



PARTNERSHIP TO PROTECT  
**WORKPLACE OPPORTUNITY**

May 21, 2019

Ms. Cheryl Stanton  
Administrator  
Wage and Hour Division  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Submitted via regulations.gov**

**Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA20) (84 Fed. Reg. 10900, March 22, 2019)**

Dear Ms. Stanton:

These comments on the proposal to change the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA) are submitted on behalf of the Partnership to Protect Workplace Opportunity (PPWO). The PPWO consists of a diverse group of associations, businesses, non-profits and other stakeholders representing employers with millions of “white-collar” employees across the country in almost every industry who will be impacted by the proposed changes.

The PPWO’s members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers when classifying employees. As was clear before the U. S. District Court for the Eastern District of Texas invalidated it, the 2016 Final Rule’s salary level created (or was expected to create) significant additional costs, and disruptions in operations, often resulting in identical pay to an employee for identical hours worked, but with a reduction in the flexibility afforded to employees in scheduling their work time, and dramatic increases in costs for an employer to monitor and ensure compliance.

Employers who belong to PPWO member groups suggested that the 2016 Final Rule's salary level, had it become effective, would have:

- harmed the ability of employers to provide, and employees to take advantage of, flexible scheduling options;
- reduced the ability of employees to attend community events and meet customers' needs outside of normal work hours;
- limited career advancement opportunities for employees;
- decreased morale for those employees who would have been (or, in some cases, were) reclassified to non-exempt status;
- reduced employee access to a variety of additional benefits, including incentive pay;
- reduced opportunities for employees to travel to conferences, meetings, and other events that can be beneficial to their career development;
- deterred employers from providing newly-reclassified employees with mobile devices and remote electronic access, further limiting employee flexibility;
- increased FLSA litigation based on off-the-clock and regular rate of pay claims; and
- introduced other legal and operational issues, such as increased administrative costs.

Thankfully, the 2016 Final Rule's salary level was preliminarily enjoined, preventing it from going into effect, and has now been invalidated. As a result, the 2016 Final Rule's most harmful impacts were limited. To ensure that those impacts are eliminated, the Department should formally rescind the 2016 Final Rule.

**I. The Methodology for Establishing the Minimum Salary Threshold for Exempt Status is Appropriate and Consistent with the Salary Level's Historical Purpose of Serving a Gatekeeper Function.**

The white-collar exemptions' minimum salary level must be set at a level that satisfies its historical gatekeeper function. Since at least 1940, the Department has recognized that the purpose of the salary level is to "provid[e] a ready method of

screening out the obviously nonexempt employees.”<sup>1</sup> That is, the salary level should be set so that the employees below it clearly would not meet any duties test; above the level, employees would still need to meet a duties test in order to qualify for exemption. This is in contrast with the 2016 rule which was explicitly intended to increase the number of employees eligible for overtime.<sup>2</sup> The PPWO rejects that objective of the 2016 rule and supports the Department’s decision to reject it as a basis for increasing the salary level.

The PPWO agrees with and supports the Department’s decision that the appropriate methodology for determining the salary threshold is the same methodology used by the Department in 2004. The 2004 methodology was consistent with the historical methods by which the Department had set the minimum level, as appropriately adjusted for the 2004 revisions to the long test/short test structure. It has been -- and remains -- the best methodology to establish the level of a salary intended to “screen out” clearly non-exempt employees.

Throughout the history of the white-collar exemptions, the Department generally established the minimum salary level for exemption in a similar way. The regulatory history of the previous salary increases reveals that, in determining appropriate salary levels, the Department has examined actual salaries and wages paid to exempt and non-exempt employees and set the salary level in such a way as to ensure that it served a screening function and did not operate as a *de facto* salary-only test:

- In 1940, the Department attempted to determine the “dividing line” between exempt and non-exempt employees, and to find the percentage of employees earning below various salary levels. The Department set the minimum required salary at levels below the average salary dividing exempt from non-exempt employees to account for low-wage areas and industries.
- In 1949, the Department considered wages in small towns and low-wage industries, among other factors. The Department compared weekly earnings in

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<sup>1</sup> *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).

