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Department of Labor  
Wage and Hour Division  
29 CFR Part 541  
RIN 1235-AA11

Re: Defining and Delimiting the Exemptions for Executive, Administrative, Professional,  
Outside Sales and Computer Employees

Comments to Proposed Rulemaking to Revise FLSA Regulations

Caribbean Restaurants, LLC (CR) respectfully submits comments to the Notice of Proposed Rulemaking by the US Department of Labor to amend the Fair Labor Standards Act (FLSA) regulations that would implement the exemption from minimum wage and overtime pay for executive, administrative, professional, and computer employees.

CR is the owner-operator of 178 Burger King restaurants in Puerto Rico. As such, it is one of the largest employer in the restaurant industry in Puerto Rico with approximately 5,300 employees. Accordingly, over 16,000 persons, including our employee's direct families, are and will be affected by the situation of our business.

With the intention of giving context to our comments and explaining the potential effects the proposed rule changes will have on CR's operations, we present some important facts about our business. As it is known, business expenses can vary dramatically from jurisdiction to jurisdiction and Puerto Rico is one of the jurisdictions of the United States with the highest cost of doing business. For example, electricity costs in Puerto Rico are more than twice the United States average<sup>1</sup> and its labor costs are substantially higher than those in the United States.<sup>2</sup> Additionally, the Puerto Rico government has recently implemented a 11.5% sales tax<sup>3</sup> and is considering numerous tax measures to handle and survive the fiscal crisis it has be suffering since 2005.<sup>4</sup> These measures will continue eroding businesses working margins and affecting the

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<sup>1</sup><http://www.eia.gov/state/analysis.cfm?sid=RQ>;

[http://www.eia.gov/electricity/monthly/epm\\_table\\_grapher.cfm?t=epmt\\_5\\_6\\_a](http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_6_a).

<sup>2</sup> Puerto Rico imposes the payment for a Christmas Bonus and paid maternity leave to all employees, and, among others, the payment of daily overtime, meal penalties, work during the rest day, mandatory vacation and sick leave for non-exempt employees.

<sup>3</sup> <http://www.forbes.com/sites/scottbeyer/2015/08/17/puerto-rico-at-11-5-has-americas-highest-sales-tax/>

<sup>4</sup> <http://www.gdbpr.com/documents/puertoricowayforward.pdf>; <http://www.reuters.com/article/2015/08/31/usa-puertorico-restructuring-idUSL1N1160G620150831>

capacity of employers in Puerto Rico of maintaining employment (much less creating new positions) and/or paying higher salaries, benefits, among others.

Our primary opposition to the proposed rule change is founded upon the degree of change recommended by the Department of Labor. The proposed increase of 102% of the current salary level (from \$455 to \$971 weekly in 2016) is not reasonable and, even with the efforts done by the Department of Labor to explain the justifications behind it, lacks of fairness since does not consider the realities of small jurisdictions with lower average salaries. This increase is unprecedented and lacks a sound business basis. On the contrary, the proposed rule change will impose almost 21% and 44% higher salary requirements than those currently existing in New York and California respectively,<sup>5</sup> jurisdictions known for their high salaries.

The potential impact of the proposed rule changes in Puerto Rico could be devastating for employers doing business in the Island, considering its realities and its current economic situation. As previously mentioned, Puerto Rico is in a financial crisis since 2005. Currently, it has a public debt of \$72 billion (four times that of Detroit) without the possibility of filing for bankruptcy<sup>6</sup> and an unemployment rate of 11.9%.<sup>7</sup> Additionally, at 2014, the average of all Puerto Rico employees' weekly earnings was \$505 while the average in the United States was \$949.<sup>8</sup> Mississippi, which is the second jurisdiction with the lower weekly salary average, has a weekly average salary of \$697, almost \$200 more than Puerto Rico.<sup>9</sup> In the case of the Food Preparation Industry, the average annual salary for first line supervisors in the United States during 2014 was \$32,420; \$10,320 higher than the \$22,100 earned in average for the same employees in Puerto Rico.<sup>10</sup> In other words, employers in Puerto Rico would have to pay an average of \$10,320 more than its counterparts in the United States in order to keep their exempt employees at the same exempt status.

In light of the above, setting a uniform minimum salary for Puerto Rico will have substantially higher implications for employers currently struggling to continue its operations and, as a result, in the lives of their employees and their families. As such, any changes to the existing rules should consider the regional differences in the level of income for middle class living standards in the Island.

In the specific case of CR, there is no doubt that the degree of the proposed increase would be critical to its operations. For example: CR has approximately 730 exempt salaried employees that currently earn a salary below \$970 per week. The potential cost of adjusting the salaries of all the above mentioned employees to \$970 weekly is projected to be over \$17,000,000 annually even without taking into consideration the proposed annual increases. To implement such a staggering increase in this struggling economy could jeopardize CR's existence. Particularly, since this type of cost cannot be passed on to the consumer. Evidently, our company cannot absorb such cost.

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<sup>5</sup> The current salary test in California is \$720 weekly and is supposed to increase to \$800 in 2016. The current salary test in New York City is \$656.25 weekly and is supposed to increase to \$675 in 2016.

