

PREPARING YOUR NON-PROFIT FOR THE NEW DEPARTMENT OF LABOR OVERTIME RULE

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On May 18, 2016, the U.S. Department of Labor issued its Final Rule increasing the minimum weekly salary level required for exempt employees under the Fair Labor Standards Act (the “FLSA”).

MINIMUM SALARY FOR EXEMPT EMPLOYEES

	Federal – Old Rule	California	Federal – New Rule
Salary Requirement	\$455/week \$23,660/year	\$800/week \$41,600/year (Jan. 1, 2017: \$840/week; \$43,680/year)	\$913/week \$47,476/year (Effective Dec. 1, 2016)
Duties Requirement	The “primary duty” of a exempt employee must fall within the FLSA definition of exempt duties. Exempt employees must be perform exempt duties at least 50% of the time. 29 C.F.R. 541, et seq.	An exempt employee must be “primarily engaged in” job duties which meet the test for the exemption. Under the CA requirement, exempt employees must perform exempt job duties (as defined by the DLSE and case law) more than 50% of the time.	The “primary duty” of a exempt employee must fall within the FLSA definition of exempt duties. Exempt employees must be perform exempt duties at least 50% of the time. 29 C.F.R. 541, et seq.

California wage-hour laws apply to all employers, including non-profits.

- Employer means any person, association, organization, partnership, business trust, limited liability company, or corporation who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.

Source of law: Cal. Code Regs., tit. 8, § 11140, subd. 2(C), (F).

- The FLSA does not apply to all employers.
- The FLSA applies to:
 1. Named Entities;
 2. Enterprises Engaged in Commerce; and
 3. Employees Engaged in Interstate Commerce.

Source: Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 et seq.

NON-PROFIT COVERAGE UNDER THE FLSA: NAMED ENTITIES

The FLSA applies to named entities regardless of whether the entity is public or private or operated for profit or not for profit. The named entities are:

- Hospitals;
- Institutions primarily engaged in the care of the sick, the aged, or the mentally ill or defective clients who reside on the premises;
- Schools for mentally or physically handicapped or gifted children;
- Preschools, elementary or secondary schools, and institutions of higher education; and
- Public agencies.

Source: FLSA, 29 U.S.C. § 203.

A non-profit is an “enterprise engaged in commerce” if it:

1. Engages in commercial activity; and
2. Has annual gross volume of sales made or business done of at least \$500,000.

Source: FLSA, 29 U.S.C. § 203.

What is “commercial activity”?

Commercial activity exists when one is “engaged in ordinary commercial activities in competition with other commercial businesses.” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 293 (1985).

Activities that are charitable in nature are not considered ordinary commercial activities. Examples include:

- Providing temporary shelter;
- Providing clothing or food to homeless persons;
- Providing sexual assault, domestic violence, or other hotline counseling services; and
- Providing disaster relief provisions.

What **counts** toward the \$500,000 threshold?

- Revenue resulting from a commercial activity.
- Unrelated business taxable income (“UBTI”).
 - UBTI is income derived from 1) a trade or business, 2) which is regularly carried on, and 3) which is not substantially related to the performance of tax-exempt functions.
 - UBTI is included because by definition it is not related to the charitable purpose of an exempt organization.

What **does not** count toward the \$500,000 threshold?

- Income that a non-profit organization uses in furtherance of charitable activities is not factored into the \$500,000 threshold.
For example:
 - Contributions;
 - Grants;
 - Membership fees;
 - Monetary and non-monetary donations; and
 - Dues (except for any portion for which the payer receives a benefit of more than token value in return).

EXAMPLE: ENTERPRISES ENGAGED IN COMMERCE

A non-profit animal shelter provides free veterinary care, animal adoption services, and shelter for homeless animals. Even if the shelter takes in over \$500,000 in donations in a given year, because the shelter engages only in charitable activities that do not have a business purpose, employees of the animal shelter are not covered by the FLSA on an enterprise basis.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

EXAMPLE: ENTERPRISES ENGAGED IN COMMERCE

A non-profit organization operates a thrift store in which its employees sell donated items. The thrift store is engaged in commercial activity by selling goods. If the thrift store on its own generates revenue of at least \$500,000 in a year, the non-profit's employees are protected by the FLSA.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

