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Director  
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: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; RIN 1235—AA39

Dear Ms. DeBisschop:

The Credit Union National Association (CUNA) represents America’s credit unions and their more than 135 million members. On behalf of our members, we are writing in response to the Department of Labor’s (Department) notice of proposed rulemaking regarding the regulations implementing the exemptions for executive, administrative, professional, outside sales, and computer employees from the Fair Labor Standards Act’s (FLSA) minimum wage and overtime requirements.<sup>1</sup>

Credit unions support the FLSA’s goal to address “the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . .”<sup>2</sup> While the current proposal attempts to strike a balance between the Department’s 2016 overtime rule<sup>3</sup> and 2019 overtime rule,<sup>4</sup> CUNA has concerns about how the proposal may affect small credit unions and other small entities and those credit unions in rural and low-cost areas.

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152 (Sept. 8, 2023).

<sup>2</sup> 29 U.S.C. § 202(a).

<sup>3</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016).

<sup>4</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 84 Fed. Reg. 51230 (Sept. 27, 2019).

As member-owned, not-for-profit financial cooperatives that operate to promote thrift, credit unions offer credit at competitive rates, and provide critical financial services to their member-owners. As the only consumer-owned cooperatives in the financial marketplace, credit unions have a tradition of protecting the interests of America’s families. This includes empowering families with opportunities for financial success and the ability to improve their economic well-being. Additionally, as member-owned cooperatives, credit unions are unique in that personnel and other factors affecting their bottom line can have a direct impact on member service. This is especially true for smaller credit unions.

Despite the large number of small credit unions and their indisputable difference in structure and resources, they have been subject to substantial regulatory changes and increased costs since the financial crisis, and more changes may be on the horizon.<sup>5</sup> When a credit union spends the resources of its membership on compliance, payroll expenses, and overhead, it has less resources available to provide members safe and affordable financial products and services.

## **Background**

The FLSA generally requires covered employers to pay an employee a minimum wage and overtime of at least 1.5 times an employee’s regular pay rate for any hours in excess of 40 hours in a given week.<sup>6</sup> Section 13(a)(1) of the FLSA exempts a “bona-fide” executive, administrative, or professional (EAP) employee from the minimum wage and overtime requirements.<sup>7</sup> The Secretary of Labor is responsible for implementing regulations that define and delimit what it means to fall within the EAP exemption.<sup>8</sup> The proposal seeks to make several changes to the existing regulations, including, among other things, increasing the salary level test to qualify for the exemption from \$684 per week (\$35,568 per year) to \$1,059 per week (\$55,068 per year) and creating a method to automatically update the salary level test thresholds every three years.

## **Disproportionate Effect of the Increased Salary Level Test on Small and Rural Credit Unions**

CUNA has concerns that the increase in the salary level test threshold may disproportionately affect small and rural credit unions. The salary level test has traditionally been used to easily identify employees whose salaries are so low that they do not fall within the EAP exemption to the minimum wage and overtime requirements of the FLSA.<sup>9</sup> Data collected from CUNA credit

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<sup>5</sup> See generally Small Business Lending Under the Equal Credit Opportunity Act (Regulation B), 88 Fed. Reg. 35150 (May 31, 2023); Credit Card Penalty Fees (Regulation Z), 88 Fed. Reg. 18906 (Mar. 29, 2023); Required Rulemaking on Personal Financial Data Rights, 88 Fed. Reg. 74796 (Oct. 31, 2023).

<sup>6</sup> 29 U.S.C. §§ 206 & 207.

<sup>7</sup> 29 U.S.C. § 213(a)(1).

