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September 4th, 2015

Mrs. Mary Ziegler
Director of the Division of Regulations, Legislation,
and Interpretation, Wage and Hour Division
United States Department of Labor Wage and Hour Division (WHD)
Room S-3502, 200
Constitution Avenue NW
Washington, DC 20210

Regulatory Information Number (RIN) 1235-AA11
Docket ID: WHD-2015-0001

RE: Petition to Exempt Puerto Rico of the Fair Labor Standards Act ("FLSA") Proposed Updates on Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees - 29 CFR 541

Dear Mrs. Ziegler:

The Puerto Rico Chamber of Commerce ("PRCC") submits comments to the Notice of Proposed Rulemaking ("NPRM") issued by the U.S. Department of Labor ("DOL") to amend the Fair Labor Standards Act ("FLSA") regulations- 29 CFR 541. The proposed changes would modify the minimum wage and overtime exemption requirements for executive, administrative, professional, and computer employees.

For the reasons stated below, the PRCC informs the DOL the proposed increase in the minimum guaranteed salary requirement will cause *severe* adverse operational and financial consequences to businesses operating in Puerto Rico- far beyond the potential consequences in *any* of the states of the United States.

Since the adverse impact will be exponentially greater in Puerto Rico than in *any* state, the PRCC requests the DOL *exempt* Puerto Rico from the proposed increase in the guaranteed salary requirement. Alternatively, the DOL should *reinstate* its historical recognition of the significant wage disparity between the states and Puerto Rico, which *for decades* justified a lower guaranteed salary test for the "white collar" exemption tests in Puerto Rico.

The rationale for abandoning such a long standing policy in the 2004 revision of the regulation should be revisited and the prior prudent policy reestablished. Given Puerto Rico's present dire economic conditions, the PRCC requests *exemption* from the proposed increase in the guaranteed salary requirement. Alternatively, the guaranteed weekly salary in Puerto Rico should be set at 55 to 70% of the stateside level (as ultimately determined). Finally, there is no statutory or policy reason to impose upon employers in Puerto Rico a greater financial burden than what is proposed for American Samoa, another U.S. territory with supervisor average wages that are *higher* than those prevailing in Puerto Rico.¹

A more detailed explanation follows.

While the Puerto Rico Department of Labor has not yet formally determined how many employers will be affected by the proposed regulations guaranteed salary hike, its representatives have informally estimated that 80 to 85% of employers will have to change the manner in which local employers currently pay their exempt workforce.² This is far greater than what will occur in the states.

In Puerto Rico, the operational and financial consequences of increasing the minimum guaranteed salary requirement will have a far greater adverse impact than in the states.

Wages for both hourly and salaried employees are generally lower in Puerto Rico in many industries and occupational classifications, when compared nationwide. For example, according to the BLS, the average wages for "all management" workers in Puerto Rico is 63% of the national average for the same general occupational category. Only 53% of the average wages paid to workers under the "all management" classification exceed the contemplated salary threshold, while nationwide 99% of the positions averaged higher than the required minimum salary.

Moreover, **none** of the first-line supervisor major occupational categories in Puerto Rico presently average more than the contemplated \$50,440 minimum threshold.³ In fact, in order to maintain the exemption most employers will have to grant first line supervisors salary increases that exceed 65%. Yes, more than a 65% salary increase in just one year!

¹ A private wage comparison service estimates average yearly supervisor salaries based on job postings in American Samoa at \$36,000 and in Puerto Rico at \$29,000. Hence, the average supervisor salaries in American Samoa are reported 24% **higher** than average supervisor salaries in Puerto Rico.

<http://www.indeed.com/salary?q1=supervisor&l1=american+samoa&q2=supervisor&l2=puerto+rico&tm=1>. The DOL has proposed setting the guaranteed salary for American Samoa at 84% of the new salary level. Given Puerto Rico's wage structure, even this percentage is too high for most local employers.

² <http://www.elnuevodia.com/negocios/consumo/nota/proponenduplicarleselsueldoalosexentos-2069479/>

³ http://www.bls.gov/oes/current/oes_pr.htm#otherlinks

As the following chart reflects, in order to maintain the exemption for first line supervisors, employers in Puerto Rico will have to increase their yearly salaries by \$10,000 to \$43,000 *more* than their counterparts in the United States.

