



American Institute of CPAs  
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September 3, 2015

Ms. Mary Ziegler  
Director of the 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: Proposed Rule RIN 1235-AA11

[Submitted via regulations.gov](http://www.regulations.gov)

Dear Ms. Ziegler:

**I. Introduction**

These comments are submitted on behalf of the American Institute of Certified Public Accountants (“AICPA”) in response to the U.S. Department of Labor’s (“DOL”) July 6, 2015 Notice of Proposed Rulemaking to amend the Fair Labor Standards Act (“FLSA”) exemptions from minimum wage and overtime requirements for executive, administrative, professional, outside sales, and computer employees (the “white collar exemptions”). The AICPA is concerned that the proposed rule changes will have unintended, detrimental effects on both employers and employees in the accounting profession.

The AICPA sets ethical standards for the accounting and auditing profession and U.S. auditing standards for private companies, nonprofit organizations, and federal, state, and local governments. It develops and grades the Uniform Certified Public Accountant (“CPA”) Examination and offers specialty credentials for CPAs who concentrate on personal financial planning, forensic accounting, business valuation, and information management and technology assurance. The AICPA is the world’s largest member

association representing the accounting profession, with more than 412,000 members in 144 countries, and a history of serving the public interest since 1887. AICPA members represent many areas of practice, including business and industry, public practice, government, education, and consulting.

While the AICPA appreciates the need to ensure the regulations governing overtime pay reflect the evolving workplace and economy, we are concerned that the DOL's proposed rule will increase the administrative burden in complying with the regulations while dramatically increasing employers' payroll costs. Further, the proposed changes would likely have the unintended impact of forcing employers to curtail hiring and even reduce the size of their workforce, with the net effect of concentrating compensation in fewer employees. While most accounting firms would be affected, the changes would have a particularly significant negative impact on smaller accounting firms that simply cannot afford to raise their salaries for exempt employees above the new proposed threshold but also cannot afford to pay overtime to formerly exempt workers.

This letter summarizes the AICPA's opposition to four proposed changes to the FLSA regulations regarding the white-collar exemptions from overtime: (1) increasing the standard salary for the salary level test for the white-collar exemptions, (2) increasing the highly compensated employee ("HCE") salary threshold, (3) potentially changing the existing duties test to the California "50 percent" model, and (4) permitting nondiscretionary bonuses and incentive payments to count toward a portion of the standard salary level test.

In general, the AICPA finds that the proposed revisions to the standard salary would also likely impact junior accounting employees as well as more senior accountants in lower-wage areas of the country. Those junior employees are currently treated as exempt, but without a pay adjustment, would not meet the salary level test and would become entitled to overtime pay. The proposed revisions to the HCE salary are likely to impact senior level accountants and managers in Corporate and Public Accounting.

## **II. Comments**

### **A. Standard Salary Increase**

The proposed 113 percent increase in the standard salary level for the white-collar exemptions from \$23,660 annually to \$50,440<sup>1</sup> annually would adversely affect employees and employers in the accounting profession. Specifically, the proposed rule increases the administrative burden on employers in complying with the regulations, and simultaneously increases employers' payroll costs. Additionally, increasing the standard salary would harm employees by reducing their flexibility, as well as hinder their advancement and networking opportunities. Finally, the proposed change would adversely and disproportionately impact small firms and nonprofit entities like state CPA societies.

First, the DOL should not underestimate the impact that this proposal will have on employers. Expanding the pool of overtime eligible employees will force firms to resort to cost-saving measures to maintain current payroll levels in a time of tight margins and an extremely competitive business environment. These measures could include reducing nonexempt employee hours and enforcing strict rules on overtime, increasing the number of temporary or part-time staff, expecting exempt employees to take on additional duties previously performed by their nonexempt colleagues, and, in the worst-case scenario, even laying off employees. The standard exemption salary increase will hinder career advancement for all employees by making it cost-prohibitive for companies to promote individuals and provide significant pay increases that do not track regular inflation. The proposed changes include methodology for annual increases in the salary threshold, which would make it difficult to plan annual salary increases and contribute to the administrative burden in doing so. It would also make it difficult to plan annual salary increases because of the uncertainty brought on by mandatory rule-driven increases. Rather than being driven by employee merit, salary increases would essentially be mandated by the government. Such a result creates a disincentive to a productive work environment where salary increases are earned, not expected. This was certainly not intended by the drafters of the FLSA.

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<sup>1</sup> This amount reflects the DOL's projection for the 40th percentile of earnings for full-time salaried workers in the first quarter of 2016, when it is anticipated that the Final Rule will be issued.

