CENTER FOR WORKPLACE COMPLIANCE

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VIA FEDERAL E-RULEMAKING PORTAL: http://www.regulations.gov

September 25, 2017

Melissa Smith
Director of the 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: Center for Workplace Compliance Response to Department of Labor Request for Information Regarding Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (RIN Number 1235-AA20)

Dear Ms. Smith:

The Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) welcomes the opportunity to comment on the Department of Labor's (DOL) request for information regarding the exemptions from the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements for certain executive, administrative, professional, outside sales and computer employees, published in the *Federal Register* on July 26, 2017.

The *Federal Register* notice indicates that DOL is seeking information to aid it in formulating a proposal to revise the FLSA's so-called "white-collar" or EAP exemptions. The notice poses a number of specific questions for comment, including:

- How to set the salary level;
- How many salary levels are appropriate;
- Should there be changes to the duties test;
- Did the 2016 revisions have any impact on employers;
- Should there be a duties-only test;
- Should nondiscretionary bonuses and incentive payments count toward the salary level;
- Should there be changes to the highly compensated employee test; and
- How should the salary level be updated in the future.

CWC's responses to the specific questions posed by DOL follow. As summarized below, our recommendations regarding possible changes to the regulations defining the FLSA's white-collar exemptions

highlight several issues of importance to the employer community, including the ease of administration generally and in particular for employers with a nationwide or multi-state presence. With those considerations in mind, we recommend:

- The salary threshold test for determining whether an employee is exempt should continue to serve the function of a gatekeeper, rather than a determinative factor. The salary level should not be set so high as to exclude a significant number of employees who are performing exempt duties.
- The standard salary level should remain uniform regardless of which exemption applies or the size or location of the employer. While theoretically different categories sound appealing, for employers operating in more than one location the burden of administration would outweigh any benefit that could be gained.
- The salary level test and duties test should continue to be used in tandem, and DOL should not implement a duties-only test.
- DOL should refrain from including any updates to the FLSA regulations going forward without first engaging in notice-and-comment rulemaking.

STATEMENT OF INTEREST

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective workplace compliance programs. Its membership includes more than 250 companies, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of workplace compliance, and their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to interpreting and applying workplace compliance policies and requirements. All of CWC's members are subject to the Fair Labor Standards Act, 29 U.S.C. §§ 206 *et seq*., as well as other federal labor and employment statutes and regulations.

Because of our strong interest in ensuring sensible application of the nation's employment laws and regulations, CWC has previously submitted written comments on the FLSA's white collar exemptions, including in 2015 in response to the publication of DOL's proposed rule regarding changes to the "white-collar" overtime exemptions.

RESPONSES TO REQUEST FOR INFORMATION

1. **In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?**

As a threshold matter, it is important to note that DOL has not made the case that any increase to the salary test is warranted. In order to make such a case, DOL should produce data that describe the types of employees who are currently classified as exempt executive, administrative, or professional employees, who are being paid a relatively low salary (that is above the salary threshold), and who regularly work more than forty hours per week. If, after analyzing such data, the Department decides to change the salary level, we believe that it should be set consistent with historical practices so that the salary test remains as a gatekeeper, as explained more fully below, with the primary focus being on the duties the employee performs.

Historically, the salary level test has worked in concert with the duties test, with the salary level being set by DOL at a level that would, by and large, exclude employees who would not pass the duties test. Indeed, the importance of this "weeding out" function has been reflected in the Department's historical methodology: over the past several decades, DOL has deliberately set the salary threshold at a level that enabled all employers, including those in low-wage areas and industries, to use the salary level as a proxy for non-exempt status, eliminating the need to conduct the duties test on employees who almost certainly did not qualify as exempt. By doing so, the focus of the analysis has been on the actual duties performed by the employee in order to determine the employee's exempt status. We believe that this framework, where the salary test is the gatekeeper and the duties test provides the in-depth analysis, should remain intact.

