



September 4, 2015

VIA E-MAIL

The Honorable Thomas E. Perez
Secretary, Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule

Dear Secretary Perez and Administrator Weil:

The Office of Advocacy of the U.S. Small Business Administration respectfully submits these comments to the Department of Labor (DOL) for this proposed rule, which amends the regulations under the Fair Labor Standards Act (FLSA) governing the “white collar” exemption from overtime pay for executive, administrative and professional employees.¹ The proposed rule implements a 2014 Presidential Memorandum that directed DOL to update and modernize these overtime regulations.² Advocacy held a number of small business listening sessions and roundtables across the country, and this letter will outline small business comments, concerns and recommendations regarding this proposal.

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act

¹ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule*, Department of Labor, Wage and Hour Division, 80 Fed. Reg. 38516 (July 6, 2015).

² Presidential Memorandum, *Updating and Modernizing Overtime Regulations* (March 13, 2014).

(SBREFA), gives small entities a voice in the Federal rulemaking process.³ For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

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

Background

The Fair Labor Standards Act (FLSA) guarantees a minimum wage and overtime pay of time and a half for work over 40 hours a week. While these protections extend to most workers, the FLSA does provide a number of exemptions. In March 2014, President Obama released a Memorandum directing DOL to modernize and streamline the existing overtime regulations, particularly the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees.⁴ This is often referred to as the "EAP" or "white collar exemption." To be considered exempt, employees must meet certain minimum tests related to their primary job duties and be paid on a salary basis at not less than a specified minimum amount or threshold. The salary threshold for this exemption was last changed in 2004.⁵

In this proposed rule, DOL would change the salary threshold for employees who are eligible to receive overtime pay from \$23,660 to \$50,440, making 4.7 million workers newly eligible for overtime pay.⁶ DOL estimates that 211,000 small establishments and an estimated 1.8 million of their workers will be affected by this rule.⁷ DOL is also proposing to include in the regulations a mechanism to automatically update the salary thresholds on an annual basis using either a fixed percentile of wages or the Consumer Price Index for Urban Consumers (CPI-U). DOL does not propose regulatory changes to the "duties" tests, which require employees to perform certain primary duties to qualify for an overtime exemption. However, DOL is seeking feedback on whether these duties tests should be revised.⁸

Advocacy thanks DOL for attending our small business listening sessions and roundtables to obtain feedback from small entities during all stages of this important rulemaking process. After the release of the Presidential Memorandum in 2014, Advocacy held two small business listening sessions with DOL to gain initial feedback on this broad directive. Since the publication of the proposed rule, Advocacy held small business roundtables attended by DOL staff in the District of Columbia, Kentucky and Louisiana. Advocacy has also heard feedback from small entities across the country from our outreach, our Regional Advocates and from small

³ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. §601).

⁴ Presidential Memorandum, *Updating and Modernizing Overtime Regulations* (March 13, 2014).

⁵ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*; 69 Fed. Reg. 22122 (April 23, 2004).

⁶ *Initial Regulatory Flexibility Analysis*, 80 Fed. Reg. at 38605.

⁷ *Id.* at 38604.

⁸ *Id.*

business representatives. Small businesses have told Advocacy that this increase of the salary threshold and the numbers of workers eligible for overtime pay will add significant compliance costs and paperwork burdens on small entities, particularly to businesses in low wage regions and in industries that operate with low profit margins. Small businesses have commented that the high costs of this rule may also lead to unintended negative consequences for their employees that are counter to the goals of this rule. Based on feedback from these roundtables, Advocacy submitted a public comment letter seeking a 90-day extension of the comment period on August 20, 2015.⁹

DOL's IRFA Undercounts the Number of Small Businesses, Underestimates the Costs of the Salary Threshold, and Does Not Examine Less Burdensome Alternatives

Under the RFA, an IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities (based on the North American Industry Classification System (NAICS)); (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.¹⁰

Advocacy believes that DOL's Initial Regulatory Flexibility Analysis does not properly inform the public about the impact of this rule on small entities. Advocacy questions DOL's analysis because it relies on multiple unsupported assumptions regarding the numbers of affected small businesses and workers and by extension the regulatory impact of this proposal. DOL's IRFA analyzes small entities very broadly, not fully considering how the economic impact affects various categories of small entities differently. Specifically, DOL's analysis does not appreciate the difference between many small entities in industry sub-sectors, regions, and revenue sizes. DOL's IRFA does not analyze the impact of this rule on small entities as required by the RFA that are non-profit organizations and governmental entities serving a population of less than 50,000.