Second, the rule will negatively impact employees who no longer meet the salary threshold. Currently, because of the complexities involved in documenting and tracking hours worked for employees on flexible schedules or those who telecommute, many companies place restrictions on nonexempt employees telecommuting or working flextime schedules. Flexible work schedules are key to retaining and promoting a high-quality talent pool in the profession. Flexible work schedules contribute to employment work-life balance, and factor significantly into an employee's job satisfaction. In fact, organizations are beginning to understand that the shift to more flexible work arrangements in turn creates flexible career paths. This new approach to management and business operations greatly impacts employee/employer relations and job satisfaction. If employers are required to convert a significant number of exempt employees to nonexempt status, employees who have come to rely on the flexibility of these alternative work arrangements may see them restricted or taken away all together. Such an about-face return to strict 9-to-5 schedules and a reduction in employee flexibility will create morale issues for firms and companies nationwide.

As the AICPA looks ahead and works to encourage students to enter the profession, we are mindful that the proposed changes will have the biggest impact on junior staff in smaller markets or smaller firms who will no longer meet the salary threshold for overtime exemption. Junior exempt staff, many of whom are recent college graduates and faced one of the toughest job markets in recent years, may see hours significantly reduced or jobs downsized in a bid to control costs. Further, junior level staff may miss out on networking or other professional development opportunities. Often, nonexempt employees are restricted from attending conferences or traveling to out-of-town meetings. For some employees, participation in, discussions held, and education gained at these events constitutes important professional development opportunities. Often times, these events provide necessary continuing professional education requirements that must be met to work in the profession. Transitioning employees from exempt to nonexempt status will force firms and state CPA societies to reevaluate whether the overtime costs can support sending employees to these events. It may also reduce the number of junior staff a company is able to take on due to the associated administrative costs of tracking their hours.

Finally, the proposed increase places smaller firms and nonprofits at a significant disadvantage. The profession is largely made up of overtime exempt employees and salaries vary by region of the country, experience, education, and company size. For illustration purposes, assume that there is a Financial Analyst in Texas with up to one year of experience. If the Financial Analyst works at a small company, his salary range is between \$43,250 and \$51,250.<sup>2</sup> At a large firm for that same position with the same level of experience, the salary range is between \$47,500 and \$61,250.<sup>3</sup> In terms of location, in El Paso, Texas, the salary range for the Financial Analyst is between \$32,580 and \$38,700, versus a salary range of between \$70,725 and \$94,875 in Odessa, Texas.<sup>4</sup> This means that the same employee with the same skill set could meet the salary threshold and be considered exempt in one location (or company size) but not be exempt in a nearby location.

Smaller firms and nonprofit state CPA societies, especially those located outside of major metropolitan areas, will struggle to absorb new payroll commitments to match the 113 percent increase in the salary threshold. The likely result will be a conversion of certain exempt employees to nonexempt status. Expanding the pool of overtime eligible employees will place an even greater burden on smaller firms and nonprofit state CPA societies to find cost-saving measures to maintain current payroll levels. Such measures may include reducing nonexempt employee hours and enforcing strict rules on overtime, increasing the number of temporary or part-time staff, requiring exempt employees to take on additional duties previously performed by their nonexempt colleagues, and even laying off employees. The end result likely will be fewer employees taking on more work or, alternatively, greater use of part-time employees with a corresponding loss of security and income for those meant to be helped by the rule changes.

The unfortunate alternative to finding internal cost-saving measures is to push the increased costs of providing accounting, auditing, and tax services to the client. Or, in the

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<sup>2</sup> Robert Half 2015 Salary Guide: Accounting and Finance, available online at <http://www.roberthalf.com/finance/2015-accounting-and-finance-salary-guide>

<sup>3</sup> *Id.*

<sup>4</sup> Based on the Salary Calculator for Accounting and Finance Professionals, provided by Accountemps (a Robert Half Company), available online at <http://www.roberthalf.com/accountemps/the-2015-salary-guide-for-accounting-and-finance>.

case of businesses, especially for smaller businesses, the increased administrative and payroll burden to comply with the rule will require companies to push costs to their customers. Small firm clients are often smaller companies and nonprofits, many of which will already be feeling significant pressure from the impact of the DOL's overtime rule on their own payroll. If resources are diverted to payroll, many smaller firms may be forced to reconsider future growth opportunities. To comply with the significant increase proposed by the DOL's rule, smaller firms looking to grow the firm's services or their employee base will be forced to reconsider those plans. In some cases, smaller firms and businesses will exhaust all internal options and will have no choice but to pass some costs onto their clients and customers.

