September 25, 2017

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

Re: Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act – Regulatory Information Number 1235-AA20

Dear Ms. Smith:

The National Retail Federation ("NRF") submits these comments in response to the above-referenced Request for Information ("RFI") published in the *Federal Register* on July 26, 2017. NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is this nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. The retail industry provides opportunities for lifelong careers, strengthens communities, and plays a critical role in driving innovation.

NRF strongly supports the Department of Labor's ("DOL's") review of the 2016 Final Rule's changes to the tests defining exempt executive, administrative, and professional ("EAP") employees and examining ways to reduce the regulatory burden imposed by the EAP tests. NRF strongly opposed the Final Rule's attempt to raise employee wages by executive fiat and significant increase in the regulatory burdens on employers. The drastic increase to the standard salary level imposed by the Final Rule ignored economic reality and would have resulted in major negative consequences for employees, employers, and the economy as a whole. Furthermore, as the Eastern District of Texas determined in *Nevada v. Dep't. of Labor*, 4:16-CV-731 (E.D. Tex. Aug. 31, 2017), the Final Rule's standard salary level of $913 per week would have operated as a *de facto* salary-only test, thus eclipsing the historic role of the duties test.

Accordingly, NRF believes that this is an appropriate time for DOL to address many of the flaws in the Final Rule and to bring the EAP tests up to speed with today's economy. As such, NRF

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supports having a national, uniform compensation threshold for the EAP exemptions that is based on the methodology DOL used in 2004. NRF also supports having all of an employee's compensation be considered in determining whether the employee meets the minimum compensation threshold for exempt status. NRF further believes that if DOL updates the compensation threshold using the 2004 methodology, revising the duties test would be unnecessary, as the new threshold would still serve its function of helping to easily distinguish nonexempt positions. NRF also opposes any change to the current duties test because such changes would increase the regulatory burden on employers and result in increased litigation and uncertainty among both employers and employees as to whether individuals are properly classified.

Consistent with these positions, the following addresses aspects of the RFI for which NRF's members have specific comments or suggestions.

I. Response To RFI Questions 2, 3 and 10: NRF Supports Having A National, Uniform Compensation Threshold For The EAP Exemptions That Is Set At A Level That Properly Accounts For Regional And Industry Differences.

In response to DOL's question regarding whether the regulations should contain multiple standard salary levels, NRF believes that there should continue to be a single, national compensation threshold that is part of the EAP exemption tests and highly compensated exemption test. Having a single standard for all EAP exemptions provides clarity for both employees and employers. In contrast, having multiple thresholds based on geography would create uncertainty and added administrative burdens and costs on employers, particularly considering today's economy where employees are mobile and can work out of multiple locations, e.g., at the office, at home, or on the road for both short- and long-term assignments. For example, if an exempt employee frequently teleworks from a different metropolitan area than where his or her office is located, or was placed on an assignment for multiple weeks in another area of the country, different compensation thresholds may be applicable. The need to comply with different thresholds could curtail the current flexibility both employees and employers enjoy in terms of selecting work locations.

DOL also should not set compensation threshold distinctions based on a company's size. There is no reliable correlation between a company's size and whether an employee is likely to be performing exempt work. Accordingly, the test for exempt status should not change, for example, because a company has decided to cross an arbitrary threshold in terms of the number of employees it has.

The purpose of the salary level test is to help easily screen out obviously nonexempt employees. This goal can be achieved by setting a compensation level that takes into account the lowest wage areas and industries in the country without the need for multiple thresholds. Furthermore, the added compliance costs, e.g., additional time spent on tracking employees who may work in multiple areas, and litigation risks that employers would incur if DOL adopted multiple salary

thresholds runs counter to Executive Order 13777's aim of trying to lower the regulatory burden on employers.

In short, NRF believes that DOL's decision in 2004 to adopt a national, uniform compensation threshold for all of the EAP exemptions has worked well in that it is both easy to apply and sufficiently screens out clearly nonexempt employees. As such, NRF urges DOL not to depart from this precedent.

II. **Response To RFI Questions 1, 5 and 8:** NRF Urges DOL To Maintain The Approach Used In 2004 For Setting The Appropriate Compensation Level To Avoid Setting A Compensation Level That Results In Individuals Who Primarily Perform Exempt Work Being Ineligible For Exempt Status.

