ACEC
American Council of Engineering Companies
100 Years of Excellence

David A. Raymond
President & CEO

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Mary Ziegler, 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-AA11

Dear Ms. Ziegler:

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 proposed rule 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 the FLSA overtime pay rule could significantly affect engineering firms and their professional employees, and must be evaluated carefully.

ACEC generally supports DOL's goal of ensuring that certain employees remain covered by the overtime pay provisions of the FLSA. However, we are making the following recommendations and will describe them in more detail:

- The salary threshold should be increased, but not doubled, and should reflect regional differences in the cost of living.
- Automatic updates to the salary threshold should occur every three years.
- Employers should be provided 120 days' notice of the updated salary threshold.
- DOL should not change the current duties test.

As you know, under current law an employee who earns less than $455 per week, or $23,660 annually, must be paid time and a half for work over 40 hours in a week. Employees who earn between $23,660 and $100,000 may be exempt from the overtime pay requirement if they pass the duties test for the executive, administrative, or professional exemption. Employees who earn

T 202-347-7474 F 202-898-0068 draymond@acec.org
1015 15th Street, NW, 8th Floor Washington, DC 20005-2605 www.acec.org

more than $100,000, primarily perform office work, and regularly perform at least one of the EAP exempt duties, are considered highly-compensated and do not need to be paid overtime.

The proposed rule would raise the salary threshold for non-exempt employees from $455 per week/$23,660 annually to approximately $970 per week/$50,440 annually. DOL proposes changing the methodology used to calculate the salary threshold to reflect the 40th percentile of full-time salaried workers nationwide, as opposed to the 20th percentile of retail workers in the South standard that was used in the 2004 update to the rule.

ACEC supports updating the salary threshold. However, we would point out that the proposed increase is quite large for an eleven-year period when there has been low inflation and a severe recession. Although we appreciate that there have been long stretches when the salary threshold was not adjusted, this size of increase could be a burden on firms whose revenues have been flat since the recession.

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 $50,440 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.

In the proposed rule, DOL mentions a "transfer of income from employers to employees in the form of higher earnings." Many engineering firms and their shareholders – who are often employees of the firm – would not be able to absorb that cost increase and would seek ways to mitigate it. One option would be to pass along the increased cost to their clients, if possible. Approximately 50 percent of A/E services are purchased by governmental clients. The proposed increase in the salary threshold and any associated overtime costs would either increase costs for infrastructure projects, or would reduce the number and scope of projects.

However, many contracts between engineering firms and their clients do not allow for passing along the cost of overtime pay. In these cases, engineering firms would need to manage labor costs. One way to do so would be to determine non-exempt hourly rates for individuals that, combined with overtime pay, would approximate the previous salaries for those employees. It is likely that affected employees would perceive that their compensation has been reduced, which could cause them to feel devalued and create employee relations problems.

We would also point out that the proposed salary threshold of approximately $970 per week/$50,440 annually in 2016 would be nearly $10,000 higher than California's 2016 salary threshold of $41,600. It would be almost $15,000 higher than New York's 2016 salary threshold of $35,100. As you know, these are two of the highest-cost states in the nation.

For these reasons, ACEC recommends that DOL increase the salary threshold but not double it, as is currently proposed. Adjusting the 2004 salary threshold for inflation would increase it from $455 per week/$23,660 annually to $553 per week/$28,756 annually. If this increase is not sufficient, DOL could consider adjusting the methodology to use between the 20th and 40th percentile of full-time salaried workers nationwide. ACEC also recommends that DOL consider modifying the salary threshold to reflect regional differences in the cost of living, and ensuring that it does not exceed the salary threshold of any state.

DOL also proposes to update the salary threshold automatically. 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. Annual updates, as suggested in the proposed rule, could place a large administrative burden on the human resources functions within engineering firms, particularly small firms. ACEC recommends that DOL update the salary threshold every three years. This compromise 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.

The proposed rule indicates that employers would be provided 60 days' notice of the updated salary threshold. ACEC believes that 60 days is not sufficient time for employers to review and reclassify employees as needed. We suggest that 120 days' notice would be more workable for employers.

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 specifically requested comment on the possibility of using the California model, which requires that at least 50 percent of an exempt employee's time must be spent on exempt duties. This concept would require significantly increased record-keeping and costs, but would not noticeably change employee classification outcomes in the engineering industry. Consequently, ACEC opposes adding a percentage of time requirement to the current duties test.

As DOL formulates the final rule, we respectfully request that DOL consider ACEC's comments on the effects of the proposed changes to overtime pay on the engineering industry. Thank you for your consideration.

Sincerely,

David A. Raymond
President and CEO