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November 6, 2023

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

**RE: ICBA Comments Opposing the Department of Labor’s Proposed Rule Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees [RIN 1235-AA39]**

Dear Sir or Madam:

The Independent Community Bankers of America (“ICBA”)<sup>1</sup> appreciates this opportunity to submit comments in response to the Department of Labor’s (“DOL”) proposed changes to the exemptions from minimum wage and overtime pay requirements for executive, administrative, professional, outside sales, and computer employees.<sup>2</sup> ICBA believes that the proposed changes exceed DOL’s authority, and in any event, would impose significant additional labor costs on community banks that would result in layoffs and hourly wage reductions for executive, administrative, and professional employees.

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<sup>1</sup> The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5.8 trillion in assets, over \$4.8 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at [www.icba.org](http://www.icba.org).

<sup>2</sup> 88 FR 62152, available at: <https://www.federalregister.gov/documents/2023/09/08/2023-19032/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and-computer-employees>.

## Background

The Fair Labor Standards Act (“FLSA”) requires employers to pay overtime premium pay of at least 1.5 times the employee's regular rate of pay to employees who work more than 40 hours in a week unless those employees are employed in a bona fide executive, administrative, or professional (“EAP”) capacity. To meet the EAP or “white collar” exemption, an employee must (1) be paid a fixed salary not subject to reduction based on the quality or quantity of work performed, (salary basis test); (2) that salary must meet a minimum level, established by regulation (salary level test); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (duties test).<sup>3</sup> The overwhelming majority of community bank employees work in roles that meet the salary basis test and the duties test. The dispositive factor in whether most bank employees meet the EAP exemption is whether they satisfy the salary level test.

In 2016, the Department of Labor finalized revisions to the Overtime Rule that would have raised the EAP exemption threshold to an annual salary of \$47,476 annually. This threshold was based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, which was then the South. The 2016 rule also included a mechanism that would have automatically updated the salary threshold every three years. At the time, ICBA opposed these changes, arguing that they would directly reduce wages and employee benefits and curb hiring.

However, the 2016 rule change never went into effect because the United States District Court for the Eastern District of Texas found that the rule change exceeded the DOL’s statutory authority.<sup>4</sup> Specifically, the court held that “the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1) [of the FLSA]” and that “the Department does not have the authority to categorically exclude those who perform ‘bona fide executive, administrative, or professional capacity’ duties based on salary level alone.”<sup>5</sup> This decision makes clear that a salary level test that excludes a significant number of employees who are employed in a bona fide executive, administrative, or professional capacity from the EAP exemption is contrary to the plain meaning of the text of the FLSA.

In 2019, the DOL issued a rule that would raise the EAP salary threshold to the current level of \$35,568. That threshold went into effect on January 1, 2020. On August 30, 2023, the DOL issued the current proposal, which would raise the threshold to \$55,068 and include a provision to automatically update that threshold every three years.

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<sup>3</sup> See 29 CFR Part 541.

<sup>4</sup> Nevada v. United States Dep’t of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017)

<sup>5</sup> *Id.* at 805.

In this proposal, “the Department is proposing to set the standard salary level at the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (\$1,059 per week or \$55,068 annually for a full-year worker).”<sup>6</sup>

### ICBA Position

Across the country, thousands of community banks are pillars of tens of thousands of communities. They offer services and products that enable members of those communities to grow and flourish. Whether members of the community need education for first-time mortgage applications, investment options for retirement, or a advice for starting a small business, community banks are the trusted source. Much of that trust comes from the fact that community bank employees live in the communities in which they serve, and their daily lives intersect.

Being a community banker requires tremendous skill and effort. They are some of the most respected professionals in towns and communities, and as such, are some of the highest compensated individuals in those areas. Yet, despite this stature and respect, the DOL proposal would undermine them by classifying them as performing roles that are less than that of an executive, administrator or professional, based exclusively on their salaries.

Community bankers are in high demand and demand competitive salaries, especially in the current high-inflation environment. As a result, community banks have increased salaries for their employees to be competitive. However, if DOL finalizes its proposed rule, the change would be a dramatic **54.8% increase** from the threshold’s current level of \$684 per week (equivalent to a \$35,568 annual salary). That would far outpace the rate of inflation, which according to the Bureau of Labor Statistics, the economy has experienced inflation of **18.6%** -- roughly 1/3 of the proposed increase.

