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UNITED STATES OF AMERICA

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The Honorable Thomas Perez
Secretary
United States Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Secretary Perez:

We, and the Chamber members who were able to participate, appreciated the opportunity to meet with you and discuss the possible revisions to the FLSA overtime pay regulations as well as the Wage and Hour Division's enforcement and compliance efforts. With apologies for the delay, we wish to follow-up on several of these issues raised during the "listening session" meeting with Chamber members.

The U.S. Chamber of Commerce is the world's largest business organization representing the interests of more than 3 million businesses of all sizes, sectors, and regions. Our members range from mom-and-pop shops and local chambers to leading industry associations and large corporations. Weighing heavily on the minds of our members are the pending revisions to the Department of Labor's "white collar" overtime exemption regulations at 29 C.F.R. Part 541.

While we recognize DOL has statutory authority to define and delimit the Section 13(a)(1) exemptions through regulation,[1] undertaking any regulatory change should be done prudently and only after careful consideration of any potential benefits justifying the likely costs. The premise of rampant non-compliance by employers, while convenient rhetoric, is patently false. Our members – and the vast majority of employers – go to great lengths to comply with the law.

There is no dispute that prior to the 2004 white collar regulations employers (including the DOL itself) struggled to interpret the regulations and arrive at a correct determination.[2] The 2004 regulations sought to bring greater clarity to the regulations. Changing these regulations once again, just as the dust is settling, and in the ways that are apparently being contemplated will not bring greater clarity, but will, instead, unsettle years of case law and serve only to further enrich plaintiffs' class action lawyers.

[1] DOL's regulatory authority as to computer employees was limited by Congress' enactment of Section 13(a)(17) of the Act. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees ("Preamble"), Federal Register, Vol. 69, No. 79, 22158-9 (April 23, 2004).
[2] "[W]orkplace changes over the decades and federal case law developments are not reflected in the current regulations … The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption." Preamble at 22122.

The following points highlight the concerns of Chamber members and provide suggestions on how the Department can move forward with changes to these regulations with the least amount of disruption, and minimize the complications. In addition, we endorse the letter sent to you by the HR Policy Association on August 20, 2014. We believe this letter does an excellent job of explaining the current FLSA landscape and suggesting constructive changes the Department could pursue to improve compliance with the law, and ultimately, employees being compensated appropriately.

I. ASSESSING THE COSTS AND BENEFITS OF REGULATORY ALTERNATIVES

Given the profound effect the contemplated changes will have, we urge the Department to adhere closely to the guidance and instructions for developing regulations contained in Executive Orders 12866 and 13563 issued by Presidents Clinton and Obama, respectively:

- "assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating;"[3]
- propose a regulation "only upon a reasoned determination that its benefits justify its costs;"[4]
- "tailor its regulations to impose the least burden on society;"[5]
- "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits;"[6] and
- "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[7]

We also expect that any proposed regulation will be sent to the Office of Information and Regulatory Affairs (OIRA) for review as specified by E.O. 12866. Such a regulation would likely qualify as a "significant regulatory action" as that term is used in the Executive Order based on its economic impact and possible effect on competition and jobs.[8]

As the executive orders instruct, the Department should identify a range of distinct regulatory alternatives, including the alternative of leaving the current set of regulations in place. Regardless of the alternatives, the Department must avoid relying on mere, anecdotal reporting to justify changes and instead establish an accurate and complete picture of the current regulation baseline which includes: the numbers of employees classified as exempt or non-exempt under existing rules in each affected industry and occupation; weekly hours worked by employees in each classification category including hours worked that would qualify for overtime compensation under the various alternatives, wage rates; and annual earnings.

[3] Executive Order 12866, Section 1(a).
[4] Executive Order 13563, Section 1(b).
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid*., Section 1(c).
[8] E.O. 12866, Section 3(f).

Currently available, routinely collected data sources, such as the Current Population Survey and the BLS Current Employment Statistics program do not provide adequate information regarding the actual FLSA overtime classification practices of employers, actual duties of employees within broad occupational titles, or hours and earnings information (particularly on a regionalized and local basis). Instead, to fulfill the Executive Order directions to "use the best available techniques to quantify benefits and costs", the Department should utilize scientific statistical sampling, employer surveys, controlled experiments, empirical interview techniques, and relevant administrative records to establish an accurate baseline from which to measure current classifications, hours, and earnings practices from which it can estimate the likely impacts of various alternative proposals. All efforts should be made to utilize the best and most accurate data, not just the anecdotal examples that create the best sound bite.

