September 3, 2015

The Honorable Thomas Perez
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Dear Secretary Perez:

On behalf of the Recreational Diving Industry, the Diving Equipment and Marketing Association (DEMA) respectfully submits these comments on the U.S. Department of Labor's July 6, 2015 Notice of Proposed Rulemaking (NPRM) to amend the Fair Labor Standards Act (FLSA) regulations implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees (known as the "white collar" or "EAP" exemptions).

DEMA is a non-profit trade association (501 (c) 6) based in the United States, representing the business interests of more than 1,400 members and 10,000 employees and business owners. DEMA's members include manufacturers, diver training organizations, non-retail service providers including the media, retail dive centers, and travel destinations both within and outside of the United States.

DEMA supports the principle in President Obama's March 13, 2014 Presidential Memorandum that the FLSA regulations need to be modernized and streamlined. DEMA has heard from numerous members, however, expressing serious concerns about the significant impact of the changes proposed in the NPRM.

As you know, the NPRM proposes increasing the minimum weekly salary level for EAP exemptions to the 40th percentile of earnings for full-time salaried workers nationwide, based on Bureau of Labor Statistic (BLS) data. In addition, the NPRM proposes automatically adjusting the minimum salary level on an annual basis, using either a fixed percentile of wages or the Consumer Price Index (CPI). For the first quarter of 2016, the Department projects that minimum annual salary for an exempt full-time employee would be $50,440, more than double the current minimum salary level for exempt employees.

While DEMA supports the principle of modernizing and streamlining the FLSA, DEMA is concerned about, and will comment on the likely outcome of the overtime rules as proposed as well as the duties tests. DEMA will also provide some suggestions on the proposed rules.

The FLSA: Background

It is important to note that the FLSA was passed in 1938. Times have changed; this is prior to the first television broadcast; the Ford Motor Company was producing the Model A; computers did not exist; and the first recreational scuba diving company was yet to be formed. FLSA was enacted to protect employees in a Depression-era workplace characterized by:

- There was a fixed beginning and end to both the workday and workweek in most American workplaces;
- Most jobs were performed within the confines of the employer's physical workplace – remote technology to perform similar work did not yet exist;
- A layered hierarchy of duties and positions existed, differing from today's workplaces where exempt employees may perform a variety of duties, including those previously associated with non-exempt employees;
- Business and occupations were primarily carried out locally and within the US, compared to today's globalized markets covering many different time zones and cultures;
- Manual labor was the predominate form of work;
- There was relatively little use of private litigation as a means to enforce federal laws and policies; and
- Fewer jobs required college or technical education, and most of those in existence at the time necessitated a four year college degree or more.

Even with the periodic changes in the FLSA made since 1938, the law is archaic. For example, the definition of "Computer Professionals" currently found in the FLSA was frozen by Congress in 1996[1], when less than 40% of Americans owned a cell phone[2] and fewer than 3% of U.S. homes had broadband access[3]. Today the entire concept of work is changing; companies are moving to highly automated manufacturing using fewer employees, and an expanded service economy exists - one that is heavily dependent on technology and much more mobile. It is an understatement to say that how and where work gets done today has changed dramatically since the FLSA was implemented. In our opinion changing the FLSA by merely altering the definition of the exempt employee salary threshold seems to be inadequate to meet the President's goal of "modernizing and streamlining" the law.

While DEMA contends that the FLSA and the proposed rules are outdated and no longer appropriate as written, and these rules should be completely overhauled, we make comment below on the likely impact the newly proposed rules will have on employment in general and specifically on the recreational diving industry.

What are the Likely Outcomes of these Proposed Rules?

Most empirical economic studies on the effect of overtime laws find that businesses are initially reluctant to pass along the increased labor cost associated with the significant change in the threshold for the exempt employee to their customers. Instead, these businesses cut expenses and find ways around the added employee-related expenditures.

