



October 30, 2023

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: Department of Labor, Wage and Hour Division
Defining and Delimiting the Exemptions for Executive, Administrative,
Professional, Outside Sales and Computer Employees
RIN 1235-AA39

Dear Ms. DeBisschop:

On behalf of the American Society of Travel Advisors, Inc. (ASTA), I am writing to express ASTA's viewpoint with respect to the issues raised in the above-referenced Notice of Proposed Rulemaking (NPRM) by the Department of Labor ("Department" or "DOL") which would, among other things, raise the minimum salary threshold for overtime-exempt employees to \$55,068 annually (\$1,059 per week).¹

Established in 1931, ASTA is the world's leading professional travel trade organization. Our current membership consists of more than 8,000 businesses representing more than 90,000 travel professionals, from the smallest home-based businesses to traditional brick-and-mortar storefront agencies to the largest travel management companies and online travel agencies. Together, they account for an annual payroll output of \$5.5 billion and annual revenues of \$17.7 billion.

ASTA has a specific interest in the outcome of this rulemaking because its member agencies are overwhelmingly small businesses, most of which operate on small profit margins and for which labor costs represent the most significant single business expense. Indeed, according to ASTA data, fully 98 percent of travel agencies qualify as small under the Small Business Administration (SBA) size standards.² A disproportionate number of workers in these

¹ *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, Notice of Proposed Rulemaking, 88 Fed. Reg. 62152 (September 8, 2023).

² The SBA assigns a size standard based on NAICS codes assigned to each industry. For travel agencies, NAICS code 561510, the current size limit for small businesses is \$22,000,000 in annual revenue.

enterprises perform *bona fide* executive, administrative or professional (“EAP”) duties at annual salaries only slightly above the current standard level of \$35,568.

Moreover, as compared with businesses in other industries, travel agencies are also much more reliant upon work performed “after hours” to meet the needs of clients traveling around the world who often require immediate assistance. Given this, any regulatory change that would result in greater numbers of workers being declared eligible for overtime compensation when working more than forty hours in a workweek would have a significant detrimental effect on agency profitability and/or the level of customer service that travel agency clients have come to expect.³

Standard Salary Level

The NPRM proposes to set the standard salary level to determine eligibility for the EAP (also referred to as the “white collar”) exemption to the 35th percentile of weekly earnings of full-time salaried workers in the lowest wage Census Region, currently \$1,059 per week (\$55,068 annually).⁴ ASTA does not take issue with the DOL’s basic methodology but disagrees that the 35th percentile is the appropriate benchmark.⁵ The result is a proposed salary standard that is nearly 55 percent higher than the current level that went into effect just three years ago.⁶ Adoption of a final rule as proposed would therefore prove highly disruptive to travel agencies and small businesses in scores of other industries.

According to the most recent data available from the Bureau of Labor Statistics (BLS), the mean annual wage for travel agents (also known as travel advisors) in the United States in 2022 was \$48,250,⁷ well above the current salary threshold of \$35,568. Accordingly, in order for a travel agency to continue treating an average-paid white-collar employee as overtime-exempt, the business would be required to provide the worker with an immediate raise of \$6,818, more

³ ASTA recognizes that employees engaged primarily in sales or customer service-related roles typically will not qualify for the EAP exemption under any of the three applicable duties tests. However, most travel agency employees do not perform exclusively either exempt or non-exempt duties. To the contrary, many employees whose primary duty is management or *bona fide* administrative work unrelated to sales – and therefore would be eligible for the EAP exemption – also occasionally perform such non-exempt work and do so outside of normal hours.

⁴ 88 Fed. Reg. at 62158.

⁵ In comparison, the 2019 rulemaking which resulted in the salary standard in effect since January 1, 2020, utilized the same methodology but fixed the level at the 20th percentile of weekly earnings of full-time workers in the lowest-wage Census region and retail nationally.

⁶ We note that if the Department proposed instead to continue using the 20th percentile benchmark, the resulting salary level adjustment would more fairly reflect the general increase in wages attributable to the cost of living.

⁷ *Occupational Employment and Wages, May 2022: 41-3041 Travel Agents*. Bureau of Labor Statistics.

