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To: John F. Morrall III/OMB/EOP@EOP

cc:

Subject: LPA Comments on Federal Regulations

Mr. Morrall:

Please find attached to this e-mail message a PDF formatted document containing LPA's comments on the Regulatory Burdens of Federal Regulations.

If you have any questions regarding the document, or have technical difficulties, please contact me.

Regards,

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May 28,2002

John F. Morrall III
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17th Street, N.W.
Washington, DC 20503

RE: Comment Letter on Regulatory Burdens of Federal Regulations

LPA is pleased to submit this Comment Letter to the Office of Management and Budget (OMB) regarding its Draft Report to Congress (hereinafter referred to as "Draft Report"), which was published in the ***Federal Register*** on March 28,2002. This is the second of two comment letters LPA will make regarding the request in the draft report. This letter focuses on the burdens imposed by regulations under the Fair Labor Standards Act (FLSA) and the Service Contract Act (SCA) which are promulgated and enforced by the Department of Labor's Wage and Hour Division under the Employment Standards Administration. It also focuses on the regulations permitting states to use their unemployment insurance funds to provide paid family leave, administered by the Department's Employment and Training Administration.

LPA is a public policy advocacy organization representing senior human resource executives of over 200 leading employers doing business in the United States. LPA provides in-depth information, analysis, and opinion regarding current situations and emerging trends in labor and employment policy among its member companies, policy makers, and the general public. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce.

All LPA members are employers subject to the FLSA and many are subject to the SCA. Virtually all LPA members have had difficulty applying the regulations that determine who is exempt and nonexempt because the regulations have not been substantially updated since 1954. For this reason, LPA recommends that OMB ensure that the Department of Labor follow through on its promise to review and revise the regulations to conform them to current types of work.

LPA also recommends that the regulations implementing the Service Contract Act wage determination process be reformed to permit employers to pay employees a market-based wage. Finally, LPA believes that the Department of Labor should repeal the Birth and Adoption Assistance through Unemployment Compensation (BAA-UC) regulation. The regulation permits states to implement programs that provide paid family leave funded through the state's unemployment insurance funds. LPA believes that the rationale behind the regulation is fatally flawed and will ultimately wreak havoc on state unemployment insurance funds.

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I. Revise the White Collar Exemptions to Fit the Modern Workplace

LPA believes that modernizing the white collar regulations under the Fair Labor Standards Act (FLSA),[1] would increase benefits for the public and allow the Wage and Hour Division to focus its enforcement funds on the worst offenders. The white collar regulations determine which employees are executive (managerial), administrative and professional employees exempt from the FLSA's minimum wage and overtime requirements.[2] However, they have not been substantially revised since 1954, and even the computer professionals exemption, which was added in 1991, is outdated because of technological progress.

A. Background on the White Collar Regulations

Despite affecting nearly every employer, most of the white-collar regulations were written between 1938 and 1954 and have not been substantially updated since then.[3] Thus, today's regulations are based upon distinctions between white- and blue-collar employees that do not hold true in today's workplaces. Among other problems, the regulations fail to account for the effects that the technological and information revolution have had on the way people work today.[4] For example, "computer keypunch operators" receive frequent mention in the regulations despite the genera1 obsolescence of this term,[5] and, in one instance, an employee's exemption depends upon how he or she is "watching machines."[6]

Substantial litigation has been generated by the uncertainties surrounding the regulations. For example, in *Freeman v. National Broadcasting Co., Inc.,*[7] it took 11 years of litigation to resolve whether a senior network news writer and a producer were professional employees exempt from overtime. They were only deemed exempt after the Second Circuit Court of Appeals reversed a lower court decision. Litigation trends demonstrate how the plaintiffs' bar has targeted employers under the outmoded regulations. In 2001, for the first time, FLSA class actions outpaced employment discrimination class actions.[8] In LPA's view, the modernization of the white-collar regulations[9] would reverse this trend—without undermining the basic protections of the statute—and reduce the number of FLSA class action lawsuits, thereby generating enormous benefits to the public.

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[1] 29 U.S.C. § 201 *et seq.* (2000).
[2] 29 C.F.R. § 541 *et seq.*, as authorized by 29 U.S.C. § 213 (a)(1).
[3] See, *e.g.,* U.S. General Accounting Office, Fair Labor Standards Act: White Collar Exemptions in the Modem Workplace (HEHS 99-164), at 15 (hereinafter **GAO** Report).
[4] 29 C.F.R. § 541.207. See ***also*** **GAO** Report, ***supra*** note 3, at 23.
[5] 29 C.F.R. § 541.205(c)(7).
[6] 29 C.F.R. § 541.108(f). See ***also Freeman v. National Broadcasting*** Co., ***80*** F.3d 78 (2d Cir. 1996) (with regard to 29 C.F.R. § 541.302(f)(1), noting that "the Secretary's journalism interpretations 'have not changed in any material respect since 1949, long before the newspaper industry evolved into its current form"') ***(quoting Reich v. Newspapers of New England,*** 44 F.3d 1060, 1071 (1st Cir. 1995).
[7] 80 F.2d, 78, 85 (2d Cir. 1996).
[8] Administrative Office of the U.S. Courts, 2001 Judicial Business, Table X-5, ***available at*** http://www.uscourts.gov/judbus2001/contents.html.
[9] 29 C.F.R. § 541 (2001).

