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CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

MARC FREEDMAN
VICE PRESIDENT, WORKPLACE POLICY
EMPLOYMENT POLICY DIVISION

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

August 22, 2018

Mr. Bryan Smolock, Director
Bureau of Labor Law Compliance
Department of Labor and Industry
651 Boas Street, Room 1301
Harrisburg, PA 17121

By electronic transmission: bsmolock@pa.gov

Re: Comments on Proposed Changes to 34 Pa. Code, Chapter 231 Regarding Overtime Pay, *Pennsylvania Bulletin* June 23, 2018, p. 3731.

Dear Director Smolock:

The U.S. Chamber of Commerce ("the Chamber") submits these comments in response to the Department of Labor and Industry's ("DLI") proposal to revise 34 Pa. Code, Chapter 231 regarding overtime pay, as published in the *Pennsylvania Bulletin* on June 23, 2018. The proposal would update Pennsylvania's regulations determining which employees are exempt from being paid overtime under the executive, administrative, and professional classifications. It would adjust the salary threshold above which employees may be exempt if they satisfy the duties associated with the specific classification, and it would also align those duty descriptions with those adopted by the U.S. Department of Labor (DOL) during its 2004 rulemaking.

Pennsylvania's proposal is almost identical to a 2016 overtime rule promulgated by DOL that was subsequently invalidated by a U.S. District Court. The Chamber believes the Pennsylvania proposal contains the same flaws that doomed the 2016 regulation and urges DLI to withdraw it. Withdrawal is particularly warranted since DOL is in the midst of drafting a new overtime rule that is likely to address many of the arguments DLI cites in its proposal. The Chamber supports, however, Pennsylvania's efforts to synchronize its duties tests with those in the federal regulations so that employers working in Pennsylvania and other states have one set of duties to use in determining the exempt status of their employees.

The United States Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. An important function of the Chamber is to represent the interests of its members in federal employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. The Chamber represents many state and local chambers of commerce and other associations who, in turn, represent many additional businesses. Among the Chamber's members are employers within the Commonwealth of Pennsylvania, as well as the Pennsylvania Chamber of Business and Industry and several local chambers of commerce.

DISCUSSION

The Pennsylvania proposed regulation, by admission, "mirrors" [1] the 2016 DOL regulation by ultimately setting a new salary threshold to determine overtime eligibility at $47,892/annual ($921/week).[2] The U.S. District Court for the Eastern District of Texas later invalidated this regulation on the basis that the $47,456 annual salary ($913 per week) was so high as to render the duties tests for exemption irrelevant. The court's ruling left the 2004 annual salary threshold of $23,660 ($455/week) in place nationally, including in Pennsylvania.

The court reasoned that the duties tests were the more appropriate representation of Congressional intent for exemption, and that the salary test was to serve merely as a proxy, or shorthand, for the duties test. The court ruled that the salary test was increased so much as to supplant the duties test; the new salary test would render non-exempt employees who should be exempt due to the duties they perform, thereby making the regulation contrary to Congressional intent and rendering it invalid. Unfortunately, Pennsylvania is repeating the same mistakes by using the invalidated federal regulation as the template for this proposal.

Pennsylvania's Proposal is Driven by the Failed Federal Overtime Rulemaking and Repeats the Same Errors

One reason the Pennsylvania proposal so closely mirrors the Obama regulation is that DLI relied on the architects of the federal proposal in developing its threshold, including the Obama administration's DOL Chief Economist, Heidi Shierholz, and Solicitor of Labor Patricia Smith. In addition, DLI relied on an economic analysis from the Economic Policy Institute that was central to the federal rulemaking.[3]

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[1] Regulatory Analysis Form (hereinafter, RAF) Question 11, page 3.

[2] The Pennsylvania proposal would go into effect in three phases: $610/week, $31,720/year effective upon the date the final regulation is published in the *Pennsylvania Bulletin*; $766/week, $39,832/year one year after the final regulation is published in the *Pennsylvania Bulletin*; and $921/week, $47,892/year two years after the final regulation is published in the *Pennsylvania Bulletin*.

[3] RAF Question 10, page 3, and Question 14, page 5.

The Pennsylvania proposal uses an almost identical methodology for setting the salary threshold: pegging it to the 30th percentile of full time salary earners in the northeastern United States, while DOL used the 40th percentile of full time salary earners in the southeastern United States (including the high-income areas of the District of Columbia, Virginia and Maryland). Although the DLI claims they chose the 30th percentile "to account for the fact that Pennsylvania is one of the lower-wage states in the Northeastern Census region and to reduce the burden on employers in lower-wage areas of the Commonwealth."[4] However, the final salary threshold will still be higher than that in the 2016 regulation. DLI gives no explanation as to why they did not use Pennsylvania specific income levels in setting this threshold, especially after acknowledging that the Commonwealth is "one of the lower-wage states in the Northeastern Census region."

The DOL's methodology included some of the highest income earning areas of the country within the Southeastern Census region and generated an elevated threshold. Likewise, Pennsylvania's use of the Northeastern Census region also includes some of the highest income earning areas of the country and yields an even higher threshold at a lower percentile. This approach does not merely update the salary threshold but actually expands the proportion of employees eligible for overtime in the same way the invalidated 2016 federal regulation would have. The proposed Pennsylvania threshold would no longer be just a proxy or shorthand for the duties test but would be the dominant determinant of an employee's exempt status.

The Pennsylvania proposal repeats another error of the invalidated regulation in its automatic increase provision. The Pennsylvania proposal calls for resetting the salary threshold every three years. For Pennsylvania this would be based on the 30th percentile for full time non-hourly workers in the Northeastern Census region. The automatic escalator provision of the federal regulation was one of the most troubling parts of that rule, and its inclusion in the Pennsylvania proposal raises identical concerns.

First, the threshold will eventually be so high that whatever duties an employee performs will be completely meaningless in determining their exempt status; the proportion of employees performing exempt duties that do not meet the salary threshold will increase as the salary threshold increases. Under the automatic escalator provision, the salary threshold will increase rapidly as the proportion of employees being paid a salary after each increase will diminish, thus accelerating the rise of the 30th percentile of full time salaried employees. The federal court reasoned that if the first salary threshold supplanted the duties tests then anything that made that higher would, by definition, be too high.

Second, repeatedly raising the salary threshold will also mean that employers will have to constantly reevaluate the classification of certain employees and will likely have to reclassify as non-exempt more and more employees currently performing exempt duties. As many comments

[4] RAF Question 11, page 4.

during the federal rulemaking demonstrated, employees often view this reclassification as a demotion and wonder whether they are being punished. The more the salary threshold affects highly educated, professional career track employees, the more this will be the case.

Finally, an automatic escalator clause will guarantee that a higher salary threshold will take effect during an economic downturn, precisely when it would be least appropriate.

Pennsylvania's Cost, Impact, and Benefit Assessments are Flawed

Since the Pennsylvania proposal explicitly relies on the federal rulemaking's assessment of costs and benefits,[5] the Chamber submits its analysis of that rulemaking as an attachment to these comments. This analysis demonstrated that the U.S. Department of Labor failed to adequately or accurately assess the total costs of that proposed regulation. Thus any reliance by DLI on the flawed federal assessment is unwarranted and undermines the legitimacy of the Commonwealth's proposal.

Not only does DLI rely on the flawed federal assessment of costs and impacts, but its own projection of benefits lacks credibility. Included in the projected benefits is an economic stimulus effect that would result in: "new job creation," "increase in pay of directly impacted salaried workers, and the pay of those hired to perform some of the hours of overtime previously performed by non-exempt salaried employees," all of which will "increase consumer demand, creating more jobs," and "a larger Pennsylvania economy." [6] These assertions are wildly speculative and unsupported by any data, study, or quantitative analysis.

In addition, the DLI's assessment of the impact of the proposal on small businesses is severely lacking and dismissive. The DLI estimates that there at least 225,400 small businesses subject to the proposed regulation in Pennsylvania but asserts that "many of these will be unaffected by the proposed amendments because they have no salaried employees who earn more than the current Pennsylvania EAP salary threshold but less than the proposed threshold."[7] No data is provided to support this statement, nor does DLI even attempt to suggest how many of 225,400 small businesses will not have any employees in that salary range. Additionally, DLI has not attempted to assess the impact on the remaining small businesses who would have employees in that salary range. DLI blithely claims that "some small businesses may see an increased cost associated with wages" and assert that reducing misclassification of employees "represents the potential for savings in litigation costs" and that "small businesses may also benefit from less employee turnover."[8] DLI does not support any of these claims with data, studies, or quantitative analysis.

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[5] RAF Question 19, page 8, Question 23, page 9.
[6] RAF Question 12, page 4, and Questions 17, 18, page 7.
[7] RAF Question 24 (a), page 10.
[8] RAF Question 24 (c), page 10.

