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Submitted via regulations.gov
Ms. Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S–3502
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Proposed Rule (RIN 1235-AA20) (84 Fed. Reg. 10900, March 22, 2019)

Dear Ms. Stanton:

On behalf of the international law firm of Seyfarth Shaw LLP, we submit this response to the Department's proposal to change the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA). We do not make these comments on behalf of any specific client that we represent. Rather, our comments are informed by feedback we have received from, as well as our experience representing, thousands of employers across most of the industries that comprise the United States economy.

Seyfarth Shaw is a global, full-service law firm with ten U.S. offices and approximately 400 attorneys who represent national and international businesses in labor and employment matters. Among this group are approximately 100 lawyers who devote the vast majority of their time to counseling, representing, and defending employers in matters concerning compliance with the FLSA and its state law analogues. Our vast team of wage-hour lawyers have assisted thousands of businesses across virtually every major industry in this regard.

We pride ourselves on how we listen to and collaborate with our clients. We work hard to explore the unique challenges each of them faces and understand how those challenges impact the objectives they strive to meet. We tailor thoughtful solutions that align with their goals. This simple but powerful approach to client service has earned us recognition by *Law360* as an "Employment

Practice Group of the Year" for eight years in a row, and our employment lawyers continue to be heralded regionally, nationally, and internationally by *Chambers*, *The Legal 500*, *U.S. News & World Report*, *The National Law Journal*, and *BTI Consulting Group*.

In the years since the prior Administration's directive that the Act's executive, administrative, and professional ("EAP") exemptions should be changed, we have listened carefully to our clients' and other businesses' concerns as they grappled with and assessed how to adapt. We have done so through continued dialogue with interested clients, as well as employer coalitions and other non-client businesses. We have also hosted roundtable discussions focused on the exemptions and other issues at our various offices across the country.

Perhaps most important, we listened as we helped our clients prepare for the revisions to the EAP exemptions that were set to take effect on December 1, 2016. We have continued doing so as we helped them contend with the aftermath of those revisions' rollout and ultimate demise, as they were deemed unlawful by a federal court in Texas.

We are pleased, as are many stakeholders with whom we have spoken, that the Department has proposed to walk back the challenged revisions. We believe the 2016 revisions, which would have more than doubled the base-level salary requirement for exempt EAP employees, failed to account appropriately for the significant, negative impact that the increased salary would have inflicted on businesses across the country, regardless of size, location, or industry. We believe that workers and businesses alike benefit from rules that promote flexibility in structuring work hours, career advancement opportunities, and clarity when classifying employees.

With this in mind, we view the Department's further review and consideration of these issues, pursuant to President Trump's Executive Order 13771, to be appropriate and necessary. Our discussion with stakeholders leads us to conclude that the last Administration's changes to the EAP exemptions' salary level requirements had the potential to increase regulatory burdens and adversely impact the employment relationship in a multitude of ways, including: reducing career advancement opportunities, limiting access to flexible scheduling options, decreasing morale, increasing FLSA litigation, and increasing administrative costs related to payroll.

With the injunction and invalidation of the 2016 Final Rule's salary level, these most harmful impacts have been limited. To ensure that those impacts are eliminated, the Department should formally rescind the 2016 Final Rule.

I. The Methodology for Establishing the Minimum Salary Threshold for Exempt Status is Appropriate.

It is our view that the exemptions' minimum salary level must be set at a level that satisfies is historical gatekeeper function. Indeed, since at least 1940, it has remained axiomatic that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously

nonexempt employees."[1] To that end, the salary level should be set at a level that separates those who clearly would not meet a duties test from those who possibly could.

We agree that the appropriate methodology for determining that level is the same one used by the Department in 2004. As you know, the 2004 methodology was consistent with methods used by the Department for many decades to set the minimum level, allowing for appropriate revisions in 2004 as an update to the long/short tests structure. We believe that it is the most appropriate methodology to establish the level of a salary that does not disregard the need to analyze employees' duties.

