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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By________ Deputy

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA**

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| UNITED STATES OF AMERICA,<br><br>v.<br><br>JOHN THOMAS HARPOLE,<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>) | CASE NO. AO4-025 CR (JKS) |

**DEFENDANT'S BRIEF REGARDING RULE 29 MOTION**

Comes now the Defendant, John Thomas Harpole, through his undersigned attorneys, and submits the following brief in support of his pending Rule 29 motion.

I. The Statutory Scheme and Implementing Regulations.

Withholding of federal income taxes from wages is chiefly governed by 26 U.S.C. § 3402, which provides as follows:

> (a) Requirement of withholding
> (1) In general
>
> Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance



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with tables or computational procedures prescribed by the Secretary. Any tables or procedures prescribed under this paragraph shall -

(A) apply with respect to the amount of wages paid during such periods as the Secretary may prescribe, and

(B) be in such form, and provide for such amounts to be deducted and withheld, as the Secretary determines to be most appropriate to carry out the purposes of this chapter and to reflect the provisions of chapter 1 applicable to such periods.

The current regulations relevant to the above provisions are 26 C.F.R. § 31.3402(b)-1 ("Percentage method of withholding") and 26 C.F.R. §31.3402(c)-1 ("Wage bracket withholding"):

Sec. 31.3402(b)-1 Percentage method of withholding.

With respect to wages paid after April 30, 1975, the amount of tax to be deducted and withheld under the percentage method of withholding shall be determined under the applicable percentage method withholding table contained in Circular E (Employer's Tax Guide) according to the instructions contained therein.

Sec. 31.3402(c)-1 Wage bracket withholding.

(a) In general. (1) The employer may elect to use the wage bracket method provided in section 3402(c) instead of the percentage method with respect to any employee. The tax computed under the wage bracket method shall be in lieu of the tax required to be deducted and withheld under section 3402(a). With respect to wages paid after July 13, 1968, the correct amount of withholding shall be determined under the applicable wage bracket withholding table contained in the Circular E (Employer's Tax Guide) issued for use with respect to the period in which such wages are paid.

Clearly pursuant to the regulations quoted immediately above, Circular E implements these regulations, which in turn implement the statutory scheme.

This has not always been the case, however. Shortly after adoption of the 1954 Internal Revenue Code, Treasury Decision 6259 (22 Fed.Reg. 8433 (Oct. 26, 1957),

1957-2 Cum.Bull. 645) was adopted and the actual withholding rates ("tables or computational procedures") were contained in charts within the regulations. About 8 years later, Treasury Decision 6860 (30 Fed.Reg. 13937 (Nov. 4, 1965), 1965-2 Cum.Bull. 399) replaced Treasury Decision 6259, and some 6 years thereafter, Treasury Decision 7115 (36 Fed.Reg. 9201 (May 21, 1971), 1971-1 Cum.Bull. 292) replaced Treasury Decision 6860. As shown via the attached excerpts from these regulations, they contained charts to calculate the amount of wage withholding.

But in 1983, Treasury Decision 7915 (48 Fed.Reg. 44073 (Sept. 27, 1983), 1983-2 Cum.Bull. 174) eliminated the withholding charts and simply referenced Circular E as a publication controlling withholding rates. The problem here, however, is that Circular E has never itself been formally adopted as a regulation pursuant to the requirements of the Administrative Procedure Act ("APA"), codified within 5 U.S.C. §§ 551 through 558.

II. The Requirements of the APA.

The requirements of the APA are well known and require little discussion. "Rules" are those agency issuances which implement the law, and such issuances must be formally adopted via the procedures of the APA. Any rule must first be published as a proposed rule in the Federal Register and subjected to public comment. Thereafter, such rule may be formally adopted by an agency after the comment period. Failure to follow the procedures mandated by the APA makes any such rule unenforceable.

An excellent example of the consequence of an agency's failure to formally adopt

a rule via APA procedures is Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954). Here, a federal agency implemented an unpublished regulation which banned commercial fishing in Taku Inlet on the Alaskan coast. Hotch was prosecuted and convicted for violating this regulation and his conviction was at first affirmed on appeal. He filed a petition for rehearing and asserted for the first time on appeal the issue of the non-publication of this substantive rule, and this directly caused a reversal of his conviction. Referring to the APA, the court held:

> "The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently is ineffective."

See also Gonzalez v. Freeman, 334 F.2d 570 (D.C.Cir. 1964).

A variety of issues based upon the provisions of the Clean Air Act were at issue in Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975). In this case, Maryland complained that certain regulations of the EPA which allegedly applied to it had not been subjected pre-promulgation publication in the Federal Register. Finding that the challenged regulations were published in final form in the Federal Register but had not been published therein in the notice and comment phase of the process of regulation promulgation, the same were found void and unenforceable. See also Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980).

At issue in Appalachian Power Company v. Train, 566 F.2d 451, 455 (4th Cir. 1977), was the failure of the EPA to publish a very lengthy document named

"Development Document" in the Federal Register. This document (described in Virginia Electric and Power Company v. Costle, 566 F.2d 446, 448 (4th Cir. 1977)) was 263 pages long and purported to establish standards for effluent emissions. Because the document itself constituted a substantive agency regulation which was not published, it was held invalid:

> "[T]he Development Document is not a validly issued part of the regulations, because it has not been published in the Federal Register, nor have the procedural requisites for incorporation by reference been complied with. With this position we agree, and hold that 40 C.F.R., section 402.12 is not enforceable for want of proper publication.
>
> "Any agency regulation that so directly affects pre-existing legal rights or obligations ..., indeed that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect to any subject within its competence,' is within the publication requirement.... As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms ..., the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register."

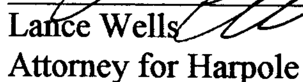
See also PPG Industries, Inc. v. Costle, 659 F.2d 1239 (D.C.Cir. 1981).

A similar problem regarding the food stamp program was raised in Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977), which considered the validity of an unpublished "Food and Nutrition Service (FNS), Food Stamp (FS) Instruction 732-1". Here the unpublished instructions commanded that HUD rent subsidies should be considered as "income" for food stamp purposes. Finding a substantial impact upon recipients of food stamps as a consequence of the "rule" contained in the unpublished instructions, the

Court declared such rule void and unenforceable. See also United States v. Shearson Lehman Bros., Inc., 650 F. Supp. 490, 496 (E.D. Pa. 1986); and United States v. Riky, 669 F. Supp. 196, 201 (N.D. Ill. 1987). Unpublished "rules" surely have less legal effect than interpretive rules; see United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000); United States v. American Production Industries, Inc., 58 F.3d 404, 407 (9th Cir. 1995)(interpretive rules do not create enforceable rights); and Multinomah Legal Services Workers Union v. Legal Services Corp., 936 F2d 1547, 1554 (9th Cir. 1991).

In this case, Circular E and its requirements can have no application. It has never been promulgated as a proposed rule and published for comment in the Federal Register; it has never been adopted as a "final" rule and published in the Federal Register. Consequently, it simply cannot be the legal basis for any claim that Harpole was to be subjected to wage withholding via its commands.

Respectfully submitted this the 23rd day of June, 2004.



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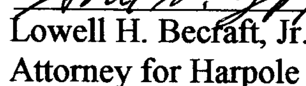

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the forgoing upon the below named counsel for the United States by depositing the same in the United States mail, postage prepaid, in an envelope addressed to him at his correct mailing address:

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Dated this the 23rd day of June, 2004.

Lance Wells

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