The supporting analysis also dismisses the effects on non-profit employers. DLI estimates there are 108,491 non-profit employers in Pennsylvania and believes the phased-in approach will provide sufficiently gradual increases that they will be able to adjust their operations to absorb the increased burden despite "having limited ability to increase their revenues to cover any increase in costs."[9] This view is consistent with that of the Obama administration that for-profit enterprises would sacrifice profit margin and non-profit enterprises would sacrifice some of their mission.

Because the Pennsylvania proposal so closely mimics the federal regulation, comments from Pennsylvania non-profits made during the federal rulemaking are relevant to this rulemaking. Accordingly, the Chamber is attaching the testimony of Elizabeth Hays of MHY Family Services in Mars, PA, delivered at a hearing of the Education and Workforce Committee of the U.S. House of Representatives. The statement describes in detail the threat to MHY's operations represented by the federal proposal. The Pennsylvania proposal would present a similar threat.

For state and local government agencies, the DLI's analysis is even thinner. All that DLI notes for state and local government agencies, is that, "No costs or savings are anticipated." While these employers are not part of the Chamber's membership, impacts on these agencies lead to tax increases and other fiscal consequences, ultimately impacting affecting U.S. Chamber members as well as Pennsylvania residents. During the federal rulemaking, state and local government agencies expressed their concerns about the serious negative impacts that regulation would have caused. The regulation was simultaneously challenged in court by a coalition of state attorneys general. The Chamber is attaching comments that the Pennsylvania State Association of Township Supervisors submitted on the federal proposal, describing the significant negative fiscal consequences. The similarity with the federal rulemaking makes these comments from the small township supervisors in Pennsylvania relevant to this rulemaking.

Question 24 (d) of the Regulatory Analysis Form asks for "a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation." The DLI stated, "No alternative method would ensure achievement of the same purpose of the proposed regulation."[10] However, that answer is inaccurate. Pennsylvania has several options for updating the regulations governing overtime exemption status:

1) Wait for the DOL to complete the rulemaking currently underway to update the salary threshold. If that threshold is not appropriate to delineate properly exempt from non-exempt employees in the Commonwealth, a Pennsylvania-specific threshold could always be implemented, as other states have done. However, Pennsylvania should first pursue the

[9] RAF Question 15, page 6.
[10] RAF Question 24 (d), pages 10-11.

possibility of a national threshold so that Pennsylvania employers operating in other states will not face a "patchwork" effect leading to increased administrative and compliance burdens.

2) Update Pennsylvania's threshold using a methodology that actually reflects Pennsylvania's employers and results in a more modest increase that works in concert with the duties test rather than supplanting it.

3) Focus only on aligning Pennsylvania's duties tests with the federal duties tests and suspend any salary threshold changes until the federal rulemaking is complete and the Commonwealth conducts a review to determine whether a Pennsylvania-specific threshold is appropriate.

CONCLUSION

Pennsylvania's proposed revision to the salary threshold for determining overtime exemption status would result in a salary threshold higher than the DOL issued in late 2016 and that a federal district judge subsequently invalidated. The DLI proposal is explicitly based on the federal regulation, and therefore built on the same flawed data, economic analysis and assumptions, and misguided understanding of the role of the salary threshold. It also includes the same problematic automatic escalator provision as the final federal regulation. DOL is currently undertaking a rulemaking to adjust the federal salary threshold. Accordingly, Pennsylvania should withdraw this proposal pending the outcome of the federal rulemaking. Alternatively, Pennsylvania should pursue only those provisions of this rulemaking that seek to align the duties test with those found in the federal regulations.

Sincerely,

Marc Freedman
Vice President, Workplace Policy
U.S. Chamber of Commerce

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U.S. CHAMBER OF COMMERCE ECONOMIC ANALYSIS OF U.S. DEPARTMENT OF LABOR PROPOSED REVISION TO OVERTIME REGULATIONS, PART 541

THE DEPARTMENT'S FUNDAMENTLY FLAWED ECONOMIC ANALYSIS GROSSLY UNDERESTIMATES THE COSTS OF THIS RULEMAKING

The Department has failed to apply seriously the principles of a thorough and objective regulatory economic cost/benefit analysis envisioned in Executive Orders 12866 (September 30, 1993) and Executive Order 13563 (July 11, 2011). As President Obama stated in Executive Order 13563, regulations "must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."[1] Regulations should "promote predictability and reduce uncertainty," "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends," and "must take into account benefits and costs, both quantitative and qualitative."[2] To achieve these principles, President Obama reaffirmed that each agency, including the Department of Labor, must "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs," "tailor its regulations to impose the least burden on society," and "quantify anticipated present and future benefits and costs as accurately as possible."[3]

These principles provide a framework for reasoned rulemaking against which the Department's economic analysis in this rulemaking must be judged. The Executive Orders reflect the purpose of the Administrative Procedure Act to provide for public participation in a structured, analytic rulemaking process. The framework provided by the Executive Orders helps to ensure that rulemaking decisions are made on the basis of demonstrated evidence and that the reasoning underlying a decision was documented and could be replicated. Rather than adding a burden to regulators, the requirements of the Executive Orders should be seen as a means of protecting the agency from charges of arbitrary and capricious action. If an agency diligently follows the requirements and intent of E.O.s 12866 and 13563 by making regulatory decisions based on rigorous regulatory impact analysis, the risk of costly litigation and attendant delay of needed action is reduced.

Four fundamental flaws in its economic analysis demonstrate that the Department has not complied with the Executive Orders, and thus, brings into question whether the Department's proposal will pass scrutiny under the Administrative Procedure Act:

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[1] E.O. 13563 at § 1(a).

[2] *Id.*

[3] E.O. 13563 at § 1(b) & (c).

1. Reliance on the Current Population Survey as the sole source of salary data.

2. Inadequate assessment of compliance costs, transfers, benefits, regulatory flexibility analysis and unfunded mandate impacts.

3. Inadequate analysis of the full costs and benefits of available alternatives; and

4. Inattention to the regulatory risks inherent in a sudden change in regulatory requirements and salary test adjustment procedures.

Each of these flaws is examined and discussed below.

A. The Department's Reliance On The Current Population Survey As The Sole Source Of Salary Data Is Inappropriate

In addition to proposing the unjustifiably high 40th percentile, the Department's proposal is further flawed because the agency relied solely on inappropriate Current Population Survey ("CPS") data. The Department's reliance on the CPS data is inappropriate on two levels: First, the CPS data is generally inappropriate because it does not provide information on key questions that need to be answered to determine reasonably the minimum salary for exemption. The Department could have obtained additional and more relevant data. Secondly, the Department has chosen to rely on a subset of the available CPS data that is particularly inappropriate. Other tabulations of the CPS data should have been considered by the Department to inform its salary test level determination. Consideration of the full range of alternative data tabulations necessarily leads to a different and lower minimum salary level.

The Current Population Survey data has been compiled, tabulated and analyzed monthly since 1948 by the Bureau of the Census and the Bureau of Labor Statistics. CPS data is a valuable national statistical resource which serves many useful purposes, and the purposes it serves best are those for which it was designed. The Current Population Survey was never intended or designed to serve as a basis to inform regulatory decisions regarding the salary level for the FLSA white collar exemptions, and thus, the CPS data is inappropriate as the sole or primary data source to rely upon to inform a regulatory decision on the minimum salary threshold for the white collar exemptions. The CPS data fails to provide complete and precise answers to the key questions that face the FLSA regulatory decision maker: How many employees perform bona fide executive, administrative or professional duties? What fixed salary amounts are bona fide exempt employees paid and what weekly hours do they work? What are the salaries or hourly rates of non-exempt employees supervised by bona fide exempt employees, and what hours do they work? How prevalent is it that employees are misclassified as exempt?

1. How many workers perform bona fide executive, administrative or professional duties required by Part 541

The actual total count of bona fide executive, administrative or professional workers is less important than the identification of actual workers who satisfy the duties test. Identification

of bona fide exempt workers is the essential first step leading to a description of the range of salaries and the range of duties. The CPS only provides occupational titles, there are no questions about duties, authority, or other factors critical to the statutory definition of exempt workers.

The current regulation makes it clear that job title alone is insufficient to determine exempt status, and the rule proposed by the Department does not contemplate changing that:

> Sec. 541.2 Job titles insufficient. A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

This shortcoming of the CPS data is complicated by the fact that the job title and other information may be incomplete or erroneous for several reasons. The survey is based on brief, limited individual verbal responses. There is little follow up, so the interview record of Benjamin Franklin, for example, would miss important detail if his initial response was modestly to describe his occupation as "printer." The CPS interviews are brief and provide no opportunity for in-depth inquiry about job functions, duties and other details that are relevant to FLSA exempt status determination.

Another complication is that the individual subject is not always the direct respondent to CPS questions. The survey collects data about everyone in a household from a single respondent who tells what he or she knows about the occupation, earnings, hours worked, how they are paid and other characteristics of each household member. These responses, especially about other household members may be inaccurate, and there is little or no follow-up in the survey procedure to verify responses.