First line supervisor	U.S average yearly salary	P.R. average yearly salary	Difference
Restaurants	\$32,420	\$22,100	\$10,320
Retail Sales	\$42,190	\$28,290	\$13,900
Housekeeping	\$39,110	\$23,640	\$15,470
Production & Operating	\$59,060	\$40,020	\$19,040
Office & Administrative	\$54,400	\$34,440	\$19,960
Non-Retail Sales	\$84,010	\$41,040	\$42,970

As a result, when compared with the situation nationwide, a far greater percentage of managerial (executives and administrators) and professional employees in Puerto Rico *will not* qualify for continued white collar exemption, unless significant -and above market- salary increases are granted.

As presently proposed, the revised regulation would require businesses operating in Puerto Rico to grant significantly greater salary increases to their first and mid-level supervisors than employers in the states, in order to maintain a desired exemption. Since the prevailing wages are primarily market and productivity driven, in many cases the proportionally higher salary increase required to maintain an exemption will foreseeably impose a greater financial burden on employers in Puerto Rico.

Puerto Rico’s Secretary of Labor and Human Resources, Hon. Vance Thomas, is entrusted with the ministerial responsibility for setting and implementing public policy in the areas of worker protection in Puerto Rico. As you are aware, *the record* reflects he has unambiguously come forward and advised the DOL that

“Increasing the salary level for required exemption from \$455 to \$970 a week (or from \$23,660 to \$50,440 for a full year worker) to executives, administrative, professional, outside sales, and computer employees, would be detrimental to the small and medium businesses, exacerbating our already fragile economy. Raising the threshold will increase the costs of doing business in Puerto Rico, and this is something we cannot afford under our current economic juncture.

Neither the Commonwealth nor private sector employers will be able to cope with the rise in labor costs caused by proposed changes to the “white collar” exemptions. The

Department's proposal to increase the threshold will negatively impact our efforts of creating jobs. We hereby request that Puerto Rico be exempted from the proposed regulations."⁴

It is foreseeable that financial constraints will impede the level of salary increases in most industries in Puerto Rico. The pure economics of imposing such a substantial minimum salary increase on an economy with salary structures *significantly* lower than those prevailing in any of the U.S. jurisdictions; will severely undermine the ability of businesses in Puerto Rico to operate with substantially similar managerial and supervisory levels in most industries. By hindering Puerto Rico employers in staffing their managerial and supervisory levels, the proposed regulation will greatly challenge their ability to supervise and direct operations at competitive ratios.

Puerto Rico employers presently operate with managerial and supervisory ratios similar to those in the states. Unless the proposed regulation is modified to take into consideration the significant wage differences in Puerto Rico, the amount of the guaranteed salary increase will force many employers in Puerto Rico to implement remedial wage actions, which include:

1. **Reclassify first and mid-level managers/supervisors to hourly employees and adjust downward their salaries in order to accommodate for the foreseeable overtime payments.** Such a downward adjustment probably will have to be greater in Puerto Rico than in the states, because local legislation entails *higher* comparative labor costs for hourly employees, in terms of daily, weekly and meal period violation premium payments.⁵ Since the employee will continue to have exempt supervisory, administrative or professional *duties* and the need for them to work the amount of hours presently required will continue to exist, the employer will need to "factor in" these additional premium payments by *reducing* their hourly wages even more than in the states where such additional payments are not required.⁶
2. When the level of the first and mid-level managers/supervisor's existing guaranteed salary does not permit a significant downward adjustment due to the federal minimum wage constraints, the employer will need to evaluate whether the employee can be

⁴ See, Hon. Vance Thomas, Puerto Rico Secretary of Labor and Human Resources petition and comment dated September 2, 2015.

⁵ Puerto Rico law requires meal breaks be taken within a specific time period and time worked outside of said time span must be paid at a double rate; in many industries daily overtime is also subject to a double rate premium payment; work on the seventh consecutive day is further subject to a double rate. Retail stores are also required to pay a special minimum wage of \$11.50 p/h for non-exempt employees.

⁶ Decades ago these higher wage premiums, as well as Puerto Rico's mandatory vacation, sick leave and Christmas bonus requirements remained unnoticed by the DOL in its minimum wage rule-making process, because the federal minimum wage for Puerto Rico was *lower* than the states. More recently, when Congress abandoned the more flexible/delayed implementation minimum wage policy for Puerto Rico, the "total labor cost" has increased in Puerto Rico beyond what is perceived by only comparing statutory minimum wage rates.

absorbed into the production workforce, subject to the typical overtime restrictions, or terminated. In such cases, cost constraints will require the elimination of first or mid-level managers/supervisors, and reassignment of their prior duties upwards to supervisory/managerial personnel compliant with the new salary levels.

