OFFICE OF COMPLIANCE:

NOTICE OF ADOPTION OF SUBSTANTIVE REGULATIONS, AND SUBMISSION FOR CONGRESSIONAL APPROVAL

Adoption of the Office of Compliance Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans, as Required by 2 U.S.C. 1316a, the Congressional Accountability Act of 1995, as Amended (CAA).

Procedural Summary:

Issuance of the Board's Initial Notice of Proposed Rulemaking:

On February 28, 2000, and March 9, 2000, the Office of Compliance published an Advanced Notice of Proposed Rulemaking ("ANPR") in the Congressional Record (144 Cong. Rec. S862 (daily ed., Feb. 28, 2000), H916 (daily ed., March 9, 2000)). On December 6, 2001, upon consideration of the comments to the ANPR, the Office published a Notice of Proposed Rulemaking ("NPR") in the Congressional Record (147 Cong. Rec. S12539 (daily ed. Dec. 6, 2001), H9065 (daily ed. Dec. 6, 2001)). The Board took no action on those earlier Notices and instead, after extensive consultation with stakeholders, issued a subsequent Notice on December 1, 2001.

Why did the Board propose these new Regulations? Section 4(c) of the CAA, 2 U.S.C. 1316a (4), requires that the Board of Directors propose substantive regulations implementing the rights and protections relating to veterans' employment which are "the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions . . . except insofar as the Board may determine, 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."

What procedure followed the Board's December 1, 2001 Notice of Proposed Rulemaking? The December 1, 2001 Notice of Proposed Rulemaking included a thirty day comment period, which began on December 2, 2001. A number of comments to the proposed substantive regulations were received by the Office of Compliance from interested parties. The Board of Directors has reviewed the comments from interested parties, engaged in extensive discussions with stakeholders to obtain input and suggestions into the drafting of the regulations, made a number of changes to the proposed substantive regulations in response to comments, and has adopted the amended regulations.

What is the effect of the Board's "adoption" of these proposed substantive regulations? Adoption of these substantive regulations by the Board of Directors does not complete the promulgation process. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for promulgating such substantive regulations requires that:

> (1) the Board of Directors issue proposed substantive regulations and publish a general notice of proposed rulemaking in the *Congressional Record* (the December 1 Notice);
> (2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; and
> (3) after consideration of comments by the Board of Directors, that the Board adopt regulations and transmit notice of such action together with the regulations and a recommendation regarding the method for Congressional approval of the regulations to the Speaker of the House and President pro tempore of the Senate for publication in the *Congressional Record*.

This **Notice of Adoption of Substantive Regulations and Submission for Congressional Approval** completes the third step described above.

What are the next steps in the process of promulgation of these regulations? Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to "include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution." The Board of Directors recommends that the House of Representatives adopt the "H" version of the regulations by resolution; that the Senate adopt the "S" version of the regulations by resolution; and that the House and Senate adopt the "C" version of the regulations applied to the other employing offices by a concurrent resolution.

Are there regulations covering veterans' rights currently in force under the CAA? No.

Additional General Information

Why are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices? Because the Board of Directors has identified "good cause" to modify the executive branch regulations to implement more effectively the rights and protections for veterans, there are some differences in other parts of the proposed regulations applicable to the Senate, the House of Representatives, and the other employing offices.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives? Yes, as required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), the substance of these regulations have also been recommended by the Executive Director and Deputy Executive Directors of the Office of Compliance.

Are these proposed CAA regulations available to persons with disabilities in an alternate format? This Notice of Adoption of Substantive Regulations, and Submission for Congressional Approval is available on the Office of Compliance web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; TDD: 202-426-1912; FAX: 202-426-1913.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 12 federal labor and employment statutes to covered employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the Legislative Branch.

The Board's Responses to Comments

SUMMARY OF MAJOR COMMENTS

Covered Employees.

