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

RE: Request for Information: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees under the Fair Labor Standards Act; RIN 1235-AA20

Dear Ms. Smith:

The American Bankers Association (ABA)¹ appreciates the opportunity to respond to the above-referenced Request for Information (RFI) by the Department of Labor (Department) as part of the Department's efforts to review the impact of the changes to the salary level for the executive, administration and professional (EAP) and highly compensated employee (HCE) exemptions adopted in its 2016 final rule. That rule has now been invalidated by the Eastern District Court in Texas.² The RFI serves as a precursor to rulemaking to determine what the salary level should be, with a focus on lowering regulatory burden in accord with Executive Order 13777.³

We are participating with other organizations on a related comment letter. Our responses in this letter focus on bank employers, particularly small community banks. Over 70 percent of our members have assets under the \$550 million threshold used by the Small Business Administration to define small banks.

ABA believes that any new rulemaking process should be guided by three fundamental tenets.

- First, consistent with the Executive Order, the Department should make every effort to simplify what is already a very complicated rule that engenders much costly litigation.
- Second, the Department should adhere to its historical position that the purpose of the salary level test is to serve as a gatekeeper; i.e., the salary level should be set at a level at which the employees below it clearly would not meet any duties test.⁴ The 2016 final rule did not meet this purpose.
- Third, the Department should acknowledge that the workplace is dynamic and that both employees and employers need to the flexibility to adapt.

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

² *Nevada v. U.S. Dep't of Labor*, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

³ 82 Fed. Reg. 34,616, 34,617 (July 26, 2017); Executive Order No. 13777, 82 Fed. Reg. 12,285 (March 1, 2017).

⁴ Since at least 1940, the Department has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees." 69 Fed. Reg. 22,122, 22.165 (April 23 2004).

DISCUSSION

1. The Department should update the salary level by applying the 2004 methodology to current salary data.

The RFI asks whether the Department should update the current salary level by adjusting it (1) for inflation or (2) using the 2004 methodology. As discussed below, we believe the 2004 methodology is by far the superior mechanism for making adjustments to the salary level.

The Department has historically set the salary level to serve as a screening mechanism reflecting the wage data of the lowest-wage region and the lowest-wage industry of the country. In 2004, the Department based the salary level on the 20th percentile for salaried employees in the South and in the retail industry, an increase from the 10th percentile to address the change from the short/long test structure with their differing duties. Only in the 2016 final rule did the Department adopt a salary level that operated as a *de facto* salary-only test, eclipsing the duties test.

Updating the salary level for inflation seemingly provides a simple mechanism for adjustment. However, inflation measures include components other than wages, making an “apples to apples” comparison difficult if not impossible. The Department itself has recognized that using a mechanical adjustment for inflation could result in an inflationary impact or cause job losses.

Accordingly, by accounting for the differences in salary levels across the country as well as the differences in wages across industries, ABA believes the 2004 methodology achieves the better result both for employees and employers.

2. The Department should adopt a uniform salary level for the EAP and HCE exemptions.

The RFI seeks input on whether there should be multiple salary levels for the exemptions based on the size of employer, geography or each particular exemption. Our members believe that simplification should be the fundamental driver of any revisions to Part 541; and the complexity and burden of implementing and maintaining multiple salary levels is inherently inconsistent with this goal. In particular, varying salary levels would be problematic for the banking industry.

- Many banks currently, or in the future may, provide services in more than one state; and it is not unusual for bank personnel to operate out of more than one regional office in different states. The new systems needed to administer multiple salary levels would be extremely costly and burdensome, as would the requisite monitoring of individual employees to assure that the proper salary level is applied (i.e., what do you do when an employee moves from one bank location to another).
- Branch managers who are responsible for top-to-bottom operations at their branches may qualify for more than one of the EAP exemptions. Differing salaries within the EAP exemptions would require them to account for time expended on duties of the separate exemptions, an administrative burden both for the employee and the employer.
- Basing salary level on the size of the “company” would be problematic for an industry comprised of multiple smaller branches or organizations within larger companies.

