Via Facsimile and First Class Mail

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Chair
Board of Directors of the Office of Compliance
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Re: **Comments to the Notice of Proposed Rulemaking Implementing Section 206a of the Congressional Accountability Act**

Dear Ms. Robfogel:

The Committee on House Administration ("the Committee") is pleased to submit the following comments, questions, and suggestions regarding the proposed substantive regulations implementing the Veterans' Employment Opportunities Act ("VEOA") as incorporated in the Congressional Accountability Act ("CAA").

Introduction

On February 16, 2005, the Board of Directors of the Office of Compliance ("the Board") submitted for publication in the Congressional Record a Notice of Proposed Rulemaking and Request for Comments from Interested Parties regarding its proposed regulations implementing certain substantive employment rights and protections for veterans under the CAA ("Proposed Regulations").[1] In the "Background" section of the Proposed Regulations, the Board explains that the regulations apply certain veterans' employment rights and protections to employing offices and employees covered by the CAA. The language of the CAA adopting specific sections of the VEOA requires the Board to issue regulations that are "the same as the most relevant substantive regulations (applicable with respect to the Executive Branch) promulgated to implement [the VEOA] . . . except insofar as the Board may determine, for good cause shown

[1] 151 Cong. Rec. H705-03 (daily ed. Feb. 16, 2005).

and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections" under the VEOA. 2 U.S.C. § 1316a(4)(B).

As evidenced by the extensive explanatory material accompanying its latest round of Proposed Regulations, the Board has considered the commentary, both formal and informal, to the earlier proposed regulations submitted by several interested parties. Although the resulting regulations are a vast improvement over the earlier proposed VEOA regulations, questions still remain regarding the prudence and efficacy of some of the Board's proposed language. However, given the tremendous strides the Board has made to address some of the earlier questions, the Committee is confident that its concerns can and will be addressed through additional revisions to the current Proposed Regulations.

Comments to Proposed Regulations

Section 1.102 – Definitions

The definitions to determine coverage of the Proposed Regulations are cumbersome and confusing. Although the Proposed Regulations and the Board's introductory statements exhaustively discuss the limitations on the definition of "covered employee" set forth in 2 U.S.C. § 1316a(5), the Board fails to state clearly whether or not these regulations apply to Member and Committee offices. Although one could surmise through the myriad of internal references to definitions of "appointment", "covered position" and "covered employee" that the regulations do not, in fact, apply to Member and Committee offices, there is no clear and plain statement from the Board stating as much.

The VEOA's legislative history shows that requirements of the statute were intended to apply to "non-political" positions within the legislative branch.[2] Yet, the definition of "covered employee" in the Board's regulations include "*any employee* of (1) the House of Representatives; [and] (2) the Senate. . . ." Section 1.102(f) (emphasis supplied). Moreover, the Board's definition of "employing office" includes "(1) the personal office of a Member of the House of Representatives or of a Senator; [and] (2) a committee of the House of Representatives or the Senate or a joint committee." These two definitions belie the exclusion of political appointments from the definition of "covered employee." Such inconsistency in the definitions creates unnecessary confusion for both

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[2] *See* 143 Cong. Rec. S7603-05 (daily ed. July 16, 1997) (statement of Sen. Cleland); 143 Cong. Rec. H1347-03 (daily ed. April 9, 1997) (statement of Rep. Solomon).

employees and employing offices.[3] The regulations should be constructed in such a manner that the reader is not required to wade through a morass of interlinked definitions simply to determine that a staff assistant in a Member office is not a covered position. We suggest that the Board state definitively that the regulations do not apply to employees of Member offices, Committees or Joint Committees.

Section 1.107 – Veterans' preference in appointments to restricted positions.

Section 1.107 describes the positions within an employing office for which the employing office "shall restrict competition to preference eligibles as long as preference eligibles are available." One classification of restricted positions is "guards." The section defines guards as

> [o]ne who is assigned to a station, beat, or patrol area in a Federal building or a building under Federal control to prevent illegal entry of persons or property; or required to stand watch at or to patrol a Federal reservation, industrial area, or other area designated by Federal authority, in order to protect life and property; make observations for detection of fire, trespass, unauthorized removal of public property or hazards to Federal personnel or property. The term guard does not include law enforcement officer positions of the U.S. Capitol Police Board.