<sup>2</sup> *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule*, 81 Fed. Reg. 32,392, 32,400 (May 23, 2016).

1940 with weekly earnings in 1949 to determine the average percentage increase in earnings, then set a lower salary level to account for small businesses.

- In 1958, the Department considered the actual salaries paid to employees who “qualified for exemption” (as determined by Wage and Hour Division investigations), grouped by geographic region, broad industry groups, number of employees, and size of city. The 1958 salary was set at “about the levels at which no more than about 10 percent of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests.”
- In 1963, the Department followed the same methodology, setting the salary level for executive and administrative exemptions at \$100 per week because survey data showed that 13 percent of establishments paid one or more exempt executives less than \$100 per week; and increasing the professional salary level to \$115 per week, when the data showed that 12 percent of establishments paid one or more professional employees less than \$115 per week.
- In 1970, the Department increased the salary level for executive employees to \$140 per week when the salary data showed that 20 percent of executive employees from all regions and 12 percent of executive employees in the West earned less than \$130 a week.
- In 1975, the Department set the salary levels based on increases in the Consumer Price Index, and adjusted the salary level downward to eliminate any potential inflationary impact. These salary levels, however, were intended as interim levels. The “interim” salary levels remained in place for nearly 30 years.
- In 2004, the Department set the minimum salary level at \$455 per week (\$23,660 annually), the 20th percentile for salaried employees in the South region and retail industry, rather than at the 10th percentile as in 1958, to account for the proposed change from the “short” and “long” test structure and because the data included non-exempt salaried employees.

With the exception of the outlier “interim” level established in 1975, the methodologies adopted by the Department have consistently sought to achieve the same

objective: “demarcating the ‘bona fide’ executive, administrative and professional employees without disqualifying any substantial number of such employees.”<sup>3</sup> Based on the data available to the Department, the 2004 methodology remains the best at achieving that objective.<sup>4</sup>

## **II. Bonuses and Commissions are Critical Components of an Employee’s Total Compensation and Should Count Towards the Minimum Salary Level without Limitation.**

The majority of employees who receive incentive payments are those who would otherwise qualify for an exemption. Those employees are most likely to have positions that include various combinations of duties associated with exempt positions. Thus, the PPWO believes that all forms of compensation should be used to determine whether the salary level has been met. It should make no difference to an exemption analysis whether someone performing exempt duties earns \$30,000 per year in base salary with \$45,000 in bonus potential or \$40,000 per year in base salary with \$35,000 in bonus potential. As far as the employee is concerned, at the end of the year, the total compensation is the same. In a similar vein, employers value and account for compensation in terms of total compensation, rather than the individual components—and the regulatory scheme should reflect that reality, and permit that flexibility.

The PPWO supports the Department’s proposal to permit the use of bonuses paid quarterly, semi-annually, or annually to satisfy a portion of the salary threshold. This decision reflects how these incentive payments are made by employers. Application of these payments should not be limited to 10 percent of the salary level; however, as this does not adequately reflect how these payments are made by employers. Under the proposal, the Department would allow only \$68 per week to be satisfied by a bonus that could be hundreds or thousands of dollars. The purpose of the salary level is to assist the Department in screening out non-exempt employees. Where someone is performing duties that qualify for an exemption, is paid a substantial amount of money for doing so,

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<sup>3</sup> *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. at 22,167 (citing prior rulemakings and Kantor Report).

<sup>4</sup> In addition, the 2004 methodology was favorably referenced by the court in *Nevada v. Dep’t of Labor*, 4:16-CV-731 (E.D. Tex. Aug. 31, 2017) (order granting expedited motion for summary judgment) and would thus appear to comport with the scope of the Department’s regulatory authority under the FLSA.

and is paid some amount in salary, the precise manner in which the employer calculates and makes the payments should make no difference as to that employee's exempt status.

