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Submitted via www.regulations.gov

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

Re: Comments in Support of DOL's Notice of Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act, RIN 1235-AA11.

Dear Ms. Ziegler:

Goldstein, Borgen, Dardarian & Ho ("GBDH") submits these comments on the Notice of Proposed Rulemaking regarding the Department of Labor's (DOL) proposed rulemaking regarding the executive, administrative, professional (EAP) and related exemptions under the Fair Labor Standards Act (FLSA); RIN 1235-AA11 ("NPRM"). Founded in 1972, GBDH represents plaintiffs and employees in complex and class action litigation nationally, including employment discrimination, wage and hour, environmental, voting rights, and other public interest class actions. In the last two decades, GBDH has represented tens of thousands of employees alleging misclassification under the EAP exemptions throughout the country, recovering tens of millions of unpaid overtime.

The EAP exemptions are intended to cover those workers whose salaries are high enough above the minimum wage in jobs with greater privileges and job security and opportunities for advancement, negating any need for overtime protections, and are to be read narrowly so that most workers are covered by the FLSA's protections. GBDH's clients have a direct and sustained interest in clarifying and expanding overtime protections to the up to 13.5 million workers who spend long hours at work but bring home less pay. The DOL proposed reforms to make more workers eligible for overtime pay are an important step toward remedying decades of neglect in maintaining those protections and reversing decades of wage declines that have harmed America's middle class.

We appreciate the opportunity to comment on the proposed regulations. The FLSA expressly grants rulemaking authority to the DOL to define the scope of the exemptions in Section 213. As the U.S. Supreme Court affirms in *Batterton v. Francis*, 432 U.S. 416, 425 n.9

(1977), when a federal statute expressly instructs the agency to work out the details of those broad definitions, those regulations have the force of law. Nearly 16 months after being instructed by the President to revise the rules, during which time the DOL conducted extensive deliberative information-gathering from all affected stakeholders and internal research and drafting, the proposed NPRM reflects well-considered policy determinations that are fully authorized by and supported by the express terms and spirit of the FLSA.

Below, we make three primary points, and conclude with illustrative examples of workers who would benefit from the proposed rules changes.

First, we note that **the current salary floor threshold below which a worker cannot be called exempt is woefully low**. That threshold now is $455 per week, or $23,660 per year. This is so low that it allows employers to exclude workers earning less than the poverty level for a family of four from overtime protection. In practical terms, what this current salary threshold means is that workers classified as exempt may actually get paid little more than the minimum wage. Workers classified as exempt from overtime get paid nothing extra at all for their hours worked over 40 hours. An assistant retail or fast food manager who is paid $25,000 annually and works an average of 60 hours per week would have an effective hourly rate of pay that is just above $8.00.

DOL's proposed salary floor threshold for the exemption of $50,440 (or $970/week) in 2016 is much better, but should be even higher. GBDH strongly supports the Department's proposal to increase the standard salary threshold. Instead of the proposed 40th percentile weekly earnings, though, GBDH urges the DOL to adopt a threshold reflecting the 50th earnings percentile of full-time salaried workers. A threshold based on the median would create the clearest and simplest dividing line between the top-half and the bottom-half of salaried workers, reflecting a low estimate of what it means to be a high-level "white collar" employee.

Second, the **DOL's proposal to index the salary threshold to an** objective measure provides a predictable and efficient way to ensure that those workers intended to be covered by the Act get its protections. While the DOL has used different methods over the decades as it has adjusted the EAP salary thresholds, regulatory adjustments to the thresholds have been somewhat uneven and slowed significantly since the early 1980's, causing the threshold to become out of date, permitting more employers of low-wage workers to sweep them into the exemptions, as is occurring now. Indexing to a readily-identifiable level would remove the need to engage in time-consuming periodic regulatory changes, saving government and public resources, and incrementally maintaining the bright-line threshold so that lower-wage workers do not slip into the exemption and lose protections over time. Choosing to index, and the method of indexing are wholly within the DOL's discretion and statutorily-directed authority.

Third, the DOL could, as it suggests, **implement a revision to the duties test that would align the federal standard with the California 50% primary duties rule**. Under the current rules, there is no percentage of an exempt worker's duties that are required in order to qualify for the duties test, meaning that workers could spend very little of their time performing exempt tasks and still be properly counted as exempt. The California rule requires that at least 50% of a

worker's duties be in the exempt category. As practitioners in California, we have seen first hand how this has been field-tested in California, and believe the rest of the country would benefit from a bright-line test, giving employers and employees guidance as to how to interpret the scope of the exemption.

Finally, the types of employees we regularly represent will benefit from these new rules. They work in retail, restaurant, call centers, and computer related companies in California, and throughout the country. In one of the firm's current cases challenging the administrative exemption, the employees worked over fifty hours a week and were paid a salary of less than $50,000 a year. The employees worked in Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin.

Thank you for consideration of our comments.

Respectfully submitted,

David Borgen

Laura L. Ho

DB/jvd