NFIB

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Via www.regulations.gov
and U.S. First Class Mail

April 4, 2019

Hon. R. Alexander Acosta, Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW, Rm. S-3502
Washington, DC 20210

Dear Mr. Secretary:

RE: Comments in Response to Notice of Proposed Rulemaking Titled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," RIN 1235-AA20, 84 *Fed. Reg.* 10900 (March 22, 2019)

The National Federation of Independent Business (NFIB) submits these comments in response to the notice of proposed rulemaking titled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" published by the U.S. Department of Labor ("Department") in the *Federal Register* of March 22, 2019. The proposed rule reduces the adverse impact on America's small businesses of the salary-level test the Department uses to implement the executive, administrative, professional (EAP) exemption from the overtime requirements of the Fair Labor Standards Act (FLSA or Act). While NFIB harbors doubts about the Department's authority to impose a salary-level test, NFIB appreciates the Department's effort to limit the economic damage the salary-level test causes.

NFIB is an incorporated nonprofit association with about 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. FLSA overtime wage controls, exemptions, and regulations apply to many small and independent businesses, including many members of NFIB.

The FLSA generally requires employers to pay employees not less than a minimum hourly wage and, if they work more than 40 hours per week, a wage for each hour of overtime equal to 150% of their regular hourly wage. Section 13(a)(1) of the Act, often called the EAP exemption, exempts from the overtime pay requirement "any employee employed in a bona fide executive, administrative, or professional capacity . . . , or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .).[1] Section 13(a)(1) exempts an employee based on the "capacity" in which the employee is employed -- not the employee's salary level.

By regulation, the Department has imposed a three-part test for determining whether an employee falls within the statutory EAP exemption. First, the employer must compensate the employee on a salaried, rather than hourly, basis (the "salary basis test"). Secondly, the employee must receive pay above a specified level (the "salary-level test"). Thirdly, the employee's duties must primarily involve executive, administrative, or professional duties (the "duties test"). The Department uses a salary-level test, even though the statutory EAP exemption speaks only of the employee's "capacity," based on reasoning that "employees compensated below the salary level are very unlikely to be employed 'in a bona fide executive, administrative, or professional capacity.'"[2]

During the George W. Bush Administration, through a notice-and-comment rulemaking process, the Department set the salary level for the salary-level test at $455 per week (with 52 weeks in a year, $23,660 per year).[3] Under that rule, an employee who earned less than $23,660 per year could not fall within the EAP exemption. During the Obama Administration, again through a notice-and-comment rulemaking process, the Department set the salary level for the salary-level test at $913 per week (with 52 weeks in a year, $47,476 per year).[4] Under that rule, an employee who earned less than $47,476 per year could not fall within the EAP exemption. That doubling of the salary-level test was of substantial concern to small and independent businesses, many of whom had executive, administrative, or professional personnel who did not earn that much. For many small and independent businesses, the Obama Administration's imposition of overtime pay requirements for personnel compensated less than $47,476 per year meant diversion of money away from growing the business and creating jobs.

A group of states led by Nevada and a group of private sector organizations including NFIB sued to prevent the Obama Administration rule from taking effect. The business organizations maintained that the doubling of the salary-level test deprived employers of the exemption to which the statute entitled them for their executive, administrative, and professional employees. In *Nevada et al. v. U.S. Department of Labor et al.*, 275 F.

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[1] 29 U.S.C. 213(a)(1). See 29 U.S.C. 213(a)(17) (exemption regarding certain computer employees).

[2] 84 *Fed. Reg.* 10900, 10903, col. 3 (rule proposed March 22, 2019) (proposed rule to be codified at 29 C.F.R. pt. 541).

[3] 69 *Fed. Reg.* 22122 (April 23, 2004).

[4] 81 *Fed. Reg.* 32391 (May 23, 2016).

