Washington, DC 20515

October 7, 2003

Mr. William Thompson, III
Executive Director
Office of Compliance
110 Second Street, S.E. Room LA-200
Washington, D.C. 20540-1999

Dear Mr. Thompson:

The Office of Compliance has provided an opportunity for comments on proposed amendments to the Procedural Rules of the Office of Compliance.

Attached are the comments of the Office of the Architect of the Capitol. We hope that our comments can contribute to the efforts of the Office of Compliance in meeting the requirements under the Congressional Accountability Act.

Please feel free to contact Peggy Tyler on 6-0680 for further assistance or information.

Sincerely,

Richard McSeveney, P.E.
Chief Operating Officer

Comments by the Office of the Architect of the Capitol on the Office of Compliance Proposed Amendments to the "Office of Compliance Procedural Rules"

The Office of Compliance (Office) has issued proposed amendments to the Office of Compliance Procedural Rules (OCPR) and has requested comments from interested parties. The Office of the Architect of the Capitol (AOC) submits the comments below regarding the proposed amendments.

The proposed amendments (or amendments) are to specific sections of the OCPR. The comments identify the specific section of the OCPR that the comments address.

OCPR 103(a) and proposed (d): This amendment provides in (a) for electronic filing of documents when specifically authorized by the Executive Director and in new section (d) for service or filing of documents by express mail or other forms of expedited delivery which provide proof of delivery to the addressee whenever the rules permit or require service or filing by certified mail, return receipt requested.

> **1.03 Filing and Computation of Time.**
> (a) *Method of Filing.* Documents may be filed in person or by mail, including express, overnight and other expedited delivery. ***When specifically authorized by the Executive Director, any document may also be filed by electronic transmittal in a designated format.*** Requests for counseling under section 2.03, requests for mediation under section 2.04 and complaints under section 5.01 of these rules may also be filed by facsimile (FAX) transmission...
> ***(d) Service or filing of documents by certified mail, return receipt requested. Whenever these rules permit or require service or filing of documents by certified mail, return receipt requested, such documents may also be served or filed by express mail or other forms of expedited delivery in which proof of delivery to the addressee is provided.***

The amendment does not indicate what will trigger the Executive Director's consideration to authorize electronic filing or if any types of matters would be excluded from consideration. The AOC is generally in favor of the inclusion of electronic transmittal as a filing method, as well as the expanded service options when proof of delivery is required.. The amendment, however, does not indicate how electronic transmittal is requested or whether it would apply to all types of matters and cases, or if there are instances where it would not be permitted (i.e., if only one party has the technological capability of electronic filing). It would be helpful to have the request process spelled out, with any known exceptions included.

OCPR 1.05(a): This amendment would permit the Executive Director, upon the request of a party, to disqualify the representative of a party during counseling or mediation because of a

conflict of interest and to extend the counseling and mediation periods to obtain another representative.

> **1.05 Designation of Representative.**.
> (a) An employee, other charging individual or party, a witness, a labor organization, an employing office, an entity alleged to be responsible for correcting a violation wishing to be represented by another individual must file with the Office a written notice of designation of representative. The representative may be, but is not required to be, an attorney. ***During the period of counseling and mediation, upon the request of a party, if the Executive Director concludes that a representative of an employee, of a charging party, of a labor organization, of an employing office, or of an entity alleged to be responsible for correcting a violation has a conflict of interest, the Executive Director may, after giving the representative an opportunity to respond, disqualify the representative. In that event, the period for counseling or mediation may be extended by the Executive Director for a reasonable time to afford the party an opportunity to obtain another representative.***

The amendment appears to be modeled on the authority given to a Hearing Officer under OCPR 7.07(f) to disqualify a representative for a conflict of interest, and to afford the affected party a reasonable time to retain other representation. However, § 7.07(f) specifically preserves the time limits for hearing and decision established by the Act. **The CAA does not permit an expansion of the counseling period beyond 30 days.** Section 402(b) of the CAA, 2 U.S.C. §1402(b) states that the counseling period shall be 30 days, unless the employee and the Office agree to reduce it (emphasis added). By contrast, the mediation period can be extended upon the request of the parties under Section 403(c), 2 U.S.C. § 1403(c). The AOC suggests that the amendment include language to provide that the affected party be given an opportunity to obtain other representation consistent with the applicable time frames of the Act.

It would be helpful to know what criteria will be applied in assessing whether or not a conflict of interest exists, and whether or not the decision of the Executive Director is appealable, and if so, to whom.