EXAMPLE: ENTERPRISES ENGAGED IN COMMERCE

A non-profit organization operates a sandwich shop. Many of the employees that work in the restaurant are individuals who were recently homeless. Even though the restaurant's operation includes charitable purposes, the restaurant is engaged in ordinary commercial activities as it competes with other restaurants. If it generates revenue of at least \$500,000 a year, the restaurant employees are protected by the FLSA.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

Individual employees of a non-profit are covered by the FLSA if the employees engage in:

- interstate commerce; or
- the production of goods for interstate commerce.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

“Interstate commerce” means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof. Example of interstate commerce include:

- Making out-of-state phone calls;
- Receiving/sending interstate mail or electronic communications;
- Ordering or receiving goods from an out-of-state supplier; and
- Handling credit card transactions or performing the accounting or bookkeeping for such activities.

Source: U.S. Dep’t of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

EXAMPLE: EMPLOYEES ENGAGED IN INTERSTATE COMMERCE

An office manager at a non-profit organization regularly sends e-mails to out-of state suppliers to purchase office materials and equipment. The employee is individually covered by the FLSA and entitled to its protections.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

EXAMPLE: EMPLOYEES ENGAGED IN INTERSTATE COMMERCE

An employee works at a homeless shelter that regularly receives food and clothing donations from corporations located across state borders. The employee's job duties consist of receiving and logging these donations. The employee is individually covered by the FLSA and entitled to its protections.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

EXAMPLE: EMPLOYEES ENGAGED IN INTERSTATE COMMERCE

An employee works at a shelter for domestic violence victims. The employee does not regularly use the telephone or computer for interstate communications and works only with clients from within the state. Because the employee is not engaged in substantial levels of activities involving interstate commerce, the employee is not covered by the FLSA on an individual basis.

Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

The FLSA applies to:

1. Named Entities;

- Hospitals; institutions primarily engaged in the care of the sick, the aged, or the mentally ill or defective clients who reside on the premises; schools and institutions of higher education; and public agencies

2. Enterprises Engaged in Commerce; and

- Enterprises engaged in commercial activity and that have annual gross volume of sales made or business done of at least \$500,000.

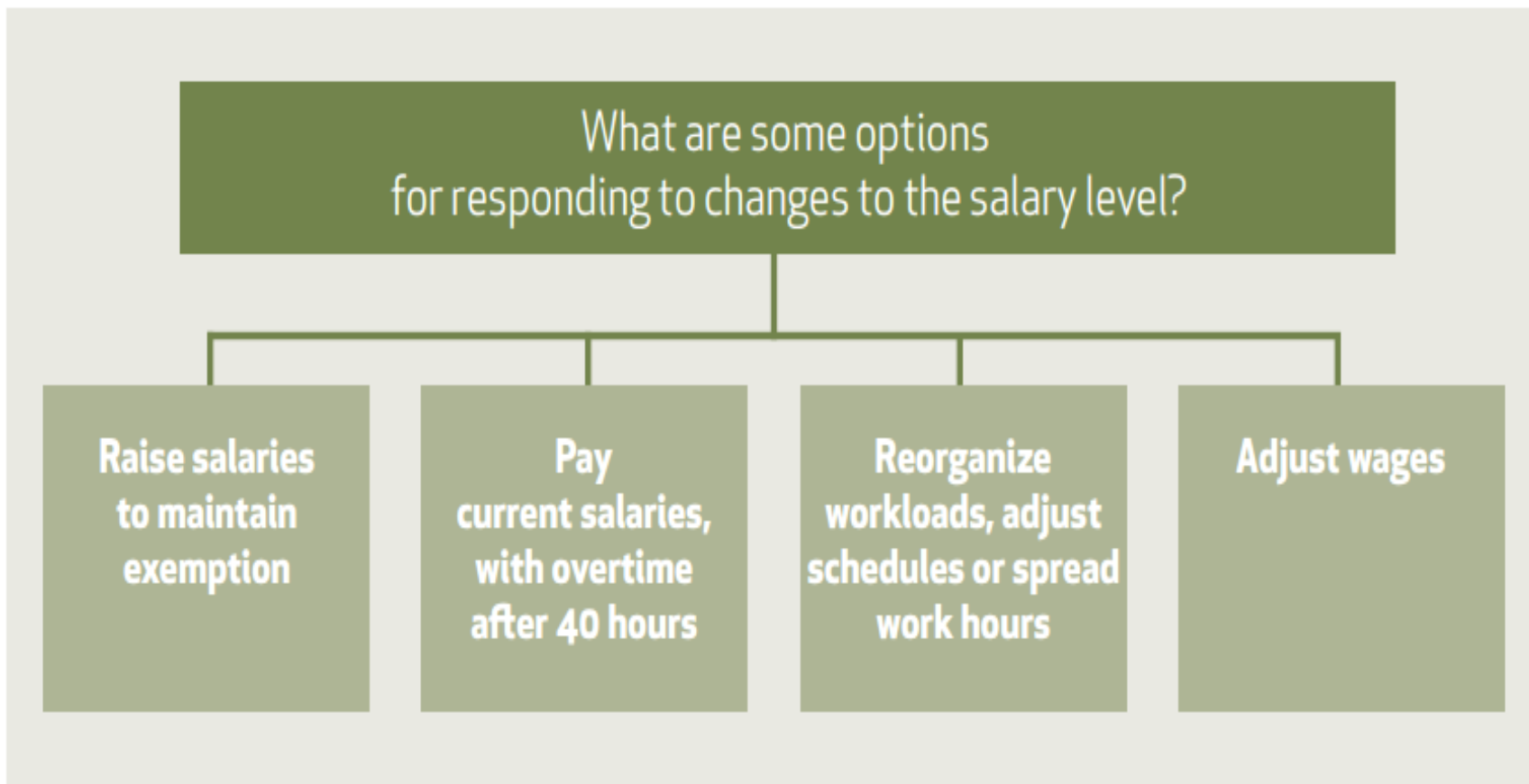
3. Employees Engaged in Interstate Commerce.

