September 4, 2015

Mary Ziegler
Director of the Division of Regulations Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Washington DC 20210

Re: RIN 1235-AA11

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Comments from law professors

Dear Ms. Ziegler:

This letter is submitted on behalf of law professors who are experts in labor and employment law at our nation's universities and independent law schools. As experts in this field, we support the Wage & Hour Division's decision to issue a Notice of Proposed Rule Making to increase the salary level used to test whether executive, administrative, and professional employees should be exempt from minimum wage and overtime provisions. U.S. Dep't of Labor, Wage & Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 80 Fed. Reg. 38515-38612 (July 6, 2015) (hereinafter NPRM). We conclude that the proposals are fully within the legal authority of the agency, and we set out our legal analysis of these changes below.

I. The Wage & Hour Division has broad discretion and authority to define the FLSA executive, administrative, and professional employee exemptions from the minimum wage and overtime provisions.

As well-stated by the Supreme Court, "[t]he principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (citing 29 U.S.C. § 202(a)). Over-work being one of the most detrimental labor conditions, Congress enacted a time-and-one-half premium pay requirement for hours worked beyond 40 in one week. 29 U.S.C. § 207.

Congress recognized, however, that while many workers did not have sufficient individual bargaining power to protect themselves against abuses like low pay and excessive hours, some workers did enjoy the kind of labor market and workplace power that would enable them to

protect themselves against abuses such as these. *See generally* Seth D. Harris, Conceptions of Fairness and the Fair Labor Standards Act, 18 HOFSTRA LAB. & EMP. L.J. 19, 98-99 (2000). Thus, the FLSA contains an exemption from the minimum wage and overtime protections for "bona fide executive, administrative, or professional employees." *Id.* at § 213(a)(1). Congress made no attempt to define these terms, however, instead specifying that these exemptions must be "defined and delimited from time to time by regulations of the Secretary [of Labor]." *Id.*

It is well-settled law that when Congress delegates regulatory authority to a regulatory agency, that agency has broad discretion in designing its regulations and that "considerable weight should be accorded to an executive department's construction of a statutory scheme that it is entrusted to administer[.]" *U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984)); *see also Home Care Assoc. of America, et al., v Weil*, USCA Case # 15-5018 (D.C. Cir., Aug. 15, 2015) (explaining, among other conclusions, that the agency's broad discretion includes significant substantive changes to an existing and longstanding regulation). "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' " *Bragdon v. Abbott,* 524 U.S. 624, 642 (1998) (quotation omitted). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 843-44.

Indeed, the Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," *id.* at 844, and that if that construction "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Id. (*quoting *United States v. Shimer*, 367 U.S. 374, 382, 383 (1961)).

In sum, the Wage & Hour Division has broad discretion and authority to define the executive, administrative, and professional employee exemptions from the FLSA's minimum wage and overtime provisions. The Wage & Hour Division has exercised this authority on numerous occasions since Congress enacted the FLSA eight decades ago. The Division has consistently relied upon a set of tests to determine which employees are exempt executives, administrators, and professionals, although the content of the tests has changed. For example, these tests have always included some salary level (or levels) that serve as a threshold for exemption. Because the Division's current NPRM continues this existing set of tests and the structure for determining which employees are exempt, and the content of these tests falls within the range of regulatory choices codified in earlier definitions of executive, administrative, and professional employees, the Division will be well within the scope of its congressionally delegated discretion and authority should it finalize this proposed regulation or a similar final rule.

II. The existing salary level is far too low to serve its intended purpose of establishing a meaningful dividing line between non-exempt employees and bona fide executive, administrative, and professional employees.

The current exemptions are in drastic need of change. The exemptions were last updated in 2004 and, even then, the changes made did not restore the exemptions to their original purpose. Congress' intent was to allow exemptions from the Fair Labor Standards Act's overtime and minimum wage protections for a relatively small group of high-paid employees who were effectively already being compensated for the extra hours that they worked by their high level of compensation. Congress understood that these workers had sufficient individual bargaining power in the labor market and workplace to protect themselves, and so did not need the government to intervene to protect them from employers who might impose low wages and excessive over-work. One very strong indication of a worker's individual bargaining power is the salary that he or she can negotiate with an employer. More individual bargaining power generally produces a higher salary. Bona fide executive, administrative, and professional employees are able to negotiate high salaries because of their skills, knowledge, close association with powerful corporate leaders and, in many cases, limited availability in the labor market. For this reason, we agree with the Wage & Hour Division that an employee's salary level should be the most important factor in determining whether he or she is an exempt bona fide executive, administrative, or professional employee.

The "duties" test – one of the set of tests employed to determine which employees are executives, administrators, and professionals – was created to ensure that the employees qualifying for the exemption were actually performing the duties of executive, administrative, and professional employees. The "salary level test" was intended to be set so that most employees earning more than the regulatory level would be employees who could also satisfy the duties test. That is, the salary level test was supposed to form a real and effective dividing line between exempt and non-exempt employees. However, at the present salary level of $455 per week, employees who may qualify for the exemptions make only $23,660 annually, which is less than the 2015 Federal Poverty Level for a family of four. During the second quarter of 2015, the median weekly earnings for all employees earning either a wage or salary were $801. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Usual Weekly Earnings of Wage and Salary Workers Second Quarter - 2015 (July 21, 2015), *available* at http://www.bls.gov/news.release/wkyeng.nr0.htm. Plainly, the existing salary level is inadequate to the task of establishing a meaningful dividing line between exempt and non-exempt employees.

Employees may be exempt if they satisfy the duties test, which was greatly simplified in the 2004 revisions to make it much easier to satisfy. Before 2004, the exemptions contained two salary level tests and two duties tests; to satisfy the "long duties" test, which was more difficult to satisfy, a lower salary level had to be met, while to satisfy the "short duties" test, which was easier to satisfy, a higher salary level had to be met. The justification for these two different tests was that, if employees had a higher salary, they were more likely to meet the duties part of the exemption, so the test was simplified for those employees. That is, the salary level for the "short duties" test was supposed to be set at a level to form a real dividing line between exempt and non-exempt employees, justifying the simpler "duties" test. *See generally* L. Camille Hébert,

"Updating" the "White Collar" Employee Exemptions to the Fair Labor Standards Act, 7 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 56-65 (2003).

However, the Wage & Hour Division in 2004 eliminated the two duties tests and adopted a "standard duties" test that was a merger of the two tests, although much closer to the "short duties" test than the "long duties" test. Even with this shorter, simplified duties test, the Division did not choose a salary level equivalent in then-present dollars to a range between the two prior "salary" tests. In 2004 dollars, the salary level for the "long duties" test would have been at least $480 per week and the salary level for the "short duties" test would have been at least $774 per week. Instead, the Department chose a level of $455, less in equivalent dollars than that necessary to meet even the "long duties" test in 1975, which was the last time before 2004 that the salary levels for the exemption had been increased. As a result, even when the 2004 salary level for the standard duty test was set, it did not act to serve as a real dividing line between exempt and non-exempt employees. *Id.* at 120-21.

The very low salary level for the exemptions as currently constituted has at least two serious negative consequences for employees and employers beyond the direct effect of excluding millions of workers from the FLSA's protections. First, it facilitates misclassification of workers as exempt who should be receiving overtime. Because the overwhelming majority of salaried employees are paid more than the current salary level for the exemptions, some employers may want to avoid the payment of overtime by trying to shoehorn into the exemption relatively low-paid employees who were never intended to be exempt from overtime and who do not meet the duties test. For the same reason, the low salary level encourages employers to manipulate employees' work arrangements to try to fit under the exemptions and deprive these low-wage workers of overtime pay, even if those work arrangements are not the most productive for their workplaces. Raising the salary level will protect millions of employees from misclassification and significantly reduce the incentive for employers to engage in unproductive manipulation of work arrangements and job descriptions.