Section 1.102 sets forth general definitions that apply throughout the Board' s veterans' preference regulations. The Committee on House Administration expressed the concern that readers might find the definitions that determine coverage of the regulations confusing. The definition of "covered employee" in Section 1.102(f) traces the definition of the same term in the Congressional Accountability Act, and then applies the differently worded and potentially more limited exception to that term as provided in the VEOA. Because these two aspects of the definition in Section 1.102(f) are based on statutory language, we have not revised the definition itself. However, the final regulations include a new Section 1.101(c) entitled "Scope of Regulations" that contains a clear statement that the regulations shall not apply to an employing office that only employs individuals excluded from the definition of "covered employee" under the VEOA, including employees whose appointment is made by a member of Congress or by a Committee or Subcommittee of either House of Congress or a Joint Committee of the House of Representatives and the Senate.

In view of the selection process for certain Senate employees, the words "or directed" have been added to the definition of "covered employee" to include any employee who is hired at the direction of a Senator, but whose appointment form is signed by an officer of either House of Congress. Including the words "or directed" in the definition has the effect of excluding such employees from the definition of "covered employee" for purposes of the veterans' preference provisions in the regulations to be made applicable to the Senate. A reference to 2 U.S.C § 43d(a) also has been added to the definition of "covered employee". Including the reference to 2 U.S.C § 43d(a) has the effect of excluding employees whose appointment is allowed under that statutory provision from the definition of "covered employee" in the regulations to be made applicable to the Senate. These changes will give full effect to the exclusion in 2 U.S.C § 1316(5)(B).

Similar additions were not made in the definition of "covered employee" that appears in the regulations to be made applicable to the House of Representatives. It appears that this language would be overreaching for the House. As the House has different methods of making appointments and selections, this language appears to be unnecessary and may create confusion given the practices of the House. Employees of members' offices are excluded from coverage, and section 1.101(c) of the draft regulations provides a number of additional exceptions to coverage that otherwise are applicable to the House:

> (1) whose appointment is made by the President with the advice and consent of the Senate;
> (2) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; or

(3) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

We believe the exceptions to coverage listed above will exclude from coverage all employees of the House who by statute were not meant to be covered under the VEOA provisions, without creating unintended exceptions due to the selection procedures under HEPCA.

The "or directed" language has not been made to the definition of "covered employee" in the regulations to be made applicable to the other employing offices. Employees of those other employing offices are included in the definition of "covered employee" even if their appointment form is signed or subject to final approval by a Member or Members of Congress.

Definition of "Appointment"

Section 1.102(d) defines the term "appointment". As initially proposed the term excluded "inservice placement actions such as promotions". This exclusion was derived from OMB regulations applicable in the executive branch. See 5 CFR 211.102(c). Senate stakeholders noted that the term "inservice placement actions" is not commonly used in the legislative branch and questioned whether the veterans' preference would apply in any post-employment decisions other than reductions in force as that term is defined in these regulations. In the executive branch, the preference afforded to preference eligibles in the appointment process only applies to original appointments in the competitive service. See 5 U.S.C. §3309. It is possible, therefore, for an executive branch employee who has initially been employed in a position that is not within the competitive service to later seek appointment to a position in the competitive service. The employing offices within the legislative branch do not have a "competitive service" and therefore do not recognize the notion that an initial appointment to the competitive service could be made by an employee holding a position that is not in the competitive service. For these reasons, the Board agreed that use of the phrase "inservice placement actions" was confusing and possibly misleading. In the final regulations, the definition of "appointment" has been modified to exclude "any personnel action that an employing office takes with regard to an existing employee of the employing office".

Definition of Employing Office.

In addition to the changes discussed above, technical corrections were made to the definition of "employing office", to clarify that the term includes the Capitol Police Board.

Veterans' preference in Appointments to Restricted Positions.

Section 1.107 addresses the application of veterans' preference in appointments to the restricted positions of custodian, elevator operator, guard and messenger. As proposed, Section 1.107 provided that, for these positions, the employing office "shall restrict competition to preference eligibles as long as preference eligibles are available." The Committee on House Administration suggested that the requirement of an absolute preference for veterans (and other preference

eligibles) to fill guard positions without regard to experience, quality of work or employment references would undermine the efforts of various congressional entities to provide the most secure environment possible for the employees of and visitors to the Congressional office buildings. For this reason, the Committee requested that the Board find "good cause" for deviating from the executive branch regulations and exclude the position of guard from Section 1.107.

