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Todd Roberts, Vice President  
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Stephen E. Sandherr, Chief Executive Officer  
Jeffrey D. Shoaf, Chief Operating Officer

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VIA ELECTRONIC SUBMISSION: <http://www.regulations.gov>

Amy DeBisschop  
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: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA39)**

Dear Ms. DeBisschop:

On behalf of the Associated General Contractors of America (hereinafter “AGC”), thank you for the opportunity to submit the following comments on the U.S. Department of Labor’s (hereinafter “DOL” or “Department”) Wage and Hour Division’s (hereinafter “WHD”) notice of proposed rulemaking (hereinafter “NPRM”) on defining and delimiting the exemptions for executive, administrative, outside sales, and computer employees (hereinafter “EAP exemption”) under the Fair Labor Standards Act (hereinafter “FLSA”). The NPRM was published in the Federal Register on March 22, 2019.

AGC is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America’s leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. All of these firms provide employment to workers whose wages are governed by the FLSA.

AGC understands the rationale for modernizing the FLSA regulations by increasing the salary threshold at times to a number that makes sense for the current workforce but believes it to be too soon to do so again, especially since the WHD just recently updated the threshold roughly three years ago. AGC believes the most recent threshold of \$35,568 continues to make sense for today’s workforce. Increasing the salary level by nearly 70 percent, from \$35,568 annually to \$60,209 annually<sup>1</sup> as proposed would be too much to absorb all at once. To impose such a large and

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<sup>1</sup> The Department proposes to increase the standard salary level to the 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region (currently the South). Although Department’s press

immediate increase would result in unintended consequences, particularly for small construction companies (which describes the vast majority of firms in the industry), construction employers in lower-wage regions, and construction personnel. To ensure that those impacts are eliminated, the Department should formally rescind this rule as proposed and retain the current thoughtful threshold at \$35,568.

AGC is also a member of The Partnership to Protect Workplace Opportunity (hereinafter “PPWO”), a diverse group of associations, businesses, and other stakeholders representing employers with millions of “EAP” employees across the country in almost every industry who will be impacted by the proposed changes. The PPWO believes that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers in classifying their employees under the FLSA. Unfortunately, if implemented as written, the NPRM will result in large numbers of employees being reclassified as non-exempt, with significant consequences for both the reclassified employees and their employers. By way of example, the PPWO is deeply concerned that such reclassification will:

- Harm the ability of employers to provide, and employees to take advantage of, remote work and flexible scheduling options which have become increasingly popular since being introduced during the pandemic and also help alleviate the growing childcare crisis;
- Limit career advancement opportunities for employees;
- Reduce employee access to a variety of additional benefits, including incentive pay;
- Limit employers’ ability to provide employees with mobile devices and remote electronic access, further limiting employee flexibility;
- Result in employees in the same job classification (for the same employer) being classified and treated differently based on regional cost-of-living differences, facility profitability or other factors that impact budget;
- Force employees to be reassigned or let go as employers make operational changes needed to achieve the organization’s mission under new pay and staffing paradigms;
- Trigger declines in employee morale, particularly in cases where peers remain exempt as exempt status is often seen as a higher status;
- Increase FLSA litigation based on off-the-clock and regular rate of pay claims; and
- Introduce other legal and operational issues, such as increased administrative costs.

### **Automatic Indexing Will Result in a Dramatic, Upward Spiral of the Salary Threshold**

The NPRM proposes to automatically adjust the minimum salary threshold on a triennial basis. As the PPWO warns, automatic indexing will result in a dramatic, upward spiral of the salary threshold as employees are either reclassified as non-exempt and/or salaries are increased to maintain exempt

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release claims that the Proposed Rule will increase the salary threshold to \$1,059 per week, or \$55,068 annually— itself an increase of almost 55 percent—the Department buries in a footnote the fact that assuming a final rule is promulgated in the first quarter of 2024, the salary threshold would in fact be \$1,158 per week, or \$60,209 annually, an increase of \$24,641 per year. See 88 Fed. Reg. 62,153 n. 3. While a final rule propounded in, say, the second quarter of 2024 would likely include an even higher threshold, these comments proceed from the assumption that the Department will issue a final rule in that first quarter, and use the Department’s own prediction as to the likely amount of the threshold in a final rule issued at that time.

status. Should increases be tied to the 35<sup>th</sup> percentile, the minimum salary level will quickly skyrocket, entirely destabilizing Congressional intent that the salary should not be set at a level that excludes many employees who obviously meet the white-collar duties tests. As noted previously, by increasing the minimum salary level from \$35,568 to over \$60,000, employers will either have to either: (a) reclassify employees as non-exempt, meaning they will be excluded from the BLS non-hourly data set; or (b) increase employee salaries to meet the new minimum salary requirement (thus raising the level of the target percentile upon which the base salary level is determined). If, as the Proposed Rule suggests, these increases are tied to a percentile of earnings, the net effect of these phenomena will be disproportionate increases in the salary threshold.

The purpose of the salary test, as stated by the Department in the NPRM, is to “help[] differentiate between exempt and nonexempt employees”<sup>2</sup> by setting a salary level at an amount that is slightly lower than the dividing line between exempt and nonexempt employees. That is, the salary level is intended to be set at a level that is over-inclusive of potentially nonexempt employees. As explained above, the Department does not adequately establish why the 35<sup>th</sup> percentile meets these standards in the first instance. That notwithstanding, the proposed rule’s escalator provision, which permanently ties the salary level to the 35<sup>th</sup> percentile of fulltime salaried workers, will only compound the Department’s error.

By way of background, the relevant data for calculating the percentile to which the NPRM ties the exemption consists of the total weekly earnings for all full-time, non-hourly paid employees, based on workers who respond to the survey. According to BLS, “total weekly earnings” includes overtime pay, commissions, and tips. Respondents are asked whether they are paid hourly; they are not asked whether they are paid a salary, earn commissions, or are paid another way. In other words, the data is based upon a worker’s response that he or she is not paid hourly and includes in the “salary” threshold elements of compensation that are not salary.

The overwhelming majority of affected employees, in the Department’s estimate, will be reclassified as non-exempt. Most of these employees will be converted to an hourly method of payment, although some will undoubtedly become “salaried, non-exempt” employees. Because the workers who will be converted to an hourly method of payment will no longer respond to the CPS Survey question as being paid “non-hourly,” they will drop out of that BLS data set. The effect of this exclusion from the data set is dramatic; as one economic analysis states:

Using the same methodology for the approximately 12 million full-time, non-hourly employees in the South Census region, where the salary threshold is determined, there are an estimated 1.4 million affected workers who earn between \$684 and \$1,059 per week and are expected to pass the duties test. If those workers are all reclassified to hourly employees, they will fall out of the distribution of workers that serve as the basis for the 35<sup>th</sup> percentile... The 35<sup>th</sup> percentile of the resulting distribution after workers are reclassified is \$1,154. For comparison, \$1,154 is the 40<sup>th</sup> percentile of the current distribution. Effectively, the Department’s automatic update mechanism would increase the salary threshold by approximately 9.1% to the current 40<sup>th</sup> percentile within three years even if there was not ANY wage growth. If the recent inflation trend continues (13.6% over three years), the 9.1%

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<sup>2</sup> 88 Fed. Reg. 62,225.

increase due to the automatic update methodology would cause the threshold to reach \$1,311 per week or about \$68,175 per year.<sup>3</sup>

Put more simply, the number of workers who respond that they are not paid hourly will decrease as workers who fail the salary test in year one (and subsequent years) are reclassified as non-exempt. If the 35<sup>th</sup> percentile test is adopted, in the years following the proposal, the salary level required for exempt status likely will be so high as to effectively eliminate entirely the availability of the exemptions in low-wage regions and industries.

