UNITED STATES CAPITOL POLICE
WASHINGTON, DC 20510-7218

October 9,2014

Barbara Sapin, Esquire
Executive Director
Office of Compliance
110 Second Street, S.E. Room LA-200
Washington, D.C. 20540-1999

Re: Comments Regarding Proposed Amendments to the Procedural Rules

Dear Ms. Sapin:

Please accept these comments on behalf of the United States Capitol Police regarding the proposed amendments to the Office of Compliance Procedural Rules. We appreciate the time and effort that went into reviewing the prior rules and look forward to utilizing rules that create efficiencies in process, save government resources, and, at the same time, afford all parties the rights and obligations under the Congressional Accountability Act ("CAA").

One major concern continues to be the Office of Compliance procedural rules precluding employing offices from learning about the claims of its employees. We encourage the Board of Directors to revisit the current proposals withholding of the Request for Counseling from employing offices once the matter is presented for mediation because our experiences reflect that sharing such a document is extremely helpful in addressing concerns raised. Specific issues are addressed below. We incorporate by reference each of the comments raised under the Americans with Disability Act ("ADA") substantive regulations as it relates to statutory conflicts with provisions suggested for adoption under Sections 3.01 through 3.18 of the amended procedural rules.

We recommend that the amended procedural rules not be adopted at this time given the areas of concern. We welcome the opportunity to work with the Office of Compliance to address each of the concerns raised below.

Procedural Regulations vs. Substantive Regulations

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 procedural rules address substantive rights that should be addressed in substantive regulations. There is no authority provided in the CAA that permits the Board of Directors of the Office of Compliance to accomplish through procedural regulations what it should be pursuing through substantive regulations as is required under Section 304(a)(2) of the CAA. See, e.g., §§3.02 through 3.09; 7.02.

Confidentiality and Waiver

1) The Board's interpretation of strict confidentiality continues to spur litigation because the employing office does not receive notice of facts, dates, or specific claims. Much litigation can be alleviated by the Office of Compliance by providing the employing office with a copy of the request for counseling submitted by the employee so that the parties are discussing the same facts, dates, and issues. There are several times when the employing office learns in litigation that the facts asserted by an employee on the request for counseling form were not the same facts asserted in mediation. Thus, the mediation becomes less productive and helpful in reaching resolution. We urge the Board to consider providing the employing office with the request for counseling form which can be maintained under the confidentiality provisions of the CAA.

2) The waiver provision under Section 1.08(e) is not clear and appears to conflict with the statutory requirement of confidentiality under Section 416 of the CAA. Where there is a waiver of confidentiality, it is unclear whether a waiver releases all requirements for confidentiality including making records public in proceedings, waiving the confidentiality requirements of Hearing Officer proceeding, and waiving the sanctions requirement under Section 1.08(f). It is important that any waiver be clear as to why it would be permissible despite the language in Section 416 of the CAA and how such a waiver affects documents, proceedings, and testimony. Additionally, the limited waiver language in Section 2.03(e)(2) is inconsistent with the limited waiver language in Sections 2.03(h)(1) and (h)(2). The waiver language should be consistent in all three provisions of Sections 1.08(e), 2.03(e)(2), and 2.03(h)(1) and (h)(2).

3) Section 2.03(e)(1) is inconsistent with the requirements in Section 1.08(d). For example, Section 2.03(e)(1) provides that "all counseling shall be kept strictly confidential and shall not be subject to discovery." First, it is not clear that the Office of Compliance Procedural Rules can control the release of discoverable information in federal district court. Notwithstanding that restriction, Section 2.03(e)(1) is inconsistent with the exceptions provided in §1.08(d) which permits disclosing information obtained in confidential proceedings when reasonably necessary to investigate claims, ensure compliance with the Act or prepare its prosecution or defense. Moreover, § 1.08(c) is also inconsistent because it prohibits disclosure of a written or oral communication that is prepared for the purpose or occurs during counseling. The most important document that allows for the preparation of a defense to a claim is the request for counseling submitted. That written document is necessary to identify the claims that a Complainant has properly exhausted under the CAA.