<sup>6</sup>[http://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html?\\_r=0](http://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html?_r=0); <http://www.foxnews.com/politics/2015/06/28/puerto-rico-governor-warning-that-public-debt-unpayable/>

<sup>7</sup> The unemployment rate for the United States for the same period (July 2015) was 5.3%; <http://www.bls.gov/eag/eag.pr.htm>; <http://data.bls.gov/timeseries/LNS14000000>

<sup>8</sup>[http://www.bls.gov/regions/new-york-new-jersey/news-release/countyemploymentandwages\\_puertorico.htm](http://www.bls.gov/regions/new-york-new-jersey/news-release/countyemploymentandwages_puertorico.htm).

Although this statistic considers all employees within the respective jurisdiction, it actually reflects the real differences between Puerto Rico and the United States in terms of wages.

<sup>9</sup> [http://www.bls.gov/regions/new-york-new-jersey/news-release/countyemploymentandwages\\_puertorico.htm](http://www.bls.gov/regions/new-york-new-jersey/news-release/countyemploymentandwages_puertorico.htm)

<sup>10</sup> [http://www.bls.gov/oes/current/oes\\_nat.htm#35-0000](http://www.bls.gov/oes/current/oes_nat.htm#35-0000); [http://www.bls.gov/oes/current/oes\\_pr.htm#35-0000](http://www.bls.gov/oes/current/oes_pr.htm#35-0000)

To be able to continue its operations, CR would need to convert the majority of its exempt employees –if not all-- to non-exempt status which, contrary to the text of the proposed regulations will not benefit them or the company. From the employees' perspective, this is viewed as a very negative change in status, as such it would be a demotion. And with the conversion from salary to hourly may come a loss of other benefits they have enjoyed up to this point, such as fringe benefits, training opportunities and career advancement options. Additionally, the affected employees will lose the certainty that they will be paid a known salary every week regardless of the hours worked. The employees' compensation can also be affected by the conversion to non-exempt status. Even if we decide to establish the employees' hourly rate so as to net out their pay at the current work week, the employees will not be the beneficiary of an overnight raise to \$50,440 per year. As a result of being converted to hourly status, former exempt employees will be subject to time keeping rules and protocols. The flexibility to perform tasks at the time of their choosing will be lost. Checking email or performing other administrative functions from home will be disallowed since the time spent doing so is considered working time and, as a matter of fact, they would be subject to disciplinary action if they did engage in that activity including the termination of their employments. Finally, as previously mentioned, the reclassification of their role from salary to hourly may also lead to a reexamination of their benefits.

Of course, there are other options for us to consider as well, recruiting part-time employees, including a redistribution of the manager's current work in such a way that we require less management/administrative time spent in the restaurant. We may compensate for this by shifting some responsibilities to other members who are employed at a lower hourly rate. This may actually produce a benefit for some of the junior members of the management team. But it will work against the goal of creating more full-time, middle class jobs. Another alternative is to have one general manager assume responsibility for two restaurants instead of one; this would lead to a significant reduction in salaried positions.

In sum, the overall effects of most of the aforementioned could result in other undesired situations such as: an increase in unemployment rates due to layoffs; morale, compliance and productivity issues for employees that perceive the change in exempt status as a demotion, and; loss of career growth opportunities because of lack of funds to approve overtime hours. Therefore, CR respectfully suggests that the proposed overtime rule changes be reconsidered in order to avoid these negative consequences. Also, other options are to consider changes related to the type and size of the employer and to consider the difference in minimum salary averages for exempt employees in different regions and jurisdictions including Puerto Rico.

Furthermore, we also oppose to the proposal that the salary level be adjusted annually. Such annual increase could only be deemed as reasonable if the salary level is set to a fair number. If the salary level is maintained at \$970 for 2016, including an annual salary increase would have a catastrophic effect on an already fragile economy.

As to the duties test, below please find CR's comments to the questions submitted by the Department of Labor.

**A. What, if any, changes should be made to the duties test?**

If the salary threshold stays at \$970, the duties test should be eliminated. If the salary threshold is set at a more reasonable point, no changes should be made, since employers have spent great amounts of effort and resources to comply with the existing duties test.

**B. Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?**

No. Primary duty should not be measured in terms of time, but in terms of importance of the task.

**C. Should the Department look to the State of California's law (requiring that 50 percent of an employee's time be spent exclusively in work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of the realities of the workplace today?**

No. The amount of litigation in this area in particular and the complexity in complying with the applicable requirements in California, are precisely the reasons that should convince the Department of Labor to not use California's Law model.

**D. Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the department reconsider our decision to eliminate the long/short duties test structure?**

Considering the proposed changes, the only reasonable change should be eliminating the duties test. However, in any event, we should not return to the short/long test duties structure. It would only complicate things and promote litigation.

**E. Is the concurrent duties regulation for executive employees (allowing the performance of both exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of nonexempt work? To what extent are exempt lower-level executive employees performing nonexempt work?**

As previously mentioned, considering the proposed changes, the only reasonable change should be eliminating the duties test. When considering management roles, it must be remembered that a manager is always managing their operation. If anything, the concurrent duties rule should be further liberalized, with the simply pure distinction being managerial accountability at any given point in time. Responsibility for the staff, physical plant, and other assets of the restaurant should be all that is required, and any work performed in the execution of those duties should be at the discretion of management (including the subject employee, who typically makes their own decisions about what duties to engage in). Additionally, the number of jobs that require the manually and physical labor that the duties test wanted to protect is decreasing which should move the Department of Labor to reconsider the effectiveness of such test.

Respectfully submitted by:



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