B. Eliminate the Administrative-Production Dichotomy Under the Administrative Exemption

Because the white collar regulations are so outdated, they cause substantial confusion among employers seeking to comply with the law. For example, under the administrative exemption, most inside sales employees are treated as nonexempt "production workers" because their job is to produce sales of the good or service that the company or the division of the company is selling." Fifty years ago, inside sales employees may have been low-level functionaries whose work was akin to manual production work. Today, however, the level of expertise required to perform this job, as well as advances in technology such as the Internet and the fax machine, have blurred the distinction between inside sales employees and outside sales employees, who have been exempt from overtime since 1938.[11]

This administrative-production dichotomy is not limited to sales employees. Two cases decided this year illustrate the absurdity of the rule. In *Carpenter v. Shoemaker*,[12] a federal district court ruled that a construction management company's Project Superintendent, who had primary on-sight managerial authority for all aspects of major construction projects and who earned $90,000 per year, was a nonexempt production worker. The court believed that because the company's business was managing construction projects, the superintendent's job involved "producing" the service that the company provided to the public—management. Similarly, in *Casas v. Conseco*,[13] the Federal Court for the District of Minnesota held that loan originators for a finance company who earned over $65,000 per year were nonexempt for the same reason—because they performed the business of the business. The administrative-production dichotomy does not produce logical results and should be abandoned.

C. Clarify or Eliminate the Regulatory Definition of Discretion

In order to be considered exempt under the administrative and professional exemptions, employees must exercise discretion and independent judgment. This means that in general, the employee's job must involve "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."[14] The person making the decision must have "the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance."[15]

In practice, highly-skilled and well-trained employees who refer to written procedures or practices are generally considered not to exercise discretion and thus are nonexempt under the regulations. This can lead to absurd results. In one case, a federal court held that highly educated network communications specialists who designed, ran and critiqued simulated space shuttle missions for **NASA** mission control personnel lacked discretion because they routinely referred to complex procedures manuals.[16] Decisions such as these erroneously deny employees who have the skills and abilities to protect themselves in the marketplace the flexibility that goes with being exempt.

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[10] *Martin v. Cooper Electric*, 940 F.2d 896 (3d Cir. 1991).
[11] 29 U.S.C. § 213(a)(1); 29 C.F.R. 541.5.
[12] No. 00-5644, 2002 U.S. Dist. LEXIS 8566 (E.D. Penn. May 6, 2002).
[13] No. 00-1512, 2002 U.S. Dist. LEXIS 5775 (D. Minn. Mar. 31, 2002).
[14] 29 C.F.R. § 541.207(a).
[15] *Id.*
[16] *Hashop v. Rockwell Space Operations Co.*, 867 F. **Supp.** 1287 (S.D. **Tex.** 1994).

Many companies are documenting their work practices from the janitor to the CEO in order to be certified as ISO 9002 compliant or to achieve Six Sigma status. These procedures seek to eliminate mistakes and thus ensure the consistency of results. However, by having documented procedures, the companies risk losing the exemption for some of their employees on the premise that they do not exercise discretion. The regulations must recognize that the existence of documented procedures does not defeat decisionmaking authority or the body of knowledge that one develops by implementing such procedures, particularly in complex areas. The regulations ought to recognize this fact.

Entry-level professionals are also harmed by the current regulatory definition of discretion. Although most entry-level professionals today have four-year college degrees and intend to work as accountants, architects, engineers or accountants, they often do not have sufficient practical knowledge to make significant decisions until they have been in the job for a period of time. Thus, employers are required to treat their entry-level professional employees as hourly workers until they have become accustomed to the job and have developed some professional judgment.

D. Refine Definition of Professional to Recognize Skills Instead of Degrees

The current definition of professional employees in the white collar regulations ignores the current focus on practical education, skills and abilities. According to the Employment Policy Foundation, since 1940, the share of the workforce that receives education beyond high school has increased from 11.6 percent to 58 percent." Many employees who perform nonmanual work are highly skilled and well-paid even though they do not have a formal degree. Yet, the regulations, and the Department of Labor's interpretations, suggest that unless an employee has a four-year degree or is licensed by the state in a recognized profession, they cannot be exempt professional employees. LPA believes that the Department ought to revisit what the proper amount of education is before an individual can be considered a professional.

E. Modify the Computer Professionals Definition Consistent With Current Technology

The computer professionals exemption is the newest part of the white collar regulations, promulgated in 1991. However, these regulations are also in need of updating because technology has changed considerably since they were first implemented. Jobs that were not included in the computer professionals exemption, such as database and network administrators, web masters, and employees who train new computer professionals, are in danger of being considered nonexempt. LPA believes that the Wage and Hour Division should update the regulatory exemption and that OMB should encourage Congress to make parallel changes to the statutory exemption so as to clarify that more recent occupations were intended to be covered by the computer professionals exemption.

