UNITED STATES SENATE

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October 9, 2014

BY FACSIMILE AND E-MAIL

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Re: Comments to the Notice of Proposed Rulemaking to implement Section 210 of the Congressional Accountability Act of 1995

Dear Ms. Sapin:

Pursuant to 2 U.S.C. § 1384(b)(2), the Office of Senate Chief Counsel for Employment ("SCCE") submits the following comments to Notice of Proposed Rulemaking ("NPRM") published at 160 CONG. REC. S5437 (daily ed. Sept. 9, 2014). The NPRM purports to propose regulations to implement Section 210 of the Congressional Accountability Act of 1995, as amended ("CAA"), which incorporates certain provisions of Titles II and III of the Americans With Disabilities Act of 1990 ("ADA"). See 2 U.S.C. § 1331 (2012).

As explained in detail below, the Board of Directors of the Office of Compliance ("the Board"), through its NPRM, has proposed a regulatory scheme that could have the unprecedented result of transferring to the Executive Branch the Senate's rulemaking power and the Senate's statutory prerogative to review and approve CAA regulations that would apply to covered Senate entities. Rather than fulfilling its statutory duty to review applicable Executive agency regulations and to issue public services and accommodations standards tailored to the Legislative Branch, the Board has proposed regulations that merely incorporate by reference Executive agency regulations as they will exist at an undetermined date in the future. On this basis alone, the Board should withdraw the NPRM; however, many other reasons exist that should compel the same result.

The proposed regulations are fraught with problems, which include, but are not limited to: (1) incorporating by reference sections of the Code of Federal Regulations ("C.F.R.") that no longer exist, are not applicable to implementation of CAA § 210, or are issued by an Executive agency not specified in CAA § 210; (2) requiring covered legislative entities to use individual office accounts to pay awards of attorney's fees, costs and compensatory damages in violation of CAA § 415(a); (3) authorizing awards of compensatory damages in the absence of a waiver of sovereign immunity from such damages awards; (4) enlarging the powers of the General Counsel

of the Office of Compliance to include rulemaking authority without statutory authorization; and (5) creating more uncertainty for covered entities and individuals with disabilities regarding their rights and obligations under CAA § 210 than the current situation in which no regulations are in force.[1]

For these reasons and the additional reasons discussed below, the SCCE urges the Board to withdraw the NPRM published at 160 CONG. REC. S5437 (daily ed. Sept. 9, 2014) and redraft specific regulations to implement CAA § 210 that are supported by law and that will aid rather than confuse covered entities and individuals with disabilities regarding their rights and obligations under CAA § 210.

I. The NPRM Is Fatally Flawed and Should be Withdrawn In Its Entirety

A. The Board's incorporation by reference of Executive agency regulations into the NPRM is an approach to CAA rulemaking that was specifically rejected by Congress when it passed the CAA in 1995.

In Part 1 of the NRPM, the Board did not issue actual regulations articulating the public services and accommodations standards required for compliance with CAA § 210 by covered Legislative Branch entities. Rather, the Board abdicated its duty to review applicable Executive agency regulations and to issue public services and accommodations standards tailored to the Legislative Branch by merely incorporating Executive agency regulations by reference in its proposed regulations. See Proposed Regulation ("Prop. Reg.") § 1.105(c)-(e). Congress did not authorize the Board to incorporate Executive agency regulations by reference into substantive CAA regulations. Indeed, Congress had considered, but ultimately declined, to include a provision in the CAA that would give the Board authority to incorporate Executive agency regulations by reference.