In each instance above, multiple salary levels would create significant new complexities and burdens, all of which are inconsistent with simplification and burden reduction. Accordingly, ABA supports a uniform salary level for the EAP and HCE exemptions with no changes to the current duties tests.

3. All forms of compensation should be used to determine whether the salary level has been met.

The RFI seeks input on whether an adjustment to the salary level should incorporate the bonus provisions contained in the 2016 final rule. These provisions permitted employers to include in the salary calculation up to ten percent of non-discretionary bonuses that were provided on at least a monthly basis. As we stated in our comment letter on the proposal, while ABA supports the concept of including additional compensation, we find the limitations of the bonus provision inconsistent with the methodology used by the Department to establish the salary level.

The Department itself already includes wages, bonuses and commissions in the calculation of its percentile of salary test, and makes no distinction as to whether bonuses are discretionary or non-discretionary.⁵ It is inconsistent for the Department to include all forms of compensation in *its* determination, while denying to employers the same basis for their determination of whether the salary level is met.

This asymmetry particularly affects bank employers, who are substantial users of discretionary incentive payments. Bank employers often provide additional compensation less frequently than monthly because bonuses generally are tied to productivity, revenue generation, profitability, and other larger picture and longer-term business results; banks typically calculate their *financials* less frequently, and thus *bonuses* are provided less frequently. Because of these limitations and the complexities of the requisite monitoring, many of our members did not take advantage of the bonus provision.

This distinction between salary and bonuses also flies in the face of how employees and employers value compensation. It should make no difference to an exemption analysis whether the total compensation of an employee performing exempt duties is comprised of salary only or salary plus bonuses. From the employee's point of view, at the end of the year what matters is the total compensation, regardless of the mix. Employers similarly value compensation in terms of total compensation, and the regulatory scheme should reflect that reality. Because the salary level serves as a mechanism to screen out non-exempt employees, it is difficult to see why the precise manner in which the employer attributes salary and bonus payments should make a difference as to the exempt status of an employee.

Accordingly ABA believes that all forms of compensation should be included in the salary calculation, frequency and amount notwithstanding, reflecting the real world experience of how employers and employees view compensation.

4. The salary level should be adjusted *only* through the notice and comment process.

The RFI seeks input on whether the salary level should be automatically updated on a periodic basis. ABA believes for two reasons that all salary adjustments should be made using the notice and comment procedure of the Administrative Procedures Act, thereby providing affected parties the opportunity to provide input into the determination.

⁵ See, U.S. Department of Labor, Bureau of Labor Statistics, Glossary, defining "earnings" to include "bonuses," overtime payments," and commissions, etc." available at <http://www.bls.gov/bls/glossary.htm>; U.S. Department of Labor, Bureau of Labor Statistics, Research Series on Deciles of Usual Weekly Earnings of Nonhourly Full-Time Workers from the Current Population Survey, earnings data "include any overtime pay, commissions, or tips usually received," available at http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm.

First it is unclear that the Department has the statutory authority to establish an automatic update process. The Fair Labor Standards Act provides that the Department may “define[] and delimit[]” the meaning of the “executive, administrative, or professional” exemptions “*from time to time by regulations of the Secretary*” [emphasis added].⁶ The Department recognized its lack of authority to index the salary level in its 2004 rulemaking, and there has been no legislative action in the interim that would alter that conclusion.

Second, an automatic update process fails to provide for comments by stakeholders or consider current economic conditions. Indeed, it is inevitable that an automatic update will occur during an economic downturn, thus potentially exacerbating the effects of a weak economy. For example, consider the negative impact if an automatic update had occurred during the financial crisis.

For these reasons, ABA opposes automatic updates and believes adjustments to the salary level should be made only through the notice and comment process.

5. The Department should retain the current “salary plus duties” structure for determining eligibility for overtime exemptions.

