



**Independent Insurance Agents
& Brokers of America, Inc.**

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September 25, 2017

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, N.W.
Washington, DC 20210

SUBMITTED VIA www.regulations.gov

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

Dear Ms. Smith:

In response to the above referenced Request for Information (RFI), the Independent Insurance Agents & Brokers of America ("IIABA") respectfully submits the following comments regarding the 2016 final overtime rule and review of 29 C.F.R. §541 by the Department of Labor (DOL or the Department) pursuant to Executive Order (EO) 13777. IIABA commends the Department for reviewing issues related to the 2016 final overtime rule and regulatory efficiencies as directed by EO 13777. Revisiting the 2016 final overtime rule salary level is consistent with an effort to lower unnecessary regulatory burdens.

IIABA is the nation's oldest and largest trade association of independent insurance agencies and brokerages. IIABA represents a nationwide network of approximately a quarter of a million agents, brokers, and employees. IIABA represents independent insurance agents and brokers that offer customers a choice of policies from a variety of insurance companies across all lines of insurance—property, casualty, life, health, employee benefit plans and retirement products.

IIABA is also part of the Partnership to Protect Workplace Opportunity (PPWO). The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of "white-collar" employees across the country in almost every industry who were (or who would have been) impacted by the Department's 2016 final overtime rule. IIABA signed on to comments submitted by the PPWO in response to the above referenced RFI and incorporates all comments contained in the PPWO response here by reference.

In addition to the letter submitted by the PPWO, IIABA would like to make the DOL aware of the following information as it specifically relates to independent insurance agencies and brokerages in relation to the 2016 final overtime rule and urges the Department to consider this information should the DOL choose to make any changes to 29 C.F.R. §541 in the near term.

One of the greatest concerns among IIABA members with the 2016 final overtime rule was that the rule's automatic increases to the EAP salary threshold would have been extremely hard to implement and track, especially for small businesses. Many businesses expressed concern about missing update notices and being subject to enforcement actions. Furthermore, if Congress had intended for automatic updates to EAP salary thresholds to be part of the rulemaking process under the Fair Labor Standards Act (FLSA) it could have done that in the statute, but instead Congress ordered the Department to update the exemptions from "time to time," through notice and comment rulemaking. Consequently, IIABA recommends that any potential future rule changes to 29 C.F.R. §541 should not index EAP salary level(s) for inflation or otherwise automatically change the salary levels short of full notice and comment rulemaking.

When compliance burdens increase many businesses have no choice but to pass on costs to those that they serve. However, insurance agencies and brokerages cannot pass on costs to their clients, so they have to absorb any additional compliance costs, or if absorbing such costs is not reasonable take action to ensure that the new regulation had a neutral effect (eliminating staff, reducing services, etc.). The highly regulated nature of the insurance business creates unique challenges for insurance agencies and brokerages and makes it nearly impossible for IIABA members to increase revenue to cover significant new compliance costs. Specifically, the prices of insurance products are closely regulated by state officials, and the ability of agents and brokers to charge fees to their clients is also severely limited or prohibited by law in most jurisdictions. As such, IIABA recommends that any potential future rule changes to 29 C.F.R. §541 consider the costs and burdens that are being imposed on industries that are subject to a high level of state regulation, including price regulations at the state level.

The 2016 final overtime rule would have likely limited the ability of insurance agencies to appropriately respond to clients in times of emergencies, which is especially relevant now as the U.S. has seen multiple major hurricanes (resulting in billions of dollars in damage and numerous insurance claims) so far this fall. Our research indicates that administrative employees of property and casualty focused insurance agencies and brokerages generally work customary work weeks. The exception to this is following severe weather events and other catastrophic events, when claims surge and more time is required to assist policyholders. If insurance agencies are required to convert many or all of their employees involved with emergency response from salaried to hourly, closely tracking hours and absorbing unpredictable overtime costs, it will make it harder to assist their clients when their services are needed the most. Therefore, IIABA recommends that any potential future rule changes to 29 C.F.R. §541 consider costs and burdens as related to businesses that are involved with disaster response and recovery.

Some lines of the insurance business (for example crop insurance) are seasonal in nature and some IIABA members expressed concern on how the 2016 final overtime rule would impact seasonality. For example, one agency noted that they work overtime to put insurance policies in place for a January 1 effective date, so currently staff works longer hours during the fall and winter and less hours during the spring and summer to make up for the overtime in the other parts of the year. Our member noted concerns that this arrangement would have to change and they would have to switch employees to hourly and cut back even further on hours when not busy to make up for the time and a half overtime costs in the fall and winter. As such, IIABA recommends that any potential future rule changes to 29 C.F.R. §541 are not constructed in such a manner as to inappropriately limit employee and employer flexibility that is needed to respond to consumers.

The 2016 final overtime 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. The above

referenced RFI asked about the inclusion of such bonuses and incentive payments in any potential future regulations. Many employees of insurance agencies and brokerages receive a significant portion of annual earnings via commissions and bonuses from selling and servicing insurance products. These include both discretionary and non-discretionary bonuses. Commissions and bonuses can be paid bi-weekly, monthly, quarterly, or annually depending on the specific circumstances of the contracts under which insurance products are sold. IIABA believes that an individual who earns a base salary of \$30,000 with \$30,000 in additional annual compensation potential should not be treated differently than an individual who earns \$40,000 in base salary with \$20,000 in additional annual compensation potential. Therefore, IIABA recommends that any potential future rule changes to 29 C.F.R. §541 allow all forms of regular and customary compensation to be considered in meeting the EAP minimum salary threshold.

Finally, IIABA was a co-litigant in *Nevada vs. Dep't of Labor* 4:16-CV-731, (E.D. Tex. Aug. 31, 2017) which challenged and invalidated the 2016 final overtime rule. In the case, the U. S. District Court for the Eastern District of Texas granted an expedited motion for summary judgment nullifying the 2016 final overtime rule as the salary level set by the rule would have operated as a de facto salary-only test, thus eclipsing the role of the duties test counter to the intent and purpose of the FLSA. Moreover, the rule would have inappropriately created significant additional costs, especially for small businesses and independent insurance agencies and brokerages; and effectively set a federal salary ceiling and not a salary floor (which states can at their choice exceed) as intended by the FLSA. This would have wrongly resulted in classifying employees who do the same work as hourly or salaried based on regional differences in pay. As such, IIABA believes the ruling invalidating the 2016 overtime rule is an appropriate legal determination and upholds the intent and purpose of the FLSA. IIABA urges the DOL to consider this ruling should the Department decide to revise 29 C.F.R. §541 as it relates to the EAP exemptions.

IIABA appreciates the opportunity to respond to this RFI and looks forward to working with the Department on this important issue. Please contact our office at (202) 863-7000 should you wish to have additional information regarding our comments.

Sincerely,

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

Jennifer M. Webb
Counsel, Federal Government Affairs