<https://www.bls.gov/oes/current/oes413041.htm> (accessed October 17, 2023).

than 14 percent, far more than the modest annual cost-of-living adjustment typical in the industry.

Furthermore, the above salary adjustment necessary to maintain overtime-exempt status is in all likelihood *understated*, perhaps substantially, insofar as the salary level set in the final rule will be based upon “the most recent data available,” which the Department projects will be \$1,140 per week, or \$59,285 on an annualized basis, as of the anticipated effective date.⁸

Plainly, an overnight salary increase of this magnitude would result in a significant number of workers performing *bona fide* exempt duties in lower-wage regions of the country being arbitrarily excluded from treatment as exempt employees. It would also have an unsustainable financial impact on the travel agency industry. A business would have no practical alternative but to either lay off a portion of its workforce or sharply curtail the amount of overtime its employees will be permitted to work. Either option would greatly diminish the ability of travel agencies to continue providing a high level of customer service, in turn reducing the value proposition associated with using a travel advisor.

In sum, we believe that the salary level proposed in the NPRM reflects insufficient consideration of the concerns of small businesses, namely, the disruption associated with an abrupt and significant increase in payroll costs resulting from raising exempt employees’ salaries and/or reclassification of formerly exempt workers to non-exempt status and, with the latter, the attendant liability for tracking hours and paying overtime when worked.

Separately, we also wish to express our serious doubts that a final rule as proposed will survive judicial review in the courts. As noted in the NPRM, the DOL’s 2016 rulemaking, which based the salary level on the 40th percentile of weekly earnings of full-time workers in the lowest-wage region, was immediately challenged by over twenty states and was ultimately invalidated by a federal district court before ever going into effect.⁹ In striking down the 2016 rule, the court held that the Department exceeded its statutory authority under the Fair Labor Standards Act (FLSA).¹⁰ Insofar as adoption of the percentile level proposed here will also result in substantial numbers of workers being excluded from overtime exemption based solely on salary, it is reasonable to believe a final rule would meet a similar fate when challenged.

⁸ 88 Fed. Reg. at 62153 (footnote 3). Note too that this figure assumes no deviation from the Department’s proposal to fix the salary level at the 35th percentile salary for full-time workers in the lowest-wage Census region.

⁹ *Nevada v. United States Department of Labor*, 275 F.Supp.3d 795 (E.D. Texas 2017).

¹⁰ *Id.* at 807 (“[n]othing in Section 213(a)(1) [of the FLSA] allows the Department to make salary rather than an employee’s duties determinative of whether a “bona fide executive, administrative, or professional capacity” employee should be exempt from overtime pay”).

ASTA therefore does not support the rule as proposed and urges the Department to either maintain the current standard salary standard or propose a more modest increase in the threshold utilizing a lower percentile level to lessen the impact of compliance on small businesses. Should it decline to do either, to ameliorate somewhat the adverse impact on small businesses, we request in the alternative that the Department adopt in any final rule a phased-in implementation of the new standard salary over a period of not less than three years.

Automatic Updates to the Salary Level Tests

The Department further proposes to automatically update the standard salary level tests every three years to “ensure that they remain effective tests for exemption.”¹¹ While ASTA agrees with the Department’s rationale that periodic updates of the salary threshold are necessary in order for it to effectively maintain its function of screening out obviously non-exempt workers,¹² we do not support the proposal for both practical and legal reasons. Both are addressed below.

First, we believe salary level adjustments on a triennial basis would be overly disruptive to the operations and detrimental to the profitability of businesses. Many employers, particularly those reliant on labor performed outside of regular hours, would be unable to absorb such frequent increases in labor costs over which they have no control. Moreover, we envision that many employers, particularly small business owners with limited resources to engage outside help, would have difficulty keeping abreast of salary level increases and could inadvertently find themselves out of compliance.

