May 2018 (Mar. 29, 2019), <https://www.bls.gov/oes/tables.htm>.

²¹ National Federation of Independent Business (NFIB), Comment Letter on Proposed Rule for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (April 4, 2019), <https://www.regulations.gov/document?D=WHD-2019-0001-0051>.

One alternative recommended by small businesses is for DOL to adopt a narrower Census definition for areas with the lowest wages in the south when calculating and adjusting the new minimum salary threshold. In DOL's proposed rule, the agency adjusted the national wages with the entire southern Census region, covering 17 states.²² Within this south definition, the agency included states that have a high median salary, including Maryland (\$44,690), Virginia (\$40,820), and Delaware (\$39,900). As shown in the table, a higher salary threshold would have more detrimental economic impacts on small businesses with lower wage jobs in food service and retail industries in certain southern states. For instance, the median wage for food service first line supervisors in Kentucky is \$28,250, and only \$25,980 in Mississippi. Therefore, Advocacy recommends the agency focus on more narrow geographic area like the East-South Central Census Region (which includes Alabama, Kentucky, Mississippi, and Tennessee) when adjusting the national wages; or provide more flexibility for these areas.

Several small businesses also recommended that DOL adopt incremental increases in the minimum salary threshold similar to implementation schedules given when a minimum wage rules becomes effective. Based on input from Advocacy roundtables, this recommendation would reduce first year and the overall cost of the rule to small businesses.

3. **Advocacy supports DOL's proposal to update the minimum salary threshold once every four years though a proposed rule published in the Federal Register, followed by a notice and comment rulemaking.** Advocacy believes that regular reviews and possible, gradual increases in this minimum salary threshold will lessen the economic impact for small businesses, rather than the agency waiting for fifteen years to update these standards again. Advocacy also supports DOL's proposal to seek public feedback on these regular reviews instead of creating automatic updates, to ensure that any potential increases are reasonable.
4. **Advocacy recommends that DOL estimate the full burden of compliance costs for this rule.** Small businesses have told Advocacy that the Department has underestimated the compliance costs that will result from this proposal. DOL estimates on average an affected small "establishment" one-hour burden for regulatory familiarization (reading and implementing the rule), a 1.25 hour burden per each affected worker in adjustment costs, and a five minute burden per week scheduling and monitoring each affected worker.²³ Small businesses have told Advocacy that it may take them many hours and several weeks to understand and implement this rule for their small businesses. Many small businesses spend a disproportionately higher amount of time and money on outside compliance staff, because they have limited or no human resources personnel, legal counsel or financial advisory, or management personnel on staff. For example, we spoke to a small retail business in Alabama, who retained the services of an attorney for 10-15 hours to review the 2016 final rule. Another HR manager at a small hotel in Alabama chronicled that many hours and

²² 2019 Proposed Rule; see also U.S. Census Bureau, Census Bureau Regions and Divisions with State FIPS Codes, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited May 14, 2019) (The Census South definition includes: South Atlantic- Delaware, District of Columbia, Florida Georgia, Maryland, North Carolina, South Carolina, Virginia, West Virginia; East South Central- Alabama, Kentucky, Mississippi, Tennessee; and West South Central- Arkansas, Louisiana, Oklahoma, and Texas.)

²³ 2019 Proposed Rule at 10,953.

weeks of human resources and manager time were devoted to “worker adjustment,” which included evaluating and reclassifying each position and speaking to employees throughout the process.

DOL estimates that the average affected small business establishments will have \$422 to \$3,187 in additional payroll costs in the first year of the proposed rule.²⁴ Small businesses are concerned that DOL’s estimate is neither transparent nor accurate. Small businesses have told Advocacy that their payroll costs will be in the thousands of dollars. To comply with this proposal, small businesses stated that they will either increase their workers’ pay to over the \$35,308 threshold to utilize the “white collar” exemption or convert these salaried employees to hourly employees. Employers reclassifying managers to hourly staff may spend many hours a week scheduling and keeping track of employee work to avoid these extra overtime costs. Employers may also be understaffed and may be required to hire and train new workers, creating extra costs.

Roundtable participants also mentioned many other costs from this rule that are not counted in this analysis. Small businesses that reclassified their salaried staff to hourly staff as a result of the 2016 final rule reported that their employee turnover increased by up to 50 percent. Managers, who now had to “clock in” their hours, felt demoralized by their changed status. These businesses had to expend costs to hire and train new workers. Small businesses noted that this may happen with this rulemaking, and DOL should estimate and include these costs in this rule.

5. **Advocacy recommends additional provisions to help small nonprofit entities comply with these regulations.** Nonprofit entities expressed their biggest concern with the overtime rule: the inability to renegotiate government nonprofit grants and contracts to reflect these higher and unanticipated costs of these new federal overtime requirements. The National Council on Nonprofits recommends a nationwide, government-nonprofit grant/contract reopener provision, which is further discussed in their comment letter.²⁵
6. **Advocacy recommends that DOL provide a least a year or 18 months to comply with this regulation.** Small businesses told Advocacy that they need time to understand this rule, evaluate and reclassify their work force and budget for changes such as payroll increases. This extra time is particularly needed for small businesses in lower wage regions and industries, particularly in lower wage regions and industries.²⁶
7. **Advocacy appreciates that DOL has adopted many other provisions in the rulemaking that were recommended by our office, which will minimize the economic impacts of this rule for the small business community while still achieving its regulatory objective.** Small businesses appreciate that DOL is not proposing any changes to the duties tests under the FLSA in this rulemaking. Most small businesses told Advocacy that they support the rule provision that allows employers to count nondiscretionary bonuses and incentive payments to

²⁴ *Id.*

²⁵ Nat’l Council of Nonprofits, Comment Letter on Proposed Rule for Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (Sept. 15, 2017).

²⁶ *See*, note 2.

satisfy up to 10 percent of the minimum salary threshold. However, multiple small businesses in retail sales and in the insurance industries recommended this percentage of bonuses counted in the minimum salary threshold should be increased to 30 to 40 percent. These companies have commented that this low limitation may negatively impact businesses and employees where compensation is largely based on incentives. Small businesses also seek clarification and compliance materials on how this 10 percent provision will be calculated.

Conclusion

Advocacy appreciates DOL's efforts to reach out to the small business community and work with our office for the last five years on this rulemaking. Most small businesses have told Advocacy that they support this more moderate \$35,308 minimum salary threshold for the "white collar" exemption to the overtime requirements. Small businesses were concerned that DOL's 2016 final rule, which doubled the minimum salary threshold within a short timeframe, would have been disruptive for the small business community. Advocacy also supports DOL's proposal to update the minimum salary threshold once every four years and seek public feedback. Advocacy believes that gradual increases in this minimum salary threshold will lessen the adverse economic impact for small businesses. While Advocacy supports this rule, DOL should also consider additional regulatory alternatives to this proposal recommended by our office and small businesses in lower wage areas and industries that may to ease their regulatory burdens. Advocacy believes that this rulemaking will reduce the adverse economic impact of these regulations to small businesses, while accomplishing the agency's regulatory goal of protecting American workers and supporting the growth of small business.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Janis Reyes at (202) 619-0312 or by email at Janis.Reyes@sba.gov.

Sincerely,

/s/

Major L. Clark III
Acting Chief Counsel for Advocacy

/s/

Janis C. Reyes
Assistant Chief Counsel for Advocacy

Copy to: Paul Ray, Acting Administrator , Office of Information and Regulatory Affairs
Office of Management and Budget