<sup>8</sup> *Ibid.*

<sup>9</sup> Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 7–8 (1949).

union members, however, illustrates how that may not be entirely accurate with respect to smaller credit unions and the proposed salary level test threshold.<sup>10</sup>

CUNA collects salary information from credit unions every year for a variety of job descriptions.<sup>11</sup> One executive management-level role included in the most recent data is for executive vice presidents. An executive vice president is “a member of the senior management team, accountable for ensuring financial stability and member satisfaction commensurate with the best interest of the members, the employees, and the credit union.”<sup>12</sup> An executive vice president would generally appear to satisfy the duties test for the executive exemption and would be EAP exempt as long as the employee satisfied the salary basis test and the salary level test. Data collected by CUNA suggests that smaller credit unions would be adversely affected by increasing the salary level test threshold to \$55,068 per year. The survey indicates that executive vice presidents for credit unions with assets of \$5 million to \$10 million have an average total cash compensation of \$47,420.<sup>13</sup> For credit unions with assets between \$10 million and \$20 million, the average total cash compensation for executive vice presidents is \$54,720. These averages for an executive would qualify for the existing EAP exemption but would be nonexempt as a result of the new salary level threshold. When looking at salaries for employees below the executive management-level, the survey data suggests that there are many roles at all credit unions—not just smaller ones—that have an average salary that is higher than the existing salary level test threshold but lower than the proposed salary level test threshold.<sup>14</sup>

Similarly, CUNA has concerns about applying a single national standard to rural areas and small towns outside the boundaries of major metropolitan areas. Incomes in rural areas can lag behind incomes in metropolitan areas.<sup>15</sup>

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<sup>10</sup> Across the country, many credit unions are considered small employers as 37.1 percent of all credit unions employ five or fewer full-time employees. In addition, 20 percent of credit unions have less than \$10 million in assets, and credit unions with \$100 million in assets or less account for over 62.1 percent of all U.S. credit unions. NCUA Call Report Data; CUNA analysis.

<sup>11</sup> CUNA Staff Salary Report 2023-2024, Dayna Johnson Schmitt ed., 2023, [https://www.cuna.org/products/cuna\\_staff\\_salaryreport2023-2024.html](https://www.cuna.org/products/cuna_staff_salaryreport2023-2024.html) (subscription).

<sup>12</sup> *Id.* at 118

<sup>13</sup> *Id.* at 121.

<sup>14</sup> There are several job titles below the executive level included in CUNA’s staff salary survey that could be impacted by the new threshold (e.g., Member Service Representative; Member Service Representative; Head Teller; Teller; Share Draft Clerk; EFT/ACH Clerk; Receptionist; General Office Clerk; IRA/Certificate Specialist; Small Credit Union Generalist; Loan Officer; Loan Processor; Loan Clerk; Consumer Loan Officer (Jr.); Consumer Loan Processor/Clerk; Mortgage Loan Officer (Jr.); Mortgage Loan Processor; Collector; Collection Clerk; Plastic Card Clerk; Data Entry Specialist; Marketing Assistant; Accounting Clerk; and Call Center Representative). Moreover, several job titles that are not listed would be impacted by the proposed threshold if you only look at data for smaller credit unions (e.g., total cash compensation for Compliance Officers for credit unions with assets between \$20 million and \$50 million and between \$50 million and \$100 million is \$54,530 and \$52,550, respectively). *See id.* at 510.

<sup>15</sup> *See* The Council of Economic Advisers, Strengthening the Rural Economy—The Current State of Rural America, <https://obamawhitehouse.archives.gov/administration/eop/cea/factsheets-reports/strengthening-the-rural-economy/the-current-state-of-rural-america> (“On average, rural residents have notably lower incomes than urban residents . . . while the rural poverty rate decreased sizably between 1979 and 1999, the average rural county posts

A sizeable number of credit union employees' salary ranges fall between the existing threshold and the proposed salary level test, which will magnify the cost burdens and time constraints credit unions are already facing in complying with the Department's overtime rule. Ultimately, this rule could disproportionately burden small credit unions and credit unions in rural areas, and they may find it difficult to maintain the same level of service to their members when faced with heightened compliance burdens.

Federal regulators have often recognized the need to make exceptions or create safe harbors for entities based on situations where one standard would be unfair or lead to unintended negative effects. For example, the Consumer Financial Protection Bureau (CFPB) must consider the impact of its proposed rules on consumers in rural areas when it implements the federal consumer financial laws. This requirement resulted in special carve-outs for small creditors in rural and underserved areas in the CFPB's rules governing mortgage origination.

