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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: Proposal Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees
80 *Federal Register* 38515, July 6, 2015, RIN 1235-AA11

Dear Ms. Ziegler:

The American Bankers Association (ABA)¹ is responding to the request for comment by the Department of Labor (Department) on the above-referenced proposal.² Specifically, the proposal would raise the salary level test for eligibility for the executive, administrative, and professional (EAP) and highly compensated employee (HCE) exemptions from the requirement to receive overtime pay under the Fair Labor Standards Act (FLSA). The proposal would further establish a mechanism for an automatic annual adjustment to the salary threshold. The proposal also seeks input on possible changes to the duties tests for the EAP and outside sales exemptions, and whether the Department should provide additional examples for the computer employee exemption.

We are participating with other organizations on related comment letters. Our comments in this letter focus on the impact of the proposal on bank employers, particularly small community banks, and on how that impacts the ability of these banks to serve their customers and communities. Approximately 73 percent of our members have assets under the \$550 million threshold used by the Small Business Administration to define small banks.

SUMMARY

The high salary level the Department has proposed would, contrary to Congressional intent, eviscerate the impact of the duties tests to assess eligibility for overtime. Moreover, adoption of the 40th percentile alternative for adjusting the salary level, as discussed below, would eventually render the duties tests meaningless. The proposed salary level fails to address the significant differences in wage rates and cost of living across the country, leading to markedly different consequences for bank employers and their resources and ability to serve customers, and would do so solely as a result of location. Accordingly, ABA strongly urges the Department to maintain an approach to salary level that is consistent with the approach taken in the Department's 2004 rulemaking, which will address bank employers' concerns about regional salary variations. The Department should not make any revisions in the duties test without proposing

¹ 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.

² 80 *Fed. Reg.* 38516.

specific regulatory language, allowing for meaningful public comment on the Department's proposals. Bank employers should have the opportunity to evaluate proposed changes and provide input about the impact on their business. Any changes to the duties test without presenting those changes for specific public comment would call for a subsequent round of public comment before finalizing any such changes.

Our key comments can be summarized as follows:

- **The increase in the proposed salary level does not comport with the purpose and objective of the EAP exemptions in the FLSA.** The proposal would transform the salary level from its historical role as a screening device into a far more substantive part of the exemption tests. Because the Department has proposed to set the salary so high, many bank employers, particularly those in low-wage regions, will be forced to reclassify as nonexempt employees who easily satisfy the relevant duties tests.
- **The salary level test must take into account the impact on geographic regions with lower costs of living and wage rates.** At the high salary level proposed, the failure to address regional wage differences results in a salary test that no longer serves to distinguish meaningfully between employees who do not need overtime protections and those who do. The failure to consider regional differences in the cost of living will have dramatically differing impacts on this sector – not based on whether a particular position should be eligible for overtime compensation – but solely as a result of the cost of living in a community. In the 2004 revisions, the Department set the salary level at the 20th percentile using “earnings data of full-time salaried employees (both exempt and nonexempt) in the South,” because “[t]he South was determined to be the lowest-wage region,” precisely to avoid disproportionate impacts based solely on geography. The Department should maintain use of that same methodology.
- **The impact on community banks in low-cost areas will be significant.** We have provided numerous examples of the negative impact on our members and their communities that are the result solely of location. Exempt employees who are converted to nonexempt status commonly perceive the change as a significant demotion with many negative consequences, such as having to track all of their time and the likely loss of the ability to structure their time to address family needs as well as on their ability to interact in a wide variety of community activities, an important element of how bank employees in management positions support their communities and customers. These and many other limitations when imposed on employees who were previously exempt, may well make them feel less trusted and less valued by the bank, and inhibit the community involvement of the bank and themselves.
- **The salary level should *not* be updated annually.** Updating the mandated salary level each year would be wholly unworkable for bank employers while providing few benefits to employees. With each annual adjustment, banks would be required to reassess the exempt status of individuals within their organizations. Even limiting adjustments to every five years would pose serious dislocations, although at a reduced level than an annual adjustment.
- **The percentile alternative based on BLS data is hopelessly flawed.** Of the two alternative mechanisms for an automatic update of the salary level, the use of a fixed percentile of wages using data compiled by BLS is inherently flawed from a statistical perspective. As salaried exempt workers are converted to hourly nonexempt workers, those hourly workers will no longer be part of the BLS survey, thus leading to a smaller base of workers with increasingly higher salaries, creating a ratcheting effect unrelated to the whole compensation structure of the business. This is building a dysfunctional process into the compensation structure. The CPI-U method of updating is a less harmful approach to a bad idea.
- **Any changes to the duties tests must be made with specificity through the notice and comment process.** Because the proposal contains no regulatory language concerning the primary duty test, bank employers are unable to determine the potential on their businesses and therefore are unable to offer meaningful comment on what ideas the Department might have in

mind or how any particular changes would affect the ability of banks to conduct their business and serve their customers. ABA most strongly urges the Department **not** to incorporate any changes to the duties tests in the final rule. Nor do we believe that changes to the current duties standards are warranted.

- **DOL should provide a minimum of nine months for compliance with any final rule.** This amount of time is critical to allow for adequate implementation by employers, which will include evaluating the impact of the rule on employee classifications, systems changes, and the delivery of customer service.

DISCUSSION

A. Salary Level

1. The dramatic increase in the proposed salary level does not comport with the purpose and objective of the EAP exemptions in the FLSA.

