May 21, 2019

Ms. Melissa Smith
Director, Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: Defining and Delimiting Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Proposed Rule: (RIN) 1235-AA20

Dear Director Smith:

On behalf of the National Association of Counties (NACo) and the 3,069 county governments we represent, we respectfully submit the following comments on the proposed rule to amend regulations under the Fair Labor Standards Act (FLSA) governing the exemption from overtime pay for executive, administrative and professional employees (EAP).

Founded in 1935, NACo is the only national organization that represents county governments in the United States. County governments are a major employer and economic engine for workers across the country. **America's 3,069 county governments employ more than 3.3 million people**, while providing service to over 316 million county residents to produce healthy, vibrant, safe and resilient communities and provide residents with essential services such as law enforcement, search and rescue, road maintenance and public health. We provide health benefits to nearly 2.5 million employees and nearly 2.4 million of their dependents. For county employees' health insurance premiums alone, counties spend an estimated $25 billion annually. Any changes to the overtime pay threshold could have a significant impact on county budgets, which in turn would impact our operations and the ability of local governments to provide these critical services to the people we serve – especially during crisis events or disasters.

On September 25, 2017, per the U.S. Department Labor's (DOL) Request for Information (RFI), NACo submitted comments expressing concern about DOL's 2016 final rule that would have nearly doubled the salary threshold for employees eligible for overtime pay. In those comments, NACo highlighted the potential impact a new overtime pay rule could have on county government budgets and administration. In particular, we emphasized the financial impact such a change could have on the nation's rural counties: nearly 70 percent of counties are considered rural and have fewer than 50,000 residents.

Our comments today reflect counties' perspective on DOL's 2019 proposed overtime pay rule and highlight the potential impact this latest overtime pay rule could have on county governments. The key issues our comments address include changing the overtime pay exemption threshold, providing updates/adjustments to the threshold, revising the duties test and providing time for public comment.

Changes to the Overtime Pay Exemption Threshold/Incentive Compensation Could Negatively Impact Counties

The new proposed rule from DOL would increase the threshold amount for EAP employees' exemption from overtime pay from $23,660 ($455 per week) to $35,308 ($679 per week). This proposal would impact a significant number of counties: **forty percent of counties have an average annual local government salary – county and municipalities – below $35,308.**[1] While the proposed rule is preferable compared to the 2016 final rule salary level of $47,476 (which was held by a federal eastern district court in Texas to be invalid and would have impacted 83 percent of counties), forty percent is still a substantial number of counties that would have to find additional revenue to cover these costs.

Most counties must operate balanced budgets, and many do not have the financial resources to make significant pay increases without increasing taxes, reducing employee benefits and/or reducing their county employee work hours or staff. Many counties also have limited authority to increase taxes. In fact, 43 states have some type of limitation on the property taxes collected by counties, including 38 states that impose statutory limitations on property tax rate, property tax assessments or both. Only 12 states authorize counties to collect their own local gas taxes, which in most cases are limited to a maximum rate and often involve additional approvals for implementation.

As employers, county governments provide both wages and benefits to our employees. The overtime pay exemption threshold increase could negatively impact county employees' wages and benefits. NACo appreciates that the proposed rule would allow for bonus and incentive payments to be used to satisfy up to 10 percent of the salary level for employees that now qualify for overtime pay.

In many counties, the proposed rule could decrease the number of exempt employees and change their classifications. This change from exempt to non-exempt status could potentially reduce these county employees' fringe benefits and incentive compensation. *This remains a concern for rural counties*, which have expressed concern that the overtime rule could adversely affect their county finances as well as their county employees' work hours and benefits.

In June 2016, Commissioner Jerrie Tipton from Mineral County, Nevada (population 4,478) testified on behalf of NACo before the U.S. House Small Business Committee regarding DOL's 2016 overtime rule.[2] In her testimony, Commissioner Tipton noted that DOL's regulation would have made 13 to 17 of the county's 102 full-time county employees eligible for overtime pay at an additional cost of up to $45,000 a year. "This might not seem like a lot, but it poses quite a financial challenge since counties are limited in our ability to generate local revenue… We have been 'doing more with less' for so long that, absent new revenue sources, it is hard to see any alternative to cutting services." **Based on the DOL's 2019**

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[1] Source: NACo Analysis of Bureau of Labor Statistics – Quarterly Census of Employment and Wages (QCEW)

[2] Commissioner Jerrie Tipton on behalf of the National Association of Counties, written statement on "Damaging Repercussions: DOL's Overtime Rule, Small Employers, and their Employees", U.S. House Small Business Committee. Available at https://naco.sharefile.com/d-s06086b158e94833b

proposed regulation, 13 of the county's full-time employees would become eligible for overtime pay at an additional cost of up to $5,110.76 a year.

NACo is concerned that these additional costs to counties as employers may negatively impact employee benefits and/or number of work hours to cover any additional costs. Reductions in employee benefits or number of hours worked could adversely impact the services counties provide daily to our residents. Counties support allowing bonus and incentive payments to be used to satisfy up to 10 percent of the salary level for employees that qualify for overtime pay.

Wide Variations in Local Labor Markets Across the United States Not Sufficiently Addressed

In responses to the RFI, NACo requested that any new proposed rule consider the wide variations in local labor markets across the country. DOL's 2016 overtime rule did not adequately address the substantial variations in local labor markets in counties across the country, which would have had broad consequences for taxpayers and county services. The 2019 proposed rule salary threshold will still likely have a greater impact on small and rural county governments. The proposed level is pegged to the 20th percentile of weekly earnings for full-time salaried workers from the lowest-wage Census region in the country (currently the South).

The latest proposal could have a significant impact on counties, especially in the South and Midwest. For example, in Calhoun County, South Carolina (population less than 15,000) the average wage in local government is $33,326. In Decatur County, Kansas the current average wage in local government is $18,523.

Census Region	# of Counties	# below $35,308	Share
Midwest	962	425	44.18%
Northeast	193	9	4.66%
South	1384	655	47.33%
West	530	152	28.68%
All Counties	**3069**	**1241**	**40.44%**

NACo welcomes the Department's reconsideration of the methodology for the overtime pay threshold increase. However, NACo maintains that the proposed change does not sufficiently address variations in local labor markets and could potentially harm counties, particularly rural ones in the South and Midwest regions.

Future Salary Updates/Subsequent Adjustments

NACo commends the Department for providing an opportunity for public comment prior to making future adjustments to the overtime pay threshold every four years as proposed. The 2016 final rule would have had automatic increases every three years. Such drastic changes would have created uncertainty for county governments and placed an undue administrative and monetary burden on county governments, as it would have been difficult to plan for and implement salary increases due to the undefined overtime pay adjustments. County budgets typically operate on an annual or biannual basis. Once approved, salary changes within these budgets are very difficult to change, even if the needs of the counties shift.

NACo thanks the Department for proposing a reasonable approach of updates every four years with an opportunity to comment prior to the effective implementation date.

Changes to Duties Test

NACo appreciates that DOL does not make any changes to the duties test, which examines employees' functions to determine whether they are exempt or non-exempt. NACo requested in our RFI comment letter that DOL provide an opportunity to comment prior to any changes to the duties test.

If the Department seeks changes to the duties test at a later date, counties ask DOL to first publish a proposed rule and provide an opportunity for comment prior to finalizing any changes to the duties test.

We thank you for the opportunity to comment. If you have any questions, please feel free to contact Daria Daniel, NACo's Associate Legislative Director at ddaniel@naco.org or 202.942.4212.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties