

# Congress of the United States

Washington, D.C. 20515

February 4, 2022

The Honorable Martin J. Walsh  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Dear Secretary Walsh,

We write to request that the Department of Labor (DOL or Department) conduct robust public engagement prior to any Notice of Proposed Rulemaking (NPRM) on overtime pay requirements. The *Administrative Procedure Act* recognizes the value of public participation in rulemaking, especially for rules that significantly affect the public. Given the past and present stakeholder interest in regulatory changes to overtime pay requirements, we request DOL conduct a Request for Information (RFI) and hold stakeholder meetings with the regulated community before commencing its process of writing an NPRM. Such steps will help DOL assess if changes are prudent and necessary at this time and gather information to better inform the substance and timing of any proposed changes.

In the Fall 2021 Regulatory Agenda, the DOL's Wage and Hour Division (WHD) announced plans to issue an NPRM as early as April 2022 to address overtime pay requirements for certain white-collar employees.<sup>1</sup> Since 1938, the *Fair Labor Standards Act* (FLSA or Act) has established the minimum wage and overtime pay requirements for hourly workers. The law also includes an exemption from these requirements, known as the white collar exemption, for "bona fide executive, administrative, and professional employees... as such terms are defined and delimited from time to time by regulations." As the committees of jurisdiction over the FLSA, we have a strong interest in insuring that DOL faithfully administers the Act while responsibly engaging with the public.

The current overtime pay regulations took effect on January 20, 2020. DOL invested two-and-a-half years to develop these regulations. During that process it

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, RIN 1235-AA39 (Fall 2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1235-AA39>.

considered 200,000 comments in response to its RFI, input from robust stakeholder meetings that were held throughout the country, and 116,000 comments during the NPRM's comment period.<sup>2</sup> Both the Obama and Bush Administrations held stakeholder meetings prior to the NPRM process.

The Administrative Conference of the United States (ACUS) observes, "Robust public participation is vital to the rulemaking process. By providing opportunities for public input and dialogue, agencies can obtain more comprehensive information, enhance the legitimacy and accountability of their decisions, and increase public support for their rules."<sup>3</sup> ACUS also notes that an RFI is generally used when an agency is determining whether to proceed with a regulatory process.<sup>4</sup>

The current overtime pay regulations were carefully developed with significant public input and at cost to the taxpayer. While DOL has stated its intention to issue an NRPM in April 2022, it is not evident that there is a real or pressing need to overhaul the current framework, which has only been in place for a scant two years. We therefore encourage the agency to engage first and foremost in an RFI process prior to developing new regulations.

It is clear that the regulated community is interested in engaging with DOL regarding its plans to develop new overtime regulations. On January 25, 2022, a diverse group of 110 organizations who would be affected by this rule wrote you to ask that stakeholder meetings be held ahead of any NPRM. In their letter, these organizations noted that, "This will be a significant rulemaking with respect to cost, difficulty in implementation and impact on the workforce, particularly given the current acute labor shortages. ... The labor markets today are much different than when the Department last updated the regulations, or when the Obama Administration did so. DOL would benefit from stakeholder insights into the current economic environment and the practical implications certain policies could have on the economy, workers, and the employer community to develop an appropriate proposed rule."<sup>5</sup> This request came from

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<sup>2</sup> July 26, 2017: The Department published an RFI asking for public input on what changes the Department should propose in a new NPRM on the executive, administrative, and professional employees' (EAP) exemption, and received over 200,000 comments on the RFI. September 7 through October 17, 2018: The Department held listening sessions in all five WHD regions throughout the country, and in Washington, D.C., to supplement feedback received as part of the RFI. March 22, 2019: The Department issued its NPRM, proposing to update and revise EAP regulations. March 22 to May 21, 2019: The Department received more than 116,000 comments. September 24, 2019: The Department announced a [final rule](#).

<sup>3</sup> Administrative Conference of the United States, "Public Engagement in Rulemaking," Recommendation number: 2018-7, [https://www.acus.gov/recommendation/public-engagement-rulemaking#\\_ftn1](https://www.acus.gov/recommendation/public-engagement-rulemaking#_ftn1).

<sup>4</sup> Ibid.

<sup>5</sup> Letter to Sec. Walsh from 110 organizations, Request for Stakeholder Meetings Prior to Development and Release of Proposed New Overtime Regulations under the Fair Labor Standards Act, Jan. 25, 2022 (letter on file; available upon request).

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a broad range of the regulated community, including representatives of small and large businesses from almost every industry, public sector employers, nonprofits and both K-12 schools and higher education. We respectfully ask that you grant the request as doing so is both fair and prudent

In closing, we request that your agency undertake a process that allows for robust and fulsome public input, which includes both an RFI and stakeholder meetings. Please respond to our letter by not later than close of business on February 14, 2022, by providing an outline of DOL's plans for preparing its NPRM, including whether there are plans to initiate an RFI as part of this process. Thank you for your immediate consideration of this request.

Sincerely,



Richard Burr  
Ranking Member  
Senate Committee on Health, Education,  
Labor and Pensions



Virginia Foxx  
Ranking Member  
House Committee on Education and  
Labor



Mike Braun  
Ranking Member  
Subcommittee on Employment and  
Workplace Safety



Fred Keller  
Ranking Member  
Subcommittee on Workforce  
Protections