JULIE E. ADAMS
SECRETARY

United States Senate

OFFICE OF THE
SENATE CHIEF COUNSEL FOR EMPLOYMENT
SUITE SH-103
WASHINGTON, DC 20510-7130
(202) 224-5424

CLAUDIA A. KOSTEL
SENATE CHIEF COUNSEL FOR EMPLOYMENT

ERICA A. WATKINS
DEPUTY CHIEF COUNSEL FOR EMPLOYMENT

ANN S. ROBINSON
CHRISTOPHER CALSYN
SENATE SENIOR COUNSEL FOR EMPLOYMENT

NEIL MANZULLO
ANDREA GOPLERUD
SENATE COUNSEL FOR EMPLOYMENT

FAX: (202) 228-2557
TDD/TTY: (202) 224-1240

November 16, 2015

BY FACSIMILE AND E-MAIL

Barbara J. Sapin, Esq.
Executive Director
Office of Compliance
110 Second Street, S.E.
Room LA-200
Washington, D.C. 20540-1999

Re: Comments to the Notice of Proposed Rulemaking to modify the rights and protections under the Family and Medical Leave Act of 1993 as incorporated by section 202 of the CAA

The Office of the Senate Chief Counsel for Employment ("SCCE") submits the following comments to the Executive Director of the Office of Compliance ("OOC") in response to the Notice of Proposed Rulemaking ("NPRM"), submitted by the Board of Directors ("Board") of the OOC and published in the Congressional Record on September 16, 2015, 161 CONG. REC. S6704-64 (daily ed. Sept. 16, 2015). The NPRM invites comments with respect to the proposed modifications to the current Regulations implementing the Family and Medical Leave Act of 1993 ("FMLA"), as applied to covered employees of, *inter alia*, the Senate.

I. Issues of General Applicability

The proposed regulations use a numbering system that differs from that of the current OOC FMLA Regulations, but the NPRM does not indicate which of the current Regulations are being replaced. In order to avoid confusion, the section-by-section comments below are based on the numbering used in the proposed regulations set forth in the NPRM. Where SCCE believes that good cause exists to retain a section from the current Regulations, the numbering used in the current Regulations is used with a parenthetical indicating the source.

Additionally, the Board, in its preamble to the proposed regulations, has indicated that minor editorial changes and corrections have been made to the proposed regulations; however, the Board has not identified such editorial changes or corrections in its comments or in the proposed regulations themselves. The Board should clarify what it means by this statement and identify all editorial changes and corrections it intends to make.

II. Issues on Which the Board Requested Comment

A. Whether rewording section titles into the more common format of descriptive titles is helpful?

The SCCE supports the Board's proposal to use descriptive titles rather than question-format titles because the descriptive titles will make the Final Regulations easier to navigate for covered employees and employing offices.

B. Whether the Board should adopt the DOL's current definition of spouse or revise the definition of spouse as the Board has proposed in sections 825.102 and 825.122?

The Board must adopt the DOL's current definition of "spouse" as announced in the DOL's Final Rule for 29 C.F.R. § 825 in the Federal Register, Vol. 80, No. 37,9989 (Feb. 25, 2015) because the Board has not shown good cause for deviating from the DOL's definition. *See* 2 U.S.C. § 1312(d)(2) (OOC FMLA regulations "shall be the same as" the DOL's substantive FMLA regulations unless the Board shows "good cause" why modification of the DOL regulations "would be more effective for the implementation of the rights and protections under [section 202 of the CAA]"). The DOL's current definition of "spouse" has gone through an extensive notice and comment period, and the DOL's definition will be used by courts when interpreting the FMLA. The Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015), does not invalidate the DOL's definition of "spouse", and the DOL's definition of "spouse" does not create a standard at odds with the *Obergefell* holding. If in the future the DOL amends the definition of "spouse" for FMLA purposes - something the DOL has given no indication it will do - then the Board can issue a new notice of proposed rulemaking on this discrete issue. Finally, the Board's definition of spouse to include "all individuals in lawfully recognized marriages" without reference to applicable state or federal law could create unintended consequences. For example, if a covered employee was married to several individuals in a country with laws that permit polygamy, then that employee's marriages would arguably be "lawfully recognized" marriages under the Board's proposed definition of spouse.