OCPR 2.03(a), (c), (l), and (m)(1)(ii)(A): (a) adds the requirement that requests for counseling be in writing, (c) that the written request for counseling be filed with the Office of Compliance and eliminates the ability to make a (presumably oral) request either in person or by telephone, (l) that service of the notification of the end of counseling period may also be by personal delivery, and (m)(1)(ii)(A) that the time to return to the procedures, after a period of referral to the grievance process of either the AOC or the United States Capitol Police does not resolve a matter, be increased from 10 (ten) days to 60 (sixty) days.

> **2.03 Counseling.**
> (a) *Initiating a Proceeding; Formal Request for Counseling.* In order to initiate a proceeding under these rules, an employee shall /formally / ***file a written*** request ***for***

counseling /from / ***with*** the Office regarding an alleged violation of the Act, as referred to in section 2.01(a) above. All /formal / requests for counseling shall be confidential, unless the employee agrees to waive his or her right to confidentiality under section 2.03(e)(2), below. ...

(c) *When, how, and Where to Request Counseling.* A ***[***formal***]*** request for counseling ***must be in writing, and [***: (1)***]*** shall be ***[***made***] filed with the Office of compliance at Room LA-200, 110 Second Street, S.E., Washington, D.C. 20540-1999; telephone 202-724-9250; FAX 202-426-1913; tdd 202-426-1912,*** not later than 180 days after the alleged violation of the Act. ***[***;***] [***(2) may be made to the Office in person, by telephone, or by written request; (3) shall be directed to: Office of Compliance, Adams Building, Room LA-200, 110 Second Street, S.E., Washington, D.C. 20540-1999, telephone 202-724-9250; FAX 202-426-1913; TDD 202-426-1912.***]*** ...

(l) *Conclusion of the Counseling Period and Notice.* The Executive Director shall notify the employee in wriating of the end of the counseling period, by certified mail, return receipt requested, ***or by personal delivery.*** The Executive Director, as part of the notification of the end of the counseling period, shall inform the employee of the right and obligation, should the employee choose to pursue his or her claim, to file with the Office a request for mediation within 15 days after receipt by the employee of the notice of the end of the counseling period. ...

(m) *Employees of the Office of the Architect of the Capitol and the Capitol Police.*

(1) Where an employee of the Office of the Architect of the Capitol or of the Capitol Police requests counseling under the Act and these rules, the Executive Director may recommend that the employee use the grievance procedures of the Architect of the Capitol or the Capitol Police. The term `grievance procedures' refers to internal procedures of the Architect of the Capitol and the Capitol Police that can provide a resolution of the matter(s) about which counseling was requested. Pursuant to section 401 of the Act and by agreement with the Architect of the Capitol and the Capitol Police Board, when the Executive Director makes such a recommendation, the following procedures shall apply:

...

(ii) After having contacted the Office and having utilized the grievance procedures of the Architect of the Capitol or of the Capitol Police Board, the employee may notify the Office that he or she wishes to return to the procedures under these rules:

(A) within ***[***10 ***/ 60*** days after the expiration of the period recommended by the Executive Director, if the matter has not been resolved; or

(B) within 20 days after service of a final decision resulting from the grievance procedures of the Architect of the Capitol or the Capitol Police Board.

The AOC is generally in agreement with requirement in (a) and (c) that requests for counseling must by in writing and filed with the Office of Compliance, the elimination in (c) of the ability to make (presumably) oral or telephonic requests for counseling, and the inclusion (l) of personal delivery as a method of notification.

AOC recommends the addition of a requirement for some form of verification of delivery of the personal delivery method of service allowed in OCPR 2.03(l). These same comments apply to the amendment to OCPR 2.04(i) adding hand delivery as an acceptable method of delivering the end of mediation period notification. The original language of both sections required certified mail, return receipt requested. It is noted that only those additional delivery methods which provided proof of delivery were included in the amendment to OCPR 1.03 discussed above. Additionally, the same language should be adopted for the additional method of delivery allowed in OCPRs 2.03 and 2.04. The respective amendments say "...by personal delivery..." and "...will be hand delivered..."in the notice of the proposed amendments.

Expansion of the time in OCPR 2.03(m)(1)(ii)(A)to return to the procedures of the Office of Compliance when a referrral to the grievance procedure of the employing office does not resolve the matter from 10 days to 60 days is excessive and unreasonably extends the total amount of time not counted as part of the initial counseling period. For the purposes of uniformity in time frames, the AOC suggests that the time allotted under (A) be expanded to **20 days** to match that provided already under (B).

