

September 25, 2017

Melissa Smith

Director of the Division of Regulations, Legislation, and Interpretation

Wage and Hour Division

U.S. Department of Labor

200 Constitution Avenue N.W., Room S-3502

Washington, DC 20210

Re: RIN 1235-AA20, Comments in Response to Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

Dear Ms. Smith:

In analysis with Ross Eisenbrey back in 2014,¹ I laid out the economic rationale for an overtime salary threshold higher than that established by the Department of Labor's 2016 Final Rule. The Final Rule reflected a conservative update of this threshold, below which all workers would earn overtime pay, after taking into account over 270,000 public comments and accommodating the concerns expressed in the small minority of comments that were opposed to an update. As I have expressed in congressional testimony,² the Final Rule, if implemented, would have been a major policy win for middle-class families. According to Department of Labor estimates, it would have directly benefited 4.2 million workers and helped to affirm the principle, established almost 80 years ago in the Fair Labor Standards Act, of fair pay for a hard day's work.

Given the years of analysis, thought, and public input that already went into this rule's determination, it is disappointing that the Department has chosen not to defend the Final Rule's salary level of \$913 per week in pending litigation. It is also disappointing that the Department has chosen to waste resources and time – meanwhile denying deserved overtime pay to potentially millions of American workers – by reopening what was already a very thorough process. As I will lay out in answers to three questions at the heart of the RFI below, and as my testimony and other written work on this topic³ have previously explained, the salary threshold in the Final Rule does in fact already “effectively identif[y] employees who may be exempt.” The salary level was also explicitly designed to ensure that it would not “adversely impact low-wage regions and industries.”

Why is \$913 per week appropriate?

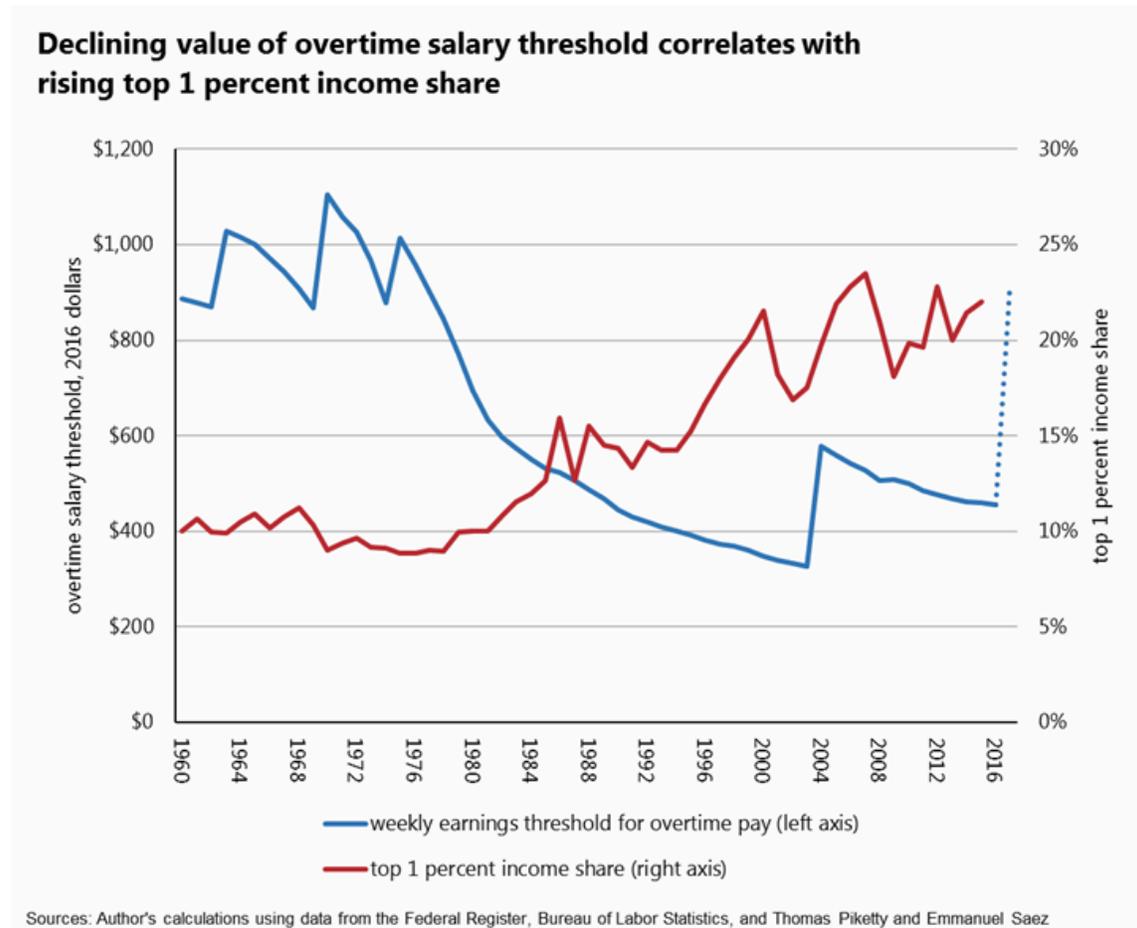
The Department asks whether the salary threshold from 2004 (\$455 per week), adjusted for inflation, would be a better threshold than \$913 per week. It would not be; as the graph below shows, the 2004 update didn't come close to restoring the value the threshold had lost since 1975, when it was last set at a more appropriate level by the Ford Administration. As the graph also shows, the threshold's deterioration has coincided with rising income concentration at the top of the scale. Correlation doesn't imply causation, of course, but it is not hard to see how this erosion is likely one of many factors that