Small businesses have told Advocacy that DOL's estimates for human and financial resources costs that result from this rule are extremely underestimated. Due to the problems with the IRFA, DOL cannot fully consider significant and less burdensome regulatory alternatives to the proposed rule that would meet the agency's objectives. Advocacy recommends that DOL publish a Supplemental IRFA providing additional analysis on the economic impact of this rule on small entities and consider recommended small business alternatives.

⁹ Comment letter from the Office of Advocacy to the U.S. Department of Labor (August 21, 2015), available at: <https://www.sba.gov/advocacy/82115-defining-and-delimiting-exemptions-executive-administrative-professional-outside>.

¹⁰ 5 U.S.C. § 603.

A. DOL's IRFA Does Not Adequately Analyze the Numbers of Small Businesses Affected by Rule

- (1) Key assumptions unnecessarily obscure the numbers of affected small businesses in industry subsectors and revenue size categories.

DOL's IRFA applies multiple assumptions to the Census' Survey of U.S. Businesses (SUSB) data to determine the number of affected businesses and workers and by extension the regulatory impact of the proposal. Advocacy is concerned that DOL made assumptions to create hypothetical data points that were otherwise easily available in the SUSB data. For example, DOL chooses to analyze all industries by general 2- or 3- digit North American Industry Classification System (NAICS) industry codes when more specific data are readily available. This can be important because substantially different types of companies can be classified under the same general NAICS code (e.g., plumbing companies and civil engineering companies are both under the same 2-digit NAICS code).

Consequently, DOL may be obscuring the impact of this rule on an industry-subsector basis by only looking at small businesses in the aggregate in terms of very general industry definitions. This broad view of small business makes it difficult to determine which subsectors may face a more significant regulatory burden. Furthermore, in its economic analysis DOL asserts data points around the number of establishments belonging to an industry as well as the number of employees on a per-establishment-basis when it could find direct estimates of that information by firm-size and industry-subsector in the SUSB data. Advocacy recommends that DOL utilize these data points over general assertions to improve the transparency and accuracy of its economic analysis.

- (2) DOL's IRFA Should Analyze Small Business Data to Reflect Regional Differences in the Regulatory Impact of the Proposal

DOL's proposal states that the current salary threshold is outdated, and proposes to base it on a national salary threshold of the 40th percentile of earnings for full-time salaried workers (estimated to be \$50,440 or \$970/week). According to DOL, this threshold should be representative of the wage for generally exempt employees. Small businesses at Advocacy's roundtables expressed concern that this salary threshold was too high to be representative of employees because DOL did not fully appreciate regional differences in wages. More specifically, DOL seemed to not fully consider the difference in purchasing power of its proposed threshold in higher- and lower-wage states and regions. In contrast, DOL's 2004 final rule adjusted this salary slightly lower than indicated by the national data because of the impact on lower wage industries such as the retail industry and in lower wages regions in the South.¹¹ For example, a study by the National Retail Federation and Oxford Economics utilized data from the Current Population Survey (CPS) to explore differences between states in the 40th percentile of salary full-time wages.¹² The study found wide differences in what constitutes the 40th

¹¹ *Defining and limiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 69 Fed. Reg. 22122, 22168 (April 23, 2004).

¹² Oxford Economics for the National Retail Federation, *State Differences in Overtime Thresholds*, Addendum to *Rethinking Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries* (August 31, 2015),

percentile in the three states that Advocacy held roundtables: Kentucky (\$882/week), Louisiana (\$784/week), and the District of Columbia (\$1,070/week).

DOL could have also analyzed this state data by other factors, such as the impact on industry sub-sectors. The National Association of Home Builders (NAHB) completed a state-by-state breakdown of the impact of this rule to first-line supervisors in the construction industry (as defined by multiple NAICS codes), and the analysis showed a large variation in the percentage of workers who would be overtime eligible making under \$50,440 depending on the state and the subsector.¹³ It is clear from these examples that this proposal will have vastly different impacts in terms of the number of small entities affected and the extent of their regulatory burden. DOL should analyze these regional and industry subsector differences as well as consider them when constructing regulatory alternatives.

B. DOL’s IRFA Does Not Consider Key Small Entities Affected by the Rule

Advocacy is concerned that DOL did not analyze the numbers of small entities and the economic impact of this rule on small entities required under the RFA including non-profit organizations and small governmental jurisdictions serving a population of less than 50,000.¹⁴ Representatives from these key small entity groups who attended Advocacy’s roundtables sought compliance materials to help them understand whether they were covered by this regulation. These entities expressed concern that their operations would have a difficult time complying with these regulations because they do not have the discretionary resources to pay for these extra costs.