NRF strongly opposes DOL's decision in the Final Rule to use the 40th percentile of all full-time salaried employees in the lowest-wage Census Region to determine the appropriate salary level for the EAP exemptions. This methodology is arbitrary, fails to properly account for the importance of lower-wage industries in the modern economy and regional cost of living differences, and results in automatically excluding many workers who are primarily performing exempt work from qualifying for the EAP exemptions. For these reasons, and those set forth in greater detail below, NRF urges DOL to adopt an approach that remains consistent with past precedent and methodologies as it considers any increase in the minimum compensation level for the EAP exemptions.

In selecting a method for updating the minimum compensation threshold, DOL should properly account for regional and industry differences in our nation's economy. The methodology adopted by the Final Rule failed to properly account for these regional and industry-specific differences and set a salary level that was artificially high. The result was a salary level test that ceased to be a reliable tool to help distinguish nonexempt from exempt employees. *See Nevada v. Dep't. of Labor*, No. 4:16-cv-731 (E.D. Tex. Aug. 31, 2017) (stating that the salary level set by the Final Rule "effectively eliminates a consideration of whether an employee performs in a bona fide executive, administrative, or professional capacity"); *see also* 80 Fed. Reg. 38,516 at 38,532 (using too high a percentile of nationwide salaries "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative, or professional duties as their primary duty"). For example, the salary level in the Final Rule caused countless individuals who had a primary duty of performing exempt work to be ineligible for exempt status unless their salaries were significantly increased. Many retailers and chain restaurants, especially those in the South and rural areas, have stated that their businesses simply could not absorb the necessary compensation increases and that adjustments to employee classifications, staffing levels, benefits, and hours were required instead. In the retail and chain restaurant industries, these impacted employees included store managers, restaurant general managers, analysts, purchasing agents, human resource managers, communications managers, accountants, and marketing managers.

Therefore, if DOL updates the compensation level for the EAP exemptions, NRF urges it to account for the regional variations in the economy and to properly take into consideration the critical role the retail industry plays in the economy. Specifically, NRF believes that in setting the minimum salary level, DOL should continue to use the methodology it used in its 2004 rulemaking, where it used "earnings data of full-time salaried employees (both exempt and nonexempt) in the South and in the retail sector," 80 Fed. Reg. 38,516 at 38,526, because "[t]he South was determined to be the lowest-wage region," which would avoid the regional pay variation and cost-of-living issues. *Id.* at 38,557. This methodology has a proven track record and properly accounts for the economic realities in low-cost regions of the country and the retail industry, which is the nation's largest private sector employer.[1] *See* 69 Fed. Reg. 22,171 (noting that the $455 minimum weekly salary requirement adopted in 2004 "represents the lowest 20.0 percent of salaried employees in the retail industry"). Moreover, as DOL previously stated, the method for setting the salary in 2004 "is consistent with the Department's historical practice of looking to 'points near the lower end of the current range of salaries' to determine an appropriate salary level." *Id*.

In short, the methodology adopted by the Final Rule resulted in setting a minimum compensation level that eclipsed the role of the duties test. To correct this problem, DOL should update the compensation level using the methodology it adopted in 2004. *See Nevada*, No. 4:16-cv-731 (signaling that an adjustment of the 2004 salary level for inflation would likely be acceptable, as it would not diminish the impact of the duties test). Applying the 2004 methodology to current data would continue to allow the compensation threshold to serve as a gatekeeper, weeding out clearly nonexempt positions, yet not automatically disqualifying individuals who are primarily performing exempt duties.

III. **Response To RFI Question 11:** There Should Be No Automatic Increases To The Minimum Compensation Levels.

NRF urges DOL not to impose automatic increases to the compensation threshold for the EAP tests or the highly compensated exemption. Any consideration given to a compensation level increase should be based on an individualized evaluation of economic conditions rather than an automatic, arbitrary formula and should adhere to proper notice and comment rulemaking procedures. DOL has the capacity to decide when it is appropriate to raise the compensation level, and it should not abdicate that responsibility by establishing an automatic increase that