Supp. 3d (E.D. Tex. Aug. 31, 2017), the U.S. District Court for the Eastern District of Texas, at the behest of a group of business organizations including NFIB, issued a permanent injunction against enforcement of the Obama Administration rule. The District Court noted that "the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1)."[5] An appeal is pending, and held in abeyance, in the U.S. Court of Appeals for the Fifth Circuit.[6] As a result of the injunction, the Obama Administration rule has never taken effect and the Department continues to enforce the Bush Administration rule.

The Bush Administration set the salary-level test at $23,660 per year; the Obama Administration set it at $47,476 per year; and the Trump Administration proposes to set it at $35,308 per year. The lower the number is set, the more money small and independent businesses have available to grow their business and create jobs. The higher the number is set, the less they have available for that purpose. Thus, for small and independent businesses, from an economic point of view, the Trump proposal is much better than the Obama rule, but not as good as the Bush rule.

The most important objective must be to ensure that the Obama rule never goes into effect; the proposed Trump rule would accomplish that objective. Wisely, in light of past salary-level test litigation, the Department made clear in the preamble to the proposed rule, as it should in the preamble to the final rule, that, if the Trump rule becomes final but is thereafter struck down by the courts (on a ground other than a departmental lack of authority for any salary-level test), then the Bush rule, and not the Obama rule, will be in force:

> Given the recent history of litigation in this area, the Department here explains for the benefit of commenters the operative effects of the proposed rule. If finalized, the proposed rule would replace the 2016 final rule functionally by revising the part 541 regulatory text in the Code of Federal Regulations. But a final rule based on this proposal would also formally rescind the 2016 final rule. That rescission would operate independently of the new content in the final rule, as the Department intends it to be severable from the substantive proposal for revising part 541. As explained more fully below, the Department believes that rescission of the 2016 final rule is appropriate, regardless of the new content proposed for its replacement. Thus, even if the substantive provisions of a new final rule revising part 541 were invalidated, enjoined, or otherwise not put into effect, the Department would intend the 2004 final rule to remain operative, not the enjoined 2016 final rule that it now proposes to rescind.[7]

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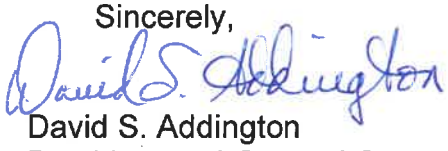
[5] 275 F. Supp. 3d at 805.

[6] No. 17-41130, order of November 6, 2017 ("IT IS ORDERED that the unopposed motion of Appellants, United States Department of Labor, R. Alexander Acosta, the Wage and Hour Division of the Department of Labor, Mary Ziegler, and Bryan Jarrett, to stay this case pending the outcome of the new rulemaking is GRANTED.") and court directive of July 6, 2018 (Department to file status reports on rulemaking with the Court every 60 days).

[7] 84 *Fed. Reg.* at 10905, col 3.

For the foregoing reasons, NFIB concurs that the Department should adopt the proposed rule, but reiterates that, as detailed in the NFIB letter dated September 1, 2017 (see especially pages 3 through 5) filed in this docket, NFIB harbors doubts about whether in the end a salary-level test is consistent with the text of Section 13(a)(1) of the Fair Labor Standards Act. As the Department proceeds with rulemaking to implement Section 13(a)(1), the Department should ensure that it complies with the statute and minimizes the adverse impact of its regulations on the ability of small and independent businesses to grow their businesses and create jobs.