Since the EAP exemptions were promulgated, the Department has generally established the exemptions' minimum salary level similarly each time the EAP definitions were updated. As reflected in the summary chart below, the Department has examined actual compensation paid to employees and set salary levels to effectively serve as a "screening function" for exempt status, not to operate as a *de facto* salary-only test:

History of Methodologies Used to Set Salary level	
Year	**Methodology Used**
1940	In an attempt to determine the "dividing line" between exempt and non-exempt employees, and to find the percentage of employees earning below various salary levels, the Department set the minimum salary below the average salary dividing exempt from non-exempt employees to account for low-wage areas and industries.
1949	Looking at wages in small towns and low-wage industries, among other factors, the Department compared weekly earnings in 1940 with weekly earnings in 1949 to determine the average percentage increase in earnings, then set a lower salary level to account for small businesses.
1958	The Department considered actual salaries paid to employees who "qualified for exemption" (as determined by Wage & Hour Division investigations), grouped by region, broad industry groups, number of employees, and city size. The 1958 salary was set at "about the levels at which no more than about 10% of those in the lowest-wage region, or in the smallest size establishment group, or in the smallest sized city group, or in the lowest-wage industry of each of the categories would fail to meet the tests."

[1] *Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees; Final Rule*, 69 Fed. Reg. 22,122, 22,165 (April 23, 2004).

History of Methodologies Used to Set Salary level	
Year	**Methodology Used**
1963	Using the same methodology as it did in 1958, the Department set the salary level for executive and administrative employees at $100 per week because survey data showed that 13% of establishments paid one or more exempt executives less than $100 per week; and increasing the professional salary level to $115 per week, when the data showed that 12% of establishments paid one or more professional employees less than $115 per week.
1970	The Department increased the salary level for executive employees to $140 per week when the salary data showed that 20% of executive employees from all regions and 12% of executive employees in the West earned less than $130 a week.
1975	For the first time using information contained in the Consumer Price Index, the Department adjusted the salary level downward to eliminate any potential inflationary impact. These salary levels, however, were intended as interim levels. The "interim" levels remained in place for nearly 30 years.
2004	After nearly three decades, the Department set the minimum salary level at $455 per week ($23,660 annually), the 20th percentile for salaried employees in the South region and retail industry, rather than at the 10th percentile as in 1958, to account for the proposed change from the "short" and "long" test structure and because the data included non-exempt salaried employees.

Setting aside 1975, when it established an interim salary level, the Department's methodologies have consistently sought to achieve the same objective: "demarcating the 'bona fide' [EAP] employees without disqualifying any substantial number of such employees." Taking all of this into account, as well as our study of data that Seyfarth accessed during the 2016 rulemaking, the 2004 methodology remains the best at achieving that objective.

II. Bonuses and Commissions are Critical Components of an Employee's Total Compensation and Should Count Towards the Minimum Salary Level without Limitation.

Seyfarth welcomes the Department's decision to continue to allow incentive and similar payments (like discretionary bonuses) to satisfy the salary level requirement for the EAP exemptions. Indeed, we are of the opinion that all forms of compensation should be permitted for use in determining whether the salary level has been met. Focusing solely on incentive and similar payments, it is our experience that most employees who receive such forms of compensation would be exempt from the FLSA's overtime requirements under an exemption besides the EAP exemptions, even if they might not satisfy the tests for one or another of those three.

That said, we believe it should make no difference to an exempt analysis whether someone earns $35,000 per year in base salary with $40,000 in bonus potential or $40,000 per year in base salary with $35,000 in bonus potential. As far as the employee is concerned, at the end of the year, total compensation is the same. Employers value compensation similarly—i.e., in terms of total compensation—and the regulatory scheme should reflect that reality, and permit that flexibility, rather than attempt to change it.

We do not believe the Department should limit the amount of incentive and similar payments that may satisfy the salary level test. A cap of 10% is, we believe, too low, is unnecessary, and does not adequately reflect how these payments are made by employers. Under the proposed rule, the Department would allow about $68 per week to be satisfied by a bonus that could far exceed $679. It actually seems to confound good reason to conclude that an employee who performs duties that qualify for exemption, is paid a substantial amount of money for doing so, and is paid some amount in salary could not be classified lawfully as exempt. Indeed, the substantial incentive payments—regardless of how they are calculated and when they are paid—would seem more likely to signify exempt status than not. Those payments plus the employee's salaried status would seem to serve quintessentially as the screen for exempt status.[2]

III. The Department Should Not Increase the Minimum Required Salary for Application of the Highly Compensated Employee Exemption.

In the current proposal, the Department proposes to use the same methodology to set the salary threshold for the highly compensated employee (HCE) provision as it did in 2016. This, despite the Department lowering the standard salary threshold from the 2016 final rule, results in an HCE figure even higher than the 2016 figure -- $147,414. Thus, the proposed HCE level is $112,106 more than the standard threshold -- a difference that exceed the entire HCE level in the current regulations.

Several of our clients have identified significant financial and administrative burdens associated with the proposed increase in the HCE salary threshold. Specifically, the proposed increase will require employers to expend resources on administrative, human resources, and legal efforts to more precisely determine whether an employee meets exempt status.

There are few employees for whom the HCE provides the sole basis of exemption. In the overwhelming majority of classification determinations, employees earning more than $100,000 per year also meet the standard executive, administrative, or professional exemption tests; the HCE provides employers with peace of mind that positions such as senior business analysts, inventory

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[2] To that end, we agree that the Department should allow "catch-up" payments to allow an employer to pay an employee incentive compensation sufficient to satisfy the salary level requirement, thus accommodating the practical reality that employees are not always able to fulfill the terms of their incentive pay plans during a plan year. The absence of a "catch-up" allowance could actually harm the incentive-paid employee and motivate an employer to eliminate its incentive plans altogether. We believe, however, that more time than a single pay period should be provided to make such payments. The single pay period limitation is likely to result in unnecessary confusion and potential litigation over relatively small amounts.

managers, sourcing managers, engineers, and marketing managers qualify as exempt. For employees who are subject to the HCE, employers can evaluate a position's exempt status holistically, with less concern over whether the employee exercises "enough" discretion and independent judgment. At a time when management relationships are becoming more fluid and flexible and a greater number of projects are being outsourced to qualified contractor teams, the HCE allows highly-paid, qualified, critical personnel to be paid a salary without the employer having to shoe-horn those individuals into an archaic understanding of what it means to be an executive, administrative, or professional employee.

Thus, the HCE allows employers one more line of defense in the thousands of FLSA cases filed each year. When employers make classification decisions, at least part of that analysis is driven by the litigation risk. The HCE allows employers to make their decisions with more confidence that carefully considered determinations will not be subject to being overruled by a court based on slight variations in the duties performed by groups of employees. The HCE provides additional certainty for employers to run their businesses.

By raising the HCE threshold, the Department eliminates that extra level of certainty. In the case of one large company, approximately 11% of the workforce are exempt employees earning between $100,000 and $147,414. For each of those employees, no longer will near certainty be sufficient: the threshold for meeting the exemption will be higher, the duties tests must be met more precisely; and, because the salaries are by definition "high," the stakes for any errors are increased. All of this requires an employer to revisit the employee's exempt status determinations—the difference between exempt and "almost exempt" will be far more consequential. Indeed, for this particular employer, initial estimates of potential overtime compensation for reclassified employees range from $8 million to $20 million per year.