Second, we believe the excessive importance of the duties test has resulted in the relatively high volume of litigation surrounding the exemptions and the many successful claims that have been asserted against employers in recent years. Because it is complex, detailed, and fact-bound, the duties test allows for disputes between employers and employees about its outcomes when applied to diverse work arrangements and jobs in millions of workplaces. These disputes foster litigation. By contrast, the salary level test offers a clear line that may be readily applied to an objective fact: the employee's salary. There is little room for dispute between employers and their employees about the level of an employee's salary and, therefore, much less cause for litigation. Raising the salary level to a more appropriate level, which allows the exemption to be met only for employees making a relatively high salary who usually can also meet the duties tests, will benefit not only employees who have been denied overtime to which they are legally entitled or should be entitled, but will benefit employers by providing them more certainty and relieve them of the litigation and other costs of disputes over classification and misclassification.

III. The Wage & Hour Division's proposed salary levels are well within its discretion and authority.

Because it has been more than a decade since the last revision of the exemptions, and that last revision set the salary level far too low, there would seem to be little serious question about the need to raise the salary level for the exemptions by a significant amount. The harder question is where the salary level should be set. The proposed regulations specify a salary level of $970 per week during the first quarter of 2016, the level estimated to be equivalent to the 40th percentile of all full-time salaried employees in 2016, when the rule is to take effect.[1] While some will argue that the move from $455 to $970 a week is too much of an increase, even that increase will not bring the salary level up to the level equivalent to the pre-2004 salary level for the "short duties" test that the current duties test most resembles.

The NPRM justifies the failure to raise the salary level to that higher level on the grounds that employees will no longer be able to satisfy the exemption at a lower salary level because of the unavailability of the former "long duties" test. We understand the Division's desire to simplify the exemptions to avoid more litigation and to make it easier for employers to comply with the rule. Reimplementation of this two-tiered standard might be counterproductive in this regard, particularly given that the "long duties" test, as a practical matter, has not been used for decades. Although the reason that the "long duties" test fell out of use was the failure of the Wage & Hour Division to keep the salary level for that test at a realistic level, it is now true that reimplementation of the two-tiered standards would serve to complicate, rather than simplify, the test for the exemption currently in use.

The current proposal largely restores the exemption to its original purpose of exempting from overtime only relatively high paid employees who are adequately compensated for the extra hours that they work. Employers will be less likely to attempt to misclassify employees, thereby depriving employees of their legal rights and prompting expensive and time-consuming litigation. Employees who are paid relatively low salaries, below $50,440 in 2016 or about 200% of the 2015 federal poverty level for a family of four, will be entitled to overtime for the extra hours that they are required to work and will not have to worry about their employer misclassifying them as exempt or manipulating their job responsibilities to attempt to squeeze them into the exemptions. Both employers and employees, and the economy in general, will benefit from the reduction in uncertainty attributable to the current exemption.

We believe that a significant argument could be made that the salary level included in the Department's current proposal, at the 40th percentile of all full-time salaried workers or $970 a week in 2016, is actually too low to restore the exemption to the role that it played before the 2004 changes. Nonetheless, we also believe that the Department's choice of the 40th percentile is appropriate and, as noted earlier, well within the Wage & Hour Division's discretion, for a number of reasons. First, the choice of the 40th percentile seeks to draw a distinction between relatively highly paid employees, for whom Congress intended the exemptions, and less highly

[1] Although the NPRM uses the figure of $921 per week, that figure was the 40th percentile for full-time salaried workers in 2013. The latest data currently available is for the first quarter of 2015, for which the 40th percentile figure is $951 per week. The Division projects, based on an estimate of two percent growth between the first quarter of 2015 and the first quarter of 2016, that the 40th percentile figure for the first quarter of 2016 will be $970 per week, or $50,440 for a full-year worker. See NPRM, 80 Fed. Reg. at 38517 n.1.

