North Carolina
Center *for* Nonprofits
Many missions | *100* counties | *One* voice

November 3, 2023

Ms. Amy DeBisschop
Director of the 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: **Proposed Rule: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees,**
WHD-2023-0001-0001; (RIN) 1235–AA39

Dear Ms. DeBisschop:

The North Carolina Center *for* Nonprofits (the Center) welcomes this opportunity to submit formal comments on the Proposed Rule published on September 8, 2023. The Center is a 501(c)(3) nonprofit that connects, educates, and advocates for charitable nonprofits throughout North Carolina. Many of the Center's 1,110+ member nonprofit organizations would be directly affected by the Proposed Rule raising the salary level threshold for Fair Labor Standards Act (FLSA) exemptions for executive, administrative, and professional employees.

When the Department published its proposed regulations to raise the salary level threshold for white-collar exemptions from FLSA in 2015 – and when it published its final rule in 2016 – the Center heard from many North Carolina nonprofits about the potential impact of the higher salary level threshold on their operations. Based on this feedback from 2015 and 2016, the Center has sought nonprofits' input on the Department's latest Proposed Rule. Over the past six weeks, the Center has heard from more than 100 nonprofits about the impact of the Proposed Rule on their missions and operations.

In its formal comments on the Proposed Rule, the National Council of Nonprofits noted that charitable nonprofits generally approach proposals for significant increases to the FLSA salary level threshold with a mixed sense of "moral support" and "operational anxiety." North Carolina nonprofits have expressed similar sentiments in response to the Proposed Rule, although most of the organizations that have shared feedback to the Center have focused more on their "operational anxiety" with the Proposed Rule than with their "moral support" for the potential positive impact on the people they serve and on their own employees.

In these comments, the Center will: (a) share a summary of the feedback we have heard from North Carolina nonprofits about the potential impact of the Proposed Rule on their missions and operations; and (b) offer some suggestions of ways the Department can help ensure that its final rule and other FLSA guidance help rather than hinder the operations of charitable nonprofits that are providing essential services to communities across North Carolina and throughout the rest of the country.

Context on Nonprofits in North Carolina

Before sharing the feedback on the Proposed Rule that we have received from North Carolina nonprofits and our suggestions to the Department for the final rule and other FLSA guidance, the Center offers the following information to provide some context on the state of the charitable nonprofit sector in North Carolina:

1. North Carolina nonprofits are stretched thin financially and operationally. Most nonprofits budget each year for a balanced budget or for a small budget surplus. In the 2022 Nonprofit Finance Fund State of the Nonprofit Sector survey, 71% of responding nonprofits from North Carolina said that demand for their services increased between 2019 and 2021, and 88% anticipated additional increases in demand for their services in 2022. In the same survey, 49% of North Carolina nonprofits reported that they were unable to fully meet demand for services between 2019 and 2021, and 48% anticipated that they would be unable to fully meet demand for services in 2022. These operational challenges are only exacerbated by the recent drop in charitable giving. Earlier this year, the annual Giving USA report found that individual giving declined by 13.4% in 2022 relative to inflation and that giving by foundations dropped by 5.0% in 2022 relative to inflation. This data suggests that; (a) many nonprofits lack the financial capacity to pay higher wages to their employees; and (b) regulatory changes that add to nonprofits' operational costs are likely to translate into more unmet needs in North Carolina communities.
2. North Carolina nonprofits are struggling to recruit and retain workers. The Nonprofit Workforce Shortage Survey in North Carolina report published by the National Council of Nonprofits in August 2023 sheds some light on the ongoing nonprofit workforce shortage crisis in North Carolina. Of the North Carolina nonprofits responding to a national survey in April 2023, 81.0% reported having job vacancies. In that report, nonprofits' two most commonly cited factors affecting employee recruitment and retention were salary competition (81.0%) and budget constraints/insufficient funds (65.5%). This data suggests that: (a) many North Carolina pay salaries that are at least somewhat lower than comparable positions in the for-profit and/or government sectors; and (b) many of these organizations lack the financial resources to pay higher salaries.
3. North Carolina is one of 20 states with a minimum wage of $7.25 per hour (see data from the National Conference of State Legislatures). Likewise, North Carolina follows the federal salary level threshold for exempt employees. This means that the proposal to increase the federal salary level threshold from $684 per week ($35,568 per year) to $1,059 per week ($55,068 per year) would be a significant change for employers – including nonprofits – in North Carolina. This change will increase labor costs – either through higher salaries or through the payment of overtime pay – for many North Carolina nonprofits.
4. Unlike for-profit businesses, charitable nonprofits generally cannot offset increases in labor costs and other operational expenses by charging higher fees for their services. While many nonprofits charge fees for some or all of their mission-related services (*e.g.*, healthcare, child care, education, and arts and cultural programming), they often charge below-market rates for these services, largely because their missions are to address community needs rather than to make a profit. When nonprofit organizations' operational costs increase, they often cannot ask their clients to pay higher fees. Instead, charitable nonprofits must rely on other funding sources – including government grants and contracts, foundation grants, and individual and corporation

