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Mary Ziegler
Director of the 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: Notice of Proposed Rulemaking; Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees (RIN 1235-AA11)

Dear Ms. Ziegler:

We appreciate the opportunity to present these comments to the Secretary of Labor's Notice of Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38516 (July 6, 2015) ("NPRM"), which seeks to revise certain of these exemptions from the Fair Labor Standards Act's ("FLSA") minimum wage and overtime pay requirements. Our comments are made on behalf of the international law firm, Seyfarth Shaw LLP ("Seyfarth Shaw"). 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 domestic businesses in their labor and employment matters. Among the 400 are approximately 100 who devote a substantial amount—if not all—of their time to counseling employers to ensure their compliance with the FLSA and its state law analogues and to defending those employers when they are investigated or sued because of allegations that they failed to comply with those laws. Over the years, our lawyers have helped thousands of businesses in this regard.

We have been able to effectively assist our clients, regardless of their industries and the peculiar challenges each might face, because we explore their concerns and focus on tailoring our suggested solutions to the actual objectives that each of them strives to meet. We have won awards for our collaborative approach to client service, including the *2015 Chambers USA Award for Excellence—Labor & Employment Team of the Year* and the *BTI Client Service A-Team 2015*. We collaborate well with our clients because we do not presume to know what their concerns are. We listen.

We have listened carefully to our clients' and other businesses' concerns regarding the Department of Labor's ("Department") recent rulemaking process and regarding the revisions to the executive, administrative, and professional ("EAP") exemptions that it has proposed. We have done so through conversations with interested clients, employer coalitions, and businesses that are not our clients. We have also coordinated "roundtables" in Atlanta, Boston, Chicago, Houston, Los Angeles, New York, San Francisco, and Washington, D.C., led by our experienced wage and hour practitioners and—at some locations—joined by expert economists.

Approximately 200 thought-leaders from employers across the country participated in our roundtable events, representing many industries and businesses both small and large. At each, we asked for attendees' thoughtful reaction to topics discussed in the Department's preamble to the proposed regulatory revisions and in the underlying economic analysis. We also asked the attendees how their workforce would be affected: (a) if the proposed changes were made finally to the EAP exemptions' salary level tests, and (b) if <u>any</u> changes were made to the exemptions' duties tests.

Overwhelmingly, the businesses with which we have spoken are gravely concerned by what the Department proposes, by the unusual approach it has taken to explore whether to revise in final rulemaking the EAP exemptions' duties tests, and by what businesses perceive to be faulty reasoning and an incomplete economic analysis purportedly justifying the Department's NPRM. They do not believe that this proposed rulemaking harmonizes with the congressional intent underlying the FLSA. It is, in fact, at odds with the principles that have grounded agency rulemaking under applicable laws for many years.

Contrary to the Department's stated intentions, the rules that it proposes, or suggests that it might adopt, would cause confusion among both employees and employers and would almost certainly generate a vast increase in wage and hour lawsuits on top of the explosion of litigation during the past decade.[1] This would increase the burden of such litigation on the courts and would run counter to the Department's expressed objective of reducing litigation costs. *See* NPRM, 80 Fed. Reg. 38518. We share these concerns and hope that our comments below will inform a more reasoned and justified result than the Department's NPRM would suggest.

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[1] For instance, if the Department's analysis is accurate, 4.6 million or more formerly exempt employees would be injected into the nonexempt workforce in 2016 alone. This would severely tax the hourly timekeeping and pay practices of employers. It is unquestionable that this dramatic increase to the nonexempt workforce would drive further increases in lawsuits filed under state and federal wage and hour laws as businesses struggle to keep pace with the changing workforce.

I. Overview

The Secretary of Labor has published proposed regulations to significantly amend the Department's definition of who is exempt from minimum wage and overtime under the FLSA's EAP exemptions. The proposal comes 11 years after the most recent amendments to the exemptions. Unlike the prior revisions, however, the current NPRM reflects a view of the Secretary's authority under the FLSA that comports neither with its obligations to follow the requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq.*, nor with President Obama's January 21, 2011, Executive Order 13563, which sets his standards for federal regulations:

> [Our regulatory system] must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

Exec. Order No. 13563, 76 Fed. Reg. 14 (Jan. 21, 2011).

The Department's NPRM concerning the EAP exemptions fails to satisfy these laudable standards. Seyfarth Shaw's comments discuss in detail the many aspects of the NPRM that (a) are unsupported by measurable evidence, (b) risk confusing employers, and (c) would certainly create significant morale and status issues for the millions of employees who would be impacted.

If the Department were to make changes of the nature it has suggested in vague terms that it is considering, the confusion would recur each year: The Department disregards APA and RFA requirements by adopting a novel and unjustified methodology to establish further automatic annual increases to the EAP exemptions' salary level tests, without the benefit of public comment, economic analysis, or explanation as to the new levels. Rather, employers would be given 60 days on an annual basis to reset their entire compensation system and reclassify perhaps millions of employees without regard to their functions, responsibilities, tenure, or even geographic location. The Department has boasted that its proposal would initially change the classification status of at least 4.6 million employees. The turmoil of such reclassification would compound each year, triggered either by increases made to the compensation paid nationally to non-hourly paid, full-time employees or by the increasing price of consumer goods.

Finally, the proposed regulations purport to reexamine the basic concept of the EAP exemptions' duties tests to determine employee classification status. Rather than formally proposing a requirement that could be subjected to the requisite public examination, the Department has avoided the obligations of this process by posing a series of questions with the stated intention that the public's answers to those questions would inform its decision whether to revise the duties tests that define whether an employee's work is exempt. The current tests have established an intuitive and reasonable standard for determining an employee's primary duty by emphasizing the employee's key value to her employer. The Department has posed questions in the NPRM that suggest a willingness to depart from this standard and create from whole cloth new, quantitative primary duty tests that harken to those applied in California—a state overrun with lawsuits filed by employees claiming wage and hour violations under federal and state laws.

The Department has done this without disclosing its own view of the efficacy of such contemplated changes and without the required analysis, including cost projections, paperwork requirements, or other analysis necessary for proper regulation. This "rulemaking by question" approach does not follow the President's demand that the regulatory process "promote predictability and reduce uncertainty," "allow for public participation and an open exchange of ideas," and "take into account benefits and costs, both qualitative and quantitative." 76 Fed. Reg. 14. It is no justification and little consolation that, as the Department suggests, it is difficult and time-consuming to follow the standard methodology for proposing and implementing rules. Such challenges cannot excuse the Department from its obligation to implement only those rules that it has justified by deep analysis and tested by public review. As we explain below, it has accomplished neither prerequisite by posing questions about the EAP exemptions' duties tests. Most evidently, there is nothing for the public to review. Equally troubling, there is no proposed rule that might be justified by an underlying analysis. Finally, by adopting this approach, the Department is providing neither predictability nor reducing uncertainty.