We agree that the Department should allow a "catch-up" payment in the event that payments to the employee over the course of the preceding year do not satisfy the salary level and qualify the employee for exempt status. Given the manner in which annual bonuses are calculated and paid, however, the PPWO respectfully requests that the Department extend the time limitation for making such catch-up payment from the proposed one pay period to a longer period of time, such as a quarter of a year. This allows the employer to obtain a complete understanding of the annual performance by an employee and reduces the likelihood that compliance errors will be made in an effort to reconcile the employee's annual pay against the salary level within the brief time frame of one pay period.

Finally, we also urge the Department to apply discretionary bonuses toward the minimum salary level. Such payments can be more reflective of an individual employee's efforts and contributions (and by implication their exercise of independent judgment and other characteristics assessed under the duties' test) than nondiscretionary bonuses. Thus, they too help effectuate laudable business objectives and often represent a substantial portion of an employees' earnings for a given timeperiod.

### **III. The Department Should Not Increase the Minimum Required Salary for Application of the Highly Compensated Employee Exemption.**

In 2004, the Department included in its Final Rule a Highly Compensated Employee (HCE) test. That test was a streamlined determination of exempt status, pairing a reduced duties requirement with a higher compensation level. Since 2004, that level has been \$100,000, a figure that appears to have been selected without methodology (and which represented a sizable increase from the proposed \$65,000). For the last 15 years, the difference between the standard and HCE levels has been \$76,340.

In the 2016 Final Rule, the Department for the first time articulated a methodology for setting the HCE threshold: the 90th percentile of full-time salaried

workers generally. In 2016, that was \$134,004. The difference between the standard and HCE levels in the 2016 Final Rule was \$86,528.

In the current proposal, the Department proposes to use the same methodology it used in 2016, resulting in a figure even higher than the 2016 figure -- \$147,414. This increase in the HCE level is proposed despite the fact that the current proposal's standard salary threshold is significantly reduced from the 2016 Final Rule. As a result, the proposed HCE level is \$112,106 more than the standard threshold.

The Department has offered no reason why the proposed level should be higher than the level in the 2016 Final Rule. And the Department offers no explanation for the gap between the standard threshold and the HCE threshold increasing from the 2016 Final Rule -- more than 2.5 times more than it did from 2004 to 2016 (\$10,000 vs. \$26,000).

Increasing the HCE threshold -- and increasing the gap between the standard salary threshold and the HCE threshold -- will require employers to dedicate significant resources on administrative, human resources, and legal efforts to determine more precisely whether an employee meets exempt status for employees who (by definition) earn in excess of \$100,000. Employers will be faced with the task of reviewing the basis on which each employee was accorded exempt status, including for employees for whom the exempt status decision was made a decade ago and who may be among the most highly paid employees in the company. The specific reasons why each position is classified as exempt must be revisited, and there may not be sufficient records explaining whether an employee is exempt pursuant to application of the HCE test or whether the exempt status is based on application of the standard exempt criteria.

A significant amount of administrative effort will be needed to determine that an employee who had been classified as exempt through application of the HCE test remains exempt under application of the standard duties test.

For the reasons cited above, the Department should not increase the minimum salary required for application of the HCE exemption. In addition to the problems identified above, there are a number of other problems that would be caused by the massive increase in the HCE threshold, many of which have been discussed in the context of the 2015 Proposed Rule increasing the standard salary threshold. For example, regional variations within the same business may result in different employees

in the same classification being treated differently from an exemption perspective based almost entirely on the location in which they work. In addition, HCE employees that must be reclassified as non-exempt may resist the reclassification because they are likely to have advanced education and an expectation that they are salaried professionals.