Sincerely,



David S. Addington
Senior Vice President and General Counsel

Attachment: NFIB Letter of September 1, 2017
Re RIN 1235-AA20

ATTACHMENT

[NFIB Letter of September 1, 2017
Re RIN 1235-AA20, as submitted]

NFIB
The Voice of Small Business.
1201 F Street NW, Suite 200
Washington, DC 20004

Via www.regulations.gov
and U.S. First Class Mail

September 1, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
c/o Ms. Melissa Smith, Director
Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW, Rm. S-3502
Washington, DC 20210

Dear Mr. Secretary:

RE: Comments in Response to "Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," RIN 1235-AA20, 82 *Fed. Reg.* 34616 (July 26, 2017)

The National Federation of Independent Business (NFIB) submits these comments in response to the notice titled "Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" (RFI) published by the U.S. Department of Labor ("Department") in the *Federal Register* of July 26, 2017. The Secretary of Labor ("Secretary") has imposed by regulation a salary level test for use in determining whether an employee falls within the Fair Labor Standards Act (FLSA) exemption for executive, administrative, professional, and outside sales employees ("EAP exemption") from federal overtime wage controls and has indicated an intention to impose a salary level test, but at a lower salary level, in the future.

NFIB is an incorporated nonprofit association with more than 300,000 members across America, including many small and independent businesses to which the federal overtime wage controls, the FLSA's EAP exemption, and Department rules apply. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. In response to the RFI, NFIB recommends that the Secretary obtain a legal opinion from the Office of Legal Counsel of the Department of Justice on whether the Secretary has authority to issue a regulation imposing a salary level test to implement the EAP exemption.

Question 7 of the Department's RFI asked in part: "Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test?" If the Department lacks authority to impose by regulation a salary level test in implementing the EAP exemption, then it would be not only preferable but mandatory for the Department to base the test for the applicability of the EAP exemption solely upon the "capacity" in which the employer employs the employee and not in whole or in part upon the salary level of the employee's compensation. Thus, the key question is whether the Department has statutory authority to impose a salary level test.

A federal department lacks power to act unless Congress confers by law such power[1] and a federal regulation inconsistent with the statute under which it is promulgated is invalid.[2] The EAP exemption in section 13(a)(1) of the FLSA exempts from the overtime wage controls imposed by section 6 of the FLSA "any employee employed in a bona fide executive, administrative, or professional capacity . . . , or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)."[3] The salary test regulations[4] promulgated by the Department to implement the EAP exemption survive as a matter of law if and to the extent that Congress has by law granted the Department authority to promulgate the regulations. The executive branch of the U.S. Government should give fresh and close scrutiny to the question whether the Secretary of Labor has statutory authority to issue a regulation to impose a salary level test in implementing section 13(a)(1) of the FLSA.

Proponents of a salary level test argue that broad statutory authority, time, and three court of appeals decisions support the Department's use of a salary test in implementing section 13(a)(1). They note that section 13(a)(1) grants the Department broad authority to define and delimit terms used in section 13(a)(1).[5] They further note that the Department issued its first regulation imposing a salary level test not long after enactment of the FLSA and that the Department has consistently used a salary level test for more than a half century. They also point out that the U.S. Courts of Appeals for the Tenth Circuit in 1944, the Fifth Circuit in 1966, and the District of Columbia Circuit in

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[1] *Louisiana Public Service Commission (PSC) v. Federal Communications Commission (FCC)*, 476 U.S. 355, 374 (1986) ("First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.").

[2] *United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("For regulations, in order to be valid must be consistent with the statute under which they are promulgated.").

[3] 29 U.S.C. 213(a)(1). See 29 U.S.C. 213(a)(17) (exemption regarding certain computer employees).

[4] See 29 CFR Part 541 (Department of Labor regulations).

[5] *Auer v. Robbins*, 519 U.S. 452, 456 (1997). *Auer* involved another aspect of the regulations under section 13(a)(1) of the FLSA: a salary-basis test, which is a Department requirement concerning how an employee is paid, such as on a salaried versus an hourly basis, that is distinct from the salary level test.

