



PUERTO RICO BANKERS ASSOCIATION

September 4, 2015

VIA ELECTRONIC MAIL (www.regulations.gov)

Ms. Mary Zeigler, Director
Division of Regulations
Legislation and Interpretation
Wage and Hour Division
US DOL of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

RE: (RIN: 1235-AA11)

TITLE: DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, OUTSIDE SALES AND COMPUTER EMPLOYEES; PROPOSED RULE WITH REQUEST FOR PUBLIC COMMENT

Dear Ms. Zeigler:

This letter contains the comments of the Puerto Rico Bankers Association (PRBA)¹ regarding the above-referenced Request for Comment (RFC) concerning the proposal by the Wage and Hour Division of the Department of Labor (DOL) to amend 29 CFR Part 541, in order to update and revise the regulations issued under the Fair Labor Standards Act (FLSA) implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales, and computer employees (the Proposed Amendments).

The PRBA strongly feels that failure to take into account in the Proposed Amendments the unique realities of Puerto Rico's (PR's) economy and current labor market situation, will have a calamitous impact on PR's already distressed economy and, as a consequence, on PR's financial services industry. Therefore, the PRBA requests that in connection with the Proposed Amendments, the minimum salary for PR remains at the current salary threshold for the exemptions from overtime, without annual increases in the salary, until such time as PR's economy fully recovers.

The PRBA's request is supported by the following:

- The economic context in which the Proposed Amendments would be applied to PR must be taken into consideration. The current economic and labor market

¹ The Puerto Rico Bankers Association represents all the commercial Banks doing business in Puerto Rico which, in the aggregate, provide approximately 12,000 jobs in Puerto Rico.

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conditions in PR are much different than those in the US. While the US economy and labor markets have strengthened since the 2009 financial crisis, PR's economic situation has and is expected to continue deteriorating. Since 2000, the gap in real GNP growth between the PR economy and that of the US has widened, with PR's remaining in negative territory since 2007. More recently, the fiscal crisis has lowered growth outlooks for the remainder of the decade (**Figure 1 of Annex**). As of today, the most optimistic forecast places the economy in a contraction mode until at least 2018.

- Since the onset of the current contraction in 2007 through July 2015, the local economy has registered a net loss of 142,275 jobs (Establishment Survey) (**Figure 2 in Annex**).
- The Proposed Amendments raise serious concerns regarding their effects on PR's economy. They would result in an increase of 113% from the current weekly average threshold of \$455 which, compounded with the mechanism of indexing the salary to the annual rate of inflation (based on the US's CPI) would add serious economic pressures.
- The wage gap between the local economy and that of the Mainland is very significant. PR's average annual wage is \$27,510 which represents only 58.2% of that in the US. Within these, in the case of the group of workers subject to the Proposed Amendments (white-collar workers), their average annual salary represents 59.4% of that for the same groups in the US (**Tables 1 and 2 in Annex**).
- Using the distribution of employment by occupations from the *Occupational Employment Survey* for PR (May 2014), 69% of those employed had annual earnings below the current salary threshold of \$455/week. If we consider the proposed changes for next year (\$970/week), based on the same levels of compensation, that share would increase to 94% (**Tables 1 and 2 in Annex**).
- The Proposed Amendments will cause a significant decrease in morale among exempt employees who become nonexempt. Exempt employees prize the flexibility they have to do their jobs and opportunities for bonuses and career development. Exempt employees are likely to view a change to nonexempt status as a demotion, and the requirement to record their hours as unduly burdensome.
- The impact of the proposed changes on an already severely constrained public budget at the central government and municipal levels will be very negative. The Government of PR's fiscal situation is well known and steps have been taken to lower government expenditures, including manpower reductions. These would have to be even more drastic should costs increase. Municipal finances in PR are also under a great deal of pressure with well over two thirds of municipalities incurring in budget deficits. In both cases an increase in costs would lead to curtailment of already stretched public services.

Following are more specific comments with respect to this important topic.

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1. Background

In 1974 Congress approved Public Law 93-259, 88 Stat. 55, which amended the FLSA in order to increase the minimum wage and expand its coverage, among other purposes. Through Public Law 93-259, Congress also sought a gradual achievement of minimum wage parity for workers in PR and the Virgin Islands with workers on the mainland. This premise was built on three factors: (1) the cost of living in PR, measured by the CPI, was rising almost as rapidly on the Island as on the mainland. (2) profit margins of establishments in PR were usually greater than their national counterparts, and (3) businesses in PR benefited from extensive financial and tax incentives. Id. In other words, in 1974 Congress determined that economic conditions in PR warranted a gradual path towards minimum wage parity.

The gradual aspect of the path towards minimum wage parity rested on the premise that, although the economic conditions in PR had improved dramatically since the FLSA was approved, they were still significantly inferior to those on the mainland. Further pursuing the purposes of the amendments to the FLSA in 1974, Public Law 95-151 was approved in 1977 which would establish that by 1984 the minimum wage prevalent in the mainland would apply in PR, with exceptions made for certain industries.

In 1989 Congress approved Public Law 101-57, which increased the minimum wage from \$3.35 in 1989 to \$4.25 after March 31, 1991. Even 15 years after Congress had enacted plans for PR to achieve minimum wage parity with the mainland, and 5 years after the mainland minimum wage was generally applicable in PR, it still recognized the Commonwealth's unique economic circumstances, including its wage structure, and allowed for an extended phase in for the increment of the minimum wage in PR, with certain industries not having to pay the minimum wage of \$4.25 until January 1, 1996. After this, all subsequent amendments to the FLSA have been fully applicable to PR. It should be noted that in 1989, PR had been experiencing strong economic growth which had even exceeded that of the mainland.