Prior to passage of the CAA, several congressional coverage bills had been introduced and considered by the House and the Senate. See, e.g., H.R. 4822, 103d Cong. (1994); S. 1824, 103d Cong. (1994); S. 2071, 103d Cong. (1994). During the 103d Congress, the congressional coverage bill that came closest to passage was H.R. 4822[2]. The Senate version of H.R. 4822

[1] The Board asserts in the NPRM that ADA public access regulations are "already in force" under the CAA because Executive Branch regulations currently apply through CAA § 411. 160 CONG. REC. S5438 (daily ed. Sept. 9, 2014). That assertion is wrong and completely overstates the purpose and meaning of CAA § 411. Moreover, the Board's assertion reveals a thorough disregard for Congress's resolve to maintain the separation of powers between the Executive and Legislative branches and, if true, would make irrelevant the entire substantive rulemaking process Congress established in CAA § 304. Had Congress intended for Executive agency regulations to be enforced against itself, Congress most certainly could have done that. Rather, the CAA reveals the opposite intention. See 2 U.S.C. § 1361(f)(3) ("This Act [the CAA] shall not be construed to authorize enforcement by the executive branch of this Act.").

[2] H.R. 4822 passed the House, was reported favorably by the Senate Committee on Governmental Affairs with an amendment in the nature of a substitute and placed on the Senate calendar, but was not given further consideration in the closing days of the 103d Congress.

included a provision, § 204(i), that specifically authorized the Board to incorporate Executive agency regulations by reference in the Board's substantive rulemaking process. See H.R. 4822 § 204(i)(1) (Oct. 3, 1994) ("The Board may, by specific reference in rules issued under this section, apply regulations issued by any Executive agency . . . ."); see also S. Rep. No. 103-397 at 33 (1994) ("In issuing regulations under this section [204], the Board may incorporate by reference the regulations issued by any Executive agency . . . .")[3].

H.R. 4822 died in the 103d Congress, but the CAA became law a few months later at the start of the 104th Congress. See Pub. L. 104-1, 109 Stat. 3 (1995). Notably absent from the CAA was any provision authorizing the Board to incorporate Executive agency regulations by reference in the Board's substantive regulations. Rather, Congress tasked the Board of its newly established "independent office within the legislative branch," 2 U.S.C. § 1381(a), to create regulations specifically for covered legislative entities. See 2 U.S.C. §§ 1331(e), 1384.

The NPRM does not accomplish what Congress specifically requires the Board to do: issue regulations that are "the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement [42 U.S.C. §§12131-12150, 12182, 12183 and 12189]" except as the Board determines "for good cause shown 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 this section." See 2 U.S.C. § 1331(e)(2). For this reason, alone, the Board should withdraw the NPRM.

B. The Board should withdraw the NPRM to avoid the unconstitutional transfer to the Executive Branch of the Senate's rulemaking power and to preserve the Senate's statutory prerogative to review and approve CAA regulations.

Another significant reason why the Board should withdraw the NPRM is because it creates a regulatory scheme that has the potential to cause an unconstitutional transfer to the Executive Branch of the Senate's rulemaking power and a usurpation of the Senate's statutory prerogative to review and approve CAA regulations that would apply to covered Senate entities. That potential is created by the Board's incorporation by reference into the proposed regulations a future version of the Executive agency regulations – the version as of the effective date of the Board's final regulations. See Prop. Reg. § 1.105(c), (d) and (e) (incorporating the referenced Executive agency regulations as those regulations exist on "the effective date of these [CAA § 210] regulations").

CAA § 304(c) sets forth the processes by which the House and the Senate may approve substantive CAA regulations issued by the Board. See 2 U.S.C. § 1384(c). Congress enacted CAA § 304(c) "as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively . . .; and . . . with full recognition of the constitutional right of either House to change such rules (so far as relating to such House)." 2 U.S.C. § 1431. Once approved by the

[3] S. Rep. No. 103-397 is the report issued by the Senate Committee on Governmental Affairs to accompany H.R. 4822.

Senate pursuant to CAA § 304(c), final regulations published by the Board for the Senate do not become effective until they are issued in accordance with CAA § 304(d).[4] Generally, even after issuance, final regulations do not go into effect for at least 60 days. See 2 U.S.C. § 1384(d)(3).

As a direct result of the Board's incorporation by reference into the proposed regulations of a future version of Executive agency regulations, the Senate's approval of the final regulations for public access and accommodations in the Senate may not be the final word on the subject. Rather, the Executive Branch may ultimately decide what public services and accommodations standards will apply to the Legislative Branch without any Senate input whatsoever. That is because following the Senate's approval of the final regulations but prior to the effective date of the final regulations, the Attorney General or the Secretary of Transportation could amend the Executive agency regulations incorporated by reference in the final regulations. If the Attorney General or the Secretary of Transportation so act, then the Board will have effectively transferred the Senate's rulemaking power to the Executive Branch and overridden the Senate's statutory prerogative to review and approve the final regulations applicable to the Senate.[5]

The possibility that the Executive agency regulations incorporated by reference in the Board's proposed regulations could be amended in the midst of the approval process as described above is not remote. For example, regulatory action is pending that, if completed, would affect a significant portion of the more than 50 Executive agency regulations that the Board has proposed incorporating in Prop. Reg. § 1.105(c). In January 2014, the Attorney General proposed sweeping amendments to 28 C.F.R. parts 35 and 36 that would bring those regulations into line with the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). See Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4,839 (proposed Jan. 30, 2014) (to be codified at 28 C.F.R. pts. 35 and 36). The comment period for the Attorney General's proposed amendments has closed, and the Attorney General has not yet finalized the regulations. The Attorney General could finalize those regulations before the Board's final regulations become effective.

C. The NPRM creates confusion rather than clarity regarding the public access and accommodation standards applicable to covered entities of the Legislative Branch.

Beyond the significant legal infirmities of the Board's proposed regulations, described above, the Board's incorporation by reference of Executive agency regulations into the NPRM creates an inexcusably complicated process for determining which standards actually apply to

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[4] This process can take four months or more. For example, the Board adopted and submitted for publication its final FMLA regulations on January 22, 1996, 142 CONG. REC. S284 (daily ed. Jan. 22, 1996), but these regulations did not become effective until April 16, 1996. See Appendix to FMLA Regulations, available at http://www.compliance.gov/wp-content/uploads/2010/05/FMLA.pdf.

[5] Other adverse effects include: (1) nullifying of comments provided by covered entities and individuals during the notice and comment period; (2) depriving covered entities and individuals of their statutory right to notice and comment; and (3) Board failure to comply with its statutory obligation to review and modify the amended Executive agency regulations for application to the Legislative Branch.

public services and accommodations in the Legislative Branch. If the regulations proposed in the NPRM are adopted as currently drafted, then covered entities and individuals with disabilities must first look to Part 1 of the Board's regulations to see which Executive agency regulation is incorporated by reference, then refer to the C.F.R. to find the incorporated regulation (assuming the incorporated regulation still exists, see section II.A below), determine whether the Executive agency regulation appearing in the C.F.R. was in effect as of the date the Board's regulations were issued (if not, then refer to historical versions of the C.F.R.), then refer back to Part 1 of the Board's regulations to determine whether technical and nomenclature changes apply, then refer to the Board's non-binding commentary preceding the regulations to determine which parts of the incorporated Executive agency regulations the Board actually intended to apply to the Legislative Branch. It is difficult to envision a set of regulations that are more unwieldy or unhelpful than those proposed in the NPRM.

II. The NPRM Should be Withdrawn Because it is Riddled with Errors

As explained above, the practice of incorporating Executive agency regulations by reference is not a legally permissible method of rulemaking under the CAA nor has it yielded a useful or helpful set of regulations for covered entities and individuals with disabilities. Even if the infirmities described in section I above did not exist, however, the NPRM must be withdrawn because it contains numerous significant errors.

A. The NPRM incorporates by reference Executive agency regulations that no longer exist where cited.

Apparently relying on an outdated version of the C.F.R.,[6] the Board, in Prop. Reg. § 1.105(c), incorporates by reference the following Executive agency regulations that no longer exist at the locations cited in the NPRM:

- "Appendix A to [28 C.F.R.] Part 36—Standards for Accessible Design."This appendix does not exist at the cited location. The appendix that currently resides at Appendix A of 28 C.F.R. Part 36 is titled "Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities" and contains material different from the former "Standards for Accessible Design."
- "Appendix B to [28 C.F.R.] Part 36—Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations (Published July 26, 1991)." This appendix does not exist at the cited location. The appendix that currently resides at Appendix B of 28 C.F.R. Part 36 is titled "Analysis and Commentary on the 2010 ADA Standards for Accessible Design"

[6] In 2010, when the Department of Justice updated its regulations implementing title III of the ADA, it moved and renamed several of the applicable appendices. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,258-59 (Sept. 15, 2010).

and contains material different from the former "Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations."

In addition, the NPRM incorporates by reference a regulation that was removed from the C.F.R. a decade ago. Specifically, Prop. Reg. § 1.105(e) incorporates by reference a regulation from 36 C.F.R. Part 1190, specifically, "[36 C.F.R.] § 1190.3[sic][7]—Accessible buildings and facilities: Leased." Apparently the Board is unaware that all regulations at 36 C.F.R. Part 1190, including 36 C.F.R. § 1190.34, were removed from the C.F.R. in 2004. See Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 69 Fed. Reg. 44,084, 44151 (July 23, 2004) ("[C]hapter XI of Title 36 of the Code of Federal Regulations [is amended] as follows: . . . Part 1190 is removed."). Furthermore, the NPRM's reference to 36 C.F.R. Part 1190 is about to become even more confusing, because rulemaking is currently under way to populate 36 C.F.R. Part 1190 with regulations wholly unrelated to leased buildings and facilities. See Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way; Shared Use Paths, 78 Fed. Reg. 10,110 (proposed Feb. 13, 2013) (proposing to fill 36 C.F.R. part 1190 with regulations regarding "Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way; Shared Use Paths").

B. The NPRM purports to incorporate by reference Executive agency regulations that are not applicable to implementation of CAA § 210.

CAA § 210(e) directs the Board to issue regulations "to implement the statutory provisions referred to in [CAA § 210(b)]." See 2 U.S.C. § 1331(e) (referring to ADA §§ 201-230, 302, 303, and 309). The Board, however, has exceeded this regulatory authority by incorporating in the NPRM Executive agency regulations or parts of regulations that apply to portions of the ADA not referred to in CAA § 210(b). For example, Prop. Reg. § 1.105(d) incorporates by reference Department of Transportation ("DOT") regulation 49 C.F.R. § 37.3, relating to implementation of ADA §§ 241 through 246; however, those sections of the ADA are not incorporated in CAA § 210(b). Indeed, the Board acknowledges the inapplicability of portions of 49 C.F.R. § 37.3 to implementation of CAA § 210(b), but incorporates the regulation in its entirety by reference in Prop. Reg. § 1.105(d) anyway. See 160 CONG. REC. S5442 (daily ed. Sept. 9, 2014) (commentary item 1 regarding Prop. Reg. § 1.105(d)).

The DOT regulation at 49 C.F.R. § 37.3 is just one of many such examples of the Board's over-incorporation of Executive agency regulations in the NPRM. In the commentary portion of the NPRM, the Board identifies multiple instances in which the Board's proposed regulations incorporate by reference Executive agency regulations that have no application to CAA § 210(b). See 160 CONG. REC. S5441-S5443 (daily ed. Sept. 9, 2014). Although the Board repeatedly states in the commentary that the inapplicable parts of the Executive agency regulations incorporated in the proposed regulations are "not adopted" or that the Board will give no effect to them, see id., the Board did not exclude those extraneous portions of the Executive agency regulations from the actual proposed regulations. The proposed regulations unambiguously adopt the entirety of each of the cited Executive agency regulations, inapplicable parts and all.

[7] Intended reference to (former) 36 C.F.R. § 1190.34.

The Board's statements in its non-binding commentary attempting to nullify the inapplicable portions of the incorporated Executive agency regulations do not cure the Board's regulatory excess because unlike the regulations proposed in the NPRM, should they become effective, the Board's commentary is not legally binding. See Wyoming Outdoor Council v. USFS, 165 F.3d 43, 53 (D.C. Cir. 1999) (observing the well recognized principle that "language in the preamble of a regulation is not controlling over the language of the regulation itself"). Furthermore, covered entities and individuals with disabilities should not be required to divine the Board's regulatory intentions by poring through the Board's commentary regarding which portions of the incorporated Executive agency regulations the Board considers adopted. The regulations to implement CAA § 210(b) should be drafted in a way that unambiguously conveys to covered entities and covered individuals with disabilities each of the standards for public services and accommodations that applies to the Legislative Branch.

C. The NPRM purports to incorporate a regulation issued by an Executive agency not specified in CAA § 210.

The Board's statutory mandate is to issue regulations derived from the "substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions referred to in subsection (b) [of CAA § 210]." 2 U.S.C. § 1331(e)(2). The Board, through its NPRM, has exceeded this statutory authority by incorporating by reference a regulation promulgated by the United States Access Board. See Prop. Reg. § 1.105(e) (incorporating 36 C.F.R. part 1190). As explained in section II.A above, however, this Access Board regulation no longer exists.

III. Several of the Regulations in the NPRM Have no Basis in Law and Should be Removed From the Proposed Regulations

A. Prop. Reg. §§ 2.101 and 3.101 purport to grant the General Counsel and the Office of Compliance rulemaking authority which the CAA has not vested in them.

The NPRM includes proposed regulations that would give the General Counsel and the Office of Compliance rulemaking authority. In Prop. Reg. § 2.101, the General Counsel or the Office of Compliance can "[b]y procedural rule or policy . . . further describe how the General Counsel will exercise the statutory authority provided by Section 210" related to the "investigation and prosecution of charges of discrimination." Similarly, Prop. Reg. § 3.101 provides, "By procedural rule or policy, the General Counsel or the Office may further describe how the General Counsel will exercise this statutory authority provided by Section 210" pertaining to the inspection and reporting duties set forth in CAA § 210(f). The CAA, however, does not give the General Counsel or the Office of Compliance authority to create procedural rules or policies.

Only the Executive Director has the statutory authority to adopt procedural rules, subject to the approval of the Board and in accordance with the procedure established in CAA § 303(b). See 2 U.S.C. § 1383. Only the Board, in concert with both Houses of Congress, has the statutory authority to create regulations to implement CAA § 210. See 2 U.S.C. §§ 1331(e), 1384.

Moreover, the CAA requires that these same processes be followed to amend procedural rules and to amend regulations, respectively. See 2 U.S.C. § 1383(a) (regarding amendment of procedural rules); 2 U.S.C. § 1384(c) (regarding amendments to regulations). Because the CAA does not grant the General Counsel or the Office of Compliance the power to establish further procedures to implement CAA § 210, Prop. Reg. §§ 2.101 and 3.101 must be removed from the proposed regulations.

B. The proposed regulations regarding remedies differ substantially from the CAA's remedial scheme and must be deleted from or modified in the Board's proposed regulations.

The Board has proposed regulations in the NPRM that would establish a remedial scheme that is not authorized by the CAA. Specifically, Prop. Reg. § 2.107(a)(2) would permit awards of compensatory damages in the absence of an express waiver of sovereign immunity for compensatory damages claims; Prop. Reg. 2.107(a)(1) would authorize awards of attorney's fees and costs that exceed the waiver of sovereign immunity for such awards contained in CAA § 225(a); and Prop. Reg. § 2.107(a)(1)-(a)(2) would require covered legislative entities to pay attorney's fees, costs and damages awards from their individual office accounts. Accordingly, these proposed regulations should be deleted from or modified in the Board's proposed regulations.

1. Prop. Reg. § 2.107(a)(2) must be removed from the proposed regulations because the Board cannot award compensatory damages in the absence of an express waiver of sovereign immunity from such awards.