Although not all security personnel on Capitol Hill work for the U.S. Capitol Police, those individuals who fall within definition of "guard" under Section 1.107 directly support the U.S. Capitol Police by providing an additional line of defense to secure Congressional Buildings and to keep its occupants and visitors safe. To require an absolute preference for veterans (and other preference eligibles) to fill guard positions without regard to experience, quality of work or employment references, undermines the efforts of relevant Congressional entities to provide the most secure environment possible for the employees of and visitors to Congressional office buildings. Given the unique security concerns on Capitol Hill and the role of "guards" in addressing these concerns, we urge the Board to find "good cause" for deviating from the Executive Branch regulations and to exclude the term "guards" from Section 1.107.

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[3] In addition to ferreting out whether one is a "covered employee" who has received an "appointment" to a "covered position" within an "employing office," in order to begin this lengthy analysis, an individual is required to determine whether or not he or she is an "employee of the House of Representatives." Surely the definition section can be streamlined to meet the mandate of 2 U.S.C. § 1316a(5)(B) without creating such confusion.

Section 1.108 – Veterans' preference in appointments to non-restricted covered positions.

Section 1.108(a) requires employing offices who use numerical examination or rating systems to add points to the ratings of preference eligibles comparable to the points added in 5 U.S.C. § 3309. Yet the Board does not state what constitutes a numerical examination or rating system. By way of example, if one interviewer "rates" interviewees based on qualifications, poise and communications skills, and gives the interviewee a "grade" of 17 on a 20 point scale but no other decision maker in the employing office uses such a method, must this single decision-maker use a percentage point system for his or her own rating system? The Board should clarify that the additional points afforded preference eligible applicants are restricted to those instances when an employing office has a formal, universally implemented numerical examination and rating system.

Section 1.110 – Waiver of physical requirements in appointments to covered positions.

Section 1.110(b) requires an employing office to notify an otherwise qualified preference eligible applicant who has a compensable service-connected disability of 30 percent or more if the employing office determines that the applicant is not able to fulfill the physical requirements of the position. The employing office must inform the applicant of the reasons for the employing office's determination and allow the applicant 15 days to respond and submit additional information to the employing office. Thereafter, the "highest level" of the employing office must then consider any response and additional information supplied by the applicant and notify the applicant of its findings regarding the applicant's ability to perform the duties of the position.

The language of this section raises a number of issues. First, what if there is a need to fill the position quickly and the employing office cannot afford to wait and see if the applicant is going to submit a further response and/or additional information? Second, how does the Board define the "highest level within the employing office"? Does this mean the highest ranking individual or group of individuals authorized to make employment decisions or does this mean the highest ranking official within the employing office, regardless of whether that individual routinely makes employment decisions? Finally, must an employing office engage in the prescribed dialogue with the preference eligible disabled applicant if the applicant is clearly not the most qualified applicant for the position? If so, why? All of these questions must be addressed in the

regulations themselves and not merely in the Board's formal and informal commentary.[4]

Section 1.111 – Definitions applicable to reductions in force.

Section 1.111(c) states that position classifications or job classifications

> shall refer to all covered positions within a competitive area that are in the same grade, occupational level or classification, and which are similar enough in duties, qualification requirements, pay schedules, tenure (type of employment) and working conditions so that an employing office may reassign the incumbent of one position to any of the other positions in the position classification without *undue interruption*.