Moreover, the proposed changes fail to achieve the policy objectives behind the standard salary test component of the white collar exemptions from overtime. The proposed rule increases the standard salary at the 40th percentile because the DOL takes the position that the proposed salary threshold "adequately distinguishes between employees who may meet the duties requirements of the EAP exemption and those who likely do not, without necessitating a return to the more detailed long duties test."<sup>5</sup> Therefore, the DOL assumes that employees who will fail the new salary test would also fail the duties test. That is not the case; there are many employees in the accounting profession (particularly at small firms or in small markets) who are above the current salary threshold of \$23,660 and below the proposed threshold of \$50,440 that also satisfy the duties test. By way of example, the Robert Half 2015 Salary Guide: Accounting and Finance<sup>6</sup> lists the following salary ranges for positions with up to one year of experience at small companies:

- General Accountants - between \$40,500 and \$47,250;
- Budget Analysts - between \$40,500 and \$51,000;
- Cost Analysts - between \$41,000 and \$50,000;
- Treasury Analysts - between \$40,750 and \$50,250;
- Tax Services - between \$46,500 and \$56,500;

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<sup>5</sup> 80 FR 38517.

<sup>6</sup> Available online at <http://www.roberthalf.com/finance/2015-accounting-and-finance-salary-guide>.

- Audit/Assurance Services - between \$45,750 and \$56,500;
- Management Services - between 45,750 and \$58,000.

All of these positions could fall below the new proposed salary threshold and thus be considered non-exempt and eligible for overtime, but would arguably satisfy the duties test. The proposed salary threshold fails to adequately distinguish between exempt and non-exempt employees — especially at small firms or in smaller markets — and should be adjusted to ensure that all possibly exempt employees meet the salary threshold.

### **B. Highly Compensated Employee Salary Level Increase**

The AICPA opposes the increased HCE salary level because it fails to achieve the policy objectives of the FLSA and unnecessarily requires employers to engage in a duties analysis for employees who are almost certainly exempt. The exemption is working effectively and does not need to be “fixed.”

It is unclear what policy benefit the DOL is attempting to achieve with the change in the HCE salary threshold, as the employees in this group are not a high risk of misclassification.

When the regulations were issued in 2004, the Department of Labor noted that:

[E]mployees at higher salary levels are more likely to satisfy the requirements for exemption as an executive, administrative or professional employee. The purpose of section 541.601 is to provide a “short-cut test” for such highly compensated employees who “have almost invariably been found to meet all the other requirements of the regulations for exemption.” 1949 Weiss Report at 22. Thus, the highly compensated earnings level should be set high enough to avoid the unintended exemption of large numbers of employees—such as secretaries in New York City or Los Angeles—who clearly are outside the scope of the exemptions and are entitled to the FLSA's minimum wage and overtime pay protections.<sup>7</sup>

The HCE salary level of \$100,000 continues to satisfy this objective, because accounting profession employees who earn salaries greater than \$100,000 will almost invariably satisfy the duties test. As a result, the increase would have no impact on whether

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<sup>7</sup> *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and computer Employees*; Final Rule, 69 Fed. 22174 (April 23, 2004).

or not employees are exempt; it would only require employers to engage in further, unnecessary analysis to support the exemption.

If the salary level is raised from \$100,000 annually to \$122,148 annually, it will affect higher-level employees in positions who clearly meet the requirements of one or more white-collar exemptions. Firm employees in such positions satisfy the professional exemption and, depending on the circumstances, satisfy the administrative and/or executive exemptions. In such a situation, there appears to be no policy justification for the proposed change. Increasing the HCE threshold would not increase the number of accounting profession employees who receive overtime but would increase the administrative burden by requiring employers to go through a duties analysis which is unnecessary.

The proposed change seems designed to fix a problem that simply does not exist. Of the pool of potentially affected employees, this group is already highly compensated and their salaries are commensurate with their duties which fulfill the EAP exemption. As noted above and in the Notice of Proposed Rulemaking,<sup>8</sup> employees earning a high level of compensation are more likely to meet the exemption requirements. That is certainly the case for employees earning \$100,000 or more. The current HCE salary threshold serves its purpose quite effectively. As a result, it would seem that the DOL's efforts could best be directed elsewhere.

### **C. Duties Test**

The proposed rule considers whether changes are necessary to the duties test and, more specifically, whether the DOL should "look to the State of California's law," which would require employees to spend at least half of their time on exempt duties and employers to categorically track an employee's time in order to monitor overtime. The AICPA strongly opposes such a change to the duties test.