contributions – to pay for these higher costs. To the extent that the Proposed Rule will increase labor costs for charitable nonprofits, it will be important for governmental and private funders to increase their support of these organizations to prevent nonprofits from having to cut services.

Input from North Carolina Nonprofits about the Potential Impact of the Rule

As noted above, the Center has received feedback from more than 100 North Carolina nonprofits (out of our 1,100+ members) about the impact of the Proposed Rule on their missions and operations. Note that this feedback came largely through emails and one-on-one conversations with nonprofits rather through a formal survey. Consequently, the Center is unable to provide a quantitative analysis of the potential impact of the Proposed Rule on North Carolina nonprofits but rather is providing a summary of the feedback we have received.

Much like the Department's 2015 proposed overtime rule, North Carolina nonprofits have generally responded to the latest Proposed Rule with a mixed sense of moral support and operational anxiety. Many nonprofits told the Center that they would like to offer higher wages to their employees and that they recognize that the DOL overtime rule is intended to help many of the working families that are served by charitable nonprofits. However, the short-term reality is that new rules will mean increased personnel costs for most North Carolina nonprofits. The following are some of the main points that nonprofits have shared with the Center about their reaction to the Proposed Rule:

- Many organizations expressed support for the Department's effort to raise wages – either through higher salaries or time-and-a-half pay for overtime – through the Proposed Rule, noting that this would be beneficial for their employees and for many of the people receiving services from their nonprofits.
- Most of the nonprofits that provided feedback to the Center indicated that they have staff who are currently exempt from FLSA's overtime pay requirements whose salaries are below the salary level threshold in the Proposed Rule. These organizations had a range of one to 490 currently exempt employees who would be affected by this rule. The majority reported having between four and 10 exempt employees who have salaries below the salary level threshold in the Proposed Rule. Most of these organizations said that more than half of their currently exempt staff would be affected by the Proposed Rule.
- Several organizations indicated that they have exempt employees who are paid salaries below the proposed salary level threshold but that they did not expect to have increased operational costs because most or all of these exempt employees typically work no more than 40 hours per week.
- Multiple organizations noted that, even if their exempt staff earning salaries of less than $55,086 per year typically work 40 hours per week or less, they were concerned about the impact of the Proposed Rule on worker morale. Some noted that their employees would likely view the conversion from exempt to non-exempt "as a kind of demotion" and that "there's a stigma attached to having to 'punch the clock' or keep an hourly accounting of your time for wage and hour purposes."
- Several nonprofits, mostly those based in rural parts of North Carolina, noted that the salary level threshold in the Proposed Rule was much higher than average salaries for exempt employees of nonprofits and small businesses in their communities. As one nonprofit explained: "The top of our salary range, which is based on salary comparisons with others in the field and in our area, are nowhere near the proposed range to be considered exempt." Essentially, they were noting that the 35th percentile of wages of non-hourly workers in the lowest-wage Census