The proposal would establish a new salary level test for consideration of the EAP and computer exemptions at the 40th percentile nationwide of all salaried workers based on data compiled by the Bureau of Labor Statistics (BLS). The Department has indicated that the final rule will incorporate 2016 BLS data, which it projects to be \$970 per week or \$50,440 annually, more than double the current salary level of \$455 per week or \$23,660 annually. This salary level is higher than minimums set under *any* state laws – more than \$10,000 higher than that of California and more than \$15,000 higher than that of New York, two of the states with the highest costs of living. The proposal would also increase the salary level for the HCE exemption from \$100,000 to a projected level of \$122,148 in 2016.

The Department justifies this dramatic increase in the salary level as a means to simplify the application of the duties tests by reducing the number of employees who could potentially satisfy the duties tests. Indeed, the proposal indicates that the new salary standard would reduce the number of individuals eligible for the exemptions by 6.3 million salaried employees.³

The Department further asserts that that the proposed 113 percent increase in the salary level test is necessary to adjust for the 2004 revisions that eliminated the stricter long duties test.⁴ As a result of using a single duties test, the Department contends that approximately 85 percent of the salaried employees who earn more than \$455 per week currently fail one of the duties tests. Therefore, the current salary test “is only screening from exemption approximately 15 percent of salaried employees.”⁵ To address this impact from the 2004 changes, the proposal introduces the new concept of relying more on the salary level test than the duties test to determine exempt status, because adjusting the salary level is necessary to account for “the absence of a more rigorous duties test.”⁶

³ 80 *Fed. Reg.* at 38529.

⁴ 80 *Fed. Reg.* at 38517.

⁵ 80 *Fed. Reg.* at 38529. This discussion suggests that the Department has specific information reflecting misclassified salaried employees under the existing EAP duties tests. If the Department indeed does have such information, we urge the Department to direct its activities toward enforcing the current regulations with respect to employers who are failing to honor their obligations under the FLSA, rather than doubling the current salary level for compliant organizations, which will have to deal with the attendant business disruption, employee relations problems, and new regulatory standards.

⁶ *Id.* at 38531.

ABA believes this view is without merit. The primary duty test has existed in the FLSA regulations for over forty years. While the 2004 revisions removed the long test, the primary duty test (previously referred to as the short test) existed well before 2004 and has been consistently interpreted in case law.⁷ The Department's suggestion that the primary duty test became less rigorous in 2004 is simply not accurate.

ABA strongly believes that reducing consideration of the longstanding exemption duties tests by introducing an inflated salary level is at odds with the purpose and objective of Section 13(a)(1) of the FLSA as well as regulations that have existed for many years. The Department has long recognized that the purpose of the salary level is to "provid[e] a ready method of *screening* out the obviously nonexempt employees" [emphasis added].⁸ The proposal, by contrast, would transform the salary level from its historical role as a screening device into a far more substantive part of the exemption tests. Moreover, because the Department proposes to set the salary so high, many bank employers, particularly those in low-wage regions, will be forced to reclassify as nonexempt, employees who easily satisfy the relevant duties tests. This would lead to employees in the same organization doing the same job being classified as both exempt and nonexempt. These results are contrary to the longstanding purpose of the salary level test.

The high salary level the Department has proposed would, contrary to Congressional intent, eviscerate the impact of the duties tests to assess eligibility for overtime. Moreover, adoption of the 40th percentile alternative for adjusting the salary level, as discussed below, would eventually render the duties tests meaningless. For these reasons, the Department should continue to use the same salary methodology as in its 2004 rulemaking.

2. The salary level test must take into account the impact on geographic regions with lower costs of living and wage rates.

In the proposal, the Department recognizes that there are significant variations in the cost of living and wage rates in different parts of the country. Nonetheless, while acknowledging that a single salary standard across all parts of the country for both the EAP and HCE exemptions creates disproportionate impacts, the Department states that for the sake of simplicity, a single salary level at \$50,440 (\$122,148 for the HCE exemption) is the proposed course of action.⁹ ABA could not disagree more. As discussed below, this dramatic increase will fall disproportionately on workers in cities and states with lower costs of living and will cause many bank employees – who are currently classified as exempt and who clearly satisfy the relevant duties tests – to be newly classified as nonexempt.

At the high salary level proposed, the failure to address regional wage differences results in a salary test that no longer serves to distinguish meaningfully between employees who do not need overtime protections and those who do. This is because that level of compensation – \$50,440 – has dramatically different meanings based on the cost of living in any particular market area. The proposed standard may be simple, but bank employers – particularly community banks – in all but urban areas are finding that the proposed salary level will adversely impact a substantial number of historically exempt classified employees.

As the salary threshold has been examined and updated by the Department over time, the agency has worked to balance simplicity and cost-of-living differences across the country. As acknowledged in the proposal, when the salary standard was increased from \$250 per week to \$455 per week in 2004, the Department set the salary level at the 20th percentile using "earnings data of full-time salaried employees (both exempt and nonexempt) in the South," because "[t]he South was determined to be the lowest-wage

⁷ 69 *Fed. Reg.* at 22185-86.

⁸ *Id.* at 22122, 22165.