paid employees who do not receive sufficient compensation to justify the failure to pay them overtime for the extra hours that they work. The salary level equivalent to the much lower percentile (20th percentile) chosen in 2004 did not serve that purpose of the salary level test. Second, the choice of the 40th percentile, rather than a higher percentile that could be justified based on the role that the salary level plays in the exemption, takes into account the fact that there are regional differences in salaries, as well as significant salary differences in different industries. Although the 40th percentile uses national salaries to determine the proper level for the salary test, this lower percentile seeks to take into account and not disadvantage employers who operate in regions and industries with lower average salaries. As we explain below, the FLSA does not require the Wage & Hour Division to take into account regional differences in costs of living or different salaries in various industries when establishing a salary level for executive, administrative, and professional employees.

Similarly, we believe that the Wage & Hour Division has acted reasonably in setting the salary level for highly compensated employees at the 90th percentile of full-time salaried employees. The test for highly compensated employees does not have a long history, having been established by the Division in 2004. The Wage & Hour Division at that time chose the salary level of $100,000 for the "salary test" for highly compensated employees, noting that "[o]nly roughly 10 percent of likely exempt employees who are subject to the salary tests earn $100,000 or more per year." Department of Labor, Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 F.R. 22122, 22174 (April 23, 2004). Accordingly, it appears that a salary level set at the 90th percentile, or $122,148 using 2013 figures, will restore the salary level to a level for truly highly compensated employees who are anticipated to generally meet the other requirements of the exemption, justifying the greatly simplified duties test for highly compensated employees.

We note that the Wage & Hour Division's adoption of a presumption that very highly paid employees are exempt and, therefore, should be subject to a shortened and weaker duties test reinforces our earlier analysis regarding the role of the salary level test in the exemptions. The purpose of these salary level tests is to establish a clear dividing line between employees who are, in the case of highly compensated employees, very likely to satisfy the duties test and employees for whom employers must demonstrate in some detail that they have satisfied the test. Similarly, the highest paid employees have the greatest individual bargaining power and, as Congress concluded, are less likely to need the government to intervene to ensure they are paid fairly when they work overtime hours.

IV. Congress delegated the authority to implement a national salary level to the Wage & Hour Division.

Congress' delegation of broad discretion to the Wage & Hour Division to interpret the executive, administrative, and professional employee exemptions includes the authority to impose a single national salary level, as the Division has proposed, rather than different thresholds for states or regions of the United States that may have different costs of living. The legislative history provides strong support to this interpretation of the Fair Labor Standards Act and confirms that the Wage & Hour Division's proposal is both an entirely reasonable interpretation of the statute and well within the Division's discretion. *See generally* Seth D.

Harris, Conceptions of Fairness and the Fair Labor Standards Act, 18 HOFSTRA LAB. & EMP. L.J. 19, 98-99 (2000); GEORGE E. PAULSEN, A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS 1933-1941 (1996). It should be unsurprising, therefore, that every time the Wage & Hour Division has used its regulatory authority to set a new salary level for the executive, administrative, and professional exemptions, it has chosen to establish national thresholds rather than differing regional or state thresholds. *See* NPRM, 80 Fed. Reg. 38524-26 (recounting regulatory history).

The legislative history discloses that the fight over national standards versus regional standards was a central consideration in Congress' crafting of the FLSA. With strong support from Secretary of Labor Frances Perkins, the U.S. Senate's Education and Labor Committee originally approved a version of the FLSA that would have established an independent Labor Standards Board. *See* SEN. REP. 75-884, at 6-7. Among other things, the Board would have had the authority to adjust minimum wages and maximum hours according to economic and living conditions. *Id.* The members of the Board were to be chosen, in part, based on geography and, presumably, would have represented their regions' interests in settings wages and hours. *See id.* at 4; *see also* 81 Cong. Rec. S7746 (daily ed. July 28, 1937) (including a letter by Sen. Black in the Congressional Record, which stated his view that different regions of the country should be represented on the Board "so that the board shall be familiar with the industrial, commercial, and agricultural problems of all parts of the United States").