Section 1.107 derives from statutory language made applicable to the legislative branch by the VEOA. Removing one of the four restricted positions from the regulations would represent a significant deviation from the VEOA's goal of applying the veterans' preference principles currently applicable in the executive branch in the legislative branch. However, the Board agrees that employing offices should not be required to appoint individuals who are not qualified to perform the role of a guard, particularly where unique security concerns are present, simply because the individual is preference eligible. Accordingly, the final regulation clarifies that with respect to the four statutory restricted positions, the employing office "shall restrict competition to preference eligible applicants as long as qualified preference eligible applicants are available." This reference to "qualified … applicants" is intended to refer to the definition of "qualified applicant" in Section 1.102(q). Section 1.102(q) defines the term as an applicant for a covered position whom an employing office deems to satisfy the requisite minimum job-related requirements of the position. Employing offices are provided flexibility in devising the minimum job-related requirements for a particular covered position. The unique security concerns on Capitol Hill may result in additional or more stringent requirements for the position of guard. Accordingly, we have revised Section 1.107 to clarify that preference eligibles must be qualified to be considered for any restricted position, be it that of custodian, elevator operator, guard or messenger.

Senate Employment Counsel noted that the definitions of three of the four listed restricted positions include the limiting words "primary duty," and suggested that the definition of "guard" also include the primary duty limitation. We agree that this is important given that the definition of guard includes those who "make observations for detection of fire, trespass, unauthorized removal of public property or hazards to federal personnel or property" and any manager responsible for insuring a safe work environment may engage in these activities. Accordingly, we have included the limiting words "primary duty" in the definition of guard.

Veterans' Preference in Appointments to Non-Restricted Covered Positions.

Section 1.108(a) requires employing offices who use numerical examination or rating systems to add points to the ratings of preference eligibles in a manner that is comparable to the points added in accordance with the provisions of 5 U.S.C. §3309. Comments submitted by the Committee on House Administration express the concern that a "numerical examination or rating system" may be interpreted to apply whenever one interviewer "rates" or gives numerical "grades" to interviewees even though other interviewers and decision makers are not using a similar system. To address this concern, Section 1.108(a) has been revised to provide that the addition of veterans' preference points is required only when the employing office has "duly adopted a policy requiring the numerical scoring or rating of applicants for covered positions …."

As proposed, Section 1.108(b) would have required employing offices to consider veterans' preference eligibility as an affirmative factor that would be "given weight in a manner proportionately comparable to the points prescribed in 5 U.S.C. § 3309 in the employing office's determination of who will be appointed from among qualified applicants." Several commenters expressed concern with respect to the manner in which Section 1.108(b)'s requirements would be administered. For example, some expressed the concern that application of a factor "proportionately comparable" to a point system would, in itself, require the adoption of a point system to ensure compliance. Others expressed concern with respect to when the preference should be afforded to qualified applicants, and suggested that Section 1.108(b) simply require that the preference be the deciding factor if all other factors among the applicants considered most qualified were equal. After careful consideration, the Board has modified Section 1.108(b) to require employing offices to consider veterans' preference eligibility as "an affirmative factor in the employing office's determination of who will be appointed". This change has been adopted to confirm that these regulations are not intended to require employing offices that do not use point-based rating systems to adopt them simply to be able to comply with their VEOA obligations. The Board reiterates that, because Section 1.108(b) is derived from the statutory provisions in 5 U.S.C. § 3309, veterans' preference will not be the only factor, and, depending upon the relative merits of the candidates, may not be the most important factor in the employing office's appointment decision. Section 3309 affords preference eligibles 5 or 10 points when a 100-point rating scale is used, and employing offices are not required to afford any greater weight to veterans' preference in their appointment decisions. The Board notes that all preference eligibles who are found by the employing office to be "qualified applicants" must be afforded the preference. The Board expects that in cases where all other factors are relatively equal, consideration of the preference as an affirmative factor may result in the preference eligible being appointed. In other cases, consideration of the preference as an affirmative factor may boost the applicant further along in the appointment process but ultimately not be sufficient to overcome the other favorable attributes of the final candidate or even of the others within a final pool of candidates.