⁹ In its proposal, the Department asserts that the salary-level test must "adequately protect low-wage industries and geographic areas," "particularly in the retail industry and in the South." 80 *Fed. Reg. Id.* at 38541. In fact, the proposed salary level does neither.

region,” precisely to avoid disproportionate impacts based solely on geography.¹⁰ By contrast, the current proposal deviates widely from that historical norm.

a. The impact on community banks will be significant.

The community banking industry demonstrates the flaw behind the “one size fits all” salary standard. The failure to consider regional differences in the cost of living will have dramatically differing impacts on this sector – not based on whether a particular position should be eligible for overtime compensation – but solely as a result of the cost of living in a community.

For our members, the increase in the salary level cannot cure the unwarranted misapplication of the duties test that will result from the inflated salary level. We have found across the industry that individuals who clearly satisfy the duties test – and in many cases for many years – are not currently paid salaries which exceed \$50,440 annually and yet are well compensated in light of the cost of living in their particular communities. As the Department itself has recognized, the agency is introducing a dynamic by which large numbers of employees who satisfy one or more of the duties tests are nevertheless treated as nonexempt due to the implementation of a new inflated salary level. Because of these widely different impacts, a single national salary level is simply inappropriate.

As the examples below show, community bank employees, such as Branch Managers, Risk Managers, Compliance Officers, and employees holding a wide range of other critically important jobs, will be adversely impacted by the proposed salary level in many parts of the country. Employees in high cost-of-living areas will remain exempt, while employees with comparable duties in lower cost-of-living areas will be converted to nonexempt.

- For example, consider community bank Branch Managers, who oversee operations at discreet community bank branches and typically have four years of related banking experience. Based upon salary survey data,¹¹ those employees are paid a median base annual salary of \$67,200 in San Francisco, \$61,400 in Washington D.C., and \$61,100 in Bridgeport Connecticut. However, employees performing exactly the same job duties are paid at a median level of \$45,400 in Akron Ohio, \$46,300 in El Paso Texas, and \$47,100 in Grand Rapids Michigan, a significant difference driven by local costs of living. Branch Managers in high cost of living markets will exceed the proposed salary threshold, but others will become nonexempt. At one of our typical bank members in the Midwest, the Vice President of Human Resources, Retail Banking Manager, Compliance Officer, Credit Analyst, IT Manager, and a number of lenders, all of whom clearly satisfy the duties tests, are paid less than the proposed salary level and would be converted to nonexempt status. Similarly, at one of our typical bank members in the Northwest, Branch Managers, a Human Resource Manager, an Operations Support Manager, a Commercial Loan Officer, and an IT Manager would lose exempt status. These are but a few examples of bank employees who clearly satisfy the duties tests yet who would be impacted solely because the proposal is blind with regard to the differences of geography.
- We have examined Check Processing Manager positions, also common in the industry, typically requiring seven years of experience and extensive supervisory responsibilities and qualifying for the executive exemption. In high wage markets, their salary level is \$60,400 in New York City, \$60,500 in San Jose, California, and \$54,800 in Seattle, Washington, and these employees remain exempt under the proposal. However, median annual compensation in Little Rock Arkansas is \$45,800, \$46,400 in Chattanooga, Tennessee, and \$45,200 in Brownsville, Texas. Again, exemption status for key banking positions which satisfy the duties test are markedly impacted by the failure to recognize differences in cost of living in a variety of locales.

¹⁰ 80 *Fed. Reg.* at 38557.

¹¹ Kenexa CompAnalyst Market Pricing Database.

Community banks in low-cost areas of the country will experience disparate impacts under the proposal.

- For example, one bank in the Midwest currently has 317 exempt employees, all of whom satisfy the current EAP duties tests. Under the proposed inflated salary standard, 144 of those employees or 45 percent will become nonexempt. Many of these employees have held management roles for many years. A number of our other members in the Midwest indicate that they will have to convert from 17 to 32 percent of their employees to nonexempt status, solely as a result of the salary increase.
- Similarly, a very small financial institution in the South, where the per capita income is just over \$18,000 annually, has four employees. Only the CEO would satisfy the proposed salary level. The other three employees whose average salary is approximately \$33,000 (a good salary considering the per capita income number and the local cost of living) would become nonexempt regardless of their duties.
- In one state in the deep South, the per capita income ranges from approximately \$13,945 annually to \$33,170, with a statewide average of \$20,618 according to the Census Bureau. One of our members reports that average Branch Manager compensation is approximately \$32,000, which is consistent with the higher income ranges in the state. Another survey of 29 institutions in the same state indicates that the percentage of currently exempt employees who would be converted to nonexempt status ranges from 2 percent to 57 percent, with a number of banks in the range of 25 to 29 percent. In another case, almost 11 percent of a bank's employees would become nonexempt, unless the bank were to raise those employees' pay by 26 percent to bring them up to the proposed salary level.
- In another Southern state with per capita income statewide of \$25,183, a survey reveals that the percentage of exempt bank employees that will have to be converted to nonexempt ranges from 7.3 percent to 87.5 percent, with the higher ranges in the rural areas of the state. The gap between these employees' average annual salaries and the proposed salary level ranges from \$7,290 and \$24,445. The projected annual cost for overtime pay if the proposal is adopted would range from \$20,000 to \$239,244. For another bank, 18 percent of employees would become nonexempt under the proposal, unless the bank were to raise compensation for those employees by \$440,000 to bring their compensation above the new proposed level.

i. Employee morale will suffer significantly.

