October 20, 2003

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

Re: Comments to Proposed Amendments to the
Rules of Procedure of the Office of Compliance

Dear Mr. Thompson:

The Office of Compliance Notice of Proposed Rulemaking ("NPR") regarding amendments to the Procedural Rules of the Office of Compliance was published in the Congressional Record on September 4, 2003 (H7944 and S11110). Pursuant to section 303(b) of the Congressional Accountability Act of 1995 ("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.

Procedural Regulations vs. Substantive Regulations

Initially, it is noted that several of the suggested amendments to the procedural rules are essentially substantive regulations. See comments below to proposed regulations §§ 1.03(a), 1.05(a), 4.16, 8.01, and 9.05. A regulation is deemed "substantive" if it "grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests." *Perales v. Sullivan*, 948 F.2d 1348, 1354 (2nd Cir. 1991); citing *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980). 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 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. Thus, they impose substantive obligations on the employing offices and grant individual rights that did not exist resulting in a significant effect on the rights of employing offices.

There is no authority provided in the CAA that permits the Office of Compliance to accomplish through procedural regulations what it should be requesting through substantive regulations 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 is requested that the Executive Director of the Office of Compliance withdraw the requested "procedural" amendments and, as necessary, issue substantive regulations and 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.

The Executive Director seeks authorization to grant his position discretion to allow any document to be filed by electronic transmittal in a designated format. First, it is unclear whether the Office of Compliance has developed proper security safeguards for ensuring that confidential and security-sensitive information can be accessed by computer hackers and other individuals with ill-purposes nor has the Office of Compliance addressed how electronic transmittal safeguards the statutory obligation to maintain confidentiality in accordance with Section 416 of the CAA. Second, if electronic filing is permitted, it is unclear why the Executive Director should have discretion and under what circumstances he will utilize this discretion. For example, if electronic filing is permitted, it is unclear whether it is appropriate to allow documents to be filed electronically by all parties, whether some documents are not appropriate for electronic filing, and what standards will be applied to make such determinations. Third, the CAA provides a Hearing Officer with the responsibilities of conducting prehearing discovery and the hearing itself. The Executive Director of the Office of Compliance does not have a statutory role once a hearing is requested in accordance with Section 405 of the CAA. Therefore, the proposed procedural regulations would exceed the scope of the Executive Director's authority and would be beyond the scope of power of this position authorized under law in accordance with the CAA. The appropriate avenue is to pursue the suggested change is through substantive regulations and congressional approval 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 attempt to take the contemplated action under the guise of procedural rulemaking in accordance with section 303 is improper.

§1.05 Designation of Representative

(a) As proposed, the Executive Director seeks authorization for the Executive Director of the Office of Compliance solely to determine whether a designated representative is appropriate. The CAA does not authorize the Executive Director to determine the designated representative for the parties. As discussed above, if the Executive Director has experienced problems with a parties designated representative,

the appropriate avenue to pursue a correction is 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 simply improper and exceeds the scope of the Office of Compliance's current statutory authority. Nevertheless, if the Executive Director is aware of a conflict of interest with a designated representative where the designated representative is a witness or a party to an alleged violation, the confidentiality provision of the CAA under section 416 permits the Executive Director to preclude the designated representative to safeguard confidentiality.

Additionally, this section proposes that the Executive Director may extend the period of counseling for a reasonable time to afford the party an opportunity to obtain another representative. The CAA specifically provides that the period of counseling shall be 30 days unless *reduced* by the Office *and the employee*. The suggested change eliminates the employee's statutory right to agree to reduce the period. Moreover, the suggested change seeks to expand the authority of the Executive Director that is beyond the scope of power authorized under law in accordance with the CAA. As discussed above, if the Executive Director has experienced problems with a parties designated representative, 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.

