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October 9, 2014

BY FACSIMILE AND E-MAIL

Barbara J. Sapin, Esq.
Executive Director
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Room LA 200
John Adams Building
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Washington, D.C. 20540-1999

Re: Comments to the Notice of Proposed Rulemaking to Implement the Proposed Amendments to the Rules of Procedure

Dear Ms. Sapin:

The Office of the Senate Chief Counsel for Employment ("SCCE") submits the following comments to the Executive Director of the Office of Compliance ("OOC") in response to the Notice of Proposed Rulemaking ("NPRM") to implement the proposed amendments to the Rules of Procedure, published in the Congressional Record on September 9, 2014, 160 CONG. REC. S5447 (daily ed. Sept. 9, 2014).

Many of the proposed amendments to the OOC Rules of Procedure ("Procedural Rules") are either inconsistent with or otherwise unsupported by the Congressional Accountability Act of 1995, *as amended*, 2 U.S.C. §§ 1301-1438 (2012) (the "CAA"), and are invalid for that reason. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("An administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."). In enacting the CAA, Congress waived its sovereign immunity – but only to the extent specified in the statute – and it is well established that the scope of the waiver must be strictly construed in favor of the sovereign. See United States v. Sherwood, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); Lane v. Pena, 518 U.S. 187, 192 (1996) ("[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.") To the extent that the proposed amendments attempt to expand that waiver of sovereign immunity, they should not be adopted.

In addition, many of the proposed amendments would affect the substantive rights of covered employees and employing offices, and to that extent they are substantive regulations and should be promulgated under section 304 of the CAA, 2 U.S.C. § 1384 (Substantive regulations), not section 303 of the CAA, 2 U.S.C. § 1383 (Procedural rules). See Chamber of Commerce of the U.S. v. U.S. Dep't of Labor, 174 F.3d 206, 211 (D.C. Cir. 1999).

In addition to these broad, fundamental defects in the proposed Procedural Rules, the SCCE also identifies these specific issues:

A. Proposed Procedural Rule 4.11(a) conflicts with fundamental separation of powers principles, is inconsistent with the CAA, and affects substantive rights and obligations of employing offices and covered employees.

Proposed Procedural Rule 4.11(a) represents the single most significant – and improper – proposed amendment to the Procedural Rules.[1] This proposed rule purports to expand the OOC General Counsel's authority to issue citations based on violation of "any occupational safety or health standard promulgated by the Secretary of Labor under Title 29 of the U.S. Code, section 655." This proposed change represents a major overreach, and would make any substantive standard promulgated by the Secretary of Labor – an Executive Branch official – automatically binding on Congressional employing offices. Proposed Procedural Rule 4.11(a) would eliminate any requirement that a substantive standard be promulgated pursuant to the clear, detailed rulemaking procedures set forth in the CAA. See 2 U.S.C. §§ 1341(d), 1384. Because the proposed rule is anathema to the notion of separation of powers, is incompatible with the CAA's statutory scheme, and would impact the substantive rights and obligations of covered employees and employing offices under the CAA, the proposed rule is invalid and should not be adopted.

In the CAA, Congress clearly staked out its authority to approve any substantive regulations before they become binding on legislative employing offices, 2 U.S.C. § 1384(c), and the CAA clearly states that this approval process is an exercise of Congress's constitutional authority under the Rulemaking Clause of the Constitution. *See* U.S. Const. art. I, § 5, cl. 2; 2 U.S.C. § 1431.[2] There is no indication in the CAA that Congress intended to assign its constitutional rulemaking function to the Secretary of Labor. Indeed, courts have construed the Rulemaking Clause broadly, *see United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995) ("[T]he Rulemaking Clause of Article I clearly reserves to each House of the Congress the authority to make its own rules"); *Skaggs v. Carle*, 898 F. Supp. 1, 1 (D.D.C. 1995) ("The Rulemaking Clause of the Constitution confers power upon both chambers of Congress to make the rules by which they conduct business."), and it is clear that any intrusion by an Executive Branch agency in Congress's exclusive rulemaking province implicates the doctrine of

[1] The other defects in Subpart D of the Proposed Procedural Rules are addressed in Part E of this letter.