The first version of the FLSA to emerge from the House Labor Committee in August 1937 was very similar to the Senate bill, particularly with regard to the Board and its authority to establish regional differentials in wages and hours. *See* H.R. Rep. No. 75-1452, at 1 (1937). Opponents blocked the bill's progress to the floor and forced the House to adjourn before it could be considered. *See* PAULSEN, A LIVING WAGE, at 100-01. After President Roosevelt called a special session of Congress, the House considered a revised version of the FLSA put forward by Labor Committee Chair Mary Norton. This version eliminated the Board and replaced it with a single Administrator to be housed within the Labor Department; however, the new Administrator could act only after a wage and hour committee representing employers, workers, and consumers had examined the facts thoroughly and made a recommendation. *See* 82 Cong. Rec. H1391 (daily ed. Dec. 13, 1937) (statement of Rep. Norton). This change cost Norton the support of Rep. Robert Ramspeck, a leader of the pro-FLSA southern Democrats, and heretofore an ally. Ramspeck wanted *regional* considerations to govern, not bargaining among representatives of workers, employers, and consumers on Norton's new committee:

> The five-man board would be appointed from five sections of the country, thus giving representation to all sections. It would have lodged in it the real power which the bill contained to regulate minimum wages and maximum hours. . . . I cannot support this new proposal. It makes no provision which insures proper consideration for the differences that exist in various sections of our country. 82 Cong. Rec. H1499 (daily ed. Dec. 14, 1937)(statement of Rep. Ramspeck).

Norton's bill, in this form, did not advance. See PAULSEN, A LIVING WAGE, at 111-12.

In April 1938, Ramspeck introduced a new version of the FLSA that, again, included a five-member Board that would be geographically selected. Ramspeck's Board would take into account the cost of living and local economic conditions, among other things. Paulsen at 119. This was the last version of the bill to allow regional differentials in wages and hours. Norton introduced a competitor proposal, which was "entirely different in form, method of administration, and philosophy from that presented to you at the special session." 83 Cong. Rec. H7275 (daily ed. May 23, 1938) (statement of Rep. Norton) ("I cannot help but feel that many Members voted for recommittal because the bill contained differentials and because they honestly believed that that was not the proper type of wage and hour legislation."); *see also* 83 Cong. Rec. at H7280 (statement of Rep. Norton reiterating her point that her proposal was entirely new); PAULSEN, A LIVING WAGE, at 120. Norton's proposal eliminated the Board and sharply restricted the Administrator's role. The bill provided no opportunity for regional differentials in labor standards, a point Norton repeatedly emphasized. A uniform national minimum wage would be set and maximum hours would also be set at a uniform national level. *See* 83 Cong. Rec. H5920 (daily ed. Apr. 28, 1938) (statement of Rep. Norton explaining her proposal); H.R. Rep. No. 83-2182 2-3, 6, 9 (1938). Norton's bill ultimately passed the House of Representatives on May 24, 1938 by a vote of 314 to 97. *See* PAULSEN, A LIVING WAGE at 125.