[1] The main explanation for declining to use the 2004 methodology is that the 2004 methodology did not properly account for the elimination of the "long test" and the Final Rule needed to correct for this "mismatch." *See* 81 Fed. Reg. 32,391 at 32,409. NRF strongly disagrees with this position. To start, the 2004 salary level test did properly account for the elimination of the long test in that the threshold from the 1958 Kantor percentage approach rose from 10% to 20% under the 2004 approach. Additionally, the decision to no longer specifically look at the retail industry in setting the salary level ignores the Kantor Report's recommendation that low-wage industries should specifically be considered and appears based on the unsupported conclusion that considering these industries would result in a salary level that would be too "low." *See* 81 Fed. Reg. 32,410. NRF submits that the desire to make a certain number of employees overtime eligible is not an appropriate basis for abandoning years of precedent and economic analysis.

may not be appropriate for a given economic climate.[2] Indeed, automatic increases are inconsistent with the compensation level requirement's gatekeeper function. For example, raising the compensation threshold during a recession is not necessary to properly screen out clearly nonexempt workers. Although DOL took the position in the Final Rule that automatic updating every three years is necessary to make sure the compensation level test "remains a meaningful, bright-line test,"[3] this goal can still be achieved by DOL's individualized evaluation of economic conditions.

Moreover, NRF believes that DOL lacks the authority to automatically increase the compensation thresholds. Specifically, Congress never granted DOL the authority to index the compensation level threshold. If Congress intended the salary test to be indexed, it would have expressly permitted indexing as it did in other statutes including the Social Security Act and the Patient Protection and Affordable Care Act. DOL recognized its lack of authority to index the salary level in 2004 and again in the 2015 Proposed Rule when it stated, "In the 2004 Final Rule the Department declined to adopt commenter requests for automatic increases to the salary level, reasoning in part that 'the salary levels should be adjusted when wage survey data and other policy concerns support such a change' and that 'the Department finds nothing in the legislative or regulatory history that would support indexing or automatic increases.'" *See* 80 Fed. Reg. at 38,537. DOL was correct in 2004 and nothing has changed to warrant a different conclusion.

NRF also opposes automatic increases because it would impose additional regulatory burdens on employers, and such changes would have significant administrative costs. *See infra* Section VII, describing the burden and costs associated with the Final Rule. Accordingly, consistent with the Regulatory Flexibility Act, any increase in the compensation level required for exempt status should be accompanied by a detailed economic and cost analysis before it is implemented to make sure the proposed increase is not unduly increasing the regulatory burden on employers. NRF also opposes automatic increases to the compensation threshold because such increases will likely compound inflationary pressures and/or cause job losses, particularly for retailers in rural areas.

IV. **Response To RFI Question 9:** DOL Should Consider An Employee's Total Compensation In Determining Whether The Minimum Compensation Threshold Required For Exempt Status Has Been Met.

In response to DOL's question regarding incentive compensation, NRF generally supports the provisions in the Final Rule that permitted nondiscretionary incentive compensation to count in determining whether an employee received the minimum compensation level required to establish exempt status. Incentive compensation is a key part of the compensation structure of

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[2] The automatic increases imposed by the Final Rule are inconsistent with past precedent and congressional intent. Prior to the Final Rule, there was never an automatic increase in the salary level. DOL has also acknowledged that, previously, the shortest period between salary level increases was five years and that between 1938 and 1975 DOL regularly updated the salary level every five to nine years. *See* 80 Fed. Reg. 38,526.

[3] *See* 81 Fed. Reg. 32,430.

many exempt employees in the retail and chain restaurant industries. Allowing companies to include all forms of compensation in determining whether the minimum salary level is satisfied will encourage employers to continue to provide bonuses, commissions, and other opportunities that allow exempt employees to share in and potentially profit from a company's overall performance.[4]

A. All Types of Compensation Should Be Considered In Determining Whether An Employee Satisfies The Increased Compensation Requirement.

If an employee is receiving a certain amount of income, the form of the income received, e.g., base salary, bonus, commission, or stock awards, should not change the exemption determination. It is the level of income an employee receives, not the income's specific form, that helps distinguish nonexempt from exempt employees. As such, no distinction between nondiscretionary and discretionary incentive compensation should be made in determining whether the salary threshold has been satisfied. Allowing both discretionary and nondiscretionary supplemental compensation to be considered provides employers with greater flexibility to create incentive systems that reflect the modern economy and work arrangements.[5] Furthermore, permitting all types of compensation to be considered would reduce administrative burdens on employers because it would allow employers to quickly verify whether an employee's compensation meets the minimum compensation threshold rather than needing to dissect the various parts of the employee's compensation package to determine whether a component can be considered.[6]

NRF also recommends that DOL not place a limit on the amount of supplemental compensation that may be considered in determining whether the minimum compensation level is satisfied. DOL's decision in the Final Rule to place a 10% cap on the amount of incentive compensation that could be considered was arbitrary and did not acknowledge that the same benefits described above for allowing incentive income to be considered are to be found regardless of the amount

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[4] Counting incentive compensation also has the benefit of potentially allowing employees to have greater control over how they spend their time. For example, an employee who earns a large amount of commissions early in a quarter could remain exempt and choose to work fewer hours during the remainder of the quarter without the pressure of needing to spend time working to "justify" his or her salary.