Waiver of Physical Requirements in Appointments to Covered Positions.

As proposed, Section 1.110(b) required an employing office to notify an otherwise qualified preference eligible applicant who has a compensable service-connected disability of 30% or more if the employing office determines that the applicant is not able to fulfill the physical requirements of the position. The employing office must inform the applicant of the reasons for the employing office's determination and allow the applicant 15 days to respond and submit additional information to the employing office. Thereafter, the "highest level" of the employing office must consider any response and additional information supplied by the applicant and notify the applicant of its findings regarding the applicant's ability to perform the duties of the position.

The Committee on House Administration inquired whether an employing office must engage in the prescribed dialogue if the applicant is clearly not the most qualified applicant for the position. A concern regarding the timing of the required dialogue was also raised in the comments received from the Senate Employment Counsel. In those comments, Counsel raised the concern that engaging in the required dialogue before a conditional offer of employment is made would conflict

with the provisions of the Americans with Disabilities Act regarding pre-employment disability-related inquiries. Section 1.110 does not require or allow employing offices to engage in any inquiries that would be unlawful under the Americans with Disabilities Act. In accordance with 5 U.S.C § 3312, Section 1.110(a)(2) requires an employing office to waive physical requirements on the basis of "the evidence before it", including any recommendation of an accredited physician submitted by the preference eligible applicant. It is presumed that such evidence will come before the employing office through means allowed under the Americans with Disabilities Act, whether this occurs through an applicant's request for accommodation or through lawful pre-employment inquiries. Similarly, Section 1.110(b) does not require an employing office to make a determination regarding preference eligible applicants' physical ability to perform the duties of the position, but only describes the procedures that must be followed if and when such a determination is made.

The Committee on House Administration also expressed the concern that a 15-day response period would impair an employing office's operations if there is a need to fill a particular covered position quickly. To respond to this concern, the final regulation includes the statement, "The director of the employing office may, by providing written notice to the preference eligible applicant, shorten the period for submitting a response with respect to an appointment to a particular covered position, if necessary because of a need to fill the covered position immediately."

The Committee on House Administration inquired about the definition of the "highest level" within the employing office. Consistent with the Committee 's suggestions, the final regulation refers to the "highest ranking individual or group of individuals with authority to make employment decisions on behalf of the employing office."

Comments submitted by the Capitol Police inquired about the definition of "accredited physician" as used in Section 1.110(a)(2). The final regulations contain a definition of this term at Section 1.102(a).

Definitions Applicable in Reductions in Force.

Senate Employment Counsel raised a concern with respect to the proposed Section 1.111(b) provision that the "minimum competitive area" be a department or subdivision of the employing office "under separate administration." Counsel raised the concern that this definition could be interpreted in a manner inconsistent with the definition of "competitive area" as "that portion of the employing office's organizational structure, as determined by the employing office, in which covered employees compete for retention." Counsel notes that certain employing offices, such as the Sergeant-At-Arms and the Secretary of the Senate, have multiple departments that are headed by different individuals, but some personnel decisions may be centralized with the executive office of the employing office. To address this concern, the final regulation deletes the reference to "separate administration" such that the minimum competitive area is a "department or subdivision of the employing office within the local commuting area."

In addition, Senate Employment Counsel suggested that the definition of "reduction in force" in

Section 1.111(e) is broader in scope than the regulations applicable to the executive branch. In this respect, Counsel suggested that the executive branch regulations in 5 C.F.R §351.201(a)(2) exclude any layoff or other personnel action that might otherwise be considered a "reduction in force" if at least 180 days prior notice is given. However, the executive branch regulations apply the 180-day exception only to "the reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days." As a result, the Board does not consider Section 1.111(e) to be broader in scope than the executive branch regulations.

