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APPENDIX C

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Testimony on NDDOL Proposed Rules
Prepared for the Administrative Rules Committee
September 13, 2012

Good Morning Chairman Koppelman and members of the Administrative Rules Committee, my name is Tony J. Weiler, and I am the Commissioner of Labor. I appear before you today in support of the proposed Administrative Rules.

Prior to the 2011 Legislative session, I was approached by the North Dakota Bankers Association about a potential exemption from overtime pay in North Dakota law for "highly compensated individuals." These are individuals who make more than \$100,000 per year and work in non-manual labor positions. In the banking industry, this would most likely apply to mortgage professionals. North Dakota did not exempt these individuals from receiving overtime pay for any hours worked over 40 in any workweek. The Bankers Association felt there was a gap in North Dakota law that could either be filled by proposing legislation, or by working with us through the administrative rules process. We felt this exemption, like the others in North Dakota law, was best left in the Administrative Code.

- These rules were not the result of legislation.
- The rules are related to federal law only in that there is a federal exemption for highly compensated individuals.
- The rulemaking procedure was in accordance with the North Dakota Century Code. The public notice given was by publication and also notifying, by letter, representatives of associations with statewide membership of which the primary focus is representing business and labor. We held one public hearing.
- There were no objections to these rules.
- The approximate cost to publish the notice was \$1,815, any other costs were minimal.

These rules will establish an exemption from the overtime pay requirement in North Dakota for employees who are paid \$100,000 or more annually. The vast majority of North Dakota employees are, and will continue to be, covered by state and federal overtime regulations. Federal law for some time has exempted highly compensated employees from the requirement to

pay time and one half for all hours worked over 40 in any workweek. This will fill a gap in North Dakota's rules on the same subject.

In the rule, we first defined a "highly compensated employee." This new rule follows the federal law for the most part, but makes it a bit simpler. The federal interpretation can often get cumbersome, so the language we have added will simplify administration of the new state rule. These rules will retain the \$100,000 federal pay standard for what constitutes a highly compensated employee, yet limits the exemption so that it only applies to employees who perform non-manual labor. Any employee who performs manual labor is excluded and will still be paid overtime no matter how much that employee makes.

We also added some language to each of the administrative, executive, and professional exemptions to the overtime rules, by stating this employee must be "paid on a salary or fee basis." This follows the federal law, and is in line with how we were applying the exemptions.

We also defined "total annualized compensation" so that the \$100,000 is limited primarily to pay, and nothing else.

Finally, we added a formula for determining overtime from a regular rate and overtime from day rates and job rates. This has nothing to do with highly compensated employees, but with more employees in North Dakota earning wages based on varying pay formulas, we have been calculating overtime for those earning day and job rates based on a formula that follows federal law. We wanted a rule in the North Dakota Administrative Code so the public knows how we are calculating overtime.

- A regulatory analysis was not necessary because no request for an analysis was filed by the Governor or a member of the legislative assembly, and the proposed rule is not expected to have an impact on the regulated community in excess of \$50,000.
- I am attaching copies of the small entity regulatory analysis, the small entity economic impact statement, and the takings assessment.
- I do not anticipate these rules will have a fiscal effect on either our revenues or expenditures.
- These rules were not adopted as emergency.

I appreciate your time this morning, thank you. Please let me know if you have any questions.

SMALL ENTITY ECONOMIC IMPACT STATEMENT

1. Which small entities are subject to the proposed rule?

Any small entity who employs a "highly compensated individual" would be subject to the new and amended rules.

2. What are the administrative and other costs required for compliance with the proposed rule?

Administrative and other costs should be negligible.

3. What is the probably cost and benefit to private persons and consumers who are affected by the proposed rule?

No cost or benefit to private persons and consumers because they will essentially be unaffected by the proposed and amended rules.

4. What is the probable effect of the proposed rule on state revenues?

Negligible.

5. Is there any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule?

Because the new proposed rule will not be "intrusive or costly" there are no alternative methods for achieving the purposes of the proposed amended and new rules.

SMALL ENTITY REGULATORY ANALYSIS

1. Was establishment of less stringent compliance or reporting requirements for small entities considered? To what result?

The proposed administrative rules deal with overtime compensation for highly compensated individuals, and there do not appear to be "less stringent compliance or reporting requirements for small entities" that could have been considered. The new and amended administrative rules do not deal with compliance or reporting requirements.

2. Was establishment of less stringent schedules or deadlines for compliance or reporting requirements considered for small entities? To what result?

Please see answer to number one above.

3. Was consolidation or simplification of compliance or reporting requirements for small entities considered? To what result?

Please see answer to number one above.

4. Were performance standards established for small entities for replacement design or operational standards required in the proposed rule? To what result?

No

5. Was exemption of small entities from all or any part of the requirements in the proposed rule considered? To what result?

An exemption for small entities from all or any part of the requirements in the proposed rule was considered, but it did not appear that any small entities would benefit from exemption. The new and amended administrative rules will apply to highly compensated individuals, whether they work for a "small entity" or not. No small entities came forward with any objection to the new or amended rules.

TAKINGS ASSESSMENT

It's unlikely that the proposed rules will result in a taking because the proposed rules do not relate to the taking of real property as defined in North Dakota Century Code § 28-32-09(3).