September 1, 2015

***VIA ELECTRONIC SUBMISSION* www.regulations.gov**

Mary Ziegler, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, DC 20210

Re: Comment on Proposed Rulemaking Regarding the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (80 Fed. Reg. 38515, July 6, 2015), RIN: 1235-AA11

Dear Ms. Ziegler:

The Clearing House Association L.L.C. ("**The Clearing House**"), the American Bankers Association, the Financial Services Roundtable, the Independent Community Bankers of America, and the Mortgage Bankers Association (collectively, the "**Associations**")[1] welcome the opportunity to respond to the Department of Labor's request for comment on the above-referenced proposed rulemaking. The Associations, which collectively represent a significant portion of the U.S. banking and financial services industry, advance the views of their members on issues of import to them, including through regulatory comment letters.

I. Summary

The Associations support the Department's "commitment to a 21st-century regulatory system," as well as the Department's goal of "simplifying enforcement and reducing litigation." 80 Fed. Reg. 38,516, 38, 531, 38,521-22 (2015). Certain aspects of the proposed regulations, however, when applied to the many industries and areas of the country, cut against those goals.

The Associations believe that with certain changes, the Department's proposed rulemaking can be much more consistent with the Department's goals. Our proposed changes can be summarized as follows:

---

[1] See Annex A for a description for each of the Associations.

- **To the extent that a process for adjustment in the salary levels is adopted, it should account for administrative burdens.** Adjustments on an annual basis as proposed by the Department are logistically impractical. To the extent that the Department adopts adjustments, it should adopt a goal of salary adjustments every five years, using the CPI-U method, with a six-month period after announcement of each adjustment before compliance is required in order for employers to have sufficient time to adapt their internal processes and procedures.

- **The salary level for exemption should be set in recognition of the substantial regional variations in compensation.** The Department's proposal to set the salary level at 40% of a national aggregate salary figure would be extremely burdensome to employers in regions with relatively low costs of living and salary rates. If national aggregate salary must be the bellwether as a matter of practicality, then the percentile should be lower than 40%, and set in a manner consistent with the Department's past practice in a 2004 rulemaking.

- **All bonuses and incentive payments should count toward the salary level**. The aggregate salary data used by the Department to set its percentile of salary level include all bonuses, whether discretionary or not, and without regard to timing. The Department's proposal to ignore discretionary bonuses in assessing whether an employee meets the salary-level test, as well as any bonuses paid less frequently than monthly, contradicts how the salary data it uses are collected. Bonuses and incentive pay of any sort, including those paid on an annual, quarterly, or more frequent basis, should count toward the salary level of all employees.

- **The duties tests for Highly Compensated Employees should be eliminated.** If the Department adopts a standard of 90% of aggregate salary level, there should be no need to examine job duties at such high salary levels. Salary levels for the highly compensated employees also should include all bonuses and incentive pay.

- **Avoid changes to the primary duties test that could increase rather than reduce costly and unnecessary litigation, and that would deprive the public of an opportunity to assess in detail.** The California percentage-of-duties test mentioned by the Department has resulted in widespread litigation, which is directly contrary to an express goal of the Department. Moreover, it would invite unnecessary risks and litigation for the Department to adopt final rules without having submitted any specific proposed rules for comment and analysis.

- **Employers should be given an appropriate amount of time to comply with any rule once final.** The effective date of the final rule should be set with an appropriate regard to the complexity of the administrative tasks that will be required of employers to comply with the rule.

II. Comments on Proposed Regulations Concerning Salary-Level Test

a. Salary Level and Adjustment

i. The Department's proposal to adjust the salary level annually presents serious practical challenges with little gain to employees.

The Department has proposed "a mechanism to automatically update the salary and compensation thresholds on an annual basis using either a fixed percentile of wages or the CPI-U." 80 Fed. Reg. 38516, 38517 (2015). The Department has further requested comments on when a final rule should take effect, how often the salary level should be updated, and what method it should use for updating. *Id.* at 38,541. The Associations understand that other commenters have questioned the need, and indeed even the Department's authority, for doing this. If the Department were to proceed nevertheless to adopt a mechanism for adjustment, the Associations urge the Department to adjust the salary level every five years using the CPI-U method, and to adopt a six-month grace period for the implementation of each adjustment.