The Board also considered the application of a veterans' preference in connection with terminations and other reductions attributable to a change in party leadership or majority party status within the House of Congress in which a covered employee is employed. The Board has determined that positions affected by such changes are subject to the same considerations applicable to positions in which appointment is made or directed by a Member of Congress. The Board therefore has excluded terminations and reductions attributable to such changes from the definition of reduction in force in Section 1.111(e) in the regulations applicable to the House and Senate, in order to give full effect to the exclusion in 2 U.S.C § 1316(5)(B). These changes have not been made to the definition of "reduction in force" contained in the regulations applicable to the other employing offices.

The Committee on House Administration suggested that the requirement of "objectively quantifiable evidence" be stricken from the definition of "undue interruption" in Section 1.111(f). The concept of "undue interruption" is used in Section 1.111(c) in determining whether various covered positions must be included within a particular position classification or job classification. Section 1.111(c) states that position classifications or job classifications "shall refer to all covered positions within a competitive area that are in the same grade, occupational level or classification, and which are similar enough in duties, qualification requirements, pay schedules, tenure (type of employment) and working conditions so that an employing office may reassign the incumbent of one position to any of the other positions in the position classification without undue interruption." The Committee noted that the definition of "undue interruption" in Section 1.111(f) allows an employing office to consider quality of work when assessing whether an employee transferred into the position would need more than 90 days to complete required work, and expressed concern with the requirement in the proposed regulation that an employing office prove "undue interruption" by "objectively quantifiable evidence." In this respect, the Committee noted that quality of work is often a subjective determination which, by its nature, cannot always be proven by "objectively quantifiable evidence." The Board agrees that the proposed "objectively quantifiable evidence" requirement could create unnecessary confusion with respect to the burden of proof applicable in a claim brought under the VEOA and has, therefore, deleted the reference to "objectively quantifiable evidence" in the final regulations.

The Committee also questioned Section 1.111(f)'s reference to "work programs." Although the Committee requested that the Board provide a definition of "work program," the Board considered it more prudent to make this provision consistent with other references in Section 1.111(f) to "work" as opposed to "work programs."

The Committee on House Administration also inquired whether the definition of reduction in force in Section 1.111(e) applies to temporary employees. The final regulation clarifies that the term "reduction in force" does not encompass a termination or other personnel action "involving an employee who is employed by the employing office on a temporary basis."

Application of Preference in Reductions in Force.

Section 1.112 makes veterans' preference the controlling factor in retention decisions if the preference eligible's performance has not been rated unacceptable. As noted by Senate Employment Counsel, the Board's proposed regulation is based upon 5 U.S.C. §3502(c), which provides that an employee is entitled to such preference if the employee's "performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this Title … . " The Supreme Court has interpreted analogous language in the predecessor legislation to mean that preference eligible veterans have preference over all non-preference eligible employees, without regard to tenure, length of service, or efficiency of performance. *Hilton v. Sullivan*, 334 U.S. 323, 335 (1948). Counsel notes that the Senate is not subject to the performance appraisal system set forth in Chapter 43 of Title 5 and asserts that it is improper to use 5 U.S.C. §3502(c) as the basis for a regulation requiring the retention of veterans over non-veterans in all cases. Counsel suggests that the regulation should be based on 5 U.S.C. §3502(a), which requires that any implementing regulation give "due effect" to tenure of employment, military preference (subject to §3501(a)(3)), length of service and efficiency or performance ratings. The Board has carefully considered these comments and continues to believe that because the VEOA makes 5 U.S.C. §3502(c) applicable to the legislative branch, the absolute veterans' preference embodied in that section also must be made applicable to the legislative branch. The Board notes that the Supreme Court's finding in *Hilton* was not based on the unique elements and attributes of the performance appraisal system implemented under Chapter 43 of Title 5, but on its understanding that "Congress passed the bill with full knowledge that the long standing absolute retention preference of veterans would be embodied in the Act." *Hilton*, 334 U.S. at 339. The Board considers its task in devising these regulations to implement veterans' preference in the legislative branch in a manner that mirrors, as closely as possible, the veterans' preference principles applicable in the executive branch. Accordingly, the final regulation retains Section 1.112 in substantially the form proposed, because the primary purpose of 5 U.S.C. §3502(c) is to make veteran' s preference the controlling factor in retention decisions. An additional concern was expressed that use of the term "rated" in Section 1.112 suggests that employing offices must adopt formal rating systems in order to comply with the regulation. The Board agrees that the term may lead to confusion and has modified the provisions in Section 1.112 so that the veterans' preference will apply only if the preference eligible employee's performance has not been "determined to be" unacceptable.