In its proposed regulations, the Board permits awards of compensatory damages for violations of CAA § 210. See Prop. Reg. § 2.107(a)(2) ("In any action commenced pursuant to Section 210 of the CAA by the General Counsel, when a charging individual has intervened, the hearing officer and the Board, in their discretion, may award compensatory damages to the prevailing charging individual."). Sovereign immunity, however, bars this type of relief.

CAA § 210 applies certain provisions of Titles II and III of the ADA to Congress, and the remedy for a violation of CAA § 210 is the same as that which would be "appropriate" under ADA § 203 and § 308(a). See 2 U.S.C. § 1331(c). The first of these sections, ADA § 203, makes available the remedies "set forth in section 794a of Title 29" (which is Section 505 of the Rehabilitation Act of 1973 ("Rehabilitation Act")). 42 U.S.C. § 12133. Rehabilitation Act § 505(a)(2), in turn, incorporates remedies from Title VI of the Civil Rights Act of 1964. See 29 U.S.C. § 794a(a)(2). In its commentary to Prop. Reg. § 2.107, the Board explains that Rehabilitation Act § 505(a)(2) provides the source for awards of compensatory damages for CAA § 210 violations and asserts that "[t]he Supreme Court has made clear that the remedies available under Title II of the ADA and the Rehabilitation Act are 'coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964' which includes compensatory, but not punitive, damages." 160 CONG. REC. S5443 (daily ed. Sept. 9, 2014) (quoting Barnes v. Gorman, 536 U.S. 181, 185 (2002)). Although the Board has accurately quoted from Barnes v. Gorman, the Board has overlooked critical precedent

regarding the *applicability* of compensatory damages in suits against the federal government for alleged violations of Rehabilitation Act § 505(a)(2).

In Lane v. Pena, the Supreme Court held that Rehabilitation Act § 505(a)(2) cannot be used to imply a waiver of federal sovereign immunity for compensatory damages. 518 U.S. 187, 192 (1996). The plaintiff in Lane had relied on Rehabilitation Act § 505(a)(2) to seek compensatory damages against the federal government because – just as the Board asserts in the NPRM – Rehabilitation Act § 505(a)(2) ties its remedies to Title VI of the Civil Rights Act, which includes compensatory damages. Id. at 191. The Court, however, rejected this argument because the plaintiff "overlook[ed] one critical requirement firmly grounded in our precedents: A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." Id. at 192. The Court held that Rehabilitation Act § 505(a)(2) does not, simply by referencing the remedies in Title VI of the Civil Rights Act, waive federal sovereign immunity from compensatory damages. Id. at 193.[8] The Board's reliance in the NPRM on the same reference to Title VI of the Civil Rights Act found in Lane fails as it did in Lane, because sovereign immunity bars an award of compensatory damages under CAA § 210.

The conclusion that CAA § 210 does not waive sovereign immunity from awards of compensatory damages is further supported by the section-by-section analysis of the CAA that was placed in the record of the 104th Congress[9] and which describes Congress's intentions regarding available remedies for claims under CAA § 210:

> Applicable remedies. The remedies for discrimination in public services prohibited by this section [210] shall be the remedies that would be available under section 203 or 308(a) of the Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12133, 12188(a)). Section 203 and 308(a) of the ADA incorporates the remedies under section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794A). This includes equitable relief, attorneys fees, and costs.

141 CONG. REC. S624 (daily ed. Jan. 9, 1995). Because sovereign immunity bars an award of compensatory damages under CAA § 210, Prop. Reg. § 2.107(a)(2) should be removed from the Board's proposed regulations.

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[8] In so holding, the Supreme Court in Lane looked to "the precision with which Congress has waived the Federal Government's sovereign immunity from compensatory damages" in another portion of the Rehabilitation Act, and noted that "[h]ad Congress wished to make Title VI remedies available broadly . . . it could easily have used language in § 505(a)(2) that is as sweeping" as the language waiving immunity. 518 U.S. at 193. With the CAA as well, Congress explicitly waived compensatory damages for certain claims in CAA § 201(a)(3)(1)(B) and could have (but did not) similarly waive immunity from compensatory damages in CAA § 210(c).