Since the CPS data only includes this imprecise and potentially incomplete or erroneous job title information, it totally fails to identify whether a person performs the duties of exempt executives, administrators or professionals as set forth in Part 541:

- For executives, the definition in the current regulation includes the requirement that the individual "customarily directs the work of two or more other employees," but the CPS data on which the Department relied for its analysis contains no information about whether a worker supervises the work of any other employee and, therefore, no information regarding putative numbers supervised.[4]

- For executives, the current regulation includes the requirement that an exempt executive must have the authority to hire or fire, promote or otherwise change the status of other employees or to make recommendations that are given particular weight in such decisions. Nothing in the CPS data relied upon by the Department

[4] 29 C.F.R. § 541.100.

provides any information about whether or not this requirement is met by any survey respondent.[5]

- Regardless of primary duties and other factors listed, any employee who owns at least a 20 percent equity share in the business and who is "active" in its management is exempt as a business owner. Nothing in the CPS data provides information on ownership at this level of detail.[6]

- Exempt administrative employees must perform work requiring the "exercise of discretion and independent judgment with respect to matters of significance."[7] Nothing in the CPS data addresses the discretion or independent judgment exercised by any employee.

- For professional employees, the exemption requirement states that the job requires "knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction."[8] The CPS data does contain information regarding the highest level of educational attainment of each respondent, but there is no indication of whether the education attained is relevant to the job in which the person is employed.

2. ***What fixed salary amounts are bona fide exempt employees paid and what weekly hours do they work***

The current white collar regulations also require that an employee be paid a minimum amount on a salary basis, defined as "a predetermined amount" which "is not subject to reduction because of variations in the quality or quantity of the work performed."[9] The FLSA statute does not include any provision for the salary level and salary basis tests, but the Part 541 regulations establishing these tests have been recognized over the years as an exercise of agency discretion to facilitate easier administration and enforcement. It has been recognized consistently since the first salary test regulation was issued in 1938 that it is important to know how many legitimately exempt employees are excluded by any contemplated salary test line and to select a line that balances the joint objectives of minimizing the number of legitimately exempt individuals and of

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[5] *Id.*

[6] 29 C.F.R. § 541.101.

[7] 29 C.F.R. § 541.200.

[8] 29 C.F.R. § 541.300.

[9] 29 C.F.R. § 541.602.

meeting the intent of the law to ensure that employees entitled to the FLSA overtime premium pay are provided that protection.

The CPS data does not address the details required to determine whether or not employees are paid a fixed and guaranteed salary (or fees), regardless of hours worked. The CPS data relied upon by the Department distinguishes only workers paid on an hourly basis (implying that weekly earnings vary with the hours worked) and categorizes all others as "non-hourly." All salary or fee based wages are included in non-hourly CPS data, but an unknown number of other non-qualifying wage payment methods are also included. For example, the "non-hourly" CPS data would include non-exempt inside sales employees paid 100 percent on commission and non-exempt employees paid on a piece rate. The CPS non-hourly worker category is at best a rough and imprecise measure of workers paid on the basis required for exempt status. No known evaluation studies or interviews have ever been conducted to determine what proportion of non-hourly workers represented in the CPS data actually are paid on a true salary or fee basis as required in the Part 541 regulations.

The CPS only provides a rough delineation of workers paid on an hourly basis versus those paid on all other bases, of which a fixed salary is a subset. The data collected in the CPS survey on hours worked – usual weekly hours and hours actually worked during the survey reference week – provide only a limited glimpse of the dimensions and context of employees work schedules which may vary significantly over the course of a year.

The 2013 CPS data that was relied upon by the Department includes numerous respondent records where the weekly earnings amount for non-hourly workers is obviously inconsistent with the number of actual hours of work reported.

Being paid on a salary or fee basis is a long recognized component of white collar regulations. Employees not paid on a salary or fee basis (other than doctors, lawyers and teachers) cannot qualify for the executive, administrative or professional exemptions even if paid far above the minimum salary level and performing exempt duties at the highest level. However, being paid on a salary basis is not sufficient to establish exempt status. Many non-exempt employees are paid on a salary basis – secretaries, payroll clerks, bookkeepers, paralegals (just to name a few) as an administrative convenience to the employer and as a benefit to the employee. Knowing with some certitude the proportions of the employees in the "non-hourly" CPS data set who are paid on a salary basis and perform exempt job duties, and knowing the variation of weekly earnings of such employees in comparison to the weekly earnings of "non-hourly" employees who do not meet the requirements for exemption is necessary for both setting the salary test level and for estimating the economic impact of a proposed change in the salary test level. The CPS data does not provide information necessary to make these determinations and distinctions.

3. *What are the earnings and work hours of non-exempt employees supervised by bona fide exempt employees*

The 1940 Stein report and successive reports examining the salary test have taken note of the wide variation across industries, across sizes and types of organizations within industries and across. The relationship between the salaries of supervisors, while generally higher than earnings of the hourly employees they supervise, varies widely and is often only a small proportion greater than the weekly earnings of those they supervise. Earlier salary test rulemakings took note of the context of exempt supervisors' earnings in relation to the earnings of the non-exempt workers whom they supervised. Generally, previous salary test determinations have considered that setting the national benchmark too high could interfere with the ability of executives in low salary regions or industries to effectively supervise and manage because non-exempt status could constrain their hours relative to the hours of the workers they supervise.

The CPS data includes information on the earnings, hours and occupations of hourly workers and non-hourly workers, but the data lacks in many cases the detailed information needed to delineate the supervisors from the supervised necessary to analyze the relative earnings of the connected groups. Only a few of the occupation groupings contain distinct coding to distinguish supervisory and line workers, and even in those cases, the CPS data lacks the duties information needed to distinguish validly exempt supervisors from non-exempt working foremen and team leaders.

4. *How prevalent is it that persons are misclassified as performing exempt duties*

Balancing the effect of a salary test between excluding workers from an exempt status that they are entitled to have versus the effect of a salary test to guarantee FLSA protection to workers who are entitled to that protection has always been an important consideration for setting the salary test. To accomplish the necessary analysis, the regulatory decision maker needs accurate and timely information about the incidence of misclassification of workers who should properly be assigned non-exempt status. In particular this information is needed at the detailed occupation and industry levels of identification, and it needs to be analyzed in relation to weekly earnings amounts.

The general principle that the likelihood of valid exempt status rises with earnings and that the incidence of misclassification as exempt falls with earnings has been long recognized, but operationalizing those correlations into a practical framework that the salary test regulatory decision maker can use is beyond the scope of the CPS data resource. The CPS provides no definitive information regarding how persons are classified or whether their classification is correct or not. One may presume that CPS respondents who report being paid on an hourly basis are classified as non-exempt, but the pay basis report by the employee on the CPS may be subject to an unknown degree of reporting error.

Also, for potentially misclassified persons, even if one could hypothesize that a CPS respondent of certain characteristics should be classified as non-exempt and paid on an hourly basis, it is not clear whether the non-hourly earnings variable in the CPS data reflects a "salary" in the sense required by the FLSA or some other compensation method which is permissible under FLSA for non-exempt workers.

Even if a worker is paid on a true fixed salary basis, the question of FLSA misclassification would not arise unless the respondent actually reported having worked over 40 hours. Since the CPS data provides information about actual weekly hours and earnings for only a single week during the year, the CPS does not provide the necessary information. The employee in question may actually be paid on an hourly basis with overtime premium for hours beyond 40, but the proxy respondent to the CPS interview may be ignorant of the fact. Only a fraction of the individuals represented in the CPS data are directly interviewed. Many responses are provided by another household member on the subject's behalf

B. BECAUSE OF THE WEAKNESSES IN THE CPS DATA, THE DEPARTMENT SHOULD CONSIDER OTHER DATA ALTERNATIVES BEFORE SETTING THE SALARY LEVEL OR, IN THE ALTERNATIVE, SHOULD CORRECT FOR THE WEAKNESS BY SELECTING A MUCH LOWER PERCENTILE

The CPS is not the only data alternative, as some have claimed. The alternative of conducting original field research is always available, has been used successfully in past FLSA exemption salary test determinations, especially in the 1958 Kantor report, and also, to some extent in the 1940 and 1949 determinations. Collecting original data through field surveys, interviews, and systematic compilation of enforcement investigation reports provides the advantage of having been collected with the intended use in mind. Reliance on CPS data attempts to fit to the present use data that was collected for a completely different purpose.

The better course was indicated by the 1958 Kantor report, which is well described in the history section of the Department's present NPRM.[10] The Kantor analysis to set FLSA overtime exemption salary thresholds was primarily based on the analysis of detailed records of individual worker duties and salary information in the context of actual, documented exemption classification determinations. The data used was the product of intensive field research by the Department.

The field research exemplified by the Kantor project to collect appropriate and accurate data regarding the earnings and working contexts of individuals who actually do perform the executive, administrative and professional statutorily exempt duties defined in the FLSA is the model that the Department should have followed.