OCPR 2.06(c)(1) and (c)(2): (c)(1) requests that covered employees send the Office of Compliance a courtesy copy of complaints they elect to file in the United States District Courts pursuant to sections 404(2) and 408 of the CAA and (c)(2) provides that no party to such a district court case can request information about the counseling or mediation period proceedings from the Office of Compliance unless they notify the other party(ies) that they are doing so. It further provides that the Office of Compliance will decide whether or not to release the information.

> **2.06 Filing of Civil Action.**
> ***(c) Communication Regarding Civil Actions Filed with District Court.***
> ***(1) The party filing any civil action with the United States District Court pursuant to sections 404(2) and 408 of the Act should simultaneously provide a copy of the complaint to the Office.***
> ***(2) No party to any civil action referenced in paragraph (1) shall request information from the Office regarding the proceedings which took place pursuant to sections 402 or 403 related to said civil action, unless said party notifies the other party(ies) to the civil action of the request to the Office. The Office will determine whether the release of such information is appropriate under the Act and the Rules of Procedure.***

The AOC has no comment on OCPR 2.06(c)(1) and (c)(2) other than to note that the subpoena power of the courts is available to parties to utilize in their requests for information and documents.

Proposed OCPR Article 4.16 provides a process by which the comments of employing offices may be considered for inclusion with Occupational Safety and Health reports issued by the OOC General Counsel.

Article 4.16 Comments on Occupational Safety and Health Reports. The General Counsel will provide to responsible employing office(s) a copy of any report issued for general distribution not less than seven days prior to the date scheduled for its issuance. If a responsible employing office wishes to have its written comments appended to the report, it shall submit such comments to the General Counsel no later than 48 hours prior to the scheduled issuance date. The General Counsel shall either include the written comments without alteration as an appendix to the report, or immediately decline the request for their inclusion. If the General Counsel declines to include the submitted comments, the employing office(s) may submit said denial to the Board of Directors which, in its sole discretion, shall review the matter and issue a final and non-appealable decision solely regarding inclusion of the employing office(s) comments prior to the issuance of the report. Submissions to the Board of Directors in this regard shall be made expeditiously and without regard to the requirements of subpart H of these rules. In no event shall the General Counsel be required by the Board to postpone the issuance of a report for more than five days.

It is unclear what are the reports to which this provision applies. The reports expressly referred to in the CAA are those that Section 215 (e)(2)(A) of the CAA, 2 U.S.C. 1341(e)(2) requires (hereinafter referred to as Periodic Reports). Indeed, the proposed wording had been introduced in an early draft of the 2002 Periodic Report, and the OOC Office of General Counsel follows the practice of issuing these reports for general distribution even though the CAA directs that Periodic Reports be sent to a limited list of recipients in leadership and employing offices. A second type of report is developed by staff of the OOC Office of General Counsel and is addressed to the General Counsel himself. Employing offices, requestors, and others frequently receive courtesy copies of these reports. These documents, drafted by OOC Office of General Counsel staff, report on matters raised by Requests for Inspection filed pursuant to Section 215(c)(1), 2 U.S.C. 1341(c)(1) (hereinafter referred to as Request Reports). The OOC has no formal procedure on how either of these types of reports is distributed. The manner of distribution has been an issue in at least one case.

The lack of OSH regulations unnecessarily prolongs the consideration of OOC Reports. The AOC is firmly committed to closely considering both draft Periodic Reports and draft Request Reports to promptly correct deficiencies and to heed the advice of the OOC. Such consideration is frequently are delayed because there are currently no established OOC OSH regulations to follow. Section 215(d) of the Congressional Accountability Act, 2 U.S.C. §1341(d), (CAA) directs the Office of Compliance to issue its own regulations regarding Occupational Safety and Health provisions. While the OOC in January 1997 published "adopted" regulations, 143 Cong. Rec. H95-H103 and 143 Cong. Rec. S30-01(1/9/97), those regulations did not become official. Thus, the OOC has not yet issued final OSHA regulations as required by Section 215(d) of the CAA, 2 U.S.C. §1341(d). If the OOC were to address this failure to issue regulations, the process would be expedited because there would be less need for extended consideration of which of the many safety

standards are authoritative in a given case. Many other benefits would follow the issuance of OOC OSH regulations.

