

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

April 28, 2016

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Administrator Shelanski:

We are writing to urge the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) to return the rule¹ revising the existing Fair Labor Standards Act (FLSA or Act)² regulations that implement the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales or computer employees (the "overtime rule")³ to the Wage and Hour Division of the Department of Labor (DOL) for reconsideration. The DOL received nearly 300,000 comments on the proposed overtime rule, many of which describe the profound negative consequences for American workers and small employers. In addition, serious concerns have been raised about the adequacy and accuracy of DOL's analysis of the overtime rule's impacts on small employers.

When promulgating regulations, the DOL must comply with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), Executive Order (E.O.) 12,866,⁴ and President Obama's Memorandum on Regulatory Flexibility, Small Business, and Job Creation (President's Memorandum).⁵ The RFA requires the DOL to determine whether a proposed rule will have a significant economic impact on a substantial number of small businesses.⁶ If DOL determines that the proposed rule will have the aforementioned impact, it must perform an initial regulatory flexibility analysis (IRFA) that describes the impact of the proposed rule on small businesses, small non-profits, and small governmental jurisdiction and any significant alternatives that would minimize any significant

¹ <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1235-AA11>.

² 29 U.S.C. §§ 201-19 (1938).

³ Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 (July 6, 2015).

⁴ 58 Fed. Reg. 51,735 (Oct. 4, 1993).

⁵ Memorandum of January 18, 2011, Regulatory Flexibility, Small Business and Job Creation, 76 Fed. Reg. 3,827 (Jan. 21, 2011).

⁶ The RFA uses the term "small entities," which includes small businesses, small non-for-profit organizations, and small governmental jurisdictions. See 5 U.S.C. § 601(6). This letter will refer to these entities as "small businesses" or "small employers."

economic impact on them. A similar assessment, a final regulatory flexibility analysis, is required at the final rule stage. Simply stated, these analyses require DOL to take the commonsense steps of assessing the effects of the rule on small employers and evaluating options to reduce significant economic impacts.

The DOL also must comply with E.O. 12,866 and the President's Memorandum. E.O. 12,866 requires the DOL to assess the costs and benefits of the regulation, including the "costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation."⁷ Furthermore, it requires DOL to "design its regulations in the most cost-effective manner to achieve the regulatory objective" and "tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities)."⁸ The President reiterated that point in his Memorandum issued on January 21, 2011 directing agencies to "give serious consideration to whether and how it is appropriate . . . to reduce regulatory burdens on small businesses, through increased flexibility."⁹

Unfortunately, DOL has not fully met its obligations under the aforementioned statute and presidential directives, and the negative ramifications will be felt most acutely by small employers and their employees. While the DOL correctly determined that the overtime rule will have a significant economic impact on a substantial number of small employers and performed an IRFA, the analysis has serious flaws. Furthermore, the overtime rule is poised to cause significant disruptions in American workplaces that are likely to harm small employers and their employees.

The Chief Counsel for Advocacy at the Small Business Administration sent a comment letter to DOL that described serious problems with its analysis of the overtime rule's impacts on small employers.¹⁰ DOL relied on numerous unsupported assumptions that obscure the number of affected small businesses, did not examine the effects on different types of small businesses by industry sub-sectors, regions, and revenue sizes, did not assess the effects on small governmental jurisdictions or small non-profits, significantly underestimated the compliance costs, did not account for non-financial effects, and failed to consider alternatives that would reduce impacts on small employers. The Chief Counsel for Advocacy recommended that DOL published a supplemental IRFA to reanalyze the impacts on small employers.

The concerns with DOL's analysis and the overtime rule's effects on small employers were echoed by three small businesses – a restaurant owner, a home builder, and a retail store owner – that testified before the Committee on Small Business Subcommittee on Investigations, Oversight and Regulations last October. Small employers, particularly those in rural areas, will be unable to increase their workers' salaries to the proposed salary threshold, which will increase 113 percent under the overtime rule, and remain economically viable. As a result, small employers will have no choice but to move salaried workers to hourly status, reduce hours, and trim benefits, which will hurt their employees.

⁷ 58 Fed. Reg. at 51,741.

⁸ 58 Fed. Reg. at 51,736.

⁹ 76 Fed. Reg. at 3,828.

¹⁰ Letter from Claudia Rodgers, Acting Chief Counsel for Advocacy, SBA and Janis Reyes, Assistant Chief Counsel, Office of Advocacy, SBA, to the Hon. Thomas E. Perez, Secretary, DOL and the Hon. David Weil, Administrator, Wage and Hour Division, DOL (Sept. 4, 2015), *available at* https://www.sba.gov/sites/default/files/Final_Advocacy_Letter_FLSA_Overtime090415.pdf.

Serious concerns have been raised about the negative repercussions for small employers and their employees. Moreover, the rule must be adequately assessed, as required by the RFA, so that the true consequences of the overtime rule are understood and considered before the DOL proceeds. Thus, we respectfully request that OIRA return the draft final rule to the DOL for reconsideration.

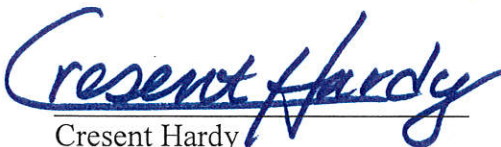
Sincerely,



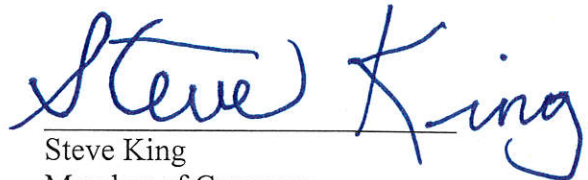
Steve Chabot
Chairman



Steve Knight
Member of Congress



Crescent Hardy
Member of Congress



Steve King
Member of Congress



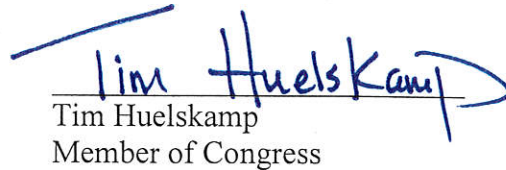
Trent Kelly
Member of Congress



Richard Hanna
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Aumua Amata Coleman Radewagen
Member of Congress



Tim Huelskamp
Member of Congress



Dave Brat
Member of Congress



Blaine Luetkemeyer
Member of Congress

cc: The Hon. Darryl L. DePriest, Chief Counsel for Advocacy, Small Business Administration