September 25, 2017

Via Federal eRulemaking Portal - http://www.regulations.gov.

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

Re: Comment on Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (82 Fed. Reg. 34,616, July 18, 2017), RIN: 1235-AA20

Dear Ms. Smith:

The Clearing House Association L.L.C., the Financial Services Roundtable and the Mortgage Bankers Association (collectively, the "**Associations**")[1] welcome the opportunity to respond to the Department of Labor's above-referenced request for information. 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 President's and the Department's "Regulatory Reform Agenda" of simplifying and streamlining burdensome regulations "with a focus on lowering regulatory burden." 82 Fed. Reg. 34,616, 34,617 (July 26, 2017); Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Mar. 1, 2017). The Associations believe that each of its comments

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

below is fully consistent with these goals. Specifically, our comments are addressed toward simplifying, rather than complicating, the task that employers must face in making decisions about hiring and compensation, while appropriately providing the overtime rights called for by federal law.

The Associations' responses to the Department's request for information can be summarized as follows:

- **Use a uniform salary level to promote simplicity and reduce administrative burden.** Any disparate salary levels, applicable to different sized employers or regions or exemptions or otherwise, would be difficult and burdensome to administer, directly contrary to the goals of Executive Order 13,777. A uniform salary level will enable employers in the banking and financial services industry—which operates nationwide with branch offices across the country—to operate and manage their businesses with a lower regulatory burden by administering straightforward, company-wide compensation systems.

- **Permit all bonuses and incentive payments to count toward the salary level.** The aggregate salary data that have traditionally been used by the Department to set its salary level include all bonuses, whether discretionary or not, and without regard to timing. Similarly, bonuses and incentive pay of any sort, regardless of whether discretionary or not and including those paid on an annual, quarterly, or more frequent basis, should count toward the salary level of all employees. The 2016 Rule's provision limiting counting of bonuses to 10% of non-discretionary bonuses was unrealistic and contradictory of the treatment of all bonuses in setting the salary level.

- **Avoid automatic updating to the salary level.** The Department arguably does not have the authority to adopt automatic updating. Even if it had such legal authority, the Department should instead continue its policy of periodically reviewing and updating its regulations by notice-and-comment rulemaking to take into account economic conditions and the views of employers and employees. Automatic updating guarantees regulatory burden, yet there is no guarantee that in the future it would even be needed. The Department has a statutory responsibility to use its judgment, and an automatic system of updating runs contrary to that.

- **Revise the tests for Highly Compensated Employees.** There should be little need to examine job duties at salary levels above $100,000, which is the salary threshold the Department adopted in its 2004 rulemaking. The Department should therefore adopt a presumption that such highly compensated employees are overtime exempt, and also apply a simplified duties test. Salary levels for highly compensated employees should also include all bonuses and incentive pay to provide an accurate measure of total compensation.

- **Maintain the longstanding salary-level test.** The Department should avoid changes to its policy of pairing a reasonable salary-level test with the standard duties test, which would invite uncertainty and litigation. Eliminating the salary-level test in favor of expanded duties tests would force employers to undertake unnecessary and burdensome, employee-by-employee analysis, which is contrary to Executive Order 13,777.

- **Permit part-time employees to satisfy a prorated salary-level test.** Requiring part-time employees to satisfy the salary-level test based on full-time salaries results in an inequity between full-time and part-time employees. Permitting a pro rata salary-level test for part-time employees will especially promote expanded employment in the banking and financial services industry, which employs many part-time employees performing exempt work in branch offices. Prorating is also consistent with the often-stated societal goal of promoting increased employee work flexibility and work-life balance, by removing disincentives for employees who may need to take part-time status during their careers.

II. The Department's Overtime Regulations Should Not Contain Multiple Salary Levels or Different Standards for Different White-Collar Exemptions.

In its request for information, the Department asked whether its overtime-exemption regulations should "contain multiple standard salary levels" that differ by "size of employer," geography, or each particular exemption. 82 Fed. Reg. at 34,618. In accordance with the President's directive to simplify and "lower[] regulatory burden," *id.* (citing Exec. Order No. 13,777), the Department should adopt and maintain a uniform salary level.