C. Whether the OOC's FMLA Regulations should depart from the DOL Regulations, which include "computer employees" in the list of exempt employees who do not lose their FLSA exempt status despite being provided with unpaid FMLA leave?

SCCE does not object to the Board's proposal to delete "computer employees" from the list of FLSA exempt categories in proposed regulation § 825.206; however, the SCCE takes exception to the Board's erroneous characterization of the exempt status of computer employees. The Board, in the preamble to the proposed regulations, states that because its September 29, 2004 FLSA Proposed Regulations were not enacted into law, "OOC FLSA Regulations do not include exemptions for computer employees." 161 CONG. REC. S6707 (daily ed. Sept. 16, 2015). This statement is incorrect. OOC FLSA Regulation § S.541.3(a)(4) provides that an employee who performs "work that requires theoretical and practical application of highly-specialized

knowledge in computer systems analysis, programming, and software engineering, and who is employed and engaged in these activities as a computer system analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field" is employed in a professional capacity and is exempt under the FLSA, as made applicable by the Congressional Accountability Act of 1995, *as amended*, 2 U.S.C. §§ 1301-1438 (2014) (the "CAA"). Thus computer employees that fit the description contained in OOC FLSA Regulation § S.541.3(a)(4) are exempt and, as professional employees, should not lose their FLSA exempt status despite being provided unpaid FMLA leave. Because the Board's comments in the preamble of the NPRM could create confusion regarding the applicability of proposed regulation § 825.206 to computer employees who are exempt professionals, the Board should either eliminate the incorrect comment from the preamble or should clarify in the Final Regulations that § 825.206 would apply to computer employees who are exempt professionals.

D. Whether to include a provision that states: "On the other hand, if an employee was hired to perform work for one employing office for a project for a specific time period, and after that time period has ended, the same employee was assigned to work at another employing office on the same project, the successor employing office may be required to restore the employee if it is a successor employing office."

The proposed regulations should not include any provision regarding successor employing offices because the successor in interest concept does not apply under the CAA. The successor in interest concept contained in the DOL Regulations derives from the FMLA definition of "employer," *see* 29 U.S.C. § 2611(4)(A)(ii)(II) (defining "employer" to include "any successor in interest of an employer"). The CAA does not incorporate the FMLA definition of "employer"; rather, the CAA contains its own definition of "employing office," *see* 2 U.S.C. § 1301(9), which specifically delineates all congressional entities that fall within the CAA's – and by extension the FMLA's – coverage. In enacting the CAA, Congress waived its sovereign immunity only to the extent specified in the statute, and the scope of that waiver must be strictly construed in favor of the sovereign. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *Lane v. Pena*, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."). To the extent the proposed regulations attempt to expand that waiver of sovereign immunity, they should not be included in the Final Regulations.

E. Whether the Board's proposed revised optional-use forms and notices should be included in the Regulations, or whether covered employees and employing offices should be directed to the DOL website for appropriate forms?

The Board should include its proposed, revised optional-use forms and notices in the Final Regulations. The FMLA is a form-driven process, and the information conveyed in these forms assist employing offices in effectively administering the FMLA, as made applicable under the CAA. Having this information in an easily accessible format that is tailored to the Legislative Branch benefits both employing offices and employees. Moreover, as these notices

and forms are a critical part of the FMLA process, these forms and notices should be part of the regulatory notice and comment process so as to receive careful consideration and review by all concerned parties and to ensure that they remain consistent with the FMLA, as applied by the CAA.