§2.03 Counseling

(l) The Executive Director seeks authorization to allow the Executive Director to notify the employee about the end of counseling by notifying the employee by "personal delivery." It is unclear how the Office of Compliance will provide notification to courts and employing offices and how that notification can be verified for jurisdictional purposes. Unlike receiving notice by certified mail where a third-party verifies that the employee has received notice, the Office of Compliance seeks to provide personal delivery. Such method of personal delivery may put the Office of Compliance in a conflict position when its own procedures are called into question and that office is called to provide testimony about the facts of notification not verified by an independent third party. It is requested that "personal delivery" is not independently verifiable and should not be used as a method for notification at the conclusion of the counseling period.

(m)(1)(ii)(A) The Executive Director seeks authorization to change from 10 days to 60 days the length of time an employee may notify the Office of Compliance that he/she wishes to return to the grievance procedures for the Capitol Police. It is unclear why the proposed regulations seek to alter this time period and no explanation is provided. Without the benefit of the Office of Compliance rationale, it appears

unnecessary to alter this time period. This procedure seeks to alter section 402(b) of the CAA which is unambiguous and requires a 30-day counseling period. By expanding the time period from 10 to 60 days, the time period will be outside the statutory outer limit of 30 days and, therefore, improperly expand the authority of the Executive Director that is beyond the scope of power authorized under law in accordance with section 402(b) of the CAA. It should be noted that the Office of Compliance Procedural Rule (m)(1)(i) likewise is *ultra vires* as that provision improperly expands section 402(b) from the statutorily-required 30-day period to a period up to 90 days or longer in the Executive Director's discretion. 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.

§2.04 Mediation

(e)(2) The Executive Director seek authorization to permit the parties to jointly request an extension of the mediation period by submitting a written request to the attention of the Executive Director of the Office of Compliance. Past practice has permitted the parties to seek an extension orally through the appointed mediator and has worked well. It is requested that this past practice be permitted in accordance with this provision. Accordingly, the following language is recommended "[t]he Office may extend the mediation period upon the joint written request of the parties or the written request of the appointed mediator to the attention of the Executive Director."

(i) The Executive Director seeks authorization to permit an employee to receive written notice of the end of the mediation period by hand-delivery. For similar reasons as those stated above in 2.03(l), this provision calls upon the Office of Compliance to testify as to when delivery is effectuated in accordance with the jurisdictional requirements of section 404 of the CAA. It is requested that hand-delivery not be permitted. If hand-delivery is permitted, it is requested that the employing office be provided with contemporaneous notification with written certification by the person making the delivery as to when hand-delivery is made to avoid any questions about jurisdictional requirements.

§2.06 Filing of Civil Action

(c) Communication Regarding Civil Actions Filed with District Court. The Executive Director seeks authorization to require the parties to provide the Office of Compliance with a copy of information filed with a district court. This provision is beyond the scope of power 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 filed in district court. Moreover, this provision seeks to dictate a procedure limiting *how*

information is requested from the Office of Compliance irrespective of how a court may order release of such information. Such a provision violates Separation of Powers principles grounded in Articles I and III of the U.S. Constitution. The Office of Compliance cannot dictate to a court the manner in which a court chooses to obtain information. Accordingly, it is requested that this provision be eliminated

§4.16 Comments on Occupational Safety and Health Reports.

The Executive Director seeks authorization to require employing offices to engage in a process that restricts an employing offices rights. The proposed regulations, suggest that "responsible employing offices" will be provided a copy of "any report" issued for general distribution and seeks to establish a tight window period of "48 hours" for an employing office to comment on "the report". The proposal also seeks to provide the Office of Compliance General Counsel with unfettered discretion to decide whether to include comments from any employing office and establishes a "non-appealable" avenue of redress to the Board of Directors of the Office of Compliance without regard to due process or safeguards for security-sensitive information. This provision is problematic for several reasons. First, this provision is unclear as to what is meant by "any report." It appears from section 1341(e)(2) that the Office of Compliance has statutory authority to issue a report on the basis of periodic inspections. 2 U.S.C. 1341(e)(2). To the extent that, the proposed provision covers any other report, the provision is ultra vires as it beyond the scope authorized by the CAA. If the provision is broader, it is requested that the Office of Compliance offer a clearer explanation of this provision.

