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Wage and Hour Division
U.S. Department of Labor
Room S–3502
200 Constitution Avenue NW
Washington, DC 20210

Re: U.S. Department of Labor; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees; RIN 1235-AA39

On behalf of the National Lumber & Building Material Dealers Association (NLBMDA), we respectfully submit the following comments regarding the U.S. Department of Labor's (DOL) Notice of Proposed Rulemaking (NPRM) to raise the salary threshold for the executive, administrative, professional, outside sales, and computer employee exemptions (the "EAP exemption") from the overtime requirements of the Fair Labor Standards Act (FLSA) published in the Federal Register on September 8, 2023.

NLBMDA with its state and regional association partners represent over 6,000 building material retail locations nationwide who operate single and multiple lumber yards and component plants serving homebuilders, subcontractors, general contractors, and consumers in the new construction, repair and remodeling of residential and light commercial structures. The majority of NLBMDA members are small, family-owned lumber and building material (LBM) operations, in many instances providing lumber products and building material in the same communities for generations.

The FLSA requires employers to track employees' work hours and pay employees at 1.5 times their regular pay rate for every hour worked over 40 in each workweek. This premium pay is known as overtime pay. The FLSA creates various exemptions from these overtime-pay requirements, including exemptions for executive, administrative and professional (EAP or "white collar") employees. The FLSA tasks DOL with defining and delimiting the terms executive, administrative and professional employees.

Under the current version of the regulations, a person must satisfy three criteria to qualify as an exempt white-collar employee: first, they must be paid on a salary basis; second, that salary must be more than the minimum amount DOL has set (currently $684/week, or $35,568 annually); and third, their "primary duties" must be consistent with those common to executive, administrative, or professional positions. DOL has proposed increasing the current minimum salary threshold from $35,568 per year ($684 per week) to $55,068 per year ($1,059 per week), which could be as high as $60,209 per year ($1,158 per week) by the time the rule is finalized.

If finalized, the proposal will negatively impact LBM dealers and the workers they employ. Moreover, the costs and organizational changes required to comply with the proposal could immediately destabilize an economy that is already facing the dual threats of inflation and recession. Despite these concerns, the agency is rushing to enact the proposed changes, which could be effective as early as May 1, 2024. At the

same time, DOL has failed to provide any evidence that the current regulations, which were last updated in 2019, are failing to protect employees.

NLBMDA 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 DOL's proposed rule will result in large numbers of employees being reclassified as non-exempt, with significant consequences for both the reclassified employees and their employers.

DOL's proposed increase is simply too much for employers to absorb and will result in large numbers of employees being reclassified from exempt to hourly. Because the law requires employers to carefully monitor employees' hours and pay the overtime for every hour worked over forty in each workweek, employers must treat hourly employees differently than exempt employees. This means that reclassification will have significant consequences for workers, including:

- limits on career advancement opportunities for employees;
- reductions in employee access to a variety of additional benefits, including incentive pay;
- limits on employers' ability to provide employees with mobile devices and remote electronic access, further limiting employee flexibility;
- 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;
- employees being reassigned or let go as employers make operational changes needed to achieve the organization's mission under new pay and staffing paradigms; and
- limits on 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.

These consequences will be disproportionally borne by entry level workers, particularly those from rural and economically struggling areas or those graduating with degrees that do not traditionally command high salaries. Also, just because an employee may be reclassified as now eligible to earn overtime is no guarantee that they will actually earn overtime as the DOL presumes. Very likely their hours will be managed closely to avoid having to pay overtime so the employee will lose the advantages of being exempt and not earn any more compensation.

DOL does not adequately address the impact such a dramatic increase in these salary levels would have on the individual employer's ability to sustain current workforce levels or on the economic recovery still playing out today in many specific sectors and geographic regions. As noted in other comments filed in this docket, the proposed increases will have a substantial impact on small businesses as well as businesses operating in various geographic regions and individual sectors. With such increases, businesses will be forced to make choices otherwise not indicated by market-driven factors and local labor market realities. Specifically, a business could be forced to choose between 1) reducing its workforce, in some cases at a time when just the opposite is indicated by local market factors, 2) lowering the hourly wages of its non-exempt workforce, or otherwise limiting other elements of compensation packages such as retirement and healthcare, or 3) establishing hard line policies on overtime for non-exempt worker, threatening its ability to expand in a challenging economy and limiting opportunities for motivated

workers to grow with their current place of employment. This will be particularly true where workers are reclassified as non-exempt under the proposed salary levels. Ironically, it is unlikely that the individual worker will actually see an increase in annual take-home pay.

Furthermore, the impact of the proposed salary level will not simply be limited to employers in the lower-cost-of-living regions in the country. Many employers with national operations will be impacted as well. Because the cost of living varies greatly throughout the country, employers often have different salaries for the same job position depending on where the employee works, similar to how the federal government operates. The job duties are precisely the same. The only thing that differs is location.

For example, an employee in New York City will have a higher cost of living than an employee working in Knoxville, Tennessee. Accordingly, the employer may provide the employee in New York with a higher salary than the employee with the same job title and job responsibilities in Knoxville. With the Department's proposed increase to the minimum salary level, that employer may now need to decide whether the economics of the Knoxville location justify an increase to the new salary level or whether the Knoxville position will need to be reclassified as non-exempt.

For employers, the ramifications of the rule will include vast legal, administrative and operational costs related to rapidly reassessing each worker's pay, position, and job duties as well as restructuring operations to meet organizational objectives under very different pay and staffing paradigms. Reclassifications, changes in duties and staffing, and adjustments to salaries to maintain exemption and the resulting pay compression (as one salary level is increased, those just above need to be increased as well) all come with significant costs. Employers will also face increased FLSA litigation triggered by errors that will occur during the rushed reclassification process and by employees who file lawsuits because they have been negatively impacted by the mass reclassification. As a result of these tremendous costs and burdens, private employers may be forced to reduce staff and offerings.

More importantly, given the DOL's proposal to increase the minimum salary threshold every three years, these are not one-time issues but will instead recur on a tri-annual basis. The automatic increases proposed by DOL will cause dramatic and unpredictable changes to the exemptions over time. This is because DOL's changes to the minimum salary will significantly impact the earnings of full-time salaried workers in the lowest wage Census region—the exact data pool DOL will rely on for the next update. For example, if the rule goes into effect as proposed in 2024 and increases the minimum salary for exemptions to $60,209, there will be far fewer full-time salaried workers making under that amount in 2027 when DOL performs the next update.

Thus the 2024 change will have impacted the 2027 threshold by reducing the number of full-time salaried workers that earn less than $60,209. This will occur again in 2030, when the 2027 minimum salary threshold necessarily impacts what full-time salaried workers earn and so on. As a result, the minimum salary threshold will quickly ratchet upwards driving wage inflation rather than responding to economic circumstances. This is particularly the case given the dramatic increase in the frequency of updates the DOL has proposed, where the rule rather than the market becomes the dominate determiner for setting wages for almost all entry level and many other exempt EAP positions.

For these reasons, NLBMDA strongly urges the DOL to withdraw its proposed rule. The Department has not provided adequate justification for the proposed increase and automatic updates, both of which will harm LBM dealers and the workers they employ.

Thank you for the opportunity to provide comments on this issue. For any questions, please contact NLBMDA's Director of Government Affairs Jacob Carter at jacob@dealer.org.

Sincerely,

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