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[10] 2015 NPRM at 38525.

The 1998 "Delphi" process for estimating correct classification probabilities for certain occupations based on the experiences of WHD enforcement officers was a step in that right direction, but it did not go far enough toward the detailed field work that could be and should be done, and the fact that the 1998 analysis effort is now 17 years out of date, renders the Department's current reliance on it in the present regulatory analysis highly questionable. Below, the Department's reliance on the 1998 estimates of exemption probability is discussed as a significant source of potential error in the estimates of the administrative costs, income transfers and monetized benefits of the proposed rule.

The Department had the opportunity over the past six years to have taken a more deliberative approach informed by systematic compilation of appropriate data focused on these key questions and other important related ones. Instead, the Department has attempted to obtain from the Current Population Survey answers to questions that the CPS does not ask.

C. The Non-hourly Workers Data Used Was Specifically Inappropriate

The Department's selection of the proposed new salary test minimum threshold for EAP exemptions is based on a published BLS table showing deciles of weekly earnings of non-hourly workers based on pooling of 12 months of CPS Outgoing Rotations Supplement (Earner Study) data for 2013. This is a new "research series" that BLS began publishing in January 2015 at the request of the Department's Chief Economist. It reported that the 40th percentile cut point (the value at or near the 40th cumulative percent of observations ranked from lowest to highest) as $921 per week. The replication file matched this result closely: $923 per week as shown in column 1, non-hourly workers, in Table 1. The other decile values also closely matched the BLS table published in the NPRM.

The data represented by column 1 includes workers listed in 477 of the 483 distinct occupation titles associated with hourly-paid workers, many of which seem on the face to be unrelated to EAP work. Table 5 of this report comprises a list of all occupational titles represented in the 2013 CPS data and shows tabulation of the numbers of hourly and non-hourly workers estimated by the survey under each occupational title, and the proportion of each occupation represented by non-hourly workers.

The Department explicitly justifies the inclusion in its weekly earnings data replicated in column 1 of workers in occupations presumably not covered by the FLSA Part 541 regulations by stating that their "salaries may shed light" on the earnings of EAP workers and so are useful for the consideration of salary test level regulatory decisions.

Since most occupations, including those occupations that might possibly involve EAP duties, are represented in the hourly category well as the non-hourly category, it is arguable that the earnings of hourly workers similarly may shed light on the rulemaking decisions. Accordingly, Table 1, column 2, Hourly Workers, shows a tabulation of weekly earnings by decile for workers who are paid on an hourly basis, and presumably may be classified as non-exempt under FLSA, i.e. entitled to overtime premium pay if they work more than 40 hours

during the week. It should be noted, however, that the hourly-paid workers represented by the wages shown by decile in Table 2, column 2, like the non-hourly workers represented in Table 2, column 1, include persons in occupations or industries not covered by the overtime provisions of the FLSA statute or exempt under other regulations besides the Part 541 regulations that are the subject of the proposed regulation.

Table 1, column 3, shows the weekly earnings by decile for the combined group of hourly and non-hourly workers. This combined group of hourly and non-hourly workers, like the group of only non-hourly workers presented by the Department, includes in addition to workers whose occupations suggest the possibility of coverage by the FLSA Part 541 regulations, other workers in named occupations that are explicitly not covered, i.e., physicians, lawyers, teachers and most federal employees. The inclusion of this broader group of non-hourly occupations, according to the Department, usefully "sheds light" on the earnings of potentially covered workers and thus the Department asserts is appropriate to include in the database used to analyze salary test questions. Since the hourly-paid workers data includes all 477 of distinct occupation titles included in the non-hourly data relied upon by the Department, and only 6 occupations (motion picture projectionist, rolling machine setters, textile knitting machine setters, textile winding and twisting machine setters, extruding machine setters, and metal pickling machine tenders) of hourly-paid workers are not duplicated among non-hourly workers, the Department should have also considered that the earnings of the two groups combined may similarly "shed light" on the salary test decision. Note that when both are tabulated together, the 40th percentile that the Department is proposing as a particularly notable benchmark corresponds to a weekly earnings amount of $673 in column 3 representing the combined group of all workers regardless of how they report being paid. The median (50th percentile) for the combined group in 2013 had weekly earnings of $788, and the amount corresponding approximately to the $923 per week 40th percentile in column 1 (non-hourly only) is near the 60th percentile ($962 per week) for the combined group.

Table 1, column 4, shows deciles of weekly earnings for a subset of non-hourly workers who usually work full time schedules who either reside in the South Census Region or who are employed in the retail trade industry sector nationwide. This subset approximates the approach used to set the salary test in the 2004 rulemaking, referencing a low wage region and a low wage industry sector, except that in accordance with the approach proposed now by the Department, the data set includes the full range of occupations, including ones not actually covered by the Part 541 regulations. As with the other data tabulations shown in Table 1, no attempt has been made to differentiate workers who may be eligible for exemption based on duties from those not eligble based on duties, and the underlying data includes workers whose weekly earnings are below the current $455 salary threshold (slightly under 10 percent of all non-hourly workers). For this subset, the weekly earnings corresponding to the proposed 40th percentile is $858. The 2004 rulemaking used a 20th percentile benchmark in relation to the low-wage industry/region combination, to arrive at the $455 salary test benchmark set in 2004. For the comparable 2013 data, the 20th percentile benchmark corresponds to a weekly earnings amount of $600 under column 4.

Table 1, column 5, shows deciles of weekly earnings for similar South Region plus Retail Industry subsector of workers who usually work full-time (35+ hours per week) for the combined set of hourly and non-hourly workers, but not those not covered by Part 541, i.e. a better data set for determining the salary threshold. The 40th percentile benchmark for this group is $600 per week ($31,200 annually) and the 20th percentile is $440 per week ($22,800 annually—actually less than the current salary threshold) weekly earnings for all hourly and non-hourly workers combined.

The Department has presented the idea that the 40th percentile of weekly earnings is a significant benchmark to consider in the context of FLSA EAP exemption salary test determination, but the question remains "40th percentile of what group of workers?" The variety of tabulations shown in Table 1 illustrate the variability of answers that can be obtained from 2013 CPS data depending on how the relevant group of workers to examine is defined, notwithstanding the qualitative limitations of CPS data as noted previously. The answers vary even more when one considers that the proposed 40th percentile is a higher percentile benchmark than has been used in previous salary test rulemakings. The variations that are illustrated in Table 1 are roughly similar to the variations shown in the Department's NPRM Table 13, but without the problematic and questionable pooling of data across years and attempt at finding definitive exempt/non-exempt duties in CPS data that provides no such information that characterizes the Department's analyses for the 2004 and Kantor alternatives analyses.

D. Inadequate Assessment of Compliance Costs, Transfers and Benefits

The Department estimates that the proposed revision of the salary level will impose $592.1 million in direct compliance costs on affected businesses (including non-profit organizations) and state and local governments in the initial compliance year, largely composed of $254.5 million in familiarization costs of learning about the revised salary level by business owners and managers and of assessing whether or not the affected establishment has workers affected by the revised threshold. The Department's cost estimates assume that the familiarization cost element will occur only the first year of implementation of the new salary test, based on the presumptions that the salary test value will remain fixed thereafter. This assumption is in direct contradiction to the Department's stated plan to implement annual changes in the salary test, increasing it either to maintain the 40th percentile value despite wage growth or to adjust the value in relation to price inflation. With automatic adjustment, familiarization costs would repeat with every annual revision of the salary test. In addition to familiarization costs, the Department also estimates first year (1) administrative costs of identifying affected employees (those earning weekly salaries under the revised salary threshold) and adjusting their pay and/or payroll status ($160.1 million), and (2) managerial costs of increased supervision of the work schedules of those added to the overtime eligible category ($178.1 million). The adjustment and managerial costs decrease, according to the Department's estimates, in the second and subsequent years, ranging from $170.1 million in the second year to $93.2 million in the 10th year. Each of these cost estimates is flawed by inaccurate assumptions

about the labor costs activities and the labor-time parameters of compliance activities. Each of the elements of direct compliance costs is discussed in detail below.

1. Familiarization Costs

The Department assumes that each of 7.44 million affected establishments will expend on average one hour of labor time to learn about and to assess whether the rule includes any provisions that affect any workers of the establishment. The Department assumes that the cost to the establishment will be $34.19 per labor hour. Across 7.44 million affected establishments the total is estimated by the Department to be $254.5 million.

The estimate of one hour familiarization time is not based on any presented empirical evidence, surveys, experiments, or opinions of documented experts. The proposed regulatory text plus accompanying discussions and explanations would take the average reader several hours for a first review, and full comprehension would likely require several reviews and other research. It is unrealistic to assume that only one person in each potentially affected establishment will be sufficient to read and assess the regulation.

For larger establishments the labor time requirement for the familiarization stage will likely increase exponentially as both the number of employees and the numbers of managers involved increases. Conferences with inside and outside legal counsel will be necessary for larger organizations.