Region (currently the South) equates to level well above the 50^{th} percentile in many rural communities in North Carolina.
- Nonprofits from rural parts of North Carolina – particularly those in the mountains in Western North Carolina - also noted that it is often difficult for them to limit employees' work weeks to 40 hours because travel time (from a nonprofit's primary place of business to the various locations where it provides services) constitutes a significant portion of their employees' work time.
- One organization noted that it has multiple exempt employees with annual salaries between $35,568 and $55,068 and explained that, if the Proposed Rule became effective, its most likely – and perhaps only financially feasible – compliance option would be to raise all of these employees' salaries to $55,068 per year to keep them all exempt. The organization expressed concerns that it would be inequitable – and harmful to some employees' morale – that employees with significantly less experience, education, and/or job responsibilities (*i.e.*, those currently being paid closer to $35,568) would receive significantly smaller raises than those with more experience, education, and/or job responsibilities (*i.e.*, those currently being paid closer to $55,068 per year).
- Multiple organizations indicated that they have set their employees' salaries at or above living wage or livable wage levels for their regions, but noted that the salary level threshold in the Proposed Rule is significantly higher than their current salary levels.

Several nonprofits provided insights on the actions they anticipated taking if the Proposed Rule takes effect and the expected costs to their organizations of taking these actions:

- The majority of nonprofits that provided feedback indicated that their preferred compliance option would be to raise salaries above the new salary level threshold. Several of these nonprofits shared their estimates for the cost of raising salaries, which ranged from a total of $20,000 to $200,000 per year. One nonprofit estimated that the cost of increasing its exempt employees' salaries to match the salary threshold in the Proposed Rule would amount to 10% of its current organizational budget.
- Several organizations indicated that they would most likely keep salaries largely unchanged and pay time-and-a-half for any overtime hours worked by currently exempt employees who would be converted to non-exempt status under the Proposed Rule. Most of these organizations did not have estimates for the annual cost of this overtime pay because they do not currently require exempt staff to track their weekly hours. Several noted that, in addition to the cost of paying overtime, the process of tracking staff time on an hourly basis would be burdensome.
- Several organizations said they would try to limit working hours (to 40 hours per week) for currently exempt staff who would be converted to non-exempt status under the Proposed Rule. Some suggested they might adopt organizational policies limiting working hours, while others indicated that they may reduce job duties for these employees to limit the hours they needed to work to complete their jobs.
- One organization that estimated that it has 100 exempt employees whose salaries are below the salary-level threshold in the Proposed Rule did not have an estimate of the cost of complying with the Proposed Rule but indicated that it would likely look at each employee's circumstances on an individual basis to assess whether to raise their salaries to maintain their exempt status, maintain their current salaries and provide overtime pay if they work more than 40 hours in a week, or limit their hours and/or job duties.
- A few organizations indicated that they would likely have to cut back on services because they would need to cut back on employees' hours as a result of the Proposed Rule, and two organizations suggested that the cost of complying with the Proposed Rule would likely cause them to close their doors and stop providing services altogether.

Suggestions for the Department in Response to the Proposed Rule

The Center prefaces its suggestions for the Department with three observations about the Proposed Rule:

1. Much of the discussion in the Proposed Rule discusses the Department's analysis of its choice of methodology for setting the salary level threshold at the 35th percentile of wages of non-hourly workers in the lowest-wage Census Region (currently the South). None of the 100+ nonprofits that provided feedback to the Center referenced this methodology. Instead, most focused on the impact of $55,068 annual (or $1,059 per week) salary level threshold would have on their organizations. Consequently, the Center's suggestions for the Department focus on the dollar amount of the salary level threshold and the impact of this threshold rather than on the percentile of wages of workers in a particular Census Region that is used to determine the salary level threshold.
2. The Center is not asking the Department to maintain the current salary level threshold of $684 per week ($35,568 per year). The Center recognizes that a higher salary level threshold would benefit people served by nonprofits and many nonprofit employees, and we encourage the Department to move forward with a final rule that increases the salary level threshold over the level set in the Department's 2019 regulations.
3. The Center does not have an opinion on the changes to the salary level for highly compensated employees in the Proposed Rule. Based on the feedback we have received from nonprofit organizations, this threshold is applicable to very few employees of North Carolina nonprofits, since the vast majority of North Carolina nonprofit employees whose salaries are above the current salary level for highly compensated employees have job duties that clearly meet the duties tests for executive, administrative, or professional employees.

With these three considerations in mind, the Center offers the following suggestions for ways that the Department can help ensure that its final rule and other FLSA guidance help rather than hinder the operations of charitable nonprofits:

1. ***Treat nonprofits the same as other employers in the final rule.*** We recognize that a minority of charitable nonprofits favor a carveout that would set a lower salary level threshold for some or all charitable nonprofits and/or small businesses. The Center agrees with the position of the National Council of Nonprofits that such a carveout would be more harmful than helpful to the nonprofit sector, and we encourage the Department not to include a nonprofit carveout in its final rule. As the National Council of Nonprofits noted in its public comments to the Proposed Rule: "Setting a sub-minimum salary level for nonprofit employees would be tantamount to treating them as second-class workers and would be unacceptable."
2. ***Do not raise the salary level threshold any higher than $55,068 per year in the final rule.*** As noted in the discussion above about the potential impact of a higher salary level threshold on North Carolina nonprofits, the $55,068 per year ($1,059 per week) salary level threshold in the Proposed Rule would create significant operational costs for many charitable nonprofits in North Carolina. Several nonprofits suggested to the Center that a salary level threshold somewhere between the current level and the $55,068 level would be preferable from an operational perspective. Footnote 2 of the Proposed Rule notes that: "In the final rule, the Department will use the most recent data available which will change the dollar figures" and suggests that the salary threshold could be as high as $60,209 per year in the final rule based on

the Department's estimates for salary data in the first quarter of 2024. The Center strongly encourages the Department *not* to include a salary level threshold any higher than $55,068 per year in its final rule – and to consider a level at least somewhat lower than this proposal – even if this means making some changes to the methodology for setting the salary level threshold. As we noted above, nonprofits appear to care much more about the actual dollar figures of the salary level threshold – and the impact that those dollar figures will have on their operations and their missions – than about the methodology for setting the dollar figures.