The Part 541 regulations were significantly updated just over 10 years ago. Thus, the cost of the uncertainty created by any drastic changes to human resources policies which are still stabilizing from the implementation of the current regulations must be considered. Settlements of FLSA lawsuits should not be used to support findings of misclassification or justify revisions to the existing regulations. In fact, an increase in litigation – and particularly in settlements – may be considered an element of the expected economic impact of regulatory change. Additional economic costs are endured by the entire labor market as both employers and employees learn new rules, analyze existing compensation practices, measure time spent in different types of work activities, restructure work places and compensation practices, adjust budgets, undergo additional training, experience temporary slowing of hiring processes and work flows, and are subject to increased recordkeeping requirements.

Given these significant and complex considerations, we ask that before undertaking a new rulemaking the Department first examine the experience and costs associated with the prior changes to develop a more accurate estimate of the likely costs, detriments and benefits of any proposed new changes to the regulations. While the President has directed DOL to issue proposed regulations, the potential scope and impact of those regulations are entirely left to the discretion of the Department.[9] We are convinced that after an objective and thorough review of the burdens and complications associated with radical changes to the Section 541 regulations, the Department will favor a modest and limited approach to these regulations.

II. REVISING THE PART 541 OVERTIME EXEMPTION REGULATIONS

As an initial matter, the Chamber requests that the Department allow the public no less than 120 days to file comments to any Notice of Proposed Rulemaking. Any proposed changes to the Part 541 regulations will impact a vast cross section of employers. The Department will be best served by public comments that examine obvious and not obvious consequences of the proposed changes thoroughly. Employers will need to provide facts and data on current business practices, compensation practices and how both employees and employers will be impacted.

[9] The Presidential Memorandum to the Secretary of Labor of March 13, 2014 merely directs him to "propose revisions to modernize and streamline the existing regulations," and to "consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply."

Business groups like the Chamber will need to work with their memberships to develop this information. A comprehensive and vigorous public comment process cannot be accomplished in less than 120 days.

If a final regulation is issued, the Chamber also requests that the Department provide–at a minimum–an implementation period of at least one year. This is less than was provided for the final companionship exemption rule, which impacted just a small subset of the employers expected to be touched by any proposed Part 541 revisions.[10] Although more than the four-month effective date for the 2004 Part 541 revisions, employers have reported that implementation in 2004 actually took much longer. Employers will need to evaluate whether each individual employee meets the changed exemption requirements. As DOL well knows, depending on a job title or job description is not sufficient in evaluating exemption status. Rather, employers need to determine actual and specific job duties performed by each currently exempt employee, individually, which requires interviewing employees and their supervisors. Even after that evaluation, months of additional work will be required to transition an employee from exempt to non-exempt, which includes: determining changes to wages (same salary, lower salary, hourly), incentive compensation and benefits; ensuring payroll systems are ready to properly calculate the regular rate; implementing new timekeeping systems and policies for employees who may have never tracked their work time before; training of newly non-exempt employees and their supervisors on what is "work" that they must track; and implementing new systems to replace employees' use of mobile devices that will no longer be allowed due to the inability to track work activities out of the workplace.

Moreover, we request that following the implementation period, the Department institute a time-limited non-enforcement policy while undertaking a substantial and substantive compliance assistance program focused on teaching *employers* – both on the new legal requirements for exemption and how those requirements apply to real jobs in the real world. Such a compliance assistance program must include the Wage and Hour Division restoring the Opinion Letter process to respond to requests from employers regarding whether particular jobs and tasks continue to meet the tests for exemption under the revised regulations.

Finally, we request proposing a safe harbor mechanism, to provide relief to ethical employers who unwittingly commit a wage or hour violation under a good-faith belief that they were complying with the law.

A. *Salary Level*

In determining the appropriate salary level, the DOL should be mindful that the purpose of the salary level test is to simplify "enforcement by providing a ready method of screening out the *obviously* nonexempt employees", the addition of which "furnishes a completely objective and precise measure which is not subject to differences of opinion or variations in judgment."[11]

[10] The Department suspended enforcement until July 1, 2015 and indicated that it would exercise prosecutorial discretion for an additional six months after that. In the interim the regulation has been vacated by the U.S. District Court for the District of Columbia in *Home Care Association of America v. Weil* which the Department has indicated it is appealing.

[11] *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("1949 Weiss Report") at 8-9.

Salary requirements also furnish[] a practical guide to the inspector as well as to employers and employees in borderline cases."[12]

Therefore, a salary level sufficient to screen out the "obviously" non-exempt employees must not be set at a bar so high as to exclude employees who comfortably meet the duties test for an exemption. Instead, "[r]egulations of general applicability such as these must be drawn in general terms to apply to many thousands of different situations throughout the country."[13] However, it has long been recognized that "such a dividing line cannot be drawn with great precision but can at best be only approximate."[14]

The Department should, therefore, consider the impact of any increase the salary level will have in low-cost living areas such as the South and Mid-West, as well as rural areas. Moreover, DOL should not depart from the long established precedent of exemptions for certain positions. Retail managers and those in the service sector have long been regarded as exempt employees as evidenced by the fact that there was even a higher tolerance for non-exempt work for managers in the retail sector. Profit margins, salary levels, and staffing patterns vary widely across industries and different parts of the country. DOL needs to study these variations carefully. To accomplish this, the Department should study the best available salary data–by using scientific statistical samplings, employer surveys, and relevant administrative records to establish the accurate baseline for current classification and earnings practices. This analysis should consider industry, job, geographical location, and rural versus urban areas. Upon completion, the salary level should then be set *below* the average salary dividing line between those obviously non-exempt and obviously exempt positions. This is the methodology used by the Department when setting the salary-basis level in 1940, 1949, 1958, 1963 and 2004.

