THE VOICE OF FOOD RETAIL
Feeding Families Enriching Lives

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VIA ELECTRONIC FILING: www.regulations.gov

Patricia Davidson
Deputy Administrator for Program Operations
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

RE: RIN 1235-AA20, Request for Information, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*

Dear Ms. Davidson:

The Food Marketing Institute ("FMI") submits these comments in response to the request for information (RFI) of the Department of Labor ("the Department"), as published in the *Federal Register* on July 26, 2017, to gather information to aid in formulating a proposal to revise the regulations at 29 C.F.R. Part 541, defining and delimiting the exemptions for executive, administrative, professional, outside sales and computer employees in Section 13(a)(1) of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. § 213(a)(1).

By way of background, FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation, visit www.fmifoundation.org. The food wholesale and retail industry is an important economic sector that employs more than 4.8 million people and helps support almost 3 million additional jobs in supplier and upstream industries.

The regulations at 29 C.F.R. Part 541 (the "EAP" or "white collar" regulations) have a significant impact on our members. FMI's member companies believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers

when classifying employees. As such, FMI strongly urges the DOL to consider the responses to the RFI below.

RFI Questions and FMI Responses

1. In 2004 the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

The recent District Court decision that invalidated the 2016 Final Rule stated the following:[1]

> Since 2004, the Department has required an employee to meet the following criteria to be exempt from overtime pay: (1) the employee must be salaried; (2) the employee must be paid above a minimum salary level; and (3) the employee must perform executive, administrative, or professional capacity duties. 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. *See, e.g.*, *Wirtz*, 364 F.2d at 608 (upholding the Department's authority to use a minimum salary level). 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." Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 7–8 (1949). 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." *Id.* at 11–12.

FMI supports the position that the appropriate basis for setting a "permissible minimum salary level" would be one that functions as a floor to screen out clearly nonexempt employees. FMI further agrees that any new salary level test should be "somewhere near the lower end of the range of prevailing salaries" for exempt employees. Based on the above, we believe the methodology the Department used in 2004 to update the salary level test would be an appropriate methodology to use in the future. Specifically, the methodology used in the 2004 Final Rule that relied on actual wage and salary data and set the salary level test slightly lower than indicated by the data because of the impact on lower-wage industries and regions.

2. Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or

[1] *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731 (E.D. Tex. Aug. 31, 2017).

some other method? For example, should the regulations set multiple salary levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

Under the Final Rule, the minimum salary level for exempt employees increased from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The Department based the 2016 salary level on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, which is currently the South. The Final Rule also creates an automatic updating mechanism that adjusts the minimum salary level every three years.

As noted in our previous comments,[2] ever since retail workers were brought under the FLSA minimum wage and overtime protections in 1961, the Department has recognized the lower salary levels in the retail industry. This is not a matter of choice, but a necessity driven by the economic realities of the retail sector, especially the food retail industry. The supermarket industry is fiercely competitive, operating on a 1% profit margin. As such, as noted in our 2015 comments, a salary level based on the 40th percentile disproportionately affects the food retail industry and forces these employers to make difficult employment decisions.

As stated above, FMI believes that a salary level based on roughly the bottom 20 percent of salaried employees in the South and in the retail industry would help avoid the disproportionate effects on the food retail industry. Assuming the Department sets a minimum salary level as such so that food retail is not burdened unfairly as compared to other industries, FMI would support one salary level across the country. Specifically, as many owners operate stores that will fall under different regions, we believe a single salary level is important for clarity, simplicity and ease of administration.

3. Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

As noted above, the food wholesale and retail industry employs more than 4.8 million people and helps support almost 3 million additional jobs in supplier and upstream industries. These jobs vary widely in duties, pay, and many other aspects. Because of the large and varying nature of workforce represented in the food retail industry, standardization and consistency are important when it comes to establishing the EAP exemption. More specifically, a standard salary level, as has been in place since 2004, helps provide employers with greater predictability and ease of compliance. As such, the Department should maintain a standard salary level for the executive, administrative, and professional exemptions.

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[2] Available at https://www.regulations.gov/document?D=WHD-2015-0001-5708.

5. Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

This concept is addressed in the recent District Court decision that invalidated the 2016 Final Rule.[3] We agree with the Court's language below, which speaks directly to this point:

> The Final Rule more than doubles the Department's previous minimum salary level, increasing it from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). This significant increase would essentially make an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level. As a result, entire categories of previously exempt employees who perform "bona fide executive, administrative, or professional capacity" duties would now qualify for the EAP exemption based on salary alone. The text of the Final Rule confirms this: "White collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, *irrespective of their job duties and responsibilities*." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,405 (May 23, 2016) (emphasis added).
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> This is not what Congress intended with the EAP exemption. Congress unambiguously directed the Department to exempt from overtime pay employees who perform "bona fide executive, administrative, or professional capacity" duties. However, the Department creates a Final Rule that makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties. The Department estimates 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, will automatically become eligible under the Final Rule without a change to their duties. 81 Fed. Reg. 32,405; *see also* 69 Fed. Reg. 22,173 (admitting "[t]he Department has always maintained that the use of the phrase 'bona fide executive, administrative or professional capacity' in the statute requires the performance of specific duties"). Because the Final Rule would exclude so many employees who perform exempt duties, the Department fails to carry out Congress's unambiguous intent.

In summary, the minimum salary level set in the 2016 rule has the effect of supplanting an analysis of an employee's job duties. In particular, as the Department's data indicates, the 2016 minimum salary level would result in the reclassification of millions of workers without any change to their duties. As noted above, only a much lower salary level

[3] *Nevada v. U.S. Dep't of Labor*, No. 4:16-CV-00731 (E.D. Tex. Aug. 31, 2017).

would fulfill the Congressional intent of screening out the obviously nonexempt employees.