[5] Because there would still be a minimum compensation threshold that must be met to qualify for exempt status, concerns raised by some commenters to the 2015 Proposed Rule that allowing supplemental compensation to be included would erode income security and predictability appear exaggerated. Employers have a strong incentive to make sure the minimum compensation threshold is satisfied because they do not wish to have their employees alternate between exempt and nonexempt status. Moreover, allowing employers to make "catch-up payments" if employees did not receive the anticipated amount of incentive compensation would also help alleviate the commenters' concern that exempt employees would no longer be guaranteed a set level of income regardless of the quantity or quality of work performed.

[6] For this reason, NRF also urges DOL to permit discretionary compensation to be included in determining whether an employee satisfies the highly compensated test. *See* 29 C.F.R. § 541.601.

of incentive compensation that counts toward the threshold. For example, it is illogical that under the Final Rule a store manager with a $50,000 salary who does not receive any supplemental compensation qualifies as exempt while a store manager who performs the same duties and who receives a base salary of $35,000 plus a $50,000 bonus for successfully managing the store could not qualify as exempt. Accordingly, in revising the salary test for the EAP exemptions, DOL should allow all of an employee's supplemental compensation to be considered in order to prevent such illogical results.[7]

Finally, given the way that many supplemental compensation programs are designed and administered by retailers and chain restaurants, NRF urges DOL to consider allowing any supplemental compensation that is paid during the year to be included in determining whether the minimum salary level is met.

B. "Catch-Up" Payments Should Count In Determining Whether The Minimum Salary Requirement Is Satisfied, And Employers Should Have A Month's Time To Make Such Payments.

NRF supports DOL's position in the Final Rule that "catch-up" payments can be considered in determining whether the minimum salary requirement is satisfied. *See* 81 Fed. Reg. 32,427. The Final Rule, however, did not fully address some practical considerations involved in catch-up payments. For example, under the Final Rule a catch-up payment needed to be made within "one pay period of the end of the quarter." *Id*. This causes administrative difficulties for payroll departments through which employees are paid weekly or biweekly and certain commissions and/or quarterly bonuses are not able to be calculated and paid within this time frame. As one NRF member commented, "We did not plan to include bonus compensation, as much as we would have liked to, because the quarterly calculations and true-ups were overly burdensome to administer." Accordingly, NRF recommends allowing employers a month after the end of the applicable period to make any necessary catch-up payments. Having a month's time to determine and make any necessary catch-up payments will increase the ability of many employers to use supplemental compensation payments to satisfy the exemption test without fear of noncompliance.

Additionally, the Final Rule did not provide clear guidance on how an employer can determine if the salary threshold is met in financial quarters that end midweek. In such situations, a pay period may straddle two financial quarters and it is unclear in which quarter the incentive payment should be attributed or if it could be prorated between quarters. In issuing new regulations, NRF also encourages DOL to make clear that just as permissible deductions can be

[7] Allowing incentive compensation to satisfy more than 10% of the salary threshold for the EAP exemptions would also be consistent with the regulations for the highly compensated exemption. *See id*. The regulations for the highly compensated exemption permit employees to receive 76% of their compensation in the form of supplemental compensation and still qualify for this exemption. For example, the highly compensated exemption does not distinguish between a manager who receives an annual salary of $100,000 and no incentive compensation and a manager who receives an annual salary of $23,660 and an annual nondiscretionary bonus of $76,340. A similar standard should apply to all of the EAP exemption tests.

made to an employee's base salary, *see* 29 C.F.R. § 541.602(b), similar deductions and/or a proration can be made to incentive payments considered in determining whether the compensation threshold is met.

V. Response To RFI Questions 4 and 7: The EAP Duties Test Should Not Be Modified In A Manner That Places More Burdens On Employers.