[2] 2 U.S.C. § 1431 provides, in relevant part, that 2 U.S.C. § 1384(c) is enacted "(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of such House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and (2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of each House."

separation of powers. *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977) (Rulemaking Clause "gives a specific constitutional base – a constitutional status, if you prefer – to the rules that Congress provides for its own proceedings. In deference to the fundamental constitutional principle of separation of powers, the judiciary must take special care to avoid intruding into a constitutionally delineated prerogative of the Legislative Branch.")

The proposed amendment would create substantial new obligations for employing offices,[3] and these *obligations* absolutely cannot be imposed through procedural rules. See Chamber of Commerce, 174 F.3d at 211. Accordingly, proposed Procedural Rule 4.11(a) should not be adopted, and the OOC Board instead must issue substantive regulations through the rulemaking process set forth in sections 215(d) and 304 of the CAA.

B. Certain proposed Procedural Rules would modify the CAA's filing requirements.

Some of the proposed Procedural Rules are invalid because they purport to modify the statutory filing requirements for CAA proceedings.[4]

- Under section 403 of the CAA, a covered employee must file a request for mediation with the OOC "[n]ot later than 15 days after receipt by the employee of notice of the end of the counseling period." Because the CAA is a waiver of sovereign immunity, all conditions of that waiver, including those delineated in section 403, must be strictly adhered to. Proposed Procedural Rule 2.04(b) would allow a covered employee additional time to file a request for mediation outside of the statutory 15-day period, with a showing of "good cause." There is no support for a "good cause" extension in the statute, and thus the OOC lacks authority to create such an extension in its proposed Procedural Rules.

- Under section 404(1) of the CAA, a covered employee may file a complaint with the OOC only within the statutorily prescribed filing period: "Not later than 90 days after a covered employee receives notice of the end of the period of mediation, but no sooner than 30 days after receipt of such notification . . ." Proposed Procedural Rule 5.01(b)(1) purports to vest the OOC Executive Director with the authority to give a covered employee the ability to file outside the statutory filing window. See proposed Procedural Rule 5.01(b)(1) ("In cases where a complaint is filed with the [OOC] sooner than 30 days after the date of receipt of the notice under section 2.04(i), the Executive Director, at his or her discretion, may return the complaint to the employee for filing during the prescribed period without prejudice and with an explanation of the prescribed period of

[3] Indeed, the Occupational Safety and Health Standards contained in 29 C.F.R. Part 1910 comprise several hundred pages of detailed requirements. See http://www.ecfr.gov/cgi-bin/text-idx?SID=5cc627d3d731871bb4b4ef0df2577883&node=pt29.5.1910&rgn=div5

[4] To the extent the CAA's timely filing requirements are jurisdictional, the proposed rules would enlarge Congress's waiver of its sovereign immunity and the rules are invalid for that reason as well. See Blackmon-Malloy v. U.S. Capitol Police Bd., 338 F. Supp. 2d 97, 104 (D.D.C. 2004) ("[T]he timeliness requirement [of the CAA] is a condition of waiver of sovereign immunity – failure to comply is fatal."), aff'd, 575 F.3d 699 (D.C. Cir. 2009).

filing.") Because the CAA is unambiguous regarding the appropriate filing window, and the OOC's Notice of End of Mediation is clear, this proposed rule is unnecessary and would improperly enlarge the rights of covered employees under the statute.[5]

- Proposed Procedural Rule 1.07(c) would provide that, if a designation of representative is revoked, the Executive Director, OOC General Counsel, mediator, Hearing Officer or OOC Board has the discretion to grant a party "additional time . . . to allow the party to designate a new representative as consistent with the Act." As noted above, the CAA is a waiver of sovereign immunity that must be strictly construed. Accordingly, there is no discretion to extend statutory deadlines to give a party time to designate a new representative, including time to request counseling under section 402, to request and complete mediation under section 403, to file a complaint or initiate a civil action under section 404, or to file an appeal under section 406 of the CAA. The rule should be modified to clarify this point.