[9] The section-by-section analysis was placed in the record by the primary co-sponsors of the CAA. See 141 Cong. Rec. S779 (Jan. 11, 1995). Explanation of a bill by the bill's sponsor deserves "substantial weight" in interpreting the statute. See FEA v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

2. Prop. Reg. § 2.107(a)(1) must be modified or removed from the proposed regulations because CAA § 225(a) is the sole source of authority for awards of attorney's fees and costs to prevailing parties in proceedings to adjudicate alleged violations of CAA § 210.

Prop. Reg. § 2.107(a)(1) would permit a hearing officer and the Board to award attorney's fees and litigation costs to a prevailing charging individual who has intervened "[i]n *any* action commenced pursuant to Section 210 of the CAA" (emphasis added). The Board relies on two Executive agency regulations as its source of authority for Prop. Reg. § 2.107(a)(1): 28 C.F.R. § 35.175, which implements Title II of the ADA and provides for attorney's fees, litigation expenses, and costs to parties that prevail against the United States, and 28 C.F.R. § 36.505, which does the same in the context of Title III of the ADA. See 160 CONG. REC. S5443 (daily ed. Sept. 9, 2014) (Board commentary on NRPM § 2.107). The Board's reliance on these two Executive agency regulations is misplaced, however, because CAA § 225(a) contains specific authority regarding awards of attorney's fees and costs to prevailing parties in proceedings under CAA § 210. See 2 U.S.C. § 1361(a).

Pursuant to CAA § 225(a), if "a qualified person with a disability, with respect to any claim under section 210, is a prevailing party in *any proceeding under section 405, 406, 407, or 408*, the hearing officer, Board, or court, as the case may be, may award attorney's fees, expert fees, and any other costs as would be appropriate if awarded under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))." Id. (emphasis added). These are the conditions under which a prevailing party may be awarded attorney's fees and costs for claimed violations of CAA § 210, and these conditions must be strictly construed. See Block v. North Dakota, ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 287 (1983) ("The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed."). To the extent that the Board is proposing a greater availability of attorney's fees and costs in Prop. Reg. § 2.107(a)(1) than what Congress has provided in CAA § 225(a), that proposal exceeds Congress's waiver of sovereign immunity, and Prop. Reg. § 2.107(a)(1) must either be modified to reflect the specific terms of CAA § 225(a) or be removed from the proposed regulations.

3. Prop. Reg. § 2.107(a)(1)-(a)(2) must be removed from the proposed regulations because the CAA expressly prohibits the payment of awards and settlements from individual office accounts.

The Board's proposed regulations for the payment of awards of attorney's fees, costs and compensatory damages[10] in actions commenced under CAA § 210 exceed the appropriations authority contained in the CAA. Specifically, Prop. Reg. § 2.107(a)(1)-(a)(2) would require covered legislative entities to pay from their individual office accounts an award by a hearing officer or the Board to a "prevailing" party of "attorney's fees[], including litigation expenses,

[10] As explained in section III.B.1 herein, compensatory damages awards are not available in CAA § 210 actions.

and costs" and "compensatory damages."[11] Although the Board cites CAA § 415(c) as authority for requiring payment of awards from individual office accounts, CAA § 415(c) does not authorize such payments. Moreover, CAA § 415(a) specifically *prohibits* the payment of awards from individual office accounts.

CAA § 415 creates an unambiguous distinction between two different types of expenditures - funds "for the payment of awards and settlements" and funds "to correct violations" - and clearly explains how those two types of expenditures are to be paid. 2 U.S.C. § 1415(a), (c). In providing for the payment of "awards" for CAA violations, CAA § 415(a) specifically prohibits the payment of such "awards" from other than the specific fund identified by Congress for that purpose: "only funds which are appropriated to an account of the Office [of Compliance] in the Treasury of the United States for the payment of awards and settlements may be used for the payment of awards and settlements under [the CAA]." 2 U.S.C. § 1415(a). In contrast, CAA § 415(c) authorizes the use of individual office accounts only "to correct" violations of CAA § 210 (and §§ 201(a)(3) and 215) and includes no language authorizing the payment of awards. 2 U.S.C. § 1415(c).