11. Reform the Regulations that Set the Wage Determination Process Under the Service Contract Act

Another area under the Labor Department's jurisdiction requiring regulatory reform is the wage determination process under the Service Contract Act (SCA).[18] The Act requires employers performing federal service contracts to provide all overtime-eligible (nonexempt)

[17] Employment Policy Foundation Tabulations of Current Population Survey data.
[18] 41 U.S.C. § 351 (2001).

employees with prevailing wages and benefits in the locality where the contract is to be performed. The prevailing wage can never be below the minimum wage.

The Wage and Hour Division sets prevailing wages under the SCA through the wage determination process, which uses survey data to calculate the prevailing wage in a specific area for a given job. The wage determination process is particularly important because it is the only way for service contractors to increase wages for their nonexempt, nonunion employees. Profit margins on federal service contracts are usually slim and federal contracting agencies rarely agree to reimburse a federal contractor for wage costs that exceed the SCA prevailing wage rates. Thus, the only way service contractors can increase their employees' reimbursable wages and still recover their costs is by obtaining an updated wage determination that accurately reflects market wages in the area where the contract is performed.

This process became extremely important to service contractors in recent years as the booming economy began to raise wages. However, as explained below, the lack of good survey data since approximately 1996 and other systemic flaws in the wage determination process have severely hampered the wage determination process. In many cases, the process has prevented service contractors from paying their employees a market-based wage, while government employees and members of the military, many of whom work side-by-side with the service contract employees, received regular cost of living adjustments.

In order to return the SCA to its original intent of providing covered employees with market-rate wages, LPA believes that the Wage and Hour Division should make the following changes to the SCA regulations:

- Reform the regulatory definition of "in the locality" (29 C.F.R. § **4** *et seq.)* so that wage determinations directly reflect wages in the nearby area, instead of excessively broad areas as has started to occur, preserving federal resources while allowing service contractors to pay their employees a market-based wage;
- Reform the regulations setting the wage calculation process once the Bureau of Labor Statistics conducts the surveys. The Wage and Hour Division currently has excessive discretion to decide how the prevailing wage will be calculated (mean, median or mode), and in some cases may use different methods, causing substantial wage deviations within families of jobs;
- Reform the directory of occupations (the index of jobs for which prevailing wages are maintained) to reflect current jobs. The index has not been adequately updated since 1968 and fails to reflect high-tech jobs, wasting government resources when making wage determinations. This option could be done informally;
- In the absence of regular wage determinations, the Service Contract Act should be amended to provide for regular wage increases based on the cost-of-living adjustment provided to federal employees.

These changes would go a long way to keep the Service Contract Act wage determination process as current as possible moving forward in the 21st Century.

111. Repeal the Birth and Adoption Unemployment Compensation Regulations

In 2000, the Department of Labor promulgated regulations, entitle the Birth and Adoption Unemployment Compensation program (BAA-UC) permitting states to provide paid family leave by taking money out of their unemployment insurance (UI) funds." The Department explained that employees were having trouble taking leave under the Family and Medical Leave Act (FMLA) because the leave is unpaid." Thus, the program would allow states to provide partial wage replacement to eligible employees in states that choose to implement such a program.

Even though no state has yet implemented a program, at least one state, New Jersey, is reportedly very close to doing so. Regardless of whether any state implements a program, LPA is extremely concerned that the precedent that the BAA-UC regulations set is extremely dangerous to the UI safety net.

Specifically, the federal unemployment insurance system was intended to provide temporary and partial wage replacement to involuntarily unemployed workers who were laid off and who are seeking work." The BAA-UC regulations would allow states to give unemployment insurance compensation to individuals who voluntarily choose to take leave and are guaranteed their job when they choose to return. In addition, the regulations would institute paid leave, an alternative that Congress considered and explicitly rejected when it passed the Family and Medical Leave Act of 1993.

The regulations were touted as a mere experiment, but they contravene a longstanding interpretation of the unemployment compensation system that dates to before its enactment. LPA believes the regulations mark a radical departure from traditional interpretation that is not supported by the Federal Unemployment Tax Act, Congressional intent or logic. For this reason, we urge OMB to persuade the Department of Labor to repeal this misguided policy.

Conclusion

The FLSA white collar regulations, SCA wage determination process and BAA-UC benefits all require significant attention by the Department of Labor. The white collar regulations need to be reformed to provide clarity so that employers can determine with certainty which of their employees are exempt from overtime. The wage determination process is in need of revamping so that employees of service contractors are paid in accordance with the statute. Finally, the BAA-UC regulations directly contradict the purposes for which Congress developed the UI system. They should be repealed. We encourage the Office of Management and Budget to look carefully into these problems and to urge the Department of Labor to review its regulations.

Sincerely,

Daniel V. Yager
Senior Vice President & General Counsel

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[19] Department of Labor, Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13,2000) (codified at 20 C.F.R. 604 *et seq.*).
[20] ***Id.*** at 37,210.
[21] ***Employment Security Manual,*** 20 C.F.R. § 617 **App.** A, Section 5000.B(1).