NRF opposes any change to the duties test that would result in employers needing to engage in an increased number of costly and time-consuming self-audits to determine whether employees satisfy the test. There is a well-established body of case law with respect to the current federal test that employers can rely upon in evaluating positions for classification purposes, and NRF's members stress that the current federal test is both manageable and eminently practical to administer. Thus, NRF strongly objects to any attempt to adopt the California "more than 50 percent" duties test, or the old "long" duties test, which also required an analysis of whether more than a certain percentage of time is spent on nonexempt duties. Neither the California duties test nor the long duties test, both of which involve a percentage of time-based approach, is practical because it is virtually impossible to have consistency in percentages on a week-to-week basis. This is particularly true for small retailers and restaurants where all employees are expected to assist customers and perform other nonexempt duties from time to time.

Determining eligibility for overtime based on the amount of time employees spend on tasks is highly inefficient and has led to an enormous waste of corporate and government resources auditing positions trying to determine the amount of time employees spent performing exempt work. The job duties of employees change — they change because some employees perform different job duties at different times of the year, they change because technology allows job duties to be performed in a different and more efficient manner, and they change because of job restructuring and job reassignments. As one retailer noted, "It is hard to assess the precise amount of time spent by management on exempt duties in retail. Many times [managers] may be doing these duties as [they] are training or overseeing [their] staff. In addition, [the amount of time] can vary based on the time of the year or even busy-ness of the store."

Another national retailer further explained that "in a retail and supply chain setting, each day is different — requiring varying amounts of time spent on training, recruiting, coaching, meeting customer needs, etc. Trying to gauge a standard percentage of time is virtually impossible in this setting. We know that our leaders' primary role is to recruit, retain, train, engage, and motivate our hourly workforce. However, in any facility on any given day, that scene will be different." Similarly, chain restaurant members of NRF noted that "the application of a duties test similar to California would lead to the elimination of many salaried positions within their restaurants" and that such a test would "ignore the realities of what it takes to properly manage the business, which works against the best interests of managers."

If the current duties test were modified based on a percentage of time an employee is spending on specific duties, it would be incumbent upon employers to constantly monitor these changes, to constantly reconsider the exempt status of their employees, and to constantly reclassify employees. To hit these moving targets, employers would need to devote substantial resources,

including human resource experts, compensation experts, and oftentimes outside legal experts.[8] This would be the antithesis of reducing the regulatory burden on employers.

NRF also opposes the adoption of either the California duties test or the long duties test because both tests are likely to foster confusion and lead to increased litigation and costs given the difficulty in accurately tracking the minute-by-minute activities of employees. NRF members with employees in California note that a quantitative approach of the "more than 50 percent" test has created more grounds for dispute, and thus litigation, with regard to proper classification status than does the FLSA's qualitative approach. It is no surprise that more overtime litigation occurs in California than in any other state. Indeed, DOL has acknowledged that "[w]hen employers, [and] employees, as well as Wage and Hour Division investigators applied the 'long' test exemption criteria in the past, distinguishing which specific activities were part of an employee's exempt work proved to be a subjective and difficult task that prompted contentious disputes." 69 Fed. Reg. 22,127.

NRF also strongly opposes any changes to the "concurrent duties" test under the current FLSA regulations. NRF rejects the misconception that managers are spending too much time performing nonexempt work such as stepping in to assist customers or helping arrange displays. When managers perform such duties, they are still "in charge" of the operations and are responsible for the success or failure of the operations. As one retailer explained, regardless of what a manager's hands might be doing at a given moment, managers are always observing and directing. Indeed, managers are not evaluated based on their ability to stock shelves, but rather on how well they manage the operation of the store.

Those opposing the concurrent duties test ignore the realities of management in the retail and chain restaurant industries. Here, management is about making sure that operations run smoothly, supervising and directing employees, and ensuring customer satisfaction. It is the essence of "people management," which is what we understand the executive exemption to be about. Management in these industries also requires managers to be on the floor — they cannot spend the majority of their time in a back office overseeing work from afar.

Creating a standard that a manager may not engage in nonexempt work while performing management duties would result in creating two equally unattractive outcomes:

- First, it could result in having the manager classified as nonexempt to avoid risk uncertainty. For many NRF members, this would mean they would not have any exempt employees on the establishment premises. It is nonsensical that the top person in a store is not automatically exempt, and is completely counter to the purpose of the FLSA's executive exemption.