Filing Requirements

4) Section 1.03(1) appears to be the same as the prior procedural rule requiring in person hand delivery by 5:00 p.m. However, the time frame is inconsistent With the 11:59 p.m. time frame required for faxed and electronically filed documents. The procedural rules should be consistent in filing time frames for documents and not have one time for in person and another

time for faxed or electronic filed documents. Moreover, the Office of Compliance should have a time-stamp to reflect the time a document has been filed. Currently, the Office of Compliance uses only a date-stamp device.

5) Section 1.03(d) is confusing. The title of the section is "Time Allowances for Mailing, Fax, or Electronic Delivery;" however, the rule only addresses time allowances for mail. It appears that five day is added to the prescribed period if the document is mailed. The procedural rule does not prescribe a time period if faxed or sent by electronic mail. It is recommended that the rule can be clarified to states that "no time allowances apply to documents sent by fax or electronic mail." The current language for fax and electronic delivery has no "time allowance."

Internal Grievance Process

6) Section 2.03(m) requires the Capitol Police to enter into a Memorandum of Understanding to permit an employee to use the Capitol Police internal grievance process. There is no such requirement in Section 401 of the CAA which states that the Executive Director "may recommend that the employee use the grievance procedures of the ... Capitol Police for resolution of the employee's grievance for a specific period of time, which shall not count against the time available for counseling or mediation."

Mediation

7) Under 2 U.S.C. § 1403(a), an employee is required to request mediation not later than 15 days after receipt of the end of counseling period. However, under § 2.04(b), the Board is changing that statutory requirement to permit an employee to show "good cause" for not meeting the statutory requirement. Thus, the procedural rule is *ultra vires* in that it seeks to change the statutory requirement.

Certification of Record

8) Section 2.06(a) the Certification of Record should contain the claims that were exhausted, the date the claim allegedly took place.

ADA Public Access Inspections

9) Section 3.02(a) overstates the statutory requirement under the CAA. Under Section 210(f), the General Counsel "shall inspect" the facilities of the entities. However, under the procedural rule, the procedural rule broadens the statutory requirement to include "enter without delay and at reasonable times any facility of any entity." The procedural rule should be aligned with the statutory requirement. Additionally, the procedural rule does not account for security of spaces or documents nor does it coordinate protocols for entering security spaces or obtaining security sensitive documents.

10) Section 3.02(b) only takes into consideration Executive Branch security clearance requirements and does not take into consideration legislative branch requirements for entering security related spaces. Office of Compliance personnel should receive approval from the United States Capitol Police prior to entering security-related spaces.

11) Section 3.03(a)(1) conflates the statutory requirements under 2 U.S.C. § 1331(d)(1) and the General Counsel's requirement to conduct periodic inspections under 2 U.S.C. § 1331(f)(1). Section 3.03(a)(1) finds that "[a]ny person who believes that a violation of section 210 of the CAA exists in any facility ... may request an inspection of such facility." However, the procedural rules cannot expand the scope of the CAA beyond what is authorized. The CAA does not authorize "any person" or "a member of the public" to request an inspection of a facility. Only a "qualified individual" with a disability can file a charge for which the General Counsel can conduct an investigation. *See* 2 U.S.C. § 1331(d)(1). On the other hand, 2 U.S.C. § 1331(f)(1) requires the General Counsel, on a regular basis to inspect facilities. Nowhere under the CAA does it authorize a member of the public to request an inspection. Had Congress intended members of the public to have rights under the CAA, it would have stated so. Rather, Congress provided such rights only to "a qualified individual with a disability" under 2 U.S.C. § 1331(d)(1) and "periodic inspections" only by the General Counsel.

12) Similarly, Section 3.03(b) is not permitted by the CAA. The statutory requirement under Section 210(d) of the CAA is only permissible for charges filed by "a qualified individual with a disability." A "covered entity" is not a qualified individual with a disability. Accordingly, the statutory procedures cannot be bootstrapped to a non-statutory requirement set forth in Section 3.03(b) of the procedural rules.