The HCE issue is further complicated by the fact that, for some employees and some positions, their exempt status determinations may have been made quite a few years ago. An employer nevertheless will need to review those determinations anew to ensure that the employees/positions meet each and every aspect of a particular duties test. Accomplishing this classification review for more than 1,000 employees in sufficient time to meet the effective date of the final rule will be a herculean effort, involving surveys of managers, follow-up interviews, budgeting discussions, planning for the implementation of changes, and the actual implementation of any changes. In some ways, the implementation will be even more difficult than it would be for changes to the standard salary threshold because highly-paid white-collar employees (and their managers) have an understandable expectation that they will be paid a salary. It will take time to manage those expectations. Even assuming all goes well—e.g., managers are available for discussions in a way that does not impede operations, manager-level turnover does not create knowledge gaps in the review process, managers and employees do not question or challenge the revised classification decisions—making these types of changes will take at least several months, and the Department should determine the Final Rule's effective date accordingly.

IV. The Department Should Not Engage in Efforts to Automatically Update the Threshold or to Bind Future Administrations with Respect to Timing.

We agree with the Department's decision to abandon efforts to automatically increase the salary threshold. A regulation that purports to automatically increase the salary level for exempt EAP employees would not be appropriate and, in our view, is not authorized by congressional mandate.[3] Such increases require notice-and-comment rulemaking, irrespective of how much time and resources that process might require. Indeed, it is axiomatic that a federal agency cannot "exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law,'" no matter how difficult an issue it seeks to address.[4]

Although less convenient and more time consuming than the automatic increases that the prior Administration desired, the notice-and-comment required to increase the EAP exemptions' salary level is necessary and important. Congress has never authorized the Department to index its salary test for EAP employees, despite the fact that it has done so in other statutes, including the Social Security Act (which preceded the passage of the FLSA and was amended to add indexing in 1975) and Patient Protection and Affordable Care Act (which was passed after the most recent revision to the Part 541 regulations). Despite knowing that the Department has increased the EAP salary level on an irregular schedule, Congress has never amended the FLSA to permit the Department to index the level.[5] Such inaction, coupled with Congress's decision to permit indexing in other legislation, demonstrates intent that the EAP salary level be revisited by the Department, with input from the regulated community, only as conditions warrant.

Further, annual increases to the salary level would be inconsistent with the screening function that a salary level test should fulfill. By automatically increasing the salary level on an annual or other periodic basis, the Department would—without debate or consideration—cause lawfully exempted employees to become non-exempt the day after an automatic increase went into effect, unless the employee's salary were increased without his or her merit justifying the raise. This would be an unreasonable result in many cases and would further denigrate the importance of the duties test to the determination of whether an employee is exempt.

Perhaps this result is among the reasons why the Department concluded during its 2004 rulemaking that it did not have authority to index the salary level, a point it acknowledged in the 2015 Proposed Rule when it explained that "nothing in the legislative or regulatory history . . . would support indexing or automatic increases."[6] Regardless, nothing has happened since 2004 that would justify changing the Department's conclusion on this point.

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[3] *See* Mem. Op. in *State of Nevada, et al. v. U.S. Dept. of Labor, et al.*, No. 4:16-cv-0731 (E.D. Tex. Aug. 31, 2017).

[4] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 125 (2000) (internal citations omitted).

[5] Similarly, when Congress has amended the FLSA to increase the minimum wage, it has not indexed that amount.

[6] *See* 80 Fed. Reg. at 38,537.

For these and other reasons, we oppose any indexing of the salary level and agree with the Department's rejection of the same.[7]

V. The Department Should Expand the Forms of Compensation Used to Satisfy the Standard Salary and/or HCE Thresholds.

In addition to the bonuses and commissions discussed above, the Department should expand the forms of compensation that can be used to satisfy the salary level. Board, lodging, and other facilities can represent a significant amount of compensation. The Department, however, does not permit that compensation to satisfy the salary test, expressly excluding it: "exclusive of board, lodging or other facilities." 29 C.F.R. 600(a). Similarly, the Department previously has excluded from the HCE threshold costs of employee benefits, such as payments for medical insurance and matching 401(k) pension payments, noting that inclusion of such costs would make the test "administratively unwieldy."[8]

The Department, however, has not explained why these amounts are "administratively unwieldy." In many cases, employers must include the payments in the regular rate of pay for non-exempt employees. If an employer must determine an item's value to ensure compliance with the regular rate requirements, a similar payment also should count towards the standard salary and HCE levels.

In addition, the Department should expressly state that various forms of equity and similar compensation count towards the standard salary and HCE thresholds. Stock grants, restricted stock units, and stock options, for example, often represent a significant portion of an exempt employee's compensation. The Department should clarify that such payments may be used to satisfy the standard salary and HCE thresholds.

VI. The Department Should Not Make Revisions to the Duties Tests.

Although no revisions to the duties tests have been proposed, we anticipate that the Department will receive comments requesting such revisions and/or an elimination of the salary test in its entirety. As practitioners with many decades of experience representing businesses in wage and hour matters, particularly with regard to matters involving questions of employee classification, it is hard for us to envision a paradigm that does not take into account employees' duties *and* their compensation levels. A duties-only test would not be workable. Indeed, such a test would almost certainly give rise to a further proliferation of litigation concerning exempt status, as employers,

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[7] It is unclear what the Department is proposing with respect to its "commitment" to undertake the rulemaking more frequently. Regardless, the Department lacks the authority to bind itself to completing notice-and-comment rulemaking on any basis in the future. Any updates to the salary threshold should be achieved through notice-and-comment rulemaking commenced at such times as deemed appropriate by the Department based on then-current economic conditions and the ability of the existing salary threshold to continue to serve its gatekeeper function under those economic conditions.

[8] 69 Fed. Reg. at 22175.

employees, their lawyers, and the courts struggled to understand and clarify what each test might require.

It is not hard to see why this is. To adopt a duties-only test, we believe the Department would almost certainly significantly restructure the regulations and would likely create more rigid duties tests—for example, applying a percentage-of-time rule for purposes of the exemptions' primary duty test. Such revisions could result in burdensome recordkeeping requirements, further complication of the exempt status analysis, and increased litigation costs.[9] The same would be true regardless of the revisions made. Any changes to the duties test would increase FLSA litigation at a time when such litigation is already exploding.

For these reasons and others, Seyfarth does not support changes to the duties tests.

VII. The Department Should Provide a Minimum of 120 Days to Implement Any Changes.

Our experience in 2016 makes clear that employers need a significant amount of time to implement any changes. Businesses cannot make changes to employees' classification or to the policies that apply to them on a moment's notice, especially when—as with the 2016 Final Rule—many employees would be impacted by the changes. Because of the chaos surrounding the eleventh-hour injunction of the 2016 rule, it is impossible to surmise what all employers did in response to the rules that were anticipated to go into effect on December 1, 2016. What is clear, however, is that substantial energies were expended by many employers as they assessed employee populations that had historically been classified as exempt, analyzed the feasibility of increasing their salaries to the new minimum requirement, where not feasible, determined whether to reclassify them or eliminate individuals or roles, and to revise policies, benefits, timekeeping systems and the like. Further, great energies were expended in figuring out how to communicate the changes. It was an incredibly time and resource intensive process and many employers were still in the final stages of implementing changes when the 2016 Final Rule was enjoined nearly six months after it was published in the *Federal Register*.

For a variety of reasons, the current proposal is likely to impact a smaller number of employees; many of the implementation challenges will nevertheless remain. As noted above, because the Department proposes to substantially increase the HCE threshold, those challenges will need to be addressed in employee populations in which the exempt classification decision is more critical from an operational and budgetary perspective. In short, human resources, legal, and operational personnel will still need to spend significant amounts of time to ensure compliance with the Final Rule.

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[9] "Yet reactivating the former strict percentage limitations on nonexempt work in the existing 'long' duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the 'long' test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes." 69 Fed. Reg. at 22,127.

Given these difficulties, we request that the Department provide a minimum of 120 days to implement any changes in the Final Rule.

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We appreciate the opportunity to respond to this Proposed Rule and look forward to working with the Department on this important issue.

Very truly yours,

SEYFARTH SHAW LLP