Directing employees and employing offices to the DOL website for FMLA forms and notices is undesirable because the DOL website may create confusion about what rights and obligations are actually applicable to employees and employing offices under the FMLA, as applied by the CAA. The Board's proposed revised forms are tailored to the Legislative Branch and provide information for covered employees and employing offices about their rights and responsibilities under the FMLA, as made applicable by the CAA. In contrast, the DOL's FMLA forms omit citations to the applicable statutes under the CAA and reference inapplicable requirements such as that a covered employee must work at a site with at least 50 employees within 75 miles. Accordingly, the SCCE supports including the Board's proposed revised forms in the Final Regulations, with the included caveat that use of these forms is optional.

III. Proposed Edits by Section

§ 825.102 Definitions.

See discussion at II.B., above, regarding the Board's proposed definition of "spouse."

§ 825.104 Covered employing offices.

825.104(c): Delete this entire section because the integrated employer concept does not apply in the CAA context. See the discussion at II.D., above, for a discussion of applicable principles. The FMLA, as incorporated by the CAA, applies to an employing office regardless of whether that office has 50 employees.

§ 825.110 Eligible employees.

825.110(c)(2): Add "as applied by section 203 of the CAA (2 U.S.C. 1313)," after "the FLSA's principles."

§ 825.112 Qualifying reasons for leave, general rule.

825.112(a)(3): Delete "and" after the semi-colon.

825.112(a)(5): Add "duty" in between "covered active" and "status."

§ 825.120 Leave for pregnancy or birth.

825.120(a)(3): Because state law does not apply to the Senate, delete the entire sentence that states: "note, too that many state pregnancy laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious

health condition of the birth mother, and would not be subject to the combined limit." The Board, in its preamble to the proposed regulations, agreed that this section should be deleted, noting that "[r]eferences in the DOL's Regulations to state law in this section and other sections throughout the DOL's Regulations have not been adopted by the Board because state law does not apply to the legislative branch."

§ 825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

825.122(b): The definition of "spouse" contained in the proposed regulations deviates from the corresponding DOL Regulation, and – as explained above – the OOC has not shown good cause for such deviation.

825.122(d)(2): As the Board recognized in its section-by-section discussion regarding proposed regulation § 825.102, the EEOC's ADA regulations do not define terms related to physical or mental disabilities but merely provide guidance in interpreting those terms. *See* 161 CONG. REC. S6707. Accordingly, replace "define these terms" with "provide guidance for these terms."

§ 825.200 Amount of Leave.

Add a subsection (j) to incorporate language from current regulation § 825.208(f) as follows:

> (j) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office.

The SCCE recommends that the Board insert the language from current regulation § 825.208(f) into the proposed regulations at § 825.200 because current regulation § 825.208(f) concerns the amount of leave an employee is entitled to receive under the FMLA, as incorporated by the CAA. Alternatively, the Board could re-designate current regulation § 825.208(f) as a standalone section at § 825.208, which is currently "Reserved" in the proposed regulations.

The Board has not explained why it has not included current regulation § 825.208(f) in the NPRM. Good cause exists for varying from the DOL Regulations to include current regulation § 825.208(f) in the NPRM. Under the FMLA, an eligible employee is entitled to up to 12 weeks of unpaid FMLA leave in any 12-month period. An employee's eligibility (12 months of employment and 1250 hours worked) is based entirely on the employee's current employment, and not their former employment with other employers. *See* 29 U.S.C. § 2611(2)(A). Under the FMLA, as incorporated by the CAA, however, a covered employee is eligible for FMLA leave if the covered employee has worked for *any* employing office for 12 months and worked for *any*

employing office for 1250 hours in the past year. *See* 2 U.S.C. § 1312(a)(2)(B). Restated, a covered employee can count employment by other congressional employing offices towards his/her FMLA leave eligibility. Correspondingly, the FMLA leave a covered employee used during his/her employment with other congressional employing offices should count against the covered employee's FMLA leave entitlement.