Non-uniform salary levels would be difficult and burdensome to administer, which is directly contrary to the goals of Executive Order 13,777. Multiple salary levels based on size of employer, location or other factors would force employers to develop new, complex compensation systems to determine whether any particular employee's exemption status has changed. There would need to be constant updating as employees move geographically or change positions, and as employers grow or shrink. Non-uniform salary levels would also produce inequitable pay disparities where employees performing identical work may be paid differently based on slight differences in location or employer size.

The administrative burden of multiple salary levels would particularly affect the banking and financial services industry, which includes companies that operate on a multi-state basis, with branch offices across the country. Instead of administering straightforward, company-wide compensation systems, banks would be forced to develop costly separate systems for each geographic area in which they operate. In addition, it is unclear how one would determine the "size of employer" for a small branch that is part of a much larger company.

The Department also asks whether its overtime-exemption regulations should contain different salary levels for each particular type of exemption. 82 Fed. Reg. at 34,618. This too would needlessly complicate the task of setting compensation, particularly because the

work of some individuals can arguably fall within multiple exemption categories, *e.g.*, the professional and administrative exemptions.

III. All Bonus and Incentive Pay Should Count in the Salary Level Test.

Although the Department's proposal to retain the rule permitting "non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level," 82 Fed. Reg. 34,618, is sound, it should be expanded. As a matter of economics and logic, there is no reason why the Department should not permit all bonuses and incentive payments to count toward the salary level, regardless of whether they arguably are "discretionary" or not. Moreover, a simpler standard of this sort would ease enforcement regulatory burden. *See* 82 Fed. Reg. at 34,618 (citing Exec. Order No. 13,777).

Permitting all bonuses and incentive payments to count toward the salary level would be consistent with the Department's longstanding practice for calculating salary generally. In its prior rulemakings, the Department has used aggregate salary data for its percentile of salary test, which includes not just wages but also bonuses and commissions, without regard to whether such additional compensation is discretionary.[2] To set a percentile-of-salary threshold based on all bonuses, but then to limit employers to counting only a small fraction of non-discretionary bonuses in deciding whether specific salaries meet that threshold, is not logical or appropriate. This distortion is particularly acute in industries such as banking and financial services, which use discretionary incentive payments substantially.

Another reason for including all bonuses in the calculation of salary is to reduce complication and potential litigation. It can be difficult to distinguish between "discretionary" and "non-discretionary" bonuses. For example, a bonus for meeting pre-set performance targets may seem non-discretionary, but the selection of such benchmarks, their levels, and, indeed, an employer's funding of a bonus pool, are arguably discretionary. The Department also should not limit the inclusion of bonus or incentive compensation by the timing or frequency of payment. It is administratively difficult to determine incentive pay on a monthly basis; many companies typically calculate their financials on a less frequent basis.

Limiting commissions to 10% of the salary level would create another unjustified distinction in treatment of employees, between inside salespeople who would be subject to these limits and outside salespeople who are not. Outside salespeople performing exempt work are not subject to a salary-level test, *see* 29 C.F.R. § 541.500(c), whereas inside salespeople—who are paid primarily on commission— are subject to the test. If commissions were limited to 10%, then inside salespeople would only have a fraction of their compensation counted towards the salary level. As a result, inside salespeople may be classified as non-exempt despite performing the same work and earning the same amounts as exempt outside salespeople.

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[2] *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").

IV. The Department Should Not Adopt Automatic Updates for Salary Level.

In its request for information, the Department asks whether the salary level should "be automatically updated on a periodic basis." 82 Fed. Reg. at 34,619. In accordance with applicable law and Executive Order 13,777, the Department should not adopt automatic updating and instead should continue its practice of using its judgment based on the circumstances at the time, in periodically reviewing and updating the salary level by notice-and-comment rulemaking.

In the first instance, the Department arguably does not have the authority to adopt automatic updating, and thus adopting it could well invite further protracted controversy. The language of the Fair Labor Standards Act permits the Department to "define[] and delimit[]" the meaning of the "executive, administrative, or professional" overtime exemptions "*from time to time* by regulations of the Secretary." 29 U.S.C. § 213(a)(1) (emphasis added). It does not explicitly permit automatic updating without any action from the Department.