**An increase of the EAP salary test threshold that is 3 times greater than the rate of inflation is not justified** and will be unduly burdensome to small businesses, including community banks, during times of still heightened economic uncertainty. To offset these costs, community banks may be forced to reduce staff, shorten business hours and reduce the services available to consumers, close branches, or reduce the hourly pay of employees.

Additionally, we believe **this proposal likely exceeds the Department’s legal authority** because it would arbitrarily require millions of employees who work in bona fide executive, administrative, or professional roles to be paid overtime – which would violate Section 213 of the FLSA. The DOL’s current proposal is a misguided return to the framework that the Department finalized in 2016 – a framework which was found to exceed the Department’s legal authority by disregarding the plain meaning of the text of the FLSA.

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<sup>6</sup> 88 FR 62152.

### **Harming Small Businesses, Including Community Banks**

DOL should not raise the salary threshold at this time, and it must not raise the salary threshold at a rate that is faster than the rate of inflation. This rapid increase will hit community banks and small businesses at a time when they can least afford it as the country is facing historic inflation and teeters on a recession. This is too much, too fast.

If the Department does continue to use a salary level test, it should not raise the salary threshold at this time, and it must not raise the salary threshold at a rate that is faster than the rate of inflation. **An adjustment of the salary threshold to \$42,184 annually would be an increase equivalent to the rate of inflation since the threshold was last raised.** The Department should not raise the salary level test threshold higher than this level.

The result of this policy, if finalized as proposed, will result in a surge of employees being reclassified as non-exempt. Community banks will likely have to respond by limiting their working hours as to not incur unanticipated and unbudgeted costs. In the community banking sector, this means longer times for customers to have their loan applications processed, longer times for mortgage closings, and less time spent on the ancillary advisory services that for which community banks are known.

Reclassification of employees who are currently exempt from overtime pay will limit their flexibility, bonus, or incentive pay availability. More fundamentally, reclassification will change the character of their jobs, their professional incentives, and even their career path. Moreover, broadening the number of small business employees subject to overtime pay will increase not only personnel costs but also administrative costs, since it will force these businesses to track the overtime hours of more employees.

### **Exceeding Department's Legal Authority**

Congress's intention behind FLSA was to exempt all bona fide executive, administrative, and professional employees from the overtime rule. DOL does not have the authority to exclude bona fide EAP employees from the exemption on salary level test alone. The 2016 U.S. District Court for the Eastern District of Texas confirms this, citing the DOL Secretary's contention that, "[i]n fact, the Department admits, '[T]he Secretary does not have the authority under the FLSA to adopt a 'salary only' test for exemption.'"<sup>7</sup>

The purpose of the salary level test is to screen out the "obviously nonexempt employees."<sup>8</sup> It is not intended to be used as a gold-plated factor that effectively preempts the other tests. The threshold is supposed to be set at a level where there would be no reasonable basis to believe that employees

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<sup>7</sup> *Nevada v. United States Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

<sup>8</sup> Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1948) at 8.

under that threshold perform any of the EAP duties.

Just as it attempted in 2016, the DOL is again trying to “categorically exclude those who perform `bona fide executive, administrative, or professional capacity” duties based on salary level alone.’ ”<sup>9</sup> However, significantly increasing the salary test threshold in an abbreviated timeframe would “essentially make an employee’s duties, functions, or tasks irrelevant if the employee’s salary falls below the new minimum salary level.”<sup>10</sup>

Instead, ICBA believes that a duties-based test alone is sufficient and appropriate to make this determination. The DOL should not use salary levels to arbitrarily exclude bona fide executive, administrative, and professional employees from the exemption.

Furthermore, the Department should not create a provision to automatically update the salary level every three years. Doing so would not allow the public to provide input on potential changes, which is contrary to the Administrative Procedure Act. Additionally, once the rate of inflation has stabilized, updating the threshold every three years is excessive because it will result in undue administrative burden to account for relatively small changes.

While ICBA disagrees with any automatic updating mechanism, updating the threshold to a specific, and significant increase in inflation would prevent businesses from being required to update policies and reclassify employees to account for only small changes in the salary level.

ICBA appreciates the opportunity to comment on the Department of Labor’s Request for Information concerning the FLSA’s minimum wage and overtime exemption for certain executive, administrative, professional, outside sales, and computer employees. If you have any questions or would like additional information, please do not hesitate to contact me at Mickey.Marshall@icba.org.

Sincerely,

/s/

Mickey Marshall  
Assistant Vice President, Regulatory Counsel

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<sup>9</sup> Nevada v. United States Dep't of Labor, 275 F. Supp. 3d 795 (E.D. Tex. 2017).

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