At Advocacy’s New Orleans roundtable, a small non-profit organization operating Head Start programs in southeast Louisiana stated that this proposal would result in \$74,000 in first year costs. Since 80 percent of its operating budget is from federal programs, which cannot be used to pay for management costs like labor, it may have to cut critical community services to reduce labor costs. Community services may also become prohibitively costly for small local jurisdictions with limited budgets.

C. DOL’s IRFA Underestimates Small Business Compliance Costs Due to Changes to the Salary Threshold

Small businesses have told Advocacy that the Department has greatly underestimated the human resource- and financial management costs that will result from this proposal. DOL estimates that on average, an affected small “establishment” is expected to incur \$100 to

available at: <https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%202%20-%20State%20level%20overtime%20threshold%20analysis.pdf>.

¹³ National Association of Home Builders, *State by State Breakdown of First Line Supervisors of Construction Trades Workers Impacted by Changing Overtime Threshold From \$23,660 to \$50,440* (August 2015), available at: <http://www.nahb.org/~media/Sites/NAHB/Research/Priorities/Overtime-Wages-State-by-State-Analysis.ashx?la=en>.

¹⁴ 5 U.S.C. § 601(4) and (5). The RFA defines a “small organization” as any not-for-profit enterprise that is independently owned and operated and not dominant in its field (for example, private hospitals and educational institutions). The RFA defines a “small governmental jurisdiction” as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.

\$600 in direct management costs; a one hour burden for regulatory familiarization (reading and implementing the rule), a one hour burden per each affected worker in adjustment costs and a five minute burden per week scheduling and monitoring each affected worker.¹⁵

Advocacy is concerned that these asserted estimates of management costs may not reflect the actual experiences of small entities. Small businesses have told Advocacy that it will take them many hours and several weeks to understand and implement this rule for their small businesses. Many small businesses spend a disproportionately higher amount of time and money on compliance because they have limited to no human resources personnel, legal counsel or financial advisory or management personnel on staff. Many small businesses may adjust to these increases in time by hiring outside advisors to help them comply with these types of regulations which can cost thousands of dollars. DOL should take this disproportionate regulatory burden into account when considering the cost of this proposal on small entities.

DOL estimates that the average establishment will have \$320 to \$2,700 in additional payroll costs to employees in the first year of the proposed rule, which is an increase of \$6.16 per week per affected worker.¹⁶ Small businesses are concerned that DOL's estimate is neither transparent nor accurate. Small businesses have told Advocacy that their payroll costs will be in the thousands of dollars.

Small businesses have stated that one of their options is to convert salaried employees making under \$50,440 to hourly employees. However, small businesses have stated that under this scenario, employers would either decrease hourly rates by an equal amount or reduce hours to avoid overtime pay. Employers could spend many hours a week scheduling and keeping track of employee work to avoid these extra costs. Employers in this scenario would also be understaffed, and may be required to hire and train new workers, creating extra costs. Under another scenario, small businesses could increase their workers' pay to over the \$50,440 threshold to allow them to remain as salaried employees. These employers could then try to raise prices or reduce costs; some small businesses have stated that they may cut back on management staff or reduce benefits and bonuses. DOL should consider the costs and benefits associated with these changes in behavior when evaluating the impact of this rule on small entities.

Small businesses at Advocacy's roundtables stated that this rule will have a disproportionate impact on certain occupations with low profit margins and wages. For example, multiple small grocery stores who attended our Kentucky roundtable stated their profit margins were under one percent and they could not pass on these extra costs to their customers. An owner of a small restaurant in Louisville calculated that this overtime rule will cost his business \$50,000, or 8 percent of the business' payroll. DOL should consider the differential impacts of this rule on lower wage industries and geographic areas.

D. DOL Does Not Account for Non-Financial Costs to Small Entities

Small employers have told Advocacy that their employees may lose flexibility in their work schedules if they are transferred to an hourly position, and that they may lose their employees

¹⁵ 79 Fed. Reg. at 38605.

¹⁶ 79 Fed. Reg. at 38605.

like millennials who expect a flexible work schedule. Employers have also stated that salaried workers often work flexible schedules by utilizing cell phones and logging onto work at computers from home; these employers could be more likely to stop allowing workers to have this type of work arrangement. Similarly, employers stated that they would try to limit travel for work and development reasons. Many roundtable participants stated that salaried employees not tied to a clock have flexibility in their work schedules, and therefore they can take off a few hours for a child's soccer game or medical appointment. After this rule is adopted, these now hourly workers would have to log in and out and would not be paid for hours "off the clock."

