September 22, 2017

Submitted via regulations.gov

Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S–3502, 200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Request for Information (RIN 1235-AA20) (29 CFR Part 541)

Dear Ms. Smith:

The American Hotel & Lodging Association (AHLA) respectfully submits the following comments in response to the above-referenced Request for Information (RFI) regarding Executive, Administrative, and Professional (EAP) exemptions to overtime pay under the Fair Labor Standards Act (FLSA).[1] The RFI was published by the Department of Labor's (DOL or Department) Wage and Hour Division (WHD) in the Federal Register on July 25, 2017. Serving the hospitality industry for more than a century, AHLA is the sole national association representing all segments of the U.S. lodging industry, including iconic global brands, hotel owners, REITs, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry suppliers. The lodging industry is one of the nation's largest employers. With nearly 8 million employees in cities and towns across the country, the hotel industry provides $75 billion in wages and salaries to our associates and generates $600 billion in economic activity from the 5 million guestrooms at the more than 52,000 lodging properties nationwide.

As detailed in the comments we filed in response to DOL's 2015 Notice of Proposed Rulemaking (NPRM), our members and their employees would have been severely and negatively impacted by an increase to the EAP exemption salary threshold of the magnitude proposed in the NPRM and contained in the related 2016 Final Rule.[2] Such an increase deviates drastically from past policy and methodology and would have required wide-spread reclassification of employees whose primary duties are executive, administrative, and professional in nature. As the court noted in *Nevada v. Department of Labor*, DOL lacks authority under the FLSA to disqualify these employees from the exemption based on salary alone.[3]

[1] AH&LA also joins the comments submitted by the Partnership to Protect Workplace Opportunity.
[2] AH&LA 2015 Comments on DOL's NPRM - https://www.regulations.gov/document?D=WHD-2015-0001-4639
[3] AH&LA, along with numerous other associations and organizations, was a plaintiff in the lawsuit challenging the 2016 Final Rule, filed in the US District Court for the Eastern District of Texas, Sherman Division.

Below, we respond to the questions posed by the Department in its RFI. Throughout these comments, we refer to the results of a survey AHLA sent out to its members seeking their input on the overtime requirements, 2016 Final Rule, and 2017 RFI.

In these comments, AHLA urges DOL to set a new standard salary level for exempt employees by applying the methodology the Department used in 2004 and to keep in place the existing duties test. We advocate against automatic updates to the salary threshold and against tying the threshold to inflation. While we support the use of incentive pay to calculate whether an employee meets the minimum salary threshold, AHLA opposes limiting the percentage of incentive income that can apply to that threshold and opposes the requirement that those payments occur on a monthly (or more frequent) basis. We also provide information on the effect the 2016 Final Rule and subsequent nullification of that rule had on the hospitality industry. We hope these responses assist the Department in establishing the most appropriate overtime requirements possible, which abides by Congress' original intent of the FLSA and also provides sufficient protections for employees and clarity for employers.

Responses to Request for Information:

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?

AHLA believes it would be most appropriate for DOL to update the EAP salary threshold by applying the 2004 methodology to current salary data. By using this methodology, DOL will be continuing the original objective of the salary threshold of providing employers and DOL with an easily applied bright-line rule that protects employees whose compensation is such that they obviously cannot meet the duties test and should not be exempt from overtime pay.

Eighty nine percent (89%) of respondents to our survey believe a new minimum salary threshold is needed in place of the salary set by the 2016 Final Rule. Fifty-two percent (52%) of respondents believe applying the 2004 methodology to current salary data would be the most appropriate method to establish a new threshold. Our calculations indicate such a figure would have been approximately $30,000 annually in 2016. This rate is more aligned with past increases and could be absorbed by the hospitality industry without significant and negative repercussions to the industry and/or economy.

The Department should not use inflation as a means of determining a minimum salary threshold. DOL has avoided using inflation in the past and, instead, has used formulas to set the salary threshold; AHLA does not believe DOL should deviate from that approach. Additionally,

attempting to discern which inflationary measure is the most appropriate for the salary threshold would further complicate the rulemaking process and invites future disputes and delays when DOL will next want to update the salary threshold. Finally, national inflationary measures will not necessarily align with the economic realities of lower-cost regions or industries. Using a national inflationary measure could result in a threshold that is either too high or too low for certain regions or industries, creating significant burdens on the economy.

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 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?