Separately, we also question the need for adjustment to the standard salary level every three years. The history of the FLSA provides some useful perspective. In the 85 years since its enactment in 1938, there have only been eight adjustments or, on average, one increase every ten-and-a-half years.¹³ To minimize both disruption and financial hardship, ASTA recommends a less-frequent adjustment schedule, perhaps once every six years, which seems to strike a better balance between maintenance of the salary level’s legitimate screening function and the burden on small businesses.

Second, we maintain serious doubts that the DOL has the statutory authority to affect such automatic updates to the salary level outside of the notice-and-comment rulemaking process prescribed under the Administrative Procedure Act (APA).¹⁴ Specifically, the APA requires

¹¹ 88 Fed. Reg. at 62160.

¹² *Nevada*, 275 F.Supp.3d at 806.

¹³ 88 Fed. Reg. at 62183. Adjustments to the standard salary level were made in 1940, 1949, 1958, 1963, 1970, 1975, 2004 and 2019. *Id.*

¹⁴ 5 U.S.C. § 551, *et seq.*

administrative agencies to provide the public with “[g]eneral notice of [a] proposed rule making” by publication in the Federal Register, and then to provide “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments” regarding the proposed rule.¹⁵ The agency may promulgate a final rule only after providing notice and opportunity for comment.¹⁶

The Department’s proposed course of action would altogether circumvent the APA’s requirements, in the process denying business owners and other interested stakeholders the right to have their views considered by regulators as the law requires. Indeed, the same federal district court that invalidated the standard salary level set in the 2016 rule also expressly stated that automatic adjustments likewise exceeded DOL’s authority under the FLSA.¹⁷ The Department itself appears to recognize the shaky ground on which it stands insofar as the NPRM proposes inclusion of a severability provision in the final rule updating the regulations which would uphold the salary level increase even if the automatic update provision was invalidated.¹⁸

In light of the clear and unequivocal precedent, we respectfully assert that inclusion of an automatic adjustment provision in the final rule will only undermine DOL’s stated objective in promulgating the proposed rule. This is because doing so will virtually guarantee legal challenges which – even if the Department were to ultimately prevail on the merits, which appears unlikely – will serve only to delay implementation of the higher standard salary level the Department maintains is urgently necessary.

Treatment of Nondiscretionary Bonuses and Incentive Pay

ASTA also wishes to express its views concerning how non-salary compensation is treated under the proposed rule. This aspect of the NPRM is of particular interest as many overtime-exempt employees in the travel industry receive at least a portion of their total compensation in the form of commissions.

¹⁵ 5 U.S.C. §§ 553(b), (c).

¹⁶ 5 U.S.C. § 553(c).

¹⁷ *Nevada*, 275 F.Supp.3d at 808 (“[t]he Final Rule also creates an automatic updating mechanism that adjusts the minimum salary level every three years. Having determined the Final Rule is unlawful under *Chevron*, the Court similarly determines the automatic updating mechanism is unlawful”).

¹⁸ 88 Fed. Reg. at 62180-62181 (“[I]t is the Department’s intent that the earnings thresholds set in this rulemaking apply even if the mechanism for automatically updating them in the future is determined to be invalid. In all circumstances, whether or not specifically discussed, it is the Department’s intent that the provisions of any final rule be construed to give the maximum effect to the provisions permitted by law, and that any invalidated provisions be considered severable from part 541 and not affect the remainder of a final rule”).

The Department is not considering any changes concerning how bonuses are counted toward the salary level requirement. Accordingly, consistent with the current regulations in effect since 2020, employers may satisfy up to 10 percent of the salary level through the payment of nondiscretionary bonuses and incentive pay (including commissions) if paid annually or more frequently.¹⁹

We are pleased that DOL is not proposing to eliminate the inclusion of an employee's incentive compensation from the determination of the standard salary threshold. According to an ASTA survey conducted earlier this year, nearly half (48.9 percent) of all travel agency employees' compensation packages contain both salary and commission components.²⁰ Therefore, if the commission portion of the worker's overall compensation were disregarded in its entirety, it would unfairly exclude a substantial number of workers performing *bona fide* exempt duties solely on the basis of the compensation structure prevalent in the travel industry.