825.200(a)(5): Add "covered" between "order to" and "active duty."

§ 825.206 Interaction with the FLSA.

825.206(c): The corresponding DOL Regulation provides examples of leave that does not qualify as FMLA leave, including the following: "leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or a *serious injury or illness*." *See* 29 C.F.R. § 825.206(c) (emphasis added). The proposed regulation §825.206(c) omits the phrase shown in italics. As no good cause has been shown for deleting this phrase, add "or serious injury or illness" after "serious health condition."

Similarly, the corresponding DOL Regulation does not include the phrase "such as leave in excess of 12 weeks in a year" after "for leave which is more generous than provided by the FMLA, as made applicable by the CAA." Because the OOC has not shown good cause for deviating from the DOL's Regulation, delete "such as leave in excess of 12 weeks in a year."

§ 825.216 Limitations on an employee's right to reinstatement.

825.216(a)(3): Delete the second sentence, "On the other hand . . . 825.107", which references the inapplicable concept of successor employer and is a cross-reference to a "Reserved" section of the proposed regulations.

§ 825.217 Key employee, general rule.

825.217(b): Add "FLSA" between "the Board's" and "regulations at part 541." The Board also requested comments about whether there is good cause not to follow the DOL changes to section 825.217(b) which exempts computer employees from the minimum wage and overtime requirements. As noted above in Section II.C, SCCE does not agree with the Board's proposal to delete "computer employees" from the list of exempt employees who do not lose their FLSA exempt status despite being provided with unpaid FMLA leave. The Board's current FLSA Regulations already exempt certain computer employees from the minimum wage and overtime requirements of the FLSA, as made applicable by the CAA. *See* OOC FLSA Regulation S.Res. 242 § S.541.3(a)(4) (1996). Thus, no good cause exists for the Board to depart from the DOL Regulations that correctly state the law that certain computer employees are exempt from the minimum wage and overtime requirements of the FLSA.

§ 825.218 Substantial and grievous economic injury.

825.218(d): Add "as made applicable under the CAA" after "under the ADA."

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

825.220(b): The proposed regulation includes the following language contained in the corresponding DOL Regulation: "An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c)." Good cause exists for removing the quoted language from the proposed regulation because the quoted language misstates the law as it applies under the CAA. An employing office could not be liable for compensation and benefits lost by reason of the violation *and* for other actual monetary losses sustained. *See* 29 U.S.C. § 2617(a)(1)(A)(i). Rather only one type of recovery is available. An employee is entitled to *either* "any wages, salary, employing benefits, or other compensation denied or lost to such employee by reason of the violation" *or* when "wages, salary, employing benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation." *Id.* That is, the relief available is stated in the statute as a disjunctive. An employee is not entitled to both compensation and other actual monetary losses sustained. In addition, the phrase "any other relief tailored to the harm suffered" in the proposed regulation is not found in the FMLA, as made applicable under the CAA, and does not accurately reflect the applicable scope of remedy. Rather, the applicable statutory provision states that an employer could be liable "for such equitable relief as may be appropriate." *See id.* at § 2617(a)(1)(B).

Accordingly, delete the following phrase from the proposed regulation: "an employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c)."

Finally, the cross-reference to § 825.400(c) is inappropriate because § 825.400(c) does not outline what remedies are available for violations of the FMLA, as made applicable by the CAA. Rather, proposed regulation § 825.400(c) merely states where aggrieved covered employees can find the OOC's complaint procedures.

§ 825.300 Employing office notice requirements.

825.300(b)(2): Delete the sentence, "The employing office . . . 825.300(a)(4)", because section 825.300(a)(4) does not exist in the proposed regulations.

825.300(c): Delete the sentence, "The employing office . . . 825.300(a)(4)", because section 825.300(a)(4) does not exist in the proposed regulations.

825.300(c)(ii): Add "covered" between "qualifying exigency arising out of" and "active duty."

825.300(e): Good cause exists for deleting this entire section because the Board has proposed to establish a remedy for a right that does exist under the CAA. Congress explicitly delineated which sections of the FMLA apply to congressional employing offices and their employees. The CAA incorporates the "rights and protections established by sections 101 through 105" of the FMLA, and incorporates remedies "as would be appropriate if awarded under" section 107(a)(1) of the FMLA. *See* 2 U.S.C. §§ 1312(a)(1), (b). Section 109 of the FMLA is not incorporated in the CAA, therefore no legal authority exists for a proposed regulation that incorporates requirements and penalties based on section 109 of the FMLA. Proposed regulation 825.300(e) derives from section 109 of the FMLA. Accordingly, the OOC has good cause to deviate from DOL regulations based on section 109, and 825.300(e) should be deleted from the proposed regulations. As explained above, the Board does not have the power to expand the waiver of sovereign immunity contained in the CAA; therefore, any proposed regulation that would expand that waiver of sovereign immunity should not be included in the Final Regulations.

§ 825.301 Designation of FMLA leave.

825.301(e): For the same reasons set forth above regarding proposed regulation § 825.220, delete the following sentence from the proposed regulation: "An employing office may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* 825.400(c)."

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

825.302(g): Replace "*See* 825.304" with the more specific "*See* 825.304(e)".

§ 825.304 Employee failure to provide notice.

825.304(a): This section provides that proper notice of the FMLA's notice requirements "would be satisfied" by an employing office if it posts at the worksite where the employee is employed information regarding the FMLA provided by the OOC to the employing office in a manner suitable for posting. Because employing offices are not required to post notices, and posting a notice is merely one way in which an employing office could provide employees with notice of the FMLA's notice requirements, the sentence regarding posting notices in the worksite ("This condition . . . suitable for posting.") should either be deleted from the proposed regulation or should be revised to make clear that posting is merely an example of how employing offices could provide employees notice of the FMLA's notice requirements.

§ 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

825.306(a)(4): Delete "and (c)" because § 825.123(c) does not exist in the proposed regulations.

825.306(a)(8): Delete "and (c)" because § 825.123(c) does not exist in the proposed regulations.

§ 825.309 Certification for leave taken because of a qualifying exigency.

825.309(a)(c): For consistency with other provisions cross-referencing DOL forms (*see, e.g.,* 825.306(b) and 825.310(d)), add "or Form WH-384 (developed by the Department of Labor)" between "Form E" and "another form containing the same basic information."

§ 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

825.310(d): In the Board's preamble to the proposed regulations, the Board states that it proposes to adopt the amendments covered in the corresponding DOL Regulations under this section, specifically noting that second and third medical opinions are available in certain specified situations. *See* 161 CONG. REC. S6710. The proposed regulation for this section, however, is not consistent with either the Board's statement in the preamble or the corresponding DOL Regulations, stating: "However, second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember."

Because the Board has not shown good cause for not adopting the corresponding DOL Regulation in full with respect to second and third medical opinions for leave taken to care for a covered servicemember, replace the above-quoted sentence with: "Second and third opinions under 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of health care providers identified in 825.310(a)(1)-(4). However, second and third opinions under 825.307 are permitted when the certification has been completed by a health care provider as defined in 825.125 that is not one of the types identified in 825.310(a)(1)-(4)."

§ 825.702 Interaction with anti-discrimination laws as applied by section 201 of the CAA.

825.702(b): Add "as made applicable by the CAA" between "(ADA)" and "the employing office." Add "as made applicable by the CAA" after "afford an employee his or her FMLA rights."

825.702(d)(2): Add "as made applicable by the CAA" after "he or she will have rights under the ADA."

Form F: Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave

Form F (Section II, Part B(2): change "gravitated" to "aggravated."

Sincerely,

Claudia Kostel

Claudia A. Kostel
Senate Chief Counsel for Employment

CAK/kj