- Alternatively, it could result in a scenario where exempt managers are continuously worried about whether they are engaging in nonexempt activities, which erodes their

[8] NRF members with operations in California also note that a quantitative duties test has caused them to conduct expensive time studies that divert limited funds from more productive uses.

> ability to perform. It is quite common and a best practice for a store manager to be out on the floor leading and directing team members. For example, a manager may pitch in for a short time to help clean up a merchandise section in order to train or teach the associates how to perform. One NRF member noted, "if a manager needs to cover an employee while the employee is on their meal or rest break, the manager should not have to fear losing their exemption status so their associates can take meal and rest breaks." The idea that managers can simply sit in a back office is anachronistic in today's retail and restaurant workplaces and does not reflect managers' motivations. A restriction on concurrent duties also would impede managers' ability to manage their stores and perform tasks that they deem important from their management perspective.

The result of any changes to the concurrent duties test will have a disproportionate impact on small establishments and small business owners that need to maximize efficiency to remain in business. Changes also will result in harming manager morale because their flexibility and ability to manage their stores will be curtailed.

NRF also believes that, to the extent that DOL is contemplating the elimination of any compensation requirement for the EAP exemptions and consequently making the duties test for these exemptions more robust, such a plan would be contrary to Executive Order 13777's stated aim of trying to reduce the regulatory burden on employers.

VI. Response to RFI Question 10: The Highly Compensated Exemption's Compensation Threshold Should Remain At $100,000.

NRF supports the continued use of a single, uniform highly compensated test to simplify the determination of exemption status. NRF does advocate, however, maintaining the $100,000 threshold for the highly compensated test, as the "bright-line" $100,000 mark furthers the goal of simplifying the analysis of who qualifies for the test. For example, employees who earn $100,000 are not frequently the type of employees under the protection of overtime regulations, and employers should be permitted to pay such an employee based on the results achieved rather than on the number of hours worked. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (Congress intended the FLSA to "aid the unprotected, unorganized, and lowest paid of the nation's working population; that is those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage"); *Counts v. South Carolina Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003) (the "FLSA was meant to protect low paid rank and file employees, not higher salaried managerial and administrative employees who are seldom the victims of substandard working conditions and low wages" (citation omitted)).

VII. Response to RFI Question 6: The Final Rule Imposed Higher Than Estimated Implementation Costs On Employers And Caused Significant Harm To Reclassified Employees.

NRF submits that in estimating the cost associated with the implementation of a new rule, DOL take into consideration that NRF members spent considerably more time and incurred more costs preparing for the implementation of the Final Rule than DOL estimated. For example,

almost all NRF members surveyed spent more than one hour and five minutes reading, analyzing and understanding the changes proposed in the Final Rule. *See* 81 Fed. Reg. 32,475 (estimating one hour and five minutes for regulatory familiarization). Indeed, retailers reported that on average they spent 13 hours on regulatory familiarization. Retailers also reported that on average 24 employees were involved in the reclassification decisions.

To prepare for the changes in the Final Rule, retailers and chain restaurants needed to develop ways to determine the number of hours their exempt employees were working to help prepare compensation models and budgets, determine whether job duties could be reassigned or adjusted, revise benefit compensation and plans, and develop training and communications for employees who would be reclassified. Accordingly, NRF members estimated spending an average of 4.2 hours of administrative time per affected worker preparing for and making the adjustments required by the changes in the Final Rule compared with the 75 minutes per worker DOL estimated for administrative time. *See id*. at 32,476. Additionally, although DOL estimated that an additional five minutes per week would be spent by management scheduling and monitoring the hours of each affected employee, *see id*. at 32,477, NRF members estimated that on average they would spend an additional 43 minutes per week on scheduling and monitoring tasks. As such, in determining the regulatory burden new rules would impose on employers, NRF strongly encourages DOL to take into account these estimates and actual experiences from employers in the retail industry.

NRF also wants to ensure that DOL understands the impact that the Final Rule has had on retail and chain restaurant employees who were reclassified as nonexempt in anticipation of the Final Rule taking effect.[9] Although there are some variations, NRF members who did reclassify employees report that the reclassification resulted in the loss of benefits, flexibility, and status that they previously enjoyed, as well as the loss of pay and overall earned income. Below is a list of some changes that reclassified employees have encountered.

