March 1, 2016

Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Dear Secretary Perez,

I write regarding the Department of Labor's proposed rule (80 FR 38515) on exemptions from the Fair Labor Standards Act's (FLSA) overtime requirements and the impact on our nation's public universities.

The Association of Public and Land-grant Universities (APLU) emphatically agrees that the Department of Labor should increase the minimum wage threshold for FLSA exemptions, but the proposed rule goes too far, too quickly and would have significant adverse consequences on our nation's public universities, students, faculty, and staff. APLU supports changes to the proposed rule as outlined in comments submitted by the higher education community.

APLU also asks the administration to broaden the existing "teaching" exemption in the current regulation, as proposed in the accompanying attachment, to include other positions critical to the educational, research, and outreach missions of institutions of higher education. These additional exemptions are minuscule in the overall context of the national impact of the proposed rule but are critical to avoid serious harm to higher education. As presently drafted, we are greatly concerned the proposed rule would put our nation's public universities under substantial fiscal strain possibly resulting in tuition increases and/or reductions in academic programs. I deeply appreciate the administration's commitment to public higher education and know you share our concern that it remains affordable and accessible.

I write not to repeat the public comments submitted by the higher education community but rather to highlight potential impacts within APLU's membership that we have learned about as campuses continue to study the proposed rule and offer additional options on how to alleviate resulting harm.

As mentioned above, I want to empathically emphasize that APLU is in complete agreement that the salary threshold for exemptions from the Fair Labor Standards Act should be increased. It is long past time for this to occur. However, the magnitude of the 113 percent increase combined with its immediate rather than incremental implementation over a significant number of years is of great concern. If the proposed rule appropriately adjusted for inflation from the current level, which was set in 2004, the new minimum threshold would be $29,172, a 21.5 percent increase.

As you know, our nation's public universities have been under significant fiscal strain given state disinvestment in public higher education. This often results in institutions having to increase tuition, a terrible outcome for all. While the disinvestment trend is unfortunately not just a recent phenomenon, cuts in recent years have been disproportionate. During the six year period of 2006-07 to 2012-13, after adjusting for inflation, four-year public universities experienced state funding cuts of $2370 per student, while tuition and fee revenues increased by only $1940. As indicated by the data, public universities struggling under state budget cuts are working to mitigate the impact on students and families. DOL's proposed rule would undoubtedly make that more challenging by significantly increasing operating costs of universities.

We anticipate the proposed rule would have a far-reaching effect across campuses including positions such as librarians, academic advisers, academic recruiters, residential hall managers, admissions counselors, financial aid counselors, research professionals, graduate students, post-doctoral trainees, student activity officers, textbook managers, accountants, alumni relations professionals, heads of mail services, farm managers, food service managers, agricultural extension agents and other community outreach professionals, etc. Many of these positions are simply incompatible with hourly employment given academic schedules, independent research, growing seasons, and work travel. A researcher may work many hours in a given week because of an NIH or NSF grant deadline and then many fewer hours the following week. Residential life staff may work longer hours in early August/late September as students first move in and fewer hours in weeks afterwards. In fact, during summers, many staff at universities will often take advantage of "summer hours," in which they may only work half days on Fridays. Hours during holiday breaks including an extended "spring break" often require fewer hours of work. This compensates for other times when the position may require longer hours.

The proposed rule also does not take into consideration benefits received by employees, which are usually generous in the public sector. For example, benefits at the State University of New York System make up 55.9 percent of an employee's compensation. At the University of Michigan, benefits are 44.38 percent of compensation for faculty and staff. At George Mason University, benefits are 33.1 percent or 42.9 percent depending on the position.

The examples on estimated costs of the proposed rule below do not include the impact of wage compression. Increases in salaries to one employee often have consequences for salaries of others.

The University System of Maryland's preliminary estimates are an increase in payroll costs between $16 and $40 million annually. The State University of New York Research Foundation estimates that it would annually cost the Foundation nearly $12 million to increase the salaries of the 910 applicable employees. At George Mason University, the estimated cost to provide just five hours of overtime per week to all impacted employees would be $4.77 million in total labor costs, including fringe benefits, annually.

The University of Missouri System estimates an initial cost of $12.6 million to implement and ongoing annual costs of $10-15 million to move applicable employees to the new exempt status. Penn State University estimates it would cost $15 million to bring its 1,780 exempt employees up to the proposed wage threshold.

Some campuses have determined the new rule would impact graduate students who work on research grants. The steady state for graduate education, in particular in the STEM fields, is that many graduate students receive a stipend of around $27,000 in addition to having their tuition paid. For some graduate students, these funds come because of part-time duty as teaching assistants, and they would thus not be affected by the proposed changes to FLSA exemptions. Others, however, are paid from federal research grants such as from the National Science Foundation and National Institutes of Health, and despite taking some advanced classes, may not be distinguishable legally in terms of the work they do from full-time research associates. They are, however, performing their thesis research and learning how to be independent scientists while at the same time working on projects important to the national science agenda. Faculty mentors simply will not have funds to pay overtime available from their research awards, and restricting the necessarily uneven and often extended duration of an experiment will compromise scientific output and student learning, and, even worse, discourage our faculty from even taking graduate students into their laboratories. To not exempt these trainees, as is already being done for medical residents, would significantly setback the creation of the next generation of science leaders. The same situation will also apply to postdoctoral research fellows.

The new proposed wage threshold is well above the $42K salary for postdocs recommended by the National Institutes of Health. The proposed rule would likely mean that grant funding would not fully cover associated labor costs thus requiring institutions to use other revenue to fund research or simply to hire fewer postdocs. For its 496 post-doctoral fellows and scholars impacted by the proposed rule, Penn State estimates an annual cost of $5.6 million to increase salaries to the new threshold. If Penn State instead paid overtime to the scholars and fellows, the cost would be between $10 and $13 million based on an estimate of 15-20 hours of overtime a week. Like medical residents, graduate students and postdocs are furthering their training through these positions.

Universities employ a significant number of part-time professionals whom are interested in the flexibility afforded by such positions. As we read the proposed rule, we think it would severely limit the ability of universities to offer part-time employment because it does not provide for prorating of an annual salary to reflect a part-time schedule. Exempt employees who want reduced or part-time schedules resulting in salaries below the proposed income threshold would present a significant challenge.

I hope these examples are helpful as you consider the impact of the proposed rule on our nation's public universities. I can assure you that APLU is not insensitive to the need to raise the FLSA salary threshold. We support doing so. However, the proposed rule would have a damaging impact on our nation's public universities many of which are struggling to hold down tuition given continued state disinvestment in higher education.

I urge you to broaden existing exemptions in the FLSA to more fully cover universities as proposed in the attached language and make appropriate changes as suggested in the comments provided by the higher education community. Please do not hesitate to contact me if you would like any additional information or if I can be helpful in any other way. Thank you.

Sincerely,

Peter McPherson
President
Association of Public and Land-grant Universities