November 7, 2023

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor, WHD/DRLI
200 Constitution Avenue, NW
Room S-3502
Washington, DC 20210

RE: Proposed Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 FR 62152 (September 8, 2023)

Dear Acting Secretary Su,

The Asian American Hotel Owners Association ("AAHOA") respectfully submits the following comments to the Department of Labor ("DOL") regarding the proposed rule defining and delimiting the exemptions of executive, administrative, professional, outside sales, and computer employees per the notice cited above relating to the Fair Labor Standards Act ("FLSA").

AAHOA is the largest hotel owners' association in the world. The association's nearly 20,000 members own more than 60% of all hotels in the United States and are themselves responsible for 1.7% of the nation's GDP. More than 1 million employees work at AAHOA member-owned hotels. In total, AAHOA member hotels support 4.2 million jobs across all sectors of the hospitality industry in the United States.

AAHOA submits these written comments on this notice of proposed rulemaking ("NPRM") based on its experience in a concentrated industry, specifically that of hotel franchising and the representation of small business hoteliers.

EXECUTIVE SUMMARY

The DOL proposed rule will effectively (a) raise the minimum salary floor required to qualify for the overtime exemptions for executive, administrative, and professional ("EAP") workers under the FLSA from $684 per week to a proposed $1,059 per week, (b) raise the total compensation requirement for exempt "highly compensated employees" ("HCEs") by nearly 35% from $107,432 to $$143,988, and (c) automatically update these salary amounts every three (3) years.

Given the scope and significance of these proposed rule changes, AAHOA submits that the revisions will unfairly compromise the labor market and cause unintended consequences to small business owners, such as the independent hoteliers and franchisee members of AAHOA. Accordingly, for the reasons set forth below, AAHOA recommends and requests that the DOL withdraw the proposed rule.

Asian American Hotel Owners Association, Inc.
1100 Abernathy Road, Suite 725
Atlanta, GA 30328-6707
Phone: 404-816-5759
info@aahoa.com

ANALYSIS OF PROPOSED RULE

A. The Increased Salary Threshold and the Formula Contemplated by the Proposed Rule are Undefined and Misplaced

AAHOA does not support or recommend the proposed increased salary threshold for overtime exemptions for EAPs. The commentary issued by the DOL provides little explanation on how the significant increase from $684 to $1059 per week ($55,068 per year) is justified based on the current data points available. The events of the last few years have not assisted with identifying the proper formulaic approach to such an increase, and likely only caused additional uncertainty and confusion.

Moreover, although the preamble to the proposed rule references an annual salary of $55,068 as the proposed threshold salary amount, the actual amount may be significantly higher. Specifically, the DOL states that "in the final rule, it will use the most recent data available, which will change the dollar figures." Indeed, the DOL noted that in the first quarter of 2024, the projections for the salary threshold could be $1,158 per week, or $60,209 for a worker. (*See*, 88 Fed. Reg. at 62152-53, n. 3.)

AAHOA does not support threshold salary exemption increases by the DOL on the standard level. The formula asserted does not account for various scenarios to determine accurate national versus regional economic conditions within a given market and the impact on the corresponding salaries. Ultimately, the singular model does not adequately protect national or regional businesses, more specifically contained within the hospitality industry.

While AAHOA understands the need for updating standards within the FLSA based on the economic climate for a particular timeframe, the drastic increase in the threshold exceeding fifty percent (50%) will pose an undue burden, especially within certain markets.

Significantly, the Eastern District of Texas struck down an Obama Administration proposal in 2015 to raise the limit to a 40th percentile model in *Nevada v. U.S. Department of Labor.*[1] Current regulations are structured on a model of the 30th percentile model, however, this most recent proposal establishes a midpoint of the 35th percentile with little explanation as to how that figure is contemplated, why it supersedes the ruling in *Nevada*, or why the DOL has particularized authority to issue the higher percentile increase within its regulatory power.

Accordingly, AAHOA respectfully recommends and submits that the proposed increased salary threshold for overtime exemptions for EAPs should be withdrawn because of the undue burdens it places on small business owners.

B. Small Business Hoteliers Will Be Significantly Hindered by the Implementation of this Proposed Rule

AAHOA supports nearly 20,000 members representing more than sixty percent (60%) of hotel owners and operators in the United States. Many of our AAHOA members are single or double property hoteliers. They own independent hotels or operate in a franchisee capacity and are restricted to certain

[1] *Nevada v. U.S. Department of Labor*, 275 F.Supp.3d 795 (E.D. Tex. 2017).

parameters within their franchise agreements. This proposed rule will have a negative impact on smaller market hoteliers and their operations due to the significantly increased regulatory rules and corresponding higher costs.

For example, if the salary threshold is increased, any business owner offering employees a salary under $55,068 will automatically be forced to pay overtime for such employees, which could have major effects on payroll costs if the total number of non-exempt employees rises significantly.[2]

Given the potential increases, small business hoteliers in smaller markets will have no choice but to examine their staffing levels, possibly minimize hourly expectations of employees to prevent the burden of overtime payments, and/or reduce the number of employees to compensate for the increased cost of operations. Such a burden could further impact and lessen the consumer hotel guest experience -- especially if there are fewer employees or reduced hours of work -- thereby also reducing revenue from loyal guests.

