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May 21, 2019

Melissa Smith
Director 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

Dear Ms. Smith:

The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members. On behalf of our members, I am writing in response to the Department of Labor's (DOL or Department) proposed overtime regulation under the Fair Labor Standards Act (FLSA). CUNA believes the current proposal is a material improvement over the 2016 Overtime Rule, but we urge the Department to avoid creating excessive costs and compliance burdens on credit unions.

General Comments

Credit unions support the spirit of the FLSA and its goal of ensuring employees are paid a fair wage for their work. The proposal attempts to strike a balance between ensuring the salary level test is consistent with present day practice while also avoiding a sudden jolt to the resources of small employers. CUNA agrees the proposal provides a more sensible balance of those two goals than the 2016 Overtime Rule, which we expressed serious concern about at the time. While the current proposal is a modest measure as compared to the 2016 Overtime Rule, CUNA remains concerned about the potential for an inordinate impact on small entities as well as those located in certain geographic regions.

As member-owned, not-for-profit financial cooperatives that operate to promote thrift, credit unions offer credit at competitive rates, and provide critical financial services to their member-owners. As the only consumer-owned cooperatives in the financial marketplace, credit unions have a tradition of protecting the interests of America's families. This includes empowering families with opportunities for financial success and the ability to improve their economic well-being. Additionally, as member-owned

cooperatives, credit unions are unique in that personnel and other factors affecting their bottom line can have a direct impact on member service. This is especially true for smaller credit unions.

In the United States, many credit unions are considered small employers as over 40 percent of all credit unions employ five or fewer full-time employees. In addition, over one-quarter of credit unions have less than \$10 million in assets, and credit unions with less than \$100 million in assets account for over 71 percent of all U.S. credit unions. Despite the large number of small credit unions and their indisputable difference in structure and resources, they have been subject to substantial regulatory changes and increased costs since the financial crisis. The Department must understand that when a credit union spends the resources of its membership on compliance, payroll expenses, and overhead, it has less resources available to provide members safe and affordable financial products and services.

Background

The Department's proposal would amend Section 13(a)(1) of the FLSA to increase the minimum salary for the "white collar" overtime exemption, which exempts "bona fide" employees from the minimum wage and overtime requirements of the FLSA. The Secretary of Labor has the statutory authority to define and delimit the terms of this exemption. In general, the exemption requires three factors: "(1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test")." The salary level test is intended to provide certainty to employers and employees.

In 2016, the Department issued a final rule (2016 Overtime Rule) increasing the salary level from \$23,660 annually to \$47,476 annually. However, the 2016 Overtime Rule was swiftly challenged in federal court and the Department was enjoined from implementing and enforcing the new level. In August 2017, the U.S. District Court for the Eastern District of Texas granted summary judgement against the Department and invalidated the 2016 Overtime Rule¹. While an appeal to the Circuit Court of Appeals for the Fifth Circuit is being held in abeyance, the Department is enforcing the salary standard in place prior to the 2016 Overtime Rule. The previous standard of \$23,660 was established in 2004.

Considering this history, the Department reevaluated the 2016 Overtime Rule and has proposed a salary level test that would increase the threshold from \$23,660 annually to \$35,308 annually. This threshold is based on the 20th percentile of earnings of full-time salaried workers in the lowest-wage census region and in the retail sector, which was also the basis for the 2004 salary level test. In addition, the Department also proposes to allow

¹ See Nevada, et al., v. U.S. Dep't of Labor, et al., 218 F. Supp. 3d 520, 534 (E.D. Tex. 2016), appeal pending, No. 16-41606 (5th Cir.).

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. This amendment would ensure the salary level test is determined in a manner consistent with modern pay practices.

The Proposed Threshold Increase, Even If Sensible Compared to the 2016 Overtime Rule, Will Likely Impact Credit Unions

The Department's proposed increase in the salary level threshold for an employee to qualify for the "white collar" exemption is modest compared to the 2016 Overtime Rule, but even modest increases have the potential to strain small credit unions' finite resources.

In general, some credit union employees, especially employees of smaller credit unions and those in rural or underserved areas, would likely be affected by the proposed salary threshold and be eligible for overtime pay after the new standard is implemented. This would result in increased costs for credit unions and could ultimately result in resources being diverted from member services. However, compared to the unreasonable and unjustified increase issued by the Department in 2016, we believe the Department has made a good faith effort to mitigate the impact of a change to the salary test threshold. While we remain concerned about the effects on small credit unions and those operating in certain geographic regions, the Department's proposed rule represents a more reasonable approach to ensuring the nation's employees deserving of overtime pay receive such pay.

A One-Size-Fits-All National Standard May Be Inappropriate for Smaller Financial Institutions and Certain Geographic Locations

CUNA would like to reiterate our previous concerns about a "one-size-fits-all" national standard for salaries. It is well established that the average salary in rural areas, small towns outside of major metropolitan areas, and certain regions of the country is substantially lower than the national average. In fact, the Council of Economic Advisers had previously noted this crucial regional variance stating, "On average, rural residents have notably lower incomes than urban residents . . . while the rural poverty rate decreased sizably between 1979 and 1999, the average rural county posts poverty rates at least several percentage points above those observed in urban counties. Note that the cost of living is higher in urban areas and ideal measures of income and poverty would adjust for these differences."²

In many instances, federal regulators have recognized the need to make exceptions or create safe harbors for entities based on situations where one standard would be unfair or lead to unintended negative effects. For example, the Consumer Financial Protection Bureau (CFPB) must consider the impact of its proposed rules on consumers in rural

² The Council of Economic Advisers, Strengthening the Rural Economy - The Current State of Rural America, available at <https://www.whitehouse.gov/administration/eop/cea/factsheets-reports/strengthening-the-ruraleconomy/the-current-state-of-rural-america> (2010).

areas when it implements the federal consumer financial laws. This requirement resulted in special carve-outs for small creditors in rural and underserved areas in the CFPB's rules governing mortgage origination.

It is logical that credit unions and other businesses located in non-metropolitan areas may deserve special consideration in the Department's overtime regulations. We encourage the Department to further evaluate and consider whether a uniform federal salary standard applicable to many diverse regions is appropriate in this context.

Department Reviews of the Threshold at Reasonable Intervals will be Crucial to Ensuring the Threshold Does Not Become Substantially Outdated in the Future

In addition to the updated salary level, the Department has stated a desire to prevent the earnings threshold levels from becoming outdated in the future, and to provide predictability and certainty for the benefit of workers and employers. To accomplish this goal, the Department has announced an intent to update the salary levels every four years through notice-and-comment rulemaking.

In general, we agree with the Department that the changing economy and its relation to salary levels must be reevaluated on a consistent basis in a more analytical way. CUNA continues to believe any threshold adjustments must be based on a substantive analysis that examines the impact on rural and underserved areas, and small businesses. To that end, the Department's plan to update these salary levels every four years is unlikely to create an unreasonable burden on employers as they review and potentially adjust pay at expected intervals. In addition, a fixed schedule for reconsidering the threshold could ensure that the salary level test keeps pace with changes in costs of living, reducing the likelihood of dramatic increases in the future.

Conclusion

On behalf of America's credit unions and their 115 million members, thank you for the opportunity to share our thoughts on the proposed rulemaking under the FLSA. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio
Senior Director of Advocacy & Counsel