

August 2, 2017

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 NW.
Washington, DC 20210

Re: Request for Information on Changes to the Overtime Regulations, RIN 1235-AA20

Dear Ms. Smith,

The American Society of Association Executives (“ASAE”) respectfully submits these comments in response to the U.S. Department of Labor’s July 26, 2017 Request for Information seeking public input prior to issuing proposed changes to the salary level test of the Fair Labor Standards Act (“FLSA”) regulations implementing the exemption from minimum wage and overtime pay for executive, administrative, and professional employees (the “EAP exemptions”). ASAE represents more than 21,000 association executives and industry partners representing more than 9,300 organizations. ASAE’s members manage nonprofit 501(c)(6) trade associations, individual membership societies and voluntary organizations across the United States. The nonprofit organizations managed by ASAE’s members include many 501(c)(3) tax-exempt charities and educational organizations. On our own behalf and on behalf of our members, we submitted comments in August 2015 in opposition to proposed increases to the salary level in the U.S. Department of Labor’s July 6, 2015 Notice of Proposed Rulemaking (“NPRM”), and we continue to oppose the 2016 Final Rule’s increase of the salary level to \$47,476, with automatic three-year increases, as specified in the 2016 Final Rule.

ASAE supports raising the minimum salary level for the EAP exemptions to reflect inflation and increases in the costs of living since the previous update in 2004. The \$47,476 level far exceeds that, however. The last increase in the salary level test, published in April 2004, set the minimum annual salary level for EAP exempt positions at \$23,660. Based on the inflation calculator published by the U.S. Bureau of Labor Statistics, that level is equivalent in current buying power of a June 2017 salary of \$30,827.85. As of the date of this submission, the most recent month for which Consumer Price Index data is available. ASAE submits that a salary level of approximately \$30,830.00 is the appropriate level for the Department of Labor to set, either nationally or, for the reasons described below, for the nonprofit sector. ASAE does not oppose automatic adjustments on a three-year cycle, provided that those adjustments are also tied to increases in the Consumer Price Index and are published at least six months in advance of the effective date of the increase, in order to allow sufficient time for budgets to be set.

Increasing a minimum salary level at a rate higher than inflation would have a significant adverse effect on many nonprofit organizations, particularly nonprofits located in rural areas and small towns outside of major metropolitan areas and in certain lower-wage regions of the country. The 2016 Final Rule’s

uniform minimum salary level of \$47,476 disregards the very real regional differences in the level of income needed to achieve a middle-class standard of living. For example, according to the relocation calculator of the FAS Relocation Network, an employee in Washington, D.C. earning an annual salary of \$47,476 would only need to earn \$23,893 to have a comparable standard of living in Marshalltown, Iowa, where the cost of living is calculated as 49.7% less expensive than in the nation's capital.¹ The federal government has available to it regional data on average salaries. In fact, the federal government's own General Schedule ("GS") pay tables for federal employees include locality adjustments that recognize that certain metropolitan areas have higher costs of living requiring an increase in pay. For example, a federal government employee with a law degree or two-year master's degree typically starts at GS-9 position.² In the 2017 GS Schedule for most of the country, Steps 1 through 3 of the GS-9 Grade earn below the 2016 Final Rule's \$47,476 minimum salary level, and a GS-10 Grade employee is the first Grade level at Step 1 to exceed that minimum (at an annual salary of \$47,630). In the San Jose, California area, however, a GS-7 Grade, Step 1 employee would earn even more than that (at \$48,856), and a GS-10 Grade, Step 1 employee in San Jose would earn an annual salary of \$65,810, over \$18,000 more than an employee in an identical position would earn outside of that locality.³ Given that the federal government recognizes for its own workforce that jobs with the same level of responsibility and qualifications appropriately command dramatically different salary levels depending on region, the minimum salary level for the EAP exemptions should – and can – also be keyed to such regional differences if the Department increases the 2004 minimum salary level above the rate of inflation increases.

Moreover, the high minimum salary level set by the 2016 Final Rule disproportionately adversely affected nonprofit employers. According to a 2009 report by the Congressional Research Service, more than 1.5 million nonprofits (including public charities, foundations, and professional and trade associations) are registered in the U.S., and the nonprofit sector employs approximately ten percent of the nation's workforce.⁴ The nonprofit sector provides social welfare services, is the backbone of the health care, education, and scientific research fields, supports religious and cultural expression, provides mechanisms for political engagement, and supports the exchange of ideas within professional, trade and other membership associations. As mission-driven, not-for-profit organizations, many nonprofit employers offer lower salaries than for-profit companies. Indeed, the data from ASAE's 2016 survey of compensation practices of nonprofit organizations managed by ASAE's members reflect that some chief executive officer positions at professional associations earn annual compensation below the 2016 Final Rule's minimum: the low end of the range of reported annual compensation for CEOs at nonprofit organizations responding to the survey was just \$46,224. Given that an unquestionably exempt position such as CEO would be converted to an overtime-eligible position under the proposed new salary level rule, the 2016 Final Rule's minimum salary is clearly too high when applied to smaller nonprofit organizations. Due to the vital role of the nonprofit sector in our nation's economy and societal structure, the Department should revise the salary level regulations so as to minimize any negative impact on nonprofit organizations.

As noted in ASAE's August 2015 comment, nonprofit employers are also less able to absorb the increased costs of expanding the pool of overtime-eligible employees. By definition, nonprofit organizations have no profits to transfer. They typically operate on tight budgets designed to maximize

¹ See http://tools.gmsrelo.com/ToolsFas/Tool_SalarySurveyCity.asp.