In sum, our comments below analyze and discuss the aspects of the NPRM that are of the greatest concern to our clients. We describe the Department's apparent misunderstanding of the modern economy and workplace, its lack of analysis of the proposal, and the shortcomings that we perceive in the Department's analysis and explanation of the changes that it may be considering. As we explain in the introduction above, we have listened carefully to our clients' and other businesses' concerns. We have concluded, based on those concerns and our vast collective experience helping employers to comply with the FLSA, that the Department should not adopt any of its current NPRM as a final rule. We recommend that the actual proposal, as well as the considerations hinted at through the questions posed in the NPRM, be withdrawn and that no final rule along the lines of the Secretary's NPRM be adopted. This will prevent the chaotic impacts that would be realized on the American workforce if a final rule were issued.

II. The Department Should Not Break With Its Own History And Ignore Practicalities In Setting A New Salary Level

The Department's NPRM includes one clear proposal: to increase immediately the salary level required for the EAP exemptions from the current requirement of $455 per week to a whopping $970 per week (or even higher) in 2016—more than a 110% increase over the current amount.[2] 80 Fed. Reg. 38517 n.1.

In making such a proposal, the Department admits that in 1940, 1949, 1958, 1963, and 1970 it considered "low-wage categories in order to protect the ability of employers in those areas and industries to utilize the exemptions and in order to mitigate the impact of higher-paid regions and sectors." 80 Fed. Reg. 38526. Again in 2004, it used low-wage data sets in order "to accommodate those businesses for which salaries were generally lower due to geographic or industry-specific reasons." *Id.*

Yet the Department now plans to disregard these issues and its historical approach by setting the salary level based on nationwide data that does not consider regional or industry variations, such as lower wage rates in the South and in industries like retail and hospitality. *Id.* at 38528. There is no logical reason for such a change in approach to setting the salary level, and there are serious, negative practical consequences of such a radical change.

A. An Exempt Employee Should Not Have To Be Reclassified As Nonexempt Because Of Geography Or Industry

The negative practical consequences of disregarding geographic and industry variations are made evident by comparing the wide ranges of compensation of different regions and industries. For example, according to the Bureau of Labor Standards' ("BLS") May 2014 State Occupational Employment and Wage Estimates, the annual mean wage in California at that time was $53,890, while the annual mean wage in Mississippi at that time was $36,750. *See* www.bls.gov/oes/current/oessrcst.htm. The annual mean wage for First-Line Supervisors of Retail Sales Workers nationally was $42,190; for First-Line Supervisors of Non-Retail Sales Workers nationally, it was $84,010. *Id.*

Private employers are not alone in paying different wages to employees performing the same types of jobs because of other considerations. The federal government recognizes regional pay differences for its own employees "in consideration of higher living costs" in certain areas "compared with living costs in the Washington, DC, area." 5 C.F.R. § 591.202. For example, federal government General Schedule employees in the "locality" of "San Jose-San Francisco-Oakland," California, receive locality pay of 35.15% of the applicable base salary grade, which means that a Grade 9, Step 1 employee in the San Francisco area earns an annual salary of $57,302. *See* https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/html/SF.aspx. In contrast, federal government General Schedule employees in Puerto Rico receive locality pay of 14.16% of the applicable base salary grade, which means that a

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[2] We acknowledge that the Department has proposed some limited exceptions to this anticipated salary level for American Samoa and the motion picture industry.

Grade 9, Step 1 employee in Puerto Rico earns an annual salary of $48,403.[3] *See* https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/15Tables/html/RUS.aspx.

Just as the federal government pays an employee in San Francisco substantially more than an employee in Puerto Rico to perform the same job, so too should other employers have this flexibility. A salary level of $970 or more per week in 2016 deprives employers of that flexibility. Indeed, if this were to be the new salary level, many employers would have to reclassify employees in low-wage areas of the country from exempt to nonexempt status, irrespective of the exempt duties they perform, because they live in an area of the country where the cost of living is low. Similarly, an employer in a low-wage industry with tight profit margins might have to reclassify many of its managers as nonexempt based on salary level alone, while employers in higher-profit industries would be able to afford to pay the increased salary level to maintain the exempt status of their managers in similar roles.

Such results would be antithetical to the concept of a salary level that, ostensibly, is intended only to "provid[e] a ready method of screening out the obviously nonexempt employees." 80 Fed. Reg. 38525 (citing Kantor Report and Weiss Report).[4]

B. The Proposed Salary Level Would Affect Substantially More Than The Department's Estimate Of 4.6 Million Exempt Employees

In its NPRM, the Department does not suggest that it gave any consideration to the detrimental impact that a drastic, sudden increase in the salary level would have on exempt employees who earn more than the proposed new salary level, and who hold positions in the organizational hierarchy above the 4.6 million employees whom the Department believes would be directly affected by its proposed changes. If the salaries of 4.6 million employees had to be raised by as much as $26,780 in 2016 (i.e., from $23,660 or more to at least $50,440 annually), many employers would find it necessary to raise the salary level of those employees' managers and supervisors as well. Otherwise, the 4.6 million affected employees would suddenly earn almost as much as their immediate supervisors. Depending on the differentials that employers currently maintain in the pay rates of their employees in successive levels of the organizational hierarchy, the salaries of the supervisors' supervisors could have to be raised as well. The problem is that most

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[3] The salary grades for Puerto Rico are found in the catch-all "locality" category of the "Rest of U.S." The "Rest of U.S." "locality" includes nonforeign areas outside of the states that are part of the commonwealths, territories, and possessions of the United States as defined in 5 C.F.R. § 591.205. *See* https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2015/general-schedule/.

[4] The "Kantor Report" is Report and Recommendations on Proposed Revision of Regulations, Part 541, Under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (Mar. 3, 1958). The "Weiss Report" is Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949).

employers cannot afford to give proportionate raises of tens of thousands of dollars immediately to multiple levels of employees in the organizational hierarchy. This problem would negatively impact employees in at least two ways.

First, there would be salary compression (i.e., materially smaller differences in the compensation paid to the various levels of exempt employees) despite substantial differences in the qualifications or seniority among the varying levels of employees. Second, to compensate for a much higher salary level and to reduce the salary compression issue, employers would have to make operational changes that would have a negative impact on many different types of employees.

With respect to the salary compression issue, employees in every industry expect that higher levels of performance, education, skill, experience, responsibility, and seniority should be reflected in their compensation. Historically, it has been. Generally, an employee's compensation vis-à-vis other employees has served as validation that an employee has a superior position, more job responsibility, and greater qualifications than her subordinates. Accordingly, a supervisor may feel devalued if she were to suddenly receive only a few dollars more per week than the employees she supervises.