The House-Senate conference committee charged with reconciling the two houses' bills was forced to confront the very same issue of regional wage and hour differences. The final compromise gave only the smallest acknowledgement to the advocates for a fact-finding Board and no concessions to the supporters of different regional wages and hours. The bill established a new Administrator in the Labor Department empowered to create "industry committees" with an equal number of worker and employer representatives and disinterested parties. The national minimum wage would be set at twenty-five cents, increasing to thirty cents in the second year for five years thereafter, and forty cents in the seventh year after enactment. Acting on an industry committee's recommendation, the Administrator could accelerate the increase in the minimum wage across the country or, if a forty-cent minimum wage would "substantially curtail employment in the industry," set a lower rate in the seventh year. Representative Norton made clear that these would be "exceptional circumstances" without which the forty-cent per hour rate would apply "automatically." The final compromise set maximum hours at 44 hours for the first year, 42 hours for the second year, and 40 hours for the third year and thereafter, with fifty percent premium pay for any time worked in excess of the maximum. *See* FRANCES PERKINS, THE ROOSEVELT I KNEW at 264-65 (1946); PAULSEN, A LIVING WAGE, at 126-7 (discussing the compromises during the debates); 83 Cong. Rec. S9164 (daily ed. June 14, 1938) (statement of Sen. Thomas explaining the revised and final FLSA); 83 Cong. Rec. H9526 (daily ed. June 14, 1938) (statement of Rep. Norton); *id.* at H9158- 62 (indicating that Rep. Norton submitted the conference report in the Senate).

In sum, after a long and difficult fight in which the issue was at the very heart of the controversy and almost killed the FLSA, Congress rejected regional differentials in wages and hours in favor of national wage and hour standards. For this reason, it is inconceivable that Congress --- in the very same legislation --- would have somehow implicitly mandated the Wage & Hour Division to establish regional salary levels or salary levels that in some other form take into account differences in living costs and conditions. Of course, the plain language of the statutory exemptions in the FLSA's section 13(a)(1), 29 U.S.C. sec. 213(a)(1), makes no mention

of the subject. Absent a specific and express mandate to the contrary, and given the FLSA's legislative history on this subject, the Wage & Hour Division must have the discretion and authority to establish a national salary level for the executive, administrative, and professional employee exemptions.[2]

V. The Wage & Hour Division's proposal for automatic updating of salary levels is also necessary and within its discretion and authority.

We particularly applaud the Wage & Hour Division for building into the salary level test for the executive, administrative, and professional employee exemptions a mechanism for updating the salary levels without the need for the issue to be revisited through a full notice-and-comment rulemaking process pursuant to the Administrative Procedure Act. As noted above, Congress granted the agency wide discretion in implementation of the statutory language. History has shown that no matter how good intentions have been, the viability of the salary level to distinguish between employees who should be classified as exempt and those who should not be so classified has been threatened by the degradation of the real value of those salary levels over long periods of time between revisions of these regulations.

The most egregious failure to revisit the salary levels occurred between 1975 and 2004, when the salary level associated with the "long duties" test became entirely irrelevant because it fell below the earnings of a full-time employee earning the minimum wage. Plainly, minimum-wage workers are not the kind of highly paid executive, administrative, and professional employees with adequate individual bargaining power to protect themselves in the labor market and workplace who Congress intended to exempt from the FLSA's protections. But even the most recent failure to revisit the regulations for a period of eleven years, in spite of the Wage & Hour Division's indication in 2004 that it would do so more frequently, shows that inertia and politics will make it difficult to keep the regulatory salary level sufficiently high to serve the purposes underlying the executive, administrative, and professional employee exemptions. More regular and predictable increases in the salary level associated with the exemptions should benefit both employers and employees.

VI. Not-for-Profit organizations will not experience substantial adverse consequences from the expansion of overtime protections to previously exempt employees.

Some critics of the Wage & Hour Division's NPRM have suggested that not-for-profit organizations will suffer negative consequences as a result of expanding overtime protections to employees who have been previously treated as exempt executive, administrative, and professional employees. While the work of not-for-profit organizations --- including private educational institutions like those that employ many of this letter's signatories --- is critical to the success of the American economy and the maintenance of a civil society, the NPRM will have only a very limited effect on not-for-profit organizations. The not-for-profit sector should be able to adjust easily.

[2] We offer no opinion on the question of whether the Administrator also would have the authority to establish regional salary levels. This question is not presented by the Wage & Hour Division's proposal.

