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September 25, 2017

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

Re: Comment on Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (82 Fed. Reg. 34,616, July 18, 2017), RIN: 1235-AA20

Dear Ms. Smith:

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to respond to the above-described Department of Labor's Request for Information. Specifically, the Request seeks information regarding the impact of the regulations concerning the exemptions from the Fair Labor Standard Act's minimum wage and overtime requirements for certain executive, administrative, professional, outside sales and computer employees.

Background

The Fair Labor Standards Act (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

[1] *The Independent Community Bankers of America®, the nation's voice for more than 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With 52,000 locations nationwide, community banks employ 765,000 Americans, hold $4.9 trillion in assets, $3.9 trillion in deposits, and $3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.*

employee's regular rate of pay for any hours worked over 40 in a workweek. However, Section 13(a) of the FLSA exempts from both minimum wage and overtime protection, "any employee employed in a bona fide executive, administrative, or professional capacity" and expressly delegates to the Secretary of Labor the power to define and delimit these terms through regulation.

For over 75 years, DOL has generally defined the terms "bona fide executive, administrative or professional capacity" by using several different tests that included a salary level test and a duties test. In 2004, DOL implemented a standard test and paired it with a salary level test of $455 per week or $23,660 per year, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry.

In 2016, DOL attempted to update the standard salary level test to reflect increases in actual salary levels nationwide since 2004. The Department set the standard salary at a level that would exclude from exemption the bottom 40 percent of salaried workers in the lowest-wage Census Region (currently the South), resulting in an increase from $455 per week to $913 per week or $47,476 per year. The Department 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.

On August 31, 2017, the United States District Court for the Eastern District of Texas issued a ruling holding that the U.S. Department of Labor's 2016 overtime exemption regulations were illegal (see *Nevada, et al., v. U.S. Department of Labor, et al*.), and made permanent a previously implemented preliminary injunction. The district court held that the Department exceeded its statutory authorization because Congress intended for the white-collar exemption to apply based on employees' job duties. The court concluded that although the Department has the authority to implement a salary-level test for overtime exemption eligibility, the 2016 regulations raised the salary level so high that the salary test improperly supplanted the duties test.

ICBA's Comments

A recent survey of ICBA's leadership bankers indicates that many community banks were significantly impacted by the 2016 final rule and that, in most cases, went ahead and complied with the rule 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.

ICBA agrees with the conclusion of the Texas district court that DOL raised its exempt salary level so high—from $23,660 per year to $47,476 per year—and that it effectively replaced the duties test as the primary test. However, the court did not say it was unlawful for DOL to impose a salary level test. In fact, the court seemed to condone the use of a salary level test by suggesting that it would be permissible for the DOL to adjust the 2004 salary level for inflation.

ICBA recommends that the DOL continue using a salary level test and pairing it with a standard duties test. We believe that relying solely on a duties test would increase regulatory burdens on small employers and could result in increased litigation. California, for example, which has a percentage-of-duties rule, has seen significant wage-and-hour litigation focused on the percentage rule that requires an employee to spend more than half of the work time on exempt duties. Rather, the DOL should continue to apply a reasonable combination of salary-level test, coordinated with a streamlined standard duties test.

Furthermore, we believe the 2004 methodology of excluding those exempt employees that made less than the 20th percentile for the lowest-wage Census Region in the country is an appropriate one. For small businesses like community banks that frequently operate in low wage rural areas, this 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.

While we have no problem with updating the 2004 salary level test for inflation, we believe the more accurate way to update the test is with actual salary data from the four Census Regions of the country—the South, Midwest, Northeast, and West--rather than applying a price inflation index to the 2004 salary level. For instance, if one applies the CPI-U inflation index to the 2004 salary level, the result would be an annual salary level of $30,061. However, that salary level might be higher than the actual 20th percentile salary level in in certain Census Regions and therefore would inaccurately represent salary conditions in that part of the country.

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

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particularly when such a standard would disproportionately impact certain types of employees (i.e., commissioned-based 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. To adopt an automatic updating would not take into account the views of employers or employees, the state of the economy and other factors and therefore would constitute a poor way to come to a public policy decision that could impact millions of employees. Automatic updating would also be an administrative burden on community banks that do not have the resources to monitor changing FLSA requirements. The DOL should instead continue its practice of updating the salary level by notice-and-comment rulemaking and not more frequently than once every five years.

Conclusion

In summary, ICBA commends the DOL for taking another serious look at its 2016 final overtime rule particularly in light of the Texas District court decision since so many small businesses, including community banks, have been adversely impacted by the rule. Although the 2016 final rule raised the salary level too high, ICBA does not recommend scrapping the salary test and just relying on the duties test. Instead, ICBA would maintain both a salary level test and a standard duties test to determine whether an employee is exempt or non-exempt under the overtime rules. However, the salary level test should be based on the same methodology used in 2004 and if updated, should be based on current salary data. Furthermore, the salary level test should be updated not more frequently than once every five years and should include all employee compensation—both discretionary and non-discretionary.

ICBA appreciates the opportunity to comment on the Department of Labor's Request for Information concerning the FLSA's minimum wage and overtime exemption for certain executive, administrative, professional, outside sales and computer employees. If you have any questions or would like additional information, please do not hesitate to contact me by email at Chris.Cole@icba.org.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Executive Vice President and Senior Regulatory Counsel