- Individual employees engaged in trade, commerce, transportation, transmission, or communication among several States.

Source: FLSA, 29 U.S.C. §§ 201 et seq.

Individual employees engaged in interstate commerce who are classified as exempt in California and who earn annual salaries above the California minimum of \$41,600/year but below the Federal minimum of \$47,476/year by December 1, 2016.

- Effective December 1, 2016
 - Exception: The new rule will not be enforced until March 17, 2019 for medical providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds.
- Increases the salary for exempt employees to \$913/week, or \$47,476/year
 - This applies to part-time workers as well; proration is not allowed.
- Duties test remains unchanged
- Increases highly compensated employees to \$134,004 per year
 - Not applicable in California
- Provides for automatic updating of salary every three years



Source: U.S. Dep't of Labor, *Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act* (May 18, 2016).

- Operations Manager in California
- Job duties qualify her for the administrative exemption under FLSA and CA law
- Earns annual salary of \$45,000
- Regularly works 40 hours or less per week

- Employees who never exceed 40 hours of work in a week are not entitled to overtime under the FLSA.
- Employer could elect not to increase salary.
- But it is important to monitor weekly hours to ensure no overtime.

- Operations Manager in California
- Job duties qualify her for the administrative exemption under FLSA and CA law
- Earns annual salary of \$45,000
- Regularly works 45 hours per week

OPTION 1: RAISE SALARIES TO RETAIN EXEMPTION

- Raise the salary on or before December 1, 2016 to at least \$913/week (\$47,476/year) to maintain the FLSA exemption.
 - Issue: December 1, 2016 is a Thursday. The FLSA measures salary by work week. Do you pay the new weekly salary for the whole week?
- Non-discretionary bonuses count toward the minimum salary level.
- Further adjust salaries as wages increase periodically.
 - In 2019, minimum wage in California will be \$12/hour. To qualify for the exemption under California law, minimum salary must be \$49,920/year.

OPTION 2: MANAGE HOURS

- Ensure employee is not working in excess of 40 hours per week.
- Reorganize workloads, adjust schedules, or spread work hours.
- But overtime will be due in any work week that employee works over 40 hours.