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<sup>8</sup> See 80 FR 38537 (quoting 69 FR 22174) ("Such a balancing of a substantially higher compensation requirement with a minimal duties test still is appropriate, so long as the required annual compensation threshold is sufficiently high to ensure that it covers only employees who "have almost invariably been found to meet all the other requirements of the regulations for exemption.")

California's experience has shown that such a rule spawns increased litigation. To ensure proper classification and to be prepared to defend against employee lawsuits, companies, firms and nonprofits will be required to track time for all traditionally exempt employees. Tracking time to ensure that employees spend at least 50 percent of their time and efforts on exempt tasks will be impractical, time-consuming and may result in additional costs to modify existing timekeeping systems. This seems particularly unnecessary for the accounting profession, where most accounting personnel clearly meet exemption requirements. It would be a triumph of form over substance to argue that because an accountant worked only 49 percent on "exempt" duties, he or she does not meet the exemption requirements.

Further, many firms' employees travel for client work, which requires an already complex system for tracking employee activities. Establishing the 50-percent rule would add to the already onerous requirements in place for tracking employee activities and further increase the costs associated with an increase in the number of nonexempt employees proposed by the DOL's rule. Design and management of these new complex systems would certainly add significant burdens to CPAs practicing in a business setting.

#### **D. Bonus Payments**

The uncertainty inherent in performance-based or nondiscretionary bonuses makes it unlikely that this proposed change will provide any real benefit to employers. The AICPA believes that there should be no cap on the amount of bonus payments that can be counted towards the salary threshold, and that those bonus payments should be permitted to be paid on a quarterly or annual basis.

The current DOL proposal is too limited to have any real impact. The proposed 10 percent cap (10 percent of the salary threshold can be made up of bonus payments) does not reflect the realities of the increased use of bonus payments. In some instances, bonuses have become an alternative to salary increases where a firm has a negative or limited cash flow. This allows employers to pass through the benefits of their success to employees, but it can be difficult to project. The proposed regulations also require that the employee receive bonus payments on a monthly or more frequent basis in order to count towards the salary threshold. This would change the way firms pay bonuses, which are commonly

calculated on an annual basis. Tracking company or individual performance on a monthly basis is too volatile and burdensome to be worth the incremental benefit to the employer of potentially counting a portion of those bonuses toward the salary threshold, and firms may have to forgo bonus payments in order to satisfy the costs of paying overtime. Additionally, companies will not want to take on the uncertainty as to whether an employee may or may not be exempt based on the firm's performance and will be discouraged from offering a nondiscretionary bonus program based on firm or individual performance.

### **III. Conclusion**

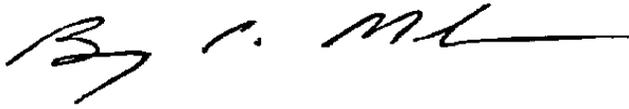
The AICPA opposes the DOL's proposed changes to the white-collar exemptions from FLSA overtime pay. While the AICPA recognizes a need to streamline the regulations to improve clarity and reduce litigation, the proposed changes will negatively impact both employers and employees. More than doubling the salary requirement — and proposing to increase that number annually — is ill-considered and extraordinarily disruptive to all businesses, including accounting firms and nonprofit state CPA societies. In addition, the changes employers would have to make to comply with the rule will have unintended, negative effects on employees. Employees who have previously enjoyed a flexible work schedule because of their exempt status will no longer be permitted to take advantage of that option when they become overtime eligible. Employees will lose out on training opportunities, and the proposed changes will inhibit career advancement. The increase of the HCE salary level is unnecessary, does not change which employees are covered by the exemptions, and adds to employers' burden in complying with the regulations.

Likewise, the potential imposition of the "50-percent rule" will add to employers' administrative burden and increase litigation costs. Such a proposed change should not be instituted without being detailed in a proposed rule with an opportunity for public comment on the specific proposal. If the DOL decides to revise the duties test, the AICPA suggests that it provide clearer guidance on positions that typically satisfy the white-collar duties tests. In particular, the administrative exemption could be clarified and simplified so that employers can apply it more confidently. While the AICPA believes changes can be made

to the white-collar duties tests, we oppose any duties test that requires exempt employees to spend a specified amount of time performing their primary duty.

For the reasons discussed above, although the AICPA supports the laudable goal to modernize and streamline the FLSA regulations, it opposes the July 6, 2015 Notice of Proposed Rulemaking. The proposed revisions fail to modernize or streamline the regulations, fail to reflect the realities of the modern workplace and a changing workforce, and adversely affect both employees and employers.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry C. Melancon". The signature is fluid and cursive, with a long horizontal stroke at the end.

Barry C. Melancon, CPA, CGMA  
President and CEO