Second, sentence one contemplates that an employing office will have a report seven days prior to distribution and comments are required within 48 hours of issuance of the report, thus limiting an employing offices ability to comment to five days. Conceivably, a report can be issued on a Friday giving an employing office only two business days to comment on a report. The Office of Compliance has offered no rationale for why this time period is shortened. Nor has the Office of Compliance determined how the employing office will receive the report to establish the seven day counting period. Moreover, the Office of Compliance has not contemplated who will receive the report for the employing office to ensure that the proper parties have the report in a timely fashion to comment. More problematic, is that the time frame is unreasonable given the nature of the schedule of the employing office governed by the work of Congress. The time frames set forth in this provision are simply untenable.

Third, this provision as a whole does not address how the Office of Compliance will address security-sensitive information, particularly as that information is within the expertise of the employing offices, namely the United States Capitol Police and the United States Capitol Police Board. These proposed rules certainly do not contemplate the ability of the security element of Congress to ensure that security sensitive information is not released in the protection of the Congress and the Capitol Complex. Any rush to judgment 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 any report. Moreover, the failure of the General Counsel of the Office of Compliance to agree to be bound by processes to ensure that security-sensitive information is safeguarded in past OSHA matters demonstrates the need for clear rules. As written, security safeguards are not in place.

Fourth, the provision does not state the standards by which the General Counsel will use to decide whether to include the written comments without alteration or the standards by which he will use to not include the comments from an employing office. Moreover, the provision suggests that there may be written comments by an employing office that can be included "with alteration," although it is unclear what standards will be used to suggest alteration. Nonetheless, as written, the provision is *ultra vires* and is not within the purview of the CAA.

Fifth, sentences four and five of this provision improperly seek to expand the rights of the General Counsel of the Office of Compliance not authorized by the CAA and is *ultra vires.* Nowhere in the CAA does the statute provide the General Counsel or the Office of Compliance the right to establish and preclude appeal rights for an employing office. Additionally, in sentence five, the Office of Compliance has altered the requirements for appeal to the Board found in subpart H, altering an employing office's substantive rights of appeal. Thus, while substantive rulemaking and congressional approval in accordance with section 304 of the CAA may be appropriate for suggested changes, it appears that this proposal is so fundamentally beyond the scope of the Office of Compliance and the Office of Compliance General Counsel's statutory authority that the only appropriate methodology to accomplish this desired objective is pursuant to a legislative enactment. To do so under the guise of procedural rulemaking in accordance with section 303 is improper.

§5.03 Dismissal, Summary Judgment, and Withdrawal of Complaints

(d) Summary Judgment. The following highlighted edits are suggested to this provision. "A Hearing Officer may, after **providing the parties with** notice and an opportunity to respond, **order** summary judgment **or dismissal** on some or all of the complaint.

§7.02 Sanctions

(a) The Executive Director seeks authorization for the Hearing Officer to impose sanctions on a party's representative for inappropriate or unprofessional conduct. It is unclear what authority the Office of Compliance has to impose sanctions on "a party's representative" as the CAA does not authorize such action. Moreover, it is unclear what constitutes "inappropriate or unprofessional conduct" and what standards will be applied by the Hearing Officer. It appears that 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 parties' representative, such process is substantive in nature. 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.