- *Impact on Flexible Work Arrangements and Professional Status*

One of the many perks of exempt status is the flexibility it gives employees in work arrangements. Many exempt employees appreciate that exempt status provides them with the flexibility of coming in late, leaving work early, determining the timing and duration of meal and break periods, and otherwise setting their own schedules to better address work-life balance issues while still receiving a minimum level of pay each week. For example, an exempt employee has the ability to respond to unexpected events such as needing to pick up a child at school without losing pay as a result of his or her time away from work. In contrast, nonexempt employees may still have flexibility in their schedules, but it often comes with an associated loss of income when they are away from work. One small business retailer commented that its reclassified employees resent no longer having the freedom to modify their schedules to see a child's school play or go to a doctor's appointment and make this time up at a later date without

[9] In light of the Final Rule's being enjoined and later invalidated, some NRF members did not reclassify employees as they were planning to do on December 1, 2016. Nonetheless, these members agree that the reclassification would have impacted their employees in a manner similar to that described herein.

incurring overtime costs. Additionally, in an effort to effectively monitor the time nonexempt employees are working and prevent off-the-clock work, many NRF members require their nonexempt employees to work in the office/store and do not grant them the same opportunities to work remotely and during nontraditional hours that exempt employees enjoy.

Related to these work-life balance issues, although it may seem to be common sense that overtime is not an issue for part-time employees, many NRF members have part-time employees who have periods when business demands necessitate that they work more than 40 hours a week. For example, an accountant may have responsibilities during tax season that require the accountant to work more than 40 hours in a week. Under the Final Rule's compensation threshold, a number of employees who clearly would meet the duties requirement for exempt status would not meet the minimum salary because they chose to work part time. Because the base salary for exempt status cannot be prorated, these employees would have to track hours worked and would be eligible for overtime pay. In turn, this creates a perverse incentive for employers not to fill positions of responsibility with part-time employees. As such, NRF proposes that if DOL does issue a new rule that increases the existing salary level, it also provide that the salary could be prorated for part-time workers.

NRF members also report that many employees in the retail and restaurant industries view being classified as exempt as an indicium of professional status. It was not uncommon for employees who were reclassified to believe that the change was a step back in their career paths and a devaluation of their roles. Employees also missed the privilege of not having to track time and not having to fill out timesheets. As such, NRF members who reclassified employees found that the reclassification had a negative impact on employee morale. For example, one NRF member who converted assistant store managers to nonexempt status found that these employees feel that they no longer contribute to the company as they did in the past, in that previously they were able to stay until a task was completed, but now because of the threat of working overtime, they feel they are leaving work for others to complete. It's a small thing, but it affects the morale of the entire team. On the flip side, this retailer's exempt store managers now feel like their workload has increased and that the changes have created a line between the manager running the store and the rest of the management team where one did not exist before.

- *Impact on Total Compensation and Benefit Packages*

Reclassifications caused by the Final Rule also resulted in some employees of NRF members receiving reduced overall compensation packages. In an effort to generally remain cost-neutral, some NRF members reduced employee hours to avoid overtime or set hourly rates based on an estimated number of overtime hours. If employees did not work these anticipated hours, their compensation was less than when they were exempt. Additionally, some employees who were converted to nonexempt status became ineligible for certain benefits such as increased vacation, life insurance, stock options, long-term disability insurance, and other supplemental incentive compensation initiatives only offered to exempt employees. For these employees, reclassification meant that even if they worked the same number of hours as they had when they were exempt, they now received a lesser compensation and benefit package.

- *Impact on Training Opportunities and Career Growth*

NRF members also report that compensation threshold changes that caused employees to be reclassified as nonexempt may result in these employees having reduced future earnings given the reduced opportunities for career growth that may come with nonexempt status. For example, NRF members report that some employees who were converted to nonexempt status will miss out on after-hours manager training programs and other programs that would foster career progression and greater opportunities for future increases in income. Reclassification also may reduce opportunities for career growth and professional development because nonexempt employees are less likely to be given opportunities to travel for nonessential training, conferences, and networking opportunities.

VIII. Conclusion

NRF thanks DOL for the opportunity to provide the above information. If you have any questions with regard to NRF's comments, please contact David French at frenchd@nrf.com.[10]

Sincerely,

Matthew R. Shay
President and CEO
National Retail Federation

[10] The law firm of Morgan, Lewis & Bockius LLP assisted NRF in drafting these comments.