



**OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416**

June 24, 2003

Via Facsimile and Electronic Mail

The Honorable Tammy D. McCutchen
Administrator, Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

**Re: Defining and Delimiting the Exemptions for Executive, Administrative,
Professional, Outside Sales and Computer Employees (68 Fed. Reg. 15559).**

Dear Administrator McCutchen:

We are writing to comment on the U.S. Department of Labor's ("DOL") Notice of Proposed Rulemaking, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*.¹ The rule revises the definitions of "executive," "administrative," and "professional" employees considered exempt from the Fair Labor Standards Act's ("FLSA") overtime compensation requirements. The Office of Advocacy ("Advocacy") commends DOL for its outreach to small entities and encourages DOL to publish small entity compliance assistance materials in conjunction with the final rule. Advocacy's comments focus on DOL's compliance with the Regulatory Flexibility Act ("RFA") and potential small business alternatives under the RFA.

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress.² Advocacy is an independent office within the U.S. Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), gives small entities a voice in the rulemaking process. The RFA requires Federal agencies, such as DOL, to consider

¹ NPRM, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 68 Fed. Reg. 15559 (proposed March 31, 2003) (to be codified at 29 C.F.R. pt. 541).

² Pub. L. 94-305, 90 Stat. 663 (1976) (codified as amended at 15 USC 634a-g).

alternatives to avoid overly burdensome regulation of small entities.³ Advocacy is also required by Section 612 of the RFA to monitor agency compliance with the RFA.⁴

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.⁵ Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs of the Office of Management and Budget.⁶ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁷

I. DOL's Small Entity Outreach

The RFA requires Federal agencies engaged in rulemaking to conduct outreach to affected small entities,⁸ and Executive Order 12866 encourages agencies to consult with affected entities.⁹ Before proposing the overtime exemption revisions, DOL met with and reviewed comments from small entities and their representatives. Small entities and their representatives have informed Advocacy that DOL reached out to small employers and has been responsive to their input. Further, DOL attended an Advocacy small entity roundtable on the proposed rule during the comment period. Advocacy encourages DOL to continue outreach to small entities once DOL has had an opportunity to collect and review public comments on the proposed rule and begin the process of formulating a final regulatory approach.

II. Small Business Flexibility

As required by the RFA, DOL has prepared an Initial Regulatory Flexibility Analysis ("IRFA") which outlines the major costs of the proposed rule to small businesses by industry.¹⁰ The RFA also requires agencies to publish a Final Regulatory Flexibility Analysis ("FRFA") at the same time as any final rule unless the agency certifies that the final rule will not have a "significant economic impact on a substantial number of small entities." The agency's FRFA must include "a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes" and the factual, policy, and legal reasons behind the alternative selected.¹¹ Also, the FRFA must contain "a summary of the significant issues raised by the public comments in response to the initial regulatory

³ Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified as amended at 5 U.S.C. §§ 601-612).

⁴ 5 U.S.C. § 612.

⁵ Exec. Order No. 13,272 § 1, 67 *Fed. Reg.* 53,461 (Aug. 13, 2002) ("E.O. 13272").

⁶ E.O. 13272, at § 2(c), 67 *Fed. Reg.* at 53,461.

⁷ E.O. 13272, at § 3(c), 67 *Fed. Reg.* at 53,461.

⁸ 5 U.S.C. § 609(a).

⁹ Exec. Order No. 12,866, at § 6(a), 58 *Fed. Reg.* 51,735 (Sep. 30, 1993).

¹⁰ 5 U.S.C. § 603(b)(4).

¹¹ 5 U.S.C. § 604(a).

flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.”¹²

Advocacy takes this opportunity to comment on areas of the proposed rule for which small entities have suggested potential flexibilities and small business alternatives which advance the goals of the statute while minimizing small entity impacts.

A. *The proposed “primary duty” test.*

In the proposed rule, DOL’s classification of exempt employees rests in part on a determination of the employee’s “primary duty,” defined as “the principal, main, major or most important duty that the employee performs.”¹³ Small business representatives have informed Advocacy that the movement away from a percentage-of-time primary duty test is an important development in reducing the regulation’s compliance burden. Advocacy recommends that DOL continue to review small business comments and incorporate this new primary duty test in any final rule.

