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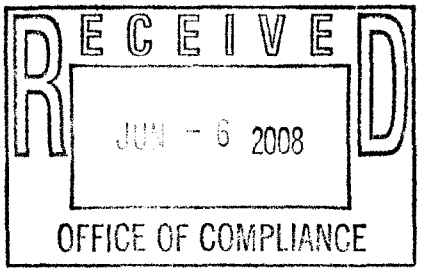

Tamara Chrisler
Executive Director
Office of Compliance
Room LA 200, 110 Second Street, SE
Washington, D.C. 20540

Dear Tamara:

Pursuant to 2 U.S.C. § 1384 (b)(2), below are comments to the Notice of Proposed Rulemaking ("NPR"),[1] regarding proposed regulations to implement section 206 of the Congressional Accountability Act ("CAA"), 2 U.S.C. § 1316, which applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") to employees and employing offices covered by the CAA. The comments regarding health plan coverage and pension plan benefits address any regulations applicable to Senate employing offices and their employees. The remainder of the comments address the proposed regulations in general.

§ 1002.5 What definitions apply to these USERRA regulations?

§ 1002.5(e)(3): "Capitol Guide Board" should be omitted. 2 U.S.C. § 1301(3)(C) defines a "covered employee" to include an employee of the Capitol Guide Service. While the term "employing office" includes the Capitol Guide Board, *see* 2 U.S.C. § 1301(9)(D), the term "covered employee" does not include an employee of the Capitol Guide Board, *see* 2 U.S.C. § 1301(3)(C).

§ 1002.5(e)(4): "Capitol Police Board" should be omitted. 2 U.S.C. § 1301(3)(D) defines a "covered employee" to include an employee of the Capitol Police. While the term "employing office" includes the Capitol Police Board, *see* 2 U.S.C. § 1301(9)(D), the term "covered employee" does not include an employee of the Capitol Police Board, *see* 2 U.S.C. § 1301(3)(D).

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[1] 154 Cong. Rec. S3970 (daily ed. May 8, 2008), with text printed at 154 Cong. Rec. S3188 (daily ed. Apr. 21, 2008).

§ 1002.5(f): "1002.5(u) of this subpart" should read "1002.5(t) of this subpart". There is no "1002.5 (u)," and "1002.5(t)" defines "uniformed services."

§ 1002.5(h): This section should be omitted because, as stated above with respect to § 1002.5(e)(4), the CAA definition of a "covered employee" includes an employee of the Capitol Police; it does not include an employee of the Capitol Police Board.

§ 1002.7 How does USERRA, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office practices?

§ 1002.7(b): The reference to USERRA superseding "any State law (including any local law or ordinance)" is superfluous, as state laws (including local laws and ordinances) do not apply to "employing offices" within the meaning of the CAA.

§ 1007.7(c): Omit that USERRA does not supersede, nullify or diminish any "State law (including any local law or ordinance)" that is more beneficial than, or is in addition to, a right or benefit provided under USERRA because state laws (including any local law or ordinance) are not applicable to "employing offices" under the CAA.

§ 1002.21 Does USERRA protect a covered employee who does not actually perform service in the uniformed services?

This section is the correlative of § 1002.20 of the USERRA regulations issued by the Department of Labor ("DOL"), which is entitled: "Does USERRA protect an individual who does not actually perform services in the uniformed services?" The DOL regulation provides:

> Yes. Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services.

The proposed Office of Compliance regulation provides:

> USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation against eligible employees. Section 207(a) of the CAA prohibits retaliation against those non-eligible, covered employees under the CAA who have not performed service in the uniformed services.

"Non-eligible, covered employees" and employees "who have not performed service in the uniformed services" is redundant. We believe the section would be clearer if it stated:

> No. USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA (including a violation of USERRA's provisions, as applied by the CAA), or testified, assisted, or participated in any manner in a hearing or proceeding under the CAA.

§ 1002.34 Which employing offices are covered by these regulations?

This section states that "USERRA applies to all covered employing offices of the legislative branch as defined in Subpart A, section 1002.5, subsection (e) of these regulations." That subsection, however, defines "covered employee," not "employing office." The CAA defines "covered employee" in 2 U.S.C. § 1301(3). It defines "employing office" in § 1301(9). See also the comments above regarding proposed regulation §1002.5, subsections (e)(3) and (e)(4). Any regulation the Office of Compliance issues for an "employing office" should track 2 U.S.C. § 1301(9), plus 2 U.S.C. § 1316(a)(2)(C)'s addition of the General Accounting Office and the Library of Congress.