Bank employers know all too well from their recent experience converting mortgage loan officers to nonexempt status that there clearly will be significant detrimental impacts on employee morale. Employees commonly perceive the shift from hourly to salaried status to be a promotion with many benefits – flexible schedules without needing to track time, the ability to balance better the competing demands of work and family life, more opportunities for career advancement, and different incentive and benefit packages. Indeed, one community banker reported that the shift to exempt status is the occasion for a group promotion party and a community announcement. Exempt employees prize their flexibility to control their schedules so long as they “get the job done” and consider themselves on a management track within the bank.

By contrast, if the salary level is adopted as proposed, the newly nonexempt employees would likely view the change as a significant demotion. Negative consequences include having to track all of their time, including lunch and other breaks, and the likely loss of the ability to structure their time to address needs such as attending teacher conferences or other school activities or scheduling doctors' appointments, not to mention flexibility for involvement in community activities, for which bankers are well known. Some employees may lose the opportunity to work from home or remotely because bank employers may face difficulties tracking time in such situations. Banks may also be reluctant to provide nonexempt employees

with mobile devices or may restrict their use, because employers will have to account for any time that employees spend on such devices. Nonexempt employees may no longer be eligible for career training events that occur after hours if limiting overtime costs is a concern. All of these limitations when imposed on employees who were previously exempt, may well make them feel less trusted and less valued by the bank.

Another consequence of the increased salary level may be that bank employers may have both exempt and nonexempt employees performing exactly the same duties within the organization or even within a single location. We have heard from banks operating in adjacent states with widely different per capita incomes that the half of their currently exempt employees (performing exactly the same jobs) will have to become nonexempt solely because of the lower salaries in the more rural state. This is a situation ripe for employee demoralization.

ii. The money to pay for increased salary costs has to come from somewhere.

Contrary to the Department's expectation, because newly nonexempt employees are eligible for overtime does not mean that their salaries will necessarily increase.¹² Our community bank members in low-wage, low cost-of-living regions will generally not be able to raise salaries to the proposed salary level. Community banks are currently facing intense competitive pressures as well as a low interest rate environment.¹³ They are also facing significant increases in bank regulatory compliance costs, the result of the avalanche of new Dodd-Frank Act regulations. Indeed, the increased compliance burden has forced many bank employers to hire new compliance officers, none of whom contribute to the bottom line. The assumption that banks have unallocated resources to use to raise compensation levels is a false one. Increased compensation not offset by business expansion is likely to come at a cost of compensation available to hire or retain other personnel.

Because increasing salaries to the new level is simply not an option in low-wage areas and with budgets already constrained by bank regulatory requirements, bank employers are likely to focus on ways to maintain cost discipline. Increases in one category are offset by cost management elsewhere. First, community banks will likely require that any overtime be approved in advance. This will have a negative impact on both employees and bank customers. Customer service is a high priority in the banking industry, and exempt employees will pitch in to enhance the customer experience. If overtime is restricted, however, there may be fewer employees at any given time to provide the customary level of customer service.

Moreover, many banks operate in underserved areas, such as small towns or low-income neighborhoods. The feasibility of continuing to operate such small branches may come under scrutiny as overtime costs impact the viability of such branches. Indeed we have heard from a number of our members that increased costs will necessitate such a review.

Community banks are extremely active participants in their communities and often have employees attend community events including outside the normal work schedule. A bank seeking to control overtime may limit the participation of nonexempt employees in such events, and the rigidities of a time clock will reduce the flexibility that facilitates bank employee interaction in community activities.

¹² We note that Labor Department Secretary Perez is reported to have said that the Department estimates that the new salary level will result in a \$1.5 billion raise for workers the first year.

¹³ See Office of the Comptroller of the Currency, *Semiannual Risk Perspective, Spring 2015* at page 9, available at <http://www.occ.gov/publications/publications-by-type/other-publications-reports/semiannual-risk-perspective/semiannual-risk-perspective-spring-2015.pdf>.

As community banks seek to control salary costs, one area that would ripe for change would be in their benefit packages. Community banks have long provided generous incentives, retirement benefits, employee leave benefits, health insurance benefits, and other forms of compensation beyond a base salary. Those practices have been a part of the culture of community banks for many decades. The percentage of an employee's total compensation being delivered in the form of non-salary compensation and benefits is much higher in the banking industry than in the marketplace as a whole. Employees have grown accustomed to these benefits. For example, it is not atypical for a community bank to provide a substantial contribution, to employees' health care costs.

Because these generous compensation and benefit programs have long been maintained in the industry, community banks and their employees are being disproportionately impacted by the proposed salary level. As a consequence of this inflated salary test, community banks will be encouraged to discontinue or reduce any compensation or benefits offered to employees and instead direct those monies to base salary or overtime costs.

For the reasons stated above, ABA believes that any salary level increase must take into account regional differences in areas with lower wages and a lower cost of living. Accordingly, we strongly urge the Department to maintain a salary level in its regulation that is consistent with the approach taken in the Department's 2004 rulemaking which will address bank employers' concerns about regional salary variations.