If the salary level is set too high, national employers that operate in multiple regions of the country would be faced with a salary threshold that would demand different treatment of workers who perform the same duties, but in different geographic regions. Consider a hypothetical retailer that has a store in downtown Washington D.C. and a store in rural Virginia. Each store has an assistant manager who is properly classified as exempt under the executive exemption. To account for regional differences in cost of living, it pays the Washington D.C. employee a salary of $45,000 per year, and the Virginia employee a salary of $35,000 per year. If there is a dramatic increase in the salary level the company could be faced with a tough decision of: (1) having to raise the Virginia employee's salary to pay an above-market rate, which may also trigger having to raise the salaries of other managers to account for wage compression issues; (2) reclassifying the Virginia employee as non-exempt even though his duties have not changed and his Washington D.C. counterpart remains classified as exempt; or (3) reclassifying both employees as non-exempt even though their duties have not changed, and essentially taking away their flexibility and some responsibilities.

A high salary threshold would also disrupt business operations and require significant changes in business models, especially for those employers in low-wage industries and geographical regions, and those employers that operate in multiple states. CWC recommends that if there is going to be an increase in the salary test, DOL should continue to use the 2004 methodology applied to current workforce data.

2. **Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?**

While multiple standard salary levels may theoretically sound appealing, we respectfully submit that such an approach would be very difficult to administer, particularly for nationwide employers trying to manage different salary level requirements for employees with the same title but sitting in different locations. Instead, if the salary level is set at a level consistent with past practice, it would take into account regional, industry or employer size variations.

Further, creating separate salary levels based on geography or employer size could create ambiguity for employers. For example, if the salary level is based on geography, what would the minimum salary level be for a sales manager who is in charge of the east coast territory, supervises employees in New York, North Carolina and Maine, but is based out of her home in Florida? Or, if salary level is based on size of employer, how would the size be calculated? Would size include international employees? One standard salary level clearly is the approach that is easiest to manage and implement company-wide.

Finally, establishing multiple standard salary levels would create material pay inequities for multi-jurisdictional employers and morale issues where an employer may be forced to pay a manager in one state significantly more than a manager in a different state even though both managers are performing the same duties. This pay inequity would not only affect exempt employees "on the bubble" of any salary test level, but all employees at the location. If an assistant manager at one location has to be paid more than the assistant manager at a second location, the general manager and the hourly employees also presumably would have to be paid more to maintain wage parity. Regional salary levels could also artificially push employers to move jobs to certain locations with lower salary levels to control costs. Of course, the employer could choose not to increase salaries, but could reclassify some managers as non-exempt. This creates other problematic inequities as managers reclassified as non-exempt lose status and flexibility.

3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

As discussed in response to question #2 above, different standard salary levels for the executive, administrative and professional exemptions may be attractive in theory but again, such a system would be very difficult to administer. If the salary level remains a gatekeeper, with the applicable duties test determining whether an employee is exempt or non-exempt, there should be no need for three different salary levels.

The benefits associated with different standard salary levels for the executive, administrative and professional exemptions do not outweigh the costs and complexity of administering and managing these different tests. This is particularly true where an employee's duties may meet more than one duties test. If the employee met both the executive and administrative exemptions' duties tests but the administrative exemption's salary threshold was $30,000 while the executive exemption's salary threshold was $35,000, an employer may choose to classify the employee as an administrative employee. If the employee disagrees this could expose his employer to increased litigation, giving the employee another tool to second guess his or her classification determination. Creating three different salary thresholds would inevitably increase wage and hour litigation, which is already at an all-time high under the current rules.

4. **In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?**

If DOL updates the standard salary level, then it should use the 2004 methodology. As we discuss in more detail in our response to question #1, no additional changes to the duties tests are necessary if the 2004 methodology is used.