AHLA does not believe multiple-standard salary levels would be appropriate or necessary for determining overtime eligibility under the FLSA. The objective of the salary threshold is to screen out the obviously nonexempt employees: those who should be and are entitled to overtime pay. By applying the 2004 methodology to current salary data, the salary threshold would be set for the lowest wage areas and industries in the country, effectively accomplishing the objective of the salary test and making numerous salary thresholds unnecessary. The obviously nonexempt employees would be screened out in all regions, census divisions, states, and metropolitan statistical areas and for employers of all sizes.

Additionally, the FLSA permits states to impose more stringent overtime pay requirements, including higher salary thresholds, when it is deemed that doing so is in the best interest of the state's workforce and economy. We believe states are in a better position to assess their own workforce and economy and to determine if such adjustments are necessary.

We also believe that by setting multiple-standard levels by region, DOL would complicate compliance, invite litigation, and make future updates more onerous. Many AHLA members have employees in multiple states and regions. Creating multiple federal levels throughout the nation would complicate compliance for these multi-state/multi-region employers and invite ligation over which salary threshold applies to employees that are mobile, on temporary assignment, or move from one jurisdiction to the next. In addition, recalculating regional salary levels and boundaries will further complicate future updates to the regulations governing the EAP exemptions as increases in regional costs of living are dynamic and will vary over time.

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?

Ninety-five percent (95%) of AHLA members that responded to our survey felt DOL should not set different salary levels for the different EAP exemptions. In today's economy and workforce, executive, administrative, and professional employees often have various overlapping roles within their company, and the distinction between those positions is less clear than it was in the past. Therefore, the duties associated with those positions are significantly more blurred. The focus of the EAP exemptions should remain on whether the totality of responsibilities of the employee results in exempt primary duties, regardless of the quantity of time the employee spends working under a particular exemption. Requiring employers to determine which of these exemptions the employee spends more of his or her time devoted to would be needlessly burdensome, complicate compliance, and invite unnecessary litigation without providing any additional protections for employees.

4. In the 2016 Final Rule the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

The changes made to the FLSA overtime requirements in 2004 obviated the need for the distinction between the long and short test salary levels. DOL adjusted the minimum salary threshold to make up for the elimination of the long/short test structure. The methodology used in 2004 was appropriate for the original intent of the salary threshold: to screen out obviously nonexempt employees. AHLA believes that methodology and reasoning still applies today.

AHLA does not believe changes to the duties test are necessary to effectively determine exemption status. DOL has not articulated any justification for making changes, which would require employers to dedicate significant amounts of time and resources to review and make determinations about their employees' overtime eligibility. AHLA members are extremely concerned about the cost and burden that would come with such changes. Specifically, AHLA opposes any effort by DOL to revise the duties test in a manner that imposes a time percentage similar to the old long test, or the test used by the state of California. Imposing such a quantitative element would create an administrative nightmare, as tracking this kind of minutiae in an employee's day-to-day responsibilities is both inefficient and extremely difficult in the lodging industry.

Additionally, changes to the duties test will likely result in a period of transition and legal uncertainty. Revising the duties test would diminish the value of the legal precedent clarifying the duties test that has developed over the past 10 years, in which the hospitality industry, as well as the rest of the employer community, has relied on to understand the complexities of the FLSA's overtime requirements. Altering the duties test will likely trigger an increase in litigation as employers and employees try to decipher and apply the new test.

Several respondents to our survey requested, however, that DOL provide greater *clarity* on the application of certain aspects to the duties test. AH&LA and its members believe DOL should provide any additional clarification through examples issued in a new regulation and guidance via the opinion letter process, rather than changes to the duties test itself.

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?

In *Nevada v. Department of Labor*, the judge determined that the salary level established by the 2016 Final Rule created a *de facto* salary-only test to determine overtime eligibility for many employees that would otherwise meet the duties test. Effectually, the salary threshold set by DOL in 2016 would have nullified the need for and role of the duties test in many cases. AHLA strongly agrees with the court's opinion. As stated previously in these comments, the original intent of the salary threshold was to set a floor for exempt status; the salary threshold is meant to screen out those employees who are obviously eligible for overtime and should not be exempt under the FLSA.

While there are various methods by which the Department could set a salary level that fits within the above parameters, DOL need look no further than its 2004 methodology. That methodology fits within historic norms and, as the judge suggested in the *Nevada v. Department of Labor* case, would align with the Department's authority under the FLSA. We urge the Department to simply apply the 2004 methodology, rather than submit employers and employees to a lengthy attempt to find an alternative, which may ultimately not survive scrutiny by the courts.

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?