§ 1002.288 How does a covered employee initiate a claim alleging a violation of USERRA under the CAA?

§ 1002.288(d): "141 Cong. Rec. §10239" should read "141 Cong. Rec. S19239-S19249 (December 22, 1995)".

Health Plan Coverage (§§ 1002.163 - 1002.171)

The proposed regulations pertaining to health plan coverage assume that the employing office provides health plan coverage, if any, to its employees and makes "employer contributions." (*See* §§ 1002.164(b) and (c), 1002.166(b), 1002.167(a) and (b), and § 1002.169.) While employees of Senate employing offices are entitled to health plan coverage, their respective employing offices do not provide the "employer contribution" for such coverage and do not determine when such coverage starts or is reinstated or any terms or conditions of the coverage.

Employees of Senate employing offices are eligible to participate in the Federal Employees Health Benefits Program ("FEHB Program"). *See* 5 U.S.C. § 8901, *et seq.* The sole role of the employing office with respect to health plan coverage for its employees is its decision to hire an individual. Once an employing office hires an individual, the employee is eligible to participate in the FEHB Program in accordance with the terms and condition of the program. The employing office does not contribute to its employees' health plan coverage, has no authority to negotiate with the health plans in the FEHB Program, and plays no role in administering the program. The Office of Personnel Management ("OPM") is the regulatory authority that negotiates with the plans and manages the program. *See* 5 C.F.R. pt. 890 for the regulations governing the FEHB Program. A Senate appropriation covers the agency contribution to such health plans for employees of Senate employing offices. Such contributions do not come from the monies appropriated to the individual employing offices.

When an employee of a Senate employing office leaves his employment to perform services in the uniformed services, the Senate employing office informs the Senate Disbursing Office that the employee is to be placed on leave of absence for military service. When the employee returns from military service, the employing office informs the Senate Disbursing Office of the employee's return from military service and return to pay status. USERRA and the Office of Compliance's proposed regulations (*see, e.g.*, proposed regulations §§ 1002.180 - 1002.226) govern the employee's reemployment rights. The employee deals directly with the Senate Disbursing Office with respect to continuation of health benefits while on military service and with respect to resumption of coverage in the FEHB Program upon returning from military service if coverage under the FEHB Program had ceased while the employee was performing service in the uniformed services.

Given the above, good cause exists for the Office of Compliance not to issue regulations that adopt the regulations promulgated by the Secretary of Labor with respect to health plan coverage (*i.e.*, regulations §§ 1002.163 - 1002.171) because such regulations do not conform to the provision of health plan coverage for employees of Senate employing offices and because Chapter 89 of title 5 of the U.S. Code, establishing the FEHB Program, and the regulations prescribed by OPM to carry out the program (*see* 5. C.F.R. pt. 890) govern the provision of health plan coverage to employees of Senate employing offices, including those employees who take leave to perform services in the uniformed services (*see, e.g.*, 5 U.S.C. § 8905a(b)(3) and (e)(1)(C)[2] and 5 C.F.R. §§ 890.303 - 890.305). In issuing its USERRA regulations (codified at 20 C.F.R. pt. 1002), the DOL, in response to comments asking about application of its regulations to Executive Branch employees of the federal government, stated, "The Federal Office of Personnel Management has issued a separate body of regulations that govern the USERRA rights of Federal employees. See 5 CFR part 353." 70 Fed. Reg. 75247 (Dec. 19, 2005). It should be noted that 5 C.F.R. pt. 353, while dealing with reemployment

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[2] 5 U.S.C. § 8905a provides that an employee taking leave to perform service in the uniformed services may elect to continue coverage in the FEHB Program for 24 months.

rights of Executive Branch employees, does not deal with health plan coverage. As explained above, health plan coverage for all federal employees is governed by the FEHB Program and the regulations promulgated by OPM in connection with that program. Accordingly, the Office of Compliance should not issue regulations concerning the provision of health plan coverage to employees of Senate employing offices.