Small businesses at Advocacy's roundtables were also concerned that this rule may lead to lower worker morale and by extension productivity, because many employees may believe that transferring from a salaried position to an hourly position is a demotion in their career advancement. Small businesses have commented that they may not be able to hire as many entry-level management positions, and their senior managers would absorb many of these job responsibilities.

Advocacy is also concerned that DOL does not consider the costs and disruption of this proposal on non-traditional businesses that operate with non-traditional work schedules. For example, a small home builder stated that they complete 10 custom homes a year and must from time to time work long hours due to weather constraints; this rule would result in extra costs and delays in building a home. Advocacy has heard from small businesses such as banks and medical facilities that may have to cut back on their hours of service. A representative from the Outdoors Industry Association stated that this rule is particularly costly for seasonal businesses as they do not have consistent work hours for employees over the work year.

Small businesses at Advocacy's roundtable asked DOL representatives about the application of compensation time, part-time arrangements (for example for professors and college staff) and flexible work arrangements under this regulation. Small businesses are also concerned that the proposed rule does not count worker bonuses or commissions as part of the salary computation. Advocacy heard from many companies such as automobile dealerships, staffing agencies and golf courses whose employees are paid in commission or bonuses; these entities have suggested that these incentives should be added to their base salary under this rule or they may otherwise be reduced or ended, limiting their ability.

E. DOL Does Not Consider Less Burdensome Alternatives that Would Still Accomplish the Agency's Objectives

Under the RFA, the IRFA must contain a description of any significant regulatory alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.¹⁷ DOL's IRFA is deficient because it does not analyze any regulatory alternatives that would minimize the economic impact of this rule for small businesses.

DOL states that it does not provide any differing compliance or reporting requirements for

¹⁷ 5 U.S.C. § 603(c).

small businesses because “it appears to not be necessary given the small annualized cost of the rule, estimated to range from a minimum of \$400 to a maximum of \$3,300.”¹⁸ Based on feedback from small businesses as outlined in this letter, Advocacy believes that DOL’s numbers of small businesses affected and cost estimates are extremely low. Advocacy recommends that DOL reassess the impact of this rule on small businesses in a Supplemental Initial Regulatory Flexibility Analysis. With more accurate information about the numbers of small businesses affected and the economic impacts of this rule to small businesses, DOL can better analyze less burdensome significant regulatory alternatives that would also meet the agency’s objectives.

DOL states that the “FLSA creates a level playing field for businesses by setting a floor below which employers may not pay their employees” and therefore setting differing compliance standards would “undermine this important purpose of the FLSA.”¹⁹ Advocacy believes that small businesses are disproportionately affected by this proposal, and suggests that DOL consider the significant alternatives put forward by small businesses to both better meet its regulatory goals and reduce the burden on small entities.

1. Small businesses recommend that DOL consider a salary threshold for the EAP exemption in the FLSA of the 40th percentile of earnings that is adjusted to reflect regional wages and wages in certain occupations such as the retail sector. This is similar to the methodology that DOL utilized in its 2004 rulemaking when it updated these regulations. Some small businesses have also recommended different salary thresholds by state, depending on the 40th percentile in each state.
2. Small businesses request a longer time to implement this final rule as they believe that it is unrealistic for management to comply with this regulation in four months, which is the implementation date that DOL provided employers after the agency last updated its salary threshold in 2004. Small businesses must understand this rule, evaluate and reclassify their workforce, and plan their budget and raise funding to pay for the compliance costs of this regulation. Advocacy recommends that DOL provide small businesses at least a year or 18 months to comply with this regulation.
3. Small businesses have also recommended a gradual increase in the salary threshold, similar to the implementation schedules given when a minimum wage rule comes into place so it is not such a sudden cost increase.

Recommendations

1. DOL Should Publish a Supplemental IRFA to Reanalyze Small Business Impacts

DOL’s IRFA does not properly analyze the economic impact of this rule on small businesses. The Supplemental IRFA should provide a more accurate estimate of the small entities impacted by this proposal, and should include an analysis of industry sub-sectors, regional differences and revenue sizes. Additionally, this IRFA should analyze the number of small non-profit organizations and small governmental jurisdictions serving a population under 50,000 that are affected by this rule, and the economic impact of this rule on these entities.

¹⁸ 79 Fed. Reg. at 38607.

¹⁹ 79 Fed. Reg. at 38607.