B. *Salary test.*

Advocacy commends DOL for soliciting small business input on the overtime exemption’s minimum salary test. However, small business representatives have informed Advocacy that the proposed minimum salary of \$425 per week would impose disproportionate burdens on small businesses. In different regions of the country, small business employees enjoy the same or similar living standards with very different salaries. Further, some small business industries, such as retail stores and restaurants, operate on thin margins with labor costs constituting a significant portion of their expenses. Many of these small businesses rely heavily on small numbers of management-level employees who will no longer be overtime exempt. Advocacy urges DOL to consider ways to alleviate this burden pursuant to the requirements of the RFA. Advocacy recommends allowing for small business flexibility in determining salary levels, such as lower minimum salary levels for small businesses. At a minimum, Advocacy urges DOL not to adopt a minimum salary test for small businesses above \$425.

C. *Enforcement flexibility.*

SBREFA required Federal agencies to establish policies which reduce or waive civil penalties for small businesses.¹⁴ Advocacy encourages DOL to consider civil penalty flexibility where appropriate. Advocacy believes that allowing for flexibility in dealing with small businesses will encourage small businesses to work more closely with DOL to bring themselves into compliance voluntarily. Advocacy notes that DOL is able to provide flexibility not only in the instant rulemaking, but also through any upcoming revision of the Wage and Hour Division’s Field Operations Handbook.

¹² 5 U.S.C. § 604(b)(2).

¹³ 68 Fed. Reg. at 15595 (proposed § 541.700).

¹⁴ *SBREFA*, at § 223(a). Congress also allowed agencies to impose common-sense restrictions on the allowance of waiver of civil penalties, including, among other things, “requiring the small entity to correct the violation within a reasonable correction period” or “excluding violations involving willful or criminal conduct.” *SBREFA*, at § 223(b).

Advocacy believes that the enforcement flexibility DOL has included in the proposed rule constitutes a potentially valuable tool for correcting inadvertent violations. However, small business representatives have expressed concern to DOL and Advocacy that the safe harbor's requirement for a pre-existing "written policy" may exclude some small businesses which do not produce written compliance materials in the ordinary course of business. Advocacy understands the purpose of this requirement is to encourage regulated entities to better understand the law's requirements, but Advocacy believes that DOL should not exclude small businesses from the proposed safe harbor, while offering the safe harbor to large businesses that are able to dedicate resources to the drafting of comprehensive written employment policies. Advocacy commends DOL for the inclusion of a safe harbor provision and encourages DOL to consider alternatives to the written policy requirement found at § 541.603.

III. Small Entity Compliance Guide

SBREFA requires agencies to publish a small entity compliance guide for rules that are accompanied by a Final Regulatory Flexibility Analysis.¹⁵ This guide must "explain the actions a small entity is required to take to comply with a rule or group of rules" and the agency must exercise discretion to "ensure that the guide is written using sufficiently plain language likely to be understood by affected small entities."¹⁶ Advocacy notes that DOL has historically made compliance materials available to small businesses via its website.¹⁷ Advocacy encourages DOL to update and revise these compliance assistance materials for small entity use with the new rule, as well as to distribute these materials to small businesses that do not have access to the Internet.

¹⁵ Small Business Regulatory Enforcement Fairness Act of 1996, at § 212, Pub. L. No. 104-121, 110 STAT. 847, 858 (March 29, 1996- 104th) ("SBREFA").

¹⁶ SBREFA, at § 212.

¹⁷ See Department of Labor, *Employment Law Guide: Minimum Wage and Overtime Pay* (accessed on June 10, 2003, at <http://www.dol.gov/asp/programs/guide/minwage.htm>) (general discussion of overtime), Department of Labor, *Fact Sheet #17: Exemption for Executive, Administrative, Professional, & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)* (accessed on June 10, 2003, at <http://www.dol.gov/esa/regs/compliance/whd/whdfs17.htm>) (fact sheet on white collar exemption application).

IV. Conclusion

Advocacy appreciates the opportunity to comment on DOL's proposed rule on white collar overtime pay exemptions, and our office stands ready to assist DOL in its efforts to reduce costs to small entities. Thank you for your consideration and please do not hesitate to contact Michael See at (202) 619-0312 or michael.see@sba.gov if you need clarification of these comments.

Sincerely,

/s
Thomas M. Sullivan
Chief Counsel for Advocacy

/s
Michael R. See
Assistant Chief Counsel

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs