NEW YORK creditunion ASSOCIATION

strength in members.

September 2, 2015

Mary Ziegler, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division, U.S. Department of Labor
200 Constitution Avenue NW, Room S-3502
Washington, DC 20210

Re: (RIN) 1235-AA11

Dear Ms. Ziegler,

I am writing this letter on behalf of the New York Credit Union Association to comment on the Department of Labor's proposal to raise the threshold salary level for exempt employees to $50,400 and the highly compensated employee threshold to $120,000. Credit unions are not-for-profit financial institutions dedicated to furthering the financial opportunities of all Americans and must compete against for-profit banks, which makes them uniquely impacted by this proposal.

In preparing this comment letter, the Association solicited the opinions of credit unions throughout New York state. Credit unions recognize that a ten-year gap in updating the exempt employee threshold has arguably diminished the effectiveness of the Fair Labor Standard Act's overtime requirements. Conversely, credit unions are very concerned that if this proposal is too hastily implemented without adequate consideration given to the unique circumstances of small businesses, the increased economic burden will result in further consolidation of the credit union industry.

This regulation will increase expenses for many credit unions already struggling to manage higher compliance costs. For eight years, credit unions have had to both cut costs and replenish the industry's insurance fund in order to survive the Great Recession. Notwithstanding the economic downturn, salary and benefit costs have continued to increase. In 2011, the average salary and benefits for full-time New York credit union employees was approximately $67,000. As of March, it has risen more than 10 percent to $76,000, according to the National Credit Union Administration's Financial Performance Report data.

The costs of salaries and benefits may rise sharply once this proposal is finalized. Of the 45 credits unions that responded to the Association's survey, 85 percent of them have exempt employees who occasionally work overtime. Many of these employees currently make less than the proposed threshold. Against this backdrop, there are adjustments that can and should be made to minimize the potentially negative consequences of this regulation.

Most importantly, a higher exempt employee threshold should be phased in over at least an 18 month period. Credit unions need the time to determine whether the costs of this regulation should be absorbed by budgeting for higher overtime costs, hiring more employees, delaying new hires or laying off staff.

By proposing that the threshold should be set at the 40th percentile of earnings for full-time salaried workers, the Department is not giving adequate consideration to regional cost-of-living differentials and corresponding divergent salary requirements. For instance, according to recent research performed by the Kaiser Family Foundation, the average cost of living for a family of four to have purchasing power equal to 400 percent of the federal poverty level in New York is $138,000. However, the corresponding costs in the state's least expensive urban area is $92,732, whereas in the most expensive area it is $216,998. Because costs vary widely, the Department's approach is too inflexible.

The Secretary should utilize his authority to "define and delimit" the scope of the EAP exemption by setting the exemption threshold by region. If it chooses not to adopt this approach, it should adopt a basket of indices to better account for regional cost differences. Greater consideration of cost of living in setting the exemption level would also be consistent with the Department's regulatory history. For example, as early as 1949, "[t]he department considered wages in small towns and low wage industries in setting the exemption threshold." (69 FR 22122-01).

For similar reasons, the Association is opposed to increasing the Highly Compensated Employee exception to $120,000. Given that only 10 percent of persons have breached this threshold, it certainly seems that these employees are highly compensated and can fairly be expected to work more hours when necessary in return for this compensation.

In the preamble to this proposal, the Department expresses concern that the "primary duty" rule has given businesses too much flexibility to classify employees who spend the majority of their time performing nonexempt duties as exempt supervisors. Consequently, the Department "is seeking to determine whether, in light of our salary level proposal, changes to the duties tests are also warranted. The duties test must adequately protect overtime-eligible white collar employees who exceed the salary threshold from misclassification as exempt EAP employees."

A more stringent application of EAP exceptions would harm many credit unions. Many credit unions are small operations that have only one or two branches. Branch managers at these institutions must, by necessity, be willing to take on a range of duties on any given day, such as advising a member applying for a mortgage or serving as a teller for a lunch hour. Simply because an executive is willing to pitch in

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and help their employees doesn't make them any less of a supervisor. Unfortunately, if the Department decides to base an employee's classification solely on the amount of time spent performing work responsibilities, this is exactly what will happen to people involved in running small institutions. They will have less flexibility to perform work that needs to be done, the costs of running smaller branches will increase and the prestige that comes with being a manager will be diminished.

At the very least, if the Department goes forward with changes to these regulations, it should reintroduce the concept of "sole-charge" employees, which was eliminated as part of the 2004 revisions. Prior to 2004, exempt executives could only perform nonexempt duties 20 percent of the time. In contrast, executives who were solely in charge of independent branches and had a primary responsibility of overseeing two or more employees could be considered exempt, so long as they performed exempt duties at least 20 percent of the time.

The President and Department are understandably concerned about the plight of workers who continue to struggle to make ends meet despite working long hours. While some adjustment of the exempt employee threshold may address part of this problem, the negative impact that a poorly designed and implemented proposal could have on employees and small businesses should not be underestimated. A delayed effective date, greater sensitivity to regional costs and enhanced flexibility for smaller institutions will help ensure that this proposal balances the desire to properly compensate employees with the needs of businesses to control expenses.

Sincerely,

William J. Mellin
President/CEO

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