The consideration of draft OOC Periodic Reports requires different time frames. If Article 4.16 were to apply to OOC Periodic Reports, the rather constricted time frame is unnecessary and in fact may obstruct future exchange of information from employing offices to the OOC. First, each of the past four (4) Periodic Reports prepared by the OOC has been a lengthy document developed after exhaustive building-by-building inspection by OOC inspectors. Indeed; the 2002 report was over 90 pages long, including the charts. Drafting comments to respond to such lengthy reports is time-consuming. In the proposed language, little time is given to employing offices to consider the draft report, decide whether comments are appropriate and then to draft comments. Further, the deadline for issuance of Periodic Reports, viz., the last day of each Congress, is rather clearly established by law, so the review process and information exchange may be scheduled in the context of that deadline.

Application of Article 4.16 to OOC Request Reports may discourage cooperative efforts between the OOC and employing offices. If Article 4.16 is to also apply to OOC Request Reports as described above, the proposed time frame may likewise be too constricted to allow for the proper consideration and information exchange. First, it is important to note that rarely are Request Reports time-sensitive. Indeed, many of these reports are the product of cooperative efforts undertaken over months of work by the OOC staff and AOC staff. Of course, the AOC makes any necessary corrections of unsafe conditions as early as possible, based on each deficiency and available resources. The AOC prides itself on promptly curing deficiencies, on the spot, if possible. This is done independent of the drafting of any written reports or comments.

Frequently, the joint efforts of the AOC, other responsible employing offices, and the OOC have followed the preparation of an initial draft Request Report by the General Counsels staff. Having time to engage in discussions ensures that the OOC inspectors have a full understanding of what the issues are, all parties agree on what standards are applicable, and all of the deficiencies and/or alleged violations of applicable standards are promptly addressed. The proposed rule may unnecessarily truncate or eliminate these cooperative efforts.

The time frames for delivery of documents established by Article 4.16 may be unworkable. The article sets no time frame or method for delivery of a draft report by the General Counsel to employing offices. Given that the General Counsel has ultimate control over developing that draft and setting the date of issuance, this omission leaves the proposed article lop-sided in favor of that office. Further, the filing by employing offices of response letters could take several days, if not a week, more than is allotted in the article. OOC Procedural Rules Article 1.03(a) permits the filing of such documents with the OOC by several methods. For example, with regard to mailing, the mailbox rule applies, thereby allowing several days to pass before the OOC General Counsel or the Board actually receives a filed document. If these days were to precede a weekend, a full week may pass before the OOC receives comments filed by an employing office. Finally, in that same light, the limitation that the Article places on the Board as to the maximum period of

postponement of the issuance of the report, i.e., not more than five days (impliedly, past the scheduled date for issuance) may therefore be unworkable and is, at a minimum, unreasonable.

The time frames for delivery of documents established by Article 4.16 are confusing. The mixing of days with hours as a time division in this article may cause confusion. It also raises questions as to the method of computation. It is clear that the seven-day timeframe will not include intermediate Saturdays, Sundays and federal government holidays, OOC Procedural Rules Article 1.03(b), but there is not a similar provision explaining how hours are to be computed. Will intermediate Saturdays, Sundays and federal government holidays be included in calculating the 48-hour period? Will the 48-hour period only include business hours? Also, the OOC General Counsel's setting of the the date scheduled for the reports' issuance may be problematic. If the General Counsel chooses to postpone the scheduled date of issuance after hearing from an employing office, certainty of application of the rule itself may be in question, particularly vis-à-vis other employing offices. Finally, in cases where there is uncertainty as to whether one or another office is the responsible employing office, the prospect of several different issuance dates may arise. In past cases, there has frequently been questions as to the proper office to contact to address alleged deficiencies. Keeping track of the deadlines in these cases may be particularly demanding.

OCPR 5.03(d) and (e): (a) gives the Hearing Officer the authority to grant summary judgment on some or all of the complaint, and (e) substitutes the words final decision for dismissal.

> **5.03 Dismissal,** ***Summary Judgment,*** **and Withdrawal of Complaints.**
> ***(d) Summary Judgment. A Hearing Officer may, after notice and an opportunity to respond, issue summary judgment on some or all of the complaint.***
> **(** ***[d Je)*** *Appeal.* A *[*dismissal *]* ***final decision*** by the Hearing Officer made under section 5.03(a)-(c) or 7.16 of these rules may be subject to appeal before the Board if the aggrieved party files a timely petition for review under section 8.01.

The amendment fails to define "final decision." A partial summary judgment results in the dismissal of some claims in a complaint, but not all, and the amendment is unclear whether or not this would qualify as a final decision for appeal purposes. If it is, this could result in one portion of the original complaint being before the Board of Directors on a petition for review while the remainder is still before the Hearing Officer in the hearing process.

OCPR 7.02 authorizes the Hearing Officer to impose sanctions on representatives for inappropriate or unprofessional conduct.