² See <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/#url=Group-Standards>.

³ See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2017/saltbl.pdf>.

⁴ See *An Overview of the Nonprofit and Charitable Sector*, available at <http://www.fas.org/sgp/crs/misc/R40919.pdf>.

the percentage of their revenues directed towards their organizational mission, rather than to overhead expenses, of which payroll is commonly the largest component. Nonprofits depend primarily on member dues or, in the case of charities, on donations or grant funds, in order to carry out their missions. Nonprofits have no owners or shareholders who can support an increase in total employee compensation costs through accepting a reduction in profits or dividend payments. Accordingly, since the budgets of nonprofit organizations do not provide flexibility for the large increase in personnel payments, implementing the 2016 Final Rule would force nonprofit employers to make unpalatable choices:

- Reduce their service levels to avoid overtime – which would undermine their effectiveness and harm the constituents the organizations are serving;
- Convert affected employees to non-exempt status at a lower hourly rate, so that payment of overtime does not increase their overall annual compensation – which would harm morale and be perceived as a demotion by the affected employees;
- Cut positions in order to fund the additional overtime obligation – which would hurt the terminated employees and the organization; or
- Require the remaining exempt employees to absorb some of the duties of the newly non-exempt employees – which would be felt as an unfair burden by the exempt employees and restrict the newly non-exempt employees from career growth.

Each of these options would harm not only the organizations, but their affected employees as well. Currently exempt junior and mid-level employees who would convert to non-exempt status under the proposed salary level change are most vulnerable to this “adverse impact.” In order to control overtime costs and comply with compensable working time regulations, many nonprofit employers exclude non-exempt employees from off-hours access to work emails and network systems. Similarly, non-exempt employees are commonly excluded from the conferences and annual meetings that are often the most important work events of membership organizations, because the travel time and long hours associated with attendance at such conferences would result in prohibitively expensive overtime costs.

Participation in key work-related discussions and attendance at their organization’s conferences, even if conducted in the evenings or over the weekends, are often highly valued building blocks to professional growth and career advancement for junior and mid-level exempt employees. If they are reclassified as non-exempt solely due to their salary level, these employees will lose meaningful opportunities to gain greater job responsibility and to develop connections within their chosen field.

In addition, in many workplaces, non-exempt employees are not permitted to telecommute or to work flextime schedules that are made available to exempt employees. Such flexible work arrangements pose challenges for employers in tracking and capturing all compensable work hours and controlling overtime costs for non-exempt employees. By contrast, the FLSA and state wage and hour laws do not require that employers record the precise hours worked each day by exempt employees, so employers have more latitude to offer flexible schedules and telework arrangements to exempt employees. These more flexible work arrangements not only tend to improve employees’ work satisfaction, but they also help employees achieve a better work-life balance. As a result of conversion to non-exempt status, some currently exempt employees may lose the flexible work arrangements on which they and their families have come to rely. In short, by setting a salary level that will categorically reclassify so many currently exempt employees as non-exempt, the 2016 Final Rule would adversely impact the work life and personal lives of many affected employees, without any guarantee that those employees will in fact earn higher incomes as a result of the proposed changes.

To avoid these negative consequences, the Department should either set a lower salary level applicable to all employers or set the minimum salary level at a lower percentile of the national average for nonprofit and/or small employers. Because the duties test will still distinguish appropriately between exempt and non-exempt positions, ASAE's proposed alternative of a lower salary level threshold, at least for small and/or nonprofit employers, would still meet the objectives of the FLSA. There is certainly precedent for exempting smaller employers from laws enacted to protect employees, where those laws could unduly burden the operations of the employer. Employers with fewer than 50 employees, for example, are not covered by the mandatory leave provisions of the Family and Medical Leave Act of 1993. Moreover, in enacting the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Congress directed agencies to evaluate whether regulations are expected to have a significant economic impact on small entities and to consider less burdensome alternatives. According to the Congressional Research Service, approximately 52% of nonprofit establishments employ fewer than 10 employees.⁵ Because the duties test will still distinguish appropriately between exempt and non-exempt positions, ASAE's proposed alternative of a lower salary level threshold, at least for small and/or nonprofit employers, would still meet the objectives of the FLSA.

The 2016 Final Rule recognized that nonprofit institutions of higher education merited exceptions from the generally applicable changes to the salary level test, providing, for example, that academic administrative employees paid on a salary basis at least equal to the entrance salary for teachers in the same educational establishment would remain exempt even if paid below the salary level established in the Final Rule. See <https://www.dol.gov/whd/overtime/final2016/highered-guidance.pdf>. ASAE submits that it and other nonprofits also deserve relief from the jeopardy to our missions posed by the costs resulting from more than doubling the salary level for EAP employees. Either for the non-profit sector or for all employers, we request that the minimum salary level for exempt employees meeting the EAP duties and salary basis requirements be set to reflect only the increase in the Consumer Price Index since 2004.

Finally, ASAE requests that the Department clarify that the stated minimum salary level amount applies only to full-time exempt employees, and that the salary level may be pro-rated for part-time exempt employees meeting the EAP duties and salary basis requirements.

Thank you for this opportunity to provide our views.

Sincerely,

A handwritten signature in black ink that reads "John H. Graham IV". The signature is written in a cursive, slightly stylized font.

John H. Graham IV, CAE
President and CEO

5. *Id.*