In 2012, the United States boasted an annual average of 267,855 not-for-profit "charitable" establishments employing 11,426,870 people.[3] *See* U.S. Bureau of Labor Statistics, National NAICS 2-digit and 3-digit Industry Data – 2012 annual averages, available at http://www.bls.gov/bdm/nonprofits/nonprofits.htm (last visited Aug. 26, 2015). Thus, not-for-profit employment among "charitable" organizations constituted only 8.5% of the roughly 134 million workers employed in the U.S. economy in 2012. Further, a sizable percentage of these establishments and employees, and others not included in these totals, are not currently covered by the FLSA.

FLSA coverage was expanded in 1961 to cover "enterprises" as well as individuals. The FLSA's section 3(r)(1) defines "establishment" to include only those "activities performed (either through unified operation or common control) by any person or persons *for a common business purpose* . . . ." 29 U.S.C. sec. 203(r)(1). The Senate Committee Report accompanying this amendment explained that this

> definition [of a covered enterprise] would not include eleemosynary, religious, or educational organizations not operated for profit. The key word in the definition which supports this conclusion is the word "business." Activities of organizations of the type referred to, if they are not operated for profit, are not activities performed for a "business" purpose. S.Rep. No. 1744, 86th Cong., 2d Sess., 28 (1960).

Accordingly, many charitable, religious, and educational establishments are categorically excluded from the FLSA's enterprise coverage.

Merely as a function of this categorical exclusion, at least several million employees in the not-for-profit sector will not be affected if the Wage & Hour Division's proposal is finalized.[4] Nearly 3 million employees worked in religious, grantmaking, civic, professional, and similar organizations in July 2015. *See* U.S. Bureau of Labor Statistics, Industries at a Glance: Religious, Grantmaking, Civic, Professional, and Similar Organizations – Workforce Statistics, *available at* http://www.bls.gov/iag/tgs/iag813.htm (last visited Aug. 26, 2015). These employees' employers likely are not subject to the FLSA's enterprise coverage. Another 3.5 million workers were employed in the social assistance sector, which includes individual and family services, community food and housing, and emergency and other relief services, vocational rehabilitation services, and child day care services. *See* U.S. Bureau of Labor Statistics, Industries at a Glance: Social Assistance – Workforce Statistics, *available at* http://www.bls.gov/iag/tgs/iag813.htm (last visited Aug. 26, 2015). Many of these employees almost certainly work for not-for-profit organizations that are not subject to enterprise coverage. Roughly 1.15 million workers were employed by private not-for-profit postsecondary education

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[3] A note to the Bureau of Labor Statistics' data on not-for-profit employment and establishments explains that these data address only those organizations that are tax exempt under section 501(c)(3) of the tax code. *See* U.S. Bureau of Labor Statistics, Overview - National NAICS 2-digit and 3-digit Industry Data – 2012 annual averages, available at http://www.bls.gov/bdm/nonprofits/nonprofits.htm (last visited Aug. 26, 2015). Because other organizations are tax exempt under other sections of the tax code, and some not-for-profit organizations do not have tax exempt status, this BLS data series understates the number of establishments and employees in the not-for-profit sector.

[4] Other organizations, including not-for-profit hospitals, were expressly defined as being operated for a business purposes, and therefore are arguably subject to enterprise coverage. *See* 29 U.S.C. sec. 203(r)(2).

institutions that are not subject to enterprise coverage. *See* Scott A. Ginder, Janice E. Kelly-Reid & Farrah B. Mann, Enrollment in Postsecondary Institutions, Fall 2013; Financial Statistics, Fiscal Year 2013; and Employees in Postsecondary Institutions, Fall 2013 at Table 3 (National Center for Education Statistics Oct. 2014). In sum, the Division's proposal, if finalized, will not reach a very sizable number of employees of not-for-profit organizations.

Even among not-for-profit organizations that may have some "business purpose," small employers are not subject to FLSA coverage and will not be affected by any changes that result from finalization of this proposed overtime regulation. Employers that have an annual gross volume of sales made or business done that is less than $500,000 per year are not covered by the FLSA. *See* 29 U.S.C. sec. 203(s)(1). Many community-based not-for-profits, including private social services agencies, would not meet this coverage threshold.