(emphasis supplied). Section 1.111(f) defines "undue interruption" as a "degree of interruption that would prevent the completion of required work by a covered employee 90 days after the employee has been placed in a different position" under Subpart D of the VEOA regulations. In other words, if an employee is transferred to another position under a reduction in force and cannot complete the tasks of the newly assigned position, within 90 days after placement, this could be considered an "undue interruption" of the employing office's operations. This section goes on to state that the 90 day standard "should be considered within the allowable limits of time and *quality*, taking into account the pressures of priorities, deadlines and other demands." (emphasis supplied). The section also states, however, that the employing office "has the burden of proving 'undue interruption' by *objectively quantifiable* evidence." (emphasis supplied). Therefore, it would seem that the employing office can look to the quality of an employee's work, but must prove that the work is insufficient through "objectively quantifiable" means. Quality of work, however, is often a subjective determination and one which, by its nature, cannot always be proven by "objectively quantifiable evidence." Accordingly, we suggest that the term "objectively quantifiable evidence" be stricken from the definition of "undue interruption" or that the Board define "objectively quantifiable evidence."

In addition, Section 1.111(f) states that "a work program would generally not be unduly interrupted even if a covered employee needed more than 90 days after the reduction in force to perform the optimum quality or quantity of work." Yet there is no discussion of what constitutes a "work program." We suggest that the Board provide a definition of "work program" in this regulation.

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[4] Similar language in Section 1.114 raises the same set of questions which should be addressed by the Board prior to final implementation of the regulations.

Finally, Section 1.111(e) defines reduction in force as "any termination of a covered employee's employment or the reduction in pay and/or position grade of a covered employee for more than 30 days and that may be required for budgetary or workload reasons, changes resulting from reorganization, or the need to make room for an employee with reemployment or restoration rights." This definition does not state whether it applies to temporary employees. This question must be addressed in the regulation prior to implementation.

Section 1.116 – Adoption of veterans' preference policy.

Section 1.116 requires employing offices to adopt a written policy specifying how it has integrated the VEOA regulations into its "employment and retention processes." Each employing office must then make its written policy available to applicants and covered employees in accordance with the regulations as well as "to the public upon request." Although in the discussion section of the Proposed Regulations, the Board affirmatively states its goals of "accountability and transparency, as well as consistency in the application of the employing office's veterans' preference procedures," it is unclear how the availability of an employing office's written policy to any member of the public, regardless of whether or not they are an applicant, furthers these goals. Such a requirement is unlike any other statutory requirement under the CAA and is overly burdensome for employing offices. Indeed, the Board acknowledges in its discussion section of the Substantive Regulations that the language of this section is not derived from statutory language of veterans' preference law. Therefore, we suggest the requirement that an employing office provide its written policy to any member of the public upon request be stricken from this regulation.

Section 1.118 – Dissemination of veterans' preference policies to applicants for covered positions.

Section 1.118(c)(2) requires employing offices to provide qualified applicants for a covered position with a written copy of the employing office's veterans' preference policy (or a summary description thereof). Subsection (d) explains that the employing office is required to provide this information to qualified applicants for covered positions "so as to allow those applicants a reasonable time to respond regarding their veterans' preference status." Given that the employing office is required to "invite applicants for a covered position to identify themselves as veterans' preference eligibles" under Section 1.118(b), the requirement that the employing office also be required to distribute its written policy to *all* qualified applicants seems redundant and overly burdensome. A more efficient approach is to require the employing office to distribute its written policy to qualified applicants upon request.

Finally, Section 1.118(e) states that employing offices are "expected to answer applicant questions concerning the employing office's veterans' preference policies and practices." Although this language is an improvement over earlier versions, we suggest that the regulations be revised to state that employing offices are expected to answer those questions which are relevant and non-confidential regarding veterans' preference policies and practices.[5] We suggest that the regulations be revised accordingly.

Conclusion

The Committee has presented a number of questions and issues which must be addressed prior to the adoption of the Board's Proposed Regulations. Such questions and concerns are intended to ensure that the regulations assisting veterans in gaining employment with the legislative branch are practicable for applicants, covered employees, and employing offices. We thank the Board for its dedication to creating substantive regulations which balance the unique nature of employment in the legislative branch of the federal government with the honorable goals of the VEOA. In addition, we thank the Board for its interest in the opinions and concerns of various interested parties in developing and revising its Proposed Regulations. We look forward to the Board's response to these questions, concerns, and suggestions.

[5] The Committee recommends the same qualifying language be inserted in Section 1.119(c).