#### **IV. The Department Should Update the Salary Threshold More Frequently than Has Been Done in the Past, but Should Not Engage in Efforts to Update the Threshold Automatically or to Bind Future Administrations with Respect to Timing.**

The PPWO supports the Department's proposed rejection of automatic increase in the standard salary level or the highly compensated employee total annual compensation level. Fundamentally, the Department lacks the authority to increase the salary level through an automatic process. The Department cannot avoid its obligations to engage in notice-and-comment rulemaking simply because notice-and-comment rulemaking takes time and resources; a federal agency cannot exceed the limits of its authority or otherwise "exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law'" no matter how difficult an issue it seeks to address.<sup>5</sup>

At no point since Congress authorized the Department to issue regulations on the FLSA's section 13(a)(1) exemption has Congress granted the Department the authority to index its salary test. Congress could have provided such authority if it wanted the Department to have it; Congress has permitted indexing expressly in other statutes, including the Social Security Act (which preceded the passage of the FLSA and was amended to add indexing in 1975) and the Patient Protection and Affordable Care Act (which was passed subsequent to the most recent revision to the Part 541 regulations). Yet Congress, despite full knowledge that the Department has increased the salary level required for exemption on an irregular schedule, has never amended the FLSA to permit the Department to index the salary level.<sup>6</sup> Congress's actions in the face of regulatory history demonstrate a clear intent that the salary level be revisited as conditions

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<sup>5</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (internal citations omitted).

<sup>6</sup> Similarly, when Congress has amended the FLSA to increase the minimum wage, it has not indexed that amount.

warrant, allowing the Department, and the regulated community, the opportunity to provide input into the appropriate level.

The importance of public feedback on the salary level is evident. In 2004, the comment process resulted in increases to both the proposed salary level and the proposed highly compensated employee salary level. An annual or other time interval, automatic revision to the salary level is inconsistent with the salary level's gatekeeper function. How can it be the case that an employee is "clearly exempt" on December 31 and while performing the same duties is "clearly non-exempt" on January 1 of the following year because of the rate of inflation or some other indexing calculation? A gate need not be replaced on an annual basis to ensure that it functions properly; rather, it needs to be "fixed" only when it approaches the end of its usefulness.

The Department recognized its lack of authority to index the salary level in its 2004 rulemaking. And it acknowledged as much in the 2015 Proposed Rule, noting that it determined "nothing in the legislative or regulatory history . . . would support indexing or automatic increases."<sup>7</sup> The Department was correct in 2004, and nothing has occurred since that time to justify a different conclusion.

When the Department has increased the salary level in the past, it has done so by stating what the new salary level would be and by making adjustments to that through the Administrative Procedure Act's required notice-and-comment rulemaking process. The current regulatory process also requires the Department to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis. An automatic update mechanism would allow the Department to announce a new salary level on a predetermined schedule in the *Federal Register* without providing notice and an opportunity for public comment, without conducting a Regulatory Flexibility Act analysis, and without satisfying any of the other regulatory requirements established by various Executive Orders. Future automatic salary threshold increases would certainly take effect during economic downturns—exactly the wrong time to be increasing labor costs on employers. Each of those regulatory requirements is intended to require the agency to consider the consequences of proposed actions and to ensure that the

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<sup>7</sup> See 80 Fed. Reg. at 38,537.

regulatory actions are carefully crafted and well-supported before being implemented. There is no reason to adopt an automatic increase to the salary level/highly compensated employee total annual compensation level based on an index.

Similarly, the Department lacks the authority to bind itself to conducting a review of the salary level on a quadrennial basis (or at other certain intervals) in the future. The PPWO appreciates the intent of the Department to provide a more regular schedule of updates to the salary threshold. Ultimately, however, the PPWO believes that any processes to consider updates should be commenced at such times as deemed appropriate by the Department based on current economic conditions and the ability of the existing salary threshold to continue to serve its gatekeeper function under those economic conditions. Robotic application of scheduled regulatory proposals does not allow the Department sufficient flexibility to account for economic downturns and similar economic events.

