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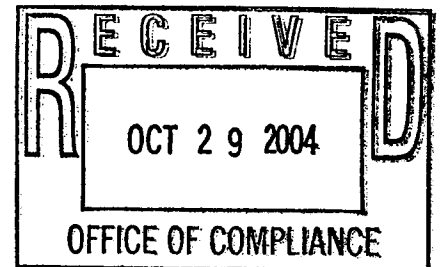
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October 29, 2004

VIA HAND DELIVERY

William W. Thompson II
Executive Director
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, DC 20540



Dear Mr. Thompson:

Thank you for the opportunity to submit comments to the Board of Directors of the Office of Compliance ("the Board") concerning proposed substantive regulations for certain rights and protections provided by the Fair Labor Standards Act of 1938 (FLSA), as proposed in the recent Notice of Proposed Rulemaking ("NPR"). The Office of House Employment Counsel offers the following comments and observations with respect to the NPR.

Comments on Proposed Regulations

On September 29, 2004, the Board issued an NPR, 150 CONG. REC. H7850-07 (daily ed. Sept. 29, 2004), seeking comment on its proposed substantive regulations ("Prop. Reg.") concerning the FLSA, 29 U.S.C. § 201 *et seq.* Relevant sections of the FLSA are incorporated in the Congressional Accountability Act ("CAA"), 2 U.S.C. §§ 1301-1438. More specifically, the CAA incorporates the rights and protections provided in sections 6(a)(1), 6(d), 7, and 12(c) of the FLSA, 29 U.S.C. §§ 206(a)(1), 206(d), 207, and 212(c).

A. General Comments

1. Incorporation of "employing office" definition. Section 541.1 of the Proposed Regulations defines "[e]mployer, company, business or enterprise" as an "employing office" as defined in section 101(9) of the CAA, 2 U.S.C. § 1301(9). See Prop. Reg. 541.1. This incorporation, rather than substitution of the term "employing office" in the appropriate places in the August 23, 2004 Department of Labor ("DOL") regulations, is confusing and inconsistent with the Board's past practice regarding incorporation of the DOL's FLSA regulations. See, e.g., OOC Reg. § H541.5b. Because the readability of the Proposed Regulations would be greatly enhanced by eliminating references to irrelevant or inapplicable terms such as "employer," "company," "business," and "enterprise," good cause exists to depart from the DOL regulations. See 2 U.S.C. § 1313(c)(2). We therefore recommend that the term "employing office" be substituted where appropriate.

2. Statutory authority for proposed regulations. The Board identifies 29 U.S.C. § 213, 2 U.S.C. § 203, and 2 U.S.C. § 304 as the statutory authority for the Proposed Regulations. The correct statutory cites for sections 203 and 304 of the CAA are 2 U.S.C. §§ 1313 and 1384. Accordingly, the cites to 2 U.S.C. §§ 203 and 304 should be replaced by the correct statutory citations.

In addition, the exemptions of section 13(a)(1) of the FLSA apply to covered employees "by virtue of Section 225(f)(1) of the CAA," 2 U.S.C. 1361(f). See OOC Reg. § H541.01. Thus, 2 U.S.C. § 1361(f) should be substituted for 29 U.S.C. § 213. Furthermore, in the interest of clarity and completeness, the explanation provided in current Board regulation section H541.01(a)-(b) should be incorporated into Proposed Regulation Section 541.0.

3. References to American Samoa employees. The Proposed Regulations include several references to a reduced salary basis rate for employees "employed in American Samoa by employers other than the Federal Government." See Prop. Reg. §§ 541.100(a), 541.200(a), 541.204(a), 541.300(a), 541.400(b), and 541.600(a). Because the Proposed Regulations do not apply to such employers, these references should be removed.

4. Use of examples/relevance of regulations to House of Representatives. The Proposed Regulations contain many examples of the exemption concepts. For instance, in defining "primary duty," the Proposed Regulations include an example involving a business consultant taking

“extensive notes recording the flow of work and materials through the office or plant of the client.” See Prop. Reg. § 541.703(b)(6). This illustration and others included in the Proposed Regulations are at best marginally helpful to employing offices in determining whether particular covered employees are exempt from the FLSA.

Because the purpose of the examples is to “further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work,” the Board should develop examples that reflect the types of work performed by covered employees. See *id.* § 541.703(b). These examples should illustrate both the typical tasks and duties performed by employees in Member offices and on Committees, but also the tasks and duties typically performed by other covered employees who are not directly involved in the legislative process. Because relevant examples will provide employing offices with guidance regarding the application of the exemptions, good cause exists to depart from the DOL regulations. See 2 U.S.C. § 1313(c)(2).

In addition, in certain sections, the Proposed Regulations refer to positions not relevant to the House of Representatives, such as “longshoremen.” See Prop. Reg. § 541.3(a), 541.601(d). Because inclusion of such references has no meaning in this context, good cause exists to depart from the DOL regulations. See 2 U.S.C. § 1313(c)(2).

Specific sections which should be customized to the legislative branch are identified in the section-by-section analysis below.

5. Subpart E—Computer Employees. The Proposed Regulations contain two identical Subparts E. The second Subpart E should be eliminated.

B. Section-by-Section Analysis

Section 541.0 Introductory Statement:

As discussed above, the CAA does not apply Section 13(a)(1) of the FLSA directly through Section 203, but rather through Section 225(f). See 2 U.S.C. § 1361(f); OOC Reg. H541.01(a).

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. Subsections (a), (b), and (c) refer to “outside sales employees.” Because no such employees are covered by the CAA, these references should be eliminated. As discussed below, the text of Subpart F should be eliminated. To avoid confusion between the DOL regulations and the OOC regulations, Subpart F

should be reserved for future use, as needed, rather than renumbering subsequent subparts.

Subsection (c) asserts that the "equal pay provisions in section 6(d) of the Fair Labor Standards Act are **also** administered and enforced by the **Office of Compliance.**" Prop. Reg. §541.0(c) (modifications in bold). In this passage, the Board substituted "Office of Compliance" for "United States Equal Employment Opportunity Commission." In the DOL regulations, the purpose of this sentence is to acknowledge the exclusive authority of another executive branch agency for a portion of the FLSA. However, the Office of Compliance has no comparable administration or enforcement authority with respect to these provisions, aside from the authority granted by the CAA. Accordingly, this sentence is unnecessary and should be deleted. At minimum, the words "also" and "enforced" should be omitted.

Section 541.1 Terms used in regulations:

See General Comment 1, *supra*, regarding the definition of "employing office."

Section 541.3 Scope of the section 13(a)(1) exemptions:

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. Subsection (a)'s reference to "longshoremens" should be eliminated because no such positions exist in the legislative branch.

Subsection (b)(1) includes many occupations that are not applicable to the legislative branch, including deputy sheriffs, state troopers, highway patrol officers, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, and ambulance personnel. These references should be omitted from the Proposed Regulations.

Section 541.4 Other laws and collective bargaining agreements:

The sentence "Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act" should be eliminated because the CAA does not incorporate any such laws, regulations or ordinances.

Section 541.100 General rule for executive employees:

See General Comment 3, *supra*, regarding American Samoa employees.

Section 541.101 Business owner:

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. Because the CAA does not cover “business owners,” the text of this section should be eliminated and the section reserved for potential future use.

Section 541.103 Department or subdivision:

See General Comment 1, *supra*, regarding the definition of “employing office.”

Section 541.104 Two or more other employees:

This section requires regular supervision of two or more “employees” to qualify for the executive exemption. Because the term “employees” does not include interns, see Prop. Reg. § 541.1, the following sentence should be appended to the end of this section: “For purposes of this section, the term “employee” also includes interns, either paid or unpaid.”

Section 541.106 Concurrent duties:

See General Comment 4, *supra*, regarding relevance of the examples to the House of Representatives.

Section 541.200 General rule for administrative employees:

See General Comment 3, *supra*, regarding American Samoa employees.

Section 541.201 Directly related to management or general business operations:

See General Comment 1, *supra*, regarding the definition of “employing office.” In addition, the references to “customers” in subsections (a) and (c) have no applicability as written to the legislative branch. Accordingly, the phrase “or the employer’s customers” should be deleted from subsection (a) and subsection (c) should be deleted in its entirety.

Section 541.202 Discretion and independent judgment:

See General Comment 1, *supra*, regarding the definition of “employing office.”

Section 541.203 Administrative exemption examples:

See General Comment 1, *supra*, regarding the definition of “employing office.”
See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives.

With regard to General Comment 4, several of the subsections have no applicability to legislative branch employees and thus should be deleted. See Prop. Reg. §§ 541.203(a), (b), (g), (h), and (i). For other subsections, we suggest that the Board modify the language to eliminate references to non-legislative branch activities. Thus, in subsection (c), the reference to “purchasing, selling or closing all or part of the business” should be replaced with “closing an office.” Similarly, we suggest that subsection (d) be modified as follows (additions in bold):

“An executive assistant or administrative assistant to a ~~business owner or~~
senior executive **of an employing office or Member of the House of**
Representatives ~~a large business~~ generally meets the duties
requirements”

Specific reference to House Members is necessary because such individuals are not employees of any “employing office,” as the term is defined in the CAA.

Section 541.204 Educational establishments:

See General Comment 3, *supra*, regarding American Samoa employees. See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. With regard to General Comment 4, subsection (b) contains regulations that are not relevant to the operation of the Page Schools or the Child Care Centers, the only educational establishments possibly covered by the CAA. Thus, we suggest that the final three sentences of subsection (b) be omitted.

Section 541.300 General rule for professional employees:

See General Comment 1, *supra*, regarding the definition of “employing office.”

Section 541.301 Learned professionals:

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. Section 541.301(e) of the Proposed Regulations includes references to several positions that are not applicable to covered employees in the House of Representatives, including registered or certified medical technologists, nurses, dental hygienists, physician assistants, chefs, and funeral directors. Accordingly, these examples should be removed from the Proposed Regulations for the

House of Representatives.¹

Section 541.304 Practice of law or medicine:

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. Because the Office of the Attending Physician is not an employing office of the House of Representatives, subsections (b) and (c) are not relevant to regulations for the House of Representatives.²

Section 541.400 General rule for computer employees:

See General Comment 3, *supra*, regarding American Samoa employees. See General Comment 5, *supra*, regarding duplicate Subpart E.

Subpart F – Outside Sales Employees:

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. Sections 541.500 through 541.504 should be eliminated because there are no outside sales employees in the legislative branch. To avoid confusion between the DOL regulations and the OOC regulations, Subpart F should be reserved for future use, as needed, rather than renumbering subsequent subparts.

Section 541.600 Amount of salary required:

See General Comment 3, *supra*, regarding American Samoa employees. See General Comment 4, *supra*, regarding relevance of regulations to the House of Representatives. With regard to General Comment 4, subsection (e) refers to medical intern and resident programs, which are not applicable to the House.

Section 541.601 Highly compensated employees:

See General Comment 4, *supra*, regarding relevance of regulations to House of Representatives. As with Proposed Regulation section 541.3, the reference to “longshoremen” should be eliminated.

¹ The medical technologist, nurse, and physician assistant classifications may have relevance to the “C” regulations to be passed by concurrent resolution because the Office of the Attending Physician may employ covered employees in these positions.

² For purposes of these comments, we have interpreted the terms “internship” and “resident” programs to refer exclusively to the practice of medicine. See Prop. Reg. § 541.600(e).

Section 541.604 Minimum guarantees plus extras:

See General Comment 4, *supra*, regarding relevance of regulations to the House of Representatives. The example regarding "commission on sales" has no application to the House of Representatives and, thus, should be eliminated.

Section 541.700 Primary duty:

See General Comment 4, *supra*, regarding relevance of the examples to the House of Representatives. The subsection (c) example of an assistant retail manager is of limited value in applying the "primary duty" test. Accordingly, we suggest that the Board also include a more relevant example for the legislative branch to assist employing offices in applying the test.

Section 541.703 Directly and closely related:

See General Comment 4, *supra*, regarding relevance of regulations to the House of Representatives. The subsection (b) examples are of limited value in applying the "directly and closely related" test. We suggest that the Board include additional examples from the legislative branch context to assist employing offices in applying the test.

Section 541.705 Trainees:

See General Comment 4, *supra*, regarding relevance of regulations to the House of Representatives. The reference to "outside sales" should be eliminated because no such position exists in the House of Representatives.

Section 541.708 Combination exemptions:

See General Comment 4, *supra*, regarding relevance of regulations to House of Representatives. The reference to "outside sales" should be eliminated because no such position exists in the House of Representatives.

Section 541.709 Motion picture producing industry:

See General Comment 4, *supra*, regarding relevance of the regulations to the House of Representatives. This section should be eliminate because it has no applicability to the House of Representatives.

William W. Thompson II

October 29, 2004

Page 9

Thank you for your consideration of these comments to the Notice of Proposed Rulemaking.

Sincerely,

A handwritten signature in black ink that reads "Gloria Lett Ferguson / all". The signature is written in a cursive style.

Gloria Lett Ferguson

Counsel

Office of House Employment Counsel