5. **Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?**

The standard salary level contained in the 2016 Final Rule would have set the salary threshold at an excessively high level that would have unfairly burdened employers generally, especially those in low-wage industries and geographical regions, and those employers that operate in multiple states. By more than doubling the salary level, the 2016 level effectively eclipsed the role of the duties test in determining exemption status, particularly for mid-level managers. Employers would have been forced to classify these types of positions as non-exempt even though these employees traditionally perform exempt duties.

While CWC cannot pinpoint a number that renders the salary level "too high" and no longer effective, we recommend that DOL err on the side of using a lower salary level so that the duties test can continue to be the primary determiner of whether an employee should be considered exempt.

6. **To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?**

The 2016 Final Rule was set to go into effect on December 1, 2016. It was not until November 22, 2016 that the Eastern District of Texas issued a preliminary injunction, blocking its enforcement. Because payroll changes can take several weeks or months to implement, particularly for large national employers, many businesses had already communicated and/or implemented salary increases for employees who met the duties tests and earned more than the 2004 salary threshold but less than the anticipated 2016 salary threshold, so that they could remain exempt employees. To the extent that the increases were already

communicated or implemented, many businesses had no choice but to keep any salary increases intact. The cost of these salary increases in many cases was monumental. For example, just one of CWC's member companies spent more than $10 million to adjust salaries to the 2016 salary threshold.

In some instances, employers did not give salary increases to employees who would not meet the new salary level in the 2016 Final Rule. Those employees would have been converted from exempt to non-exempt, and their duties would have had to change to account for the change in status. When the injunction was issued many of these employees were able to keep their exempt status with no change to their salary or duties. But, this required companies to spend a lot of time and effort communicating with employees first about changing to non-exempt status and then about how these changes were not going to take place.

When DOL issued the 2016 Final Rule, one of its main goals in increasing the salary level was "to more effectively distinguish between overtime-eligible white collar employees and those who may be exempt, thereby making the exemption easier for employers and employees to understand and ensuring that the FLSA's intended overtime protections are fully implemented." *See* 81 Fed. Reg. 32,391. The Department did not consider the effects that a salary threshold increase would have on employees who were classified as exempt but earned less than the new threshold, noting that such a "concern involves compensation for hours worked by overtime-protected employees, [and therefore] it is beyond the scope of this rulemaking." *See* 80 Fed. Reg. 38,522.

By more than doubling the minimum salary an employee needed to earn to even be eligible for an overtime exemption, however, the Final Rule would have created confusion and morale issues for employees. For example, take employee A, a high performing payroll manager who was earning $30,000 a year. Under the 2016 Final Rule, in order to remain exempt, employee A's employer would have had to give her a $17,476 raise. Her employer could not afford to give such a significant raise, and so employee A was converted from exempt to non-exempt. This meant that employee A would have to clock-in and clock-out every day, she could no longer have a company phone because the company does not want to risk her working off-the-clock, she lost the flexibility she had to make her own hours and work nights and weekends, and she lost the work-life balance she had by being able to attend her children's school activities or stay home with them if they were ill because she was now an hourly employee. Along with these tangible effects, the change from exempt to non-exempt would have affected employee A emotionally, lowering her morale and sense of worth to the company, as well as cause her to question her performance and if the change was being made because she did something wrong. Once the change was made, employee A's morale would have declined, along with her performance and motivation.

By changing the salary level in such a dramatic fashion, the negative effects on employee performance and morale for key employees – in particular mid-level managers and professionals in areas such as finance, marketing, and technology – would have had a significant impact on many businesses. CWC urges DOL to carefully consider those effects when drafting any changes to the white-collar exemptions. Indeed, many of these potential negative consequences might be avoided if the Department chooses a more-moderate salary threshold increase (or no increase at all).

7. Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

The duties tests under the white-collar exemptions have always generated some challenges for employers. If the Department initiated a duties-only test, it would almost certainly include a more specific examination of the particular amount of time that employees spend performing specific tasks. This type of duties-only test would likely only serve to add further complexity and confusion and increase litigation over exempt and non-exempt status. Therefore, CWC recommends that the Department keep the structure of the 2004 rules with a salary test as a gatekeeper as well as a duties test.

