UNITED STATES CAPITOL POLICE
OFFICE OF THE EMPLOYMENT COUNSEL

March 29, 2004

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

Re: Comments to Second Notice of Proposed Rulemaking
to the Rules of Procedure for the Office of Compliance

Dear Mr. Thompson:

The Office of Compliance Second Notice of Proposed Rulemaking ("NPR") regarding amendments to the Procedural Rules of the Office of Compliance was published in the Congressional Record on February 26, 2004 (H693 and S1671). Pursuant to section 303(b) of the Congressional Accountability Act ("CAA"), the following comments and observations have been prepared and submitted by the Capitol Police Office of Employment Counsel and the Office of the General Counsel for the United States Capitol Police Board. We also incorporate by reference our previous comments and recommendations not otherwise adopted by the Office of Compliance pursuant to our submission dated October 20, 2003.

Procedural Regulations vs. Substantive Regulations

You did not address the distinction between procedural and substantive regulations when we first addressed the problems in the first notice of proposed rulemaking. Because several provisions are again incorporated into your second NPR, which we again point out are essentially substantive regulations, we again address the restriction placed on the Office of Compliance to move forward with such proposed rules.

Section 303 does not allow the Office of Compliance to accomplish through procedural rules what it could not do through substantive rulemaking provisions. Several of the proposed rules of the second NPR meet the definition of substantive regulations as they directly impact the ability of the employing offices to function in accordance with the statutes incorporated under the CAA. See Proposed Rules §§ 4.16, 7.02, and 8.01(3).

There is no authority provided in the CAA that permits the Office of Compliance to accomplish through procedural regulations what it should be pursuing through substantive regulations as is required under section 304(a)(2) of the CAA. "An administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Section 304(a)(2) of the CAA requires that substantive regulations can only be adopted once those regulations have received Congressional review and, if appropriate, approval. In accordance with the comments below, it

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is requested that the Executive Director of the Office of Compliance withdraw those regulations that are "substantive" and not "procedural" and issue substantive regulations and seek congressional approval in accordance with section 304. In the alternative, the Office of Compliance could seek a statutory adjustment from Congress to receive specific legislative authority for the contemplated action.

§ 1.03 Filing and Computation of Time

(a) Method of Filing

We raised concerns initially about whether the Office of Compliance has developed proper safeguards for ensuring that confidential and security-sensitive information cannot be accessed by computer hackers and other individuals with ill-purposes. The Office of Compliance still has not addressed how electronic transmittal safeguards have been implemented to maintain the statutory obligation of confidentiality in accordance with section 416 of the CAA. It is also not clear what is meant by "electronic transmittal." While facsimile is an "electronic transmittal" (and already addressed in the procedural rules), that method of filing has clearer safeguards. The broad definition of "electronic transmittal" could also include service through the internet, e-mail, wireless telephones and the like which are not properly safeguarded and could breach confidentiality required by section 416 of the CAA. One need only consider an e-mail message which is sent to the Office of Compliance and blind copied to several other individuals.

Of equal concern is the lack of information in the procedural rule regarding certification or confirmation of when the document was filed which may be necessary for jurisdictional purposes in federal district court. The Office of Compliance states in its discussion of this provision that "[n]ot including such information also better safeguards the security of document filing" which appears to be contrary to establishing definitively when a document has been filed. Procedural Rule 1.03(a)(3) addressed when a document would be deemed filed for faxed documents. Such a procedure should also be clearly specified for "electronic transmittal".

Moreover, the CAA provides a Hearing Officer with the responsibilities of conducting pre-hearing discovery and the hearing itself and does not authorize the Executive Director to allow electronic filing. Although not clear in the text of the procedure, it is assumed that the Executive Director will never authorize any document to be filed electronically once a case is assigned to a Hearing Officer as the procedural rules specify that a Hearing Officer may order documents to be filed by fax. This distinction should be clearly explained in the procedural rule. On the other hand, if the intent is that the Executive Director may authorize electronic filing once a case has been assigned to a Hearing Officer, the Executive Director does not have a statutory role to do so once a hearing is requested in accordance with Section 405 of the CAA and would exceed the scope of the Executive Director's authority under the CAA.

§ 2.03 Counseling

(l) Conclusion of the Counseling Period and Notice

It is recommended that after "evidence by a written receipt," the following language be added: "provided and date/time stamped by the Executive Director or his designee." Such a date/time stamp will serve as an independent verification of evidence of written receipt.