Pension Plan Benefits (§§ 1002.259 - 1002.267)

The proposed regulations pertaining to pension plan benefits incorrectly assume that employing offices maintain pension plans, if any, for their employees (*see* § 1002.259) and make "employer contributions" to the plan (*see* §§ 1002.261 and 1002.262). Employees of Senate employing offices are participants in the Civil Service Retirement System ("CSRS") or the Federal Employment Retirement System ("FERS"),[3] which are defined benefit plans governed by Chapters 83 and 84 of title 5 of the U.S. Code, respectively.[4] The employing office does not make any "employer contribution" to the plan. The Senate appropriates monies for any agency contribution to such plans, and such contributions do not come from the monies appropriated to individual employing offices.

When a Senate employing office hires an employee, the employee becomes entitled to participate in FERS or CSRS, as appropriate, subject to the terms of those pension plans. The employing office is not involved in determining the terms of the pension plan, in deciding what constitutes service for which an employee obtains credit under the plan, or in managing or maintaining the plan.

When an employee of a Senate employing office leaves his employment to perform services in the uniformed services, the Senate employing office informs the Senate Disbursing Office that the employee is to be placed on leave of absence for military service. When the employee returns from military service, the employing office informs the Senate Disbursing Office of the employee's return from military service and return to pay status. USERRA and the Office of Compliance's proposed regulations (*see, e.g.*, proposed regulations §§ 1002.180 - 1002.226) govern the employee's reemployment rights. The employee receives credit under the plan for the period of military service in accordance with the terms of the plan. *See, e.g.*, 5 U.S.C. §§ 8411(c)(1) and 8422(e).

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[3] Employees of Senate employing offices are also eligible to participate in the Federal Thrift Savings Plan ("TSP"), but, as DOL regulation § 1002.260(b) and the correlative, proposed Office of Compliance regulation state, USERRA does not cover pension benefits under the TSP.

[4] Regulations for CSRS can be found at 5 C.F.R. pt. 831, and regulations for FERS can be found at 5 C.F.R. pts. 841 - 847

Given the above, good cause exists for the Office of Compliance not to issue regulations that adopt the regulations promulgated by the Secretary of Labor with respect to pension plan benefits (*i.e.*, regulations §§ 1002.259 - 1002.267) because employing offices do not maintain pension plans for their employees, and the provision of pension plan benefits for employees of Senate employing offices is governed by Chapters 83 and 84 of title 5 of the U.S. Code. Moreover, 5 C.F.R. pt. 353, dealing with reemployment rights of Executive Branch employees, does not deal with pension plan benefits. Pension plan benefits for all federal employees are governed by Chapters 83 and 84 of title 5 of the U.S. Code. Accordingly, the Office of Compliance should not issue regulations concerning the provision of pension plan benefits to employees of Senate employing offices.

In the event the Office of Compliance does issue regulations pertaining to pension plan benefits for employees of Senate employing offices, note should be taken of the following:

§ 1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?

The reference to multi-employer plans should be omitted because the Senate does not participate in any multi-employer pension plans.

As explained above, "U.S. Senate" should be substituted for "employing office" whenever the proposed regulations refer to a Senate employing office's obligation to contribute to the plan.

§ 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?

This section should be omitted because the Senate does not participate in any multi-employer pension plans.

Consistency:

- The term "employing office," rather than "employer," should be used consistently throughout the regulations, including in the headings (*compare* §§ 1002.33, 1002.34, 1002.85, 1002.116, 1002.121 *with* §§ 1002.87, 1002.104, 1002.115, 1002.153), except that the term "employer" should be used when referring to any employing entity, including entities not covered by the CAA.

- DOL Regulations §§ 1002.149 - 1002.153 speak of an employee in the uniformed services being deemed to be on furlough or leave of absence. The correlative proposed regulations omit the references to "on furlough" in the texts of §§ 1002.149 and 1002.150 but not in § 1002.153 or in the section headings (see overall heading before § 1002.149 and the headings for §§ 1002.151 and 1002.152). The regulations should be consistent. The Senate does not have furloughs and, therefore, the term "on furlough" should be omitted from the Senate regulations.

Sincerely,

Toby R. Hyman

Toby R. Hyman
Senate Senior Counsel for Employment

TRH/kj