Good Cause for Requirements in Subpart E.

The regulations in Subpart E contain various informational requirements. Section 1.116 requires an employing office with covered employees to adopt a written veterans' preference policy. Section 1.117 requires employers to retain certain information regarding their veterans' preference decisions for specified periods of time. Sections 1.118 and 1.119 address the

dissemination of information to applicants for covered positions. Section 1.120 addresses the dissemination of information to covered employees generally, and Section 1.121 describes the notice that must be given before a reduction in force.

Senate Employment Counsel and the Capitol Police note that no corresponding executive branch regulation would require either the adoption of a written policy or the other informational and record keeping requirements in Subpart E. These commenters express the concern that the regulations in Subpart E are not consistent with the directive in Section 4(c)(4)(B) of the VEOA, which states in relevant part, "The regulations issued … shall be the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions … except insofar as the Board may determine 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."

The Board has carefully considered these concerns and reaffirms its previous determination that there is good cause for adopting the requirements described in Subpart E of the regulations. We note first that the very structure of the statutory provisions made applicable to the legislative branch by the VEOA presumes that uniformly applicable policies and procedures will be used in applying veterans' preference in hiring and retention decisions. We also continue to believe that the requirements in Subpart E of the regulations are a necessary counterpart to the approach reflected in the veterans' preference regulations, which affords employing offices with significant discretion and flexibility in implementing their own veterans' preference policies and procedures. For example, the regulations do not mandate a particular policy or practice in implementing veterans' preference, such that applicants cannot turn to published regulations to fully determine their rights. Further, since the regulations do not mandate the maintenance of retention registers, covered employees will not be able to inspect such registers to determine their retention status vis-à-vis other employees. Because OPM-like regulations will not be adopted, the Board has determined that the creation of a policy, dissemination of information and record keeping are necessary to insure the effective implementation of the rights and protections provided under the VEOA. This approach meets the requirements of Section 4(c)(4)(B) of the VEOA and is also consistent with the purposes of the Congressional Accountability Act (see Section 301(h) of the Act, 2 U.S.C. §1381(h), which charges the Office of Compliance with carrying out a program of education "…to inform individuals of their rights under laws made applicable to the legislative branch of the Federal Government").

Adoption of Veterans' Preference Policy.

Senate Employment Counsel and other commenters suggest that, as proposed, Section 1.116 was overbroad to the extent that it would require employing offices to make their veterans' preference policies available to the public upon request. Senate Employment Counsel notes that "unlike executive branch agencies, Senate employing offices are not subject to the Freedom of Information Act and therefore have no duty to make available to the public any records regarding their employment practices." (Citing 5 U.S.C. §551, which defines "agency" as excluding the Congress.) The Board agrees that effective implementation of the rights and protections under the VEOA only requires dissemination of information regarding an employing office's veterans'

preference policies to covered employees and applicants for covered positions. Accordingly, the final Section 1.116 has deleted the requirement that these policies be made available to the public upon request.

Record keeping.

Senate Employment Counsel suggests that the record retention period described in Section 1.117 be shortened from one year to nine months or perhaps 275 days, given the deadlines by which an employee must request counseling and mediation under Sections 402 and 403 of the Congressional Accountability Act, 2 U.S.C. §1402 and §1403. In this respect, Counsel suggests that an employing office will always be informed about a possible claim within 8 months or approximately 240 days after notice of hiring or a reduction in force is provided to the employee. Counsel has not suggested that the requirement that applicable records be retained for one year, or 90 to 120 days longer than may be required given the CAA deadlines, will work a significant hardship on employing offices, and the Board finds it prudent to allow additional time from the date on which the employing office is formally notified of a claim for that notice to reach the individual representatives of the employing office who have maintained records relative to the claim.

