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National Association of Federally-Insured Credit Unions

September 25, 2017

Melissa Smith
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210

RE: Request for Information – Overtime Rule (RIN 1235-AA20)

Dear Ms. Smith:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing to you in regard to the Department of Labor's (DOL) Request for Information (RFI) on how to revise the regulations pertaining to minimum wage and overtime requirements under the *Fair Labor Standards Act* (FLSA), codified in 29 C.F.R. Part 541. The DOL's 2016 Final Rule (Overtime Rule) on overtime salary would have posed risks to the stability and growth of credit unions nationwide. NAFCU supports the modernization of current regulations to grant fair pay to all Americans, but urges the DOL to consider geographic salary differences and provide exceptions for non-salary based employee advancement opportunities, including travel time for conferences and training events.

NAFCU encourages the DOL to revise the Overtime Rule to establish flexibility and phase in more reasonable benchmarks over the course of several years. Such benchmarks should not be indexed or automatically updated on a periodic basis. NAFCU also requests an alternate salary designation for full-time salaried workers employed at qualifying not-for-profit institutions, such as credit unions.

General Comments

The FLSA requires covered employers to pay their employees at least the federal minimum wage for all hours worked and an overtime premium pay of one and one-half times the employee's regular pay rate for any hours worked over 40 in a workweek. Section 12(a)(1) of the FLSA, frequently referred to as the "white collar" exemption, exempts from both of these requirements "any employee employed in a bona fide executive, administrative, or professional capacity" and

expressly delegates to the Secretary of Labor the power to define and delimit these terms through regulations. Part 541 implements the Section 13(a)(1) exemptions and in October 1938, the DOL issued its initial Part 541 regulations, which were later amended several times. In 2016, the DOL sought to update the standard salary level test, setting a level that would exclude from exemption the bottom 40 percent of salaried workers in the lowest-wage Census Region (currently the South), which resulted in an increase from the current \$455 per week to \$913 per week. The DOL also established a mechanism for automatically updating the salary level every three years. The DOL published the 2016 Final Rule on May 23, 2016 with an effective date of December 1, 2016.

On November 22, 2016, the U.S. District Court for the Eastern District of Texas issued a nationwide injunction of the new regulation, thereby halting the effective date. The DOL appealed the judge's order but decided to not advocate for the specific salary level set in the 2016 Final Rule and plans to issue further rulemaking to determine what the salary level should be. On August 31, 2017, the U.S. District Court for the Eastern District of Texas struck down the Overtime Rule, holding that the DOL exceeded its authority because the FLSA does not permit the DOL "to make salary rather than an employee's duties determinative of whether a 'bona fide executive, administrative, or professional capacity' employee should be exempt from overtime pay." *See* Mem. Op. and Order, at 17, ECF No. 99.

On July 26, 2017, the DOL released this Request for Information in compliance with President Trump's February 24, 2017 Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The DOL plans to review the impact of the 2016 Final Rule's changes to the Part 541 regulations in an attempt to lower the overall regulatory burden and this RFI will assist the DOL in that effort. NAFCU supports a review of the Overtime Rule and, if the DOL were to pursue another rulemaking, would like to see a more tailored rule that recognizes the unique structure and mission of credit unions and phases in any salary increases over time.

The Credit Union Difference

In advance of the effective date of the Overtime Rule, many credit unions across the country began preparing and making changes to their employee salaries and classifications. These changes imposed a financial burden on those institutions and caused concern throughout the industry. Additionally, some credit unions felt that their core ethical values were at question as employees began to wonder whether they were being underpaid before they made the salary change in anticipation of the Overtime Rule. Many credit unions, however, reevaluate their salary levels annually to provide their employees fair market rates.

Above all else, as not-for-profit, member-owned financial institutions, credit unions treat their employees with fairness and respect because every employee of a credit union is eligible to become a member-owner of the institution. The employees of a credit union, therefore, have a vested interest in the credit union. The Overtime Rule, which doubles the minimum overtime exempt salary, would also disproportionately burden credit unions in underserved and non-urban communities. As such, NAFCU and its member credit unions do not support a doubling of the salary threshold as provided in the Overtime Rule.

The Overtime Rule would also harm credit unions because as not-for-profit, cooperative institutions, they have finite resources and limited ability to absorb large salary increases without a potential corresponding impact to the products and services they provide their communities and the opportunities they offer their employees. Credit unions are dedicated to their employees and seek to offer them excellent career training and growth opportunities. The Overtime Rule, however, would have made it difficult for credit unions to continue to offer such opportunities to their employees. For example, credit unions would have struggled to continue to cover travel, lodging, registration, and other costs and fees associated with sending their employees to trainings and conferences in addition to paying for overtime hours. This type of unintended consequence must be avoided as the DOL evaluates and revises the Overtime Rule. Accordingly, NAFCU urges the DOL to create an exemption for such non-salary based employee advancement opportunities.

NAFCU also requests that the DOL consider establishing an alternate salary designation for full-time salaried workers employed at qualifying not-for-profit institutions. An alternate salary designation could also help alleviate some of the potential difficulties explained above and would recognize the unique relationship credit unions have with their employees. Additionally, the threshold should vary based on location as well because a one-size-fits-all approach is completely inappropriate for a metric like salary, which is largely dependent on geographic location.

NAFCU and its member credit unions are also opposed to the indexing of the salary threshold and believe that the total annual salary level should not be automatically updated on a periodic basis. Instead, the salary level should be reviewed periodically through the current notice and comment rulemaking process so that the public may provide input and all impacted parties have a say in any changes that directly affect them and their employees. Credit unions and other institutions affected by proposed changes should be permitted to provide the DOL with input so it can better gauge the appropriate salary increase given the specific needs and challenges of the various communities they serve.

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Conclusion

NAFCU appreciates the opportunity to provide our comments regarding the DOL's Request for Information on overtime salary requirements. If you have any questions or concerns, please do not hesitate to contact me at (703) 842-2212 or akossachev@nafcu.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann Kossachev". The signature is fluid and cursive, with the first name "Ann" and last name "Kossachev" clearly distinguishable.

Ann Kossachev
Regulatory Affairs Counsel