> **7.02 Sanctions**
> ***(a) The Hearing Officer may impose sanctions on a party's representative for inappropriate or unprofessional conduct.***

What criteria will the Hearing Officer apply in determining whether or not conduct is inappropriate or unprofessional? Perhaps guidance on appropriate behavior or decorum in

the hearing process should be available as not all representatives of parties are attorneys or other types of professionals.

The AOC is generally in agreement with the amendments to **OCPRs 8.01, 9.01, and 9.03.**

OCPR 9.05: The amendment to (b) requires the Executive Director to give written grounds for not approving any proposed Formal Settlement Agreement, (c) bars rescission of a fully executed agreement without voluntary written revocation signed by all parties, (d) proposes procedures to handle violations of Formal Settlement Agreements if not addressed in the Agreement itself.

> **9.05 Informal Resolutions and Settlement Agreements**
> (b) *Formal Settlement Agreement.* The parties may agree formally to settle all or part of a disputed matter in accordance with section 414 of the Act. In that event, the agreement shall be in writing and submitted to the Executive Director for review and approval. ***If the Executive Director does not approve the settlement, such disapproval shall be in writing, shall set forth the grounds therefor, and shall render the settlement ineffective.***
> ***(c) Requirements for a Formal Settlement Agreement. A formal settlement agreement requires the signature of all parties on the agreement document before the agreement can be submitted to the Executive Director. A formal settlement agreement cannot be rescinded after the signatures of all parties have been affixed to the agreement, unless by written revocation of the agreement voluntarily signed by all parties, or as otherwise required by law.***
> ***(d) Violation of a Formal Settlement Agreement. If a party should allege that a formal settlement agreement has been violated, the issue shall be determined by reference to the formal dispute resolution procedures of the agreement. If the particular formal settlement agreement does not have a stipulated method for dispute resolution of an alleged violation of the agreement, the following dispute resolution procedure shall be deemed to be a part of each formal settlement agreement approved by the Executive Director pursuant to section 414 of the Act: Any complaint regarding a violation of a formal settlement agreement may be filed with the Executive Director no later than 60 days after the party to the agreement becomes aware of the alleged violation. Such complaints may be referred by the Executive Director to a Hearing Officer for a final and binding decision. The procedures for hearing and determining such complaints shall be governed by subparts F, G, and H of these rules.***

The AOC generally agrees with (b) and (c), noting the Age Discrimination in Employment Act requirements for settlement agreements.

The imposition of a formal dispute resolution mechanism as a means to address alleged violations of settlements in the absence of a dispute resolution mechanism included by the

parties in the formal settlement agreement is substantive rather than procedural and cannot be effected by promulgation of an amendment to the procedural rules. The CAA specifically included enforcement authority in selected portions of the Act, but did not include that authority in reference to settlement agreements.

The CAA does not provide the Office of Compliance, its Executive Director or Hearing Officers with the authority to impose conditions on settlement agreements - only the power to approve or disapprove the same. Further, inasmuch as the Act reserved to the Senate and the House of Representatives, respectively, the power to establish rules governing the process by which a settlement may be entered into by such House or by any employing office of such House, it would seem to be a logical extension of that power to establish the rules for addressing claims of noncompliance with such settlement agreements.

OCPR 9.06 This amendment sets out a record retention schedule for closed files.

9.06 Destruction of Closed Files.
Closed case files regarding counseling, mediation, hearing, and/or appeal may be destroyed during the calendar year in which the fifth anniversary of the closure date occurs, or during the calendar year in which the fifth anniversary of the conclusion of all adversarial proceedings in relation thereto occurs, whichever period ends later.

AOC recommends that other federal record retention statutes be checked for applicability to be certain there is no conflict.

OCPR 9.07 This amendment identifies the Executive Director as the action official to receive requests for requisitions from the account of the Office of Compliance in the Department of the Treasury.

9.07 Payment of Decisions, Awards, or Settlements under section 415(a) of the Act.
Whenever a decision or award pursuant to sections 405(g), 406(e), 407, or 408 of the Act, or an approved settlement pursuant to section 414 of the Act, require the payment of funds pursuant to section 415(a) of the Act, the decision, award, or settlement shall be submitted to the Executive Director to be processed by the Office for requisition from the account of the Office of Compliance in the Department of the Treasury, and payment.

If the purpose of the proposed amendment is to simply identify the official of the Office of Compliance to whom to submit a decision, award, or settlement which requires requisition of funds from the account of the Office of Compliance in the Department of the Treasury, the AOC is generally in agreement with this amendment.