- Proposed Procedural Rules 5.03(f) and (g) would allow the Hearing Officer to permit a covered employee or the OOC General Counsel to re-file a complaint after withdrawal. The rule should be modified to clarify that the Hearing Officer cannot allow a complainant to re-file a complaint that would be time-barred under section 404 of the CAA. As compliance with the timing requirements set forth in section 404 is required to waive sovereign immunity, the Hearing Officer lacks authority to expand a complainant's time to file a complaint.

- Proposed Procedural Rule 4.11(a) purports to introduce a "continuing violation" theory to occupational safety and health ("OSH") citations under the CAA, and no such theory exists under the CAA. The proposed rule would read: "No [OSH] citation may be issued under this section after the expiration of 6 months following the occurrence of any alleged violation unless the violation is continuing or the employing office has agreed to toll the deadline for tolling the citation." (emphasis added). There is no tolling or continuing violation language in the CAA, nor is there any such language in the OSHA provision upon which the proposed Procedural Rule is based. See Occupational Safety and Health Act of 1970 ("OSH Act or OSH"), 29 U.S.C. § 658(c), as incorporated in 2 U.S.C. § 1415(c)(2). Because there is no statutory basis for this provision, the proposed rule should not be adopted.

[5] Under section 404(1) of the CAA, a covered employee may initiate a section 405 proceeding by filing a complaint only within the CAA's statutory filing window. Proposed Procedural Rule 1.03(a)(2) purports to give a covered employee additional time to file an OOC complaint, by providing that an OOC complaint is "deemed filed" as of the date it is postmarked (if filed by mail). Under the existing Procedural Rule, an OOC complaint filed by mail is "deemed filed" on the date it is received by the OOC. The upshot is that the proposed Procedural Rule would give a covered employee an additional five days to file an OOC complaint.

C. The proposed Procedural Rules would undermine the confidentiality of counseling, mediation, hearings and other CAA proceedings.

The proposed Procedural Rules would weaken the confidentiality requirements set forth in section 416 of the CAA in the following ways:

- Proposed Procedural Rule 1.08 would allow "participants" – including witnesses – to waive the confidentiality of counseling, mediation, or any other CAA proceeding or appeal at any time. See proposed Procedural Rule 1.08(b) (changing definition of "participant" to include "witness"); proposed Procedural Rule 1.08(e) (providing that "[p]articipants may agree to waive confidentiality"). Because this proposed rule is inconsistent with the statutory requirement that counseling and mediation be "strictly confidential" and that hearings and deliberations be "confidential," 2 U.S.C. § 1416, the proposed rule should not be adopted.

- Proposed Procedural Rule 1.08(c) contains confidentiality language that is inconsistent with the CAA. As written, the proposed rule may be read to allow a "participant" to publicize the fact that a covered employee has requested and/or engaged in counseling and mediation, and the fact that an individual has filed an OOC complaint. See also proposed Procedural Rules 2.03(d), 2.04(b) and 5.01(h) (requiring the OOC – but not participants – to keep confidential the "invocation of mediation" and "the fact that a complaint has been filed with the [OOC] by a covered employee"). Because these disclosures would violate the strict confidentiality mandated by the CAA, 2 U.S.C. § 1416, the proposed rule should not be adopted.

- The proposed Procedural Rules would eliminate the existing process for filing a complaint based on violation of the confidentiality provisions of section 416 of the CAA. See Procedural Rule 1.07. The effect of this proposed rule change is that, if there is a confidentiality breach, a party may obtain relief only pursuant to an "agreement" facilitated by the mediator during the mediation period (see proposed Procedural Rule 2.04(k)), or through sanctions issued by a Hearing Officer during a section 405 proceeding (see proposed Procedural Rules 2.04(k) and 7.12(b)). If an individual violates section 416 of the CAA at any other time, there would be no remedy available under the proposed Procedural Rules. This is obviously inconsistent with the confidentiality requirements of the CAA, and the Procedural Rules should include a complaint procedure for resolving violations of section 416.[6]

[6] Under the proposed Procedural Rules, if parties agree to a settlement during mediation, there is no remedy available to the employing office if the employee decides to publicize the terms of the settlement or any statements made during mediation. Similarly, if a covered employee never initiates a section 405 proceeding, and instead either drops the matter or initiates a section 408 proceeding, the proposed Procedural Rules would allow the employee to publicize any statements made during mediation, with no fear of sanction. The uncertainty regarding confidentiality will result in parties being less candid in mediation and, thereby, undermine it as a dispute resolution process.