Finally, the Department should not adopt automatic increases to the salary level based on an inflationary index. Metropolitan statistics – which are what inflation measures are tied to – wholly fail to account for differences in the cost of living and salary levels between metropolitan versus rural areas. Neither the minimum wage nor the Part 541 salary level has ever been tied to automatic increases, despite many proposals to do so, and there is no foundation for establishing one now. Nor does the FLSA, itself, provide authority for adopting an inflation index. Indeed, in an analogous context, one feature of the proposals to increase the minimum wage endorsed by the President and many Congressional Democrats is to index the minimum wage to inflation which suggests that even if the Secretary has the authority to "define and delimit" the statutory exemptions, this authority does not go so far as to include indexing the salary threshold to inflation.

B. *Duties Tests*

In discussing possible revisions to the current regulatory scheme, the idea of replacing the Part 541 qualitative "primary duty" test with a quantitative test is a continuing theme. The

[12] *Ibid.*; *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report") at 2-3 (salary levels "furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees").
[13] 1949 Weiss Report at 8-9.
[14] 1949 Weiss Report at 11.

Chamber strongly urges the Department *not to* adopt such a quantitative test. Doing so would not solve any of the perceived problems, but would instead create tremendous burdens upon the regulated community. As we have seen in jurisdictions that have adopted quantitative tests, such measures do not decrease litigation or uncertainty over classifications.[15] In its place, regardless of any effort to regulate around such ambiguities, the central issue will always remain what is – and is not – exempt work. This will incentivize the plaintiffs' bar to systematically attack an employee's classification. Employers will be required to wade through the hour-by-hour – and in some cases – minute-by-minute tasks of their employees, in defending their classification decisions. Such a measure represents the wholesale abandonment of 70 years of case law, setting up potential challenges and further litigation.

Equally troubling are the additional costs that will be borne by every employer as they attempt to time-test employees for time spent in activities. In order to ensure the proper classification, employers would need to put into place systems or other reporting or monitoring measures for all of their employees. These systems would have to track not just hours worked, but the specific quantity of time spent performing exempt versus non-exempt tasks. Additionally, at a minimum, each category of employee and each employee would have to be evaluated separately. Time studies of this kind, which would be necessary to defend against litigation, can easily cost up to $100,000 which would be a significant burden for many employers. Such time testing may require new technology and systems that are not readily available. It also may require periodic retesting, thereby creating a recurring –as opposed to a one-time- cost. Adopting such a measure is imprudent and would prove unduly burdensome and ineffective, and merely create more confusion.

1. ***Executive Exemption***

During our meeting, you expressed concerns with the current "concurrent duties" test and asked our view on possible revisions to the test. We are predisposed to leaving it untouched. However, to the extent you are committed to making changes, we have a few suggestions which, in whole or in part, may address your stated concerns:

1. The current concurrent duties test set forth in 29 C.F.R. § 541.106 can be revised to delineate additional specific managerial duties that the manager, supervisor or assistant manager must also be performing before the rule would apply.

2. The Department could consider reinstituting a version of the pre-2004 "sole-charge" test, which permitted employers to classify one manager (who otherwise meets the duties test for the executive exemption) as exempt during each shift. This test is premised upon the commonsense notion that *someone* must be in charge, and therefore responsible for all management duties, during the entire time a store or business is open regardless of what other duties they may from time to time have to perform. Inclusion of the "sole-charge"

[15] The obvious example is California. We have heard from our members in California that this provision has created uncertainty about what an employer expected an employee to be doing and whether the employee was doing the specific job assigned. What sounds like a straightforward concept quickly becomes impractical when seen in the context of these expectations. Furthermore this provision, as predicted, has become a major source of class action litigation further draining employer resources and undermining the ability of employers to avail themselves of these statutory exemptions with confidence.

test could be used in addition to any other employees at the facility that otherwise meet the executive exemption test.