3. When first and mid-level managers/supervisors are reclassified to hourly employees, the employer will need to reexamine their eligibility for benefits applicable only to exempt employees.

The PRCC understands the Department's national goal (voiced by the President) of ensuring every American citizen is paid "a fair day's pay for a fair day's work." However, the proposed level of \$921 is clearly *too high* for absorption in Puerto Rico. The large increase in salary thresholds required to maintain an exemption will impose an immediate financial burden on Puerto Rico employers, who generally will be unable to meet the proposed level of \$50,440 and maintain the exemptions, even if they—and their employees—would like to.

The proposed regulation, as presently stated, will definitely shrink the exempt employee population pool Puerto Rico, at a ratio far greater than in any state. Due to pure economic realities, the proposed regulation will place Puerto Rico businesses at a competitive disadvantage.

The Department assumes employers who will be unable to increase salaries to the new levels, will likely maintain the same weekly earnings reduced to a 40 hour workweek. Such an assumption is *unfounded* when guaranteed salary increase requirements are extremely burdensome—such is the case in Puerto Rico.

Thus, for Puerto Rico, with significantly lower income levels than those found in the mainland, the degree of change in the proposed salary thresholds will prove too steep, at best, moving many employers to reclassify their exempt employees *as hourly*, with the implications this brings, but at worst, forcing some employers to relocate their operations to other jurisdictions that are not subject to the many additional labor costs associated with an hourly status in Puerto Rico.

The adverse employment consequences of the indiscriminate and/or rapid imposition of the federal minimum wage rates to Puerto Rico are well documented.⁷ The following chart

⁷ *Informe al Gobernador del Comité para el Estudio de las Finanzas de Puerto Rico -Informe Tobin* (1975), pp. 6-7, 31-34; *Comité Asesor del Gobernador Sobre Política Económica, Informe al Gobernador* (1984), pp. 5-7; *Informe Sub-Comité Para el Desarrollo Económico de Puerto Rico (Informe Carrión-Ferré)* (1984), pp. 22-23, 32, 45-46; S. Andic & R. J. Cao García, "Un Estimado del Efecto del Salario Mínimo y de un Posible Aumento Sobre Economía de Puerto Rico" (1987); R. J. Cao García, "Efectos Económicos del Aumento en el Salario Mínimo Federal" (1990); S. J. Davis & L. A. Rivera-Batiz, *The Climate for Business Development and Employment Growth in Puerto Rico*, Ch. 6, *The Economy of Puerto Rico-Restoring Growth*, 255, pp. 290-291 (2006); C.E. Santiago,

demonstrates *the employment destruction effect* of eliminating the federal minimum wage *differential treatment* in Puerto Rico since the mid 1970's and particularly the impact of the most recent automatic extension to Puerto Rico of the federal minimum wage, commencing in the year 2007.

Year	Labor Participation Rate		% difference in Labor Participation Rates
	PR	/USA	
1970	48.0%	/ 60.4 %	22.9 %
1975	44.8%	/ 61.2 %	30.9%
1980	43.3%	/ 63.8 %	38.2%
1985	42.3%	/ 64.8 %	42.0%
1990	45.4%	/ 66.5 %	37.7%
1995	46.6%	/ 66.6 %	35.3%
2000	46.1%	/ 67.1 %	37.1%
2005	47.7%	/ 66.0 %	32.1%
2010	43.5%	/ 64.7 %	39.1%
2015(May)	39.6%	/ 62.9%	45.5%

A similar economic effect occurs when nationwide salary thresholds based on the fortieth percentile of earnings for full time employees, that include the earnings of employees in richer states like New York with annual mean wages of \$55,630, are indiscriminately applied to Puerto Rico- a U.S. territory with an annual mean wages of \$27,510. Such a federal agency action would be incognizant of the prevailing local business, wage structure, economic, employment and unemployment realities. Accordingly, it is respectfully submitted that such an indiscriminate action would be unjustified by the record or, at a minimum, imprudent.

Before the 2004 revision of the regulation, the federal government had consistently taken into consideration the disparate wage structure between Puerto Rico and the states, and established minimum guaranteed weekly salaries for the exemption categories between 55 and 84% of the applicable stateside minimum guaranteed salary rate for executive and administrative employees.⁸ As reflected from the following chart, this prudent policy dated since **1949**.