3. Calculation of the salary level should include all forms of compensation payments to employees.

In calculating an employee's salary, the proposal would permit employers to include as a portion of salary nondiscretionary bonuses and incentive compensation paid on a monthly basis. While ABA supports the concept of including additional compensation, we find these limitations inconsistent with the methodology used to establish the salary level. Specifically, the aggregate salary data on which the Department bases its percentile calculation includes not only nondiscretionary bonus payments, but also any bonus payments made regularly, regardless of whether they arguably are "discretionary" or not, as well as commissions.¹⁴

It is neither logical, consistent, nor appropriate for the Department to include all bonuses and commissions in its salary level determination while employers may include only nondiscretionary bonuses in determining whether a particular employee's salary meets the Department's salary level test. This asymmetry would particularly affect bank employers that are substantial users of discretionary incentive payments. Moreover, bank employers often provide additional compensation less frequently than monthly, because they typically calculate their financials less frequently. ABA believes that all compensation payments to employees should be included in the salary level calculation, frequency notwithstanding.

¹⁴ 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").

B. The salary level should *not* be updated annually.

The Department has proposed an automatic annual adjustment of the standard salary level and the HCE total annual compensation requirement.¹⁵ The Department has further requested comments on how often the salary level should be updated. Under the proposal, the Department would provide at least 60 days notice to employers of the annual adjustment. At the outset, we note that such an automatic adjustment has never been considered since enactment of the FLSA in 1938. The comments below apply to both the EAP and HCE exemptions.

Updating the mandated salary level each year would be wholly unworkable for banks – indeed all employers – while providing few benefits to employees. With each annual adjustment, banks would be required to reassess the exempt status of individuals within their organizations. This exercise does not simply involve comparing an exempt employee’s base salary against an updated salary rather, as would be the case if there was simply an increase in the minimum wage. To the contrary, there is nothing about an overtime exemption analysis that is “automatic.”

Rather, an increase in the salary level requires an entire range of analyses and business decisions. Each year, banks will be called upon to consider restructuring duties and responsibilities performed by impacted individuals, restructuring compensation and benefit plans for those employees, eliminating roles within organizations, and developing communication strategies to address adverse employee relations implications. Community banks in particular will incur substantial costs and disruption examining their organizations to conform to an annual adjustment to the salary level.

The Department ignores the time, expense, and disruption associated with those changes as well as the fact that adversely affected employees will react very negatively to the change in their exempt status. Moreover, the Department fails to recognize that the annual updating would provide minimal benefits to employees under current inflation rates. While the Department may want to avoid salary levels becoming obsolete, the proposal to adjust the salary level annually is simply unworkable and will create far more burdens than benefits.

Even updating levels automatically every five years would only reduce the problems associated with blind, automatic adjustments. It might facilitate the Department’s goals of “predictable and incremental changes” that are “based on the best available data” in a manner that is less administratively problematic for employers, but it would not eliminate the problems.¹⁶ Moreover, it does not appear that the Department even plans a minimal six-month implementation period for periodic salary adjustments, even though it is clear that due to the complex calculations and determinations bank employers would need to make to implement any periodic salary level adjustment, a minimum six-month implementation period would be vitally necessary.

1. The percentile alternative based on BLS data is inherently flawed.¹⁷

The Department has proposed two alternative mechanisms to automatically update the salary annually using either (1) a fixed percentile of wages using data compiled by BLS, or (2) the Consumer Price Index for Urban Areas (CPI-U). The Department seeks input on which method it should use for the updating process.¹⁸ The proposal, however, provides no regulatory language for either method, making it impossible for bank employers to fully assess the impact of the alternatives. Nonetheless, as discussed more fully below, ABA strongly believes that the use of the percentile method based on BLS data is inherently flawed from a statistical perspective.¹⁹

¹⁵ 80 *Fed. Reg.* at 38538.

¹⁶ *Id.* at 38541.

¹⁷ These comments apply equally to the 90th percentile alternative used to calculate the HCE salary level.

¹⁸ 80 *Fed. Reg.* at 38541.

¹⁹ “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

Under this method, BLS conducts a survey which includes only full-time salaried workers, not hourly workers.²⁰ But, as the Department acknowledges, increasing the salary level will result in employers reclassifying formerly exempt salaried workers as non-exempt hourly workers.²¹ If adjustments were based on a percentile of salaried workers' earnings, the base would exclude the newly hourly workers and thus would represent a pool of increasingly fewer workers.²²

If this methodology were to be implemented in 2016, when the survey of full-time salaried employees is conducted for 2017 salary level setting purposes, the data will include only those individuals who were in the top range for full-time salaried employees in 2016. The 40th percentile in the 2017 data will show a dramatic increase, not due to wage or cost of living developments during 2016. Rather, the significant increase will simply be a function of full-time salaried employees being converted to hourly status and dropping out of the survey data.²³

This result is simply unacceptable. Over time, the duties test would all but cease to matter as the salary threshold dramatically rises. The Department noted that it considered using "median earnings for all full-time wage and salaried workers combined (i.e., not just salaried, but also hourly workers), which would not raise this issue. However, the Department dismissed the idea on the ground that "the resulting salary level was too low" without explanation.²⁴ This approach would have a dramatic impact on banks in low-wage areas because nearly all employees would be converted to nonexempt status within a few years.

Because the 40th percentile alternative is hopelessly flawed, the Department should 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, that 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.²⁵

C. Highly Compensated Employees

The HCE exemption is an important aspect of the FLSA rules because it provides for an expedited consideration of duties test compliance. Accordingly, ABA supports the continued use of the HCE exemption. To ensure that only employees who clearly meet the duties test are eligible for the HCE exemption, the proposal has set the salary threshold for this exemption at the 90th percentile of BLS wage data. As discussed with respect to the EAP exemptions, the use of the percentile method for calculating ongoing salary adjustments is as inherently flawed for the HCE exemption as it is for the EAP exemptions. Rather, the Department should establish the new HCE salary level using the same salary methodology as in its 2004 rulemaking, and update those figures to present day values.

