



## National Association of Computer Consultant Businesses

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Date: <b>May 17, 2002</b>	Time:	Fax Transmittal
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May 17, 2002

John Morrall  
 Office of Information and Regulatory Affairs  
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 NEOB, Room 10235,  
 725 17th Street, NW  
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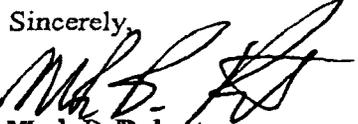
Via Facsimile (202) 395-6974

**Re: Request for Relief from Outdated Regulations**

Dear Mr. Morrall:

The National Association of Computer Consultant Businesses ("NACCB") attaches its comments seeking relief **from** outdated regulations arising under **29** U.S.C. Section 213(a)(17) (commonly referred to as the Computer Professional **Exemption** of the Fair Labor Standards Act).

Thank you for your consideration.

Sincerely,  
  
**Mark B. Roberts**  
 COO & General Counsel

*The Tools to Grow Your Business,  
 the Power to Shape an Industry*

## **Keep the Economic Engine of High-Technology and Computer Dependent Industries Going—the Need to Update the "Computer Professional Exemption" Under the Fair Labor Standards Act**

As explained below, the computer professional exemption (CPE) under the Fair Labor Standards Act (FLSA) needs regulatory updating and clarification.

### **A Bipartisan Congress Originally Fashioned The Computer Professional Exemption**

In 1990, Congress enacted P.L. 101-583, which required the Department of Labor to promulgate regulations that would treat computer programmers, systems analysts, software engineers, **and** other similarly skilled workers as exempt professionals under the **FLSA**. Even **if** these workers were paid by the hour, they would continue to be exempt if their hourly wage rate **was** at least six and one-half times the federal **minimum wage**. The 1990 **law**, which received broad bipartisan support, was promoted by Senators John Kerry **and** David Durenburger who worked with Senators Kennedy and Hatch for passage of the **law**. Senator Kerry best explained the purpose for the law, and how it benefited both employers and employees, in a Senate floor statement emphasizing that "our economy depends greatly on high-technology industries that must remain flexible, responsive and competitive". He addressed how outdated Department of Labor regulations had impeded these goals:

*[T]he provision we have adopted today will help both employers and employees.... [I]n many cases where employees have been prohibited by their employers from working any overtime - because few if any employers will pay time and one half rates at such high levels of compensation - the employees will be able to choose to work some overtime hours at their regular high rates, and they will earn more as a result. And the full range of duties typically performed by these employees will be more broadly defined and updated.*

In 1996, Congress went beyond the 1990 law by adding a specific exemption to the **FLSA** for computer professionals (**29 USC Section 213(a)(17)** as added by P.L. 104-188, The Small Business Job Protection Act). As in 1990, Congress continued to refer to computer systems analysts, computer programmers, software engineers, and "other similarly skilled workers", knowing that it would be **impossible** to define in the statute every "similarly skilled" computer professional existing at such time or in the future. The hourly rate exemption was then fixed at **\$27.63** per hour, the rate that applies today.

### **The Problem**

Because of the significant changes occurring in computer professional occupations and the information technology industry since 1990, and even within the past several years, the proper interpretation of the exemption has become increasingly difficult for compliance oriented employers. The problem **has** been compounded in that regulatory clarification **has** not been provided by the Department of Labor after the 1996 amendments. As explained below, in tune with the corrective spirit of the law, the need for a regulatory update is urgent:

**New Technology Requires An Update.** As America's technology industry has grown at an extremely fast pace in the last decade, there are literally hundreds of new information technology (IT) professional occupations including the creation of Internet and world wide web occupations. As a result, it is important to resolve any doubts about whether these occupations come within the "computer professional" exemption.

**Workers Want Overtime Barriers Removed.** Skilled employees, **many** earning over \$100,000, who want to work overtime may today be denied such work due to the reluctance **of** employers to give **this** opportunity without the certainty that regulatory clarification would provide.

**Employers Need Certainty To Extend Work Opportunities.** Employers cannot extend overtime work opportunities to the computer professionals demanding such **work** given the lack of regulatory clarity under the revised statute. Employers should not be placed in the position of having to prohibit work opportunities their employees are demanding.

**Without Relief Businesses Could Face Draconian Penalties.** **Small** businesses, in **fact** all businesses, face **stiff** penalties (e.g. damages going back two or three years, double damages in certain cases, and **mandatory** attorneys fees) if they accede to their employee's demands by providing overtime under the assumption that particular computer skilled occupations are exempt and later finding out that their honest interpretation **of** the vague exemption was incorrect.

### **Summary of Need for Update and Clarification of "Other Similarly Skilled Workers"**

In 1996, Congress amended the Fair Labor **standards** Act to include a specific exemption to the Act's overtime provisions for computer professionals (29 USC Section 213(a)(17)). The exemption applies to certain named highly-skilled computer professionals as well as to "other similarly skilled worker[s]". Because of the significant changes that have occurred and continue to occur in the information technology industry that dramatically affect related computer professional occupations, there is a clear **need** for the Department of Labor to update the regulations pertaining to the computer professional exemption. In the absence **of** updated regulations that clarify the various aspects of the exemption, computer professionals **are** being denied **work** opportunities they are demanding **and** employers of such professionals are placed in **an awkward** position of either denying additional requested hours **of** work or of acceding to workers demands without having assurance that the requests for **overtime** work **fall** within the exemption.

In the interest of furthering compliance with, and the intent of, the computer professional exemption, as enacted, the Department of Labor should issue updated regulations that recognize the dynamic changes that have taken place within the computer professional community. It is requested that the **Department of Labor** update **and** clarify the computer professional exemption to give specific recognition to the computer professional occupations **falling** within the "other similarly skilled worker" category and to also **give** specific recognition to related "primary duties". An update to such regulations providing additional clarity will benefit both the computer professionals now denied overtime opportunities **as** well as their employers who today **may** error on either side due to lack of specific interpretative guidance.