As a small industry contributing around $11 billion to the US GDP, the recreational diving industry has dedicated and passionate employees who are often underpaid, owing to limited profits and required high service levels. For example, retail dive stores currently employ exempt and non-exempt workers who are involved in a variety of store-related activities including sales and sales management, and who are also involved in diving-related activities such as consumer education, on-site training, offshore travel, equipment maintenance and more. In the manufacturing, travel and training sectors, currently-exempt employees may be involved in

product development and management, marketing, engineering, education, inside or outside sales, extensive customer service, and additional duties.

Numbers of workers in every sector of the diving industry are likely to be re-classified under these proposed rules, making these individuals ineligible to attend educational and technical conferences which are critical to maintaining their expertise. Further, the proposed rules do nothing to help employers and employees account for the way people work today; the rules actually discourage the concept of working remotely; they favor elimination of mid-level management and entry-level administrative positions, and they make it more difficult for lower-level employees to climb the professional employment ladder. The proposed rules attempt to create a one-size-fits-all framework in a modern work environment that otherwise rewards flexibility. We believe that, at least in the short term, the proposed rules are likely to encourage recreational diving (and all) businesses to adopt one or more of the following strategies:

Make an adjustment in accounting:
Currently-salaried employees who are furthest from the new threshold will probably be re-classified from exempt to non-exempt, and their wages converted to hourly. As most businesses already limit labor hours to the minimum required, hours are unlikely to change. However, in order to control overall labor costs, employers are likely to adjust the hourly rate of pay for these employees so that the calculated hourly rate for the hours they work will include overtime. In many cases benefits will be reduced so that the total compensation for a given employee remains the same for the same work and same hours.

Importantly, when this employee does not work overtime in a given week, his or her pay will be less.

In some cases employees whose exempt status has been changed may find that they have lost both tangible and intangible benefits which are available only to exempt employees. For example, the opportunity to attend conferences, education programs or maintain certifications may be withdrawn by the employer since these could necessitate overtime pay. Employees in this situation could find themselves unable to advance professionally.

Make an adjustment to the employees' compensation "mix":
Currently-exempt employees who are close to the new, higher threshold could see their salary increased so that they would still be considered "exempt" and thus ineligible for overtime. While their salary may actually increase, to control costs, employees could see the remainder of their "total compensation package" reduced by a comparable amount, so that their overall compensation remains the same as prior to the threshold increase.

Reduce employee hours (and pay) and a turn to automation:
Current non-exempt workers may see a reduction in their hours from 40 per week to something less, so the employer can manage hours to avoid pay for overtime (e.g. the employee is reduced to a 38-hour workweek). A reduction in hours will also reduce total compensation for this non-exempt employee.

With reduced non-exempt employee hours, one of two scenarios may occur:

- The business turns to automation of functions where possible; this could eliminate the need for some non-exempt positions. Back-office employees are particularly vulnerable to this cost-savings approach.

- The business may create a part-time position (30 or fewer hours per week) to make up for the lost hours created when non-exempt employees' hours are cut. This may be the only situation where additional positions could be created by the business, albeit part-time.

Other outcomes – reductions in flexibility, price increases and lost jobs

Formerly salaried employees, re-classified to hourly workers are most likely to stagnate as their opportunities for demonstrating a willingness to work harder or more are withdrawn. It should be no surprise that when employers are compelled to re-classify employees from exempt to non-exempt status, there is often bitter, employee resentment. The realization that there may be little or no extra pay, along with the fact that work flexibility, mobility, education and advancement are adversely affected, may cause employees to feel deeply disappointed, and as a result, lose motivation – something that could lower the employer company's overall level of customer service and effectiveness.

Labor is among the highest costs in the recreational diving industry. At the point where recreational scuba diving meets the end-user, such as in recreational dive stores or at US-based dive destinations, these diving activities are service-intensive, and profit margins can be slim. Diving consumers require personal attention, including assistance from a diving instructor, sales person or dive guide. While the diving industry has no intention of cutting corners by reducing the service levels needed to maintain safety protocols and promote enjoyment of recreational scuba diving, the increased labor cost created in these proposed rules could result in increased prices for the consumer. Increased prices will, in turn, reduce demand as price-sensitive consumers move to other recreational activities that are less labor-intensive and consequently less expensive.

In some cases, as price sensitive customers decline to participate in diving, retail dive stores, travel businesses, manufacturing and training will all be forced to lay off employees and in some cases, close their operations.

