



September 10, 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, D.C. 20210

***Supplementary Statement***

**Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees {RIN 1235-AA11}**

This supplementary statement is to present general concern of the National Propane Gas Association (NPGA) on the Notice of Proposed Rulemaking (NPRM) to update and revise regulations under the Fair Labor Standards Act (FLSA) regarding the exemption of executive, administrative, professional, outside sales and computer employees from minimum wage and overtime pay. The Wage and Hour Division of the Department of Labor (DOL) proposed to update the salary level utilized to categorize employees as eligible for overtime pay.<sup>1</sup> The agency also proposed to amend the exemption with an annual, automatic salary level adjustment.<sup>2</sup> NPGA supports the spirit of FLSA as well as efforts by DOL to ensure implementation of the law; however, we are concerned that the NPRM proposed drastic measures that reach beyond the scope of necessary action.

NPGA is the national trade association of the propane industry having a membership of about 2,800 companies, with 39 state and regional associations representing members in all 50 states. NPGA's membership includes retail marketers of propane gas who deliver the fuel to the end user, propane producers, transporters and wholesalers, and manufacturers and distributors of equipment, containers and appliances. Propane gas is used in millions of installations nationwide for home and commercial heating and cooking, in agriculture, in industrial processing and as a clean air alternative engine fuel for both over-the-road vehicles and industrial lift trucks. A majority of NPGA members are propane marketers that operate small businesses in the delivery of propane to commercial and residential customers.<sup>3</sup> Although the proposal impacts businesses of all sizes throughout the dynamic regions of the United States, we emphasize the relative magnitude of the impact that the proposal may have on small businesses with varying and fluctuating business structures and operations.

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<sup>1</sup> Department of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 128, 38516 (proposed July 6, 2015) (to be codified at 29 C.F.R. 541).

<sup>2</sup> *Supra* note 1, at 38516.

<sup>3</sup> Many NPGA propane marketers fall within the definition of a small business fuel dealers according to the U.S. Small Business Administration. See U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, 25 (2012). See also *supra* note 1, at 38603.

We appreciate the proposal's intent to ensure the overtime protections enacted by Congress are fully implemented in correlation with adjustments to our economic climate. We believe that DOL's proposed increase to the salary threshold, however, is a drastic overstep that may, in fact, have an inverse negative effect on small businesses. The agency concludes that failure to revise the salary threshold in more than a decade necessitates immediate correction,<sup>4</sup> but we disagree with the scope of action that the agency proposed. Specifically, the proposed increase to the 40<sup>th</sup> percentile expands the salary test by nearly double.<sup>5</sup> Moreover, it appears that the decision to increase the salary threshold by such a large measure was based principally on the concern that the agency did not review or update the threshold for eleven years.<sup>6</sup> We urge the agency to consider a more reasonable increase to the salary threshold that would match the changes in our economic climate without posing substantial risk to small businesses that employ many of the workers who would fall within the parameters of the exemption. The suggestion of a 20<sup>th</sup> percentile salary threshold detailed in several public comments would appear to represent a reasonable approach.

Similarly, we identify the proposed annual automatic update to the salary threshold as overambitious and ineffectual for the agency's goals. It would likely foster far more confusion among small businesses than the beneficial assistance intended by its proposal. An annual automatic update to the salary threshold presumes simple and uniform economic change despite the reality of economic complexities and variations in regional economies within the United States that typically exist. The nuances of the American economy require keen attention from DOL and Congress with updates to measures like the salary threshold based on real, studied need rather than automatic habit. Furthermore, the potential annual adjustments impose a constant burden on employers to maintain compliance based on a regularly moving target. If DOL wishes to implement an automatic updating mechanism, we submit that it be done on a five (5) year basis, as a minimum, rather than the currently proposed annual basis.

We urge the agency to consider the statement of NPGA in the refinement of the proposed modifications detailed in the NPRM. While we support the FLSA and efforts of DOL to update regulations that maintain the objectives of the legislation, we caution the agency from drastic measures. We reiterate our concern that an increase of the salary threshold to the 40<sup>th</sup> percentile is more significant than necessary to correct past inaction, and poses negative consequences for small businesses. We also strongly discourage the agency from implementation of an annual automatic update system because it is ineffective and additionally burdensome.

Thank you for considering this supplementary statement. Please feel free to contact us with any additional questions.

Sincerely,



Sarah J. Reboli  
Director, Regulatory Affairs  
National Propane Gas Association

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<sup>4</sup> See *supra* note 1, at 38517.

<sup>5</sup> *Id.*

<sup>6</sup> See *id.*