September 25, 2017

Melissa Smith, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW, Room S-3502
Washington, DC 20210

Re: RIN 1235-AA20

Dear Ms. Smith:

On behalf of the American Council of Engineering Companies (ACEC) – the national voice of America’s engineering industry – I appreciate the opportunity to comment on the Department of Labor’s request for information (RFI) under the Fair Labor Standards Act (FLSA) on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.

ACEC members – numbering more than 5,000 firms representing hundreds of thousands of engineers and other specialists throughout the country – are engaged in a wide range of engineering works that propel the nation’s economy, and enhance and safeguard America’s quality of life. Changes to FLSA overtime pay requirements would have a significant impact on engineering firms and their professional employees, and must be evaluated carefully.

As you know, in May 2016 the Department of Labor (DOL) finalized a rule that would have raised the salary threshold for non-exempt employees from $455 weekly/$23,660 annually to $913 weekly/$47,476 annually. In addition, the salary threshold would have been automatically updated every three years, and there were no changes made to the duties test for exempt employees. The 2016 rule was recently overturned by a federal judge.

The RFI asks respondents to provide feedback on a number of questions related to the 2016 rule, the salary threshold, and the duties test. ACEC would like to make the following recommendations and will describe them in more detail:

- The salary threshold needs to be increased but to a more reasonable level than that in the 2016 rule, which far outpaced inflation.
• The salary threshold should be updated every three to five years, and employers should be provided substantial notice of the updated salary threshold.
• The current duties test should be maintained along with the salary threshold.

ACEC supports updating the salary threshold to ensure that certain employees remain covered by the overtime pay requirements of the FLSA. However, the 2016 rule would have doubled the salary threshold over a time period when cumulative inflation was only 26 percent. This disparity resulted from DOL significantly changing the methodology for setting the salary threshold to reflect the 40th percentile of full-time salaried workers nationwide, instead of the 20th percentile of retail workers in the South standard that was used in the 2004 update to the rule.

Raising the salary threshold to reflect the 40th percentile of full-time salaried workers nationwide would have certain impacts on engineering firms that ACEC respectfully asks DOL to consider. Depending on the region of the country, entry-level engineers may earn less than $47,476 annually, and would be classified as non-exempt under the proposed rule. While these employees meet the professional exemption from a duties perspective, entry-level engineers and others in disciplines related to the profession require a significant amount of additional training that is not charged to a client. If an entry-level engineer earns overtime due to working more than 40 hours per week and some of those hours are attributed to training, it represents a substantial cost to the engineering firm. This is a particular concern for small engineering firms. Employers in this circumstance might find it to be more cost-effective to hire engineers with a few years of experience who would earn more than the salary threshold, which could limit opportunities for recent graduates seeking employment.

ACEC recommends that DOL continue to use the methodology from the 2004 rule and increase the salary threshold to reflect inflation since then. Adjusting the 2004 salary threshold for inflation would increase it from $455 weekly/$23,660 annually to $553 weekly/$28,756 annually.

DOL asked whether the salary threshold should vary by region based on the cost of living. Many ACEC member firms have offices in multiple states, and often in different regions of the country. Salaries for the same position may vary significantly depending on costs in that location.

As mentioned above, the 2004 update of the salary threshold reflects salaries in the retail industry in the South, which is a low-cost area of the country. If the salary threshold is based on this methodology, then there is no need for different salary thresholds by region. However, a significantly higher salary threshold, such as the one that was approved in 2016, would result in disparities for firms that must classify employees doing the same job differently, depending on where they work. In the case of a salary threshold that significantly expands the pool of non-exempt employees, DOL should include flexibility for firms that have employees in different regions of the country.

The 2016 rule would have also updated the salary threshold automatically every three years. Given the length of time between regulatory changes to the salary threshold, it
seems reasonable to have a process in place for modifying it on a more regular basis. ACEC recommends that DOL update the salary threshold every three years to five years. This would strike a balance between ensuring that certain employees remain eligible for overtime pay and the ability of employers to manage the administrative costs and process of re-evaluating which employees are exempt and which are non-exempt. In addition, employers should be provided significant notice of the updated salary threshold.

ACEC does not recommend that DOL change the current duties test for exempt employees. The duties test works well for the engineering industry and the certainty it provides is important. DOL asked if the duties test should be used without a salary threshold, and ACEC thinks that the test for exemption should continue to rely on both a salary threshold and the duties test.

As DOL considers reopening the regulatory process, we respectfully request that DOL consider ACEC's comments on the effects of changes to overtime pay on the engineering industry. Thank you for your consideration.

Sincerely,

[Signature]