CUNA urges the Department to consider whether a one-size-fits-all threshold national standard is appropriate given the limited resources available to smaller credit unions and rural credit unions who might be disproportionately impacted by the proposed salary level test threshold.

### **Automatic Updates of Thresholds Could Restrict Their Gatekeeper Function**

CUNA understands the need to regularly update the salary level test and highly compensated employees (HCE) thresholds so that they continue to perform their historical gatekeeper functions. That said, CUNA has concerns about automatically updating both thresholds every three years to reflect the 35th percentile of weekly earnings of full-time nonhourly workers for the salary level test and the 85th percentile of weekly earnings of full-time nonhourly workers for the HCE test. Rote application of these percentiles every three years without considering other factors that contribute to changes to the economy and workforce would lead to a situation where an employee's salary rather than the employee's duties would determine when the employee is EAP exempt. This outcome may conflict with how section 13(a)(1) of the FLSA has recently been interpreted by courts.<sup>16</sup> We believe the changing economy should be reevaluated in a more analytical way than merely looking at a fixed percentile of the entire country to determine a threshold, and we ask the Department to reconsider whether an automatic update mechanism is necessary. While notice and comment rulemaking takes time, it also helps to ensure that defining the EAP exemption continues to consider an employee's duties rather than just an employee's salary.

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poverty rates at least several percentage points above those observed in urban counties. Note that the cost of living is higher in urban areas and ideal measures of income and poverty would adjust for these differences."); U.S. Dep't of Agric., *Rural America At a Glance 2017 Edition*, U.S. Census Bureau, *A Comparison of Rural & Urban America: Household Income & Poverty*, [https://www.census.gov/newsroom/blogs/random-samplings/2016/12/a\\_comparison\\_of\\_rura.html](https://www.census.gov/newsroom/blogs/random-samplings/2016/12/a_comparison_of_rura.html) ("According to the most recent estimates from the 2019 American Community Survey (ACS), the nonmetro poverty rate was 15.4 percent in 2019, compared with 11.9 percent for metro areas.").

<sup>16</sup> See *Nev. v. U.S. Dep't of Labor*, 275 F. Supp. 3d 795, 807 (E.D. Tex. 2017) ("If Congress was ambiguous about what specifically constituted an employee subject to the EAP exemption, Congress was clear that the determination should involve at least a consideration of an employee's duties.").

CUNA applauds the Department for acknowledging, should it proceed with the rule as proposed, that it may need the flexibility “to temporarily delay a scheduled automatic update where unforeseen economic or other conditions warrant.”<sup>17</sup> But proposed section 541.607, which would implement the automatic update mechanism, does not include an explanation of when the Department should take action to delay an automatic update. Including procedural guardrails explaining when the Department should take action to delay an automatic update provides more certainty about the types of economic and other conditions that would trigger action by the Department.

### **Effective Date of the Final Rule Should be No Earlier Than 150 Days After Publication in the Federal Register**

CUNA has concerns about the proposed rule only providing 60 days to implement any changes that are published in a final rule in the Federal Register. The increases in both the salary level test and HCE thresholds are significant. Credit unions will need time and resources to review exempt classifications and compensation and make decisions about how to proceed. This review will require an interdisciplinary approach in which legal, human resources, and business lines will need to work together to make sure that their credit unions are complying with the Department’s final rule. Considering that the 2004, 2016, and 2019 final rules provided 90 to 180 days to comply with those requirements,<sup>18</sup> we feel that 60 days is too short a time period. In fact, it is well short of the 150-day notice period that the proposed rule provides in the context of automatic updates to the thresholds. We encourage the Department to provide employers at least 150 days to comply with the final rule for the sake of consistency with the proposal and the past.

### **Conclusion**

Thank you for this opportunity to provide input on the notice of proposed rulemaking about defining and delimiting the EAP exemption. If you have questions or if we can be of any assistance, please do not hesitate to contact me at (202) 603-1985 or [dpark@cuna.coop](mailto:dpark@cuna.coop).

Sincerely,



David Park  
Senior Director of Advocacy & Counsel

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<sup>17</sup> 88 Fed. Reg. at 62179.

<sup>18</sup> 88 Fed. Reg. at 62180.