- In addition to severely limiting the circumstances under which a party may obtain relief for a violation of section 416 of the CAA, the proposed rules also would limit the available remedies and the conditions for obtaining those remedies. Under the existing Procedural Rule, an individual who violates section 416 is presumptively required to pay reasonable expenses (including attorneys' fees) caused by the violation (either in addition to or in lieu of a sanction). See Procedural Rule 1.07(e)(4). Under proposed Procedural Rule 1.08(f), a Hearing Officer may impose sanctions for a violation of section 416 only with a showing of "good cause," and there is no reference to payment of reasonable expenses caused by the violation.

- Proposed Procedural Rule 1.08(f) would remove the requirement that the OOC advise participants of their confidentiality obligations in a timely fashion. The existing Procedural Rule 1.06(b) requires the OOC to provide this notification "[a]t the time that any individual . . . becomes a participant," and that language is not included in proposed Procedural Rule 1.08(f). Such notice is critical to ensuring that CAA-mandated confidentiality is maintained and, thus, the existing rule should be retained.

- Proposed Procedural Rule 2.03(e)(1) would permit the OOC to publicize certain statistical information regarding CAA proceedings, which is consistent with section 301(h)(3) of the CAA, but the proposed rule would remove this language: ". . . so long as that statistical information does not reveal the identity of the employees involved or of employing offices that are the subject of a request for counseling." To ensure compliance with section 416 of the CAA, the rule should specify that the OOC will not publicize this detailed information in its statistical reports.

In addition, although the SCCE believes the OOC's decision to permit parties to file electronically would be beneficial to parties, see proposed Procedural Rule 1.03(a), the proposed rules contain no procedure for maintaining the confidentiality and security of documents that are filed with the OOC in electronic format. The Procedural Rule should explain the OOC's process to store electronic material in a manner that will protect confidentiality and ensure compliance with section 416 of the CAA.

D. Proposed Procedural Rules §§ 3.01-3.18 purport to give the OOC General Counsel ADA inspection authority that is not supported by the CAA.

As explained in the SCCE's letter dated May 23, 2014, the proposed Procedural Rules relating to "ADA Public Services" are invalid because they are not supported by the CAA.[7] The "Supplementary Information" section of the NPRM (p. 2) states: "Because the Office of the General Counsel conducts ADA inspections and investigates ADA charges using procedures that

[7] Notably, a comparison of the draft ADA Procedural Rules issued by the OOC on May 1, 2014, and the NPRM published in the Congressional Record on September 9, 2014, reveals that the OOC did not make any of the edits recommended by the SCCE in its May 23 letter. A copy of SCCE's May 23 letter is attached as Exhibit A.

are similar to what are used in its [OSH] inspections and investigations conducted under section 215 of the CAA, the procedural rules are similar to what are contained in Subpart D of the Procedural Rules relating to OSH inspections and investigations." This is wholly inappropriate. As explained in the SCCE's May 23, 2014 letter, the inspection authorities available to the OOC General Counsel in ADA and OSHA inspections are fundamentally different. Compare 2 U.S.C. § 1331(f)(1) (authorizing OOC General Counsel to perform only periodic ADA inspections of "facilities") with 2 U.S.C. §§ 1341(c)(1) and (e)(1) (authorizing OOC General Counsel to perform OSH inspections on a periodic basis and upon request, and authorizing OOC General Counsel to exercise Secretary of Labor's OSH inspection authorities laid out in 29 U.S.C. §§ 657(a), (d), (e) and (f)). Accordingly, the Procedural Rules for ADA inspections should not track the Procedural Rules for OSH inspections.

