AGRICULTURAL RETAILERS ASSOCIATION

The Fertilizer Institute
Nourish, Replenish, Grow

September 25, 2017

Attention: Docket ID No. WHD-2017-0002; RIN: 1235-AA20

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, NW
Washington, DC 20210

RE: Comments on Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; (RIN 1235-AA20) (82 Fed. Reg. 34616, July 26, 2017).

The Agricultural Retailers Association (ARA) is a not-for-profit trade association that represents the nation's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers which include: fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 states and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

The Fertilizer Institute (TFI) represents the nation's fertilizer industry including producers, importers, retailers, wholesalers, and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic, information, and public communications programs.

ARA and TFI submitted comments in September 2015 opposing the Wage and Hour Division's proposed changes to the rule. The increase of the salary threshold to the 40th percentile of earnings would have a significant impact on the ARA and TFI membership. The increase would have tightened already small margins and led to increased consolidations in an industry that is currently seeing numerous mergers. The increased production costs associated with the proposed rule would have likely been passed along to the consumer and would have negatively impacted American agriculture's competitiveness in the global market place.

We are pleased with the decision of the U.S. District Court for the Eastern District of Texas which invalidated the 2016 Final Rule and applaud the Department of Labor for issuing this RFI to revisit the EAP exemption.

As you are aware, the Eastern District of Texas invalidated the 2016 Final Rule on August 31, 2017. In *State of Nevada v. Dep't. of Labor*, the court found Congress unambiguously requires employees performing "bona fide executive, administrative, or professional" duties to be exempt from overtime pay.[1] Furthermore, the significant salary increase of the 2016 Final Rule effectively eliminated any "duties test" of the regulations.[2] Therefore, the 2016 Final Rule fails to carry out Congress's unambiguous intent in the Fair Labor Standards Act and is unlawful.[3]

ARA and TFI are pleased to know that the Department explained in their reply brief in the appeal before the Fifth Circuit that it has decided not to advocate for the specific salary level set in the 2016 Final Rule. If the Wage and Hour Division proposes any changes to 29 CFR Part 541, the Division should do so with *State of Nevada* on the front of mind.

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?*

   If the Department decides to update the salary level, the methodology used by the Department in 2004 would be the appropriate methodology. The objective of the salary level should be a minimum salary level with only the intention to determine the difference between non-exempt and exempt employees.

   Any automatic adjustment to the salary level to account for inflation should be avoided. Not only did the court in *State of Nevada* determine an automatic inflationary adjustment to be outside the Departments statutory authority, it would circumvent notice-and-comment rulemaking requirements of the Administrative Procedures Act (APA). Furthermore, it would have negative policy implications particularly in small businesses and rural areas where much of our membership exists.

[1] 29 U.S.C. § 213(a)(1) (2016); *Nevada v. Dep't. of Labor*, 4:16-CV-731 at *13 (E.D. Tex. Aug. 31, 2017).
[2] *Nevada v. Dep't. of Labor*, 4:16-CV-731 at *14 (E.D. Tex. Aug. 31, 2017).
[3] *Id.* at *16

If the Department applies the 2004 methodology which is consistent with the objective that the salary level serve only as a gatekeeper, revisions to the "duties tests" are not necessary.

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?*

   If the Department uses the 2004 methodology for setting the salary level and sets the level at the least common denominator, multiple standard salary levels are not necessary. However, in the event that the salary level is set too high (not at the least common denominator), geographic differences should be taken in to consideration. Many of the ARA and TFI members operate in rural areas in the Midwest and Southeast. The salaries required for a quality standard of living in these rural areas is much different that the salaries required for the same quality standard of living in metropolitan areas on either coast.

   The most prudent course of action for the Department, however, is to set the salary level low enough to take variations into account and serve the purpose of simply screening out nonexempt employees. Multiple regional salary levels would create extra, unnecessary layers of bureaucracy and make it difficult for large employers that have employees all across the nation. Maintaining a single salary level sufficient to screen out clearly nonexempt employees in the lowest wage industries and regions is far preferable to a multi salary level approach.