The Duties Test

Perhaps a different way to approach this issue is by altering the current "duties tests" rather than (or in addition to), altering the exempt salary threshold. The NPRM does indicate that the Department is considering whether the tests are, "working as intended to screen out employees who are not bona fide EAP employees."

DEMA would welcome the opportunity to comment on whether the duties tests currently "may allow exemption of employees who are performing such a disproportionate amount of non-exempt work that they are not EAP employees in any meaningful sense." However, we are concerned that the NPRM does not, as written, provide sufficient detail about the extent or nature of any changes to the duties tests for employers to evaluate and comment on the impact of such changes.

In our opinion, issuance of a Final Rule containing changes to the duties tests based only on comments received in response to this NPRM would violate the Administrative Procedure Act. *See Small Refiner Lead Phase-Down Task Force v. U.S. Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (vacating EPA's change to regulatory definition under the Clean Air Act because the EPA's "general notice that it might make unspecified changes in the definition of small refinery" was "too general to be adequate. The agency notice must reasonably describe the range of alternatives being considered. Otherwise, interested parties will

not know on which parts to comment, and notice will not lead to better-informed agency decision making").

In our opinion, any change to the duties test without an additional notice and comment period would also violate the Unfunded Mandates Reform Act of 1995; the NPRM did not contain estimates of the costs and benefits from any specific changes to the duties tests (as no specific changes were proposed). In addition, inclusion of changes to the duties tests based on the NPRM would violate the Paperwork Reduction Act of 1995. The Department cannot include an explanation of modifications made to the duties tests regulations in response to comments unless the Department first alerts the public to the nature of the proposed rule changes. *See* 5 C.F.R. § 1320.11(f) ("When the final rule is published in the Federal Register, the agency shall explain how any collection of information contained in the final rule responds to any comments received from OMB or the public. The agency shall include an identification and explanation of any modifications made in the rule, or explain why it rejected the comments.").

Given the absence in the NPRM of specific proposals for changes to the duties tests element of these regulations, DEMA strongly opposes any change to the duties tests at this time, and suggests that the Department first publish another Notice of Proposed Rulemaking and open another public comment period.

DEMA's suggestions for updating and modernizing the FLSA

DEMA strongly suggests revising the FLSA to include the changes in the today's workplace and workforce. We recognize that adjusting the salary threshold is expedient since this can be most easily tracked and recorded. However, other measures should be considered and included, in recognition of the realities of today's employment picture.

Among the most important issues to be recognized are the issues regarding regional differences in cost of living, mobility of today's workforce, and the legal protections needed by both employers and employees in governing the overtime issue.

Although not an all-inclusive list, two suggestions are included below. We believe these would help begin the process of modernizing and streamlining the FLSA rules and would provide benefits to businesses and employees in the diving industry, as well as in other fields.

