November 7, 2023

The Honorable Jessica Looman
Administrator, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Re: *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees;* RIN: 1235-AA39

Dear Administrator Looman:

On behalf of our food retail, wholesale, and product supplier members, FMI – The Food Industry Association welcomes the opportunity to submit comments regarding the notice of proposed rulemaking (NPRM) on *"Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees."* FMI is concerned about the rationale of and need for a revamp of the federal overtime regulations in this time of continued economic uncertainty. We also associate ourselves with the comments in opposition to the NPRM filed by the Partnership to Protect Workplace Opportunity, of which FMI is a member.

As the food industry association, FMI works with and on behalf of the entire food industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain – from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services – to amplify the collective work of the industry.

FMI member companies, which range from independent operators to regional and large national and international businesses and brands, operate roughly 33,000 grocery stores and 12,000 supermarket pharmacies. FMI members produce and supply the roughly 30,000 different food and consumer goods products found on store shelves, and ultimately touch the lives of more than 100 million U.S. households per week. The food industry provides a wide range of full-time, part-time, seasonal, and flexible workforce opportunities in a diverse variety of careers and serves as an essential employer in every community around the country. The diversity of career opportunities offered through the food industry provides individuals with employment at any stage of life and any education level.

The proposed amendments to the regulations at 29 C.F.R. Part 541 (the "EAP" or "white collar" regulations) would have a significant impact on our members, and FMI was one of many stakeholders to make a statement during Department of Labor's (DOL) public hearings in the spring of 2022, on whether there should be a revamp of the federal overtime rules. During this hearing we stressed two points that remain true 18-months later:

1. There is no justification or need to amend the overtime rule, especially on the heels of a major reform just a few years ago; and

2. Amending the overtime rule will cause more harm than good as the country and economy deal with workforce shortages, inflation, and continued supply chain disruptions.

FMI and our members believe that employees and employers alike are best served with a system that promotes maximum flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers in classifying their employees under the FLSA. Unfortunately, FMI is very concerned that if the NPRM is finalized in its current form, it will result in large numbers of employees being reclassified as non-exempt, with significant consequences for both the reclassified employees and their employers. For these reasons and as explained further herein, FMI urges the Department to reverse course on issuing a new overtime rule.

A. <u>Any Rule Change Now is Ill Advised.</u>

Food retailing is a very diverse industry and brings a different set of challenges when considering the numerous daily functions a single store provides to its customers and communities – including the hub for everyday food and consumer goods, operating pharmacies that dispense life-depending medications and administer COVID-19 vaccines and flu shots, and serving the community of Americans who rely on critical food assistance programs like the Supplemental Nutrition Assistance Program (SNAP) and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC). A single grocery store employs more than 100 individuals on average and a larger format supermarket employs well over 300 individuals on average.

The nation's economy is continuing to experience workforce shortages, inflationary pressures, supply chain disruptions, and a changing American workforce following the COVID-19 pandemic. Any modification to the overtime rules is ill-advised and will likely have a negative impact on the nation's economy, including the national food supply chain.

The food industry's biggest supply chain challenge remains the workforce shortage. Our industry continues to face significant challenges maintaining adequate staffing despite extraordinary efforts to attract and retain associates. Food retailers, wholesalers, and product suppliers experience worker shortages everywhere in their operations – from truck drivers to warehouse and logistics workers to cashiers. To address these labor challenges, companies offer a combination of higher wages, bonuses, improved benefits, flextime, and training and skills development opportunities. FMI members are creatively partnering with community organizations, schools, and NGOs to promote the diversity of job opportunities available in their stores and companies. The low unemployment rate, inflation challenges, the lack of real

immigration reform, and the constant barrage of new and revamped federal and state labor policies are all stifling employers' ability to recruit and retain talent.

According to the most recent annual survey of FMI members, 76 percent of food retailers and 88 percent of suppliers said inflation had a negative impact on their businesses in 2022, and 80 percent of retailers and 56 percent of suppliers expected their company operating costs to increase in 2023.[1] The survey noted that workforce challenges had negative impacts on the overall businesses of food retailers and suppliers in 2022. Companies pointed to recruitment, retention, and cost of compensation as areas of biggest concern. The survey showed that more than 90 percent of retailers and suppliers offered increased wages/salaries to boost hiring and retention of full-time employees, over 70 percent are offering improved benefits, and nearly 70 percent are offering flex time.[2]

B. <u>The NPRM Will Likely Face Judicial Scrutiny and Should be Withdrawn.</u>

DOL's proposal to increase the minimum salary level for the overtime exemptions under the Fair Labor Standards Act (FLSA) is excessive and misguided. DOL's proposal amounts to more than a 50 percent increase from the final overtime rule adopted in 2020. The NPRM will raise the salary threshold, below which an employee is non-exempt by more than 50 percent from the current $35,568/year ($684/week) to $55,068/year ($1,059/week). The NPRM sets a salary level that will likely be much higher at the time the final rule is implemented. More specifically, in a footnote, DOL states that it expects to use the latest data when implementing the final regulation and projects the threshold to go as high as $60,000 by that time. DOL should not propose one threshold but signal that it will implement another. The uncertainty regarding the salary threshold under the NPRM does not give FMI members the certainty needed to address current and future consumer trends, supply chain challenges, and evolving economic conditions.

Historically, DOL has recognized that the purpose of the salary level is to "provid[e] a ready method of screening out the obviously nonexempt employees."[3] In other words, DOL should not set the level so high that it expands the number of employees eligible for overtime beyond what Congress envisioned when it created the exemptions. Yet, this is exactly what DOL proposes in this rulemaking. The regulatory history reveals that, in determining appropriate salary levels, DOL has examined actual salaries and wages paid to exempt and non-exempt employees and

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[1] *See* The Food Retailing Industry Speaks 2023, FMI (2023), https://www.fmi.org/forms/store/ProductFormPublic/the-food-retailing-industry-speaks-2023.

[2] *Id.*

[3] *See, e.g.*, Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations*, Part 541, at 7–8 (1949) ("[T]he best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them."); Harold Stein, *Report and Recommendations of the Presiding Officer at Public Hearings on Proposed Revisions of Regulations, Part 541*, at 42 (1940) ("The salary paid the employee is the best single test of the employer's good faith in characterizing the employment as of a professional nature.").

set the salary level in such a way as to ensure that it served a screening function and did not operate as a salary-only test. Recent DOL rulemaking recognizes that the FLSA exemptions focus on an employee's duties and not the application of a salary test.[4]

The NPRM is also at odds with the FLSA itself, which exempts employees based on duties rather than dollars. The FLSA exempts "any employee employed in a bona fide executive, administrative, or professional capacity."[5] Significantly, the phrase "employee employed in a bona fide ... capacity" focuses on the employee's actual duties as performed during his or her employment. The FLSA exemptions focus on an employee's duties and these exemptions must be interpreted fairly. The Supreme Court has expressly held that the exceptions must be given a "fair (rather than narrow) interpretation" because the FLSA's exemptions are "as much part of the FLSA's purpose as the [minimum wage] and overtime-pay requirements."[6] The Third Circuit has explained that a "fair reading" is what "should be expected, because employees' rights are not the only ones at issue and, in fact, are not always separate from and at odds with their employers' interests."[7]

The outcome of DOL's 2016 final rule set a precedent. In 2017, the U.S. District Court for the Eastern District of Texas invalidated the 2016 final rule's salary level because it created (or was expected to create) significant additional costs, disruptions in operations, and dramatic increases in costs for an employer to monitor and ensure compliance.[8] The 2016 rule was explicitly intended to increase the number of employees eligible for overtime. In enjoining the rule, the U.S. District Court held that "the Department does not have the authority to use a salary-level test that will effectively eliminate the duties test as prescribed" in the FLSA.[9] DOL then withdrew the rule and promulgated a new rule in 2019. In the new rule, DOL discussed the district court's decision, and recognized that "the 2016 final rule was in tension with the Act," and emphasized that a "salary level set that high does not further the purpose of the Act, and is inconsistent with the salary level test's useful, but limited, role in defining the EAP exemption."[10] Like the 2016 rule, this proposed rule's increased salary thresholds would make the duties test null and void due to such high salary designations.

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[4] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 84 Fed. Reg. 51,230, 51,238 (Sept. 27, 2019) (codified at 29 C.F.R. 541) (recognizing that salary level is generally "not a substitute for an analysis of an employee's duties," but is, "at most, an indicator of those duties").

[5] 29 U.S.C. § 213(a)(1).

[6] *Encino Motorcars, L.L.C. v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (emphasizing that agencies and courts "have no license to give the exemption[s] anything but a fair reading" and rejecting the argument that exemptions should be construed narrowly).

[7] Sec'y U.S. Dep't of Lab. v. Bristol Excavating, Inc., 935 F.3d 122, 135 (3d Cir. 2019).

[8] Nevada v. U.S. Dep't of Labor, 275 F. Supp. 3d 795, 805–808 (E.D. Tex. 2017).

[9] *Id.* at 805.

[10] 2019 Final Rule, 84 Fed. Reg. at 51,238.

C. <u>The NPRM Will Severely Undermine Employment Flexibility.</u>

FMI's members firmly believe that employees and employers alike are best served with a system that promotes optimal flexibility in structuring employee hours, career advancement opportunities for employees, and clarity for employers. The proposed changes will create problems for both employees and employers. Employers will be required to restrict flexible work arrangements and scale back certain employee benefits.

The food industry is ever evolving due to many factors including supply chain challenges, consumer trends and demands, and economic conditions. The staffing needs of manufacturing, warehousing, and retail must remain flexible to meet these changes and demands. Our ability to serve the public depends on our ability to staff our stores, distribution centers, and manufacturing facilities and schedule appropriately to meet customer demands. The decisions that go into these staffing needs are constant and changing and for regional and national grocery stores, often made at a local level based on consumer demand. Any approach that restricts flexibility should be rejected. As a result of the COVID-19 pandemic, retailers and wholesalers have been experimenting with new employment models offering more flexible work arrangements depending on their employees' needs. Technology continues to play a part in making these flexible work arrangements possible and we fear the proposed rule will further limit innovation in this area.

Employers are currently required to do extensive record keeping and document compliance to limit the risk of legal liability. The NPRM would force businesses to take steps employees dislike but that are necessary for employers to prove they comply. This would likely include limiting remote work where employee record keeping and time compliance cannot be as easily monitored. Employers would need to balance the liability they face from this new rule with the need for efficiency during the 40-hour work week – potentially leading to more micromanaging as employers are required to pay more attention to the details of each employee's work plan.

If employees are reclassified to hourly workers, they will only be compensated for those hours they work. This means that instead of being able to structure their day around childcare needs, children's school meetings, doctor's appointments, and other personal needs without losing pay, they will lose critical flexibility. While the Administration and DOL have promoted helping employees balance their work and personal lives, the NPRM effectively forces millions of employees who currently enjoy these benefits of flexibility to an entirely different work-life balance tightly linked to documenting the specific hours they worked rather than the job completed. Employers may no longer be able to allow these employees to work from home or other locations removed from the central workplace since doing so will not allow the employer to reliably and accurately track the hours worked. This may limit the ability of employers to

provide electronic devices such as iPads since using them beyond the specified work hours would require the employee to be compensated.[11]

The proposed changes to the overtime regulations will also likely reduce career advancement opportunities and prevent employee advancement as employees may have to forgo workplace training or other career-enhancing opportunities because the employer is not able to pay overtime rates for that additional training time. When employees have been reclassified from exempt to nonexempt, there is also very often a decline in employee morale, as this change is generally seen as a loss of "workplace status." Employees often view this as a punishment or demotion and can cause distrust in the employee-employer relationship.

These concerns are even more pronounced today given the prevalence of flexible working arrangements in the post-COVID world. To reclassify some of these employees will jeopardize their ability to work remotely, which has been a flexibility that has been extremely well-received by many employees and their ability to juggle personal responsibilities such as childcare with their professional obligations. Additional changes in the economy make the proposed boost in the salary threshold even more problematic. Employers continue to struggle to find enough employees and pay higher wages as a result. Increasing the cost of labor even further through this regulation will add to their burdens and will have a more significant impact on small businesses.

D. <u>DOL Should Abandon Automatic Increases to the Salary Levels.</u>

DOL's proposal to establish a mechanism for automatically increasing the compensation thresholds every three years should also be abandoned for the following reasons. First, there is no evidence that Congress intended that the salary level test for exemption under section 13(a)(1) be indexed. Throughout the history of the FLSA, Congress has never provided for automatic increases of the minimum wage. Neither has Congress indexed the minimum hourly wage for exempt computer employees under section 13(a)(17) of the Act, the tip credit wage under section 3(m) or any of the subminimum wages available in the Act. Congress has provided indexing under other statutes, but never under the FLSA.

Second, there is no precedent for indexing in the regulatory history of Part 541. Historically, Congress has consistently rejected automatic increases to the minimum wage. DOL has also repeatedly rejected requests to rely mechanically on inflationary measures when setting salary levels because of concerns regarding the impact on lower-wage industries and geographic regions. The same reasoning applies to automatic annual salary increases based on inflation. Using the proposed methodology to trigger automatic annual increases is equally troublesome, and will lead to rapidly increasing income thresholds, effectively punishing the business community for increasing salary levels.

[11] *Id.*

Third, automatic increases to the salary level would impose significant additional burdens on employers. As noted above, adjusting to changes in the Part 541 regulations to ensure compliance with the FLSA is a complicated and time-consuming process. Adjusting to an increased minimum wage only requires adjusting hourly rates in a payroll system. However, adjusting to changes in the white collar regulations is much more complex and would require FMI members to identify all exempt employees earning a salary less than that set by the rule; evaluate whether the most appropriate way to comply is by providing a salary increase or reclassifying some or all of the employees to non-exempt status; deciding whether to pay reclassified employees on an hourly or salaried basis, and how much; drafting new compensation plans for reclassified employees; communicating the changes to employees; and, finally, implement the changes. According to our members, reclassification can take many months. Additionally, planning for a salary increase will be even more difficult for FMI members whose fiscal year is not the calendar year or otherwise does not coincide with the timing of DOL's automatic update.

Finally, the Administrative Procedure Act (APA) requires DOL to provide a notice and comment rulemaking and prohibits an automatic process. The APA contemplates that agencies will enact major policies through notice-and-comment rulemaking. Such rulemaking gives stakeholders an opportunity to weigh in and provide the Department with information. On a practical level, automatic increases to the salary bases would leave businesses in a perpetual state of uncertainty. As noted earlier, the salary threshold under the NPRM does not give FMI members the certainty needed to address current and future consumer trends, supply chain challenges, and evolving economic conditions. While FMI understands that, from time to time, the salary bases may need to be adjusted to reflect economic changes and growth, this should be done through the rulemaking process under the APA so that all stakeholders can provide feedback on, and then adequately prepare for, any changes.

E. DOL Should Allow all Nondiscretionary Bonuses, Commissions, and Other Incentive Payments to Count Toward the Minimum Salary Level and Increase the 10 Percent Cap.

In the NPRM, DOL states that it is not proposing any changes to how bonuses are counted toward the salary level requirement. This continues to limit the amount of credit to 10 percent of the salary level ($105.90 per week under the proposed rule) through the payment of nondiscretionary bonuses and incentive pay (including commissions) paid annually or more frequently. FMI supports allowing such credits in general since nondiscretionary incentive payments comprise part of compensation packages for many exempt employees.

There are many benefits of incentive pay. Incentive pay motivates employees and increases workforce productivity and efficiency. Incentive pay likewise encourages employees to improve their job performance and recognizes their extra effort. Research has shown that incentives are one of the reason employees feel energetic and motivated toward their work. Incentive payments also encourage positive behaviors by linking an employee's compensation to the business's success. Historically, DOL has recognized that giving employers the flexibility to structure compensation packages this way is highly beneficial for businesses and consistent with

the FLSA's goals. Incentive pay has become even more important in recent years. A Commissioner on the U.S. Equal Employment Opportunity Commission who previously served as the Acting Administrator of WHD and a former WHD senior policy advisor have explained incentive pay was especially important during the COVID-19 pandemic.[12] More specifically, the former WHD officials note that many employers in essential industries implemented or considered a variety of innovative compensation strategies for their employees during the COVID-19 pandemic which was mutually beneficial for both the employees and the employers.[13] Incentive pay is equally important in the age of remote work for similar reasons.

We applaud the Department for continuing to allow employers to use bonuses and incentive payments paid annually or less frequently. However, FMI objects to the 10 percent cap and recommends that the Department allow all forms of incentive pay paid out at any frequency to count towards up to 20 percent of the salary level. The origin of the 10 percent cap comes from the 2016 final rule, which failed to explain how the Department settled on 10 percent. Once again, DOL fails to explain why a 10 percent cap is necessary. To reiterate, incentive payments are important because they encourage positive behaviors by linking an employee's compensation to the business's success. The 10 percent cap is inconsistent with real compensation plans, many of which now pay exempt employees far more than 10 percent of their total compensation through incentive payments.

There is no reason for the Department to create hindrances for incentive-based compensation. Employees receive the same guaranteed minimum compensation either way – the proposed credit must come from "non-discretionary" incentives, after all; the only difference is that incentive payments encourage success-oriented behavior. DOL has recognized that incentive payments increasingly correlate with exempt duties. Large incentive payments therefore are consistent with an employee satisfying the duties test. This is precisely the sort of short-hand inquiry the salary level was designed to answer. Allowing a higher cap will strengthen the salary test and help it better serve its original – and only proper – function.

F. <u>DOL Should Provide Significantly More Time to Comply with a Final Rule.</u>

Determining compliance with federal overtime regulations is a very complex and complicated endeavor for our member companies, and specifically grocery retailers. The more time grocery store managers, owners, and operations are forced to spend complying with complex and burdensome regulations, the less time they have to serve their communities – their most important duty.

The Department's proposal that all aspects of the final rule become effective 60 days after publication does not provide our members with close to enough time to take the necessary

[12] *See* Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 Mo. L. Rev. 1171, 1203 (2021).

[13] *Id.*

steps to ensure compliance. Significantly more time should be provided. DOL acknowledges that the 60-day proposed effective date is significantly shorter than the effective dates for its three prior overtime rules, which became effective between 90 and 180 days after those rules were issued. Our members need additional time to read the final rule, train staff on any changes, conduct pay assessments, and review job descriptions. A 60-day compliance deadline is simply unrealistic.

Further, the grocery industry is highly competitive and functions on razor thin profit margins that are around 2 percent a year – averaging among the lowest of any business organizations in the economy. Labor is the industry's largest operations cost and this cost is a factor along every step of the grocery value chain – production, distribution, and retail.

G. FMI Strongly Opposes Any Changes to the Duties Test.

In the NPRM, DOL states that it "is not proposing any changes to the salary basis or duties test requirements in this rulemaking" but notes that the Department "welcomes comments on all aspects of this proposal." FMI strongly opposes any effort to address the duties test in this rulemaking as this would be exceedingly onerous and simply unworkable for our members. Were the Department to make changes to the duties test, this would be an unfair and inappropriate revision of critically important rules with a substantial impact throughout the economy. Furthermore, any changes to the duties test would increase FLSA litigation at a time when such litigation is already exploding across the country.

Conclusion

FMI and our member companies stand committed to serving their employees and communities across the country. We welcome the opportunity to continue to work with the Biden-Harris Administration and DOL on creative ways to address the workforce shortage crisis. As detailed in this letter and in comments filed by the Partnership to Protect Workplace Opportunity, revising the overtime rules in the ongoing economic environment and extremely tight labor market will do little to help American workers, consumers, and businesses.

Thank you for your consideration of these comments. Please contact us if you have questions or would like to discuss our comments and other issues vital to the food industry.

Sincerely,

Christine Pollack

Christine Pollack
Vice President, Government Relations