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**NEW YORK BAR MEMBERSHIP PENDING

April 5, 1996

By Hand Delivery

Glen D. Nager
Chair of the Board of Directors
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments on Proposed Rulemaking To Implement Chapter 71
of Title 5

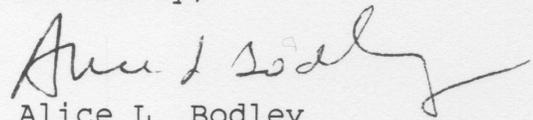
Dear Mr. Nager:

I am writing on behalf of AFSCME Council 26, which represents employees of both the Executive and Legislative branches. We appreciate the opportunity to provide input prior to the Board's promulgation of proposed regulations to apply the federal labor law to those affected by the Congressional Accountability Act.

Steve Kreisberg, Assistant Director of the Department of Research and Collective Bargaining Services of AFSCME has provided the attached comments, which are incorporated by reference. Essentially, we see no reason to deviate from the full application of Chapter 71 and the implementing regulations of the FLRA. We cannot conceive of the required "good cause" for deviation from the current law. The Federal Labor Management Relations Statute and implementing regulations contain sufficient safeguards and exclusions to address the particular needs with respect to Congressional employees.

Please provide me with a copy of the proposed regulations when they are published. Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alice L. Bodley", with a long, sweeping tail extending to the right.

Alice L. Bodley

Attachment

cc: Carl Goldman
Steve Kreisberg

**Comments on Application of
Chapter 71 of 5 USC to Congressional Employees**

- **Section 220(e)(1)(A) manner and extent of application of Chapter 71.**

Regulations issued by the Board should not deviate from the FLRA's regulations in this respect and should not specify which positions are excluded from the application of Chapter 71. The only appropriate method to determine if a position should be excluded is through a full factual inquiry on a case-by-case basis. A case-by-case approach will preserve the rights of all affected parties to raise facts and arguments in support of the inclusion or exclusion of a position. The regulatory process is an inappropriate forum to deal with the exclusion of individual positions because some affected parties are unaware of the proceedings and constructively will be denied the opportunity to participate. Categorical exclusion, such as "confidential" employees and "supervisory" employees, are already established and are best applied on a case-by-case basis.

- **Extent to which the findings of purposes of the Federal Service Labor - Management Relations Act, set forth in 5 USC § 7101 apply.**

In the absence of any other Congressional finding and purpose of the applicability of Chapter 71, the Congressional intent of Chapter 71, as set forth in 5 USC Section § 7101, is applicable. The application of any other "finding and purpose" is tantamount to adding to and/or deleting from Congressional intent.

- **Deviation from FLRA regulations.**

The regulations promulgated by the FLRA should not be modified; "good cause" does not exist to justify deviation from the FLRA regulations.

- **Exclusions from Coverage.**

1. Constitutional responsibilities of Congress. Under Section 220(e)(1)(B) of the CAA, the Board may exclude a covered employee if application of Chapter 71 to such an employee would be incompatible with Congress' constitutional responsibilities. This basis for exclusion from Chapter 71 must be applied very narrowly. Congressional employees perform no constitutional function. Only members of Congress are authorized to cast votes and pass laws. Employees work in support of Members. Therefore, the extension of Chapter 71 to employees (as opposed to Members) poses no conflict with the Constitution. Chapter 71 authorizes the exclusion of employees on the basis of job duties to be incompatible with Chapter 71 coverage (i.e., supervisory, managerial, etc.).

2. **Determinations of exclusions should be based on performance of duties and should not be made on an office-wide basis.** Because exclusions must be applied narrowly, and because affected employees should be offered the opportunity to participate in decisions affecting their status as an included or excluded employee, whole offices should not be excluded from Chapter 71 by regulation. Any determination by the Board that the job duties performed by all employees of an office are incompatible with Chapter 71 applicability should be made on a case-by-case basis to ensure that job duties of all affected employees are fully considered.