1984 specifically upheld the salary level test against legal challenges.[6] They may further point out that the U.S. District Court for the Eastern District of Texas, when it struck down the current salary level test on summary judgment, said that a salary level test would be permissible in certain circumstances.[7]

Opponents of the salary level test point to the plain text of the statute. They emphasize that the exemption in section 13(a)(1) of the FLSA refers to the "capacity" in which an employee is employed and makes no mention of "salary." They note that, although Congress granted the Secretary authority to define and delimit the terms in section 13(a)(1), the Secretary cannot issue regulations that give "capacity" or the other terms used a meaning beyond the outer limits of the linguistic meaning those words can bear.[8]

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[6] *Walling v. Yeakley*, 140 F. 2d 830, 832-33 (10th Cir. 1944) ("Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Admittedly, a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives. On the other hand, it is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capacities. Therefore, in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitation."); *Wirtz v. Mississippi Publishers Corporation*, 364 F. 2d 603, 608 (5th Cir. 1966) ("The statute gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive * * * capacity.' We cannot say that the minimum salary requirement is arbitrary or capricious." (citations omitted)); and *Prakash v. American University*, 727 F. 2d 1174, 1177 (D.C. Cir. 1984) ("Congress expressly authorized the Secretary to 'defin[e] and delimit' the term 'bona fide ... professional,' and, acting pursuant to this delegation, the Secretary conducted hearings in 1940 to assist his response. A minimum-wage requirement in the regulatory definition was applauded by employers participating in the hearings as 'a valuable and easily applied index to the "bona fide" character for which exemption is claimed.' Employers felt, and the Secretary agreed, that the salary paid the employee was 'the best single test of the employer's good faith in characterizing the employment.' We thus conclude that the Secretary, in imposing the minimum-wage condition, 'acted within the statutory bounds of his authority, and that his choice among possible alternative standards ... is one which a rational person could have made.' Accordingly, we hold, in common with many other courts, that this requirement is valid." (footnotes omitted)).

[7] In *Nevada v. U.S. Department of Labor*, No. 4:16-CV-731, Document 99 (E.D. Tex. August 31, 2017), slip opinion at 14-15 (citations omitted), the Court said: "While the plain meaning of Section 213(a)(1) does not provide for a salary requirement, the Department has used a permissible minimum salary level as a test for *identifying* categories of employees Congress intended to exempt. The Department sets the minimum salary level as a floor to 'screen[] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary.' Further, the Department acknowledges that in using this method, '[a]ny new figure recommended should also be somewhere near the lower end of the range of prevailing salaries for these employees.' The use of a minimum salary level in this manner is consistent with Congress's intent because salary serves as a defining characteristic when determining who, in good faith, performs actual executive, administrative, or professional capacity duties." Previously in the litigation, the Court had issued a preliminary injunction; an appeal of the preliminary injunction is pending. *Nevada v. U.S. Dept. of Labor*, 218 F. Supp. 3d 520, 529-30 (E.D. Tex. November 22, 2016) (preliminary injunction), *stay denied*, 227 F. Supp. 3d 696 (E.D. Tex. January 3, 2017), *appeal pending*, No. 16-41606 (5th Cir., notice of appeal filed in E.D. Tex. December 1, 2016). The case arose in the context of the Department's Final Rule titled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees" published in the *Federal Register* on May 23, 2016 (81 *Fed. Reg.* 32391).

[8] See *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 229 (1994) (" . . . [A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear . . . .").

They point out that the Department cannot reasonably claim that the authority to define and delimit allows the Department to impose upon the words of the statute any meaning it wishes, such as "capacity" means "salary," for that would involve an agency unlawfully conferring power on itself[9] or a rare unconstitutional delegation of authority to legislate.[10] They note that the Supreme Court of the United States indicated in 2012 that the term "capacity" in section 13(a)(1) calls for an analysis of functions.[11] They may also note that, while the U.S. District Court for the Eastern District of Texas, in enjoining the current salary level test, said that a salary level test would be permissible in certain circumstances, the Court reached some findings and conclusions that may call into question any salary level test.[12] As for the claim that the Department has long and consistently followed a salary test, opponents point out that the Department's decades of consistency in adhering to a regulation without statutory authority would not give the Department's error legal legitimacy.[13] And, with regard to the three opinions of the

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[9] *Louisiana PSC v. FCC*, 476 U.S. 355, 374 (1986) ("An agency may not confer power upon itself.").