The extent of the OOC General Counsel's inspection authority with regard to ADA public services and accommodations is defined in section 210(f)(1) of the CAA: "On a regular basis, and at least once each Congress, the General Counsel shall inspect the facilities of the entities listed in subsection (a) of this section to ensure compliance with subsection (b) of this section." 2 U.S.C. § 1331(f)(1). As explained below, Subsection C of the proposed Procedural Rules would grant the OOC General Counsel broader inspection authority than is conferred by the CAA, and the proposed rules are invalid for that reason. In particular, section 210 of the CAA does not authorize the General Counsel to inspect facilities upon request by members of the public or covered entities. Nor does section 210 authorize the General Counsel, in the course of a periodic ADA inspection, to question individuals regarding compliance with section 210(b) of the CAA. Further, section 210 does not authorize the General Counsel, in the course of a periodic ADA inspection, to review a covered entity's records.

Given the broad defects with Subpart C of the proposed Procedural Rules that are discussed above, the proposed Procedural Rules should not be adopted. In addition, the following specific proposed Procedural Rules also should not be adopted:

- Proposed Procedural Rule 3.02(a) would grant the OOC General Counsel the authority to "inspect and investigate" any facility of any entity covered by section 210(a) of the CAA, and to inspect "all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any covered entity, employee, operator, or agent; and to review records maintained by or under the control of the covered entity." Because the OOC General Counsel's inspection authority under section 210(f) of the CAA is limited to periodic inspection of "facilities," proposed Procedural Rule 3.02(a) is invalid to the extent it would authorize the General Counsel to question individuals and/or review records in the course of an ADA inspection.

- Proposed Procedural Rule 3.03 would enable "any person who believes that a violation of section 210 of the CAA exists in any facility of a covered entity" to request an ADA inspection. The CAA authorizes the OOC General Counsel to perform periodic ADA inspections, see section 210(f) of the CAA, but there is nothing in section 210 that would empower the General Counsel to conduct ADA inspections upon request. It appears that the proposed Procedural Rule is improperly "borrowing" ADA inspection authority from

the CAA's OSH provisions. In particular, under section 215 of the CAA, there is a provision for covered employees and employing offices to request an OSH inspection, see 2 U.S.C. § 1341(c)(1), but there is no such provision under section 210 of the CAA. Accordingly, proposed Procedural Rule 3.03 exceeds the authority granted by the CAA and should not be adopted.[8]

- While section 210 of the CAA does not provide for ADA inspections upon request, section 210(d)(1) of the CAA requires the OOC General Counsel to "investigate" a charge filed by a "qualified individual with a disability" (as defined in 42 U.S.C. § 12131(2)). Proposed Procedural Rule 3.03(a)(1) would convert a "Request for ADA Inspection" (which is invalid to begin with, as explained above) into a "charge" simply by stating: "If the person making the request is a qualified individual with a disability, . . . the request for inspection shall be considered a charge of discrimination within the meaning of section 210(d)(1) of the CAA."[9] This alchemy is wholly inappropriate. While the General Counsel is authorized to investigate a "charge" filed under section 210(d)(1) of the CAA, proposed Procedural Rule 3.03(a)(1) would impermissibly expand the General Counsel's authority to "investigate" where a qualified individual with a disability has not actually filed a charge. Accordingly, proposed Procedural Rule 3.03(a)(1) should not be adopted.

- Proposed Procedural Rule 3.07 is invalid to the extent it purports to authorize the General Counsel to review records, take or obtain photographs, and question individuals privately in the course of an ADA inspection (see proposed Procedural Rule 3.07(a)-(c)). The CAA does not grant the General Counsel such authority in the ADA inspection process, and, thus, proposed Procedural Rule 3.07 should not be adopted.