AHLA members made several changes to their workforce following the announcement of the 2016 Final Rule. Forty percent of respondents in our survey made some form of a change to their

workforce policies. Over sixty percent (60%) reclassified at least one worker. Forty-three percent (43%) raised the salaries of at least one worker to a figure above the 2016 Final Rule's salary threshold, and 31% changed the work hours or employment provisions for entry-level managers. Additionally, 5% of respondents lowered the starting salary for new positions in order to comply with the new threshold. Out of the respondents, 40% initiated the changes after the 2016 Final Rule was announced, but 80% delayed implementation of all or some of those changes following the preliminary injunction halting implementation of the 2016 Final Rule. Half of our respondents did not reverse changes, however, once they were implemented.

Following implementation of these changes, fifty one percent (51%) of respondents said they saw a noticeable dip in employee morale. Forty-seven percent (47%) said there was a reduction in professional development opportunities. Twenty-seven percent (27%) said there was diminished workplace autonomy, and forty seven percent (47%) said less flexibility was offered to employees. One respondent said they increased training in scheduling in order to make directors conscious of how they're using their managers.

AHLA members are not able to provide accurate data on costs, since implementation was limited as a result of the court's preliminary injunction against the 2016 Final Rule. Some members noted, however, that as a result of some of the changes they did implement, they had to reduce staff and increase costs for customers.

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?

AHLA does not believe a duties-only test would be appropriate for the overtime requirements under the FLSA. In order to compensate for the bright line the salary threshold provides, the Department would have to significantly restructure the overtime regulations. This would inevitably result in increased litigation, compliance challenges, and costs as employers and employees struggle to understand the changes and new requirements. Additionally, moving to a duties-only test would undoubtedly result in a more rigid duties test, potentially one including a quantitative element on the amount of time an exempt employee can spend on nonexempt duties. Such changes will likely result in excessive burdens on the hospitality industry, including new and onerous recordkeeping requirements and increased litigation costs.

8. Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

Had it gone into effect, the 2016 Final Rule's salary level would have excluded from exemption middle-management positions in the hospitality industry. Many of these positions are well-

paying jobs with substantial responsibility and authority in the workplace. These positions are seen as key steps in the ladder of professional development and success. As explained in AHLA's 2015 Comments, multiple AHLA members stated they were likely to reclassify at least 50% of their managers as nonexempt in order to absorb the costs of complying with the 2016 Final Rule. One member said they will eliminate all entry-level management positions; another said they will eliminate a third of their exempt managers and give increased responsibilities to the remaining two-thirds. This is a great loss to the hospitality industry and the nation's workforce.

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?

AHLA supports allowing incentive compensation to be counted in determining whether the minimum salary threshold is met. Allowing such supplemental incentive compensation in overtime eligibility determination will encourage companies to provide bonuses and other opportunities that allow exempt employees to share and potentially profit from a company's overall performance. That said, AHLA does not support limiting the amount of supplemental compensation that may be considered when determining if the salary threshold has been met.

AHLA also opposes the suggestion that supplemental compensation would have to be paid on a monthly or more frequent basis in order to be included in the salary-level calculation. Many supplemental compensation programs in the lodging industry are not structured to be paid with such frequency. This requirement would place a significant administrative burden on employers to calculate and pay incentive compensation on a monthly or more frequent basis.

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?

AHLA believes multiple levels for the highly compensated employee exemption would result in the same difficulties as discussed in our response to Question 2. Multiple thresholds would complicate compliance, invite litigation, and make future updates far more onerous.

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?

Considering the significant economic impact such changes have on the economy and the operations of the hospitality industry, DOL should not implement any changes to the overtime requirements and regulations automatically. Doing so would result in increased burdens on employers during economic downturns, hampering the economy even more. In our member survey, 85% of respondents called on DOL not to automatically update the salary threshold. The same percentage believe DOL should evaluate economic circumstances and seek input from stakeholders before raising the salary threshold.

Input from stakeholders is vital, and no changes should be made to any area of the FLSA's overtime requirements without first proposing specific language being considered, giving the public notice of the potential changes, and providing the public with an opportunity to comment. Any changes made without undergoing the formal notice-and-comment process would violate the Administrative Procedures Act and would jeopardize the economic prosperity of the American workforce and hospitality industry, one of the most vital and successful industries in the US economy.

Conclusion:

The American Hotel & Lodging Association thanks you for the opportunity to respond to this Request for Information. We look forward to working with the Department of Labor on this immensely important workplace issue.

Sincerely,

Brian C. Crawford
Vice President, Government & Political Affairs