To deal with the salary level and salary compression issues, some employers would have to make operational changes, such as: decreasing the number of managers and supervisors employed and increasing the workload and scope of responsibility among the managers and supervisors who remain; closing less-profitable divisions, departments, and locations where the higher salaries cannot be absorbed even with operational changes, and laying off both exempt and nonexempt employees within those divisions, departments, or locations; demoting or firing exempt employees whose individual performance does not justify a salary level of $970 or more per week; and hiring more nonexempt, part-time employees at much lower hourly wage rates to share the workload of the displaced managers and supervisors, while avoiding the incursion of overtime work (and expensive overtime pay). The gap between the "C suite" and the rest of the workforce would grow as the number of mid-level managers and supervisors dwindled in favor of a larger, low-wage, and more fractured nonexempt workforce.

These salary compression problems and operational changes would likely occur across all industries, but the impact can be illustrated by way of example through discussion of the retail industry. Retail employers may employ exempt store managers, each responsible for a single store, and exempt regional managers, who are responsible for a group of stores in a particular geographic region. The expectation of regional managers and their retail employers is that they will be better compensated than store managers, commensurate with the regional managers' greater responsibilities.

Assume that the store managers are currently compensated at $500 per week, and that regional managers, who may oversee a dozen or even several dozen stores, currently receive $1,000 per week—double that of the store managers they supervise. Under the proposed regulations, the retail employer would have to raise the store manager's compensation to $970 a week in 2016 to maintain the executive or administrative exemption. While the regional managers are already being paid more than $970 per week, the differential between the store managers' and regional managers' compensation would become a mere $30 per week (only 3% more), if only the store managers received a raise to comply with the proposed new salary level. In other words, absent any adjustment to regional manager compensation, the result would be severe wage compression.

To prevent regional managers from quitting over compensation inequity, an employer would have to increase compensation for regional managers. If the employer wanted to maintain the 2:1 ratio in compensation, regional managers would have to be paid $1,940 per week, which is almost double what they are currently paid. Alternatively, the employer could maintain the same $500 difference in annual salary between store and regional managers (reducing the percentage difference but maintaining the same margin), in which case regional managers would need to be paid $1,470 per week. The regional managers' supervisors would almost certainly demand a pay raise as well. This domino effect of increasing salaries for clearly exempt, highly-paid managers would cause labor costs to be unmaintainable within the current small profit margins of the typical retailer.

To offset the dramatic increase in labor costs, the retail employer might have no choice but to make operational changes. These could include: reducing the number of regional managers and increasing their workload by requiring them to supervise a greater number of stores across a broader geographic area; closing less-profitable locations where the salary increases could not be absorbed, and laying off both exempt and nonexempt store employees or requiring them to relocate to other stores, if there are jobs available there; demoting or firing the store managers whose work performance did not justify a salary level of $970 or more per week; and hiring more nonexempt, part-time employees to share the workload of the displaced store managers and regional managers while avoiding the incursion of expensive overtime hours.[5]

Other industries would face similar salary compression issues and tough operational choices. It is unclear whether the Department has considered these costs and consequences. The NPRM fails to acknowledge them or attempt to analyze their economic impact.

[5] The Department has suggested that employers could merely convert exempt employees, like store managers, to nonexempt status. The feedback we have received from employers is that such a conversion would negatively affect morale and have adverse cultural impacts. Managers would lose their (a) work schedule flexibility, (b) benefits that are provided only to exempt employees, (c) incentive payments that are made only to exempt employees, (d) authority over their subordinates, and (e) status as white-collar workers who are not required to punch a time clock. In addition, employers would face an exceptional burden in trying to acclimate the previously-exempt managers to accurately record their work hours.

C. The Proposed Salary Level Increase Would Adversely Impact An Unascertained Number Of Currently Exempt Part-Time Employees, Causing Them To Lose Their Flexible Work Schedules And Benefits That Their Full-Time Counterparts Receive

Not all exempt employees work "full-time" hours. Many part-time employees perform duties that satisfy the EAP exemptions' duties tests. At the current salary level required for exempt classification, employers can provide opportunities for exempt employees to perform part-time work at a compensation level that is economically feasible. Under the current standard, a single mother with young children or an aging or ill parent may be able to use her advanced learning to perform duties satisfying the FLSA's professional exemption while working several days per week. A tenured executive approaching retirement might likewise work a reduced schedule with the flexibility to contribute productively to her employer's business while working remotely or at atypical times in her office. Of course, some employers simply choose to structure their business with part-time exempt employees performing highly skilled work on non-traditional schedules.

The Department has given short shrift to this important segment of the American workforce in its purported justification for increasing the salary level for EAP employees to a height that would make part-time, exempt work economically infeasible. There can be no doubt that many, if not most, part-time exempt employees would have to be reclassified as nonexempt under the Department's proposed salary level, and, in this regard, it is evident that the Department has ignored the tremendous, possibly unintended, adverse impact it would cause such workers.

Evidence of the potential adverse impact derives from simple math. At the current salary level of $455 per week, most employers can afford to pay part-time exempt employees the full salary required for exempt status, even if they work just 15 to 20 hours per week, because that amounts to an hourly rate in the range of $22.75 to $30.33.

If the Department were to raise the salary level to the estimated $970 per week in 2016, however, the effective hourly rate of a part-time employee working 15 to 20 hours per week would suddenly jump to the range of $48.50 to $64.67 per hour, and higher in successive years as the salary level would automatically increase under both of the Department's alternative indices. At such exceptionally high rates, employers would likely need to convert the vast majority of part-time exempt employees to nonexempt status.

This simple math and the sheer realities faced by most employers compel the conclusion that employers would not take a consistent approach to job classification as a result. Exempt status would be determined based on how many hours per week an employee is willing to commit to working, rather than on the employee's duties.

The ramifications would far exceed this inconsistency, however. Peers working side by side would have different rights and obligations simply because one is a full-time employee and the other a part-time employee. Part-time workers would lose the flexibility of working from home or working odd hours, as employers would need to institute greater rigidity into the employees' work schedules to monitor their work hours and to account for the infrequent situations in which such employees work overtime hours, or at least more hours than they would typically work. In addition, treating part-time employees differently could have significant adverse consequences for employees of businesses that provide different benefits packages to exempt and nonexempt (or salaried and hourly) employees. These differences in how part-time employees would be treated in the likely event that they were reclassified as nonexempt would undermine teamwork, pride in work, and a sense of fairness.

Beyond all of the practical issues, there is also no logic to requiring the same salary level for full-time and part-time employees. As the Department explains, it has proposed a salary level that would be at least $970 per week in 2016 by tagging the salary level to the 40th percentile of the weekly earnings of <u>full-time</u>, non-hourly paid employees nationwide. 80 Fed. Reg. 38527 n.20. Part-time, non-hourly paid employees' earnings are apparently not even captured by the BLS data. If their weekly earnings were captured, the 40th percentile would undoubtedly be much lower than the anticipated salary level. Using data that does not include part-time employees to set a salary level that nevertheless would apply to part-time employees, with the same force and effect, is simply not logical or justifiable.

To avoid these adverse consequences for exempt, part-time employees, and to avoid the illogical position of requiring part-time employees to earn a salary that is likely much higher than the 40th percentile of part-time employees nationally, the Department should allow for pro-rating of the salary level for part-time employees.

D. Incentive Payments Should Count Towards The Salary Level Requirement

While the Department has made no actual proposal in the NPRM regarding the salary level beyond the issues discussed above, the Department has suggested that it is considering whether to permit certain types of incentive payments to count towards the salary level requirement. Incentive payments commonly take two forms: bonuses and commissions. It appears that the Department believes that non-discretionary bonuses are the only types of incentive payments that should count towards the salary level requirement, but the Department's reasons for not also allowing discretionary bonuses and commissions to count are illogical.

To justify excluding discretionary bonuses from the type of incentive payments that it might permit to count towards the salary level requirement, the Department offers nothing more than the following statement: "Consistent with the rule for highly compensated employees (which counts nondiscretionary bonuses toward the total annual compensation requirement), the Department is not considering expanding the salary level test calculation to include discretionary bonuses." 80 Fed. Reg. 38536. If it can be considered a reason at all, this is not a valid reason for refusing to count discretionary bonuses towards the salary level requirement.

The only reason that the Department provides for its suggestion that commissions would not count towards the salary level is its belief that employees who earn commissions are sales employees who cannot meet the duties tests of the EAP exemptions. This is a non-sequitur and an incorrect and overbroad generalization. If certain sales employees do not meet the duties test, they will not be exempt, no matter how much they are paid and no matter the form of compensation. But if they do meet the test, there is no reason their commissions should not be counted towards the salary level. Indeed, the Department has opined that certain "registered representatives" in the financial services industry qualify for the administrative exemption even though they receive commissions and bonuses in addition to their salary. *See* FLSA2006-43 (Nov. 27, 2006).

Likewise, many managerial employees (e.g., a branch manager at a bank or a manager at an auto dealership) are clearly covered by the executive exemption and would not be disqualified simply because they receive commission payments as part of their overall compensation. Commissions, just like hourly payments, are compensation for an employee's labor, and in effect are simply another form of nondiscretionary bonus—a formula that if you achieve X, you will earn an additional Y%.

In our experience, the vast majority of employees who receive incentive payments of any sort are those whose duties qualify them for an exemption. Those employees have the greatest "sense of ownership" that the Department states it wants to preserve, and they are the ones whom employers most want to incentivize by sharing the fruits of strong business performance, such as revenues or profits. This holds true regardless of whether the incentive payments take the form of bonuses or commissions, and regardless of whether the bonuses are discretionary or non-discretionary. In other words, counting all forms of incentive payments towards the salary level requirement would aid, not hinder, the demarcation between exempt and nonexempt employees. Thus, all forms of incentive payments should count towards the salary level requirement.

The frequency with which the incentive payments are made should also not matter. The Department's reasoning for its suggestion that it would reject a payment interval greater than monthly for incentive payments is devoid of any rationale. In our experience, such payments are typically made much less often than monthly, since they are tied to business results, such as sales revenues or profitability, that can fluctuate significantly on a quarter-to-quarter or longer period.

We question the Department's suggestion that, if it were to permit incentive payments to count towards the salary level requirement, it would not allow for a "catch up" payment in the event that an employee failed to meet the metrics for incentive payments sufficient to reach the salary level. The Department appears to recognize that catch-up payments have worked well in the context of the highly-compensated employee ("HCE") exemption but has not provided any reason that they would not work here. We see no logical reason why they would not.

We also see no logical reason to cap at 10% the amount of incentive payments that could count towards the salary level requirement. The Department provides no explanation as to why 10% makes sense or how it arrived at that figure. Needless to say, there is wide variation among employers in the amounts of such payments and the corresponding percentage of an employee's total income contained in a bonus, especially during times of business volatility. Placing a percentage cap on the amount of incentive payments that could count towards the salary level, especially an arbitrary one, does not serve any useful purpose.

In short, if the Department were to engage in the formal process required for enactment of a regulation with respect to incentive payments counting towards the salary level, we would suggest that all forms of incentive payments, whether commissions or discretionary or non-discretionary bonuses, and whether paid on a weekly, monthly, quarterly, or annual basis, be included in the salary level. In the event of an actual proposal on this issue, we would also suggest that catch-up payments be permitted if a shortfall in incentive payments unexpectedly causes an exempt employee's compensation to fall below the salary level.

Overall, Seyfarth Shaw, and many of the employers that have provided feedback to us, would not oppose a reasonable increase in the salary level for <u>full-time</u> exempt employees. We are concerned, however, that the Department has not given sufficient, careful consideration to the appropriate amount of the increase, the ramifications of increasing the salary level by such a substantial amount so suddenly, the negative impacts on currently exempt part-time employees, and the extent to which the impacts of such a high new salary level could be partially (although certainly not fully) ameliorated if the Department were to propose a regulation permitting incentive payments to count towards the salary level as outlined above.

III. The Department Should Not Pursue Its Efforts To Increase The Salary Level Automatically

A. The Department Lacks the Authority To Increase The Salary Level Automatically

According to its NPRM, the Department seeks "to 'modernize' the EAP exemptions by establishing a mechanism for automatically updating the standard salary test." 80 Fed. Reg. 38537. The Department contends that this would "promote government efficiency by removing the need to continually revisit the issue through resource-intensive notice and comment rulemaking." *Id.* The Department's concerns regarding the difficulty of formal rulemaking and the regulatory processes mandated by the APA and related statutes do not except the Department from the requirement that the "exercise of regulatory authority by agencies must be rooted in a grant of such power by the Congress." *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). A federal agency cannot exceed the limits of its authority or otherwise "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. *See FDA* v. *Brown* & *Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (internal citations omitted).

When it authorized the Department to issue regulations under the FLSA, Congress did not, either in 1938 or at any time since, grant any authority to index its salary test. The fact that

Congress could have expressly provided such authority if it desired the Department to have it is evidenced by the fact that Congress has expressly permitted indexing in other statutes, including the Social Security Act and the Patient Protection and Affordable Care Act. The Department acknowledges in the NPRM that, in 2004, it had determined that "nothing in the legislative or regulatory history… would support indexing or automatic increases." 80 Fed. Reg. 38537. The Department was correct in 2004, and nothing has occurred in the interim to justify the opposite conclusion.

Each time the Department has increased the salary test since 1946, it has done so subject to the APA's required procedures—by stating explicitly what the new salary level would be and by leaving adjustments to that level to be handled through subsequent notice and comment rulemaking efforts. Since the enactment of the RFA, the process has also required the Department to undertake a detailed economic and cost analysis. 5 U.S.C. § 601 *et seq*. Nevertheless, in the NPRM, the Department suggests automatically establishing a new salary level each year in the Federal Register without notice and comment and otherwise effectively bypassing the APA, the RFA, and Executive Order 13563. Such automatic increases would be without any statutory basis. For these reasons alone, the Department should not pursue its efforts to increase the salary level automatically based on an index.

B. The Expressed Alternatives For Increasing The Salary Level Automatically Would Be Impracticable

Even if the Department were to ignore the legal issues associated with announcing a new salary level each year without the required notice and comment process, the practicability issues caused by salary indexing would be insurmountable. The Department has suggested that it might determine the new salary level each year by indexing it to data collected throughout the year on the total weekly earnings of full-time, non-hourly paid employees or the percent increase in the cost of a basket of goods purchased by urban consumers. Neither indexing method would provide necessary guidance to employers in making exemption determinations or alert employees as to their exempt or nonexempt status. Rather, automatically raising the salary level through any indexing method would create a moving target untethered to a standard against which the new salary level for each year could be measured. It would establish an ad hoc, artificially-created level determined by statistical assumptions.

Beyond the issue that either indexing method would make it impossible to determine the new salary level each year in advance of the Department's pronouncement in the Federal Register, indexing would not serve the Department's stated purpose of making compliance with the EAP exemptions easier and more routine. To the contrary, the indexing alternatives would create enormous uncertainty, extraordinary administrative burden, and would likely cause employees' status to oscillate between exempt and nonexempt status based upon an arbitrary and constantly-changing trigger—the timing of salary level pronouncements—instead of on a legal analysis of employees' executive, administrative, and professional duties.

1. Indexing To The 40th Percentile Would Render The Duties Test Superfluous In A Matter Of Years

As the Department notes in its NPRM, the objective of the salary level test is "to differentiate exempt and nonexempt white collar employees" by setting a salary level at an amount that is slightly lower than the dividing line between exempt and nonexempt employees. 80 Fed. Reg. 38527. In discussing the importance of getting the salary level right, the Department notes its concern that if the salary level is set too high, it "reduces the number of overtime-protected employees subject to the duties test and eliminates their risk of misclassification, but at the cost of requiring overtime protection for workers who pass the duties test." *Id.* at 38531. The Department also notes that it chose the 40th percentile, rather than a higher percentile, because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative, or professional duties as their primary duty…." *Id.* at 38532. Yet, the Department cites to no authority for its suggestion that the 40th percentile would be an appropriate standard against which to determine a statutorily coherent salary level.

If the Department were to index the salary level to the 40th percentile of all full-time, non-hourly paid workers, it would realize the aforementioned concerns of having a salary level that is too high. It would fail to realize the goals of having a salary level requirement at all because it would force upon the American workforce a salary level that, through annual indexing, is too high to be a useful or realistic guide in determining employees' exempt status.

As the Department notes, the BLS data upon which the deciles are based consists of the total weekly earnings for all full-time, non-hourly paid employees. 80 Fed. Reg. 38527 at n.20. Total weekly earnings are not limited to base compensation but instead include any overtime pay, commissions, and tips such workers usually receive. *See* http://www.bls.gov/cps/research_series_earnings_nonhourly_workers.htm. Both the limitation of this data to non-hourly paid workers and the over-inclusiveness of this data in counting all weekly earnings would cause the 40th percentile to increase dramatically as employers reacted to the potential new salary level. The result would be a salary level that, a few years from now, would be too high to serve as an effective dividing line between exempt and nonexempt employees even in higher wage regions and industries. Indeed, over the next several years, the salary level required for exempt status would climb so high as effectively to eradicate the availability of the EAP exemptions in most regions and industries.

The Department predicts that, in year one of the proposed new regulations alone, 4.6 million currently exempt workers would need to be reclassified as nonexempt or their salaries raised to maintain exempt status because they currently do not earn a high enough salary to qualify for exempt status. 80 Fed. Reg. 38518. Employers would have to choose to (i) reclassify such workers as nonexempt and convert them to an hourly rate of pay, (ii) reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked, or (iii) increase the salaries of such workers to the new salary level to maintain their exempt status. No matter which of these three options employers were to choose, the effect would be to increase drastically the wages paid to the 40th percentile in the coming years.

Those who are reclassified as nonexempt and converted to an hourly payment method would drop out of the BLS data because the data is limited to full-time, non-hourly paid workers. Because such workers currently are part of the 10th, 20th, or 30th percentile, as these workers drop from the data set altogether, the wages paid to the new 40th percentile would increase.

Since the BLS weekly earnings data includes overtime compensation, those workers who were reclassified as nonexempt but were still paid on a salaried basis would also artificially inflate the 40th percentile mark due to their receipt of overtime compensation.

Finally, the 40th percentile would be increased to the extent employers were to choose to raise the salaries of workers who are currently below the 40th percentile in order to maintain such employees' exempt status.

In short, if the Department is correct that 4.6 million workers who are currently part of the BLS data would no longer qualify for exempt status under the proposed new regulations due to insufficient base salaries, then there are 4.6 million workers who would either be dropped from the data due to conversion to an hourly rate of pay or would be paid more in total compensation or base salary in response to the new salary level. Accordingly, the 40th percentile of all full-time non-hourly paid workers would necessarily shift drastically upwards as employers changed the compensation of these 4.6 million workers.

It is difficult to predict with any level of accuracy exactly what the BLS data on full-time, non-hourly paid workers would look like a few years from now as employers responded to the new salary level of the proposed regulations. It is not difficult to predict, though, that the 2.6% average annual growth rate that the Department reports has occurred for the 40th percentile between 2003 and 2013 (*see* 80 Fed. Reg. 38587), is a far cry from the actual annual growth rates that would occur in the first several years if the 40th percentile approach were to be used. With an average annual growth rate drastically exceeding the 2.6% that the Department anticipates, it would not take more than a handful of years for the duties tests to be rendered superfluous as very few employees who are currently eligible for the EAP exemptions would receive a high enough salary level to qualify for exempt status, regardless of their duties. In the low-wage regions and industries, the duties tests would become superfluous even sooner, if not immediately.[6]

For all of these reasons, if the Department enacts a final rule that includes automatic updates to the salary level based on indexing, the indexing should not be to the 40th percentile of all full-time, non-hourly paid employees. For the same reasons that indexing the salary level to the 40th

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[6] As noted in Section II.A., a salary level of $970 per week would cause many employers in low-wage areas of the country and low-wage industries to reclassify currently exempt employees as nonexempt immediately, irrespective of the exempt duties they perform.

percentile would frustrate the Department's goals, indexing the total compensation of the HCE exemption to the 90th percentile of all full-time, non-hourly paid employees would be unworkable as well.

2. Indexing To The CPI-U Would Be Improper Because The CPI-U Has No More Relevance To Wage Rates Than The Cost Of Oil In Saudi Arabia

Beyond the inappropriateness of automatically increasing the salary level by any means, it would be improper for the Department to tie the salary level to the Consumer Price Index for All Urban Consumers (CPI-U) in particular. The CPI-U is not a measure of wage growth. It is a measure of inflation in the prices of a certain basket of consumer goods that is not tied in any direct way to employees' wage rates. According to the BLS website, the CPI-U considers the purchase prices of goods and services in eight major groups: "food and beverages," "housing," "apparel," "transportation," "medical care," "recreation," "education and communication," and "other goods and services." *See* http://www.bls.gov/cpi/cpifaq.htm#Question_7. Within each of these major groups are a variety of categories of goods that are imported from other countries and, thus, whose prices are largely determined by conditions in other countries rather than the U.S. For example, the "transportation" group includes categories such as the price of "gasoline" and "airline fares." *Id.* The "housing" group includes a category for "fuel oil." *Id.* These examples alone beg the question: what relevance does the price of oil coming out of Saudi Arabia have to the appropriate salary level for an U.S. employee to be exempt from the minimum wage and overtime pay requirements?

Also included within these major groups are fees for services like water and sewer, auto registration fees, and sales and excise taxes that are determined by municipal, state, and federal governments. The prices consumers pay for these services are largely, if not entirely, unaffected by inflation, but rather change at the whim of governments.

The CPI-U is a volatile index, perhaps because it includes categories of goods, such as oil, that wildly fluctuate due to factors wholly unrelated to wages. At the same time, the CPI-U includes government-imposed fees and taxes that are largely inflation-proof and change at the discretion of federal, state, and local governments, and therefore is not an appropriate indicator of salary growth (or decline). For example, in the year 2008, the CPI-U was 3.81492%; in the year 2009, it was negative 0.32009%. *See* https://research.stlouisfed.org/fred2/series/CPIAUCSL. Such drastic yearly shifts in the CPI-U would cause great volatility and unpredictability in the salary level, which would only further increase the unpredictability and unmanageability of automatically adjusting the salary level.

3. Annual Updating Would Create Uncertainty And Leave Employers With Inadequate Time To Plan For Salary Increases

As stated, Seyfarth Shaw, as well as most employers with whom it has spoken, does not necessarily oppose a reasonable increase in the standard salary level from the amount set in 2004. Any increase, however, should be consistent with market conditions in different geographies and industries. Moreover, annually increasing it by arbitrarily tying it to an index that was not designed for such a purpose would be a drastic response that would impede employers' ability to manage labor costs consistent with long-range business plans and annual budgets.

The annualized increases the Department suggests it is considering would create uncertainty year in and year out as to the application of the EAP exemptions. Once the specific salary level is ascertainable for a new year, employers would embark upon an unavoidable last-minute fire drill to identify which employees would lose their exempt status without a raise. Then, those employers would have to scramble to determine the impact and viability of increasing salaries to maintain exemptions versus converting employees to nonexempt status.

If employers decided not to increase salaries to maintain those employees' exempt status, employers would have to rapidly amend their current reporting and record keeping systems to convert, by the Department's estimate, at least 4.6 million employees to nonexempt status and repeat that process annually. The Department vastly underestimates the cost and time obligations this would create.

If employers decided instead to maintain the exempt status of particular employees by raising their salaries, they would then also have to determine how much to increase the salaries of each level of employees up the organizational chain to deal with the salary compression issue. The financial impact would be enormous—including not only the costs of the increased base wage rates and potential overtime pay but also the costs employers would incur annually in undertaking the classification analysis, decision-making, and implementation of changes in response to the new salary level announced each year.

Beyond such financial impacts, transitioning employees from exempt to nonexempt status requires careful planning and implementation to avoid undermining employee morale—time that employers could not spare with such fast-changing salary levels. In its effort to narrow the pool of employees eligible for the EAP exemptions, the Department unfortunately fails to acknowledge the reality that many workers view their exempt status as a symbol of their success and prestige within their companies. In fact, as Seyfarth Shaw knows from many of the employers it represents, employees often view a transition from exempt to nonexempt as a demotion, even if all other aspects of the work remain the same and even if their overall compensation increases with the addition of overtime pay. The last-minute nature of making annual adjustments would negatively impact employers' ability to manage transitions so as not to leave large portions of the workforce disaffected by a change from exempt to nonexempt status.

Employee morale would also likely take a hit because in order to keep pace with the ever-increasing salary level, low-performing employees would receive pay raises each year that would undermine, if they did not entirely eliminate, the merit raises employers can afford to give to their high-performing employees. To avoid this unfairness—or the perception of unfairness—while maintaining consistent exemptions across the organization would likely cause employers to escalate performance management efforts and terminate lower-performing employees sooner.

In short, increasing the salary level each calendar year would create uncertainty for employers in their budgeting and planning process, would significantly undermine employee morale, and would ultimately frustrate the Department's goal of simplifying the EAP exemptions.

4. Lack Of Sufficient Notice Of Salary Increases Would Exacerbate The Problems Of Unpredictability And Inadequate Planning Time

The Department has suggested that it would provide employers with a mere 60 days' notice of what the new salary level would be each year. This timeline would further exacerbate the problems of unpredictability and inadequate planning time that would be created by automatic annual increases to the salary level.

Employers would be operating in the dark for most of each calendar year with respect to what the chosen index would cause the new salary level to be. Even with advanced planning, the uncertainty regarding the salary level and the likely impact on labor costs and employee headcount would make accurate advanced budgeting and business operations planning all but impossible.

A lead time of 60 days would not be nearly enough time for the business community to evaluate the impact of the salary level on labor costs and make sound decisions regarding compliance with the rule each year. This uncertainty would create a trickle-down harm to employees. For instance, the "rush to comply" could result in layoffs so that companies could "bank" enough money earmarked for labor costs in order to cover the increased payroll expenses created by the unpredictably-increasing salary level.

The proposed changes to the salary level of the EAP and HCE exemptions are substantial and would have an enormous impact on employers across all industries. Annually changing the salary level employers must comply with, and providing an unnecessarily short 60-day period of notice of the new salary level each year, would make it exceedingly difficult for businesses to adequately prepare for and comply with the EAP exemptions. In no way, shape, or form would such a process serve the Department's expressed purpose of making compliance easier and more routine.

IV. The Department Should Not Make Changes To The EAP Exemptions' Duties Tests

A. The Department Should Not Revise The Primary Duty Tests

The Department should not change the EAP primary duty tests at this time. As a threshold matter, the Department's presentation of open-ended questions about the tests, without an accompanying proposal as to the contemplated regulatory changes and without the requisite detailed economic and cost analyses, does not comply with the Department's rulemaking obligations. Many of our clients and others we have heard from are confused by the Department's unusual decision to withhold notice of any actual changes to the tests, while maintaining that some undisclosed changes are possible. The sound reasons that justify the processes required by the APA, the RFA, and Executive Order 13563 also militate against the exceptional question-posing approach the

Department has chosen in its NPRM. In advance of a final rule being announced, the regulated community must be given the opportunity to review and comment on the actual language, costs, and economic impact of any proposed regulatory changes the Department might be considering.

Even if the Department had followed the required process and proposed actual changes to the primary duty tests, it would be impracticable to overhaul the tests while employers simultaneously adapt to significant, serial salary level increases. The need to adapt to such adjustments, year over year, after a decade of comparative stability, is reason enough to forego a change to the tests at this time.

The lack of proper notice is not the only reason that the Department should not add a quantitative-style, percentage-of-time rule to the primary duty tests, whether like the California-style primary duty test or otherwise. The asserted ease of administration of a time-based test is a myth. We know from experience with California-based employers that the recordkeeping it requires for exempt employees vastly exceeds what is required for nonexempt, hourly employees whom they outrank. Further, the reality of today's global workplace, where employees are often performing multiple different duties inside of the same minute, does not lend itself to a time-based test. Now, more than ever before, a quantitative threshold is neither helpful nor wise.[7]

Instead of considering changes to the duties tests, the Department should set a single salary level that genuinely facilitates the identification of bona fide executive, administrative, and professional employees without becoming so artificially high that it no longer serves as a reasonable predictor of whether an employee's duties fit within the EAP exemptions that Congress created.

B. If The Department Were To Revise The Primary Duty Tests, It Should Not Adopt A California-Style Or Any Other Percentage-Of-Time Requirement

In the NPRM, the Department asks whether it should adopt a percentage-of-time rule for purposes of the EAP exemptions' primary duty tests, and, in particular, whether it should adopt California's 50% rule. It should not. A percentage-of-time rule would result in overly burdensome recordkeeping requirements, increased litigation costs, and, contrary to the President's and the Department's stated goals, an even more complicated EAP exemption analysis.

Unlike the federal EAP exemptions, California's primary duty requirement is quantitative: any duty that an employee does not devote at least 50% of her time to is not her "primary" duty. Also unlike federal law, California requires identifying work tasks as either exempt or nonexempt,

[7] The Department's inquiry concerning California's 50%-standard omits reference to that state's regulations, which focus largely upon the employer's realistic expectations and requirements of the job. This critical regulatory focus is designed to prevent the poor performer who fails to meet her employer's legitimate expectations or to perform required exempt duties from establishing misclassification based upon her own substandard efforts. Were the Department to disregard employers' reasonable expectations and merely adopt a time-based rule, undeserving employees would be rewarded at the expense of their high-performing peers and their employers.

without recognizing that an employee could concurrently perform nonexempt tasks and carry out an exempt function at the same time. *Heyen v. Safeway Inc.*, 216 Cal. App. 4th 795, 826-27 (2013). Thus, in *Heyen*, a grocery store assistant manager who spent more than half her time supervising her staff was deemed nonexempt under California law because she was concurrently bagging groceries.

The Department should not adopt a percentage-of-time rule like California's for purposes of the EAP exemptions' primary duty tests. First, any such rule would create an unwieldy administrative burden. The Department recognized as much in 2004, when it explained that a time-based rule "would require employers to perform a moment-by-moment examination of an exempt employee's specific daily and weekly tasks, thus imposing significant new monitoring requirements (and, indirectly, new recordkeeping burdens)." Final Rule, 69 Fed. Reg. 22122, 22186 (Apr. 23, 2004) ("2004 Final Rule"). Indeed, the recordkeeping requirements would be even greater for an employer's exempt employees than for the nonexempt employees they outrank. In addition to tracking hours worked for both groups, employers would also have to monitor the duties that each exempt employee performs and for what increments of time. In other words, employers would have to most stringently micromanage the employees whom they otherwise entrust with the most responsibility for their business. This would be an illogical result.

Second, a time-based rule is out of touch with the reality that exempt employees in major industries perform nonexempt tasks while concurrently carrying out their primary, exempt function. The law has long been settled that such employees can be properly classified as exempt under the FLSA. *See, e.g.*, *Jones v. Virginia Oil Co.*, 69 F. App'x 633, 637-39 (4th Cir. 2003) (assistant manager who spent 75-80% of time performing basic line-worker tasks was exempt because she ''could simultaneously perform many of her management tasks''); *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) (''an employee can manage while performing other work,'' and ''this other work does not negate the conclusion that his primary duty is management''). A percentage-of-time rule would unwind that case law by requiring employers to classify each minute of each exempt employee's day as <u>either</u> exempt <u>or</u> nonexempt.

Third, and in a similar vein, a percentage-of-time rule would increase litigation in an FLSA arena where litigation is already soaring. This concern is part of the reason the Department rejected a time-based rule in 2004. 2004 Final Rule, 69 Fed. Reg. 22127 (rejecting long test in part because "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"). It is a concern that persists in California, where misclassification lawsuits rage on under the state's 50% rule. Under a time-based rule, even employers that set out to track precisely exempt employees' hours and build contemporaneous records supporting how that time is spent can eventually face costly litigation over fact-sensitive issues inherent to each aspect of the equation (e.g., the hours worked, the breakdown of those hours, and the exempt character of each duty within that breakdown). Employers who track their exempt employees only as stringently as their hourly staff—i.e., recording hours worked—are even more susceptible to costly litigation.

At the outset of the NPRM, the Department explains that its proposed changes to the salary level test are meant to "simplify the identification of overtime-eligible employees, thus making the EAP exemption easier for employers and workers to understand." 80 Fed. Reg. 38516. This is in line with the President's directive to propose revisions to "modernize and streamline" the regulations and to "simplify the regulations to make them easier for both workers and businesses to understand and apply." *See* Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18737 (Apr. 3, 2014). For the reasons detailed above, introducing a percentage-of-time rule to the primary duty tests would frustrate this purpose.

C. If The Department Were To Revise The Primary Duty Tests, It Should Not Reconsider The Short/Long Test

Replacing the current primary duty tests with two different tests—a long and a short—is also inconsistent with President Obama's directive to simplify the regulations. Since 2004, the EAP regulations have included only one primary duty test per exemption. The Department should not revive the short/long tests.

When it eliminated the dual-test structure in 2004, the Department explained that retaining the concept of dual tests would "add new complexity and burdens to the exemptions tests" and, because the tests included percentage-of-time requirements, "require employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek." *See* 2004 Final Rule, 69 Fed. Reg. 22122, 22126.

The same reasons hold true today. To the extent that the Department would attempt to include a percentage-of-time rule in a dual-test structure, it is ill-advised for the reasons detailed above in Section IV.B. Moreover, while the Department does not explain how it might set the two salary levels for a dual-test structure, based on the balance of the NPRM it seems possible that the Department would attempt to impose automatic annual increases to both salary levels. If that were the case, then the concerns detailed in Section III.B regarding the administrative burdens of tracking a single salary level requirement would apply doubly.

In short, a return to the short/long tests would add complexities to the EAP exemption framework that would benefit neither employees nor employers. It would also run afoul of the President's directive to simplify and streamline the regulations. The Department should not revive a two-test structure jettisoned years ago.

D. If The Department Were To Revise The Primary Duty Tests, It Should Leave The Concurrent Duties Rule In Place And Unchanged

The concurrent duties rule is grounded in more than thirty years of federal case law. As the Department explained in 2004, that law "makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously" does not preclude an employee from being classified as exempt. 2004 Final Rule, 69 Fed. Reg. 22136. The rule recognizes a reality that has not since changed: front-line managers in many major industries (e.g., retail, hospitality, restaurant) play a multi-faceted role in which they often perform nonexempt tasks, while concurrently carrying out their exempt, managerial function. This rule is as in touch with the modern workplace as any other component of the regulatory framework. The Department should not change it.

This concurrent duties rule is at the heart of the executive exemption's primary duty test, which focuses on an employee's key value to her employer and recognizes that performing nonexempt tasks does not require the cessation of one's exempt role. The rule notes, for example, that an assistant manager can stock the shelves while simultaneously overseeing her subordinates. *See* 29 C.F.R. § 541.106(b). Likewise, a hotel manager can staff the checkout desk while observing how her concierge interacts with a guest; a restaurant manager can seat a party of five while considering which server to send out for the next break; and a retail manager can help unpack a vendor's delivery while also considering what items to order for the next shipment. *See, e.g.*, Field Ops. Hbk., § 22b04 (confirming exempt status of restaurant manager who serves or cooks during peak periods).

Such examples are not mere hypotheticals. Rather, as the Department recognized in 2004, "exempt executives generally remain responsible for the success or failure of business operations under their management while performing [any] nonexempt work." 2004 Final Rule, 69 Fed. Reg. 22137. Indeed, modern-day managers are trained, financially incentivized, and evaluated for their ability to manage. To carry out that function, however, they are entrusted to act no differently than business owners (who are exempt, 29 C.F.R. § 541.101) in deciding how to help their business or business unit prosper. This often means working alongside the staff they manage to help achieve the goals of the week, the day, or even the shift, but that does not mean that they stop acting as managers with all of the responsibilities that the managerial role entails.

This concurrent duties rule is well-established. Long before and leading up to 2004, courts uniformly held that an employee can have an exempt primary duty while concurrently performing nonexempt tasks. *See e.g., Virginia Oil Co.*, 69 F. App'x at 637-39; *Burger King Corp.*, 672 F.2d at 226; *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 617-20 (8th Cir. 1991) (store managers who spent up to 90% of time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves" were exempt); *Horne v. Crown Central Petroleum, Inc.*, 775 F. Supp. 189, 190 (D.S.C. 1991) (store manager who performed management duties "simultaneously with assisting the store clerks in waiting on customers" was exempt). When it revised the EAP regulations in 2004, the Department endorsed the rule as practical, realistic, and modernized. *See* 2004 Final Rule, 69 Fed. Reg. 22136-37 (noting that concurrent duties rule is consistent with case law and "accurately reflects the appropriate test of exempt executive status and is a practical approach that can be realistically applied in the modern workforce"). Since then, courts have continued to embrace the rule. *See, e.g.*, *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496 (6th Cir. 2007) (store managers who spent over 60% of time on nonexempt tasks were exempt); *Soehnle v. Hess Corp.*, 399 F. App'x 749, 751-52 (3d Cir. 2010) (store manager who spent 85% of time on nonexempt tasks was exempt because "qualitative assessment" of her responsibilities reflects that primary duty was management); *In re Family Dollar*, 637 F.3d 508, 515 (4th Cir. 2011) (store manager exempt because despite performance of nonexempt tasks, “she was the person responsible for running the store”).

In addition to asking whether the concurrent duties rule should be modified, the NPRM includes alternative questioning that more specifically asks whether the Department should inject a percentage-of-time requirement into the rule. It should not. A percentage-of-time requirement is ill-advised for all of the reasons detailed in Section IV.B. In addition to those reasons, a percentage-of-time requirement would be contrary to the very notion of *concurrent* duties. As illustrated through the various examples noted above, the concurrent duties rule is premised on the reality that managers may, as part of their managerial duties, decide to spend time completing nonexempt tasks to help the store, restaurant, hotel, or other workplace meet its needs or achieve its goals. At the same time—indeed, at all times—they remain ultimately responsible for carrying out their exempt, managerial function. *See* 29 C.F.R. § 541.106. It would be unrealistic and, ultimately, not feasible to categorize such job functions as either exempt or non-exempt. The fact is, they are both. A percentage-of-time requirement would undermine this premise by forcing employers to classify each moment of their exempt managers’ time as <u>either</u> exempt <u>or</u> nonexempt. The concurrent duties rule recognizes this reality.[8]

As noted above, the Department has previously endorsed the concurrent duties rule as practical, realistic, and modernized. It remains so today. Overhauling the rule, whether through adding a percentage-of-time requirement or through some other as-yet undisclosed modification to the rules, would be a regression from the strides the Department has already made in endorsing the concurrent duties rule. The Department should not modify the rule.

E. The Department Should Not Add Examples Of Jobs That Satisfy Or Fail To Satisfy The EAP Exemptions’ Duties Tests

The Department has posed the vague questions of: (i) whether the public would benefit from examples of job positions that fall into the broad and vague category of “computer employees,” and (ii) whether it should add other examples of the types of duties that employees in various, unidentified job positions might perform that likely would or would not qualify for exempt status. The Department’s only suggestion as to what “computer employee” job positions it is considering providing such regulations for is in its discussion of two positions that fall at the extreme ends of clearly nonexempt and clearly exempt. The first is “a help desk operator whose responses to routine computer inquiries … are largely scripted or dictated by a manual that sets forth well-established techniques or procedures,” and the second is “an information technology specialist who, without supervision, routinely troubleshoots and repairs significant glitches in his

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[8] To the extent that the Department is nonetheless concerned about managers who spend a “significant amount” of time performing nonexempt tasks while also carrying out their exempt functions, it can rest assured now, as it was in 2004, that “[s]ince all of the prongs of the executive test need to be met to classify an employee as an exempt executive, [the] rule has sufficient safeguards to protect nonexempt workers.” *See* 2004 Final Rule, 69 Fed. Reg. 22137.

company's point of sale software for the company's retail clients." 80 Fed. Reg. 38544. The Department makes no suggestion that it would attempt to help employers and employees sort through the litany of different "computer employee" jobs that fall into the vast space between these two poles.

Identifying the extreme examples of exempt and nonexempt employees does not increase clarity or reduce litigation. Because the Department provides no hint as to the types of job positions about which it could opine regarding exempt status, beyond the extreme "computer employees" examples of a help desk operator and information technology specialist, we lack sufficient understanding to provide more specific comments to the Department on this issue.

V. Conclusion

Seyfarth Shaw respectfully requests that the Department withdraw the NPRM and refrain from issuing a final rule making changes to the Part 541 regulations at this time. Based on the feedback we have received from clients, employer coalitions, and other businesses, we have determined that the changes that the Department is proposing or may be contemplating would not have the positive impacts on employees that the Department intends, but rather would serve to undermine the Department's goals of modernizing and simplifying the EAP exemptions.

Very truly yours,

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