Unionized workplaces will need to consult with labor representatives to assess the need and complexities of potential reclassifications of workers. Employees classified as "exempt" may currently be excluded from a collective bargaining unit as a manager or supervisor. Reclassification to non-exempt may put an "employee" – no longer a "supervisor" – under the collective bargaining unit. Such an issue may be subject to a bargaining obligation at a minimum or raise an issue to be resolved through grievance and arbitration. If reclassified employees become subject to the CBA, the employer will need to determine what terms and conditions are applicable; can the employer unilaterally set the employee's pay rate or must the employee be slotted into ranges and pay grades already established; and how benefit entitlements and contributions will be calculated? The reclassified employee may have enjoyed a more robust benefit package than the non-exempt employees and may have even made a contribution for insurance coverage that was different than those for bargaining unit employees. If the employer takes the position that the reclassified employees are outside of the bargaining unit, the union may file a unit clarification petition or argue an accretion to the existing unit. The proposed rule does not consider the resources necessary to resolve any of these issues.

For the very smallest establishments a familiarization time of one to two hours may be possible, but for larger establishments the number of labor hours may amount to hundreds or more.

The potential familiarization cost based on the labor time and establishment numbers parameters assumed by the Department would increase to $1.5 billion if the average establishment time were just 6 hours. This illustration makes obvious the need for the Department to research carefully the question of compliance time by conducting empirical research. Retrospective studies of familiarization cost experience of employers affected by recent regulations in other contexts would be one source of information. For example, the Department could easily conduct a survey of employers affected by recent Office of Federal Contract Compliance Programs regulations regarding affirmative action programs for Veterans and Persons with Disabilities to assess actual time expended for regulatory familiarization. The results of such a survey could be scaled to account for differences in complexity of the subject regulations and provide familiarization time parameters that could be applied to other rulemakings. Alternatively, the Department could conduct an internal experiment in which offices within the Department or other Federal agencies were designated as proxy "establishments" and tasked to review and assess the proposed rule with an imagined perspective of assessing its applicability to their unit. By selecting experiment units of various sizes and requiring each to record the labor times and activities involved in the exercise a credible estimate of familiarization time as it varies by establishment size could be developed.

In addition, challenges to improperly classifying employees as exempt can be defended by raising the "good faith" defense the FLSA provides. That defense frequently is established by documenting the legal advice and fact-gathering that supported the determination. The efforts a prudent employer must engage in to prevail on that defense is likely to far exceed the 15 minutes assumed by the Department.

The unit labor cost parameter, $34.19 per hour is clearly inaccurate. The Department has used a compensation amount (wages plus fringe benefits) for a human resources office administrative clerk, a position that is itself clearly not exempt under the FLSA rules. It should be obvious that the assessment of the implications of this rule on an organization will be the duty of an exempt executive or administrator, earning compensation at the $60 per hour range published by BLS for managers. In addition, the Department has failed to fully account for the economic opportunity cost of redirecting labor for productive activity to the regulatory compliance activity. Our previous study of Federal management services contracts found that the government routinely pays private contractors a fully-loaded rate of $200 per hour for the services of a project manager whose basic compensation (wages plus fringe benefits) is $60 per hour, amounting to a markup of 3.3 times direct compensation to cover indirect overhead and support services cost. Adjusting the per hour cost accordingly, the cost of the Department's estimated one hour per establishment for familiarization cost increases from the published $254.5 million to a total of $1.49 billion.

At an average of 6 hours familiarization time and the revised opportunity cost of $200 per hour, total familiarization costs total $8.9 billion per year.

If the Department implements an automatic annual adjustment to the salary test every year, the $8.9 billion calculated as a first year cost would recur every year.

These calculations are illustrative, and they show the need for the Department to conduct research to produce credible estimates of the labor time required and for the unit labor opportunity cost, including reasonable overhead allowances, which may vary by establishment size and industry for the critical estimation of cost for the familiarization step of regulatory compliance.

2. Adjustment Costs

The Department estimates that firms will incur initial and on-going costs to re-determine the exemption status of each affected employee, to update and revise overtime policies, to notify employees of policy changes and to adjust payroll systems to accommodate reclassified employees.

The Department estimates that it will require one hour per each of 4.682 million affected exempt EAP employees whose current weekly earnings are below the proposed salary threshold and will be converted to non-exempt status (hourly or salaried with monitored/managed schedule). The Department admits that it has no basis for this estimate and requests the public to offer data suggestions. The available public comment period is too short for public commenters to undertake meaningful experiments or assessment of this question.[11] The Department had the time and resources to develop a scientifically credible research-based estimate of these costs, varied by establishment size and industry. The estimate of one hour per affected employee has no basis in reality. Considering that each employee adjustment will involve management time at several levels of authority and discussions, the time per employee for all labor effort involved in the process could range from at least 4 hours to several days depending on the complexity of the case. As an illustration, an average of just 4 hours per affected employee (probably the minimum) would raise the adjustment cost from the Department's estimate of $160.1 million to $640.4 million, using the $34.19 per hour labor rate assumed.

As discussed previously, the Department's estimated per hour labor rate is an inaccurate estimate of full labor opportunity cost. Using the alternative $200 per hour rate based on Federal government contract procurement of project management services, $3.75 billion per year may be a more likely conservative estimate of the adjustment cost.

The Department estimates that adjustment costs will fall significantly after the first year when most of the adjustment will occur, but that decline ignores the proposed annual automatic adjustment of the salary threshold. With annual adjustment of the salary threshold as proposed by the Department a more significant annual adjustment cost will continue. Even if the

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[11] The Chamber, as well as many others, requested an extension of the comment deadline. The Chamber's request was specifically predicated on the need to conduct more research and do the work the Department would not. Alas, despite signals that an extension would be granted, the definitive rejection of the request was not received until Monday August 31.

subsequent adjustments involve only 10 percent of the number of workers initially affected, the annual adjustment cost going forward could be $375 million per year.

The adjustment cost example, again, illustrates the need for the Department to conduct careful empirical research to understand the potentially costly implications of its proposal.

3. Management Costs

Conversion of currently exempt salaried employees to non-exempt hourly or non-exempt salaried status under the proposed salary test threshold will require closer management monitoring and supervision of the schedules of affected employees. The Department estimates $178.1 million per year in additional management costs.

The Department assumes that only 1.022 million of the 4.682 million affected EAP workers who will be converted from exempt to nonexempt status will require additional management of their schedules. The Department bases this on the CPS data for 2013 that shows 1.022 million currently exempt EAP workers usually work over 40 hours per week now and will require management time to contain or approve their future schedules. This is an unrealistic assumption because even those who usually work only 40 hours will require additional management schedule monitoring to ensure that their hours do not go higher. Applying the Department's 5 minutes per employee per week management effort and estimated $40.20 cost per hour of management time, the Department's estimate of $178.1 million per year increases to $815.6 million per year. Moreover, even those who work overtime only intermittently will require their overtime hours to be managed.

The Department's estimate of 5 minutes of management time per year is not based on any empirical evidence. The Department admits this and asks for public comment to provide data. Again, the Department could have conducted field research or experiments to obtain credible estimates. Five minutes per week is *de minimus*. As an illustration 30 minutes per day would increase the management cost to $4.9 billion per year.

The Department's per unit labor cost estimate of $40.20 per hour for a manager is a median not a mean. The mean is about $60 per hour ($124,000 per year) and adjusting for correct overhead cost load, a more likely correct figure is $200 per hour on average. This changes the total cost, along with the previous adjustments to $24.3 billion per year.

Combined adjusted cost estimates total $36.95 billion for the initial year and $33.52 billion for each subsequent year. The Department calculated decreases in subsequent yearly costs in future years as wage inflation pushes workers above the salary threshold, but that calculation ignores the planned annual adjustments of the salary threshold. With annual adjustments occurring, it is possible that the ten year cumulative cost of the proposed rule will be $338.5 billion.

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STATEMENT OF ELIZABETH S. HAYS, MHRM, SHRM-SCP, SPHR

DIRECTOR OF HUMAN RESOURCES

MHY FAMILY SERVICES

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO

U.S. HOUSE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING ON

"EXAMINING THE COSTS AND CONSEQUENCES OF THE ADMINISTRATION'S OVERTIME PROPOSAL"

JULY 23, 2015

Introduction

Chairman Walberg, Ranking Member Wilson and distinguished members of the Subcommittee, my name is Elizabeth Hays and I am the Director of Human Resources of MHY Family Services in Mars, Pennsylvania. I appear before you today on behalf of the Society for Human Resource Management (SHRM), of which I've been a member for nearly twenty years. On behalf of more than 275,000 SHRM members in over 160 countries, I thank you for this opportunity to appear before the Subcommittee to discuss the recently proposed changes to the Fair Labor Standards Act (FLSA) overtime regulations and the potential impact on my organization and others.