**V. The Department Should Harmonize Compensation Used to Satisfy Salary Thresholds with the Regular Rate Regulations.**

In conjunction with the Department's efforts to update and clarify the regular rate regulations,<sup>8</sup> the Department should expand the forms of compensation that can be used to satisfy the salary level. For example, in some industries, board, lodging, and other facilities can represent a significant amount of compensation. The Department, however, does not permit that compensation to satisfy the salary test, expressly excluding it: "exclusive of board, lodging or other facilities." 29 C.F.R. 600(a). Similarly, the Department previously has excluded from the HCE threshold costs of employee benefits, such as payments for medical insurance and matching 401(k) pension payments, noting that inclusion of such costs would make the test "administratively unwieldy."<sup>9</sup>

The Department should use the current opportunity to harmonize the salary rules with the regular rate rules. If an employer must include a non-hourly payment in the regular rate, that payment also should count towards the salary threshold. If the employer can exclude the payment, it should not count towards the salary threshold. If

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<sup>8</sup> *Regular Rate Under the Fair Labor Standards Act*, 84 Fed. Reg. 11888 (March 29, 2019).

<sup>9</sup> 69 Fed. Reg. at 22175.

the employer must determine the value -- and the Department must determine the value -- in the context of a regular rate calculation, there is no reason why the determination of the value is “administratively unwieldy” in the context of salary. Non-hourly payments that count towards regular rate should count towards both the standard salary threshold and the HCE threshold.

**VI. The Department Should Not Set Varying Salary Thresholds Based on Geography or Other Factors, Nor Should the Department Make Revisions to the Duties Tests.**

Based on the comments received by the Department in response to prior proposals related to the salary threshold, the Department should anticipate comments suggesting that the federal standard salary threshold should be set at different levels based on geography, employer size, industry, or the specific duties performed by an employee. We support the Department’s rejection of such variations in the current proposal. By setting the threshold at a level that restores its role as gatekeeper, the Department eliminates any need for such variations. Where states believe that salary level is not consistent with their specific economy, they are free to set a higher threshold, as some already have.

Setting multiple salary levels to reflect regional, industry, or employer size variations will also require the Department to establish rules for assessing when an employer or employee is working in a particular geographic area or industry or how employer size should be determined. Those rules, once promulgated, would almost certainly be the subject of litigation as the future workforce pushes the bounds of what it means to be employed by a particular employer in a specific industry in a static location.

Multiple regional salary levels would also create significant difficulties for employers with offices located across state lines or regional boundaries or employers whose employees move around between locations in different salary regions or work remotely. Maintaining a single salary level sufficient to screen out clearly non-exempt employees in the lowest wage industries and regions is far preferable to a regime that could lead to costly litigation that provides no benefit to employees or consumers.

The PPWO also opposes making changes to the duties test. Changes to the duties test would increase FLSA litigation at a time when such litigation is already exploding.

Increasing these litigation costs for employers is not good for employers, employees, or the economy, as noted by the Department in the preamble to the 2004 Final Rule:

Yet reactivating the former strict percentage limitations on nonexempt work in the existing “long” duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee’s daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the “long” test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee’s exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes.<sup>10</sup>

With 15 years (and counting) of disputes involving the 2004 regulatory language in the past, the Department should not now reintroduce uncertainty into the exempt duties analysis. Accordingly, the PPWO supports the Department’s decision not to address the duties test in this rulemaking.

## **VII. The Department Should Provide a Minimum of 180 Days to Implement Any Changes.**

In 2016, employers around the country were required to review exempt classifications and compensation levels, and make decisions regarding FLSA exempt status while considering a wide variety of operational issues and while attempting to integrate compensation changes into budget and performance review cycles. It was incredibly time and resource intensive, and many employers were still in the final stages of implementing changes when the 2016 Final Rule was enjoined nearly six months after it was published in the *Federal Register*.