In the absence of enterprise coverage, workers may be covered by the FLSA if they are individually engaged in interstate commerce or in the production of goods for interstate commerce, or in any closely-related process or occupation directly essential to such production. The Division describes the following employees as examples of individual coverage

> [those who] work in communications or transportation; regularly use the mails, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross State lines in the course of employment; or work for independent employers who contract to do clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

U.S. Dep't of Labor, Wage & Hour Div'n, Handy Reference Guide to the Fair Labor Standards Act, *available at* http://www.dol.gov/whd/regs/compliance/hrg.htm (last visited Aug. 28, 2015).

The NPRM concedes that it is not possible to determine the number of workers who are employed by enterprises, whether for-profit or not-for-profit, with annual gross revenue below $500,000 and subject to individual coverage. Fed. Reg. at 38552. However, the Division assumes, and assumed in its 2004 rulemaking process, that the number of these employees is small. *Id.* Given the types of activities that constitute engaging in interstate commerce, it is also entirely reasonable to assume that the number of workers employed by not-for-profit organizations and subject to individual coverage is also quite small. Thus, the overwhelming majority of the millions of employees excluded from FLSA coverage because their not-for-profit employers are not subject to enterprise coverage also are not subject to individual FLSA coverage. As a result, the Division's final overtime regulation will not affect these workers and their employers.

Among the remaining not-for-profit enterprises that are subject to FLSA coverage, another sizable percentage of their employees will not have their exempt status changed simply because the Division's proposal would raise the salary level that serves as a threshold for these exemptions. As the Division's proposal explains, only those currently exempt executive,

administrative, and professional employees earning between the existing salary level of $455 per week and the proposed new salary level of $970 (in 2016) will be newly entitled to premium pay for overtime if the proposed regulation's increase in the salary level is finalized (and they satisfy the other tests required for exemption). Amy Butler, an economist in the Bureau of Labor Statistics' Division of National Compensation Survey, found that management employees working in the not-for-profit sector in 2007 earned an average of $34.24 per hour,[5] which far exceeded the proposed new salary level seven or eight years before it may be implemented. Legal, mathematical science and computer, and business and financial professional employees also received average hourly earnings in 2007 that far exceeded the proposed new salary level for 2016. Thus, there is very good reason to conclude that only a minority of currently exempt executive and professional employees would be newly entitled to overtime protections under the FLSA as a result of the NPRM's proposed increase in the salary level.

In sum, some not-for-profit organizations may have to pay higher salaries to some or all of their executive, administrative, and professional employees to surpass the new proposed salary level if they want to maintain existing exemptions. Others may change existing work arrangements to spread work and limit these employees' work hours to avoid overtime liability if they do not maintain existing exemptions. But the overall impact of the proposed regulation on the not-for-profit sector, in our view, will be quite small. Many organizations will not be affected at all. A very large number of employees will not be affected. As a result, when finalized, the Division's new overtime regulations should not have a deleterious effect on these valuable organizations or their efforts to accomplish their important missions.

VII. **Conclusion**

In conclusion, we urge the Wage & Hour Division to proceed to finalize the proposed rule so as to raise and automatically update the nationally-determined salary level that is used to decide whether executive, administrative, and professional employees are entitled to the protections of the minimum wage and overtime provisions of FLSA.

Respectfully submitted,[6]

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[5] Management employees in all sectors earned an average of $54.08 in May 2014 --- a substantial increase over 2007 --- so it is reasonable to assume that the average wage of not-for-profit managers is substantially higher now than it was in 2007. See Bureau of Labor Statistics, May 2014 National Occupational Employment and Wage Estimates United States, *available at* http://www.bls.gov/oes/current/oes_nat.htm#11-0000 (last visited Aug. 26, 2015).

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