Regional/State Salary Thresholds

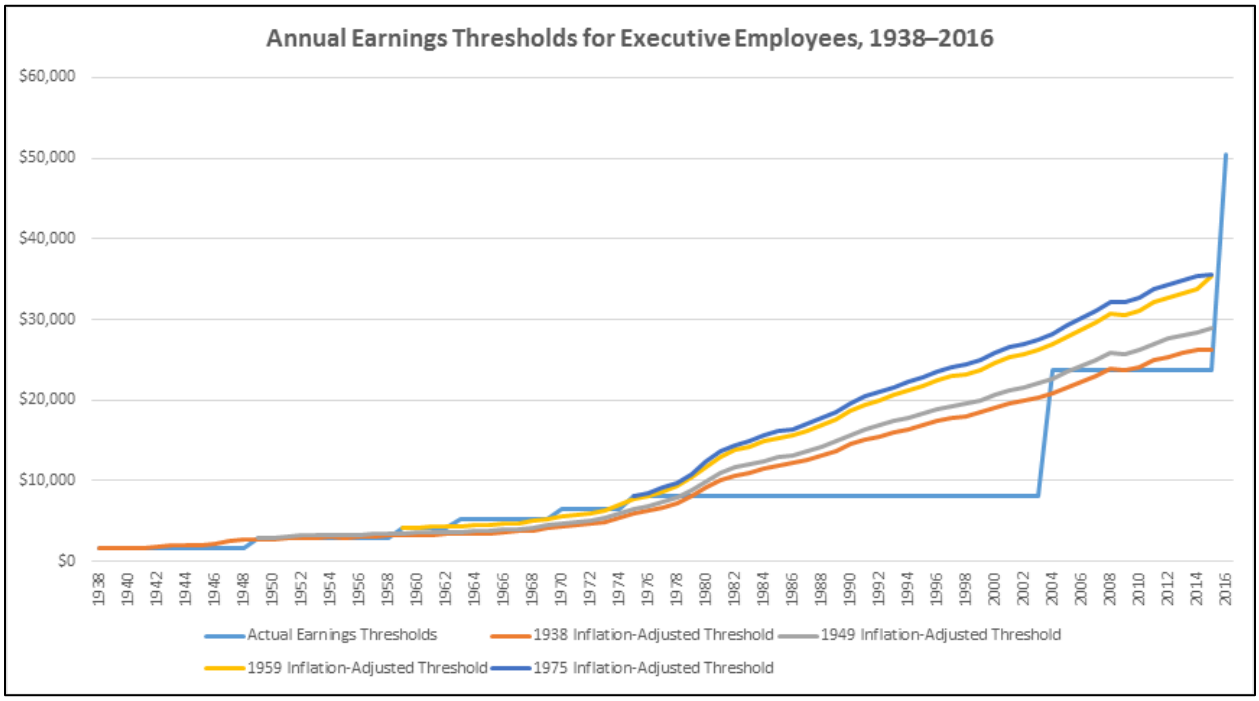
It is well known that the average salary in areas outside of major metropolitan cities is lower than the national average. Living in one state or region could carry a higher or lower cost of living than living in another. The Federal Government itself recognizes, and has access to information about these regional differences, and uses them in calculating pay grades for its General Schedule (GS) Pay Tables. For example, according to the relocation calculator of the FAS Relocation Network, an employee in Washington, D.C. earning an annual salary of $50,400 would only need to earn $28,577 to have a comparable standard of living in Corpus Christi, Texas, where the cost of living is calculated as about 57% of the cost of living in the nation's capital.

Solution: Rather than an exemption threshold with a one-size-fits all minimum, allow the exemption threshold to be keyed to the states or to key it to regional differences in accordance with the actual cost of living.

Lower Exempt Threshold

Alternative to keying to a state or region, the FLSA could consider an exempt employee threshold that is lower than the $50,400 per year ($970 per week) suggested in the proposed rules.

The National Association of Manufacturers has calculated the annual earnings thresholds based on the FLSA since 1938 and adjusted them based on the Consumer Price Index (CPI). The data reveals that, even using the 1975 thresholds as a starting point, the CPI adjusted threshold is about $36,000. Clearly the jump from the current $23, 600 per year ($455 per week) to $50,400 is substantially more than is warranted.



Source: National Association of Manufacturers: Shop floor Blog.

Solution: Calculate a reasonable increase in the threshold that encourages remote and mobile employees and job retention.

Greater Flexibility for Non-Exempt Employees

Today's workforce can and should be permitted to utilize the available flexibility of the digital workplace. FLSA regulations must accommodate these realities of today.

For example, employees today want to be connected to their workplaces. An employee who occasionally checks and perhaps quickly responds to an email or text message on a mobile device or platform may technically be working, but the activity is often sporadic and involves negligible amounts of time. Unfortunately current interpretation by the Department of Labor cites cases that are more than 50 years old to establish the "de minimus" amount of time which is compensable. These cases do not provide meaningful guidance on the issue. With the concern about overtime created by these proposed rules, employers are likely to restrict mobile or internet access and prevent non-exempt employees from having access to information, smart phones and other work-related connections.

Additionally, under the current and proposed rules non-exempt employees may incur overtime hours without notification or permission of employers. This discourages employers from hiring remotely-located workers. Yet it would make abundant sense to permit non-exempt employees to work remotely as doing so opens the door to a greater diversity of workers, including those living outside the immediate geographic location of the business. Doing so also helps defray the employees' use and cost of expensive fuel, and expands employees' living/location options, in some cases reducing labor costs as employees opt for locations with a lower cost of living.