However, ASTA respectfully submits that the current ten percent limitation on non-salary compensation is arbitrarily low and indiscriminately disadvantages employers in industries such as travel where compensation models lean in favor of high incentives rather than high base salaries. Put another way, we believe the Department's current rule does not go far enough in crediting commission and nondiscretionary bonus income when determining whether an employee's overall compensation will satisfy whatever standard salary level is in effect.

Examination of other ASTA compensation data will be insightful in demonstrating the point being made here. Of travel agency employees who received their compensation in the form of a salary-commission split, only one-third (33 percent) reported that the salary component comprised at least 90 percent of the total compensation.²¹ This means that only one in three employees paid on this basis would have all of their income counted for purposes of the proposed salary threshold.

For the other two-thirds of employees receiving salary plus commission compensation, at least a portion of their income – and in many cases, a substantial portion – will be disregarded in determining whether the salary test is satisfied. For example, an otherwise exempt employee earning as much as \$70,000 a year would not satisfy the new salary level proposed in the NPRM if 30 percent of that amount came from commissions.²² Moreover, the scenario just described

¹⁹ 88 Fed. Reg. at 62169.

²⁰ *ASTA 2023 Labor & Compensation Report*, September 2023.

²¹ *ASTA 2016 Labor & Compensation Report*, March 2017 at 6-7.

²² Assuming a 70%-30% salary-commission split on \$70,000 total compensation, \$49,000 is attributable to salary and \$21,000 is attributable to commission. However, due to the ten percent limitation on nondiscretionary bonuses and incentive pay, only \$5,506 of the \$21,000 commission income may be counted toward the \$55,068

could only be characterized as typical in the travel industry, as ASTA's compensation data reveals that the average salary-commission split reported by its members was 69 percent salary and 31 percent commission.²³

As the example illustrates, in order to avail themselves of the overtime exemption employers in industries where commission-heavy compensation structures are commonplace will, practically speaking, be required to pay their employees greater total compensation than will employers in industries where commissions are less prevalent or less generous. While we recognize that permitting employers to count incentive payments without limitation would effectively eviscerate the salary basis test, it seems apparent to ASTA that the Department should consider adjustments to the rule to address this inequity.

Specifically, ASTA believes DOL should adopt a final rule permitting employers to count nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to thirty percent of the standard salary level threshold. This percentage would strike a significantly more equitable balance as to the interests of both workers and businesses across all industries as compared with the current ten percent maximum.

Effective Date

The Department proposes that any final rule resulting from this rulemaking take effect sixty days after its publication in the Federal Register and seeks comments as to whether that timeframe is appropriate should the rule be adopted as proposed.²⁴

As detailed above, adoption of a significantly higher standard salary level for overtime-exempt employees as proposed would be highly disruptive to most travel agencies as well as businesses in many other industries. Since simply raising salaries to the new level alone will not be economically feasible in most cases, businesses must consider other action. These include, for example, raising professional service fees, converting some workers to non-exempt status and limiting their overtime hours, shifting job responsibilities to other employees, or curtailing after-hours customer service. Therefore, ASTA believes a longer interval between the publication date and the effective date is warranted here.

Moreover, we disagree with the DOL's stated rationale that a shorter timeframe is appropriate given the recency of the last rulemaking. To the contrary, we see no basis to deviate from the longer 90- to 180-day intervals adopted in connection with the earlier rulemakings on this

threshold (with the remainder disregarded) and as such an employee paid on this basis would fall short of the proposed salary minimum.

²³ *ASTA 2016 Labor & Compensation Report*, March 2017 at 7.

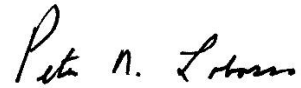
²⁴ 88 Fed. Reg. at 62180.

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subject, which in our view were more reasonable given the time needed for each affected business to thoughtfully consider the feasibility of the various responsive options mentioned above.

Thank you for considering ASTA's views on these critically important issues. If you or your staff have any questions regarding our comments or any issues related to the travel agency business, please do not hesitate to contact me at (703) 739-6854 or plobasso@asta.org.

Sincerely,



Peter N. Lobasso
Senior Vice President & General Counsel
American Society of Travel Advisors, Inc. (ASTA)