Labor in the Puerto Rican Economy: Postwar Development and Stagnation (1992), pp. 130-141; 153-158; A. J. Castillo-Freeman & R. B. Freeman, *When the Minimum Wage Really Bites: The Effect of the U. S. -Level Minimum on Puerto Rico*, en G.J. Borjas & R. B. Freeman, *Immigration and the Workforce: Economic Consequences for the United States and Source Areas* (1992), págs. 177-211; Banco de la Reserva Federal de Nueva York, *Informe Sobre la Competitividad de la Economía de Puerto Rico* (2012), pp. iv, 7-8, 21-22.

⁸ William G. Whittaker, Congressional Research Service, *The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)*, May 2005.

Weekly Earnings Thresholds Applicable to Executive, Administrative, and Professional Employees under Section 13(a)(1) of the Fair Labor Standards Act

Date mandated	Executive	Administrative	Professional
1938	\$30	\$30	-
1940	\$30	\$50	\$50
1949 ^a	\$55	\$75	\$75
1959 ^b	\$80	\$95	\$95
1963 ^c	\$100	\$100	\$115
1970 ^d	\$125	\$125	\$140
1975 ^e	\$155	\$155	\$170

- a. In Puerto Rico and the Virgin Islands, the rates were \$30 for executives, \$50 for administrators and professionals.
- b. In Puerto Rico, the Virgin Islands, and American Samoa, the rates were \$55 for executives, \$70 for administrators and professionals.
- c. Special rates were set for workers newly covered (retail and service workers) under the 1961 FLSA amendments: \$80 for executives and administrators (\$55 in Puerto Rico, the Virgin Islands and American Samoa), and \$95 for professionals (\$75 in Puerto Rico, the Virgin Islands, and American Samoa). The regular rates would take effect on Sept. 2, 1965. In Puerto Rico, the Virgin Islands, and American Samoa, the rates were \$75 for executives and administrators, \$95 for professionals.
- d. Special rates were set for workers newly covered under the 1966 FLSA amendments: \$115 for executives and administrators, \$130 for professionals. The regular rates would take effect on Feb. 1, 1971. In Puerto Rico, the Virgin Islands and American Samoa, the rates were \$115 for executives, \$100 for administrators and \$125 for professionals. The special interim rates would not apply to the insular jurisdictions.
- e. In Puerto Rico, the Virgin Islands, and American Samoa, the rates were \$130 for executives and administrators, \$150 for professionals.

This decade tested policy was abruptly changed for Puerto Rico in the 2004 revision of the regulation. For the first time, the minimum compensation level for the Executive, Administrative, Professional and Computer Employee exemptions was set at a uniform level. Puerto Rico lost the previously granted special treatment. Only workers in American Samoa, who work for an employer other than the federal government, were required to receive a salary of at least \$380 per week.

At that time the Puerto Rico Chamber of Commerce recommended Puerto Rico businesses be subject to the same salary test proposed for American Samoa- approximately 84% of the proposed new salary test). The Department, however, dispatched the request by simply concluding “that such a differential in Puerto Rico would be inconsistent with the FLSA Amendments of 1989 (Pub. L. 101-157), which deleted Puerto Rico and the Virgin Islands from the special industry wage order proceedings under section 6(a)(1) of the FLSA allowing industry minimum wage rates that are lower than the U.S. mainland minimum wage.”⁹

Such a justification is seriously flawed. Predicated exclusively on the federal minimum wage rate, it does not consider *the realities* of the comparative mean or median wages actually paid in the compared jurisdictions. As indicated above, the reality is that actual wages for first line supervisors and mid-management in Puerto Rico are such that automatically extending the proposed guaranteed salary requirement will have the aforesaid adverse economic and operational consequences. The PRCC respectfully requests the DOL consider this reality when issuing the Final Rule.

For the reasons previously stated the PRCC requests *exemption* from the proposed increase in the guaranteed salary requirement. Alternatively, the pre-2004 deference should be reinstated, resulting in a guaranteed weekly salary requirement in Puerto Rico set at 55 to 70% of the stateside level (as ultimately determined).

Respectfully,

José E. Vázquez Barquet, PhD
Chairman of the Board

c: Hon. Alejandro Javier García Padilla, Governor of Puerto Rico
Hon. Vance Thomas, Puerto Rico Secretary of Labor and Human Resources
Hon. Pedro Pierluisi, Resident Commissioner (Congressman for Puerto Rico)

⁹ Federal Register Volume 69, Number 79, at page 22172.