

United States Senate
WASHINGTON, DC 20510-1904

March 28, 2016

The Honorable Howard A. Shelanski
Office of Information and Regulatory Affairs
725 17th Street, NW
Washington D.C., 20503

Dear Mr. Shelanski:

I am writing you concerning the Office of Information and Regulatory Affairs' (OIRA) formal review of the U.S. Department of Labor (USDOL) Wage and Hour Division's "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" proposed rule, published in the *Federal Register* on July 6, 2015. I am deeply concerned about the impact of this rule and urge OIRA to return the rule, commonly referred to as the "overtime rule," to USDOL's Wage and Hour Division for reconsideration and substantial changes.

Pursuant Executive Order 12866, OIRA's regulatory review responsibilities include reviewing significant draft rules from agencies at both the proposed and final rulemaking stages. At the end of the review period, OIRA may return the rule to the agency "for reconsideration," if the agency has not considered all reasonable alternatives or failed to select an alternative that would yield the greatest net benefits. After reviewing the proposed rule, and hearing from many small businesses and educational institutions in Maine, I believe that the final rule should be sent back to the agency for further reconsideration.

According to the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act, small businesses are entitled to a voice in the federal rulemaking process. In fact, for all rules that are expected to have a substantial impact on a large number of small businesses, federal agencies are required by the RFA to assess their effects on small businesses, and if applicable, to consider less onerous alternatives through an Initial Regulatory Flexibility Analysis (IRFA). Several reasons warrant further review of the overtime rule by the USDOL Wage and Hour Division.

First, I have heard from many Maine small businesses that USDOL's Notice of Proposed Rulemaking (NPRM) greatly underestimates the cost and time needed to comply with the proposed rule. In its IRFA, USDOL estimates that, on average, the affected small establishments will incur a one hour burden for regulatory familiarization and a one hour burden for each affected worker in adjustment costs. Small business owners in Maine, however, report to me that compliance time will be much greater than USDOL assumes. Regulatory compliance disproportionately affects small businesses in costs and time, and my constituents tell me that the proposed rule would force many of them to hire compliance advisors and spend additional hours

understanding the rule and how it affects them. Both options cost more money than USDOL has detailed in its IRFA.

Small businesses are not alone in their concern. According to the College and University Professional Association for Human Resources, to comply with the new threshold, colleges and universities would need to increase salaries for the handful of individuals whose pay is closest to the threshold to make them exempt, but would also need to reclassify the majority of other employees to hourly status. The cost of compliance would lead many institutions to reduce services and potentially raise tuition for students. To comply with the rule, the University of Maine system estimates that as many as 900 employees would be affected, for a cost of \$14.5 million system-wide. The University is very concerned about what impact the added costs, implementation, and compliance will have on its workforce, students, and departments for research and athletics.

Second, USDOL's IRFA does not fully consider regional differences in wages when raising the overtime rule's salary threshold. USDOL states that the rule's current salary threshold is outdated and proposes to base the new standard on a national threshold of the 40th percentile of earnings for full-time salaried workers. The National Federation of Independent Business – a leading voice for small business – has noted that this change would particularly hurt small businesses in rural areas. The Maine Department of Labor believes that the rule would have a disproportionate economic effect on businesses in Maine, where salaries and the cost-of-living are not as high as other regions of the country. Moreover, according to the U.S. Small Business Administration's Office of Advocacy, this standard contradicts USDOL's own basis for determining a salary threshold as USDOL's 2004 final overtime rule adjusted the threshold lower than the national average data because of the impact of the rule on lower wage industries in different regions.

Third, USDOL proposes to update automatically the salary threshold on an annual basis. This greatly concerns small businesses and universities and colleges in my state. If annual updating based on inflation is included in the final rule, it would mean that Maine small business owners would have to increase exempt employees' salaries each year to maintain the exemption, or reclassify employees from salary-based to hourly. The automatic update requirement is unprecedented, and it is essential that USDOL assess its economic impact on small businesses, nonprofits, and colleges before including it in the final rule. Implementing this piece of the rule would have severe impacts on small business and colleges and universities' ability to budget and plan for the future.

Finally, USDOL's IRFA does not analyze regulatory alternatives that would minimize the harm to small businesses. According to the RFA, an agency's IRFA must contain a description of any significant regulatory alternatives to the proposed rule which would lessen any economic impact of the rule on small entities. In its IRFA, USDOL plainly states that it does not provide any differing reporting requirements for small businesses. USDOL should carefully consider significant regulatory alternatives in its IRFA that are less burdensome to small businesses in Maine and across the country.

Given these reasons, I respectfully ask OIRA to carefully review the final overtime rule submitted by the USDOL Wage and Hour Division and return the rule to the agency for reconsideration. It is clear that small businesses, universities and colleges, and non-profit organizations will have a very difficult time complying with the proposed 113 percent increase of the current overtime threshold, and as such, reconsideration of the rule is warranted.

Thank you for your time and attention to this matter. If you need further information, please do not hesitate to contact me directly or to have your staff contact David Lieberman of my staff at 202-224-2523.

Sincerely,

A handwritten signature in blue ink that reads "Susan M. Collins". The signature is fluid and cursive, with the first name "Susan" and the last name "Collins" being more prominent than the middle initial "M".

Susan M. Collins
United States Senator