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?*

   There is no need for additional salary levels based on the specific exempt duties performed by the exempt employee. The lines of distinction between exempt categories has blurred as the workforce has become more educated. It is for this reason the 2004 regulation did away with the distinction.[4]

   Establishing different salary levels for administrative and executive employees compared to professional employees would require employers to make a determination that a particular exemption applied or, more likely, that a particular exemption is the primary duty. This would only lead to increased confusion and litigation.

[4] 69 Fed. Reg. 22,273 (Apr. 23, 2004) (codified at 29 CFR 541.708).

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?*

   As previously noted, we believe the 2004 methodology is the appropriate means to determine any increase to the minimum salary level. The 2004 rulemaking adequately and appropriately addressed each of these issues and the Department should not deviate from that methodology.

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?*

   The Eastern District of Texas determined the Department's 2016 salary level effectively eliminated the "duties test," and was therefore invalid.[5] ARA and TFI are not in the position to determine the specific salary level at which the "duties test" becomes irrelevant. However, it is not necessary to make such a determination. There is little harm in setting the level "too low" because even if the employee meets the salary level, that employee would still need to meet the duties test. Contrarily, setting the level "too high" and eclipsing the "duties test," the Department would fail to carry out Congress's unambiguous intent.

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?*

   ARA and TFI does not have specific data for the actions taken by employers in anticipation of the 2016 Final Rule. However, employers' anecdotes include: employees getting raises in

[5] *Nevada v. Dep't. of Labor*, 4:16-CV-731 at *16 (E.D. Tex. Aug. 31, 2017).

the Fall of 2016 to ensure compliance by December 1; employees were reclassified to non-exempt status; and some employers took no action in anticipation of the 2016 Final Rule.

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?*

   Reliance on only the duties performed without regard to the amount of salary paid by the employer is preferred for determining the EAP exemption. A duties-only test would eliminate confusion of a somewhat arbitrary salary minimum and would fulfill Congress's intent of making the exemption specific to the tasks of executive, administrative, and professional employees.

   A duties-only test should not create more rigid requirements, however. Any sort of prescriptive regulation, such as applying a percentage-of-time rule for the purposes of the exemptions' primary duty test would not be advised. Such revisions would only result in burdensome recordkeeping requirements, increased litigation, and would further complicate the exempt status analysis.

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?*

   The agricultural retail business is one of seasonal peaks. There is a small window of time in the spring and fall when agricultural retail facilities all across the country are extremely busy trying to complete the necessary work while Mother Nature permits. This often leads to many hours worked and the need for additional labor during these seasons. The 2016 Final Rule would have greatly impacted part-time exempt positions in a negative way. The number of employees eligible for part-time exempt employment would have been significantly limited if the 2016 Final Rule would have gone into effect, drastically hurting the agricultural retail industry.

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?*

   As was mentioned in our 2015 comments, ARA and TFI firmly believe that all forms of compensation, including bonuses and incentive payments, should be included in meeting any salary level. Bonuses and incentive pay is often used in the agribusiness industry. The

employee is concerned with the total compensation at the end of the year—not the individual components of that compensation. The regulatory scheme should also be only concerned with the total compensation at the end of the year.

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?*

    There should not be multiple total annual compensation levels for the highly compensated employee exemption. Multiple levels are unnecessary and would only add confusion to the exemption.

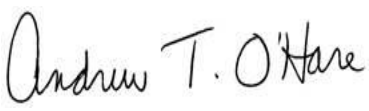
11. *Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should 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?*

    Automatic updated mechanisms should not be utilized by the Department. Automatic increases are not only illegal because they are outside the Departments statutory authority as was found by the Eastern District of Texas, but also illegal because it would avoid the Department's notice-and-comment rulemaking requirements under the APA. Furthermore, automatic salary threshold increases could have very negative, and very serious policy implications. An automatic threshold increase could occur in the middle of an economic downturn greatly disturbing the labor market and costing many employees their jobs.

ARA and TFI are extremely appreciative of the Departments continued work on this issue and grateful the 2016 Final Rule never went into effect.

Sincerely,

Kyle Liske
Public Policy Counsel
Agricultural Retailers Association



Andrew T. O'Hare
Vice President, Public Policy
The Fertilizer Institute