Dissemination of Veterans' Preference Policies to Applicants for Covered Positions.

As proposed, Section 1.118 required that employing offices disseminate their veterans' preference policies and procedures to "all qualified applicants" for a covered position. Several of the commenters expressed concern with the burden and cost attendant to such a requirement. The final regulation, in Section 1.118(c), requires that the described information be provided "upon request" from an applicant for a covered position, and does note require dissemination to "all qualified applicants." In Section 1.118(c) of the final regulations, the Board has also clarified that an applicant' s request for information must be made in writing. To ensure that preference eligible applicants will know that they may request information from an employing office, we have added Section 1.118(b)(3), which requires that invitations to self-identify oneself as veterans' preference eligible applicants "state clearly that applicants may request information about the employing office's veterans' preference policies as they relate to appointments to covered positions and … describe the employing office's procedures for making such requests."

The Committee on House Administration also suggested that Section 1.118(d) be modified to provide that employing offices are expected to answer applicant questions concerning the employing office's veterans' preference policies and practices only if such questions are "relevant and non-confidential." The Board agrees and has revised Section 1.118(d) as suggested.

Dissemination of Veterans' Preference Policies to Covered Employees.

Several comments were received regarding Sections 1.119 (dissemination of veterans' preference policies to covered employees), 1.120 (written notice prior to a reduction in force), and 1.121 (informational requirements regarding veterans' preference determinations. In the final regulations, these provisions have been modified in several ways. Requirements regarding

information that must be provided to preference eligible applicants as a result of appointment determinations have been moved from Section 1.121(a) and now appear in Section 1.119.

Section 1.119 of the final regulations addresses requests for information by applicants for a covered position. The requirements of this Section have been limited to providing the employing office's veterans' preference policy or a summary of the policy as it relates to appointments to covered positions, a statement of whether the applicant is preference eligible and, if the applicant is not preference eligible, the reasons for the employing office's determination that the applicant is not preference eligible. After further consideration, the Board removed from the final regulations the requirements that the employing office provide additional information about its appointment decision. As noted previously, these regulations are intended to implement veterans' preference in the legislative branch in a manner that mirrors as closely as possible the veterans' preference principles applicable in the executive branch. The Board has removed the additional informational requirements because they exceeded OPM requirements and were not deemed critical to the implementation and enforcement of the veterans' preference principles made applicable to the legislative branch by the VEOA.

Section 1.120 of the final regulations addresses the dissemination of veterans' preference policies to covered employees. For the reasons addressed above, Section 1.120(c) limits an employing office's responsibility to answer questions from covered employees to those questions that are "relevant and non-confidential" concerning the employing office's veterans' preference policies and practices.

Section 1.121 of the final regulations addresses the written notice required prior to a reduction in force. Under Section 1.121(b)(6)(A) and (B) of the final regulations, the written notice must include a list of all covered employees in the covered employee's position classification or job classification and competitive area who will be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible, and a list of all covered employees in the covered employee's position classification or job classification and competitive area who will not be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible. Along with the information required under Section 1.121(b)(4) (the covered employee's competitive area) and Section 1.121(b)(5) (the covered employee's eligibility for the veterans' preference in retention and how that status was determined) of the final regulations, these lists are intended to replace the provisions in 5 U.S.C. §3502(d)(2)(D), which require that the notice include "the employee's ranking relative to other competing employees, and how that ranking was determined." Because this information will be provided in the notice required before a reduction in force, the Board has determined that it is unnecessary to require that additional information be provided to employees affected by a reduction in force, as had been contemplated by Section 1.121(b) of the proposed regulations.

The changes in Sections 1.118, 1.119, 1.120 and 1.121 of the final regulations are intended to reduce the burden and cost to employing offices in providing information to applicants for covered positions, and to reduce the burden and cost to employing offices in providing information to covered employees in the event of a reduction in force.