(m)(1)(ii)(A) Although section 401 of the CAA states that the period of internal grievance process for the Capitol Police "shall not count against the time available for counseling or mediation," we are still unclear as to how the extension of the time period from 10 days to 60 days may effect the jurisdiction of the courts. The lack of clarity as to what is intended causes question of the intent, particularly as we do not have current information as to how the time period is calculated by the Office of Compliance. For example, if an employee has participated in five days of counseling and then is ordered to go through the internal grievance procedure, upon completion of the procedure, is the counseling period then twenty five days? More clarity as to how the periods are to be computed will assist us in determining whether the proposed rule would affect the substantive rights of jurisdiction. Accordingly, we request that this procedural rule not be adopted at this time so that we may appropriately comment with accurate information.

§ 2.04 Mediation

(i) Conclusion of the Mediation Period and Notice

It is recommended that after "evidence by a written receipt," the following language be added: "provided and date stamped by the Executive Director or his designee." Such a date/time stamp will serve as an independent verification of evidence of written receipt.

§ 2.06 Filing of Civil Action

(c) Communications Regarding Civil Actions Filed with District Court

The Executive Director seeks authorization to require that the party filing a civil action shall provide written notice to the Office of Compliance specifying the district court in which the civil action was filed and the case number. This provision is beyond the scope of authority granted to the Office of Compliance under the CAA. There is no requirement under the CAA, or any other law, that grants the Executive Director authority to require the parties to provide the Office of Compliance with information about district court filings.

In the discussion of this proposed rule, the Office of Compliance states that "[t]he Office

has the responsibility to be aware of judicial applications and interpretations of the Act" but does not provide a citation for such authority under the CAA nor provides statutory authority to impose additional obligations on a party not authorized by the CAA. Moreover, it is unclear what sanctions are available or contemplated, if any, if a party does not comply with such a notice obligation.

Should the Office of Compliance seek to require a party to provide notice of a district court filing, the Office of Compliance should pursue an amendment to the CAA through the normal legislative process. To do so under the guise of procedural rulemaking in accordance with section 303 is improper and unauthorized.

§ 4.16 Comments on Occupational Safety and Health Reports

Under this proposed procedural rule, the Office of Compliance seeks to establish a procedure for disseminating reports authorized under section 215(c)(1) or 215(e)(2) of the CAA, providing the Office of Compliance General Counsel with authority to decide whether to attach employing office's comments to the reports, and creating a non-appealable process to the Office of Compliance Board of Directors.

First, the proposed rule does not address how the Office of Compliance will address security-sensitive information, particularly information that is within the expertise of the employing offices, namely the United States Capitol Police and the United States Capitol Police Board. These proposed rules do not contemplate the ability of the security element of Congress to insure that security sensitive information is not released for the protection of the Congress and the Capitol Complex. Any precipitous action on such information is irresponsible and potentially dangerous particularly in circumstances where immediate corrective measures can be taken to protect individual health and safety concerns irrespective of the dissemination of a report. Currently, there are no security safeguards in place with the Office of Compliance to ensure that security-sensitive information is safeguarded which has created problems in past OSHA matters. Even with executive branch security clearances, which carry sanctions for dissemination of this information, the federal legislative branch must likewise be assured that appropriate safeguards are in place to control the release of information that specifically relates to the security of Congress.

Second, the provision seeks to establish a process by which an employing office's comments may or may not be attached to a report. This provision improperly seeks to expand the rights of the General Counsel of the Office of Compliance as well as the Board of the Office of Compliance. Nowhere in the CAA does the statute provide the General Counsel or the Board with the right to establish and preclude appeal rights for an employing office and is, therefore, *ultra vires*. Should the Board desire to make this change, the appropriate avenue is to pursue the

proposed change through substantive rulemaking and congressional approval in accordance with section 304 of the CAA. Again, a legislative initiative could also be pursued by the Office of Compliance to appropriately confer this requested authority.

§ 7.02 Sanctions

(a) The Office of Compliance seeks authorization for the Hearing Officer to impose sanctions on a party's representative necessary to regulate the course of the hearing. To support its proposed rule, the Office of Compliance cites to section 556(c)(5) of the Administrative Procedures Act. While it is true that section 556(c)(5) authorizes a presiding official to "regulate the course of the hearing," that provision says nothing about sanctions. Therefore, it remains unclear what authority the Office of Compliance relies on to impose sanctions on a "party's representative" as the CAA does not authorize such action. Moreover, it continues to remain unclear what constitutes "inappropriate or unprofessional conduct" and what standards will be applied by a Hearing Officer. This provision is beyond the scope of authority allowed a Hearing Officer under the CAA. It also appears that as this provision seeks to affect the rights of a party's representative, such a proposed measure is substantive in nature. Therefore, the appropriate avenue is to pursue a correction through substantive regulations in accordance with section 304 of the CAA. The Office of Compliance may also pursue an amendment to the CAA through the normal legislative process. To do so under the guise of procedural rulemaking in accordance with section 303 is improper and unauthorized.