§8.01 Appeal to the Board

(3) The Executive Director seeks authorization to allow the Executive Director to determine any requests for extension of time to file a document or submission which shall remain in effect until revoked by the Board. First, the CAA does not provide the Board with discretion to delegate its responsibility to the Executive Director. Section 406 of the CAA is clear that the Board is given the responsibility to handle appeals to the Board, not the Executive Director. Moreover, the CAA does not give the responsibility to the Board "or its designee." Rather, the CAA is clear that the responsibility is that of the Board solely. Second, it is likely that the requested provision would result in a conflict of interest for the Executive Director. Given the nature of decision-making by the Executive Director that can have effects on a parties rights, it is conceivable that the Executive Director's decision is appealed to the Board. If the Board has provided the Executive Director with its delegation, it will result in a direct conflict of interest if an extension is sought and the Executive Director does not grant such an extension. Such a result may affect the substantive rights of an employing office and will leave the employing office without appeal options which, in turn, would affect the employing offices substantive rights. Thus, this provision is not properly brought under procedural rulemaking. Rather, such provision must be pursued in accordance with substantive rulemaking in accordance with section 304 of the CAA. In addition to the problems noted above, there is no discussion as to what circumstances the Board would make such a delegation to the Executive Director or under what circumstances the Board would revoke such a delegation. Finally, the requested provision conflicts with the CAA and is therefore beyond the scope of authority of the Board and the Executive Director. For example, section 406(a) provides that not later than 30 days after entry of the decision, an aggrieved party may file a petition for review. If the Executive Director is authorized to determine extensions of time to file *any* document or submission, then the Executive Director's decision to extend the 30 days would be contrary to the CAA. Thus, this provision is *ultra vires* as being beyond the scope of authority authorized by the CAA.

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

(a) The Executive Director seeks authorization to request that a party file an original and seven copies of a document whenever a party is aggrieved by the decision of a Hearing Officer "or other determination reviewable by the Board." This provision is unclear as to what constitutes an "other determination reviewable by the Board." More specifically, if "other determination" refers to a decision made by the Executive Director, this provision reinforces the concern addressed in section 8.01(b)(3) above, page 7, that there could be a conflict of interest in the Executive Director's role. It is more helpful if the Office of Compliance is explicit so that the parties are clear when it needs to file an original and seven copies and when it does not. Additionally, as was discussed in section 1.03(a) above, page 2, it is unclear whether the Office of Compliance has developed proper security safeguards for ensuring that confidential and security-sensitive information cannot be accessed by computer hackers and other individuals with ill-purposes or whether the Office of Compliance has addressed how electronic transmittal safeguards the statutory obligation to maintain confidentiality in accordance with Section 416 of the CAA. Additionally, it is unclear who is "the Officer" in the proposed rule as "Hearing Officer" is already designated in the procedural rule.

9.05 Informal Resolutions and Settlement Agreements

(d) Violation of a Formal Settlement Agreement. The Executive Director seeks authorization to establish a process for processing an alleged violation of a settlement agreement. This requested process exceeds the scope of the Office of Compliance under the CAA. Section 414 of the CAA only authorizes the Executive Director of the Office of Compliance to approve settlement agreements. Once the settlement agreement is approved, the Office of Compliance has no further statutory role to play in the process. It is *ultra vires* for the Office of Compliance to attempt to expand its authority through procedural rulemaking. Rather, the only avenue available to the Office of Compliance to request such authorization is through a legislative change through Congress. Accordingly, the entire provision under section 9.05(d) of this provision is improper and is contrary to statutory authority found in section 414 of the CAA.

9.06 Destruction of Closed Files

The Executive Director seeks authorization to destroy closed files in the fifth anniversary of the closure date or during the calendar year in which the fifth anniversary of the conclusion of all adversarial proceeding occurs, whichever is later. Such a procedure should be accomplished only when both parties concur in the destruction of documents. Because the Office of Compliance oftentimes does not have knowledge of proceedings once it has administratively processed the claim, it is best that the parties be consulted to ensure that evidence will not be destroyed unnecessarily. 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.*"

9.07 Payment of Decisions, Awards, or Settlements under section 415(a) of the Act.

The Executive Director seeks authorization to establish a procedure for paying a decision, award, or settlement provided to the Executive Director to process. It is recommended that this provision seek authorization to process payment only once all time periods for appeal have been exhausted. Accordingly, it is recommended that the following language be added to this section: "*Payment of funds cannot be made until all time periods for appeal have been exhausted.*"

Respectfully submitted,

Frederick M. Herrera
Employment Counsel

John T. Caulfield
General Counsel