- Proposed Procedural Rule 3.09 is invalid to the extent it purports to authorize the General Counsel's designee to "consult with individuals with disabilities concerning matters of accessibility to the extent he or she deems necessary for the conduct of an effective and thorough inspection." This proposed Procedural Rule is invalid because it would expand the limited ADA inspection authority conferred by section 210(f)(1) of the CAA.

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[8] The OOC website currently has a "Request for ADA Inspection" form that members of the public are invited to complete and submit to the OOC in person, by fax or by email. See http://www.compliance.gov/wp-content/uploads/2011/07/Request-for-ADA-Inspection-2011-Printed-Form-Web.pdf. Because there is no statutory authority for ADA inspection upon request under the CAA, the OOC should remove the "Request for ADA Inspection" form from its website.

[9] Further, Proposed Procedural Rule 3.03(a)(1) would allow a charging party to remain anonymous. There is nothing in section 210 of the CAA that would allow an individual to file an anonymous charge against a covered entity, and again it appears that the Proposed Procedural Rule is borrowing this language from an inapposite OSH Act provision. See 29 U.S.C. § 657(f)(1) ("Any employees or representative of employees . . . may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger . . . upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available . . ."), as incorporated in 2 U.S.C. § 1341(c)(1).

- Proposed Procedural Rule 3.10 is invalid because it is premised on the availability of an ADA inspection upon request, and section 210 of the CAA does not provide for ADA inspections upon request.

E. The proposed OSH Procedural Rules are invalid because they are inconsistent with the CAA.

The proposed Procedural Rules in Subpart D – relating to OSH inspections, citations and complaints – would represent a significant change in the OOC General Counsel's authority and the rights and obligations of covered employees and employing offices under the CAA. Because the OOC cannot effect such change through its Procedural Rules, and because some of the authorities claimed in Subpart D are unsupported by the CAA, the following proposed Procedural Rules are invalid and should not be adopted:

- Proposed Procedural Rules 4.02(a) and 4.03(a) and (b) would authorize the OOC General Counsel to conduct an OSH inspection of "any place where covered employees work ('place of employment')." This proposed change represents a significant expansion of the General Counsel's inspection authority, as the existing Procedural Rules state that the General Counsel may inspect any "place of employment under the jurisdiction of an employing office." The language of the existing Procedural Rule comes directly from section 215(c)(1) of the CAA ("Upon written request of any employing office or covered employee, the General Counsel shall exercise the authorities granted to the Secretary of labor . . . to inspect and investigate places of employment under the jurisdiction of employing offices.") (emphasis added). The proposed rules purport to authorize the OOC General Counsel to inspect "any place where covered employees work," irrespective of whether the employing office has any jurisdiction over that place. For example, if an employee works from a home office, the proposed Procedural Rule would give the OOC General Counsel authority to visit the employee's home to conduct an OSH inspection. This proposed rule is inconsistent with the statute (and common sense) and should not be adopted.

- Proposed Procedural Rule 4.02(a) also purports to give the OOC General Counsel authority to "review records maintained by or under the control of the covered entity" in the course of an OSH inspection. This proposed rule is invalid because the recordkeeping requirement of OSHA explicitly does not apply to Congressional employing offices. See 2 U.S.C. §§ 215(c)(1) and (e)(1) (defining the OOC General Counsel's OSH inspection authorities, and not incorporating 29 U.S.C. § 657(c), the OSHA recordkeeping requirement).[10]

[10] The existing Procedural Rule 4.02(a) already represents an overreach on the part of the OOC, but at least the invalid rule is limited to records that are "directly related to the purpose of the inspection." The proposed Procedural Rule, amazingly, may be read to broaden the OOC General Counsel's inspection authority to include review of all records maintained by the employing office, without regard to whether those records are even related to the purpose of the inspection. The existing Procedural Rule 4.02(a) and the proposed amendment to the rule are both invalid, and neither rule should be adopted.

