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May 20, 2019

Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: **Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule (RIN 1235-AA20)**

Dear Ms. Smith:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to comment on the proposed rulemaking by the Department of Labor (DOL) concerning *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*.

Background

The Fair Labor Standards Act or FLSA generally requires covered employers to pay their employees at least the federal minimum wage (currently $7.25 an hour) for all hours worked, and overtime premium pay of not less than one and one-half times the employee's regular rate of pay for any hours worked over forty in a workweek. However, the FLSA also exempts from both minimum wage and overtime protection "any employee employed in a bona fide executive, administrative, or professional capacity" and expressly delegates to DOL the power to define these terms through regulation. This exemption is frequently referred to as the "white collar" exemption.

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

In 2004, the DOL imposed a salary test of $455 per week (or $23,660 per year) to the "white collar" exemption which excluded from the exemption roughly the bottom 20 percent of salaried employees in both the South (which at the time was the lowest-wage Census Region) and in the retail industry (the "2004 Final Rule"). In 2016, the DOL under the Obama Administration raised the standard salary level test to $913 per week (or $47,476 per year) to reflect increases in actual salaries nationwide since 2004. DOL set the new standard salary level to exclude from the exemption the bottom 40 percent of salaried workers in the lowest-wage Census Region (currently the South). DOL also established a mechanism for automatically updating the salary level every three years to ensure it remained a meaningful test for helping determine an employee's exempt status. The final rule became effective on December 1, 2016 (the "2016 Final Rule").

Litigation challenging the 2016 Final Rule is currently pending before the Fifth Circuit Court of Appeals and in the U.S. District Court for the Eastern District of Texas. By District Court order, DOL is enjoined from implementing and enforcing the 2016 Final Rule and the Fifth Circuit Court of Appeals is holding the appeal in abeyance pending further rulemaking regarding a revised salary threshold. The District Court also invalidated the 2016 Final Rule. Consequently, the DOL is enforcing the regulations in effect on November 30, 2016, including the $455 per week standard salary level, which is the same level set in place during the 2004 Final Rule.

The DOL Proposal

DOL is reconsidering the $913 per week standard salary level set in the 2016 Final Rule in light of the District Court's decisions, the public comments received in response to a July 26, 2017 Request for Information (2017 RFI), and feedback received at public listening sessions around the country. The DOL believes that increasing the standard salary level to $913 per week was inappropriate since it excluded from the exemption 4.2 million employees whose duties would have otherwise qualified them for the exemption. DOL agrees with the rationale of the District Court's decision that invalidated the 2016 Final Rule—which is that the increase in the standard salary level "untethered the salary level test" from its original justification which was to potentially exempt those employees who were unlikely to be bona fide executives, administrators, or professionals because of their compensation level.

To address the District Court's and the DOL's concerns with the 2016 Final Rule and set a more appropriate salary level, the DOL proposes to rescind formally the 2016 Final Rule and simply to update the 2004 standard salary level by applying the same methodology to current data. The 2004 Final Rule set the standard salary level at approximately the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region (then and now the South) and in the retail sector. The proposed rule would do the same. When this method is applied to 2017 data and projected forward to January 2020 (the approximate date the proposed rule is anticipated to be effective), it results in a proposed standard salary level of $679 per week ($35,308 per year).

DOL estimates that in 2020, 1.1 million currently exempt employees who earn at least $455 per week but less than the proposed standard salary level of $679 per week would, without some intervening action by their employers, gain overtime eligibility. To align the regulations better

with modern pay practices, the DOL also proposes to allow employers to count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test, provided such bonuses are paid annually or more frequently. The Department is not proposing any changes to the standard duties test.

ICBA's Comments

ICBA surveyed our leadership bankers about the 2016 Final Rule in response to DOL's 2017 RFI.[2] As we indicated in our letter to DOL, many community bankers were significantly impacted by the 2016 Final Rule and in most cases, went ahead and complied with it despite the preliminary injunction issued by the Texas District Court. Just about all of the banks surveyed thought that the new salary level (i.e., $47,476 per year) for exempt employees was much too high. Of those impacted, most banks said that they had to either reclassify employees from exempt to non-exempt or adjust salaries of exempt employees in order to keep their status. In either case, complying with the 2016 Final Rule became a significant regulatory burden for community banks.

For this reason, ICBA agrees with the DOL's position that the appropriate methodology for determining the salary threshold is the same methodology used by the DOL in 2004. For small businesses like community banks that frequently operate in low wage rural areas, the 2004 methodology would be the most accurate way of distinguishing exempt employees from non-exempt. Furthermore, basing the salary level test on the 20th percentile of the lowest-wage Census Region takes into consideration regional disparities and does not unfairly discriminate against any particular region of the country. ICBA recommended this approach in response to the 2017 RFI.[3] As was mentioned before, when this method is applied to 2017 data, and projected forward, it results in a proposed standard salary level of $35,308 per year.

Furthermore, ICBA believes that all bonus and incentive pay should count towards the salary level test. While DOL's proposal to permit non-discretionary bonuses and incentive payments to satisfy up to 10 percent of the standard salary level on its face makes some sense, we believe that it would be more logical and less complicated if businesses were allowed to include all bonus and incentive pay, whether such pay is discretionary or not. It is often difficult for employers to determine whether compensation is discretionary or non-discretionary. Furthermore, it is not entirely logical for DOL to include some types of compensation in the salary test and not others particularly when such a standard would disproportionately impact certain types of employees over other types of employees.

ICBA also recommends that the DOL not adopt automatic updates for the salary level test. The decision whether to change overtime eligibility standards is best made after assessing circumstances at the time and should be made pursuant to the Administrative Procedure Act's required notice-and-comment rulemaking process. Adopting an automatic updating would mean that the DOL would never take into account the views of employers or employees,

[2] See ICBA's comment letter to the Department of Labor dated September 25, 2017 in response to the 2017 RFI.

[3] Id.

the state of the economy and other factors. It would therefore constitute a poor way to come to a public policy decision that could impact millions of employees. Automatic updating, for example, could occur at exactly the wrong time during an economic cycle. While we have no problem with the DOL updating the salary threshold more frequently than it has been done in the past, we would oppose an automatic system that was not based on current economic conditions and an assessment of the ability of the existing salary threshold to screen out those employees that are clearly non-exempt.

Conclusion

In summary, ICBA fully supports the proposal to use the 2004 methodology for determining salary thresholds but believes that all bonus and incentive pay should count towards the salary level test. We also oppose automatic updating of the salary thresholds. The decision to change overtime eligibility standards should be made after assessing the circumstances at the time. Furthermore, such changes should be made pursuant to the Administrative Procedure Act's required notice-and-comment rulemaking process.

ICBA appreciates the opportunity to comment on DOL's proposal. If you have any questions or would like additional information, please do not hesitate to contact me at (202) 821-4431 or Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel