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October 29, 2004

William Thompson
Executive Director
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Room LA 200
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110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments on Notice of Proposed Rulemaking Implementing New Overtime Regulations

Dear Mr. Thompson:

We submit this letter to the Board of Directors of the Office of Compliance ("the Board") in response to the Notice of Proposed Rulemaking ("NPR"), 150 Cong. Rec. S9917-27 (daily ed. Sept. 29, 2004). The NPR invites comments with respect to proposed regulations implementing new overtime regulations for covered employees of the Senate.

Below we submit our section-by-section analysis. At the outset, however, we note that there are currently three bills pending in Congress, H.R. 5006 (passed by the House on September 9, 2004), S. 2975 (passed by the Senate on October 10, 2004), and S. 2810 (on the Senate calendar), that would substantially void the overtime regulations promulgated by the Department of Labor (DOL). As the Board's proposed regulations are based on those DOL regulations, the Board's NPR is precipitous.

We have two additional general comments before the section-by-section analysis. First, the proposed regulations use a numbering system that differs from that of the existing regulations, but the NPR does not state which of the existing regulations are being replaced. You verbally informed us that the proposed regulations are intended to replace the currently existing 541 series, and our comments are based on that representation. Additionally, the DOL regulations often refer to a "business" or "company." To make the regulations more applicable to the Senate, the Board should replace "business" or "company" where appropriate with "employing office."

Section 541.0 Introductory statement

The proposed section 541.0 appears intended to replace current Office of Compliance (OC) regulation S541.01. Subsection (a) of the proposed regulation begins with "Section 13(a)(1) of the Fair Labor Standards Act (Act), as amended. . . ." Currently, regulation S541.01 does not contain the language "as amended," and it is erroneous for the Board to insert "as amended" in the proposed regulation. As the Congressional Accountability Act (CAA) incorporated the Fair Labor Standards Act (FLSA) by specific reference, well-recognized principles of statutory construction require that the CAA be interpreted as adopting the FLSA as the FLSA existed on January 23, 1995 (the date of the CAA's passage), without subsequent amendments. *See Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 625 (1838); *United States ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178, 180 (2d Cir. 1936). Some courts subsequently have held that if the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute, then subsequent amendments will become part of the later enacted statute. *See Curtis Ambulance of Florida, Inc. v. Bd. of County Comm'rs of Shawnee County, Kan.*, 811 F.2d 1371, 1378-79 (10th Cir. 1987); *EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 74 (E.D. Mich. 1982), *opinion modified on other grounds and reinstated*, 1982 WL 406 (E.D. Mich. 1982), *aff'd* 733 F.2d 1183 (6th Cir. 1984). When Congress enacted the CAA, it did not incorporate the FLSA "as amended," nor did it otherwise expressly state that subsequent amendments to the FLSA were to be incorporated into the CAA. Also, it would be improper to infer that Congress intended to incorporate subsequent FLSA amendments into the CAA because the CAA operates to waive sovereign immunity and waivers of sovereign immunity must be "strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981). "So long as a statute supposedly waiving immunity has a 'plausible' non-waiver reading, a finding of waiver must be rejected." *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 464 (D.C. Cir. 1999), *citing United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Moreover, "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the "unequivocal expression" of elimination of sovereign immunity that [the Supreme Court] insist[s] upon is an expression in statutory text.'" *Lane v. Pena*, 518 U.S. 187, 192 (1996). Because the CAA plausibly can be read as including only those provisions of the CAA that existed at the time the CAA was adopted, amendments to the FLSA that would result in additional liability must be rejected absent Congress's unequivocal expression that the amendment is to be incorporated into the CAA. The proposed regulation, therefore, is inconsistent with the CAA.

Subsection (a) also refers to outside sales employees. As an outside sales employee is not an employee who works in the Senate, we recommend that the phrase "or in the capacity of an outside sales employee" be deleted as superfluous.

Similarly, subsections (b) and (c) contain references to outside sales employees. We, therefore, recommend that the phrase "outside sales employees, subpart F" be deleted from subsection (b), as well as the entire Subpart F. Deletion of Subpart F would require subsequent subparts to be renumbered. We also recommend that the phrase "or in the capacity of an outside sales employee under section 13(a)(1) of the Act" be deleted from subsection (c)).

Subsection (c) states that "[t]he equal pay provisions in section 6(d) of the Fair Labor Standards Act are **also** administered and enforced by the [[United States Equal Employment Opportunity Commission]] **Office of Compliance**." Unlike the EEOC, which has broad administrative and enforcement authority, the OC has no authority to enforce the equal pay provisions. Further, the CAA limits the OC's administrative authority to the processing of claims as set forth in Title IV of the CAA. The proposed sentence, therefore, is an inaccurate statement of the OC's delegated duties and should be deleted.

Section 541.1 Terms used in regulations

This section also refers to the FLSA, "as amended." For the same reasons stated above, "as amended" should be deleted.

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

Subsection (a) provides an illustrative list of occupations excluded from exempt status, and it includes longshoremen. Because this job is inapplicable in the Senate, we suggest its removal. Similarly, subsection (b) provides an illustrative list of law enforcement and safety personnel whose positions do not exist within the Senate or the Capitol Police. Therefore, we suggest the removal of the following titles: deputy sheriffs, state troopers, highway patrol officers, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, and ambulance personnel.

Section 541.4 Other laws and collective bargaining agreements

The proposed regulation provides that employers must comply with any Federal, State or municipal laws, regulations or ordinances that establish a minimum wage that is higher than, or maximum workweek that is less than, those provided by the FLSA. The Senate, however, is subject only to those federal laws prescribed by Congress, and this part of the proposed regulation is an inaccurate statement of law. We recommend that the following sentence be deleted: "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."

Section 541.100 General rule for executive employees

Subsection (a)(1) provides that the minimum salary is $380 per week for employees employed in American Samoa by employers other than the federal government. This provision clearly was intended for private corporations and is inapplicable to the Senate. Therefore, it should be excised.

Section 541.101 Business owner

The proposed regulation, which addresses the exempt status of a business owner, is inapplicable to the Senate, and the entire section should be deleted.

Section 541.200 General rule for administrative employees

Subsection (a)(1) provides that the minimum salary is $380 per week for employees employed in American Samoa by employers other than the federal government. This provision clearly was intended for private corporations and is inapplicable to the Senate. Therefore, it should be excised.

Section 541.201 Directly related to management or general business operations

Subsection (a) provides that work qualifying for the administrative exemption includes work performed for the employer's customers. Because this provision is inapplicable in the Senate, we recommend deleting the phrase "or the employer's customers." Similarly, subsection (c) should be deleted in its entirety as it deals only with work performed for the employer's customers.

Subsection (a) also includes work on a manufacturing production line. Because this type of work is so far removed from Senate operations, it is of no benefit. We suggest that the Board consider the type of work performed by Senate offices and develop more useful examples.

Section 541.203 Administrative exemption examples

Several subsections have no applicability to the Senate, and we recommend those subsections be deleted. Specifically, we recommend deletion of the following: subsection (a) (insurance claims adjusters); (b) (financial services industry); (g) (ordinary inspection work); (h) (examiners or graders); and (i) (comparison shopping).

To make the example in subsection (c) more relevant, we suggest that the Board delete the parenthetical phrase "(such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements)." To make the example in subsection (d) more relevant to the Senate,

we recommend that the phrase "business owner or senior executive of a large business" be changed to "senior executive."

Section 541.204 Educational establishments

Subsection (a)(1) provides that the minimum salary is $380 per week for employees employed in American Samoa by employers other than the federal government. This provision clearly was intended for private corporations and is inapplicable to the Senate. Therefore, it should be excised.

Section 541.300 General rule for professional employees

Subsection (a)(1) provides that the minimum salary is $380 per week for employees employed in American Samoa by employers other than the federal government. This provision clearly was intended for private corporations and is inapplicable to the Senate. Therefore, it should be excised.

Section 541.301 Learned professionals

Subsection (e) addresses a number of occupations that are not present in the Senate and should be deleted. Namely, we recommend the following be deleted: (1) registered or certified medical technologists;[1] (2) nurses; (3) dental hygienists; (4) physician assistants; (6) chefs;[2] (8) athletic trainers; and (9) funeral directors or embalmers.

Section 541.400 General rule for computer employees

Subsection (b) provides that the minimum salary is $380 per week for employees employed in American Samoa by employers other than the federal government. This provision clearly was intended for private corporations and is inapplicable to the Senate. Therefore, it should be excised.

Subpart F – Outside Sales Employees

We recommend that Subpart F (Sections 541.500-541.504) should be deleted as being inapplicable to the Senate.

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[1] Any medical professionals employed in the Office of the Attending Physician fall under the Architect of the Capitol, not the Senate.

[2] Food service personnel are employed by the Architect of the Capitol, not the Senate.

Section 541.600 Amount of salary required

Subsection (a) provides that the minimum salary is $380 per week for employees employed in American Samoa by employers other than the federal government. This provision clearly was intended for private corporations and is inapplicable to the Senate. Therefore, it should be excised.

Section 541.601 Highly compensated employees

Subsection (d) lists longshoremen as an occupation that would not be exempt. Because this occupation is inapplicable to the Senate, it should be deleted.

Section 541.705 Trainees

The reference to "outside sales" should be deleted as inapplicable.

Section 541.708 Combination exemptions

The reference to "outside sales" should be deleted as inapplicable.

Section 541.709 Motion picture producing industry

This section should be deleted as inapplicable.

Sincerely,

Jean M. Manning

JMM/kj