§ 8.01 Appeal to the Board

(2) Although not "bolded" as an Office of Compliance proposed change, this provision is not entirely accurate. First, the second sentence of this provision is missing from the text that is currently in the procedural rules. Second the word "reply" is currently listed in the procedural rules as "responsive." It is assumed that the Office of Compliance is not proposing a change to this provision. However, if the changes are being made, we request that you notify the employing offices of such a change.

(3) The Office of Compliance seeks to authorize written delegation to the Executive Director to determine extensions of time for post petition for review of documents where the Executive Director has not rendered a determination on the merits. As we discussed in our prior submission, the CAA does not provide the Board with discretion to delegate its responsibility to the Executive Director. Though the Office of Compliance identifies such act as "ministerial," nonetheless, Section 406 of the CAA makes clear that the Board is given the responsibility to handle appeals, not the Executive Director or any other designee.

Moreover, the proposed rule leaves the Board with sole discretion in determining whether

an issue is "a determination on the merits." There appears to be no appeal right for an employing office that may disagree with the Board determination resulting in a substantive effect on an employing office's right to appeal. Therefore, the appropriate avenue requires pursuing a change through substantive regulations in accordance with Section 304 of the CAA.

§ 9.01 Filing, Services and Size Limitations of Motions, Briefs, Responses and other Documents

We raised in our initial filing the issue of who "the Officer" is under the proposed rule. It is unclear who this individual is under the CAA or the role or responsibility of such individual. There is also a need to re-examine the definition of "matter." As previously raised and asserted by this employing office, "any matter" refers to any matter under section 220(c)(1) which must be presented to a Hearing Officer. The incorporation of "matter" into the Second NPR simply confuses the issue and is highlighted when comparing the proposed rule to the Office of Compliance discussion regarding that rule. The discussion following the procedural rule is inconsistent with the proposed rule itself. For example, the discussion states that "matter" was included because some procedures are addressed by the Board in the first instance yet the proposed rule addresses "matters" reviewable by the Board. The addition of "matter" to the proposed rule still does not provide sufficient clarity for the employing office to determine whether appropriate statutory distinctions have been taken into consideration and what change of the existing rule is being proposed.

§ 9.05 Informal Resolutions and Settlement Agreements

(c) Requirements for a Formal Settlement Agreement. Sentence two suggests that a formal settlement agreement can be rescinded. Once the Settlement Agreement is approved, the Office of Compliance has no further statutory role to play in the process. Section 414 of the CAA only authorizes the Executive Director of the Office of Compliance to approve settlement agreements. It is, therefore, *ultra vires* for the Office of Compliance to expand its authority through procedural rulemaking. The Office of Compliance must utilize a legislative charge through Congress if it wants to expand its reach.

(d) Violation of a Formal Settlement Agreement. The Office of Compliance seeks to establish a procedure when a party alleges the violation of a formal settlement agreement. This proposed procedural regulation would exceed the scope of the Office of Compliance's authority and would be beyond the scope of power authorized under law in accordance with the CAA. There is no authority provided in the CAA that authorizes the Office of Compliance to address violations of a formal settlement agreement much less establish a procedure for handling an alleged violation. Moreover, the Office of Compliance does not cite statutory authority for such a proposed regulatory provision. The Office of Compliance's reliance on Section 414 simply

does not give the Office of Compliance authority to establish an appeal procedure not found in the CAA. The Office of Compliance must request authorization through a legislative change through Congress.

§ 9.06 Destruction of Closed Files

The Office of Compliance seeks authorization to destroy closed files in the fifth anniversary of the closure date or during the calendar year for which the fifth anniversary of the conclusion of all adverse proceedings occurs, whichever is later. We stated in Section 2.06 that the provision is beyond the scope of authority granted to the Office of Compliance under the CAA. As such, it may be difficult for the Office of Compliance to ascertain when a closure date occurs. We suggested an approach in our earlier submission which we renew again at this time. It is recommended that the following language be inserted after the word destroyed: "with the consent of the parties and/or their last designated representative of record."

Respectfully submitted,

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