Adjusting the mandated salary level every year would be impractical for employers while providing few benefits to employees, particularly in a low-inflation environment. As an initial matter, annual adjustments would not be "based on the best available data," *id.* at 38,541, as inflation data are not published instantly and are often subject to revision, and earnings data are only "publishe[d] quarterly." *Id.* 38,528 n.24. Employers will not be able to anticipate earnings adjustments because "the public will not be able to exactly replicate the weekly earnings and percentiles" used by the Department, *id.*, making annual adjustments nearly impossible. Moreover, employers rarely perform a wholesale adjustment of salary levels on an annual basis. If the Department were to adopt its proposed rule, employers would be forced to undertake administratively complex and costly calculations every year. While imposing significant costs on employers, annual updating would provide minimal benefits to employees under current inflation rates. Adjustments would be relatively modest but administratively onerous.

If the Department continues to believe that adjustments should be implemented, then it should provide for them to be done every five years. This would facilitate the Department's goals of "predictable and incremental changes" that are "based on the best available data" in a manner that is administratively feasible for employers. *Id.* Other regulatory agencies have adopted similar standards for analyzing and adjusting employee compensation. *See* Pay Ratio Disclosure, SEC Release No. 34-75610, at 32 (Aug. 5, 2015) (modifying proposed rule requiring "registrants to identify the median employee every year" to "allow registrants to identify the median employee every three years," as suggested by commenters to "help minimize compliance costs").

Moreover, employers should be given six months to implement any periodic salary adjustment. Implementation of such adjustments would require a complicated and time consuming process.

The Department has asked whether, if it does decide to adopt automatic salary-level adjustments, it should use the CPI-U method or a fixed percentile of salaried workers approach.[2] The

[2] 80 Fed. Reg. at 38,539 ("The Department is not proposing specific regulatory text because it has not chosen the updating methodology and is instead seeking comment on two alternatives—using a fixed percentile of wage earnings or using the CPI-U.").

fixed percentile approach should be rejected as unworkable. The Department has proposed maintaining the salary level at a set percentile of the earnings of full-time salaried workers, not hourly workers. 80 Fed. Reg. at 38,517 & n.1. As the Department acknowledges, the salary level it proposes will result in employers reclassifying formerly exempt salaried workers as non-exempt hourly workers. *Id.* at 38,562. If adjustments were based on a percentile of salaried workers' earnings, the base would exclude the newly excluded hourly workers and thus would represent a pool of increasingly fewer workers. This is both untenable and unrepresentative of actual wages or job duties. The Department noted that it considered using "median earnings for all full-time wage and salaried workers combined (*i.e.*, not just salaried, also workers paid by the hour)," which would not pose this problem, but it dismissed the idea on the ground that "the resulting salary level was too low" with no further explanation. *Id.* at 37,534.

The Department should therefore use the CPI-U method of updating if it chooses to adopt automatic salary-level adjustments. In using such a method, the Department should make clear that, as it has confirmed elsewhere, any salary level adjustments based on the CPI-U should "involve changing the base payment by the percentage change in the level of the CPI," rather than the index point change. U.S. Dep't of Labor, Bureau of Labor Statistics, Frequently Asked Questions, http://www.bls.gov/dolfaq/bls_ques7.htm.

ii. Setting a standard of 40% of a nationwide average salary ignores the wide regional variation in compensation and cost of living, and prevents the exemption from matching applicable job duties.

In its proposal, the Department recognizes that using "nationwide aggregates" can "have impacts that differ by region or industry," *id.* at 38,563, and that the salary-level test must "adequately protect low-wage industries and geographic areas," "particularly in the retail industry and in the South." *Id.* at 38,541. The proposed nationwide salary level runs contrary to the Department's position in this regard and certainly would not protect low wage industries and areas. The Associations urge the Department to adopt a lower salary level, consistent with the approach taken in the Department's 2004 rulemaking, which will enable exemptions properly to align with job duties.