13) Section 3.04 does not define what is meant by "appropriate action." It is unclear whether this language includes any legal action or action precluded by the CAA. Accordingly, the language should be explained. As currently written, it is impossible to provide comment on the permissibility of the action.

14) Section 3.06 is not consistent with the statutory authority of other entities including the Capitol Police Board. Accordingly, an additional exclusion should be added that includes "proper coordination with the Capitol Police Board or the United States Capitol Police."

15) Section 3.07 is inconsistent with the statutory responsibilities of other entities, including the Capitol Police Board. The Capitol Police Board has statutory responsibility to determine release of security information under 2 U.S.C. § 1979. Among other things, that statute authorizes the Capitol Police Board, "notwithstanding any other provision of law," to determine "in consultation with other appropriate law enforcement officials, experts in security preparedness and appropriate committees of Congress ... the release of the security information [that] will not compromise the security and safety of the Capitol buildings and grounds or any individual whose protection and safety is under the jurisdiction of the Capitol Police." Section 3.07 authorizes the taking of photographs, obtaining samples, accessing documents, and entry

into spaces that likely with have a security impact. Employing offices should have the opportunity to raise any security concerns prior to commencement of any investigation under Section 3.07.

16) Section 3.08 is beyond the authority for the General Counsel. Each employing office can select the representative it authorizes to represent the employing office. The procedural rules cannot limit employing offices to select its own representative as it so chooses. Accordingly, any language that identifies "a different covered entity representative" or the General Counsel determining "whom is the representative" should be deleted. Section 3.08(c) does not take into account security concerns and the Capitol Police Board and/or the USCP can accompany should security concerns be raised. Section 3.08(d) is limiting and should be rewritten. There may be security reasons separate and apart from "national security" that may preclude a person to have access to information as such information may be deemed "security sensitive information" in accordance with 2 U.S.C. §1979.

17) Section 3.09 as written does not limit the area to only a facility where there is public access. Thus, if any person believes a violation exists in a non-publicly accessible facility, that location is outside of the jurisdiction of the General Counsel under Section 210(f)(1).

18) Section 3.10 discusses a potential for an "informal conference" in which the General Counsel is affirming, modifying, or reversing a decision. Depending on the nature of the ruling, consideration should be given as to whether the hearing should be memorialized by a court reporter and/or the ruling committed to writing as an official record after the event.

19) Under Section 3.12, it appears that a person filing a charge can request anonymity. However, there is no such requirement in Section 210(d) of the CAA. The employing office is entitled to raise a defense that a charge was not filed by "an individual with a disability" under Section 210(d) of the CAA. Accordingly, the employing office is required to know the name of the individual filing the charge to determine whether a proper investigation has been raised. The CAA does not authorize that an individual with a disability can remain anonymous while, at the same time, the procedural rules require in Section 3.11(c) that a charging party provide the full name and address. Moreover, the requirement is inconsistent with the mediation procedure proposed at Section 3.14 "between the charging party and any entity responsible for correcting the alleged violation."

20) Under Section 3.13, the methods used by the General Counsel should not conflict with other requirements which may be placed on employing offices through statutory, regulatory, rule, or procedural requirements.

21) The procedural requirements under Section 3.16 should include a preclusion of *ex parte* communications with any employee of the General Counsel and the Hearing Officer.

22) Section 3.18 should be deleted because the language is inconsistent with Section 415(c) of the CAA. Funds must be appropriated first to correct the violation. Thus, a procedural regulation cannot govern the timing of an appropriation of funds and, thus, a date of compliance.