Solution: Establish a clearly defined and realistic exception that recognizes the reality of today's technology as well as the fact that employees want to stay connected to their workplaces outside of their normal working hours. Means to encourage remotely-located employees should be included in these rules.

Summary: Adverse Impact on the Diving Industry and DEMA's Members

The NPRM acknowledges that the proposed FLSA regulatory changes as stated would entail a significant cost for employers, as the new salary level standards would "transfer income from employers to employees in the form of higher earnings." Diving businesses typically operate on tight budgets and payroll can be one of the largest cost components. The Department of Labor's proposed automatic increases to the minimum salary level will also be difficult for the diving industry to implement, as it will for many specialty recreation businesses. As a consequence of the proposed rule's conversion of currently exempt employees into non-exempt employees, many of DEMA's Members will be forced to choose among three unpleasant options:

- Lay off employees to fund the increase in wages for retained employees. This could necessitate curtailing aspects of business operations and/or increasing the workloads of the remaining exempt workforce.
- Lower the hourly wages of non-exempt employees in order to maintain current payroll budgets, so that the total annual compensation costs, including overtime payments, remain at the prior year's level. This will have a negative impact on employee morale in an industry dependent on high levels of customer service.
- DEMA's Member businesses will need to adopt firm restrictions on the overtime hours worked by non-exempt employees, relying on temporary or part-time staff for additional personnel resources at straight-time rates, or forcing exempt employees to absorb some of their non-exempt colleagues' duties. The industry will lose some remote employees as these individuals are re-classified from exempt to non-exempt.

Secretary Perez, you have said that those employees converted from exempt to non-exempt status will benefit from this proposed change, even if they are not permitted to work overtime hours. You stated that, "equally precious is the gift of time. It's not a salary increase, but they will have more time to spend with their families." Similarly, the NPRM states that "the additional time off may help these workers better balance work-life commitments, thus potentially making them better off." As the NPRM concedes, however, "not all workers would prefer to work fewer hours, and thus some of these workers might experience an adverse impact."

In an industry where workers are passionate and excited everyday about what they do, these proposed rules will have an adverse impact on employee morale, curtail professional growth as they are restricted or prevented from attending education programs and events, and in some cases, cause them to lose their jobs.

To avoid these negative consequences, DEMA suggests that the Department should recognize that there are several options available for setting the new threshold; for example., states or regions could set the appropriate exempt threshold, or a lower federal threshold could be considered. These new rules should be completely modernized and streamlined, as promised by President Obama, including developing and adopting rules that accommodate the way employees work today.

Thank you for the opportunity to comment on these proposed rules. We look forward to commenting on the duties tests and continuing to help guide the Department in developing rules that make sense for the 21st century.

Sincerely,

Tom Ingram
Executive Director

Resources:

- [1] Pub. Law No. 101-188; 104-583.
- [2] "Wireless History Timeline," CTIA-The Wireless Association, accessed June 11, 2014, http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-history-timeline.
- [4] Pew Research Internet Project, *Home Broadband 2013*, http://www.pewinternet.org/2013/08/26/home-broadband-2013/.
- [5]Which happened in 1961, 1966, and 1974; see William G. Whittaker, "The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1).
- [6]Samuel Estreicher and Kristina Yost, "Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment," New York University School of Law, Working Paper No. 08-03, January 2008.
- Pew Research Center, *Cell Phone Ownership Hits 91% of Adults*, http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/.
- Pew Research Internet Project, *Home Broadband 2013*, http://www.pewinternet.org/2013/08/26/home-broadband-2013/.
- See http://www.dol.gov/dol/aboutdol/history/flsa1938.htm.
- These revisions increased the salary thresholds for overtime exemption. The 2004 revision also eliminated the alternative "short" duties test, and set the same threshold for executive, administrative, and professional workers. See Whittaker (2005).
- Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations." Notice in the April 3, 2014 *Federal Register* 79(64): 18737.