Examination of regional compensation and cost of living variations demonstrates the flaws in the proposed approach based on nationwide data. Based on studies conducted by the Economic Research Institute, with 100% as the national average, pay varies from 84.8% to 119.6%. This stark disparity is made even wider when adjusted for cost of living. The cost of living in Manhattan, for example, is 149% higher than the cost of living in Des Moines, Iowa. By using nationwide data, the Department is proposing to adopt a salary level that is far too high for Des Moines—where pay is lower and a dollar is worth more—and may prevent employers from properly classifying even senior managers as exempt. 80 Fed. Reg. at 38,532 (using too high a percentile of nationwide salary "could have a negative impact on the ability of employers in low-wage regions and industries to the claim the EAP exemptions for employees who have bona fide executive, administrative, or professional duties as their primary duty").

In its 2004 rulemaking, the Department used "earnings data of full-time salaried employees (both exempt and nonexempt) in the South and in the retail sector," *id.* at 38,526, because "[t]he South was determined to be the lowest-wage region," which would avoid the regional pay variation and cost of living issues. *Id.* 38,557. That same rationale continues to apply. The Department can and should correct for regional variations by adopting a percentile of a national salary level lower than 40%.

Moreover, using a higher salary level as a "proxy for distinguishing between overtime-eligible and exempt white collar workers," *id.* at 38,528, without due regard for job duties, would lead to many cases in which the same job in the same workplace would be held by both exempt and non-exempt employees, causing problems in record-keeping and pay administration as well as likely negatively affecting employee morale.

b. Bonuses and Incentive Pay

The Associations support the Department's proposal to "include nondiscretionary bonuses and incentive payments as part of the salary level test," but submit that it does not go enough. The data on which the Department bases its salary test include not only nondiscretionary bonus payments, but also any bonus payments made regularly, regardless of whether they arguably are "discretionary" or not. Similarly, here, to avoid a distortion of the data and to remain consistent with the underlying rationale of the Department's entire approach to the rule, all compensation payments made to employees should be includible. *Id.* at 38,535-36.

The aggregate salary data that the Department is using for its percentile of salary test includes not just wages but also bonuses and commissions, without regard to whether such additional compensation is discretionary.[3] To set a percentile-of-salary threshold based on all bonuses, but then to limit employers to counting only nondiscretionary bonuses in deciding whether specific salaries meet that threshold is not logical or appropriate. If only nondiscretionary bonuses were counted, then the net result in industries such as banking and financial services, which use discretionary incentive payments substantially, would be a distorted set of salary levels for those industries, well above the level set by the Department using all bonuses.

Another reason for including all bonuses in the calculation of salary is to reduce complication and potential litigation. Although the Department offers examples of how to distinguish among types of bonuses, referring to "meeting specified performance metrics" and "bonuses tied to productivity and profitability," *id.* at 38,535, the selection of such benchmarks and their levels is itself discretionary. By introducing "nondiscretionary" into the regulatory text, the Department will only foster more litigation and uncertainty. Moreover, it is administratively difficult to determine incentive pay on a monthly basis, as the Department proposes, *id.* at 38,536, because many companies typically calculate their financials on a less frequent basis. There is no need to limit the inclusion of compensation by frequency of payment.

c. Highly Compensated Employees ("HCEs")

The Associations support the Department's continued endorsement of the HCE exemption. *Id.* at 38,536. In response to the Department's invitation for comments on "changes to the requirements for the use of the HCE exemption," *id.* at 38,537, the Associations urge the Department to

---

[3] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, Glossary, http://www.bls.gov/bls/glossary.htm (defining "earnings" to include "bonuses," "overtime payments," and "commissions, etc."); U.S. Dep't of Labor, Bureau of Labor Statistics, Research Series on Deciles of Usual Weekly Earnings of Nonhourly Full-Time Workers from the Current Population Survey, http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm (earnings data "include any overtime pay, commissions, or tips usually received").

eliminate the duties test for HCEs, and to permit all bonuses and incentive pay to count towards the HCE salary-level test.