CPI-U." 80 Fed. Reg. at 38,539

²⁰ 80 Fed. Reg. at 38 517 & n.1.

²¹ *Id.* at 38562.

²² If the proposed rule was implemented in 2016, most individuals paid in the lower 40th percentile of the full-time salaried employee national survey, would be converted to nonexempt and hourly status. When the survey is conducted to establish salary levels in 2017, those individuals previously in the lower 40th percentile in 2016 will no longer be included in the data. They will have been converted to hourly status and will no longer qualify as full-time salaried employees.

²³ Attached as Exhibit A is a chart prepared by *World at Work* which illustrates the dynamic established by introducing the concept of "automatic" salary adjustments and by relying upon the 40th percentile of full-time salaried employee wages.

²⁴ 80 Fed. Reg. at 37534.

²⁵ U.S. Dep't of Labor, Bureau of Labor Statistics, Frequently Asked Questions, http://www.bls.gov/dolfaq/bls_ques7.htm.

D. The Department should not provide examples concerning computer-related occupations.

In the proposal, the Department has encouraged the public to suggest examples of how the EAP exemptions would apply to specific computer-related occupations. We understand that the Department is contemplating providing examples of occupations which might satisfy the white collar exemption duties test with the objective of bringing additional clarity to computer and information technology positions.

At the outset, ABA finds the statement in the proposal that the Department will look to job title to determine exempt status to be completely inconsistent with the manner in which the FLSA has been administered since its enactment in 1938, The Department and the federal courts have long recognized that satisfaction of the EAP exemptions does not turn on job title. Satisfaction of the called “duties test” depends upon just that – the specific duties and responsibilities performed by the particular employee. In the case of technology-related positions, we believe reference to job titles is particularly inappropriate. The duties and responsibilities performed by such employees evolve rapidly, and job title classifications quickly become antiquated.

ABA believes the proposal’s references to “a help desk operator” and “information technology specialist” to be of little benefit, unless one understands the specific duties and responsibilities performed by those roles. It is possible that an individual with a “help desk operator” job title could qualify for any of the various white collar exemption standards based on their duties not the on the job title. It is equally likely that an individual employed as an information technology specialist would not qualify for exempt status, given the particular duties assigned to that role.

Accordingly, ABA will not offer any suggestions in terms of enumerating by job title the exempt treatment of computer-related occupations. We believe that exercise to be without merit.

Separately, the Department has indicated that it was considering “whether to add to the regulations examples of additional occupations to provide guidance for administering the EAP exemptions. For the reasons stated above, ABA does not believe that a final rule should provide examples of exempt roles based upon the name of a specific occupation.

E. Any changes to the duties tests must be made through the notice and comment process.

In the proposal, the Department is seeking input concerning possible changes to the primary duty test associated with the EAP exemptions. The proposal, however, contains no regulatory language concerning the primary duty test which bank employers could evaluate for impact on their businesses. Despite this lack of concrete language, Department legal staff has asserted that by merely asking questions the Department has complied with its obligations under the Administrative Procedures Act. While the Department may believe it has satisfied the letter of the Act, it has utterly failed to comply with the spirit of the Act. To make such significant changes to the primary duty tests is unfair to the employer community who would lack the opportunity consider the changes and the impact on their businesses. Accordingly, ABA most strongly urges the Department ***not*** to incorporate any changes to the duties tests in the final rule.

If the Department is contemplating changes to the primary duty test, bank employers expect the opportunity to see the proposed changes, evaluate the implications, and comment on those proposed changes. Any such changes ***must*** be made through the notice and comment process.

F. The Department should not modify the current primary duties tests.

ABA does not believe that changes to the duties tests are warranted. Nonetheless, in the absence of any proposed regulatory language, our observations on the four questions posed in the proposal are below.

Question 1: What, if any, changes should be made to the duties test? Should employees be required to spend a minimum amount of time performing work that is their primary duty in order to qualify for exemption? If so, what should that minimum amount be?"

Response: ABA believes there should be no changes to the primary duty tests. The current standard has remained in effect consistently since 1975, and the test has been clarified through Department and federal court interpretations over that forty-year period. Bank employers and their employees understand the primary duty test.

The primary duty test contemplates that employees will devote significant time and effort toward performing exempt responsibilities. The current regulation contains a reference to a "50 percent of work time rule of thumb." Thus, the primary duty test already incorporates the concept of an employee primarily performing exempt work.

Establishing a specific "minimum amount of time" standard is a misplaced effort. In the banking industry, the duties of exempt employees will vary from day-to-day and from week to week depending upon the immediate needs of the organization and the immediate needs of customers. Measuring how a community bank Branch Manager, for example, is spending his/her work time on minute-by-minute, hour-by-hour, or day-by-day basis would interject even more uncertainty and burden into this exercise. Establishing a minimum amount of time only generates litigation, ambiguity, and costs for bank employers.

Question 2: Should the Department look to the state of California's law (requiring that 50 percent of an employee's time be spent exclusively on work that is the employee's primary duty) as a model? Is some other threshold that is less than 50 percent of an employee's time worked a better indicator of realities of the workplace today?"