SHRM is the world's largest association devoted to human resource management. The Society serves the needs of human resource (HR) professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

As the Director of Human Resources for MHY Family Services since 2007, I am responsible for overseeing all HR operational and regulatory areas including those associated with benefits administration, recruitment, employee relations, health and safety, and policy administration. I also serve as the chair of MHY's Health & Safety Committee, and I'm a member of the organization's Continuous Quality Improvement Steering Committee. In collaboration with other Leadership Team and staff members, I support training and development initiatives for all employees of MHY as a member of the Staff Development Committee.

MHY Family Services is a 501(c)(3) nonprofit organization serving youth by providing support and services that afford opportunities for a better life. Through its residential and community-based programming, MHY strives to meet the ever-changing needs of at-risk youth and their families through a holistic approach to treatment. MHY offers comprehensive residential, educational and community-based services responding to an array of hardships and traumas, including mental illness, behavioral issues, abuse and neglect. MHY has an overall budget of $8.7 million, including approximately $6.2 million from Medicaid, federal and state dollars with 81 percent of our overall budget going toward programming and delivery of services.

MHY Family Services employs 138 people, most of whom are full-time employees, including 64 exempt and 74 nonexempt employees. Most of our exempt employees—executives, managers and professionals—are currently paid less than $50,000, and under the Administration's proposal would become eligible for overtime. As a nonprofit organization with limited flexibility in the budget, I have serious concerns about how I will cover potential overtime expenses while still aiming to provide high-quality services for the at-risk youth served by MHY.

Furthermore, if the FLSA's salary threshold is more than doubled, as proposed, exempt employees may lose their exempt status and return to nonexempt status. In their eyes, the exempt classification is seen as a promotion, providing a sense of "workplace status" and greater workplace flexibility to meet work/life needs. Our supervisors will view reclassification as a demotion, causing a decline in employee morale.

In my testimony, I will explain the Department of Labor's (DOL's) recent proposal to update the FLSA overtime regulations, discuss the specific impact of these changes on organizations like mine in the nonprofit sector, and share SHRM's early thoughts on the proposal.

The Fair Labor Standards Act

The FLSA has been a cornerstone of employment and labor law since 1938. The FLSA establishes minimum wage, overtime pay, record-keeping and youth employment standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA was enacted to ensure an adequate standard of living for all Americans by guaranteeing the payment of a minimum wage and overtime for hours worked in excess of 40 in a workweek.

Virtually all organizations are subject to the FLSA. A covered enterprise under the FLSA is any organization that "has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and has $500,000 in annual gross volume of sales; or engaged in the operation of a hospital, a preschool, an elementary or secondary school, or an institution of higher education."[1]

Additionally, many states, such as California, have their own laws pertaining to overtime pay. If a state's law is more inclusive or more generous to the employee than federal law, the state law will apply. If, however, the state law is less inclusive, employers are required to follow federal law. The myriad federal and state laws create additional complexity when employers are working diligently to remain compliant.

The FLSA also provides exemptions from both the overtime pay and minimum wage provisions of the Act. Employers and HR professionals use discretion and independent judgment to determine whether employees should be classified as exempt or nonexempt and, thus, whether they qualify for the overtime pay provisions or the minimum wage provisions of the FLSA. Generally speaking, the classification of an employee as either exempt or nonexempt is determined by whether the employee is paid on a salary basis with a fixed rate of pay and by their duties and responsibilities.

Classification determinations must also be made by looking at each individual job position. Classification decisions for all positions are challenging as they are based on both objective criteria (salary basis level, salary basis test) and subjective criteria (duties test). As a result, an employer acting in good faith can easily mistakenly misclassify employees as exempt when they should be nonexempt, or vice versa.

FLSA Overtime Regulations

Regulations governing the FLSA have been revised by the Executive Branch numerous times. Since the FLSA's passage in 1938, the salary threshold has been updated seven times, most recently in 2004. In 2004, the DOL attempted to simplify the overtime regulations for employers and employees by consolidating the long and short duties tests into a single "standard" test and raised the salary threshold. Specifically, under the current regulations, individuals must satisfy two criteria to qualify as a salaried worker exempt from federal overtime pay requirements: first, they must be paid on a salary basis (that is, the salary cannot fluctuate) of more than $455/week ($23,660 annually); and second, their "primary duty" must be consistent with those common to executive, professional or administrative positions as detailed in section 541 of the FLSA overtime regulations or one of the other statutorily defined exemptions. Employees who meet these criteria are considered exempt from the overtime requirements of the FLSA.

On March 13, 2014, President Barack Obama directed the DOL to "modernize and streamline" the FLSA overtime regulations. On June 30, 2015, the DOL announced proposed changes to the section 541 FLSA regulations governing overtime determination and coverage.

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[1] 29 U.S.C. 203(s)(1)(A)

Under the proposal, the salary threshold would be set equal to the 40th percentile of earnings for full-time salaried employees—this is estimated to be $970 per week in 2016. The proposal also raises the highly compensated salary to the 90th percentile of earnings for full-time salaried employees, or $122,148 annually. For the first time, the DOL is proposing to include a mechanism to automatically update the salary threshold on an annual basis. The DOL is seeking input on whether to use a fixed percentage of wages, such as the 40th percentile of earnings, or to base the annual increase to the salary threshold on the Consumer Price Index for All Urban Consumers (CPI-U), which calculates inflation by measuring the average change over time in the prices paid by urban consumers. The DOL is also seeking comment on a proposed formula to include nondiscretionary bonuses to satisfy a portion of the standard salary requirement.

In its proposed regulations, the DOL did not suggest specific modifications to the section 541 FLSA duties test. The proposal does, however, raise a series of questions focused on what, if any, changes should be made to the duties test, including specific questions on minimum requirements for primary duties, whether California's 50 percent rule should be adopted nationwide, and whether concurrent duty rules or elimination of the long/short duties test should be reconsidered. The DOL also seeks input on what types of examples to provide in the final regulation to illustrate how the exemptions may apply to specific jobs.

The proposed rule was published in the *Federal Register* on July 6, and comments are due to the DOL by September 4, 2015. SHRM is requesting additional time in order to gather member input and provide comprehensive comments on the proposal. In the meantime, SHRM is making sure its members are well-briefed about the potential implications of the rule and on how they can best participate in the regulatory process in the coming months.

As an indication of the significance of this issue, SHRM recently held the most widely attended webinar in SHRM history with over 11,000 members registering to learn about the impact of the proposed rule on their organizations. In response to record-high involvement, SHRM has created a special section in its HR Policy Action Center dedicated to content and advocacy efforts surrounding changes to the overtime regulations.

In addition, SHRM chairs the Partnership to Protect Workplace Opportunity (PPWO), consisting of a diverse group of associations, businesses and other stakeholders representing employers with millions of employees across the country in almost every industry. The Partnership is the industry coalition that will be responding to the proposed overtime regulations. The Partnership's members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees and clarity for employers when classifying employees.

Overtime Regulations' Impact on Nonprofit Sector

Most nonprofit enterprises and their employees are covered under the FLSA because coverage under the law may be triggered either by individual coverage or enterprise coverage. According to a 2004 DOL opinion letter, there is no exclusion in the FLSA for private nonprofit organizations. Employees of nonprofit organizations are individually covered under the FLSA if, in the performance of their duties, they are engaged in interstate commerce or in the production of goods or materials for interstate commerce. In determining whether employees are engaged in interstate commerce for purposes of the FLSA, "the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567 (1943). In other words, if nonprofit employees are involved in fundraising, taking credit card numbers, receiving

out-of-state checks or making telephone calls, they could be deemed as utilizing the channels of interstate commerce.

As a nonprofit organization, it is not uncommon for most of MHY's exempt employees, as executives, managers and professionals, to work more than a 40-hour workweek. Due to the nature of our programming and operations, it is common for the majority of these individuals to work 10- and 12-hour days, at times, in response to clients in crisis. This is not unique to MHY but is the reality for many nonprofit organizations across the country. Many nonprofit employees are highly experienced, possess bachelor's and master's degrees, and hold professional certifications aligned with their respective fields. In terms of the proposal's impact on MHY Family Services, consider the following:

Impact of Proposed Salary Threshold: As a result of this proposed rule, I estimate that 48 out of 64 exempt employees who directly or in a supervisory capacity support client care will be affected by the new salary threshold of $50,440. The employees in question at MHY work as operations specialists, senior therapists, front-line supervisors, program managers and assistant directors. These employees work varied schedules to provide client services (including admissions) and programming, individual and family therapy, supervisory oversight, and crisis support to direct-care employees. Based on their job duties, these employees clearly meet the duties test standard under the current FLSA overtime regulations.

MHY Family Services works hard to reward these employees with the flexibility to work a lighter schedule some days to make up for the long hours that are sometimes needed when providing therapeutic services to our clients. As is the case at many organizations, nonprofits often have a fairly flat organizational structure. As a result, exempt employees in nonprofit organizations often engage in work activities along with nonexempt employees. This happens at MHY, for example, so that we can meet the needs of our youth.