3. ***Phase in the implementation of a higher salary threshold.*** As noted earlier in these comments, the proposal to increase the salary level threshold from the current level of $35,568 per year to $55,068 per year would be a significant change and would create significant operational costs for many North Carolina nonprofits, particularly those with exempt employees who are currently paid salaries close to the current threshold. To help mitigate the immediate compliance costs, the Center strongly encourages the Department to phase in any increase to the salary level threshold over multiple years to give nonprofits and other employers adequate time to make the operational changes necessary to comply with the higher threshold.
4. ***Consider different salary level thresholds for different regions of the country.*** The Center recognizes that the salary level threshold in the Proposed Rule is likely to have much less of an operational impact on employers – including nonprofits – in places where state laws already establish a higher salary level threshold for exempt employees than the current federal level of $35,568 per year. In those states, it is quite possible that a salary level threshold of $55,068 per year is reasonable. However, as noted in these comments, a salary level threshold of $55,068 per year or higher would create significant operational costs for nonprofits in North Carolina, particularly those in rural parts of the state. Because a single salary level threshold would have such disproportionate impacts on nonprofits and other employers in different states and in different regions within states, the Center encourages the Department to consider setting different salary level thresholds for each Census Region, state, or region within a state. This could help ensure that the impact of the Proposed Rule – and the operational costs for employers – will be more consistent across different states and regions.
5. ***Provide clear and accurate information about the range of potential compliance costs for nonprofits.*** Table 35 of the Proposed Rule suggests that the average compliance cost of the salary level threshold in the Proposed Rule would be $1,669 per organization or 0.34% of total payroll. Based on the feedback nonprofits have provided to the Center about potential compliance costs, this estimate appears to be much lower than even the minimum compliance cost for most small nonprofits in North Carolina. In its final rule, the Center encourages the Department to acknowledge that actual compliance costs for nonprofits (and perhaps for other employers also) – particularly those in rural areas and/or in states like North Carolina – could be considerably higher than these estimates and to provide a broader range of the potential compliance costs for employers in areas of the country (like North Carolina and rural North Carolina in particular) and sectors (like the nonprofit sector) that are likely to be disproportionately impacted by a higher salary level threshold.
6. ***Acknowledge that some options for mitigating the compliance costs of a higher salary level threshold are not available to nonprofits.*** The Proposed Rule notes that: "The Department anticipates that some firms could offset part of the additional labor costs through charging higher prices for the firms' goods and services." As we noted earlier in our comments, raising prices for services is not a viable option for many charitable nonprofits. Instead of raising prices, most nonprofits would likely respond to the increased personnel costs that would accompany a higher salary level threshold by either: (a) seeking additional funding from government grants and contracts, foundation grants, and individual or corporate contributions; and/or (b) cutting back on their mission-related services. In its final rule, it would be helpful for the Department to acknowledge

this reality of the potential impact of the higher salary level threshold on nonprofits and the communities they serve.

7. ***Encourage nonprofit funders to help offset the increased operational costs that would result from a higher salary level threshold.*** As the Center has noted in these comments, a salary level threshold of $55,068 per year or higher would create significant operational costs for many North Carolina nonprofits. Many nonprofits have told the Center that they view this proposed increase as an "unfunded mandate" from the Department. If the Department's final rule sets the salary threshold at or above $55,068 per year, the Center strongly encourages the Department to provide guidance to governmental and private funders about the likely increased labor costs for many nonprofits and to encourage governmental and private funders to increase their level of investment in affected nonprofits to help offset these higher labor costs. In addition, the Center encourages the Department to work with the Office of Management and Budget to include language in OMB's final rule on the recently-published proposed changes to the OMB Uniform Guidance to allow nonprofits with federal grants to automatically receive the opportunity to reopen their written agreements to seek additional reimbursements to cover the increased labor costs that would result from a higher salary level threshold.
8. ***Provide guidance on the applicability of FLSA duties tests to common nonprofit positions.*** The Center has heard from several nonprofits that the Department's current guidance, including its regulations and its fact sheets, does not provide adequate clarity on whether several job classifications that are common in the nonprofit sector fall within one or more of the duties tests for exempt employees under FLSA, including positions like fundraising/development staff, volunteer managers, and child care workers (acknowledging that Fact Sheet #46 provides some guidance on the applicability of duties tests to positions at daycare centers and preschools). The Center acknowledges that the Department has chosen not to make changes to the duties tests for executive, administrative, and professional employees in the Proposed Rule, and we recognize that a final rule may not be the appropriate place to provide additional guidance on the applicability of these duties tests to common nonprofit positions. However, the Center encourages the Department to: (a) reach out to nonprofits to identify other job classifications that are common among nonprofit employers for which further guidance on the applicability of the executive, administrative, and/or professional duties tests would be beneficial; and (2) publish fact sheets targeted specifically to nonprofit organizations with clear guidance on the applicability of the duties tests to common positions in nonprofit organizations.

Thank you for the opportunity to submit these comments on behalf of North Carolina's nonprofit sector.

Respectfully submitted,

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