Response: ABA strongly believes that the Department should *not* look to California state law when establishing the duties test for the EAP exemptions. The California standard is hardly a model of clarity and simplicity. Moreover, the overtime exemption standards in California have generated an unprecedented volume of litigation and agency enforcement activity, which continues to this day. The "primarily engaged" standard has not proven effective for employers or employees. Rather, it has proven to be effective only for lawyers.

Question 3: Does the single standard duties test for each exemption category appropriately distinguish between exempt and nonexempt employees? Should the Department reconsider our decision to eliminate the long/short duties test structure?"

Response: ABA believes that a single primary duty test has proven to be effective, and accurately distinguishes between exempt and nonexempt employees. Bank employers and their employees have become accustomed to that methodology since 1975. Accordingly, ABA does not believe that Department should revert to the long test/short test structure.

Question 4: Is the concurrent duties regulation for executive employees (allowing the performance of both the exempt and nonexempt duties concurrently) working appropriately or does it need to be modified to avoid sweeping nonexempt employees into the exemption? Alternatively, should there be a limitation on the amount of exempt work? To what extent are exempt lower level executive employees performing nonexempt work?"

Response: ABA believes that the concurrent duties rule, added in 2004, is consistent with federal court decisions and does assist in distinguishing between exempt and nonexempt employees. The preamble to the 2004 final rule cited numerous court decisions that supported the inclusion of the concurrent duties rule. Employees clearly can perform exempt and nonexempt duties simultaneously. The stereotypical example in the banking industry is a bank branch manager assisting a customer on the teller line, while at the same time demonstrating the bank's customer service expectations to a new employee being trained.

G. Time Frame for Compliance with the Final Rule

Because the proposal raised so many questions, bank employers are limited in the ability to prepare for a final rule. Even if only the salary level is changed, there are still questions about other aspects of the rule such as those governing incentive pay, for example. Once the final rule is published, employers will have to analyze how it will affect their employees and then implement new payroll systems and practices including new rules and protocols for compensating and tracking hours of many newly nonexempt employees. Accordingly, ABA strongly urges the Department to provide for a minimum of nine months (preferably more) for bank employers to comply with the changes.

CONCLUSION

As discussed more fully above, ABA does not argue that there should be no increase in the salary level – it has not been adjusted since 2004. However, the high salary level the Department has proposed would, contrary to Congressional intent, eviscerate the impact of the duties tests to assess eligibility for overtime. Should the Department also adopt the 40th percentile alternative for adjusting the salary level, as discussed below, the duties tests would eventually be rendered meaningless.

Critically, the proposed salary level fails to address the significant differences in wage rates and cost of living across the country leading to markedly different consequences for bank employers solely as a result of location. Accordingly, ABA strongly urges the Department to adopt a salary level that is consistent with the approach taken in the Department's 2004 rulemaking and update those figures to present day values, which will address bank employers' concerns about regional salary variations. We further urge the Department to provide a minimum of nine months for compliance.

Finally, the Department should not make any revisions in the duties test without proposing specific regulatory language. Bank employers must have the opportunity to evaluate proposed changes and provide comments about the impact on their institutions.

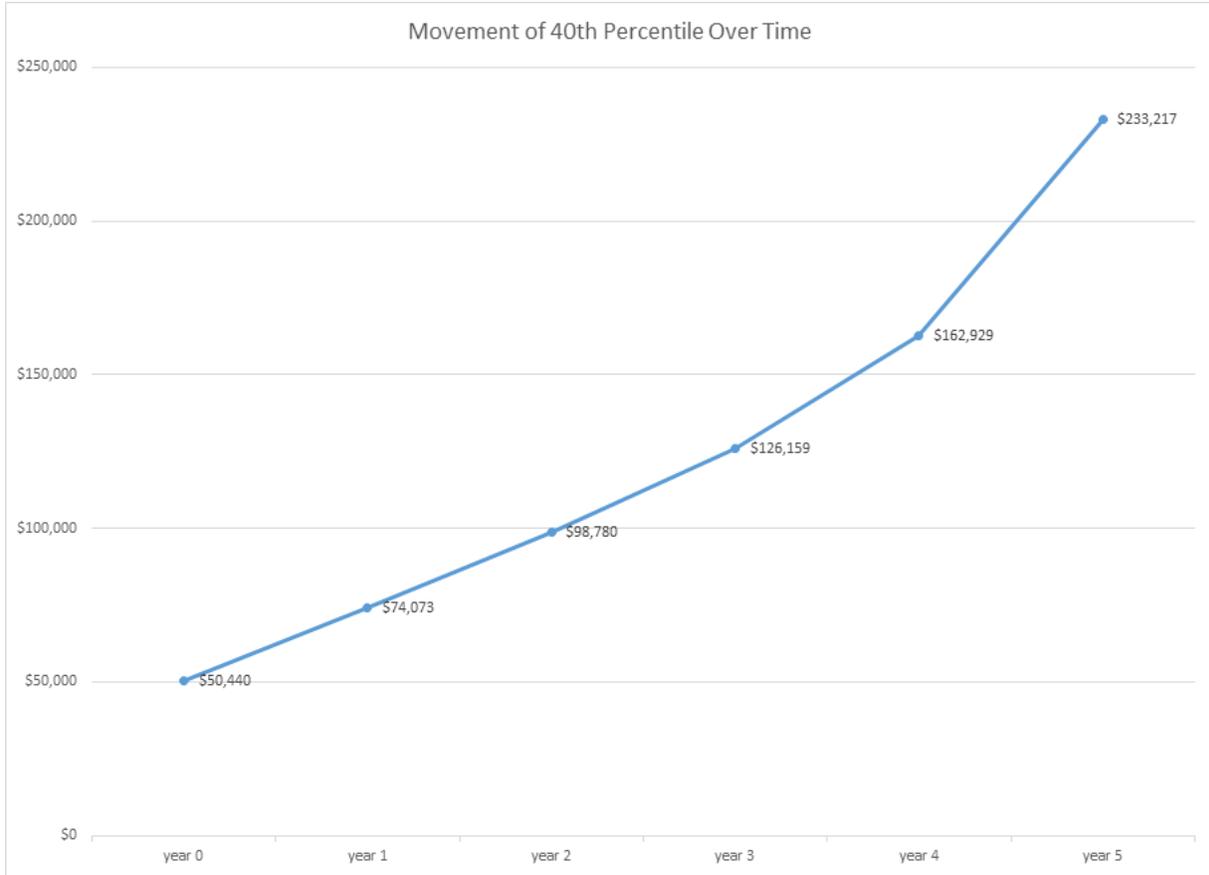
If you have any questions about the foregoing, please do not hesitate to contact the undersigned.