OPTION 3(A): RECLASSIFY TO NON-EXEMPT AND PAY SAME SALARY PLUS OVERTIME

- Pay salary for the first 40 hours of work per week and pay overtime for any hours over 8 in a day and 40 in a week.
 - $\$45,000 / 2080 \text{ hours}^* = \21.63 per hour
 - $\$21.63 \times 1.5 = \$32.45 \text{ per overtime hour}$
- Pay for 45 hours in one week.
 - Regular pay: $\$21.63 \times 40 = \865.20
 - Overtime pay: $\$32.445 \times 5 = \162.23
 - Total pay: $\$1,027.43$ (**\$53,427 annualized**)

* For the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary. Cal. Lab. Code § 515(d)(1).

OPTION 3(B): RECLASSIFY TO NON-EXEMPT AND PAY LOWER SALARY PLUS OVERTIME

30

- Adjust earnings to reallocate between regular wages and overtime so that total amount paid remains largely the same.
 - Reverse engineer the hourly rate: \$18.22
 - Divide the annual salary by the number of weeks in a year (52) to get weekly salary.
 - $\$45,000 / 52 = \865.38
 - Divide the weekly salary by 40 plus 1.5 times the number of overtime hours.
 - $\$865.38 / (40 + (1.5 \times 5)) = \18.22
- Pay for 45 hours in one week.
 - Regular pay: $\$18.22 \times 40 = \$ 728.80$
 - Overtime pay: $\$18.22 \times 1.5 \times 5 = \$ 136.65$
 - Total pay: $\$865.45$ (**\$45,003.40 annualized**)

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Same calculations as 3(A) and 3(B), but pay as hourly rate plus overtime.

- In California, wage statements of non-exempt employees must show all weekly hourly rates plus overtime rates, whether paid by a salary or hourly.
- Employer must accurately record all time worked.
- Meal and rest periods must be provided.

OTHER REQUIREMENTS TO MAINTAIN EXEMPT STATUS: SALARY BASIS TEST

- To be “salaried” means to be paid a guaranteed minimum amount that cannot be reduced due to variations in the quality or quantity of work performed, and is exclusive of board, lodging or other facilities.
- Subject to certain permissible deductions, the employee must receive the full salary for any week where employee performs work, even if less than 40 hours - no requirement to pay for any workweek in which the employee performed no work at all.

DUTIES TEST: EXECUTIVE EXEMPTION

FLSA Regulations	California Wage Orders
<p><u>Primary duty</u> is the management of the enterprise or of a customarily recognized department or subdivision;</p>	<p>Duties and responsibilities involve the management of the enterprise or of a customarily recognized department or subdivision; and</p>
<p>Customarily and regularly directs the work of two or more other employees; and</p>	<p>Customarily and regularly directs the work of two or more other employees; and</p>
<p>Has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion <u>or</u> other change of status of other employees are given particular weight.</p>	<p>Has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring or firing <u>and</u> as to the advancement and promotion <u>or</u> any other change of status of other employees will be given particular weight; and</p>
	<p><u>Customarily and regularly exercises discretion and independent judgment;</u> and</p>
	<p><u>Primarily</u> engaged in duties which meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the FLSA effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-116.</p>



DUTIES TEST: ADMINISTRATIVE EXEMPTION

FLSA Regulations	California Wage Orders
<p><u>Primary duty</u> is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and</p>	<p>Duties and responsibilities involve the performance of office or non-manual work directly related to the management <u>policies</u> or general business operations of the employer or the employer's customers; and</p>
<p>Primary duty <u>includes</u> the exercise of discretion and independent judgment with respect to <u>matters of significance</u>.</p>	<p><u>Customarily and regularly</u> exercises discretion and independent judgment; and</p>
	<p><u>Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity</u> (as such terms are defined for purposes of this section); or <u>Performs under only general supervision work along specialized or technical lines</u> requiring special training, experience, or knowledge; or <u>Executes under only general supervision special assignments and tasks</u>; and</p>
	<p><u>Primarily</u> engaged in duties that meet the test of the exemption. The activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed in the following regulations under the FLSA effective as of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215.</p>