- Proposed Procedural Rule 4.13(a) is a step in the right direction, to the extent it would clarify how the OOC General Counsel would handle security information in the OSH inspection process. The proposed rule reads: "When a citation contains security information as defined in Title 2 of the U.S. Code, section 1979, the General Counsel may edit or redact the security information from the copy of the citation used for posting or may provide to the employing office a notice for posting that describes the alleged violation without referencing the security information." The Procedural Rule should not be limited to "security information," as defined in 2 U.S.C. § 1979, and instead should be expanded to include other security-sensitive information (including "sensitive but unclassified" information). Further, the rule should not be limited to posting of citations, and instead should address how the OOC will protect all security-sensitive information it encounters during all stages of the OSH inspection process. The Procedural Rule also should clarify how the OOC will determine what information is entitled to protection.

F. Other specific issues with the proposed Procedural Rules.

- Proposed Procedural Rule 1.03(c) purports to extend filing deadlines in certain circumstances when the OOC is "officially closed for business." Presumably, this would include days when the OOC is closed due to inclement weather or furlough. If the OOC is going to implement this rule, the rule should explain how the OOC will notify employees and employing offices as to which days it is "officially closed for business."

- Proposed Procedural Rule 1.04(d) imposes a 35-page limit for filings, and would give the Hearing Officer, OOC Board, or Executive Director discretion to allow a party to re-file if the party exceeds the page limit. The rule should allow the parties to request leave to file an overlong brief, but should not allow parties to re-file if they exceed the page limit.

- Proposed Procedural Rule 2.04(g) would grant the mediator the authority to require "any party" to attend a mediation meeting in person. There is nothing in the CAA that would give a mediator the authority to direct a specific individual to attend a mediation meeting, see 2 U.S.C. § 1403(b), and the rule is invalid as a result.

- Proposed Procedural Rule 5.01(g) would allow a respondent to file a motion to dismiss, but only "in addition to an answer." This is not a meaningful change from the existing Procedural Rule 5.01(f) (which provides that the respondent "shall file an answer" in all cases); the rule should give the Hearing Officer discretion to allow a respondent to file a motion to dismiss in lieu of an answer. Otherwise, a party will be forced to waste resources responding to a complaint that may be dismissed or significantly altered by a Hearing Officer's ruling on the motion to dismiss.

- Proposed Procedural Rules 1.07(c) and 5.03(h) would govern the circumstances under which a designated representative may withdraw or be removed from a matter. The rules should require that all parties, the mediator, the Hearing Officer, and the Executive Director be advised immediately (within 24 hours) by email when a designated representative ceases to be involved in a matter. An immediate notice requirement in

these rules will ensure accurate service on the appropriate individual. Proposed Procedural Rule 5.03(h) provides that a designated representative must provide "sufficient notice" of his or her withdrawal, but the rule does not define "sufficient notice."

- Proposed Procedural Rules 7.13(d) and (e) purport to limit the availability of interlocutory appeals, and Rule 8.01(e) purports to limit the availability of judicial review. Because these issues should be addressed by substantive rulemaking, these proposed Procedural Rules are invalid and should not be adopted.

- Proposed Procedural Rule 9.03(d) would give the Executive Director sole authority to resolve alleged violations of settlement agreements, in the event that the parties do not agree on a method for resolving disputes. There is nothing in the CAA that gives the Executive Director the authority to resolve contractual disputes, and this rule should not be adopted.

- Proposed Procedural Rule 9.04 states that, after a settlement agreement has been approved by the Executive Director, "[n]o payment shall be made from such account until the time for appeal of a decision has expired." This rule should clarify that it does not apply to settlements reached in the absence of a "decision" that may be appealed.

- Proposed Procedural Rules 2.03(e)(1), 6.01(a), and 6.02(a) are invalid to the extent that they would limit the availability of OOC employees and records in the discovery process, because there is no statutory basis for this evidentiary privilege.[11]

- Proposed Procedural Rule 6.02(a) would provide that "[e]mploying offices shall make their employees available for discovery and hearing without requiring a subpoena." (emphasis added). The rule should clarify that it applies only to "employing offices" that are respondents in OOC litigation. The rule, as written, may be read to require all Legislative Branch employing offices to make their employees available for discovery and hearing, without a subpoena, even if the employing office is not a respondent in OOC litigation.