6. To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

FMI's members strive to comply with all applicable laws and regulations, and work tirelessly to ensure that compliance programs are implemented in a timely fashion. As such, due to the timing of the preliminary injunction as compared to the compliance date of the rule, many of our members made a number of changes to comply with the 2016 Final Rule. We have not reviewed the extent of these changes with our members.

7. 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 so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

FMI believes that the salary level test remains an important element of the EAP exemption, as the test has long served as a simple method of screening out the obviously nonexempt employees. For clarity, simplicity, and objectivity the Department should continue to use a salary level test. As noted in our 2015 comments, FMI strongly opposes any revision to the duties test which introduces a quantitative requirement, as this would be exceedingly onerous and unworkable in the food retail business.

9. The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

As noted in our 2015 comments, FMI recommends that the Department allow all forms of incentive pay (bonuses, commissions, profit-sharing, etc.) paid out at any frequency (including quarterly and annually) to count towards up to 20 percent of the salary level.

10. Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census

division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

See response to question 3 above. Because of the large and varying nature of workforce represented in the food retail industry, standardization and consistency are important when it comes to establishing the EAP exemption.

11. Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

FMI members have expressed significant concerns with the Department's adoption of the mechanism to automatically increase the salary level every three years. We strongly urge the Department to abandon this provision of the rule for the following reasons:

First, as we also noted in our September 4, 2015 comments,[4] there is no evidence that Congress intended that the salary level test for exemption under section 13(a)(1) be indexed. In the 77 year history of the FLSA, Congress has never provided for automatic increases of the minimum wage. Neither has Congress indexed the minimum hourly wage for exempt computer employees under section 13(a)(17) of the Act, the tip credit wage under section 3(m) or any of the subminimum wages available in the Act. Congress has provided indexing under other statutes, but never under the FLSA.

Second, there is no precedent for indexing in the regulatory history of Part 541. Public commenters have suggested automatic updates to the salary levels in at least two past rulemakings. In 1970, for example, a "union representative recommended an automatic salary review" based on an annual BLS survey, the National Survey of Professional, Administrative, Technical, and Clerical Pay.[5] The Department quickly dismissed the idea as "needing further study," although stating that the suggestion "appears to have some merit particularly since past practice has indicated that approximately 7 years elapse between amendment of these salary requirements."[6] However, the "further study" came in 2004, after *29 years* had elapsed between salary increases. Nonetheless, the Department rejected indexing as contrary to congressional intent, disproportionately impacting lower-wage geographic regions and industries, and because the Department intended to review the salary level more frequently:

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[4] Available at https://www.regulations.gov/document?D=WHD-2015-0001-5708.

[5] 35 FR 883, 884 (Jan. 22, 1970).

[6] *Id.*

> [S]ome commenters ask the Department to provide for future automatic increases of the salary levels tied to some inflationary measure, the minimum wage or prevailing wages. Other commenters suggest that the Department provide some mechanism for regular review or updates at a fixed interval, such as every five years. Commenters who made these suggestions are concerned that the Department will let another 29 years pass before the salary levels are again increased. The Department intends in the future to update the salary levels on a more regular basis, as it did prior to 1975, and believes that a 29-year delay is unlikely to reoccur. The salary levels should be adjusted when wage survey data and other policy concerns support such a change. Further, the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases. Although an automatic indexing mechanism has been adopted under some other statutes, Congress has not adopted indexing for the Fair Labor Standards Act. In 1990, Congress modified the FLSA to exempt certain computer employees paid an hourly wage of at least 61/2 times the minimum wage, but this standard lasted only until the next minimum wage increase six years later. In 1996, Congress froze the minimum hourly wage for the computer exemption at $27.63 (61/2 times the 1990 minimum wage of $4.25 an hour). In addition, as noted above, the Department has repeatedly rejected requests to mechanically rely on inflationary measures when setting the salary levels in the past because of concerns regarding the impact on lower wage geographic regions and industries. This reasoning applies equally when considering automatic increases to the salary levels. The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.[7]

Finally, automatic increases to the salary level would impose significant additional burdens on employers. As noted above, adjusting to changes in the Part 541 regulations to ensure compliance with the FLSA is a complicated and time consuming process. Adjusting to an increased minimum wage only requires adjusting hourly rates in a payroll system. But adjusting to changes in the white collar regulations would require FMI members to identify all exempt employees earning a salary less than that set by the rule; evaluate whether to comply by providing a salary increase or reclassifying some or all of the employees to non-exempt; decide whether to pay reclassified employees on an hourly or salaried basis, and how much; draft new compensation plans for reclassified employees; communicate the changes to employees; and, finally, implement the changes. According to our members, reclassification can take many months. Additionally, planning for a salary increase will be even more difficult for FMI members whose fiscal year is not the calendar year or otherwise does not coincide with the timing of the Department's automatic update.

[7] 2004 Final Rule at 22171-72.

Although we support the removal of the automatic salary adjustment provision altogether, in the case that the Agency determines the provision should not be removed, we would propose that the Agency adopt a process for updating the salary levels every five years. This would help limit the regulatory burdens on food retailers by requiring adjustments to compliance less often.

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FMI appreciates the opportunity to comment on the Wage and Hour Division's Request for Information on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, and we look forward to working with you in the future. If FMI can be of further assistance, please contact me at 202-452-8444 or dmullen@fmi.org.

Sincerely,

Dana Mullen
Regulatory Counsel