8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

As discussed above in our response to question # 6, the salary level set in the 2016 Final Rule did exclude from exemption employees in many positions that were traditionally covered by the exemption. Generally, this included many mid-level managers and professionals in areas such as finance, marketing, and technology who simply could not be paid at or above the $47,476 level.

The other group of employees significantly impacted was part-time exempt employees. The 2016 Final Rule did not distinguish between part-time and full-time employees. Therefore, a part-time employee also had to earn $47,476 a year in order to be considered for a white-collar exemption, which in most cases means this employee had to be paid the equivalent of nearly $100,000 if he was working on a full-time basis. Because most part-time employees are not being paid at this level, they also would have been excluded from exemption, even if they were performing exempt duties. With more employees wanting flexibility and work-life balance, part-time opportunities are growing. CWC recommends that any revisions to the regulations take this into account and provide a prorated salary level to allow part-time employees to remain exempt if they are performing exempt duties.

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

The idea of allowing nondiscretionary bonuses to be attributable to a portion of the minimum salary level is a good one. However, as finalized in the 2016 Final Rule, it would have been hard for many employers to utilize.

The challenge with permitting non-discretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level is that often bonus amounts vary and exact amounts are not calculated until the end of a specific period (*e.g.*, the end of the year or the end of a quarter). Because of the uncertainty

or inability to calculate bonuses and incentive payments when employers are budgeting for salaries, most employers did not plan to take advantage of the 10 percent allowance in the 2016 Final Rule.

DOL should consider fewer restrictions on the use of bonuses and incentives so that employers will take advantage of any such allowance. This would include allowing nondiscretionary bonuses to account for a greater percentage of the salary threshold, permitting payment to be made over a longer period of time, and allowing employers to count discretionary bonuses toward the salary threshold.

10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

Providing multiple total annual compensation levels for the highly compensated employee exemption provides the same challenges as discussed in our response to question # 2, including administrative difficulties and complexities. Therefore, we recommend using one annual compensation level for the highly compensated employee exemption.

In addition, we note that the highly compensated employee annual compensation level is optional for classification purposes. In our experience, most employers do not rely on this method for classifying employees, although it is helpful when defending against a misclassification allegation.

11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

CWC recommends that DOL not automatically update the standard salary level and the highly compensated employee total annual compensation level. Rather, any updates to the salary level and highly compensated employee compensation level should first be subject to notice-and-comment rulemaking.

Importantly, we respectfully submit that the Department has no authority to automatically update the threshold, as the regulated community must be consulted through notice-and-comment rulemaking each and every time the FLSA exemptions are modified. *See Nevada et al., v. U.S. Department of Labor et al.*, No. 4:16-CV-00731-ALM (E.D. Texas August 31, 2017).

In addition, automatic updates would make it very difficult for employers to plan for changes in salaries. Most companies prepare budgets well in advance of the start of the fiscal year and need to include employee salaries in those budgets. Moreover, automatic updates do not account for economic downturns or other outside factors that would warrant delaying increases in pay.

Finally, we question the need for regular updates though a process outside of notice-and-comment rulemaking. The irregularity with which the Department has historically updated the salary threshold – it has been updated only seven times in 77 years – demonstrates that DOL has not considered this to be an urgent issue. Perhaps more importantly, if annual updating were indeed crucial to the functioning of the FLSA exemptions, we do not doubt that the Department would marshal the resources necessary to ensure that it occurred.

CONCLUSION

CWC appreciates this opportunity to comment on DOL's Request for Information. Our recommendations are made in the spirit of improving the current FLSA regulatory scheme, keeping in mind the practical compliance issues we have raised that we believe would arise if drastic changes are made, as related to us by our member companies. We would welcome a further opportunity to discuss our views with DOL at any time.

Sincerely,

Jaime L. Novikoff
Senior Counsel