In light of the high proposed salary requirement for HCEs—90th percentile of full-time salaried workers—the Department should eliminate the duties test for HCEs. Unlike at lower salary levels, there is no need to inquire into job duties because this extremely high salary level "serves as a better proxy for distinguishing those white collar workers who meet the requirements of the HCE exemption." *Id.* at 38,537. Simply put, employees who make more than $122,148 per year "are at the very top of today's economic ladder," and "would satisfy any duties test." *Id.* at 38,536 (quotation omitted). Eliminating the duties test for HCEs would satisfy the Department's goals of "simplifying enforcement and reducing litigation," *id.* at 38,531, while reducing the administrative burden on both employers and employees of keeping time.

Moreover, as we note above with respect to all other employees, the Department should also confirm that all bonuses and incentive pay count towards the HCE salary-level test. Use of all payments conforms to the Department's stated rationale for the HCE exemption—that such highly paid employees do not need additional protections—as well as the common structure of HCEs' compensation. In the banking and financial services industry, bonuses and incentive pay are important parts of compensation, particularly for HCEs whose bonuses often far exceed their base salaries. The Department should not open a new avenue for litigation over whether such bonuses are "nondiscretionary," as all bonuses are fundamentally discretionary. And there is little reason to preclude annual bonuses because the Department currently permits annual "catch-up" payments to count towards the HCE salary-level test. *Id.* at 38,535. The Department should therefore permit all bonuses and incentive pay to count towards "determining compliance with the standard salary requirement for HCE workers." *Id.* 38,537 n.36.

III. Duties Test

The Department has asked a broad range of questions about the duties tests in its proposed rulemaking but has offered no specific proposals for how it might change the related parts of the existing rule. The Associations believe that the Department should not attempt to issue final rules on those topics without allowing the public the opportunity to study and comment on specific proposals. In particular, the Department should not modify the current primary-duties test. The area of national overtime standards is monumentally important to the economy and the risk of unintended consequences is serious. There is a strong possibility that an ill-crafted or considered rule could cause industry disruption and employment dislocation. Given the importance of these matters, we strongly urge that no final rule be adopted without affording the public an opportunity to comment on the specifics of what is being considered and proposed.

a. The Department should not modify the current primary-duties test. A rigid percentage-of-duties test would only engender undue complexity and litigation, contrary to the goals of the Department.

The Department's stated goal for its proposed rulemaking is "simplifying enforcement and reducing litigation." *Id.* at 38,531. Any application of the California percentage-of-duties test would achieve exactly the opposite result. California is a hotbed of wage and hour litigation, much of it focused on its percentage rule. By California plaintiffs' attorneys' own estimates, "there were 100 wage

and hour lawsuits that preceded [the percentage rule] and 1,000 since."[4] As the percentage rule became established, "California has seen the filing of over 10,000" wage and hour class actions.[5] This includes a $90 million jury award in 2001, which was upheld by the California courts,[6] and a $56.6 million wage and hour class action settlement in 2014.[7] Indeed, 75 percent of all wage and hour settlement dollars in the United States in 2007 were paid in California.[8]

A percentage-of-duties test is particularly problematic in the financial services and banking industry. Many banks operate a significant number of small branches, and they rely on managers to have full accountability for end-to-end operations at the branch, which inevitably will lead them to perform other duties. It would be harder to assess percentages of time spent on a consistently accurate basis without significant supervision or technology commitments, which would still have a margin of error. These difficulties impose significant economic costs that have not been taken into account in the cost-benefit analysis of the proposed rule.

b. Any changes to the primary duties test should be detailed and aired for public comment.

Although the Department has announced that it is "considering revisions to the duties test," it has proposed no regulatory text or concrete alternative proposals. *Id.* at 38,523. If significant changes were imposed without previewing specifics, employers would be unable to provide the Department with comments as to problematic aspects of what it may be considering. Moreover, without the benefit of comments, the Department may not be in a position to conduct the sort of thorough economic analysis of any new proposed primary duties test that is required by Executive Orders 12866 and 13563, prior to publication of the final rule. *See generally Michigan* v. *EPA*, 576 U.S.