Automatic updating also arguably violates the Administrative Procedure Act ("APA"). Whenever the Department seeks to change its overtime regulations, including those regarding salary levels, it must engage in the notice-and-comment process. 5 U.S.C. § 553. Automatic updating could be held to violate the APA by enabling the Department to modify its regulations without engaging in notice-and-comment rulemaking.

As a practical matter, even if the Department has the legal authority to adopt automatic updating, it should not do so because it is inconsistent with Executive Order 13,777. The decision whether to alter overtime eligibility standards is one best made as a matter of judgment assessing circumstances at the time. To adopt an automatic updating would not take into account the state of the economy, or the views of employers or employees, and is therefore a poor process for creating public policy that affects millions of people. Automatic updating will also be administratively burdensome for businesses, which would be required constantly to conduct complex and costly wholesale adjustments of salary levels. While impractical and burdensome for employers, such updates will provide few benefits to employees, particularly in a low inflation environment. The Department should instead continue its practice of periodically updating the salary level by notice-and-comment rulemaking.[3]

V. The Department Should Limit Any Duties Test for Highly Compensated Employees.

Under the Department's 2004 rulemaking, "if an employee earned at least $100,000 a year he or she needed to satisfy only a very minimal duties test for exemption" from overtime requirements. 82 Fed. Reg. at 34,617 (citing 69 Fed. Reg. 22,112, 22,172–74 (Apr. 23, 2004)). In light of the high salary requirement for such "highly compensated employees"

[3] In its 2016 rulemaking, the Department adopted automatic salary level adjustments to take place every three years. 81 Fed. Reg. 32,391, 32,393 (May 23, 2016). The Department recognized that annual adjustments would be unworkable and chose every three years. If, despite the strong arguments against automatic updating, the Department were to proceed with automatic updating (and we urge that it not do so), consistent with Executive Order 13,777's "focus on lowering regulatory burden," 82 Fed. Reg. at 34,618, we believe that no such process should be required more than every five years.

("HCEs"), *id.*, there seems little need for a detailed duties test for such employees. If the Department thinks it cannot eliminate the duties test, we suggest that it at least adopt a presumption that all HCEs are overtime exempt and a simplified duties test for HCEs and consider simplifying the duties test for HCEs.

The August 31, 2017 decision from the Eastern District of Texas invalidating the 2016 overtime rule held that a salary test alone for all employees would be unlawful; however, it did not directly address HCEs, which represent a small fraction of the total workforce. *Nevada* v. *U.S. Dep't of Labor*, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017). If the Department feels unable to eliminate the duties test for HCEs entirely in light of the court's ruling, it could still effectively limit the test by adopting a presumption that HCEs are overtime exempt. The Department could also simplify the duties test for HCEs. For example, it seems unnecessary to subject HCEs and employers of HCEs to the uncertainty of requiring both that the primary duty includes performing office or non-manual work and that the employee "customarily and regularly performs" at least one of the exempt duties or responsibilities of exempt employees. In the context of HCEs, it should suffice to require only that the primary duty include performing office or non-manual work. Limiting the duties test for HCEs would satisfy the Department's goals, under Executive Order 13,777, of simplifying enforcement and reducing litigation, while reducing the administrative burden on both employers and employees of keeping time. 82 Fed. Reg. at 34,617–18. As the Department found in 2004, such a "high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties." 69 Fed. Reg. at 22,172 (internal quotation marks omitted). By the Department's own findings, the current duties test for HCE provides few benefits to employees, and its elimination would enable the Department to "focus on lowering regulatory burden." 82 Fed. Reg. at 34,618 (citing Exec. Order No. 13,777).

The Department should also permit all incentive pay to count towards the HCE salary level. In the banking and financial services industry, incentive pay is an important part of compensation, particularly for HCEs. Ignoring incentive pay thus presents a distorted view of employee compensation, which may result in unnecessary application of the standard duties test and litigation. The Department should therefore include all incentive pay in calculating the HCE salary level to accurately measure employee compensation, and reduce the administrative burden of unnecessarily applying the standard duties test. 82 Fed. Reg. at 34,618.