¹ <http://s2.epi.org/files/2014/Overtime-Rules-03-13-2014.pdf>

² <https://www.cbpp.org/economy/new-overtime-rule-a-major-policy-win-for-middle-class-families>

³ https://www.washingtonpost.com/posteverything/wp/2015/06/29/president-obama-raises-the-overtime-salary-threshold-reestablishing-a-key-labor-standard/?utm_term=.b2f6cb7cc8b9; <https://www.vox.com/the-big-idea/2016/12/5/13838188/overtime-pay-rule-judge-strikes-down>;

have tilted the economic playing field away from low- and middle-income workers and towards the owners of capital.



The 2016 Final Rule would still only partially recover the ground the salary threshold has lost since 1975. Back then, over 60 percent of full-time salaried workers earned salary levels that qualified them for overtime pay. The new threshold would be above the salaries of only 35 percent of full-time salaried workers, more than the Bush-era rule would have covered (and much more than the 7 percent of full-time salaried workers below the threshold today) but not nearly as high as a reasonable rule update might have gone.

Shouldn't the threshold account for low-wage regions and industries that have less wiggle room for labor costs?

The 2016 Final Rule already accounted for concerns about low-wage regions and nonprofit institutions with tight operating margins. The Department chose, rather than restoring the salary threshold to its 1975 level, to set it at the 40th-percentile wage for the lowest-wage region in the country – the South. Instead of updating the rule every year to keep pace with inflation, the Department decided to reset it only every three years by benchmarking it again to the 40th-percentile wage in whatever region that wage is lowest. The threshold should thus be seen as a conservative floor that gives businesses time to adjust, per the Department's consideration of the public comments already submitted on this topic.

The Department also went out of its way to address concerns raised by certain nonprofit institutions, delaying implementation of the rule for Medicaid-funded providers of certain services in certain facilities and working with the NIH to increase National Research Service Award grant amounts to help higher education institutions pay their post-docs. The Department did not need to take these steps – the nonprofit sector should recognize that the pay and work-life balance of their employees is no less important than the pay and work-life balance of employees in the private sector – but that the Department did make these accommodations indicates the degree to which it already gathered information and incorporated it into the rulemaking process.

Isn't the "duties test" the more appropriate way to determine whether or not a worker should receive overtime pay?

No, because the duties test is complex, hard to enforce, and is the most costly part of the compliance costs faced by firms when administering the overtime rule. This is especially true when compared to the simple salary test. In 2015 congressional testimony, a witness for the National Restaurant Association noted that compliance with a higher salary threshold "would be an easy transition to make from a management and bookkeeping standpoint," and there is good reason to believe the new rule would reduce the compliance burden for firms by eliminating the need for application of the duties test to the millions of workers between the old and new thresholds.

Moreover, according to data from the Bureau of Labor Statistics (BLS), median weekly earnings for supervisory employees (who we would expect to be exempt from overtime as a result of the duties test) are north of \$1,500. BLS also has a 15-point scale on which they assess each occupation's demands for skills, knowledge, and responsibilities, and jobs with weekly earnings below \$913 per week consistently score below a 7 on this scale. In other words, once again, the salary threshold has been conservatively set; it targets only those workers who would be likely to qualify for overtime pay under the duties test *anyway*.

That doesn't mean the duties test isn't necessary for workers above the threshold – it absolutely is, as many of those workers are still deserving of overtime. What it means is that the duties test should only be applied to workers who are more likely to be executive, administrative, or professional employees, something a salary threshold significantly *higher* than \$913 per week would accomplish.

There is thus a clear, sound rationale, based on historical precedent, for the conservative salary threshold in the Department's 2016 Final Rule. Delaying the rule's implementation further and/or reducing the salary threshold below which workers are covered will have a negative impact on the living standards of millions of middle-class, working Americans. I urge the Department of Labor to reconsider its decision, defend the \$913 per week salary threshold in court, and move forward with implementation of the 2016 Final Rule as soon as possible.

Sincerely,

Jared Bernstein
Senior Fellow at the Center on Budget and Policy Priorities