DOL should be more transparent in its compliance cost data and utilize data provided in the comment process to accurately estimate the human resources and financial management costs of this regulation. With this important information regarding the numbers of small businesses affected by this regulation and the economic impact on small entities, DOL can effectively analyze less burdensome significant regulatory alternatives that would minimize the impact on small businesses that would also meet the agency objectives.

2. DOL Is Required to Publish a Small Business Compliance Guide

DOL is required to publish a Small Business Compliance Guide for this regulation. For each rule requiring a final regulatory flexibility analysis, section 212 of SBREFA requires the agency to publish one or more small entity compliance guides.²⁰ Agencies are required to publish the guides with publication of the final rule, post them to websites, distribute them to industry contacts, and report annually to Congress.²¹ Advocacy is available to help DOL in the writing and dissemination of this guide.

3. DOL Should Publish a Separate NPRM for Any Specific Duties Test Revisions

DOL should issue a separate NPRM and IRFA if the agency seeks to adopt any changes to the duties tests, as the agency has not provided adequate notice to small businesses on the proposed revisions or any analysis of the economic impact of these changes in the IRFA to allow for meaningful public comment. DOL preamble states that “it is not making specific proposals to modify the standard duties tests,” which require certain that workers perform primary duties to qualify for an overtime exemption.²² The preamble lists five general questions about the duties tests, mentioning California’s duties test (50 percent primary duty requirement) and the concurrent duties regulations (which allow the performance of both exempt and nonexempt duties concurrently). In its preamble, DOL suggests that adopting this proposed rule would make future revision unnecessary. When Advocacy held a Small Business Listening Session in 2014 after the Presidential Memorandum was released, small businesses cited potential changes to the duties test to be the most costly and problematic aspect of an update to the FLSA EAP exemption. Small businesses are concerned that quantification of exempt managers’ duties will be extremely burdensome for operations because every task must be tracked and classified either an exempt or non-exempt action. Small operations will be disproportionately impacted by a change to the duties test because they have less staff and managers are constantly multi-tasking throughout the day.

4. DOL Should Analyze the Impact of Annual Salary Updates on Small Businesses

DOL is proposing to include in the regulations a mechanism to automatically update the salary and compensation thresholds on an annual basis using either a fixed percentile of wages or the CPI-U. Advocacy recommends that DOL assess the economic impact of these automatic updates on small businesses. According to a forecast by NRF and Oxford Economics, if the overtime threshold were set at \$970/week in 2016 and indexed to CPI-U inflation, the 40th percentile of wages for full-time non-hourly wages would be \$1,013/week

²⁰ Small Business Regulatory Enforcement Fairness Act, Pub. Law 104-121 § 212.

²¹ The Small Business and Work Opportunity Act of 2007 added these additional requirements for agency compliance to SBREFA.

²² 79 Fed. Reg. at 38518.

in 2018 and \$1,081/week in 2021.²³ Small businesses at Advocacy’s roundtable were concerned about this unprecedented requirement, and stated that it would add compliance costs every year to comply with these updates. Many businesses were concerned about missing these updates in the Federal Register and being subject to enforcement actions.

Conclusion

While small businesses support a modest increase in the salary threshold under the “white collar” FLSA exemption, DOL’s proposal more than doubles this salary threshold. Based on small business feedback, Advocacy believes that these changes will add significant compliance costs and paperwork burdens on small entities, particularly businesses in low wage regions and in industries that operate with low profit margins. Small businesses at our roundtables have told Advocacy that the high costs of this rule may also lead to unintended negative consequences for their employees that are counter to the goals of this rule. Advocacy is concerned that the Initial Regulatory Flexibility Analysis (IRFA) contained in the proposed rule does not properly analyze the numbers of small businesses affected by this regulation and underestimates their compliance costs. Advocacy recommends that DOL publish a Supplemental IRFA providing additional analysis on the economic impact of this rule on small entities and consider recommended small business alternatives. DOL must also publish a small entity compliance guide with the publication of the final rule, as required by the Regulatory Flexibility Act (RFA).

Advocacy reiterates its thanks to DOL for participating in five Advocacy listening sessions and roundtables on this regulation. For additional information or assistance please contact me or Janis Reyes at (202) 619-0312 or Janis.Reyes@sba.gov.

Sincerely,



Claudia Rodgers
Acting Chief Counsel for Advocacy



Janis C. Reyes
Assistant Chief Counsel

Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

²³ Oxford Economics for the National Retail Federation, *Updated Impacts of Raising the Overtime Exemption Threshold, Addendum to Rethinking Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries*, Page 5 (July 17, 2015), available at: https://nrf.com/sites/default/files/Documents/retail%20library/Rethinking-Overtime-threshold-update_MEMO.pdf.