sifma
Invested in America

September 4, 2015

Mary Ziegler, Director
Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, DC 20210

Re: Comments on Proposed Rulemaking Regarding the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees (80 Fed. Reg. 38,515, July 6, 2015), RIN: 1235-AA11

Dear Ms. Ziegler:

The Securities Industry and Financial Markets Association ("SIFMA") submits these comments in response to the above-referenced Notice of Proposed Rulemaking ("Proposed Rule") published in the *Federal Register* on July 6, 2015. SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the United States, serving retail clients with over $16 trillion in assets, and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is a U.S. regional member of the Global Financial Markets Association.

SIFMA strongly supports the Department of Labor's ("DOL's") stated aim of simplifying the tests for defining exempt employees. SIFMA believes that simplification and greater clarity regarding the contours of the tests benefit both employers and employees by allowing them to more easily determine whether an employee qualifies as exempt. SIFMA also strongly supports DOL's suggestion that incentive income counts in determining whether an employee received the minimum salary level required to establish exemption status under 29 C.F.R. Part 541.

Nonetheless, SIFMA does have concerns regarding some of the potential changes set forth in the Proposed Rule. The following addresses aspects of the Proposed Rule for which SIFMA's members have specific comments or concerns.

## I. SIFMA Urges DOL To Allow Incentive And Supplemental Compensation To Count Toward The Base Salary Level Required For Exemption Status

SIFMA strongly supports DOL's suggestion that incentive and supplemental compensation be considered in determining whether an employee has received the minimum level of compensation in order to qualify for the "white collar" exemptions.

### A. Income, Such As Performance Bonuses And Commissions, Should Be Considered In Determining Whether An Employee Satisfies The Increased Compensation Requirement

If an employee is receiving a certain amount of income, the form of the income received, e.g., base salary, bonus or commission, should not change the exemption determination. Moreover, allowing companies to include nondiscretionary supplemental compensation in determining whether the minimum salary level is satisfied will encourage companies to provide bonuses and other opportunities that allow exempt employees to share and potentially profit from a company's overall performance.

SIFMA recommends not placing a limit on the amount of nondiscretionary supplemental compensation that may be considered in determining whether the base salary level is satisfied, as the same benefits described above for allowing nondiscretionary income to satisfy the base salary level apply regardless of the amount considered. SIFMA also is opposed to DOL's suggested approach that in order to qualify for inclusion in the base salary level calculation, supplemental compensation would have to be paid on a monthly or more frequent basis. In the financial services industry, many supplemental compensation programs are not structured to be paid with such frequency, and it would place a significant administrative burden on employers to calculate and pay incentive compensation on a monthly or more frequent basis. Given the way that most supplemental compensation programs are designed and administered in the financial services industry, SIFMA urges DOL to consider allowing any supplemental compensation that is paid during the year to be included in determining whether the minimum salary level is met.[1]

Finally, SIFMA urges DOL to reconsider its position expressed in the Proposed Rule that discretionary income should not be considered in determining whether an employee has received the minimum salary level needed to qualify for the white collar exemptions. *See* 80 Fed. Reg. 38,536. If employees receive discretionary bonuses or other similar discretionary compensation, that income supports a threshold income level that distinguishes exempt from nonemployees and further supports the benefits of counting nondiscretionary income described above. There is no practical distinction between the total income the employee receives in such circumstances and, as such, no distinction between nondiscretionary versus discretionary income should be made in the Final Rule.

### B. "True-Up" Payments Should Count In Determining Whether The Minimum Salary Requirement Is Satisfied.

SIFMA notes that as a practical matter, it is not clear what would happen if an employee does not earn the anticipated supplemental compensation and thus does not satisfy the minimum

[1] Considering allowing all incentive compensation paid within a year to count is consistent with the time frame utilized for the current highly compensated test. *See* 29 C.F.R. § 541.601.

salary requirement for exempt status.[2] For the proposed approach regarding the inclusion of supplemental compensation to have any practical effect, DOL must allow catch-up or true-up payments to count toward the salary requirement. Allowing true-up payments to count helps ensure that exempt employees are receiving the guaranteed income they anticipated and is consistent with the historical salary basis approach of ensuring guaranteed income. In short, if a Final Rule prohibits true-up payments from being considered, DOL will in effect be rendering the concept of counting supplemental compensation toward the salary level of limited value. Without the ability to have true-up payment count, employers will not be able to rely on supplemental payments to employees in order to satisfy the exemption test without fear of noncompliance if incentive compensation is not actually earned.