Raising the exempt salary threshold under the new FLSA regulations to $50,440 literally presents the risk of MHY closing its doors. Given our nonprofit status and tight costs, we are unable to provide pay increases and hire additional employees. I estimate that these changes could result in additional costs of $797,371.38 a year—more than three-quarters of a million dollars of additional unfunded costs on an $8.7 million budget. This assigns to MHY a 9.1 percent unfunded increase to our current budget.

Given our reliance on federal, state and local funding, MHY's service programs are not expected to receive any significant increases at this time. Unfortunately, the youth that we serve present increasingly chronic and complex mental health and trauma issues, while demands on MHY and programming expectations from stakeholders have increased exponentially. We are forced to do more with less.

Impact on Populations We Serve: At MHY, we prioritize a continuity of care model that ensures that the at-risk youth population receives services and care from the same therapists and supervisors. Consistent with best practices, developing a relationship between the youth and practitioners maximizes the opportunity for healing and effective treatment.

Therapeutic services are driven by the relationships that professionals have with the youth and families to which they are assigned. Months and sometimes years go into building that trust and bond, and this can't be replicated by swapping in another professional to avoid exceeding 40 hours on the part of the primary professional. Such measures are contrary to generally accepted effective practices in therapy and also to the expectations of our stakeholders (families, counties, insurers). Under this overtime proposal, continuity of care would be undermined by limiting the ability of therapists to effectively respond to clients' clinical needs, as well as their school and work schedules.

Furthermore, currently many exempt employees are available during non-traditional hours and overnight on a regular basis to provide crisis services or supervisory response to crisis as needed. In our residential setting, managers commonly work longer hours and shift their schedules to ensure their presence during anticipated difficult admissions and discharges or, again, if client behaviors are elevated and unsafe, in order to provide direction and support to staff members. They maintain on-call rotations during which they provide remote supervisory direction and problem solving, in separate specialized units that differ based on their clients and programming. Limiting managers' availability to their units risks jeopardizing client care and staff safety and violates state regulation. If the overtime regulations were to be implemented as proposed, MHY would likely have to decrease services because, as noted earlier, we would not be able to afford the additional overtime pay. In addition, MHY would be forced to reduce our client base and unfortunately underserve our county and family stakeholders.

Impact on Employees: If the proposed overtime rules become final, nonprofit organizations like MHY will also be forced to make difficult decisions to potentially reduce employee benefits. Pay in nonprofits, including at MHY, trends lower than in the for-profit sector. To offset the costs and to attract and retain talent, MHY tries to maintain an attractive benefits structure. Diminishing or eliminating benefits, and thereby diminishing total compensation, would only add to the significant challenges of recruitment and retention already faced by this industry. Turnover only places greater demands on managers, who spend additional time coordinating staffing, delivery of services and crisis support, resulting in longer workweeks.

As is the case for many employers, a majority of MHY employees mention the importance of workplace flexibility when deciding whether or not to take a new job with us. Changes to the overtime regulations will likely require employers to reclassify a significant number of salaried employees to hourly employees. Hourly employees are paid only for the hours they work and often are forced to closely track their hours to ensure compliance with federal and state overtime requirements, which can lead to less flexibility.

At MHY, our Residential Program Managers are provided with workplace flexibility options. For example, a manager who may work a long shift or report to campus due to a client crisis can then use flextime to attend a child's soccer game or go to a doctor's appointment. Our exempt workforce has the ability to leave early on calmer workdays or take a Friday off to offset long work hours on other days. Offering these flexibility options to our employees is an additional benefit that would be lost if we are forced to reclassify our current exempt workforce to hourly status.

SHRM's Initial Analysis of the Overtime Regulations

While SHRM continues to carefully review the proposed rule to determine its full impact, the Society has the following initial concerns:

First, SHRM appreciates the Administration's interest in modernizing the FLSA overtime regulations and updating the salary threshold. SHRM agrees that an appropriate salary threshold increase is warranted. However, more than doubling the salary threshold to the 40th percentile of weekly earnings (an estimated $50,440/year in 2016) presents challenges for employers whose salaries tend to be lower. This includes employers in certain industries; nonprofits such as MHY Family Services; and employers in certain geographic areas of the country.

DOL claims a significant increase to the salary threshold is needed in exchange for not reinstating the more detailed long duties test.

SHRM agrees that the DOL should not reinstate the outdated, more detailed long duties test which would lead to further complications for employers and employees. However, the DOL's dramatic increase to the 40th percentile sharply contrasts with previous increases to the salary threshold. In 1958, 1963 and 1970, the DOL set the salary threshold to exclude approximately the lowest paid 10 percent of exempt salaried employees in low-wage regions, taking into account employment size groups, city size and industry sectors. In 2004, the DOL set the required salary threshold at approximately the 20th percentile of salaried employees in the south region and in the retail industry.

This regulatory history reflects both Democratic and Republican administrations increasing the salary level between 10 and 20 percent of affected employees while taking into consideration regional and industry differences. SHRM is concerned that the recent proposed increase to the 40th percentile sharply contrasts with historical updates to the salary threshold that represented more reasonable increases that acknowledged pay differences across sectors and in certain areas with lower costs of living.

Second, SHRM notes that, for the first time, the DOL is proposing to include a mechanism to automatically update the salary threshold on an annual basis. As noted earlier, the DOL is seeking input on whether to use a fixed percentage of wages, such as the 40th percentile of earnings, or to base the annual increase to the salary threshold on the CPI-U, a measure that calculates inflation by measuring the average change over time in the prices paid by urban consumers. A robust analysis will be needed to understand the potential for salary compression (when the pay of one or more employees is extremely close to the pay of more-experienced employees in the same job or when employees in lower-level jobs are paid nearly the same as employees in higher-level jobs) and how the proposal would impact employers' compensation decisions around merit increases.

As with any employment policy, one size does not fit all. Average salary increases look very different across industries, sectors and regions. The proposed indexing model would likely present administrative challenges to employers who would need to update exemptions yearly, leading to increased legal and compliance costs. Furthermore, the automatic wage adjustments will have numerous ripple effects for HR policies, likely impacting workers' compensation, payroll taxes and employee benefits.

Third, SHRM is concerned that the DOL may still make changes to the duties test that would further exacerbate an already complicated set of regulations for employers, particularly employers in industries where managers often conduct exempt and nonexempt work concurrently. Further changes to the primary duty test, including a required quantification of exempt time or the elimination of managers' ability to perform both exempt and nonexempt work concurrently, would create challenges for employers and employees.

Today's modern workplace often means a flatter organizational structure, with fewer staff in support roles and many employees performing a combination of exempt and nonexempt work. Nonprofits, in particular, often employ a workforce that must pitch in and work at the front desk, answer client phone calls and check in on clients. If overtime regulations eliminate the ability of an employee to perform concurrent duties and maintain their exempt status, many organizations would need to be restructured in ways that diminish the services being provided. The DOL's questions about the duties test in the proposed rule suggests a potential interest in changes. But, by not proposing specific changes to the duties test the DOL places employers and employees in a very uncertain waiting period. Should the DOL ultimately suggest changes to the duties test, SHRM believes a full comment period would be warranted.

Fourth, SHRM cautions that the proposed changes to expand overtime *eligibility* will not necessarily result in a windfall of overtime income for newly classified nonexempt employees. Employers across all sectors monitor labor costs closely and will likely cap or eliminate access to overtime work or will adjust salaries to make sure that an employee's total wages remain the same even if that employee's overtime hours increase.

If the overtime changes are implemented as proposed, some employers may hire more part-time workers who usually enjoy fewer workplace benefits. Furthermore, some employers will look to identify ways to reduce labor costs, such as automating service-sector jobs. From store kiosks to online and mobile ordering, it's hard to ignore the impact of technology on service-sector jobs. Many well-known restaurants and retailers are starting to replace cashiers and service staff with electronic devices such as iPads to expedite the ordering process for customers. Automation of entry-level jobs is likely to increase as federal and state laws and regulations make it more expensive to conduct business.

Finally, SHRM believes the proposed changes to the overtime regulations will limit workplace flexibility. If the salary threshold is doubled, many employees will lose their exempt status and the workplace flexibility it affords. Employers will need to closely monitor hours to avoid potential lawsuits and carefully track employee time. Greater workplace flexibility allows employees to meet work/life needs and benefits the employer through greater employee retention and engagement.

Conclusion

In conclusion, Mr. Chairman, MHY, other nonprofits, and employers across the country are concerned with these proposed changes to the overtime rules. As I noted earlier, more than doubling the salary threshold will significantly impact my organization, our employees, and the youth and families we serve.

It is important to note that when the overtime regulations were last updated in 2004, many SHRM members reported reclassifying exempt employees to nonexempt status, resulting in lower employee morale, a sense of loss of "workplace status," and increased distrust between employers and employees. SHRM and its members are concerned that the recent proposed changes to the overtime rules will have the same result.