Privilege

23) Under Section 6.01(d)(1), a claim for privilege cannot be waived. The privilege belongs to the client and only the client can waive the privilege. *See In re Sealed Case*, 107 F.3d 46,49 (D.C. Cir. 1997); *Daniels* v. *Hadley Mem. Hosp.,* 68 F.R.D. 583, 588 (D.D.C. 1975)
Moreover, a party does not waive a privilege unless it has opted to do so. *Abtew v. United States Dept, of Homeland Sec.,* -F.Supp.2d-, 2014 WL 2620982 (D.D.C. 2014) (a party may not be estopped from asserting a privilege just because it may waive the privilege in the future). Thus, the procedural rules under Section 6.01(d)(1) cannot place a limitation on a party's right to assert a privilege and would be inconsistent with the inadvertent disclosure identified in Section 6.01(d)(2). One may have inadvertently disclosed privileged information on the last day of discovery which would require that it be returned or destroyed in accordance with Section 6.01(d)(2). However, if the privilege was not asserted on the last day of discovery, the procedural rules would allow the opposing party to keep the inadvertently disclosed documents. Thus, by limiting the timing of the asserted privilege, a conflict is created between Sections 6.01(d)(1) and 6.01(d)(2).

Sanctions

24) It is unclear what authority under the CAA, the Board of Directors is utilizing to authority a Hearing Officer to issue sanctions under Sections 7.02 and 7.12(b). Sanctions are not authorized under the CAA and, thus, procedural rules incorporating a substantive provisions are beyond the scope of authority permitted under the CAA and is *ultra vires* and inconsistent with the requirements for procedural rules under Section 303 of the CAA. A sanctions provision affects the rights of the parties and, therefore, is substantive in nature. The appropriate avenue should a substantive sanctions provision be requested is to pursue a statutory amendment to the CAA.

Moreover, the sanctions provision at Section 7.02(g) can require a non-complying party or the representative to pay all or part of the attorney's fees and reasonable expenses. The CAA is clear under Section 415 that payments of awards and settlements are to be appropriated to an account of the Office of Compliance in the Treasury of the United States. There is no statutory authority permitting "the representative" to pay attorney's fees and reasonable expenses and is contrary to Section 415 of the CAA.

25) Nor does the CAA authorize each of the remedies for failure to maintain confidentiality under Section 7.02(5). The Hearing Officer is authorized to issue a decision under Section 405. However, Congress did not authorize remedies for breach of confidentiality. Accordingly, the Board of Directors of the Office of Compliance is required to seek a statutory correction should that desire to provide remedies for breach of confidentiality. Where Congress sought to provide a remedy under the CAA, it specifically incorporated it. Compare 2 U.S.C. 1313(b), 2 U.S.C. 1314(b), 2 U.S.C. 1317(b), and 2 U.S.C. 1331(c) incorporating a remedy provision with the absence of a remedy provision in 2 U.S.C. 1416.

Final Decisions

26) Section 9.01(a) is unclear as to what is meant by a "decision of the Office." If the procedural rule is meant to be a decision of the Board of Directors of the Office of Compliance, the rule should be clarified.

Ex Parte Communications

27) Section 9.02(b) is unclear. Because Hearing Officers do not have a role in settlement, there should never be *ex parte* communications with a Hearing Officer and, thus, *ex parte* communications cannot be waived with a Hearing Officer.

Res Judicata

28) In accordance with Section 1.04(e), records of Hearing Officers may be made public if required for the purposes of judicial review under Section 407. However, records are also necessary for purposes of civil action review under Section 408 for *res judicata* purposes, and the procedural rules do not address this requirement. Nor does the certification of record under Section 2.06 account for the judicial review for purposes of *res judicata* where the same case is filed subsequently in federal district court. In accordance with a claim of *res judicata*, the district court requires a certification of the underlying record including the pleading filed in the matter. The Supreme Court has decided in *Montana* v. *United States*, 440 U.S. 147,153 (1979), that once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits.

However, the court cannot make a determination if it does not have the pleadings filed in the underlying record with the Office of Compliance. Three elements must establish the preclusive effect of a prior legal determination. First, the same issue being raised in the second case must have been contested by the parties and submitted for judicial determination in the first case. Second, the issue must have been actually and necessarily decided by a court of competent jurisdiction. Third, preclusion in the second case must not work a basic unfairness to the party bound by the first case. It is necessary for the Office of Compliance Procedural rules to address release of the record for *res judicata* determinations.

Respectfully submitted,

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