## II. Increases To Salary Levels Should Take Place No More Frequently Than Every Five Years On A Calendar-Year Basis

SIFMA strongly opposes annual increases to the salary level. It would be an unprecedented and significant administrative burden to annually adjust the minimum salary level for exempt employees.[3] In addition, annual increases will hamper an employer's ability to budget and provide merit increases, a significant tool and motivator in the workforce, if annual increases are automatically provided to preserve exemption status. Thus, SIFMA proposes that increases to the base salary level for the white collar exemptions occur not more often than every five years. This approach is consistent with historical precedent. Indeed, DOL acknowledges in the Proposed Rule that the shortest period of time between salary level increases was five years. *See* 80 Fed. Reg. 38,526. Moreover, DOL previously rejected suggestions to annually increase salary levels. *See* 80 Fed. Reg. 38,537, 38. Although DOL suggests that a break with historical precedent is necessary to ensure "that the salary level does not become obsolete over time," this goal can still be achieved through increasing the minimum salary level every five years.

To the extent that a Final Rule adopts a mechanism to routinely and automatically update the salary levels, DOL should provide notice of the amount of the increase to employers at least one year in advance. SIFMA members conduct financial planning many months in advance and need a year's warning to adequately prepare for changes. For example, in addition to having to determine whether the change in the minimum salary level warrants any reclassifications, employers must determine new compensation rates for affected employees, and whether there needs to be any resultant changes to benefits eligibility, incentive compensation programs, training opportunities, and the company's overall organizational structure. A cost analysis will have to be conducted to make appropriate business decisions. Timekeeping and recordkeeping practices will have to be developed and implemented for the reclassified population (which may

[2] DOL suggests in the Proposed Rule that true-up payments would not necessarily be appropriate in this context. *See* 80 Fed. Reg. 38,535. SIFMA disagrees with DOL's assessment and sees no basis for distinguishing the use of true-up payments outside of the context of highly compensated employees. *See* 29 C.F.R. § 541.601(b)(2) (discussing the permissible use of true-up payments).

[3] We note that not even the minimum wage has been increased on a regular annual basis.

not necessarily lend itself to a "one size fits all" approach) and training provided to both employees and managers with regard to such procedures. Employers will also need time to ensure that any changes are properly communicated to the affected employees. As such, a 60-day notice period is an unreasonably short period of time for employers to conduct necessary planning, implement any resulting changes, and ensure timely compliance.

SIFMA also urges DOL to consider the fact that if salary levels are annually increased, there can be no certainty in exemption status, which in turn creates instability as far as an employee's overall compensation and benefit package. Employers frequently tie supplemental compensation, vacation entitlements and benefit opportunities to exemption status. If every year there is a possibility of having exemption status change, employers are likely to reduce compensation and benefit opportunities available to numerous exempt employees in order to cover the administrative cost associated with the annual changes. Finally, if DOL includes annual rate increases in a Final Rule, DOL should do so on a calendar-year basis because, like many employers, SIFMA members' business operations are tied to annual calendars. Further, adjusting the salary level midcalendar year may create issues in terms of year-end bonuses and fringe benefits. For example, if an exempt employee needs to be converted to nonexempt status midyear, he or she may lose eligibility for a bonus and fringe benefits that he or she was counting on when the year began.

## III. Methodology Used To Determine Increased Salary Levels Should Be Consistent With Past DOL Practices

To the extent that a Final Rule provides for automatic salary level increases, SIFMA strongly urges DOL to refrain from adopting the methodology of using the 40th percentile of all full-time salaried employees to determine further increases. If such a methodology were to be utilized, future salary level increases would be inflated as a result of any Final Rule significantly increasing the minimum salary level needed to quality as exempt. For example, if the Final Rule sets the minimum salary level needed to qualify as $50,440, SIFMA anticipates there will be relatively few salaried employees making less than this going forward. Consequently, the next time DOL examines the 40th percentile of full-time salaried employees, it will be significantly higher than $50,440, as the initial increase of $50,440 for base salary level will be serving as the "floor" of those full-time salaried workers examined to determine the 40th percentile threshold.

There is no historic precedent for this approach. The Kantor Report noted that the objective of setting a salary level to reflect exemption status would be met if set at points near the lower end (10 percent) of the current range of salaries for those in the lowest wage regions, smallest-sized establishment group, smallest-sized city group, or lowest wage industries using data the DOL had collected at that time and utilized such an approach to set the level in 1958. And in 2004, DOL used Current Population Survey (CPS) data that included most salaried workers and set the level at the bottom 20 percent of the salaried population in the South and the retail industry. SIFMA also notes that the proposed increase greatly exceeds the increase that would result of the DOL used the consumer price index. For example, a salary of $29,889.76 in 2015 has the same

purchasing price power as a salary of $23,660 had in 2004. *See* http://www.bls.gov/data/inflation_calculator.htm.

As such, SIFMA urges DOL to tie any increases to the Consumer Price Index and make explicit that the salary level minimum could decrease in a period of deflation or lower wages. Moreover, the methodology utilized should be as simple and transparent as possible to allow employers insight in advance of any announcement as to what future salary levels will be.

## IV. The Highly Compensated Test Should Remain At $100,000 And Include A More Simplified Duties Test

SIFMA strongly supports the continued use of a highly compensated test to simplify the determination of exemption status. It does advocate, however, maintaining the $100,000 threshold for the highly compensated test, as the "bright-line" $100,000 mark furthers the goal of simplifying the analysis of who qualifies for the test. Creating new salary levels that may continue to change will foster litigation, as anything less than a bright-line salary threshold will lead to confusion and error in determining whether the threshold is met, especially if annually increased, thereby reducing the benefits of a more simplified test to determine exemption status.

SIFMA also advocates for the elimination of a duties test in connection with a highly compensated test to the extent any changes are made to the duties test in this rulemaking (which SIFMA respectfully argues should only occur with further notice and comment as discussed below) and for consideration in further rulemaking. Employees who receive at least $100,000 a year are not the type of employees who need the FLSA to ensure a minimum level of income nor are they the type of employees that the FLSA was meant to protect.[4] Moreover, employers are unlikely to pay employees a six-figure salary without expecting them to be managing employees and/or using discretion and independent judgment on significant matters.

In 1985, the Administrator sought comments on the elimination of the duties test, suggesting that the Wage-Hour Division believed it had the authority to establish an exemption test that does not rely on specific duties. *See* 50 Fed. Reg. 47,696 (Nov. 19, 1985). SIFMA strongly believes that it is now time to adopt such an approach. To the extent that DOL believes that it does not have authority to eliminate a duties component to the highly compensated test, DOL could greatly simplify and clarify the analysis, and in turn reduce litigation, if it revised the highly compensated exemption to provide for more straightforward duty requirements. Specifically, the

[4] *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (Congress intended FLSA to "aid the unprotected, unorganized, and lowest paid of the nation's working population; that is those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage"); *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003) (The "FLSA was meant to protect low paid rank and file employees, not higher salaried managerial and administrative employees who are seldom the victims of substandard working conditions and low wages." (internal quotation marks and citation omitted)).

test could provide that if either office or nonmanual work is performed, the employee directs the work of at least one other employee, or has a four-year course of study in a field of science or learning that relates to the duties of the position, then the highly compensated duties test is satisfied, as there would be evidence of duties performed associated with either the administrative, executive or professional duties tests. Such an approach would provide a much more clear-cut analysis to determining whether the highly compensated exemption's duties test is met.

## V. The Duties Test For The White Collar Exemptions Should Not Be Revised And If DOL Determines It Appropriate To Do So, The Issue Should Be Proposed To The Public For Comment

SIFMA strongly agrees with DOL's approach not to revise the basic duties test for the white collar exemptions. Although some may assert that the existing duties test is vague and therefore invites litigation, there are decades of existing legal authority upon which employers may look in order to determine if the duties tests are satisfied. Making changes to the duties tests that depart from the existing body of federal legal authority will result in increased litigation and directly contradict DOL's stated goal to simplify the exemption analysis.[5]

Moreover, there would be significant administrative burdens and costs imposed on employers if DOL were to adopt tests that depart from existing legal standards. For example, employers would need to engage in an increased number of costly and time-consuming self-audits to determine whether employees satisfy the new duties test. As such, SIFMA strongly objects to any change to the duties test, and in particular any attempt to adopt the California "more than 50 percent" duties test, or the old "long" duties test, which also requires an analysis of whether more than a certain percentage of time is spent on nonexempt duties. Neither the California duties test nor the long duties test, both of which involve a percentage of time-based approach, are practical because it is virtually impossible to have consistency in percentages on a week-to-week basis. SIFMA also opposes the adoption of either the California duties test or the long duties test because both tests are likely to foster confusion and lead to increased litigation because of the extreme difficulty in accurately tracking the minute-by-minute activities of employees, which in turn leads to legal challenges. For example, SIFMA members with employees in California note that a quantitative approach of the "more than 50 percent" test has created more grounds for dispute, and thus litigation, with regard to proper classification status than does the FLSA's qualitative approach.

Additionally, to the extent that DOL determines that it is appropriate to modify the duties test under 29 C.F.R. Part 541, DOL should not implement any changes without first proposing specific language that would give the public notice and opportunity for comment, especially

[5] This issue would not be a concern with regard to changes to the duties component of the highly compensated test as proposed above as there is still very little established legal authority on the highly compensated test.

given the significant economic impact such changes will have on operations. Any failure to formally vet proposed changes with the public would violate the spirit and purpose of the notice and comment requirements. While DOL may believe that the duties test is a "logical outgrowth" of the Proposed Rule, "fair notice" of the changes are needed for compliance with the Administrative Procedures Act ("APA"). *See Long Island Care At Home, LTD. v. Coke*, 551 U.S. 158, 174 (2007) ("The object, in short, is one of fair notice."); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (stating that purposes of APA's notice and comment requirements are "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review"). Without first setting forth the specific changes to the duties test in a notice of proposed rulemaking, employers will not have "fair notice" of any change or the ability to comment on the economic costs associated with changes. *See Prometheus Radio Project v. FCC*, 652 F.3d 431,450 (3d Cir. 2011) (stating that "the opportunity for comment must be a meaningful opportunity. That means enough time with enough information to comment and for the agency to consider and respond to the comments." (internal citation and quotation marks omitted)). Thus, SIFMA believes that any change to the duties test without fair notice and opportunity to comment would violate the APA.[6]

## VI. Implementation Costs Will Be Significantly Higher Than Estimated In The Proposed Rule

DOL has asked for input as to what the implementation costs would be, based on DOL's proposal. SIFMA respectfully submits that the DOL has significantly underestimated the time and associated cost that will be involved to implement changes associated with the requirements of a Final Rule. As already noted, a full analysis of the total compensation package and associated benefits will need to be reevaluated in conjunction with an employer's total operating costs to implement necessary changes. The annual changes could result in employee grade levels and compensation being in annual flux, which hinders an employer's ability to plan for the future. Changes to policies, timekeeping and recordkeeping systems also will have to be developed and implemented. Communications also will have to be developed so that employees understand the impact of any changes made. As such, any change will involve a significant amount of resources and time to ensure that it is implemented properly.

## VII. Increasing The Salary Level Will Affect Employee Status, Benefits, And Opportunities

SIFMA wants to ensure that DOL understands that the proposed increased salary level will result in many employees being reclassified to nonexempt status. For many of these employees, this reclassification will mean the loss of benefits, flexibility and status that they previously enjoyed,

[6] Additional laws may potentially be implicated if DOL fails to give fair notice including but not limited to the Unfunded Mandate Reform Act of 1995.

as well as the loss of pay and overall earned income. Below is a list of some changes that reclassified employees will likely face.

- *Impact on Flexible Work Arrangements and Professional Status*

One of the many perks of exempt status is the flexibility it gives employees in work arrangements. Many exempt employees appreciate that exempt status provides them with the flexibility of coming in late, leaving work early, determining the timing and duration of meal and break periods, and otherwise setting their own schedules to better address work-life balance issues while still receiving a minimum level of pay each week. For example, exempt employees have the ability to respond to unexpected events like needing to pick up a sick child at school without the fear of losing pay as a result of their time away from work. In contrast, nonexempt employees paid by the actual hours worked may still have the flexibility in their schedule, but it often comes with an associated loss of income when they are away from work. Additionally, in an effort to effectively monitor the time nonexempt employees are working and prevent off-the-clock work, many SIFMA members require their nonexempt employees to work in the office and do not grant them the same opportunities to work remotely and during nontraditional hours that exempt employees enjoy. As such, reclassification may have a negative impact on employee morale.

Related to these work-life balance issues, employees who want and need flex-time status due to personal obligations may lose exemption status as a result of DOL's decision not to allow the minimum required salary to be prorated for part-time employees. Although it may seem to be common sense that overtime is not an issue for part-time employees, many SIFMA members have employees who have periods where business demands necessitate that part-time employees work more than 40 hours a week. For example, a number of employees who clearly meet the duties requirement for exempt status, but do not meet the minimum salary because they chose to work part time, may have responsibilities during tax season that require them to work more than 40 hours in a week. Because the base salary for exempt status cannot be prorated, this employee would have to track hours worked and would receive overtime pay. In turn, this creates a perverse incentive for employers not to fill positions of responsibility with part-time employees. As such, SIFMA proposes that if DOL does issue a final rule that significantly increases the existing salary level, that it also provide that the salary could be prorated for part-time work.

SIFMA also understands that many of its members' employees view being classified as exempt as an indicia of professional status. Being reclassified will be seen by many as a step back in their career paths and as a devaluation of their roles in the organization. Employees like not having to track time and spending time filling out timesheets. Employees also like the peace of mind knowing that they will receive a minimum level of compensation each week. Thus, the reclassifications that will result from changes that DOL proposes will impact the morale of employees who will view the reclassification as a loss of status and predictable income.

- *Impact on Total Compensation and Benefit Packages*

Reclassifications caused by the increase in required salary level also may have the negative consequence of employees receiving reduced overall compensation packages. As DOL itself recognizes in the Proposed Rule, employers may reduce employee hours to avoid overtime or set hourly rates to account for an estimated number of overtime hours such that operations are able to remain generally cost neutral. *See* 80 Fed. Reg. 38,569.[7] Additionally, some employees converted to nonexempt status will be ineligible for certain benefits such as increased vacation, life insurance, long-term disability insurance, and certain supplemental incentive compensation initiatives only offered to exempt employees. Indeed, some benefits such as short-term and long-term disability are not always offered to nonexempt employees.

- *Impact on Training Opportunities and Career Growth*

Employees may have their future compensation affected by reclassification given the reduced opportunities for career growth that may ensue if an employer determines that the appropriate response to an increased salary level is to reclassify the employee to nonexempt status. Such employees converted to nonexempt status will miss out on after-hours manager training programs and other programs that would foster career progression and greater opportunities for future increases in income. The changes also may reduce opportunities for career growth and professional development because nonexempt employees are less likely to be given opportunities to travel for training, conferences, and networking opportunities.

- *Less Opportunity to Establish Satisfactory Performance*

To the extent that an employer decides to raise salary levels to preserve exemption status for certain employees, a significant increase to the salary threshold may reduce the opportunity for employees in the financial services industry to establish sufficient performance such as through the growth of customer portfolios. The higher salary levels required may translate into greater demands being placed on employees with greater threshold revenues and zero tolerance for anything less than meeting expected performance standards and targets. For example, employees who take a longer time to learn the job may be terminated at a quicker pace because they are not covering the higher labor costs associated with the higher salary.[8]

---

[7] In discussing the economic impact of the proposed salary increase, the Proposed Rule recognizes that one employer "model" "in response to the proposed increase is the "employment contract model." As the Proposed Rule states, [un]der this model, when employers are required to pay employees an overtime premium, they adjust the employees' implicit hourly rate of pay downward so that when the overtime premium is paid total employee earnings (and thus total employer cost) remain constant, along with the employees' hours. The employer does not experience a change in cost and the employee does not experience a change in earnings or hours . . . ." *Id.*

[8] SIFMA notes that if a Final Rule does allow incentive compensation to count toward the increased level, the issue of an employer having less tolerance to establish satisfactory performance may be mitigated.

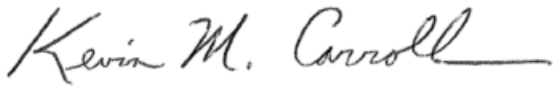
## VIII. Effective Date Of Final Rule

SIFMA urges DOL to give employers sufficient time to review the Final Rule issued and to implement it in a manner that does not unduly disrupt operations and allows for timely compliance. SIFMA respectfully submits that one calendar year is a reasonable period to do so.

## IX. Conclusion

SIFMA thanks the DOL for the opportunity to provide comments on the Proposed Rule. If you have any questions with regard to SIFMA's comments, please contact Sam Shaulson, Corrie Fischel Conway, or Russell Bruch at Morgan, Lewis and Bockius LLP.[9]

Respectfully submitted,



Kevin Carroll
Managing Director and Associate General Counsel
SIFMA

c: Sam S. Shaulson, Esq.
Corrie Fischel Conway, Esq.
Russell R. Bruch, Esq.

[9] Mr. Shaulson is a partner at Morgan, Lewis & Bockius LLP located at 101 Park Avenue, New York, NY and he can be reached at 212.309.6000. Ms. Conway and Mr. Bruch are Of Counsel at Morgan, Lewis & Bockius LLP and are located at 1111 Pennsylvania Ave., NW, Washington, DC. They can be reached at 202.739.3000.