DUTIES TEST: PROFESSIONAL EXEMPTION

FLSA Regulations	California Wage Orders
<p>The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;</p>	<p>Licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or Primarily engaged in an occupation commonly recognized as a learned or artistic profession; and</p>
<p>The advanced knowledge must be in a field of science or learning; and</p>	<p>Customarily and regularly exercised discretion an independent judgment in the performance of duties set forth above.</p>
<p>The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction</p>	





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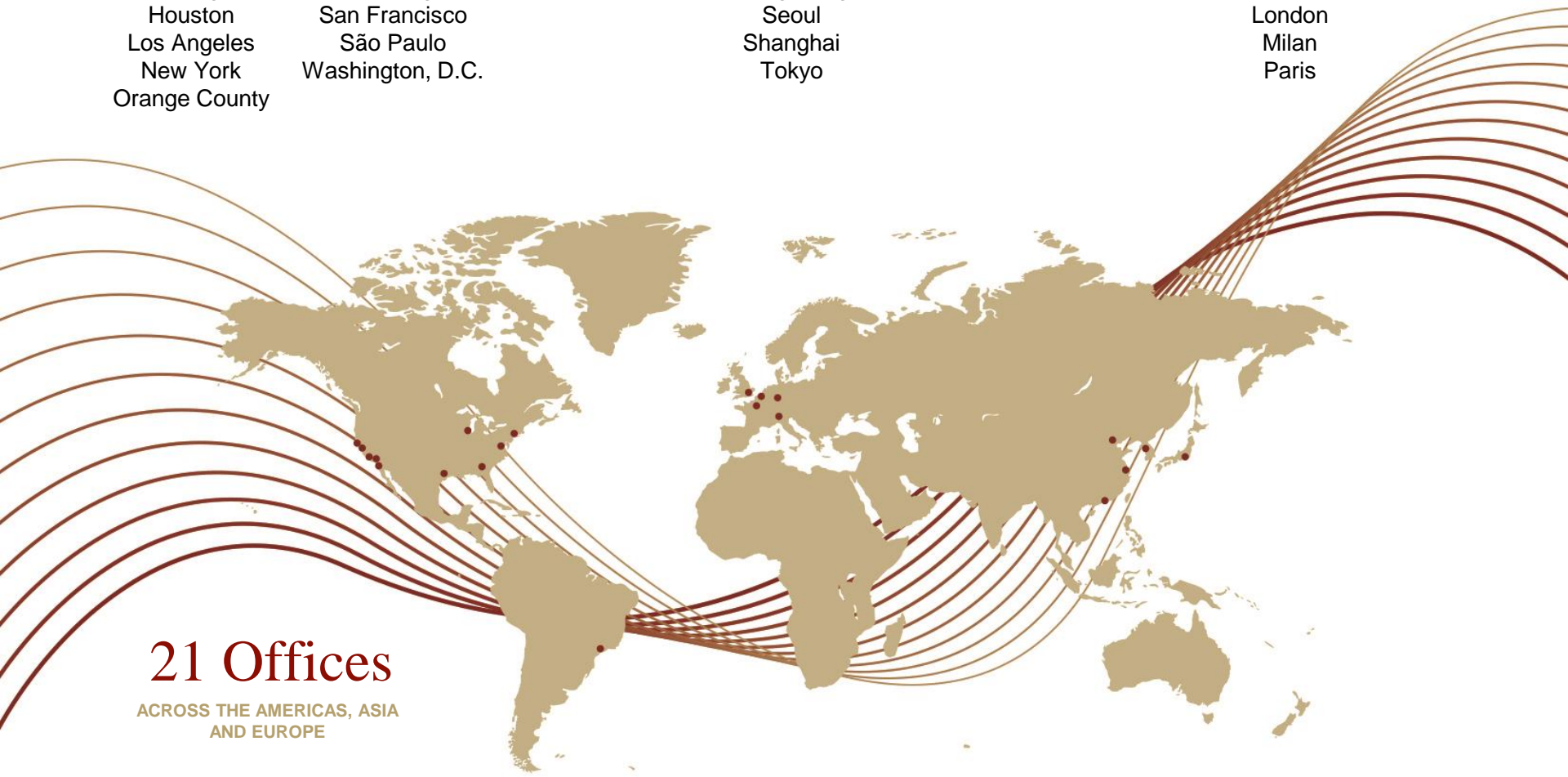
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