---

4 Michael D. Singer, *California Supreme Court Should Use* Sav-On *v.* Superior Court *to Validate Wage and Hour Class Actions*, L.A. Daily J. (June 2004).

5 Michael D. Singer, *Settling Wage and Hour Class Actions in Light of Recent Legal Developments*, Cal. Labor & Employment Bull. 311 (Sept. 2010). *See* Seyfarth Shaw LLP, Litigating California Wage & Hour and Labor Code Class Actions 8 (13th ed. 2013) ("Most litigation in California arises out of . . . [the requirement that] the employee spends more than half of the work time on exempt duties."), *available at* http://www.seyfarth.com/uploads/siteFiles/practices/aa77b980a9da4efcb1f16351de4ecd79_LitigatingCaliforniaWageandHourClassActions2011.pdf; *id.* at 17-18 (because of California's percentage rule, "there has been significant litigation" over exempt status).

6 *See* Singer, *California Supreme Court*, *supra*.

7 Stephanie Plancich, et al., NERA Economic Consulting, Trends in Wage and Hour Settlements: 2015 Update 14 (2015), *available at* http://www.nera.com/content/dam/nera/publications/2015/PUB_Wage_and_Hour_Settlements_0715.pdf.

8 *Id.*

___, slip op. at 1-15 (2014) (emphasizing the importance of conducting cost-benefit analysis prior to issuing new regulations).[9]

IV. Effective Date of the Final Rule

Effective implementation of the Department's rules across the national economy will be a huge undertaking. Without adequate time for planning and implementation, there is a danger of significant disruptions to employees as well as employers. The reality is that at least 9 to 12 months from the issuance of the final rule to the time for required compliance would be essential to allow for adequate implementation by employers. When the Department adopts its rule, whose details—such as the complex rules governing incentive pay—are currently unclear, employers will be forced to analyze how the new standards apply to their workforces, and then to design and implement complicated and costly new payroll systems and practices. They must also introduce new rules and protocols for compensating and tracking hours of many newly non-exempt employees, id. at 38,518, while also attempting to maintain a flexible workplace that permits employees to use electronic devices. Id. at 38,522. Moreover, the Department has indicated that in setting initial salary levels, it will "likely rely on data from the first quarter of 2016," which will not be published until mid-2016; employers will require months from then to develop and adopt appropriate policies. A rushed implementation could lead to software glitches and misclassification, which would not further the Department's goals of "simplifying enforcement and reducing litigation." Id. at 38,531.

*   *   *

[9] At the close of its discussion of the duties test, the Department sought comments on whether inserting additional examples in the regulation concerning banking and financial services would be "useful in determining exempt status." 80 Fed. Reg. at 38,543. We do not believe that expansion would be useful.

The Associations thank the Department for the opportunity to respond to its request for comments. If you have any questions, please feel free to contact any of the undersigned below.

Respectfully submitted,

John Court
Deputy General Counsel
The Clearing House Association
(202) 649-4628

Pete Mills
Senior Vice President, Residential Policy and Membership Engagement
Mortgage Bankers Association
(202) 557-2700

Cristeena G. Naser
Vice President, Center for Securities, Trust & Investment
American Bankers Association
(202) 663-5332

Rich Foster
Senior Vice President & Senior Counsel for Regulatory and Legal Affairs
Financial Services Roundtable
(202) 589-2424

Christopher Cole
Executive Vice President and Senior Regulatory Counsel
Independent Community Bankers of America
(202) 659-8111

cc: Dr. David Weil, U.S. Department of Labor
Theodore O. Rogers, Jr., Sullivan & Cromwell LLP

Annex A

The Associations

The Clearing House

Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. See The Clearing House's web page at www.theclearinghouse.org.

American Bankers Association

The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits and extend more than $8 trillion in loans.

Financial Services Roundtable

As advocates for a strong financial future™, Financial Services Roundtable (FSR) represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

Independent Community Bankers of America

The Independent Community Bankers of America(r), the nation's voice for 6,400 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. ICBA members operate 24,000 locations nationwide, employ 300,000 Americans and hold $1.4 trillion in assets, $1.1 trillion in deposits, and $900 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

Mortgage Bankers Association

The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of

the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.