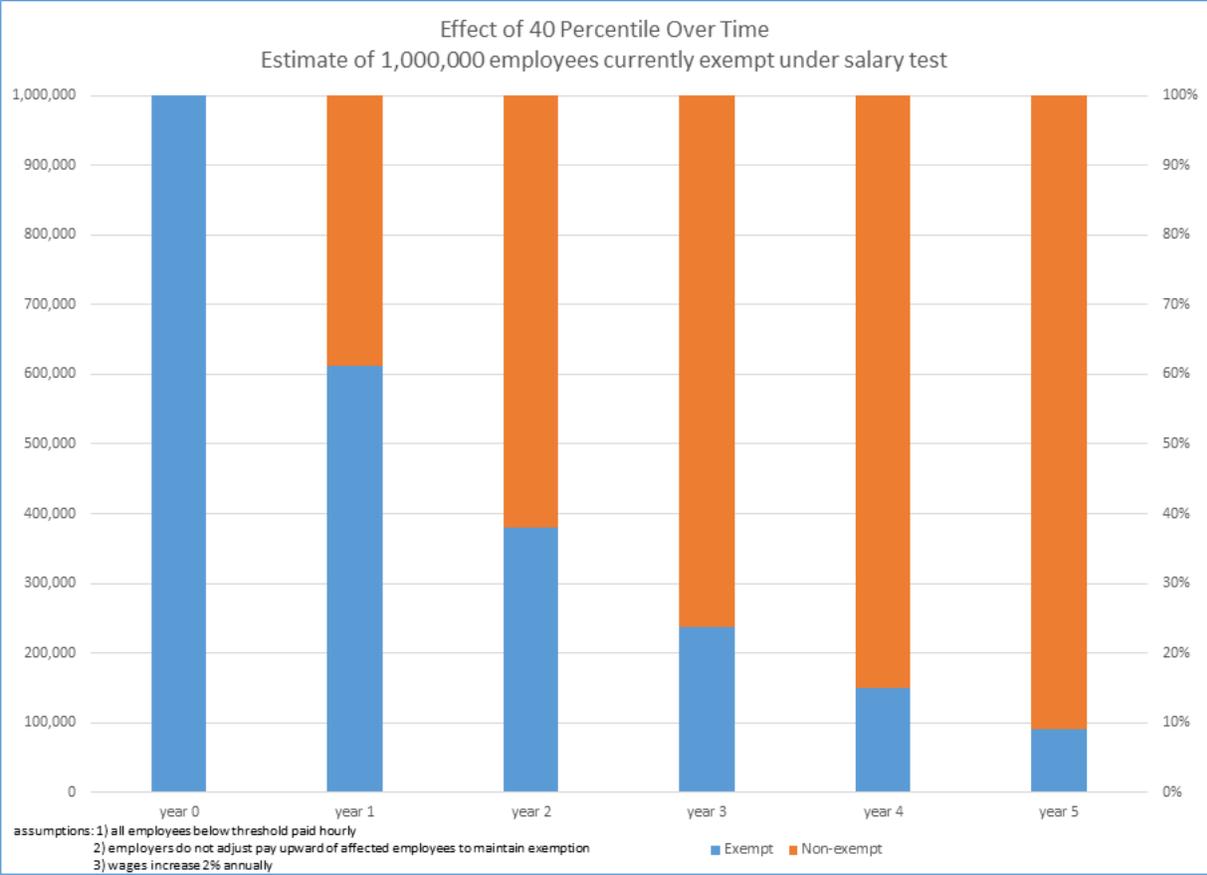
Sincerely,



Cristeena G. Naser
Vice President and Senior Counsel
Center for Securities, Trust & Investment

EXHIBIT A
Analysis of the Impact of the Percentile Alternative
World at Work





NON-HOURLY PAY DISTRIBUTION ESTIMATED 2016

Labor Force Statistics from the Current Population Survey
2nd Quarter 2015
Data aged 2.3% to Estimate 2016 Pay Levels