Additionally, given the Department's proposal to increase the salary level on a triennial basis, these are not one-time issues. Rather, these issues will recur repeatedly, as employers decide with each salary threshold increase whether continued classification of an employee as exempt is worth the annual salary increase. Also as discussed in the PPWO's comments, the proposed increase is too much to absorb all at once and if the Department impose any increase, it should be phased in over time.

### **Proposal Would Uniquely and Negatively Impact the Construction Industry**

The NPRM proposes to increase the minimum weekly salary threshold for EAP exemptions from \$35,568 annually to \$60,209 annually nationwide. That is an increase of more than 70 percent. To understand the full impact of this impact on the construction industry, AGC previously surveyed its members. AGC was not surprised to learn that nearly 70% of the companies that participated in the survey had employees who were currently and lawfully classified as exempt under the FLSA and earn an annual salary that is less than the proposed. Most of those impacted are in areas where the cost of living and, consequently, wages are lower than in other areas of the country.

While the WHD may believe that a simple solution to this problem would be to raise the salaries of the impacted workers to the proposed threshold amount, it is in fact not a practical one. Construction contractors operate at a very slim profit margin and cannot afford to increase salaries of all affected employees up to 100% overnight. Also impractical for many is the solution of reclassifying such employees as non-exempt and paying them time-and-a-half for hours worked over 40 per week. Not only does this alternative raise concerns about the affordability of employment costs, it also increases the uncertainty to employment costs – costs that must be predictable far in advance if the company is to submit proper bids on projects and survive.

The impracticality of these solutions is reflected in AGC's survey results, which show that an increase in the salary threshold at the proposed level will force construction employers to take drastic measures to maintain the integrity of their compensation budgets. When asked how their companies would comply with a new salary threshold level, 74% of AGC-surveyed construction contractors responded that they would likely reclassify some or all of the impacted exempt workers to a non-exempt hourly status at their current salaries. The survey results also showed that: over 60% of respondents expected to institute policies and practices to ensure that affected employees do not work over 40 hours a week, 40% expected affected employees to lose some fringe benefits, 33% expected some positions to be eliminated, and 23% expected to exchange some fulltime positions

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<sup>3</sup> See Stephen G. Bronars, Ph.D. & Deborah K. Foster, Ph.D., Edgeworth Economics, "Important Implications of DOL's Proposed Automatic Updating Mechanism "(Oct. 26, 2023), available at: <https://www.edgewortheconomics.com/publication-6501> (last visited October 20, 2023).

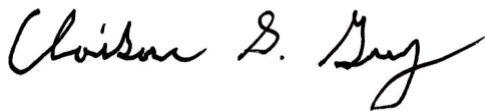
for more part-time positions. Furthermore, about 80% of respondents expected employee morale to be damaged because employees who are reclassified to hourly, non-exempt status will feel as if they have been demoted despite eligibility for overtime pay.

To avoid this demoralizing and financially burdensome impact on workers, the WHD should retain the current salary threshold that makes sense for employers nationwide, including those in lower-cost, lower-wage regions, allowing the economic market conditions to prevail in higher-cost, higher-wage regions. Specifically, when asked to provide a more appropriate threshold that would lessen the impact on their companies, nearly 70% of those surveyed recommended a threshold that does not exceed \$37,500 per year. The current threshold reflects salaries that construction employers are actually paying, or are able to pay, to employees performing exempt executive, administrative, and professional duties.

### **Conclusion**

AGC urges the Department to reconsider the proposed EAP exemption threshold and to instead retain the current threshold of \$35,568 annually which makes sense for today's construction employers nationwide. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to amend regulations that impact construction employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Claiborne S. Guy". The signature is written in a cursive style with a large, sweeping "G" at the end.

Claiborne S. Guy  
Director, Employment Policy & Practices