VI. The Department Should Not Eliminate the Salary-Level Test.

The Department's proposal of a "test for exemption that relies solely on the duties performed by the employee" would result in expansions of duties standards that would inevitably increase administrative burdens and could well result in increased litigation, which is not consistent with Executive Order 13,777's "focus on lowering regulatory burden." 82 Fed. Reg. at 34,618. Rather, the Department should continue to apply a reasonable combination of salary-level test, coordinated with a streamlined standard duties test.

The standard salary-level test gives employers certainty to set budgets and plan for the future. A "duties-only test," conversely, would require employee-by-employee "examination of the amount of non-exempt work performed," which is uncertain and would vastly increase the regulatory burden. *Id.* A "duties-only test" could also lead to inequitable

results. For example, without any salary-level test, an employee could be paid minimum wage but nevertheless be classified as overtime exempt.

The fact-specific nature of assessing and categorizing the number of hours spent performing exempt and non-exempt tasks would also result in increased administrative burden and litigation, and is contrary to Executive Order 13,777. Many financial services companies 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 lead them to perform other duties. It would be difficult 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. California, for example, which has adopted a percentage-of-duties rule, is a hotbed of economically unproductive wage-and-hour litigation, much of it focused on the percentage rule.[4] Moreover, a focus on the "outdated" production/administrative dichotomy for an industrial economy is ill-suited for the modern, service-based economy, particularly in the financial sector. 82 Fed. Reg. at 34,617 (quoting Exec. Order 13, 777).

The Department should instead continue its 2004 policy of pairing a reasonable salary-level test with a practical standard duties test. In its 2004 rulemaking, the Department adopted a bright-line test that "excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry." 82 Fed. Reg. at 34,617. For employees above this threshold, the Department should continue to apply its "standard duties test [that] d[oes] not limit the amount of non-exempt work an exempt employee could perform." *Id.*

VII. The Department Should Permit Part-Time Employees to Satisfy the Salary-Level Test on a Pro Rata Basis.

Under the Department's 2004 Rulemaking, the salary of part-time employees performing exempt work must satisfy the full-time salary-level test to be overtime exempt. 69 Fed. Reg. at 22,171. This results in an inequity between full-time and part-time employees performing the same work. The Department should permit part-time employees to satisfy the salary-level test on a pro rata basis based on the number of hours they work per month.

Permitting a pro rata salary-level test for part-time employees could very well spur increases in employment in the banking and financial services industry. The banking and financial services industry employs many part-time employees performing exempt work in branch offices across the country, and requiring these employees to satisfy the same salary-level test as full-time employees limits employers' ability to hire and flexibility. For example, an employer may be forced to reduce headcount instead of reducing hours if the reduction in hours will affect employees' exempt status.

Prorating the salary-level test will also promote employee flexibility and reduce the administrative burden on employees, consistent with Executive Order 13,777. Many

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[4] *See, e.g.*, Seyfarth Shaw LLP, Litigating California Wage & Hour and Labor Code Class Actions 8 (17th ed. 2017) ("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/dir_docs/publications/CAWhitePaper2017.pdf.

employees seek to take part-time status at some point in their careers, such as after having children or when caring for an elderly parent. Rigid adherence to salary levels for full-time employees may limit their ability to do so. Under the Department's 2004 Rulemaking, when employees who are exempt convert to part-time employment with a prorated salary that no longer satisfies the full-time employee salary threshold, their employers must convert them to non-exempt status. Among other things, the employees would need to be trained to record time. When they returned to full-time status, they would then need to be reconverted. This is a needless and confusing burden. It also may be vexing to the employees, both because of the administrative complications and also as a matter of their standing within the organization. As the Department previously recognized, "employees are attached to the perceived higher status of being in exempt salaried positions, and value the time flexibility and steady income that comes with such positions." 80 Fed. Reg. 38,516, 38,521 (July 6, 2016). By assessing employees who go part time with administrative burden and loss of status, employees may be deterred from doing so. By contrast, prorating salary levels for part-time employees would remove this disincentive and promote workplace flexibility.

The Associations thank the Department for the opportunity to respond to its request for information. If you have any questions, please do not hesitate to contact any of the undersigned below.

Respectfully submitted,

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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 http://www.theclearinghouse.org.

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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. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.