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DIVISION OF SOCIAL JUSTICE
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Via Electronic Submission (Regulations.gov)

The Honorable R. Alexander Acosta
Secretary
United States Department of Labor
200 Constitution Ave. NW
Washington DC 20210

Melissa Smith
Director of the Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
United States Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Re: Request for Information (RIN 1235-AA20)
Defining and Delimiting the Exemptions for Executive,
Administrative, Professional, Outside Sales and Computer Employees

Dear Secretary Acosta and Ms. Smith:

We write on behalf of the states of New York, California, Delaware, Illinois, Iowa, Maryland, Massachusetts, Vermont, and Washington to comment in response to the Request for Information ("RFI") by the U.S. Department of Labor ("USDOL") regarding the regulations at 29 C.F.R. part 541 (RIN 1235-AA20), which define exemptions from the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") for certain executive, administrative, and professional ("EAP") employees.

The undersigned state attorneys general believe that expansion of the EAP exemption, also known as the "white collar" exemption, would considerably scale back federal worker protections in a manner that will hurt the workers in our states and make our jobs enforcing labor laws harder. As detailed in this comment, we believe that the standard for EAP exemption should be at least as protective of workers—who remain at significant risk of being misclassified as EAP—as the 2016 regulations concerning the EAP exemption promulgated by USDOL (the "2016 Final Rule"),

including retaining a meaningful salary level test and automatic updating mechanism. The 2016 Final Rule was recently struck down by a Texas federal district court,[1] and thus the USDOL rule, including the salary level test, adopted in 2004 remains in effect.

I. Statement of Interest

The undersigned attorneys general have an interest in protecting the workers in our states, advising state labor enforcement agencies, and in many cases, enforcing labor laws. Many signatories have extensive experience ensuring proper payment of wages, including minimum wage and overtime. We all have a shared interest in the well-being of workers nationwide, and multiple signatory state attorneys general have authority to enforce both state labor laws and FLSA.

Based on our collective experience, if USDOL expands the EAP exemption beyond the scope that was to be set by the 2016 Final Rule, it will result in more workers in our states being subjected to EAP misclassification and unlawful exclusion from minimum wage and overtime protections under FLSA. Weakening the bright-line salary level test and requiring law enforcement to rely increasingly on the easily manipulable "duties" test will make it significantly more difficult to investigate and prosecute EAP misclassification, which remains a pernicious and growing problem in our states.

Despite federal and state enforcement efforts, rampant violations of labor laws have continued nationwide. A 2009 study of over 4,000 low-wage workers in New York City, Chicago, and Los Angeles found that nearly 26% of workers were paid a sub-minimum wage, and of the workers who had worked over 40 hours in a week, over 76% were not paid overtime in accordance with FLSA. *See* Nat'l Emp. Law Project, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 20, *available at* http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf. Workers who were not paid on an hourly basis faced even higher risk of violation, with 46% being paid sub-minimum wages and 92% not being paid overtime. *Id.* at 30. In other words, at a time when the 2004 salary level test was in effect, there were extremely high labor law violation rates, and salaried workers—who are most at risk of being misclassified as EAP and deprived of their rights under FLSA—were subject to the highest violation rates of all. Since the 2004 salary level has not increased, despite the increased cost of living over the past 13 years, it is reasonable to assume that the rates of violation revealed in this 2009 study are the same, or worse, today.

The EAP exemption makes minimum wage and overtime protections under FLSA inapplicable to workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). Historically, USDOL has determined whether a worker is a "bona fide" EAP employee using three criteria: (1) the employee must be paid a fixed salary that does not change based on the quality or quantity of work done (the "salary basis test"); (2) the employee must receive at least a minimum specified salary amount (the "salary level test"); and (3) the employee's job must primarily involve duties that are executive (management, supervision,

[1] As discussed, *infra*, at p. 3, the court in *Nevada v. USDOL*, No. 16-cv-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017), struck down the 2016 Final Rule on the grounds that USDOL exceeded its statutory rule-making authority. As further discussed herein, the undersigned attorneys general believe that decision was wrongly decided.

hiring/firing), administrative (office/non-manual work, discretion/judgment), or professional (advanced scientific/academic knowledge) in nature (the "duties test"). *See* 29 C.F.R. § 541.0 *et seq.*

The purpose of the EAP exemption must be understood in the context of the purposes of the overtime laws, which include discouraging employers from requiring employees to work extremely long workweeks, compensating employees for the burden of such workweeks, and encouraging employers to hire more workers and spread employment throughout the workforce. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577–78 (1942). Unlike the workers that the overtime laws seek to protect, bona fide white collar employees have the ability to decide how to get their work done in whatever hours or time is required, and have elevated status—and thus increased bargaining power—due to salaries far above minimum wage, fringe benefits, job security, and opportunities for advancement. *See* Defining and Delimiting the Exemptions for EAP Employees, 81 Fed. Reg. 32,392, 32,400 (2016) (citing 1940 USDOL Report by Harold Stein on EAP exemption); Nat'l Emp. Law Project, *The Case for Reforming Federal Overtime Rules* (Dec. 2014), *available at* http://www.nelp.org/content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf. The danger of defining the EAP exemption too broadly is that, in addition to applying to bona fide EAP employees, it will sweep up workers who are misclassified as EAP—whether inadvertently or in an attempt to evade labor laws—and deprive these workers of minimum-wage and overtime protections.

With these considerations in mind, USDOL's 2016 Final Rule raised the minimum weekly salary level for the EAP exemption from $455 to $913 and created a mechanism for updating the salary level automatically every three years. *See* 81 Fed. Reg. 32,405, 32,408, 32,438. Before the 2016 Final Rule went into effect, it was challenged in a federal district court, resulting in a nationwide order partially enjoining the salary level test. *Nevada v. USDOL*, 218 F. Supp. 3d 530 (E.D. Tex. 2016). In a subsequent opinion and order, the court stated that it invalidated the 2016 Final Rule because the $913 salary level purportedly "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employee's job duties." *Nevada v. USDOL*, No. 16-cv-731, 2017 WL 3837230, at *8 (E.D. Tex. Aug. 31, 2017).

We believe that the district court's opinion is wrongly decided and based on an incorrect interpretation of FLSA and the 2016 Final Rule that ignores the plain text and remedial purpose of the statute, as well as the broad authority of USDOL to implement it.[2] However, in response to the district court's decision, Labor Secretary Alexander Acosta "has decided not to advocate for the specific salary level ($913 per week) set in the 2016 Final Rule," instead issuing this RFI to "determine what the salary level should be." (RFI at 7.)[3] We believe that the 2016 Final Rule

[2] We note that the signatories are not parties to the Texas litigation largely for procedural reasons and have a significant interest in this issue.

[3] The RFI states that USDOL's review of the salary test will focus on "lowering the regulatory burden" consistent with President Trump's Executive Order 13777 on Regulatory Reform, which tasks federal agencies with identifying regulations for repeal, replacement, or modification, including regulations that "eliminate jobs, or inhibit job creation." (RFI at 8.) The 2016 Final Rule does not require modification on the grounds set forth in Executive Order 13777; indeed, the 2016 Final Rule furthers President Trump's job creation goals. As discussed above, an original purpose of the overtime requirement was to create a financial incentive for employers to hire *more* employees rather than requiring existing workers to work longer hours. *See Davis v. J.P. Morgan Chase*, 587 F.3d

fairly considered the comments of stakeholders and struck an "appropriate balance between minimizing the risk of employers misclassifying overtime-eligible employees as exempt, while reducing the undue exclusions from exemption of bona fide EAP employees." 81 Fed. Reg. 32,409. Furthermore, we note that the 2016 Final Rule was the carefully considered product of a two-year deliberative process in which USDOL reviewed more than 270,000 comments from a broad array of constituencies, including unions, worker advocacy groups, small businesses, Fortune 500 corporations, state and local governments, and economists. *Id.* at 32,397.

Accordingly, we urge USDOL to establish an EAP standard, including, but not limited to, a meaningful salary test and automatic updating mechanism, that is at least as protective of workers who are potentially subject to EAP misclassification as the 2016 Final Rule.

II. The Salary Level Test Makes State Labor Law Enforcement More Effective and Efficient (Response to RFI Question 7)

The RFI seeks input on a proposal that eliminates the salary level test entirely and instead relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer. (RFI at 11.) We urge USDOL to reject any such proposal.

The salary level test is essential to meaningful enforcement of FLSA. A salary level test makes it simpler for both workers and law enforcement agencies to identify underpayments of wages. Because enforcement is more difficult without a salary level test, misclassification would be even more pervasive, due to employer and employee uncertainty, as well as intentional abuse by employers. As discussed above, many employers do not pay overtime even with a bright-line test. Law enforcement agencies can more easily identify misclassified workers by clearly knowing which employees are overtime eligible using a salary test. In the absence of this bright-line test, law enforcement agencies must rely solely on a multifactorial duties test that is more susceptible to exploitation. The fact-specific determination required by the duties test forces law enforcement agencies to spend valuable resources gathering facts—interviewing workers, analyzing documents, and taking testimony—in order to assess whether employees were properly classified. If a law enforcement agency determines that a worker should not have been EAP exempt, it then often must engage in a resource-intensive litigation in which these issues of fact will need to be determined and proven.

A clearly defined EAP exemption under FLSA is also critically important to states' enforcement of labor laws. Workers across the country rely on FLSA, and its implementing USDOL rules and regulations, to protect them on the job. Some states have more limited labor protections than those provided under FLSA, and any expansion of the EAP exemption will directly impact workers and employers in these states. Other states have passed their own overtime protections, which in some cases include their own versions of an EAP exemption. These states will also be impacted to the extent that their laws are less protective than FLSA, and because many of these states' laws expressly reference FLSA or look to FLSA for guidance. Accordingly, a clear EAP exemption with a meaningful salary test is required for our states to achieve effective labor enforcement.

529, 535 (2d Cir. 2009). The 2016 Final Rule took this job-creation goal into account in devising the final rule. *See* 81 Fed. Reg. 32,394.

A salary test also facilitates compliance and detection of noncompliance because it creates a clear, bright-line rule for employers. Even for well-intentioned, law-abiding employers, a salary level test is a useful bright line, particularly for small companies that may not have sophisticated employment counsel to advise them on the complexities of the duties test. Further, employees themselves can more easily detect and report misclassification.[4] Indeed, in promulgating the 2016 Final Rule, USDOL estimated that "5.7 million white collar workers who are currently overtime eligible because they do not satisfy the EAP duties tests and who currently earn at least $455 per week but less than $913 per week will have their overtime protection strengthened [immediately] because their status as overtime-eligible will be clear based on the salary test alone without the need to examine their duties." 81 Fed. Reg. 32,393.

With a salary test in place, law enforcement resources can focus on investigating and litigating the proper payment of overtime to employees falling below a salary threshold rather than investigating and litigating whether a given employee satisfies the duties test for exemption, as would be required *in every case* in the absence of a salary test. *See id.* at 32,463 ("The salary level test has historically been intended to serve as an initial bright-line test for overtime eligibility for white collar employees."). If USDOL eliminates the salary test, law enforcement will be forced to undertake a fact-intensive analysis in every instance of suspected violations, and employers would be required to expend resources on this same analysis in monitoring compliance. *See id.* at 32,419–20 (observing that "[g]iven the new standard salary level, there will be 9.9 million fewer white collar employees for whom employers could be subject to potential litigation regarding whether they meet the duties test"). A meaningful salary test, used in conjunction with the duties test, allows law enforcement to assess the bona fide status and bargaining power of employees designated as EAP more accurately, and allows for more efficient and effective enforcement by federal and state law enforcement.

III. A Meaningful Salary Test Is Essential to Protecting Workers from EAP Misclassification (Response to RFI Question 1)

The RFI seeks input on multiple proposals, including retaining the salary level established by USDOL in 2004 ($455 per week) adjusted for inflation (approximately $595 per week). (*See* RFI at 9.) Adopting these proposals would be a large step backwards, as they would significantly increase the number of workers potentially subject to EAP misclassification.

If USDOL expands the EAP exemption by setting the salary level test significantly below $913, the adverse impact on workers in our states would be significant. The population of workers most directly affected by rolling back the 2016 Final Rule's EAP salary threshold to the 2004 level is employees classified as EAP and making salaries between $455 per week ($23,660 annually) and $913 per week ($47,476 annually). USDOL estimated in 2016 that 4.2 million workers perform qualifying duties and have salaries in this range, and another 5.7 million workers do not perform qualifying duties but make less than $913 per week. These 9.9 million workers would all receive additional protection from the bright-line salary test. USDOL observed that these workers are "at particular risk of misclassification," and, indeed, that 732,000 of them were likely already

[4] Establishing a clear, bright-line salary test thus also furthers President Trump's Executive Order 13777 on Regulatory Reform by streamlining compliance with regulations. *See supra* note 3.

misclassified. *See* 81 Fed. Reg. 32,500. Retaining the 2004 salary level would again expose all of these workers to EAP misclassification and deprive them of FLSA protections.

Many of our offices prioritize labor enforcement for low-wage workers, who are particularly vulnerable to exploitation and generally cannot afford their own private counsel. Under the 2004 salary test, many of these workers could potentially be subject to misclassification as EAP exempt. Based on our enforcement experience, we have observed that large categories of employees can be misclassified as EAP exempt, such as crew leaders and supervisors who work alongside janitorial, car wash, retail, construction, and fast-food workers (executive); clerical and office workers (administrative); and medical and dental technicians, film and television production assistants, and mid-level IT employees (professional).

USDOL statistics are consistent with our experience, indicating high rates of misclassification of first-line supervisors in food preparation and service (41%), sales (34%), landscaping (26%), construction and extraction (19%), and other occupational categories. *See* 81 Fed. Reg. 32,464 tbl. 10. This is particularly the case in large cities where higher median wage rates results in higher wages for non-EAP employees. *See id.* at 32,409 ("As we have previously explained when discussing the salary level to be paired with the more rigorous long duties test, the threshold can be of little help in identifying bona fide EAP employees when large numbers of traditionally nonexempt workers in large cities earn more than this amount." (internal quotation marks omitted)).

More generally, state attorneys general regularly see workers who make weekly wages between $455 and $913—including workers in the janitorial, waste processing, transportation and delivery, elder care, and food service occupations—filing complaints at high rates alleging exploitative labor practices, including failure to pay overtime. The fact that these workers are paid above minimum wage does not mean they are free from exploitation; to the contrary, such workers often come to our office precisely because they lack the financial resources and bargaining power that are hallmarks of bona fide white-collar employees. The clear intent of FLSA is to protect these types of vulnerable employees, some of whom may have duties that could be classified (or misclassified) as administrative, executive, or professional in nature, but who nonetheless lack the status and power associated with bona fide EAP capacity. *See* 81 Fed. Reg. 32,413 (observing that "the purpose of the salary level test has always been to distinguish bona fide [EAP] employees from those who were not intended by Congress to come within these exempt categories" (internal quotation marks omitted)).

Accordingly, USDOL should adopt a salary level test at least as protective as the one set forth in the 2016 Final Rule. *See id.* at 32,465 (observing that USDOL findings "underscore[] the large number of overtime-eligible workers for whom employers must perform a duties analysis, and who may be at risk of misclassification as EAP exempt").

IV. A Salary Level of $913/Week Is Consistent with Congressional Intent (Response to RFI Question 5)

The RFI asks whether a $913 salary level "work[s] effectively with the standard duties test or, instead . . . eclipse[s] the role of the duties test in determining exemption status?" (RFI at 10.) The Texas district court, in considering this issue and invalidating the 2016 Final Rule, ruled that

the $913 salary level "makes overtime status depend predominately on a minimum salary level, thereby supplanting an analysis of an employer's job duties" and ignoring Congress's "intent for employees doing 'bona fide executive, administrative, or professional capacity' duties to be exempt from overtime pay." *Nevada v. USDOL*, 2017 WL 3837230, at *8 (E.D. Tex. Aug. 31, 2017). This ruling was clearly erroneous for the following reasons, and should not be given deference in the USDOL's rulemaking process.

First, the court improperly substituted its judgment for USDOL, which comprehensively detailed its rationale and methodology in determining the salary level in the implementing regulations of the 2016 Final Rule. Specifically, USDOL observed that the 2004 salary level ($455) "was too low to effectively screen out from exemption overtime-eligible white collar employees" for a number of reasons, including both inflation and the fact that the 2004 revisions to the EAP standard had weakened the duties test, thus exposing greater numbers of workers to potential misclassification.[5] 81 Fed. Reg. 32,404. USDOL thus concluded that revising the EAP regulations was necessary to "effectively distinguish between overtime-eligible white collar employees who Congress intended to be protected by FLSA's minimum wage and overtime provisions and bona fide EAP employees whom it intended to exempt." *Id.* at 32,393.

We believe that the 2016 Final Rule was reasonable in observing this shortcoming of the 2004 salary level. For example, adjusting the salary level that was in effect in 1975 (and paired with a more rigorous duties test) for inflation results in a salary level of $1,100 (in 2016 dollars), which is significantly higher than the $913 salary level set forth in the 2016 Final Rule. Indeed, from 1958 to 1975, the real value of the salary level associated with the more rigorous duties test was *always* higher than $913. (*See* 81 Fed. Reg. 32,450 & fig. 1.) Indexing the 2004 salary level for inflation results in a salary level (approximately $595) that is significantly less protective than both the pre-1975 levels and the 2016 Final Rule. Thus, while the court relied heavily on the 2004 salary level, we submit that in the long history of FLSA and its EAP exemption, the 2004 level should be viewed as the outlier, not the standard-bearer.

Second, the court incorrectly concluded that Congress, in passing FLSA, "defined the EAP exemption with regard to duties" primarily, and that salary may *only* be used as a secondary "defining characteristic" when determining who performs EAP duties. *Nevada v. USDOL*, 2017 WL 3837230, at *8. Neither "duties" nor "salary" is referenced in the text of FLSA, which states only that "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt, and the Labor Secretary may "define[] and delimit[]" those terms. 29 U.S.C. § 213(a)(1). If Congress had wanted to exempt categorically any employee performing executive, administrative, or professional duties, it easily could have done so—but it did not. Instead, as discussed above, USDOL has for over 75 years defined the term EAP to mean that an employee must (1) be paid on a salary basis, (2) receive a minimum salary amount, and (3) perform a job

[5] "In the [2016] Final Rule, the Department corrects for the elimination of the [more rigorous] long duties test [in 2004] and sets a salary level that works in tandem with the [more easily manipulable] standard duties test [adopted in 2004] to appropriately classify white collar workers as entitled to minimum wage and overtime protection or potentially exempt. [The] standard salary level [of $913] set by the Department . . . is set at the low end of the range of the historical short test levels, based on the ratios between the short test and long test levels, and much lower than the historical average for the short test." 81 Fed. Reg. 32,463.

primarily involving EAP duties. *See* 29 C.F.R. pt. 541. In other words, USDOL "has always recognized that the salary level test works in tandem with the duties tests"—not as a subordinate component—"to identify bona fide EAP employees." 81 Fed. Reg. 32,400. Accordingly, it is well within USDOL's authority and historical practice, and Congress's intent, to adopt a salary test that renders certain employees exempt *even if* they satisfy the duties test.[6]

Third, even accepting the court's flawed premise that the salary test is subordinate to the duties test, it is empirically false that using a $913 salary level makes overtime status depend "predominately" on salary, thereby "supplanting" the duties test. The court relies heavily on the 2016 Final Rule's finding that 4.2 million employees who pass the standard duties test no longer qualify for the EAP exemption, concluding that the 2016 Final Rule must be invalid if it "would exclude so many employees who perform exempt duties." *Nevada v. USDOL*, 2017 WL 3837230, at *8 (citing 81 Fed. Reg. 32,405). But the $913 salary level plainly does not predominate the EAP exemption. The additional 4.2 million workers who cannot be exempt from FLSA overtime and minimum wage protections because of the $913 salary level test are dwarfed, for example, by 78.3 million workers who cannot be exempt because of the salary basis test (*i.e.*, EAP workers must be paid on a non-hourly basis). *See* 81 Fed. Reg. 32,456 (observing that of the 132.7 million workers potentially subject to FLSA and its regulations in Part 541, 78.3 million are hourly workers and thus excluded from the EAP exemption). Similarly, USDOL estimated in 2016 that there are 12.2 million salaried, white collar workers who earn more than $455 per week but are overtime eligible because they fail to meet the duties test. *Id.* at 32,465.[7] Thus, of the three factors determining EAP status, it is clear that the salary basis test and the duties test continue to predominate, and the salary level test does not supplant them even when set at $913.

Accordingly, the 2016 Final Rule's salary level of $913 is consistent with Congressional intent and we urge USDOL to use a salary level at least as protective of workers as this amount.

V. Automatic Updating Is Essential to a Meaningful Salary Level Test (Response to RFI Question 11)

Automatic updating is necessary to ensure that the salary level test remains a meaningful, bright-line test for the reasons set forth above, and that the salary level's effectiveness is not eroded over time as the wages of employees rise with inflation. As USDOL observed in promulgating the 2016 Final Rule, "misclassification of overtime-protected employees occurs more frequently when the salary levels have become outdated by a marked upward movement of wages and

[6] And this was precisely USDOL's intent in adopting a higher salary test to compensate for the weakening of the duties test caused by the 2004 revision to the EAP regulations. *See supra* note 5. This is quite different from an impermissible "salary only" test, which would permit USDOL to exempt workers from FLSA protections based solely on their high salaries, even though they have no executive, administrative, or professional characteristics whatsoever, such as "mechanics, carpenters, or linotype operators." 81 Fed. Reg. 32,446 n. 84. The 2016 Final Rule does not do this; it continues to require a worker's duties to be considered and determined to qualify as EAP if he or she is to qualify for the exemption from FLSA.

[7] Indeed, there are many factors in the EAP analysis that have a greater effect than the increase of the salary level to $913. *See, e.g.*, 81 Fed. Reg. 32,451 (noting that "14.9 million workers do not satisfy the duties tests for EAP exemption and/or earn less than $455 per week" and another 7.4 million are not even subject to a salary test—only a duties test—because they are in certain statutorily enumerated occupations).

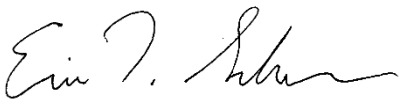
salaries." 81 Fed. Reg. 32,402 (quotation omitted). We need not imagine whether this could happen; the RFI acknowledges that federal labor protections did, in fact, atrophy over time due to failure to update the EAP exemption's salary threshold. In the 1970s, USDOL set "what were intended to be 'interim' salary levels," which, in fact, remained unchanged for nearly 30 years. By that point, "the passage of time had eroded the . . . salary levels below the . . . minimum wage," and thus the salary test "as a practical matter . . . fell out of operation." (RFI at 5–6.)

With the 2016 Final Rule, USDOL "established a mechanism for automatically updating the salary level every three years to ensure it remained a meaningful test for helping determine an employee's exempt status." (RFI at 6–7.) In contrast, the 2004 rule that the RFI proposes retaining did not have such a mechanism. USDOL should ensure that the salary threshold is automatically updated to remain an accurate measure of the line between bona fide EAP employees and non-EAP employees, as was provided for in the 2016 Final Rule. USDOL should not risk letting labor protections erode again due to legislative or regulatory inaction. The signatory states believe that an automatic updating formula should be used that is at least as protective of workers as the one set forth in the 2016 Final Rule.

VI. Conclusion

For the foregoing reasons, the signatory states urge USDOL to refrain from further expansion of the EAP exemption and to adopt a standard that is equally or more protective of workers—who remain at significant risk of being misclassified as exempt from minimum wage and overtime protections—than the 2016 Final Rule, including retaining a meaningful salary test and automatic updating mechanism.

Respectfully submitted,



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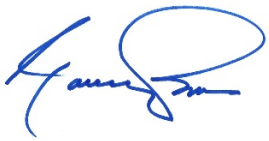

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