

Congress of the United States
Washington, DC 20515

August 21, 2015

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

Dear Secretary Perez:

On July 6, 2015, the U.S. Department of Labor (DOL) issued its proposal to update the overtime regulations for “white collar” workers under the *Fair Labor Standards Act* (FLSA).¹ The deadline for submitting comments on the Notice of Proposed Rulemaking (NPRM) is September 4, 2015, providing only 60 days for public comment. While we have long supported efforts to update and clarify implementation of the FLSA, we have two principle concerns with the NPRM: first, the amount of time provided for public comment is insufficient given the significance of the proposed changes, and second, the way the NPRM is drafted leaves great uncertainty for employers and workers as to what the scope of a final regulation might be.

The public must be given adequate time to review, evaluate, and provide meaningful comments whenever the government proposes changes to regulations, especially when the proposed changes are as large and sweeping as these. Among other things, the proposal would more than double the minimum salary threshold used in determining exempt status from the FLSA’s minimum wage and overtime requirements. In addition, the minimum salary threshold would, for the first time, automatically increase on an annual basis. Evaluating the implications of these proposed changes will take some time for many small businesses, nonprofit organizations, and other enterprises.

We are also concerned about the manner in which the NPRM considers the so-called “duties tests.” The NPRM requests comment on numerous questions related to whether the duties tests should be changed and, if so, what changes should be made. It may take commenters longer to evaluate and formulate responses to these questions than if DOL had proposed specific revisions of the duties tests. Rather than make a specific proposal to change the duties tests, the NPRM requests comment on “issues,” in the form of 10 questions, generally alluding to a wide variety of possible changes to the tests but not providing any detail.² This format does not afford the public an opportunity to review and comment on a specific rule change, which is the only way DOL would be able to make a fully-informed judgment if it chooses to change the duties tests. As one witness testified before the Subcommittee on Workforce Protections:

¹ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38516-38612 (July 6, 2015).

² *Id.* at 38543.

DOL's failure to provide specific regulatory text for any of these "issues" is perhaps the most alarming aspect of the NPRM. Perhaps the DOL plans to rely on the "logical outgrowth" doctrine that allows regulators to issue final regulations that are a "logical outgrowth" of the proposed regulations. But "outgrowth" implies something to grow out of. Words matter. Specific word choices, and even the placement of a comma, can make a significant difference in how a regulation is interpreted and applied by the DOL itself and federal courts. Yet, apparently, the DOL is signaling that it plans to make changes to the specific text of the regulations without giving the public any chance to review and comment on that language. Even if the DOL has a colorable argument that it need not propose specific regulatory text, making significant changes to the Part 541 regulations without first doing so, flies in the face of Congress' intent in passing the *Administrative Procedure Act* to allow the public a meaningful role in rulemaking, and also contradicts the Administration's promise to bring more transparency to the federal government's policy-making process.³

We request DOL extend the comment period for the NPRM for an additional 60 days, for a total of 120 days, so the public has sufficient time to evaluate the proposal and provide thoughtful comments. In addition, given the NPRM's ambiguity concerning possible changes to the duties tests, we request DOL clarify if it intends to make changes to the duties tests and if the public will be provided notice and the opportunity for comment.

Please provide us with your decision concerning our request **by no later than September 4, 2015**. If you have additional questions or comments, please contact Joe Wheeler or Molly Salmi of the Committee staff at (202) 225-7101.

Sincerely,



JOHN KLINE
Chairman
Committee on Education and the Workforce



TIM WALBERG
Chairman
Subcommittee on Workforce Protections



JOE WILSON



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³ Statement of Tammy D. McCutchen at 10, Examining the Costs and Consequences of the Administration's Overtime Proposal Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce, 114th Cong. (July 23, 2015), available at http://edworkforce.house.gov/uploadedfiles/mccutchen_testimony.pdf.



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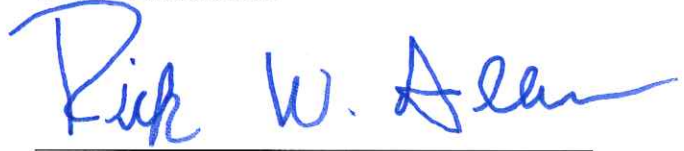
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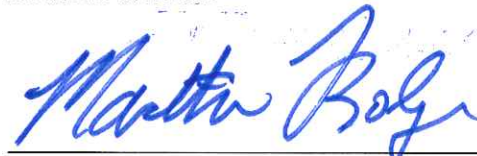
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