While SHRM appreciates the need to update the salary threshold over time, challenges arise if the increase is too high, is implemented too quickly, or fails to consider geographic and industry differences. SHRM would also caution against making any changes to the primary duty test that would include a quantification of exempt time or eliminate the ability to engage in exempt and nonexempt work concurrently.

SHRM and its members, who are located in every congressional district, are committed to working with policymakers to ensure that any proposed changes to the FLSA regulations work for both employers and employees.

Thank you, I welcome your questions.

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PSATS

PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS

September 4, 2015

Mary Zeigler
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: Regulatory Information Number (RIN) 1235-AA11 – Comments on the United States Department of Labor's July 6, 2015 Notice of Proposed Rulemaking to Revise Fair Labor Standards Act Regulations

Dear Ms. Zeigler:

The Pennsylvania State Association of Township Supervisors ("PSATS") respectfully submits these comments on the Notice of Proposed Rulemaking ("Notice") issued by the United States Department of Labor ("DOL") and published in the Federal Register on July 6, 2015. DOL seeks to amend the Fair Labor Standards Act ("FLSA") regulations governing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees (referred to herein as the "white collar" exemption) by increasing the minimum salary level that employees must meet in order to be subject to that exemption.

PSATS is a non-profit association that represents the interests of municipal officials from over 1,400 townships of the second class in the Commonwealth of Pennsylvania for almost 100 years. Townships of the second class represent approximately 95% of the land mass of the Commonwealth of Pennsylvania and are home to more than 5.5 million Pennsylvanians. These townships are very diverse, ranging from rural communities with fewer than 200 residents to suburban communities with populations in excess of 60,000 residents. Townships of the second class employ thousands of Pennsylvanians. PSATS estimates that substantially all of its membership will be affected in some way by the proposed changes to the FLSA regulations.

PSATS objects to the proposed changes because they would significantly and negatively impact virtually all of PSATS's members and, by extension, the residents and taxpayers they serve, who would be forced to pay higher taxes or obtain or otherwise have access to fewer vital services.

4855 Woodland Drive ▮ Enola, PA 17025-1291 ▮ Internet: www.psats.org
PSATS ▮ Pennsylvania Township News ▮ Telephone: (717) 763-0930 ▮ Fax: (717) 763-9732
Trustees Insurance Fund ▮ Unemployment Compensation Group Trust ▮ Telephone: (800) 382-1268 ▮ Fax: (717) 730-0209

I. The Proposed Changes to the "Salary Level" Test would Adversely Affect All Municipal Government Employers, Particularly Those that are Located in More Rural Areas and have Fewer Employees.

DOL proposes to increase the minimum weekly salary level for the "white collar" exemption from $455 to the 40th percentile of earnings for full-time salaried workers nationwide, based on Bureau of Labor Statistics ("BLS") data. DOL currently projects that the earnings level for the first quarter of 2016 will be $50,440, which translates to $970/week. Therefore, if the regulations proposed in the Notice are implemented, the minimum weekly salary level will increase by almost 115%, a staggering jump.

DOL posits in the Notice that the proposed adjustment in the minimum salary level simplifies the administration of the "white collar" exemption and "establishes an appropriate dividing line between overtime-eligible workers and those who are not." But while the proposed salary level adjustment may be easier for DOL to administer, as illustrated by the examples set forth below, the adjustment will greatly harm municipal employers because every municipal employee making less than $50,440 will become eligible for overtime pay. This will cause incredible strain on municipal budgets and taxpayers.

In 2014, PSATS conducted a wage and benefits survey of over 1,000 Pennsylvania townships. Those townships provided wage and benefits data regarding 42 different full-time employee positions, many of which would be classified as exempt under the FLSA. Those positions include that of township manager, generally responsible for managing the day-to-day operations of the township, and finance director, generally responsible for managing the financial affairs of the township. In all, PSATS collected wage and benefits information for eleven different "management/professional" level positions. For every one of those eleven positions, the lowest full-time salary reported was below DOL's proposed new salary floor for exempt employees. In some cases, the reported salary levels were more than $10,000-$15,000 below DOL's proposed threshold. Moreover, for 28 of the remaining 31 positions, the reported average and median salaries were below the threshold. This illustrates the widespread impact that this salary level change would have across PSATS's entire membership.

The proposed increase in the minimum salary level will also disproportionately impact municipal employers in more rural areas with smaller populations, which happens to be a significant portion of PSATS's membership. For example, according to respondents to PSATS's 2014 survey, in townships with populations ranging from 1,001 to 2000 and 2,001 to 4,000, the median salary for township managers was $50,000 and $49,627, respectively, while the lowest salary in each was $38,000 and $31,907, respectively. Yet, in townships with populations over 8,000, the median salary range for township managers was $93,743 and the lowest was $56,243.

A substantially similar disparity exists between the salary levels of municipal employees across the various geographic regions within Pennsylvania. As DOL is aware, the Philadelphia and Pittsburgh metropolitan areas are subject to a higher cost of living than elsewhere in the state. That difference is borne out in the salary levels of municipal employees. For example, according to respondents to PSATS's survey, the median salary for parks and recreation directors, who perform the vital role of managing all aspects of municipal recreation facilities,

including swimming pools, parks, and playgrounds, in south-central Pennsylvania is $48,760. Meanwhile, the median salary for individuals performing the same role in the southeastern part of Pennsylvania is $68,015.

These examples illustrate the harm that an increase of over 100% in the minimum salary level for exempt workers will impose upon all municipal employers.

II. The Proposed Regulations will Require Municipal Employers to Raise Taxes or Reduce Employees and Services.

DOL correctly acknowledged that the proposed changes to the FLSA regulations will come at a cost to employers because the changes would "transfer income from employers to employees in the form of higher earnings." But that acknowledgment ignores the critical fact that because municipal governments do not sell goods and services, they do not have "earnings" that can be transferred to their employees. Instead, municipal governments operate within a finite universe of financial resources, which are obtained almost exclusively through taxes and financial assistance from state and federal governments and then budgeted to ensure the adequate and appropriate provision of necessary services. Thus, if forced to adapt to comply with the new regulations, municipal governing bodies will have to choose between the following options, none of which are beneficial to the municipal governments, their taxpayers and residents, or the economy as a whole.

First, if municipal employers wish to keep their current complement of employees in order to provide the level of services that their residents and taxpayers expect, they will need to increase taxes to account for the increased salary levels of their exempt employees. It is worthy to note that, at least in Pennsylvania, municipal governments have statutory limits on the types and amounts of taxes that may be implemented. In other words, even if municipal governing bodies wanted to raise taxes to account for their increased payroll costs, they might not be able to do so.

Second, if municipal employers do not wish to raise taxes or otherwise do not have the capacity to do so, they would need to reduce the level of services that they provide to their residents and taxpayers. That could mean foregoing infrastructure repairs, laying off employees who perform critical roles for the municipality, closing down parks and recreation facilities, or reducing the complement of officers on the police force.

Third, municipal employers could be forced to reduce the salaries and hourly wages of other employees (both higher and lower paid) to ensure their compliance with the FLSA's new requirements and their budgetary needs. They could also limit the amount of overtime work available to those employees who want it.

None of these are good options. There are a litany of other negative impacts that these proposed regulations could have on municipal governments and the residents and taxpayers that they serve. DOL should take into account those impacts before imposing requirements that will apply across the board to all employers, regardless of their unique status or geographic location.

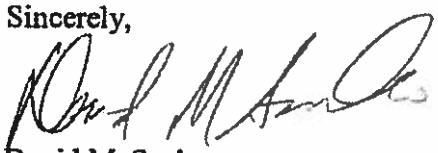
PSATS recognizes that some upward adjustment in the minimum salary level may be appropriate, particularly to address the impacts of historic inflation. But DOL's proposed changes do not adequately take into account the varying cost of living levels and the fact that municipal employers, particularly in less urbanized settings, will most likely not be able to sustain themselves if forced to adjust their salary levels to comply with DOL's proposed regulations. Moreover, when one takes into consideration the challenges that municipal governments would face because they are dependent on revenues from taxes and fees, the issues are compounded.

Therefore, DOL should not implement the regulations that are proposed in the Notice. However, if DOL does move forward with the regulations, it should (1) exempt municipal governments, thereby taking into account their inability to transfer "earnings" from the employer to its employees, as for-profit employers may more easily be able to do; or (2) revise its proposed regulations to account for regionalized costs of living, which, as evidenced by the examples above, would alleviate at least some of the devastating financial impact that implementation of these proposed regulations will have on PSATS's members.

Finally, PSATS notes that DOL referenced in the Notice that it is considering whether revisions to the FLSA's "duties test" are necessary and that it is inviting comments on the issue. Because of the lack of detail regarding this issue in the Notice, PSATS opposes any changes to that test until after DOL has issued a separate Notice of Proposed Rulemaking that more fully addresses the issue.

Thank you for your consideration of these comments.

Sincerely,



David M. Sanko
Executive Director