2. Potential Impact on PR's economy and on the Financial Services Industry

- a. Based on the proposed threshold of \$50,440 (\$970/week), the proportion of white-collar workers that would be automatically eligible for overtime pay would increase from 44.2% now to 86.8% in 2016 (**Table 3 in Annex**), which represents a dramatic increase given the unique economic condition of PR.

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- b. Using as a comparative basis the estimates from the DOL for the states in terms of coverage, the proportion of white-collar employees in PR who would be covered by the Proposed Amendments in 2016 would increase significantly, to 50.1% in 2016 from 25.5% in 2015. This means that an additional 24.6% of the total labor force would be non exempt, when in the states the highest share is that for Oklahoma (4.4%). In other words, the impact in PR would be more than 5 times the impact for the US. The comparison is dramatic in terms of coverage. Given the fragile state of the local economy and the prospects for the next few years, the proposed changes would further restrict the possibilities for economic recovery in PR **(Table 4 in Annex)**.
- c. PR's banking sector has been negatively impacted by the long term contraction of the Island's economy and the government's fiscal situation. Using prevailing per hour rates for those earning below \$970 per week and estimating an average 1.5 hours per week of overtime, the overall impact on the banking industry was estimated at approximately \$34 million (not including the cost of fringe benefits and employer's statutory obligations) based on information from the six commercial banks in PR. The direct and indirect impact of the Proposed Amendments on the financial services industry are expected to be dramatic since this will result in an unexpected increase in the operational costs of our banks, and of their respective clients.

3. Additional Arguments

- a. The Proposed Amendments already contemplate distinct treatment based on the unique circumstances of a jurisdiction. The Proposed Amendments contemplate a special salary level for American Samoa because minimum wage rates in that jurisdiction have remained lower than the federal minimum wage. Even though the special treatment is based on the fact that the federal minimum wage does not yet fully apply, this fact should not prevent that PR, which is subject to the federal minimum wage, be ineligible for an adjustment or special treatment from the Proposed Amendments based on its unique extremely difficult current economic situation, prolonged economic contraction and substantial differences in the salaries paid in PR versus in the US. The full extension of the FLSA and the federal minimum wage to PR was based on premises that no longer exist:
 - i. In 1996 Congress eliminated the tax incentives that served as a backbone of the PR economy and which had "impressed" the House Committee which drafted the 1974 amendments to the FLSA. Profit margins are no longer higher in PR than in the US, as employers grapple with the highest energy costs in the nation, severe tax burdens and shrinking sales owing to the contraction in the economy and shrinkage of the population.

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- ii. As was mentioned earlier, when Congress finally eliminated all the exemption for PR in the FLSA, the Island was growing at almost twice the rate of the US, and it was reasonable for Congress to conclude that PR's economy would eventually catch up with the rest of the US. However, the elimination of the federal tax incentives upon which PR's economy was built, derailed the Island's path towards economic parity with the mainland and has led to the current state of affairs where its economic contraction has reached depression like levels, at a time where the national economy is not only expanding, but accelerating its rate of expansion.
- b. The extension of the FLSA to PR continues to have profound effects in the Island, which would only be exacerbated if the Proposed Amendments are made equally applicable to PR. While the salary threshold under the Proposed Regulations only represents 42.4% of the median hourly wage in the US, for PR the figure jumps to 76.9%. (Bureau of Labor Statistics)
- c. In June 2015, PR's unemployment rate stood at 12.6%, more than West Virginia, the state with the highest rate of unemployment at 7.4%. The reduction in employment, coupled with the unfavorable economic situation of the Island, may have driven more workers to quit searching for jobs and either work informally or leave PR altogether. As mentioned, PR's unemployment rate is substantially higher than any other state (Data for June 2015) (Figure 3 in Annex).
- d. A very recent report prepared by former International Monetary Fund (IMF) official Anne O. Krueger, among others, found that part of PR's current economic malaise may be attributed to the disincentive to hire employees created by the relationship between the minimum wage and per capita income (77% in PR, while 28% in the US). Anne O. Krueger, Ranjit Teja and Andrew Wolfe, PR – A way Forward (July 13, 2015), at 6 (<http://www.gdb-pur.com/documents/PuertoRicoReport-Update.pdf>). The Report concludes that as part of the reforms that PR should implement in order to overcome its current economic hardship, the Island should obtain an exemption from the federal minimum wage.

Conclusion

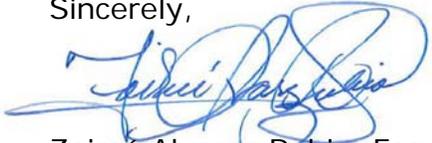
The PRBA respectfully reiterates its request that, in connection with the Proposed Amendments, the minimum salary for an employee to be exempt in PR remains at the current salary threshold for the exemptions from overtime, without annual increases in the salary threshold, until such time as the PR's economy is fully recovered. PRBA also hereby requests to be given the opportunity to meet with representatives of the DOL in order to be able to discuss in more detail the profound impact that the Proposed Amendments would have on the already distressed economy of PR, and as a consequence on the financial services sector.

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The PRBA appreciates the DOL's consideration of these comments in response to the RFC.

Sincerely,

A handwritten signature in blue ink, appearing to read "Zoimé Alvarez Rubio", with a large, stylized flourish at the end.

Zoimé Alvarez Rubio, Esq.
Executive Vice President