Sincerely,

Patrick McMurray
Senate Senior Counsel for Employment

[11] Section 403(d) of the CAA provides that a mediator in a particular matter cannot be "subject to subpoena or any other compulsory process with respect to the same matter." There is nothing in the CAA that would prohibit a party from obtaining discovery from a counselor or other OOC employee, nor is there any CAA provision that would make any OOC records off-limits for discovery purposes.

EXHIBIT A

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VIA FAX

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Re: Draft Procedural Rules for Compliance, Investigation and Enforcement under Section 210 of the CAA

Dear Mr. Uelmen:

The Office of Senate Chief Counsel for Employment ("SCCE") submits the following informal comments regarding the draft Procedural Rules circulated by the Office of Compliance ("OOC") on May 1, 2014, regarding "Compliance, Investigation, and Enforcement under Section 210 of the CAA (ADA Public Services)" (hereinafter the "draft ADA Procedural Rules"). We appreciate the opportunity to provide feedback on the OOC's draft ADA Procedural Rules and hope our suggestions are helpful to the OOC and the OOC Board. We look forward to providing further input during the formal rulemaking process.

General Observations on draft ADA Procedural Rules, §§ 3.01-3.10

Sections 3.01 through 3.10 of the draft ADA Procedural Rules prescribe "rules and procedures" for the OOC General Counsel's inspection of facilities of the entities listed in section 210(a) of the CAA, 2 U.S.C. § 1331(a). The SCCE has concerns with many of the draft ADA Procedural Rules, particularly those that purport to vest various OOC officials, including the OOC General Counsel, with powers that Congress itself has not vested in those officials. *See, e.g.*, §§ 3.02, 3.03, 3.07 & 3.10 of the draft ADA Procedural Rules.

The OOC General Counsel's inspection authority with regard to ADA public services and accommodations is defined in section 210(f)(1) of the CAA: "On a regular basis, and at least once each Congress, the General Counsel shall inspect the facilities of the entities listed in

subsection (a) to ensure compliance with subsection (b)." 2 U.S.C. § 1331(f)(1). Notwithstanding the very specific ADA inspection authority granted to the OOC in section 210 of the CAA, the draft ADA Procedural Rules appear to import the broader occupational safety and health ("OSHA") inspection authority granted to the OOC General Counsel in section 215 of the CAA.[1] The CAA simply does not support treating ADA and OSHA inspections as if they are identical. *Compare* 2 U.S.C. § 1331(f)(1) *with* 2 U.S.C. §§ 1341(c)(1) and (e)(1) (incorporating 29 U.S.C. §§ 657(a), (d), (e) and (f)).

Further, some of the draft ADA Procedural Rules purport to create new substantive rights and/or impose new substantive obligations on the entities covered by section 210 of the CAA. For example, section 3.03 of the draft ADA Procedural Rules, purports to enable "*any person* who believes that a violation of section 210 of the CAA exists in any facility of a covered entity" to request an ADA inspection. Section 210 of the CAA does not provide any such right or remedy to all individuals and does not provide the OOC General Counsel with the power to effectuate such a right or remedy. To the extent the draft ADA Procedural Rules purport to create new rights and/or impose new obligations, they are substantive regulations and must be promulgated as such under section 304 of the CAA, 2 U.S.C. § 1384.

Again, we appreciate the opportunity to provide these preliminary comments and hope our suggestions are helpful to the OOC and the OOC Board as they continue to revise and refine the draft ADA Procedural Rules. We look forward to providing further input during the formal rulemaking process.

Sincerely,

Claudia A. Kostel
Senate Chief Counsel for Employment

[1] Sections 3.01 through 3.10 of the OOC's draft ADA Procedural Rules closely track sections 4.01 through 4.10 of the OOC Procedural Rules regarding "Compliance, Investigation, Enforcement and Variance Process under Section 215 of the CAA (Occupational Safety and Health Act of 1970)" (hereinafter the "OSHA Procedural Rules"). *See* Procedural Rules of the Office of Compliance, Subpart D, §§ 4.01-4.10.