Further, the proposed rule will establish a mechanism to automatically increase the salary threshold every three years. This will create additional burdens that are difficult to foresee. With such anticipated increases, hotel owners and/or hotel franchisees will face increased labor and administrative costs that will contribute to the instability of the small business model.

In light of the foregoing, AAHOA remains highly concerned that the DOL did not adequately consider the significant and detrimental impacts the proposed rule will have on small businesses.

Moreover, the DOL did not fully consider the time, resources and expenses it will take for a small business to sufficiently comply with the proposed rule. The DOL suggests that one hour will be sufficient time to review the changes required by this rule. However, for a small business owner, AAHOA anticipates that it will take substantially more time to review and assess the overall impacts, retain an attorney or HR professional to advise of the changes relating to the current employees, and prepare an adequate compliance plan.

For small business owner hoteliers facing such significant changes and corresponding increased costs, often the only way to cover them will be to increase pricing for consumers, reduce the amount and scope of excellent services provided to the hotel guests, and/or reduce the overall salaries and benefits of the existing employees, along with limiting the hiring of new ones. In this current economic environment of increased labor and operational costs, plus inflationary pressures, these proposed rule changes will only magnify the existing problems.

Consequently, AAHOA strongly urges the DOL to reconsider the proposed rule and promptly withdraw it due to the burdensome impact it will have on independent and small business owners.

[2] Kate Leismer: How New Federal Overtime Laws Will Affect Small Businesses: The Logical Entrepreneur (August 8, 2023) (figure of $55,068 updated to reflect the proposed rule of September 8, 2023).

C. The Proposed Rule Does Not Account for Flexibility in the Hotel Industry

Creation of a system to maximize flexibility due to evolving technological and economic conditions is paramount to hoteliers when classifying employees for overtime purposes. The proposed rule does not account for the evolving technologically interceding environment that many small businesses rely on for operational purposes.

The impact of the COVID-19 pandemic and resulting uncertainty of the economic climate has created labor shortages, specifically within the hotel industry. The proposed rule of a one-size-fits-all mandate creates a grey area to flexible work arrangements that are commonplace in the hotel industry and the supplemental businesses that support the flexible work arrangements.

Businesses, specifically hotels, can connect with a myriad of hourly or seasonal workers to fill short term or long-term permanent possibilities. According to a 2022 survey conducted by Instawork (a supplementary business that emerged through the Covid labor crisis), sixty-four percent (64%) of their respondents said choosing when and how to work was a leading non-monetary motivation for flexible working.[3] The DOL's proposed rule, however, will create significant limitation on how particular employees might be utilized. Flexibility in the hotel workforce will be significantly hindered.

Creation of a system to maximize flexibility due to evolving technological and economic conditions is paramount to hoteliers when classifying employees for overtime purposes, and AAHOA urges the DOL to withdraw the proposed rule because of the burdens it will place on the industry.

D. Exempt Salary Levels for Highly Compensated Employees Should, At a Minimum, Be Properly Phased Over Time

AAHOA does not support singular contemplated increases in exempt identification for highly compensated employees through the proposed rule. Similar to the concerns involving the standard increase exempt threshold, the contemplated exemption increases for highly compensated employees will create an undue burden for small and medium size businesses, which could inflate costs to consumers and prevent economic growth in certain markets.

Indeed, the proposed rule will raise the standard salary minimum for highly compensated employees from $107,432 to $143,988 per year based on the "annualized weekly earnings of the 85th percentile of full-time salaried workers nationally."

Similar to the standard salary exemption increase, in the case of *Nevada v. U.S. Department of Labor, supra,* the court addressed this particular issue and struck down the proposed rate at the ninetieth (90th) percentile.

[3] Jenna Walters: Hotel Tech-in: Staffing app matches hotels, workers amid labor shortage: Hotel Dive (August 31, 2023). https://www.hoteldive.com/news/hotel-staffing-app-technology-labor-shortage-hiring/692458/

Here, the proposed rule will create an approximate thirty-five percent (35%) increase above and beyond the approximate nineteen percent (19%) increase from just two years prior.[4] This proposed increase is so sharp that it "shocks the conscience" of small and medium business owners. Rather than a bulk initiation of approximately fifty-eight percent (58%) in five years after a pandemic, AAHOA respectfully submits that, at a minimum, such a dramatic increase in a short period should be phased over time.

***

In light of the foregoing, AAHOA respectfully submits and recommends that the DOL withdraw the proposed rule because of the detrimental impact it will have on America's small business owners, especially including independent hoteliers and hotel franchises who are part of AAHOA's membership.

AAHOA is willing and ready to discuss the proposed rule further and provide more information concerning the anticipated impact on AAHOA's hotelier members should it be useful. Please do not hesitate to contact us if you have any questions concerning the foregoing.

Sincerely,

Laura Lee Blake
President & CEO

[4] CPI Inflation Calculator, in 2013dollars.com, accessed Nov. 2, 2023 (comparing data from Jan. 2020 – Sept. 2023).