The foregoing interpretation of CAA § 415 accords with congressional intent as explained in the section-by-section analysis of the CAA. With regard to the payment of awards and settlements from the Office of Compliance's Treasury account set forth in CAA § 415(a), the section-by-section analysis provides:

> A prevailing party may recover *exclusive compensation* for his or her claims from such appropriated funds. . . . Nothing in this act authorizes the Board, the Office [of Compliance], the [Executive] Director, or a hearing officer, without further authorization, to direct that amounts paid for settlements or awards be paid from official accounts of the employing office.

141 Cong. Rec. S631 (daily ed. Jan. 9, 1995) (emphasis supplied).

Accordingly, Prop. Reg. §§ 2.107(a)(1) and (a)(2) which purport to require payment from individual office accounts of awards of attorney's fees, costs and compensatory damages, exceed the appropriations authority set forth in CAA § 415 and should be removed from the proposed regulations.

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[11] See Prop. Reg. § 2.107(a)(1) ("[T]he covered entity responsible for correcting the violation shall pay such fees, expenses and costs from its appropriated funds as part of the funds to correct violations of Section 210 under Section 415(c) of the CAA."); Prop. Reg. § 2.107(a)(2) ("[T]he covered entity responsible for correcting the violation shall pay such compensatory damages from its appropriated funds as part of the funds to correct violations of Section 210 under Section 415(c) of the CAA.").

C. Prop. Reg. § 2.102(c)(2) would extend the 180-day limitations period for filing CAA § 210 claims indefinitely and should be removed from the proposed regulations.

Under CAA § 210(d)(1), a person with a disability who wishes to file a charge alleging that a covered entity has violated CAA § 210 must file that charge "within 180 days of the occurrence of the alleged violation." 2 U.S.C. § 1331(d)(1). Prop. Reg. § 2.102(c)(2), however, would allow an individual who did not experience discrimination within the 180-day limitations period to file a charge. Because Prop. Reg. § 2.102(c)(2) is inconsistent with CAA § 210(d)(1), it should be removed from the proposed regulations.

Prop. Reg. § 2.102(c)(2) defines "occurrence of the alleged violation" to include "the last date on which the service, activity, program or public accommodation described by the charging party was operated in a way that denied access in the manner alleged by the charging party." This proposed regulation decouples the date on which a charge may be brought from the date on which the alleged violation of the charging party's rights occurred.[12] As written, Prop. Reg. § 2.102(c)(2), would negate the 180-day limitations period in CAA § 210(d)(1) because the regulation would permit a charging party to file a claim well after the 180-day period following the alleged violation of his/her rights so long as a covered entity still operates a service, activity, program or public accommodation "in the manner" that previously denied access to a charging party. For example, if a charging party had a disability in 2010 and could not, because of that disability, access some program in 2010, Prop. Reg. § 2.102(c) would allow that charging party to bring a claim in 2014 as long as the program was still being operated "in the manner" it was in 2010. Accordingly, Prop. Reg. § 2.102(c)(2) should be removed from the proposed regulations.

Sincerely,

Claudia Kostel

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Senate Chief Counsel for Employment

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[12] In support of this regulation, the Board cites to a case regarding the continuing violations doctrine. See 160 CONG. REC. S5443 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982)). That case involved the Fair Housing Act, not the ADA. See Havens, 455 U.S. at 380–81 ("[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the statutory period, running from] the last asserted occurrence of that practice."). Congress has codified the continuing violations doctrine within the Fair Housing Act, see Garcia v. Brockway, 526 F.3d 456, 462 (9th Cir. 2008) (en banc) ("Congress has since codified this continuing violation doctrine by amending the FHA."), but has not similarly amended the CAA. The Board has not explained why the Fair Housing Act case it has cited in the NPRM should govern CAA § 210 claims.