The RFI seeks input on whether the Department should eliminate the salary level test and provide for only a duties test to determine an employee’s eligibility for an exemption from overtime. ABA opposes a duties-only test. The duties tests for the various exemptions are far more susceptible to subjective interpretations as witnessed by the recent enormous increase in FLSA litigation. A restructuring of the Department’s longstanding model of “salary plus duties” would – in the absence of a screening mechanism – we believe result in more rigid duties tests leading, in the worst case, to strict percentage of time rules for exempt and non-exempt work. This, in turn, would lead to far more burdensome recordkeeping requirements and even more FLSA litigation. The current situation in California which has adopted such a model portends the future of litigation should the Department eliminate the salary level test.

For these reasons, ABA believes that a duties-only test would increase burden for bank employers, a result that is wholly at odds with the goal of reducing burden.

6. Bank Employer Responses to 2016 Final Rule and Injunction

As predicted in our comment letter on the 2015 proposal, our members, particularly our small community bank members, anecdotally report that they expended an inordinate amount of time and effort to examine the compensation of their existing workforce, and review their duties given a very short time frame in which to become compliant.

This effort included very difficult decisions about whether they could, given their economic circumstances, raise salaries to the \$913/week level or convert exempt employees to non-exempt status. Communicating to formerly exempt employees, who sometimes had been in an exempt status for many years, made this situation all the more difficult, burdensome and time-consuming. Once the exemption decisions were made, companies then had to determine how to recoup, if possible, the additional costs for increased salaries or overtime, often by limiting benefits for and incentive payments to newly non-exempt employees. Moreover, employees had to be trained on how to track their hours, limitations on the use of devices after hours, and limitations on community involvement, a longstanding staple of community banks. Officers at one community bank said they were concerned about how to apply the new standards in the case of an employee being stopped in the grocery store by a customer who had a question. What should they tell the employee to do? These kinds of concerns played out in myriad situations.

⁶ 29 U.S.C. § 213(a)(1).

After the injunction was issued just days before the December 1, 2016 effective date of the final rule, many of our members anecdotally report that they retained the increases in salary for exempt employees, but they did not generally revert newly non-exempt employees back to exempt status.

7. Impact on Employees

The RFI seeks input on positions that previously had traditionally been exempt but were impacted by the \$913/week salary level of the 2016 final rule. For community banks, those positions include Branch Manager, Accountant, Credit Analyst, HR Generalist, Network Administrator, Teller Operations Supervisor, Financial Service Advisor, Account Managers, Loan Officers, and Teller Managers. For most of these positions, the employees would have satisfied the executive exemption duties test. However, because they were employed in average- or low-wage regions of the country, the banks for economic reasons could not raise their salaries to \$913/week.

We also note that for previously exempt employees, their morale suffered when they became non-exempt, as did their flexibility in the workplace. Despite the fact that the status changes had nothing to do with their performance, employees viewed becoming non-exempt as a demotion, even after the communication efforts of their bank employers. Parents and other caregivers lost the flexibility to make up work outside regular hours. Additionally, bankers often participate in community events and meet with community organizations outside of regular hours, a practice that had to be carefully considered and often curtailed. Similarly, part-time employees who were exempt because their part-time salary exceeded the salary level lost their flexibility. We urge the Department to take into consideration the need for flexibility for employees and employers when undertaking its review of the current rule.

CONCLUSION

ABA appreciates the opportunity to respond to the Department's RFI and to participate in the process of updating the salary level test for exemptions from overtime under the FLSA. As discussed above, we believe that the Department should continue to use the 2004 methodology as a mechanism for updating the salary level test and that there should be a single uniform salary for the EAP exemptions. Like the Department, employers should be permitted to include all forms of compensation in the determination of whether an employee has met the salary level requirement. We believe the Department should retain the existing exemption components of "salary level plus duties" with no changes to the duties tests. Finally, we strongly believe the salary level should be adjusted only through notice and comment rulemaking.

We look forward to working with the Department as it reviews the current salary level. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



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