[10] *Whitman v. American Trucking Assns.*, 531 U.S. 457, 472 (2001) (". . . [W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (citation omitted)).

[11] *Christopher v. SmithKline Beecham Corporation*, 567 U.S. 142, 161 (2012). In *Christopher,* in determining that certain pharmaceutical sales representatives were outside salesmen exempt from overtime under the Department's regulations implementing section 13(a)(1) of the FLSA, the Court stated (emphasis added):

> We begin with the text of the FLSA. Although the provision that establishes the overtime salesman exemption does not furnish a clear answer to the question before us, it provides at least one interpretive clue: It exempts anyone "employed . . . *in the capacity* of [an] outside salesman." 29 U.S.C. § 213(a)(1) (emphasis added). "Capacity," used in this sense, means "[o]utward condition or circumstances; relation; character; position." Webster's New International Dictionary 396 (2d ed. 1934); see also 2 Oxford English Dictionary 89 (def. 9) (1933) ("Position, condition, character, relation"). The statute's emphasis on the "capacity" of the employee counsels in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of the particular industry in which the employee works.

[12] In *Nevada v. U.S. Department of Labor*, No. 4:16-CV-731 (Document 99, E.D. Tex. August 31, 2017), slip opinion at 11-13 (citations omitted), the Court said: "Here, the precise question at issue is what constitutes an employee employed in a 'bona fide executive, administrative, or professional capacity.' Since the statute does not define the terms 'executive,' 'administrative,' 'professional,' or 'capacity,' the Court must examine the plain meaning of the terms at or near the time Congress enacted the statute. Generally, the plain meanings of executive, administrative, and professional capacity relate to a person's performance, conduct, or function. . . . After reading these plain meanings in conjunction with the statute, it is clear Congress defined the EAP exemption with regard to duties. . . . The fact that bona fide modifies the terms executive, administrative, and professional capacity suggests the exemption should apply to those employees who, in good faith, perform actual executive, administrative, or professional capacity duties. Therefore, the Court finds Section 213(a)(1) is unambiguous because the plain meanings of the words in the statute indicate Congress's intent for employees doing 'bona fide executive, administrative, or professional capacity' duties to be exempt from overtime pay.".

[13] *Summit Petroleum Corp. v. U.S. EPA*, 690 F. 3d 733, 746 (6th Cir. 2012) (". . . [W]e conclude that an agency may not insulate itself from correction merely because it has not been corrected soon enough, for a longstanding error is still an error.").

Courts of Appeals, opponents emphasize that those opinions came before the Supreme Court's decision in 2012 and none of them undertook the kind of functional analysis of the term "capacity" that the Supreme Court called for. Moreover, they note that the Courts of Appeals in those opinions did not undertake the rigorous textual analysis that Supreme Court decisions now require when approaching questions of statutory construction.[14]

Section 512 of title 28 of the U.S. Code provides: "The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." To obtain an opinion authoritative within the executive branch on whether the Secretary of Labor has statutory authority to require use of a salary level test in implementing section 13(a)(1) of the FLSA, the Secretary should seek such an opinion from the Attorney General's delegate for purposes of section 512 of title 28, the Assistant Attorney General, Office of Legal Counsel.

NFIB appreciates the opportunity to draw to the Department of Labor's attention in response to the RFI key legal issues concerning a salary level test and to recommend that the Secretary seek a legal opinion on the issues from the Department of Justice. NFIB urges the Department to consider on a continuing basis how the Department could reduce the intrusiveness, cost to taxpayers, and costs to businesses and individuals of its regulatory schemes.

Sincerely,

David S. Addington

David S. Addington
Senior Vice President and General Counsel

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[14] See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 288 (2003) ("We have never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text." (citation omitted)); *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015) ("Our job is to follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'" (citation omitted)).