2. ***Administrative Exemption***

The Chamber appreciates the need for clarity; however we do not believe that regulations are a forum to re-litigate old arguments. We urge the Department not to revisit positions on which hundreds of millions of dollars in litigation costs have already been spent and which are well-settled by the courts. Positions such as pharmaceutical representatives, loan officers, and claims adjusters have been adjudicated. To attempt to overturn court decisions achieved in litigation through regulations would create massive uncertainty and instability, in direct contradiction to what the stated goal of this rulemaking.

3. ***Computer Employee Exemption***

As noted in the 2004 Preamble, the Department's authority to revise the primary duties that must be performed by exempt computer employees is limited by the language of Section 13(a)(17) of the Act. However, the Chamber would welcome the opportunity to work with the Department and Congress to develop a legislative solution to the statutory language that has not kept pace with developments in the computer industry.

III. ENFORCEMENT AND COMPLIANCE

The Chamber recognizes that to have effective regulations, the Department must—at the same time—have effective enforcement and mechanisms to drive compliance. The Chamber believes that the Department can improve its efforts in both arenas.

The Wage and Hour Division's (WHD) approach to FLSA enforcement has become increasingly focused on merely punishing the employer rather than seeking balanced resolutions—regardless of whether the agency is investigating an employer with a long history of violations, or an employer with no prior violations; and regardless of whether there is a clear violation or ambiguity in allegations. In order to achieve and maintain regulatory compliance, WHD must be willing to provide employers with meaningful compliance assistance and to support those employers who evaluate their wage and hour practices and seek to correct any mistakes with DOL supervision of any back wage payments. Instead, WHD's current practice is to offer negligible compliance assistance, refuse to supervise voluntary back wage payments, and to aggressively pursue maximum penalties regardless of the employer's compliance history. This position helps no one, least of all the employees.

Further, utilizing certain investigatory tactics – conducting unannounced investigations, threatening subpoena actions if overbroad documents requests are not responded to within 72 hours, and imposing civil money penalties and liquidated damages in almost every case – have impeded resolution and hindered cooperation. In many cases this has forced employers to contest these actions which only delays employees receiving their compensation. While the WHD should punish bad-faith employers who willfully and/or repeatedly violate the law, not every employer with a wage and hour violation should be handled the same way. Such an approach is counter-productive for good-faith employers who express a willingness to take corrective measures or redress mistakes. Without incentives for voluntary remediation, and

given WHD's limited investigation resources, an all-stick-no-carrot approach cannot effectively accomplish the agency's key mission to ensure our nation's employees are paid in compliance with the FLSA.

To have an effective enforcement program, an agency must have an effective compliance assistance program that provides employers with meaningful assistance regarding the compliance challenges posed by the FLSA in an era of rapidly changing technology. Recently, WHD's compliance assistance efforts appear focused primarily upon assisting employees and their advocacy groups in pursuing litigation against employers rather than helping employers achieve compliance through voluntary means short of litigation.

WHD should develop programs to recognize and reward good faith employers seeking to improve their compliance with the FLSA. We recommend:

- A Voluntary Settlement Program where employers who self-disclose a violation to WHD can agree to pay 100% of back wages, but are not subject to a third-year of willfulness back wages, liquidated damages or civil money penalties, and are issued WH-58 forms to obtain employee waivers;

- Awards for developing and implementing best practice compliance programs.

At the same time, the regulated community would be best served by the WHD reinstituting the 50-year practice of issuing Opinion Letters, providing an analysis of the specific facts present. Other agencies provide this level of guidance to employers and the agency will be fulfilling its mission by continuing the practice. Such efforts provide an invaluable resource to employers in assisting them to comply with the law.

IV. CONCLUSION

The anticipated Department of Labor regulations altering how the statutory exemptions to overtime compensation are applied threaten to upend years of settled law, create tremendous confusion, and have a significantly disruptive effect on millions of workplaces. Such a rulemaking should only be undertaken, if at all, after a thorough examination of the data describing the number of employees and workplaces that would be impacted, and the true nature and breadth of that impact. It should not be undertaken based on isolated or anecdotal examples of violations under the current regulatory regime. Included in the costs that must be accounted for ought to be those associated with the increase in litigation that such new regulations will inevitably create.

As we made clear during our meeting with you, there will also be significant negative impacts on employees who are forced to be reclassified from exempt to non-exempt. The Department must quantify and examine these closely before moving forward with any proposed regulation.

Finally, the WHD's approach to enforcement and compliance assistance must be revised. Any changes in these regulations must be accompanied by comprehensive compliance assistance including restoring the practice of issuing Opinion Letters to help employers understand how these regulations will apply to specific fact patterns. Similarly, the Wage and Hour Division's

approach to enforcement should be reexamined to distinguish those cases with egregious violations from those where the employer has made a good-faith error. Any changes to the Section 541 regulations will undoubtedly generate many of the latter cases.

We appreciate your consideration of these matters and the opportunity we had to meet with you. If we can provide you with any additional information or resources, please do not hesitate to contact me.

Sincerely,

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