Although the current proposal is likely to impact a smaller number of employees, many of the implementation challenges will remain nevertheless. And, because the Department proposes to substantially increase the HCE threshold, those challenges will be faced for employee populations in which the exempt classification decision is more critical from an operational and budgetary perspective. In short, human resources, legal, and operational personnel will need to spend significant amounts of time to ensure compliance with the Final Rule.

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<sup>10</sup> 69 Fed. Reg. at 22,127.

Given these difficulties, the PPWO requests that the Department provide a minimum of 180 days to implement any changes in the Final Rule.

### **VIII. Conclusion.**

The PPWO supports the Department's proposal to rescind the 2016 Final Rule and revert to the 2004 methodology in setting the salary threshold for determining exempt status, yielding a standard salary threshold of \$35, 308/year or \$679/week. The PPWO requests that the Department uncap the percentage of salary threshold that can be satisfied by commissions and nondiscretionary bonuses and that the Department harmonize the types of compensation that can be considered to satisfy the salary thresholds with the regular rate regulations. The PPWO further requests that the Department not increase the HCE threshold. Finally, the PPWO requests that the Department provide a minimum of 180 days to implement any changes.

#### *Of Counsel*

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#### **National Organizations**

Aerospace Industries Association  
Agricultural Retailers Association  
American Bankers Association  
American Bus Association  
American Foundry Society  
American Horticultural Society  
American Institute of CPAs  
American National CattleWomen  
Amusement & Music Operators Association  
Argentum  
Associated Builders and Contractors  
Associated General Contractors of America  
Association of American Veterinary Medical Colleges  
Blue Roof Franchisee Association  
Electronic Transactions Association  
Equipment Dealers Association  
Global Cold Chain Alliance  
HR Policy Association  
Independent Electrical Contractors  
Independent Insurance Agents & Brokers of America

International Association of Amusement Parks and Attractions  
International Festivals & Events Association  
International Foodservice Distributors Association  
International Franchise Association  
International Public Management Association for Human Resources  
International Warehouse Logistics Association  
Job Creators Network  
Manufactured Housing Institute  
Marine Retailers Association of the Americas  
National Association of College Stores  
National Association of Convenience Stores  
National Association of Home Builders  
National Association of Landscape Professionals  
National Association of Manufacturers  
National Association of Professional Insurance Agents  
National Association of Wholesaler-Distributors  
National Association of Women Business Owners  
National Automobile Dealers Association  
National Beer Wholesalers Association  
National Cattlemen's Beef Association  
National Council of Chain Restaurants  
National Lumber and Building Material Dealers Association  
National Marine Distributors Association  
National Parking Association  
National Ready Mixed Concrete Association  
National Retail Federation  
National RV Dealers Association  
National Ski Area Association  
National Small Business Association  
National Tooling and Machining Association  
North American Die Casting Association  
Outdoor Amusement Business Association  
Outdoor Power Equipment and Engine Service Association  
Precision Machined Products Association  
Precision Metalforming Association  
Retail Industry Leaders Association  
Small Business & Entrepreneurship Council  
Small Business Legislative Council  
Society for Human Resource Management  
Textile Care Allied Trades Association  
U.S. Chamber of Commerce  
Window and Door Manufacturers Association  
Wine & Spirits Wholesalers of America

**Regional, State and Local Organizations**

Capital Associated Industries (CAI)  
Colorado Cattlemen's Association  
Colorado Livestock Association

Employers Coalition of North Carolina  
Five Rivers Cattle Feeding, LLC  
Indiana Beef Cattle Association  
Indiana Manufactured Housing Association  
Kansas Livestock Association  
Kentucky-Indiana Automotive Wholesalers  
Louisiana Cattlemen's Association  
Maryland Association of CPAs  
Ohio Cattlemen's Association  
Ohio Equipment Distributors Association  
Ohio Society of CPAs  
Pennsylvania Cattlemen's Association, Inc.  
Pennsylvania Food Merchants Association  
Pennsylvania Manufactured Housing Association  
South Dakota CPA Society  
United Equipment Dealers Association  
Washington Cattle Feeders Association